

Essays on Consent

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Thesis Abstract

This thesis is comprised of four substantive essays on consent. More specifically, they concern *individual permissive consent*—that is to say, consent by which one person intentionally and directly gives another person moral or legal permission to perform an action. What follows is a brief outline of each of those essays.

Essay One is titled ‘An Introduction to the Importance of Consent in Our Sex Lives’. In this essay, I explore three themes. The first is whether consent is necessary or sufficient for morally permissible sex. The second theme is how someone’s consent relates to whether that person is wronged or harmed by another person having sex with them. The third theme concerns how all this relates to the principles that govern the legitimate scope of the criminal law.

Essay Two is titled ‘Conditional Consent’. In this essay, I distinguish two ways for someone to place conditions on their morally valid consent. The first is to place conditions on the *moral scope* of their consent—whereby they waive some moral claim rights but not others. The second is to *conditionally token* consent—whereby the condition affects whether they waive any moral claim rights at all. I suggest that understanding this distinction helps makes progress with debates about so-called ‘conditional consent’ to sexual intercourse in English law, and with understanding how individuals place conditions on their morally valid consent in other contexts.

Essay Three is titled ‘Sexual Consent and Having Sex Together’. In this essay, I defend what I call the Commonsense View of sexual consent. The Commonsense

View states that if you have sex with someone without that person's consent, you thereby infringe that person's moral rights. Perhaps surprisingly, John Gardner, Catharine MacKinnon, and Tanya Palmer all deny the Commonsense View. According to their view, if sex is in some sense ideal, then each partner's consent is unnecessary—that is to say, even absent each partner's consent, neither partner infringes the other's moral rights. On the contrary, I defend the Commonsense View. In so doing, I develop what I call the Hybrid Account of Consent. The Hybrid Account retains the benefits of two existing accounts of consent while avoiding their shortcomings. I close by suggesting some benefits of my alternative picture and some implications for law reform.

Essay Four is titled 'Children, the Unconscious, and the Dead: Consent and the Will Theory of Rights'. In this essay, I defend the Will Theory of Moral and Legal Rights from what I call the Impossibility Objection. The Impossibility Objection alleges that if the Will Theory is correct, then it is impossible for children, the unconscious, and the dead to have moral and legal rights. I formulate a version of the Will Theory, and use insights about the timing of consent to argue that this version can avoid the Impossibility Objection. This leaves the Will Theory with better extensional adequacy than is widely supposed to be possible.

The four substantive essays are followed by a brief chapter titled 'Summary and Directions for Future Research'.

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Preface

1. Declaration

This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the Preface and specified in the text. It is not substantially the same as any that I have submitted, or is being concurrently submitted for a degree or diploma or any other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. I further state that no substantial part of my dissertation has already been submitted, or is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. It does not exceed the prescribed word limit for the relevant Degree Committee.

2. Acknowledgements

Recognising my interest in the philosophy (or perhaps just the scepticism of my teenage self), a schoolteacher once recommended that I read *The Meditations*. I dutifully went to a bookshop, found the philosophy section, located a book called *The Meditations*, purchased it, and read it.

It was not until many years later, when I started my philosophy degree, that I realised that the teacher had doubtless meant to recommend *The Meditations* of mathematician and philosopher *René Descartes*, a staple of first year philosophy syllabi. While at school, I had instead purchased *The Meditations* of *Marcus Aurelius*, the Roman philosopher-Emperor.

To date, Marcus Aurelius' *Meditations* have influenced my philosophical work only indirectly—by teaching me a valuable lesson about the importance of unambiguous referencing. But Marcus was good at writing acknowledgements. I could do no better than to borrow his words here: ‘To the gods I owe good grandparents, good parents, a good sister, and teachers, comrades, kinsmen and friends’.¹ Let me try to be more specific.

I could not have written this thesis without the boundless love of my parents, Manjit Chadha and Nita Chadha, my sister, Ankita Chadha, and my wife, Francesca Chadha-Day. My deepest thanks to them.

Special thanks to my primary supervisor, Tom Dougherty. Tom's work sparked my philosophical interest in consent. As a PhD supervisor, Tom has held me to a higher standard than I thought I could achieve. I am unsure whether I have yet met that standard, but I am confident that aspiring to it has made me a better philosopher than I had thought possible.

¹ Book 1 Meditation 17. Marcus Aurelius, *Meditations* (Maxwell Staniforth tr, New Ed edition, Penguin 2004).

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Thanks to Findlay Stark, who—before we had ever met—generously emailed me comments on an early draft of 'Conditional Consent'. I am confident that responding to Findlay's comments greatly improved not only that essay, but the overall quality of my philosophical thinking about the law. I am also very grateful for his support and counsel when navigating the job market in legal academia.

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Thanks to audiences at Brave New World at the Manchester Centre for Political Theory, the Cambridge Forum for Legal and Political Philosophy, the Cambridge Jurisprudence Discussion Group, the Cambridge Moral Sciences Club, the Cambridge Philosophy Graduate Seminar, the Cambridge Political Philosophy Workshop, the Durham Law School-Rights of Responsibility Workshop on Recent Work on the Ethics of Consent, European Research Council Roots of Responsibility

Reading Group, the Mary Shepherd Conference in Feminist Philosophy at the University of Edinburgh, the New Work in Socially Engaged Philosophy Workshop, the University of Nottingham, the POLEMO Symposium at Central European University in Budapest, and the Postgraduate Session of the Aristotelian Society and Mind Association.

I was very fortunate to have generous financial support while writing my thesis. I thank the Arts and Humanities Research Council for awarding me a Full Doctoral Scholarship (grant number AH/L503897/1). I thank the Modern Law Review for awarding me the Mike Redmayne Scholarship for Criminal Law, and the Royal Institute of Philosophy for awarding me a Jacobsen Studentship. Thanks also to Trinity College, Cambridge and to the Faculty of Philosophy for providing me with funds to travel to conferences to present my work and to learn from others. Finally, I thank Durham University, where I am employed as an Assistant Professor in Legal Theory as I finish writing up this thesis.

Introduction

This thesis is comprised of four substantive chapters. Each of these substantive chapters is—as the title of the thesis suggests—an essay on consent.

The word ‘consent’ is used to pick out several distinct phenomena, not only in ordinary language but also in moral and political philosophy and legal theory. For example, in moral philosophy we might say that if two people agree to swap seats on a flight, they *consent* to doing so.² In political philosophy, it is sometimes said that the justification for a sovereign’s authority over citizens in some sense derived from the *consent* of the citizens. This sort of view was prominent among the early social contract theorists. For example, Thomas Hobbes says, ‘The Right of all Sovereigns [sic] is derived originally from the consent of every one of those that are to be governed.’³ Similarly, in his *Second Treatise on Government*, John Locke claims that ‘Men being ... by

² See Renée Jorgensen Bolinger, ‘Moral Risk and Communicating Consent’ (2019) 47 *Philosophy & Public Affairs* 179, 180. A rather different issue of consent arises in the context of Immanuel Kant’s moral philosophy. There, the *possibility* of consenting to a maxim is a one test for whether that maxim meets the requirements of Kant’s Categorical Imperative. For a discussion of the Kantian project, see Thomas E Hill, ‘Hypothetical Consent in Kantian Constructivism’ (2001) 18 *Social Philosophy and Policy* 300. For a discussion of how we might use the possibility of consent to think about moral permissibility outside the bounds of the Kantian project, see Derek Parfit, *On What Matters*, vol 1 (Samuel Scheffler ed, Oxford University Press 2011) 177–211. My focus in this thesis will be actual, rather than possible consent.

³ Thomas Hobbes, *Leviathan* (WG Pogson Smith ed, Clarendon Press 1965) 448.

nature, all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent.’⁴ More recently, Joseph Raz has claimed that ‘consent to a political authority entails a promise to obey it (as well as perhaps an obligation to support it in other ways)’.⁵ In legal theory, some authors write of a ‘consent theory of contract’.⁶

My primary focus in this thesis will not be on any of these phenomena. These other phenomena all involve the individuals who give ‘consent’ thereby undertaking *duties*—the duty to swap seats, to obey the sovereign, or to perform the contract. Instead, my primary focus will be *permissive consent*—consent that (merely) releases others from pre-existing moral or legal duties they owe the consent-giver.⁷

More specifically, my primary focus will be on what is sometimes called *individual* permissive consent. It is *individual* in two senses: it is both given *by* one individual and given *to* another individual. Relatedly, my focus will be on cases in which an individual consents *on their own behalf*. It is sometimes maintained, for example, that it is possible for parents to validly consent to surgery on behalf of their young children. I will address such cases only in passing.

⁴ John Locke, *Two Treatises of Government* (Thomas Hollis ed, A Millar and others 1764) 279.

⁵ Joseph Raz, *The Morality of Freedom* (Clarendon Press 1986) 83.

⁶ See, e.g., Randy E Barnett, ‘A Consent Theory of Contract’ (1986) 86 Columbia Law Review 269.

⁷ Consent only releases individuals from such duties if the consent is *valid*. For a person’s consent to be valid, I assume they must at least be an adult of sound mind whose consent is not induced by serious coercion or deception. I discuss validity conditions further in the essays that follow.

With these clarifications in mind, let us turn to an outline of the four substantive essays.

The first essay is ‘An Introduction to the Importance of Consent in Our Sex Lives’. A version of this essay is under editorial consideration for publication in the *Routledge Handbook of Sex and Sexuality*, edited by Clare Chambers, Brian Earp, and Lori Watson. This essay provides an introduction to the importance of consent in the sexual domain. It begins by considering what I call Naïve Liberal Orthodoxy regarding sexual consent. According to Naïve Liberal Orthodoxy, it is morally permissible for one person to have sex with another if and only if that other person consents. I argue that Naïve Liberal Orthodoxy is implausible and that we should reject it, because sex is sometimes morally impermissible due to its effects on third parties. However, there is a Sophisticated Liberal Orthodoxy regarding sexual consent that is more plausible. According to Sophisticated Liberal Orthodoxy, one person does not wrong another by having sex with her if and only if she gives morally valid consent to his doing so. I suggest that we should interpret Sophisticated Liberal Orthodoxy in light of the liberal commitment to the maxim *volenti non fit iniuria*—roughly, that no wrong is done to someone who consents. I evaluate the plausibility of Sophisticated Liberal Orthodoxy interpreted this way by breaking it down into two steps: the Sufficiency of Consent and the Necessity of Consent.

I first consider the plausibility of the Sufficiency of Consent. According to the Sufficiency of Consent, if one person gives morally valid consent to another person having sex with her, then he does not wrong her by doing so. I survey the existing literature and suggest that neither arguments for the Sufficiency of Consent nor the

arguments against it are decisive. To make progress, I suggest we might resort to broader theoretical considerations about the relationship between sexual morality and morality more generally. Given a plausible assumption about this relationship, we can say that the Sufficiency of Consent is true only if the following more general principle is true: If one person gives morally valid consent to another person doing something, then he does not wrong her by doing that thing. This principle is the *volenti* maxim. To work out whether the Sufficiency of Consent is true, then, we need to work out whether the *volenti* maxim is true. And to do this, we need to consider morality outside the sexual domain.

Next, I consider the plausibility of the Necessity of Consent. According to the Necessity of Consent, if one person has sex with another person without her morally valid consent to his doing so, then he thereby wrongs her. To many, the Necessity of Consent is on its face extremely plausible. However, there is an increasingly influential argument against it. According to that argument, individuals engaged in ideal sex do not need each other's morally valid consent, because they have something *better* than consent—namely, the kind of mutuality that makes sex a joint action. I argue that this argument is mistaken, because such sexual joint action involves individual sub-actions for which each person needs the other's morally valid consent.

Finally, I distinguish the Necessity of Consent from the Sexual Harming Claim. According to the Sexual Harming Claim, if one person has sex with another person without her morally valid consent to his doing so, then he thereby harms her. I suggest that the Sexual Harming Claim is plausible only if we have a notion of harm that covers more than merely experiential harms. I explore why it matters whether the Sexual

Harming Claim is true. I suggest that it matters for those who accept two claims. The first is that it is legitimate for the state to criminalise the behaviour of someone who has sex with another person without that person's consent, even if that person suffers no experiential harm. The second is the Harm Principle, which states that it is legitimate for the state to criminalise a person's behaviour only if that behaviour harms another person.

The second essay is 'Conditional Consent'. This essay is published online in *Law and Philosophy* (<https://doi.org/10.1007/s10982-020-09400-8>). This essay distinguishes two ways for someone to place conditions on their morally valid consent. The first is to place conditions on the *moral scope* of their consent—whereby they waive some moral claim rights but not others. The second is to *conditionally token* consent—whereby the condition affects whether they waive any moral claim rights at all. I suggest that understanding this distinction helps makes progress with debates about so-called 'conditional consent' to sexual intercourse in English law, and with understanding how individuals place conditions on their morally valid consent in other contexts.

I first distinguish issues of conditional consent from issues of consent induced by deception. Next, I outline the familiar picture of how one person gives morally valid consent to another person's action. According to the familiar picture, it is possible for someone to place conditions on their morally valid consent by restricting the scope of the actions to which they give their morally valid consent. For example, they might give their morally valid consent to another person operating on them, but not to that person having sex with them. This is all correct. However, I suggest that there is a

second—hitherto unexplored—way for someone to place conditions on their morally valid consent to another person’s action. This second way is to *conditionally token* consent. I present two reasons to believe that it is possible for someone to conditionally token consent. The first concerns the possibility of conditionally performing certain speech acts, including the speech act of tokening consent. The second concerns the nature of rights. Finally, I suggest some implications for reforming sexual offences law.

The third essay is ‘Sexual Consent and Having Sex Together’. This essay is published in the *Oxford Journal of Legal Studies*, Volume 40, Issue 3, Autumn 2020, pages 619-644 (<https://doi.org/10.1093/ojls/gqaa011>). In this essay, I show that some influential theorists have recently argued that if sex is in some sense ideal, then each partner’s consent is unnecessary: even absent each partner’s consent, neither partner infringes the other’s moral rights. I challenge a key premise in their argument for this alarming conclusion. I instead defend the Commonsense View: If you have sex with someone without their consent, you thereby infringe that person’s moral rights. In the course of defending the Commonsense View, I develop what I call the Hybrid Account of Consent. The Hybrid Account retains the benefits of two existing accounts of consent while avoiding their shortcomings. I close by suggesting some benefits of my alternative picture and some implications for law reform. Notably, I argue that thinking about sexual morality in terms of consent does not—as some theorists suggest—commit us to objectionable views about women being sexually passive.

The fourth essay is ‘Children, the Unconscious, and the Dead: Consent and the Will Theory of Rights’. In this essay I defend a well-known theory of the function of moral and legal rights—the Will Theory—from what I call the Impossibility

Objection. If the Will Theory is correct, so goes the Impossibility Objection, then it is impossible for young children, the unconscious, and the dead to have moral and legal rights. I formulate the Contemporary Will Theory of Rights—a Hartian theory of the function of moral and legal rights. I argue that if it is possible for someone to give valid prior consent to actions that occur while they are unconscious or after they die, then according to the Contemporary Will Theory, it is possible for the unconscious and the dead to have moral and legal rights. Moreover, I argue that if it is possible for adults to give valid subsequent consent to actions that occurred when they were children, then according to the Contemporary Will Theory, it is possible for children to have moral and legal rights. Since the notion of valid subsequent consent is more contentious than that of prior consent, children provide, in Neil MacCormick’s words, a ‘test-case’ for the Will Theory—though not in the way that MacCormick envisaged.

The final chapter of the thesis is titled ‘Summary and Directions for Future Research’. The contents of that chapter are twofold. First, it offers a recap of the four substantive essays on consent. Second, the chapter makes explicit some questions which arise from the four substantive essays, but which are not answered in those essays. I suggest that these questions are important and ought to be addressed in future research on individual permissive consent.

Essay One

An Introduction to the Importance of Consent in Our Sex Lives

Abstract: This essay examines what it takes for one person to give morally valid consent to another having sex with them. It explores whether such consent is necessary or sufficient for morally permissible sex, and how it relates to whether someone is wronged or harmed by another having sex with them. Finally, it explores how these features relate to whether it is legitimate for the state to criminalise the behaviour of someone who has sex with another person without that person's morally valid consent to their doing so.

1. Introduction

Since #MeToo went viral on Twitter in 2017, there has been an explosion in public discussions about the importance of sexual consent.⁸ These public discussions highlight the centrality of consent in our sex lives. Participants in these discussions often hold a popular view of liberal sexual morality. The popular view of liberal sexual morality is

⁸ The MeToo movement was started by activist Tarana Burke in 2007 to express solidarity with girls and women who experienced sexual assault. In 2017, #MeToo went viral on Twitter following a tweet from actor Alyssa Milano. Elizabeth C Tippet, 'The Legal Implications of the MeToo Movement' (2018) 103 Minnesota Law Review 74, 231.

neatly captured in a catch phrase from a viral video on the importance of sexual consent. When it comes to sex, the catch phrase goes, ‘consent is everything’.⁹

Consent plays an important role in liberal morality generally. However, we might wonder whether there is something specific about the importance of consent in liberal *sexual* morality. Is there anything that makes *sexual* consent distinctively morally important? A useful way to answer this question is by comparing and contrasting sexual consent with consent outside the sexual domain.

Let us start by comparing sexual consent with property consent. Generally, it is morally important to get consent when using someone else’s property. For example, it is morally important to get someone’s consent when borrowing their lawn mower. However, sexual consent differs from property consent in at least two important respects. First, you may need someone’s consent to using their property even if they are at some distance. Even if someone is halfway across the world, you may nevertheless need to borrow their lawn mower. If the distance makes it impossible to contact them, this may license you to make certain inferences about whether they permit you to borrow it. For example, have they let you borrow their lawn mower before in similar circumstances? If yes, perhaps you are justified in inferring that they permit you to use it in similar circumstances. Sexual consent is not like this. You will tend to need someone’s sexual consent only if they are nearby. It follows that communication will be easier, and so your unilateral inferences will not be justified. In

⁹ *Tea Consent* (Blue Seat Studios 2015) <<https://www.youtube.com/watch?v=oQbei5JGiT8>> accessed 15 September 2020.

short, to work out whether someone consents to you having sex with them, you can *ask* them.

Second, whereas consent to someone borrowing your lawn mower is consent to them interacting with your property, sexual consent is consent to them interacting with your person. It is generally more important for us to control interactions with our person than with our property. We can say that sexual consent involves higher *stakes* than consent over our property. It is worse for one person to have sex with another without their consent than it is for them to borrow their lawn mower without their consent. The higher the stakes, the more certain a person needs to be that they have the other's consent to their action. This is another reason why it is unjustified to assume without communication that someone consents to sex, whereas it may in some cases be justified to assume that someone consents to you borrowing their lawn mower even without communication.

Another natural comparison is with medical consent. Like sexual consent, medical consent concerns interactions with our person. However, there are again some important differences. First, doctors have special expertise that patients tend to lack about treatment options. By contrast, sexual partners tend not to be so asymmetrically situated in their knowledge of sex. This is plausibly why doctors tend to have additional duties to provide their patients with information—in the medical domain we speak not only of consent but of *informed* consent. Second, the need for medical consent tends to arise in relatively formal environments such as hospitals. In such environments, there is often a need for clear and operationalizable rules for professionals such as doctors to follow, especially where the presence of many patients

makes it unfeasible to spend large amounts of time with each one. These feasibility constraints tend not to apply in the sexual context, where there is no requirement for individuals to engage in sexual interactions with many individuals in a short time frame.¹⁰ Third, medical intervention is sometimes required even when someone is not in a position to consent. For example, it might be morally required to perform a blood transfusion on a patient who is currently unconscious and therefore unable to consent, to prevent death or serious long-term injury. The justification for proceeding without consent is that it would be extremely bad for the patient if they were to go untreated. These considerations do not apply when it comes to sexual consent; there is no sexual equivalent to emergency medical treatment. Fourth, and similarly, it is sometimes possible for one person to give medical consent on behalf of another. For example, a parent can sometimes give medical consent on behalf of a child because the child is too young to consent for themselves. Again, the justification for proceeding without the child's consent is that it would be extremely bad for the child if they were to go untreated. But there are no equivalent considerations in the sexual domain.

Both sexual consent and medical consent concern high stakes interactions with our person. However, one distinctive feature of sexual consent is that, in our actual world, the victims of non-consensual interactions in the sexual domain are disproportionately women and girls.¹¹ These non-consensual interactions are plausibly

¹⁰ Things may be different (and more morally complicated) in the context of certain kinds of sex work.

¹¹ For a brief overview of statistics from England and Wales, see Rape Crisis England and Wales, 'Statistics about Sexual Violence' <<http://rapecrisis.org.uk/get-informed/about-sexual->

both symptoms and causes of a social structure that oppresses women. Such interactions affect not only their direct victim, but also perpetuate this oppression of women and girls.¹²

Despite these important differences between sexual consent and consent in these other domains, I suggest that we can still think profitably about consent across several domains. Indeed, much of this essay will discuss consent in general rather than sexual consent in particular. This is because the core function of consent is common across these domains. Roughly speaking, consent gives individuals control over how others may permissibly interact with them (we will make this rough idea more precise as the essay proceeds).

Having contrasted sexual consent with property consent and medical consent, let us return to the claim that when it comes to sex, consent is everything. What does this mean? On one understanding, the claim expresses what David Archard calls the ‘liberal moral orthodoxy’ regarding sexual consent.¹³ For reasons that will become clear, I suggest we instead call it the Naïve Liberal Orthodoxy regarding sexual consent:

violence/statistics-sexual-violence/> accessed 12 May 2021. For the United States, see Rape, Abuse, and Incest National Network, ‘Victims of Sexual Violence: Statistics’ <<https://www.rainn.org/statistics/victims-sexual-violence>> accessed 12 May 2021.

¹² See Catharine A MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989); Susan Estrich, *Real Rape* (Harvard University Press 1984).

¹³ David Archard, ‘Sexual Consent’ in Andreas Müller and Peter Schaber (eds), *The Routledge Handbook of the Ethics of Consent* (Routledge 2018) 174.

Naïve Liberal Orthodoxy. It is morally permissible for one person to have sex with another if and only if that other person consents.

Though perhaps initially plausible, Naïve Liberal Orthodoxy is not strictly true. Perhaps the easiest way to illustrate this is to point out that sex between two individuals sometimes generates what Alan Wertheimer calls ‘externalities’—effects on individuals other than those engaged in the sex. Consider *Adultery*:¹⁴

Adultery. Ali promises their spouse Charlie that Ali will not have sex with anyone else. Ali then has sex with Baljit with Baljit’s consent.¹⁵

¹⁴ This case is adapted from Alan Wertheimer, *Consent to Sexual Relations* (Cambridge University Press 2003) 131.

¹⁵ Some people think it is odd to talk of one person having sex with another, because they think this implies that sex is something that one person does to another. For views like this, see John Gardner, ‘The Opposite of Rape’ (2018) 38 *Oxford Journal of Legal Studies* 48; Tanya Palmer, ‘Distinguishing Sex from Sexual Violation: Consent, Negotiation and Freedom to Negotiate’ in Alan Reed and others (eds), *Consent: Domestic and Comparative Perspectives* (Routledge 2017); Rebecca Kukla, ‘That’s What She Said: The Language of Sexual Negotiation’ (2018) 129 *Ethics* 70. Elsewhere, I have suggested that this is not as odd as it might seem, because people have sex together by doing things to each other. Karamvir Chadha, ‘Sexual Consent and Having Sex Together’ (2020) 40 *Oxford Journal of Legal Studies* 619. This essay is reproduced as Essay Three in this thesis. I return to related issues in section 3, ‘The Necessity of Consent’, below.

Given the promise that Ali makes to Charlie, it may seem that it is morally impermissible for Ali to have sex with Baljit, even though Baljit consents. If this is correct, then *Adultery* is a counterexample to Naïve Liberal Orthodoxy, because Baljit's consent is insufficient to make it morally permissible for Ali to have sex with Baljit. If *Adultery* is a counterexample, then Naïve Liberal Orthodoxy is false.

Suppose that *Adultery* is a counterexample, and that Naïve Liberal Orthodoxy is indeed false. Still, the liberal has available the following natural response. We should indeed accept that in *Adultery* it is morally impermissible for Ali to have sex with Baljit. However, the response continues, the explanation for *why* it is morally impermissible for Ali to do is because Ali's doing so wrongs Charlie, rather than Baljit. By promising Charlie that they will not have sex with anyone else, Ali places themselves under a moral duty not to have sex with anyone else.¹⁶ Importantly, Ali owes this duty *to Charlie*. By having sex with someone else, Ali breaches this duty and thereby *wrongs Charlie*, morally speaking. The view that Ali wrongs Charlie (rather than, say, Baljit) is supported by two observations. First, Charlie can legitimately demand an apology from Ali. Second, it is Charlie who is uniquely placed to forgive Ali's behaviour, if Charlie chooses to do so.

¹⁶ I am assuming that Ali's promise is *morally valid*. I assume that for Ali's promise to be morally valid requires Ali to be an adult of sound mind, whose promise is not induced by coercion or deception. For a discussion of the ethics of sexual promises, see Hallie Liberto, 'The Problem with Sexual Promises' (2017) 127 *Ethics* 383.

In light of this response, the liberal might instead resort to what we can call *Revised Liberal Orthodoxy*:

Revised Liberal Orthodoxy. One person does not wrong another by having sex with them if and only if that other person consents.

A proponent of Revised Liberal Orthodoxy can accept that Ali's behaviour in *Adultery* is morally impermissible, while nevertheless insisting that it does not wrong Baljit. I speculate that proponents of the Naïve Liberal Orthodoxy will readily accept this amendment. Indeed, Archard himself suggests a similar amendment on the liberal's behalf.¹⁷

Revised Liberal Orthodoxy is in keeping with what I take to be the liberal's guiding principle, which is sometimes expressed in the Latin maxim *volenti non fit iniuria* (the '*volenti* maxim'). Roughly translated, the *volenti* maxim means 'no wrong is done to a person who consents'. Philosophers disagree about precisely how we should interpret the *volenti* maxim.¹⁸ To properly understand the *volenti* maxim, we need to understand

¹⁷ Archard, 'Sexual Consent' (n 13) 175.

¹⁸ See Joel Feinberg, 'Legal Paternalism' (1971) 1 *Canadian Journal of Philosophy* 105; Michelle Madden Dempsey, 'Victimless Conduct and the Volenti Maxim: How Consent Works' (2013) 7 *Criminal Law and Philosophy* 11; Peter Schaber, 'The Volenti Maxim' (2020) 24 *The Journal of Ethics* 79.

what we mean by ‘wrong’ and what we mean by ‘consent’. Let us briefly consider what we mean by ‘wrong’ before turning to what we mean by ‘consent’.

What is it for one person to wrong another? Perhaps surprisingly, philosophers have found it hard answer this question.¹⁹ For our purposes, we can simply generalise our observations about why Ali wrongs Charlie in *Adultery*. We can say that, morally speaking, one person wrongs another if and only if they breach a moral duty they owe to that person. Typically, two moral consequences follow if someone breaches such a duty. First, if the duty is breached, the person to whom the duty is owed can legitimately demand an apology from the person who breaches the duty. Second, the person to whom the duty is owed is uniquely placed, if they choose to do so, to forgive the person who breaches the duty. Now that we have a working account of what means for one person to wrong another, let us turn to what we mean by ‘consent’.

2. What is consent?

What does ‘consent’ mean in the *volenti* maxim? Philosophers tend to think that it cannot just mean saying, ‘I consent’. After all, if that were true, the *volenti* maxim would just mean that no wrong is done to someone who says they consent. But that is not very plausible. After all, someone might say they consent only because they are threatened at gunpoint. Instead, philosophers tend to think that the *volenti* maxim means this: if

¹⁹ For discussion, see Michael Thompson, ‘What Is It to Wrong Someone? A Puzzle about Justice’ in R. Jay Wallace and others (eds), *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (Clarendon Press 2004).

someone gives *morally valid consent to another person doing something* then they are not wronged by that person doing that thing. In this section, we examine what it means for someone to give morally valid consent to another person doing something.

Philosophers tend to think that three things must be true for someone to give morally valid consent to another person doing something. The first thing that must be true is that the person giving consent must perform some action that constitutes an act of consent. The second thing that must be true is that the person's consent must be *morally valid*. The third thing that must be true is that the person's consent must be consent *to what the other person does* rather than to something else. Let us look at each of these requirements in more detail.

First, for someone to give morally valid consent to another person doing something, the person giving the consent must perform some action that constitutes an act of consent.²⁰ This raises a question: what does it take to perform an act of consent? I will discuss two prominent answers to this question, the 'purely mental' view and the 'successful communication' view.²¹

²⁰ What I call an *act of consent* is what some other writers call a *token* of consent. Wertheimer (n 14) 2. Still others call this *assent*, and reserve the word *consent* for what I call *morally valid consent*. Kimberly Kessler Ferzan and Peter Westen, 'How to Think (Like a Lawyer) About Rape' (2017) 11 Criminal Law and Philosophy 759. These differences are purely terminological.

²¹ A third prominent view of what it takes to perform an act of consent charts an intermediate position between the mental state view and the successful communication view. According to the 'attempted communication' view, for someone to perform an act of consent, that person must hold a particular mental attitude and attempt to communicate that attitude to the recipient of their consent, even if that

Let us start with the ‘purely mental’ view. According to the purely mental view, for a person to perform an act of consent requires only that they hold a particular mental attitude or perform a particular mental act. There is room for disagreement about exactly which mental attitude or act is required. Candidate attitudes include *intending* or *desiring* whatever is to be consented to, or thinking to themselves that whatever is to be consented to is ‘okay with me’.²² As a placeholder for the relevant attitude or act, let us say that someone consents to another person doing something if they are *willing* for that person to do that thing. Importantly, according to the purely mental view, communication is not required to perform an act of consent.

Perhaps the best motivation for the purely mental view distinguishes between two kinds of case:²³

Unexpressed. Yang is willing for Zoey to have sex with him, but does not communicate this to Zoey because he is worried it will make him seem

communication is unsuccessful. Victor Tadros, *Wrongs and Crimes* (Oxford University Press 2016) 209; Neil C Manson, ‘Permissive Consent: A Robust Reason-Changing Account’ (2016) 173 *Philosophical Studies* 3317. For reasons of space, I do not engage with the attempted communication view in this essay.

²² See, respectively, Heidi M Hurd, ‘The Moral Magic of Consent’ (1996) 2 *Legal Theory* 121; Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct* (Ashgate 2004); Kimberly Kessler Ferzan, ‘Consent, Culpability, and the Law of Rape’ (2016) 13 *Ohio State Journal of Criminal Law* 43.

²³ These cases are adapted from Tom Dougherty, ‘Affirmative Consent and Due Diligence’ (2018) 46 *Philosophy & Public Affairs* 90, 96–97.

sexually inexperienced. Though Zoey is unsure whether Yang is willing for Zoey to have sex with him, Zoey has sex with Yang.

Unwilling. Yang is not willing for Zoey to have sex with him, but does not communicate this to Zoey because he is worried it will make him seem sexually inexperienced. Zoey has sex with Yang. Though Zoey is unsure whether Yang is willing for Zoey to have sex with him, Zoey has sex with Yang.

As Tom Dougherty points out, there is an important moral difference between these two kinds of case.²⁴ In *Unwilling*, Zoey perpetrates an especially serious kind of sexual offence against Yang: she has sex with him against his will. But in *Unexpressed*, Zoey does not perpetrate that kind of offence, because in that variant Yang is willing for Zoey to have sex with him.

Perhaps the most plausible way to understand the purely mental view is as claiming that Yang's *consent* that makes the difference between the two variants. Yang consents in *Unexpressed* but not in *Unwilling*. If that is correct, then performing an act of consent does not require communication.

We can contrast the purely mental view with the 'successful communication' view. According to the successful communication view, for someone to perform an act

²⁴ *ibid* 97.

of consent requires not only that they hold a particular mental attitude, but also that they successfully communicate this attitude to the recipient of their consent.²⁵ Those who adopt the successful communication view need not insist that the communication always be verbal. In some contexts, gestures may be sufficient to successfully communicate an attitude of consent. For example, in the context of a certain kind of long-term relationship, placing a condom on one's partner's penis may be sufficient to constitute an act of consent.

To see the motivation for the successful communication view, we can reflect further on *Unexpressed*. We saw above that in *Unexpressed*, Zoey does not have sex with Yang against his will. However, Zoey's behaviour should still give us pause. After all, she is unsure whether Yang is willing for her to have sex with him, but goes ahead anyway. By doing so, Zoey expresses *disrespect* for Yang, because she has sex with him despite being unsure about whether he is willing for her to do so.²⁶ That disrespect is absent in the following variant:

Expressed. Yang is willing for Zoey to have sex with him. Yang successfully communicates his willingness to Zoey. Zoey is sure that Yang is willing for Zoey to have sex with him. Zoey has sex with Yang.

Perhaps the most plausible motivation for the successful communication view is that consent distinguishes cases like *Expressed* from those like *Unexpressed*. If that is correct,

²⁵ Tom Dougherty, 'Yes Means Yes: Consent as Communication' (2015) 43 *Philosophy & Public Affairs* 224.

²⁶ See Dougherty, 'Affirmative Consent and Due Diligence' (n 23).

the successful communication view provides us with one way to understand the claim that sexual consent is about respect for sexual autonomy. For Zoey to respect Yang's sexual autonomy, her behaviour must be appropriately sensitive to whether Yang consents. Zoey's behaviour can be appropriately sensitive to whether Yang consents only if Zoey reliably knows whether Yang consents. Zoey can reliably know whether Yang consents only if Yang's consent involves him successfully communicating his willingness for Zoey to engage in the relevant behaviour.²⁷

We can think of the purely mental view and the successful communication view as capturing different *functions* we might want consent to play. On the purely mental view, the function of consent is to distinguish cases like *Unexpressed* from those like *Unwilling*. This is the function that consent tends to play in sexual offences law such as the UK Sexual Offences Act 2003. On the successful communication view, the function of consent is to distinguish cases like *Unexpressed* from those like *Expressed*. This is arguably the function of consent in the 'affirmative consent' policies that are increasingly common on university campuses.²⁸

In this essay, I will reserve the word 'consent' for the purely mental view of what it takes for someone to perform an act of consent. On this way of talking, consent

²⁷ On Mollie Gerver's view, it is sometimes possible for one person to reliably know whether another is willing for them to perform an action even if that person has not *communicated* their willingness. If that is correct, then performing an act of consent may not require communication. Mollie Gerver, 'Inferring Consent Without Communication' (2020) 46 *Social Theory and Practice* 27.

²⁸ For a discussion of affirmative consent policies, see Dougherty, 'Affirmative Consent and Due Diligence' (n 23).

performs the first of the two functions outlined above. However, we can also accommodate the insight of the successful communication view by saying ‘affirmative consent’ plays the second of the two functions.

It is worth noting all interactions in which there is affirmative consent will also involve consent. In these interactions, a person has the mental state or attitude required to perform an act of consent (and thereby performs an act of consent), and successfully communicates that attitude to its intended recipient (and thereby performs an act of affirmative consent).

For someone to give morally valid consent to another person doing something, it is not enough for them to perform an act of consent—their consent must also be *morally valid*. Philosophers tend to agree that for someone’s consent to be morally valid, that person must be an adult of sound mind whose consent is not induced by serious coercion or deception.²⁹ However, there is room for disagreement about exactly how to interpret each of these requirements. Consider first the requirement that the consent-giver must be an adult. At what age does someone become an adult? Everyone should agree that a very young child cannot give morally valid consent to someone having sexual intercourse with them. But can a 17-year-old give morally valid consent their 18-year-old partner having sex with them?³⁰ We saw above that sexual consent is

²⁹ Some philosophers also believe that there are some things to which it impossible for anyone to give morally valid consent, such as being enslaved, or being subject to very serious physical harm. See Victor Tadros, ‘Consent to Harm’ (2011) 64 *Current Legal Problems* 23.

³⁰ For a discussion of the age of valid consent to sexual intercourse, see David Archard, *Sexual Consent* (Westview Press 1998) 116–29.

like medical consent insofar as both concern high stakes interactions with our person. A natural suggestion, then, is that the age at which someone can give morally valid consent to sex should plausibly track the age at which they can give morally valid consent to medical treatment.

Consider next the requirement that the consent-giver be of sound mind. What does it mean for someone to be of sound mind? We might all agree that someone with very severe cognitive disability is not able to give morally valid consent to another person having sex with them. But can someone with dementia give morally valid consent to their spouse having sex with them?³¹

Now consider the issue of coercion. When does coercion undermine the validity of someone's sexual consent?³² Philosophers typically agree that threatening someone with serious physical violence undermines the validity of that person's consent. However, there might be disagreement about other cases. For example, if a boyfriend threatens to break up with his girlfriend unless she consents to him having sexual intercourse with her, does this undermine the validity of the girlfriend's consent?³³ In addition to being coerced by particular individuals, we might worry about structural

³¹ For a discussion of whether it is possible for those with dementia to give morally valid consent to sexual intercourse, see Samuel Director, 'Consent's Dominion: Dementia and Prior Consent to Sexual Relations' (2019) 33 *Bioethics* 1065.

³² See Japa Pallikkathayil, 'The Possibility of Choice: Three Accounts of the Problem with Coercion' (2011) 11 *Philosophers' Imprint* 1; Tom Dougherty, 'Coerced Consent with an Unknown Future' [forthcoming] *Philosophy and Phenomenological Research*.

³³ See Sarah Conly, 'Seduction, Rape, and Coercion' (2004) 115 *Ethics* 96.

coercion or oppression. We saw earlier that one feature of our actual world is the structural oppression of women and girls, especially in the sexual domain. In these circumstances, we might wonder whether it is possible for women to validly consent to others, especially men, having sex with them. Victor Tadros has recently suggested that we can distinguish between different causes of such consent, with only some kinds of causes having consent-invalidating effects.³⁴ This idea deserves more consideration than we can give it here.

Finally, consider the issue of deception. Can deception ever undermine the moral validity of someone's consent? To illustrate the issue, consider the legal case of *Boro v Superior Court*.³⁵ In *Boro*, the defendant deceived the complainant into believing that she had contracted a deadly disease, but that he had been injected with a serum which would cure her if he had sex with her. On that basis, the complainant consented to the defendant having sexual intercourse with her. In *Boro*, it seems that the complainant performed an act of consent to the defendant having sexual intercourse with her. At least arguably, however, the defendant in *Boro* had sex with the complainant without her morally valid consent. If this is correct, then a natural explanation for why is that the complainant's consent was not morally valid.³⁶

So far, we have seen that for someone to give morally valid consent to another person doing something, two things must be true: first, the person trying to give consent

³⁴ Victor Tadros, 'Consent to Sex in an Unjust World' (2021) 131 *Ethics* 293.

³⁵ 163 Cal. App. 3d 1224, 210 Cal. Rptr. 122 (1985)

³⁶ For a discussion of how deception might affect the validity of someone's consent, see Joel Feinberg, 'Victims' Excuses: The Case of Fraudulently Procured Consent' (1986) 96 *Ethics* 330.

must perform an act of consent; and second, that act of consent must be morally valid. We now turn to the third thing that must be true—namely, that the consent must be *to what the other person does* rather than to something else. To illustrate, consider the following case:

Penetration. Bernice consents to Ace inserting his penis into her vagina.

Bernice is an adult of sound mind whose consent is not induced by coercion or deception. Ace instead inserts his penis into Bernice’s anus.

In *Penetration*, Bernice plausibly gives her morally valid consent to Ace doing *something*—namely, inserting his penis into her vagina. However, Ace does something *else*—namely, insert his penis into her anus. Similar issues arose in some nineteenth century legal cases. For example, in *R v Flattery*,³⁷ the complainant arguably gave morally valid consent to the defendant performing a surgical operation on her, whereas the defendant instead had sexual intercourse with her.³⁸ In a later case, a judge reviewing *Flattery* and other similar cases said that in such cases, ‘the act consented to is not the

³⁷ (1877) 1 QBD 410.

³⁸ It is arguable that the complainant in *Flattery* did not give morally valid consent even to the defendant performing a surgical operation on her, for two reasons. First, the complainant may have been a minor rather than an adult and therefore unable to give morally valid consent. Second, the defendant deceived the complainant into consenting, which may have undermined the validity of her consent.

act done. Consent to a surgical operation... is not consent to sexual [intercourse]'.³⁹ In other words, even if the complainant in each of these cases gave morally valid consent to the defendant doing *something*, the defendant did something *else*. As a result, the complainant did not give morally valid consent *to what the defendant did*. Philosophers sometimes say that in such cases, what the defendant does is outside the *moral scope* of the complainant's consent.⁴⁰

Importantly, cases like *Penetration* are different from cases like *Boro*. In *Boro*, the complainant performed an act of consent to the defendant having sexual intercourse with her, but this act of consent was induced by deception and arguably on that basis was not morally valid. By contrast, in *Penetration*, Bernice plausibly gives her morally valid consent to Ace doing *something*—namely, inserting his penis into her vagina. However, Ace does something *else*—namely, insert his penis into her anus.

What determines the range of actions to which someone consents? For example, in *Penetration*, what determines that Bernice gives morally valid consent to vaginal but not anal penetration? The purely mental view outlined above offers a natural answer. According to that view, someone consents to another person doing something if and only if they are willing for that person to do that thing. To determine what Bernice consents to, then, we need to ask what she is willing for Ace to do. In *Penetration*, Bernice is willing for Ace to penetrate her vagina with his penis but not for

³⁹ *R v Clarence* [1889] 22 QBD 23, 44.

⁴⁰ On the moral scope of consent, see Tom Dougherty, *The Scope of Consent* (Oxford University Press forthcoming).

Ace to penetrate her anus with his penis.⁴¹ This will sometimes mean that someone is unsure whether their sexual partner gives morally valid consent to some things rather than others. For example, if in *Penetration* Bernice says she consents to sex with Ace, this may leave Ace unsure about whether Bernice consents to vaginal penetration or anal penetration. If Ace is unsure, he should ask Bernice about what she is willing for him to do.

Having considered what it takes for someone to give morally valid consent to another person doing something, we are now in a position to understand the *volenti* maxim. We can state the *volenti* maxim, properly understood, as follows:

Volenti maxim. If one person gives morally valid consent to another person doing something, then he does not wrong her by doing that thing.

Why might someone believe the *volenti* maxim, so understood? Recall that one person wrongs another if and only if they breach a moral duty they owe to that person. Philosophers tend to agree that individuals owe each other default moral duties not to do certain things to them. However, a person's morally valid consent to another person's doing these things releases that person from these default moral duties. For

⁴¹ For more detailed discussion of the scope of consent, see Neil M Manson, 'The Scope of Consent' in Andreas Müller and Peter Schaber (eds), *The Routledge Handbook of the Ethics of Consent* (Routledge 2018); Dougherty, *The Scope of Consent* (n 40).

example, when it comes to sex, philosophers tend to agree that by default, individuals owe each other moral duties not to have sex with each other. However, if someone gives their morally valid consent to another person having sex with them, they release that person from this default moral duty. As a result, if that person were to have sex with them, that person would no longer breach that duty, and consequently would not wrong the consent-giver.

Applying the *volenti* maxim to the sexual domain we can say this: one person does not wrong another by having sex with her if that she gives her morally valid consent to his doing so. We can put this in more natural language as follows:

Sufficiency of Consent. If one person gives morally valid consent to another person having sex with her, then he does not wrong her by doing so.⁴²

We should distinguish the Sufficiency of Consent from a different claim, which we can call the *Necessity of Consent*:

Necessity of Consent. If one person has sex with another person without her morally valid consent to his doing so, then he thereby wrongs her.

⁴² The Sufficiency of Consent, the Necessity of Consent, and Sophisticated Liberal Orthodoxy use gendered pronouns only for economy of expression. Either person could be of any gender.

We should apply our understanding of morally valid consent not just to the *volenti* maxim but also to Revised Liberal Orthodoxy. If we do this, we get what we can call *Sophisticated Liberal Orthodoxy*:

Sophisticated Liberal Orthodoxy. One person does not wrong another by having sex her if and only if that she gives morally valid consent to his doing so.

Taken together, the Sufficiency of Consent and the Necessity of Consent are equivalent to Sophisticated Liberal Orthodoxy. Accordingly, we can assess whether Sophisticated Liberal Orthodoxy is true in two steps. The first is to assess whether the Sufficiency of Consent is true. The second step is to assess whether the Necessity of Consent is true. Let us take each step in turn.

3. The Sufficiency of Consent

In this section, we will examine the first element of Sophisticated Liberal Orthodoxy—the Sufficiency of Consent. We will first briefly consider an argument for the Sufficiency of Consent. We will then consider an argument against it. We will see that neither argument is decisive. To make progress, I suggest we might resort to broader theoretical considerations about the relation between sexual morality and morality more generally.

Let us start by considering an argument for the Sufficiency of Consent, made by Igor Primoratz.⁴³ Primoratz considers and rejects various conditions, besides morally valid consent, that other people claim must be satisfied for it to be true that one person does not wrong another by having sex with them. For example, Primoratz considers and rejects what we can call the procreative marital sex condition, according to which the sex must be for procreation within a monogamous marriage between the two individuals. Primoratz also considers and rejects the mutual romantic love condition, according to which the two individuals must share certain intentional attitudes characteristic of mutual romantic love. Let us assume that Primoratz is correct that we should reject both the procreative marital sex condition and the mutual romantic love condition.

Even if Primoratz is correct that we should reject the conditions he considers, this is not enough to establish the truth of the Sufficiency of Consent. To see this, consider the following example, which is adapted from Seiriol Morgan's discussion of the Vicomte de Valmont's seduction of Madame de Tourvel in Pierre Laclos' novel, *Les Liaisons Dangereuses*:⁴⁴

Dangerous Liaisons. Madame de Tourvel has built her identity around being chaste. She has never given her morally valid consent to anyone

⁴³ Igor Primoratz, 'Sexual Morality: Is Consent Enough?' (2001) 4 *Ethical Theory and Moral Practice* 201.

⁴⁴ Seiriol Morgan, 'Dark Desires' (2003) 6 *Ethical Theory and Moral Practice* 377, 381.

having sex with her. For the Vicomte, this makes her particularly appealing target for seduction. Madame de Tourvel is an adult of sound mind. Without using coercion or deception, the Vicomte convinces her to perform an act of consent to his having sexual intercourse with her. The Vicomte then has sex with Madame de Tourvel, and this destroys her sense of her own identity.

Morgan seems to believe that the Vicomte wrongs the Madame de Tourvel by having sex with her. Suppose this is correct.⁴⁵ Morgan also believes that the Madame de

⁴⁵ In the main text, I have focused on Morgan's argument because it is the best developed in the philosophical literature. However, in sexual ethics, individuals often differ in their intuitions about particular cases. Not everyone will agree that the Vicomte wrongs Madame de Tourvel in *Dangerous Liaisons* despite having her morally valid consent to sex. For them, the specifics of Morgan's argument will be unpersuasive. However, there are plausibly other examples in which someone has another person's morally valid consent to sex but nevertheless wrongs that person by having sex with them. Consider 'race play'. Race play is 'a subset of BDSM where the focus of the imbalance of the role play stems from the races of the people in question. In practice, this often presents as people of colour role playing as slaves, or people of Jewish heritage role playing as prisoners'. Rebecca Reid, 'Exploring the Controversial Fetish of Race Play' *Metro* (3 November 2017) <<https://metro.co.uk/2017/11/03/exploring-the-controversial-fetish-of-race-play-7051288/>>.

Plausibly, a person of colour, Amardeep, can give valid consent to sex involving race play with Bart. After all, if they have sex involving race play, it does not seem that the Bart wrongs Amardeep in the same way as he would if, for example, he *coerced* Amardeep into sex (and for that reason lacked Amardeep's valid consent to sex). It is also plausible that despite having Amardeep's valid consent to sex

Tourvel gives her morally valid consent to the Vicomte having sex with her. After all, she has an adult of sound mind whose act of consent to the Vicomte having sex with her is not induced by coercion or deception. On Morgan's view, then, *Dangerous Liaisons* is a counterexample to the Sufficiency of Consent. If that is correct, then the Sufficiency of Consent is false.

Morgan suggests the following explanation for why the Vicomte wrongs the Madame de Tourvel. According to Morgan, the Vicomte owes the Madame a duty of benevolence, and the Vicomte breaches this duty by having sex with the Madame despite knowing that it will destroy her sense of identity. On Morgan's view, the Madame's morally valid consent to the Vicomte's having sex with her cannot release him from this duty of benevolence.

In response to this suggestion, a defender of the Sufficiency of Consent might insist that the Madame's morally valid consent could in principle release the Vicomte from the duty of benevolence he owes her, but that the Madame does not really give her morally valid consent to his having sex with her. For this response to succeed,

involving race play, Bart nevertheless wrongs Amardeep by engaging in such sex. It is difficult to say precisely why Bart wrongs Amardeep, but perhaps it is because he disrespects her on racial grounds. If something like this is correct, then this is another example where someone has another person's morally valid consent to sex but nevertheless wrongs that person by having sex with them. Ultimately, however, it seems unlikely we will decisively settle whether the Sufficiency of Consent is true exclusively by relying on individuals' intuitions about particular cases. Another strategy is to resort to broader theoretical considerations about the role of consent and other so-called 'normative powers'. For a preliminary exploration of this strategy, see Victor Tadros, 'Appropriate Normative Powers' (2020) 94 *Aristotelian Society Supplementary Volume* 301.

however, there must be more conditions on morally valid consent than the ones outlined above—after all, the Madame is an adult of sound mind whose act of consent to the Vicomte having sex with her is not induced by coercion or deception.

In light of this response, we have two options. On the one hand, we might add further conditions into what it takes for someone to give morally valid consent to another person having sex with them. The more conditions we add, the more plausible the Sufficiency of Consent becomes. On the other hand, we might say that all it takes for someone to give morally valid consent to another person having sex with them is that they are an adult of sound mind whose consent is not induced by coercion or deception. If we say this, then—assuming the Vicomte wrongs the Madame in *Dangerous Liaisons*—the Sufficiency of Consent is false.

How should we decide which option to choose? There is no straightforward argument that decisively favours one option over the other. However, one way to make progress is to shift our focus to broader theoretical considerations. For example, we can consider the relation between sexual morality and morality more generally. Plausibly, sexual morality is governed by the same principles that govern morality more generally.⁴⁶ If that assumption is correct, then the Sufficiency of Consent is true only if the following more general principle is true: If one person gives morally valid consent

⁴⁶ For a similar argument in the context of Just War Theory, see Helen Frowe, ‘The Just War Framework’ in Seth Lazar and Helen Frowe (eds), *The Oxford Handbook of Ethics of War* (Oxford University Press 2018).

to another person doing something, then he does not wrong her by doing that thing. Note that this more general principle is the *volenti* maxim.

Some philosophers press this argument even further, claiming that most people deny this more general principle.⁴⁷ This is equivalent to claiming that most people deny the *volenti* maxim. These philosophers claim most people believe that non-sexual morality is governed not only by considerations of morally valid consent, but also by considerations such as duties of benevolence.⁴⁸ If a person's morally valid consent cannot release others from the duties of benevolence that others owe that person outside the sexual domain, these philosophers conclude, then nor can it release them from the duties of benevolence they owe them within the sexual domain. To work out whether the Sufficiency of Consent is true, then, we need to work out whether the *volenti* maxim is true. And to do this, we need to consider morality outside the sexual domain.

In this section, we have seen that neither Primoratz's argument for the Sufficiency of Consent nor Morgan's argument against it is decisive. I have suggested that given a plausible assumption, we can say that the Sufficiency of Consent is true only if the following more general principle is true: If one person gives morally valid consent to another person doing something, then he does not wrong her by doing that thing. This more general principle is the *volenti* maxim. To work out whether the *volenti* maxim is true, we need to consider morality outside the sexual domain.

⁴⁷ Jonathan Webber, 'Sex' (2009) 84 *Philosophy* 233.

⁴⁸ Piers Benn, 'Is Sex Morally Special?' (1999) 16 *Journal of Applied Philosophy* 235.

4. The Necessity of Consent

In this section, we turn our attention to the Necessity of Consent, which is the second element of Sophisticated Liberal Orthodoxy.

Recall that Necessity of Consent states:

Necessity of Consent. If one person has sex with another person without her morally valid consent to his doing so, then he thereby wrongs her.

The Necessity of Consent is extremely plausible. Recall that one person wrongs another if and only if they breach a duty they owe to that person. Recall also that individuals owe each other default moral duties not to have sex each other. If one person has sex with another person without her morally valid consent to his doing so, he breaches the duty he owes her not to do so. It follows that he thereby wrongs her. The two consequences that typically follow from such wronging are again present. First, she is entitled to demand an apology from him. Second, she is uniquely placed to forgive him, if she chooses to do so. (Indeed, we will see later that his behaviour should subject to criminal punishment.)

Despite the plausibility of the Necessity of Consent, some philosophers have recently denied it. They argue that it is a kind of category mistake to conceptualise sexual morality in terms of consent, because consent is something you give to actions that others do *to* you rather than *with* you.

This view requires some explanation. Perhaps its clearest formulation is in the work of John Gardner.⁴⁹ According to this view, one person needs another person's morally valid consent only if the first person do something *to* the second. To illustrate, think of a non-sexual situation in which one person needs another person's morally valid consent. If a doctor injects a patient with a vaccine, the doctor needs the patient's morally valid consent to her doing so—otherwise, she wrongs the patient. The injection is something that the doctor does *to* the patient. In respect of the injection, the doctor is active, and the patient is passive. She is the agent, and he is quite literally the patient. So, the argument continues, if sex as something for which one needs another person's morally valid consent, then sex is something that the first person does *to* the second—something in respect of which the first person active and the second is passive. However, the argument continues, the best sexual interactions are not properly characterised as one person doing something to another. Rather, the best sexual interactions are those involving the kind of mutuality that makes sex a joint action—interactions in which two people have sex *together*. In such interactions, the argument goes, consent is both *inapposite* and *unnecessary*. Consent is inapposite because neither person is doing anything *to* the other. Consent is unnecessary because the interaction involves something *better* than consent—namely, the kind of mutuality that makes sex a joint action.

As I have argued elsewhere, I believe this view is mistaken.⁵⁰ For even if we accept that the best sexual interactions are characterised as joint actions, these joint

⁴⁹ Gardner, 'The Opposite of Rape' (n 15).

⁵⁰ Chadha (n 15). The material for this article is reproduced as Essay Three in this thesis.

actions involve individual sub-actions. For example, where a *cis*-man and a *cis*-woman engage in the joint action of having sex together, this characteristically involves him penetrating her vagina with his penis, and her enveloping his penis with her vagina. These sub-actions are things that each of them does to the other. In respect of the penetration, he is active and she is passive. In respect of the envelopment, she is active and he is passive. To avoid wronging the other, each person needs the other's morally valid consent to the sub-action in respect of which they are active and the other is passive. To avoid wronging her, he needs her morally valid consent to his penetrating her vagina with his penis. To avoid wronging him, she needs his morally valid consent to his enveloping his penis with her vagina. Provided we are clear about the sub-actions for which consent is necessary, then, the Necessity of Consent is true—or rather, the argument from sexual joint action gives us no reason to believe that it is false.

5. Consent, Harm, and Criminalisation

In the previous section, we examined the plausibility of the Necessity of Consent, and I argued that it is true. Notice that the Necessity of Consent is a claim about whether one person *wrongs* another by having sex with her. We should distinguish the Necessity of Consent from a similar claim, which concerns whether one person *harms* another by having sex with her. Let us call this other claim the *Sexual Harming Claim*:

Sexual Harming Claim. If one person has sex with another person without her morally valid consent to his doing so, then he thereby harms her.

Like the Necessity of Consent, the Sexual Harming Claim is, on its face, extremely plausible. To see why it is plausible, recall that one person might lack another's consent to his having sex with her for three reasons. First, she might not even perform an act of consent, as when she is not willing for him to do anything. Second, she might perform an act of consent which is not morally valid, either because she is not an adult or because the act of consent is induced by serious coercion or deception. Third, she might give her morally valid consent to him doing something other than having sex with her, such as performing surgery on her. According to the Sexual Harming Claim, if in any one of these three situations he has sex with her, he thereby harms her. To many, these will seem like paradigmatic cases of one person harming another.

Despite the plausibility of the Sexual Harming Claim, some philosophers deny that it is true. These philosophers tend to distinguish carefully between the Sexual Harming Claim and the Necessity of Consent. This may seem puzzling. After all, non-philosophers tend not to distinguish carefully between harming someone and wronging them. If we treat these two notions as equivalent, then the Sexual Harming Claim is equivalent to the Necessity of Consent. However, moral philosophers do tend to distinguish between wronging someone and harming them. To help us understand the distinction, let us take a closer look at the Sexual Harming Claim.

To understand the Sexual Harming Claim, we need to understand what it is for one person to *harm* another. Harm has been conceptualised a number of different ways by different philosophers. But one especially influential account says that to harm someone is to set back or undermine their interests, where an interest just means an

aspect of their wellbeing.⁵¹ Wellbeing, too, is understood in various ways, but we can think of an ‘aspect of a person’s wellbeing’ as something that is good for that person—something that makes that person’s life go better. Now, in some ways, this just kicks the can further down the road, because there is a lot of disagreement among philosophers about precisely what things are good for people, or what makes something good for a person—that is, what their wellbeing consists in—and therefore about what their interests actually are.⁵² However, some interests will feature on any plausible list. For example, most people would agree that we all have an interest in being free from arbitrary or extreme physical pain, especially if it is not serving some instrumental purpose. In other words, our lives tend to go better to the extent that we are not subjected to such pain. Similarly, it is plausible that we have an interest being free from psychological trauma and emotional distress.

We can now see why the Sexual Harming Claim is plausible. It is typically true that if one person has sex with another without her morally valid consent to his doing so, then he thereby harms her. Typically, he sets back her interests in being free from physical pain, psychological trauma, and emotional distress.

⁵¹ For classic discussions, see Joel Feinberg, *Harm to Others*, vol 1 (Oxford University Press 1987); Raz (n 5).

⁵² For a useful introduction to some key accounts of wellbeing, see Roger Crisp, ‘Well-Being’ in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2017, Metaphysics Research Lab, Stanford University 2017) <<https://plato.stanford.edu/archives/fall2017/entries/well-being/>> accessed 27 May 2020.

It might seem implausible that there are any cases in which one person has sex with another without her morally valid consent to his doing so, without thereby harming her. To illustrate what those who deny the Sexual Harming Claim have in mind, consider *Unconscious Rape*:⁵³

Unconscious Rape. Ashley is unconscious. Bob has sexual intercourse with Ashley, using a condom while doing so. Since Ashley is unconscious, Ashley suffers no physical pain, no psychological trauma and no emotional distress. Neither Ashley nor anyone else ever discovers what has happened.

We should all agree that Bob *wrongs* Ashley in *Unconscious Rape*. Bob clearly breaches a moral duty he owes Ashley. Moreover, we should all agree that the state can legitimately criminalise Bob's behaviour.⁵⁴ In addition to wronging Ashley, does Bob also *harm* her? Some philosophers believe that he does not. If that is correct, then the Sexual Harming Claim is false. These philosophers do not say explicitly why they believe that Bob does not harm Ashley in *Unconscious Rape*. However, if those who deny the Sexual Harming Claim are correct, it must be because Bob does not set back any interest of Ashley's in this case. As we will see later, because the legal system should

⁵³ This example is adapted from John Gardner and Stephen Shute, 'The Wrongness of Rape', *Oxford Essays in Jurisprudence* (Clarendon Press 2000).

⁵⁴ See Tadros, *Wrongs and Crimes* (n 21) 106–07; *ibid* 201–03.

criminalise and punish Bob's behaviour, the way we think about *Unconscious Rape* has significant implications for the principles that constrain legitimate criminalisation and punishment.

It is true that none of the interests we identified above is set back in *Unconscious Rape*. Bob does not set back Ashley's interest in being free from physical pain: after all, Ashley is not in pain because Ashley is unconscious. For the same reason, Bob does not set back Ashley's interest in being free from psychological trauma or emotional distress. Whether those who deny the Sexual Harming Claim are correct, therefore, depends on whether there is any other interest of Ashley's which Bob *does* set back in *Unconscious Rape*.

Can we identify an interest of Ashley's that Bob sets back in *Unconscious Rape*? To do this, we need to consider a broader range of interests than the ones we have identified so far. So far, all the interests we have identified have been *experiential interests*. Ashley's interest in being free from pain is Ashley's interest in not *experiencing* pain. Similarly, Ashley's interest in being free from psychological trauma is Ashley's interest in not *experiencing* psychological trauma, and Ashley's interest in being free from emotional distress is Ashley's interest in not *experiencing* emotional distress. However, it is plausible that not all interests are experiential interests. And this point is not limited to the sexual domain. To illustrate, consider the following example from Roger Crisp:⁵⁵

⁵⁵ Roger Crisp, 'Medical Negligence, Assault, Informed Consent, and Autonomy' (1990) 17 *Journal of Law and Society* 77, 81.

Committee. At the age of twenty-two years, you are approached by a committee composed of middle-aged friends and members of your family. They point out to you a number of serious wrong turns you have made in your life so far (you left school too early, embarked on a tedious and unfulfilling career, bought a time-share in a hovel, and so on), and tell you that, purely out of love and respect for you, they are prepared to take over the running of your life. In future, you will be protected from the sort of mistakes which you are now regretting. Your first reaction is likely to be doubt. But the committee can point to various other people whom it has helped. On reflection, you realize that the committee will run the remainder of your life better than you, in the sense that there will be fewer wrong turns. The question is: will you surrender control of your life?

Crisp speculates that many of us would be reluctant to hand over control of our lives in such circumstances. If that is correct, then we implicitly accept that there is more to our wellbeing than an education, a job, and holidays. As Crisp puts it, ‘one’s wellbeing is constituted partly by the very living of one’s life oneself, as opposed to having it led for one by others’.⁵⁶ Crisp and others call this our interest in *autonomy*.

If Ashley has an interest in autonomy, then in *Unconscious Rape*, Bob harms Ashley. This is because Ashley’s interest autonomy includes controlling whether others

⁵⁶ *ibid* 82.

have sex with Ashley, and Bob sets back this interest by having sex with Ashley without Ashley's morally valid consent to his doing so. Matthew Gibson holds just such a view. On Gibson's view, one person harms another in cases like *Unconscious Rape* by setting back that person's interest in 'sexual autonomy'—that is to say, their interest in autonomy over their sex life.⁵⁷

Some people might deny that we have an interest in autonomy. This might be because, for example, they insist that there are no non-experiential components to wellbeing. If that is correct, then in *Unconscious Rape*, Bob does not harm Ashley, and the Sexual Harming Claim is false.

At this point, we might ask why it matters whether the Sexual Harming Claim is true. After all, non-philosophers tend not to distinguish between wronging someone and harming them, and we have already accepted that Bob does wrong Ashley.

The truth of the Sexual Harming Claim is important for those who accept an influential view of the relationship between liberal political philosophy and the criminal law. That view has its roots in the philosophy of John Stuart Mill, who famously claimed in his book, *On Liberty*, that 'the only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent

⁵⁷ Matthew Gibson, 'Deceptive Sexual Relations: A Theory of Criminal Liability' (2020) 40 Oxford Journal of Legal Studies 82, 100–01. For more on how consent protects sexual autonomy, see Stephen J Schulhofer, *Unwanted Sex* (Harvard University Press 2000).

harm to others'.⁵⁸ Philosophers disagree about precisely how to interpret this claim.⁵⁹ However, they tend to agree that the criminal law is one way in which the state exercises power over its citizens. As a result, liberal political philosophers tend to agree that on the best interpretation, Mill's claim is at least partly about when it is legitimate for the state to criminalise someone's behaviour. For our purposes, we can interpret Mill's claim as follows:

Harm Principle. It is legitimate for the state to criminalise a person's behaviour only if that behaviour harms another person.

For those who accept the Harm Principle, the Sexual Harming Claim is important. According to the Harm Principle, it is legitimate for the state to criminalise a person's behaviour only if that behaviour harms another person. Almost everyone agrees that it is legitimate for the state to criminalise a person's behaviour where he has sex with another person without her morally valid consent to his doing so. Indeed, this seems to be a paradigm case in which it is legitimate for the state to criminalise someone's behaviour. If all this is correct, then the Sexual Harming Claim must be true. It must be true that if one person has sex with another without her morally valid consent to his doing so, then he thereby harms that person.

⁵⁸ John Stuart Mill, 'On Liberty', *The Collected Works of John Stuart Mill*, vol 18 (University of Toronto Press 1977) 281.

⁵⁹ See James Edwards, 'Harm Principles' (2014) 20 *Legal Theory* 253.

Even those who deny the Sexual Harming Claim should accept that it is legitimate for the state to criminalise Bob's behaviour in *Unconscious Rape*. However, to accept this, those who deny the Sexual Harming Claim must reject the Harm Principle as it is formulated above. One option is to reinterpret the Harm Principle. For example, we might suggest that it is legitimate for the state to criminalise someone's behaviour where *not* criminalising that behaviour would lead to more harm overall. This is the strategy that Gardner and Shute pursue, and it leads them to suggest that it is legitimate for the state to criminalise the behaviour of people like Bob.⁶⁰ Another option is to replace the Harm Principle altogether with another principle governing when it is legitimate for the state to criminalise a person's behaviour. For example, one suggestion is to replace the Harm Principle with a Sovereignty Principle, and to say that the requirements of the Sovereignty Principle are satisfied in cases like *Unconscious Rape*.⁶¹ To evaluate whether this is plausible, we would need to know more about the Sovereignty Principle. I will not pursue that task here. A third option is, roughly speaking, a mix of the first two. This third option both reinterprets the Harm Principle and adds at least one other principle that provides a sufficient condition for when it is legitimate for the state to criminalise someone's behaviour, even if that behaviour does not harm another person. For example, we might say that it is legitimate for the state to criminalise someone's behaviour if that behaviour either (a) harms another person, or (b) seriously *wrongs* another person, even if it does not harm that person.⁶² This third

⁶⁰ Gardner and Shute (n 53).

⁶¹ See Arthur Ripstein, 'Beyond the Harm Principle' (2006) 34 *Philosophy & Public Affairs* 215.

⁶² For a view like this, see Tadros, *Wrongs and Crimes* (n 21) 107.

option is especially attractive where one person's behaviour seriously wrongs another even though it does not harm them. Those who deny that Bob harms Ashley tend to believe that *Unconscious Rape* is just such an example. If that is correct, then according to this third option it is legitimate for the state to criminalise Bob's behaviour because it seriously wrongs Ashley, even if it does not harm her.⁶³

6. Conclusion

We began by considering what we called Naïve Liberal Orthodoxy regarding sexual consent. According to Naïve Liberal Orthodoxy, it is morally permissible for one person to have sex with another if and only if that other person consents. I argued that Naïve Liberal Orthodoxy is implausible and that we should reject it, because sex is sometimes morally impermissible due to its effects on third parties. However, we have seen that there is a Sophisticated Liberal Orthodoxy regarding sexual consent that is more plausible. According to Sophisticated Liberal Orthodoxy, one person does not wrong another by having sex with her if and only if she gives morally valid consent to his doing so. I have suggested that we should interpret Sophisticated Liberal Orthodoxy in light of the liberal commitment to the *volenti maxim*. We evaluated the plausibility of Sophisticated Liberal Orthodoxy interpreted this way by breaking it down into two steps: the Sufficiency of Consent and the Necessity of Consent.

⁶³ Interestingly, according to some recent scholarship, Mill himself may best be interpreted as claiming that, in deciding whether it is legitimate for the state to criminalise someone's behaviour, whether the supposed victim gives is morally valid consent to the behaviour is more important than whether that person is harmed. See Ben Saunders, 'Reformulating Mill's Harm Principle' (2016) 125 *Mind* 1005.

We first considered the plausibility of the Sufficiency of Consent. According to the Sufficiency of Consent, if one person gives morally valid consent to another person having sex with her, then he does not wrong her by doing so. We saw that neither Primoratz's argument for the Sufficiency of Consent nor Morgan's argument against it is decisive. To make progress, I suggested, we might resort to broader theoretical considerations about the relationship between sexual morality and morality more generally. Given a plausible assumption about this relationship, we can say that the Sufficiency of Consent is true only if the following more general principle is true: If one person gives morally valid consent to another person doing something, then he does not wrong her by doing that thing. This principle is the *volenti* maxim. To work out whether the Sufficiency of Consent is true, then, we need to work out whether the *volenti* maxim is true. And to do this, we need to consider morality outside the sexual domain.

Next, we considered the plausibility of the Necessity of Consent. According to the Necessity of Consent, if one person has sex with another person without her morally valid consent to his doing so, then he thereby wrongs her. We noted that the Necessity of Consent is on its face extremely plausible, but there is an increasingly influential argument against it. According to that argument, individuals engaged in ideal sex do not need each other's morally valid consent, because they have something *better* than consent—namely, the kind of mutuality that makes sex a joint action. I argued that this argument is mistaken, because such sexual joint action involves individual sub-actions for which each person needs the other's morally valid consent.

Finally, we distinguished the Necessity of Consent from the Sexual Harming Claim. According to the Sexual Harming Claim, if one person has sex with another person without her morally valid consent to his doing so, then he thereby harms her. We saw that the Sexual Harming Claim is plausible only if we have a notion of harm that covers more than merely experiential harms. We then asked why it matters whether the Sexual Harming Claim is true. We saw that it matters for those who accept that it is legitimate for the state to criminalise the behaviour of people like Bob in *Unconscious Rape*, while also accepting the Harm Principle, which states that it is legitimate for the state to criminalise a person's behaviour only if that behaviour harms another person.

Essay Two

Conditional Consent

Abstract: There are two distinct ways for someone to place conditions on their morally valid consent. The first is to place conditions on the *moral scope* of their consent—whereby they waive some moral claim rights but not others. The second is to *conditionally token* consent—whereby the condition affects whether they waive any moral claim rights at all. Understanding this distinction helps make progress with debates about so-called ‘conditional consent’ to sexual intercourse in English law, and with understanding how individuals place conditions on their morally valid consent in other contexts.

1. Introduction

An English court recently had to decide whether to extradite WikiLeaks founder Julian Assange to Sweden to face rape charges.⁶⁴ Discussing Assange’s interactions with a woman known as AA, the court said, ‘if AA had made it clear that she would only consent to sexual intercourse if Mr Assange used a condom,’ then a jury could hold that ‘there would be no consent if ... he did not use a condom’.⁶⁵ Subsequent legal judgments appear to suggest that it is possible for someone to consent to sexual

⁶⁴ This essay is published as Karamvir Chadha, ‘Conditional Consent’ [2021] Law and Philosophy <<https://doi.org/10.1007/s10982-020-09400-8>> accessed 19 February 2021.

⁶⁵ *Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin) at [86].

intercourse on the condition that their partner does not ejaculate inside them,⁶⁶ or on the condition that their partner is a cisgender man.⁶⁷ According to the Crown Prosecution Service, these judgments suggest a ‘developing concept of conditional consent’. But the CPS notes the ‘absence of clear authority as to how far the concept extends’.⁶⁸ Legal commentators likewise observe that the courts must now address ‘whether the concept of conditional consent ought to be extended to other situations’.⁶⁹

The recent judgments cast doubt on previous judgments, in which the courts took the view that the defendant had the complainant’s legally valid consent to sexual intercourse despite breaching the complainant’s condition that he not have HIV,⁷⁰ or that the two be married beforehand.⁷¹

Perhaps the most famous of these older judgments is *Linekar*, in which a prostitute consented to Linekar having sexual intercourse with her on the condition

⁶⁶ *R (on the application of F) v DPP and A* [2013] EWHC 945 (Admin).

⁶⁷ *R v McNally* [2013] EWCA Crim 1051.

⁶⁸ Crown Prosecution Service, *Rape and Sexual Offences*, Chapter 3: Consent, <<https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-3-consent>> (accessed 13 October 2020).

⁶⁹ Gavin A Doig and Natalie Wortley, ‘Conditional Consent? An Emerging Concept in the Law of Rape’ (2013) 77 *The Journal of Criminal Law* 286, 291.

⁷⁰ *R v Dica (Mohammed)* [2004] EWCA Crim 1103; *R v Konzani (Feston)* [2005] EWCA Crim 706.

⁷¹ *R v Papadimitropoulos* (1957) 98 CLR 249 (High Court of Australia).

that he paid her £25 afterwards.⁷² After having sexual intercourse with the prostitute, however, Linekar absconded without paying her. The court took the view that the prostitute had given legally valid consent to Linekar having sexual intercourse with her.

Should the law of conditional consent be extended to cases like *Linekar*? The existing academic literature leaves the answer to this question unsettled, because contributors to that literature differ in their intuitions about cases like *Linekar*. Some commentators have the intuition that there is an important difference between cases like *Assange* and those like *Linekar*.⁷³ They might be prepared to believe that a defendant who has sexual intercourse with a complainant in breach of a condom-wearing condition lacks the complainant's valid consent to his having sexual intercourse with

⁷² *R v Linekar (Gareth)* [1995] QB 250 (Court of Appeal, Criminal Division). The case report leaves the precise details of the condition unclear. One leading criminal law textbook describes it as a case in which 'payment was the condition of consent'. AP Simester and others, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (6 edition, Hart Publishing 2016) 794. But others describe *Linekar* as a case in which it was not payment, but rather Linekar's *promise* of payment, which was the condition of consent. G Syrota, 'Rape: When Does Fraud Vitiating Consent?' 25 Western Australia Law Review 334. See also the discussion in *R v Jheeta* [2007] EWCA 1699 at [27]. Since the former view is more common, I assume it for simplicity.

⁷³ See Joel Feinberg, *Harm to Self* (Oxford University Press 1986) 300. See also Joan McGregor, *Is It Rape? On Acquaintance Rape and Taking Women's Sexual Consent Seriously* (Routledge 2005) 186; Wertheimer (n 14) 207. Each of these authors discusses consent induced by deception rather than conditional consent, but I speculate that their position would be similar with respect to both issues. Indeed, as I say in n 77, below, the existing literature does not always clearly distinguish these two issues.

her. But they find it hard to believe that the same is true of a defendant who has sexual intercourse with a complainant in breach of a payment condition. Other commentators have different intuitions about cases like *Linekar*. They believe that there is no relevant difference between someone consenting on the condition that their partner wears a condom, and someone consenting on the condition that their partner pays them afterwards. A defendant who has sexual intercourse with a complainant in breach of either condition lacks the complainant's valid consent to his action.⁷⁴ Liberal sexual morality, they say, requires us to respect 'individuals' freedom to set their own limits to their consent, be these wide or narrow.'⁷⁵ On this view, it is illiberal to treat sexual intercourse in breach of some conditions but not others as lacking valid consent. Individuals should, in light of their own conception of the sexual good, be able to place whatever conditions they like on their sexual consent.

In this essay, I advance two theses. The first, and most important, is that there are two distinct ways for A to place conditions on her morally valid consent. One is for A to restrict the *moral scope* of her consent—whereby she waives some moral claim rights but not others. The other is for A to *conditionally token* consent—whereby the condition affects whether A waives any moral claim rights at all.

⁷⁴ Jonathan Herring, 'Does Yes Mean Yes? The Criminal Law and Mistaken Consent to Sexual Activity' (2002) 22 Singapore Law Review 182; Jonathan Herring, 'Mistaken Sex' [2005] Criminal Law Review 511. Herring is concerned primarily with consent induced by mistake, though in 'Does Yes Mean Yes?' he often writes in terms of conditions on consent.

⁷⁵ Simon Gardner, 'Appreciating Olugboja' (1996) 16 Legal Studies 275, 281.

My second thesis is that understanding the distinction between moral scope restriction and conditional tokening helps make progress with legal debates about so-called ‘conditional consent’ to sexual intercourse in English law. To help make progress with those legal debates, I start by assuming that if B has sexual intercourse with A without A’s morally valid consent to B’s doing so, then B’s action constitutes a moral wrong that ought to be criminalised.⁷⁶ More generally, I make what I shall call the *Tracking Assumption*:

Tracking Assumption: Whether A gives legally valid consent to B’s action ought to track whether A gives morally valid consent to that action.

I argue that, given some plausible assumptions, the defendant acts without the complainant’s morally valid consent to his action both in *Assange* and in cases like *Linekar*. Accordingly, I argue that it ought to be the case that he lacks the complainant’s legally valid consent to his action. We shall see, however, that it does not follow automatically that the defendant’s behaviour should be criminalised using the same offence in each kind of case. Indeed, I suggest that each set of commentators on cases like *Assange* and *Linekar* plausibly gets something right. One set of commentators is correct that in both kinds of case, the defendant acts without the complainant’s morally valid consent to his action. But the other set of commentators may be correct that there is an important moral difference between the two kinds of case—a difference in *why* the defendant lacks the complainant’s morally valid consent to his action. If that is

⁷⁶ See Tom Dougherty, ‘Consent, Communication, and Abandonment’ (2019) 38 *Law and Philosophy* 387, 387–88.

correct, the difference should, I suggest, be reflected in different offences in the criminal law.

The essay is arranged as follows. In section 1, I distinguish the issue of conditional consent from the issue of consent induced by deception. In section 2, I outline the familiar picture of how A gives morally valid consent to B's action, and how this picture explains how A places conditions on such consent. On this picture, A places conditions on her morally valid consent to B's action by restricting the *moral scope* of her consent, thereby waiving some moral claim rights but not others. In section 3, I introduce the notion of A *conditionally tokening* consent—a distinct and hitherto unnoticed way for A to place conditions on her morally valid consent to B's action. I argue that there are two reasons to believe that it is possible for A to conditionally token consent to B's action. In section 4, I suggest how the law of conditional consent to sexual intercourse should develop in light of the distinction between moral scope restriction and conditional tokening.

2. Conditional consent or deception?

Importantly, I am concerned with whether the law of *conditional consent* should be extended to cases like *Linekar*.⁷⁷ I am not in this essay concerned with the distinct—though important—issue of deception in these cases. Assume at least

⁷⁷ Thanks to the anonymous reviewers for encouraging me to spell out the distinction between conditional consent and deception. The existing academic literature does not always clearly distinguish these two issues. See, e.g., Herring (n 74); Hyman Gross, 'Rape, Moralism, and Human Rights' [2007] *Criminal Law Review* 220, 223–24.

arguably deceived AA about whether he was wearing a condom when having sexual intercourse with her. And Linekar deceived the prostitute insofar as he never sincerely intended to pay her.⁷⁸ Deception is at least sometimes sufficient to prevent a complainant from giving morally valid consent to the defendant having sexual intercourse with her. While clearly important, the issue of deception is distinct from the issue of conditional consent.

To illustrate how the issues of conditional consent and deception can come apart, we can consider a fictional variant of *Assange* called *Condom*.

Condom. Amrit tells Bilal, ‘I consent to your having sexual intercourse with me on the condition that you wear a condom.’ Without noticing that the condom has come off, Bilal has sexual intercourse with Amrit.

If *Assange* really does involve a concept of conditional consent (rather than merely being a case about consent induced by deception), then that concept applies in *Condom*. Bilal has sexual intercourse with Amrit without her legally valid consent. This is not due to any deception on Bilal’s part. Indeed, Bilal’s behaviour is not deceptive. Rather, it is because Bilal has sexual intercourse with Amrit in breach of her condition that he wear a condom. I believe that this is the correct analysis of *Condom*. I believe that Bilal lacks Amrit’s legally valid consent to his having sexual intercourse with her. I also believe that this is how the law ought to be. This is because Bilal lacks Amrit’s morally valid consent to his having sexual intercourse with her, and according to the Tracking Assumption, legally valid consent ought to track morally valid consent.

⁷⁸ Similar things can be said of *R (on the application of F) v DPP and A and R v McNally*.

Importantly, this analysis does not commit us to criminalising Bilal's behaviour. In having sexual intercourse with Amrit without her legally valid consent, Bilal commits the *actus reus* of a sexual offence. Precisely which sexual offence depends on precisely which acts the sexual intercourse involves.⁷⁹ To warrant criminalisation, Bilal must have committed the *actus reus* with the relevant culpability or *mens rea*.⁸⁰ There is a substantive question about what level of culpability the law should require before holding a defendant criminally liable, i.e., about how to calibrate the *mens rea* requirement. One option is to hold a defendant criminally liable only if he acted intentionally. Other options include holding a defendant liable only if he acted recklessly, or perhaps even negligently. If a defendant is truly innocent, then he should not be subject to criminal liability. However we calibrate the *mens rea* requirement, the law should still recognise that Bilal commits the serious moral wrong of having sexual intercourse with Amrit without her morally valid consent, even if he does so non-culpably. The Tracking Assumption enables the law to do just this, by recognising that Bilal commits the *actus reus* of a sexual offence.⁸¹

⁷⁹ See Sexual Offences Act 2003, ss 1 (rape), 2 (assault by penetration), and 3 (sexual assault).

⁸⁰ For helpful discussion of the relationship between *mens rea* and *actus reus* in criminal offences, see Simester and others (n 72) 19–20.

⁸¹ Thanks to the reviewers for encouraging me to spell out the implications of my view for when we should hold a defendant criminally liable.

3. A's giving morally valid consent to B's action

Having clarified that I am concerned with conditional consent, I turn in this section to summarising a familiar picture of the role of morally valid consent and its relation to our moral rights. This includes outlining three requirements for A's giving morally valid consent to B's action, and how the familiar picture explains how A places conditions on this consent.

The familiar picture starts with the idea that each of us possesses general moral rights over our person and property. These general moral rights consist in more specific rights against specific interactions by specific individuals. For example, each of us possesses a moral claim right against it being the case that [others-have-sexual-intercourse-with-us], and others owe us the correlative moral duty not to have sexual intercourse with us. Likewise, each of us possesses a claim right against it being the case that [others-enter-our-home], and others owe us the correlative moral duty not to enter. These claim rights create moral defaults: if others have sexual intercourse with us or enter our homes, the moral default is that they infringe our moral claim rights and breach the correlative moral duties. By giving our morally valid consent to others performing these actions, we displace the moral default. We waive the relevant moral claim right and release others from the correlative moral duty.⁸²

⁸² This picture of morally valid consent broadly follows that of Judith Jarvis Thomson in Judith Jarvis Thomson, *The Realm of Rights* (Harvard University Press 1990). Thomson herself builds on Wesley Hohfeld's account of legal rights. For a broadly Thomsonian account of morally valid consent in the sexual domain, see Tom Dougherty, 'Sex, Lies, and Consent' (2013) 123 *Ethics* 717.

For A to give morally valid consent to B's action, three requirements must be satisfied. First, A must *token* consent. Second, A's token must be *morally valid*. Third, B's action must fall within the *moral scope* of A's consent. Let us consider each of these requirements in turn, before turning to the issue of how A places conditions on this consent.

a. *The tokening requirement*

First, A must *token* consent.⁸³ For A to token consent is for A to perform an act that constitutes an act of consent. There are differing views about precisely what A must do to token consent. According to the *mental state view*, it is possible for A to token consent purely mentally. For A to token consent, proponents of the mental state view maintain, it is sufficient for A to hold some purely mental attitude or to perform some purely mental act. Proponents of the mental state view disagree about the particular mental attitude or act required of A. For example, according to one suggestion, for A to token consent to B's action, A must *intend* B's action.⁸⁴ According to another, A must

⁸³ For the language of 'tokening' consent, see Franklin G Miller and Alan Wertheimer, 'Preface to a Theory of Consent Transactions: Beyond Valid Consent', *The Ethics of Consent: Theory and Practice* (Oxford University Press). Other writers call this 'assent', though this is a purely terminological difference. See Ferzan and Westen (n 20).

⁸⁴ Hurd (n 22).

think to herself that B's action is 'okay with me'.⁸⁵ Proponents of the *speech act view* disagree with proponents of the mental state view. According to the speech act view, for A to perform a token of consent requires not only that A holds a particular mental attitude, but also that A communicates that attitude to B. On this view, tokening consent requires the performance of a speech act (though performance of the speech act does not necessarily require 'uptake' from B).⁸⁶ The relevant speech act will often involve A verbally communicating with B, though it need not. For example, it is possible for a thumbs up to constitute a speech act of consent, if A intends it to communicate an attitude of consent.

In this essay, I shall assume that the speech act view is correct, because the speech act view makes it easiest to illustrate the idea of conditionally tokening consent. However, I believe it may be possible to conditionally token consent on at least some versions of the mental state view—an issue to which I shall briefly return below.⁸⁷

⁸⁵ Ferzan, 'Consent, Culpability, and the Law of Rape' (n 22). For other suggestions, see, e.g., Larry Alexander, 'The Moral Magic of Consent (II)' (1996) 2 *Legal Theory* 165; Larry Alexander, 'The Ontology of Consent' (2014) 55 *Analytic Philosophy* 102.

⁸⁶ See, e.g., Dougherty, 'Yes Means Yes' (n 25); Monica R Cowart, 'Understanding Acts of Consent: Using Speech Act Theory to Help Resolve Moral Dilemmas and Legal Disputes' 32; HM Malm, 'The Ontological Status of Consent and Its Implications for the Law on Rape' (1996) 2 *Legal Theory* 147. On the issue of 'uptake' from B, see Manson, 'Permissive Consent' (n 21); Tadros, *Wrongs and Crimes* (n 21) 205–209; Dougherty, *The Scope of Consent* (n 40). Ch. 6.

⁸⁷ See fn. 98, below.

b. The validity requirement

The second requirement is that A's token of consent must be *morally valid*. For A's token of consent to be morally valid, I assume that A must be an adult of sound mind whose token of consent is not induced by coercion or deception.⁸⁸ I shall assume that this requirement is satisfied in all the fictional cases I discuss.

c. The moral scope requirement

Third, B's action must fall within the *moral scope* of A's consent.⁸⁹ To illustrate, consider *Gynaecologist*:

Gynaecologist. Patient says to Doctor, 'I consent to your inserting a medical instrument into my vagina.' Patient is an adult of sound mind whose token of consent is not induced by coercion or

⁸⁸ On coercion, see, e.g., Pallikkathayil (n 32). On deception, see, e.g., Dougherty, 'Sex, Lies, and Consent' (n 82). Dougherty's argument concerns the *moral scope* of consent induced by deception. However, it has sometimes been interpreted as an argument about the *validity* of such consent. See, e.g., Campbell Brown, 'Sex Crimes and Misdemeanours' (2020) 177 *Philosophical Studies* 1363, 1374; Chloë Kennedy, 'Criminalising Deceptive Sex: Sex, Identity and Recognition' (2021) 41 *Legal Studies* 91, 95. fn. 22. It is partly to avoid such confusions that I address tokening, validity, and moral scope separately in this essay.

⁸⁹ For a detailed discussion of the moral scope of consent, see Dougherty, *The Scope of Consent* (n 40).

deception. Instead of inserting a medical instrument into patient's vagina, however, Doctor inserts his penis.⁹⁰

In *Gynaecologist*, Patient does give morally valid consent to Doctor's doing *something*—namely, inserting a medical instrument into Patient's vagina. But Doctor does something *else*, outside the moral scope of Patient's consent. As one nineteenth century judge put it, 'the act consented to is not the act done. Consent to a surgical operation or examination is not consent to sexual connection'.⁹¹

Reflecting on *Gynaecologist* might lead us to assume that the moral scope of A's consent is given simply by the descriptive content of A's consent token.⁹² After all, in *Gynaecologist*, the moral scope of Patient's consent includes Patient's moral claim right against it being the case that [Doctor-inserts-a-medical-instrument-into-Patient's-vagina], but excludes Patient's moral claim right against it being the case that [Doctor-inserts-his-penis-into-Patient's-vagina]. And the descriptive content of Patient's consent token includes Doctor's inserting a medical instrument into Patient's vagina,

⁹⁰ For a similar legal case, see, e.g., *R v Flattery* (1877) QBD 410. *Flattery* has at least two complicating features which *Gynaecologist* avoids. First, the complainant in *Flattery* may have been a minor and so incapable of giving *morally valid* consent. Second, *Flattery* *deceived* the complainant about his intentions, which may also have undermined the moral validity of her consent.

⁹¹ *R v Clarence* (1889) 22 QBD 23, 44.

⁹² Since I assume that a consent token is a speech act, I assume that the descriptive content of the token is given by the content of that speech act. However, proponents of the mental state view may hold that the descriptive content of a consent token is fixed by the content of the relevant mental attitude. For example, if for A to token consent to B's action is for A to *intend* B's action, then the content of A's consent token may be fixed by the content of A's intentions.

but excludes Doctor's inserting his penis into her vagina. These two features of *Gynaecologist* might lead us to assume that the moral scope of A's consent is given simply by the descriptive content of A's consent token.

But this is not quite right.⁹³ To see this, consider *Pen*:

Pen. Penelope owns a car and mistakenly believes she also owns a pen. The pen actually belongs to Rex. Pointing to each item in turn, Penelope says to Quentin, 'I consent to your borrowing this car and using this pen.'

In *Pen*, the descriptive content of Penelope's token of consent includes both Quentin's borrowing the car and Quentin's using the pen. However, the moral scope of Penelope's consent—the set of moral claim rights she waives by tokening consent—covers only her claim right against it being the case that [Quentin-borrows-the-car]. Penelope lacks a moral claim right against it being the case that [Quentin-uses-the-pen], because Rex rather than Penelope is the pen's true owner. Since Penelope lacks any moral claim rights over the pen, she cannot waive any such rights by consenting. It is true that if Quentin were to use the pen, he would not infringe Penelope's rights. But this is not because Penelope gives morally valid consent to Quentin's using the pen. Rather, it is because Penelope lacks any moral claim rights over the pen in the first place. The lesson from *Pen* is this: it is possible for A to waive a moral claim right against

⁹³ See Neil C Manson, 'How Not to Think about the Ethics of Deceiving into Sex' (2017) 127 *Ethics* 415, 423–28; Manson, 'Permissive Consent' (n 21) 3319–3320.

B's action only if A initially possesses a claim right against B's performing that action.⁹⁴ Provided A's consent token is morally valid, A's consent token waives a moral claim right against B's action if and only if two requirements are satisfied. First, B's action must be within the descriptive content of A's consent token. Second, A must initially possess a claim right against B's performing that action.

d. The familiar picture and conditions on morally valid consent

Reflecting on the familiar picture of morally valid consent, we can see that A's morally valid consent to B's action always involves conditions. For example, in *Gynaecologist*, Patient gives morally valid consent to Doctor inserting something into her vagina *on the condition* that it is a medical instrument. On the familiar picture, such conditions restrict the *moral scope* of consent. Patient waives her moral claim right against it being the case that [Doctor-inserts-a-medical-instrument-into-Patient's-vagina], but not her moral claim right against it being the case that [Doctor-inserts-his-penis-into-Patient's-vagina].

⁹⁴ This is true at least where A consents on her own behalf. Things may be different, for example, where a parent gives morally valid consent to a surgeon operating on their infant. Since one cannot give morally valid consent to *sexual intercourse* on behalf of another person, I leave this complication aside in this essay.

4. Conditionally tokening consent

In this section, I introduce a second way for A to place conditions on her morally valid consent to B's action. The second way is for A to *conditionally token* consent. Since A's tokening consent is a requirement for A's giving morally valid consent to B's action, A's placing conditions on her consent token is a way for A to place conditions on her morally valid consent to B's action. If the condition on A's tokening is not satisfied, then A does not token consent. And if A does not token consent, then A does not give her morally valid consent to anything at all. In this section, I first illustrate the idea of conditionally tokening consent. I then argue that there are two distinct reasons to believe that it is possible for A to conditionally token consent to B's action—one based on what it takes to token consent, and another based on A's rights.

a. Conditionally tokening consent: An illustration

To illustrate the idea of conditionally tokening consent, consider *Mother*:

Mother. On Monday, Aliyah says to Beau, 'If you visit your mother on Wednesday, I hereby consent to your entering my apartment on Friday.'

In *Mother*, a condition of Aliyah's tokening consent to Beau's entering her apartment on Friday is that he visits his mother on Wednesday. If Beau does not visit his mother on Wednesday, then Aliyah does not token consent. If Aliyah does not token consent, then Aliyah does not give her morally valid consent to Beau's entering her apartment.

Let us now turn to the two reasons to believe it is possible for A to conditionally token consent.

b. Speech acts

This first reason to believe that it is possible for A to conditionally token consent concerns what it takes to token consent. I have assumed that the speech act view of consent is correct—that a consent token requires a speech act. If this is correct, then we should expect consent tokens to function like other speech acts. More specifically, if consent is a speech act by which we exercise a normative power, we should expect it to function like other speech acts by which we exercise normative powers.⁹⁵ Other speech acts by which we exercise normative powers include commands and promises. Some work in the philosophy of language suggests that it is possible for A to conditionally token commands and promises. If this is correct, then this gives us reason to believe that it is also possible for A to conditionally token consent.

To see why some philosophers of language believe it is possible to conditionally token a command, consider *Bandages*:

Bandages. Doctor says to Nurse, ‘If the patient is alive in the morning,
change the bandages.’

One possible way to think of *Bandages* is as a case in which Doctor tokens command of a conditional. On this picture, Doctor tokens his command unconditionally. But the

⁹⁵ On normative powers, see David Owens, *Shaping the Normative Landscape* (Oxford University Press 2012).

descriptive content of the token is conditional. However, if the conditional involved is the ordinary material conditional from propositional logic, then this has unhappy implications. On this picture, *Bandages* involves Doctor commanding Nurse to make it the case either that Nurse changes the bandages in the morning, or that the patient is not alive in the morning. On this picture, Nurse could obey the command by killing the patient. To avoid this unhappy conclusion, Dorothy Edgington advances a view of *Bandages* according to which Doctor conditionally performs the speech act of commanding the Nurse to change the bandages—the condition being that the patient is still alive in the morning. If the patient is not alive in the morning, then, on Edgington’s view, Doctor has not performed the speech act of commanding Nurse to change the bandages.⁹⁶ If a speech act of command is what it takes to token a command, then if the condition on Doctor’s speech act is not satisfied, then Doctor does not token command Nurse to change the bandages. Since tokening a command is a requirement for giving a morally valid command, it follows that if the patient is not alive in the morning, Doctor does not give Nurse a morally valid command to change the bandages.

Likewise, some philosophers believe it is possible to conditionally token a promise. Margaret Gilbert calls this phenomenon an *externally conditional promise*. As she explains, ‘The condition of an *externally conditional promise* is a condition for the existence

⁹⁶ Dorothy Edgington, ‘On Conditionals’ (1995) 104 *Mind* 235, 287. Indeed, Edgington holds the stronger view that ‘[a]ny kind of speech act can be performed unconditionally or conditionally. There are conditional questions, commands, promises, agreements, offers, etc.’ See also, Dorothy Edgington, ‘Conditionals’ in Lou Goble (ed), *The Blackwell Guide to Philosophical Logic* (Blackwell 2001) 410.

of the [speech act of] promise as such.’ Gilbert gives the following example: ‘On the condition that you do the laundry today, I promise to mow the lawn tomorrow.’⁹⁷ This constitutes my speech act of promising to mow the lawn tomorrow, conditional on it being the case that you do the laundry today. If you do not do the laundry today, then I have not performed the speech act of promising to mow the lawn tomorrow. Now, performing the speech act of promising is a requirement for tokening a promise, and tokening a promise is a requirement for my giving you a morally valid promise. Accordingly, if you do not do the laundry today, then I have not given you a morally valid promise to mow the lawn tomorrow.

If it is possible for A to conditionally token commands and promises, then we have reason to believe that it is also possible for A to conditionally token consent.⁹⁸

⁹⁷ Margaret Gilbert, ‘Is an Agreement an Exchange of Promises?’ (1993) 90 *The Journal of Philosophy* 627, 633. See also Charles Fried, *Contract as Promise* (Harvard University Press 1981) 46–47.

⁹⁸ I have assumed both that tokening consent requires a speech act, and that Edgington and Gilbert’s analyses of conditional speech acts is correct. Both these assumptions might be challenged. First, Edgington and Gilbert’s analyses of conditional speech acts might be incorrect. (See, respectively, Angelika Kratzer, *Modals and Conditionals* (Oxford University Press 2012). and Luca Ferrero, ‘Conditional Intentions’ (2009) 43 *Noûs* 700. fn. 30.) If Edgington and Gilbert’s analyses are incorrect, this would show at most that the correct account of conditionally tokening consent is not the one that follows naturally from their analyses. It would not be fatal to the main thesis of this essay, which is that moral scope restriction and conditional tokening are two distinct ways to place conditions on morally valid consent. This becomes even clearer when we consider the possibility that tokening consent does not require a speech act. We can ask: if the mental state view is correct, is it nevertheless possible for A to conditionally token consent to B’s action? The answer depends on precisely which mental attitude or mental action is

c. *Rights*

There is a second reason to believe that it is possible for A to conditionally token consent. The second reason is especially important for those who deny the Conjunction Thesis:

Conjunction Thesis. If A possesses a moral claim right against it being the case that $[p]$, then it follows that for any proposition q , A also possesses a moral claim right against it being the case that $[\text{both } p \text{ and } q]$.⁹⁹

To understand the issue, consider first those who accept the Conjunction Thesis. Those who accept the Conjunction Thesis do not need to invoke conditional tokening for their view to be extensionally adequate, for they can explain any condition in terms of moral scope restriction. On their view, if A wants to give morally valid consent to it being the case that p if and only if it is the case that q , then A can waive her moral claim right against it being the case that $[\text{both } p \text{ and } q]$. To illustrate, consider Aliyah's position in *Mother*. Aliyah wants to give morally valid consent to Beau entering her apartment on Friday if and only if Beau visits his mother on Wednesday. Aliyah possesses a moral claim right against it being the case that $[\text{Beau-enters-Aliyah's-}$

sufficient for tokening consent. For example, according to one version of the mental state view, for A to token consent to B's action is for A to *intend* B's action. (See n 84, above.) If this is correct, then it may be possible for A to conditionally token consent to B's action if A *conditionally* intends B's action. (On conditional intentions, see *ibid.*)

⁹⁹ Strictly speaking, these rights are always held against another individual, B. To state this explicitly on every occasion would complicate the discussion without adding to the analysis.

apartment-on-Friday]. Those who accept the Conjunction Thesis believe that it follows that Aliyah also possesses a moral claim right against it being the case that [*both* Beau-enters-Aliyah's-apartment-on-Friday *and* Beau-visits-his-mother-on-Wednesday]. Consequently, those who accept the Conjunction Thesis have no problem explaining *Mother* as a case of moral scope restriction: Aliyah restricts the descriptive content of her consent token to waive this moral claim right, leaving intact her moral claim right against it being the case that [*both* Beau-enters-Aliyah's-apartment-on-Friday *and* Beau-*does-not*-visit-his-mother-on-Wednesday].

The problem arises for those who deny the Conjunction Thesis. For them, it does not necessarily follow from the fact that Aliyah possesses a moral claim right against it being the case that [Beau-enters-Aliyah's-apartment-on-Friday] that Aliyah also possesses a moral claim right against it being the case that [*both* Beau-enters-Aliyah's-apartment-on-Friday *and* Beau-visits-his-mother-on-Wednesday]. As we learned from our discussion of *Pen*, for A to waive a moral claim right, A must initially possess that moral claim right. Consequently, if Aliyah does not possess a moral claim right against it being the case that [*both* Beau-enters-Aliyah's-apartment-on-Friday *and* Beau-visits-his-mother-on-Wednesday], then Aliyah cannot waive this right, and so it is not possible to explain *Mother* as a case of moral scope restriction.

Does Aliyah possess a moral claim right against it being the case that [*both* Beau-enters-Aliyah's-apartment-on-Friday *and* Beau-visits-his-mother-on-Wednesday]? According to those who deny the Conjunction Thesis, she might not. To see this, consider a view recently advanced by Hallie Liberto, which implicitly denies the Conjunction Thesis. Liberto considers a case in which Jo and Casey are having

sexual intercourse—or, as Liberto puts it, ‘having sex’. Jo does not want Casey to have sexual intercourse with Jo if Casey is in pain. On Liberto’s view, Jo possesses a moral claim right against [Casey-having-sex-with-Jo], but Jo lacks a moral claim right against [Casey-having-sex-with-Jo-while-Casey-is-in-pain].¹⁰⁰ Putting Liberto’s view in the terminology of this essay, Jo cannot waive a claim right against it being the case that [*both* Casey-has-sexual-intercourse-with-Jo *and* Casey-is-not-in-pain] while leaving intact her claim right against it being the case that [*both* Casey-has-sexual-intercourse-with-Jo *and* Casey-is-in-pain], because Jo does not possess these rights.¹⁰¹

There are different possible accounts of why someone might deny the Conjunction Thesis. According to one possible account, which we can call the *Reasonable Demands* account, whether A possesses a moral claim right against it being the case that [*p*] depends on whether it is reasonable for A to demand that *not-p*.¹⁰² On the Reasonable Demands account, whether Jo possesses a moral claim right against it being the case that [*both* Casey-has-sexual-intercourse-with-Jo *and* Casey-is-not-in-pain] depends on whether it is reasonable for Jo to demand that Casey not have sexual intercourse with Jo while Casey is in pain. Let us assume for the sake of argument that it is not reasonable, so that Jo lacks this right. We can now ask whether Jo possesses a moral claim right against it being the case that [Casey-has-sexual-intercourse-with-Jo].

¹⁰⁰ Hallie Liberto, ‘Intention and Sexual Consent’ (2017) 20 *Philosophical Explorations* 127, 136–38.

¹⁰¹ Liberto’s view is formulated in terms of the right that remains intact, whereas I have formulated my examples in terms of the right that is waived.

¹⁰² For an account of rights along these lines, see Jonathan Quong, ‘Rights Against Harm’ (2015) 89 *Aristotelian Society Supplementary Volume* 249.

Since it is reasonable for Jo to demand that Casey not have sexual intercourse with Jo, Jo possesses this right. Reasonableness determines whether Jo possesses this right. However, once Jo possesses the relevant right, Jo can choose whether or not to waive it for a range of reasons. For example, Jo can decide not to waive her moral claim right against it being the case that [Casey-has-sexual-intercourse-with-Jo] because Casey is in pain, or because Casey does not share Jo's taste for pop music. According to the Reasonable Demands account, reasonableness constrains *which* rights an individual possesses, but it does not constrain how an individual can *exercise* those rights.¹⁰³

According to another possible account of which rights A possesses—the account that Liberto herself advances—whether A possesses a right depends on the scope of A's realm of legitimate discretion. Call this the *Legitimate Discretion* account. (If A's realm of legitimate discretion is equivalent to what A can reasonably demand of others, then the Legitimate Discretion account is equivalent to the Reasonable Demands account.) Now, whether Casey has sexual intercourse with Jo is within Jo's realm of legitimate discretion. This explains why Jo possesses a right against it being the case that [Casey-has-sexual-intercourse-with-Jo]. By contrast, Liberto maintains, whether Casey is in pain while having sexual intercourse with Jo is something that falls outside of Jo's realm of legitimate discretion.¹⁰⁴ On Liberto's view, this explains why Jo lacks a right against it being the case that [*both* Casey-has-sexual-intercourse-with-

¹⁰³ For a discussion of related issues, see Jeremy Waldron, 'A Right to Do Wrong' (1981) 92 *Ethics* 21.

¹⁰⁴ Liberto (n 100) 135. This is easiest to imagine if Casey's pain is caused by something other than the intercourse itself—for example, by Casey's pre-existing headache. Whether Casey has sexual intercourse while he has a headache seems like it is in Casey's realm of legitimate discretion rather than Jo's.

Jo and Casey-is-not-in-pain]. Despite all this, Liberto maintains that if, while having sexual intercourse to which Jo has initially given morally valid consent, Jo comes to know that Casey is in pain, then Jo can revoke her morally valid consent *because* Casey is in pain. Liberto maintains that it is possible for Jo to do this even though whether Casey is in pain while having sexual intercourse is outside Jo's realm of legitimate discretion. Moreover, Liberto maintains, if Casey tries to initiate sexual intercourse with Jo, Jo can withhold her morally valid consent *because* Casey is in pain. Speaking generally, Liberto says that 'A can refuse to waive her... right against B having sex with A in light of finding out about *any* feature of the sexual encounter, even those outside her own realm of discretion.'¹⁰⁵

I suspect that many people subscribe to the Reasonable Demands account, the Legitimate Discretion account, or some similar account of which rights A possesses—and, as a result—deny the Conjunction Thesis. That said, which if any of these possible accounts is correct is a difficult and contentious issue. Rather than take a stand on which of these possible accounts is correct, I shall assume for simplicity that those who deny the Conjunction Thesis accept that *Mother* is a case in which Aliyah possesses a right against it being the case that [Beau-enters-Aliyah's-apartment-on-Friday] without Aliyah possessing a right against it being the case that [*both* Beau-enters-Aliyah's-apartment-on-Friday *and* Beau-visits-his-mother-on-Wednesday]. After all, both the accounts just canvassed seem to generate this result. It seems reasonable for Aliyah to demand that Beau not enter her apartment on Friday, but at least arguably unreasonable to demand that he also visits his mother on Wednesday. Likewise,

¹⁰⁵ *ibid* 138.

whether Beau enters Aliyah's apartment on Friday seems within Aaliyah's realm of legitimate discretion, but whether Beau also visits his mother on Wednesday seems outside this realm. Those who disagree with this verdict about *Mother* should feel free to substitute another case in which A possesses a moral claim right against it being the case that $[p]$ but lacks a moral claim right against it being the case that $[\text{both } p \text{ and } q]$.¹⁰⁶

Now, if moral scope restriction is the only way for A to place conditions on her morally valid consent to B's action, then A cannot place a condition on her morally valid consent to B's action unless A initially possesses the relevant right. We have assumed Aliyah lacks a right against it being the case that *[both Beau-enters-Aliyah's-apartment-on-Friday and Beau-visits-his-mother-on-Wednesday]*. Accordingly, if moral scope restriction is the only way for Aliyah to place conditions on her morally valid consent, then Aliyah cannot give her morally valid consent to Beau entering her apartment on Friday if and only if he visits his mother on Wednesday. But this is counterintuitive. Intuitively, this *is* possible. This gives those who deny the Conjunction Thesis reason to believe that there is another way for A to place conditions on her morally valid consent to B's action. A natural suggestion is that it is possible for A to conditionally token consent. On that picture, Aliyah would waive her moral claim right against it being the case that *[Beau-enters-Aliyah's-apartment-on-Friday]*, but would do so conditionally on Beau's visiting his mother on Wednesday.

¹⁰⁶ If the reader believes that there are *no* such cases, then the reader accepts the Conjunction Thesis.

d. *Can A make the truth of any proposition a condition of A's tokening consent?*

The idea of conditionally tokening consent raises a question: Is it possible for A to make the truth of *any* proposition a condition on A's tokening consent?¹⁰⁷ For many propositions, making their truth a condition of A's tokening consent seems unproblematic. For example, it seems unproblematic for Aliyah to token consent to Beau's entering her apartment on Friday conditional on the truth of the proposition 'Beau visits his mother on Wednesday'. But other propositions might raise concerns—consider, 'Beau *murders* his mother on Wednesday' or 'Beau believes that Aliyah does *not* consent to his entering her apartment on Friday'. Here is a problematic example from the sexual domain:

Climax. Agnes tokens consent to Barry's having sexual intercourse with Agnes on the condition that Agnes reaches sexual climax before Barry.
Barry has sexual intercourse with Agnes. Barry reaches sexual climax before Agnes.

If it is possible for Agnes to make the proposition 'Agnes reaches sexual climax before Barry' a condition of her tokening consent to Barry's having sexual intercourse with her, then this seems to yield some concerning results. First, Barry has sexual intercourse with Agnes without her morally valid consent to his doing so. Second, in light of the Tracking Assumption, it ought to be the case that Barry lacks Agnes's legally valid consent to his having sexual intercourse with her. Third, if Barry acts with the relevant *mens rea* (perhaps because he knows he is an unskilled lover), then it follows that it ought

¹⁰⁷ Thanks to an anonymous reviewer for encouraging me to address this question, and for the *Climax* case that follows.

to be the case that Barry commits a criminal offence. This will strike many—including myself—as an undesirable overreach of the criminal law.

Given the diversity of possible conditions, answering the general question of whether it is possible for A to make the truth of *any* proposition a condition on A's tokening consent would require at least another essay. However, as we shall see shortly, we can make progress with the legal debates about conditional consent to sexual intercourse without answering this general question here.

5. Legal implications

Let us now return to the law of conditional consent to sexual intercourse. We began with the question of whether that law ought to be extended to cases like *Linekar*. We then made the Tracking Assumption, which states that whether A gives legally valid consent to B's action ought to track whether A gives morally valid consent to that action. We then saw that there are two distinct ways for one person to place conditions on her morally valid consent to another's action. It follows that there are two distinct ways for a complainant to place conditions on her morally valid consent to a defendant's having sexual intercourse with her. In this section, I use this distinction to argue that the law of conditional consent ought to be extended to cases like *Linekar*, outlining two possible suggestions for how the law might do this. I also briefly suggest that the distinction helps us to understand how individuals place conditions on their morally valid consent in other contexts.

Let us start by considering *Assange*. AA possessed a moral claim right against it being the case that [Assange-had-sexual-intercourse-with-AA]. Plausibly, AA also

possessed a moral claim right against it being the case that [*both* Assange-had-sexual-intercourse-with-AA *and* Assange-wore-a-condom]. In more natural language, we can say that AA plausibly had a right against it being the case that [Assange-had-*protected*-sexual-intercourse-with-AA]. If that is correct, then AA plausibly waived this right, leaving in place her moral claim right against it being the case that [Assange-had-*unprotected*-sexual-intercourse-with-AA]. If in these circumstances Assange had unprotected sexual intercourse with AA, then he did something other than that to which she gave her morally valid consent. If Assange did something other than that to which AA gave her morally valid consent, then Assange did not have AA's morally valid consent to what he did. If this is correct, then *Assange* involves moral scope restriction just like *Gynaecologist*, in which Patient gives her morally valid consent to Doctor's inserting a medical instrument into Patient's vagina, but Doctor instead inserts his penis. What Doctor does is outside the moral scope of Patient's consent. Similarly, what Assange did was outside the moral scope of AA's consent.

Now consider *Linekar*. The prostitute possessed a moral claim right against it being the case that [Linekar-had-sexual-intercourse-with-the-prostitute]. Did she also possess a moral claim right against it being the case that [*both* Linekar-had-sexual-intercourse-with-the-prostitute *and* Linekar-paid-the-prostitute-£25]? In more natural language, we might ask, did the prostitute possess a right against it being the case that [Linekar-had-*paid*-sexual-intercourse-with-the-prostitute]?

Those who accept the Conjunction Thesis must answer yes. According to them, the prostitute's possession of a moral claim right against it being the case that [Linekar-had-*paid*-sexual-intercourse-with-the-prostitute] follows from her possession of the

right against it being the case that [Linekar-had-sexual-intercourse-with-the-prostitute]. If that is correct, then we can explain *Linekar* in terms of moral scope restriction. By tokening consent to paid sexual intercourse, the prostitute restricted the moral scope of her consent so as to waive only her right against it being the case that [Linekar-had-*paid*-sexual-intercourse-with-the-prostitute], leaving intact her right against it being the case that [Linekar-had-*unpaid*-sexual-intercourse-with-the-prostitute]. If that is correct, then *Linekar* involves moral scope restriction just like *Assange* and *Gynaecologist*. The prostitute gave her morally valid consent to Linekar having paid sexual intercourse with her, but he instead had unpaid sexual intercourse with her. Since what Linekar did was something other than that to which the prostitute gave her morally valid consent, Linekar did not have the prostitute's morally valid consent to what he did.

Those who reject the Conjunction Thesis might answer no: The prostitute did not possess a right against it being the case that [Linekar-had-*paid*-sexual-intercourse-with-the-prostitute]. What if the prostitute lacked this right? Even if those who reject the Conjunction Thesis believe that the prostitute lacked this right, they should agree that she possessed a right against it being the case that [Linekar-had-sexual-intercourse-with-the-prostitute]. This is where the discussion of conditionally tokening consent comes into play. Earlier, we put off answering the general question of whether it is possible for A to make the truth of *any* proposition a condition of A's tokening consent. Accordingly, if we are to invoke the notion of conditional tokening in *Linekar*, we must now make the following assumption:

Payment Assumption: It is possible for A to token consent to B's having sexual intercourse with A conditional on the truth of the proposition 'B pays A'.

The Payment Assumption is plausible. Indeed, many regard payment as among the most plausible conditions for A to place on A's consent to B's sexual intercourse with A.¹⁰⁸

Provided the Payment Assumption is true, we can think of *Linekar* as a case in which the prostitute conditionally tokened consent to Linekar having sexual intercourse with her, with the condition being the truth of the proposition 'Linekar paid the prostitute £25 afterwards'. On this view, Linekar's paying the prostitute £25 was a condition on her speech act of consent. Since tokening consent requires a speech act, conditionally performing a speech act of consent amounts to conditionally tokening consent. If the condition on the speech act is not satisfied, then the prostitute has not tokened consent. Since her tokening consent is a requirement for her giving morally valid consent to Linekar's having sexual intercourse with her, it follows that she did not give her morally valid consent to Linekar's having sexual intercourse with her. On this picture, Linekar had sexual intercourse with the prostitute without her morally valid consent.

If this picture is correct, then *Linekar* is a case of conditional tokening just like *Mother*. Recall that in *Mother*, Beau's visiting his mother on Wednesday was a condition

¹⁰⁸ See, e.g., Joseph J. Fischel, *Screw Consent: A Better Politics of Sexual Justice* (University of California Press 2019) 112.

of Aliyah's speech act of consent to Beau's entering Aliyah's apartment on Friday. Since tokening consent requires a speech act, conditionally performing a speech act of consent amounts to conditionally tokening consent. If the condition on the speech act is not satisfied, then Aliyah does not token consent. Since her tokening consent is a requirement for her giving morally valid consent to Beau's entering her apartment on Friday, it follows that Aliyah does not give her morally valid consent to Beau's entering her apartment on Friday. If Beau enters her apartment on Friday, he does so without Aliyah's morally valid consent to his action.

The preceding discussion might help to explain the different intuitions about *Assange* and *Linekar*. Recall that some commentators have the intuition that there is an important difference between cases like *Assange* and those like *Linekar*. We can now see why philosophical argument might vindicate those intuitions as correct. Whether those intuitions are correct depends on whether the complainants in each kind of case possess the relevant moral claim right. If A possess a right against [B-having-*protected*-sexual-intercourse-with-A] but not against [B-having-*paid*-sexual-intercourse-with-A], then cases like *Assange* are cases of moral scope restriction, whereas cases like *Linekar* are cases of conditionally tokening consent. This is an important difference.

Recall that the commentators in the second set have the intuition that a defendant who has sexual intercourse with a complainant in breach of either condition—whether payment or condom use—does so without the complainant's valid consent to what he does. My argument in this essay has been that this, too, is correct. Even if there is an important difference between the conditions in the two cases—namely, that one is a restriction on moral scope and the other is a condition on

tokening—a defendant who has sexual intercourse with a complainant in breach of either kind of condition does so without her morally valid consent to his action.

Currently, the law treats sexual intercourse in breach of a condition as non-consensual only where what the defendant does falls outside the moral scope of the complainant's consent. But if I am correct, then a defendant who has sexual intercourse with a complainant in breach of a condition she places on her consent token also has sexual intercourse with the complainant without her morally valid consent to his action. In light of the Tracking Assumption, it ought to be the case that the defendant in such cases lacks the complainant's legally valid consent to what he does.

Should the law treat sexual intercourse in breach of a condition on tokening in any way differently from sexual intercourse in breach of a restriction on moral scope?¹⁰⁹ I suggest the answer is yes. I have argued that there are three distinct ways in which a defendant might lack a complainant's morally valid consent to his having sexual intercourse with her. First, the complainant might not *token* consent—for example, where she is unconscious throughout the relevant period. Second, the complainant's consent might not be *valid*—for example, if it is induced by coercion. Third, the complainant might give morally valid consent to something *other* than his having sexual intercourse with her—for example, his performing surgery on her. I suggest that these different ways in which a defendant might lack the complainant's morally valid consent to sexual intercourse should be reflected in the law.

¹⁰⁹ Thanks to an anonymous reviewer for encouraging me to make this explicit.

Currently, English criminal law does not make such distinctions. For example, it uses the same offence to criminalise the behaviour of the defendant who has sexual intercourse with an unconscious complainant, the defendant who coerces a complainant into sexual intercourse, and the defendant who engages in sexual intercourse instead of performing medical treatment.¹¹⁰ However, many theorists have called for more fine-grained individuation of sexual offences, mainly based on considerations of fair labelling.¹¹¹ Although the defendant lacks the complainant's morally valid consent to sexual intercourse in each of the cases outlined above, the *reason why* is different in each case. I suggest that the law should acknowledge this difference. The best way for it to do this, I suggest, is through the finer grained individuation of offences, such as sexual-assault-by-lack-of-tokening-of-consent, sexual-assault-by-lack-of-validity-of-consent, and sexual-assault-by-acting-outside-the-scope-of-consent. Indeed, sexual-assault-by-lack-of-tokening-of-consent should plausibly be subdivided further, to reflect the fact that a defendant might lack the complainant's token of consent due either to the complainant's condition not being satisfied (as was arguably the case in *Linekar*) or to the fact that the complainant never even conditionally tokened consent (as where the complainant is unconscious).

¹¹⁰ The offence committed depends on precisely which acts the sexual intercourse involved. See n 79, above.

¹¹¹ For different suggestions about how to individuate sexual offences, see Gibson (n 57); Dougherty, 'Affirmative Consent and Due Diligence' (n 23) 109–112; Amit Pundik, 'Coercion and Deception in Sexual Relations' (2015) 28 *Canadian Journal of Law & Jurisprudence* 97; Victor Tadros, 'Rape Without Consent' (2006) 26 *Oxford Journal of Legal Studies* 515.

How, then, should the law be extended to cover cases like *Linekar*? This depends on whether they are cases of moral scope restriction or conditional tokening. If they are cases of moral scope restriction, then the defendant's behaviour should be criminalised using the offence that should be used to criminalise the defendant's behaviour in *Assange*, namely, sexual-assault-by-acting-outside-the-scope-of-consent.¹¹² On the other hand, if they are cases of conditional tokening, then they should plausibly be criminalised using a different sexual offence, namely, the appropriate subdivision of sexual-assault-by-lack-of-tokening-of-consent.

In applying the distinction between moral scope restriction and conditional tokening, I have in this essay focused on the law of conditional consent to sexual intercourse. But the distinction between moral scope restriction and conditionally tokening consent applies well beyond this. As a result, the distinction might also help us to understand how individuals place conditions on their morally valid consent in other contexts. Since I do not have space to pursue this issue at length here, a full analysis will have to wait for another occasion.

¹¹² We may wish to have a variant on these offences called *rape*-by-acting-outside-of-the-scope-of-consent, etc, depending on precisely which acts the intercourse involves. See n 79, above.

Essay Three

Sexual Consent and Having Sex Together

Abstract: Some influential theorists have recently argued that if sex is in some sense ideal, then each partner's consent is unnecessary: even absent each partner's consent, neither partner infringes the other's moral rights. I challenge a key premise in their argument for this alarming conclusion. I instead defend the Commonsense View: If you have sex with someone without their consent, you thereby infringe that person's moral rights. In the course of defending the Commonsense View, I develop what I call the Hybrid Account of Consent. The Hybrid Account retains the benefits of two existing accounts of consent while avoiding their shortcomings. I close by suggesting some benefits of my alternative picture and some implications for law reform.

1. Consent, rights, and ideal sex

If you have sex with someone without their consent, you thereby infringe that person's moral rights. Uncontroversial, you might think. Yet John Gardner, Catharine MacKinnon, and Tanya Palmer disagree. All have recently defended views on which it is possible for you to have sex with someone, without their consent, without thereby infringing that person's moral rights. Specifically, they defend what I will call the *No Consent Thesis*:

No Consent Thesis. If sex is ideal, then consent is unnecessary.

To be clear, the claim that consent is unnecessary means that it is possible to have sex with someone without their consent, without thereby infringing that person's moral rights.¹¹³ The No Consenter believes that if sex is in some sense *ideal*, then even absent each partner's consent, neither partner infringes the other's sexual rights. Ideal sex, according to the No Consenter, involves a particular kind of mutuality that makes it a joint action—something that sexual partners do *together*. Consent, by contrast, is something we give to the actions of other persons—to things that others do *to* us, rather than *with* us. Describing sex that exhibits the relevant mutuality as sex that women want, MacKinnon captures the No Consenter's view in characteristically vivid language: 'Consenting is not what women do when they want to be having sex... No one says, "We had a great hot night, she (or I or we) consented."'”¹¹⁴

To see that Gardner, MacKinnon and Palmer each defend the No Consent Thesis, consider what each of them says about consent. MacKinnon claims that 'when a sexual interaction is equal, consent is not needed and does not occur because there is no transgression to be redeemed.'¹¹⁵ Similarly, Palmer claims that

while consent is clearly absent from the worst sexual encounters it will also be absent in the most positive encounters jointly instigated by mutually active partners, because both partners are in a state beyond

¹¹³ Gardner, 'The Opposite of Rape' (n 15); Catharine A MacKinnon, 'Rape Redefined' (2016) 10 Harvard Law & Policy Review 431; Palmer (n 15).

¹¹⁴ MacKinnon (n 113) 450.

¹¹⁵ *ibid* 476.

consent, a state of active involvement rather than reaction or submission.¹¹⁶

Finally, Gardner, after noting that in previous work he advanced the proposition that consent is insufficient to guarantee that sex is morally permissible, says this:

Here I am advancing the more explosive proposition that, when the sexual going is good, consent is also unnecessary. Before you explode, bear in mind that my case proceeds, not from the thought that consent is too high an expectation for our sex lives, but rather that it is too low an expectation. Ideally, I suggest, the question of consent does not arise between sexual partners, for the question of consent belongs to sex individualistically, even solipsistically, conceived as something that one person does to another (even if, in the course of their sexual encounter, the individuals concerned take scrupulously equitable turns in being the doer and the done to). The proper antidote to this somewhat melancholy conception of sex, or of what sex can be, is not to replace what Lacey calls the “individualised notion of consent” with some refurbished (and perhaps less individualised) notion of consent, but rather to replace the emphasis on consent, which cannot but be individualised, with an emphasis on some less individualised notions. Teamwork is one such notion.¹¹⁷

¹¹⁶ Palmer (n 15) 13.

¹¹⁷ Gardner (n 1) 60 (footnotes omitted).

As Gardner explains, the argument for the No Consent Thesis proceeds from the thought that consent is too *low* an expectation for our sex lives. Partners engaging in ideal sex do not infringe one another's moral rights because ideal sex involves something *better* than consent—namely, the kind of mutuality that makes sex a joint action.¹¹⁸

While these three theorists' claims differ in detail, then, all defend the No Consent Thesis: If sex is in some sense *ideal*, then consent is unnecessary.

The Main Argument for the No Consent Thesis proceeds as follows:

Main Argument

- (1) *Ideal Sex Premise*. If sex is ideal, then it is something two people do together.¹¹⁹

¹¹⁸ I believe, as I argue in the main text, that each of the three theorists is committed to the No Consent Thesis. It is difficult to see how else to interpret what each of them says about consent in the text accompanying nn 115, 116, and 117, above. Independently of matters of interpretation, the essay should remain of interest for two reasons. First, each of the three theorists accepts at least the following more modest claim: we should reduce the focus on consent in sexual morality and rape law, because this focus on consent objectionably conceptualises women as sexually passive. (If this is the correct interpretation of their view, then it resembles the view of Rebecca Kukla. See Kukla (n 15).) I go on to argue that even this more modest claim is false. My argument against this more modest claim goes through even if, contrary to what I argue above, none of the three theorists is committed to the No Consent Thesis. Second, my arguments for the Hybrid Account of Consent likewise go through regardless of whether the three theorists are committed to the No Consent Thesis. Thanks to an anonymous reviewer for pointing all this out.

¹¹⁹ Like Gardner, I restrict myself for simplicity to the two-person case, while recognising that ideal sex may involve more than two people. Speaking more generally, we might say that ideally, sex is something that its participants do together. Gardner *ibid* 54, fn 18.

(2) *Joint Action Premise*. If two people do something together, then consent is unnecessary.¹²⁰

(3) *No Consent Thesis*. Therefore, if sex is ideal, then consent is unnecessary.

To see that Gardner, MacKinnon, and Palmer accept the Ideal Sex Premise, we can ask, ‘What is ideal sex?’ For MacKinnon, ideal sex is *equal* sex, which she says involves ‘mutuality, reciprocity, respect, trust, [and] desire...not one-sided acquiescence’.¹²¹ For Palmer, ideal sex is *mutually active* sex. For Gardner, ideal sex is *teamwork* sex, where teamwork is a ‘particular kind of mutuality’.¹²² Although these three theorists might differ in the details of what constitutes ideal sex, their references to mutuality suggest that each of them accepts what I will call the *Ideal Sex Premise*: (1) If sex is ideal, then it is something two people do together.

The Ideal Sex Premise is plausible, and I suggest that we should accept it.

In this essay, I will argue against the No Consent Thesis. I will defend the Commonsense View:

¹²⁰ Does the Joint Action Premise commit its proponents to the view that non-consensual sex can be permissible? On one way of talking, it does not. This is because they are free to stipulate meanings for the terms ‘consensual’ and ‘non-consensual’. For example, they might say that ‘non-consensual sex’ picks out sexual offences, and that ideal or teamwork sex is ‘consensual’. On that way of talking, a sexual encounter can be consensual without the individuals involved giving consent. On that way of talking, the Joint Action Premise does not commit its proponents to the view that non-consensual sex can be permissible. Thanks to an anonymous reviewer for encouraging me to address this point.

¹²¹ MacKinnon (n 113) 476.

¹²² Gardner, ‘The Opposite of Rape’ (n 15) 54.

Commonsense View. If you have sex with someone without their consent, you thereby infringe that person's rights.

I have already suggested that we should accept the Ideal Sex Premise. Accordingly, I will challenge the Joint Action Premise, which does the philosophical heavy lifting in the Main Argument for the No Consent Thesis.

I will distinguish two plausible arguments for the Joint Action Premise. The first is an argument from the *metaphysics* of sexual joint action, whereas the second is an argument from its *moral significance*. The Metaphysical Argument, I maintain, rests on a mistaken metaphysics of sexual joint action—of what it is for two people to have sex *together*. I suggest an alternative picture. I then turn to the Moral Argument. The Moral Argument rests on the claim that engaging in sexual joint action is itself sufficient to waive each partner's rights and thus that consent is redundant. I argue that this is a mistake, because ideal sex *involves* each partner's consent. To make my case, I rely on a substantive account of consent. I first consider two influential accounts of consent, highlighting their shortcomings. Next, I propose what I call the Hybrid Account of Consent. The Hybrid Account retains the benefits of each of the existing accounts, while avoiding their shortcomings. If the Hybrid Account is correct, then there is no reason to believe that the Moral Argument is sound. We should therefore accept the Commonsense View: If you have sex with someone without their consent, you thereby infringe that person's rights. I close by suggesting some attractive features of my way of looking at things and some implications for law reform.

2. The Commonsense View and when consent is necessary

Before turning to the two arguments for the Joint Action Premise, it is worth briefly outlining the view of consent and its relation to our moral rights that undergirds the Commonsense View. This will help us to understand the normative effect of consent, and thus to understand the circumstances in which consent is necessary. To help do this, I briefly contrast the Commonsense View with an alternative view of when consent is necessary, recently advanced by Michelle Madden Dempsey.¹²³

According to Dempsey, X's consent to Y's action is necessary—or, as she puts it, 'called for'—if and only if two conditions are met.¹²⁴ First, Y's action must 'call for justification'—that is to say, Y must have a 'non-trivial reason' not to perform that action. Second, at least one reason in virtue of which Y's action calls for justification must be grounded in X's wellbeing.

However, as Richard Healey has convincingly argued, Dempsey's view is over-inclusive.¹²⁵ To illustrate, Healey offers us two cases. In the first case, Y purchases the

¹²³ Thanks to an anonymous reviewer for encouraging me to make this explicit.

¹²⁴ Dempsey (n 18) 15–17.

¹²⁵ Richard Healey, 'Consent, Rights, and Reasons for Action' (2019) 13 *Criminal Law and Philosophy* 499, 506–507. I rely only on Healey's claim that Dempsey's view is over-inclusive. But Healey also argues that Dempsey's view is under-inclusive, because it cannot accommodate cases of 'harmless wronging', in which Y infringes X's rights without setting back any interest of X's. It is difficult to evaluate the charge of under-inclusivity. The difficulty arises because it is contentious whether cases like the ones Healey adduces, such as non-consensual mouth swabs, are genuinely cases of harmless wronging. For example, on one view, if Y takes a mouth swab from X without X's valid consent, then

last available cinema ticket, when X needs to see the film in order to complete a school project. Here, it is plausible that Dempsey's two conditions are met. Plausibly, Y has a 'non-trivial reason' not to purchase the ticket—namely, Y's purchasing the ticket will frustrate X's ability to complete his school project—and this will negatively affect X's wellbeing. Nevertheless, it is implausible that X's consent is necessary in this case. Healey's second case is one in which Y casts the deciding vote for a political candidate whose policies adversely affect X. Again, it is plausible that Dempsey's two conditions are met in this case. Y has a non-trivial reason not to vote for the candidate, and this reason is grounded in X's wellbeing. Nevertheless, it is implausible that X's consent is necessary in this case.

We can summarise Healey's diagnosis for why X's consent is unnecessary in each of these cases: X lacks a claim right against Y's action.¹²⁶ In the first case, X lacks a claim right against Y purchasing the last cinema ticket. In the second case, X lacks a claim right against Y casting the decisive vote for a candidate whose policies are unfavourable for X. The general lesson from Healey's critique of Dempsey, then, is that X's consent to Y's action is necessary only if X initially possesses a claim right

Y sets back X's interest in living autonomously, and thereby harms X. For this view of the relationship between autonomy and harm, see, e.g., Crisp (n 55) 81–84.

¹²⁶ To be clear, Healey is concerned with moral rather than legal rights. Healey's account of moral rights, like my own, broadly follows Judith Jarvis Thomson (n 82). Thomson is building on Wesley Hohfeld's the account of legal rights. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Walter Wheeler Cook ed, Yale University Press 1920).

against Y's performing that action.¹²⁷ Provided it is valid, X's consent waives this claim right, thereby releasing Y from the correlative duty that Y owes X not to perform that action.¹²⁸ The Commonsense View, as I understand it, presupposes this relationship between consent and its relationship to our moral rights.

To be clear, the Commonsense View is concerned with moral rights. This raises a question: what is the relation between moral rights and the law?¹²⁹ Tom Dougherty offers the following answer, which I take to be plausible. The state punishes those who commit sexual offences by depriving them of their liberty. According to liberal political morality, such deprivations of liberty call for justification. One plausible justification is that the offences they commit are proportionately objectionable, morally speaking. This raises the question of what makes such offences morally objectionable. A popular answer from within liberal political morality focuses on each person's sexual rights. The default is that imposing sexual contact on someone infringes their moral rights, which makes it a moral wrong that should be criminalised. But valid consent waives the relevant moral rights, thereby displacing this default. Provided there is valid

¹²⁷ I claim merely that X's consent is necessary *only if* X initially possesses a claim right against Y's action. I do not claim that X's consent is necessary *if* X initially possesses a claim right against Y's performing an action. This is because, as we will see in our discussion of the Moral Argument in section 4, it is sometimes possible for X to divest themselves of the relevant claim right via some mechanism other than consent, thereby rendering X's consent unnecessary.

¹²⁸ I assume that for consent to be valid requires, at a minimum, that it is given by an adult of sound mind who is not induced by coercion or deception.

¹²⁹ Thanks to an anonymous reviewer for encouraging me to address this point.

consent, such sexual contact does not constitute a moral wrong that the state should criminalise.¹³⁰

Now that we understand when consent is necessary, we are in a better position to consider—and eventually reject—two arguments for the Joint Action Premise.

3. The Metaphysical Argument

There are two plausible arguments for the Joint Action Premise.¹³¹ The first such argument is the Metaphysical Argument. In this section, I first reconstruct the Metaphysical Argument and then go on to reject it.

a. Reconstructing the Metaphysical Argument

The first premise of the Metaphysical Argument is a widely accepted conceptual premise about consent. As it is sometimes put, ‘consent in the strict sense is always given to the actions of other persons.’¹³² This premise is often expressed in terms of

¹³⁰ See Dougherty, ‘Consent, Communication, and Abandonment’ (n 76) 387–388. The harm principle is often thought to provide an additional constraint on criminalisation. For a discussion of why the criminalisation of rape and sexual assault also satisfies the harm principle, see John Gardner, ‘The Wrongness of Rape’, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press 2007) 29–30.

¹³¹ The first argument is most plausibly attributed to Gardner, whereas the second argument is more plausibly attributed to all three theorists.

¹³² A John Simmons, *Moral Principles and Political Obligations* (Princeton University Press 1979) 76. See also Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct* (Ashgate 2004) 3, who describes one use of ‘consent’ in the criminal law as including (inter alia) all instances in which persons ‘choose for themselves, what other persons do to them.’

X—the consent-giver—being passive, and Y—the recipient of consent—being active. The idea is that the very concept of consent presupposes that Y does something *to* X. For Y’s action not to infringe X’s rights, Y requires X’s valid consent.¹³³ For example, when doctor Y injects patient X with a vaccine, this is something that Y does *to* X, and Y’s action is permissible only if X gives valid consent. This is the sense in which Y is active and X is passive. Gardner, MacKinnon, and Palmer all hold views on which the sexual context is no different.¹³⁴ So, for example, MacKinnon claims that on the consent model of sex, ‘active [Y] initiates, passive [X] acquiesces or yields to [Y]’s initiatives... Intrinsic to consent is the actor and the acted-upon.’¹³⁵ Similarly, Palmer claims that ‘a consent framework implies that sex always involves one (active) person doing something to another (passive) person.’¹³⁶ Likewise Gardner claims that

¹³³ As I say in n 128, above, I assume that for consent to be valid requires, at a minimum, that it is given by an adult of sound mind who is not induced by coercion or deception. Much of MacKinnon’s work criticises courts’ willingness to find that a woman’s sexual consent was valid despite that consent being induced by coercion, deception, or egregious power inequalities. Nothing I say in this essay is meant to deny the force of that part of MacKinnon’s critique.

¹³⁴ For analogies between the medical case and the sexual case, see: Gardner (n 1) 57; MacKinnon (n 1) 475; Palmer (n 1) 11, fn 21, citing Robert M Veatch, ‘Abandoning Informed Consent’ (1995) 25 *The Hastings Center Report* 5; Michelle J Anderson, ‘Negotiating Sex’ (2005) 78 *Southern California Law Review* 1401, 1408–09; Sharon Cowan, ‘Choosing Freely: Theoretically Reframing the Concept of Consent’ in Rosemary and Cowan Hunter Sharon (ed), *Choice and Consent: Feminist Engagements with Law and Subjectivity* 100.

¹³⁵ MacKinnon (n 113) 440. For clarity, I have replaced MacKinnon’s letters A and B with Y and X, respectively.

¹³⁶ Palmer (n 15) 13.

‘consent presupposes an asymmetry in activity—a doer and a sufferer.’¹³⁷ The idea is as follows. It is only possible to consent to an action if it is something that another person does *to* you. If the action is not something another person does *to* you, then it is not possible for you to consent to it. If it is not possible for you to consent to an action, then it is unnecessary for you to do so. After all, it cannot be morally required to do something that is morally impossible. It follows that all three theorists must accept what we can call the *Conceptual Premise*: (1) Consent is necessary only if one person does something *to* the other.

While many theorists accept the Conceptual Premise, few if any explicitly acknowledge that it is not a claim about how ‘consent’ is used in ordinary language. In ordinary language, the word ‘consent’ is used to pick out several distinct moral phenomena. Some of these phenomena presuppose neither the passivity of the consent-giver, nor that the consented-to action is something that is done to them. For example, in ordinary language we say things like, ‘Tracy consented to giving Sam a massage’. In respect of the massage, Tracy is active rather than passive—it is something she does *to* Sam. It is useful to think about the moral phenomenon here in terms of each person’s moral rights.¹³⁸ Initially, Sam has no claim right to Tracy giving him a massage and, correlatively, Tracy owes no duty to Sam to give him a massage. By ‘consenting’ to give Sam a massage, Tracy can change the structure of the moral rights and duties between them. Provided her ‘consent’ is valid, Tracy gives Sam a claim

¹³⁷ Gardner, ‘The Opposite of Rape’ (n 15) 48.

¹³⁸ As I say in n 126, above, the account of moral rights here broadly follows that of Judith Jarvis Thomson.

right to her giving him a massage, and places herself under a correlative duty to do so. To distinguish this kind of ‘consent’—the kind in which one person gives another a claim right—from other moral phenomena that are also called ‘consent’ in ordinary language, some writers call this moral phenomenon an *undertaking* or even a *promise*.¹³⁹ Whatever we choose to call it, this kind of ‘consent’ is not the subject of the Conceptual Premise.

Instead, the Conceptual Premise concerns cases in which one person waives a so-called ‘negative’ moral claim right over their person. A negative claim right is a claim right against another person *doing* something.¹⁴⁰ A negative claim right over your *person* is a right against them doing something *to you*. For example, in the medical cases, your negative rights over your person include a claim right against your doctor injecting you with a vaccine. By consenting to her giving you the vaccine, you can—provided your consent is valid—waive that negative claim right, and release the doctor from her correlative duty not to inject you with the vaccine. The Conceptual Premise concerns only this technical sense of ‘consent’ as intentionally waiving a negative claim right over your person.

¹³⁹ For ‘undertaking’ see, e.g., Oliver Black, ‘Two Theories of Agreement’ (2007) 13 *Legal Theory* 1. For ‘promise’ see, e.g., Liberto (n 16). See also Gardner, ‘The Opposite of Rape’ (n 15) 61.

¹⁴⁰ For a classic statement of the difference between positive and negative rights, see Charles Fried, *Right and Wrong* (Harvard University Press 1978) 110. Cécile Fabre draws attention to what she calls the *duty distinction*:

‘some rights are negative in that they ground negative duties only while other rights are positive in that they only ground positive duties to help and resources.’ Cécile Fabre, ‘Constitutionalising Social Rights’ (1998) 6 *Journal of Political Philosophy* 263, 263–64.

It is instructive to compare the sense in which ‘consent’ is used in the Conceptual Premise with the sense in which Healey uses ‘consent’. Recall that on Healey’s view, X’s consent to Y’s action is necessary only if X initially possesses a claim right against Y’s action.¹⁴¹ The Conceptual Premise uses ‘consent’ in a narrower sense: X’s consent to Y’s action is necessary only if X possesses a negative claim right *over their person* against Y’s action. We can accommodate the latter sense within the former by saying that X’s consent to Y’s doing something to X is necessary only if X initially possesses a negative claim right over their person against what Y does to X.

The second premise of the Metaphysical Argument concerns the metaphysics of joint action. It states that if two people do something together, then neither of them does anything *to* the other. Gardner makes this point explicitly. He says that in teamwork sex,

The actions of the me and the you have to contribute constitutively to the actions of the we. In this situation, nothing is being done *to* anybody.

What is done, including what is being done constitutively by me or you, is now being done *with* somebody.¹⁴²

Gardner’s point provides us with one way to interpret MacKinnon’s claim that when sex is equal or mutual, ‘there is no transgression to be redeemed’.¹⁴³ On this interpretation of MacKinnon’s claim, there is no transgression to be redeemed because

¹⁴¹ See text accompanying n 127, above.

¹⁴² Gardner, ‘The Opposite of Rape’ (n 15) 56.

¹⁴³ See n 115, above.

there is no *transgression*—because neither person is doing anything *to* the other.¹⁴⁴ If this interpretation is correct, then Gardner and MacKinnon both accept what we can call the *Metaphysical Premise*: (2) If two people do something together, then neither of them does anything *to* the other.

We are now in a position to summarise the general structure of the Metaphysical Argument:

Metaphysical Argument

- (1) *Conceptual Premise*. Consent is necessary only if one person does something *to* the other.
- (2) *Metaphysical Premise*. If two people do something together, then neither of them does anything *to* the other.
- (3) *Conclusion*. Therefore, if two people do something together, then consent is unnecessary. [Joint Action Premise of Main Argument.]

I suggest that we may, for the sake of argument, accept the Conceptual Premise. But we should reject the Joint Action Premise. Accordingly, I will argue against the Metaphysical Premise.

¹⁴⁴ Palmer is less explicit, though perhaps she too can be interpreted as accepting the Metaphysical Premise. See text accompanying n 116.

b. Rejecting the Metaphysical Argument

In this subsection, I argue that the Metaphysical Premise is false. It is not true that if two people do something together, then neither of them does anything *to* the other. Since Gardner defends this premise most explicitly, I focus primarily on his work.

To see that the Metaphysical Premise is false, it is worth looking at Gardner's examples of non-sexual joint action. These are winning a match, reroofing a house, and rescuing a hamster.¹⁴⁵ It is true that in each of these cases, we do something together without doing anything to each other. We win the match together. We reroof the house together. We rescue the hamster together. But these joint actions—these things we do together—are partly constituted by actions that each of us does individually. The joint action of winning the match is partly constituted by my action—passing the ball—and your action—scoring the goal. The joint action of reroofing the house is partly constituted by my action—attaching the slates—and your action—doing the leadwork. The joint action of rescuing the hamster is partly constituted by my action—shining the torch—and your action—reaching into the sofa. In each case, the joint action is partly constituted by our individual actions.¹⁴⁶

Now, in each of these examples, the things we do individually are not things that we do *to* each other. As such, these examples do not involve our negative claim rights

¹⁴⁵ Gardner, 'The Opposite of Rape' (n 15) 51–52.

¹⁴⁶ It is not only joint actions that are partly constituted by individual actions. Many of our individual actions are also partly constituted by other individual actions. For example, my making an omelette is partly constituted by my cracking the eggs, my beating the eggs, my adding the spices, and my frying the mixture.

over our person.¹⁴⁷ But in other examples of joint action, the things we do individually *will* be things we do to each other. As such, these other examples *will* involve our negative claim rights over our person.

Famously, it takes two to Tango:

Tango. Amelia and Bert Tango together *by* Amelia placing her hands on Bert's shoulders and *by* Bert's placing his hands on Amelia's waist.

Each of these actions—Amelia's placing her hands on Bert's shoulders, and Bert's placing his hands on Amelia's waist—partly constitutes their joint action of Tangoing together, and each of these actions is something that one does *to* the other. In respect of the act of Amelia placing her hands on Bert's shoulders, Amelia is active and Bert is passive. In respect of the act of Bert's placing his hands on Amelia's waist, he is active and she is passive. So although neither person does the *joint action* to the other, the joint action is partly constituted by *individual actions* in which each of them does something to the other.

It is for those *individual* actions that the question of consent arises, because it is against these individual actions that Amelia and Bert each have negative claim rights over their person. Amelia's rights over her person include a claim right against Bert's placing his hands on her waist. Amelia must consent not the joint action of their Tangoing together, but instead to this individual action of Bert's. Similarly, Bert's negative rights over his person include a claim right against Amelia placing her hands

¹⁴⁷ The same is true of Gardner's examples of people keeping down a balloon together, playing jazz together, and meeting under the Paddington Station clock at noon. See Gardner (n 1) 52, 55, 61.

on his shoulders. Bert must consent not to the joint action of their Tangoing together but rather to Amelia's action of placing her hands on his shoulders.

The same is true in the sexual context. Individuals engaging in ideal sex need not consent to the joint action of having sex together. Instead, each must consent to the individual actions of their partner—the things their partner does *to* them—that partly constitute their joint action of having sex together. This is because these individual actions involve the negative rights that each person has against their partner doing something *to* them. To see this, consider the 'straight sex' scenario with which Gardner is primarily concerned, in which a cis-woman has penetrative sex with a cis-man. Let us first consider the woman's rights. The woman has negative claim rights over her person. These include a claim right against her partner penetrating her vagina with his penis. Lest the man infringe that right, the woman must give her valid consent to his penetrating her vagina with his penis. If this correct, then the Metaphysical Premise is false, and the Metaphysical Argument is therefore unsound.¹⁴⁸

As we have just seen, the easiest way to reject the Metaphysical Premise is to point out that in Gardner's 'straight sex' scenario, when the man and the woman have sex *together*, their joint action is partly constituted by something the man does to the

¹⁴⁸ In other words, in Gardner's examples, X initially lacks a claim right against what Y does, and *a fortiori* initially lacks a claim right against what (if anything) Y does *to* X. Consequently, Gardner is correct that X's consent—both in Healey's sense and in the narrower sense used in the Conceptual Premise—is unnecessary in each of these examples. But it does not follow from this that X's consent is also unnecessary in cases such as X and Y having sex together, which do involve X's negative claim rights over their person.

woman—namely, penetrate her vagina with his penis. Those who reject the Metaphysical Premise are not automatically committed to any view as to whether, in ‘straight sex’, the woman does anything to the man. But it is overwhelmingly plausible that just as their joint action of having sex together is partly constituted by the man penetrating the woman’s vagina, that joint action is also partly constituted by something the woman does to the man—namely, ‘envelop’ his penis with her vagina.¹⁴⁹ Thinking about the man’s rights, it is plausible that he possesses a right against such envelopment. Lest the woman in ‘straight sex’ infringe the man’s right, he must consent to the envelopment. One attractive feature of this picture is that it shows that the Conceptual Premise is compatible with the Commonsense View. The Commonsense View tells us that in ‘straight sex’, the man must consent or have his rights infringed. The Conceptual Premise tells us that he need consent only if another person does something to him. This picture identifies the act done to him—namely, the woman’s enveloping his penis with her vagina.

To summarise, the Metaphysical Argument does not support the Joint Action Premise. This is because the Metaphysical Premise is false. We sometimes do things together by doing things to each other, as when we Tango together or have sex together. It is only for this kind of joint action—where we do something together by doing things to each other—that consent is necessary. For these joint actions, each person must consent not to the joint action but to the actions of their partner that partly constitute the joint action.

¹⁴⁹ The notion of ‘enveloping’ is from Andrea Dworkin, *Intercourse* (Secker & Warburg 1987) 81.

4. The Moral Argument

Even if I am correct that the Metaphysical Argument is unsound, there is a second plausible argument for the Joint Action Premise. This second argument focuses not on the metaphysics of sexual joint action, but instead on its moral significance. Accordingly, I will call it the Moral Argument. The Moral Argument starts from the insight that consent is not the only mechanism by which it is possible for someone to divest themselves of a right. If someone divests themselves of a right using another mechanism, then that person's consent is unnecessary. According to the Moral Argument, engaging in joint action is itself such a mechanism. In this section, I first reconstruct the Moral Argument, and then go on to reject it. In the course of rejecting the Moral Argument, I rely on a substantive account of consent. To settle on the correct account of what consent is, I first outline two existing accounts of what consent is. I argue that each of these existing accounts faces problems. I develop a new account of consent that retains the benefits of each of the existing accounts while avoiding their problems. I then use my own substantive account of consent to challenge the Moral Argument.

a. Reconstructing the Moral Argument

The first premise of the Moral Argument is another conceptual premise about consent. Recall that the Conceptual Premise in the Metaphysical Argument claims that consent is necessary *only if* one person does something to another. But it does not follow that consent is necessary *if* one person does something to another. Indeed, it is not always

true that consent is necessary if one person does something to another—something against which that person initially has a negative claim right. This is because consent is not the only mechanism by which it is possible for someone to divest themselves of a right. Another such mechanism is *forfeiture*. The idea that it is possible for someone to forfeit their claim rights is familiar from debates about liability to defensive harm. Those debates take as their starting point that each of us has negative claim rights over our person, and that these rights include claim rights against others harming us. However, if you culpably threaten to kill an innocent person, you thereby forfeit your negative claim rights against them harming you in self-defence.¹⁵⁰ The moral upshot of your forfeiture is this: if that person harms you in self-defence, they do not thereby infringe your rights, even if you do not consent. The lesson is quite general: If an individual forfeits their rights, then that individual's consent is unnecessary.

I assume that it is not possible to forfeit one's negative sexual claim rights merely by engaging in ideal sex. For a person to forfeit their rights, that person must, at a minimum, engage in wrongdoing. But it is wholly implausible that an individual engaging in ideal sex is *as such* engaging in wrongdoing.¹⁵¹ Nevertheless, the discussion

¹⁵⁰ There are plausibly other requirements, such as that the self-defence is proportionate. Debates about the precise conditions under which you forfeit your rights is the subject of extensive debate in the literature on liability to defensive harm.

¹⁵¹ Christopher Heath Wellman suggests that it might be possible for someone to forfeit their sexual rights in certain extreme cases. Even if Wellman's suggestion plausible, it does not help the No Consenter, for (as I say in the main text) it is wholly implausible that it is possible to forfeit one's sexual rights by engaging in ideal sex. See Christopher Heath Wellman, 'The Rights Forfeiture Theory of Punishment' (2012) 122 *Ethics* 371, 385.

of forfeiture illustrates the more general point that consent is not the only mechanism by which it is possible for someone to divest themselves of a claim right. If someone divests themselves of a claim right using another mechanism, then that person's consent is unnecessary. We can call this insight the Second Conceptual Premise about consent:

- (1) *Second Conceptual Premise.* If a person divests themselves of their relevant rights using some mechanism other than consent, then that person's consent is unnecessary.¹⁵²

The next premise of the Moral Argument is that doing things together—or as we might say, engaging in joint action—is just such a mechanism. The idea is that engaging in joint action is itself morally significant: in engaging in the joint action, each individual waives the relevant rights, making their consent unnecessary. Gardner illustrates this idea using an example of musicians playing jazz together. If two musicians play jazz together, then each musician's consent is unnecessary. The best explanation for why consent is unnecessary, on this view, is *because* the musicians engage in joint action—they do something *together*. In playing jazz together, each musician waives the relevant claim rights. On this view, having sex together is morally significant in just the same way as playing jazz together. If two people engage in sexual joint action—if two people

¹⁵² There is an important question of precisely which rights a person divests. I claim only that, if X divests themselves of a claim right against Y's ϕ -ing, then X's consent is unnecessary: it is possible for Y to ϕ without X's consent, without thereby infringing X's claim right.

have sex *together*—each of them thereby waives the relevant rights against the other, rendering each person’s consent unnecessary.¹⁵³

Like Gardner’s other examples of non-sexual joint action, playing jazz together is unlike sexual joint action because it not something two people do together by doing things to each other.¹⁵⁴ But we can replace Gardner’s example with one in which two people do something together by doing things to each other. As we saw in our discussion of the Metaphysical Argument, *Tango* is just such an example. In *Tango*, Amelia and Bert each initially possess negative claim rights against what the other does to them. If Gardner were to use this example instead, he could suggest that in Tangoing together, Amelia and Bert each divest themselves of their negative claim rights against what the other person does to them. To illustrate this Gardnerian view, it is useful to imagine the justifications that Amelia might offer to Bert if he were to complain that she had infringed his rights. Intuitively, when they Tango together, Amelia does not infringe Bert’s rights. But imagine that, after they have finished Tangoing together, Bert complains that Amelia *did* infringe his claim right against her placing her hands

¹⁵³ For Gardner’s analogy between sex and jazz, see Gardner, ‘The Opposite of Rape’ (n 15) 55–56. Thomas Macaulay Millar also makes the analogy between sex and jazz. See Thomas Macaulay Millar, ‘Toward a Performance Model of Sex’ in Jaclyn Friedman and Jessica Valenti (eds), *Yes Means Yes: Visions of Female Sexual Power and a World Without Rape* (Seal Press 2008). Just as it is possible for someone to be coerced into consenting, it is also possible for them to be coerced into performing a joint action: see Michael Bratman, ‘Shared Intention and Mutual Obligation’, *Faces of Intention: Selected Essays on Intention and Agency* (Cambridge University Press 1999) 132–133; Millar 40. I assume throughout that to successfully waive rights, joint action, like consent, must be morally valid (see n 128, above).

¹⁵⁴ See n 147 and accompanying text, above.

on his shoulders. What might Amelia say in response? She might say, ‘I didn’t infringe your right! You *consented* to me doing that to you!’ Here the explanation for why Amelia did not infringe Bert’s right is that he divested himself of that right *by consenting*.

But if the Gardnerian view is correct, Amelia might instead offer a second response. She might say, ‘I didn’t infringe your right! We were Tangoing *together*!’ Here the explanation for why Amelia did not infringe Bert’s right is because he divested himself of that right not by consenting, but rather in doing something together with Amelia—in engaging in the joint action of Tangoing with her. We can state this in general terms as the *Joint Action Explanation*:

(2) *Joint Action Explanation*. If two people do something together, then each person thereby divests themselves of their relevant rights.¹⁵⁵

The Joint Action Explanation provides an alternative interpretation of MacKinnon’s claim that if sex is ideal, then ‘consent is not needed and does not occur because there is no transgression to be redeemed’. On this interpretation, although each partner does things to the other, what each partner does to the other does not constitute a transgression—that is, a rights infringement—because each partner divests themselves of the relevant negative claim rights merely in engaging in joint action as such.

¹⁵⁵ To be plausible, the Joint Action Explanation must claim only that each person divests the *relevant* rights against the other. For example, if two people Tango together, each of them divests themselves of their rights against their partner touching them in ways that partly constitute their Tangoing together, but each of them retains their rights against the other stealing their property. The same is true of consent. If I consent to your giving me a haircut, I waive my rights against your cutting my hair, but I retain my rights against your stealing my property.

We are now in a position to summarise the Moral Argument.

Moral Argument

- (1) *Second Conceptual Premise.* If a person divests themselves of their relevant rights by some mechanism other than consent, then consent is unnecessary.
- (2) *Joint Action Explanation.* If two people do something together, then each person thereby divests themselves of their relevant rights.
- (4) *Conclusion.* Therefore, if two people do something together, then consent is unnecessary. [Joint Action Premise of Main Argument.]

I suggest that we should accept the Second Conceptual Premise. It is true that if an individual divests their rights using some mechanism other than consent, then consent is unnecessary. But we should reject the Joint Action Premise. It will be no surprise, then, that I plan to challenge the Joint Action Explanation.

b. Rejecting the Moral Argument: What is Consent?

The Joint Action Explanation is one possible explanation for why, in cases like *Tango*, neither person infringes the other's rights. But there is a natural alternative explanation, namely, that each person in these cases *consents*. To adjudicate between these rival explanations, we need an account of what consent *is*. In what follows, I first consider two existing accounts of what consent is, one favoured by MacKinnon and

another by Gardner.¹⁵⁶ I argue that each of these accounts of consent faces problems. I outline a new account of consent which combines the insights of each of the existing accounts while overcoming their shortcomings. I then go on to use this account of consent to argue against the No Consenter's Moral Argument.

Before discussing each account of consent, it is worth making one clarification. There is considerable controversy over whether an act of consent requires communication. On one view, consent requires *successful* communication.¹⁵⁷ On a second view, consent requires only *attempted* communication.¹⁵⁸ On a third view, it is possible for someone to perform an act of consent purely mentally, without even attempting to communicate.¹⁵⁹ In formulating each of the accounts of consent that follow, I assume for ease of exposition that the third view is correct—that it is possible for someone to perform an act of consent purely mentally. However, nothing hinges on this assumption, and I suggest alternative formulations in the footnotes for those who hold the other views.

¹⁵⁶ I will say little about Palmer in this section because she does not endorse any particular view of what consent is. While Palmer recognises that consent is an 'ambiguous concept', she goes on to say, 'I do not, however, propose to develop a clearer definition of consent.' Palmer (n 15) 5.

¹⁵⁷ Dougherty, 'Yes Means Yes' (n 25).

¹⁵⁸ Tadros, *Wrongs and Crimes* (n 21); Manson, 'Permissive Consent' (n 21).

¹⁵⁹ Hurd (n 22); Alexander, 'The Moral Magic of Consent (II)' (n 85); Alexander, 'The Ontology of Consent' (n 85); Larry Alexander, Heidi Hurd and Peter Westen, 'Consent Does Not Require Communication: A Reply to Dougherty' (2016) 35 Law and Philosophy 655; Kimberly Kessler Ferzan, 'Consent, Culpability, and the Law of Rape' 13 Ohio State Journal of Criminal Law 397.

c. *The Choice Account of Consent*

Perhaps the most initially plausible account of what consent is the Choice Account:

Choice Account: For X to consent to Y's action is for X to choose Y's action.¹⁶⁰

Several authors defend versions of the Choice Account. For example, according to Peter Westen, a person consents if they 'choose for themselves... what other persons do to them.'¹⁶¹ MacKinnon explicitly endorses Westen's version of the Choice Account.¹⁶² Similarly, according to Heidi Hurd, for one person to consent to another

¹⁶⁰ The successful communication analogue of the Choice Account is the *Successfully Communicated Choice Account*.

Successfully Communicated Choice Account: For X to consent to Y's action is for X to both choose Y's action and to successfully communicate that choice to Y.

There are also intermediate possibilities, such as the *Attempted Communication Choice Account*.

Attempted Communication Choice Account: For X to consent to Y's action is for X to both choose Y's action and to attempt to communicate that choice to Y.

¹⁶¹ Westen (n 22) 3. Westen's is an account of consent in the criminal law. Westen also claims that desire or acquiescence are also individually sufficient for consent. But desire and acquiescence are poor candidates for consent. For why acquiescence is a poor candidate, see Alexander, 'The Ontology of Consent' (n 85) 107. Desire is a poor candidate because it is possible both to desire that another person perform an action without consenting, and to consent to them performing an action without desiring it.

¹⁶² MacKinnon (n 1) 440–41, citing Westen (n 22) 3.

person's actions involves the first person 'intending the actions' of the second.¹⁶³ Intentions and choices are intimately connected. To form an intention ordinarily involves making a choice. For example, X's forming the intention to buy eggs tomorrow involves X's now choosing to buy eggs tomorrow. For our purposes, we can treat X's choosing Y's action as interchangeable with X's intending that Y perform that action. For Westen and Hurd, the object of the X's propositional attitude—whether choice or intention—is Y's *action*. Finally, the Sexual Offences Act 2003 can also be read as endorsing a version of the Choice Account. Under the Sexual Offences

¹⁶³ Hurd (n 22) 131. There has been much debate about whether it is possible for one person to intend the actions of another. On one hand, Luca Ferrero argues that one person can intend both the actions of another, and states of affairs more generally. On the other hand, Larry Alexander and Neil Manson deny that one person can intend the actions of another. But Manson's own view of consent seems, at least *prima facie*, to require one person to intend the actions of another. On Manson's view, a necessary condition for R's consent is that 'R intends S to recognise [R's intention]'. This seems to be an example of R intending S's action. Luca Ferrero, 'Can I Only Intend My Own Actions?' in David Shoemaker (ed), *Oxford Studies in Agency and Responsibility*, vol 1 (Oxford University Press 2013); Alexander, 'The Moral Magic of Consent (II)' (n 85) 166; Alexander, 'The Ontology of Consent' (n 85) 107; Manson, 'Permissive Consent' (n 21) 3320–3321; *ibid* 3329.

Act, a person consents if he ‘agrees by choice’, where this seems to mean nothing more than ‘chooses’.¹⁶⁴ In each case, the object of the X’s choice is Y’s action.¹⁶⁵

If the Choice Account is correct, then there is no reason to believe that the Moral Argument is sound. This is because, if the Choice Account is correct, then there is no reason to believe the Joint Action Explanation. Instead, the best explanation for why individuals do not infringe each other’s rights in cases like *Tango* is that each of them *consents* to what the other does to them. The easiest way to see this is to consider some general constraints on joint action. First, if X and Y perform a joint action, then each of them intends that they perform the joint action. For example, if Bert and Amelia Tango together, then Bert intends that he and Amelia Tango together.¹⁶⁶ Second, if X intends to perform some joint action with Y, and X knows that their performing that joint action involves Y performing some individual action, then X intends that Y perform that individual action. For example, if Bert intends that he and Amelia Tango together, and Bert knows that their Tangoing together involves Amelia placing her

¹⁶⁴ Sexual Offences Act, s 74. This section also requires that they have the ‘freedom and capacity’ to make that choice. I take these to be conditions not on whether someone consents but on whether that person’s consent is *valid*. For discussion, see Ferzan and Westen (n 20). For further criticisms of the framing of section 74, see Jennifer Temkin and Andrew Ashworth, ‘The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent’ [2004] *Criminal Law Review* 328; Tadros, ‘Rape Without Consent’ (n 111).

¹⁶⁵ As David Owens puts it, each of these choices ‘has a non-normative object’. Owens, *Shaping the Normative Landscape* (n 95) 168.

¹⁶⁶ See Michael Bratman, ‘I Intend That We J’, *Faces of Intention: Selected Essays on Intention and Agency* (Cambridge University Press 1999).

hands on Bert's shoulders, then Bert intends that Amelia place her hands on his shoulders. If the Choice Account is correct, then this constitutes Bert's consenting to Amelia's placing her hands on his shoulders.

Similar reasoning applies in Gardner's 'straight sex' scenario. First, if the man and the woman have penetrative sex together, then the woman intends that they have penetrative sex together. Second, if the woman intends that they have penetrative sex together, then she intends that the man penetrate her vagina with his penis.¹⁶⁷ If the Choice Account is correct, then this constitutes her consenting to his penetrating her vagina with his penis.

On the Choice Account, then, the Joint Action Explanation is redundant, and there is no reason to believe it. Accordingly, there is no reason to believe that the Moral Argument is sound.

But the Choice Account is incorrect. Though perhaps initially plausible, it faces two important objections, either one of which is sufficient to show that the Choice Account is incorrect. The first is that intending another person's action is *insufficient* for consent. The second is that it is *unnecessary*. Consider first the objection that intending another person's actions is *insufficient* for consent. This is familiar from cases of entrapment, in which X intends that Y performs the action *and thereby wrong X*. As an example of a case of entrapment, Govert den Hartogh discusses the legal case of *Bink*:

¹⁶⁷ Assuming that 'penetrative sex' here means sex that involves the man penetrating the woman's vagina with his penis, and the woman knows this.

Bink.¹⁶⁸ A prisoner collaborated with the police to entrap a fellow inmate, Bink, into a conviction for assault. The prisoner ‘actually intended Bink to attack him; he had only failed to express his intention, at least to Bink, for the obvious reason that this would have been the surest way to frustrate it.’ Bink attacked the prisoner.

In *Bink*, the prisoner intended that Bink attack him without thereby consenting to Bink’s attacking him. If that is correct, then intending another’s action is insufficient for consent.

Now consider the second objection to the Choice Account: that X’s intending Y’s action is *unnecessary* for X to consent to Y’s action. Victor Tadros offers the following case as one in which someone consents to another person doing something without intending that they do it:

Borrow.¹⁶⁹ Jess wants to skip class and go to a party, and asks to borrow Betty’s car. If Betty does not consent, Jess will go to class. Betty thinks it Jess’s decision whether to skip class, but wants Jess to go to class. Betty says to Jess: ‘take my car if you want to, but I really want you to go to class.’

¹⁶⁸ See Govert Den Hartogh, ‘Can Consent Be Presumed?’ (2011) 28 *Journal of Applied Philosophy* 295, 301. This case is based on *New York v Bink* 444 N.Y.S.2d 237 (1981). See also den Hartogh’s example of intending that someone take your car so that you can claim the insurance money. *ibid.* For another example of entrapment, see *The High Ground* in Tadros, *Wrongs and Crimes* (n 21) 210.

¹⁶⁹ Tadros, *Wrongs and Crimes* (n 21) 209.

In *Borrow*, Betty consents to Jess taking her car. She thereby waives her right against Jess taking her car, and releases Jess from the correlative duty. But Jess does this without intending that Jess take the car. Reflecting on *Borrow*, it is clear it is possible for one person to consent to another person's action without intending that action.¹⁷⁰

Since intending another person's actions is neither sufficient nor necessary for consent, the Choice Account is incorrect. Accordingly, we must look elsewhere for an account of consent.

d. The Normative Power Account of Consent

There is an alternative account of consent that avoids the two problems with the Choice Account. The alternative account is the Normative Power Account.

Normative Power Account: For X to consent to Y's action is for X to choose that Y's action not infringe X's rights.¹⁷¹

¹⁷⁰ See also David Owens, who says that 'consenting to ϕ -ing... involves... no intention that ϕ -ing occur'. Owens, *Shaping the Normative Landscape* (n 95) 173.

¹⁷¹ The successful communication analogue of the Normative Power Account is the *Successfully Communicated Normative Power Account*.

Successfully Communicated Normative Power Account: For X to consent to Y's action is for X both to choose that Y's action not infringe X's rights and to successfully communicate that choice to Y.

There are also intermediate possibilities, such as the *Attempted Communication Normative Power Account*.

Attempted Communication Normative Power Account: For X to consent to Y's action is for X both to choose that Y's action not infringe X's rights and to attempt to communicate that choice to Y.

The Normative Power Account also comes in several variations. For example, according to Victor Tadros, for X to consent to Y's action involves X 'intend[ing] directly to release' Y from a duty that Y owes to X not to perform that action.¹⁷² For Larry Alexander, the object of the intention is not the duty but the correlative claim right.¹⁷³ For David Owens, for X to consent to Y's action is involves X intending to thereby make it the case that Y's action does not wrong X. The object of X's intention the normative status of Y's action.¹⁷⁴ The general feature of the Normative Power Account is that the object of X's intention is not Y's action itself, but rather the normative status of Y's action: whether Y's action infringes X's claim right, or breaches a duty that Y owes to X, or wrongs X.

The Normative Power Account avoids the Choice Account's problems with cases like *Borrow* and *Bink*. If the Normative Power Account is correct, then in *Borrow* it is possible for Betty to consent to Jess's taking her car without Betty intending that Jess take her car. The object of Betty's intention is not Jess's taking the car, but rather the normative status of Jess's taking the car. Conversely, in *Bink*, it is possible for the prisoner to intend that Bink attack him without consenting to Bink's attacking him, because the prisoner intends that Bink's attack wrong him.

¹⁷² Tadros, *Wrongs and Crimes* (n 21) 211. For Tadros, X must also attempt to communicate that intention.

¹⁷³ See Alexander, 'The Ontology of Consent' (n 85) 107.

¹⁷⁴ For Owens, X must also intentionally communicate that intention. See Owens, *Shaping the Normative Landscape* (n 95) 165.

If the Normative Power Account is correct, then the No Consenter is correct: it is possible for X and Y to have sex together, without Y infringing X's sexual rights, even if X does not choose the normative status of Y's action. To see this, we can start by considering *Patriarchal Marriage*.

Patriarchal Marriage. Enid and Frank are married in the 1950s. Like most people in their society, Enid and Frank falsely believe that a husband has a liberty right to have sex with his wife, and, equivalently, a wife has no claim right against her husband having sex with her. Consequently, Enid and Frank believe that Frank has a liberty right to have sex with Enid and, equivalently, that Enid has no claim right against Frank having sex with her.

Perhaps it is plausible that much of the sex in marriages like the one in *Patriarchal Marriage* involved husbands infringing the sexual rights of their wives and thereby committing serious sexual wrongs. But it is implausible that *all* sex within such marriages involved husbands seriously wronging their wives in this way. To see this, consider a variation of *Patriarchal Marriage* with the details filled out as follows:

Better Marriage. As in *Patriarchal Marriage*, but Frank has sex with Enid only when she initiates it, and he is guided entirely by her wishes. He would not dream of having sex with Enid against her will.¹⁷⁵

¹⁷⁵ Tom Dougherty has independently conceived the same example in his *The Scope of Consent* (unpublished manuscript).

Intuitively, in *Better Marriage*, it is implausible that Frank violates Enid's right against him having sex with her. There are at least two considerations that support this intuitive judgment. First, we can ask whether a third party would be morally required to use force to prevent Frank from having sex with Enid.¹⁷⁶ Surely not. Generally, though, if one person violates another's sexual rights in this way, then a third party is required to use necessary and proportionate force to stop him from having sex with her.¹⁷⁷ Second, even if the sex involved Frank penetrating Enid's vagina with his penis, courts faced with *Better Marriage* would not hold that Frank commits the *actus reus* of rape.¹⁷⁸ This is because it is implausible that Frank has infringed Enid's right against his having sex with her.

In *Better Marriage*, then, it is implausible that Frank infringes Enid's sexual rights. However, as Victor Tadros persuasively argues, on the Normative Power Account, it is impossible for individuals like Enid to consent. Tadros explains that this is because these individuals cannot form the relevant intentions to consent. Accordingly, we can

¹⁷⁶ Considering what is morally required of a third party is a standard methodology for considering whether something amounts to a fact-relative wrongdoing. For that strategy applied to the question of whether someone consented, see Alexander, 'The Ontology of Consent' (n 85) 105; Kimberly Kessler Ferzan, 'The Bluff: The Power of Insincere Actions' (2017) 23 *Legal Theory* 168. More generally, claim rights are the grounds of duties of assistance on the part of third parties. See Helen Frowe, 'Claim Rights, Duties, and Lesser-Evil Justifications' (2015) 89 *Aristotelian Society Supplementary Volume* 267.

¹⁷⁷ For the intervention to be required, perhaps there is an additional requirement that the intervention is not excessively burdensome for the third party. But even if it were burdensome, the intervention would remain permissible.

¹⁷⁸ See Sexual Offences Act 2003, s1(1).

call Tadros's argument the Intentions Argument.¹⁷⁹ The Intentions Argument proceeds as follows. On the Normative Power Account, for Enid to consent requires her to *intend* to waive the right. But Enid cannot form the intention to waive the relevant right. This is because she believes that she does not initially possess a claim right against Frank having sex with her, so she believes it is impossible for her to waive that right. Enid cannot form the intention to do something that she believes is impossible.¹⁸⁰

The Intentions Argument is sound. If the Normative Power Account is correct, then Enid cannot consent. Nevertheless, Frank does not infringe Enid's rights. From this it follows that Gardner correctly diagnoses the following feature of the Normative Power Account: If the Normative Power Account is correct, then consent is unnecessary. But if consent is not the mechanism by which Enid divests herself of the relevant right in *Better Marriage*, then what *is*? The Gardnerian view suggests the Joint Action Explanation: it is not Enid's consent, but instead her engaging in the joint action of having sex with Frank that functions to waive her claim right. Just as Amelia and Bert's Tangoing together waives the relevant rights that each of them possesses against the other, so too in *Better Marriage*.

While perhaps initially plausible, the Joint Action Explanation is unlikely to provide the most fundamental or most general explanation for why individuals in cases

¹⁷⁹ See Tadros, *Wrongs and Crimes* (n 21) 211. See also Westen (n 22) 31–32.

¹⁸⁰ Although I have formulated the Intentions Argument in terms of Enid's inability to form the intention to waive a right, parallel formulations are available for the other variations of the Normative Power Account. For example, if Enid believes that Frank does not owe her the relevant duty, then Enid cannot form the intention to release him from that duty.

like *Better Marriage* do not infringe each other's rights. To see why, consider a case in which the relevant action is not a joint action but simply something that one person does individually, such as *Massage*:

Massage. Enid asks Frank to give her a massage, which he does. Both Enid and Frank believe that Enid does not have a claim right against Frank touching Enid.

The massage is something that Frank does *to* Enid—something in respect of which he is active and she is passive, and something that involves her negative claim rights over her person. Intuitively, Frank does not infringe Enid's rights over her person in giving her a massage. But is not plausibly described as a joint action. As a result, it cannot be explained using the Joint Action Explanation. This is true even though, as we saw in our discussion of the Intentions Argument, Enid cannot form the relevant intention to consent.

On the Normative Power Account, if a person believes that they lack a certain claim right, then it is impossible for that person to waive that claim right by consenting. But this leads to counterintuitive results in cases like *Better Marriage*. The No Consenter's explanation in these cases is the Joint Action Explanation—it is joint action rather than consent that is divesting the person of the relevant claim rights in each case. But this does not seem to be the correct explanation, because it is unable to explain cases such as *Massage*, in which there is no joint action but in which, intuitively, there is no rights infringement. It seems that whatever explains why there is no rights infringement in those cases is also likely to explain why there is no rights infringement in cases like *Better Marriage*. If that is so, then the Joint Action Explanation is redundant, and there is no

reason to believe it. If that is correct, then the Moral Argument provides gives us no reason to believe the Main Argument's Joint Action Premise.

e. The Hybrid Account of Consent

We have seen that both the Choice Account and the Normative Power Account of consent face problems. A natural way to avoid the problems with each account while retaining its strengths is to suggest a Hybrid Account of Consent, which combines Choice Account and the Normative Power Account to provide two individually sufficient conditions for consent. In this subsection, I defend the Hybrid Account of Consent:

Hybrid Account of Consent: X consents to Y's action if and only if either:

- (1) X intends that Y's action not wrong X; or
- (2) Both:
 - (a) X has no intentions regarding whether Y's action wrongs X;
 - and
 - (b) X chooses Y's action.

The Hybrid Account is a disjunction of two conditions. Condition (1) states the Normative Power Account. As such, all cases of consent according to the Normative Power Account are also cases of consent under the Hybrid Account. But Condition (2) avoids the counterintuitive consequences of the Normative Power Account in cases like *Better Marriage*. The intuitive result in these cases is that there is consent. The Hybrid Account delivers this result. This is because Condition (2)(b) of the Hybrid Account states the Choice Account. In cases like *Better Marriage*, X intends that Y perform the action in question. Now, we saw above that this feature of the Choice Account commits

it to counterintuitive results in entrapment cases such as *Bink*. On the Choice Account, the prisoner in *Bink* consented to Bink's attacking him. But this is not the intuitive result. Intuitively, while the prisoner in *Bink* intended that Bink attack him, he did not thereby consent to Bink's attacking him. This is because, in addition intending that Bink attack him, the prisoner intended that Bink's attack wrong him. This is an intention regarding the normative status of Bink's action. While the normative intentions in entrapment cases are a problem for the Choice Account, they are not a problem for the Hybrid Account. This is because condition (2)(a) of the Hybrid Account delivers the intuitively correct result that they are not cases of consent.¹⁸¹

If the Hybrid Account of Consent is correct, then the No Consenter has no support for the Joint Action Explanation. The support for the Joint Action Explanation came from thinking of *Better Marriage* as a case in which there was no consent but in which Enid nevertheless waived her rights. But on the Hybrid Account, *Better Marriage* is a case of consent, so it does not support the Joint Action Explanation. Accordingly, there is no reason to believe that the Moral Argument is sound.

¹⁸¹ There might be some circumstances in which both conditions (2)(a) and (2)(b) are met, but where intuitively X does not waive their right against Y's action. The question here is not whether X consents to Y's action—X *does* consent Y's action—but rather whether X's consent is *morally valid*. This will in turn depend on whether it is valuable for X to have the power to waive the right in such circumstances. For a sketch of considerations that bear on whether it might be valuable for X to have that power, see Owens, *Shaping the Normative Landscape* (n 95) 166–168.

This argument against the Joint Action Explanation depends on the adequacy of the Hybrid Account. Can the No Consenter reject the Hybrid Account? Here is one way they might try. Suppose X and Y engage in some joint action. In that case, X intends that Y perform some individual actions that partly constitute the joint action. On the Hybrid Account, if X intends that Y wrong X by performing these individual actions, then Y's individual actions do actually infringe X's rights. For example, if Bert and Amelia Tango together, then Bert intends that Amelia place her hands on his shoulders. If Bert also intends that Amelia's placing her hands on his shoulders wrong him, then on the Hybrid Account, she does in fact infringe his right against her doing so. If this is incorrect, then there must be something wrong with the Hybrid Account. Though this might seem implausible, I suggest it is correct. This is easiest to see in cases in which we imagine Bert telling Amelia explicitly, 'I intend both that you touch me in ways that partly constitute our Tangoing together, and that you wrong me by doing so.'¹⁸² If at this stage, Amelia Tangoes with Bert, she thereby infringes his rights.

The same is true in the sexual case. It is possible for the woman in Gardner's 'straight sex' scenario to both intend that the man penetrate her vagina with his penis, and also intend that he wrongs her by doing so. On the Hybrid Account, the woman in this scenario does not consent to the man's penetrating her vagina. It follows that if he nevertheless penetrates her vagina, he thereby infringes her rights. Again, this is easiest to see in cases in which we imagine her telling him explicitly, 'I intend both that

¹⁸² This is different from the case in which Amelia culpably deceives Bert into believing that she has consented. Amelia's culpable deception is plausibly sufficient for her to *forfeit* the relevant rights. See Ferzan, 'THE BLUFF' (n 176).

you penetrate my vagina with your penis, and that you wrong me by doing so.’ If at this stage, he penetrates her vagina, he thereby infringes her rights.¹⁸³

When a person has rights against another person performing an action, the Hybrid Account prioritizes the rightholder’s normative intentions regarding that action—their intentions about whether that action wrongs them. This is a plausible feature, because a central function of the power of consent is to give rightholders direct control over the normative landscape—control over whether other people’s actions wrong them. But where the rightholder has no normative intentions regarding the action, the Hybrid Account does not simply assume that they cannot, by means of their choices, waive the relevant rights. Instead, the Hybrid Account asks whether the rightholder chooses the action. This is a secondary way in which the rightholder’s choices can affect whether the action infringes their rights.

5. Conclusions

In this essay, I have argued against the No Consent Thesis, which states that if sex is ideal, then consent is unnecessary. I have claimed that the Main Argument for the No Consent Thesis rests on the Joint Action Premise, which states that if two people do something together, then consent is unnecessary. I have suggested that it is possible to

¹⁸³ Owens is therefore correct when he claims that ‘sex that has been chosen [can] constitute rape.’ Owens, *Shaping the Normative Landscape* (n 95) 181. See further, text accompanying n 184, below. Even if Owens is wrong about this, cases like these are little help for the No Consenter, as they do not exhibit the kind of mutuality that makes it ‘ideal’ in the sense that the Main Argument requires.

distinguish two arguments in support of the Joint Action Premise. The first is an argument from the *metaphysics* of sexual joint action, whereas the second is an argument from its *moral* significance. I have argued that both the Metaphysical Argument and the Moral Argument are unsound. Accordingly, I have argued, neither supports the Joint Action Premise. Consequently, the Main Argument gives us no reason to believe the No Consent Thesis. On the contrary, we should accept the Commonsense View: If you have sex with someone without their consent, you thereby infringe that person's rights.

The case against the Moral Argument and the Metaphysical Argument yields several valuable lessons. Consider first the case against the Moral Argument. In making this case, we have learnt that two influential accounts of what consent is—the Choice Account and the Normative Power Account—both face problems. One important lesson is that sexual offences law could not adopt either of these accounts without importing its problems into the law.

As we saw from our discussion of *Bink* and *Borrow*, the Choice Account faces two problems: intending that an action occur is neither sufficient nor necessary for consenting to that action. *Bink* and *Borrow* concerned non-sexual actions, but the same is true for sexual actions. X's intending that Y sexually penetrate X is insufficient for X to consent to Y's sexually penetrating X. Owens acknowledges this explicitly. Thinking of rape as non-consensual sex, Owens says, 'sex that has been chosen [can] constitute rape... Someone chooses to be raped where they intend that the rapist have

sex with them after they have explicitly refused their consent.¹⁸⁴ Owens is explicit, then, that it is possible for X to intend that Y sexually penetrate X without consenting to Y's penetrating X. Conversely, it is possible for someone to consent to penetration without intending that it occur. To see this, consider *Job Interview*:

Job Interview. Ursula really wants Tariq to penetrate her vagina with his penis. If Ursula does not consent to his penetrating her, then Tariq will prepare for his upcoming interview. While Ursula thinks it would be better for Tariq if he were to prepare for his interview, she thinks that whether he chooses to do this instead of penetrating her is ultimately his responsibility. She tells him, 'I permit you to sexually penetrate me' despite intending that he prepare for the job interview instead.

Intuitively, Ursula consents to Tariq's penetrating her vagina with his penis, even if she intends that he instead chooses to prepare for his job interview. If that is correct, then it is possible for someone to consent to their partner penetrating them without intending that their partner penetrate them.

If the law were to adopt the Choice Account of consent, then it could not acknowledge that it is possible both for a person to consent to penetration without intending that penetration occur (as in *Job Interview*) and to intend that a person penetrate them without consenting to their doing so (as in Owens' discussion).

If on the other hand the law were to adopt a Normative Power Account of consent, then in *Better Marriage* Frank would commit the *actus reus* of rape. Since no

¹⁸⁴ *ibid.*

court faced with *Better Marriage* would hold that Frank commits the *actus reus* of rape, the law could not adopt a Normative Power Account of Consent.

A second lesson from our discussion of the Moral Argument is that the Hybrid Account of Consent avoids the problem faced by the Choice Account and the Normative Power Account. Accordingly, the law could avoid importing the problems of the Choice Account and the Normative Power Account by instead adopting the Hybrid Account.

Now consider the case against the Metaphysical Argument. In making that case we have seen the importance of being clear about precisely what a person consents to. We have learnt that when two people have sex together, each of them consents not to the whole of the sexual joint action but instead to those individual actions of their partner that partly constitute it, such as penetration and envelopment. Thinking about things this way has four attractive features.

First, it diffuses an important part of the No Consenter's critique of conceptualising rape law and sexual morality in terms of consent.¹⁸⁵ That critique proceeds as follows. Consent, as we saw above, presupposes that the consent-giver is passive in respect of the action to which they consent. If rape is non-consensual sex, then, a woman who consents to sex is passive in respect of the sex—sex is something that another person, typically a man, does *to* her. Conceptualising rape law and sexual

¹⁸⁵ This critique is present in Gardner, 'The Opposite of Rape' (n 15); Palmer (n 15); MacKinnon (n 113); Natasha McKeever, 'Can a Woman Rape a Man and Why Does It Matter?' (2019) 13 Criminal Law and Philosophy 599; Anderson (n 134); Kukla (n 15).

morality in terms of women's consent to sex with men, so goes the No Consenter's critique, is objectionable because it involves conceptualising women as passive with respect to sex.

Given that we now accept that each sexual partner must consent lest their partner infringe their rights, the No Consenter's critique faces a puzzle.¹⁸⁶ If both the man and the woman consent to the sex, then both of them must be passive in respect of the sex. In respect of the sex, it is not possible for either to be the active partner, the 'doer'. The puzzle for the No Consenter is this: If both the man and the woman consent to the sex, and consent presupposes the passivity of the consenter, then who is active in respect of the sex?¹⁸⁷

Being clear about what each person consents to solves the No Consenter's puzzle. A woman having sex with a man does not consent to their having sex together. Instead, she consents to the things he does to her that partly constitute this joint action—most saliently, to his penetrating her vagina with his penis. Penetration *is* something that he does to her. Thinking that a woman is passive with respect to this action does not entail thinking about her as passive with respect to their joint action of having sex together, and so does not entail thinking of women generally as sexually passive.

¹⁸⁶ For example, it is now legally possible for a man to be the victim of rape.

¹⁸⁷ There are parallel puzzles that arise when neither partner is a woman. Similar issues arise with respect to MacKinnon's views on pornography: How can pornography portray women as passive when, as in gay male pornography, it doesn't portray any women at all? For discussion, see Leslie Green, 'Pornographies' (2000) 8 *Journal of Political Philosophy* 27, 32–35.

The second attractive feature of thinking about things this way is that doing so explains why the law formulates the wrong of rape in terms of non-consensual *penetration*.¹⁸⁸ Since penetration is something that another person does to you, it involves your negative claim rights over your person. Third, thinking about things this way highlights a potential risk of defining rape instead—as some theorists have suggested we should—in terms of non-consensual sex.¹⁸⁹ To the extent that sex is a joint action, it is a category error to think that we consent to sex. It is not the joint action of having sex together to which each partner consents. Rather, each individual consents to those actions of their sexual partner that partly constitute their having sex together.

A fourth attractive feature of thinking about things this way makes perspicuous an important case for law reform. While the law criminalises non-consensual penile penetration of the vagina as rape, it does not at present adequately criminalise non-consensual vaginal envelopment of the penis. If the Commonsense View and the Conceptual Premise are both correct, then the man has a relevant claim right against what the woman does to him—namely, envelop his penis with her vagina. If that is

¹⁸⁸ The wrong of rape, which lawyers often call the *actus reus* of rape, is outlined in section 1(1) of the Sexual Offences Act 2003, which provides, in relevant part: ‘(1) A person (A) commits an offence if—
he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis, [and]
B does not consent to the penetration’.

¹⁸⁹ David Archard, ‘The Wrong of Rape’ (2007) 57 *The Philosophical Quarterly* 374.

correct, then the law should plausibly criminalise non-consensual envelopment in a way that recognises it as a moral wrong of comparable seriousness to rape.¹⁹⁰

¹⁹⁰ For suggestions along these lines, see McKeever (n 185); Siobhan Weare, ““Oh You’re a Guy, How Could You Be Raped by a Woman, That Makes No Sense”: Towards a Case for Legally Recognising and Labelling “Forced-to-Penetrate” Cases as Rape’ (2018) 14 *International Journal of Law in Context* 110. I take their arguments to be broadly in the correct vein, though I have my reservations about the details of their arguments and their proposals for law reform.

Essay Four

Children, the Unconscious, and the Dead: Consent and the Will Theory of Rights

Abstract: In the debate between the Will Theory of Rights and its rivals, a key objection to the Will Theory concerns the possibility of its extensional adequacy. I call it the Impossibility Objection. If the Will Theory is correct, so goes the Impossibility Objection, then it is impossible for young children, the unconscious, and the dead to have moral and legal rights. I argue that the Will Theory can avoid the Impossibility Objection. I formulate the Contemporary Will Theory of Rights—a Hartian theory of the function of moral and legal rights. I argue that if it is possible for someone to give valid prior consent to actions that occur while they are unconscious or after they die, then according to the Contemporary Will Theory, it is possible for them to have moral and legal rights. Moreover, I argue that if it is possible for adults to give valid subsequent consent to actions that occurred when they were children, then according to the Contemporary Will Theory, it is possible for them to have moral and legal rights. Since the notion of valid subsequent consent is more contentious than that of prior consent, children provide, in MacCormick’s words, a ‘test-case’ for the Will Theory—though not in the way that MacCormick envisaged.

1. The Will Theory and its Rivals

The Will Theory of Rights is one of the leading theories of the function of moral and legal rights. According to the Will Theory, the function of moral and legal rights is to endow those who have rights with *normative control*—that is, control over the moral and legal duties that others owe them.¹⁹¹ The main alternative to the Will Theory is the Interest Theory of Rights, according to which the function of moral and legal rights is to protect the *interests* of those to have rights—a person’s interest being an aspect of their wellbeing.¹⁹² To be sure, the Will Theory and the Interest Theory are not the only possible theories of the function of rights. Perhaps rights have some third function. Or perhaps they have more than one function.¹⁹³ Each of these possibilities is plausible and deserves further consideration.¹⁹⁴ But it is fair to say that the Will Theory and Interest Theory have dominated discussion of the function of moral and legal rights.

¹⁹¹ Joseph Bowen, ‘Beyond Normative Control: Against the Will Theory of Rights’ (2020) 50 *Canadian Journal of Philosophy* 427.

¹⁹² See Raz (n 5) 166.

¹⁹³ See, e.g., Leif Wenar, ‘The Nature of Rights’ (2005) 33 *Philosophy & Public Affairs* 223; Leif Wenar, ‘The Nature of Claim-Rights’ (2013) 123 *Ethics* 202; Gopal Sreenivasan, ‘A Hybrid Theory of Claim-Rights’ (2005) 25 *Oxford Journal of Legal Studies* 257. There are also further possibilities. For example, perhaps moral rights have one function but legal rights have another.

¹⁹⁴ For doubts, see MH Kramer and H Steiner, ‘Theories of Rights: Is There a Third Way?’ (2005) 27 *Oxford Journal of Legal Studies* 281.

The debate between the Will Theory and the Interest Theory is long running, with powerful objections on against each theory. In this essay, I take up one objection against the Will Theory.

In this essay, I shall defend the Will Theory of Rights against a specific charge of extensional inadequacy which I call the Impossibility Objection. According to the Impossibility Objection, if the Will Theory is correct, then it is impossible for young children, the unconscious, and the dead to have moral and legal rights. I shall argue that the Impossibility Objection does not succeed: the Will Theory can accommodate the possibility of young children, the unconscious, and the dead having moral and legal rights. If I am correct, then this leaves the Will Theory better off than is widely supposed. It leaves the Will Theory better with respect to the Interest Theory than is widely supposed with regard to possibility of each theory's extensional adequacy. And it removes one significant motivation for looking for a different theory altogether of the function or functions of rights—namely, the Will Theory's apparent inability to account for the possibility of young children (hereinafter simply 'children'), unconscious adults, and the dead having moral and legal rights. This is not a knock-down argument in favour of the Will Theory. However, I shall argue in this essay that the Will Theory is better able to respond than is widely supposed to the specific charge of extensional adequacy with regard to the possibility of children, unconscious adults, and the dead having moral and legal rights.

2. Hohfeldian Terminology

The arguments that follow rely on some specialist terminology from Wesley Newcomb Hohfeld's scheme for analysing rights. While Hohfeld limits his discussion to the analysis of legal rights, the Hohfeldian scheme has also been applied very successfully to the analysis of moral rights.¹⁹⁵ For our purposes, we can assume that Hohfeld's analysis applies to moral rights as well as to legal rights. With that assumption in mind, we can turn to Hohfeld's terminology.

Hohfeld distinguishes several *jural relations*—relations that obtain between different Hohfeldian incidents and their correlatives. For our purposes, it is important to distinguish three Hohfeldian incidents: *claims*, *liberties*, and *powers*. To understand these incidents, we need to understand their correlatives. If X has a *claim* against Y's performing some action, then Y owes X a correlative duty not to perform that action. For example, if I have a claim against your entering my apartment, then you owe me a correlative duty not to enter my apartment. Conversely, if X lacks a claim against Y's performing some action, then Y owes X no correlative duty not to perform that action. If Y owes X no duty not to perform an action, then Y has a *liberty* (with respect to X) to perform that action.¹⁹⁶ For example, if I lack a claim against your walking in the park, then you owe me no duty not to do so. Since you owe me no duty not to walk in the park, you have a liberty (with respect to me) to walk in the park. Hohfeld might

¹⁹⁵ Wesley Newcomb Hohfeld (n 126). For a Hohfeldian analysis of moral rights, see Judith Jarvis Thomson (n 82).

¹⁹⁶ While Hohfeld himself uses the term 'privilege' rather than 'liberty' for this incident, I follow the widespread practice among contemporary rights theorists in calling it a liberty.

have put my *lacking* a claim against your walking in the park as my *having* a ‘no-right’ against your walking in the park. Accordingly, the correlative of a liberty is a no-right. However, it is better to express this idea as my having a no-*claim* against your walking in the park, for calling the incident a no-right is apt to prejudice the notion of a right. In any event, I shall treat my having a no-claim against your walking in the park as equivalent to my lacking a claim against your walking in the park.¹⁹⁷

Hohfeld’s scheme also involves various ‘second-order’ incidents—incidents that operate on first order incidents. For our purposes, the most important of these is the *power*. Powers operate on claims. X has a *power* over X’s claim against Y’s performing an action just in case it is possible for X to waive that claim. For example, I have a power over my claim against your entering my apartment just in case it is possible for me to waive that claim. Since claims and duties are correlative, we can also define a power in terms of duties rather than claims. We can say that X has a power over the duty that Y owes X just in case it is possible for X to waive that duty. I have a power over your duty not to enter my apartment just in case it is possible for me to waive that duty. The correlative of a power is a *liability*. If I have a power to waive the duty to enter my apartment, you are—as it were—‘liable’ to me waiving the duty you owe me.

¹⁹⁷ For recent debate regarding Hohfeld’s use of the term ‘no-right’, see Heidi M Hurd and Michael S Moore, ‘The Hohfeldian Analysis of Rights’ (2018) 63 The American Journal of Jurisprudence 295; Matthew H Kramer, ‘On No-Rights and No Rights’ (2019) 64 The American Journal of Jurisprudence 213.

As our discussion of claims, liberties, and powers illustrates, correlatives in Hohfeld's scheme merely—as Walter Wheeler Cook puts it in his introduction to Hohfeld's work, 'describe the situation viewed first from the point of view of one person and then from that of the other. Each concept [claim, liberty, and power] must therefore, as a matter of logic, have a correlative.'¹⁹⁸ Correlative to X's claim against Y's performing an action is the duty that Y owes X not to perform that action. Correlative to Y's liberty with respect to X to perform some action is X's 'no-claim' against Y's performing that action. Correlative to X's power over the duty that Y owes X not to perform some action is Y's liability with respect X regarding that duty.

3. The Will Theory of Rights

We can use this Hohfeldian scheme for analysing rights to help us to formulate a version of the Will Theory of Rights. In this section, I do just that. I outline what I call the Contemporary Will Theory of rights. I take as my starting point HLA Hart's classic statement of the Will Theory as an account of the function of legal rights. The Contemporary Will Theory is the result of modifying Hart's Will Theory in two important respects. The first modification involves using Hohfeldian terminology to clarify the relation between various elements of Hart's Will Theory. The second modification follows from the fact that, unlike Hart's Will Theory, the Contemporary Will Theory aims to provide an account of the function not only of legal rights but also

¹⁹⁸ Walter Wheeler Cook's 'Introduction' to Wesley Newcomb Hohfeld (n 126) 10. As Hohfeld puts it at page 38, 'In other words, if X has a right against Y that he shall stay off the former's land, the correlative (and equivalent) is that Y is under a duty toward X to stay off the place.'

of moral rights. To accommodate this increased generality, the Contemporary Will Theory jettisons those features of Hart's Will Theory which apply only to legal rights. The Contemporary Will Theory is what emerges following these modifications to Hart's Will Theory. As should be clear from what follows, I do not mean to suggest that the Contemporary Will Theory is the only contemporary version of the Will Theory.¹⁹⁹

a. Hart's Will Theory of Legal Rights

Hart's classic statement of the Will Theory of legal rights has proved enormously influential, so it is worth quoting in full:

'The idea is that of one individual being given by the law exclusive control, more or less extensive, over another person's duty so that in the area of conduct covered by that duty the individual who has the right is a small-scale sovereign to whom the duty is owed. The fullest measure of control comprises three distinguishable elements: (i) the right holder may waive or extinguish the duty or leave it in existence; (ii) after breach or threatened breach of a duty he may leave it 'unenforced' or may 'enforce' it by suing for compensation or, in certain cases, for an injunction or mandatory order to restrain the continued or further breach of duty; and

¹⁹⁹ See text accompanying n 204, below.

(iii) he may waive or extinguish the obligation to pay compensation to which the breach gives rise.’²⁰⁰

In this passage, Hart identifies three elements that comprise the ‘fullest measure of control’ that it is possible for X to have over the legal duty that Y owes X. For reasons that will become clear later in the essay, I shall assume that for X to have ‘control’ over a duty that Y owes X is for X to have the power to waive that duty or leave it in force.²⁰¹

Hart’s reference to a ‘small-scale sovereign’ puts us in mind of the adage that an Englishman’s home is his castle. To illustrate what Hart has in mind, then, consider Rex’s legal right against Sarah’s entering his home. This right includes Rex’s legal claim against Sarah’s entering Rex’s home and Sarah’s correlative legal duty not to enter it. Rex’s legal right also includes, on Hart’s view, Rex’s legal power to waive Sarah’s legal duty not to enter. For example, Rex has the legal power to give legally valid consent to Sarah’s entering his home, thereby waiving Sarah’s legal duty not to

²⁰⁰ HLA Hart, ‘Legal Rights’, *Essays on Bentham: Jurisprudence and Political Theory* (Oxford University Press 1982) 183–84. (Footnote omitted.) I focus on Hart’s Will Theory because this is the classic formulation of the Will Theory. However, there are other more recent defences of the Will Theory as an account of both moral and legal rights. See, e.g., Carl Wellman, *Real Rights* (Oxford University Press 1995). Wellman’s discussion of the impossibility of fetuses having moral and legal rights makes clear that his version of the Will Theory (the ‘dominion theory’) is also subject to what I call the Impossibility Objection. See Carl Wellman, ‘The Concept of Fetal Rights’ (2002) 21 *Law and Philosophy* 65.

²⁰¹ For discussion, see Hillel Steiner, ‘Working Rights’ in Matthew Kramer, Nigel Simmonds and Hillel Steiner (eds), *A Debate Over Rights: Philosophical Enquiries* (Clarendon Press 1998) 240.

do so. (This raises an important question about what it takes for Rex's consent to be legally valid. I assume that for Rex's consent to be legally valid requires, at a minimum, that Rex is an adult of sound mind whose consent is not induced by coercion or deception.²⁰²) Rex's legal power corresponds to Hart's first element of control. Speaking generally, we can call this element of control the *Waivability of Legal Duty*:

Waivability of Legal Duty. X has a legal right against Y performing an action only if X has the legal power to waive the legal duty Y owes X not to perform that action.

Continuing with our illustration, we can now ask what happens if Sarah breaches her legal duty by entering Rex's home. If Sarah breaches her legal duty not to enter Rex's home, then Rex has what Hart characterises as the legal power to sue Sarah for damages or an injunction.²⁰³ This is Hart's second element of control. We can call this the *Waivability of Legal Enforcement of Duty*:

²⁰² For a discussion of validity conditions, see, Emma C Bullock, 'Valid Consent' in Andreas Müller and Peter Schaber (eds), *The Routledge Handbook of the Ethics of Consent* (Routledge 2018). See also Emma Cave, 'Valid Consent to Medical Treatment' [2020] *Journal of Medical Ethics* 1.

²⁰³ According to James Penner, Hart is wrong to characterise this element of control as a legal power. What Hart calls the legal power to sue is instead, according to Penner, a legal liberty to sue and a 'paired' legal liberty not to sue. Penner seems correct on this point. However, this does not affect the Contemporary Will Theory because (as we shall see) the Contemporary Will Theory jettisons this

Waivability of Legal Enforcement of Duty. X has a legal right against Y performing an action only if X has the legal power to waive legal enforcement of the legal duty Y owes X not to perform that action.

To complete our illustration, we can assume that Sarah's breach of her legal duty not to enter Rex's home generates an additional legal duty for Sarah to compensate Rex for that breach. However, Rex has the power to waive Sarah's duty to compensate him for the breach. This power is an example of Hart's third element of control. We can call this element the *Waivability of Legal Compensation* for a breach of legal duty:

Waivability of Legal Compensation. X has a legal right against Y's performing an action only if X has the power to waive the legal duty Y owes X to compensate X if Y performs that action.

Having outlined the three elements of control, we can make three observations. First, on Hart's view, if X has all three elements of control over the legal duty Y owes X not to perform some action, this is *sufficient* for X to have a legal right against Y's performing that action. Paradigmatic legal property rights such as freehold ownership do indeed involve all three elements of control. For example, it is clear that on Hart's

element of Hart's Will Theory. James Penner, 'Legal Powers and the Will and Interest Theories of Rights' in Mark McBride (ed), *New Essays on the Nature of Rights* (Hart Publishing 2017) 106.

view, Rex has a legal right against Sarah's entering his home because Rex has all three elements of control over Sarah's duty not to enter.

We have just seen that, for Hart, X's having all three elements of control over the legal duty Y owes X not to perform an action is *sufficient* for X to have a legal right against Y's performing an action. The second observation concerns whether, for Hart, X's having each of these elements of control is also *individually necessary* for X's having such a right. Hart is unclear on this point. Let us assume that each element is individually necessary on Hart's view.

This brings us to the third observation. Hart speaks of these elements in terms of X's *control* over Y's duty. I have identified Hart's notion of 'control' over a duty with the power to waive that duty or leave it in force. The reason for this identification is twofold. First, this is how Hillel Steiner formulates his version of the Will Theory of Legal Rights, which is perhaps the most influential contemporary Hartian Will Theory.²⁰⁴ Second, identifying control over a duty with the power to waive that duty or leave it in force is dialectically generous to those who seek to challenge the possibility of the Will Theory's extensional adequacy. To see why, consider an example. Plausibly, children have *some* control over the duties others owe them. For example, by putting themselves in harm's way a child can plausibly place nearby strangers under a duty to save them. This need not be denied by those who believe the Will Theory cannot account for the possibility of children having moral and legal rights. Instead, these people are more charitably interpreted as claiming only that a child cannot *waive*

²⁰⁴ See Steiner (n 201) 240.

the duties that others owe them. Accordingly, let us assume that according to the Will Theory, X's having control over a duty in this context means X's having the power to waive that duty or leave it in force.

We can summarise Hart's Will Theory of Legal Rights as follows: X has a legal right against Y's performing some action just in case: (1) X has the legal power to waive the legal duty Y owes X not to perform that action; (2) X has (what Hart calls) the legal power to waive legal enforcement of the legal duty Y owes X not to perform that action; and (3) X has the power to waive the legal duty Y owes X to compensate X if Y performs that action.

b. The Contemporary Will Theory of Rights

In the essay from which the passage from Hart is taken, Hart's goal is limited to providing an account of the function of legal rights. The aims of the Contemporary Will Theory are broader. The Contemporary Will Theory aims to provide an account not only of legal rights but also of moral rights. In this subsection, I examine each of the elements of control that Hart identifies, modifying or eliminating those elements where necessary to achieve this broader goal. What results is the Contemporary Will Theory. Let us consider each of Hart's elements in turn.

It is clear that the first element of control—the power to waive the duty or leave it in existence—is also a feature of paradigmatic moral rights. Consider Patient's moral claim against Doctor performing surgery on him, and the correlative moral duty that Doctor owes Patient not to perform surgery on him. This moral claim is protected by a moral power. Patient has the moral power to waive Doctor's moral duty not to

perform surgery on him. Indeed, this is what Patient does when giving morally valid consent to surgery. (As with legally valid consent, I assume that to give morally valid consent, Patient must at a minimum be an adult of sound mind who is not induced by coercion or deception.²⁰⁵) Accordingly, it is possible for the Contemporary Will Theory to keep Hart's first element. Accordingly, the first element of control, which in Hart's Will Theory is *Waivability of Legal Duty* corresponds to the broader notion in the Contemporary Will Theory, which we can call *Waivability of Duty*:

Waivability of Duty. X has a right against Y performing an action only if X has the power to waive the duty Y owes X not to perform that action.

Hart's second element of control is *Waivability of Legal Enforcement of Duty*. In the legal context, as Hart himself notes in the passage quoted earlier in this essay, this second element of control comprises what he characterises as a power to sue, whether for compensation or injunctive relief.²⁰⁶ However, the Contemporary Will Theory has a broader goal than Hart's. The Contemporary Will Theory aims to provide an account of the function not only of legal rights, but of rights as such. In particular, the Contemporary Will Theory also aims to provide an account of moral rights. With respect to moral rights, it is unclear what it could mean have the power to waive or

²⁰⁵ See n 202, above.

²⁰⁶ See text accompanying n 200, above.

enforce the relevant moral duty.²⁰⁷ To accommodate this increased generality, the Contemporary Will Theory jettisons the second of Hart's elements of control over the duty, because that element applies only to legal rights.

Hart's third element of control is *Waivability of Legal Compensation*. Where the loss is monetizable, this element applies to moral rights just as it does to legal rights. If a stranger takes \$10 from my wallet, they have a moral duty to compensate me for my loss. And I have the moral power to waive that duty. However, sometimes compensation for loss is not easily monetizable. For example, if a husband breaches his promise to his wife that he will not have sexual intercourse with others, 'it is likely that penitent deeds would be more appropriate than cash'.²⁰⁸ We can say more generally that the third element of control involves the power to waive the duty to make it up to you that the initial duty was breached. That is to say, the third element of control, according to the Contemporary Will Theory, is the *Power to Waive the Duty to Make Amends*, or *Waivability of Amends* for short:

²⁰⁷ See Katharina Nieswandt, 'Authority and Interest in the Theory of Right' in David Plunkett, Scott Shapiro and Kevin Toh (eds), *Dimensions of Normativity: New Essays on Metaethics and Jurisprudence* (Oxford University Press) 320.

²⁰⁸ Dougherty, 'Yes Means Yes' (n 25) 233. See also Rowan Cruft, 'Rights: Beyond Interest Theory and Will Theory?' (2004) 23 *Law and Philosophy* 347, 359. According to Cruft, 'my aunt holds a right that I visit her only if she holds not merely a claim that I visit her, but if she also *would hold a claim that I apologise or in some other way make amends were I to fail to visit her.*' (Original emphasis.) In a footnote, Cruft says, 'Note that the forms that appropriate remedies can take are various, and need not be limited to a spoken apology or a compensation payment.'

Waivability of Amends. X has a right against Y's performing an action only if X has the power to waive the duty Y owes X to make it up to X if Y performs that action.

If both *Waivability of Duty* and *Waivability of Amends* are satisfied, then the situation is as follows. First, X has a claim against Y's performing some action. Second, X has a power to waive the duty that Y owes X correlative to that claim. These two incidents make up *Waivability of Duty*. Third, if Y breaches the duty correlative with X's claim, X has an additional claim that Y make amends to X. Fourth, X has the power to waive duty to make amends that Y owes X correlative to X's additional claim. The latter two incidents make up *Waivability of Amends*.

It should be clear from the preceding discussion that the relation between *Waivability of Duty* and *Waivability of Amends* is not a relation of Hohfeldian logic. If it is not a relation of Hohfeldian logic, what kind of relation is it? I suggest the former is the defeasible ground of the latter. X's claim against Y's performing some action defeasibly *explains* and *justifies* why X has an additional claim that Y make amends if Y breaches the duty correlative to the first claim.²⁰⁹ To illustrate, consider an example. I have a claim against your entering my apartment. I also have the power to waive the duty you owe me, correlative to that claim, not to enter my apartment. Assume that I do not

²⁰⁹ For a classic statement of the view that rights can be the grounds of both other rights and of duties, see Raz (n 5) 167–170.

waive that duty. If you nevertheless enter my apartment, you breach the duty you owe me and infringe my claim. This explains and justifies why I have a second claim against you—a claim that you make amends for breaching the duty you owed me not to enter my apartment. And I in turn have a power to release you from this second duty—this duty to make amends.

If I am correct that relation between *Waivability of Duty* and *Waivability of Amends* is one of grounding, then it is a contingent relation. There will be occasions on which *Waivability of Duty* is satisfied but *Waivability of Amends* is not, because it has been defeated by some other factor. For example, imagine you promise to meet me at the pub and thereby give me a claim to your doing so and a power over your correlative duty. Imagine you breach your duty to show up. Here it seems you breach your duty and infringe my right. And it seems that is true regardless of whether you owe me amends. Perhaps I have forfeited (i.e. defeated) my claim to amends by jilting you at the pub on previous occasions. Nevertheless, I suggest, you have infringed my right.

If all that is correct, then it is possible for X to have a right against Y's action even if *Waivability of Amends* is not satisfied. Accordingly, the Contemporary Will Theory requires only *Waivability of Duty*. We can therefore summarise the Contemporary Will Theory as follows:

Contemporary Will Theory of Rights. X has a right against Y's performing some action if and only if X is in a position to waive the duty Y owes X not to perform that action.

This formulation of the Contemporary Will Theory provides us with a way to understand the oft-quoted claim that the Will Theory is concerned with ‘normative allocations of freedom’.²¹⁰ According to the Will Theory, the function of rights is to give individuals who have rights control over the duties that others owe them. Recall that Y’s having a liberty (with respect to X) to perform an action is equivalent to Y not owing a duty to X not to perform that action. Accordingly, we restate the point about duties in terms of liberties: the Will Theory is concerned with normative allocation of *liberties*.

4. The Impossibility Objection to the Will Theory of Rights

Now that we have outlined the Contemporary Will Theory of Rights, we are well placed to understand a key objection to the Will Theory. I shall call this the *Impossibility Objection*:

Impossibility Objection. According to the Will Theory, if X is a child, unconscious adult, or dead, then it is not possible for X to have a right against Y’s ϕ -ing.

²¹⁰ Steiner (n 201) 238.

The Impossibility Objection is made by those who reject the Will Theory in favour of one of its rivals, though Will Theorists themselves seem to accept that the objection at least correctly characterises the Will Theory. Consider first what Interest Theorist Matthew Kramer says about the Will Theory as an account of the function of legal rights: ‘A striking corollary of the Will Theory is that ... infants, comatose people, senile people, and dead people do not have any legal rights.’²¹¹ It is not only Interest Theorists who raise the Impossibility Objection. For example, Leif Wenar, who rejects both the Will Theory and the Interest Theory, says this: ‘The limitations of the will theory are ... evident in its inability to account for the rights of incompetent (e.g., unconscious) adults, and of children.’²¹² Indeed, even Will Theorists themselves tend to accept that the Will Theory cannot account for the possibility of children, the unconscious, and the dead having rights. As Anna-Karin Andersson puts it, even Will Theorists ‘agree that it is at least a very controversial implication of the theory that it excludes from the class of rights bearers temporarily unconscious adults ... and very young children’.²¹³

²¹¹ Matthew H Kramer, ‘Do Animals and Dead People Have Legal Rights’ (2001) 14 *Canadian Journal of Law and Jurisprudence* 29, 30. Kramer is concerned only with the Will Theory as an account of the function of legal rights. Kramer also finds it striking that, according to the Will Theory, animals do not have rights. However, this is much less striking than the other categories above. Indeed, it seems quite contentious whether animals have moral or legal rights.

²¹² Wenar (n 193) 240.

²¹³ Anna-Karin Margareta Andersson, ‘Rights Bearers and Rights Functions’ (2015) 172 *Philosophical Studies* 1625, 1627.

According to Kramer, the proposition that these individuals cannot have legal rights is ‘jarringly and gratuitously at odds with ordinary patterns of discourse’ and Kramer ultimately takes this to be an important reason to prefer the Interest Theory to the Will Theory.²¹⁴ Wenar likewise believes that this an important reason to reject the Will Theory. Indeed, Will Theorists themselves tend to accept that the Impossibility Objection correctly characterises the Will Theory, but downplay the extent to which this is a serious defect. That is to say, they accept that according to the Will Theory, if X is a child, unconscious adult, or dead, then it is not possible for X to have a moral or legal rights. However, they are willing to accept this counterintuitive consequence. I suspect that those who are not already convinced by the Will Theory are unlikely to find this response persuasive. I shall in due course argue this response is mistaken, and that the Impossibility Objection does not accurately characterise the Will Theory.

Before we get to the defence of the Will Theory against the Impossibility Objection, it is important to understand the argument for the Impossibility Objection. To do this, it is helpful to focus on a particular version of the Will Theory. I shall focus on the Contemporary Will Theory. We can ask: according to the Contemporary Will Theory, what does it take for X to have a right against Y performing an action? As we saw above, one necessary condition is the element of control we identified as *Waivability of Duty*: X has a right against Y performing an action only if X has the power to waive the duty Y owes X not to perform that action.

²¹⁴ Kramer (n 211) 31.

Now, *Waivability of Duty* identifies a necessary condition for X to actually have a right against Y performing an action. However, we can also ask a more general question: according to the Contemporary Will Theory, what does it take for it to be *possible* for X to have a right against Y performing an action? The answer is that it must be *possible* for X to waive the duty Y owes X not to perform that action. Or, for reasons that will shortly become clear, we might say X *must be in a position to* waive the duty Y owes X not to perform that action. We can summarise this as the first premise in the argument for the Impossibility Objection. Let us call it the *Waivability Premise*:

- (1) *Waivability Premise*. According to the Will Theory, it is possible for X to have a right against Y's ϕ -ing only if X is in a position to waive the duty Y owes X not to ϕ .

The next premise in the argument for the Impossibility Objection is that if X is a child, comatose adult, or dead, then X is not in a position to waive the relevant duties. For example, as Kramer correctly observes, children, the comatose and the dead, are 'not able to grasp what is involved in the enforcing or waiving of a duty'.²¹⁵ Likewise, Wenar argues that 'The will theory can acknowledge rights only in those beings competent to exercise powers, which incompetent adults and children are not. Incompetent adults and children therefore cannot on this view have rights.'²¹⁶ Similarly, Andersson argues

²¹⁵ *ibid* 30.

²¹⁶ Wenar (n 193) 240.

that according to the Will Theory, for X to have a right against Y's performing an action, X must have a 'capacity for exercising agency'—a capacity which children, the unconscious and the dead do not have.²¹⁷ We can summarise this premise as follows:

- (2) *Inability Premise*. If X is a child, unconscious adult, or dead, then X is not in a position to waive the duty Y owes X not to ϕ .

Now that we understand both the Waivability Premise and the Inability Premise, we are in a position to summarise the argument for the Impossibility Objection:

²¹⁷ Andersson (n 213) 1627.

The Argument for the Impossibility Objection

- (1) *Waivability Premise.* According to the Will Theory, it is possible for X to have a right against Y's ϕ -ing only if X is in a position to waive the duty Y owes X not to ϕ .
- (2) *Inability Premise.* If X is a child, unconscious adult, or dead, then X is not in a position to waive the duty Y owes X not to ϕ .
- (3) *Conclusion.* Therefore, According to the Will Theory, if X is an infant, unconscious adult, or dead, then it is not possible for X to have a right against Y's ϕ -ing. [Impossibility Objection.]

At this point it is worth making two observations. First, both premises of argument for the Impossibility Objection include the phrase 'X is in a position to waive the duty that Y owes X.' That phrase requires some clarification. On a natural reading, it requires not only that X has the *moral or legal power* to waive X's duty, but also that X has the *ability* to do so.²¹⁸ If it did not require the ability to exercise the power, the Will Theorist could make a straightforward argument that it is possible for children, unconscious adults, and the dead have moral and legal rights. After all, the Will Theorist could claim that, in each of these cases, the individual has a *moral or legal power* to waive the relevant duty, but merely lacks the *ability to exercise* that power. This response might in principle help the Will Theorist. However, I do not propose to rely on it. I shall not

²¹⁸ Nieswandt canvasses some arguments along these lines. Nieswandt (n 207) 322–24.

rely on it because both Hart and the those pressing the Impossibility Objection presuppose that being in a position to exercise the right—that is, having the ability to do so—is a necessary condition for X’s having a right. If this were not what they had in mind, then the answer to the Impossibility Objection would be obvious when it comes to unconscious adults: Unconscious adults have the moral and legal powers to waive the duties that others owe them, but are simply not in a position to exercise those powers. Consequently, unconscious adults do have rights, but they are not in a position exercise those rights. However, this is not a Hartian response. According to Hart, ‘it is hard to think of rights except as capable of *exercise*’.²¹⁹ Unconscious adults are not capable of exercising their rights.

The second observation concerns the strength of the Impossibility Objection. The Impossibility Objection is not merely that, according to the Will Theory, children, unconscious adults, and the dead do not have moral and legal rights. Rather, the Impossibility Objection is that the Will Theory cannot account for the *possibility* of these individuals having moral and legal rights. As it is sometimes put, the Will Theory rules out the possibility of such individuals having rights as ‘conceptually incoherent’,²²⁰ and it does so not through substantive moral or legal argumentation, but rather by ‘definitional fiat’.²²¹

²¹⁹ Hart (n 200) 184. (Original emphasis.)

²²⁰ Cruft (n 208) 369.

²²¹ Cécile Fabre, ‘Posthumous Rights’ in Matthew H Kramer and others (eds), *The Legacy of HLA Hart: Legal, Political, and Moral Philosophy* (Oxford University Press 2008) 226.

5. Challenging the Argument for the Impossibility Objection

In the previous section, we outlined the argument for the Impossibility Objection. The argument looks sound. However, I shall argue that it is not. Rather, the argument for the Impossibility Objection depends on an equivocation between an *only if* condition and an *only when* condition. It is true that, according to the Will Theory, it is possible for X to have a right against Y's action *only if* X is in a position to waive the duty Y owes X not to perform that action. But it is not true that, according to the Will Theory, it is possible for X to have a right against Y's action *only when* X is in a position to waive the duty Y owes X not to perform that action. Put slightly differently, each the premises of the argument for the Impossibility Objection ambiguous. On one interpretation, the Waivability Premise is true but the Inability Premise is false. On the second interpretation, the Inability Premise is true but the Waivability Premise is false. On neither interpretation, therefore, does the argument require us to accept the Impossibility Objection.²²²

The argument for the Impossibility Objection is commonly interpreted as follows:

²²² Temporal issues like the ones raised in this section also arise for the Interest Theory of Rights. For discussion, see Sandeep Sreekumar, 'Some Conceptual Aspects of Temporality and the Ability to Possess Rights' (2015) 28 Ratio Juris 330.

Current Waivability Argument

- (1A) *Current Waivability Premise*. It is possible for X to have a right against Y's ϕ -ing only if X is now in a position to waive the duty Y owes X not to ϕ .
- (2A) *Current Inability Premise*. If X is a child, unconscious adult, or dead, then X is not now in a position to waive the duty Y owes X not to ϕ .
- (3) *Conclusion*. Therefore, if X is a child, unconscious adult, or dead, then it is not possible for X to have a right against Y's ϕ -ing. [Impossibility Objection.]

The Current Waivability Argument is valid. But the Current Waivability Premise is false. To see this, let us start return to the case of Rex and Sarah. Recall that Rex has both a moral and a legal right against Sarah's entering his home. According to the Contemporary Will Theory, each of these rights consists in the conjunction of a claim and a power. Rex has a claim against Sarah's entering his home, and Sarah owes Rex the correlative duty not to enter. Rex also has a power to waive Sarah's duty. Rex exercises this power by giving Sarah his valid consent to his entering her home. But let us suppose that Rex does not exercise this power, as in the following variant of the case:

Trespass. Sarah enters Rex's home without Rex's valid consent to her doing so.

In *Trespass*, Sarah infringes Rex's claim against her entering his home and breaches her correlative duty not to enter. Now consider a variant of *Trespass* in which Rex is asleep when Sarah enters his home:

Sleeping Trespass. Rex is asleep. Sarah enters Rex's home without Rex's valid consent to her doing so.

I suggest that Sarah commits the *same wrong* in *Sleeping Trespass* as in *Trespass*: she infringes Rex's claim against her entering his home and breaches her correlative duty not to enter. If that is correct, then the Current Waivability Premise is false. After all, in *Sleeping Trespass*, Rex is asleep. And if Rex is asleep, Rex is not now in a position to exercise the power his power to waive the duty that Sarah owes him not to enter his home. The same applies if Rex is unconscious rather than merely asleep when Sarah enters his home.

This style of argument is not limited to individuals' rights over their property. It also extends to their rights over their person. Consider:

Surgery. Doctor removes Patient's appendix without Patient's valid consent to her doing so.

We should all agree in *Surgery*, Doctor wrongs Patient. The best explanation for why Doctor wrongs Patient in these cases is that he infringes Patient's rights over his person.²²³ Among the rights that Patient has over his person, Patient has a right against Doctor removing his appendix. As we saw from our discussion of the Contemporary Will Theory, this right consists in both a claim and a power. Patient has a claim against Doctor's removing his appendix, and Doctor is under a correlative duty not to do so. Patient also has a power to waive Doctor's duty. By giving her morally valid consent, it is possible for Patient to waive Doctor's duty not to remove her appendix, thereby giving Doctor a liberty to do so. In *Surgery*, Doctor removes Patient's appendix without his morally valid consent. Doctor thereby breaches his duty not to remove Patient's appendix, and thus infringes Patient's correlative claim.

We can now imagine a variants of *Surgery* in which Patient is not in a position to waive Doctor's duty because Patient is unconscious:

Unconscious Surgery. Patient is unconscious due to general anaesthetic. Doctor removes Patient's appendix without Patient's valid consent to her doing so.

²²³ To be clear, Doctor morally wrongs her Patient by infringing Patient's moral rights, and legally wrongs Patient by infringing Patient's legal rights.

I suggest that in *Unconscious Surgery*, Doctor commits the *same wrong* as she does in *Surgery*. Both in *Surgery* and in *Unconscious Surgery*, Doctor breaches her duty not to remove Patient's appendix, thus infringing Patient's correlative claim.

I have suggested that in *Unconscious Trespass* and *Unconscious Surgery*, the explanation for why Y breaches the duty to X and thereby infringes X's claim is what we can call the Actual Consent Explanation: Y wrongs X because X does not actually give valid consent to what Y does—X does not actually waive the duty that Y owes X. It is important to distinguish the Actual Consent Explanation from what we might call a Hypothetical Consent Explanation. According to a Hypothetical Consent Explanation, the explanation for why Y wrongs is that X *would not have waived* Y's duty in certain hypothetical circumstances. For example, according to a Hypothetical Consent Explanation of *Unconscious Surgery*, the explanation for why Doctor wrongs Patient is this: Patient would not have waived Doctor's duty not to operate on Patient *if Patient had been awake*.²²⁴

However, appealing to hypothetical consent is an unpromising strategy for two reasons. First, such appeals are unlikely to explain all the relevant cases. For example, if Patient is unconscious following a heart attack, a defender of a Hypothetical Consent Explanation might want to say that Patient would waive Doctor's duty not to use a defibrillator on Patient. But it is not true that, *if Patient had been awake*, Patient would have waived Doctor's duty not to use a defibrillator on Patient (because Patient would

²²⁴ For an interesting discussion of Hypothetical Consent, see David Enoch, 'Hypothetical Consent and the Value(s) of Autonomy' (2017) 128 *Ethics* 6.

not have needed one!).²²⁵ If we ask what Patient would have consented to *prior* to becoming unconscious, then it is *prior* hypothetical consent that is doing the explanatory work. If prior hypothetical consent is sufficient to waive a duty, prior actual consent seems on surer footing. And this is sufficient to explain the cases I have in mind. After all, it is a familiar idea that surgery under general anaesthetic wrongs a patient unless he give his actual prior consent, and this consent is valid.

The second reason the appeal to hypothetical consent is unpromising is that the Will Theory's motivation is to protect the right-holder's actual choices, not the choices that the right-holder would have made under other (albeit idealised) conditions.²²⁶

Since the *Current Waivability Premise* is false, the Current Waivability Argument does not require us to accept the Impossibility Objection to the Will Theory.

²²⁵ It may be possible to generate extensionally adequate results by considering different counterfactuals. As I go on to say in the main text, even if this is possible, this is not the most plausible position for the Will Theorist to take, for three reasons. First, it difficult to see what would motivate the use of some counterfactuals rather than others. Second, as I say in the main text, it seems that counterfactual (or hypothetical) consent is on less sure footing than prior actual consent. We frequently to prior actual consent in our everyday lives. The same is not true of counterfactual (or hypothetical) consent. The third reason is also one I give in the main text, namely, that the Will Theory's motivation is to protect the right-holder's actual choices, rather than the choices they would have made in certain (albeit idealised) conditions.

²²⁶ Indeed, some theorists prefer to call the Will Theory the Choice Theory of Rights. See, e.g., JE Penner, 'The Analysis of Rights' (1997) 10 Ratio Juris 300; Adina Preda, 'Rights: Concept and Justification' (2015) 28 Ratio Juris 408.

This brings us to the second interpretation of the argument for the Impossibility Objection. I shall call this the *Lifetime Waivability Argument*, and I summarise it as follows:

The Lifetime Waivability Argument

- (1B) *Wide Waivability Premise*. It is possible for X to have a right against Y's ϕ -ing only if X is ever in a position to waive the duty Y owes X not to ϕ .
- (2B) *Wide Inability Premise*. If X is now a child, unconscious adult, or dead, then X is not ever in a position to waive the duty Y owes X not to ϕ .
- (3) *Conclusion*. Therefore, if X is now a child, unconscious adult, or dead, then it is not possible for X have a right against Y's ϕ -ing. [Impossibility Objection.]

This Lifetime Waivability Argument is also valid. However, the Wide Inability Premise is false.

The easiest way to illustrate that the Wide Inability Premise is false is to consider *prior consent*. Provided it is valid, prior consent functions to waive the duties correlative with the claims of those about to undergo surgery under general anaesthetic.²²⁷ For example, in *Unconscious Surgery*, Patient is now an unconscious adult. However, immediately before becoming unconscious, Patient was in a position to waive Doctor's duty not to operate on Patient. If Patient gave Doctor valid prior

²²⁷ For a related discussion, see Westen (n 22).

consent to Doctor's removing his appendix, Patient would thereby waive the duty that Doctor owed Patient not to do so.

In this section, we have focused mainly on cases involving the unconscious. However, similar considerations apply to the dead. Recall that when Rex is asleep, his valid prior consent can release Sarah from the duty she otherwise owes him not to enter his home. Similarly, after Rex dies, his valid prior consent to Sarah's living in his home can release her from the duty she otherwise owes him not to do so. Indeed, it is a familiar thought that Rex might leave a will to this effect. And recall that when Patient is unconscious due to anaesthetic, his valid prior consent can release Doctor from the duty she otherwise owes him not to remove his appendix. Similarly, after Patient dies, his valid prior consent—given while he was alive—to Doctor's removing his organs can release Doctor from the duty she otherwise owes him not to do so. It is a familiar thought that valid consent to posthumous organ donation has just this effect.

In this section, we have seen that according to the Contemporary Will Theory, it is possible for the unconscious and the dead to have moral and legal rights. Though the Contemporary Will Theory requires that these individuals are in a position to exercise a powers to waive the duties that others owe them, the Contemporary Will Theory does not require that they are in a position to exercise this power while unconscious or dead. Instead, the Contemporary Will Theory acknowledges the familiar practice of giving their valid consent prior to the loss of consciousness or life. By engaging in this familiar practice, individuals can exercise the relevant powers prior to loss of consciousness or life. Accordingly, it is possible for these individuals to have moral and legal rights.

6. The Impossibility Objection and Children

The case of children is more contentious. Neil MacCormick famously claimed that children are a ‘test-case’ for the Will Theory of Rights.²²⁸ On MacCormick’s view, if the Will Theory is correct, then it is not possible for children to have rights. However, MacCormick asserted, it is possible for children to have rights, therefore the Will Theory is not correct. I shall deny the first premise in MacCormick’s argument. If the Contemporary Will Theory is correct, then it is possible for children to have rights—provided they can as adults give valid subsequent consent to actions performed when they were children.

Let us return to the Lifetime Waivability Argument. To show that the Wide Inability Premise is false with respect to unconscious adults and the dead, it was necessary only to rely on the notion of *prior consent*. There is widespread agreement that it is possible to give valid consent to an action prior to its occurrence. However, to defend the possibility of children having rights, it is necessary to rely on the notion of *subsequent consent*. This is sometimes also known as *retrospective consent*. Like X’s prior consent, X’s subsequent consent—provided it is valid—waives the duty that Y owes X not to perform some action. However, subsequent consent is given *after* the action has occurred (or was due to occur).

²²⁸ Neil MacCormick, ‘Children’s Rights: A Test-Case for Theories of Right’, *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Oxford University Press 1984).

While the notion of subsequent consent is much more contentious than that of prior consent, it does have its defenders.²²⁹ The purpose of this section is to make clear that the Contemporary Will Theorist can account for children having rights if she accepts the notion of subsequent consent.

Before going further, it worth addressing a concern about the very notion of subsequent consent. Some theorists have expressed scepticism about that notion. For example, according to Joel Feinberg, ‘There is very little that can be done, despite the ingenious efforts of some philosophers, to extract coherence from the strange notion of “subsequent consent”.’²³⁰ In a similar vein, Douglas Husak says, ‘It is unlikely that consent *can* be retrospective.’²³¹ Talk of subsequent consent strikes many theorists as

²²⁹ Eric Chwang, ‘A Defense of Subsequent Consent’ (2009) 40 *Journal of Social Philosophy* 117; John K Davis, ‘Precedent Autonomy and Subsequent Consent’ (2004) 7 *Ethical Theory and Moral Practice* 267; Westen (n 22) 254–61. Chwang’s is a discussion of subsequent consent in the moral domain, whereas Westen’s is a discussion of subsequent consent in the legal domain. See also Jonathan Witmer-Rich, ‘It’s Good to Be Autonomous: Prospective Consent, Retrospective Consent, and the Foundation of Consent in the Criminal Law’ (2011) 5 *Criminal Law and Philosophy* 377; Jacob E Gersen and Jeannie Suk, ‘Timing of Consent’ in Frank Fagan and Saul Levmore (eds), *The Timing of Lawmaking* (Edward Elgar Publishing 2017).

²³⁰ Feinberg, *Harm to Self* (n 73) 182.

²³¹ Douglas Husak, ‘Paternalism and Consent’ in Franklin Miller and Alan Wertheimer (eds), *The Ethics of Consent: Theory and Practice* (2010) 114. (Emphasis original.) Donald Van De Veer also expresses scepticism about the notion of subsequent consent. Donald Van De Veer, ‘Paternalism and Subsequent Consent’ (1979) 9 *Canadian Journal of Philosophy* 631. Others have expressed scepticism not at the notion of subsequent consent, but rather at the idea that such consent would be valid in certain contexts.

‘somewhat odd because consenting, like giving permission and granting, is concerned with the present or future.’²³²

The objection underlying this scepticism seems to be that the notion of subsequent consent is *incoherent*. Eric Chwang, a defender of subsequent consent, summarises the objection as follows: ‘it is a conceptual mistake think that you can consent to something that has already happened. By the very meaning of the concept, consent is concerned with what is happening or will happen, not something that has already happened.’²³³ Call this the *Incoherence Objection*.

Chwang claims that the Incoherence Objection arises from wrongly identifying the attitude of consenting with the attitudes of gratitude, welcoming, or approval. Chwang correctly argues that the attitude of consenting is distinct from the attitudes of gratitude, welcoming or approval. On the one hand, it is possible to consent to someone’s action without being grateful for that action, welcoming it, or approving of it. Consider a parent who consents to their child leaving the house after the child’s ordinary curfew. To consent, the parent need not be grateful for, welcome, or approve of the child leaving the house. On the other hand, it is possible to be grateful for someone’s action, to welcome it, or to approve of that action without thereby

For example, Paul Jarvis argues that it is not possible to give valid subsequent consent to sexual intercourse in English law, given the phrasing of the provisions of the Sexual Offences Act 2003. Paul Jarvis, ‘The Timing of Consent’ [2019] Criminal Law Review 394.

²³² Peter Gardner, ‘Paternalism and Consent in Education, or One Day You’ll Be Grateful’ (1983) 17 Journal of Philosophy of Education 57, 63.

²³³ Chwang (n 229) 119.

consenting to it. Consider my attitude towards the government changing its foreign aid budget. It is possible for me to be grateful for the change, to welcome that change, and to approve of it, without thereby *consenting* to that change.²³⁴

²³⁴ Chwang's own suggestion is to identify consenting to an action with the attitude of 'not minding' that action. *ibid* 121. This is similar to Kimberly Kessler Ferzan's recent suggestion that the attitude of consenting to an action is the attitude of thinking to oneself that the action is 'ok with me'. Ferzan, 'Consent, Culpability, and the Law of Rape' (n 22) 398. Chwang's and Ferzan's views contrast with those of Michael Thompson. According to Thompson, 'There is an obvious and intuitive difference between *Sylvia consents to your doing B* and *Sylvia doesn't mind that you're doing B*, the latter being a species of the more general type found in *Sylvia doesn't mind that E is happening*. ... It seems no description of *what Sylvia doesn't mind* or *what she would very much like to be the case* will ever add up to your *having her consent* to your doing something.' Thompson (n 19) 350–51. (Emphasis original.)

My own view is that suggestions such as Chwang's and Ferzan's are ambiguous. There are at least four distinct senses in which someone might 'not mind' another person's action. First, X might be said to 'not mind' Y's action insofar as X takes Y's action to be *all-things-considered permissible*. As an example of when X might hold this attitude, consider a case in which Y breaks a promise to meet X for lunch because Y remembers that he had earlier made a conflicting promise to take Y's mother to the doctor at lunchtime. There is a sense in which X might 'not mind' Y's breaking Y's promise, because X recognises that it is all-things-considered morally permissible for Y to prioritise the earlier promise. Nevertheless, this is consistent with X holding the attitude that Y breached a duty *to X*.

This brings us to a second attitude that might be called 'not minding'. X might be said to 'not mind' Y's action insofar as X holds that Y's action does not breach a duty owed to X, even if it breaches a duty owed to another. For example, X might not mind that Y breaches his promise to take Y's mother to the doctor at lunchtime, because even though it is morally wrong for Y to breach his promise, it does not wrong X.

A third attitude of ‘not minding’ is closely related. X might be said to ‘not mind’ Y’s action in some cases where X holds—perhaps mistakenly—that Y does not owe X a duty not to perform the relevant action to begin with. For example, X might ‘not mind’ that Y takes an umbrella from the stand, simply because X fails to realise that the umbrella belongs to X. (This is based on an example from David Owens. See David Owens, ‘Promising without Intending’ (2008) 105 *The Journal of Philosophy* 737, 740.)

Finally, X might be said to ‘not mind’ Y’s action in case a where, although X holds that Y did owe a duty not to perform the relevant action, X holds that Y’s non-performance is *excused*. For example, if Y breached his promise to have lunch with X because Y was in a cycling accident *en route*, X might excuse Y’s absence because under the circumstances X ‘doesn’t mind’ that Y did not show up. Here, X might recognise that Y has an *excuse* for wronging X, and so hold that Y is not culpable for doing so.

Fortunately, Chwang helps us disambiguate these possible interpretations of what it means for X to ‘not mind’ Y’s action. According to Chwang, if X validly consents to Y’s action, then X ‘thereby rescinds her right to demand compensation for it.’ Chwang (n 229) 120. This is true. However, it seems that Chwang goes on to *identify* X’s consenting to Y’s action with X’s waiving the duty of compensation. If that is indeed Chwang’s view, then it is mistaken. After all, as we saw above, Waivability of Duty and Waivability of Amends are distinct. Indeed, for amends to be apt presupposes that the initial duty has been breached.

Relatedly, Chwang leaves open the possibility that subsequent consent is equivalent to forgiveness. However, forgiving someone for breach of a duty presupposes that they have breached (or will breach) a duty. Consenting, by contrast, releases someone from the initial duty not to perform an action. If they perform the consented-to action, there is nothing to forgive (provided the consent is valid). For related discussions of forgiveness, see Pamela Hieronymi, ‘Articulating an Uncompromising Forgiveness’ (2001) 62 *Philosophy and Phenomenological Research* 529; Nicolas Cornell, ‘The Possibility of Preemptive Forgiving’ (2017) 126 *Philosophical Review* 241.

However—contrary to what Chwang claims—the Incoherence Objection does not rely on identifying the attitude of consenting with that of gratitude, welcoming, or approval. To see this, consider the *simple intention* view of consent. According to the simple intention view of consent, for you to consent to someone’s action is for you to *intend* that person’s action.²³⁵

If the simple intention view of consent is correct, then given a plausible assumption, the Incoherence Objection arises again. On the simple intention view of consent, to consent to an action is to *intend* that action. For someone to intend an action, they must believe that it is possible for that intention to lead to action.²³⁶ However, ordinarily, individuals do not believe that their present intentions can lead to past actions having occurred. Ordinarily, then, individuals cannot intend a past action.²³⁷ If an individual cannot intend a past action, then on the simple intention view of consent, the notion of subsequent consent is incoherent for that individual. The attitude of consent is such that it is impossible for that individual to form that attitude after the action to be consented to has already occurred.

²³⁵ Hurd (n 22) 131. Larry Alexander objects to the simple intention view on the grounds that ‘one cannot intend another’s act ... One can only intend one’s own act.’ Alexander, ‘The Ontology of Consent’ (n 85) 107. See also Alexander, ‘The Moral Magic of Consent (II)’ (n 85) 166. It is worth stating that much of the literature on shared intention denies Alexander’s claim that one can only intend one’s own act. See, e.g., Bratman (n 166) 148–50. For related discussion, see n 163, above.

²³⁶ Oded Na’aman, ‘Can We Intend the Past?’ (2017) 12 *Journal of Ethics and Social Philosophy* 304, 307.

²³⁷ Na’aman (n 236).

However, the simple intention view of consent is incorrect. The following example from Victor Tadros helps illustrate:

*Borrow.*²³⁸ Jess wants to skip class and go to a party, and asks to borrow Betty's car. If Betty does not consent, Jess will go to class. Betty thinks it's Jess's decision whether to skip class, but wants Jess to go to class. Betty says to Jess: 'take my car if you want to, but I really want you to go to class.'

In *Borrow*, Betty consents to Jess borrowing the car without intending that Jess borrows the car. On Tadros's view, for Betty to consent to Jess borrowing the car, it is sufficient that Betty intends directly to release Jess from the duty she would otherwise owe Betty not to take the car.²³⁹ I believe Tadros is correct about this.

Let us assume that intending directly to release someone from a duty they owe you is sufficient to perform an act of consent. If that is correct, then it is plausible that you can also perform an act of consent by intending directly to release someone from a duty they *owed* you. Contrary to what some have suggested, this does not require 'backward causation'.²⁴⁰ It does not require any change in which actions have occurred. Rather, it involves you intending to make it the case that those past actions

²³⁸ Tadros, *Wrongs and Crimes* (n 21) 209.

²³⁹ *ibid.* (On other views, Betty may also need to communicate this intention.)

²⁴⁰ Van De Veer (n 231) 638.

did not wrong you.²⁴¹ If you can indeed release someone from a duty in this way, then the Incoherence Objection does not succeed.

Let us take stock. In the preceding paragraphs, we have defended the notion of subsequent consent from the Incoherence Objection. The goal of this defence was to overcome scepticism about the very notion of subsequent consent. The more plausible the notion of subsequent consent, the more plausible it is that the Will Theory can accommodate the possibility of children having moral and legal rights.

The main argument in this section has proceeded in two parts. First, I have argued that if it is possible for adults to give valid subsequent consent to actions that others performed when they were children, then the Contemporary Will Theory can accommodate the possibility of children having moral and legal rights. Second, I have argued that the notion of subsequent consent is not incoherent. As a result, it is at least somewhat plausible that it is possible for adults to give valid subsequent consent to actions that others performed when they were children.

It is worth noting that while this substantially increases the extensional adequacy of the Will Theory, it might not do so completely. Some children die prematurely. Others live beyond infancy but lack the cognitive capacity ever to waive

²⁴¹ David Owens defends a similar view of prior and contemporaneous consent, though he does not address the possibility of subsequent consent. See David Owens, 'The Possibility of Consent' (2011) 24 Ratio 402.

the duties that others owe them. According to the Contemporary Will Theory, it is not possible for such children to have moral and legal rights.²⁴²

This will seem to many a significant cost. However, there are two lines of reply that may mitigate this cost. First, we can say that it is wrong to, for example, enter the homes of those who are never in a position to waive duties that others owe them not to do so—but for reasons other than infringing their rights.²⁴³ Indeed, the Will Theorist can even say that we infringe their moral and legal *claims*, but that these claims are not properly called rights because they are not conjoined with the relevant power. The second line of reply concerns our knowledge. We will often not be in a position to know whether a particular child will at some later point be in a position to waive the duties that others owe them. If that is true, then given the significant moral risk that we might infringe their rights, we should err on the side of caution and treat them as if they have rights.

7. Conclusions

The Will Theory of Rights can avoid the Impossibility Objection. According to the Contemporary Will Theory of Rights, it is possible for children, unconscious adults,

²⁴² There is some similarity between the Contemporary Will Theory and what Elizabeth Harman calls the Actual Future Principle. See Elizabeth Harman, 'Creation Ethics: The Moral Status of Early Fetuses and the Ethics of Abortion' (1999) 28 *Philosophy & Public Affairs* 310. Thanks to Rae Langton for this observation.

²⁴³ Indeed, on one reading, this is just what Hart says of children and nonhuman animals. See HLA Hart, 'Are There Any Natural Rights?' (1955) 64 *Philosophical Review* 175, 180–81.

and the dead to have moral and legal rights. If it is possible for an individual to give valid prior consent to actions that occur while they are unconscious or after they die, then according to the Contemporary Will Theory, it is possible for that individual to have moral and legal rights. It is possible for individuals to give such consent. So, according to the Contemporary Will Theory, it is possible for them to have moral and legal rights. Moreover, if it is possible for adults to give valid subsequent consent to actions that occurred when they were children, then according to the Contemporary Will Theory, it is possible for them to have moral and legal rights. Since the notion of valid subsequent consent is more contentious than that of prior consent, children provide, in MacCormick's words, a 'test-case' for the Will Theory—though not in the way that MacCormick envisaged.

This is a surprising result. It is one that Interest Theorists, Will Theorists, and those who subscribe to neither theory had alike assumed to be false. Moreover, it leaves the Will Theory better off than has hitherto been assumed. This is because the Will Theory is significantly more plausible with regard to the possibility of its extensional adequacy.

Summary and Directions for Future Research

Let us take stock. This thesis was comprised of four substantive chapters. Each of those four chapters was a freestanding essay on individual permissive consent. We are now in a position to summarise the findings of those essays, and to consider possible areas for future research. Let us consider each essay in turn.

The first essay was ‘An Introduction to the Importance of Consent in Our Sex Lives’. That essay provided an overview of the moral and legal importance of consent in our sex lives. It clarified the notion of one person giving morally valid consent to another person’s action. It explored whether such morally valid consent is necessary or sufficient for morally permissible sex. When considering the sufficiency of consent, one theme that emerged was that the arguments for and against the sufficiency of consent rely on appeal to intuitions about particular cases. Specifically, they rely on intuitions about whether one person wrongs another by having sex with them despite having that person’s morally valid sexual consent. Since people differ in their intuitions about those cases, I suggested that we should consider resorting to broader theoretical considerations. Specifically, I suggested that someone’s valid consent to you having sex with them is sufficient to avoid you wronging them only if the *volenti maxim* is true. One question for future research, then, is whether the *volenti maxim* is true.

The second essay was ‘Conditional Consent’. That essay was motivated by the developing doctrine in English law of so-called ‘conditional consent’ to sexual intercourse. I distinguished two ways for someone to place conditions on their morally valid consent to another person’s action. The first is *moral scope restriction*, whereby

someone waives some moral claim rights but not others. For example, it is possible for someone to waive their moral claim rights against another person *performing surgery* on them, while retaining their moral claim rights against that person *having sexual intercourse* with them. The second is to *conditionally token* consent. Where someone conditionally tokens consent, their action constitutes an act of consent to another person's action if and only if the condition is satisfied. For example, we can imagine one person—perhaps a philosopher—saying to another, 'If and only if you visit your mother today, I hereby consent to you staying in my apartment tomorrow.' I suggested that understanding the distinction between moral scope restriction and conditional tokening can help make progress with debates about conditional consent to sexual intercourse in English law, and in thinking more generally about how we place conditions on our consent. In making my case, I left open an important question: is it possible for someone to place any condition they like on their tokening consent to another person's action? This is a difficult question, but one that should be addressed in future work on conditional consent.

The third essay was 'Sexual Consent and Having Sex Together'. That essay looked at a view that challenged what in 'An Introduction to the Importance of Consent in Our Sex Lives' I called the Necessity of Consent. According to that view, if sex is in some sense ideal, then consent is unnecessary. That is to say, where sex is a joint action between its participants, it is possible for one person to have sex with another, without that person's consent, without thereby infringing that person's moral rights. I reconstructed what I called the Main Argument for this view. I suggested that one of the key premises of the Main Argument was itself supported by two arguments—one from the metaphysics of sexual joint action and another from its moral significance.

I argued that neither of these supporting arguments is sound. As a result, the Main Argument is unsupported, and gives us no reason to accept the view that if sex is ideal, then consent is unnecessary. I instead defended what I called the Commonsense View. The Commonsense View states that if you have sex with someone without their consent, you thereby infringe that person's moral rights. In the course of defending the Commonsense View, I surveyed two existing accounts of consent—the Choice Account and the Normative Power Account. I argued that each of these accounts faces objections. To avoid these objections, I developed the Hybrid Account of Consent.

As well as developing the Hybrid Account of Consent, I suggested that my proposed picture yields several valuable lessons. Among those lessons is that my proposed picture highlights the need for law reform. I suggested that the law does not at present adequately criminalise the behaviour of a woman who uses her vagina to envelop a man's penis without his morally valid consent to what she does. Recognising this point, both Natasha McKeever and Siobhan Weare have recently suggested that we should criminalise such behaviour *as rape*.²⁴⁴ However, I believe that their arguments are too quick. They do not rule out the possibility that it might be better to criminalise non-consensual envelopment as a distinct offence from rape. In 'Conditional Consent', I suggested that fair labelling considerations generally favour the fine-grained individuation of sexual offences. For similar reasons, it may be better to have a distinct offence of non-consensual envelopment. Moreover, it seems this would be sufficient to assuage what seems to be McKeever's and Weare's key concern—namely, that the law portrays women as sexually passive by recognising

²⁴⁴ McKeever (n 185); Weare (n 190).

women only as possible victims and not as possible perpetrators of the most serious sexual offences. I would like to explore the arguments for a new criminal offence in more detail in future research.

The fourth essay was 'Children, the Unconscious, and the Dead: Consent and the Will Theory of Rights'. In that essay, I turned to a theoretical debate about the function of moral and legal rights. The two most influential positions in that debate are the Interest Theory and the Will Theory. According to the Interest Theory, the function of rights is to protect the interests of those who have them. By contrast, according to the Will Theory, the function of rights is to protect the will or the choice of those who have them. I highlighted a common objection to the Will Theory, which I called the Impossibility Objection. According to the Impossibility Objection, if the Will Theory is correct, then it is impossible for young children, the unconscious, and the dead to have moral and legal rights. I formulated what I called the Contemporary Will Theory, a Hartian theory of the function of moral and legal rights.

I argued that the Contemporary Will Theory can overcome the Impossibility Objection. That case proceeded in two steps. The first step was to consider the unconscious and the dead. I argued that if it is possible for someone to give valid prior consent to actions that occur while they are unconscious or after they die, then, according to the Contemporary Will Theory, it is possible for the unconscious and the dead to have moral and legal rights. I suggested that it is possible for someone to give such valid prior consent. After all, individuals give valid prior consent to surgery that will occur while they are unconscious due to general anaesthetic. And individuals give valid prior consent to the use of their organs and their property after they die. The second step was to consider children. I argued that if it is possible for adults to give

valid subsequent consent to actions that occurred when they were children, then according to the Contemporary Will Theory, it is possible for children to have moral and legal rights. I suggested that the notion of subsequent consent is at least somewhat plausible, and can be defended from a prominent objection. Nevertheless, the notion of valid subsequent consent remains more contentious than that of valid prior consent. Accordingly, children provide a ‘test-case’ for the Will Theory—though not in the way that Neil MacCormick envisaged when he first used that phrase.

The Impossibility Objection is only one of the objections against the Will Theory. As a result, even if the Will Theory can avoid the Impossibility Objection, this is not a knock-down argument for the Will Theory. To provide a complete defence of the Will Theory, there are others questions that must be answered. For example, can the Will Theory accommodate the possibility of rights that no one is ever in a position to waive? (Arguably, the right against being enslaved is like this.) *Should* the Will Theory accommodate the possibility of such rights? These are interesting questions for future research.

List of Academic References

- Alexander L, 'The Moral Magic of Consent (II)' (1996) 2 Legal Theory 165
- , 'The Ontology of Consent' (2014) 55 Analytic Philosophy 102
- Alexander L, Hurd H and Westen P, 'Consent Does Not Require Communication: A Reply to Dougherty' (2016) 35 Law and Philosophy 655
- Anderson MJ, 'Negotiating Sex' (2005) 78 Southern California Law Review 1401
- Andersson A-KM, 'Rights Bearers and Rights Functions' (2015) 172 Philosophical Studies 1625
- Archard D, *Sexual Consent* (Westview Press 1998)
- , 'The Wrong of Rape' (2007) 57 The Philosophical Quarterly 374
- , 'Sexual Consent' in Andreas Müller and Peter Schaber (eds), *The Routledge Handbook of the Ethics of Consent* (Routledge 2018)
- Aurelius M, *Meditations* (Maxwell Staniforth tr, New Ed edition, Penguin 2004)
- Barnett RE, 'A Consent Theory of Contract' (1986) 86 Columbia Law Review 269
- Benn P, 'Is Sex Morally Special?' (1999) 16 Journal of Applied Philosophy 235
- Black O, 'Two Theories of Agreement' (2007) 13 Legal Theory 1

Bolinger RJ, 'Moral Risk and Communicating Consent' (2019) 47 *Philosophy & Public Affairs* 179

Bowen J, 'Beyond Normative Control: Against the Will Theory of Rights' (2020) 50 *Canadian Journal of Philosophy* 427

Bratman M, 'I Intend That We J', *Faces of Intention: Selected Essays on Intention and Agency* (Cambridge University Press 1999)

——, 'Shared Intention and Mutual Obligation', *Faces of Intention: Selected Essays on Intention and Agency* (Cambridge University Press 1999)

Brown C, 'Sex Crimes and Misdemeanours' (2020) 177 *Philosophical Studies* 1363

Bullock EC, 'Valid Consent' in Andreas Müller and Peter Schaber (eds), *The Routledge Handbook of the Ethics of Consent* (Routledge 2018)

Cave E, 'Valid Consent to Medical Treatment' [2020] *Journal of Medical Ethics* 1

Chadha K, 'Sexual Consent and Having Sex Together' (2020) 40 *Oxford Journal of Legal Studies* 619

——, 'Conditional Consent' [2021] *Law and Philosophy*
<<https://doi.org/10.1007/s10982-020-09400-8>> accessed 19 February 2021

Chwang E, 'A Defense of Subsequent Consent' (2009) 40 *Journal of Social Philosophy* 117

Conly S, 'Seduction, Rape, and Coercion' (2004) 115 *Ethics* 96

Cornell N, 'The Possibility of Preemptive Forgiving' (2017) 126 *Philosophical Review* 241

Cowan S, 'Choosing Freely: Theoretically Reframing the Concept of Consent' in Rosemary and Cowan Hunter Sharon (ed), *Choice and Consent: Feminist Engagements with Law and Subjectivity*

Cowart MR, 'Understanding Acts of Consent: Using Speech Act Theory to Help Resolve Moral Dilemmas and Legal Disputes' 32

Crisp R, 'Medical Negligence, Assault, Informed Consent, and Autonomy' (1990) 17 *Journal of Law and Society* 77

——, 'Well-Being' in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2017, Metaphysics Research Lab, Stanford University 2017) <<https://plato.stanford.edu/archives/fall2017/entries/well-being/>> accessed 27 May 2020

Cruft R, 'Rights: Beyond Interest Theory and Will Theory?' (2004) 23 *Law and Philosophy* 347

Davis JK, 'Precedent Autonomy and Subsequent Consent' (2004) 7 *Ethical Theory and Moral Practice* 267

Dempsey MM, 'Victimless Conduct and the Volenti Maxim: How Consent Works' (2013) 7 *Criminal Law and Philosophy* 11

Director S, 'Consent's Dominion: Dementia and Prior Consent to Sexual Relations' (2019) 33 *Bioethics* 1065

Doig GA and Wortley N, 'Conditional Consent? An Emerging Concept in the Law of Rape' (2013) 77 *The Journal of Criminal Law* 286

Dougherty T, 'Sex, Lies, and Consent' (2013) 123 *Ethics* 717

——, 'Yes Means Yes: Consent as Communication' (2015) 43 *Philosophy & Public Affairs* 224

——, 'Affirmative Consent and Due Diligence' (2018) 46 *Philosophy & Public Affairs* 90

——, 'Consent, Communication, and Abandonment' (2019) 38 *Law and Philosophy* 387

——, 'Coerced Consent with an Unknown Future' [forthcoming] *Philosophy and Phenomenological Research*

——, *The Scope of Consent* (Oxford University Press forthcoming)

Dworkin A, *Intercourse* (Secker & Warburg 1987)

Edgington D, 'On Conditionals' (1995) 104 *Mind* 235

——, 'Conditionals' in Lou Goble (ed), *The Blackwell Guide to Philosophical Logic* (Blackwell 2001)

Edwards J, 'Harm Principles' (2014) 20 *Legal Theory* 253

Enoch D, 'Hypothetical Consent and the Value(s) of Autonomy' (2017) 128 *Ethics* 6

Estrich S, *Real Rape* (Harvard University Press 1984)

Fabre C, 'Constitutionalising Social Rights' (1998) 6 *Journal of Political Philosophy* 263

——, 'Posthumous Rights' in Matthew H Kramer and others (eds), *The Legacy of HLA Hart: Legal, Political, and Moral Philosophy* (Oxford University Press 2008)

Feinberg J, 'Legal Paternalism' (1971) 1 *Canadian Journal of Philosophy* 105

——, *Harm to Self* (Oxford University Press 1986)

——, 'Victims' Excuses: The Case of Fraudulently Procured Consent' (1986) 96 *Ethics* 330

——, *Harm to Others*, vol 1 (Oxford University Press 1987)

Ferrero L, 'Conditional Intentions' (2009) 43 *Noûs* 700

——, 'Can I Only Intend My Own Actions?' in David Shoemaker (ed), *Oxford Studies in Agency and Responsibility*, vol 1 (Oxford University Press 2013)

Ferzan KK, 'Consent, Culpability, and the Law of Rape' (2016) 13 *Ohio State Journal of Criminal Law* 43

——, 'The Bluff: The Power of Insincere Actions' (2017) 23 *Legal Theory* 168

——, 'Consent, Culpability, and the Law of Rape' 13 *Ohio State Journal of Criminal Law* 397

Ferzan KK and Westen P, 'How to Think (Like a Lawyer) About Rape' (2017) 11 Criminal Law and Philosophy 759

Fischel JJ, *Screw Consent: A Better Politics of Sexual Justice* (University of California Press 2019)

Fried C, *Right and Wrong* (Harvard University Press 1978)

——, *Contract as Promise* (Harvard University Press 1981)

Frowe H, 'Claim Rights, Duties, and Lesser-Evil Justifications' (2015) 89 Aristotelian Society Supplementary Volume 267

——, 'The Just War Framework' in Seth Lazar and Helen Frowe (eds), *The Oxford Handbook of Ethics of War* (Oxford University Press 2018)

Gardner J, 'The Wrongness of Rape', *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press 2007)

——, 'The Opposite of Rape' (2018) 38 Oxford Journal of Legal Studies 48

Gardner J and Shute S, 'The Wrongness of Rape', *Oxford Essays in Jurisprudence* (Clarendon Press 2000)

Gardner P, 'Paternalism and Consent in Education, or One Day You'll Be Grateful' (1983) 17 Journal of Philosophy of Education 57

Gardner S, 'Appreciating Olugboja' (1996) 16 Legal Studies 275

- Gersen JE and Suk J, 'Timing of Consent' in Frank Fagan and Saul Levmore (eds), *The Timing of Lawmaking* (Edward Elgar Publishing 2017)
- Gerver M, 'Inferring Consent Without Communication' (2020) 46 *Social Theory and Practice* 27
- Gibson M, 'Deceptive Sexual Relations: A Theory of Criminal Liability' (2020) 40 *Oxford Journal of Legal Studies* 82
- Gilbert M, 'Is an Agreement an Exchange of Promises?' (1993) 90 *The Journal of Philosophy* 627
- Green L, 'Pornographies' (2000) 8 *Journal of Political Philosophy* 27
- Gross H, 'Rape, Moralism, and Human Rights' [2007] *Criminal Law Review* 220
- Harman E, 'Creation Ethics: The Moral Status of Early Fetuses and the Ethics of Abortion' (1999) 28 *Philosophy & Public Affairs* 310
- Hart HLA, 'Are There Any Natural Rights?' (1955) 64 *Philosophical Review* 175
- , 'Legal Rights', *Essays on Bentham: Jurisprudence and Political Theory* (Oxford University Press 1982)
- Hartogh GD, 'Can Consent Be Presumed?' (2011) 28 *Journal of Applied Philosophy* 295
- Healey R, 'Consent, Rights, and Reasons for Action' (2019) 13 *Criminal Law and Philosophy* 499

Herring J, 'Does Yes Mean Yes? The Criminal Law and Mistaken Consent to Sexual Activity' (2002) 22 Singapore Law Review 182

——, 'Mistaken Sex' [2005] Criminal Law Review 511

Hieronymi P, 'Articulating an Uncompromising Forgiveness' (2001) 62 Philosophy and Phenomenological Research 529

Hill TE, 'Hypothetical Consent in Kantian Constructivism' (2001) 18 Social Philosophy and Policy 300

Hobbes T, *Leviathan* (WG Pogson Smith ed, Clarendon Press 1965)

Hurd HM, 'The Moral Magic of Consent' (1996) 2 Legal Theory 121

Hurd HM and Moore MS, 'The Hohfeldian Analysis of Rights' (2018) 63 The American Journal of Jurisprudence 295

Husak D, 'Paternalism and Consent' in Franklin Miller and Alan Wertheimer (eds), *The Ethics of Consent: Theory and Practice* (2010)

Jarvis P, 'The Timing of Consent' [2019] Criminal Law Review 394

Judith Jarvis Thomson, *The Realm of Rights* (Harvard University Press 1990)

Kennedy C, 'Criminalising Deceptive Sex: Sex, Identity and Recognition' (2021) 41 Legal Studies 91

Kramer MH, 'Do Animals and Dead People Have Legal Rights' (2001) 14 Canadian Journal of Law and Jurisprudence 29

——, ‘On No-Rights and No Rights’ (2019) 64 *The American Journal of Jurisprudence* 213

Kramer MH and Steiner H, ‘Theories of Rights: Is There a Third Way?’ (2005) 27 *Oxford Journal of Legal Studies* 281

Kratzer A, *Modals and Conditionals* (Oxford University Press 2012)

Kukla R, ‘That’s What She Said: The Language of Sexual Negotiation’ (2018) 129 *Ethics* 70

Liberto H, ‘The Problem with Sexual Promises’ (2017) 127 *Ethics* 383

——, ‘Intention and Sexual Consent’ (2017) 20 *Philosophical Explorations* 127

Locke J, *Two Treatises of Government* (Thomas Hollis ed, A Millar and others 1764)

MacCormick N, ‘Children’s Rights: A Test-Case for Theories of Right’, *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Oxford University Press 1984)

MacKinnon CA, *Toward a Feminist Theory of the State* (Harvard University Press 1989)

——, ‘Rape Redefined’ (2016) 10 *Harvard Law & Policy Review* 431

Malm HM, ‘The Ontological Status of Consent and Its Implications for the Law on Rape’ (1996) 2 *Legal Theory* 147

Manson NC, ‘Permissive Consent: A Robust Reason-Changing Account’ (2016) 173 *Philosophical Studies* 3317

——, ‘How Not to Think about the Ethics of Deceiving into Sex’ (2017) 127 *Ethics* 415

Manson NM, ‘The Scope of Consent’ in Andreas Müller and Peter Schaber (eds), *The Routledge Handbook of the Ethics of Consent* (Routledge 2018)

McGregor J, *Is It Rape? On Acquaintance Rape and Taking Women’s Sexual Consent Seriously* (Routledge 2005)

McKeever N, ‘Can a Woman Rape a Man and Why Does It Matter?’ (2019) 13 *Criminal Law and Philosophy* 599.

Mill JS, ‘On Liberty’, *The Collected Works of John Stuart Mill*, vol 18 (University of Toronto Press 1977)

Millar TM, ‘Toward a Performance Model of Sex’ in Jaclyn Friedman and Jessica Valenti (eds), *Yes Means Yes: Visions of Female Sexual Power and a World Without Rape* (Seal Press 2008)

Miller FG and Wertheimer A, ‘Preface to a Theory of Consent Transactions: Beyond Valid Consent’, *The Ethics of Consent: Theory and Practice* (Oxford University Press)

Morgan S, ‘Dark Desires’ (2003) 6 *Ethical Theory and Moral Practice* 377

Na’aman O, ‘Can We Intend the Past?’ (2017) 12 *Journal of Ethics and Social Philosophy* 304

Nieswandt K, 'Authority and Interest in the Theory of Right' in David Plunkett, Scott Shapiro and Kevin Toh (eds), *Dimensions of Normativity: New Essays on Metaethics and Jurisprudence* (Oxford University Press)

Owens D, 'Promising without Intending' (2008) 105 *The Journal of Philosophy* 737

——, 'The Possibility of Consent' (2011) 24 *Ratio* 402

——, *Shaping the Normative Landscape* (Oxford University Press 2012)

Pallikkathayil J, 'The Possibility of Choice: Three Accounts of the Problem with Coercion' (2011) 11 *Philosophers' Imprint* 1

Palmer T, 'Distinguishing Sex from Sexual Violation: Consent, Negotiation and Freedom to Negotiate' in Alan Reed and others (eds), *Consent: Domestic and Comparative Perspectives* (Routledge 2017)

Parfit D, *On What Matters*, vol 1 (Samuel Scheffler ed, Oxford University Press 2011)

Penner J, 'Legal Powers and the Will and Interest Theories of Rights' in Mark McBride (ed), *New Essays on the Nature of Rights* (Hart Publishing 2017)

Penner JE, 'The Analysis of Rights' (1997) 10 *Ratio Juris* 300

Preda A, 'Rights: Concept and Justification' (2015) 28 *Ratio Juris* 408

Primoratz I, 'Sexual Morality: Is Consent Enough?' (2001) 4 *Ethical Theory and Moral Practice* 201

Pundik A, 'Coercion and Deception in Sexual Relations' (2015) 28 Canadian Journal of Law & Jurisprudence 97

Quong J, 'Rights Against Harm' (2015) 89 Aristotelian Society Supplementary Volume 249

Rape, Abuse, and Incest National Network, 'Victims of Sexual Violence: Statistics' <<https://www.rainn.org/statistics/victims-sexual-violence>> accessed 12 May 2021

Rape Crisis England and Wales, 'Statistics about Sexual Violence' <<http://rapecrisis.org.uk/get-informed/about-sexual-violence/statistics-sexual-violence/>> accessed 12 May 2021

Raz J, *The Morality of Freedom* (Clarendon Press 1986)

Reid R, 'Exploring the Controversial Fetish of Race Play' *Metro* (3 November 2017) <<https://metro.co.uk/2017/11/03/exploring-the-controversial-fetish-of-race-play-7051288/>>

Ripstein A, 'Beyond the Harm Principle' (2006) 34 Philosophy & Public Affairs 215

Saunders B, 'Reformulating Mill's Harm Principle' (2016) 125 Mind 1005

Schaber P, 'The Volenti Maxim' (2020) 24 The Journal of Ethics 79

Schulhofer SJ, *Unwanted Sex* (Harvard University Press 2000)

Simester AP and others, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (6 edition, Hart Publishing 2016)

Simmons AJ, *Moral Principles and Political Obligations* (Princeton University Press 1979)

Sreekumar S, 'Some Conceptual Aspects of Temporality and the Ability to Possess Rights' (2015) 28 *Ratio Juris* 330

Sreenivasan G, 'A Hybrid Theory of Claim-Rights' (2005) 25 *Oxford Journal of Legal Studies* 257

Steiner H, 'Working Rights' in Matthew Kramer, Nigel Simmonds and Hillel Steiner (eds), *A Debate Over Rights: Philosophical Enquiries* (Clarendon Press 1998)

Syrota G, 'Rape: When Does Fraud Vitiating Consent?' 25 *Western Australia Law Review* 334

Tadros V, 'Rape Without Consent' (2006) 26 *Oxford Journal of Legal Studies* 515

——, 'Consent to Harm' (2011) 64 *Current Legal Problems* 23

——, *Wrongs and Crimes* (Oxford University Press 2016)

——, 'Appropriate Normative Powers' (2020) 94 *Aristotelian Society Supplementary Volume* 301

——, 'Consent to Sex in an Unjust World' (2021) 131 *Ethics* 293

Tea Consent (Blue Seat Studios 2015)

<<https://www.youtube.com/watch?v=oQbei5JGiT8>> accessed 15 September 2020

Temkin J and Ashworth A, 'The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent' [2004] *Criminal Law Review* 328

Thompson M, 'What Is It to Wrong Someone? A Puzzle about Justice' in R Jay Wallace and others (eds), *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (Clarendon Press 2004)

Tippett EC, 'The Legal Implications of the MeToo Movement' (2018) 103 Minnesota Law Review 74

Van De Veer D, 'Paternalism and Subsequent Consent' (1979) 9 Canadian Journal of Philosophy 631

Veatch RM, 'Abandoning Informed Consent' (1995) 25 The Hastings Center Report 5

Waldron J, 'A Right to Do Wrong' (1981) 92 Ethics 21

Weare S, "'Oh You're a Guy, How Could You Be Raped by a Woman, That Makes No Sense": Towards a Case for Legally Recognising and Labelling "Forced-to-Penetrate" Cases as Rape' (2018) 14 International Journal of Law in Context 110

Webber J, 'Sex' (2009) 84 Philosophy 233

Wellman C, *Real Rights* (Oxford University Press 1995)

——, 'The Concept of Fetal Rights' (2002) 21 Law and Philosophy 65

Wellman CH, 'The Rights Forfeiture Theory of Punishment' (2012) 122 Ethics 371

Wenar L, 'The Nature of Rights' (2005) 33 Philosophy & Public Affairs 223

——, 'The Nature of Claim-Rights' (2013) 123 Ethics 202

Wertheimer A, *Consent to Sexual Relations* (Cambridge University Press 2003)

Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*
(Walter Wheeler Cook ed, Yale University Press 1920)

Westen P, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct* (Ashgate 2004)

Witmer-Rich J, 'It's Good to Be Autonomous: Prospective Consent, Retrospective Consent, and the Foundation of Consent in the Criminal Law' (2011) 5 Criminal Law and Philosophy 377

List of Legal References

1. Case Law

Assange v Swedish Prosecution Authority [2011] EWHC 2849 (Admin).

New York v Bink 444 NYS.2d 237 (1981) (Appellate Division of the Supreme Court of New York).

R (on the application of F) v DPP and A [2013] EWHC 945 (Admin).

R v Clarence (1889) 22 QBD 23.

R v Dica (Mohammed) [2004] EWCA Crim 1103.

R v Flattery (1877) QBD 410.

R v Jheeta [2007] EWCA 1699.

R v Konzani (Feston) [2005] EWCA Crim 706.

R v Linekar (Gareth) [1995] QB 250 (Court of Appeal, Criminal Division).

R v McNally [2013] EWCA Crim 1051.

R v Papadimitropoulos (1957) 98 CLR 249 (High Court of Australia).

2. Statute Law

Sexual Offences Act 2003:

—s 1.

—s 2.

—s 3.

—s 74.