Inside the Moral Nexus: On Wrongs, Rights, and Normative Powers

by

Anni Aliisa Raty

BA (Hons), University of Cambridge, 2017

Submitted to the Department of Linguistics and Philosophy in partial fulfilment of the requirements for the degree of

Doctor of Philosophy

at

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Signature of Author: _____

Anni Aliisa Raty
Department of Linguistics and Philosophy

Certified by:_____

Tamar Schapiro
Professor of Philosophy

Accepted by:_____

Brad Skow
Laurance S. Rockefeller Professor
Chair of the Committee on Graduate students

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ABSTRACT

Common sense morality recognises a distinction between doing something that is wrong, and *wronging* someone in particular: littering is wrong, but stealing from your neighbour or trampling their flowerbed wrongs them in particular. The difference is that wronging someone is interpersonal or *relational* in a way that "mere" wrongdoing is not.

In the first chapter, titled "Wrongs without Rights?", I consider the relation between wronging someone and violating that person's *rights*. Most moral philosophers take it for granted that whenever you wrong someone, you violate that person's rights. Most also take it for granted that someone's having a claim right against you is equivalent to your being under a duty that you owe to that person in particular—a *directed* duty, as they are often called. This chapter challenges these orthodox ideas and suggests that to wrong someone is, in the first instance, to violate a directed duty that you owe to that person. I also suggest that directed duties do not always correspond to rights. So wronging someone does not always involve a rights violation.

Consent is a normative power that allows us to alter the duties that others owe to us. By giving consent, we can make it so that something something that would otherwise wrong us, does not. In chapter 2, "The Normative Power of Uptake", I ague that morally transformative consent requires the consent-recipient's *uptake* or *acceptance*. Consent can't be given unilaterally by the consent-giver; it requires the recipient's cooperation.

Chapter 3 is titled "A Joint Decision Account of Consent". In this chapter I develop a novel account of consent as a kind of joint decision. According to the view I propose, consent is a joint decision that results in the recipient being released from a duty owed to the consent-giver. I argue that this view of consent is better suited to the project of sexual ethics than some of the alternatives: unlike some other views of consent, it does not portray consent as one-sided acquiescence to someone else's pursuits. The account also guides us to ask important questions about the appropriate ways to negotiate sexual consent.

Thesis supervisor: Tamar Schapiro
Title: Professor of Philosophy

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Introduction

In his 2019 book *Moral Nexus*, Jay Wallace uses the titular term "moral nexus" for the net of moral relations that ties us to one another. The topic of this thesis is, broadly speaking, the moral nexus. More precisely, the chapters of my thesis address (just some of the many) questions that are important for those of us who inhabit the moral nexus. What are the stakes in our moral relations to one another? What is it to violate the terms of these relations? How can we exercise our normative powers to alter them?

Many of the moral relations that tie us to one another take the form of a *bipolar obligation*. A bipolar moral obligation is an obligation that A owes to B in particular. For example, I owe it to my neighbour to keep off their property, unless they give me permission to enter. If I were to violate this obligation, I would *wrong* my neighbour. By contrast, if I were to litter in a public park, I would do something wrong but I would not wrong anyone in particular.

It is popular to assume that wrongs and bipolar obligations entail *rights*—specifically, moral *claim* rights. The thought that bipolar obligations and rights are correlated has been orthodoxy among rights theorists and moral philosophisers at least since Hohfeld's influential analysis of legal rights in 1919. If this idea is correct, then wrongs just are violations of rights: to wrong your neighbour by trespassing on their property just is to violate a right that they hold against you.

In the case of trespassing on a neighbour's property, this seems right. But not all cases are so amenable to the orthodox idea that rights, bipolar obligations, and wrongs all go hand in hand. For example, I owe it to my partner to provide them care, attention, and emotional support when they most need it. If I neglect to do this, they would rightly feel wronged by my aloofness. But it seems mistaken to say that the hold a right against me that I provide them care and emotional support. Right holders can typically demand performance from those who bear the correlative duty; my partner could ask me for emotional support, but it does't seem quite right to say that he can demand it—at least, he

cannot do so in the same way that my neighbour could demand me to stay off their property.

What gives? Some authors have recently argued that there are principled reasons to divorce wrongs from rights. Nicolas Cornell has argued that sometimes *third parties* can be wronged without having their rights violated. For example, consider Hart's well known case where one person promises another to take care of the latter's ailing mother. The promisor neglects their duty, thereby clearly wronging the promisee who holds the correlative right. Cornell has the intuition that the mother of the promisee is also wronged, even though she has no right against the promisor. There is no obvious right that could explain why the mother is wronged, and further, it would violate theoretical constraints concerning what rights are like to posit a new right to explain why the mother is wronged.

The bulk of chapter 1 is dedicated to showing that this latter part of Cornell's case for divorcing wrongs from rights is not adequately supported. Positing new rights is a viable strategy, so far as the theoretical role of rights is concerned.

I also argue that the view of wrongs that emerges form Cornell's argument fails to explain the relational nature of wrongs. Cornell sides with the Hohfeldian orthodoxy in assuming that bipolar obligations and rights are two sides of the same relation. So neither rights, nor bipolar obligations, can explain the relational nature of wrongs on his view. I suggest that we should reject the Hohfeldian orthodoxy on two grounds. First, rejecting it allows us to say that wrongs are in the first instance violations of bipolar obligation. This explains their relational nature. And, second, rejecting it allows us to make sense why my partner is wronged if I fail to provide them care, attention, and emotional support, even though they have no right to any of it. They stand to be wronged simply because I owe it to them to be there.

The discussion in chapter 1 suggests that the moral nexus consists of bipolar obligations that tie us to other agents, and that some of these obligations correlate with rights. Here is an important feature of bipolar obligations: ordinary people have the power to alter them, and even have the power to create new ones. One way to alter existing bipolar obligations is by *consent*. Consent is a normative power that we can use

to release others from obligations that they owe to us. For example, my neighbour can release me from my duty to not enter their property; my partner can release me from my duty to not read their mail; John can release Jill from her duty not to touch him; and so on. Consent grants the recipient a *permission* to do something that they previously couldn't have done without wronging the consent-giver.

Much of the philosophical literature on consent focuses on the ontological question about consent: what does consent consist in? Is consent just a mental state? Or is some form of observable behaviour also an integral part of consent? Authors in this literature often cite the *function* (or functions) of consent to motivate their views. For example, one popular argument for mental views of consent claims that consent's function is to extend the consent-giver's control over the duties that others owe to them. It is said that this function is best served by consent that consists in a mental state, and doesn't require observable behaviour or the cooperation of the consent-recipient. By contrast, proponents of behavioural views tend to emphasise consent's function as a tool that allows us to cooperate with others: there are many projects and activities that we couldn't carry out if we couldn't consent to others' interacting with our property or our person. This cooperative function of consent is facilitated by consent that can be observed by the recipient and by third parties.

I think that consent has a variety of different functions, including the ones just mentioned. In chapter 2, "The Normative Power of Uptake", I draw attention to an often overlooked function of consent that I call the *relationship-shaping function*. By granting permissions to other people, we can enable—and sometimes generate—special relationships like friendship, partnership, and the like. For example, acquaintances can become friends when they give one another certain permissions that are typically considered constitutive of friendship, like the permission to ask personal questions, and the permission for casual physical touch. This observation about consent has a parallel in the literature on promising, where several authors have discussed the power that promises have to shape our special relationships.

Given that consent has a relationship-shaping function, I argue that the norms of how consent is given must grant the consent-recipient a say in whether a given act of consent

is *morally transformative,* i.e. in whether it really releases the recipient from a duty. My relationship with you is my business as much as it is yours; therefore I ought to have a say in whether, when, and how it is altered. Some caveats apply here—for example, if you violate the norms of our relationship, I may be justified in disengaging from it unilaterally. But absent special circumstances like these, relationship-modification requires cooperation and concurrence from both of us. I argue that just like the normative power of promising, consent requires its recipient's *uptake* (or *acceptance*) in order to be morally transformative.

Views of consent that incorporate the uptake-requirement conceive of consent as a *bilateral* normative power. In chapter 3, "A Joint Decision Account of Consent", I begin to develop a novel account of what consent consists in that is thoroughly bilateral and respects the uptake-requirement. I propose that when A consents to B's phi'ing, A and B make a *joint decision* that releases B from an obligation (owed to A) not to phi. Call these *joint decisions of consent*. On my view joint decisions of consent that succeed in releasing the recipient from an obligation are the output of an *appropriate process* of joint deliberation. Whether a process of joint deliberation is an appropriate one depends on a number of features, including the parties' relationship to one another, potential imbalances of power, the moral stakes of the act that is being negotiated, and so on.

The account of consent that I propose has two main attractions. First, it gives us the resources to explain why the notion of consent still deserves a central place in sexual ethics. Several critics of so-called "consent theory" have argued that consent is essentially passive, or that giving consent involves passively yielding to someone else's requests or pursuits. The joint decision account of consent shows that there are conceptions of consent that do not conceive of consent as something that is passive: making joint decisions involves the agency of both (or all) parties. Some critics who press this objection also argue that focusing on questions about consent in sexual ethics obscures important questions about how sex and sexual consent are (or ought to be) negotiated. I argue that the joint decision account of consent has room to address these questions. On my view, the norms of sexual negotiation are the norms that determine whether a process of making a joint decision of consent is appropriate.

The second attraction of the joint decision account of consent is that it opens up an interesting prospect of a unified theory of two distinct normative powers: consent and promising. In recent years, philosophers who are interested in promising have developed accounts of promises as joint decisions between the promisor and the promisee. I suggest that these accounts may want to joint forces with a joint decision account of consent, like the one I propose here.

Chapter One

Wrongs without Rights?

ABSTRACT: Most moral philosophers believe that to wrong someone just is to violate their rights. This chapter is an attempt to see whether this commonly accepted dictum still stands, in light of recent arguments that purport to show that rights and wrongs can come apart. I will discuss potential wrongs to third parties who are injured or otherwise affected by a wrong against someone else. I argue that there is no theoretical obstacle to maintaining that such third parties have rights against the acts that wrong them. I also discuss potential wrongs that violate bipolar obligations generated by personal relationships. Comparing these two kinds of possible wrongs without rights shows that third party wrongs without rights would require us to admit of a variety of wrongs that isn't relational, violating a desideratum for an account of what it is to wrong someone.

1. Introduction

Most moral philosophers believe that there are at least two ways to do wrong. You can *wrong* someone, and you can do wrong without wronging anyone in particular. For example, vandalising a neighbour's garden wrongs the neighbour. By contrast, littering in a public park is wrong, but does not wrong any particular person. Many moral philosophers also believe that to wrong someone in particular just is to violate that person's rights. If someone stands to be wronged by your phi'ing, then they had a right against you that you not phi, and vice versa. This chapter is an attempt to see whether this commonly accepted dictum still stands, in light of some recent arguments that purport to show that rights and wrongs can come apart.

In ‘Wrongs, Rights, and Third Parties’ Nicolas Cornell argues that wrongs and rights are separate moral phenomena and are not, as is often said, simply two ways of picking out the same bipolar moral relation.[1] Cornell argues that there are cases where third parties stand to be affected by an agent’s actions in a way that wrongs them, even though there is no identifiable rights violation to that third party. The cases are persuasive, but they only go so far. I will argue that there is no theoretical obstacle to positing rights to explain these purported wrongs to third parties. I will also argue that there are reasons to not divorce third party wrongs from rights: the concept of a wrong against someone is a *relational* notion. It belongs to a group of moral concepts that purport to pick out something that has direction; in other words, something that exhibits a particular type of moral normativity that is relational or “bipolar”. I will argue that the view of wrongs against third parties that emerges from Cornell’s arguments fails to explain the relational nature of such wrongs. Wrongs against affected third parties, if they exist, are still best understood as rights violations.

[1] Cornell, Nicolas. 2015. “Wrongs, Rights, and Third Parties.” *Philosophy & Public Affairs* 43 (2): 109–43. I am going to use the noun term “wrong” (instead of “wronging”) to talk about directed wrongdoing. The choice is purely terminological, to maintain a consistent vocabulary across text cited from Cornell and my discussion of it.

2. Preliminaries, and the stakes of the debate

Let me begin with some preliminaries and an explanation of what is at stake in wondering whether rights and wrongs can come apart. According to Hohfeld's influential analysis of rights, A's having a claim right against B that B phi is equivalent to B's having a duty to A to phi.[2] One person's having a right to such-and-such is equivalent to another person's bearing a duty *to the right-holder* that has the same content as the right. Duties of this kind are commonly called "directed" duties (since they are owed *to* a particular person) or "bipolar" obligations (since the right-holder and the person who bears the obligation may be thought of as the two "poles" of a current or a relation).[3] In what follows, I am going to use these terms interchangeably to talk about moral obligations that are owed by one person to another. And when I talk about rights, I should be understood to be talking about claim rights.

Familiar rights like property rights, rights to privacy, and rights against bodily harm serve as easy examples of rights that clearly entail bipolar obligations: my neighbour has a right against me that I not trample over their flowerbed, and I have a duty to them to not do so. My neighbour owes it to me to not go through my mail, and I owe them the same. And so forth. Not all moral obligations appear to be directed in this way. For example, there may be an obligation to not spoil nature, or an obligation to protect culturally, artistically, or historically valuable artefacts. A duty of beneficence requires that we help others according to our means, but does not specify any one person or party as the proper recipient of our beneficence. These obligations, if they exist, seem to lack the bipolarity or direction that is characteristic of the obligations that my neighbour and I owe to one another. For the purposes of this discussion it does not matter whether these obligations are real—they serve primarily as a contrast to highlight what is bipolar about bipolar obligations.

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[2] Hohfeld, Wesley. 1919. *Fundamental Legal Conceptions*, W. Cook (ed.), New Haven: Yale University Press.

[3] Cf. Thompson, Michael. "What Is It to Wrong Someone? A Puzzle About Justice." In *Reason and Value: Themes from the Moral Philosophy of Joseph Raz*, edited by R. Jay Wallace, Philip Pettit, Samuel Scheffler, and Michael Smith, 333–84. Clarendon Press, 2004.

Most theorists of rights accept the Hohfeldian equivalence between rights and duties owed to the right-holder. Here is another widely accepted claim about rights:

> (1) A is wronged by B's phi'ing if and only if A has a right against B that B not phi.

To wrong someone, this claim says, is to violate that person's rights.[4] By contrast, violating a moral obligation that is not owed to anyone in particular is wrong, but does not wrong anyone. "Mere" wrongdoing like littering, or carelessly trampling over ancient ruins, lacks the direction or bipolarity of a wrong *against* someone.

Most philosophers who accept (1) tend to do so without argument. Recently, some have challenged the tight connection between wrongs and rights. Others have challenged the Hohfeldian equivalence between rights and directed duties. I will discuss both of these challenges below, with a focus on whether claim (1) still stands in face of the challenges levelled against it. But first, a word on what is at stake in rejecting claim (1).

One upshot of rejecting claim (1) has to do with how we deliberate about rights and wrongs. If claim (1) is true, then we can infer the existence of a right from a wrong, and vice versa. Inferences in both directions are common in political discourse and in the legal arena.[5] For example, it is sometimes argued that a disadvantaged group has no legitimate complaint against a policy that denies them assistance because the group has no right to such assistance.[6]

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[4] Cornell, Nicolas. 2015. "Wrongs, Rights, and Third Parties." *Philosophy & Public Affairs* 43 (2): 109–43. Cornell helpfully cites a slew of philosophers who affirm these commonly held ideas in so many words. Among them are such names as G.E.M. Anscombe, Jeremy Bentham, and Judith Jarvis Thomson. See Cornell, "Wrongs, Rights, and Third Parties," 111-112.

[5] Cornell, "Wrongs, Rights, and Third Parties," 141-142

[6] ibid.

A related practical upshot is that if we continue to rely on such inferences, then we as individuals and our moral practices will fail to recognise some victims of wrongs as having suffered a moral injury. Victims of wrongs are often entitled to some form of compensation or apology that seeks to make them whole (to whatever extent that is possible), typically from the person who has wronged them. Moral practices that fail to register wrongs that occur outside of the context of rights would fail to give victims of some wrongs their due.

In addition to the deliberative and practical upshots, there is a philosophical question that opens up if we reject claim (1): if wrongs are not rights violations, what are they? If we reject claim (1), we need to reconsider when people stand to be wronged by the actions of others, and why. In other words, our theory of rights cannot be our theory of wrongs, and we now face the need for an independent theory of what wrongs are. I will return to this new need for a theory of wrongs after discussing the arguments that challenge claim (1).

With these stakes in mind, let's consider Cornell's case for third party wrongs without rights.

3. Wrongs against affected third parties

Cornell contends that there are cases where, intuitively, a person is wronged by someone else's act, but has no right against the agent that they not perform that act, *and* someone else suitably related to the wronged party does have a right against the agent's so acting. Consider the case of a third party beneficiary to a promise (or contract): if A promises B to take care of B's mother and then fails to do so and the mother is injured, intuitively the mother is wronged by A even though she has no right against A that A care for her. The promise generates a right in B against A, but not in the mother.[7] Another example is the case of a caring friend or family member: if a drunk driver kills a child, the child's parents are wronged by the driver. But the parents lack any right against the driver that could easily explain why this is so.[8]

The proponent of claim (1) could respond to these cases by insisting that since there are no rights, there are no wrongs in these cases either. To make this response stick and to avoid an unhelpful stalemate of intuitions about cases, the proponent should be ready to provide a direct defence of claim (1). I share the intuition that third parties like the caring family member and the promisee's mother *can* be wronged. So instead of searching for an argument for claim (1), I am going to focus on what I will call the "rights-positing response" to Cornell's cases: the proponent of claim (1) could respond by saying that affected third parties do have rights against the parties who wrong them.

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[7] H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982), 183. In Cornell, "Wrongs, Rights, and Third Parties," 116

[8] Cornell, "Wrongs, Rights, and Third Parties," 126. Other cases discussed include cases where a third party is causally affected by an action that violates someone else's rights, as well as cases where the third party overhears a lie told to someone else, and is harmed as a result. ibid. 119-123.

Cornell argues that the rights-positing response would violate our settled theoretical commitments concerning rights: the rights of affected third parties would either not be action-guiding in the way rights are, or these rights wouldn't give third parties the full standing of a right-holder. I am going to argue that Cornell is mistaken here: the theoretical commitments of rights theory are more flexible than he makes them out to be. In the next two sections, I will discuss Cornell's two arguments against the rights-positing response. I will then argue that there is a problem with divorcing wrongs from rights: some ways of doing this, including Cornell's rejection of claim (1), risk losing sight of the fact that the concept of a wrong against someone is relational.

4. Rights and reasons

The first argument against the rights-positing response claims that rights that are posited merely to explain third party wrongs don't provide reasons to act. Consider a variation on the case of a drunk driver whose behaviour causes the death of a child.

> EXPLOSIVES. As a hobby, you like to set off elaborate fireworks. There is a plot of land where you another firework hobbyists can securely set off your devices. There are signs that notify people to stay clear of the area when fireworks are being set off. In addition, anyone using the plot must broadcast a loud warning message before setting off any fireworks. One day you set up an explosive device on the plot of land, light it, and back out to a secure spot—but you forget to broadcast the warning signal. After walking away, you look back and to your horror see that two local children are standing near the device. One of them is a girl with no family and no one who cares for her. The other child is a boy with loving parents who will be heartbroken if he is injured or killed. You have enough time to get one child out of harm's way, but not both.[9]

[9] This case is adapted from Cornell, "Wrongs, Rights, and Third Parties,"128-129

The boy's parents will be wronged if you fail to get him out of the way of the device and he is injured or killed. The boy of course has a right against you that you not kill or injure him. But it is not at all clear that the parents have any right against you that could explain why injuring the boy would wrong them.

The argument for why we should not posit such a right to explain the wrong to the parents—as per the rights-positing response—begins with a claim about how rights guide action: a bona fide moral right should be at least capable of providing reasons for action. That is, if A's phi'ing would infringe a right that B has against A, then this fact is a reason for A to not phi. For ease of reference, let's call a reason to act that is provided by a right a *rights-based reason*. In many circumstances, a rights-based reason will not dictate what A should do all things considered (sometimes rights can be justifiably infringed), and not all rights will provide particularly weighty rights-based reasons (not all rights are very stringent). The claim is that a bona fide moral right cannot be entirely normatively inert: it has to be capable of providing rights-based reasons. Let's call this idea *action-guidingness*. Cornell claims that action-guidingness is a settled theoretical commitment concerning rights, and that the rights-positing response violates this commitment. In EXPLOSIVES, the parents' supposed right would not give you any rights-based reason at all to save the boy.[10]

[10] Cornell, "Wrongs, Rights, and Third Parties," 129

4.1. Is action-guidingness a settled commitment?

Before I offer my direct response to this argument, I want to take a closer look at action-guidingness and its status as an uncontroversial commitment concerning rights. I mentioned above that in order for a right to meet the condition set by action-guidingness, the right does not have to determine what an agent should do all things considered. For one, sometimes rights can be justifiably infringed (for example, I may permissibly shove you off the street and on to the sidewalk to save you from being run over by a car). Another reason is that rights-based reasons do not always break ties between competing reasons.[11] Cornell cites both of these considerations in support of action-guidingness, which is supposed to be an uncontroversial commitment concerning rights that all rights theorists should be poised to accept.

The latter consideration—rights-based reasons don't always break ties—may give some readers pause. Some readers may believe that all reasons are *additive* in such a way that, if the two children's claims in EXPLOSIVES are balanced and the parents have a right against you, then the rights-based reasons should tip the scales in favour of saving the boy. Cornell rejects the idea that rights are additive in this way, but not everyone does. For example, Selim Berker has argued that certain conceptions of what it is for a consideration to be a reason for (or against) an action are committed to the following conditions for how reasons are added:

> "(i) individual reasons always make discernible individual contributions to the overall rightness or wrongness of a given action and (ii) the individual contribution made by a reason of positive valence always positively affects the total reason in favor of the action."[12]

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[11] ibid.

[12] Berker, Selim. "Particular Reasons." *Ethics* 118, no. 1 (2007): 109–39. https://doi.org/10.1086/521586.

If these conditions hold then additional reasons (rights-based or otherwise) should always break a tie between competing reasons. For example, the rights-based reasons provided by the parents' right against you should break the tie between the children's competing claims.

There is a difficulty here. Action-guidingness, as Cornell states it, is *not* uncontroversial, since there are some who would reject it based on their view of how reasons are added. But that view of how reasons are added is not itself uncontroversial.[13] I don't hope to solve this difficulty here—that would take us too far into the weeds of the literature on reasons. The fact of the difficulty is enough to cast some doubt on whether Cornell's argument fits his intended strategy: identify a settled theoretical commitment concerning rights that all rights theorists should be poised to accept, and then show that rights posited in affected third parties would violate that commitment. It is not clear that action-guidingness really is a settled theoretical commitment, so the argument seems off to a bad start.[14] [15]

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[13] Cornell of course would reject this view, as does e.g. Setiya, Kieran. "What is a Reason to Act?." *Philosophical Studies* 167, no. 2 (2014): 221-235.

[14] To add on to this difficulty, some rights theorists reject the link between at least some rights and reasons outright. Daniel Muñoz argues that rights *against oneself* do not provide reasons, because reasons based on rights against oneself don't have the kind of stability that a bona fide reason for action should have. See Muñoz, Daniel. "The paradox of duties to oneself." *Australasian Journal of Philosophy* 98, no. 4 (2020): 691-702. Since we are now concerned with rights against others, I don't consider this a decisive blow against Cornell's treatment of action-guidingness as a settled commitment concerning rights.

[15] What should the proponent of the rights-positing response say about rights-based reasons and their additivity? There is a choice point here: if we endorse Cornell's version of action-guidingness, we are pushed towards a view that denies that rights-based reasons are always additive in a way that breaks ties. If we endorse a stronger version of action-guidingness or a Berker-style view of reasons, then we must explain why the parents' right does not tip the scales in EXPLOSIVES. I am not sure which option is preferable, but this choice point does tell us something interesting about the relation between views of reasons and views of (the theoretical roles of) rights: not all of them can be joined in a happy union. Thanks to Kieran Setiya for discussion on this topic.

4.2. Reasons based on third parties' rights

I will now argue that even if we grant action-guidingness, the argument against the rights-positing response does not go through. To see why, let's take a closer look at what it takes for a right to meet action-guidingness. A right fails to meet this condition if it fails to provide any rights-based reasons. Cornell claims that the parents' right against you in EXPLOSIVES gives you no reason at all to save the boy.

The problem with the argument is that we've not been given good reason to think that the parents' right gives you no reason at all to save the boy. The two reasons to accept this claim that Cornell gives are (1) that it would be pernicious to take the parents' presence into consideration when deliberating about what to do, and (2) it is not necessary to cite the parents' right to explain why you should save the boy in a modified EXPLOSIVES case where you should do so, all things considered. Let's take these considerations in turn.

First, the idea that it would be wrong, or pernicious, to consider the parents when trying to decide whether to save the boy or the girl. Cornell writes:

> "It would be erroneous—perhaps downright pernicious—to think that the existence of the parents can decide between the otherwise evenly balanced claims of the two children. It is not something that you should think about. Whatever status the parents have, it does not appear to inform your choice."[16]

[16] Cornell, "Wrongs, Rights, and Third Parties,"129

I agree that it would be pernicious to consider the parents and the potential wrong to them, when the girl's life is also in the balance. But this is consistent with the parents having a right against you, and that right providing you reason to save the boy. To see how, consider the following case: things are as described in EXPLOSIVES, except you could save both children from being hurt by the explosive device at the cost of being mildly injured yourself (you have to swat away the device, which will cause a small burn). It is safe to say that you should not even think about the injury to yourself—only a jerk would pause and wonder whether saving the children is worth the minor injury. But it would be a mistake, I believe, to conclude from this that your self-interest gives you no reason at all to not save the children. Given the context, that reason is barely worth noting and it would show poor character to dwell on it or give it much weight. But insofar as your wellbeing really will be set back by saving the children, I see no reason to insist that you have no reason at all to not do so.

I think that we (and the proponent of the rights-positing response) can say the same about the perniciousness of considering the potential wrong to the boy's parents when the girls' life is at stake. Given that her life is at stake, it would be insensitive to her to consider the parents' position. The fact that considering their position would show poor character does not prove that their position gives you no reason at all to save the boy, and therefore does not prove that a right in the parents would violate action-guidingness.

The second consideration for the parents' right providing no reason at all is that it wouldn't be necessary to cite this right to explain why you should save the boy, in a context where you should do so all things considered. Suppose again that your choice is between saving both children from being hurt by the explosive device and being mildly injured, *or* saving neither child and avoiding a mild injury to yourself. Clearly you ought to save the children. Why? The easiest explanation is that you would violate the children's rights if you failed to save them. Cornell claims that since it is unnecessary to cite the parents' right in explaining why you ought to save the children, their right gives you no reason at all to do so.[17]

The problem with this line of reasoning is that it is not true in general that in order to provide a reason for an agent to phi, a consideration has to feature in the explanation of why an agent ought to phi.

One way to illustrate this would be to consider a situation where you ought to save the children, but we screen off the reasons to do so that are provided by the children's rights. The trouble with such a case is that the parents' status as it is described by Cornell depends on the boy's right against you: the parents are a third party who suffer a wrong *because* the boy's rights are violated.[18]

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[17] The idea Cornell is endorsing is what Daniel Wodak calls the "Explanatory Intuition", see Wodak, Daniel. "Redundant reasons." *Australasian Journal of Philosophy* 98, no. 2 (2020): 266-278. Wodak likewise argues that the Explanatory Intuition is mistaken because reasons can be redundant in explaining why someone ought to phi, while still being considerations that count in favour of phi'ing.

[18] For this reason, Cornell rejects the idea that the parents' right might provide a reason counterfactually: if it weren't for the boy's rights against you, the parents' right against you would provide a reason to save the boy. No surprise, since Cornell focuses only on cases where a third party stands to be wronged *because* someone else suffered a rights violation.

I suggest we consider a different case that illustrates the same point. Suppose I have separately promised my dentist and my mother that I will brush my teeth every day before going to bed. My only reason to not brush my teeth is that it is mildly inconvenient. Either one of the promises would suffice to explain why I should brush my teeth, all things considered. But that doesn't mean that the other promise fails to provide me any reason at all to brush my teeth.[19]

If I neglect to brush my teeth, I've broken both promises and I owe an apology to my mother *and* to my dentist. At this point, both promises exert their normative power on me. It seems implausible that before I break the promises, one of them somehow lost its normative grip on me, but only until the very moment that I break both promises. It seems more plausible that neither promise stopped being a reason for me to brush my teeth, and that both promises gave me reason to brush my teeth regardless of whether it was necessary to cite either of them to explain why I should brush my teeth before bed, all things considered.

If this is right then the fact that the children's rights suffice to explain why you should save them (rather than avoid a small injury to yourself) does not prove that the parents' right against you gives you no reason at all to save the children, and therefore does not prove that a right in the parents would violate action-guidingness.

4.3. Wrongs and reasons

According to Cornell it would be a mistake to posit rights in affected third parties who stand to be wronged because these rights would not be action-guiding—they wouldn't provide reasons to act. Instead, we should stop at saying that third parties like concerned family members stand to be wronged without having their rights violated. According to this view, these wrongs to affected third parties are not action-guiding. They do not provide reasons to act—otherwise there would be no objection here to identifying the wrongs with rights violations.

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[19]Consider also the prudential reasons that I have to brush my teeth every day before going to bed. If there couldn't be an excess of reasons, these prudential reasons would somehow cease to be reasons when I promise to my dentist (or to my mother) that I will brush my teeth. That is implausible.

This idea that wrongs are normatively silent as far as reasons for action go should strike us as strange. Whatever else we say about wronging another person, wronging another person is a violation of an obligation that you owe to that other person. Unless the fact that phi'ing would wrong you provides me with reason not to phi, it would turn out that I have bipolar moral obligations that I have no reason at all to conform to. This seems false at worst, and controversial at best.[20] What's more, wrongs can sometimes be very serious indeed. Consider for example the prospective injury to Y's mother, whom X has promised to look after. If the mother will be injured if X fails to keep his promise, then that fact surely gives X some reason to keep his promise to Y. Contra Cornell, wrongs do seem to provide reasons—it would be very odd if they did not.

Another consideration that supports the idea that wrongs—*even when they don't correspond with rights*—do provide reasons is the following. In recent writing, Adrienne Martin has argued that there are bipolar obligations that do not correspond to rights.[21] Obligations that are owed to particular others but do not correspond to rights can arise in the context of special relationships like friendship, partnership, and parent-child relationships. For example, parents owe their children to foster their growth into healthy and balanced adults, co-parents owe it to one another to be sensitive to one another's needs, and partners owe one another care and emotional support. Martin calls obligations of this kind personal bonds. Now, the following seems true: if A's phi'ing violates a personal bond that A owes to B, then that fact is a reason for A to not phi. For example if I owe my partner emotional support, then that is a reason to not turn cold and distant when they most need it from me. And if parents owe it to their children to foster their growth into balanced adults, that is a reason for a parent to not deny them access to a variety of hobbies and pastimes.

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[20] I noted earlier that Daniel Muñoz rejects the idea that rights against oneself provide reasons. Muñoz also rejects the idea that duties to oneself provide reasons, on similar grounds, see Muñoz, Daniel. "From rights to prerogatives." *Philosophy and Phenomenological Research* 102, no. 3 (2021): 608-623. But as I noted earlier, we are concerned now with duties to others, not duties to self.

[21] Martin, Adrienne M. "Personal Bonds: Directed Obligations without Rights." *Philosophy and Phenomenological Research* n/a, no. n/a. Accessed January 22, 2020. https://doi.org/10.1111/phpr.12620.

Recall the connections between rights, wrongs, and bipolar obligations that we started out with. These included the Hohfeldian equivalence between rights and duties and the following claim:

> (1) A is wronged by B's phi'ing if and only if A has a right against B that B not phi.

Given the Hohfeldian equivalence, these claims have the corollary that

> (2) A is wronged by B's phi'ing if and only if B has a duty to A to not phi.

If personal bonds really are bipolar obligations, this challenges the Hohfeldian equivalence. Not all bipolar obligations correspond to rights. But the corollary claim (2) may still be true for reasons that have nothing to do with the Hohfeldian equivalence. For the sake of being conservative in uprooting claims that are commonly accepted by many moral philosophers, let us assume that (2) is true. If (2) is true, then violating a personal bond that you owe to a friend, partner, or child, wrongs them. And since the fact that A's phi'ing would violate a personal bond is a reason for A to not phi, wrongs that are violations of personal bonds provide reasons.

The same seems to go for bipolar obligations that do correspond to rights. I have a duty to my neighbour to not trample over their flowerbed, and the fact that doing so would wrong my neighbour is no doubt a reason to not do so. The fact that wrongs that are rights violations and wrongs that are violations of personal bonds *do* provide reasons for action casts doubt on the idea that there is some third variety of wrongs—wrongs against affected third parties—that, unlike these two, does not provide reasons for action at all. The rights-positing response saves us from having to say this. Wrongs against affected third parties *are* violations of their rights and, as such, give you reason to refrain from doing what would wrong them.

5. Rights, demands, and ex ante entitlements

Let's move on from reasons and consider the second argument against the rights-positing response. The second argument claims that third parties lack the right kind of standing to be bona fide right-holders. Right-holders typically are entitled to demand that those who bear the correlative duty not act in ways that would violate their rights. Cornell claims that the parents in EXPLOSIVES lack the entitlement or standing to demand that you not harm their child. They are therefore not bona fide right-holders; the rights-positing response is mistaken in saying that they have a right against you that you not harm their child.[22]

The crucial premise of this argument—the settled commitment that it appeals to—says that right-holders are entitled to demand that others not act in ways that would violate their rights. A typical claim right comes with an entitlement to demand *ex ante* that others respect the claim, as well as with an entitlement to seek compensation or apology *ex post* in case the right is violated. This is all uncontroversial, but there are several problems with the argument.

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[22] Cornell, "Wrongs, Rights, and Third Parties," 132

5.1. Bystander demands

Here is the first problem: right-holders are not the only ones who can make demands on a right-holder's behalf. Bystanders (especially bystanders who have a stake in what happens to the right-holder) can also demand that others not act in ways that are wrong. For example, suppose I see a burglar climbing in through my neighbour's window. As a concerned member of the moral community (and as someone who lives in the same neighbourhood), I might yell at the burglar: "Hey, what do you think you are doing? That's not your house!" By yelling at the burglar I am trying to get them to stop what they are doing so as to prevent a burglary. I am doing that by addressing the burglar and demanding that they stop the wrongdoing. I too have standing to demand the non-infringement of my neighbour's rights.[23]

Here's how the possibility of bystander demands bears on Cornell's argument: Cornell claims that the parents lack standing to demand that you save their child. I assume that he has in mind the kind of standing that right-holders have, since as bystanders and concerned family members they do have standing to demand that you save their child. What they are said to lack is a particular type of standing to make demands on their own behalf, demands to the non-infringement of their own rights. But how do we tell these two types of standing to demand apart?

It would help of course if we knew whether the parents really are just concerned bystanders, or whether they have a right against your harming their child. But it would be question-begging at best to say that the parents lack a right-holder's standing to demand because they don't have a right against you that you not harm their child.

This leaves the argument from the parents' purported lack of standing weaker than it first appears. To strengthen the argument, more needs to be said about why we should think that the parents lack a right-holder's standing to demand—without begging the question against the rights-positing response.

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[23] See e.g. "Bipolar Obligation" in Darwall, Stephen. *Morality, Authority, and Law*. Oxford University Press UK, 2013.

5.2. Standing and justification

The second problem with Cornell's argument arises when we look at what Cornell says to support the claim that the parents cannot demand that you save their child: Cornell claims that the parents "could not (properly) demand that you save their child at the expense of the familyless girl". I agree wholeheartedly, but the impropriety of making that demand does not show that they lack the standing to make it. Consider this scenario:

ROOMMATES: Alice and Bee are roommates. Alice promises Bee that she will clean the kitchen but fails to do so. Bee is annoyed and considers confronting Alice about the broken promise. But Bee knows that she too has a habit of making promises that she does not keep, especially when it comes to doing chores around the house.

Given that Alice has promised, Bee would be within her rights to demand that Alice apologise and that she make amends (for example by cleaning the kitchen as soon as she is able to). But this wouldn't be appropriate because it would be *hypocritical* of her to hold Alice to account. That is a good reason for her to not do it. What Bee is entitled to do, and what she should do all things considered, come apart.

It is easy to multiply the cases to illustrate the general point. You may be within your rights to paint your house an ugly colour, but out of consideration for your neighbours you shouldn't. You may be within your rights to keep your pay check to yourself, but you should give some to charity. And so forth. All sorts of considerations can make it so that you should not, all things considered, do something that you are within your rights to do. This extends to the kinds of *ex ante* and *ex post* entitlements that attend ordinary claim rights. You may be entitled to resent an ex who has wronged you, but resentment can be psychologically taxing. You may be entitled to compensation from a thief who is now behind bars, but doing so would be costly and time-consuming.

It is worth noting here that even rights theorists who take the standing to demand to be characteristic of having a moral claim right accept this idea. Margaret Gilbert has put forward a view of Hohfeldian claims as "demand-rights".[24] According to her view, to have such a right is to have the standing to make authoritative demands of others. But even Gilbert accepts the distinction between standing and justification; she writes:

> "To have the *standing* to demand an action is not the same as being *justified* in demanding it all things considered. For instance, I may have the standing to demand of you that you have dinner with me this evening since we agreed that you would. Still, I should not make this demand if your ailing parents need assistance. I would not, in other words, be justified—all things considered—in doing so."[25]

In other words: however tight the connection is between possessing a right and having the standing to demand, lacking the justification to demand does not entail a lack of standing.

As I said earlier, I do agree with Cornell that the parents have good reason not to demand that you save their child in EXPLOSIVES: if the parents demanded that you save their boy, they would be demanding that you save him at the expense of the familyless girl. Demanding that you save the boy at her expense would be, simply, a horrible thing to do. That's a very good reason for the parents not to do it—even if they were within their rights to do so, as the rights-positing response says.[26]

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[24] Gilbert, Margaret. Rights and Demands: A Foundational Inquiry. Oxford University Press, 2018.

[25] ibid. (58).

[26] Consider also a scenario where your choice is between saving the boy and saving your friend's precious crystal vase. It seems clear to me that the parents *would not* be overstepping their rights if they demanded that you save their child at the expense of the vase. Nor would it be inappropriate for them to do so. It makes sense then that what makes the parents' demand in EXPLOSIVES inappropriate is the presence of the other child.

6. Wrongs without relation

I want to move on now from Cornell's arguments against the rights-positing response and consider a positive reason against divorcing wrongs to affected third parties from rights. In discussing the argument from action-guidingness I noted that it seems plausible to me that we can do wrong by others in the context of a personal relationship without violating their rights. This includes relationships like friendship, romantic partnership, relationships between co-parents, parent-child relationships, and more. I explained that Adrienne Martin has argued that relationships of this kind generate bipolar obligations in the parties to the relationship: parents owe their children to foster their growth into healthy and balanced adults, co-parents owe it to one another to be sensitive to one another's needs, partners owe one another care and emotional support, and so on.

Personal relationships can of course generate rights too. Parents owe their children a certain level of material care and protection, and the children have a correlative right against their parents that their basic needs be met. Monogamous romantic partnership consists in part of a promise or a commitment to not pursue other romantic relationships, and that promise or commitment may generate rights in both parties. Aspects of some personal relationships like marriage and guardianship are also governed by laws, and these can ascribe rights to the parties in the relationship. But the duties that personal relationships generate don't stop there—some duties borne out of relationships aren't matters of right and duty.

The reason why I bring in personal bonds here is to bring out a shortcoming in the view that emerges from Cornell's discussion of wrongs without rights. Returning once more to the commonly accepted claims we started with, recall that Cornell is challenging the following claim:

> (1) A is wronged by B's phi'ing if and only if A has a right against B that B not phi.

I also introduced the Hohfeldian equivalence which says that A's having a claim right against B that B phi is equivalent to B's having a duty to A to phi. Cornell does not argue against this equivalence. Whereas by contrast, the existence of personal bonds is inconsistent with the equivalence between rights and directed duties, as I explained above. The existence of personal bonds however is consistent with

(2) A is wronged by B's phi'ing if and only if B has a duty to A to not phi

Claim (2) seems plausible even if we reject (1): violations of personal bonds wrong the parties to whom they are owed.

With all this in mind, here is my objection to Cornell's attempt to divorce rights from wrongs—*not* via rejecting the Hohfeldian equivalence, but through rejecting claim (1): unlike Martin's view, Cornell's view leaves us with no explanation of the relational nature of wrongs. Let me explain.

At the outset, I explained how the notion of a wrong against someone is a relational notion. There is wronging someone, or doing wrong by another person, and then there is "mere" wrongdoing without wronging anyone in particular. For example, littering in a public park is wrong but has no particular victim, whereas stealing someone's property wrongs the owner of that property in particular. This distinction makes a big difference in practice: wronged parties typically have standing to demand apology or compensation from the wrongdoer, and wronged parties are licensed to hold their wrongdoers accountable through personal reactive attitudes like resentment. Wronged parties also have the standing to forgive a wrongdoer, and to let go of their standing to resent and seek compensation. These practical consequences of wronging indicate that what has taken place isn't just an impersonal wrong, or a bad state of affairs, but that one person has *done wrong by* another. They are indicators of the relational nature of wrongs.

Consider now claim (1):

(1) A is wronged by B's phi'ing if and only if A has a right against B that B not phi.

The orthodox view that accepts both claim (1) and the Hohfeldian equivalence between rights and directed duties has a natural explanation of the relational nature of wrongs: wrongs inherit their relational nature from directed duties. Cornell rejects claim (1), but does not reject the Hohfeldian equivalence. What, on this view, could secure and explain the relational nature of wrongs without rights? Not the fact that doing wrong by someone violates an obligation owed to that person, since according to the Hohfeldian equivalence, these only exist where rights do. It remains entirely unclear what could explain the relational nature of wrongs against affected third parties—if these wrongs are not rights violations.

By contrast, this problem does not arise for Martin's idea of personal bonds. As I explained above, Martin's discussion prompts us to reject the Hohfeldian equivalence between rights and directed duties by showing that the realm of directed duties is broader than the realm of rights, so to speak. Accepting the existence of personal bonds, and even admitting that violating personal bonds can wrong another person, does not threaten the relational nature of wrongs.

7. Conclusion

Most moral philosophers believe that to wrong someone just is to violate their rights. I have argued that as far as affected third parties go, this dictum still stands: wronging them does still seem to be a violation of their rights—at the very least, the challenges that purport to say otherwise don't stand up to scrutiny.

I have also discussed challenges to the related idea that rights and directed duties are correlates. If personal bonds exist and violating such bonds is a wrong against the other party, then wrongs and rights may come apart—but not because of any considerations having to do with affected third parties, or problems with the rights-positing response.

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Chapter Two

The Normative Power of Uptake[27]

ABSTRACT: Much of the recent philosophical literature on consent focuses on a debate between mental views of consent and behavioural views of consent. Mental views claim that a mental state or an attitude is necessary and sufficient for morally transformative consent. Behavioural views claim that something more, like communication or observable behaviour, is required. Proponents of mental and behavioural views often cite different functions of consent in support of their view. In this paper I argue that consent has an often overlooked *relationship-shaping* function: consent can enable and alter our personal relationships. The fact that consent can alter our relationships grounds an argument for the following claim: consent cannot be morally transformative without the consent-recipient's uptake or acceptance. This is because we ought to have a say in the shape of our personal relationships. Mental views of consent deny the need for uptake, and so do some behavioural views. Views that deny the need for uptake view consent as a *unilateral* normative power: consent can be exercised by the consent-giver alone, and no one else need enter the picture. My argument in this paper suggests that this conception of consent is mistaken, and that the question of whether consent is unilateral—whether it requires uptake—carves the space of existing views of consent in a deeper way than the question of whether a mental state is sufficient for consent.

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[27] This chapter first began as a term paper that I wrote with Judy Thomson for an individual study on moral rights. I am indebted to her for encouraging me to keep thinking about the question of uptake.

1. Introduction

Much of the recent philosophical literature on consent focuses on a debate between so-called "mental" views of consent and "behavioural" views of consent. Mental views of consent are committed to the following claim: consent consists in a mental state or an attitude, and having the right kind of mental state or attitude is both necessary and sufficient for consent.[28] Behavioural views deny that a mental state is sufficient for consent. Something more is required. On one popular version of the behavioural view what's needed is either verbal communication ("Yes, go ahead") or non-verbal communication (a nod, or perhaps an inviting gesture).[29]

Arguments for either of type of view often appeal to ideas about the *function* of consent. The proponents of mental views tend to emphasise how consent extends and expresses the consent-giver's autonomy. Proponents of behavioural views sometimes emphasise how consent lets us coordinate our actions with other people. These different ideas about what consent does for us motivate different views of what consent is—more on this later. In this chapter I argue that consent has an often overlooked *relationship-shaping* function. Acts of consent can foster trust, intimacy, and other preconditions of personal relationships. Acts of consent can also directly affect the nature of an existing personal relationship.

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[28] Alexander, Larry. "The Moral Magic of Consent (II)." *Legal Theory* 2, no. 3 (September 1996): 165–74. https://doi.org/10.1017/S1352325200000471.; Alexander, Larry, Heidi Hurd, and Peter Westen. "Consent Does Not Require Communication: A Reply to Dougherty." *Law and Philosophy* 35, no. 6 (December 1, 2016): 655–60. https://doi.org/10.1007/s10982-016-9267-z.; Ferzan, Kimberly Kessler. "Consent, culpability, and the law of rape." *Ohio St. J. Crim. L.* 13 (2015): 397.; Hurd, Heidi M. "The Moral Magic of Consent Special Issue: Sex and Consent, Part I." *Legal Theory* 2, no. 2 (1996): 121–46.

[29] Dougherty, Tom. *The Scope of Consent*. Oxford: Oxford University Press, 2021. https://doi.org/10.1093/oso/9780192894793.001.0001; Dougherty, Tom. "Yes Means Yes: Consent as Communication." *Philosophy & Public Affairs* 43, no. 3 (2015): 224–53. https://doi.org/10.1111/papa.12059.

Which relationships we have, and with whom, matters to us a great deal. Since consent can shape our relationships, it would be objectionable if others could wield it without our having a say in the matter. I am going to argue that for this reason we ought to have a say in whether other people's consent to us is morally transformative. Our having a say is secured by the following condition on morally transformative consent: a person cannot give their morally transformative consent to another person unless there is uptake or acceptance from the latter. What exactly this means, and what constitutes uptake or acceptance, will become clearer as we proceed.

Mental views of consent deny the claim that consent requires the recipient's uptake. So do versions of the behavioural view. Focusing on the question of uptake therefore tells us something interesting about the ongoing debate between mental and behavioural views of consent: members in both of these opposing camps have a shared commitment to the idea that a consent-giver can *unilaterally* release others from obligations they owe to her. My discussion here introduces a distinction between unilateral and *bilateral* conceptions of consent. This distinction carves the space of existing views of consent in a different way than the question of whether a mental state is sufficient for consent.

I'll begin with preliminaries in section 2. In section 3, I will explain how the question of uptake bears on the debate between mental and behavioural views of consent. In section 4, I begin to develop an argument for the idea that consent requires uptake. Section 5 returns to mental views of consent and the thought that consent gives us control over our normative boundaries. I explain how this function of consent finds a home within conceptions of consent as a bilateral normative power. In section 6, I respond to objections.

2. Preliminaries

2.1. Consent

Sometimes when we talk about consent it can be unclear whether we are talking about a speech act, a legal concept, or a normative power. When I talk about consent here, I am talking about a normative power. More precisely, I am talking about the normative power that you exercise when you permit someone else's doing something, say phi'ing, by releasing that person from an obligation not to phi. When someone's consent has this effect we may say that their consent was valid, morally transformative, or successful. However for ease of expression, in what follows I will use the term "consent" so that

(1) A consented to B's phi'ing

Implies that

(2) B was released from an obligation not to phi.

This choice is purely terminological. When A tries to consent but fails to release B from an obligation, I will say that A tried to, or attempted to, consent.[30] My use of the term "consent" to pick out a particular normative power may not capture everything that we call "consent" in everyday parlance, or in specialised domains like the legal realm. For example in everyday discussions of sexual consent the word "consensual" sometimes stands in for "morally permissible", and for reasons I explain below, this does not track what I call consent here. But what matters is that what I talk about when I talk about consent in this paper *does* track the thing that my interlocutors talk about.[31] [32]

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[30] Consent can fail to release its recipient from an obligation for a number of reasons. For example the would-be-consent-giver may be heavily intoxicated, insufficiently informed about what they are doing, or under a threat of violence. All of these may be reasons why their consent doesn't go through.

[31] See for example: Wertheimer, Alan. *Consent to Sexual Relations*. Cambridge Studies in Philosophy and Law. Cambridge: Cambridge University Press, 2003. https://doi.org/10.1017/CBO9780511610011.; Hurd, "Moral Magic"; Bolinger, "Moral Risk"; Dougherty, "Scope of Consent".

[32] An anonymous reviewer has suggested that it may be a mistake for theorists of consent to assume that consent is a unified phenomenon at all. I don't think that the different uses of the word "consent" in different domains (philosophy of language, legal discourse, everyday parlance, etc.) is strong evidence that the *normative power* of consent isn't a unified phenomenon. I do believe that the norms of valid and appropriate consent are not uniform cross all contexts—in chapter 3 I argue for a substantive view of consent that makes this a central point.

Consent releases obligations, but not all obligations can be released through consent. Let's assume that there is an obligation to preserve and protect the natural environment. No one can release you from this obligation by consenting to your sullying the environment because you do not owe it to anyone in particular. Consent operates "directed" or "bipolar" obligations that are owed to particular others.[33] For example, I owe it to my neighbour to not enter their apartment. I have a bipolar obligation *to* my neighbour to not enter. My neighbour can release me from this obligation by consenting to my entering the apartment. And *only* my neighbour can release me from this obligation, except in special circumstances where a third party is authorised to do so.[34] Absent such special circumstances, *your* consent cannot make it permissible for me to enter my neighbour's apartment. Consent operates between the consent-giver and the consent-recipient, on the bipolar obligations that tie them to one another in particular.[35]

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[33] Thompson, Michael. "What is it to wrong someone? A puzzle about justice." In R. Jay Wallace, Philip Pettit, Samuel Scheffler & Michael Smith (eds.), *Reason and Value: Themes from the Moral Philosophy of Joseph Raz*. Clarendon Press. pp. 333-384 (2004). See also Darwall, Stephen. "Bipolar Obligation." In *Oxford Studies in Metaethics Volume 7*. Oxford: Oxford University Press, 2012.

[34] Right holders can sometimes transfer their powers to a third party, for example when a person entrusts a financial advisor to trade their stocks for them. A third party can also be authorised to exercise a power because the right holder is unable to do so, for example when next of kin give consent to an emergency surgery.

[35] This is consistent with one person being able to give consent to, and receive consent from, multiple people at once. It is also consistent with groups having the power to give as well as receive consent. These possibilities introduce complications that would take us too far afield from the question at hand; in what follows I am going to focus only on consent between two individuals.

The concept of a bipolar obligation is closely tied to the idea of wronging, or doing wrong by, someone in particular. Assuming again that there is a duty to preserve the environment, violating that duty by littering in a public park is wrong. But littering in a public park does not wrong anyone in particular. By contrast, entering my neighbour's apartment without their permission wrongs my neighbour. In what follows I will use the noun terms "wrong" and "wronging" to talk about violations of bipolar obligation.[36]

I said that when I talk about consent, I am talking about a power that you exercise when you *permit* someone else's doing the thing that you consent to. It pays to be careful here. Suppose you are the owner of a priceless piece of rare art. You say to a villain, "Do whatever you will with this piece of art." The villain then destroys it. Your consent made it the case that the villain does not *wrong you* when they destroy the art. But your consent did not make it permissible for the villain to destroy it. Why? Because although bipolar obligations are important moral considerations, they are not the only considerations that bear on what a person ought to do. And consent, since it operates on bipolar obligations, is not powerful enough to dissolve all moral objections to a consented-to act. That said, I see no harm in saying that when you consent to someone's phi'ing, you *give permission* to that person to phi as long as we keep in mind that it doesn't follow that it is permissible for them to phi all things considered.

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[36] It is common to assume that bipolar obligations correspond to rights, and that all wrongs are therefore rights violations (the thought has its origins in Hohfeld's influential analysis of legal rights. (Hohfeld, W., 1919, *Fundamental Legal Conceptions*, W. Cook (ed.), New Haven: Yale University Press.). If this is true, then consenting is the same as waiving a right. Recent work on rights and wrongs has challenged the common assumption. See e.g. Cornell, Nicolas. "Wrongs, Rights, and Third Parties." *Philosophy & Public Affairs* 43, no. 2 (March 1, 2015): 109–43. https://doi.org/10.1111/papa.12054 and Martin, Adrienne M. "Personal Bonds: Directed Obligations without Rights." *Philosophy and Phenomenological Research* n/a, no. n/a. Accessed January 22, 2020. https://doi.org/10.1111/phpr.12620. In light of this, I will say that consent releases bipolar obligations, rather than saying that it waives rights.

2.2. Uptake

Before we go any further, I should clarify what I mean by "uptake" and "acceptance" (I will use these terms interchangeably in what follows). I am not able to offer here a principled account of what acceptance is—developing such an account will have to wait for another time. Instead, I will discuss a variety of cases that will hopefully illustrate what I mean by "acceptance" in this context. I acknowledge that intuitions about cases may vary, but the purpose of these cases is just to give us an idea of what acceptance looks like; the argument for why uptake is needed for morally transformative consent doesn't rest on these cases.

Consider first these cases of *promising*:

> (Promise 1) Before Bertha leaves for work in the morning, she says to Astrid: "I promise to pick up the dry cleaning today." Astrid says: "Okay, thanks!"
>
> (Promise 2) Bertha says to Astrid: "I promise to pick up the dry cleaning today." Astrid does not hear Bertha.
>
> (Promise 3) Bertha says to Astrid: "I promise to pick up the dry cleaning today." Astrid says: "No thanks, I would rather do it myself."

Something happens in the first case that doesn't happen in the second or third. Astrid says, "Okay, thanks", and thereby *accepts* Bertha's promise. This does not happen in Promise 2 or Promise 3. In Promise 2 Astrid does not even hear Bertha's utterance, so she couldn't accept it even if she wanted to. In Promise 3 Astrid *rejects* Bertha's offer. Of these three scenarios, only Promise 1 involves the thing that I am talking about when I talk about uptake or acceptance.

It is commonly accepted that promises require the promisee's uptake in order to be binding.[37] A promise that gets no uptake from the promisee does not create an obligation for the promisor. This is to say that in Promise 1 after Astrid's acceptance, Bertha owes it to Astrid to pick up the dry cleaning. Not so in Promise 2 or Promise 3.

These cases give us a clue as to what counts as acceptance when we talk of normative powers like promising and consent. Promise 1 is the most straightforward case: Astrid communicates her acceptance to Bertha verbally, and this has the effect of making Bertha's promise binding. Astrid could also give Bertha a thumbs up or a nod, and that would plausibly have the same effect. Promise 2 does *not* involve acceptance. It would not involve acceptance even if Astrid had heard Bertha but gave her no response at all: if Astrid gives no response at all and Bertha chooses to not pick up the dry cleaning, Astrid cannot then complain that Bertha broke her promise to pick up the dry cleaning.[38] This suggests that accepting a promise goes beyond just knowing or recognising that someone has offered to make a promise: the promisee must actively participate in making the promise binding.

Consider now consent. I want to argue that in order for A's consent to B's phi'ing to release B from an obligation not to phi, B must accept A's attempt to consent. Call this claim *the uptake requirement for consent*. To illustrate how consent may be accepted (or not), consider these parallel cases:

> (Consent 1) Astrid asks Bertha: "Can I use your parking spot this week?" Bertha says: "Sure, go ahead". Astrid says: "Thanks, I appreciate it."
>
> (Consent 2) Astrid asks Bertha: "Can I use your parking spot this week?" Bertha says: "Sure, go ahead". Astrid does not hear what Bertha said.

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[37] See for example Thomson, Judith Jarvis. *The Realm of Rights*. Cambridge, Mass: Harvard University Press, 1990.*;* Owens, David. *Shaping the Normative Landscape*. Oxford, New York: Oxford University Press, 2012.*;* Liberto, Hallie. "Promises and the Backward Reach of Uptake." *American Philosophical Quarterly* 55, no. 1 (2018): 15–26.; Gilbert, Margaret. *Rights and Demands: A Foundational Inquiry*. Oxford University Press, 2018.

[38] The case is complicated by the fact that even if Bertha's utterance doesn't constitute a promise (because it is not accepted), she may incur some reason to do what she said she would. In general, if I publicly assert that I will do thus-and-so, knowing that others may come to rely on my doing thus-and-so, that puts some pressure on me to act as I said I would.

(Consent 3) Bertha says to Astrid: “Feel free to use my parking spot this week.” Astrid says: “That’s okay, I’d rather not.”

If consent requires its recipient’s uptake, then in Consent 1 Astrid is released from her obligation to not use Bertha’s parking spot. But not in Consent 2 or 3. This seems intuitively correct. Imagine that in Consent 2 or 3 Astrid were to go ahead and use the parking spot anyway. Bertha could reasonably complain that Astrid didn’t have her permission to do that.

Of the three cases, Consent 1 represents the most straightforward case: Astrid communicates acceptance verbally, and once again a non-verbal act of communication like a smile or a nod that says “thanks” would also suffice. Consent 2 does not involve acceptance, and it wouldn’t involve acceptance even if Astrid (merely) heard Bertha’s offer. As with Promise 2, it seems as though Astrid needs to do something more than just listen and register Bertha’s utterance.

You may wonder whether this is the right thing to say about Consent 2. Perhaps the following is true instead: Bertha did consent to Astrid using her parking spot, but Astrid should not park in Bertha’s spot because there is an independent norm concerning consent that says that you may not act on someone’s consent unless you know that it was given. Since Astrid doesn’t know that Bertha consented, she shouldn’t use the parking spot.

I grant that there probably is a norm like this, but I don't think that this is quite right as an analysis of the case. It seems plausible to me that Astrid wrongs Bertha if she uses her parking spot after their exchange in Consent 2. This is just to say that Astrid still owes it to Bertha to not do so. It is unclear how an independent norm that says not to act on someone's consent unless you know it was given can explain the fact of wronging in this case.[39] So I contend that the right thing to say about Consent 2 is that there was no uptake, and so no morally transformative consent. But as I said earlier, I acknowledge that intuitions may differ here. My case for the uptake requirement for consent does not rest on these cases—their purpose is just to illustrate what accepting someone's consent looks like.

Here is a slight complication: sometimes doing the very thing that is being consented to can constitute uptake. For example, if Bertha says "Feel free to use my parking spot", and after hearing this Astrid proceeds to park in the spot, her doing so seems to constitute acceptance of Bertha's consent. Bertha could not complain that she did not give Astrid permission to do that. Note however that this is different from Bertha saying "Feel free to use my parking spot" without Astrid's knowledge, and Astrid then proceeding to park in Bertha's spot. Uptake or acceptance is a response to someone else's act or utterance; in this latter case Astrid is not responding to Bertha's utterance since she remains unaware of it.

[39] An anonymous reviewer has suggested that the fact of wronging in this case could be explained as follows: we can wrong others (especially our friends, roommates, and so on) by doing something that does not strictly speaking violate a right of theirs, but does display a lack of care towards that person. I agree wholeheartedly that wrongs like these are possible—I discuss them at length in Chapter 1. But we can assume that Astrid is not displaying a lack of care towards Bertha: suppose Astrid is asking for permission precisely because she wants to act in a way that Bertha is okay with. She fails to hear Bertha's "Sure, go ahead." Astrid does not believe that Bertha has given her permission to park, but she does so anyway because she is in a hurry. Astrid does this hoping that Bertha will consider her excuse a reasonable one, and plans to apologise if Bertha gets mad at her. It seems to me that the consent-transaction didn't go through here, and that the fact of wronging cannot be explained by any sort of lack of care that Astrid has towards Bertha.

These remarks on acceptance don't amount to a theory of acceptance, or even a complete list of the ways in which promises and consent can be accepted. There are many open questions about how acceptance works that I haven't addressed here: when does performing the consented-to act constitute uptake? When and why do offers of consent expire?[40] How do mere offers of consent change a would-be-consent-giver's normative situation? Answering these questions will have to wait for another time—right now I'm just concerned with arguing that the consent-recipient has a part to play in making any act of consent morally transformative. For that purpose we only need an idea of what we are talking about when we talk about acceptance, and the cases discussed here should suffice for that.

3. The stakes in debating uptake

The uptake requirement for consent says that for A's consent to B's phi'ing to be morally transformative, B must accept A's attempt to consent. In this section I will explain what hangs on whether the uptake requirement is true. The upshots I will focus on are these: first, the uptake requirement rules out certain views of consent that deny it. And second, the uptake requirement reveals a distinction between views of consent that hasn't previously been appreciated. This is the distinction between what I will call *unilateral* and *bilateral* conceptions of consent.

[40] Cf. Liberto, "Promises and the Backward Reach of Uptake".

Much of the recent philosophical literature on consent is focused on the debate between "mental" or "attitudinal" views of consent, and "behavioural" views of consent. These two families of views disagree on whether morally transformative consent requires an expression of consent in the consent-giver's outward behaviour. According to mental views of consent, an expression of consent is not necessary. Having the right kind of mental state is necessary and sufficient for morally transformative consent.[41] Communicating that one has the mental state requisite for consent can be instrumentally useful, since it can give the consent-recipient and others reliable evidence that one has consented.[42] But communication or other outward behaviour makes no difference to whether one's consent is morally transformative.

Mental views of consent differ on the details of which mental state they consider to be necessary and sufficient for consent: according to Heidi Hurd, to consent to someone's phi'ing is to intend that person's phi'ing.[43] Larry Alexander identifies consent with the "subjective mental state" of choosing to forgo a moral objection to another's action.[44] Kimberly Ferzan argues that consent is "willed acquiescence".[45]

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[41] For the sake of brevity, in what follows I am going to say "mental state" instead of "mental state or attitude". This should be understood to cover mental states, mental events, and attitudes alike. Using "mental state" to cover all of these things does not obscure any detail that matters for present purposes.

[42] See e.g. Hurd "Moral Magic" 125. A proponent of a mental account of consent could go so far as to defend affirmative consent rules and practices on the grounds that they help to minimise mistakes about whether someone has the mental state requisite for consent. This is not the same as saying that communication is a necessary condition of successful consent. (See e.g.: Ferzan, Kimberly Kessler. "Consent, culpability, and the law of rape." *Ohio St. J. Crim. L.* 13 (2015): 397.)

[43] Hurd, "Moral Magic".

[44] Alexander, "Moral Magic II".

[45] Ferzan, "Consent".

One popular argument that motivates mental views of consent appeals to consent's connection to autonomy. By giving consent to someone, the consent-giver can voluntarily choose to permit something that would otherwise wrong them. By revoking previously given consent, the consent-giver can also choose to impose an obligation on another person. The ability to consent and to revoke consent makes the consent-giver, in Hart's memorable phrase, a "small-scale sovereign" over the bipolar obligations that others owe to them.[46] Hurd, for example, claims that consent functions as an expression of this type of autonomy and argues that the fact that consent has this function supports the idea that consent consists in a mental state:

> "If autonomy resides in the ability to will the alteration of moral rights and duties, and if consent is normatively significant precisely because it constitutes an expression of autonomy, then it must be the case that to consent is to exercise the will. That is, it must be the case that consent constitutes a subjective mental state."[47]

In a discussion of this motivation for the mental view, Tom Dougherty points out that there is a gap in Hurd's argument: outward behaviour, like communication, can also be an expression of the consent-giver's autonomy.[48] So the fact that consent functions as an expression of the consent-givers autonomy does not, on its own, tell decisively in favour of mental state views of consent. Ferzan (2016) bridges the gap by claiming that

> "autonomy is best respected by recognizing that the consenter has it within his or her power to allow the boundary crossing simply by so choosing."[49]

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[46] Hart, H. L. A. *Essays on Bentham: Jurisprudence and Political Philosophy*. Oxford: Oxford University Press, 1982. https://doi.org/10.1093/acprof:oso/9780198254683.001.0001.

[47] Hurd, "Moral Magic," 124-125.

[48] Dougherty, "Scope of Consent".

[49] Ferzan, "Consent," 405.

Ferzan claims that if consent is important *because* it expresses the consent-giver's autonomy, then consent should be *maximally* within the consent-giver's control. Our mental operations (of the sort needed for consent) are more fully within our control than our outward behaviour. So consent is best able to express the consent-giver's autonomy if it consists in a mental state—or so the argument goes.[50]

The uptake requirement is at odds with this line of argument. The need for uptake takes the morally transformative power of an agent's consent (in part) out of her hands, since acceptance is up to the consent-recipient. It is no surprise then that the uptake requirement is not part of mental views of consent. To illustrate, suppose that to consent to someone's phi'ing is to intend that person's phi'ing, per Hurd's view. I can form such an intention without any cooperation from your part, even without your knowledge. Similarly for other mental views: consent is given in the privacy of the consent-giver's mind, and no one else needs to enter the picture.[51]

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[50] For constraints on space I am not going to weigh in on how well this argument supports the mental state view over alternatives. See Dougherty, *Scope of Consent* for a more thorough assessment of this motivation for mental state views. I will return below to the question of how much, and what kind of, control we ought to have over the obligations others owe to us.

[51] An anonymous reviewer has suggested that there could be a view according to which morally transformative consent consists in (1) a mental state of some kind in the consent-giver, and (2) a justified belief in the recipient that the consent-giver has the right kind of mental state. They suggest that a view like this would be an example of a mental view of consent that incorporates an uptake requirement. I have characterised mental views as being committed to the claim that a mental state is both necessary and sufficient for morally transformative consent. So strictly speaking, what we have here is neither a mental nor a performative view of consent. More importantly however, when characterising what counts as acceptance in section 2.2 I assumed that merely knowing that consent was offered doesn't constitute acceptance. So the requirement for a justified belief doesn't count as a requirement for uptake as I am understanding it here. But since I haven't offered a substantive account of uptake or acceptance, I am open to the possibility that mere knowledge or justified belief could constitute acceptance, at least in some contexts. If it can, then a view like this might count as a bilateral mental view of consent.

Things are a little more complicated with behavioural views of consent. Behavioural views are unified by their rejection of the mental views' core idea that a mental state is sufficient for successful consent. Different behavioural views disagree on whether a mental state is necessary. Alan Wertheimer distinguishes between "hybrid" views, which consider both a mental state and an expression of consent in outward behavior necessary for consent, and "performative" views, which consider an expression of consent necessary and sufficient.[52] As I'm using the term here, both kinds of views count as behavioural views of consent.

Arguments that motivate behavioural views of consent also often cite the function(s) of consent. But while the proponents of these views tend to acknowledge that consent has functions that are related to the consent-giver's autonomy, they argue that the functions of consent don't stop there. Consent also coordinates behaviour, enables joint activities, and changes the reasons and obligations of its recipients and of third parties. These functions suggest that consent should be observable by the recipient and by third parties: consent needs to be expressed in outward behaviour.[53]

Now, whether a given behavioural view is committed to the uptake requirement for consent depends on the details of what kind of behaviour is necessary for successful consent. To illustrate, here is one possible behavioural view that looks to be committed to the uptake requirement, discussed in (but not endorsed by) Dougherty (2021):

> Successful Communication View: X gives consent to Y if and only if X successfully communicates to Y that X is giving permission to Y.[54]

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[52] Wertheimer, *Consent to Sexual Relations.*

[53] Bolinger, "Moral Risk," p.181

[54] Dougherty, *Scope of Consent*, 67

Successfully communicating anything to another person requires some work from the hearer. If I tell you about my day but you don't pay attention to what I am saying, our communication falls apart. So the successful communication view seems to be committed to an uptake requirement for consent because of the type of behaviour that it considers necessary for consent. Compare the successful communication view to the following view:

> Pure Behavioural View: X gives consent to Y if and only if X deliberately engages in behavior B that indicates that X is releasing Y from a duty.[55]

A full clarification of which behaviours "indicate that X is releasing Y from a duty" would tell us whether the pure behavioural view is a hybrid view or a performative view of consent.[56] But whatever those behaviours are, the pure behavioural view does not require the consent-giver's release-indicating behavior to be observed by the consent-recipient (or by anyone else for that matter). The view is therefore not committed to the uptake requirement for consent: consenting is strictly something that the consent-giver does, and they can do it successfully without the consent-recipient's cooperation (and even without their knowledge!).

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[55] ibid. 120. This claim is half of Dougherty's "expression of will" view of consent, which says that "Expression of Will View. X gives consent to Y if and only if either X gives consent to Y via a directive or X gives consent to Y via expressing permission." (ibid. p. 124)

[56] Verbal communication is one type of behavior that can indicate release from a duty, as is signing a waiver, putting out a public notice, a nod, and so forth. If deliberately engaging in these entails that the agent does so with a particular mental state, the view is a hybrid behavioural view of consent. If not, it is a performative view.

The stakes in wondering whether consent really requires uptake are starting to look clearer. If uptake *is* required then any view that denies that consent requires uptake is open to the objection that it fails to accommodate a necessary condition for morally transformative consent. And as we've just seen, there are many such views: practically all mental views consider consent a private act of the consent-giver's mind, and some behavioural views (like the pure behavioural view) don't consider it necessary that anyone be there to observe—let alone accept—the consent-giver's consent-giving behaviour. This is by itself a significant upshot. An even more significant upshot is that this objection targets both sides of the mental/behavioural distinction that shapes the current debate on the ontology of consent. By considering the question of uptake, we can see that views in both of these camps have something in common. Namely, their conception of consent as a normative power that the consent-giver can exercise *unilaterally*, without any cooperation or input from the consent-recipient. By contrast, views that endorse the uptake requirement, like the successful communication view, are committed to a view of consent as a *bilateral* way of altering bipolar obligations.

This distinction between unilateral and bilateral conceptions of consent hasn't previously been appreciated in the literature on the ontology of consent. In what follows I am going to directly argue that consent requires uptake, but before doing so I want to emphasise that even if my argument is unpersuasive, the distinction between unilateral and bilateral views of consent is real—and largely under appreciated by theorists of consent.[57]

[57] Interestingly, this distinction does not exist among different views of promising. The consensus opinion on promising is that it requires uptake, and is therefore a bilateral normative power.

4. An argument for the uptake requirement

4.1. Personal relationships and their importance

Like the motivating arguments for mental and behavioural views discussed in the previous section, my argument for the uptake requirement will appeal to one of the many functions that consent plays in our lives: its function in enabling, shaping, and altering personal relationships. By "personal relationships" I mean relationships like friendship, romantic or life partnership, relationships between family members and relatives, and the relationship between colleagues.

These relationships are of interest to moral philosophers because they tend to affect what we have reason to do, and which obligations we have to the people that we have these relationships to. For example, friends typically have reason to help friends out with their projects. Family members often owe duties of care and support to family members. And monogamous romantic partners owe it to one another to not have other romantic relationships.

Personal relationships also often give us *permissions* that we wouldn't have, were it not for the relationship. For example, casual touch like placing a hand on another person's shoulder is typically permitted between friends and close acquaintances, but is not permitted between strangers. A parent can be permitted to enter a child's bedroom to clean it up, but if a house guest were to do this it may constitute an infringement of the child's privacy. People who are dating but are not cohabiting often give one another keys to their respective apartments, and give the other person permission to enter it at will. And so on.

Not all friendship, families, and partnerships are alike of course. Which permissions and which obligations I have towards a particular friend, for example, is a complicated function of things like our own understanding of our friendship, the prevalent understanding of friendship in our culture(s), past interactions between us, explicit agreements, personal preferences, and much, much more. In this discussion I am going to rely on what I believe to be commonly accepted ideas about friendship, family, partnership, and so on. But I acknowledge that these ideas are culturally specific and that personal relationships and their attendant obligations are very malleable.

It seems clear that the obligations that attend personal relationships can be burdensome. For example, parenthood sometimes requires that we set our own preferences aside and provide for our children. The obligations of parenthood are also pervasive: having a child can require a thorough restructuring of daily life, habits, and routines (especially in contexts where material support like paid parental leave and free childcare are unavailable). Same goes for partnership, family relations, and close friendships. This is not to say that these relationships are therefore always unwanted. Some people positively welcome the duties of parenthood, and many find meaning in making sacrifices—big and small—for their loved ones. But the opposite is also true: many do not want to bear the duties of parenthood because doing so would interfere with their chosen life plans, and some people opt out of monogamous romantic relationships because of the attendant duty to not have other romantic relationships.

The (potentially) burdensome nature of personal relationships is just one of the many reasons why it is important that we have a say in which relationships exist in our lives. Some people forgo marriage for political reasons. Others want to be married to their partners because of the social meaning that marriage has. Many people experience friendship and partnership as things that increase their quality of life, and so they seek out these types of relationships. And so on. These all seem like perfectly good reasons for preferring to have (or not have) a certain type of personal relationship in one's life. And it seems to me that we would lack a very important kind of power to shape our lives if we lacked the power to form personal relationships, or if we lacked the power to shape our existing personal relationships.[58]

This isn't to say that we should have full control, or a unilateral say, over which personal relationships we have and with whom: I might wish very much to be someone's friend or lover, but I am not entitled to anyone's friendship or partnership. I am also not claiming that we should always be able to disengage from existing personal relationships because they affect us and how our lives go.[59] Relationships are, well, relational, and involve the wills, lives, preferences, boundaries, and choices of more than one person. What I think we ought to have is a *say* in which personal relationships we have and with whom.[60]

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[58] See e.g. Shiffrin, Seana Valentine. "Promising, Intimate Relationships, and Conventionalism." *The Philosophical Review* 117, no. 4 (October 1, 2008): 481–524. https://doi.org/10.1215/00318108-2008-014. Shiffrin argues that the capacity to promise enables personal relationships to form in healthy ways, and is for that reason also part of the abilities of a fully autonomous person.

[59] Bracketing relationships that are abusive, toxic, or otherwise harmful. If one party to a relationship wrongs the other or violates the norms of the relationship, the wronged party may have justification for unilaterally disengaging from the relationship.

[60] What about involuntary relationships? We don't get to choose our parents, guardians, siblings, or relatives. But as we grow and mature, we ought to have a say in whether to continue having a relationships with the people who raised us, and in what those relationships look like.

4.2. The relationship-shaping function of consent

Let's turn now to consent. Consent is a normative power that, when it is morally transformative, gives the recipient a permission to do something that would otherwise wrong the consent-giver. Since personal relationships are characterised by the obligations they impose on us, as well as the permissions that they grant us, acts of consent can influence the nature of an existing personal relationship. Consider this case:

> (Non-monogamy) Colt and Larissa are a monogamous married couple. They are both interested in also having romantic relationships with other people. After a lot of discussion, they decide that both will give the other permission to date other people outside of their marriage.

Taking back a monogamy-promise and granting a partner permission to date others is a very clear alteration of the existing relationship. In this case the alteration is desired by both parties—Colt and Larissa are enthusiastic about their new non-monogamous relationship—but we can easily imagine a case where it is not. I'll discuss a case like that in a moment, but let's consider first some less clear-cut cases where consent alters the nature of a relationship. Consider this case:

> (Apartment key) Fernanda and Robbie have been dating for a few months. Robbie offers to Fernanda a key to his apartment and says: "You can have this, and feel free to come and go as you please."

In the context of dating, sharing a key to one's apartment and giving the other person permission to enter one's private space at their leisure often signals a certain level of commitment to, or seriousness about, the relationship. The change that takes place in Fernanda and Robbie's relationship (if she accepts) is not as clear-cut as it is in the (Non-monogamy) case. But there is a change here; the permission that Robbie is offering *means* something to their relationship.

Consider one more case that is not a case of a romantic relationship:

> (Friends) Phoebe and Monica are colleagues. So far all of their interactions have been strictly professional, but they have a good rapport. Phoebe is going through some troubles in her personal life and is having difficulty finding someone to confide in. She decides to approach Monica and asks her: "I know we don't really know each other like that, but is it okay if I ask you for advice on some personal stuff?"

The permission to talk about personal issues and to ask personal questions is characteristic of friendship—a relationship that Phoebe and Monica don't yet have. If Monica agrees that Phoebe can share her worries with her, this changes things between them, and depending on how things unfold afterwards it may be the beginning of a path towards friendship.

These cases illustrate that consent has what I will call a *relationship-shaping* function: acts of consent can shape, alter, and enable personal relationships. Unlike the autonomy-related function of consent, and consent's function in enabling cooperation and joint activities, consent's role in shaping personal relationships has received relatively little attention. By contrast, several authors have argued that *promising* can shape, alter, and enable personal relationships. When you make a promise to someone, you make yourself accountable to that person for acting as you promised, and you grant them a kind of discretionary power over your actions—the promisee now gets to decide whether you are bound to act as you promised, or whether they will release you from the obligation you owe to them. Seana Shiffrin argues that these features of accountability and discretion are key to what we might call the relationship-shaping function of promising: Shiffrin explains that without the power to promise, I might tell you that I *intend* to, say, meet you for lunch this afternoon. But I cannot make myself accountable to you for doing so, and I have no power to give you a say in the matter. The power to promise enables us to forge personal relationships where we are not vulnerable to each other's whims, and where we can relate to one another as moral equals.[61] In a similar vein, Tom Dougherty has argued that promises play "relationship-building functions", and that

[61] Shiffrin, "Promising."

> "promises can enable intimate relationships to develop in morally healthy ways, both by creating commitment and by protecting individuals from imbalances of power within a relationship."[62]

Again the reason why promising can do this is because it generates voluntary relations of accountability with others.[63] These can be instrumental in building the kind of trust and commitment that enables a friendship, partnership, or other close relationships to develop.

Consent and promising trade in the same currency of bipolar obligations, so it should not come as a surprise that consent also has a relationship-shaping function. I have already shown through the cases discussed above that the granting of particular permissions (like the permission to ask for personal advice, or to date other people) can be constitutive of a significant change in a relationship. In addition, it seems to me that consent has the same sort of power to create the preconditions of a personal relationship as promises do.[64] The duties that other people owed to us typically keep them at arm's length from our bodies, our property, and our sphere of privacy. Releasing others from such obligations by giving consent brings the closer to us, into a domain that is normally off limits to them.[65] This in turn can foster trust, vulnerability, closeness, and physical, emotional, or intellectual intimacy between us; it may allow a new relationship to begin to develop.

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[62] Dougherty, "Yes Means Yes," 238

[63] ibid. p. 205

[64] It also seems to me that promises can be not only instrumental to developing personal relationships, but that sometimes the relevant relations of accountability can be constitutive of a type of relationship between two parties. Consider for example a monogamy-promise to a partner, or undertaking an obligation to care and provide for a minor.

[65] Bolinger, "Moral Risk."

4.3. The step to uptake

So far I've argued that it's important that we have a say in which personal relationships we have in our lives, and that consent has a relationship-shaping function. I hope that the way towards the uptake requirement for consent is starting to look clear from here. To clear the route, I want to address one final moving part. Consider again the following case:

> (Apartment key) Fernanda and Robbie have been dating for a few months. Robbie offers to Fernanda a key to his apartment and says: "You can have this, and feel free to come and go as you please."

Robbie is offering Fernanda a permission to do something that she does not yet have permission to do, namely to enter his private space at her will. Some authors have recently argued that it is not appropriate to describe Robbie as *giving consent* to Fernanda's doing so, because Robbie is not responding to a request from Fernanda or acting "at Fernanda's behest".[66] Jonathan Ichikawa argues that attributions of consent (and non-consent) are linguistically inappropriate in contexts like (Apartment Key).[67] In the same vein, Quill Kukla (writing as Rebecca Kukla) claims that paradigmatic consent-exchanges are ones where the consent-recipient requests something from the consent-giver, and the latter either yields or refuses.[68]

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[66] Ichikawa, Jonathan Jenkins. "Presupposition and Consent." *Feminist Philosophy Quarterly* 6, no. 4 (2020): Article 4. https://doi.org/10.5206/fpq/2020.4.8302.

[67] ibid.

[68] Kukla, Rebecca. "That's What She Said: The Language of Sexual Negotiation." *Ethics* 129, no. 1 (September 7, 2018): 70–97. https://doi.org/10.1086/698733.

By contrast, Japa Pallikkathayil distinguishes between solicited consent, unsolicited consent, and presupposed consent.[69] Solicited consent is the kind of consent that Kukla and Ichikawa talk about: you ask to park in my parking spot, I say 'yes'. Unsolicited consent might happen like this: I notice that you need somewhere to park, and I offer—unprompted by a request—to let you park in my spot. Presupposed consent might be my asking or ordering you to do something, and in doing so giving my consent to your doing that thing. For example, suppose that I ask that you park in my parking spot when you pick me up at my house. This ask presupposes that I am giving you permission to park in my parking spot (I would have no grounds to complain if, after having asked, you do so).[70]

I explained earlier that when I am talking about consent, I am talking about the normative power by which we release others from obligations they owe to us. My primary interest is in understanding what it takes for this sort of moral transformation to happen. It seems clear to me that we can offer to release others from their obligations without being solicited to do so, like Robbie does in (Apartment Key). So on this question I side with Pallikkathayill. My suspicion is that Kukla, Ichikawa, and others who deny that consent can be offered are primarily interested in a very specific speech act, which they contend can only be performed in response to someone else's request. My focus here is on the moral transformation. And it seems clear to me that if all goes well in (Apartment Key) and Fernanda accepts, the moral transformation that I am interested in does take place.

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[69] Pallikkathayil, Japa. "Consent to Sexual Interactions." *Politics, Philosophy & Economics*, November 5, 2019. https://doi.org/10.1177/1470594X19884705.

[70] Pallikkathayill, "Consent to Sexual Interactions" p. 4 onwards. See also Dougherty, *Scope of Consent.*

Let's return now to the case at hand and consider why it is important that Fernanda have a say in whether Robbie's offer of consent is morally transformative. As I explained earlier, what personal relationships we have in our lives is a matter of great importance to us—we have legitimate preferences about these things. Fernanda might not be ready for the change in her and Robbie's relationship that typically follows the granting of this particular permission: she might not want a serious relationship with Robbie, and so she might not welcome the prospect of having permissions that are typically associated with a serious relationship. Robbie shouldn't be in a position to impose those permissions on her just by saying so. Just like he cannot force Fernanda to take the key to his apartment, he should not be in a position to force her to take on permissions that she actively does not want.

Fernanda and Robbie's case is also an example of a situation where an act of consent can create pressure to reciprocate the trust and vulnerability that is being offered by the consent-giver. Fernanda might not be ready to respond in kind, which means that she should *at the very least* have an opportunity to reject Robbie's offer. Without something like the uptake-requirement to block Robbie's act of consent from going through without Fernanda's input, she is robbed of having a say in whether their relationship is modified in ways that may be unwelcome to her.

Reflection on this case reveals that the relationship-shaping function of consent is in tension with our interest in having a say in our personal relationships. We have an interesting in having a say in which permissions we have, because these permissions can constitute significant changes to our personal relationships. If others can grant us permissions at will, they can modify our relationship without our having a say in the matter. The uptake requirement for consent eases this tension. In other words: the fact that consent has a relationship-shaping function generates a need to distribute control over whether an act of consent is morally transformative between the consent-giver and the consent-recipient. Without the uptake requirement, control over consent lands entirely in the hands of the consent-giver; with the uptake requirement, that control is more evenly distributed.

5. Interlude: Consent and control

Before arguing for the uptake requirement for consent, I explained how the question of uptake divides views of consent into two camps: unilateral views and bilateral views. I also explained that the argument for uptake is an argument against unilateral conceptions of consent, including mental views and certain behavioural views. When discussing these two kinds of views we saw that one popular motivation for mental views of consent begins with the idea that consent functions as an expression of the consent-giver's autonomy. Proponents of behavioural views point out that consent has other functions too, and that these functions pull in other directions. My argument for the uptake requirement for consent follows a similar argumentative strategy: I have explained how a particular function of consent—its relationship-shaping function—speaks in favour of the uptake requirement, and therefore a bilateral conception of consent. You might wonder whether this all takes consent too far out of the consent-giver's control, or whether a bilateral conception of consent ignores or downplays its autonomy-expressing function. Dougherty (2021) raises this concern, writing:

> "[W]hen we discussed the Mental View, we encountered the idea that consent enables a consent-giver to exercise autonomous control over their normative boundaries. We also saw that if consent requires uptake with the consent-receiver, then the consent-giver is less able to exercise this autonomous control. Therefore, there is a tension between the ideal that the consent-receiver has control over their consent and the ideal that the consent-giver and the consent-receiver both know whether consent has been given."[71]

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[71] Dougherty, *Scope of Consent,* 60

It is true that if uptake is necessary and consent is bilateral, then a consent-giver cannot shift the normative boundaries all by herself. But I do not think the proponent of uptake needs to be worried about this. Focusing exclusively on the consent-*giver's* control over their normative boundaries obscures the fact that what those boundaries look like matters to the consent-*recipient* too, in ways that I've discussed at length above. In objecting to a behavioural account of consent, Hurd, Alexander and Westen—defenders of the mental view—write:

> "Consent… merely removes a moral (and sometimes legal) barrier. If it is not communicated,… those to whom consent is given may not realize that those barriers are down and that they have permission to cross the consenter's moral (and legal) boundary. But so what? They have no duty to cross, only a permission to do so."[72]

But permissions matter, as I argued in section 4.1, and as is illustrated by the cases discussed in 4.2. Unless we keep this in mind, it is easy to overlook the ways in which our autonomy as recipients of others' consent is hampered if consent can be given unilaterally. So while bilateral conceptions of consent do distribute control over normative boundaries between both the consent-giver and the recipient, I think that they do so for a good reason.

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[72] Alexander et al., "Consent Does Not Require Communication," 657

6. Objections to the uptake requirement for consent

Before concluding, I want to consider two objections to the uptake requirement for consent.

6.1. Revoking consent

The first objection states that because consent can be unilaterally revoked, it should be unilaterally given. Consider the following case:

> (Revocation) Angie has moved to a new country and is making friends. In her home country it is customary to linger after a dinner party while the host clears the dishes. In the country where she lives now, clearing the dishes is a clear sign that the party is over and guests should leave. At a party at Betty's, Betty starts to clear the dishes. Angie thinks the party is still going and lingers for longer than Betty would like.[73]

Betty tries to revoke her consent to Angie's presence at her house. If Angie's uptake is necessary for revoking consent, then Betty cannot do that unilaterally. But we do tend to think that consent can be revoked by the consent-giver at any point, at their will, for any reason—especially in the context of sexual consent and other high-stakes interactions. Tom Dougherty raises this objection to the idea that consent requires uptake and writes:

> "In so far as we have reason to expect that giving consent operates similarly to revoking consent, we have reason to reject the Uptake [requirement]."[74]

Do we have reason to expect that giving consent operates like revoking consent? Dougherty does not provide any such reason, and the proponent of the uptake requirement might take cases like (Revocation) as evidence that revoking consent *does not* operate like giving consent.

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[73] Cf. Dougherty, *The Scope of Consent*, 79

[74] ibid. 79

It also seems to me that we have reason to think that revoking consent does not operate like giving consent. One of the functions of consent is to enable us to engage in joint activities and to cooperate with others without the risk of wronging them, and without the risk of being wronged. The reason why consent requires uptake is because when we let others inside our personal domains that are normally off limits to them, this should only happen with their agreement. Revoking one's consent does not serve the same purpose: the power to revoke previously given consent is the power to reassert or reestablish our normative boundaries, and to put others at an arm's distance once again. It seems to me that we all have interest in having such a power, especially to protect us from consent-recipients whose behaviour turns hostile, harmful to us, or simply unwanted. This interest may be best served by a unilateral power to revoke previously given consent.[75]

6.2. Public permissions

Another objection claims that there can be public acts of consent that succeed without the recipient's uptake. Consider this case:

> (Public signal) It is Friday. Sandra is going to have a party in her dorm room and wants everyone who lives on her floor to join. In the morning she puts out a notice on the floor's noticeboard saying: "Party in Sandra's room tonight, everyone is welcome!"[76]

[75] In Chapter 3 I address the question of revoking consent from a different point of view and suggest that, in most cases, revocations of consent only have an appearance of unilaterality. See chapter 3, section 5.

[76] Cf. ibid. 81

Sandra intends to permit everyone who lives on the floor to enter her room for the party. Opponents of the uptake requirement note that Sandra really does seem to be giving consent to *everyone* on the floor, as it says on her notice. And "everyone" includes even those of Sandra's floormates who have not seen the notice. Suppose one of these people is Rob who stays in his room all day on Friday and hasn't seen Sandra's notice. If Rob has Sandra's consent to enter her room tonight, then consent can be given without its recipient's uptake.[77]

For what it's worth, I do not share the intuition that Sandra consents to Rob's presence in her dorm room. And there are nearby cases where I think we would not want to say that a person's public notice releases everyone, including those who haven't seen it, from an obligation. Consider this case:

> (Craigslist) Parvati puts up an advertisement on Craigslist that says: "Moving today. Giving away all my possessions for free, including the car in the driveway. Keys are already in the car, first come first served". Jeff, who never saw the Craigslist ad, comes by, hops in the car, and drives off.

This case seems relevantly similar to (Public signal), and it seems to me that Parvati could complain about the villain taking her car. It also seems to me that Sandra could complain about Rob showing up at her party, if she were to discover that he didn't read the sign telling everyone that they are welcome ("He didn't even know there was a party, he just showed up!").

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[77] ibid. 81

I want to note at this point that at the outset, I decided to set aside cases where there are more than one consent-recipient. These cases give rise to questions that are beyond the scope of this chapter. I am open to the possibility that acceptance in these cases may look very different than it does in more familiar interpersonal cases of consent.[78] But I do not think that in cases of public consent or consent given to an unspecified group of recipients (like in Craigslist), a person's consent can be morally transformative without so much as others knowing that it has been offered.

Some of the complications with public exercises of normative powers have been discussed in the literature on promising and uptake. Judith Thomson has argued that public promises are just like promises between individuals: they are not binding without the promisee's uptake.[79] Margaret Gilbert has suggested that when we say that, for example, a politician speaking to their constituents "has promised" to do thus-and-so during their time in office, we are using the verb "promise" to pick out only one part of a morally binding exercise of the power to promise. The politician's "I promise to you" really means "I have done all I can to promise"—the rest is now up to the audience.[80] There is precedent then for the idea that normative powers that require uptake, like promising, require it even when the power is exercised publicly.

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[78] In section 2.2 I noted that sometimes performing the very act that was consented to can constitute uptake. This seems especially plausible in cases of public permission-giving, like Sandra's notice and Parvati's Craigslist ad. I am also open to the possibility that cases of public permission-giving aren't best understood as cases of consent, but of a different normative power that may work unilaterally.

[79] Thomson, *Realm of Rights,* 296

[80] Gilbert, *Rights and Demands*, 108-109

7. Conclusion

I have argued that consent requires its recipient's uptake. My argument for this claim proceeded by way of showing that consent has a relationship-shaping function, and that we ought to have a say in our relationships. The fact that what permissions we have, and with respect to whom, has been curiously overlooked by many theorists of consent—particularly those who defend mental views of consent. My argument in this paper has an important upshot for the existing debate between mental and behavioural views of consent. Defenders of both types of views have denied the uptake requirement, and thereby committed themselves to a unilateral conception of consent. If my argument here is correct, this is a mistake. And even those who find my argument for the uptake requirement unpersuasive would do well to consider whether their views of consent are unilateral or bilateral.

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Chapter Three

A Joint Decision Account of Consent

ABSTRACT: This paper argues that consent is a kind of joint decision between the person giving consent and the person receiving it. This account of consent mirrors existing accounts of promising that conceive of promising as a joint decision concerning what the promisor will do. By adopting a joint decision account of consent, we can get to a unified view of these two distinct normative powers. Another benefit of the joint decision account of consent is that it can accommodate an objection to sexual ethics that centres the concept of consent. This objection claims that consent essentially involves yielding to another person's will, and that focusing on whether a sexual interaction is consensual or not does not allow us to ask important ethical questions about how sexual interactions are negotiated. I argue that the joint decision account of consent can avoid these objections, and that it can provide us resources for developing a picture of what good sexual negotiation is like.

1. Introduction

Here is a widespread thought: consent is key to making any sexual encounter morally permissible. Contemporary discussions about sexual ethics taking place on college campuses, in popular and social media, and in everyday life tend to take this for granted. This commonly accepted idea about the importance of consent has faced some serious criticism from philosophers and other academics. According to some critics, giving consent is a response to a request and therefore involves yielding to someone else's will. This leads the critics to wonder how much work the notion of consent can do for us in the realm of sexual ethics, and even leads some to suggest that consent is not necessary for morally permissible sex. I am sympathetic to some elements of this objection, but I do not think that it gives the notion of consent enough credit. I think consent can do more for us in the realm of sexual ethics than its critics believe—provided we are working with the right idea of what consent is.

In this paper I want to propose a novel account of consent as a kind of joint decision between the person giving consent and the person receiving it. Roughly, consent is a joint decision that permits certain actions that were previously off-limits to the consent-recipient. I argue that this account of what consent is can accommodate the critics' objection. On this conception of what consent is, consent does not necessarily involve yielding to another person's will. Furthermore, the account can give us resources for developing a picture of what good sexual negotiation is like.

Consent is a *normative power* like promising, abandonment, waiving a right, and more. Normative powers alter our normative relationships with others, often by changing which rights and obligations obtain between ourselves and other people. Many theorists interested in our normative powers have observed that consent and promising are similar in a number of ways—they are like mirror images: promising generates new voluntary obligations, consent voluntarily releases obligations that previously existed. Some theorists interested in promising have recently developed views according to which a promise is a joint decision concerning what the promisor will do. I will argue that the prospect of a unified account of these two distinct but similar normative powers is one benefit of adopting the joint decision account of consent.

I will start with some preliminaries concerning consent. In section 2, I will discuss the criticism that consent involves yielding to someone else's will. In section 3 I will introduce the ideas of joint decisions and joint deliberation, and give a full statement of the joint decision account of consent. I will also discuss the connection between my account and joint decision theories of promising. In section 4 I explain how this account avoids the criticism from section 2. Before concluding, I consider an objection to the joint decision account of consent: consent should be revokable by the consent-giver at any time, for any reason. But joint decisions cannot be taken back unilaterally. The joint decision account of consent needs to explain this apparent asymmetry—I will argue that it can do so.

1.1 Preliminaries

When I talk about consent, I am talking about the normative power that you exercise when you give another person a permission to do something that was previously off limits to them. More precisely,

> When A consents to B's phi'ing, A releases B from an obligation owed to A not to phi.

For example when I consent to your entering my apartment, I thereby release you from an obligation to not enter my personal space. When you consent to my giving you a hug, you release me from an obligation to not touch you in that way. And so on. Obligations that are owed by one person to another are often called *bipolar obligations* or *directed duties*.[81] In what follows I will use these terms interchangeably. So we might say: consent is the normative power that you exercise when you release someone from a bipolar obligation that they owe to you.

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[81] See e.g. Darwall, Stephen. "Bipolar Obligation." In *Oxford Studies in Metaethics Volume 7*. Oxford: Oxford University Press, 2012. https://doi.org/10.1093/acprof:oso/9780199653492.003.0011.; Thompson, Michael. "What Is It to Wrong Someone? A Puzzle About Justice." In *Reason and Value: Themes from the Moral Philosophy of Joseph Raz*, edited by R. Jay Wallace, Philip Pettit, Samuel Scheffler, and Michael Smith, 333–84. Clarendon Press, 2004.; Sreenivasan, Gopal. "Duties and Their Direction." *Ethics* 120, no. 3 (April 2010): 465–94. https://doi.org/10.1086/652303. Bipolar obligations can also obtain between entities that are not individual persons. In this paper I will set aside cases of consent where the parties are not individual persons—I explain the reason for this below.

There are some situations where one person can give consent on another person's behalf, like when next of kin consent to a medical intervention on behalf of a patient who is unconscious or otherwise incapacitated. So strictly speaking: when A consents to B's phi'ing, A releases B from an obligation owed to A not to phi *or* A releases B from an obligation owed to C not to phi, where A is authorised to do so on C's behalf. I'll set aside this complication in what follows and focus on the more standard case where the consent-giver and the person to whom the relevant bipolar obligation is owed are the same person.

The concept of a bipolar obligation is connected to the idea of *wronging* someone.[82] Suppose you enter my apartment without asking me for permission first (and you have no good excuse for doing so—you are not saving my puppy from a house fire or anything like that). This is wrong, but it also wrongs *me* in particular. This is the sense in which your entering my apartment is "off limits" to you before I consent to your doing so: you will wrong me if you do it, unless I give you my permission. Note that if I give you my permission to enter my apartment, that does not guarantee that your doing so is morally permissible all things considered. Suppose you have solemnly promised my roommate that you will never enter the apartment again. My consent to your entering the apartment doesn't make it okay for you to do so—at most, my consent makes it the case that you don't do wrong by me.

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[82] See e.g. Thomson, Judith Jarvis. *The Realm of Rights*. Cambridge, Mass: Harvard University Press, 1990.; Cornell, Nicolas. "Wrongs, Rights, and Third Parties." *Philosophy & Public Affairs* 43, no. 2 (March 1, 2015): 109–43. https://doi.org/10.1111/papa.12054.; Martin, Adrienne M. "Personal Bonds: Directed Obligations without Rights." *Philosophy and Phenomenological Research* n/a, no. n/a. Accessed January 22, 2020. https://doi.org/10.1111/phpr.12620.; Darwall, "Bipolar Obligation"; Thompson, "What Is It to Wrong Someone?".

Another idea that often accompanies the concept of a bipolar obligation is that of a moral claim right. Many moral philosophers believe that if B owes it to A not to phi, then A has a right against B that B not phi. If this is correct, then to consent to someone's phi'ing just is to waive a right against them that they not phi. In chapter 1, "Wrongs without Rights?" I discussed in length some of the recent work on rights, wrongs, and bipolar obligations that casts doubt on the idea that bipolar obligations and moral claim rights are correlated in this way. In light of that, I'm going to refrain from saying that consent is the normative power to waive rights.[83]

In what follows I am going to use the term "consent" as a success term. That is, I will use it so that it follows from

A consented to B's phi'ing

That

B was released from an obligation not to phi.

This choice is purely terminological. Some authors use the term "consent" in a way that does not entail success, and will use qualifiers like "valid" or "morally transformative" when talking about exercises of consent that successfully release the recipient from an obligation. I will sometimes use these qualifiers for clarity or for emphasis. When A tries but fails to release B from an obligation, I will say that A *attempted* to consent to B's phi'ing.

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[83] In Chapter 1, "Wrongs without Rights?", I also suggested that wrongs are in the first instance violations of bipolar obligations, and not rights-violations. So even if the connection between bipolar obligations and rights is severed, it is true that the concept of a bipolar obligation has the connection to wronging that I described in the previous paragraph, and that consent prevents wrongs against the consent-giver.

Attempts to consent can fail for a number of reasons. For example, if a villain says to me: "Let me have that bike or I'll punch you" and I give them the bike, I didn't consent to the villain's taking my bike. They still wronged me by taking it. This kind of coercion is inconsistent with (valid, morally transformative, successful) consent. Same is true of certain kinds of deception: if a villain disguises themselves as my friend and asks to borrow my bike, and I agree, they still wrong me.[84] Voluntariness, lack of deception, and competence to exercise one's normative powers are all necessary for A's attempt to consent to be successful. Let's call these background conditions that must be in place for A's attempt to consent to be successful the *validity-conditions* of consent.

Consent can be given to and by a variety of agents, in a variety of contexts. A friend can consent to a friend asking them private questions. A patient can consent to a team of surgeons performing an operation on them. A customer can consent to a corporation collecting their personal information through a mobile application. And so on. In some of these contexts, questions about the legality of someone's consent will tend to take the front seat—for the time being I want to set legal notions of consent aside. Some of the contexts just mentioned involve consent between an individual and an entity that is not an individual. Consent can be given to (and possibly by) a group of people, a hospital, a corporation, perhaps even a state. The involvement of entities like these introduces a number of complications, such as questions about group rights, group obligations, and group agency. For the time being I want to set aside consent between entities that are not individuals and focus on the interpersonal case. This is in part because the concerns about consent that I am aiming to alleviate have to do with sexual consent, which is a paradigm case of consent between individuals. For ease of presentation I am going to talk mostly about cases involving only two persons, but most of what I say below applies to more numerous cases of interpersonal consent as well.

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[84] Cf. Dougherty, Tom. "Sex, Lies, and Consent." *Ethics* 123, no. 4 (2013): 717–44. https://doi.org/10.1086/670249.

2. Concerns about "consent theory"

With the preliminaries out of the way, we can start by taking a look at a criticism levelled against a general approach to sexual ethics that focuses on questions of consent. As I said earlier, the idea that consent is key to explaining why some sexual encounters are morally permissible and others are not, is widespread. Jonathan Jenkins Ichikawa writes:

> "The language of 'consent' is pervasive in contemporary discourse about sexual ethics. It is common in philosophical and other academic discourse, and completely inescapable in discussions of sexual ethics in popular liberal media. This is why I call the orthodox approach to sexual ethics 'consent theory'."[85]

What are the commitments of this orthodox approach? Ichikawa himself doesn't attribute any specific doctrine to people who are "consent theorists" in his sense.[86] But I think the approach that Ichikawa is gesturing at can be characterised by a commitment to the general idea that when it comes to the moral permissibility of any given sexual encounter, it matters whether the encounter was consensual or not.

As we will see soon, Ichikawa goes on to argue that consent is *not necessary* for morally permissible sex, while at the same time acknowledging that this is contrary to common sense ideas about sexual ethics. This suggests that the "orthodox" approach considers consent at least necessary for morally permissible sex. Few authors writing on sexual ethics these days would endorse the idea that consent is *sufficient* for morally permissible sex: there can be all kinds of bad, harmful, alienating sex that is at the same time consensual.[87]

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[85] Ichikawa, Jonathan Jenkins. "Presupposition and Consent." *Feminist Philosophy Quarterly* 6, no. 4 (2020): Article 4. https://doi.org/10.5206/fpq/2020.4.8302. 7

[86] Ichikawa, "Presupposition". See footnote 10 p.7.

[87] Critics of consent theory also acknowledge that this isn't a popular position, see e.g. discussion in Kukla, Rebecca. "That's What She Said: The Language of Sexual Negotiation." *Ethics* 129, no. 1 (September 7, 2018): 70–97. https://doi.org/10.1086/698733. Note that this is a particular instance of the idea that consent doesn't guarantee that the consented-to act is morally permissible all things considered, which was discussed in section 1.1. At most, consent can guarantee that the consented-to act does not wrong the consent-giver.

I will borrow the term "consent theory" for the general approach to sexual ethics that states that consent is a necessary but not a sufficient condition for morally permissible sex. Consent theorists can disagree about what else it takes to make sex morally permissible, and about what consent consists in. So the intended target of the concerns that I'm going to discuss next is not any substantive theory of consent, but rather the place of consent in our theorising about sexual ethics.

2.1. The objection

For ease of presentation I am going to focus on two authors who have recently objected to consent theory on the grounds that consent involves yielding to someone else's will.[88] The first of these is Ichikawa, who argues that consent is not a necessary condition for morally permissible sex.

Ichikawa's argument for this striking conclusion begins with the thought that consent is paradigmatically given in response to someone else's request. For example, I might want to enter your apartment (without wronging you as I do so!) and request that you give me permission to do so. More precisely, Ichikawa argues that describing someone as giving consent at all presupposes that the person is acting "at someone else's behest". For example, if you consent to my entering your apartment, you're doing so because I asked you to. You can do what someone else asks you to do freely and willingly, but this is still different from doing something for your own reasons, of your own accord. Ichikawa writes:

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[88] It's important to acknowledge before we proceed that there are a number of other criticisms of consent theory that are left out of the current discussion. For example, Michelle Anderson has argued that existing legal definitions of consent within rape law reform are problematic because they don't require, or even encourage, mutual negotiation between sexual partners. (Anderson, Michelle J. "Negotiating Sex." *Southern California Law Review* 78 (2005 2004): 1401.) Anderson and others have also argued that discussions of consent are often gendered and heteronormative in ways that are objectionable. See e.g. Anderson, "Negotiating Sex" and Kukla, "What She Said". Nothing I say here is meant to alleviate the whole range of worries that have been raised about consent theory. Note also that some of these objections, like Anderson's criticism of legal definitions of consent, are beyond the scope of the present discussion which focuses on interpersonal consent.

> "[W]hen one consents, one is yielding to another's will. One may do so freely… But this is different from when one does things out of one's own accord. Consent presupposes the former; it is typically a response to a request, an instruction, a command, or the like. When you are considering doing something at another's behest, the question of consent is an appropriate one. When you are considering doing something for your own reasons, the question doesn't even arise."

In chapter 2, "The Normative Power of Uptake" I briefly discussed the possibility of giving *unsolicited* consent.[89] On the way Ichikawa conceives of consent, unsolicited consent isn't consent at all; consent essentially involves acting at someone else's behest and not of your own accord. This is why Ichikawa claims that "[w]hen one consents, one is yielding to another's will."

Since there can be sexual encounters where no one does what they do at another person's behest, there can be sexual encounters where it would be inappropriate to describe the parties as "giving consent" to any part of the encounter. Encounters like these can be morally permissible.[90] So, Ichikawa concludes, "I say, against orthodox consent theory and everything you'll read on your university's student services website, that consent is not a necessary condition for morally permissible sex."[91]

Quill Kukla makes a version of the same objection against consent theory in Kukla (2018). Like Ichikawa, Kukla conceives of consent as being paradigmatically a response to a request. They write:

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[89] Cf. section 4.3. in "The Normative Power of Uptake". See also Pallikkathayil, Japa. "Consent to Sexual Interactions." *Politics, Philosophy & Economics* 19, no. 2 (May 2020): 107–27. https://doi.org/10.1177/1470594X19884705.

[90] Ichikawa doesn't argue for this claim. Presumably the thought is that we can imagine a sexual encounter where no one does anything because someone else asked for it, and the encounter is free of all other moral flaws that might make it impermissible or wrongful.

[91] Ichikawa, "Presupposition", 14.

> "In paradigmatic consent exchanges, one person is actively seeking sex, and the other person is passively agreeing to allow it to happen. Consenting involves letting someone else do something to you… Surely we hope for more out of good sexual negotiation than this, and in particular we hope that it will be a dialogical activity that expresses both partners' positive agency."[92]

Kukla cites two reasons for why we hope for more out of sexual negotiation than just one person (the consent-giver) "passively agreeing" to allow something to happen to them. First, Kukla explains that good quality sexual negotiation that goes beyond allowing or refusing something to happen to oneself can enhance and enable certain goods that we all have an interest in enjoying. These include sexual agency, bodily agency, and pleasure. And second, poor quality sexual negotiation that fails to be "a dialogical activity that expresses both partners' positive agency" can lead to harms that we have an interest in avoiding; Kukla writes:

> "Sometimes we autonomously agree to participate in a sexual activity for ethically problematic reasons. Sometimes we agree to do things that degrade us or harm us. Furthermore, sometimes a sexual negotiation itself violates ethical norms, but not by violating consent: an invitation may be unwelcoming, inappropriate, or too pressing; a gift offer may be insulting…and so forth."[93]

I take it that when Kukla talks about merely agreeing to a sexual activity (even if that agreement is autonomous), they are talking about the kind of "passive" agreeing that they associate with giving consent. Agreement in this sense isn't a result of respectful, considerate negotiation—it is paradigmatically a response to a request from someone else. Consent, so understood, doesn't protect the consent-giver from the kinds of harms that Kukla cites. Assuming that these harms can make a sexual encounter morally impermissible, it follows that consent is not a sufficient condition for morally permissible sex.

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[92] Kukla, "What She Said", 75-76

[93] ibid. 94-95

As I said earlier, this should not be surprising even for consent theorists. Consent can make it the case that a consent-recipient does not wrong the consent-giver when they act in a way that is normally off-limits. But there are other moral considerations that can make it wrong for the consent-recipient to so act, like the fact that performing the consented-to act would harm the consent-giver or wrong a third party. However I want to highlight the second half of the passage that I just cited. Kukla remarks that there are ethical norms that govern the activity of sexual negotiation itself: certain ways of negotiating a sexual encounter are *inappropriate*. Put a pin in this thought for now; I'll return to it later. I want to suggest that the joint decision of consent actually brings out, rather than obscures, questions about when and why a certain way of negotiating a sexual encounter are inappropriate.

3. Joint decisions and consent

We can now start developing the joint decision account of consent. I want to start by describing joint practical deliberation, which is the process of making a joint decision concerning what we will do.[94]

[94] Joint *practical* deliberation is the activity of deciding what we (two or more of us) will do. Joint deliberation about what to believe is also possible (imagine a group of scientists interpreting their data and figuring out whether it supports their hypothesis)

3.1. Deciding and deliberating together

Suppose you and I are choosing whether to play a game of badminton or a game of basketball. There are many ways to make this choice: we can flip a coin. You can say, "You choose!" and leave it up to me. I can plead, threaten, or manipulate you into doing what I want. Or we can deliberate *together* and try to choose the option that makes most sense to us.[95] All of these are ways of making a decision about what to do, but only the last is a way of making a decision together.

What is the difference between our deciding to play badminton together and, say, my getting you to play badminton through threats? The most significant difference is that deliberating together is a *joint activity*—like writing a paper together, ballroom dancing, playing badminton, or taking a walk with someone. One of the main tasks for a general theory of joint action would be to explain the difference between taking a walk with someone and taking a walk alongside, but not together with, someone. According to many theories of joint action the difference is an internal one. For example according to Searle, collective or joint actions are characterised by the presence of "we-intentions", or intentions that *we* (the joint actors) do so-and-so.[96] By contrast, Margaret Gilbert emphasises the normative features of doing things together: if we are walking together and you wander off without me, I can rebuke you in ways that I couldn't if we just happened to be walking alongside each other. Participants in a joint activity have *mutual obligations* to one another.

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[95] Theorists of joint practical deliberation sometimes characterise joint deliberation as choosing what to do based on the co-deliberator's shared reasons. See e.g. DeKenessey, Westlund for discussion on shared reasons. I intend for the most part to stay neutral on questions about shared reasons, and about whether joint practical deliberation is always responsive to shared reasons. Later on, I will say that joint decisions (just like individual decisions) can be made on a whim, without careful consideration of reasons for and against the deliberators' options; depending on the background picture of shared reasons, or what it takes to be responsive to them, this may be difficult to square with views of joint deliberation that require responsiveness to reasons.

[96] Searle, John. "Collective Intentions and Actions." In *Intentions in Communication*, edited by Philip R. Cohen Jerry Morgan and Martha Pollack, 401–15. MIT Press, 1990. Bratman also locates the difference in the agents' intentions, with further conditions on how the agents' intentions are interrelated. See e.g. Bratman, Michael. *Shared Agency: A Planning Theory of Acting Together*. Oup Usa, 2014.

Evaluating these competing theories of joint action here would take us too far afield from questions of consent. For now, it is enough that we have an intuitive grasp of two contrasts. First, the contrast between agents acting individually, and joint actions (like ballroom dancing, playing badminton) that agents may undertake together as a group or as a pair. And second, the contrast between deliberating about something with another person in a collaborative manner, and the many other ways of settling what to do such as bargaining, manipulating someone into doing something, deciding unilaterally on another person's behalf, and so forth. These two contrasts give us a grasp of the idea of joint deliberation.

When one person deliberates about what to do, their aim is to arrive at a *decision* about what to do. Similarly, joint deliberation aims at making a *joint decision* about what the deliberators will do. The content of a joint decision can be that we will do something together; we can jointly decide to undertake a joint activity. But we can also decide jointly that one you will do such-and-such, while I do thus-and-so; or that you will do such-and-such, and decide nothing at all about what I will do. This sort of flexibility in the contents of decisions that are made together is key to joint decision theories of promising, and will also be crucial for the joint decision account of consent.

When I say that practical deliberation aims at a decision about what to do, and that joint deliberation aims at making a joint decision, I don't mean to suggest that decisions of either kind are always preceded by something that we would ordinarily call "deliberating". "Deliberating" (as opposed to just "deciding") suggests a careful, deliberate consideration of reasons for and against a variety of possible options. But many decisions are made without deliberation in this sense—for example, I might feel like going for a run and spontaneously, without much thinking, decide to do so.[97]

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[97] Cf. Gilbert, Margaret. *Rights and Demands: A Foundational Inquiry.* Oxford University Press, 2018. 43

Similarly, I might feel like going for a run with you and suggest to you, without much thinking, that we go for a run. Suppose you say yes. We've now made a joint decision to go for a run together even though there was no giving and taking of reasons, or attempts to justify my proposal, or to assess alternatives to it. On the sense of "deliberation" that is relevant here, cases like this still count as an instance of joint deliberation.[98] Other instances of joint deliberation can, and often should, involve more deliberate discussions of reasons and options. I'll return to this point later.

Individual decisions have familiar effects on the decision-maker's thought and behaviour. For example, suppose I decide to go for a run. Having made this decision, I should be disposed to do things like change into running clothes, plan a route, and so on, since these are the necessary means to carrying out my decision to go for a run. I should also consider the deliberation about whether to go for a run closed—a decision puts an end to deliberation.[99] Joint decisions are much like individual decisions in this regard. After we have made a decision to play badminton, we should consider our deliberation closed, and we should be disposed to do things like fetch the badminton rackets and set up the net.[100]

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[98] Compare to e.g. Kenessey, Brendan de. "Promises as Proposals in Joint Practical Deliberation." *Nous* 54, no. 1 (March 2020): 204–32. https://doi.org/10.1111/nous.12269. And Gilbert, *Rights and Demands*. Gilbert is especially clear that nothing like conscious deliberation of reasons needs to precede a joint decision. DeKenessey on the other hand seems to think that all joint decisions are preceded by joint deliberation, but according to his view cases where one person proposes an action and another outright accepts the proposal without further evaluation are instances of joint deliberation. This "thin" sense of deliberation is the one that's relevant to us here.

[99] Cf. DeKenessey, "Promises as Proposals", 208

[100] Joint decisions concerning one deliberator's actions are a little more complicated. Suppose we decide that you will set up the net, and decide nothing about what I will do. Plausibly you should be disposed to take the necessary means to setting up the net, like walking over to the closet where it is kept. But what about me? According to Margaret Gilbert, joint decisions involve a commitment to endorsing a particular plan of action *as a body*. Endorsing a plan of action as a body involves emulating the actions of a single endorser of the plan, or the actions of a single decision-maker. So having decided together that you will set up the net, I should refrain from doing anything that would prevent you from doing so, treat the question of who will set up the net as closed, and so on. The decision that you will set up the net is still *our* decision, and as part of the decision-making body I need to act accordingly.

If a decision-maker fails to follow through on their decision without retracting it, or acts contrary to their decision by for example refusing to take the necessary means to carrying it out, they may be criticised for being irrational or weak-willed. This is true whether the decision-maker is an individual, or a group or a pair of individuals—both individual and joint decisions are normative in this way.[101] But joint decisions seem to be normative in a way that individual decisions are not: if one party to a joint decision fails to follow through, the other party appears to have a special standing to rebuke them. In other words, people who make joint decisions appear to be accountable *to one another* for acting as they have decided. According to some theorists, it is a constitutive feature of joint decisions that they generate bipolar obligations.[102] According to others, the story is more complicated. For example Bratman argues that agents who are acting together often make implicit promises to one another, and thereby incur bipolar obligations. But this is not an essential feature of doing things together, nor is it a necessary upshot of deciding to do something together.[103]

In what follows I am going to assume that there is a close connection between joint decisions and bipolar obligations. That is, I will assume that if A and B together decide to phi, where phi is some joint activity that A and B will undertake together, then A and B owe it to one another to phi. These obligations will persist until the decision is either carried out or revoked. I am not going to argue for this assumption here, but let me offer one reason in its favour: failing to follow through on a joint decision can *wrong* the other members of a decision-making body. For example, Brendan DeKenessey writes:

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[101] Cf. Alonso, Facundo M. "Shared Intention, Reliance, and Interpersonal Obligations." *Ethics* 119, no. 3 (2009): 444–75. https://doi.org/10.1086/599984.; Gilbert, *Rights as Demands*, 43.

[102] For a story of how acting together generates obligations, see Gilbert, Margaret. "Walking Together: A Paradigmatic Social Phenomenon." *Midwest Studies In Philosophy* 15, no. 1 (September 1990): 1–14. https://doi.org/10.1111/j.1475-4975.1990.tb00202.x.; Gilbert, *Rights and Demands*.

[103] See Bratman, *Shared Agency*. See also Alonso, "Shared Intention."

> "Suppose that you and I jointly decide to read each other's papers. You carefully read and write comments on my paper, and come to our meeting to find that I have not even glanced at yours. You would rightly feel wronged. Not only have I done wrong, I have wronged you."[104]

Wronging someone presupposes that the wrongdoer had a bipolar obligation to the wronged party to not act as they did. So the fact that flouting a joint decision can wrong the other party places joint decisions squarely in the realm of bipolar obligations.

The assumption that there is a close connection between joint decisions and bipolar obligations is key to joint decision accounts of promising, which we will discuss later in more detail. Promises generate a bipolar obligation in one of the parties, namely, the promisor. According to joint decision theories of promising, a promise is a joint decisions whose content concerns what the promisor will to—promises are joint decisions that generate asymmetrical, rather than mutual, obligations in the parties.[105] Now, consent does not generate new bipolar obligations—it releases the recipient from one, and thereby creates a new permission.[106] But consent, promising, and joint decisions all have the following feature in common: they can be used to alter what we owe to each other, as a matter of bipolar obligation. With this clue in hand, I want to now propose an account of consent as a kind of joint decision.

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[104] DeKenessey, "Promises as Proposals", 212.

[105] DeKenessey, "Promises and Proposals", Gilbert, *Rights and Demands*. Plausibly, promises also generate what Gilbert calls "ancillary obligations" in the promisee. For example, if you promise to call me tonight and I accept, and then turn my phone off for the night, you could reasonably rebuke me. (See Gilbert, *Rights and Demands*, 114.) This suggests that promisors incur ancillary obligations to e.g. not prevent the promisor from acting as promised.

[106] Strictly speaking, a consent-giver does typically incur a bipolar obligation to the recipient to not prevent them from performing whatever act was consented to. Ordinary instances of consent involve generating this ancillary obligation, though it is possible for someone to say: "You may enter my apartment, but I'm going to retain the right to do what I can to stop you!" (Cf. Thomson, Judith Jarvis. *The Realm of Rights*. Cambridge, Mass: Harvard University Press, 1990.)

3.2. The joint decision account of consent

I suggest that

> X consents to Y's phi'ing iff (1) X and Y make a joint decision that releases Y from a directed obligation owed to X to not phi, and (2) X and Y arrived at this joint decision through an appropriate process of joint deliberation.

Note that "X consents to Y's phi'ing" on the left hand side should be read as "X *validly* consents to Y's phi'ing" since we are using "consent" as a success term throughout. Condition (1) captures the core of consent: consent releases its recipient from a directed obligation to not perform the consented-to act.[107] Let's call joint decisions that do this "joint decisions of consent".[108] As we just discussed, joint decisions of consent do not generate an obligation to perform the consented-to act. The content of a joint decision of consent must therefore be such that it leaves the consent-recipient free to choose whether or not to perform the consented-to act. (This is consistent with the consent-recipient having reasons, even compelling reasons, to perform the consented-to act.) The content must also concern the consent-recipient's actions only, leaving open what the consent-giver will do.

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[107] I noted earlier that sometimes third parties, like next of kin, can be authorised to consent on common else's behalf. To accommodate this possibility we might amend condition (1) to say that

(1*) X and Y make a joint decision to release Y from a directed obligation not to phi

Leaving it open whether the obligation in question is owed to X or to someone X is acting on behalf of.

[108] Joint decisions of consent can be part of a more elaborate plan that may involve joint decisions to act, promises, and more. For example, suppose that we decide that tomorrow morning you will take my car and drive to the airport to pick me up. Part of this plan is a decision to permit your driving my car. Another part is a promise that you will pick me up from the airport.

Here is a suggestion. When X and Y make a joint decision of consent, their consent has the following content: either Y will phi, or, Y will not phi.[109] This releases Y from their obligation to X to not phi, but leaves it up to Y whether to phi. Disjunctive joint decisions like this are commonplace even outside joint decisions of consent: suppose we need to wash the dishes and do the laundry, and we choose that you will either wash the dishes or do the laundry while I'm at work, and I will do the rest later. This leaves your options open in the same way as my permitting you to enter my apartment, borrow my bike, or to give me a hug. The only difference is that you had no obligation to not do the dishes or the laundry, and so our joint decision wasn't one of consent.

Condition (2) states that consent requires an *appropriate* process of joint deliberation.[110] The notion of appropriateness here can be understood to cover the various validity-conditions of consent (competence to exercise one's normative powers, absence of undue coercion and deception, and so on). Alternatively, we may try to derive the validity-conditions of consent from condition (1) by reflecting on the conditions of joint deliberation. Some proponents of joint decision theories of promising have argued that the validity-conditions of promising can be explained in this way. For example, DeKenessey argues that deception and coercion undermine joint decisions because genuine, good faith joint deliberation is not possible if your co-deliberator is coercing or deceiving you.[111] For the time being I want to remain agnostic about whether an argument like this is going to work for consent. If there is a way to derive the validity-conditions of consent from the conditions under which joint decisions can be made, then there is no need to read "appropriate" in (2) as covering these conditions. They will follow from condition (1) alone.

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[109]Cf. Setiya, "What is a Right?" (ms)

[110] Recall that we are using the word "deliberation" in a thin sense here. Deliberation in the relevant sense does not *require* e.g. giving and taking of reasons or assessing alternative options, although these may be necessary in a given context for the process of joint deliberation to be appropriate.

[111] DeKenessey, "Promises", 216-218

Either way, I intend "appropriate" in condition (2) to cover more than just the minimal validity-conditions of consent. Let me explain. I noted earlier that the sense of deliberation that is relevant here is a thin one: for you and I to make a joint decision, it is not necessary that we engage in a careful evaluation of the reasons for or against any given option. But sometimes it is *appropriate* to be careful and deliberate about the decisions we make. For example, suppose Jules and Glenn are deciding whether to have children. This is a high stakes decision, and some of their options will be ones that they can't go back on. It seems appropriate for Jules and Glenn to take the time to consider all of their options carefully, and to really delve in to the reasons for and against each of them. It is also appropriate for both parties to be forthcoming about their personal preferences and their expectations about what each option will entail, and both parties should be open to hearing the other person's perspective. By contrast, if you and I are choosing whether to play badminton or basketball, we do not need to be as careful about having all of our options on the table or about weighing the reasons for or against them. The stakes are low, and we can easily go back on whatever decision we make.

The stakes of a given joint decision are one feature of what I will call the *context* of a joint decision. The appropriateness of a given process of joint deliberation is context-sensitive.[112] The level of care and consideration that is given to reasons for and against a given option is one aspect of appropriateness; another aspect of appropriateness is the explicit surveying of all the relevant options. These aspects of appropriateness are both sensitive to the stakes of a joint decision in the way that Jules and Glenn's case illustrates.

Another important feature of the context of a joint decision is the parties' relationship to one another. I want to highlight two important ways in which this feature can influence different aspects of appropriateness.

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[112] This means that if the validity-conditions of consent like absence of coercion are included in the notion of appropriateness, there is room for a context-sensitive understanding of what kinds of coercion and deception can undermine consent.

Unlike individual decisions which are often made in the privacy of the decision-maker's mind, joint decisions depend on communication between the parties.[113] Consent therefore also requires communication, according to the joint decision account.[114] What *kind* of communication is appropriate can vary depending on various features of the context, including (but not limited to) the parties' relationship to one another. Let me illustrate with a joint decision of consent this time. Suppose Mark and Lindsey are college students who have just met at a house party for the first time. They are practically strangers to one another. Lindsey is attracted to Mark and wants to hook up with him. Since they have just met, they do not know one another's boundaries or preferences, and cannot reasonably think that they will be able to read the other's body language.[115] If Lindsey wants to get Mark's consent to kiss him, the right thing for her to do is ask—in other words, the appropriate type of communication in the context is unambiguous verbal communication.[116] By contrast, long term partners who do know one another's boundaries and preferences, and who can reliably rely on nonverbal communication, may appropriately do so.

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[113] For example, DeKenessey writes: "One obvious difference between joint and individual practical deliberation is that, while individual deliberation can be performed in solitary thought, joint delibera- tion needs to happen in conversation. We need to *communicate* with one another to deliberate together." "Promises", 210

[114]Readers familiar with the literature on the ontology of consent will notice that since communication is necessary for the making of joint decision, the joint decision account is what is often called a *behavioural view* of consent (cf. Dougherty, Tom. *The Scope of Consent*. Oxford: Oxford University Press, 2021. https://doi.org/10.1093/oso/9780192894793.001.0001). According to behavioural views, consent is not just in the consent-giver's head: having a particular mental state or attitude is not sufficient for morally transformative consent. Some type of observable behaviour is also necessary. By contrast, *mental views* of consent claim that there is a mental state or attitude that is both necessary and sufficient for morally transformative consent (See e.g. Hurd, Heidi M. "The Moral Magic of Consent Special Issue: Sex and Consent, Part I." *Legal Theory* 2, no. 2 (1996): 121–46.; Ferzan, Kimberly Kessler. "Consent, Culpability, and the Law of Rape." SSRN Scholarly Paper. Rochester, NY: Social Science Research Network, 2016. https://papers.ssrn.com/abstract=3349292.; Alexander, Larry, Heidi Hurd, and Peter Westen. "Consent Does Not Require Communication: A Reply to Dougherty." *Law and Philosophy* 35, no. 6 (December 1, 2016): 655–60. https://doi.org/10.1007/s10982-016-9267-z.)

[115] Cf. Anderson, "Negotiating Sex".

[116] Verbal communication includes spoken, written, and sign language. Nonverbal communication includes things like: body language, gestures, posture, eye contact, and the like.

Many of the relationships we have with other people are characterised by an asymmetry of power. Employees have power over workers, professors have power over students, doctors have power over patients, and parents and guardians have power over their children. Power relations like these complicate the giving of consent in ways that are well known: it is difficult, sometimes impossible, to refuse consent or to negotiate options that are favourable to you with someone who holds power over you. In the context of a relationship that involves an asymmetry of power, the appropriate way to make a joint decision of consent will be one that doesn't allow the more powerful party to take advantage of their situation. What this looks like in practice will depend on who is involved, and what is being negotiated. For example in a situation where an adult is asking a child for permission to give the child a hug, it may be appropriate for the adult to explicitly mention to the child that they have the option of refusing consent. And in a situation where a doctor is asking for a patient's consent to an invasive surgery that they have recommended to the patient, it may be appropriate to contrast it with other treatment options.

These are just some of the aspects of appropriateness that fall under condition (2), and only some of the features that go into determining the context of a joint decision—developing a more principled account of the notion will have to wait for another time.

3.3. A unified theory of two normative powers

In section 4 below I will explain how the joint decision account of consent can accommodate the criticism of consent theory that we encountered in section 2. Before that, I want to explore a different positive feature of the account. As we saw earlier, in recent years philosophers interesting promising have proposed that promising should be understood as a type of joint decision. For example, Brendan DeKenessey has proposed the following theory of promises:

> The Deliberative Theory of Promises: For S to promise A that she will ϕ *just is* for S to propose to A, by means of the propose-and-challenge method, that they make a joint decision to the effect that she will ϕ.[117]

According to DeKenessey's deliberative theory, when S promises to A that S will phi, S proposes to A that they make a joint decision with the content: S will phi. In a typical joint deliberation proposals about what to do are put forth by one person and then accepted, rejected, or otherwise taken up by the other deliberator(s).[118] For example, I might propose that we play badminton because there are only two of us and basketball is a team sport. A joint decision is made only if you accept my proposal ("Sure, badminton sounds good to me!"). DeKenessey argues that sometimes a proposal can get accepted by default, unless it is challenged or rejected by the other deliberator(s). This is the "propose and challenge" method mentioned in the deliberative theory. When a speaker S proposes that S will phi using the propose and challenge method, S and A will jointly decide that S will phi *unless* A rejects the proposal.

Margaret Gilbert has suggested a similar theory of promising. According to Gilbert promises are close cousins with *agreements*. The idea of an agreement to play badminton or an agreement that I will shovel your driveway immediately suggests that we together have decided on something, and that we are now accountable to one another for acting accordingly.[119] These are of course characteristic features of joint decisions, as we saw in section 3.1. Joint decisions, Gilbert argues, are constituted by "a joint commitment to endorse as a body a particular plan of action."[120] On Gilbert's account of promising,

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[117] DeKenessey, "Promises", 211. Note that DeKenessey's statement of the deliberative theory of promises does not use promise as a success term. If S's proposal to make a joint decision to the effect that she will phi is rejected by A, DeKenessey would still say that S promised A that she will phi, but her promise misfired or failed.

[118] For example, the audience can accept a proposal conditionally, reject it conditionally, or suggest an alternative.

[119] Gilbert, *Rights and Demands,* 190-191

[120] ibid. 213

> "X has made a promise to Y if and only if (1) X and Y are jointly committed to endorse as a body a particular plan of action P, and (2) X and Y created this joint commitment by virtue of appropriate, explicit expressions on the part of each, in conditions of common knowledge and (3) P specifies an action for X."[121]

"Endorsing a plan of action as a body" involves emulating a single actor of the plan—this explains why promises impose certain ancillary obligations on the promisee.[122] But since the plan specifies an action only for the promisor, the obligations that arise from a joint decision are asymmetrical.

Now, I don't intend to endorse either of these two theories of promising here. The purpose of introducing them is to show that there are viable accounts of promising that resemble the account of consent that I am proposing. Here is why I think this gives us a reason to take the joint decision account of consent seriously: consent and promising are both ways to alter the bipolar obligations that bind us to other people. Beyond this core similarity, there is also remarkable overlap in the validity-conditions of promising and consent. Both can be undermined by undue coercion, manipulation, deception, as well as a lack of sufficient competence on the part of the consent-giver or the promisor. It is also widely recognised that promising requires the promisor's uptake; I argued in chapter 2 ("The Normative power of uptake") that consent likewise requires the recipient's uptake.[123] It seems to me that it would be desirable to have an understanding of both of these powers that can explain why the two distinct powers are essentially ways of doing the same thing, namely, voluntarily altering our normative boundaries with other people. We can achieve this by combining a joint decision account of promising with the joint decision account of consent.[124]

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[121] ibid. 204

[122] ibid., see especially section 2.2.

[123] See e.g. Thomson, *Realm of Rights;*Owens, David. *Shaping the Normative Landscape*. Oxford, New York: Oxford University Press, 2012; Liberto, Hallie. "Promises and the Backward Reach of Uptake." *American Philosophical Quarterly* 55, no. 1 (2018): 15–26.

[124] It would be *even better* if this unified theory could explain why the validity-conditions of these two powers are what they are—that is, if we could explain the validity-conditions of consent and promising by reference to the conditions of joint decision-making.

4. Accommodating the concerns about consent theory

I want to explain now what resources the joint decision account of consent has to alleviate the concerns about consent theory discussed in section 2. I want to argue that the joint decision account of consent is not committed to the idea that consent involves yielding to another person's will. I also want to argue that the picture of sexual negotiation that arises from the joint decision account of consent is much more nuanced than the simple request-and-assent-or-refuse picture of consent negotiation that critics like Kukla and Ichikawa assume. Consent may not guarantee that a sexual encounter is free of all moral faults, but it can do much more for us than its critics think it can.

4.1. Negotiating consent

I want to start by describing the picture of sexual negotiation that follows from the joint decision account of consent. Having this picture on the table will help us see why the account is not committed to the idea that consent involves yielding to someone else's will.

When we discussed Kukla's criticism of consent theory in section 2, we saw that Kukla writes that we ought to hope that sexual negotiation is "a dialogical activity that expresses both partners' positive agency."[125] Giving consent, according to Kukla, does not involve any such activity. This is why the picture of sexual negotiation that Kukla associates with consent theory is one where one person, the consent-recipient, issues a request to do something to someone else, the consent-giver, and the consent-giver either yields to the request or refuses. We also saw that one of the ideas that emerges from Kukla's criticism of consent theory is the thought that sexual ethics should ask questions about the appropriate way(s) to negotiate a sexual encounter. They write,

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[125] Kukla, "What She Said", 75-76

> "[S]ometimes a sexual negotiation itself violates ethical norms, but not by violating consent: an invitation may be unwelcoming, inappropriate, or too pressing; a gift offer may be insulting…and so forth."[126]

I want to return to this thought now and argue that there is room for questions like these in consent theory—*if* we have the right understanding of what consent is.

To start, it will be helpful to have an idea of what we want from a picture of sexual negotiation. What kind of a picture will satisfy our critics? In the following passage, Kukla describes some of the features of good sexual negotiation and how consent (as Kukla conceives of it) falls short of it:

> "[The focus on consent] represents all expressions of desires as requests, for which agreement or refusal is the appropriate possible uptake. But this flattens the communicative terrain. When I initiate a conversation about a possible sexual encounter, I may not be requesting sex. I might be beginning to articulate a fantasy, suggesting a possibility that I think might please the other person, probing to find out how the other person feels about an activity or role, or seeking help in exploring how I feel about it, for instance. Good sexual negotiation often involves active collaborative discussion about what would be fun to do. It also often includes conversations about limits, constraints, and exit conditions. None of this fits nicely into a request-and-consent-or-refuse model of sexual negotiation."[127]

This passage suggests that in order to satisfy its critics, a picture of sexual negotiation should

> (1) not assume that negotiating a sexual encounter has to begin with a request (rather than a question, a proposal, etc.),
>
> (2) not limit a consent-giver's contributions to the negotiation to either assenting to or refusing a request,

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[126] ibid. 94-95

[127] ibid. 70

(3) consider it appropriate for parties to discuss limits, constraints, desires, and exit conditions as they negotiate a sexual encounter.

According to the joint decision account of consent, A consents to B's phi'ing when the two carry out an appropriate process of joint deliberation and, as a result, make a joint decision that alters their normative boundaries so that B is permitted to do something that was previously off-limits to them. This places no constraints on what kinds of speech acts can initiate, or be involved in, a process of negotiating a joint decision of sexual consent —so long as the requirement of an appropriate process of joint deliberation is not violated; threats and ultimatums, for instance, have no place in a negotiation concerning sex. An appropriate process of joint deliberation that concerns consent to a sexual activity can certainly involve requests, questions, assertions, assurances, offers, and more— whatever the parties want, and whatever suits their context. The joint decision account also places no constraints on the consent-giver's contributions to a joint deliberation concerning sexual consent. Suppose Noi asks Steven: "Can I kiss you?" Steven has the options of agreeing to Noi's request and refusing it. But he also has the following options:

Countering with a different proposal: "No, but do you want to hug?"

Asking what the request entails: "Do you mean on the lips?"

Setting a condition on agreement: "Yes, but only on the cheek."

Since the joint decision account places no limits on what moves are possible within a joint deliberation—beyond the limits that are set by the notion of appropriateness—it can easily accommodate desiderata (1) and (2).

As for (3), the joint decision account certainly has resources to recommend that consent to a sexual encounter should be negotiated in a way that involves discussions of limits, desires, exit conditions, and more. We *could* go even further and argue that these moves are part of any appropriate process of joint deliberation when the deliberation concerns consent to a sexual encounter. I suggested earlier that contexts where the stakes are high and contexts that involve an asymmetry of power between the deliberators call for certain ways of negotiating consent. For example I suggested that in high stakes situations we should consider all of our options carefully, and that in certain contexts of inequality it is important to emphasise the option of refusing consent. Much of heterosexual sex takes place against a background of gender inequality, and sex is often a morally risky, high stakes activity. These features of the context could raise the bar for valid consent to sex so high as to require moves like those mentioned in (3). But for the time being, I am happy to rest with the idea that there are good, virtuous ways of negotiating sex that go beyond what is strictly required for valid consent.

4.2. Yielding to someone else's will

Consider now the claim that giving consent involves yielding to another person's will. Ichikawa endorses this claim because he believes that when one consents, one is acting at someone else's behest. Kukla endorses the nearby idea that giving consent is passive, and that paradigmatically, consent is given in response to a request. From what we've just said in the previous section, it should be clear that the process by which a joint decision of consent is made does not necessarily begin with, or even involve, anything like a request to do something to another person. And since joint deliberation is a joint activity, it necessarily involves the agency of both parties.

The idea that consent involves acting at someone else's behest assumes that consent cannot be offered up spontaneously; that there is no such thing as unsolicited consent.[128] This seems to me to be a mistake in the underlying understanding of what consent is. Consent is a normative power by which we can release others from the obligations they owe to us, thereby granting them permission to do what was previously off limits to them. Permissions can be offered even if they weren't asked for, like when my neighbour generously offers to let me use their parking spot, or when I invite an acquaintance to enter my apartment for the first time. The fact that a process of negotiating consent can begin with speech acts that are not requests (or demands, or any other request-like acts) is further proof that consent doesn't always involve acting at someone else's behest.

This is not to say that there aren't substantive views of consent within the approach we're calling "consent theory" that are open to the charge that consent involves yielding to someone else's will. For example according to Ferzan (2016) consent just is a mental state of willed acquiescence.[129] Substantive views of consent like these may be an apt target for a version of Kukla and Ichikawa's criticism. But not every consent theorist is committed to thinking of consent as a mental state of willed acquiescence—there are plenty of other views out there, including the joint decision account of consent.

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[128] Cf. Pallikkathayil, "Consent to Sexual Relations".

[129] Ferzan, "Consent, Culpability, and the Law of Rape".

5. Revoking consent

Before concluding I want to address a potential objection to the joint decision account of consent. Here's something we tend to take for granted about consent: it can be revoked by the consent-giver at any time, for any reason. This is especially relevant to sexual consent: we are free to change our minds about agreeing to a sexual encounter (or to some part of a sexual encounter) at any point, for any reason, or for no reason at all. Consent should be revokable *unilaterally* by the consent-giver, and the consent-giver shouldn't need to provide a reason or a justification for doing so.[130]

This seems to pose a problem for the joint decision account of consent. A typical joint decision generates mutual bipolar obligations in the parties, and these obligations cannot just be released at will by the duty-bound. Taking back a joint decision requires communication and concurrence from both parties, just like making one does. In other words, joint decisions *cannot* be revoked unilaterally.[131] In virtue of their content, joint decisions of consent don't impose bipolar obligations to act on either party. But the challenge still stands, since a joint decision of consent is a decision made by both parties: why should the consent-giver have unilateral power to take back a decision that is *theirs*? The joint decision account of consent needs to explain how joint decisions of consent can be revoked, and explain why consent can be revoked in a way that is—or at least appears to be—unilateral.

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[130] Cf. Hallie Liberto, "The Problem with Sexual Promises" Ethics: Vol 127, No 2." Accessed April 22, 2022. https://www.journals.uchicago.edu/doi/abs/10.1086/688742.; Dougherty, *Scope of Consent*

[131] Joint decision theories of promising also face the challenge of explaining why the promisee seems to have unilateral authority to release a promisor from their promissory obligation. Cf. DeKenessey "Promises"

To explain how joint decisions of consent are revoked, I want to go back to an idea that we encountered in section 3.3. DeKenessey argues that promises are joint decisions concerning the promisor's actions that are made using the "propose and challenge" method. When joint decisions are made using this method, a joint decision comes into effect unless it is challenged by the co-deliberator(s). For example, suppose the chair of a meeting proposes that the meeting be adjourned unless anyone objects. Unless the participants voice their dissent, their silence will indicate that everyone backs the proposal, and a joint decision to adjourn the meeting will come into force.[132] Contrast this with what DeKenessey calls the "propose and ratify" method. This is a method of making joint decisions where, after one person puts forth a proposal, others have to explicitly accept, reject, or otherwise respond to it before any joint decision is made.

Joint decisions can be made using both of these methods. They can also be retracted using both of these methods.[133] I want to suggest that when a consent-giver chooses to revoke a joint decision of consent, the appropriate method for doing so is "propose and challenge": all they need to do is say so, and a joint decision to return the normative boundaries to where they once were will be made. Revoking a joint decision of consent has an appearance of unilaterality because a proposal to revoke one does not require voiced, explicit acceptance from the consent-recipient.[134]

So far so good—but what if the proposal to revoke a joint decision of consent is challenged? DeKenessey writes that

> "A proposed joint decision comes into force just in case there have been no successful challenges to it (meaning either that no challenges have been raised, or that all challenges have been successfully rebutted)."[135]

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[132] DeKenessey, "Promises as Proposals", 209

[133] ibid.

[134] My argument here mirrors DeKenessey's story of why in the case of promises, uptake by the promisee doesn't require voiced, explicit acceptance by the promisee. See ibid.

[135] DeKenessey "Promises as Proposals" 209

On DeKenessey's background view of joint deliberation, joint deliberation is a rational process that is responsive to the parties' *shared reasons*. Whether a challenge is successful, or successfully rebutted, is a matter of whether it is justified by the parties' shared reasons. DeKenessey does not develop a substantive view of what shared reasons are, or what determines which considerations count as shared reasons for a certain pair or group of deliberators, but he writes:

> "Two or more persons' *shared reasons* are the set of normative reasons that determine what joint decisions they ought to make. Whenever one extols the benefits of one's favored joint plan, or objects that a proposed joint decision is unfair or foolish, one is appealing to shared reasons."[136]

For example, suppose a participant at the meeting challenges the chair's proposal to adjourn the meeting by saying: "I would like to keep the meeting going because I haven't finished my coffee yet." This challenge certainly seems foolish, and the consideration that is being cited is clearly not a good reason to keep the meeting going.

So far I have remained neutral on the question of shared reasons.[137] But I think that there is something to the idea that challenges to a proposal to either make or to revoke a joint decision can be bad, foolish, selfish, inappropriate, or unreasonable, and that challenges like these do not stop a proposal to make or to revoke a joint decision from coming into force.

To illustrate, consider first the following case.

> Holiday home: Memphis is going through a difficult divorce. For her own safety, she has had to move out of the house that she owns with her former spouse. Memphis has a sister who owns a holiday home that is empty and unused. She has given Memphis permission to stay there for the time being.

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[136] ibid. 207

[137] See note 88 above.

Suppose the sister now wants to rent out the property to someone else. She says to Memphis: "I gave you permission to stay in the house, but I take it back. I need you to move out immediately and find somewhere else to stay." This is the sister's proposal to revoke a joint decision of consent. The proposal seems callous to me: Memphis is her sister, she has fallen on hard times through no fault of her own, and the sister loses nothing but an opportunity to make some extra money by letting her stay in the home. Consider how Memphis might challenge her sister's proposal to take back the permission. She might say:

> "Please, I cannot move out now, I have nowhere else to go and I can't go back to my own house. Can't you let me stay?"

This strikes me as a *reasonable* challenge to the sister's proposal to revoke her previous consent to Memphis's staying at the property. It is not inappropriate or unreasonable for Memphis to ask her sister to help her, and to forgo making some extra money so that Memphis can be safe.[138] Consider now a very different case:

> College party: Mark and Lindsey are at a college party. Lindsey wants to kiss Mark, so she asks him if she may do so. Mark says: "Yes, but can we go somewhere more private? I feel awkward with so many people around." The pair find a quiet spot. Lindsey goes in for the kiss. Mark says: "Actually I still feel awkward—I don't think I want you to kiss me."

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[138] I do not think that this means that the sister *must* yield to Memphis's challenge to her attempt to revoke their joint decision of consent. As the property-owner, she still retains certain rights to determine who occupies the property.

Mark gave consent to Lindsey kissing him, conditional on going somewhere more private. He then says he takes it back; Lindsey may not kiss her. If Mark's retraction is not challenged, his consent to the kiss is taken back. But what if Lindsey does challenge him? Unlike with Memphis and her sister, it does not seem to me that there are any reasonable challenges that Lindsey could make against Mark's proposal. Here is why: any attempt to keep the joint decision of consent in force, against Mark's wishes, goes against his general right to sexual and bodily autonomy. There is no consideration that Lindsey could cite as a reason to keep their joint decision in force, because the mere fact that Mark does not feel like it anymore will be more important than any consideration that she might appeal to.

I submit that as a general rule, there are no reasonable challenges to proposals to retract consent to a sexual encounter. And as I said earlier, proposals that are unreasonable, selfish, irrelevant, or otherwise inappropriate do not stop a revocation from going through. It makes sense for our practices around revoking sexual consent to reflect this: revocations go through by default because they cannot be successfully challenged.

6. Conclusion

I have proposed that consent can be fruitfully understood as a kind of joint decision between the consent-giver and the consent-recipient. The account that I have proposed has two chief benefits. First, it affords consent theorists an account of consent that is not susceptible to the criticisms discussed in section 2. According to the joint decision account consent is essentially cooperative; this affords room to ask questions about how consent should be negotiated, given the context at hand. Second, it suggests that there could be a unified theory of two distinct normative powers: it is possible to understand both promising and consent as ways of making joint decisions concerning our normative powers.

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