

**From the holdings of the Department of Special Collections , Princeton University Library,
Princeton, NJ**

These documents are either in the public domain, or can only be used for educational and research purposes (Fair use) as per U.S. Copyright law (text below). By accessing this file, all users agree that their use falls in the public domain or within fair use as defined by the copyright law. We do not charge any permission or usage fees for the publication of images of material in our collections, including those provided by Princeton University Library, via our website, catalog, or directly from staff. For more information regarding copyright, credit, and citation please review the information on the Copyright, Credit and Citation Guidelines page of our website.

<https://library.princeton.edu/special-collections/policies/copyright-credit-and-citation-guidelines>. If you have any questions, including how to order higher-quality images from the collection, contact Special Collections Public Services via our Ask Us! Form. <https://library.princeton.edu/special-collections/ask-us>

Doctoral Dissertations, 2011-2026

Philosophy

2015

Explaining the Wrong of Rape

Schouten, Vanessa

Princeton, NJ : Princeton University

<http://arks.princeton.edu/ark:/88435/dsp01td96k483r>

U.S. Copyright law: The copyright law of the United States (Title 17, §108, United States Code) governs the making of photocopies or other reproductions of copyrighted material. Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specified conditions is that the photocopy or reproduction is not to be used for any purpose other than private study, scholarship, or research. If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of fair use that user may be liable for copyright infringement. This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve a violation of copyright law. <https://www.copyright.gov/title17/title17.pdf>

EXPLAINING THE WRONG OF RAPE

VANESSA SCHOUTEN

A DISSERTATION
PRESENTED TO THE FACULTY
OF PRINCETON UNIVERSITY
IN CANDIDACY FOR THE DEGREE
OF DOCTOR OF PHILOSOPHY

RECOMMENDED FOR ACCEPTANCE
BY THE DEPARTMENT OF PHILOSOPHY
ADVISOR: MICHAEL SMITH

JUNE 2015

© Copyright by Vanessa Schouten, 2015
All rights reserved.

Abstract

The standard view in the literature is that the wrong of rape has to do with consent rather than experiential harm – this is the Consent Explanation for the wrong of rape. In this dissertation, I argue that we should reject this view, for three reasons: (1) there are many ordinary instances of morally permissible non-consensual sex (for example, cases involving people with intellectual disabilities); (2) if we accept the Consent Explanation, we have to say that we ought to prevent such people from having sex when they would enjoy and benefit from it, and this is counter-intuitive; (3) we can explain the other intuitions we have about wrongful sexual activity by appealing to harm (so the appeal to consent is unnecessary).

Acknowledgements

I would like to thank the graduate students and faculty at Princeton University, in particular Ashley Atkins, Jimmy Martin, Angela Mendelovici, Carla Merino-Rajme, Jack Woods, and Michael Smith, my advisor.

I would like to thank audiences at the 2014 Australasian Association of Philosophy Conference and the 2014 Victoria University of Wellington Programme Seminar.

I am also grateful to the faculty and students at Victoria University of Wellington – and I would especially like to thank Nick Agar, Stuart Brock and Ramon Das.

But most importantly, I would like to thank my family, especially my Mum and Dad. I would not have been able to do this without them, and so I dedicate this dissertation to them.

Table of Contents

Abstract	iii
Acknowledgements	iv
Table of Contents	v
List of Tables	ix
Introduction	1
Chapter 1	11
1. The role of consent in a definition of rape	11
1.1. The legal definition	11
1.2. Sexual relations	12
1.3. Consent	12
1.4. Belief in consent	14
1.5. Moral analogy of the legal position	15
1.6. Moral wrongs and moral culpability	17
1.7. A note on wrongs	19

Chapter 2	22
1. The role of consent in the explanation of the wrong of rape	22
1.1. The Consent Explanation	22
1.2. The Equivalent Harm Explanation	23
1.3. The Consistent Harm Explanation	24
1.4. On what's at stake	26
2. Why consent is important	30
2.1. Consequentialist justifications for the value of consent	30
2.2. Deontological justifications for the value of consent	32
3. What does it mean to consent?	34
 Chapter 3	 39
1. Capacity to consent	39
2. Moral analogues of consent	43
2.1. Low-quality consent	44
2.2. Proxy consent	46
2.3. Consent*	47
2.4. Implications for the Consent Explanation	49
3. Possible cases involving those incapable of consent	50

Chapter 4	52
1. Consent and intellectual disability – two cases	52
2. Can Carol and Eve give morally valid consent?	54
2.1. Consent tokens	54
2.2. Disability and consent	56
2.3. Response one: capacity is domain-local	60
2.4. Response two: lower the standard	63
2.5. Response three: capacity is relationship local	65
2.6. Proxy consent	69
 Chapter 5	 76
1. Do Eve and Carol give morally valid consent?	76
1.1. <i>Pro tanto</i> wrong?	77
2. Does David do something morally wrong or blameworthy?	79
3. Does Frank do something morally wrong or blameworthy?	82
4. Why we should treat these cases as counter-examples	83
4.1. Do people with profound intellectual disabilities desire and benefit from sex?	84
4.2. Welfare rights	85
5. One more move?	87

Chapter 6	89
1. Can children give morally valid consent?	89
2. Morally relevant differences between children and those with intellectual disabilities	92
3. What about children who won't be autonomous in future?	94
4. A new approach?	98
 Chapter 7	 102
1. The two-tier approach	102
2. Assessing Criterion 2	105
3. Should we retain Criterion 1?	109
4. Why we should reconsider the Consent Rule	113
5. Conclusion	118
 Appendix A: List of Cases	 120
Bibliography	122

List of Tables

Table 1: Combinations of partners/impairment	50
Table 2: Intuitions/Criterion 2	106

Introduction

Imagine this case:

Comatose: John has sex with Anna, who is in a persistent vegetative state. It is very unlikely that she will ever wake up, she has been through menopause so there is no risk of pregnancy, and John has no STDs. Furthermore, no other person ever finds out about this event.

Cases like these illustrate why most people think that the wrong of rape has something to do with consent.¹ Furthermore, they illustrate why most people think that the wrong of rape has something to do with the consent *rather than* (experiential) harm.² Why? Because it seems like John does something wrong – he rapes Anna. By stipulation, he causes no experiential harm to Anna, or anyone else. But he does have sex with her without her consent. So if John does something wrong, the reason must be because John has sex without her consent.

Following Tom Dougherty, I will call views that accept the claim that the wrong of rape has something to do with consent rather than experiential harm **Consent Explanations** for the wrong of rape (Dougherty, 2103, pg. 724). My goal is to undermine the plausibility of Consent

¹ For example, in “Sex, Lies and Consent,” Tom Dougherty introduces a case which involves sex with a chronically comatose patient. He argues that the fact that we think such an act would be morally wrong is a datum in need of explanation, and that the best explanation is that the perpetrator has sex with the comatose patient without her consent (Dougherty, 2013, pg. 724).

² There are of course some views of harm which *count* violations of consent as harms. According to these views, John does harm Anna. I will be discussing these views in Chapter 2, Section 1, but for the moment we’ll assume that ‘harm’ refers to *experiential* harm.

Explanations. My reasons for doing this are not because I want to give John a moral excuse. Rather, I think that Consent Explanations face a problem. The problem is this: there are many cases of non-consensual sex which are in fact morally permissible.

There are three distinct types of situation in which we might describe Partner A as engaging in non-consensual sex with Partner B:

Partner A has non-consensual sex with Partner B when:

1. **General and Particular Capacity:** Partner B currently has the capacity to consent, and can also currently exercise that capacity, and Partner B does not consent.
2. **General but no Particular Capacity:** Partner B currently has the capacity to consent (for example, she currently has the capacity to understand and evaluate information pertinent to her decision), but cannot exercise that capacity (because she is being coerced, manipulated, or she does not actually have the pertinent information).
3. **No General or Particular Capacity:** Partner B does not currently have the capacity to consent (for example, she is comatose).

Consent Explanations for the wrong of rape tend to treat instances of non-consensual sex falling under 1, 2 and 3 as morally wrong, and wrong for the same reason. Cases like **Comatose** help to motivate the view that it is morally wrong to engage in sexual activity with someone who does not have the capacity to consent (as well as someone who withholds consent) even when the sexual activity in question does not cause any experiential harm.

I will argue that there are in fact many instances of **No General or Particular Capacity** cases which are morally permissible, and that these cases are not particularly outlandish.³ Furthermore, the fact that there are many instances of **No General or Particular Capacity** cases which are morally permissible gives us reason to reject Consent Explanations which claim that the wrong of rape has to do with consent rather than experiential harm. This is because the feature that **General and Particular Capacity** and **General but no Particular Capacity** cases share, and that **No General or Particular Capacity** cases lack, is that in the first two Partner B *experiences the act* as a violation of her autonomy. So if this is the feature that makes the moral difference between the three cases, then we have reason to reject the claim that the wrong of rape has to do with consent rather than experiential harm.

Instead, we should adopt the view that the feature which distinguishes morally permissible cases of sex from morally impermissible cases has to do with either actual or expected harm. Although I will at times mention the legal rules regarding sex, I take my claim to be a moral rather than a legal claim. That is, even if I am right that consent will play no role in an explanation of the wrong of rape, it may still be true that we have good reasons to retain laws which refer to consent.

There are four views in the area which I wish to distinguish my argument from. The first is that there are some instances of **No General or Particular Capacity** cases which are morally permissible because they occur in the context of a relationship which is ‘beyond consent.’ In

³ For example, an advocate of the Consent Explanation might accept that it is permissible to have non-consensual sex with someone if it will prevent the destruction of the universe. But because cases of this kind are so unlikely, I take it that they are not particularly compelling counter-examples to the Consent Explanation.

Sexual Consent David Archard argues that some loving couples might have relationships of this type – relationships of mutual understanding such that actual consent is unnecessary. However, he also claims that “the relationship which lies ‘beyond consent’ is one whose parties *would* consent to their sexual interaction even though they do not, in fact, do so” (Archard, 1998, pg. 27). There are two reasons why my argument is dissimilar from Archard’s: firstly, none of the relationships I discuss are of this type; secondly, the existence of such relationships do not necessarily pose a challenge for the Consent Explanation, because they can easily be interpreted in a way that is consistent with the spirit of that explanation.

The second view holds that we should, in fact, reject the distinction between consensual and non-consensual sex as useful in demarcating morally permissible instances of sexual activity⁴. I shall also argue for this claim. However, what differentiates views of this kind from my own is that they reject the distinction on the grounds that while non-consensual sex is coercive, what we normally class as consensual sex is also coercive, and therefore counts (morally) as non-consensual. So the distinction is rejected because instances of sexual activity of both kinds (‘consensual’ and non-consensual) are impermissible, not because there are permissible instances of non-consensual sex. Furthermore, while the distinction we ordinarily employ is rejected, it is still true according to this view that the moral impermissibility of certain instances of sexual activity is grounded in considerations to do with consent rather than harm. It is simply the case that most, if not all, instances of sexual activity are morally impermissible for reasons to do with consent.

⁴ See for example Mackinnon, 1987, pp. 81-93; and Mackinnon, 1989, pp. 146, 174.

The third is an argument put forward by Ben Spiecker and Jan Steutel in “Sex Between People with ‘Mental Retardation’: An Ethical Evaluation” (Spiecker & Steutel, 2002). They argue that there are **No General or Particular Capacity** cases which are morally permissible, but that we can explain the permissibility of these cases in a manner which is consistent with at least the spirit of the Consent Explanation. I give reasons why I think this move is implausible in Chapter 3, Section 2.7.

The fourth is the view that while the explanation for why certain instances of sexual activity are wrong is grounded in considerations to do with experiential harm, the moral rules we should adopt are rules which refer to consent. An example is the view that Alan Wertheimer develops in *Consent to Sexual Relations* (Wertheimer, 2003). I describe how this view differs from Consent Explanations in Chapter 2, Section 1. In Chapter 6 I argue that there are reasons that speak in favour of rejecting such a view, however I don’t take these reasons to be conclusive.

So, my argument will be that there are morally permissible instances of non-consensual sex, and so we should reject the Consent Explanation as an explanation of why certain instances of sexual activity are impermissible. Furthermore, we have reasons that speak in favour of rejecting *any* view which appeals to a notion of consent in order to differentiate between morally permissible and morally impermissible instances of sexual activity.

One thing I wish to make clear, however, however, is that I don’t mean to minimize the very real suffering of those who have been victims of rape – non-consensual sex, whether forcible or not, is often very traumatic. However, what I wish to emphasize in this dissertation is that very real

trauma and psychological suffering often experienced by those who are forced to have sex against their will, not the bare fact of its non-consensuality, is the moral problem with non-consensual sex.

Explanation of terms

In this section, I want to explain some of the terms I will be using, and why I will be using those terms. Firstly, I will not be using the word ‘rape’ unless we have conclusively established that a particular instance of sexual relations is morally wrong. Moves like this are controversial, because avoiding the word ‘rape’ sometimes trivializes the experiences of the victim.⁵

However, the word ‘rape’ also implies moral wrongdoing, so to use it to describe a situation implies the very thing I am trying to establish. So while I recognise that there are reasonable objections to describing potentially morally problematic situations as situations where, for example, ‘A has sex with B,’ this is the language I will use throughout this dissertation.

Secondly, many of the cases I will discuss involve people with intellectual disabilities. There is some debate about how best to refer to people with intellectual disabilities (and indeed, whether we should refer to them as a class at all).⁶ As much as possible I will discuss particular cases, in order to avoid generalizations, but where necessary I will refer to such people as intellectually disabled (following usage in the DSM-5). It is now fairly widely accepted that the term

⁵ Consider this headline from the Seattle Times: ‘Ex-student sues Tacoma schools over restroom sex.’ The article goes on to explain that the girl involved is alleging that she was in fact raped. Being *raped* in a restroom is very different from having sex in a bathroom. *Seattle Times*, May 10, 2013.
http://seattletimes.com/html/localnews/2020960301_apwatacomaschoolsex1stldwritethru.html

⁶ For example, in “Rights not restrictions for learning disabled adults: A response to Spiecker and Steutel”(Leicester & Cooke, 2006), the authors state: “to attach a label to a socially disadvantaged group of people often reinforces a devaluing and marginalization of that group” (Pg. 182).

‘retardation’ is offensive. I will be using this term only in the context of a citation or a reference to another work which uses the term. Furthermore, in some of my cases I will be discussing people with Alzheimer’s disease or dementia – I will assume that people who are in the relatively advanced stages of either of these diseases count as intellectually disabled.

Thirdly, I will refer to the kind of consent that is usually considered sufficient to render an instance of sexual activity morally permissible as ‘morally valid consent’. However, other authors frequently refer to such consent as ‘informed consent’, and so when I discuss the positions these authors hold, I will occasionally use the term ‘informed consent’ rather than ‘morally valid consent.’ Unless otherwise noted, I will take ‘consent,’ ‘morally valid consent,’ and ‘informed consent’ to be referring to the same concept.

Fourthly, when I make general statements about the instances of sexual relations which count as rape, I adopt the convention of referring to the potential perpetrator as Partner A and the potential victim as Partner B. In most cases I will assume that Partner A is a man and B is a woman. I do not mean this to imply that, for example, men cannot be raped. However, I adopt this convention because the majority of cases of rape fit this pattern, and because this convention is a better fit with the assumption I make about the type of instances of sexual relations which count as rape, which I explain in Chapter 1.

Lastly, I do not intend anything I say to undermine the idea that victims of rape usually suffer significant psychological, and sometimes physical, trauma. It is quite clear that many, if not most, instances of non-consensual sex are incredibly traumatizing for the victim, and we should

be wary of views which are dismissive of these harms. What I wish to emphasize, though, is that we should pay moral attention to the harm of non-consensual sex, rather than the bare fact of its non-consensuality.

How I will proceed

In Chapter 1, I give an explanation of how consent might play a role in the definition of rape, and distinguish between acts which count as morally wrong and acts which count as morally blameworthy according to that definition.

In Chapter 2, I describe the different ways that consent might play a role in the explanation of the wrong of rape, and describe candidates for an explanation of what it might mean to consent.

In Chapter 3, I discuss what it means to have the capacity to consent, introduce some possibilities for moral analogues of consent which are candidates for describing problem cases in a manner consistent with the spirit of the Consent Explanation, and describe possible combinations of partners in which one partner should be considered not capable of consenting.

In Chapter 4, I describe two cases involving people with permanent impairments – cases involving partners with moderate intellectual disabilities which (I will argue) we should take to be counter-examples to the Consent Explanation. I argue that these cases cannot be explained in a manner consistent with the letter of the Consent Explanation, nor can they be explained in a manner consistent with the spirit of the Explanation, by an appeal to proxy or hypothetical consent.

In Chapter 5, I explain exactly why we should take the cases described in Chapter 4 to be counter-examples to the Consent Explanation. I explain why the advocate of the Consent Explanation must say that these are cases which include either moral wrongdoing or culpability, and why we should not accept that this is true of either case.

In Chapter 6, I describe two cases involving a person with a temporary impairment – a child – where the child in question is not capable of consent. I argue that these cases show that the Consent Explanation advocate not only cannot adopt proxy consent in order to describe problem cases in a manner consistent with her view, she also cannot appeal to a moral analogue of consent – consent*. I suggest instead that the best avenue available to the advocate of the Consent Explanation is to take a two-tier approach to consent (that is, hold that different accounts of which acts of sexual activity count as morally impermissible should apply, depending on whether the potential victim is currently an autonomous or currently a non-autonomous agent).

In Chapter 7, I describe what I take to be the best version of the two-tier approach, and argue that this approach actually shows that the principle at the heart of the Consent Explanation – that is morally wrong to have sex with an autonomous agent for reasons to do with consent rather than harm – is unmotivated. I conclude with a discussion of the alternative explanation, the Consistent Harm Explanation. I argue that while my cases do not conclusively show that we should reject the Consistent Harm Explanation, they do give us reasons against adopting such an explanation. I conclude by arguing that not only is it the case that we should reject explanations of the role of

consent which treat consent as foundational, but that we have reasons against adopting any explanation of the wrong of rape that invokes the notion of consent.

Throughout this dissertation, I will describe and refer to a number of hypothetical cases involving people who are not capable of giving consent. A complete list of those cases is included in Appendix A.

Chapter One

1. The role of consent in a definition of rape

1.1 The legal definition

Rape is a legal crime as well as a moral crime, and so a useful place to start will be to look at the legal definition of rape. Though definitions of rape vary according to jurisdictions, there are usually two requirements which need to be met for an instance of sexual relations to count as rape. In law, these are referred to as the *actus reus* and *mens rea* requirements. Below is an example of how we might describe them:

1. **Actus Reus Requirement:** An instance of sexual relations takes place between Partner A and Partner B, without Partner B's consent.
2. **Mens Rea Requirement:** Partner A does not (or should not) believe that Partner B consents.¹

There at least three problems here – what do we mean by ‘sexual relations’, what do we mean by ‘consent’, and what do we mean when we say that Partner A ‘should not’ believe that Partner B consents?

One of these issues (what do we mean by ‘consent’?) will be particularly important for my argument, as the cases I will consider all turn on the following question: what does it mean to

¹ Loosely based on the NZ Crimes Act 1961.

have the ‘capacity’ to consent? I will discuss this issue in more detail in the context of the particular cases I describe. But first, I want to make some brief comments on each of these issues, stating a minimum assumption about each.

1.2 Sexual relations

In all of my cases, the instances of sexual relations I describe involve sex acts in which a man penetrates a woman’s vagina with his penis. I don’t mean to imply that these are the only sex acts which might count as rape – and in fact, most jurisdictions count other kinds of sex acts as rape, or at least serious sexual assaults. But the sex acts I will talk about are by far the least controversial. (For example, some jurisdictions hold that penetration with objects counts as a lesser crime of sexual assault, rather than rape).

Sexual Relations Assumption: at minimum, a sexual act in which a man penetrates a woman’s vagina with his penis is the kind of sexual act that might be rape, depending on other features of the situation.

Hereafter, whenever I refer to sex or sexual relations, this is the kind of act I will be referring to.

1.3 Consent

When I discuss consent, the notion of consent that I will be referring to is the notion of morally valid consent. The main important difference between the legal notion of consent and the notion

of morally valid consent is the following: laws about rape often distinguish between *actual* and *effective* consent.

Actual consent is just that – does the person in question actually consent to the act of sex that takes place? However, the law also holds that certain classes of people (for example, teenagers) cannot give effective consent, even if they can give actual consent. Effective consent is consent given by a person who we treat as capable of consent for legal purposes.

There might of course be moral reasons to hold that teenagers, for example, cannot give effective consent even if they do in fact give actual consent. One of the explanations for the wrong of consent that I will consider (the Consistent Harm Explanation) will argue for a position like this. However, in my discussion I will focus on whether particular classes of persons can *actually* consent.

My reasons are the following: the best consent-based justification for treating classes of persons as effective non-consenters is the fact that most members of that class can't give (actual) consent, and there are practical reasons why we cannot or should not simply assess each individual case on its merits. But this justification depends on the claim that *most members of that class can't give (actual) consent*, so this is the claim that we need to establish first. Accordingly:

Consent Assumption: the relevant notion of consent is morally valid consent.

1.4 *Belief in consent*

In all the cases I discuss, an important consideration is *what Partner A believes* with regard to Partner B's consent. The reason why is that according to the definition of rape given, Partner A does nothing wrong if he believes that Partner B does consent and he is not culpable for the fact that he should not believe this, given the evidence before him.

The best kind of evidence Partner A is likely to have before him is this: does B token consent?² By 'token consent' I mean the following: does Partner B verbally agree to sex? Does Partner B signal her agreement physically – for example, by actively and enthusiastically participating? But this tokening of consent will only count as evidence for B's consent if Partner A believes, or should believe, that Partner B has the capacity to consent.

So, Partner A meets the **Mens Rea Requirement** if he either does not, or should not believe that Partner B consents. The term 'should not' needs further clarification – for example, sometimes we do not believe what the evidence indicates because we are (non-culpably) incapacitated in some way. I don't want to get into an extensive discussion of these issues here, so I will simply stipulate what you should, at minimum, accept with regards to Partner A:

² Other types of evidence that might render Partner A's beliefs permissible may be something like the following: even if Partner B does not token consent, is it reasonable for Partner A to believe (based on Partner B's past behaviour) that she does consent? However, for simplicity's sake I will try to avoid this issue: so all of my cases will be cases in which Partner B does, in fact, token consent.

Belief in Consent Assumption:

Partner A *should* believe that Partner B does not consent if:

1. Partner B does not token consent.
2. Partner B tokens consent, but because of other features of Partner B's situation (for example, her capacity to consent), this should not be taken to indicate consent.
3. Partner A does not form the correct beliefs given the evidence before him about either Partner B's tokening of consent or her capacity to consent, but he is culpable for this fact (for example, he deliberately got drunk).

1.5 The moral analogy of the legal position

Now, in order for it to be the case that a person is *legally* guilty of rape or sexual assault, both requirements must be met. Both are necessary, and the two requirements are jointly sufficient. But morally speaking, the situation is different. One position is simply the moral analogy of the legal position: Partner A is *morally* guilty (blameworthy) if his actions meet the **Actus Reus Requirement**, and he meets the **Mens Rea Requirement**. I will call this the Moral Luck Position, for the following reason: we are assuming that A is not blameworthy if the **Actus Reus Requirement** is not met. But this might be merely a matter of luck.

But you might hold that Partner A is morally guilty (and therefore he does something wrong) if he meets the **Mens Rea Requirement**, even if the **Actus Reus Requirement** is not met. And cases like these are certainly possible, even if they are not likely to be common. For example, consider this case:

Actress: Jane does want to have sex with Adam, but she also enjoys role-play – in particular, she enjoys pretending she is having sex against her will. She is a very good actress, and she is acting as though she does not want to have sex. Adam falls for her act – he fully believes that Jane does not want to have sex with him, throughout the entire process. Adam and Jane have sex. Neither Jane, Adam, nor any other person is harmed by this fact.

Is Adam blameworthy? The answer to this question depends on whether you think Adam must actually have non-consensual sex with someone in order for us to hold that he has done something morally blameworthy (and this in turn will depend on your view of moral luck). So Position Two (the No Moral Luck Position), which gives us the tools to blame Adam, is the claim that the **Mens Rea Requirement** by itself is both a necessary and sufficient condition for describing the wrong of rape in terms of consent.

Furthermore, you might think that Partner A is not blameworthy if the **Actus Reus Requirement** is met but the **Mens Rea Requirement** isn't, but that there is still something morally troubling about the situation. Here is a case that illustrates this position:

Sexsomnia: Joe is a sexsomnia. That means that he sometimes has sex while he is asleep – and while he is asleep, he is unable to form beliefs. One night while Joe is lying

next to his wife Andrea, he has sex with her while she is asleep. Halfway through the act, Andrea wakes up and is aware of what is happening, but she is unable to stop Joe.³

1.6 *Moral wrongs and moral culpability*

One thing you might say about **Sexsomnia** is that Joe is clearly not blameworthy, and therefore we should not call his actions wrong. However, I think a better way to think about this case is to hold that Joe did in fact do something wrong, but that he is not blameworthy.

Larry Alexander introduces a distinction that will be useful for my purposes here: he holds that someone like Joe does in fact do something wrong, but he is not culpable.

Wrongdoing, at least as I am using the term, occurs when an actor crosses another's moral or legal boundary without the latter's consent. An actor is *culpable* if he believes he is crossing that boundary without believing he has received consent to do so. An actor can commit a wrong without being culpable (because he mistakenly believes he has received consent). And he can be culpable without committing a wrong (because he does not believe he has received consent when in fact he has, or when he believes he has crossed another's boundary without consent when he has not in fact crossed that boundary) (Alexander, 2014, pp. 102- 103).

³ I want to make clear that sexsomnia is in fact a real condition, and has been used successfully as a defense in a number of criminal cases. See Ingravallo et al., 2014 for a discussion of such cases.

Here's why I think this distinction is useful for my purposes. If we say, for example, that Joe does something wrong (even if he is not blameworthy) we can explain this fact: in the case of Joe and Andrea, it would be appropriate for an observer to intervene to prevent Joe from having sex with Andrea (on the assumption that she does not consent). So I will make this assumption: that if Partner A's action would meet the **Actus Reus Requirement**, then if you think that non-consensual sex is wrong, you ought (in general) to intervene (regardless of whether Partner A meets the **Mens Rea Requirement**).⁴

So, according to the consent definition of rape, there are three possible situations that are potentially morally troubling:

1. Partner A's actions meet the **Actus Reus Requirement**, but he does not meet the **Mens Rea Requirement**. In which case, we will say that he does something wrong, but that he is not blameworthy.
2. Partner A's actions meet the **Actus Reus Requirement**, and he does meet the **Mens Rea Requirement**. In which case, he does something wrong and he is blameworthy.
3. Partner A's actions do not meet the **Actus Reus Requirement**, but he does meet the **Mens Rea Requirement**. In which case, he does not do something wrong, but he is blameworthy.

Depending on your prior views about the nature of Moral Luck, you might dispute some of these assessments. For example, the last scenario is a situation where the Moral Luck position and the

⁴ Of course, if intervening would put you in danger you should not be required to intervene – I use 'ought' here in the sense of giving you a (defeasible) reason.

No Moral Luck position will disagree about either wrongdoing (as I have defined it) or culpability. According to the Moral Luck position Partner A is *not* blameworthy; however, according to the No Moral Luck position he *is* blameworthy.

I think in this particular case, the Moral Luck position is pretty implausible. However, I don't want the plausibility of my argument to depend on your views about moral luck, so all of the cases I present will be ones in which (I argue) that Partner A's actions meet the **Actus Reus Requirement**. So at the very least, in each case A does something wrong (for reasons to do with consent) and he might also do something blameworthy (depending on the details of the case).

In general, however, I will be employing Alexander's distinction. I shall use the term 'wrongfulness' to describe situations in which Partner A either does something wrong or blameworthy. So, if you think the wrongfulness of rape has something to do with consent, then it needs to be the case that when Partner A meets the **Actus Reus Requirement** he does something wrong, and if he also (or perhaps only) meets the **Mens Rea Requirement**, he does something blameworthy.

1.7 A note on wrongs

One worry at this point is the following. If you think that consent is important but not necessarily a trumping consideration, it is easy to find cases in which both the **Actus Reus Requirement** and the **Mens Rea Requirement** are met, yet Partner A does nothing wrong or blameworthy. Consider this case:

Gunman: a gunman walks into the hospital and informs John* that unless he has sex with Anna*, who is in a persistent vegetative state, that he (the gunman) will kill ten other patients.

Maybe you think that in this case it is permissible (maybe even required) for John* to have sex with Anna* without her consent, and therefore John* does not commit an all-things-considered wrong. But all we have shown, then, is that you think that sometimes considerations to do with experiential harm can *trump* considerations to do with consent. An advocate of the Consent Explanation might agree that other morally relevant considerations can trump considerations to do with consent. But she can still say that what John* does is wrong – she simply claims that he commits a *pro tanto* rather than an all-things-considered wrong.

In the cases I present, I think we should say that (intuitively) none of the actors commits even a *pro tanto* wrong. This is because the cases I present all have the following feature in common: the only potentially trumping morally consideration has to do with experiential benefits. And I take it that an advocate of the Consent Explanation would not want to accept the claim that experiential *benefits* can trump considerations to do with consent, even if she accepts that maybe considerations to do with harm can trump consent.

Why? Because if she accepts this claim, then she has to accept that there is a possibility that in **Comatose**, John does not commit an all-things-considered wrong. In **Comatose** John presumably gets pleasure out of having sex with Anna (otherwise he probably wouldn't do it). And if we accept the claim that experiential benefits can trump considerations to do with

consent, then depending on the amount of pleasure John gets, his actions might be permissible.

But I take it that the Consent Explanation advocate wants to deny even the possibility that facts to do with Joe's pleasure can trump the fact that Anna does not consent.

Chapter Two

1. The role of consent in the explanation of the wrong of rape

So now we have a description of the kinds of sexual acts which are wrongful for reasons to do with consent. An act is wrongful if it fits the description of (1), (2), and possibly (3) in Chapter One, section 1.6. However, what we do not yet have is an *explanation* of why such acts are wrongful for reasons to do with consent.

Generally speaking, there are two main accounts that attempt to explain the wrongfulness of certain kinds of sexual acts in terms of consent. Following Tom Dougherty's usage in "Sex, Lies and Consent" (Dougherty, 2013), I will refer to these as the Consent Explanation and the **Harm Explanation**. There are two versions of the Harm Explanation. I will call these the **Equivalent Harm Explanation** and the **Consistent Harm Explanation**.

1.1 *The Consent Explanation*

The relationship between the Consent Explanation and the definition of rape (in terms of consent) is pretty straightforward. The definition tells you when something counts as rape, and the Consent Explanation states that those very same conditions explain why what happened was wrongful (and therefore *should* count as rape). For example, if we consider **Comatose**, John's act is rightly described as an act of non-consensual sex, and the fact that it was non-consensual explains why it is wrong.

1.2 *The Equivalent Harm Explanation*

The relationship between the Harm Explanation and the definition of rape (in terms of consent) is a little more complicated. The Harm Explanation holds that the wrongfulness of a particular act of non-consensual sex is explained by the fact that the victim (or someone else) is harmed in some way. But by stipulation, nobody was harmed in any of our cases. So doesn't the advocate of the Harm Explanation have to say that in the case of **Comatose**, no-one did anything wrong or blameworthy? If so, it looks like the Explanation will be counter-intuitive.

However, there are two versions of the Harm Explanation which do explain the wrongfulness of rape in terms of consent. The first is equivalent to the Consent Explanation. The second is merely consistent with it.

The Equivalent Harm Explanation (like the Consent Explanation) holds that the wrongfulness of a particular act of non-consensual sex is explained by the fact that it was non-consensual. So what's the difference between this view and the consent view? The Equivalent Harm Explanation advocate also makes some further claims: claims that refer to harm.

Consider **Comatose** again. The advocate of the Equivalent Harm explanation can say that John *does* harm Anna (because he vitiates her consent). Our advocate can also say that John meets something like the **Mens Rea Requirement** because he does, or should, believe that he vitiates Anna's consent (and so does, or should, believe that she will be harmed).

Accepting this explanation means committing yourself to a particular view of harm. I don't wish to get into an extensive discussion about different views of harm here – so I will just note that the important claim about harm that the Equivalent Harm Explanation commits itself to is that there are non-experiential harms; for example, dignitary harms. In *Consent to Sexual Relations*, Wertheimer describes a dignitary harm to Partner B as “a set-back to her rights-based interest in her bodily integrity or sexual autonomy” (Wertheimer, 2003, pg. 97). If there are such harms, then the Equivalent Harm Explanation advocate can easily explain the wrong of rape in terms of harm while still invoking the notion of consent.

Now, to say that this explanation is *equivalent* to the Consent Explanation is not to say that there is *nothing at stake* between the two explanations. I will discuss this in Section 1.4 of this chapter, but first I want to get the other alternative on the table.

1.3 The Consistent Harm Explanation

The Consistent Harm Explanation is an attempt to explain the wrongfulness of rape in terms of consent even if the only harms are experiential. This makes it quite hard to see how the Consistent Harm Explanation advocate can still explain the wrongness of rape in terms of consent.

For example, consider **Comatose** again. Doesn't the Consistent Harm Advocate have to say now that John did nothing wrong or blameworthy? By stipulation, John's acts caused no (experiential) harms.

The move the Consistent Harm Advocate makes is this: he appeals to rule-consequentialist considerations. For example, Wertheimer says that the right thing to do is to consider what rules we should have about sexual relations (one way to think about this Explanation is to consider it the moral analogue of laws requiring effective consent). For example, what rules could we have about kinds of acts which should be prohibited, if we want to frame these rules in terms of consent rather than experiential harm?

There are two possible answers. We should have rules prohibiting either:

1. Consistent Harm + Moral Luck: Instances of sexual relations which take place between Partner A and Partner B, without Partner B's consent, when Partner A does not (or should not) believe that Partner B consents, OR
2. Consistent Harm + No Moral Luck: Instances of sexual relations which take place between Partner A and Partner B, when Partner A does not (or should not) believe that Partner B consents, whether or not Partner B does in fact consent.

Furthermore, we should count Partner A as doing something wrong or blameworthy if he violates your preferred version of the rule *even if* no experiential harms result.

But how can we justify these kinds of rules? What we do is we think about two worlds which are pretty much exactly like ours (and like each other) in all but one respect. In World One, we don't have any rules about sexual relationships that mention consent. In World Two, we do have one

of the rules mentioned above. Now we compare the worlds in terms of the level of likely experiential harm. Which world looks better?

Wertheimer for example argues that there are deep psychological facts that explain why experiencing non-consensual sex causes distress. He also argues that there are socially mediated facts about how we think about non-consensual sex that explain why experiencing it causes great distress. Furthermore, he claims that if we didn't have a rule against non-consensual sex, the numbers of people experiencing non-consensual sex would rise, which would lead to an increase in experiential harm. Now, if we do have a rule against non-consensual sex, we might prevent a few people from engaging in acts they would otherwise enjoy and condemn a few people when they have not done anything that causes experiential harm. But according to Wertheimer, the harms of failing to adopt such a rule outweigh the harms of adopting it. So we should adopt the rule.

Note that Consistent Harm Explanations still explain the wrong of rape in terms of consent. An act is rape *when* it vitiates consent. It is wrong *because* it vitiates consent. However, there are some important differences between Consistent Harm Explanations and Consent Explanations, and these differences mean that my cases will be less problematic for an advocate of the Consistent Harm Explanation. I will explain these differences in the following section.

1.4 *On what's at stake*

So, what is at stake between these three possible explanations? Why should we favour one over another, when they will reach the same conclusions about the wrongfulness of certain acts?

Consent vs. Equivalent Harm

Let's start by comparing the first two explanations. What is at stake here is really the direction of fit. For example, Alessandro Spina claims that "if rape is wrong, it is not because of the experiential harms it normally causes. It is quite the contrary: rape typically causes awful experiences because it is wrong in the first place" (Spina, 2010, pg. 501). Spina is of course talking of experiential harms, but we can adapt his claim in order to understand the difference between the Consent and the Equivalent Harm Explanations. The first explanation holds that rape causes (for example) dignitary harms because it is wrong. The second holds that rape is wrong because it causes dignitary harms.

A second important question is this: is it more appropriate to simply say, for example, that Partner A did something wrong because he met the **Actus Reus Requirement** with regard to Partner B? Or, do we need to say that Partner A did something wrong because he met the **Actus Reus Requirement** with regard to Partner B and therefore *harmed* Partner B?

I don't think this matters for our purposes. What the two explanations agree on is this: the fact that Partner A's actions meet the **Actus Reus Requirement** with regard to B means that A *wronged* B. The only difference is a difference in opinion about what kind of wrong this is. Depending on your other commitments, you might wish to call it a harm (or not). So for our purposes, I will treat these views as though they are the same. From now on, I will refer to both Consent and Equivalent Explanations as **Consent Explanations**.

Consent vs. Consistent Harm

The first difference between these two views is this: they disagree about whether Partner B was harmed, and therefore disagree about whether Partner B *in particular* has a complaint against Partner A. Consent Explanations will hold that Partner B was wronged (either because her rights were violated, or because her rights were violated and so she was harmed). Consistent Harm Explanations will hold that Partner B was not harmed, and that therefore Partner B was not wronged by the fact that A had non-consensual sex with her (even though Partner A actually did something wrong). Of course, strictly speaking some Consent Explanations will hold that B was in fact harmed, because vitiating consent counts as a harm. But for simplicity's sake, whenever I refer to harms here I will mean *experiential* harm (unless otherwise stated).

There is one further difference between these two views. Consent Explanations treat Consent as foundational. What I mean by this is that according to both the Consent and the Equivalent Harm Explanations, it is necessarily the case that non-consensual sex is morally wrong. However, for an advocate of the Consistent Harm Explanation, it is merely contingent. This is true for the following reason: if we were to find out, for example, that acts of non-consensual sex as a type do not typically cause harm (or if we could bring it about that they don't) then the justification for a rule prohibiting such acts would be undermined. Furthermore, we might discover that even if such acts typically do cause harm, there are other reasons why we ought not to treat non-consensual sex as morally wrong *as a rule*.

Some philosophers, for example Tom Dougherty, argue that this very feature of the Consistent Harm Explanation is why we should reject it. For example, he states that:

“Even if, as an act-type, nonconsensual sex with the comatose turned out to be rarely detected and hence highly unlikely to be harmful, this discovery would not change our minds about it being seriously wrong. And the same is true of any token of this act-type” (Dougherty, 2013, pg. 726).

In what follows, I shall argue that there are in fact several act-types of non-consensual sex where the fact that these act-types are unlikely to cause harm *does* change our minds about whether it is seriously wrong. If this is true, then such examples seriously undermine Consent Explanations for the wrongfulness of rape. However, the problems they cause for Consistent Harms Explanations are less serious – we still need to consider the effect such instances are likely to have on our conclusion about whether, all-things-considered, we ought to have rules about the impermissibility of certain sexual acts which refer to consent.

This question is difficult for the following reason: even if we can find an instance of non-consensual sex that is morally wrongful, is it possible that a rule prohibiting such acts still be justified? I shall not attempt to answer this question definitively. Weighing up the likely harms and benefits of adopting any particular rule is a complex exercise. However, I will say this: if we find that there are in fact a *cluster* of cases in which non-consensual sex is not morally wrongful, then this casts doubt on whether we ought to adopt a rule prohibiting non-consensual sex.

Chapter 6 will deal with this question.

So, in terms of my argument, the different features of the Consent and the Consistent Harm Explanations have the upshot that what I will say should be taken as an attempt to seriously

undermine the Consent Explanation, but only as an attempt to raise new considerations for the advocate of the Consistent Harm Explanation. Exactly how serious these considerations are in terms of whether we should reject the Consistent Harm Explanation is a complicated matter which depends on a host of empirical facts as well as your prior moral commitments on many issues, so I shall leave them merely as considerations.

2. Why consent is important

What we do not yet have, however, is an explanation of why consent is important. Broadly speaking, there are two possible justifications for the value of consent. The first is consequentialist in nature; the second is deontological.

2.1 Consequentialist justifications for the value of consent

The standard consequentialist justification goes something like this: Partner B is the best judge of what is likely to harm and benefit her. So if we are concerned with harms and benefits, we should treat consent as morally valuable. Treating consent as morally valuable is a heuristic for achieving our overarching goal: for example, maximizing benefits and minimizing harm.

So why should we treat acts which vitiate B's consent as morally wrong? Here we appeal to rule-consequentialist considerations. Even though it may be true that in a particular instance vitiating B's consent will be the right thing to do (because it is the act which maximizes benefits and

minimizes harm), adhering to a rule which treats consent as morally valuable is the best thing to do if we are concerned with maximizing benefits and minimizing harms in general.

One thing that is important to note about this position is that it does not commit itself to any particular view about what kinds of harms and benefits matter. Perhaps, for example, the harms which we are concerned to minimize are experiential harms. But perhaps they are not. They might, for example, be dignitary harms of the kind invoked by the advocate of the Equivalent Harm Explanation. However, in order for this to be the case, it must also be true that the Equivalent Harm Explanation advocate agrees, for example, that the right way to treat dignitary harms is to minimize dignitary harm overall. This is a possible version of the view, though it seems it would be a somewhat unusual way to treat harms grounded in autonomy considerations.

So a consequentialist justification of the value of consent is consistent with the Equivalent Harm Explanation, but not with the straightforward version of the Consent Explanation, for the following reason: the straightforward Consent Explanation does not appeal to any considerations to do with harm, or to any other considerations to do with the consequences of vitiating consent. On this view, vitiating consent is wrong merely because vitiating consent is wrong. However, the reasons that the advocate of the straightforward Consent Explanation can appeal to in order to justify this position (for example the claim that vitiating consent is morally wrong) are the same reasons that the Equivalent Harm Explanation advocate appeals to in order to substantiate the claim that acts which vitiate consent are harmful.

I shall describe these reasons as deontological, but it is important to note that they can, strictly speaking, be regarded as consequentialist, if we adopt the view that these reasons also describe a morally important kind of harm. If dignitary harms count as harms, they are most likely harms for reasons to do with your interest in your bodily autonomy, or for reasons to do with your rights-based interests. So a view according to which dignitary harms play a fundamental role will likely appeal to the same considerations that deontological justifications for the value of consent appeal to.

2.2 Deontological justifications for the value of consent

I shall begin by considering the claim that consent is valuable because vitiating a person's consent involves a rights violation. This view is common in the literature. For example, Joan McGregor claims that the "moral wrongness of rape consists in violating an individual's autonomy right to control one's own body and one's sexual self-determination and the seriousness of rape derives from the special importance we attach to sexual autonomy" (McGregor, 1994, pg. 236).¹

Such a view must presuppose that the individual in question in fact has a right to autonomy. This feature of the view is important, for the following reason: the cases I will be considering as challenges to the Consent Explanation are all cases in which Partner B does not have the capacity to consent. So now a new question arises: if a person does not have the capacity to consent, does

¹ A slightly different way of describing this that is consistent with the Equivalent Harm Explanation is to say that consent is valuable because vitiating a person's consent amounts to a set-back to her rights-based interest in her bodily integrity or sexual autonomy. However, for simplicity's sake I will simply refer to instances where consent is vitiated as rights violations.

it follow that they also do not have autonomy rights? I will take up this question when I discuss particular cases involving individuals who do not have the capacity to consent.

A second kind of deontological justification for the value of consent is Kantian in nature. For example, we might argue that non-consensual sex is wrong because if Partner A has non-consensual sex with Partner B, he treats her as a mere means. That is, he involves her in a scheme of action to which she could not in principle consent.

But this justification raises a similar problem: if Partner B is not capable of consent, it is true that when Partner A has non-consensual sex with Partner B he involves her in a scheme of action to which she could not in principle consent. But now we have a new question: if Partner B does not have the capacity to consent, does it also follow that she is not (properly speaking) a moral agent? And if she is not a moral agent, then it is no longer clear why it is wrong to treat her as a means.

For the purposes of discussion, in what follows I will focus on rights-based considerations rather than Kantian considerations. I take it that both are, at base, concerned with autonomy. But it is worth noting here that regardless of which position you take in terms of the deontological justification for the value of consent, a similar question arises. The question is this: does the condition that renders Partner B incapable of consenting to sexual activity also make it the case that she is not an agent in the right kind of way when it comes to the sexual domain? I shall address this question in Chapter 3, Section 2.7

3. What does it mean to consent?

One last important question to consider is what it really means to consent. So far we have considered the role that consent plays in a definition of rape, the role consent plays in an explanation of why rape is wrong, and justifications for why consent plays a role in the explanation of the wrong of rape. However, it is not yet clear what consent actually is.

One suggestion from Heidi Hurd is that consent is a subjective mental state, and furthermore that this subjective mental state is an intentional mental state, where “to intend another’s actions is to intend to allow or enable those actions by means of some act or omission of one’s own” (Hurd, 1996, pg. 130).

Although he agrees with the claim that consent is a subjective mental state, and an intentional mental state, Larry Alexander disagrees with Hurd with respect to its content. Alexander characterizes Hurd’s view as the claim that “to consent is to intend another’s act of crossing what, in the absence of consent, is a moral boundary” (Alexander, 1996, pg. 166). His own view is that what one does when one consents is to choose “to forgo or waive one’s moral objection to the boundary crossing” (Alexander, 1996, pg. 166).

One important question is what you require in order to be able to be in the mental state which is constitutive of consent. In a later paper, Alexander argues that consent is a mental state with informational (but no motivational) requirements:

“The mental state that constitutes consent is a (mental) waiving of one's objection to having one's legal or moral boundaries crossed. The informational requirements for successfully consenting—the degree to which one must understand the nature and consequences of the act to which one is attempting to consent—is quite undertheorized” (Alexander, 2014, pg. 113)

So in order for B to give morally valid consent then, B must be capable of mentally waiving her rights to a moral boundary crossing, and must have enough information. Alexander construes information broadly – for example, it is not enough just to know the facts of a situation, you must also understand their significance.

For my purposes, there is one particularly important feature of Alexander's later view. This feature is that he does not treat the question of capacity as a separate question from the informational requirement. On his view, those whom we normally take to lack capacity (for example, children and the profoundly intellectually disabled) really just lack information, or the capacity to understand the significance of that information. For example, a child is usually unable to understand the significance of sex.

There are of course other requirements that are usually considered necessary for consent. For example, threats, coercion or manipulation can sometimes vitiate consent. (Alexander discusses this consideration, as does Tom Dougherty in Dougherty 2013). However, for my purposes I want to focus on ‘capacity’ – none of my cases will involve threats or coercion.

One issue that Dougherty's paper raises is this: exactly how much information do you need in order to successfully consent? I will not attempt to give a full answer to this question. Instead, I consider whether we should adopt different standards relative to ordinary adults for those who are not usually considered competent to consent, in terms of how much information (and what understanding of that information) is necessary for a person to count as capable of consent.

An alternative view is that consent is not a mental state, but rather is performative instead. According to this view, Partner B consents just in case she communicates (either by her behaviour or by expressing verbally) that she consents. Wertheimer describes this view in the following way: "B consents if and only if she tokens or expresses consent in an appropriate way" (Wertheimer, 2003, pg. 144). Yet another alternative is a hybrid position, which holds that both the relevant mental state and that relevant consent token are necessary for consent to be morally valid.²

One of these views – the performative view – raises a particular problem for the cases I will discuss. In all the cases I consider, Partner B tokens consent – but because she is not capable of consent, the pertinent question is whether it is in fact appropriate to treat her token of consent as appropriate – that is, whether we should treat it as morally transformative.

I will however remain neutral on the question of what consent actually is, although I address consent tokens in Chapter 4, Section 2.1. I will focus on situations in which one partner (Partner B) does not have the capacity to consent – so it might seem like, for example, one question we

² For a useful discussion of these alternatives, see Wertheimer 2003, Chapter 7.

need to ask is whether Partner B is capable of being in the subjective mental state that either Hurd or Alexander thinks constitutes consent.

I will remain neutral on this issue for the following reason: I think it is clear that whatever consent turns out to be, it had better be the case that an ordinary adult, unimpaired by drugs, alcohol, or illness, is capable of giving consent. If this were not true, then consent would not be able to do the moral work we intend the concept to do (for example, help us distinguish between cases of morally permissible sexual activity and morally impermissible sexual activity). So whenever I consider whether a particular person should count as capable of consent, I will consider what their capacities are like relative to an ordinary adult.

Furthermore, I think it is clear that a person who in no way comes close to having the capacity of an ordinary adult, particularly in the domain of sexual decision making, should be treated as being incapable of consent. For example, whatever the capacity to consent to sexual relations consists of, it should turn out that ordinary unimpaired adults have this capacity, and the ordinary 8-year-old child does not have this capacity.

Of course, the cases that fall somewhere in the middle will be more difficult to make a judgment about. Different jurisdictions, for example, have different criteria for setting the age of effective consent. Different jurisdictions also have different criteria for deciding the difficult cases: for example, what kind of understanding of sex and sexuality does an intellectually disabled adult need to have in order to consent? My question is of course what it means to give morally valid consent, rather than legally valid consent. However, because the law is often informed by

morality on this issue, the way in which the law treats particular classes of persons in terms of their capacity to consent will serve as a useful guide.

With regards to the difficult cases, I will make two assumptions. The first is that the cognitive capacity of an average 16-year-old is a useful guide. In many jurisdictions, 16 is the age at which a person is considered capable of giving consent to sexual activity. So I will assume that in order to consent, a person must have (roughly speaking) at least a decision-making capacity with regards to sexual activity which approximates that of the average 16-year-old.

The second is that we should be consistent – that is, that we should not have different standards for what it means to give morally valid consent for particular groups of people, merely on the basis that such people fall into a particular group. For example, we should not have different standards for what counts as necessary for giving morally valid consent (in the legal sense of actual consent) merely because a person is a child rather than an adult, or a person with intellectual disabilities rather than an adult with ordinary cognitive function.

In the following chapter, I will consider whether even if it is the case that a person is not capable of consent, she might be able to apply an appropriate moral analogue of consent, and present a schema for the kinds of cases I will be considering in more detail.

Chapter Three

1. Capacity to consent

In my introduction, I identified three situations in which we might conclude that sexual activity with a person counts as non-consensual. These were the following:

Partner A has non-consensual sex with Partner B when:

1. **General and Particular Capacity:** Partner B currently has the capacity to consent, and can also currently exercise that capacity, and Partner B does not consent.
2. **General but no Particular Capacity:** Partner B currently has the capacity to consent (for example, she currently has the capacity to understand and evaluate information pertinent to her decision), but cannot exercise that capacity (because she is being coerced, manipulated, or she does not actually have the pertinent information).
3. **No General or Particular Capacity:** Partner B does not currently have the capacity to consent (for example, she is comatose).

The first case is pretty clear in terms of B's capacity to consent: by stipulation, Partner B has the capacity to consent. The distinction between **General but no Particular Capacity** and **No General or Particular Capacity** cases is less clear, however. For example, we might say that Partner B is not capable of giving morally valid consent if she does not have the pertinent information (like if her partner has lied to her about his HIV status). We might also say that

Partner B is not capable of giving morally valid consent if she is being coerced into sexual activity.

However, I think there is an important difference between **General but no Particular Capacity** and **No General or Particular Capacity** cases. When we say, for example, that a person who is being coerced is not capable of consenting to sexual activity, we are not making a claim about her actual capacities. Rather, we are making the claim that she is not currently capable of exercising a capacity – the capacity to consent – which she does in fact have. There are important issues here – for example, the question of exactly how much information Partner B needs to have in order to be capable of consent (for a discussion of this issue, see Dougherty 2013). However, this is not the issue which I wish to focus on here.

In **No General or Particular Capacity** cases, however, it is true of Partner B that she does not have the capacity to consent, and we cannot alter this fact by giving B more information, or by ensuring that she is not subject to coercion or manipulation. That is, facts about what Partner B is like, rather than about what she happens to know or about how others are treating her, are the relevant facts. These are the cases which I wish to focus on.

So what are the situations in which a person might lack the capacity to consent? Broadly speaking, they are situations like these: Partner B has an intellectual disability that impacts on her decision-making capacity in the sexual domain; Partner B is a child; Partner B is in a coma, or asleep; Partner B is under the influence of alcohol or drugs. What these cases have in common is that in all of them, Partner B does not, at the moment in question, have the capacity to consent.

(For example, if we take Hurd and Alexander's view, Partner B is not capable of being in the subjective mental state which is constitutive of consent, whatever mental state that happens to be).¹

Of course, such cases also differ. One important difference is that in some of them, this incapacity is permanent, and furthermore it's true that Partner B has always been incapable of consent. In other cases (for example those involving children) Partner B has not previously been capable of consent but will (presumably) be so in the future. In other cases, for example those involving a person who is asleep or under the influence of alcohol, the person in question has previously been capable of consent and will again be capable of consent at some point in the future. These differences are important, and I will take them up again when I discuss particular examples.

One last important similarity, however, is that all the cases mentioned involve people. I have been referring to Partner B as a person, but in some ways this is misleading – I do not mean to assume, for example, that in all cases Partner B is a *moral* person in the sense of being a fully-fledged autonomous agent. In particular, people with certain kinds of intellectual disabilities may never be fully-fledged autonomous moral agents. But in all cases, Partner B is a human being.

This raises a new wrinkle. I think it is a mistake to maintain that 'human being' is a moral category. Yet there are other, non-human, entities that are also not capable of consenting to sexual activity. For example, inanimate objects are clearly not capable of consent. An animal is

¹ See Hurd 1996 and Alexander 1996.

not capable of consent, because an animal is not capable of being in the right kind of subjective mental state, nor do animals have anywhere near the cognitive capacities of the average 16-year-old human. However, it seems like while it is not wrong to have sex with a blow-up doll without the consent of the doll, it is wrong to have sex with a person who is currently drunk. Yet both the blow-up doll and the drunk human are currently incapable of consent.

So if we want to maintain this distinction, we need to point to some morally relevant difference between the drunk human and the blow-up doll. And this difference cannot have anything to do with the current capacity of either to consent – in this respect they are alike. Nor can it have anything to do with the fact that one is human, and the other is not, because ‘human’ is not a morally relevant category.

There are of course obvious differences – a human can suffer in a way that an inanimate object cannot, and therefore a human may well have claim-rights (the right not to be subjected to suffering) that an inanimate object will not. But if this is the morally relevant difference, then our obligations to the human will be grounded in neither their humanity nor their autonomy. So sex with such a person will not be wrong for reasons to do with consent, but rather for reasons to do with suffering.

So the task, then, for the advocate of the Consent Explanation who maintains that it is wrong to have sex with a person incapable of consent *for reasons to do with consent rather than harm* will be to explain what these reasons are in cases involving those who are not generally capable of consent. My goal will be to show that there are clear cases in which it is not morally wrong to

have sex with a person who is not capable of consent, and so a view – like the Consent Explanation – which is committed to the claim that all non-consensual sex with a person is morally wrong *for reasons to do with consent rather than harm* should be rejected.

2. Moral analogues of consent

One move a Consent Explanation advocate might make is to hold that even if there are cases in which it is not morally wrong to have sex with a person who is incapable of consent, these cases are morally permissible for reasons to do with the spirit of the Consent Explanation, even if they don't adhere to the letter of the view. This is a fair move, and I think that if we can explain such cases in a way that is consistent with the spirit of the view, then the view should not be rejected. What someone who supports this move requires, however, is an account of the appropriate moral analogue of consent.

There are three main variants of this move. The first is to claim that even though Partner B is not capable of giving fully-fledged consent, she is capable of giving low-quality consent. The second is to argue that we can get proxy, or hypothetical, consent – and that proxy consent is sufficient. The third is to claim that she is capable of giving some appropriate analogue of consent (consent*).

2.1 Low-quality consent

Wertheimer argues in *Consent to Sexual Relations* that the principles of morally valid consent are “sensitive to the possibility or feasibility of ‘high quality’ consent” (Wertheimer, 2003, pg. 246). His argument refers to consent in medical contexts: he claims, for example, that if a certain medical procedure would benefit an elderly patient with dementia, and it is not possible to get high-quality consent (because the patient lacks the cognitive capacity necessary to give high-quality consent) we should accept low-quality consent as being morally transformative.

That is, we should do what we can to explain the procedure to the patient, and attempt to get her consent, even though we know that she is not capable of consent in the full sense of the word. In contrast, if a patient is not capable of consenting because she is drunk, and the operation can be delayed, then we should not take the low-quality consent she gives while drunk to be sufficient – because if we wait, there is the possibility of getting high-quality consent. The problem is that in most cases involving operations, ordinary people typically only consent if they believe that the operation is in their best interests. And our beliefs about what kinds of medical procedures are likely to be in someone’s best interests are (relatively) widely shared.

However, sex is a lot messier. For a start, while a particular instance of sexual activity may well be in a person’s best interests, it is not usually the case that it will be very obviously in a person’s best interests, the way that an operation usually is. So while we may be happy to accept low-quality consent in order to secure something that is clearly very beneficial, we should be less likely to accept it for things that are only small benefits. As Wertheimer states, the principles of morally valid consent are not just sensitive to the possibility of high-quality consent, they are

also sensitive to “the costs – broadly construed – of preventing arguably consensual transactions when they are likely to be beneficial to the parties” (Wertheimer, 2003, pg. 246). But unless the situation is very unusual, the costs of preventing any one instance of sexual activity are unlikely to be very high.

Secondly, our decisions about sex are a lot less straightforward than our decisions about medical procedures. Many ordinary adults make unwise decisions about sex – for example, powerful politicians enter into risky affairs which, if discovered, will seriously affect their careers. If we were to assume that most people make decisions about sex like they make decisions about medical procedures – on the basis of what is likely to be in their long-term best interests – such behaviour would be inexplicable. Conversely, people rarely have risky operations merely because they strongly desire to do so, especially if it is likely that the procedure will not be in their long-term interests.

The problem with a view like this for the Consent Explanation (rather than for Wertheimer, who is an advocate of the Consistent Harm Explanation) is that it seems that the reason we are happy to accept low-quality consent is because the operation is in the patient’s best interests. This seems an acceptable move to make in situations where a medical procedure is necessary to maintain a person’s quality of life, and in particular in situations where the medical procedure in question is necessary to preserve the future autonomy of the patient. However, cases like the latter are incredibly unlikely in the domain of sex – it is very hard to see how you could possibly justify having sex with someone on the grounds that it will preserve their autonomy.

So the move to accept low-quality consent when and if a particular instance of sexual activity is likely to be in a person's best interests is much harder to defend if the low-quality consent itself is the legitimizing feature, rather than the fact that the instance of sexual activity is in someone's best interests. And the fact that what people typically consent to, and what is in their best interests, come apart far more easily in cases involving sex as opposed to cases involving medical procedures means that we cannot so easily treat 'best interests' as a reasonable indicator of what someone would consent to, were they capable of giving high-quality consent.

2.2 *Proxy consent*

Proxy consent is a concept that is usually invoked in another context where we must regularly grapple with the question of how to treat a person who is not capable of consent: medicine. The basic idea is that in situations where a person cannot consent, we instead get the consent of a relative or guardian. So while it is true that we have performed a procedure on a child, say, without his informed consent, this is permissible because we have the consent of his parent or guardian. So because consent is the legitimizing feature, performing the procedure is consistent with the spirit of a consent explanation, even if it does not adhere to the letter of the view (that is, the doctor has still, as a matter of fact, performed an operation on someone who did not give informed consent).

There has been some discussion of whether proxy consent can legitimize sexual activity with a partner who is not capable of consent.² I think this question is best addressed in the context of particular examples, so I shall discuss this position further in Chapter 4, Section 2.6. But for the

² See for example Spiecker & Steutel 2002.

moment, I want to note two things: the first is that just as we saw in the discussion of low-quality consent, there are important differences between medical procedures and sexual activity, generally speaking. These differences will make it harder to justify the use of proxy consent in the case of sexual activity, even if we think it is the right move with regards to medical procedures. The second is that, as always, for an advocate of the Consent Explanation to make the move to proxy consent, it has to be the case that such a move preserves the claim that the sexual activity in question is permissible for reasons that are grounded in consent, rather than reasons that are grounded in (experiential) harms.

2.3 *Consent**

However, there is another option in the ballpark. Unlike medical procedures, where it is difficult to determine from someone's behaviour what he or she would prefer, we can sometimes infer from the behaviour of someone who is not capable of consent whether she desires sexual activity. We may not be able to infer consent, but we can sometimes draw an inference about whether the activity is being engaged in *voluntarily*.

I want to be careful here to distinguish 'voluntariness' from consent. Voluntariness is often taken to be a component of consent, along with an information requirement and the capacity to make decisions in the particular domain in question. But voluntariness is not the same thing as consent. Consider this case: some children submit voluntarily to a vaccination. They sit quietly in the chair, and refrain from wriggling about. Other children scream and cry and try to get away from the needle. Now, no child is ordinarily treated as capable of consent to a medical procedure – we must get the consent of the child's parents before giving a child an injection. But there is a clear

sense in which some children voluntarily submit, and others don't. And we can infer this information based on the behaviour of the child.

In his paper "What (if Anything) is Wrong with Bestiality?" (Levy, 2003) Neil Levy provides an example of how we might treat a behavioural analogue of consent as capable of morally legitimizing sexual behaviour with a partner who is incapable of consent.³ He cites an example from Peter Singer's "Heavy Petting":

Who has not been at a social occasion disrupted by the household dog gripping the legs of a visitor and vigorously rubbing its penis against them? The host usually discourages such activities, but in private not everyone objects to being used by her or his dog in this way, and occasionally mutually satisfying activities may develop (Singer, 2001, unpaginated).

Levy labels this analogue of consent 'consent*.' According to Levy, such behaviour is permissible. And precisely the thing that renders it permissible is that even though the dog does not consent, the dog gives consent* - the sexual activity is clearly voluntary and desired, even if the dog does not give informed consent.

One obvious problem, however, is that if we accept consent* as a legitimizing condition for sexual activity when one partner is not capable of informed consent, we shall also have to

³ I want to acknowledge here that many people will find it morally repugnant to compare sexual activity with a child to bestiality. The only feature that I take these cases to have in common is this: in both cases, neither the child nor the animal is capable of giving consent to sexual activity in the same way that an ordinary adult human being is.

conclude that some instances of paedophilia are permissible. On this view, paedophilia is permissible if the child gives consent*. And there are certainly possible cases in which a child gives consent*.

Levy of course resists this conclusion. I shall take up his reasons for rejecting the claim that accepting consent* as a legitimizing condition of sexual activity in circumstances involving children licenses paedophilia in Chapter 6. But before I move on, I want to make two points. The first is that we should treat like cases alike: if the dog and the child are alike in all morally relevant respects (each is not capable of consent, but each gives consent*) then we should hold that sexual activity with either is permissible, absent any morally relevant difference. But more importantly, in order for an advocate of the Consent Explanation to hold that there is a morally relevant difference between permissible sexual behaviour towards the dog and permissible sexual behaviour towards the child, the difference must have to do with consent rather than with (experiential) harm.

2.4 Implications for the Consent Explanation

I accepted at the beginning of this section that if the Consent Explanation can explain why certain cases of sexual activity involving those incapable of consent are permissible for reasons to do with the spirit of the Consent Explanation, then we should not reject the view, even if such cases contravene the letter of the view. So what I want to make clear at this point is the following: I will be arguing that each possible method of interpreting such cases in ways that are consistent with the spirit of the view involves accepting a claim that the advocate of the Consent Explanation must reject. That is, that we cannot interpret such cases in a way which is consistent

with the spirit of the Consent Explanation, because in each possible scenario, the legitimizing feature is grounded in reasons to do with (experiential) harms, rather than in reasons that are, strictly speaking, to do with consent.

3. Possible cases involving those incapable of consent

So, in what kinds of situations are people incapable of giving consent? There are two ways in which someone might not be able to consent. They could be permanently impaired, or temporarily impaired. This means (assuming only two people are involved in the instance of sexual activity) that there are five possible combinations in which at least one partner is incapable of giving consent:

Table 1: Combinations of partners/impairment

One Partner is...	The other Partner is...
Permanently impaired	Not impaired
Permanently impaired	Temporarily impaired
Permanently impaired	Permanently impaired
Temporarily impaired	Not impaired
Temporarily impaired	Temporarily impaired

There are further complications, however. For example, we might think the following questions are morally relevant:

1. If a person is impaired, are they responsible for this impairment? (For example, did they deliberately put themselves in a state in which they would be incapable of giving consent?)
2. If a person is permanently impaired, were they capable of consent at some point in the past, and if so, can we make an inference about what they would consent to if they were capable?
3. If a person is temporarily impaired, were they capable of consent at some time in the past? Will they be capable of consent at some time in the future?

What I shall do in the next chapter is focus the discussion on particular instances involving certain combinations of partners, bearing these questions in mind. For example, I begin by considering cases involving a partner (Partner B) who has an intellectual disability, and therefore counts as permanently impaired with regards to their capacity to consent. I will also consider whether the status of Partner A with regards to impairment makes a moral difference. In Chapter Six I consider cases involving a partner with a temporary impairment.

Chapter Four

1. Consent and intellectual disability – two cases

Below, I present two cases which, I argue, are counter-examples to the Consent Explanation. I will argue that they are counter-examples for the following reason: in both cases, Partner B does not consent to sex, yet Partner A does nothing wrong or blameworthy by having sex with Partner B. The first is a permanently impaired/unimpaired pairing; the second involves partners who are both permanently impaired with regards to their capacity to consent.

Alzheimer's: David (Partner A) and Carol (Partner B) have been married for 50 years. Carol is in the middle stages of Alzheimer's, and David is her main carer. She is still able to live at home because of David's support. Carol's Alzheimer's is advanced enough that she is considered incapable of making informed decisions about, for example, her medical care, but she is otherwise physically healthy. She also takes enjoyment from certain activities: painting pictures, picking flowers, going for walks. One activity she enjoys is sex with her husband. David also enjoys sex with his wife, both for his own sake and because he deeply cares for her, and sex seems to be one of the pleasures she is still able to enjoy. It is their wedding anniversary, and Carol verbally expresses the desire to have sex. Carol and David have sex.¹

¹ One thing I want to note about this case is the following: the relationship between Carol and David in this case might be considered a good candidate for the kinds of relationships the Archard characterizes as 'beyond consent' (Archard, 1998, pg. 27). However, I will assume that the psychological changes in Carol as a result of her Alzheimer's are enough to rule this possibility out.

Down's: Frank (Partner A) and Eve (Partner B) are both 25. Both of them have Down's syndrome, and they are approximately equal in terms of their mental capacities. (They both have the functioning of an average 8-year-old).² They have known each other for many years, and are in love. They decide to get married. They both receive education about sexuality at the appropriate level, and Eve is on birth control. They both have decided that after their marriage they would like a sexual relationship, and their family and carers are supportive. On their wedding night, after a discussion about what they want to do in which Eve verbally expresses the desire for sex, they have sex. This is the first time they have had sex with each other.³

We now have a series of questions to answer:

1. Do Eve and Carol give morally valid consent?
2. Does David do something wrong or blameworthy?
3. Does Frank do something wrong or blameworthy?

I shall take these questions in turn. I will argue that the advocate of the Consent Explanation should agree that neither Eve nor Carol gives morally valid consent, and that therefore she must

² I am aware that people with Down's syndrome cover a wide spectrum of levels of cognitive functioning, and that this capacity might vary even within individuals (for example, someone might not have the capacity to consent to a contract, but still have the capacity to consent to sex). For my purposes though, I will stipulate that Eve and Frank actually do have the capacity of an average 8-year-old in all respects. I want to note here that many people consider it offensive to compare people with intellectual disabilities to children. I want to make clear that I am not making this claim about all such people, but merely about fictional Eve. Furthermore, I am only comparing her to a child in one particular respect: her capacity to make decisions that count as morally transformative in the domain of sexual activity.

³ Again, this kind of case might be considered a good candidate for a relationship that is 'beyond consent' (see the Introduction, pg. iv.) but I think we should reject this view because the parties involved are not yet in a sexual relationship.

argue that both David and Frank do either something wrong or blameworthy, and furthermore that this last claim is counter-intuitive.

2. Can Eve and Carol give morally valid consent?

In cases involving people with an intellectual disability or other cognitive impairments, the crucial question is this: does such a person have the capacity to consent? I shall argue that in most cases, the answer is no. Furthermore, we should hold that in my cases in particular, neither Eve nor Carol gives morally valid consent.

2.1 *Consent tokens*

By stipulation, both Carol and Eve *token* consent. That is, they both verbally agree to have sex. This is of course not the only way you can token consent. You can token consent in many ways – by performing actions, or by speaking words. But for simplicity's sake, in both my cases B verbally tokens consent, because cases involving a verbal consent token (for example, a 'yes') are the least ambiguous.

You might think the following claim is true: if B tokens consent, then it follows that (1) B consents to sex, and that (2) A is justified in believing that B consents to sex. If this claim is correct, then all of my cases will be ones in which neither the **Actus Reus Requirement** nor the **Mens Rea Requirement** are met. If so, they cannot possibly be cases of moral wrongdoing or cases where blame is appropriate according to the Consent Explanation, and therefore will not be counter-examples to the Consent Explanation.

However, it is not at all obvious that (1) and (2) follow from the fact that B tokens consent. To keep things simple, I will focus on the following question: does it follow from the fact that B tokens consent that B in fact consents? (I will leave discussion about what it is reasonable for A to believe in cases like the ones above, given that B tokens consent, until Chapter 5).

What are the possible positions you might take on this claim? There are three: you might claim that if B tokens consent, this should *always* be taken to indicate morally valid consent; or, that if B tokens consent, this should *sometimes* be taken to indicate morally valid consent; or finally, you might claim that if B tokens consent, this should *never* be taken to indicate morally valid consent.

Clearly, the claim that tokens of consent should *never* be taken to indicate morally valid consent is a very strong claim. I think we should reject this view out of hand: for what it would mean is that even if an autonomous adult with full information verbally agrees to have sex with another autonomous adult, her partner is not licensed to believe that she gives morally valid consent (so it is hard to see how any cases of sexual activity will be cases in which Partner A does nothing blameworthy). The claim that consent tokens should *always* be taken to indicate morally valid consent is also difficult to support – what about someone who has been misled, coerced, or is drunk or is a child? So for my purposes, I will assume that the moderate position on this issue – the view that consent tokens should sometimes be taken to indicate morally valid consent - is the correct one.

So if the mere fact that B tokens consent is not sufficient for us to conclude that she does consent, we need to ask what is sufficient for us to conclude that B consents. The answer is this: a voluntarily given consent token, tokened by a person capable of morally valid consent.⁴ So now we need to know this: what's necessary for morally valid consent? Because my cases are fictional, I could of course just stipulate that Carol and Eve do not meet the criteria for being capable of morally valid consent, whatever you think those criteria happen to be. However, I want this claim to be not just stipulative, but also convincing. So in the following sections, I will consider whether it is likely that Carol and Eve have the capacity to give morally valid consent.

However, as I mentioned in Chapter 2, Section 3, I will not be assuming any particular model of what counts as consent, nor asking whether Carol or Eve meets the conditions proposed by that model. Instead, I shall be considering Carol and Eve's consent capacity relative to that of an ordinary adult.

2.2 *Disability and consent*

Until relatively recently, it was assumed that all adults with at least moderate intellectual disabilities were not able to consent to sex.⁵ The following argument will explain why: by definition, having an intellectual disability impairs your cognitive abilities. So if the capacity to consent to sex requires the decision-making capacity of an ordinary adult, then on the

⁴ I include the term 'voluntarily' here because there are cases of coercion and manipulation, for example, where a consent token is given but this should not be taken to indicate morally valid consent. The term 'voluntarily' is intended to exclude such cases.

⁵ There is some dispute about whether an IQ band is the right way to differentiate people with differing degrees of disability. However, according to the DSM 5, individuals with an IQ from 50-69 count as mildly intellectually disabled, individuals with an IQ ranging from 35-49 count as moderately intellectually disabled, and individuals with an IQ below 35 count as profoundly intellectually disabled.

assumption that people with moderate intellectual disabilities (by definition) do not meet this criterion, then we should hold that people with intellectual disabilities cannot consent to sex.⁶

Views like this have had a big impact on people with intellectual disabilities. For example, in a paper discussing dementia patients and intimate relationships, Peter Lichtenberg states that:

“staff [in a particular residential care home] usually prevent physical affection between two demented (*sic*) patients because they believe that such patients cannot truly consent”

(Lichtenberg, 1990, pg. 117). In a 2010 paper, “Sex Rights for the Disabled?” Jacob M. Appel discusses the fact that many American nursing facilities, mental hospitals, and group homes have ‘no sex’ policies. He argues that such policies are in desperate need of reform, and that one problem is that not only do they make any kind of sexual intimacy practically impossible, but that “the assumption underlying these restrictions is that anything short of clearly expressed wishes by a fully competent and rational individual does not fulfill a minimum standard to consent to sexual relations” (Appel, 2010, pg. 153).

The problem with policies like these, according to many disability researchers and advocates, is that they deny people with intellectual disabilities the right to express their sexuality. For example, Laura Tarzia et al, writing on Residential Aged Care Facilities (RACFs), argue that:

“the formation of relationships, physical intimacy and the expression of sexuality are a basic human right and a normal and healthy part of ageing, and that older people in

⁶ Furthermore, in a lot of cases, the intellectual impairment is obvious to an outside observer, so we should hold that if B has an (obvious) moderate or profound intellectual disability, then A is morally blameworthy if he has sex with her, if it is true that people like B cannot consent to sex.

RACFs, including those with dementia, have the right to make, and at the very least be involved in, decisions.” (Tarzia et al, 2012, pg. 609).

Moreover, in a speech at a British Home Office Conference on disability and consent, Lord Justice Henry Brooke stated that “to deny adults the legal right to participate in sexual activity, if they wish to do so, is in an important sense to deny them their humanity” (Great Britain, Home Office, 1999, pg. 7).

The obvious problem is this: both the right to make decisions to participate in sexual activity and right not to be forced to participate in sexual activity that you do not consent to are rights grounded in considerations of autonomy. But if the reason that we say that Partner B is not capable of consent is because we think she lacks the requisite decision-making capacity, and therefore can’t make an autonomous choice about her sexuality, we can’t at the same time hold that she has the right to make an autonomous choice to *engage in* sexual activity, even if she desires to do so.

It may seem, then, that in order to guarantee intellectually disabled people access to the benefits of sexual activity which they desire, we need to argue that they have the right to sexual autonomy; and that in order to argue that they have the right to sexual autonomy, we must argue that they have the capacity to consent.

So the move that disability advocates make, then is this: they argue that in fact many people with intellectual disabilities do have the capacity to consent. There are three main strategies we could employ to establish this claim:

1. Argue that decision-making capacities are localized (so, when it comes to at least some decisions about sex in particular, if not about other domains like healthcare or finance, many people with moderate or profound intellectual disabilities *do in fact* have the decision-making capacity of an ordinary adult). This is the domain-local view.
2. Argue for a lower standard: claim that people with moderate or profound intellectual disabilities do not *require* the decision-making capacity of an ordinary adult even in the particular domain of sexual activity.
3. Argue that decision-making capacity is relationship-local. The idea here is that not only is it the case that a person might have the capacity to consent to sexual relationships even if they do not have the capacity to consent in other domains, like finance or healthcare; but also that they might have the capacity to consent to a particular sexual relationship or activity even if they do not have the capacity to consent to a different sexual relationship or activity.

Following the view suggested by Larry Alexander in *The Ontology of Consent* (Alexander, 2014), I will focus on one particular question: does the person involved have (and understand) the information they need in order to successfully consent? For example, does Carol understand

(enough of) the facts about the act of sex she is about to engage in with David, including facts about the significance of that act?

As we have noted, this is a very difficult question to answer – but I think it will be useful to recall the two assumptions I made earlier. The first is that a young child (for example, an 8-year-old) should not usually be considered capable of giving morally valid consent to sex.⁷ Whatever the (ordinary) 8-year-old child understands about sex and its significance, this is not enough for them to be a successful consentor. The second is this: the ordinary 30-year-old adult should usually be considered capable of consent, and the amount of information such adults usually have should be enough for them to count as successful consenters.

So my question is this: bearing in mind these two assumptions, what would it take for us to say that Carol and Eve can consent (and that so, in each case, the **Actus Reus Requirement** is not met)? Furthermore, what are the problems that arise if we claim that either Carol or Eve can consent?

2.3 Response one: capacity is domain-local

One important claim which is often made in the disability literature is this: whether you have the capacity to consent should be treated as a local question. For example, we should not assume that because Carol does not have the capacity to consent to medical treatment (and so others should

⁷ Some people dispute the claim that a young child should not be considered capable of consent. See for example Kershnar (2001) for a discussion of the kinds of cases in which a child might be considered capable of giving morally valid consent to sex. However, it is enough for my purposes that we accept the claim that it is *usually* the case that a child is not capable of giving morally valid consent to sex.

make those decisions for her) that it follows that she does not have the capacity to consent to sexual relationships.

An example of the domain-local view is the following:

“Decision-making capacity is not an “all-or-none” phenomenon. That is, the ability to make a decision may depend on the decision to be made. For example, a patient with early dementia may not be able to render informed consent to an operation that has a significant risk of death but may be able to decide what flavor of ice cream he would like for dessert. In most cases, the ability to consent to sexual activity could be considered to lie closer to the decision about ice cream than to the decision about major surgery”
(Richardson, 1995, pg. 12).

So what we need, then, is a tool that specifically assesses a cognitively impaired person’s capacity to consent to *sexual relations in particular*. But such assessments should not be overly restrictive. For example, they should be such that an adult with no mental impairments could meet the conditions for being assessed as capable of consent. Conversely, they should not be overly inclusive: they should not be so broad as to include those who we ordinarily count as non-consenters, for example, young children. Furthermore, for our purposes we should focus on questions about the kind of information and understanding of the significance of that information that is required to count as a capable consentor.

In 2004, Ali Murphy and Glynis H. O’Callaghan conducted a study designed to assess the capacity of mild to moderately intellectually disabled adults to consent to sexual relations relative to a group of young people (16-year-olds) presumed in law to have the capacity to consent. What they found was that the adults with intellectual disabilities were significantly less knowledgeable about almost all aspects of sex and sexual relationships, and appeared significantly more vulnerable to abuse, having difficulty at times distinguishing abusive from consenting relationships. Furthermore, there was very little overlap in the levels of understanding between the subjects with intellectual disability and the young people. That is, almost all of even the highest scoring intellectually disabled adults scored lower than the lowest scoring 16-year-olds. (Murphy & O’Callaghan, 2004, pg. 1355).

One problem might be that people with intellectual disabilities might be less likely to receive appropriate sexual education. While it is true that previous sex education did make a difference to the scores of the intellectually disabled adult subjects who had received it, their scores were still well below those of the young people. Murphy and O’Callaghan conclude that even if we set the information criterion for the capacity to consent at the level of the lowest scoring 16-year-old included in the study, most mild- to moderately intellectually disabled people would be deemed unable to consent, including those who had received previous sex education (Murphy & O’Callaghan, 2004, pg. 1355).

So, if we want to count even most moderately intellectually disabled people capable of consent, let alone profoundly disabled people, we will need to move to a lower standard in terms of the information you are required to understand in order to count as capable of consent.

2.4 Response two: lower the standard

Some disability advocates have advocated a very low standard for what counts as meeting the informational requirement. For example, here is the standard proposed by the Foundation for Learning Disabilities in the UK, which would require that people know the following in order to be capable of consent:

1. That sex is different from personal care;
2. That penetrative vaginal sex can lead to pregnancy; and
3. That penetrative anal sex is associated with a risk of HIV/AIDS (Home Office, 2000, pg. 71).

It's worth noting that even according to this set of very minimal criteria, "about 50% of the people with intellectual disabilities in the current research would be deemed unable to consent" (Murphy & O'Callaghan, 2004, pg. 1356). I think that while the motivation for this list was probably the fact that people with disabilities have been denied sexual experiences for a very long time, and that we should seek to fix this problem, the list is not at all sufficient.⁸

My first reason is this: the list of information required is so minimal that most 8-year-old children would pass the capacity to consent test. Now, we could still perhaps claim that children should be treated as *effective* non-consenters. There are two potential justifications for this claim.

⁸ There is of course a practical worry with moving to a lower standard: it makes it very difficult to prosecute cases of clear wrongdoing. For example, in *R v Jenkins*, a care worker was acquitted of the rape of a woman with severe intellectual disability, despite forensic evidence of his guilt, because he argued that the woman consented and the judge accepted a very low standard for consent (Murphy, 2000, pg. 63). However, I will focus on methodological rather than practical issues.

The first is that children are likely to be harmed if they engage in sexual activity. But an advocate of the Consent Explanation cannot appeal to this justification, because it explains the wrong of sexual activity with children in terms of harm, rather than consent.

The second (consent-based) justification for treating classes of persons as effective non-consenters is the fact that most members of that class can't give (actual) consent, and there are practical reasons why we cannot or should not simply assess each individual case on its merits. But this justification depends on the claim that *most members of that class can't give (actual) consent*, so this is the claim that we need to establish first. If we apply the standard proposed above, most 8-year-olds will count as capable of consent. So we cannot justifiably treat them as effective non-consenters.

But I think there is a bigger worry: the claim that we should lower the standard for consenting for a certain class of persons is conceptually incoherent. For example, if we assume that Alexander's (2014) view of consent is the correct one (the view that consent is a mental state with informational, but no motivational, requirements – see Chapter 2, Section 3), we need to ask what precisely it takes to meet the informational requirement in order to count as a capable consentor. This is an important question, but claiming that we should lower the standard for a person merely because that person has an intellectual disability seems like it cannot be justified.

The reason is that if we do this, we are treating the fact that Partner B has an intellectual disability as a morally relevant feature, but this fact is not, by itself, of any moral relevance. Rather, facts about the capacities of the person in question are the morally relevant features of

the situation. So if we lower the standard for people with disabilities, we now have a new standard for what it takes to meet the information requirement, which should apply to everybody. But if we lower the standard, then it is very difficult to claim, for example, that children are not capable of consent. I take it that children, especially young children, are paradigm cases of persons who are incapable of giving morally valid consent to sex, and on these grounds a view which argues for a lower standard according to which children would be capable of giving morally valid consent should be rejected.

2.5 Response three: capacity is relationship-local

Some disability advocates argue along the following lines: we should not assume that because Partner B does not have the ability to consent to a sexual relationship with a particular person, she does not have the ability to consent to a sexual relationship with a different person. I will call this the relationship-local view.

According to this view, “a determination of sexual consent capacity can depend on the risks of the proposed relationship...a person might be found capable of consenting to sexual intimacy with one specific person and not others” (Lyden, 2007, pg. 17). This seems plausible for if we assume that in order to give morally valid consent, you must understand and appreciate the significance of certain pieces of information that would be relevant to your decision, it seems clear that some pieces of information will be relevant to a decision about whether to engage in certain kinds of sexual activity but not others.

For example, take one of the criteria outlined above: the requirement that in order to be capable of consent, Partner B must know and understand that penetrative vaginal sex can lead to pregnancy. If the sexual activity in question is not heterosexual, and therefore cannot lead to pregnancy, there seems no reason at all why Partner B should be required to understand that sexual activity which is distinctively different in kind from the sexual activity she is contemplating engaging in might have a certain outcome in order to be capable of consenting.

Consider a sexual relationship between two men. Should those men be required to know and understand that penetrative vaginal sex can lead to pregnancy in order to have the capacity to consent to their relationship? This seems absurd. If we were to apply a similar standard to those intending to engage in heterosexual activity, for example, we might say that in order to be capable of consenting to heterosexual sex, Partner B must understand and appreciate the significance of certain facts about homosexual sex. But I can see no reason why we should claim something like this.

However, this standard – that in order to consent to homosexual sexual activity, Partner B must know and understand that penetrative vaginal sex can lead to pregnancy – is the standard that has been applied in several cases which have come before the British courts.

For example, in *D Borough Council v AB* [2011] EWHC 101 COP the judge deciding the case found that such a person was not capable of consent. This case involved a man called Alan with a moderate learning disability who lived in a council care home. Alan developed a sexual relationship with a male cohabitant, 'Kieron'. The council applied to the court for an order

restricting contact between Alan and Kieron, on the grounds that Alan did not have the capacity to consent to sexual relations.

Following precedent set by *X City Council v MB, NB and MAB* [2006] EWHC 168 FAM the judge approved an interim order prohibiting sexual contact between Alan and Kieron, on the grounds that Alan did not have the capacity to consent to sex because such capacity requires an understanding and awareness of: 1) the mechanics of the act; 2) the fact that there were health risks involved; and 3) the possibility that sex between a man and a woman may result in the woman becoming pregnant.

So the relationship-local view seems plausible. That is, it seems as though you should only be required to understand and appreciate the information that is pertinent to the particular kind of sexual activity you intend to engage in in order to be capable of consenting to that instance of sexual activity. Furthermore, we apply this standard in other domains. For example, imagine that you are about to have an operation under local anesthetic. Many other operations, however, take place under general anesthetic. Should you be required to understand the risks of operations involving general anesthetics before you can be capable of consenting to *your* operation? Clearly not.

So, in order to be capable of consent, you need to understand the risks and benefits of the particular course of action (relationship, operation) that you are about to embark on, and be able to weigh those risks and benefits according to your preferences.

Of course, we shouldn't set the bar too high in terms of understanding the risks and benefits of a relationship. For example, most adults understand that unprotected heterosexual sex can lead to pregnancy. But it is not clear that most adults understand the *significance* of this fact. For example, if Laurie Paul's argument in "What Can't You Expect When You're Expecting" (Paul, 2015)) is right, and having a child is both an epistemically and personally transformative experience, then *none* of us fully understand the significance of the choice to become a parent. So if we set the bar for what counts as understanding the significance of your sexual choices too high, then it may turn out to be the case that no adults can consent to sex if there is a chance that the sexual activity in question can result in pregnancy. But I take it that we would not wish to accept this conclusion.

So, are there any risks inherent in all sexual relationships that someone must understand in order to be capable of consent? I submit that there is one risk involved in all such relationships – the risk that the relationship will end, for reasons beyond your control, and that this will cause emotional distress.

In ordinary cases, the parties involved in a sexual relationship realize this, and accept the risk. You know, for example, that your partner might leave you (even if you believe the risk is small). But I submit that many people with profound intellectual disabilities do not. For example, many people with advanced Alzheimer's forget that particular family members have died, and keep asking when they will come to visit. So it seems plausible to assume that a person in the relatively advanced stages of the disease may not appreciate the fact that the sexual relationship may come to an end, and will find it bewildering if the relationship does in fact come to an end.

This suggestion that in order to consent to a sexual relationship, a person must be cognizant of the risk that the relationship might end may seem puzzling. It might seem as though I am suggesting, for example, that David stop having sex with Carol when she will not understand why on the grounds that it will be upsetting for Carol if he stops having sex with her and she does not understand why. But I am not claiming this.

I am merely claiming that, *according to the Consent Explanation*, Carol should not count as capable of consent for the reason that she cannot weigh the risks and benefits to her of the relationship ending. Therefore, according to the Consent Explanation, David should stop having sex with Carol. I however believe that the Consent Explanation is mistaken, partly on the grounds that it is entirely permissible for David to continue to have sex with Carol.

2.6 *Proxy consent*

I have argued that people with profound intellectual disabilities cannot consent to sex, on the grounds that they do not have the capacity to make autonomous choices about their sex lives. If this is true, then it also follows that they do not have the right to freedom of sexual expression, as this right is grounded in the right to make autonomous choices about our sex lives.

If this argument is correct, this is very bad news for the advocate of the Consent Explanation, for the following reason: it seems she now has to argue that not only is it true that most, if not all, sexual activity involving moderately intellectually disabled people is morally impermissible, but also that moderately intellectually disabled people don't have any right to the freedom of sexual expression. And this last claim is precisely what many disability advocates have been urging us

to reject, on the grounds that it fails to recognise the fact that many people with profound intellectual disabilities appear to both desire and enjoy sexual experiences.

But there is one last move available to the advocate of the Consent Explanation. She can argue that while it is true that people with moderate intellectual disabilities don't have a freedom right to express their sexuality, what they do have is a welfare right.⁹ That is, while people with moderate intellectual disabilities do not have a right, grounded in autonomy, to make decisions about their sexual behaviour (because they are non-autonomous in this domain) what they do have is a right to enjoy sexual activity grounded in the fact that they can both benefit from, and express clear preferences for, some instances of sexual activity.

Now, this move would be unsatisfactory if it turned out that people with profound intellectual disabilities could never permissibly exercise their welfare rights. This is not always a problem – for example, we might argue that a paedophile has a welfare right to access sexual experiences that he enjoys, but that he can never permissibly exercise this right. This is for the reason that if he exercises this right, he either harms or vitiates the consent of others. But it seems very odd to say that you cannot exercise your own welfare rights on the grounds that exercising those rights causes your *own* right not to be subjected to non-consensual sex to be vitiated.

However, there are analogous situations which show the next step to take. Consider an adult with Alzheimer's who does not understand the risks of a certain medical procedure. He is unable to make an autonomous choice, yet he does have a welfare interest in receiving healthcare. In cases

⁹ See for example Greenspan, 2002, pg. 177

like these, doctors are considered to act permissibly if they get consent from the patient's healthcare proxy (usually next of kin). However, it is still true that in cases such as these, a doctor who performs an operation on an Alzheimer's patient technically performs an operation on a person who is not capable of consent.

So here is how we claim that a moderately intellectually disabled person can exercise her welfare right to access enjoyable sexual experiences without vitiating (anyone's) consent: we get consent by proxy. Just like in the case of a doctor performing an operation on an Alzheimer's patient, someone who has sex with a person who is moderately intellectually disabled has sex with her without her consent. However, just like in the case of an operation, we might be able to get proxy consent instead. Proposals like this, depending on how they are worked out, might be argued to be "fully consistent with the *spirit* of the principle of mutual consent" (Spiecker & Steutel, 2002, pg. 164).

However, there is one big problem with the move to proxy consent. There are two ways to understand proxy consent: the first as an appeal to the principle of substituted judgment, whereby the proxy consenter makes a decision based on what he believes Partner B would have consented to, were she competent. The second is an appeal to the principle of best interests, whereby the proxy consenter makes a decision based on what he believes is in fact in the best interests of Partner B.

There are many problems with the substituted judgment view. For example, it is not clear that we are very good at making substituted judgments.¹⁰ But there is a particular problem for one of the cases I have described: **Down's**. If someone never has (and never will have) the capacity to consent, it is very difficult to even begin to describe the kinds of sexual situations that she would likely consent to, were she capable of consent.

Furthermore, even if a person has in the past been capable of consent (for example, a patient with Alzheimer's, like Carol) it is often the case that the very condition which renders her incapable of consent also changes her personality significantly (and in cases like these, for example, it is not clear whether considerations about what her pre-Alzheimer's self would have consented to should have any bearing on what her post-Alzheimer's self would consent to).

Spiecker and Steutel argue for proxy consent in cases involving intellectually disabled people and sex. They argue for a substituted judgment view: "caregivers should imagine themselves in the position of people with mental retardation (sic) and consider carefully whether they, if they were those retarded people themselves, would have voluntarily consented to the sexual interaction" (Spiecker & Steutel, 2002, pg. 165). This is why they take their proposal to be in the spirit of the Consent Explanation. However, they also claim that this view will be, in effect, a decision based on the best interests of the people involved. "In fact, such an evaluation will be tantamount to weighing the pros and cons of the sexual interaction for the parties involved, and will only result in substitutive consent if, in the end, the benefits for both parties are seen as outweighing the disadvantages" (Spiecker & Steutel, 2002, pg. 165).

¹⁰ For a discussion of these problems, see Wrigley (2007).

So our question is this: if you, the proxy consentor, make a decision for Partner B about her sexual activity based on what you believe is in her best interests, is this enough for us to claim that Partner B (hypothetically) consents, in a manner that is consistent with the spirit of the Consent Explanation?

I claim that it is not. The reason is this: it is possible, when you or I consent to something, that we give valid consent even though consenting is *not* in our best interests. For example, I might consent to something because it is in the best interests of a person that I care about, rather than in my best interests. I might consent to something that is not in my best interests because I am behaving recklessly. I might consent to something that an outside observer believes is not in my best interests, because *I* believe it is in my best interests.

The point of invoking consent – a consideration grounded in autonomy – is precisely because we believe that you should be able to decide to act against your best interests, should you wish to do so, and because we believe that you should be the authority on what is in fact in your interests, not someone else. If your best interest view denies that we can make proxy decisions based on considerations like these, then it is not tantamount to the substituted judgment view.

Furthermore, decisions about who to have sex with and when to have sex are not like the kinds of decisions that we make in other domains where we accept that proxy consent can stand in for actual consent. For example, often we allow next-of-kin to give proxy consent for medical treatment, or make financial decisions on behalf of a cognitively impaired person. But the difference is this: if I were capable of consenting to medical treatment, it is very unlikely that I

would consent to a procedure which is not in my best interests. So if, in the medical case, the proxy consentor makes a decision based on what he believes the best interests of the patient to be, it is likely that his decision will be close to the substituted judgment of the patient – that is, it is likely his decision will be the same as the decision the patient would have made, were she competent to do so.

But it is not very unlikely that I would consent to sex, when it is not in my best interests. Decisions about sex are often about desire or passion, rather than a rational weighing of interests. Many people who are capable of consenting to sex consent to activities which are not in their best interests at all. For example, they have affairs, or have sex with deeply unsuitable people. So if we use the ‘best interests’ standard, it is unlikely that we will, in fact, be making the same decisions as Partner B would make, were she capable of consenting.

The central point is this: if we are going to claim that people with cognitive impairments can permissibly engage in sex when an appointed caregiver believes that it is in their best interests to do so, then there are no good reasons for appealing to notions of hypothetical consent (unless you are already dedicated to preserving the Consent Explanation). It is simpler just to say that what matters in terms of the permissibility of a sexual act is nothing to do with consent, actual or hypothetical.¹¹ What matters is simply whether it is in a person’s best interests to engage in sex.

The upshot of all this is the following: we can only use proxy consent to claim that our permissibility judgments about sex involving a person who is incapable of consent are in the

¹¹ For a version of this argument, see Wrigley (2007).

spirit of the Consent Explanation if we take the substituted judgment view. But if you are not already committed to the Consent Explanation, it is not clear what would motivate you to take such a view (rather than a best interests view) to be the right model of proxy consent.

Furthermore, there are independent reasons for thinking that the best way to think about the notion of proxy consent is as a best interests judgment, and that the substituted judgment view is *not* tantamount to the best interests view, particularly in the domain of sexual activity.

The two cases I have chosen illustrate some of these problems. The substituted judgment view is far more plausible in cases involving people like Carol and David (**Alzheimer's**) than Eve and Frank (**Down's**). The reason is that it seems like David might have a reasonably good idea about what Carol would decide, were she capable – however, this ignores worries about the extent to which Carol's Alzheimer's has also changed her personality. But in cases like **Down's**, it is far harder to answer the question “what would Eve decide to do, were she capable?” Eve never has been capable of giving morally valid consent, so it is very difficult to see what information we could base an answer to that question on.

However, if you think that we can employ a substituted judgment view in both cases, then you will disagree with me that these are good counter-examples to the Consent Explanation. But, as I have noted, I think there are reasons for rejecting such a view, especially in the kinds of cases I am discussing (cases involving sex). For these reasons, I will not consider the implications of proxy consent when I discuss my cases in more detail.

Chapter Five

1. Do Eve and Carol give morally valid consent?

Now that we have a better idea what it means to have the capacity to consent, we can ask whether Carol and Eve in fact have this capacity. If they do, the **Actus Reus Requirement** is not met, and their cases do not include moral wrongdoing. (Though they might still, of course, involve actions which are blameworthy).

On the assumption that Eve is relevantly similar to an ordinary 8-year-old child (that is, she has the same level of understanding of sex and its significance as the average 8-year-old) I think that we should not count her as capable of consent. Otherwise, we would also have to count most 8-year-old children as capable of consent (on pain of inconsistency).¹

But what about Carol? As I have described the case, Carol isn't capable of consent, even in the context of her particular relationship with her husband. The reason is that she is unable to weigh the risks and benefits to her of that particular relationship (in particular, she is not able to weigh the risk of the relationship ending for reasons beyond her control).

Furthermore, I think that the motivation for treating people like Carol (and Eve) as capable of consent is often something like this: we should hold that Carol has the capacity to consent if

¹ Again, I want to emphasize that I am not saying that we should treat all disabled people like children, or that they are relevantly similar to children, in any respect but one: many profoundly intellectually disabled people like Eve have an understanding of sex and its significance that is more comparable to that of a child than to that of a fully autonomous adult.

there are cases in which we believe that consenting would be in her best interests. But this claim gets the order of explanation backwards. We don't treat people as capable of consent because there are situations in which we believe consenting would in fact be in their best interests – we treat people as capable of consent because we believe they have the *capacity to decide* whether consenting will be in their interests. And we should say that both Eve and Carol do not.

I think this is very bad news for the Consent Explanation. It means that in both cases, the advocate of the Consent Explanation should say that both David and Frank *at least* commit *pro tanto* wrongs. But it is hard to explain why this might be. The next section explains why I think such a move cannot be justified.

1.1 *Pro tanto* wrong?

Perhaps we could say that according to the Consent Explanation, what David and Frank do is *pro tanto* wrong but not all-things-considered wrong. That way, we preserve both the spirit of the Consent Explanation, but we (possibly) get the final judgment on the case to agree with our intuitions. I want to be clear at this point that I think that, intuitively, neither David nor Frank commits even a *pro tanto* wrong. But claiming that they do is a way to preserve the claim that they do not commit an all-things-considered wrong, and also (potentially) a way to rescue the Consent Explanation from the challenge on the grounds that the results the Explanation generates run counter to our intuitions about wrongdoing in **Down's** and **Alzheimer's**.

In order for it to be the case that David and Frank commit *pro tanto* (but not all-things-considered) wrongs, we need to point to the morally relevant features of the case which trump

the *pro tanto* wrong generated by the fact that Carol and Eve do not consent. So what morally relevant considerations could there be, then, other than the fact that Carol and Eve do not consent? We cannot say that Carol and Eve have a right to freedom of sexual expression, and that this right might trump their right not to be subjected to non-consensual sex. In order to have the right to freedom of sexual expression, you must be capable of exercising autonomy, and neither Carol nor Eve are capable of exercising autonomy in this domain.

We cannot say that the mere fact that sex would benefit Carol and Eve trumps their right not to be subjected to non-consensual sex. Why? Because in general, I am not permitted to violate your rights merely because I believe it would (or because it would in fact) benefit you – particularly when these rights are grounded in considerations of autonomy. The whole point of claiming that you have a right grounded in considerations of autonomy is that you have the right to exercise choice based on what *you* believe is in your best interests, not what *I* believe is in your best interests.

So, it seems like the only way that the advocate of the Consent Explanation can justify the claim that non-consensual sex with either is merely *pro tanto* wrong is if there are other morally relevant considerations which trump the fact that in both cases, Partner B's consent is vitiated. But the only other consideration that might be morally relevant is whether sex with Carol and Eve will (experientially) benefit them. And if you are an advocate of the Consent Explanation, you cannot consistently hold that this is a trumping consideration, as I discussed in Chapter 1, Section 1.7.

Furthermore, the fact that neither Eve nor Carol are capable of consent has implications for what others should believe about their capacity to consent, and therefore for whether we should hold that David and Frank are morally blameworthy. I will consider this question next. Let's stipulate that in cases like these – where capacity to consent is a live question – you ought to take reasonable steps to determine your partner's capacity to consent. The situation is rather different with regards to David versus Frank, because Frank himself suffers from intellectual disability. So I shall treat the cases separately.

2. Does David do something wrong or blameworthy?

If (as I have argued) Carol is not capable of consent, then according to the Consent Explanation, David does something wrong when he has sex with Carol. The wrong he commits is this: he has sex with her without her morally valid consent. This claim seems to be clearly counter-intuitive. Intuitively, it seems that David does not commit an all-things-considered wrong when he has sex with Carol in the situation described in my case.

And the Consent Explanation advocate cannot even move to the weaker claim that David commits a *pro tanto* rather than all-things-considered wrong. Because the only other relevant moral consideration is this: sex with Carol will confer experiential benefits to both David and Carol. But in general, A is not permitted to vitiate B's consent because doing so would benefit B. And A is certainly not permitted to vitiate B's consent because doing so would benefit A.

This is very bad news for the Consent Explanation. But it gets worse. The Consent Explanation advocate not only has to claim that David commits a moral wrong, but also has to claim that what David does is morally blameworthy – because he also meets the **Mens Rea Requirement**. He meets the **Mens Rea Requirement** for the following reason: given Carol's condition, he should believe that she is not capable of consent.

Of course, it might be true that he does not believe this. However, given his wife's obvious dementia, the question of whether she has the capacity to consent is a live question. So David should take steps to determine Carol's capacity for consent. In this case, David may need to rely on assessment tools proposed by the experts. So the first step the David is required to take is this: given that Carol's decision-making capacity is clearly compromised, he has an obligation to ascertain if she is capable of consent.

And given the evidence, he is likely to find that according to any reasonable measure, Carol does not have the capacity to consent. If so, not only will sex with Carol be non-consensual, David *ought to believe* that sex with Carol will be non-consensual, and so he meets the **Mens Rea Requirement**. One way out is if we think David can give proxy consent for Carol, on the basis that it is what Carol would choose, but as I have argued in Section 2.6 of Chapter 4 there are big problems with holding that proxy consenters should use a substituted judgment principle when they make their decisions.

I want to make clear here that I am not claiming that it is *Carol's* job to prove that she is capable of consent. Tarzia et al. reject this claim for the following reason:

Tests of sexual decision-making capacity also ignore the most important ethical and legal issue: that capacity should be assumed until proven otherwise. In other words, it should not be up to the individuals with dementia to ‘prove’ that they have the capacity to decide whether or not to engage in sexual behaviour, but, rather, the onus is on staff to prove—incontrovertibly—that they do not (Tarzia et al., 2012, pg. 611).

While I agree that it should not be up to the person with dementia – in this case Carol – to prove anything, I do reject the claim that capacity should be assumed until proven otherwise. If we adopted this practice, then it would also follow that we should assume that any given young child is capable of consent until it is proven otherwise. But this is clearly not what we should assume. Rather, if there is good reason for Partner A to have doubts about Partner B’s capacity to consent, it is up to Partner A to ascertain whether she does in fact have the capacity to consent before proceeding. For example, if Partner B appears very drunk, then it is up to Partner A to ascertain whether it is in fact true that Partner B is too drunk to consent (rather than merely, say, acting drunk) before proceeding, even if B has given a consent token.

So the right thing for David to do is attempt to ascertain whether Carol is capable of consent, and if he does this he is very likely to come to believe that she is not capable. So this case is particularly bad for the advocate of the Consent Explanation. She has to say both that David does something morally wrong and that he is morally blameworthy. And this seems counter-intuitive – in fact, it seems like it would be wrong for David to *deny* Carol something she both enjoys and benefits from.

3. Does Frank do something wrong or blameworthy?

One of the big problems for the advocate of the Consent Explanation with regards to Carol and David was that David met the **Mens Rea Requirement**, and so David did something blameworthy. But in the case of Eve and Frank, Frank (arguably) does not meet the **Mens Rea Requirement**, and this case is (potentially) not as troublesome for the Consent Explanation advocate.

Why does Frank fail to meet the **Mens Rea Requirement**? Because while Frank (by stipulation) does not believe that Eve is incapable of consent, Frank's belief is mistaken only because he himself is cognitively impaired. Furthermore, he is not responsible for the cognitive impairment. So Frank cannot be blameworthy.²

If the advocate of the Consent Explanation can say this, then this is good news for the Explanation – this is clearly the right result. But the problem is that even though Frank is not blameworthy, he still commits a moral wrongdoing. Eve does not have the capacity to consent, therefore she does not consent, and therefore Frank has non-consensual sex with Eve.³

² By pointing to the fact that Frank is not responsible for the impairment, I wish to distinguish this case from other cases in which Partner A fails to believe that Partner B does not consent because he himself is cognitively impaired, but is responsible for that fact (for example, if Partner A is drunk). The reason these cases differ is that it is plausible that you are responsible for failing to hold the correct beliefs if this failure is due to a cognitive impairment you are in fact responsible for, but less plausible if you are not responsible for the cognitive impairment that causes the failure to have correct beliefs.

³ It should be obvious that we can say exactly the same thing about Eve's behavior with regards to Frank. However, for simplicity's sake I will continue to treat Frank as Partner A and Eve as Partner B.

Now, I previously argued that if Partner A's action would meet the **Actus Reus Requirement**, then if you think that non-consensual sex is wrong, you ought (in general) to intervene, regardless of whether Partner A meets the **Mens Rea Requirement** (see Chapter 1, Section 1.6). But it doesn't seem that in this case, anyone has any reason to prevent Frank from acting. In fact, the opposite seems true: given that Frank's actions will benefit both Eve and Frank, the people who care for them have reason to *facilitate* sexual relations between Eve and Frank. (Furthermore, if you think that no one has *any* reason to prevent Frank from having sex with Eve, then it is unlikely that you think he has committed even a *pro tanto* wrong).

So this case is also bad news for the Consent Explanation. Our advocate doesn't have to say that Frank does something blameworthy, but she does have to say that Frank does something wrong. And this last claim seems counter-intuitive.

In the following sections, I will explain why we should believe that it is in fact true that we have reasons to facilitate sex between people like Eve and Frank, and what this means in terms of what we should say about the Consent Explanation.

4. Why we should treat these cases as counter-examples

With regard to both my cases, I argued that not only do David and Frank do nothing wrong or blameworthy, but the claim that they do is particularly implausible because it seems like both David and Frank do something that others ought to encourage or facilitate. In fact, I think this is true: the moral reasons in these cases speak in favour of Frank's and David's actions.

What I am not claiming is that Eve and Carol have a right to sexual expression grounded in autonomy. Rather, I have claimed that they have a welfare right to engage in sexual experiences that they enjoy and (experientially) benefit from. And if Frank and David help them to exercise that right, then this is morally praiseworthy rather than morally blameworthy.

4.1 Do people with profound intellectual disability desire and benefit from sex?

Until relatively recently, it was widely assumed that people with intellectual disabilities – and in particular, people with profound intellectual disabilities – were not sexual beings. That is, that such people had little desire for or interest in engaging in sexual activities and relationships.⁴

However, there is now evidence that even people with profound intellectual disabilities both desire sexual activity with others, and enjoy engaging in sexual activity with others. For example, in his discussion of a study of voluntary relationships between those with profound intellectual disabilities, Fred Kaeser concludes:

If the data in this study are typical of the total population of persons with severe or profound mental retardation, then the proportion of those involved in voluntary sexual relationships range somewhere between 1 out of every 11 to 1 out of every 7 people. To think that these individuals have probably had to endure prohibitive restrictions and that many are likely to have experienced various forms of punishment for their behaviours, it seems rather

⁴ See for example Gebhard (1971), Haavik & Menninger (1981), and Myerowitz (1971).

astonishing that there may be this many who continue to express themselves sexually.
(Kaeser, 1996, pg. 318).

As for whether people with profound intellectual disabilities enjoy sexual relationships, a situation described by Kaeser in “Can People with Severe Mental Retardation Consent to Sex?” clearly indicates that we should believe they do. In the paper he discusses the example of a patient in a residential facility named Maryann, who would indiscriminately have sex with the men in her facility, often in return for small items such as a comb or a hairpin. The interdisciplinary team tasked with developing management plans for negotiating the sexual behaviours of the clients of the facility determined that Maryann “gave every indication that she enjoyed her sexual involvement with men.” (Kaeser, 1992, pg. 39). So if it is true that people with profound intellectual disabilities both desire and benefit from sexual activity, then we should also assume that many more people who have moderate (like in the cases I have described), rather than profound, intellectual disabilities also desire and benefit from sexual activity.

4.2 *Welfare rights*

So, while there might be some people with profound intellectual disabilities who have no sexual desires, there is good evidence both that some such people both desire and enjoy sex, and that probably more people with moderate intellectual disabilities both desire and benefit from sexual activity. One problem we now face is this: if we reject the Consent Explanation, we also have to reject the claim that such people have the right to exercise their sexual autonomy. But shouldn't people have rights to participate in behaviour which they both desire and benefit from?

I think the right response is the following: of course people have such rights. But we don't have to ground these rights in autonomy. We can ground these rights in welfare interests. But if we want to ensure that people with profound intellectual disabilities can *meaningfully exercise* these rights, then we have to argue that non-consensual sex is (sometimes) morally permissible.

Furthermore, non-consensual sex in cases like these is morally permissible for reasons that are not even in the *spirit* of the consent explanation. Non-consensual sex between people like Eve and Frank is permissible exactly because it benefits both parties, not because their parents have given proxy consent. If we are designing policies to protect vulnerable people from exploitation, we might of course wish to consult Eve's family when making a determination that sex with Frank will in fact benefit her long-term. But the reason that sex between Eve and Frank is permissible is not *because* their parents consent on their behalf, but rather because it is in their interests, and accords with their preferences, even if those preferences are not fully informed.

I shall, however, not attempt to answer the question of what actual policies we should put in place to protect vulnerable people from harm – that's a job for psychologists and policy makers. But I will say that the right move is not to try to argue that such people can give actual or hypothetical consent – but rather, that we should argue that people with profound intellectual disability have a welfare right to sexual experiences, and that we should endeavour to ensure they can meaningfully exercise this right, while also protecting them from harm.

5. One more move?

In the previous I have argued that we should not accept the claim that many, or even most, people with moderate intellectual disabilities (and clearly, also most people with profound intellectual disabilities) have the capacity to consent to sex. Nor can we make the move to proxy consent in such cases. Because of this, it seems that an advocate of the Consent Explanation for the wrong of rape has to claim that in cases like **Alzheimer's** and **Down's**, David and Frank do something wrong and/or blameworthy.

However, there is one final move available to the advocate of the Consent Explanation. In Chapter 3, Section 2 I described three ways in which the advocate of the Consent Explanation could accommodate the view that non-consensual sex is permissible which were still in the spirit of a consent view. In Chapter 3, Section 2.1, I argued that the move to low-quality consent fails. I have argued in this section that the move to proxy consent fails – the kinds of cases I have been talking about (cases involving those with intellectual disabilities) are the most obvious cases in which a move to proxy consent would be justified, but as I have argued the most plausible appeal to proxy consent in the domain of sex is grounded in considerations to do with best interests rather than autonomy.

But this still leaves open a move to consent*. To recap, according to this view, we should accept that when Partner B lacks the capacity to consent, the legitimizing feature of sexual activity is not whether Partner B gives informed consent, but whether Partner B consents*. To consent* is

to indicate by your behaviour that you desire to engage in sexual activity, and that such activity would be undertaken on a voluntary basis.

If we accept this as a moral analogue of consent in the spirit of the Consent Explanation, we can account for the moral permissibility of David' and Frank's behaviour in a way that is consistent with the spirit of the Consent Explanation. Both Carol and Eve are not capable of giving informed consent, but both of them (by hypothesis) give consent*. So we can delineate the morally permissible instances of sexual activity with a moderately intellectually disabled person from the morally impermissible instances in the following way: sex is permissible if Partner B gives consent*, but impermissible if Partner B does not give consent*.

So this looks pretty good for the advocate of the Consent Explanation, then. She can account for our moral intuitions about the kinds of cases I have described in a way which is consistent with the spirit of her view. But the new problem is now this: can we also apply the move to consent* in other cases involving people who are not capable of consent? The most obvious cases for which this seems problematic are cases involving children. I shall take up such cases – and the implications for a move to consent* in such cases – in the following chapter, where I discuss cases in which one partner has a temporary impairment.

Chapter Six

1. Can children give morally valid consent?

In the previous chapter I argued that there are clear cases in which a cognitively unimpaired Partner A has sex with an impaired Partner B where A does nothing wrong or blameworthy. I also argued that there are clear cases in which we have a pair of similarly impaired Partners where Partner A has sex with Partner B and Partner A does nothing wrong or blameworthy. But one feature of these cases was that in all of them, the impairment was permanent. In this chapter I will consider a class of cases where the impairment is not permanent – cases involving children.

It seems pretty clear that children cannot give morally valid consent to sex. While there are of course borderline cases (for example, a 15-year-old may be capable of giving morally valid consent) I think that for any view of consent to be plausible, it needs to be the case that, for example, an 8-year-old child cannot give morally valid consent to sex on that view.

There are three reasons why I think we should make this claim: the first is that sex with an 8-year-old child seems obviously impermissible. And if one goal of a consent view is to differentiate cases of morally impermissible sex from cases of morally permissible sex, then it had better come out that according to this view, an 8-year-old child cannot consent to sex.

The second is that children are not usually considered to be fully-fledged autonomous agents. We certainly don't treat them as being autonomous in other domains involving a decision-making capacity, for example medical treatment. And if Partner B is not an autonomous agent, then it seems very likely that Partner B is, for example, not capable of being in the appropriate subjective mental state that counts as giving consent, regardless of what we take the content of this mental state to be.

The third is that most children do not have the decision-making capacity of an average 16-year-old, which I have been treating as a rough benchmark for the kind of decision-making capacity a person needs in order to be able to give morally valid consent in the domain of sex. (Some children of course might – but it seems fairly clear to me that the *average* 8-year-old child does not have a decision-making capacity that approximates that of a 16-year-old).

So the advocate of the Consent Explanation should say the following about sexual activity involving children: if the wrong of rape has to do with consent rather than experiential harm, we need an account of why it is wrong to have sex with children which is grounded in consent rather than harm. And such an account is available to us: it is wrong to have sex with children because, in most cases, a child is not capable of giving morally valid consent.

However, given what I have said about cases involving people with moderate intellectual disabilities, the advocate of the Consent Explanation faces a problem. I argued that in order to accommodate our intuitions about the kinds of cases in which it is permissible to have sex with a moderately intellectually disabled person, in a way that is consistent with the spirit of the

Consent Explanation, the best move the advocate of such an explanation could make is the move to consent*. This move is the following:

1. In cases where Partner B is not capable of giving morally valid consent, the legitimizing feature of sexual activity is consent*.
2. To consent* is to indicate by your behaviour that sexual activity is both desired and will be engaged in voluntarily.
3. If Partner B is not capable of giving morally valid consent, but does indicate by her behaviour that sex is both desired and will be engaged in voluntarily (gives consent*), then sex with Partner B is morally permissible.

It should be clear now what the problem is: there are possible cases of sexual activity involving children where the child in question gives consent*. But we tend to think that even if this is true, it is wrong to have sex with a child, and if the person who has sex with a child is an adult, then furthermore the adult does something morally blameworthy.¹

However, as I have argued, if it is true that a person with moderate intellectual disabilities gives consent*, we should (at least sometimes) hold that sex with that person is permissible (and the plausibility of this claim is supported by our intuitions in a range of cases). So in order to keep

¹ Cases involving two consenting* children are slightly more complicated, for the reason that in such cases the perpetrator may not be morally blameworthy, because he is not responsible for the cognitive impairment (childhood) which is the cause of the fact that he fails to believe (when he should believe) that Partner B does not give morally valid consent. However, I shall leave such cases aside because I think the Consent Explanation advocate can account for such cases in a manner that is consistent with our intuitions. She can simply say neither Partner A nor Partner B is blameworthy, but both partners do something morally wrong, and therefore we should prevent the activity if possible. And it does seem intuitive to say that we should prevent two 8-year-olds from engaging in sexual activity of the kind I have been referring to, even if both partners appear to desire and enjoy the activity.

the best explanation available to her of our intuitions about cases involving people with moderate intellectual disabilities, while resisting the claim that there are permissible cases of sexual activity involving children, the Consent Explanation advocate needs to point to a morally relevant difference between children and people with moderate intellectual disabilities.

2. Morally relevant differences between children and people with moderate intellectual disabilities

The relevant similarity between children and people with moderate intellectual disabilities is the following: both are currently not capable of giving morally valid consent to sex. In both cases, there is the possibility of consent*. But there is an obvious relevant difference: most children will become someone who is capable of giving morally valid consent to sex, whereas most people with moderate intellectual disabilities will not.

Levy raises this important difference in his paper “What (if Anything) is Wrong With Bestiality?” (Levy, 2003). As he points out, we face a dilemma: if we argue that bestiality is permissible in cases where an animal gives consent*, then we should also argue that paedophilia is permissible in cases where a child gives consent*. For my purposes, the dilemma is this: if we argue that sex with a person who has moderate intellectual disabilities is permissible when such a person gives consent*, we should also argue that paedophilia is permissible in cases where a child gives consent*. This problem is the problem that the advocate of the Consent Explanation faces.

The move Levy makes is the following: we can in fact hold that bestiality is permissible in cases where an animal gives consent*, while still holding that paedophilia is morally impermissible even when a child gives consent*. Levy argues that paedophilia is impermissible because a child cannot give morally valid consent on the grounds that:

[I]f they merely consent* in their...underdeveloped state, there is a high probability that they will, when they come to possess full cognitive ability, regret their consent*; indeed, they may be traumatized or physically damaged by the memory. Thus it is appropriate to apply the high standard of informed consent to sexual relations between (normal) human beings; since children are incapable of such informed consent, paedophilia is impermissible. (Levy, 2003, pg. 447)

Can an advocate of the Consent Explanation make use of Levy's argument? It is important to remember here that the Consent Explanation advocate is committed to the claim that if non-consensual sex is wrong, it is wrong for reasons to do with consent *rather than* experiential harm. So she cannot refer to the fact that a child may be traumatized or physically damaged. If this were of course true, then the act which traumatized or damaged the child would be wrong. But it would be wrong for reasons to do with harm to the child, not for reasons to do with the child's lack of consent.

So what about Levy's alternative claim: the claim that it is wrong to engage in sexual activity with a child because there is a high probability that the child will come to regret her consent*? The advocate of the Consent Explanation cannot appeal to this either. You cannot come to regret

something without experiencing that regret. And you do not regret something without this regret counting as a harmful experience (it is never pleasant to be in a state of regret, for example). So again, if it is true that it is wrong to have sex with a child for the reason that the child will come to regret her consent*, this is a reason that has to do with experiential harm. And so if the Consent Explanation advocate is committed to the claim that non-consensual sex is wrong for reasons to do with consent *rather than* experiential harm, she cannot make use of Levy's argument in an attempt to forestall the move to the claim that paedophilia is sometimes permissible.

3. What about children who won't be autonomous in future?

One further problem that both Levy and the Consent Explanation advocate face is that even if everything Levy says is true, there are cases which it will fail to capture. These cases have the following structure: they involve a sexual act with a child who consents* but cannot give morally valid consent. But it is also true, for whatever reason, that the child will not come to possess full cognitive ability, and therefore will not come to regret her consent. For example, the child might have a terminal illness. Or they might be unlikely to reach adulthood for some other reason. Below, I present two cases which illustrate the problem:

Carer: Toby is ten. He is terminally ill, and it is almost certain that he will die within the next month. He expresses a strong desire to have sex before he dies. His carer, Sarah,

whose motives are entirely altruistic, has sex with Toby, and Toby consents*. Toby dies soon after, and so he never regrets his consent*.

Killer: Peter intends to engage in sexual activity with a consenting* 8-year-old, and then kill her. So, we should not expect that the 8-year-old will suffer any future harm to do with consenting*. It is of course wrong to kill her, but the fact that he kills her renders the previous sexual activity morally permissible, because there is no longer any possibility that the 8-year-old child will come to regret her consent*.

In both cases, we cannot make use of the argument that sex with Toby or sex with the 8-year-old is wrong because there is a high probability that either will come to regret their consent*. In **Carer**, there is a very low probability that Toby will come to regret his consent*. In **Killer**, there is no possibility whatsoever that the child will come to regret her consent*. But these cases do not seem morally permissible (at least, while the first case might be arguably permissible, the second case is clearly not a case of morally permissible sex). In fact, in the case of **Killer**, the result is clearly absurd. It should not be the case that killing a child renders previous sexual activity with that child morally permissible.

Levy does not address cases like these in particular, but he does address cases in which it is true that Partner B is not capable of consent, but does consent*, and will not come to regret her consent*. The cases he addresses involve children with intellectual disabilities. Levy argues that while it is possible to imagine cases like this – cases which will not result in direct harm to the

child in question – such cases are wrong on virtue-ethical grounds (Levy, 2003, pg. 449). Here is what he says about such cases:

We will object to the use of the handicapped (*sic*) for sex on the grounds that engaging in such sexual activity would tend to inculcate undesirable habits and dispositions in the agent. That is, the agent would tend to acquire the disposition to treat persons beings (*sic*) as mere objects, or to apply a standard lower than that of informed consent to sexual relations with persons. (Levy, 2003, pg. 449)

A useful thing about Levy's claim is that we can also understand it in a way that is sympathetic to rule-consequentialist considerations (this will be useful when it comes to considering what the best version of the Consistent Harm Explanation should look like). For example, we may object to sexual activity with those who are incapable of consent, but do consent* and will not come to regret their consent*, on the grounds that a rule against such behaviour is likely to prevent greater future harm. We may object to this for reasons similar to those Levy appeals to: permitting such behaviour may well mean that agents acquire dispositions to apply a standard lower than that of informed consent to sexual relations with (fully-fledged autonomous) persons.

However, it is not clear to me that Levy's argument works, whether we give it his virtue-ethical reading or the rule-consequentialist reading. For example, consider cases involving paedophiles. Paedophiles are by definition sexually attracted to children – and most are not sexually attracted to adults at all. So it is not clear how permitting paedophiles to engage in sexual activity with consenting* children who will not come to regret their consent* will make it likely that the

paedophile applies a standard lower than that of informed consent to sexual relations with a fully-fledged autonomous adult. A paedophile of the kind I have described is unlikely to attempt to engage in sexual relations with adults at all.

But the further problem for the advocate of the Consent Explanation is this: even if we accept Levy's argument, on whatever grounds, she cannot avail herself of it. As I stated in Chapter 2, Section 1.4, there are two major differences between Consent Explanations and Consistent Harm Explanations. The first difference is that they disagree about whether Partner B is always harmed, and therefore disagree about whether *Partner B in particular* has a complaint against Partner A. Consent Explanations will hold that Partner B was wronged (either because her rights were violated, or because her rights were violated and so she was harmed). Consistent Harm Explanations will hold that Partner B was not harmed, and therefore Partner B was not wronged (even though Partner A actually did something wrong).

But if we accept Levy's argument, then the reason that sex with intellectually disabled children is wrong is not because you wrong the child – but rather because it will tend to inculcate undesirable habits and dispositions in Partner A (the person who has sex with the child). So Levy's argument, even if effective, speaks in favour of a Consistent Harm Explanation rather than a Consent Explanation.

The second difference between the two views is the following: Consent Explanations treat Consent as foundational. What I mean is that according to both the Consent Explanation and the Equivalent Harm Explanation, it is necessarily the case that non-consensual sex is morally

wrong. However, for an advocate of the Consistent Harm Explanation, it is merely contingently the case. This is true because if we were to find out, for example, that acts of non-consensual sex as a type do not typically cause harm (or if we could bring it about that they don't) then the justification for a rule prohibiting such acts would be undermined. Furthermore, we might discover that even if such acts typically do cause harm, there are other reasons why we ought not to treat non-consensual sex as morally wrong *as a rule*.

But it seems like if we were to discover that sexual activity of the kind Levy is worried about does not tend to inculcate undesirable habits and dispositions in partner A, then we should drop his objection. So it is not true, then, that non-consensual sex with the kinds of partners Levy refers to is necessarily wrong. It is merely contingently wrong, and again, this speaks in favour of (though is not a conclusive reason in favour of) the Consistent Harm rather than the Consent Explanation.

4. A new approach?

I do not mean to argue here that it is permissible to have sex with a child who consents* if she will not grow up to be an autonomous agent, and therefore will not regret the fact that she consented*. It seems quite clear to me that we should treat most, if not all, sexual activity of this type as morally wrong. Instead, I take these cases to be a problem for the advocate of the Consent Explanation.

The reason such cases are a problem is that best way for the advocate of the Consent Explanation to accommodate intuitively permissible cases of sex involving people with intellectual disabilities was to claim that in cases involving those incapable of consent, consent* is the legitimizing feature of sexual interaction. However, this move poses a problem because it also licenses sex with children who consent*. There are moves available to avoid this problem – which Levy outlines – but as I have argued, the advocate of the Consent Explanation cannot avail herself of those moves.

So now she must hold one of two positions: she must either claim that in actual fact, sexual activity with people with moderate intellectual disabilities is always morally impermissible, even in the face of cases which make this claim seem counter-intuitive. Or, she must claim that there is some reason why we should exclude cases involving children and those with moderate or profound intellectual disabilities from an explanation of the wrong of rape in terms of consent rather than experiential harm.

One possible version of the latter move is to adopt a two-tier approach. For example, we hold that in cases where Partner B is not capable of giving morally valid consent, it is wrong for A to have sex with B just in case B is (experientially) harmed. But in cases where Partner B is capable of giving morally valid consent, it is wrong for Partner A to have sex with Partner B just in case B does not give morally valid consent. Essentially, this involves carving off **No General or Particular Capacity** cases of the kind I described from **Both General and Particular Capacity** and **General but no Particular Capacity** cases.

One motivation for such a move might be the following: the Consent Advocate agrees that autonomy is important. But she need not reject the claim that harm is also an important consideration. So what she can say is that in cases where Partner B is an autonomous agent, it is wrong for A to have non-consensual sex with her, for reasons to do with consent (like autonomy) rather than harm. But in cases where Partner B is not an autonomous agent, sex may also be wrong for reasons to do with harm.

So the modified claim is that non-consensual sex *with an autonomous agent* is wrong for reasons to do with consent, rather than (experiential) harm. Non-consensual sex with a currently non-autonomous agent might be wrong, but if it is wrong, it is not wrong for reasons to do with consent. Instead, if sex with a non-autonomous agent causes (experiential) harm to that agent, then it is wrong for reasons to do with harm.

One problem with this move is that it fails to explain the intuitions that the Consent Explanation advocate originally relied on to motivate her view. Recall **Comatose**:

Comatose: John has sex with Anna, who is in a persistent vegetative state. It is very unlikely that she will ever wake up, she has been through menopause so there is no risk of pregnancy, and John has no STDs. Furthermore, no other person ever finds out about this event.

Anna is not an autonomous agent. She is not harmed. So according to the two-tier view, the advocate of the Consent Explanation should say that John did nothing wrong when he had sex

with Anna. But it seems clear that she should not want to say that: this case, and cases like it, are the very cases which motivated the view that the wrong of rape has to do with consent rather than experiential harm.

In the following chapter, I consider whether a version of the modified explanation – a two-tier approach – can account for cases like **Comatose**.

Chapter Seven

1. The two-tier approach

In Chapter 6, I mentioned the possibility of taking a two-tier approach, carving off **No General or Particular Capacity** cases of the kind I described from **Both General and Particular Capacity** and **General but no Particular Capacity** cases. So the new two-tier approach looks like this:

1. In cases where Partner B is capable of giving morally valid consent, or Partner B is briefly incapable (but we are treating her as autonomous) then it is wrong for Partner A to have sex with Partner B just in case B does not give morally valid consent. (And Partner A is blameworthy if he does, or should believe, that B does not give morally valid consent).
2. In all other cases, it is wrong for Partner A to have sex with Partner B just in case B suffers experiential harm. (And Partner A is blameworthy just if he does, or should, believe that B is likely to be harmed).

The appeal of this approach is the following: it allows the advocate of the Consent Explanation to carve off the cases that were a problem for her view – cases involving adults with moderate intellectual disabilities. According to the two-tier view, both **Down's** and **Alzheimer's** now come out as morally permissible. (These cases would be covered by Criterion 2, yet in neither case does B suffer experiential harm, nor is she likely to).

The two-tier approach also seems intuitively plausible – it does sound right to say that we should worry about violating the autonomy only of those who are in fact autonomous. But this does not mean we have no duties to the non-autonomous – we also have duties to avoid causing harm, and this duty explains why it is wrong to have sex with a child, or wrong (in some cases) to have sex with an adult with moderate intellectual disabilities – because in both cases, there is a high probability that the child or adult in question will be harmed.

For the advocate of the Consent Explanation, this approach has the virtue of treating consent as foundational – there are important cases (cases involving autonomous agents) where rape is morally wrongful for reasons to do with consent rather than harm. But this account also recognises that sex with non-autonomous agents can also be wrongful, even though they are not capable of consent (and therefore their consent cannot be vitiated).

There are some problems with this approach, however. Even if she adopts the two-tier view, the advocate of the Consent Explanation cannot explain why John's actions in **Comatose** are morally impermissible. In this case, which I introduced as the case which motivated the Consent Explanation, Anna is not autonomous. She is in a persistent vegetative state. So if we take the two-tier approach, Anna falls under Criterion 2, rather than Criterion 1. But Anna is not harmed, so it is not wrong for John to have sex with her. And John reasonably believes that Anna is not likely to be harmed, so he does nothing blameworthy.

In order to explain the wrong of this case, the advocate of the Consent Explanation will have to introduce a new criterion. One candidate is the following: unlike Carol in **Alzheimer's**, Anna in

Comatose was not *benefited* by the fact that her Partner had sex with her in the absence of morally valid consent. So, our replacement for Criterion 2 could be:

2*: In all other cases, it is wrong for Partner A to have sex with Partner B just in case B does not gain experiential benefit.. Partner A is blameworthy if he does, or should, believe that Partner B will not, or is not likely to, gain experiential benefit. (Conversely, then, it is permissible for Partner A to have sex with Partner B if she does gain experiential benefit and he does, or should, believe that Partner B will, or is likely to, gain experiential benefit.)

One problem with this, however, is the following: if Partner A has no obligations to Partner B grounded in autonomy, yet he does have obligations to her grounded in harm, it is not clear why he should forgo a benefit merely because Partner B will not gain experiential benefit. In general, it seems that I am not required to forgo a benefit merely because you will not also benefit (even though I may be required to forgo a benefit if you will be harmed in the process of my attempt to secure that benefit). So why should Partner A be required to forgo a benefit merely because Partner B will not benefit, if there are no other relevant moral considerations that speak against his actions?

One thing we might do here is appeal to Kantian considerations. In securing the benefit, Partner A treats Partner B as a mere means. But by hypothesis, Partner B is not an autonomous agent. So Kantian considerations should not apply. And as I argued in Chapter 6, Section 3, the Consent

Explanation advocate cannot appeal to rule-consequentialist or virtue-ethical considerations. So it seems we should retain the original version of Criterion 2.

Hence, we should stick with both our original criteria: 1 and 2 as outlined above. However, these criteria not only fail to explain **Comatose**. They fail across a range of cases. In the following section, I consider how Criterion 2 fares in comparison to our intuitions across a range of cases involving non-autonomous agents.

2. Assessing Criterion 2

Below is a table of the cases I have considered where a non-autonomous agent is the potential victim. In each I note what our intuitions tell us about the case, erring in favour of what an advocate of the Consent Explanation would say in controversial cases. For each, I note whether we think Partner A has done something intuitively wrong, whether he has done something intuitively blameworthy, whether he has done wrong according to Criterion 2, and whether he has done something blameworthy according to Criterion 2.

Table 2: Intuitions/Criterion 2

Case	Intuitively wrong?	Intuitively blameworthy?	Wrong (acc. To 2?)	Blameworthy (acc. to 2?)
Comatose	Y	Y	N	N
Sexsomnia¹	Y	N	Y	N
Gunman²	N	N	N	N
Alzheimer's	N	N	N	N
Downs	N	N	N	N
Carer	Y	Y	N	N
Killer	Y	Y	N	N

So there are several clashes between what Criterion 2 states and our intuitions. These cases are **Comatose**, **Carer**, and **Killer**. However, there is one final modification we can make to Criterion 2 in order to solve these clashes. The modification is this: we remodel Criterion 2 in a manner sympathetic to rule consequentialism.

2': It is wrong for Partner A to have sex with Partner B just in case a (moral) rule permitting A to have sex with B is likely to lead to worse overall consequences in terms of experiential harm. If A violates this moral rule, he does something wrong,

¹ You might disagree that Partner A does something wrong in **Sexsomnia**. However, I am assuming here that we should accept the distinction between wrongness and blameworthiness which I used this case to illustrate in Chapter 1, Section 1.6.

² This case is a bit of an outlier – in comparison to the other cases I have mentioned, cases like **Gunman** seem relatively unlikely. And I think intuitions about this case may well differ: it is structurally similar to the case of 'Jim and the Indians' that Bernard Williams describes in *Utilitarianism: For and Against* (Williams, 1973, pp. 97-99). However, if your intuitions differ from those I have supposed, you will probably be hostile to my view as it stands, because it is in nature consequentialist.

and if A does (or should) believe his actions will violate this moral rule, he does something blameworthy. Furthermore, if these consequences are worse for B in particular, Partner A wrongs B. If the consequences are likely to be worse overall for people other than Partner B, Partner A does something wrong, but he does not wrong B.

If we apply this criterion, I think the clashes resolve themselves. Take for example **Comatose**, **Carer**, and **Killer**. In all three, it seems like we ought to adopt a rule prohibiting, for example, sex with a person who is comatose or asleep, or sex with a child. And we should adopt such a rule because permitting such behaviour is likely to lead to situations in which a consent-incapable Partner B is in fact harmed by the fact that A has sex with her, even though in these cases in particular, B did not suffer experiential harm as a result of the fact that A had sex with her.³

One problem we introduce is this: in each particular case I have mentioned, we are now licensed to say that A does something wrongful, but we will not be licensed to say that Partner A wrongs Partner B *in particular*. I think the advocate of the Consent Explanation will have to swallow this, and this might seem troubling when we think about cases like **Comatose**. We can now no longer say that John wrongs Anna when he has sex with her while she is in a coma. But I don't take it to be a particularly big bullet to bite. It does seem plausible, according to her view, that we don't wrong non-autonomous agents by engaging in non-consensual activity with them.

³ Arguably this is not true for cases like **Carer**. But I am happy to accept that in cases like these, there is a possibility that Partner A does nothing wrong or blameworthy.

But the problem with this approach should now be obvious. In order to explain why certain instances of sexual activity involving non-autonomous agents are morally wrongful, the Consent Explanation advocate has to supplement the claim that it is morally wrong to vitiate the autonomy of autonomous agents with a claim that is exactly what the advocate of the Consistent Harm Explanation appeals to. And while one desideratum of an explanation is that it matches our intuitions across a range of cases, another desideratum is simplicity.

So the new question is this: do we really need Criterion 1 at all? Can we explain our intuitions about cases involving autonomous agents merely by appealing to Criterion 2'? I think we clearly can.

There is one important feature of the cases I have been considering which speaks in favour of adopting Criterion 2' on its own rather than the two-tier approach. The two-tier approach carved off cases involving autonomous agents (or those whom we were treating as autonomous) from non-autonomous agents. But one relevant difference between autonomous and non-autonomous agents with regards to non-consensual sex is that autonomous agents are overwhelmingly likely to be experientially harmed by non-consensual sex.

For most ordinary adults – our paradigm case of an autonomous agent – being forced to have sex against one's will causes significant psychological harm. Discovering that a person had sex with you while you were incapacitated also often causes significant psychological harm. So if we adopt only Criterion 2', it will still be true that it is wrongful for Partner A to have sex with Partner B, if Partner B is an autonomous agent. It will be wrong because non-consensual sex

with autonomous agents usually causes such agents experiential harm, and so we are justified in proposing a rule which prohibits such behaviour.

Furthermore, we still get to say that in most cases where Partner A has non-consensual sex with Partner B, and B is an autonomous agent, that A wrongs B. This is because it is usually the case that Partner B in such situations suffers experiential harm, and so the consequences of having her consent vitiated will be wrong for B in particular.

So the (two-tier) Consent Explanation now seems unmotivated – we don't need to include Criterion 1 in order for our theory to match our intuitions across a range of cases involving both autonomous and non-autonomous agents. And we don't need it in order to be licensed to make the claim that in most cases where Partner A has non-consensual sex with an (autonomous) Partner B, A wrongs B. So are there any reasons why we might retain Criterion 1, and thus opt for a Consent Explanation rather than a Consistent Harm Explanation of the wrongfulness of rape?

3. Should we retain Criterion 1?

One reason why we might retain Criterion 1 is the following: while it is true that Criterion 2' is sufficient to explain our intuitions across a range of cases, Criterion 1 does serve an explanatory

purpose. It highlights the fact that there is something distinctively wrong about having one's consent vitiated.⁴

One reason you might accept that this justifies the role that Criterion 1 plays in the explanation of the wrongfulness of rape is if you are antecedently committed to the view that there is something distinctively morally wrong about vitiating a person's consent. However, this will not suffice. Our question is not 'what would someone who is committed to the moral importance of autonomy say about which instances of sexual activity are wrong and why' but rather 'what should we say about the wrongfulness of rape? Is the fact that having non-consensual sex with an autonomous agent vitiates her consent the wrong-making feature?'

So we want an explanation for why we should retain Criterion 1 which does not *presuppose* the moral importance of refraining from vitiating the consent of an autonomous agent. Is there something distinctive about autonomy violations which mean that, even though we do not need a criterion of morally wrong actions which appeals to them to explain our intuitions, we should nevertheless retain such a criterion because it serves a useful explanatory purpose?

In "Sex, Law and Consent," Robin West argues that there is at least one fundamental difference between acts which override the consent of the victim, and acts which are harmful, but do not override consent. She argues that this difference is not a difference in the *degree* of harm –and

⁴ Parfit makes a move similar to this in Chapter 8 of "On What Matters" (Parfit, 2001, pp. 189-190). He argues that the Consent Principle, which states: "It is wrong to treat anyone in any way to which this person could not rationally consent" (pg. 181) is explanatory, even in situations where it is superfluous as a criterion (see pg. 190). However (as I argue in the rest of this section) at least in the particular domain of sexual consent, it is difficult to see how such a principle could serve a necessary explanatory role. All the reasons why we think it is bad to vitiate a person's consent in the domain of sexual consent are reasons to do with the fact that the victim is likely to suffer experiential harm.

that in fact some acts which are harmful but do not override consent may be more harmful than those which do. Rather, she claims that there is a difference in the qualitative experiences between the victims of such acts, and that because of this we have reason not to conflate non-consensual sex with harmful (but consensual) sex (West, 2008).

This seems clearly right. For example, West explains the experience of forcible non-consensual sex in the following way:

The physical invasion of the self and the body, the interruption and denial of sovereignty over one's physical boundaries that the invasion entails, the fear of death foremost in the mind of the victim, the sure knowledge that one's will is irrelevant, the immediate and total reduction of one's self to an inanimate being for use by another, and the sustenance of multiple injuries, both vaginal and non-vaginal – all of this, simultaneously experienced, typify – constitute – the experience (West, 2008, pg. 10).

However, I think that even if West is right and there is a difference between the qualitative experiences of autonomous agents whose consent is vitiated and autonomous agents who experience harmful (but consensual) sex; the Consent Explanation advocate cannot avail herself of this difference in order to justify the inclusion of Criterion 1 in her explanation of which instances of sexual activity are morally permissible.

The reason for this is the following: the considerations West appeals to are all to do with the harmful nature of the experience. But the point of the Consent Explanation was to explain the

wrong of rape in terms of consent *rather than* experiential harm. Of course, a Consistent Harm Explanation advocate need not reject the claim that there are differences in the qualitative experiences that the victims of certain types of acts suffer. But there seems no reason why this should play a role in the explanation of why certain types of acts are morally wrong.

For example, you might think that physical harms and psychological harms are qualitatively different. But even if this is true, it does not follow that your theory needs two principles: one which states that it is wrong to cause someone physical harm, and one which states that it is wrong to cause someone psychological harm. The explanation of the wrong of both kinds of acts (acts which cause physical harm and acts which cause psychological harm) is still simply that they are wrong because they cause harm.

So I think we should reject Consent Explanations for the wrongfulness of rape. Non-consensual sex may be morally wrongful, but it is wrongful for reasons to do with experiential harm, not reasons to do with consent. However, you might think that the notion of consent still plays some role in the explanation of the wrongfulness of rape. This might be true if you adopt Criterion 2', but think that the best rule we should adopt is a rule which refers to consent. This move is the move that the Consistent Harm Explanation advocate makes. In the following sections, I explain how it might work, and consider whether the cases I have described give us reasons against making such a move.

4. Why we should reconsider the Consent Rule

At the beginning of this dissertation, I identified this approach as the Consistent Harm approach. One advocate of this approach is Alan Wertheimer, who argues in *Consent to Sexual Relations* that we should adopt principles of morally valid consent (PVC), but that in order to decide which principles we should adopt, “we will examine the costs and benefits of different versions of PVC and adopt those principles that generate the best consequences when all things are considered” (Wertheimer, 2003, pp. 123- 124).

There are obviously many possible versions of this view. Which principles of morally valid consent you adopt will of course depend on how you weigh their costs and benefits. But one thing that it does assume is that what we should be looking for are not just rules that govern our sexual behaviour, but rules that necessarily include a reference to consent (even if our reasons for invoking consent are to do with harm rather than autonomy). I obviously cannot consider all possible versions here, but I do want to make one important point.

In the first chapter, I identified a possible definition of which sexual acts were impermissible (based on law), and in Chapter 2 I described different possible explanations of why such acts were impermissible. So as I described them, Consent and Consistent Harm Explanations were identical at the level of description of which acts are wrong, but differed at the level of explanation.

If we assume that the correct account of the principles of valid consent *for morality* mirror the legal definition, are these the moral principles we should adopt? For example, should we agree that when Partner A has sex with Partner B without her morally valid consent, he does something wrong? And that if he believes (or should believe) she does not consent, he does something blameworthy?

The Consistent Harm Explanation advocate can of course accept this view – the difference is that he accepts it for reasons that differ from the reasons the Consent Explanation advocate gave. For example, an advocate of the Consistent Harm Explanation may hold that Criterion 2' is the right criterion for which sexual acts count as wrong and/or blameworthy, but also maintain that the right rule is a rule which prohibits sexual activity in the absence of morally valid consent. For example:

2': It is wrong for Partner A to have sex with Partner B just in case a (moral) rule permitting A to have sex with B is likely to lead to worse overall consequences in terms of experiential harm. If A violates this moral rule, he does something wrong, and if A does (or should) believe his actions will violate this moral rule, he does something blameworthy. Furthermore, if these consequences are worse for B in particular, Partner A wrongs B. If the consequences are likely to be worse overall for people other than Partner B, Partner A does something wrong, but he does not wrong B.

Is replaced by:

Consent Rule: It is wrong for Partner A to have sex with Partner B if B withholds, or is not capable of giving or withholding, consent. If A violates this moral rule, he does something wrong; and if A does (or should) believe his actions will violate this moral rule, he does something blameworthy. Furthermore, if these consequences are worse for B in particular, Partner A wrongs B. If the consequences are likely to be worse overall for people other than Partner B, Partner A does something wrong, but he does not wrong B.

If we accept a rule like this, then we can accept that consent plays a role in the definition of which instances of sexual activity are morally wrong. But because we accept this for reasons to do with experiential harm rather than consent, we have moved from the Consent Explanation of the wrong of rape to a version of the Consistent Harm Explanation.

The assumption which licenses the move from Criterion 2' to the **Consent Rule** is the following: a rule permitting Partner A to have sex with Partner B in any circumstances where B withholds, or is not capable of giving or withholding, consent is likely to lead to worse consequences than a rule which prohibits A's behaviour in those circumstances.

However, I think we should reject this assumption. The reasons we should reject it are clear: there are circumstances in which a rule permitting Partner A to have sex with Partner B when Partner B withholds, or is not capable of giving or withholding, consent would not lead to worse overall consequences.

Consider **Alzheimer's**: it is not clear at all why a rule permitting David to have sex with Carol is likely to lead to worse overall consequences. It is not clear why a rule permitting A to have sex with B in circumstances which are relevantly similar will lead to worse overall consequences. Furthermore, if we accept the **Consent Rule**, then we should say that David does something both morally wrong and blameworthy (although he does not wrong Carol). And this seems counter-intuitive.

Now let's consider **Down's**. It is not clear why a rule permitting Frank to have sex with Eve is likely to lead to worse overall consequences. It is not clear at all why a rule permitting A from having sex with B in circumstances which are relevantly similar will likely lead to worse overall consequences. (In fact, a rule prohibiting such behaviour is likely to lead to some pretty bad consequences, as the evidence from the disability literature shows). Furthermore, if we accept the **Consent Rule**, then we should say that even though Frank does nothing blameworthy, he does something wrong – and if he does something wrong, I have argued, we have reason to try and prevent his actions. But these claims seem counter-intuitive.

One thing we could say is that whenever we adopt a rule, this rule will be necessarily imprecise (that is, we should not expect a general rule to get every particular case right, and in the situations where a rule gets a case wrong, it is simply the case that Partner A is unfortunate in that he is the one who happens to be shouldering the burden of a rule that makes everyone else, in general, better off). However, I think this is a particularly problematic thing to say about this situation, for the following reason: the cases I have described illustrate that the kinds of people who are likely to shoulder the burden of the rule are people with intellectual disabilities.

I think this is a problem for Rawlsian reasons. If we apply the **Consent Rule**, then members of one particular group – and only members of that group – will never be able to permissibly exercise their welfare right to enjoy sexual activity which they both desire and benefit from. Furthermore, members of this group (people with intellectual disabilities) are already counted among those in our society who are the least advantaged. These considerations speak strongly against adopting the Consent Rule as a moral rule.

However, I will not argue here that we have definitive reason to reject such a rule. One important feature of the Consistent Harm Explanation was that unlike the Consent Explanation, the Consistent Harm Explanation makes it *contingent* that we should have rules that mention consent. I have provided what I take to be reasons against adopting a rule which mentions consent. But in order to argue that we ought conclusively to reject such a rule, we would need a full accounting of the likely costs and benefits.

One thing I wish to note is this, however: it might be tempting to think that the best law describing which instances of sexual activity are legally wrong should invoke consent, and that if this is true, the best moral rule should also invoke consent. I have not attempted to discuss which legal rules we should adopt, but I think that even if there are reasons why the law should invoke consent, it does not follow that the best moral rule should invoke consent. I think this is true for the following reason: the law and morality have different concerns. One thing, for example, that the law is concerned with is to allow us to successfully prosecute cases of wrongful sex, but also that this does not result in the fact that innocent people could be easily prosecuted of a particular

crime. Such considerations may not be considerations that we should take into account when adopting a moral rule that plays the role of an explanation, however.

5. Conclusion

In this dissertation, I have argued that we should reject the dominant class of views about what constitutes the wrong of rape. (The dominant views being that the wrong of rape has to do with consent rather than harm). Rather, I have argued that such views – which I have classed as Consent Explanations – are in an unstable position. Either they cannot explain cases like **Comatose** (the very cases which motivated such explanations in the first place) or they must supplement their criterion for what counts as morally wrongful sex with a criterion that refers to harm rather than consent.

But the best version of this new (harm-related) criterion is now all we need to explain the wrongfulness of rape. If so, we should reject the consent criterion (Criterion 1) as being explanatorily superfluous. This licenses a move to the Consistent Harm Explanation, which still allows us to invoke the notion of consent, but rejects the idea that the wrongfulness of rape is grounded in considerations to do with consent rather than experiential harm.

However, I think the very same cases which I presented as a challenge to the Consent Explanation also pose problems – though not decisive – for the Consistent Harm Explanation. If it turns out such problems are decisive, then consent should play no role at all in the explanation of the wrongfulness of rape. But I think the most important thing that I have shown here is that at

the very least, considerations to do with consent rather than harm cannot ground an explanation of the wrongfulness of rape.

Appendix A: List of Cases

Comatose: John has sex with Anna, who is in a persistent vegetative state. It is very unlikely that she will ever wake up, she has been through menopause so there is no risk of pregnancy, and John has no STDs. Furthermore, no other person ever finds out about this event.

Actress: Jane does want to have sex with Adam, but she also enjoys role-play – in particular, she enjoys pretending she is having sex against her will. She is a very good actress, and she is acting as though she does not want to have sex. Adam falls for her act – he fully believes that Jane does not want to have sex with him, throughout the entire process. Adam and Jane have sex. Neither Jane, Adam, nor any other person is harmed by this fact.

Sexsomnia: Joe is a sexsomnia. That means that he sometimes has sex while he is asleep – and while he is asleep, he is unable to form beliefs. One night while Joe is lying next to his wife Andrea, he has sex with her while she is asleep. Halfway through the act, Andrea wakes up and is aware of what is happening, but she is unable to stop Joe.

Gunman: a gunman walks into the hospital and informs John* that unless he has sex with Anna*, who is in a persistent vegetative state, that he (the gunman) will kill ten other patients.

Alzheimer's: David (Partner A) and Carol (Partner B) have been married for 50 years. Carol is in the middle stages of Alzheimer's, and David is her main carer. She is still able to live at home because of David's support. Carol's Alzheimer's is advanced enough that she is considered incapable of making informed decisions about, for example, her medical care, but she is otherwise physically healthy. She also takes enjoyment from certain activities: painting pictures, picking flowers, going for walks. One activity she enjoys is sex with her husband. David also enjoys sex with his wife, both for his own sake and because he deeply cares for her, and sex seems to be one of the pleasures she is still able to enjoy. It is their wedding anniversary, and Carol verbally expresses the desire to have sex. Carol and David have sex.

Down's: Frank (Partner A) and Eve (Partner B) are both 25. Both of them have Down's syndrome, and they are approximately equal in terms of their mental capacities. (They both have the functioning of an average 8-year-old). They have known each other for many years, and are in love. They decide to get married. They both receive education about sexuality at the appropriate level, and Eve is on birth control. They both have decided that after their marriage they would like a sexual relationship, and their family and carers are supportive. On their wedding night, after a discussion about what they want to do in which Eve verbally expresses the desire for sex, they have sex. This is the first time they have sex with each other.

Carer: Toby is ten. He is terminally ill, and it is almost certain that he will die within the next month. He expresses a strong desire to have sex before he dies. His carer, Sarah, whose motives are entirely altruistic, has sex with Toby, and Toby consents*. Toby dies soon after, and so he never regrets his consent*.

Killer: Peter intends to engage in sexual activity with a consenting* 8-year-old, and then kill her. So, we should not expect that the 8-year-old will suffer any future harm to do with consenting*. It is of course wrong to kill her, but the fact that he kills her renders the previous sexual activity morally permissible, because there is no longer any possibility that the 8-year-old child will come to regret her consent*.

Bibliography

- Alexander, L. (1996). The moral magic of consent (II). *Legal Theory* 2 (3):165-174
- Alexander, L. (2014). The ontology of consent. *Analytic Philosophy* 55 (1): 102-113
- Appel, J.M. (2010). Sex rights for the disabled? *Journal of Medical Ethics* 36 (3): 152-154
- Archard, D. (1998). *Sexual consent*. Boulder, CO: Westview Press
- Archard, D. (2007). The wrong of rape. *Philosophical Quarterly* 57 (228):374–393
- Beliotti, R.A. (1993). *Good Sex*. Lawrence, KS: Kansas University Press
- Benedet, J., & Grant, I. (2007). Hearing the sexual assault complaints of women with mental disabilities: consent, capacity, and mistaken belief. *McGill Law Journal* 52: 243-289
- Buchanan, A. & Brock, D.W., (1989). *Deciding for Others: The Ethics of Surrogate Decision Making*. Cambridge: Cambridge University Press
- Di Nucci, E. (2011). Sexual Rights and Disability. *Journal of Medical Ethics* 37 (3):158-161.
- Dougherty, T. (2013). Sex lies and consent. *Ethics* 123 (4): 717-744
- Doyle, S. (2010). The notion of consent to sexual activity for persons with mental disabilities. *Liverpool Law Review: A Journal of Contemporary Legal and Social Policy Issues* 31 (2): 111-135
- Dworkin, Gerald. (1988). *The Theory and Practice of Autonomy*. Cambridge: Cambridge University Press.
- Estrich, S. (1986). Rape. *Yale Law Journal* 95: 1087–1184
- Feinberg, Joel. (1986). *Harm to Self*. New York: Oxford University Press
- Gebhard, P. H. (1973). Sexual behavior of the mentally retarded. In E E de la Cruz & G. D. La Veck (eds.), *Human Sexuality and the Mentally Retarded*. New York: Bruner/Mazel, pp. 29-49
- Great Britain Home Office (1999) *Review of Sex Offences: report of conference on the Capacity to Consent (Striking the balance between freedom and protection)* London Office
- Greenspan, S. (2002). A sex police for adults with “mental retardation”? Comment on Spiecker and Steutel. *Journal of Moral Education* 31 (2): 171-179.

- Grisso, T., & Appelbaum, P.S. (1998). Assessing competence to consent to treatment: a guide for physicians and other health professionals. *Psychiatry Publications and Presentations* Paper 314
- Haavik, S. F., & Menninger, K. (1981). *Sexuality, law, and the developmentally disabled person: Legal and clinical aspects of marriage, parenthood, and sterilization*. Baltimore: P.H. Brookes Pub. Co.
- Hawkins, J. (2014). Well-Being, Time, and Dementia. *Ethics* 124 (3): 507-542.
- Hillman, J. (2012). *Sexuality and Ageing: Clinical Perspectives*. New York: Springer
- Hurd, H.M. (1996). The Moral Magic of Consent. *Legal Theory* 2 (2):121-146.
- Kaeser, F. (1992). Can people with severe mental retardation consent to mutual sex? *Sexuality and Disability* 10 (1): 33-42
- Kaeser, F. (1996) A Survey of the perceptions of twenty-three service providing agencies on the sexual behaviors of persons with severe or profound mental retardation. *Sexuality and Disability* 14 (4): 309-320
- Kennedy, C.H., & Niederbuhl, J. (2001). Establishing criteria for sexual consent capacity. *American Journal of Mental Retardation* 106 (6): 503-510
- Kershnar, S. (2001). The moral status of harmless adult-child sex. *Public Affairs Quarterly* 15 (2): 111-132
- Kluge, E.H. (1987). After "Eve": whither proxy decision-making? *Canadian Medical Association Journal* 137: 715a - 720
- Leicester, M., & Cooke, P. (2002). Rights not restrictions for learning disabled adults: A response to Spiecker and Steutel. *Journal of Moral Education* 31 (2): 181-187
- Levy, Neil (2003). What (if anything) is wrong with bestiality? *Journal of Social Philosophy* 34 (3):444-456.
- Lichtenberg, P.A., & Strzpek, D.M. (1990). Assessments of institutionalized dementia patients' competencies to participate in intimate relationships. *Gerontologist* 30 (1): 117-120
- Lyden, M. (2007). Assessment of sexual consent capacity. *Sexuality and Disability* 25 (1): 3-20.
- MacKinnon, C.A. (1989). *Toward a Feminist Theory of the State*. Cambridge, MA: Harvard University Press
- MacKinnon, C.A. (1987). *Feminism Unmodified: Discourses on Life and Law*. Cambridge, MA: Harvard University Press

- McGregor, J. (1996). Why when she says no she doesn't mean maybe and doesn't mean yes: a critical reconstruction of consent, sex, and the law. *Legal Theory* 2 (3): 175-208.
- Miller, F.G. & Wertheimer, A. (eds.) (2010). *The Ethics of Consent: Theory and Practice*. Oxford: Oxford University Press.
- Murphy, G.H. (2003). Capacity to consent to sexual relationships in adults with learning disabilities. *Journal of Family Planning and Reproductive Health Care* 9 (3): 148-149
- Murphy, G.H., & O'Callaghan, A. (2004). Capacity of adults with intellectual disabilities to consent to sexual relationships. *Psychological Medicine* 7: 1347-1357
- Myerowitz J. H. (1971). Sex and the mentally retarded. *Medical Aspects of Human Sexuality* 5: 94-118
- O'Connor, J. (2011). National Disability Agency Literature Review – Crisis Pregnancy <<http://nda.ie/Policy-and-research/Research/Research-publications/Literature-Review-Crisis-Pregnancy/>>
- O'Neil, R. (1983). Determining proxy consent. *Journal of Medicine and Philosophy* 8 (4): 389-403
- Parfit, D. (2011). *On What Matters*. Oxford: Oxford University Press
- Paul, L. A. (2015). What you can't expect when you're expecting. *Res Philosophica* 92 (2): 1-23
- Primoratz, Igor (2001). Sexual morality: Is consent enough? *Ethical Theory and Moral Practice* 4 (3): 201-218.
- Primoratz, Igor (2013). Sexual Morality. In H. LaFollette (ed.), *The International Encyclopedia of Ethics*. Wiley-Blackwell
- Reed, E. (1997). Criminal law and the capacity of mentally retarded persons to consent to sexual activity. *Virginia Law Review* 83 (4): 799-827
- Richardson, J.P., & Lazur, A. (1995). Sexuality in the nursing home patient. *American Family Physician* 51 (1): 121-124
- Samowitz, P. (2010). A sexuality policy that truly supports people with disabilities. *Impact* 23 (2): 18-20
- Singer, P. (2001). Heavy petting. *Nerve* (March/April). <www.nerve.com/Opinions/Singer/heavyPetting>
- Smart, J.J.C., & Williams, B. (1973) *Utilitarianism: for and against*. Cambridge: Cambridge University Press

Spena, A. (2010). Harmless Rapes? A False Problem for the Harm principle. *Diritto & Questioni Pubbliche*, 10: 497-524

Spiecker, B., & Steutel, J. (2002). Sex between people with "mental retardation": an ethical evaluation. *Journal of Moral Education* 31 (2): 155-169

Stark, Cynthia A. (2000). Hypothetical consent and justification. *Journal of Philosophy* 97 (6):313-334.

Tarzia, L., D. Fetherstonhaugh, D., & Bauer, M. (2012). Dementia, sexuality and consent in residential aged care facilities. *Journal of Medical Ethics* 38 (10): 609-613

Thomas, L. (2002). Sexual desire, moral choice, and human ends. *Journal of Social Philosophy* 33 (2):178–192

Wade, H. (2002). Discrimination, sexuality and people with significant disabilities: issues of access and the right to sexual expression in the United States. *Disability Studies Quarterly* 22 (4): 9-27

Wertheimer, A. (2001). Intoxicated consent to sexual relations. *Law and Philosophy* 20 (4):373-401

Wertheimer, A. (2003). *Consent to sexual relations*. Cambridge: Cambridge University Press

West, R. (2008). Sex, law and consent. *Georgetown Law Faculty Working Papers*. Paper 71

Wrigley, A. (2007). Proxy consent: moral authority misconceived. *Journal of Medical Ethics* 33 (9): 527-531