“The Significance of Consent”

Arudra Burra
UCLA Law and Philosophy Program

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Arudra Burra (burra@law.ucla.edu)

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The Significance of Consent

I

Other things being equal, it is wrong to have sex with another without their consent. We can say this another way: when we have sex with another without their consent, we are perpetrating a certain kind of wrong upon them, i.e. the wrong of *non-consensual* sex. In this way the absence of consent can sometimes be used to characterize certain wrongs: theft as the non-consensual taking of property, battery as non-consensual touching, kidnapping as the non-consensual transportation of people, and so on.

What instances of such wrongs seem to share is that there is nothing intrinsically wrong with the activity that is performed (having sex or using someone's car or transporting people), but we wrong others when we perform the activity without their consent. The ubiquity of such characterizations across different spheres or domains of human activity might lead us to think that these are all instances of some broader moral kind, that of "non-consensual Φings," and that what makes these acts wrong is that they instantiate this broader kind. This thought is reinforced by the fact that we can present paired cases which are identical in all respects save that regarding consent, in which the act done with consent is permissible while the same act done without consent is impermissible.[1]

So it might seem that the absence of consent plays an important part of the explanation of why such actions are wrong. This in turn suggests a project of moral enquiry directed at uncovering the nature of the general kind of "non-consensual Φings." One would hope that such an enquiry would reveal some deep facts about the importance of consent, which in turn would explain why it seems correct to characterize a range of different wrongs in terms of it.

[1] I used "wrongful" and "impermissible" interchangeably.

Arudra Burra (burra@law.ucla.edu)

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I believe that this kind of enquiry is misguided: there is no general right against non-consensual actions from which the more particular rights against non-consensual sex and non-consensual property-takings derive. Rather, non-consensual actions, when they are wrongful, are wrongful for different reasons in different cases: or as I shall sometimes put it, non-consensual actions share a common structure, but need not share any common "wrong-making" features. It is sometimes useful to regard the class of non-consensual actions as a single, unified, moral kind; and it is neither false nor empty to say that some acts are wrong because they are non-consensual. But, I will argue, such assertions can be unhelpful and misleading.

As an analogy, consider an example from the work of Joseph Raz.[2] One might have a theory about freedom of expression according to which the grounds upon which different types of speech are protected vary according to the type of expression in question. The reasons why we have rights to freedom of political expression might be thought to be quite different from the reasons why we have rights to freedom of commercial expression or artistic or scientific expression.

This may in turn affect the contours of the right: there may be reasons to restrict the ability of corporations to sponsor advertisements in political campaigns which are simply not applicable to the sponsorship of advertisements in marketing for products. It would not be incorrect to describe laws governing political campaigning and those governing fair marketing practices as both involving "restrictions to freedom of expression." But it would be a mistake to think that there is some general "core" right to freedom of expression from which all these more specific rights are derived. Rather, one would want to say that there are a number of distinct rights, with distinct grounds, which it might be useful to unify, for some purposes, under the umbrella term "right to freedom of expression."[3] Contrast this with, say, the right to life. There are a number of ways one

[2] Raz 1988, 169-70.

[3] I am not endorsing this view as a theory of freedom of expression; merely pointing out the structural similarities between it and the view I am defending in the case of consent.

Arudra Burra (burra@law.ucla.edu)

might kill another person, but it is not as though there are *independent* rights against being poisoned and being shot at; that we have such rights derives from the core right we have against being killed. My claim is that the right against non-consensual Φings is like the right of freedom of expression, rather than the right to life.

I suggest an alternative picture of the role played by the absence of consent in explanations of why certain acts are impermissible. This role is mediated by the value or importance of having control over certain aspects of our lives in certain circumstances, a control which we can exercise by signaling our desires, wishes, and preferences, and having these signals respected. Under certain conditions, expressing and withholding consent are ways in which we can communicate this information. The wrongfulness of doing something without another's consent will then depend (amongst other things) upon why control of this sort was morally important to begin with. This importance, in turn, is contingent and variable: in particular, it might depend upon quite fine-grained empirical analysis.[4]

The claim that such control *is* important in some domain – say the domain of sexual activity or property transfers – is a substantive moral claim; establishing it may require appealing to an underlying moral theory (e.g. a utilitarian or contractarian one), if we have one. If this is correct, I argue, it follows that we cannot ground the morality of sexual relations or property transactions in terms of the notion of consent, because the explanatory power of consent itself rests upon substantive moral theorizing in these domains.

II

Let me begin by noting that "non-consent" seems to cover at least four different kinds of cases. Consider two ways in which I might steal something that you own (a statuette, say):

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[4] Here I borrow the framework provided by Thomas Scanlon's account of the "Value of Choice" in Scanlon 1986.

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(1) I pocket it while your attention is elsewhere;

(2) I ask you if I may take it; you refuse, but I take it anyway.

Both (1) and (2) involve taking your statuette without your consent, and thereby perpetrating, let us assume, the wrong of theft.[5] The difference is that in one case you fail to give consent, while in the other you expressly withhold it: my taking of the statuette is surreptitious in one case, and defiant in the other.

Now consider two other ways in which I might take your statuette:

(3) By means of coercion: I threaten to kill you unless you let me take your statuette;

(4) By means of deception: I tell you to give it to me temporarily so I can have it cleaned and returned to you.

Now clearly (3) and (4) also involve the wrong of theft, though they may involve other wrongs as well (such as the wrong of threatening to kill you).[6]

We might wonder, though, whether they involve taking the statuette without your consent: for we may imagine that, as a result of my threat or lie, you perform actions (saying "Sure, go ahead," or handing it over) which would constitute acts of consent absent my threat or lie. But it seems clear that someone who thought that theft

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[5] I should emphasize at the outset that my own focus in this paper is on moral rather than legal issues. It is just that the moral questions seem to be most naturally discussed in a highly 'legalistic' vocabulary, and can draw upon intuitions that are most vivid in legal contexts. (It is an interesting question just how to understand concepts such as 'theft' and 'rape' which have a home in both legal and moral contexts, and as a genealogical matter, I am not sure which of these has priority; I think the direction of influence can go both ways).

At any rate, my use of legal terms here and elsewhere is for the most part informal and non-technical. My arguments do not depend upon claims about what the law is; nor do they have consequences – at least in any immediate sense – for what the law should be, or for how legal actors should behave.

[6] See Fletcher 1978, 3-49 for an interesting and pertinent discussion of the development of theft law. Traditionally, (1)-(4) would have been regarded as very different sorts of crimes: distinctions were made, for instance, between robbery, burglary, larceny, and embezzlement, because the focus of attention was on the *form* that the action took, e.g. whether or not it was 'manifest'. As Fletcher points out, the "unification" of theft law was the result of shifting focus from the form of the act to the protection of the underlying legal interest; and it is with respect to that legal interest that the cases of taking the statuette without consent, and taking the statuette with consent induced by force or fraud, belong to a single category.

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constitutively involved the non-consensual taking of someone's property, and thought that these were acts of theft, would want to say that they too also involved "non-consent" in *some* sense.

As long as we grant this, I don't think it matters much whether we adopt a definition of consent upon which your acts in (3) and (4) are genuine cases of consent. One who accepts that you consent in (3) and (4) may nevertheless take me to have stolen your statuette, by taking it non-consensually. They might add that what matters, from a moral point of view, is not simply whether there is consent, but whether it is valid: and claim that coercion and deception somehow "vitiate" consent. Either way, someone who takes acts of non-consent to form a unified moral kind will have to decide what to say about cases like (3) and (4), involving coercion and deception. They might say that such cases shouldn't fall at all into the category of "non-consent" at all – that the wrongs involved are of a quite different kind. But I think that someone who thought that acts of non-consent formed a unified moral kind would find this kind of position unsatisfactory.

My main argument against the view that the class of non-consensual Φings forms a unified moral kind proceeds via an explanation of how coercion and deception vitiate consent in cases like (3) and (4). I claim that they do so because they constitute domain-specific violations of duties involving getting other people to do things.[7] The content and grounds of these duties will depend upon the domain in question, and upon various empirical questions. If that is the case, and if cases like (3) and (4) should be considered amongst the class of "non-consensual acts" in some sense, then it follows that the class of non-consensual acts doesn't form a unified moral kind.

I present the argument in §IV. But first it will help to make our terminology a bit more precise. That is the task of the following section.

III

[7] I focus on the case of deception, but a parallel argument could be made for the case of coercion.

Arudra Burra (burra@law.ucla.edu)

What is it for S to consent to P's Φing, where 'Φ' names a possible action of P's under some description? Consent seems to come in many forms: one might differentiate between actual and hypothetical or even implied consent; between explicit and implicit or tacit consent; between prospective and retrospective consent. In what follows, I will ignore these complexities, and restrict my attention to the clearest, central cases, in which one person gives his or her actual consent explicitly to the contemplated action of another. Because instances of such consent are in fact relatively rare in ordinary life, it may seem somewhat unnatural or artificial to consider examples in which consent is given in this way.

Any definition will involve an element of stipulation, and I will adopt as broad a definition as possible, keeping in mind the restriction to actual, explicit consent. I will treat 'consent' as roughly synonymous with 'agree': S consents to P's Φing just in case S agrees that P Φ.[8] This accords to some extent with the dictionary meaning: according to the *Oxford English Dictionary*, when 'consent' is used as a verb, it means (among other things) "voluntarily to accede to or acquiesce in what another proposes or desires; to agree, comply, yield." Used as a noun, 'consent' means "voluntary agreement to or acquiescence in what another proposes or desires; compliance, concurrence, permission."[9]

Because my focus is on actual, explicitly signaled consent, let us take consent in its primary sense to be an *act*.[10] To say that S consents to P's doing Φ is to say that S

[8] Thanks to Gil Harman for this suggestion. While there is something very odd about the locution "I agree that you have sex with me," the locution "I agree to have sex with you" seems fine. This is not of the form 'S agrees that P Φ,' but that's really because 'have sex' is being used here as a transitive verb, and "I have sex with you" is equivalent to "You have sex with me."

[9] My aim here is neither to provide an analysis of the term, nor a "real definition" of what consent is. What is important is to have a clear and consistent vocabulary with which to discuss the relevant moral issues, one that is not too far out of step with the way in which the word is used in legal and moral discourse. Because this discourse is not uniform, an alternative stipulation might also do the job.

[10] So I will not be concerned with questions about whether consent *always* refers to an act (as opposed, say, to a state of mind). The question is what to make of the significance of consent in its most vivid, uncontroversial manifestations.

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performs a certain speech-act which has as its object a possible action of P's. S's consent, understood thus, does not require any particular pro-attitude towards P's doing Φ. To consent to Φing is not to endorse or express approval of Φing: one might consent reluctantly or regretfully or wistfully, one might consent to another's Φing while hoping that they won't Φ, and so forth.[11]

To consent to another's act is, then, to perform a certain illocutionary speech-act.[12] The conditions under which it is proper to say of S that she consented to P's proposal to Φ are minimal: S must be speaking sincerely, in a non-special context, in a language that she understands; an attribution of consent fails, e.g., when one is merely rehearsing the words which would ordinarily signify that one has consented. S's words must have 'uptake' on the part of P (one cannot *privately* consent to another's action). S must intend by his words to agree to *P*'s doing Φ (rather than Q or R's doing Φ), and so on.

I will not attempt to further spell out what might be called the performance conditions for the speech-act of consent. For the most part, the appropriate "input-output" conditions under which speech-acts are acts of consent will be no different from the input-output conditions for any kind of communication via direct, contentful speech. Giving one's consent is, as Judith Jarvis Thomson would put it, a "more-or-less solemn affair" – but not *too* solemn.[13] Note, on this "action-theoretic" conception of consent, that the performance conditions are non-moral: we can identify an act as an act of consent without appeal to any moral considerations whatsoever.

On this view, the following scenario does not involve an act of consent:

[11] Here I follow Kleinig 1982, 93-96.

[12] Which we might also gloss as the speech-act of "giving" or "expressing" consent.

[13] The reference is to her account of what she calls "word-giving" in chapter twelve of Thomson 1990.

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(1) P asks S "May I take your statuette?" S says "Yes, of course you may." But S's reason for saying so is that, being rather deaf, he thinks that P's request was not to take his statuette, but to use his rest-room.

As I noted above, this use of 'consent' does not perfectly track ordinary language. For consider the following scenario:

(2) P asks S "May I borrow take your statuette?" S says "Yes, of course you may." But S's reason for saying so is that P has pulled out a gun and threatened to kill S if he refuses to give him the statuette.

Did S consent to P's borrowing taking his statuette? One is inclined to say that he did not: he may have uttered the relevant words with the relevant references and intentions, but he didn't *really* consent.

Let us say that S's consent to P's Φing is *effective* when, by consenting, S gives up a claim against P that P not Φ.[14] To state that S's consent is effective is to state a particular moral fact: that S does not have a claim against P that P not Φ; or equivalently, that P has a privilege against S as regards Φing.[15] It also indicates the way in which S comes to lack this claim, viz. by consenting to P's Φing.[16]

[14] To say that S's consent to P's Φing is effective presupposes that S has the prior claim against P that P not Φ; the felicity conditions for attributions of effective consent require that S (a) has the prior claim, and (b) has the power to give up this claim via consent. (One may have a claim but lack the power to give it up by one's consent: at election time I may have a claim against an election official that they not interfere with my entering the polling booth, but I retain this claim even if I consent to such interference. Of course, there may be other ways in which I can bring it about that I no longer have this claim, e.g. by changing my citizenship; and I might choose not to exercise my right not to be interfered with, by not attempting to enter a polling booth).

[15] For this terminology, see Thomson 1990. What I call effective consent Wertheimer (2003, 119-20) calls "morally transformative consent."

[16] For consenting is not the only way in which one comes to lack a claim against another person. I have a claim against others that they not cause me harm, but I might *forfeit* that claim by unjustly trying to cause them harm. To take another case, if P has promised me that she will Φ, I have a claim against P that she Φ, which I might give up by releasing her from the promise.

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In case (2), clearly S does not give up his claim that P not take his statuette when his agreement is extracted at gunpoint. I will say that in such cases S did, in fact, consent to P's taking his car, but that this consent is ineffective because it was coerced, our intuitions to the contrary being explained on pragmatic grounds, since to say that A has consented to B's doing something carries the pragmatic implicature that A's consent is effective.

Why might S's consent to P's Φing be ineffective? The traditional answer is as follows. In one class of cases, S lacks certain important cognitive or volitional capacities, e.g. for careful deliberation, or for self-restraint in the face of temptation for short-term gain, which we take to be serious enough to reduce S's *competence* to give effective consent: examples might include severe intoxication, suffering, or certain developmental disorders.[17]

On the traditional view, consent is also ineffective when it is not fully *voluntary*. The conditions of voluntariness, again, are stronger than the conditions for performance of the speech-act of consent; one is not talking of cases of hypnosis or brainwashing, in which it would be inappropriate to say that S acted at all. Coercion and fraud fall into the category of inducements to consent which render it involuntary – either by depriving the agent of eligible alternatives, or by producing false beliefs that are in some way material to the decision to consent. These conditions of choice and information are typically referred to as conditions of *voluntariness*.[18]

[17] Sometimes it may be hard to distinguish between the conditions of competence required for performing the speech-act of consent from the conditions of competence required for speech-acts of consent to be *effective*: in these cases, I am assuming that the agent has whatever capacities are required to meet the performance conditions for the speech-act of consent.

[18] There may be additional conditions of voluntariness as well: one may think that certain forms of psychological manipulation render consent involuntary, even when it is neither coercive or deceptive. I ignore these complications here.

Arudra Burra (burra@law.ucla.edu)

Let us refer to the competence and voluntariness conditions collectively as *validity* conditions on consent.[19] On the traditional picture, the validity conditions on consent are non-moral and synchronic: whether or not an agent's consent is valid can be settled simply by examining the agent's options, beliefs, and capacities at the time of consenting. Just what these conditions are, in a given case, is however a matter for moral theorizing; for instance, an important question for bio-ethics is to understand what agents need to know about medical procedures before they can count as having given "informed" consent to being operated upon.

So on this picture, consent is effective if and only if it is valid, and consent is valid if and only if it is both competent and voluntary, where to say that consent is effective is to report a certain moral fact, i.e. that an agent has given up a claim, and to say that consent is valid is to report certain non-moral facts about the conditions of choice, information, and capacity under which the agent consents.

Note that the conditions on valid consent are all what we might call "agent-centered:" whether or not consent is valid depends only upon facts about the consenting agent, specifically facts about the agent's capacities, choices, and beliefs. This in turn provides an explanation for how coercion and fraud render consent ineffective ("vitiate consent"). The idea is that coercion and deception vitiate consent by their effects on the agent, which are such as to render the agent's consent involuntary: coercion reduces the eligible options open to the agent, while deception induces false beliefs in the agent.[20] The

[19] The term "valid consent" is used in different ways by different authors, but all pointing to the same general idea.

[20] See, in the context of a discussion of coercion, Joel Feinberg's insistence that "…since our basic concern is with the degree of voluntariness with which persons can be said to choose their own actions, our attention should be focused mainly on the coercee…" (Feinberg 1985, 146). It should be noted that Feinberg's concern with consent – as defining the boundaries of paternalistic interference with other people's lives – is different from ours. Feinberg seems to think that what voluntariness amounts to may shift according to the use we want to put the concept of consent to in our moral lives; I suspect that he would endorse an agent-centered view of voluntariness even in the cases under consideration here. As I will show below, my own sympathies are with Dripps 1996, 115 who argues in favor of concentrating on what he calls "the author, rather than the target, of coercive pressure."

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explanation is made additionally plausible by the natural thought that coercion constitutively involves the deprivation of options available to another.[21]

Two further comments. First, one complication with an action-theoretic notion of the conditions of validity is that these conditions seem to be context-relative, or, as I shall sometimes put it, *domain-specific*. If I drunkenly go ahead and tell someone they can sleep with me, it has been argued that my consent is invalid and so does not constitute a defense to a charge of wrongdoing.[22] But surely if I drunkenly go ahead and tell someone they can use my bathroom (assuming everything else about me and my situation is the same), my consent *is* valid? (It would be crazy to then accuse someone of trespass, and claim that one's consent was invalid and so doesn't count as a defense). To take another example, circumstances that don't render a confession involuntary may nevertheless be sufficient to vitiate a will.[23]

Everyone who writes about consent acknowledges the phenomenon, but their theories tend to leave little room for explaining how this could be the case. If the conditions of valid consent are purely action-theoretic, the content of *what* is consented to should not make a difference to whether or not consent is valid. To take another example, the facts that determine whether or not I have intentionally lifted some object should not depend upon whether the object is a grenade or a cricket ball.[24]

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[21] In chapter one of my dissertation, "Coercion and Moral Explanation," I argue that such accounts of coercion are mistaken.

[22] See Wertheimer's discussion of the Brown University Code of Student Conduct, according to which one commits an offense if one has sexual relations with another who has a "mental or physical incapacity or impairment of which the offending student was aware or should have been aware." (Wertheimer 2003, 234).

[23] A point made in an unpublished note by Kent Greenawalt, quoted in Feinberg 1985, 121. It may seem that neither the act of making a will nor the act of making a confession have anything to do with *consent*, but it's relatively easy to fix this. ("Do you consent to my turning on the tape-recorder so that we can record your confession?"). The general point has been noted by many writers, e.g. Dripps 1996, 113-4.

[24] As a matter of folk-psychology, there seem to be important differences in how people judge actions to be intentional or not based on context and the salience of moral features of those actions. This has led Joshua Knobe to claim (in Knobe 2006 and elsewhere) that the concept of intentional action is *not* a purely action-

Arudra Burra (burra@law.ucla.edu)

Finally, note that when S's consent to P's Φing is effective, S gives up a claim against P that P not Φ. *It does not follow that it is permissible for P to Φ*. For there may be other people who have a right against P that P not Φ. If I have your consent to use your car to go to the market, it does not follow that I am thereby permitted to drive it to the market; I may have promised someone else that I won't, or I may come across an injured pedestrian who needs to be taken to hospital, and so forth.

IV

On the picture of consent that I wish to reject, consent is valid, when it is, in virtue of facts about the options open to the consenting agent, the agent's beliefs, and the agent's cognitive and motivational capacities. On this view, these conditions are synchronic, by which I mean that the relevant facts obtain at the time at which consent is given. They are also non-moral: whether or not the validity conditions for consent are met at a time *t* can be determined without moral theorizing. These claims are independent, for one might believe that the validity conditions are non-moral but can include historical facts about the agent, and one might believe that the validity conditions are moral, but can include both synchronic and historical facts about the agent. Nevertheless, they fit together with a certain action-theoretic conception of what valid consent amounts to, and it is with that conception that I am concerned.[25]

On this picture of consent, coercion and deception render consent invalid (and therefore ineffective) by bringing it about that the validity conditions do not obtain: they play a *causal* role in the explanation for why consent is invalid. To use terminology introduced earlier, such explanations of invalidity may be called "agent-centered," for they proceed via the effect of coercion and deception on the choices and beliefs of the agent whose

theoretic one, but is used to mark certain *moral* features of actions. The account of consent developed in this paper is in many respects congenial to his account of intentional action.

[25] Has any actual philosopher subscribed to the conception I am attacking? Given the vast literature on consent, it would be an enormous exegetical exercise to establish that this is in fact a "standard" picture of how consent is vitiated. I will not try to do so: in any case there is a diversity of views, and the assumptions are not always clearly articulated. What matters for my purposes is to articulate a certain framework of what consent is and how it is vitiated, so as to isolate in a clear fashion where the framework fails.

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consent is being assessed for validity. My rejection of the general picture of consent begins with a rejection of agent-centered explanations of invalidity.

Here is a schematic view of agent-centered explanations for the invalidity of consent induced by deception (a similar schema could be constructed for the case of coercion):

1. S consents to P's Φing.
2. For S's consent to be valid, S must be in epistemic conditions **C**.
3. P brings it about that S is not in conditions **C**.
4. Therefore S's consent is invalid.

Given

5. S's consent is effective if and only if it is valid.

We get from (4)

6. S's consent is ineffective.

Assuming that this is a 'felicitous' context, i.e. one in which S has a right against P that P not Φ, then it follows that though S consented to P's Φing, S does not give up this right; so by Φing, P has violated S's right. Though our main interest is in (6), the claim about the ineffectiveness of S's consent, I will focus on (4), the claim that S's consent is invalid.

If this is the correct explanatory schema, then the role of fraud is restricted to premise (3): P's fraud renders consent ineffective by bringing it about that S is not in the necessary epistemic situation for effective consent. I claim that the explanatory schema is incorrect, for it mis-describes the role of fraud in such cases. (1)-(3) taken together might entail (4), the claim that S's consent is invalid, but I deny that they explain *why* S's consent is invalid.[26]

[26] The fact that explanation is a stronger relation than entailment is familiar from discussions of scientific explanation: given certain facts about astronomy and trigonometry, the fact that the shadow cast by a tower

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To show this, I will present a series of cases in which conditions (1)-(3) hold, but in which either (a) it's not clear that (4) holds, or (b) even if (4) holds, the explanation of why it holds varies from case to case.[27] I will call this an argument from *symmetry*: the cases are symmetric with respect to conditions (1)-(3), but they are asymmetric with respect to the question why (4) holds; so (1)-(3) do not tell the whole explanatory story.

I will illustrate the argument from symmetry with the case of epistemically defective consent, though a structurally similar argument could be given for consent rendered invalid by coercion. The case I will discuss involves, not agreements to have sex, but agreements to purchase something valuable – a painting by Vermeer, say.[28]

Let's assume that you buy what you take to be a Vermeer from an art dealer, which turns out to be a clever forgery. This is a situation in which your epistemic status with respect to the painting you purchased is defective: your belief that the painting is a Vermeer is mistaken; you are ignorant of the fact that it is not a Vermeer. The question is what role is played by this epistemic defect in determining whether or not your consent to the dealer taking your money is valid. We can use, as a heuristic, our intuitions about whether your consent was effective: whether, for instance, you have the right to get your money back when you learn about the forgery.

My claim is that your epistemic state – considered purely in terms of your doxastic or psychological state with respect to the painting's status as a Vermeer – is not sufficient to

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is a certain length entails that the tower is a certain height; but it is the height of the tower that explains the length of the shadow, not vice versa.

[27] A very compressed version of what is essentially the same argument (in the case of coercion) is to be found in Thomson 1990, 310-13.

[28] While it is natural to model a purchase – or any contract – as a bilateral promise, it is easy enough to think about some purchases, at least, as involving consent. Simply imagine that when making the purchases, one agrees to let the other party take money out of something like an escrow account. Since the money is already secured, one is then not *promising* to pay money to the other person; though this agreement may be made in exchange for a promise by the other party (e.g. a promise not to withdraw money until the good has been handed over).

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answer this question.[29] But on an agent-centered account of invalid consent, this is the only feature of your situation that should figure in the explanation of how your consent is affected. Therefore agent-centered accounts of consent rendered invalid because of epistemic defects are themselves defective.

Let us assume, then, that you buy a fake Vermeer from an art-dealer, for a price which would be fair if the painting were it in fact a Vermeer. Now consider three sets of cases: call them Innocence, Negligence, and Fault respectively. These names refer to your role and culpability in forming the false belief. Within each set we will consider differences in the role and culpability of the art-dealer in your coming to have this false belief.

First consider Innocence. Let us assume that you have good reasons for believing that the painting is a Vermeer – it looks like a Vermeer, the relevant experts have declared it to be a Vermeer, and so forth. It merely happens to be a very good forgery. Now distinguish:

Mutual innocence

> The art dealer also believes it to be a Vermeer, in good faith, having relied on the relevant experts, etc. He would be devastated to know that the painting is a forgery, perhaps because he paid good money for it as well.

Non-disclosure

> The art dealer knows that the painting is a forgery, and knows that you think it is genuine. He doesn't actively represent the painting to be a forgery (perhaps he lists it as merely "attributed" to Vermeer), but nor does he do anything to disabuse you of your belief.

Fraud

[29] The restriction to doxastic states (which may or may not be purely *psychological*, depending upon one's theory of belief) is an important one: as Paul Benacerraf pointed out to me, there is clearly a sense in which the epistemic state of one who negligently comes to believe the painting is a Vermeer is different from the epistemic state of one who is fraudulently induced into so believing – they have different grounds for belief. More on this below.

Arudra Burra (burra@law.ucla.edu)

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> The art dealer was out to dupe you from the start. He commissioned the forgery, knowing your fondness for Vermeer, and spent a great deal of time winning your trust, and that of the relevant experts.

Now consider Negligence. You don't have good grounds for believing that the painting is a Vermeer: you neglect to consult the relevant experts, who would have told you that the painting was a fake, though a very good one; you are willing to take the art-dealer's word for it. Now we might distinguish the cases of mutual negligence (in which the art-dealer also fails to consult the relevant experts, even though he ought to have), non-disclosure, and fraud on the part of the art-dealer.

Finally, consider the case of Fault. You have good reasons to believe that the painting is *not* a Vermeer: the experts you consult are unanimous in denouncing the painting to be a forgery, but you have an irrational belief in your own powers of discernment. In this case, distinguish between a case in which the art-dealer is innocent – he sides with the experts in thinking that the painting is probably a forgery (but you insist on paying him the price of a genuine Vermeer), and again between fraud and non-disclosure.

Now suppose you discover, incontrovertibly, that the painting is a fake. You go back to the dealer and ask for your money back; he demurs on the grounds that you consented to his taking the money in exchange for your taking the painting; you claim in return that your consent was invalid and that you should therefore get your money back. When asked to explain why your consent was invalid, you point to the fact that it was based upon a false belief with respect to a "material fact": a fact which, had you been aware of it, would have caused you not to buy the painting.[30]

The question is what role your false belief should play in determining whether or not you should be able to get your money back. Suppose, as a general matter, that the falsity of

[30] I am assuming here that if your consent was indeed invalid, then you do have a right to your money back, for it is only valid consent that transfers the right to the money in the escrow account from you to the dealer. So let us suppose that there are no further features – such as the art-dealer's reliance on the money that you have given him – that complicate the situation.

Arudra Burra (burra@law.ucla.edu)

your belief with respect to a material fact is sufficient to invalidate consent. If this is so, then your consent should be invalid in each of the nine cases just considered, since the element of false belief stays the same in each case. If it is the invalidity of consent that determines whether or not you ought to get your money back, then, it would seem, that the answer to whether or not you get your money back should be uniform across all nine cases we have considered. But – as I shall argue in a moment – it simply does *not* seem to be the case that the answer to whether you should get your money back is the same across all cases. So either invalidity requires more than simply your false belief, or what grounds whether or not you should get your money back is something more than invalidity, something that varies across the cases I have considered.

The easiest contrast is between the case of Innocence when the art-dealer has tried to defraud you, and of Fault when the art-dealer is innocent. In the first case, it is clear that you ought to get your money back, and in the second, equally clear that you shouldn't. For in the second case, the art-dealer might very well reply that he had no role to play in your belief about the authenticity of the Vermeer; it was you who chose to believe in its authenticity, and to pay him the price of a real Vermeer: it was your own fault that you got saddled with a fake.

Now take two cases in which the art-dealer is innocent: while he attributes the painting to Vermeer, he acknowledges the authenticity of the painting to be a matter of doubt (he does not know that it is a forgery). Contrast the case in which you are innocent but unlucky (you consult the relevant experts, and they tell you it is genuine), and a case in which you are simply negligent: you neglect to consult the relevant experts, who would have told you that it is a forgery. In the first case it seems to me unclear whether you ought to get your money back or not: the dealer might argue that you "assumed the risk" that the painting was a fake. The second case seems to be closer to the case of fault: you should have to bear the cost of mistake, since it is the result of *your* negligence.

Finally, consider two cases in which the *art-dealer* negligently believes the Vermeer to be genuine: he had access to evidence which would have raised doubts against its

Arudra Burra (burra@law.ucla.edu)

authenticity (evidence, let us say, about where the painting came from, which would not be available to outside experts), but to which he didn't pay sufficient attention. Here it seems to me at least arguable that you have a right to your money back even when you negligently failed to conduct your own independent evaluation of its authenticity (let us assume that in the absence of the evidence in the art-dealer's possession, the experts would have agreed that the painting was authentic). The art-dealer has a higher "duty of care" than you do – based partly on the fact that he has access to this special evidence, and also partly on the fact that he is an art-*dealer*: someone who is expected to have some special expertise in this domain.

The relevant question in every case is: who should be saddled with the fake Vermeer, and at what price? To answer this question we consider various issues: what are the duties of due diligence in the evaluation of authenticity on the part of the seller and the buyer in that market? What duties of disclosure are owed by the art-dealer to you? Is he obliged, for instance, to communicate private doubts he may have with respect to the authenticity? Or to correct your mistaken beliefs regarding authenticity, even if he has no role in directly causing them?

What determines what these duties are? To answer this we need to examine questions such as: who has access to information or the resources to get this information in the art-market (e.g. whether prospective buyers will be "sophisticated" or not), what sorts of behavior we wish to encourage in such a market, how we would wish to apportion the risk of mistake, and so forth. Some of these questions – e.g. about the prior distribution of talents and resources – will be empirical, while others – e.g. that it is not fair to make an unsophisticated customer (such as the proverbial old lady who wants to buy a present for her niece) pay for a mistake when the dealer has access to material information – will be normative. Considerations of this sort will allow us to make very fine-grained distinctions between the duties owed by art-dealers to fellow dealers and the duties they owe to infirm aunts. They will also allow us to make fine-grained distinctions between the duties owed by sellers in markets for different sorts of goods: the standards of disclosure in the art-market may be quite different from, e.g., the standards relevant in the housing market.

Arudra Burra (burra@law.ucla.edu)

Notice that we can ask questions about what these duties are, whether or not they have been violated, and the normative consequences of their being violated, without appealing at all to the notion of 'valid consent.' The alternative explanation for why the art-dealer must return the money when he defrauds the customer will go something like this:

1. The art-dealer violated the relevant duties of disclosure.
2. Those who violate such duties should not profit from their wrongdoing.
3. By keeping the money, the art-dealer would be profiting from his own wrongdoing.
4. Therefore the art-dealer ought to return the money.

Explanations of this form differ from explanations in terms of invalid consent in many respects. First, they make explicit appeal to substantive moral principles, at two levels. At the first level there are the moral considerations that determine just what are the duties of fair play in the relevant market, which, as we saw, may be quite domain-specific, and depend upon many contingent, empirical, facts. At the second level, they appeal to the principle of premise (2), one which is familiar, and plausible, though remarkably under-theorized.[31]

Second, they are "inducer-centered" rather than "agent-centered:" the explanation is driven by facts about the conduct of the person inducing consent, not by facts about the conditions of the person who gives consent. These facts are not synchronic: in order to know whether or not the inducer has violated a duty of fair play, one has to know something about what the dealer has done prior to the moment of actual exchange. Finally, these facts are not uniform, for the question of just what are the relevant duties will be a domain-specific one. The duties governing disclosure in the art market are very

[31] In *Riggs v. Palmer* (115 NY 506, New York Court of Appeals, 1889), a man who willed his estate to his grandson was subsequently murdered by him; the issue arose whether the grandson could inherit the property, given the terms of the will and the laws of probate. The Court acknowledged the validity of the will, but denied possession on the grounds that "No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime." The case has been made famous by Ronald Dworkin in his attack on positivist accounts of the nature of law (Dworkin 1967).

Arudra Burra (burra@law.ucla.edu)

different from the duties governing disclosure in the world of medical research, and the reasons for this difference are to be found in facts about the nature of the domain in which the relevant transactions are taking place.

Now this not to say that the buyer's epistemic state is irrelevant to the question of whether or not he or she has a claim against the seller that he return the money. The point is that the relevance of the state is derivative: what matters is not *this* buyer's epistemic state so much as the fact that in buying works of art it tends to be extremely important to people that paintings have a certain causal history as well as a set of aesthetic qualities, and so information about authorship is crucially important to deliberation about whether or not to pay large sums of money for some particular painting.[32] It is features like this that determine what the duties of disclosure – and of buying and selling more generally – should be in the art-market; and it is on the basis of these more general duties that one determines whether or not, when some particular buyer pays a lot of money for a painting under conditions of ignorance or mistake, what rights he or she has with respect to the seller of that painting.

If such conditions were induced by the seller's fraud, one might still be able to describe the situation as one in which the buyer's consent was invalid (and therefore ineffective), as long as one gave up the earlier assumptions that the conditions of valid consent were non-moral, synchronic, and uniform. One would simply have to acknowledge an additional condition on valid consent, to the effect that consent is invalid when it is wrongfully induced.[33] But notice that this condition does no additional explanatory work: the explanation just given for why the art-dealer should return the money is a perfectly satisfactory one, and makes no mention of valid consent.

[32] Of course, the buyer's epistemic state is *causally* relevant to his decision to buy the painting. (Though, as Gideon Rosen pointed out to me, it is not an easy matter to see how a massively extrinsic property like a false belief about something in the distant past could be causally efficacious).

[33] This seems to be the position of Wertheimer 2003.

Arudra Burra (burra@law.ucla.edu)

In fact, the introduction of this additional condition only serves to confuse matters. For one thing, it is misleading, because explanations couched in terms of consent are by their very nature agent- rather than inducer-centric, since *consenting* after all is something the agent does. Smuggling in facts about what the inducer does via the notion of validity simply obscures the structure of the explanation. For another, to adopt this more expansive notion of validity is to give up on a host of connections with the notion of 'voluntary action,' which has seemed such a promising notion in terms of which to explain the phenomena: valid consent has seemed to many to simply *be* voluntary, suitably informed consent given by competent agents.[34] If one expands the notion of validity in this way, one is simply giving up on an action-theoretic account of the voluntary, without advertising it as such.[35] It seems to me that if one goes down this path, one should just abandon talk of the conditions of valid consent in terms of the notion of 'voluntariness.'

Finally, to describe the situation of the buyer as one whose consent has been invalidated by reason of fraud suggests that questions about the standards for valid consent, and questions about which features render actions fraudulent, are somehow *prior* to the question of what are the appropriate rules in some given domain. And it is this claim to explanatory priority that the argument from symmetry proposed above is meant to challenge.

My own suggestion is that we should abandon the idea that 'validity' describes properties of acts of consent in virtue of which those acts are effective; rather, we should regard claims about valid consent as *reporting* that one person's agreement to another's doing something is in fact effective; that it has, in the given circumstances, changed the normative situation. But what explains why agreement under those circumstances is in

[34] For one of many examples, see Radcliffe Richards 2010, 285.

[35] As Thomas Scanlon pointed out in a review of *Anarchy, State and Utopia* (Scanlon 1976/1982, 117), when notions of voluntariness incorporate moral principles, then such appeals to intuitions about voluntariness are going to be suspect when these principles are themselves in dispute: "Disagreements about these principles will be translated into conflicting judgments about the voluntariness of actions and into disagreements in particular cases over whether voluntary is being used in a morally charged way."

Arudra Burra (burra@law.ucla.edu)

fact effective requires substantive, domain-specific, moral theorizing. There may be no uniform explanation which applies equally to effective consent in the domain of art-purchases as well as to effective consent in the domain of sexual relations.

V

There are two important objections to the line of thought for which I have just argued. The first objection concerns the role of the inducer's wrongdoing in getting you to purchase the painting.[36] Suppose the dealer wrongs you by misrepresenting the facts, but his misrepresentation plays no causal role in your decision to buy the painting: perhaps you had already decided to buy the painting, convinced that it was a Vermeer, and therefore paid very little attention to what he was saying; or perhaps you also knew it was a fake, but were buying it because you have a particular penchant for forged Vermeers, or because you planned sell it to someone else at an even higher price.

These are cases in which you have been wronged, but it's no longer obvious who gets to keep the money. This suggests that, in the clear case of fraud, the explanation for why you get your money back must appeal not only to the dealer's wrongdoing, but also to the effect of his wrongdoing on your choice. This in turn encourages the thought that in the clear case of fraud, consent is invalidated because the act of consent is in some respects defective.

Note that I did not mean to deny that the buyer's epistemic defect was relevant to the explanation of why he is entitled to getting his money back: the point was that its relevance is purely *causal*, and that it did not play a deep role in the explanation for why he is entitled to get the money back. There are two further responses one might make. It may be that the "wrongdoing" account is only triggered when the seller's wrongdoing plays a causal role in the buyer's decision to buy the painting, but it doesn't follow that this causal role (and therefore the buyer's defective consent) is part of the explanation for

[36] Versions of this objection have been advanced to me by Brookes Brown and Gideon Rosen: it is the latter's formulation that I present here.

Arudra Burra (burra@law.ucla.edu)

why the buyer gets to keep the money.[37] In the clearest case, when the buyer purchases the painting despite his knowledge that it is a fake, one might think that he simply has not been harmed by the seller's wrongdoing, and that the seller's wrongdoing renders consent ineffective (i.e. that it does not extinguish the buyer's right to his money) only when it causes harm.

Now this explanation won't work for the first kind of case, in which the buyer is harmed, because his purchase is made on the basis of a false belief, but the buyer's wrongdoing plays no role in producing this false belief. Here we should distinguish two sorts of cases. In the first sort of case, the buyer would not want to return the painting even if he were made aware of the seller's wrongdoing – perhaps he has an irrational belief in his own power to spot Vermeers, and takes the seller's wrongdoing to consist not in misrepresenting the facts, but misrepresenting what the seller *takes* (mistakenly) to be the facts. This sort of case seems close to the "no harm" cases discussed above, and it is not easy to understand why such a buyer would even want to return the painting once he discovers that the seller was lying to him.[38]

In the second sort of case, the question of whether the painting is a genuine Vermeer *does* matter to the buyer. This is a case in which, as it were, there is wrongdoing but no reliance. Here it seems to me that there are three "equitable principles" at work. The first is the principle that figures in the "wrongdoing" account, viz. that no one should profit from their own wrongdoing. Typically this principle ties into another, which is that no one should have to bear the cost of good faith reliance on the word of another: one of the anomalies of the case under consideration is that the second principle is inapplicable.[39]

[37] Compare: a mathematical proof is only correct if there are no mistakes of transcription and so forth from one line to the next; but the fact that there are no such mistakes is not part of the set of facts in virtue of which the proof is correct or incorrect.

[38] One might imagine a case in which the buyer changes his mind about wanting to keep the painting for reasons extraneous to its status as a Vermeer: perhaps he simply becomes bored with it, and finds that the seller's wrongdoing provides a convenient pretext for returning it.

[39] When there is good faith on both sides, of course, the answer will require a "balancing of the equities," which in turn might depend on further background facts about, e.g., who is best placed to bear the cost of such mistakes.

Arudra Burra (burra@law.ucla.edu)

The third principle is that one *should* have to bear the costs of one's own negligence. To see whether this principle is applicable one would need to know more about the reasons why the buyer purchases the picture: the fact that he *ignores* what the art-dealer is saying, and that his decision to buy involves his own irrational beliefs, inclines one to invoke the thought that he has nobody to blame but himself – even if he *would* have been able to blame the art-dealer had his decision to buy the painting been based upon a reliance on the art-dealer's word.

I think our uncertainties about this case are driven by the fact that these three principles seem to be interacting in unfamiliar ways, and not because the buyer's epistemic situation has some central role to play in the explanation for whether or not he should keep his money. In any event, this is a complicated case, in which so many different moral principles seem to be interacting in unfamiliar ways. It's not clear to me what lessons we should draw from it for the *clear* case of fraud, in which these principles line up, and the principle that no one should profit from his own wrongdoing seems to do the job.

The second objection seems to me more serious, and involves cases of what might be called third-party coercion or deception. They are most vividly illustrated in the domain of sexual relations.[40] Suppose a third party, R threatens S with some dire consequence if she does not have sex with P, or misrepresents some important fact material to a decision by S to have sex with P. Now suppose S consents to have sex with P under these circumstances (recall that the conditions for the performance of this speech-act are relatively thin). Assume that P is innocent of any wrongdoing himself, and is blamelessly ignorant of the background circumstances under which S consents to have sex with him.

If P does have sex with S under these circumstances, one might wish to say that P has *wronged* S, but is excused because of his blameless ignorance of the circumstances in which S consented. In fact, it may seem natural to say that his wrong consists in *having had sex with S without her (valid) consent*. But if her consent is invalid, it can only be because of some defect with respect to her options or her beliefs, defects which have been

[40] Thanks to Eugene Volokh for a stimulating discussion of this kind of case.

Arudra Burra (burra@law.ucla.edu)

caused by R rather than P. So if we think that P has wronged S, then an "agent-centered" view of valid consent seems to be doing important explanatory work: P has wronged S by having sex with her without her valid consent, where the conditions of validity refer to features of S's situation at the time of consenting.

This is a difficult case to think about, because it involves some subtle questions about the role of a person's intentions in determining whether or not they have acted wrongly. What I say here is accordingly very tentative.

First let me present the case in favor of the claim that P *has* wronged S, without going into the question of just how this wrong should be characterized. Here are three thoughts one might have. First, clearly S has been wronged, and wronged by *someone*. Furthermore, this wrong is clearly linked in some constitutive way with a violation of S's sexual autonomy (leaving aside just how we are to understand this link). But who could have wronged her in this way except for P? Though R is surely culpable in some way, *he* hasn't had sex with S, and so can't be the person who has wronged her in the distinctive way associated with a violation of her sexual autonomy.

Second, think about how one would answer the question: what ought P to do under these circumstances? The answer seems clearly to be that P ought *not* to have sex with S; but it seems extremely unclear how the permissibility of what P ought or ought not to do should depend upon P's *beliefs* about what these circumstances are.[41] Finally, one might appeal to an "assistance heuristic" for permissibility, proposed by Gideon Rosen.[42] Rosen's thought is that if it is permissible for A to Φ, then it is permissible for a third-party to assist A in Φing. In the present case, it is clearly *not* permissible for a third party to assist P in having sex with S, though the notion of "assistance" might seem somewhat

[41] A general point along these lines is made by Judith Jarvis Thomson in Thomson 1990, 229.

[42] In talks at Columbia and NYU in 2009-10.

Arudra Burra (burra@law.ucla.edu)

out of place in a sexual context.[43] If that's the case, then it is not permissible for P to have sex with S in the first place – if it was permissible for P to do so, what could be wrong with helping him out?

Now consider why one might want to deny that it is *P* who has wronged S in the distinctive way associated with a violation of her sexual autonomy.[44] The main consideration, as I see it, has to do with the transmission of moral responsibility for P's action. Consider the familiar example of an agent who blamelessly takes the white powder which he mixes in another person's tea for sugar, when in fact it is arsenic. The standard account of this case is that the agent has acted wrongfully (for the reasons given above, among others), but it not to blame because he was not to blame for his mistake.

Now suppose that his mistake was caused by a third party who maliciously replaced the sugar with arsenic, so as to ensure that the agent poisons the victim. It seems to me that it is this third party who should be blamed for the victim's death. But how can you be blamed for doing something wrong (poisoning the victim), if it is someone *else* who has committed the wrong? A better description of the situation seems to me that, if the person who mixed the powder into the tea was entirely blameless, then he did nothing wrong, and was merely a tool in a larger plan initiated by the third party; and that it is this plan that should properly be regarded as the bearer of the moral attribute "wrongness."[45] This explains why the third party should inherit the entire blame for the victim's death.[46]

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[43] Suppose P needs a car to get to S's apartment. Is P's friend Q, who knows the background facts, permitted to lend P his car to help P reach the apartment? (We have to imagine a scenario in which Q's refusal to lend the car is the only way in which he can effect P's ability to have sex with S).

[44] Feinberg 1985, 195-6 also denies that P wrongs S in such a case, but his argument only goes to show that P is not culpable in such a case. Wertheimer 2003, 149 also denies that P wrongs S: "After all, it is not quite right to say that the motorist should be *excused* for the crime of raping Mrs. Burnham [S] if her consent token justifies A's belief that he is authorized to proceed." But justified ignorance of the circumstances is often regarded as exculpatory, rather than "right-making."

[45] One might view this as an argument of the form "Guns don't kill, people do," with the addendum that sometimes agents who are causally responsible for another's death function as guns rather than as people.

Of course there is much more to be said here: if I am correct, there is a radical asymmetry between this case and a case in which there is no third-party involved in the creation of the false belief. This may seem highly counter-intuitive. It is interesting that the framers of the *Model Penal Code* seem to have similar intuitions

Arudra Burra (burra@law.ucla.edu)

My sense is that the situation in the sexual case is parallel. Imagine that R's *reason* for threatening or deceiving S is that he wants P to have sex with her; his threat or lie is not merely gratuitous. Then it seems to me that P is merely the causal agent in R's wrongdoing, that S's *real* complaint is against R.[47] There is a contractarian notion of wrongdoing in the vicinity, which involves the importance of being able to *justify* one's actions to another. It seems to me that there is at least some sense in which P could justify his actions to S in this way, and to say "*I*, at least, did you no wrong." To take another example, suppose R tricks S into consenting to P's use of her car. On an agent-centered view of invalidity, one would want to say that S's consent to P's using her car is invalid, and so therefore P wrongs her by using her car without her consent. It's not clear to me that we should say that what P did was *wrong*: in fact, S's consent may have given P some rights to use of the car, perhaps for reasons of reliance. This suggests to me that our intuitions are better explained by conditions on the legitimacy of the inducement to consent, rather than by conditions on the epistemic and choice situations in which consent is given.

VI

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about asymmetry in the case of coercion and duress as excuses to homicide. If my brakes fail for no fault of mine, and the only way I can avoid plunging into a deep crevasse is by swerving and killing two tramps on the side of a road, then I cannot use duress as a defense against homicide. But if I swerve and kill the tramps because a gunman in my car threatens to kill me if I don't, then I can. (§2.09(1), *Model Penal Code*).

[46] Notice that the third party's intentions seem crucial here. Compare the case just described with another one, in which the third party switches the sugar for arsenic, but without the desire to kill anyone in particular, or even to kill at all (rather than simply cause someone to become ill). Now it seems that the act one should accuse the third party of is something like that of maliciously and recklessly raising the *risk* that someone will die, rather than that of actually killing someone, even if the switch results in someone's being killed. (There are interesting questions here about how to interpret risk in the case of attempts more generally – even if I were to directly put poison in another's tea in order to kill them, strictly speaking all I have done is raise the risk that they will die; though perhaps not to very high levels, if, e.g., there are easily available antidotes of which I am not aware).

[47] Sex is a difficult case, because whether or not sex is harmful seems to depend, among other things, upon how one *feels* about it, and how one feels about it will depend among other things upon the occurent sensations during sex – which will of course involve P rather than R, in this case.

Arudra Burra (burra@law.ucla.edu)

To review the situation: I claimed that someone who thought that the class of non-consensual actions formed a unified moral kind is likely to wish to include cases of consent induced by force or fraud within that kind. One way to do so is to regard the kind as including cases of 'involuntary' consent, where 'voluntary' is given an action-theoretic gloss, and force and fraud are taken to render consent involuntary. The argument from symmetry was supposed to show that no purely action-theoretic conception of 'voluntariness' will do the work. Furthermore, I claimed, one could explain the relevant moral phenomena – in this case that an agent did not give up certain claims – without appealing to the notion of voluntary consent at all. Rather, it is possible to explain the phenomenon by appealing, not to the features of the situation of the one who gives consent, but instead to features of the one who induces consent by means of force or fraud. In particular, one can do so by appealing to the violation of domain-specific duties governing how to get people to do things. The grounds and content of these duties will in turn depend upon the domain in question, various empirical issues, and features of our background moral theory.

This alternative picture also gives us a nice way of understanding the cases of what I called "surreptitious" and "defiant" non-consent. I pocket your statuette when your attention is turned elsewhere. I do not thereby acquire a claim to it; in fact, I have done something wrong. What are we to make of the claim that my wrong consists (at least in part) of *taking the statuette without your consent*?[48]

Now clearly such an explanation is incomplete: non-consent is surely not a sufficient condition for wrongdoing. There are all sorts of things I can do without your consent – marry someone, sing to myself in the shower, sign political petitions – without thereby doing something wrong. Even the act of taking the statuette is not 'in itself' wrong: in particular, it would not be wrong to take the statuette – or at least not a wrong to you – if the statuette wasn't *yours*. So taking the statuette without your consent is wrongful only insofar as the statuette belongs to you in the first place.

[48] For it might consist in other wrongs as well, such as the wrong of violating your trust.

Arudra Burra (burra@law.ucla.edu)

But what constitutes the fact that the statue belongs to you? To answer this question we need to appeal to a background theory of the grounds of the right to property. Any such theory will include rules governing the initial appropriation of property, as well as its disposal and transfer. Any justifiable property regime will rule out certain kinds of takings as unacceptable. Here is one such candidate: taking something that has been appropriated by another without first asking them is not an acceptable way of transferring property. One might give different explanations for why such a mode of transfer would be unacceptable; indeed, in this case the bar seems to be almost a conceptual one. Once we have an explanation in place, we can see more clearly what my wrong consisted in: it consisted in the violation of one of the rules of the property regime. One might describe the rule as one that says: "do not take another's property without their consent."

But now the appeal to non-consent seems to be doing very little substantive work. When non-consensual Φings are wrongful, they are wrongful because they have a certain complex property: that of *being a Φing in the absence of consent when one has a* right *against others that they not Φ without our valid consent*. One of the elements of this conjunctive wrongmaker is the particular right whose violation constitutes the wrong in question. Once again, the question of whether some token Φing in the absence of consent is wrongful must be settled by appeal to a prior moral question about the violation of some underlying right.

I haven't said anything yet about how we might go about establishing that we have these rights, though in the next section I will try to sketch a picture of how one might ground a right against non-consensual sexual encounters. In a sense this is an impossible task to characterize in the abstract: the details will depend upon features of our underlying moral theory, if we have one. Even if utilitarians and contractualists recognize a right against non-consensual touchings, they will ground it in different ways.

But to say this is to invite an immediate objection. The fact that an act is a lie or a breach of promise seems to be an important part of the explanation for why it is wrong, even though there may be a deeper explanation for why the act is wrong, e.g. a utilitarian or

Arudra Burra (burra@law.ucla.edu)

contractarian one. Similarly, explanations of natural phenomena in terms of the concepts of chemistry (concepts such as 'ion' and 'acid,' for instance) seem to be perfectly legitimate, even if these explanations can be further reduced to the language of fundamental physics.

Why not allow that the same is true for the concept 'consent'? One might say that some acts are wrong because (a) they are non-consensual Φings, where (b) the victim had a right against non-consensual Φings, and grant that that the victim may have this right for some deeper reason. On such a picture, the fact that a Φing is non-consensual is a perfectly legitimate – and possibly important – part of the explanation for why the fact is wrong. To deny this would seem to require thinking that the only genuine grounds of explanation are *fundamental*, and this seems too strong.

I am unsure what to make of the general point, and I suspect that there is much more to say about the explanatory role of 'mid-level' moral concepts such as those of a lie or a promise.[49] But I think I can say enough to distinguish the case of consent from the cases of lying and promising. One difference lies in the kind of reduction at work. Another difference relates to my aims. Though I have made assertions about explanatory depth, my main interest has been in questions of explanatory *priority*.[50]

Consider first the point about explanatory priority. I have tried to argue that attributions of consent or non-consent do not ground moral judgments about permissibility and impermissibility. In particular, explanations of how certain inducements to consent render

[49] I think there are interesting connections to be made between these questions and parallel questions that arise in the natural sciences about levels of explanation, and about the relationship between reduction and elimination.

[50] Recall that I do not wish to deny that *saying* that an act is non-consensual can convey important information, which may in turn point to the features in virtue of which it is wrong: such information has explanatory import, but here 'explanatory' is being used in a pragmatic rather than a metaphysical sense.

Of course, the claim that an act is non-consensual, combined with the claim that non-consensual acts are wrong for reasons R1…Rn, together *entail* that the act is wrongful. But it is a familiar point that explanatory structure may not be revealed in the structure of deductive arguments: cf. the relationship between the height of the tower and the length of its shadow.

Arudra Burra (burra@law.ucla.edu)

it invalid require prior moral evaluations about the legitimacy of those inducements as ways of securing consent. On my view, one cannot answer the question whether some particular inducement to sex is legitimate by *first* asking whether sex, so induced, is consensual. Rather, the question of which inducements to sex are legitimate – which one might also phrase as a question about what rights we have with respect to others in the sexual domain – is one we have to answer on its own terms, as a matter of substantive moral theorizing. And I have claimed that there are satisfactory answers to this question which do not appeal to the notion of consent. This point about explanatory priority seems independent of the reduction/elimination question.

Consider next the sort of reduction at work in the case of consent. I have claimed that standards for when acts are non-consensual are not uniform, and may vary from domain to domain. The conditions of validity for consent to medical procedures with potentially harmful consequences are far more stringent than the conditions of validity for consent to the use of someone's restroom (recall that we must include under "non-consent" acts of invalid consent). But the conditions under which a speech-act counts as a promise do not depend upon whether the promise is to pay for a medical operation, or to meet someone for dinner.[51] Nor is there a diversity in the underlying explanations for why it would be wrong (other things equal) to perform actions which lead to breaking the promises in question. These acts are wrong because they are promise-breakings; while there may be a deeper explanation for why promise-breakings are wrong, this deeper explanation will be common to many different sorts of promises. Not so in the case of non-consensual Φings.

But there is a further objection in the offing. Consider the claim that some act is wrong because it is arbitrary or unfair. This seems to be a substantive claim, and unfairness and arbitrariness have as much of a claim to the status of wrongmakers as anything else. Yet the grounds of arbitrariness in the case of firing someone at will might be quite different

[51] This may be controverted as well: in the case of lying, especially, there is often a temptation to deny that some intentional misrepresentations of things one takes to be true are genuine *lies*. This is seen most vividly in cases where there seems to be no moral restrictions on such misrepresentations, such as in negotiations and games. I discuss this issue in greater detail in "Deception and the Structure of Moral Principles."

Arudra Burra (burra@law.ucla.edu)

from the grounds of arbitrariness in the case of sentencing someone to some form of punishment. The fact that arbitrariness and fairness are in this way "multiply realizable" does not take away from their explanatory import.[52]

I think these cases can also be distinguished from the case of non-consent. In the cases of unfairness and arbitrariness, the connection between (a) these moral concepts and the broader moral category of 'wrongfulness' is independent from (b) the relation between these moral concepts and the particular token acts which fall within their extension. In order to determine whether or not some particular act is unfair or arbitrary, we don't need to refer back to the question of whether it is wrongful; questions about their unfairness or arbitrariness are *prior* to questions about their wrongfulness. If I am correct, this is not the case for non-consensual Φings: the connection between a Φing's being non-consensual or consensual-but-invalid and its being wrongful is *not* independent of moral judgments about wrongfulness.

A final analogy might help illuminate the point I am trying to make about the priority of explanation. On a "bundle theory" of property rights, the right to property in some object X just is a collection of more specific rights: the right to exclude others from using X, the right to transfer X to someone else, the right to destroy X, and so forth. It is quite possible to have some of these rights but not others: a museum may own the paintings in its collection, but may not be allowed to sell individual artworks except to add to its collection.[53] I may own a piece of land, but be required to provide certain easements or rights of way to others. I may own a player in the football team that I own, which gives me the right to sell him to another team in the same league; I certainly have no right to *destroy* him, in the way that I have the right to destroy the pencil that sits on my desk. And so on.

[52] Thanks to Mark Greenberg for pressing this point.

[53] See the discussion by Pogrebin 2010 of proposed legislation in New York State that would prohibit museums from using proceeds from the sale of artworks "for traditional and customary operating expenses."

Arudra Burra (burra@law.ucla.edu)

If this is correct, one cannot ground the claim that one has one of these more specific rights over X in the claim that one owns X. So for instance it is a mistake to argue against civil rights legislation on the grounds that prohibiting the exclusion of people from hotels and so forth on the basis of race is a restriction on the property-rights of hotel-owners.[54] On my view, this gets things exactly the wrong way round. One cannot settle the question of whether the owner has such a right by appeal to some *prior* question about property rights: the question just *is* a question about what rights constitute the bundle of property rights the hotel-owner has.

My claim is that rights against non-consensual Φings are like property rights on a bundle theory.[55] One has rights against non-consensual sex and non-consensual property transfers, but these don't derive from a core right against non-consensual Φings; they have to be defended on their own terms. Furthermore, once we establish that in some given case these rights have been violated, there is no *further* question about consent that we need to investigate in order to judge that the relevant Φing is wrongful. This is why 'non-consent' doesn't play a deep role in the characterization of various wrongs, though there may be good reasons to *classify* a set of wrongs under the general rubric of being non-consensual.[56]

VII

I want to suggest that the picture of consent I have sketched above can be usefully applied to thinking about cases of sexual consent. Consider the following scenarios, all drawn from real cases:

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[54] See the interview of Rand Paul on the *Rachel Maddow Show*, 19 May 2010, transcript available at http://www.msnbc.msn.com/id/37252841/ns/msnbc_tv-rachel_maddow_show/. Thanks to Gideon Rosen for this example.

[55] Or like privacy rights, on the view advanced by Judith Jarvis Thomson (1975, 312): "…I don't have a right to not be looked at because I have a right to privacy; I don't have a right that no one shall torture me in order to get personal information about me because I have a right to privacy; one is inclined, rather, to say that it is because I have *these* rights that I have a right to privacy."

[56] Just as there may be good reasons to classify a set of rights under the general rubric of being rights to privacy or property.

Arudra Burra (burra@law.ucla.edu)

1. R, a gynecologist, tells S, his patient, that he needs to insert a medical instrument into her vagina. She agrees, but he instead inserts his penis.[57]

2. R pretends to be a doctor, and calls S to tell her that the results of her blood test show she has contracted a dangerous, highly infectious and perhaps fatal disease. He tells her that there are only two ways to cure it: a painful surgical procedure, which would cost $9000 and require six weeks of uninsured hospital stay; or sex with an unidentified donor who is injected with a special serum which could cure the disease (and would cost on $4500). After thinking about this and consulting some other people, S chooses to have sex with R.[58]

3. R is a Palestinian man who pretends to be a Jewish bachelor looking for a serious relationship, and has sex with S, a Jewish woman who is looking for a serious relationship with a Jewish man.[59]

4. S, a prostitute, agrees to have sex with R, a client, for a certain price. R pays her (as he intended to all along) in counterfeit money.[60]

5. S agrees to have sex with R, without knowing that R is HIV+.[61]

6. S has sex with R, her husband. Unbeknownst to her, R has been having an extra-marital affair.[62]

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[57] *People v. Minkowski*, 204 Cal.App.2d 832 (1962). There is a long line of such "medical" cases in many jurisdictions, going back to the nineteenth century. Falk 1998 provides a number of such examples.

[58] *Boro v. Superior Court*. 210 Cal. Rptr. 122 (Cal Ct. App. 1985).

[59] This is the case of Sabbar Kashur, who was held to be guilty of rape by an Israeli Court. See Addetunji and Sherwood (2010). Thanks to Bennet Foddy and Dan Moller for pointing me towards this case.

[60] The hypothetical case is discussed by Joel Feinberg in Feinberg 1985, 295. There are several real cases in the neighborhood: in *Regina v. Linekar*, 1995 QB 250, the defendant made off without paying the agreed sum; the Court found that he had never intended to pay in the first place.

[61] *Rex v. Cuerrier*, Supreme Court of Canada, 162 D. L. R 4th 513.

[62] *Neal v. Neal*, 873 P. 2d 877 (Idaho 1994). Unlike the other cases, this was not a criminal prosecution for rape, but a civil charge of battery.

Arudra Burra (burra@law.ucla.edu)

7. R pretends to be the photographer Richard Avedon, and induces S to have sex with him based on this belief.[63]

8. R gets into bed with S, his twin brother's girlfriend. She has sex with him, mistaking him for her boyfriend.[64]

Let us assume that in all these cases R deceives or withholds the relevant information intentionally, for the purpose of getting S to have sex with him, and that R would not have had sex with him had she known the truth. Now consider: did S *consent* to R's having sex with her? If the having of non-consensual sex constitutes a distinctive form of sexual wrongdoing, then this would seem to be an important question to ask.

Courts have typically distinguished between "fraud in the factum" and "fraud in the inducement":

> The general rule is that if deception causes a misunderstanding as to the act itself (fraud in the *factum*), there is no legally recognized consent, because what happened is not that for which consent was given; whereas consent induced by fraud is as effective as any other consent, so far as direct and immediate legal consequences are concerned, if the deception relates not to the thing done, but merely to some collateral matter (fraud in the inducement).[65]

Applying the rule to these cases, (1) is a clear case of fraud in the factum; (2) and (3) are cases in which sex has been induced by means of some form of deception; in (4), (5), and (6) there is not active deception but a failure to disclose (what S would regard as) facts material to her decision to consent; and (7) and (8) are cases of impersonation. In all but cases like (1), Courts have traditionally said that the fraud in question does *not* vitiate consent: looming in the background is the worry that there is a slippery slope from that

[63] See the discussion of Oscar Kendall's impersonations of Richard Avedon in Falk 1998, 69. Kendall had slept with 33 women in 25 cities by the time he was caught, and pleaded guilty to four crimes in four cities; seventeen other charges were dropped.

[64] *People v. Hough*, 607 N.Y.S.2d 884 (Dist. Ct. 1994). In many jurisdictions it was a crime to have sex with someone by impersonating their spouse.

[65] Kleinig 1982, 103 (quoting Roland M. Perkins, *Criminal Law*).

Arudra Burra (burra@law.ucla.edu)

sort of case to the case of mere seduction – "a man who promises a woman a fur coat in return for sexual intercourse, with no intention of fulfilling his promise, would not generally be regarded as committing rape."[66]

Finally, in the impersonation cases, Courts seem to have waffled a bit – impersonating a husband to have sex with a woman did not constitute rape in 19th century English law, but as Perkins pointed out:

> Some courts have taken the position that such a misdeed is fraud in the inducement on the theory that the woman consents to exactly what is done (sexual intercourse) and hence there is no rape; other courts, with better reason it would seem, hold such a misdeed to be rape on the theory that it involves fraud in the *factum* since the woman's consent is to an innocent act of marital intercourse while what is actually perpetrated upon her is an act of adultery.[67]

Perkins' point is made by an Irish Court did with respect to another husband-impersonation case,

> I think it follows that . . . an act done under the bona fide belief that it is another act different in its essence is not in law the act of the party. That is the present case – a case which it is hardly necessary to point out is not that of consent in fact sought to be avoided for fraud, but one in which that which took place never amounted to consent. The person by whom the act was to be performed was part of its essence. The consent of the intellect, the only consent known to the law, was to the act of the husband only, and of this the prisoner was aware.[68]

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[66] *Linekar*, 255, quoting a report of the Criminal Law Revision Committee on Sexual Offences. Schulhofer 1998, 153 points out that inducing sexual intercourse with a false promise to marry *was* a crime ("seduction") in many jurisdictions, and also a cause for the civil action of "breach of promise." Both the crime and the civil action have long since fallen into desuetude in the United States.

The Israeli decision in the case of Sabbar Kashur is anomalous in this respect, since it found him guilty of "rape by deception." The leading Israeli case concerns a man who claimed to be a high-level official of the Housing Department, and told several women that he would help them get housing if they had sex with him. See *Saliman v. State* (Israeli Supreme Court, 2006). Thanks to Eugene Volokh for bringing this case to my attention.

[67] Quoted in *Boro*, 8.

[68] *Regina v. Dee*, quoted in *Linekar* 257. The English cases make a distinction between consensus quoad hoc (in the medical cases) and consensus quoad hanc personam (the impersonation cases).

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In the medical cases perhaps it is clear that what was consented to (a medical examination) was *not* the act which was performed (an act of sexual intercourse). The others are harder. What was the act to which Lenny Hough's girlfriend gave her consent: sex-with-Lenny, or sex-with-the-man-in-bed-with-her, who turned out to be not Lenny, but his twin brother Lamont?

Or consider the *Boro* case. Daniel Boro induced his victim, Ms. R, to have sex with him by claiming that it was necessary to save her life. Under the California Penal Code he was charged with rape, for having sexual intercourse with someone who was at the time "unconscious of the nature of the act."[69] The defense claimed that this was a mistake – Ms. R was clearly aware of the nature of the act; it was an act of *sex*. The prosecution argued that, because of his misrepresentation, she believed it was in the nature of a medical treatment and not a simple, ordinary act of sexual intercourse.

At *this* level of description the case seems harder to distinguish from the classic medical cases – in both cases the victim consents to a bodily intrusion on the basis of a belief that the intrusion is necessary for therapeutic purposes. In both cases the belief is false, and intentionally induced so as to secure the victim's agreement. And in fact the bodily intrusion consists of the insertion of the perpetrator's penis into the victim's vagina, with no therapeutic value whatsoever.

So Courts have treated the question as a metaphysical one: to decide whether or not a case of deceptively induced sex constitutes "rape by fraud," we seem to need an account of which features of an act belong to its "essence," and which are "merely collateral."[70] It

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[69] §261(4), quoted in *Boro*, 3.

[70] Jon Kleinig (Kleinig 1982, 103-4) is skeptical:

> What is merely collateral cannot be decided by a simple process of inspection. Acts do not come to us in neatly labeled packages. Descriptions are given to acts, and the description we give of any particular act reflects a judgment about the nature and importance of its contextual features, relative to certain ends…The descriptions are not necessarily exclusive, though any one description may be challenged by another which selects other contextual features or rates them differently…[in a Boro-type case] it was judged that even though X was deceived, she nevertheless consented to extra-marital intercourse. But to believe that this is a satisfactory

also suggests that important issues in the philosophy of mind are at stake, such as the issue of whether consent requires a *de dicto* or *de re* attitude towards the act to which consent is given.[71] Familiar philosophical puzzles might be invoked in this context: if one consents to sex with the President, but does not consent to sex with Bill Clinton, has one consented to sex when Bill Clinton *is* President? What are we to say about someone who consents to sex with Mark Twain, the famous writer, but would not consent to sex with Samuel Clemens, the man who patented an invention regarding "an Improvement in Adjustable and Detachable Straps for Garments"?[72]

But do we really need to appeal to such heavy-duty philosophical machinery to understand whether or not these are cases of sexual wrongdoing, and why? (Leave aside for the moment the question whether they constitute instances of rape, in either a legal or a moral sense). Let me suggest that we do not.

First, note that in all but the "medical" cases, S agrees to have sex with R; so on my use of the term "consent," S consents to have sex with R. The only relevant question, I claim, is whether R's actions are improper as a means of inducing S to consent to sex with him.[73] And this question, it seems to me, requires substantive moral theorizing in the domain of sexual morality.

Let us apply the test in an intuitive way. Some cases are easy: it is improper to hide the fact that one has an sexually transmittable disease; it is improper to sleep with a prostitute

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description of her conduct is to make a contestable judgment about the relative importance of the various features of the situation. It is not the only possible description of her behavior, and some other description is arguably preferable. For example, it might be claimed that what she consented to was not extra-marital but therapeutic intercourse, though what she got was not therapeutic but merely extra-marital intercourse. My point here is that it may be grossly misleading to describe X has having 'consented to extra-marital intercourse,' even though it is in some sense 'true.' It is misleading in the same way that it is misleading to describe someone who has killed the President as having pulled the trigger.

[71] See Hurd 1996, 127 for a brief discussion of this point.

[72] Patent #121,992 received on December 19, 1871. The invention was supposed to be an improvement on suspenders. See Quinn and Sewell 2001. (Thanks to Gideon Rosen for the examples).

[73] See Dripps 1992 and 1996 for clear statements of this point.

Arudra Burra (burra@law.ucla.edu)

without intending to pay the amount one has negotiated for sex; it is improper to falsely claim that sex is necessary for therapeutic purposes; it is improper to impersonate another's boyfriend. In these cases the victim is wronged because her consent was induced improperly.

To take another set of easy cases, consider deceptive inducements which are not improper means of gaining sexual consent. Here are some candidates: it is not improper to falsely claim that one has read *Ulysses*, that one is a good cook, that one remembered a joint anniversary. These lies may amount to wrongs, but (I claim) they do not amount to *sexual* wrongs, even if one uses them to induce consent to sex.

What about intermediate cases, such as pretending to be Jewish, pretending to be in love, failing to disclose an extra-marital affair, or pretending to be Richard Avedon? I am unsure just what to think about these cases; but the source of this uncertainty is a background uncertainty about the proper norms of disclosure governing sexual conduct.

This is the crucial point: though one may disagree about how the cases divide, my suggestion is that disagreements about the division represent, at bottom, disagreements about the proper norms governing sexual conduct; these questions are obscured by stating them in the language of consent, as involving a metaphysical question about the nature of the act to which consent is given.

VIII

One might object that this is all well and good, but surely the paradigmatic sexual wrong, the wrong of *rape*, is best characterized as the wrong of non-consensual sex: there at least it does not seem helpful to appeal to some allegedly deeper feature with respect to which we should characterize the right. If my schema cannot classify the paradigmatic kind of sexual wrongdoing, this is a reason to reject the schema; quite likely it fails even with respect to the cases of deceptively induced sex.

Arudra Burra (burra@law.ucla.edu)

The issue deserves to be discussed at greater length than is possible here, but I will try to offer a few observations.[74] First, I am not interested in which forms of deceptively induced sex deserve the label 'rape': the question is which forms of deceptively induced sex constitute sexual wrongs, and why they do so. So my concern is not to classify sexual wrongs as rape or not.

More importantly, I am skeptical of the view that we should regard rape as a *sui generis* moral kind, the central moral and legal category in terms of which to think about all other forms of sexual wrongdoing. We should not take essential features of paradigm instances of a class to be essential elements in defining membership in that class. Enumerating features of the paradigm instances – in this case sex induced by threats of physical violence – may mislead us as to the nature of the class itself. In this respect, rape as it is traditionally understood may be to deceptively induced sex as robbery is to larceny.[75] Robbery is surely worse – much worse – than larceny; but both are instances of the same kind of wrong. Similarly, rape is much worse than some forms of deceptively induced consent, but both may be instances of the same kind of wrong.

The question remains of how to determine the correct standards for proper and improper inducements to sexual consent. It seems natural to suggest that the relevant standards are those having to do with sexual autonomy, with the importance of being able to have some control over whom one has sex with, when, and under what conditions.[76] Having a recognized right against others that they not have sex with us without our consent is valuable, because it allows us to exercise this control.

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[74] In particular, a proper treatment would require engaging with the full range of feminist scholarship – both within the law and outside it – on the concept of rape and its connections with consent. Much of what I say will be congenial to certain strands of feminist legal scholarship, but I will not try to establish those connections here.

[75] An example due to Dripps 1992.

[76] See Schulhofer 1998, 99-113 for some suggestive remarks to which I am sympathetic. I am also very sympathetic to Thomas Scanlon's account of the "Value of Choice" (Scanlon 1986) as a general framework for thinking about the importance of having a say over what happens to us. I think that the framework could be usefully applied to the case of consent, but my attempts at application are quite sketchy here.

Arudra Burra (burra@law.ucla.edu)

There are many ways in which it is valuable to be able to control whom we have sex with, under what circumstances, and for what reasons. In the most straightforward sense this ability has what Scanlon calls instrumental or predictive value. In one class of cases it is this sort of value that is undermined by deception. In *Linekar*, the prostitute exercised this control with the aim of making money, while in *Boro* the patient exercised this control with the aim of getting better; in both cases the defendant's actions brought it about that these exercises of control were fruitless. One might think, in addition, that the defendant violated a more general norm of reciprocity, which applies in the sexual domain as well as in other domains: these were "benefits" obtained under false pretences.[77]

In some of the other cases, the relevant standards seem to flow from considerations having to do with the nature of sex and its place in our lives. Sex is *meaningful* to many people because it is associated with certain forms of intimacy and emotional connection; so the ability to decide when and with whom to have sex has, as Scanlon puts, *demonstrative* value. In the cases involving the twin brother, the Jewish impostor, and the adulterous husband, this connection is broken because of the deceptive inducement. The wrong of deceptively induced sex might also flow in these cases from the more general wrong of deceiving people about aspects of their lives which they find deeply meaningful: in the way that one might deceive someone about the importance of a friendship, when our own interest in them is purely instrumental.

The general point is that the underlying grounds which explain why certain forms of sexual inducement are illegitimate are not usefully reduced to the single category of "non-consent." This point extends beyond the examples just considered of deceptively induced sex. For one thing, thinking of rape as primarily consisting in the wrong of non-consensual sex may give the impression that the point of engaging in rape – like the point of engaging in theft – is the sex to which rape is a means. But as feminist scholars have

[77] In saying that this was an instance of a broader kind, I do not mean to suggest that all instances are alike in terms of their moral importance.

emphasized, one needn't think about rape primarily as concerned with *sex* at all.[78] In different cases, rape might be an instrument of violence, or a way of exercising domination or power, or a form of punishment.

When members of a victorious army rape civilian women in the territories it has conquered, the point is not simply that they have induced sex by illegitimate means. Rape can be a means of revenge and humiliation, and such humiliation can be parasitic upon the value that consent actually has in the domain of the sexual: in having sex with someone at gun-point one might be demonstrating one's power by bringing it about that the victim has overwhelming reason to have sex under conditions in which it has no value *at all*, in fact just the opposite; part of the point of doing so might also be, in the process, to demonstrate to the men in defeated territories their own powerlessness in the matter (which may in itself have great symbolic significance).[79] But one may perpetrate the same *kind* of wrong in such cases without recourse to sex at all; by setting fire to valuable property, by making parents watch their children being beaten or killed, and so forth.[80]

Another virtue of thinking of illegitimate sex in terms of the value of having control over rather than in terms of non-consent is that it helps us see the continuities between the illegitimacy of sex induced violently, and sex induced in other ways that in *some* sense

[78] See Wertheimer 2003, 70-80 for references and criticisms of the view that rape is about violence, not sex. On the view I am advancing, rape can *sometimes* be about violence, not sex; this is harder to account for on the view that rape just *is* non-consensual sex.

[79] So in this way the ability to choose whom to have sex with and under what conditions may have what Scanlon calls *symbolic* value, both for the person engaging in sex, as well as for others in the community.

[80] Gideon Rosen points out that seem to be a very strong claim, for the suggestion is that in such cases there is nothing distinctively wrong about rape – the wrong-making feature of (this kind of) rape might be equally present in acts that do not involve rape. True enough, but note that it might be very much *worse* to humiliate someone or demonstrate their powerlessness by showing that they lack control over whom they have sex with, than by other means; the value of choice in our sexual lives might be very much more important than its value in other areas of our life.

The use of the term 'value' is perhaps unfortunate because of its consequentialist connotations: the phrase "value of choice" is meant to represent the importance of having control over what happens to us in some domain of life; in the sense I am using it, is not something that is the subject of consequentialist calculations, which could then be traded against other 'values.' (This is not to say that consequentialist considerations will always be irrelevant in determining *when* having such control is important).

Arudra Burra (burra@law.ucla.edu)

seems consensual. Consider the case of a school-teacher who threatens to give a student a failing grade unless she has sex with him, or of a supervisor who threatens to fire an employee unless she sleeps with him.[81] Clearly these are cases of sexual wrongdoing. Are they also cases of non-consent? This is not so clear: after all, one can imagine scenarios in which the proposal is made not by the superior (teacher or supervisor) but by the subordinate (student or employee); and in *these* cases I am tempted to say that the superior doesn't wrong the subordinate, even if the superior does something wrong in accepting the proposal.[82]

Is there a way to describe the straightforward cases of superior/subordinate sexual wrongdoing without appealing to the notion of consent? I think there is. For one thing, these are clear cases of abuse of authority. There are reasons why superior/subordinate relationships are structured in certain ways in the relevant institutional contexts: reasons having to do with the promotion of learning or efficiency, for instance. These reasons, in turn, impose certain constraints on the discretion exercised by superiors over their subordinates. Trading grades or job security for sex is an abuse of this discretionary authority, but so is the trade of grades or job security for promises to baby-sit on demand; and so is the exercise of this discretion on purely whimsical grounds.[83]

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[81] We might distinguish two version of each case. In one kind of case, the teacher or supervisor has the right to carry out his 'declared unilateral plan,' (the student is doing badly in her exams; the employee is coming in habitually late). In such cases the proposal to have sex might be seen as an 'offer' rather than a threat. In the other sort of case, the student or employee has done nothing to independently merit failing or being fired; this would just be a consequence of refusing to have sex with the superior.

See Schulhofer 1998, 168-205 for a very subtle discussion of such cases.

[82] The relevant wrong seems to be in the nature of taking a bribe. Of course, the supervisor might also create the *conditions* under which bribing him becomes the overwhelmingly rational choice for the subordinate: e.g. by closing of outside options, and intentionally making the test too hard, or the employee's tasks too burdensome. Let me ignore these complications.

[83] I discuss these cases in some detail in "Coercion and Moral Explanation." As I point out there, the subordinate's *preferences* also play a very small role in this story: the superior's proposals would be illegitimate even if the subordinate would prefer the proposal than doing the work required. One might also hope that one's professors grade exams by throwing them down the stairs and seeing where they land – if one knows one has bombed an exam, this method provides at least *some* hope that one will get a decent grade. But it would still be wrong of the professor to do so. (Would one be *wronged* by a professor who did

Arudra Burra (burra@law.ucla.edu)

Of course, this story is incomplete, for there seems to be an important moral difference between asking for sexual favors and asking for baby-sitting favors in exchange for grading or employment favors. I think the difference can be explained by pointing out that the value of being able to have some control over what happens to us varies in importance across different domains. The instrumental value of choice in the realm of sex is enormous: having control over when to have sex, with whom, and in what circumstances, makes a great deal of difference not only to how sex is experienced, but also to some of the physical concomitants of sex, such as pregnancy or the risk of contracting sexually transmitted diseases. The demonstrative value of choice in the case of sex is also very great: it is only because we have control over our sexual lives that we can use sex as a means of communicating love or affection, for instance. Finally, the symbolic value of having this control is very great as well. When we value control over our sexual lives because of its connection with central aspects of who we take ourselves to be, and how we express intimacy and affection, the *fact* of being able to assert such control also has tremendous symbolic value. It is simply not as important to have control over whether or not, and when, to baby-sit for someone else.

One can imagine a situation in which the difference was not so stark. Consider a society in which people don't have sex: "orgasmatrons" are readily available, and reproduction is carried out by means of *in vitro* fertilization.[84] In such a society, a superior's request to have sex in exchange for not failing or firing a subordinate would still be wrong, but it might not seem *distinctively* wrong; one can imagine it having the quality of a bizarre and unpleasant interference with one's person, but without the valence attached to the request in our society. In the same society, one might imagine that *baby-sitting* is a very big deal indeed (suppose the demand for baby-sitters is extremely high, and the privilege of baby-sitting for someone is bestowed only very carefully, for it is held to be a mark of singular

so, even if this resulted in doing better than one would have if the exam had been graded fairly? I'm not sure.)

[84] Think of Woody Allen's *Sleeper*.

Arudra Burra (burra@law.ucla.edu)

esteem and friendship). In such a society, I can imagine that it would not be *very much* worse to ask someone for sex than to ask them to baby-sit.[85]

So I want to suggest that there is no binary distinction here between "pure" cases of rape which are to be understood in terms of violence and non-consent, and other kinds of unwanted sex (e.g. in the case of deception and abuses of authority) which nevertheless seems consensual. Of course it might be that sex induced by threats of violence is very much worse than sex induced in these other ways, but the wrongdoings in this case, are massively over determined, and include the pain and experiential suffering sex so induced.

I do not think, then, that it is useful to search for some distinctive set of characteristic wrongmaking features of impermissible sexual inducement. At most we can say that such impermissible inducements share a certain structure. Control over our sexual lives is valuable, among other things, because it allows us to have sex for some reasons rather than others. In the cases I considered, the perpetrators wrongfully bring it about that others have sex for reasons (to avoid physical hurt, or failing a class), which are not amongst the reasons that makes control over sex valuable in the first place.

Of course, we might *label* the heterogeneous class of impermissible inducements with the term "non-consensual," or claim that inducements are illegitimate unless there is valid consent, and consent is not valid if it is impermissibly induced. But doing so will not tell us much about the structure and character of wrongdoing in the domain of sexual activity.[86]

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[85] I'm unsure of the extent to which a thought-experiment of this sort points one towards some kind of relativism or subjectivism in the domain of sexual morality. On the one hand, there may well be reasons to value control over sex which are independent of whether one values it or not. On the other, it seems to me no accident that one of the most effective arguments in favor of legalized prostitution has been the characterization of it as *work*. See Zatz 1997 for helpful discussion of this point.

[86] Many thanks to Gideon Rosen for introducing me to the cases of "rape by fraud" which initially sparked my interest in the topic, and for supervising the dissertation from which this paper is descended: he has contributed far more to the paper than my footnoted references might suggest.

Arudra Burra (burra@law.ucla.edu)

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Arudra Burra (burra@law.ucla.edu)

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