

## **Sexual Consent and Having Sex Together**

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

**Key Words:** Consent; Sex; Normative Powers; Rape; Joint Action; Teamwork

## 1. Consent, rights, and ideal sex

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

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

To be clear, the claim that consent is unnecessary means that it is possible to have sex with someone without their consent, without thereby infringing that person's moral rights.<sup>1</sup> The No Consenter believes that if sex is in some sense *ideal*, then even absent each partner's consent, neither partner infringes the other's sexual rights. Ideal sex, according to the No Consenter, involves a particular kind of mutuality that makes it a joint action—something that sexual partners do *together*. Consent, by contrast, is something we give to the actions of other persons—to things that others do *to* us, rather than *with* us. Describing sex that exhibits the relevant mutuality as sex that women want, MacKinnon captures the No Consenter's view in characteristically vivid

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<sup>1</sup> John Gardner, 'The Opposite of Rape' (2018) 38 *Oxford Journal of Legal Studies* 48; Catharine A MacKinnon, 'Rape Redefined' (2016) 10 *Harvard Law & Policy Review* 431; Tanya Palmer, 'Distinguishing Sex from Sexual Violation: Consent, Negotiation and Freedom to Negotiate' in Alan Reed and others (eds), *Consent: Domestic and Comparative Perspectives* (Routledge 2017).

language: ‘Consenting is not what women do when they want to be having sex... No one says, “We had a great hot night, she (or I or we) consented.”’<sup>2</sup>

To see that Gardner, MacKinnon and Palmer each defend the No Consent Thesis, consider what each of them says about consent. MacKinnon claims that ‘when a sexual interaction is equal, consent is not needed and does not occur because there is no transgression to be redeemed.’<sup>3</sup> Similarly, Palmer claims that

while consent is clearly absent from the worst sexual encounters it will also be absent in the most positive encounters jointly instigated by mutually active partners, because both partners are in a state beyond consent, a state of active involvement rather than reaction or submission.<sup>4</sup>

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

Here I am advancing the more explosive proposition that, when the sexual going is good, consent is also unnecessary. Before you explode, bear in mind that my case proceeds, not from the thought that consent is too high an expectation for our sex lives, but rather that it is too low an expectation. Ideally, I suggest, the question of consent does not arise between sexual partners, for the question of consent belongs to sex individualistically, even solipsistically, conceived as something that one

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<sup>2</sup> MacKinnon (n 1) 450.

<sup>3</sup> *ibid* 476.

<sup>4</sup> Palmer (n 1) 13.

person does to another (even if, in the course of their sexual encounter, the individuals concerned take scrupulously equitable turns in being the doer and the done to). The proper antidote to this somewhat melancholy conception of sex, or of what sex can be, is not to replace what Lacey calls the “individualised notion of consent” with some refurbished (and perhaps less individualised) notion of consent, but rather to replace the emphasis on consent, which cannot but be individualised, with an emphasis on some less individualised notions.

Teamwork is one such notion.<sup>5</sup>

As Gardner explains, the argument for the No Consent Thesis proceeds from the thought that consent is too *low* an expectation for our sex lives. Partners engaging in ideal sex do not infringe one another’s moral rights because ideal sex involves something *better* than consent—namely, the kind of mutuality that makes sex a joint action.<sup>6</sup>

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<sup>5</sup> Gardner (n 1) 60 (footnotes omitted).

<sup>6</sup> I believe, as I argue in the main text, that each of the three theorists is committed to the No Consent Thesis. It is difficult to see how else to interpret what each of them says about consent in the text accompanying fns 3, 4, and 5, above. Independently of matters of interpretation, the essay should remain of interest for two reasons. First, each of the three theorists accepts at least the following more modest claim: we should reduce the focus on consent in sexual morality and rape law, because this focus on consent objectionably conceptualises women as sexually passive. (If this is the correct

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

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

### **Main Argument**

- (1) *Ideal Sex Premise*. If sex is ideal, then it is something two people do together.<sup>7</sup>
- (2) *Joint Action Premise*. If two people do something together, then consent is unnecessary.<sup>8</sup>

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interpretation of their view, then it resembles the view of Rebecca Kukla. See Rebecca Kukla, 'That's What She Said: The Language of Sexual Negotiation' (2018) 129 *Ethics* 70.) I go on to argue that even this more modest claim is false. My argument against this more modest claim goes through even if, contrary to what I argue above, none of the three theorists is committed to the No Consent Thesis. Second, my arguments for the Hybrid Account of Consent likewise go through regardless of whether the three theorists are committed to the No Consent Thesis. Thanks to an anonymous reviewer for pointing all this out.

<sup>7</sup> Like Gardner, I restrict myself for simplicity to the two-person case, while recognising that ideal sex may involve more than two people. Speaking more generally, we might say that ideally, sex is something that its participants do together. Gardner *ibid* 54, fn 18.

<sup>8</sup> Does the Joint Action Premise commit its proponents to the view that non-consensual sex can be permissible? On one way of talking, it does not. This is because they are free to stipulate meanings for the terms 'consensual' and 'non-consensual'. For

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

To see that Gardner, MacKinnon, and Palmer accept the Ideal Sex Premise, we can ask, ‘What is ideal sex?’ For MacKinnon, ideal sex is *equal* sex, which she says involves ‘mutuality, reciprocity, respect, trust, [and] desire...not one-sided acquiescence’.<sup>9</sup> For Palmer, ideal sex is *mutually active* sex. For Gardner, ideal sex is *teamwork* sex, where teamwork is a ‘particular kind of mutuality’.<sup>10</sup> Although these three theorists might differ in the details of what constitutes ideal sex, their references to mutuality suggest that each of them accepts what I will call the *Ideal Sex Premise*: (1) If sex is ideal, then it is something two people do together.

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

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

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

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

<sup>9</sup> MacKinnon (n 1) 476.

<sup>10</sup> Gardner (n 1) 54.

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

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

## **2. The Commonsense View and when consent is necessary**

Before turning to the two arguments for the Joint Action Premise, it is worth briefly outlining the view of consent and its relation to our moral rights that undergirds the Commonsense View. This will help us to understand the normative effect of consent, and thus to understand the circumstances in which consent is necessary. To help do

this, I briefly contrast the Commonsense View with an alternative view of when consent is necessary, recently advanced by Michelle Madden Dempsey.<sup>11</sup>

According to Dempsey, X's consent to Y's action is necessary—or, as she puts it, 'called for'—if and only if two conditions are met.<sup>12</sup> First, Y's action must 'call for justification'—that is to say, Y must have a 'non-trivial reason' not to perform that action. Second, at least one reason in virtue of which Y's action calls for justification must be grounded in X's wellbeing.

However, as Richard Healey has convincingly argued, Dempsey's view is over-inclusive.<sup>13</sup> To illustrate, Healey offers us two cases. In the first case, Y purchases the

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<sup>11</sup> Thanks to an anonymous reviewer for encouraging me to make this explicit.

<sup>12</sup> Michelle Madden Dempsey, 'Victimless Conduct and the Volenti Maxim: How Consent Works' (2013) 7 *Criminal Law and Philosophy* 11, 15–17.

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



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

We can summarise Healey's diagnosis for why X's consent is unnecessary in each of these cases: X lacks a claim right against Y's action.<sup>14</sup> In the first case, X lacks a claim right against Y purchasing the last cinema ticket. In the second case, X lacks a claim right against Y casting the decisive vote for a candidate whose policies are unfavourable for X. The general lesson from Healey's critique of Dempsey, then, is that X's consent to Y's action is necessary only if X initially possesses a claim right

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Crisp, 'Medical Negligence, Assault, Informed Consent, and Autonomy' (1990) 17 *Journal of Law and Society* 77, 81–84.

<sup>14</sup> To be clear, Healey is concerned with moral rather than legal rights. Healey's account of moral rights, like my own, broadly follows Judith Jarvis Thomson, *The Realm of Rights* (Harvard University Press 1990). Thomson is building on Wesley Hohfeld's the account of legal rights. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Walter Wheeler Cook ed, Yale University Press 1920).

against Y's performing that action.<sup>15</sup> Provided it is valid, X's consent waives this claim right, thereby releasing Y from the correlative duty that Y owes X not to perform that action.<sup>16</sup> The Commonsense View, as I understand it, presupposes this relationship between consent and its relationship to our moral rights.

To be clear, the Commonsense View is concerned with moral rights. This raises a question: what is the relation between moral rights and the law?<sup>17</sup> Tom Dougherty offers the following answer, which I take to be plausible. The state punishes those who commit sexual offences by depriving them of their liberty. According to liberal political morality, such deprivations of liberty call for justification. One plausible justification is that the offences they commit are proportionately objectionable, morally speaking. This raises the question of what makes such offences morally objectionable. A popular answer from within liberal political morality focuses on each person's sexual rights. The default is that imposing sexual contact on someone infringes their moral rights, which makes it a moral wrong that should be criminalised. But valid consent waives

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<sup>15</sup> I claim merely that X's consent is necessary *only if* X initially possesses a claim right against Y's action. I do not claim that X's consent is necessary *if* X initially possesses a claim right against Y's performing an action. This is because, as we will see in our discussion of the Moral Argument in section 4, it is sometimes possible for X to divest themselves of the relevant claim right via some mechanism other than consent, thereby rendering X's consent unnecessary.

<sup>16</sup> I assume that for consent to be valid requires, at a minimum, that it is given by an adult of sound mind who is not induced by coercion or deception.

<sup>17</sup> Thanks to an anonymous reviewer for encouraging me to address this point.

the relevant moral rights, thereby displacing this default. Provided there is valid consent, such sexual contact does not constitute a moral wrong that the state should criminalise.<sup>18</sup>

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

### **3. The Metaphysical Argument**

There are two plausible arguments for the Joint Action Premise.<sup>19</sup> The first such argument is the Metaphysical Argument. In this section, I first reconstruct the Metaphysical Argument and then go on to reject it.

#### **A. Reconstructing the Metaphysical Argument**

The first premise of the Metaphysical Argument is a widely accepted conceptual premise about consent. As it is sometimes put, ‘consent in the strict sense is always

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<sup>18</sup> See Tom Dougherty, ‘Consent, Communication, and Abandonment’ (2019) 38 *Law and Philosophy* 387, 387–388. The harm principle is often thought to provide an additional constraint on criminalisation. For a discussion of why the criminalisation of rape and sexual assault also satisfies the harm principle, see John Gardner, ‘The Wrongness of Rape’, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press 2007) 29–30.

<sup>19</sup> The first argument is most plausibly attributed to Gardner, whereas the second argument is more plausibly attributed to all three theorists.

given to the actions of other persons.<sup>20</sup> This premise is often expressed in terms of X—the consent-giver—being passive, and Y—the recipient of consent—being active. The idea is that the very concept of consent presupposes that Y does something *to* X. For Y’s action not to infringe X’s rights, Y requires X’s valid consent.<sup>21</sup> For example, when doctor Y injects patient X with a vaccine, this is something that Y does *to* X, and Y’s action is permissible only if X gives valid consent. This is the sense in which Y is active and X is passive. Gardner, MacKinnon, and Palmer all hold views on which the sexual context is no different.<sup>22</sup> So, for example, MacKinnon claims that

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<sup>20</sup> A John Simmons, *Moral Principles and Political Obligations* (Princeton University Press 1979) 76. See also Peter Westen, *The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct* (Ashgate 2004) 3, who describes one use of ‘consent’ in the criminal law as including (inter alia) all instances in which persons ‘choose for themselves, what other persons do to them.’

<sup>21</sup> As I say in fn 16, above, I assume that for consent to be valid requires, at a minimum, that it is given by an adult of sound mind who is not induced by coercion or deception. Much of MacKinnon’s work criticises courts’ willingness to find that a woman’s sexual consent was valid despite that consent being induced by coercion, deception, or egregious power inequalities. Nothing I say in this essay is meant to deny the force of that part of MacKinnon’s critique.

<sup>22</sup> For analogies between the medical case and the sexual case, see: Gardner (n 1) 57; MacKinnon (n 1) 475; Palmer (n 1) 11, fn 21, citing Robert M Veatch, ‘Abandoning Informed Consent’ (1995) 25 *The Hastings Center Report* 5; Michelle J Anderson,

on the consent model of sex, ‘active [Y] initiates, passive [X] acquiesces or yields to [Y]’s initiatives... Intrinsic to consent is the actor and the acted-upon.’<sup>23</sup> Similarly, Palmer claims that ‘a consent framework implies that sex always involves one (active) person doing something to another (passive) person.’<sup>24</sup> Likewise Gardner claims that ‘consent presupposes an asymmetry in activity—a doer and a sufferer.’<sup>25</sup> The idea is as follows. It is only possible to consent to an action if it is something that another person does *to* you. If the action is not something another person does *to* you, then it is not possible for you to consent to it. If it is not possible for you to consent to an action, then it is unnecessary for you to do so. After all, it cannot be morally required to do something that is morally impossible. It follows that all three theorists must accept what we can call the *Conceptual Premise*: (1) Consent is necessary only if one person does something *to* the other.

While many theorists accept the Conceptual Premise, few if any explicitly acknowledge that it is not a claim about how ‘consent’ is used in ordinary language. In ordinary language, the word ‘consent’ is used to pick out several distinct moral

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‘Negotiating Sex’ (2005) 78 Southern California Law Review 1401, 1408–09; Sharon Cowan, ‘Choosing Freely: Theoretically Reframing the Concept of Consent’ in Rosemary and Cowan Hunter Sharon (ed), *Choice and Consent: Feminist Engagements with Law and Subjectivity* 100.

<sup>23</sup> MacKinnon (n 1) 440. For clarity, I have replaced MacKinnon’s letters A and B with Y and X, respectively.

<sup>24</sup> Palmer (n 1) 13.

<sup>25</sup> Gardner (n 1) 48.

phenomena. Some of these phenomena presuppose neither the passivity of the consent-giver, nor that the consented-to action is something that is done to them. For example, in ordinary language we say things like, ‘Tracy consented to giving Sam a massage’. In respect of the massage, Tracy is active rather than passive—it is something she does *to* Sam. It is useful to think about the moral phenomenon here in terms of each person’s moral rights.<sup>26</sup> Initially, Sam has no claim right to Tracy giving him a massage and, correlatively, Tracy owes no duty to Sam to give him a massage. By ‘consenting’ to give Sam a massage, Tracy can change the structure of the moral rights and duties between them. Provided her ‘consent’ is valid, Tracy gives Sam a claim right to her giving him a massage, and places herself under a correlative duty to do so. To distinguish this kind of ‘consent’—the kind in which one person gives another a claim right—from other moral phenomena that are also called ‘consent’ in ordinary language, some writers call this moral phenomenon an *undertaking* or even a *promise*.<sup>27</sup> Whatever we choose to call it, this kind of ‘consent’ is not the subject of the Conceptual Premise.

Instead, the Conceptual Premise concerns cases in which one person waives a so-called ‘negative’ moral claim right over their person. A negative claim right is a

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<sup>26</sup> As I say in fn 14 above, the account of moral rights here broadly follows that of Judith Jarvis Thomson.

<sup>27</sup> For ‘undertaking’ see, e.g., Oliver Black, ‘Two Theories of Agreement’ (2007) 13 *Legal Theory* 1. For ‘promise’ see, e.g., Hallie Liberto, ‘The Problem with Sexual Promises’ (2017) 127 *Ethics* 383. See also Gardner (n 1) 61.

claim right against another person *doing* something.<sup>28</sup> A negative claim right over your *person* is a right against them doing something *to you*. For example, in the medical cases, your negative rights over your person include a claim right against your doctor injecting you with a vaccine. By consenting to her giving you the vaccine, you can—provided your consent is valid—waive that negative claim right, and release the doctor from her correlative duty not to inject you with the vaccine. The Conceptual Premise concerns only this technical sense of ‘consent’ as intentionally waiving a negative claim right over your person.

It is instructive to compare the sense in which ‘consent’ is used in the Conceptual Premise with the sense in which Healey uses ‘consent’. Recall that on Healey’s view, X’s consent to Y’s action is necessary only if X initially possesses a claim right against Y’s action.<sup>29</sup> The Conceptual Premise uses ‘consent’ in a narrower sense: X’s consent to Y’s action is necessary only if X possesses a negative claim right *over their person* against Y’s action. We can accommodate the latter sense within the former by saying that X’s

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<sup>28</sup> For a classic statement of the difference between positive and negative rights, see Charles Fried, *Right and Wrong* (Harvard University Press 1978) 110. Cécile Fabre draws attention to what she calls the *duty distinction*:

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

<sup>29</sup> See text accompanying fn 15, above.

consent to Y's doing something to X is necessary only if X initially possesses a negative claim right over their person against what Y does to X.

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

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

What is done, including what is being done constitutively by me or you, is now being done *with* somebody.<sup>30</sup>

Gardner's point provides us with one way to interpret MacKinnon's claim that when sex is equal or mutual, 'there is no transgression to be redeemed'.<sup>31</sup> On this interpretation of MacKinnon's claim, there is no transgression to be redeemed because there is no *transgression*—because neither person is doing anything *to* the other.<sup>32</sup> If this interpretation is correct, then Gardner and MacKinnon both accept what we can call the *Metaphysical Premise*: (2) If two people do something together, then neither of them does anything *to* the other.

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<sup>30</sup> Gardner (n 1) 56.

<sup>31</sup> See fn 3, above.

<sup>32</sup> Palmer is less explicit, though perhaps she too can be interpreted as accepting the Metaphysical Premise. See text accompanying fn 4.



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

### **Metaphysical Argument**

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

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

#### **B. Rejecting the Metaphysical Argument**

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

To see that the Metaphysical Premise is false, it is worth looking at Gardner's examples of non-sexual joint action. These are winning a match, reroofing a house, and rescuing a hamster.<sup>33</sup> It is true that in each of these cases, we do something together without doing anything to each other. We win the match together. We reroof the house

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<sup>33</sup> Gardner (n 1) 51–52.

together. We rescue the hamster together. But these joint actions—these things we do together—are partly constituted by actions that each of us does individually. The joint action of winning the match is partly constituted by my action—passing the ball—and your action—scoring the goal. The joint action of reroofing the house is partly constituted by my action—attaching the slates—and your action—doing the leadwork. The joint action of rescuing the hamster is partly constituted by my action—shining the torch—and your action—reaching into the sofa. In each case, the joint action is partly constituted by our individual actions.<sup>34</sup>

Now, in each of these examples, the things we do individually are not things that we do *to* each other. As such, these examples do not involve our negative claim rights over our person.<sup>35</sup> But in other examples of joint action, the things we do individually *will* be things we do to each other. As such, these other examples *will* involve our negative claim rights over our person.

Famously, it takes two to Tango:

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<sup>34</sup> It is not only joint actions that are partly constituted by individual actions. Many of our individual actions are also partly constituted by other individual actions. For example, my making an omelette is partly constituted by my cracking the eggs, my beating the eggs, my adding the spices, and my frying the mixture.

<sup>35</sup> The same is true of Gardner's examples of people keeping down a balloon together, playing jazz together, and meeting under the Paddington Station clock at noon. See Gardner (n 1) 52, 55, 61.

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

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

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

The same is true in the sexual context. Individuals engaging in ideal sex need not consent to the joint action of having sex together. Instead, each must consent to the individual actions of their partner—the things their partner does *to* them—that partly constitute their joint action of having sex together. This is because these individual actions involve the negative rights that each person has against their partner doing

something *to* them. To see this, consider the ‘straight sex’ scenario with which Gardner is primarily concerned, in which a cis-woman has penetrative sex with a cis-man. Let us first consider the woman’s rights. The woman has negative claim rights over her person. These include a claim right against her partner penetrating her vagina with his penis. Lest the man infringe that right, the woman must give her valid consent to his penetrating her vagina with his penis. If this correct, then the Metaphysical Premise is false, and the Metaphysical Argument is therefore unsound.<sup>36</sup>

As we have just seen, the easiest way to reject the Metaphysical Premise is to point out that in Gardner’s ‘straight sex’ scenario, when the man and the woman have sex *together*, their joint action is partly constituted by something the man does to the woman—namely, penetrate her vagina with his penis. Those who reject the Metaphysical Premise are not automatically committed to any view as to whether, in ‘straight sex’, the woman does anything to the man. But it is overwhelmingly plausible that just as their joint action of having sex together is partly constituted by the man penetrating the woman’s vagina, that joint action is also partly constituted by

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<sup>36</sup> In other words, in Gardner’s examples, X initially lacks a claim right against what Y does, and *a fortiori* initially lacks a claim right against what (if anything) Y does *to* X. Consequently, Gardner is correct that X’s consent—both in Healey’s sense and in the narrower sense used in the Conceptual Premise—is unnecessary in each of these examples. But it does not follow from this that X’s consent is also unnecessary in cases such as X and Y having sex together, which do involve X’s negative claim rights over their person.

something the woman does to the man—namely, ‘envelop’ his penis with her vagina.<sup>37</sup> Thinking about the man’s rights, it is plausible that he possesses a right against such envelopment. Lest the woman in ‘straight sex’ infringe the man’s right, he must consent to the envelopment. One attractive feature of this picture is that it shows that the Conceptual Premise is compatible with the Commonsense View. The Commonsense View tells us that in ‘straight sex’, the man must consent or have his rights infringed. The Conceptual Premise tells us that he need consent only if another person does something to him. This picture identifies the act done to him—namely, the woman’s enveloping his penis with her vagina.

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

#### **4. The Moral Argument**

Even if I am correct that the Metaphysical Argument is unsound, there is a second plausible argument for the Joint Action Premise. This second argument focuses not on the metaphysics of sexual joint action, but instead on its moral significance.

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<sup>37</sup> The notion of ‘enveloping’ is from Andrea Dworkin, *Intercourse* (Secker & Warburg 1987) 81.

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

#### A. Reconstructing the Moral Argument

The first premise of the Moral Argument is another conceptual premise about consent. Recall that the Conceptual Premise in the Metaphysical Argument claims that consent is necessary *only if* one person does something to another. But it does not follow that consent is necessary *if* one person does something to another. Indeed, it is not always true that consent is necessary if one person does something to another—something against which that person initially has a negative claim right. This is because consent is not the only mechanism by which it is possible for someone to divest themselves of a right. Another such mechanism is *forfeiture*. The idea that it is possible for someone to forfeit their claim rights is familiar from debates about liability to defensive harm. Those debates take as their starting point that each of us has negative claim rights over

our person, and that these rights include claim rights against others harming us. However, if you culpably threaten to kill an innocent person, you thereby forfeit your negative claim rights against them harming you in self-defence.<sup>38</sup> The moral upshot of your forfeiture is this: if that person harms you in self-defence, they do not thereby infringe your rights, even if you do not consent. The lesson is quite general: If an individual forfeits their rights, then that individual's consent is unnecessary.

I assume that it is not possible to forfeit one's negative sexual claim rights merely by engaging in ideal sex. For a person to forfeit their rights, that person must, at a minimum, engage in wrongdoing. But it is wholly implausible that an individual engaging in ideal sex is *as such* engaging in wrongdoing.<sup>39</sup> Nevertheless, the discussion of forfeiture illustrates the more general point that consent is not the only mechanism by which it is possible for someone to divest themselves of a claim right. If someone divests themselves of a claim right using another mechanism, then that person's

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<sup>38</sup> There are plausibly other requirements, such as that the self-defence is proportionate. Debates about the precise conditions under which you forfeit your rights is the subject of extensive debate in the literature on liability to defensive harm.

<sup>39</sup> Christopher Heath Wellman suggests that it might be possible for someone to forfeit their sexual rights in certain extreme cases. Even if Wellman's suggestion plausible, it does not help the No Consenter, for (as I say in the main text) it is wholly implausible that it is possible to forfeit one's sexual rights by engaging in ideal sex. See Christopher Heath Wellman, 'The Rights Forfeiture Theory of Punishment' (2012) 122 *Ethics* 371, 385.

consent is unnecessary. We can call this insight the Second Conceptual Premise about consent:

(1) *Second Conceptual Premise*. If a person divests themselves of their relevant rights using some mechanism other than consent, then that person's consent is unnecessary.<sup>40</sup>

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

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<sup>40</sup> There is an important question of precisely which rights a person divests. I claim only that, if X divests themselves of a claim right against Y's  $\phi$ -ing, then X's consent is unnecessary: it is possible for Y to  $\phi$  without X's consent, without thereby infringing X's claim right.



have sex *together*—each of them thereby waives the relevant rights against the other, rendering each person’s consent unnecessary.<sup>41</sup>

Like Gardner’s other examples of non-sexual joint action, playing jazz together is unlike sexual joint action because it not something two people do together by doing things to each other.<sup>42</sup> But we can replace Gardner’s example with one in which two people do something together by doing things to each other. As we saw in our discussion of the Metaphysical Argument, *Tango* is just such an example. In *Tango*, Amelia and Bert each initially possess negative claim rights against what the other does to them. If Gardner were to use this example instead, he could suggest that in Tangoing together, Amelia and Bert each divest themselves of their negative claim rights against what the other person does to them. To illustrate this Gardnerian view, it is useful to imagine the justifications that Amelia might offer to Bert if he were to complain that

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<sup>41</sup> For Gardner’s analogy between sex and jazz, see Gardner (n 1) 55–56. Thomas Macaulay Millar also makes the analogy between sex and jazz. See Thomas Macaulay Millar, ‘Toward a Performance Model of Sex’ in Jaclyn Friedman and Jessica Valenti (eds), *Yes Means Yes: Visions of Female Sexual Power and a World Without Rape* (Seal Press 2008). Just as it is possible for someone to be coerced into consenting, it is also possible for them to be coerced into performing a joint action: see Michael Bratman, ‘Shared Intention and Mutual Obligation’, *Faces of Intention: Selected Essays on Intention and Agency* (Cambridge University Press 1999) 132–133; Millar 40. I assume throughout that to successfully waive rights, joint action, like consent, must be morally valid (see fn 16, above).

<sup>42</sup> See fn 35 and accompanying text, above.

she had infringed his rights. Intuitively, when they Tango together, Amelia does not infringe Bert's rights. But imagine that, after they have finished Tangoing together, Bert complains that Amelia *did* infringe his claim right against her placing her hands on his shoulders. What might Amelia say in response? She might say, 'I didn't infringe your right! You *consented* to me doing that to you!' Here the explanation for why Amelia did not infringe Bert's right is that he divested himself of that right *by consenting*.

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

(2) *Joint Action Explanation*. If two people do something together, then each person thereby divests themselves of their relevant rights.<sup>43</sup>

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<sup>43</sup> To be plausible, the Joint Action Explanation must claim only that each person divests the *relevant* rights against the other. For example, if two people Tango together, each of them divests themselves of their rights against their partner touching them in ways that partly constitute their Tangoing together, but each of them retains their rights against the other stealing their property. The same is true of consent. If I consent to your giving me a haircut, I waive my rights against your cutting my hair, but I retain my rights against your stealing my property.

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

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

### **Moral Argument**

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

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

#### **B. Rejecting the Moral Argument: What is Consent?**

The Joint Action Explanation is one possible explanation for why, in cases like *Tango*, neither person infringes the other's rights. But there is a natural alternative

explanation, namely, that each person in these cases *consents*. To adjudicate between these rival explanations, we need an account of what consent *is*. In what follows, I first I consider two existing accounts of what consent is, one favoured by MacKinnon and another by Gardner.<sup>44</sup> I argue that each of these accounts of consent faces problems. I outline a new account of consent which combines the insights of each of the existing accounts while overcoming their shortcomings. I then go on to use this account of consent to argue against the No Consenter's Moral Argument.

Before discussing each account of consent, it is worth making one clarification. There is considerable controversy over whether an act of consent requires communication. On one view, consent requires *successful* communication.<sup>45</sup> On a second view, consent requires only *attempted* communication.<sup>46</sup> On a third view, it is possible for someone to perform an act of consent purely mentally, without even

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<sup>44</sup> I will say little about Palmer in this section because she does not endorse any particular view of what consent is. While Palmer recognises that consent is an 'ambiguous concept', she goes on to say, 'I do not, however, propose to develop a clearer definition of consent.' Palmer (n 1) 5.

<sup>45</sup> Tom Dougherty, 'Yes Means Yes: Consent as Communication' (2015) 43 *Philosophy & Public Affairs* 224.

<sup>46</sup> Victor Tadros, *Wrongs and Crimes* (Oxford University Press 2016); Neil C Manson, 'Permissive Consent: A Robust Reason-Changing Account' (2016) 173 *Philosophical Studies* 3317.

attempting to communicate.<sup>47</sup> In formulating each of the accounts of consent that follow, I assume for ease of exposition that the third view is correct—that it is possible for someone to perform an act of consent purely mentally. However, nothing hinges on this assumption, and I suggest alternative formulations in the footnotes for those who hold the other views.

### C. The Choice Account of Consent

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

*Choice Account:* For X to consent to Y's action is for X to choose Y's action.<sup>48</sup>

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<sup>47</sup> Heidi M Hurd, 'The Moral Magic of Consent' (1996) 2 *Legal Theory* 121; Larry Alexander, 'The Moral Magic of Consent (II)' (1996) 2 *Legal Theory* 165; Larry Alexander, 'The Ontology of Consent' (2014) 55 *Analytic Philosophy* 102; Larry Alexander, Heidi Hurd and Peter Westen, 'Consent Does Not Require Communication: A Reply to Dougherty' (2016) 35 *Law and Philosophy* 655; Kimberly Kessler Ferzan, 'Consent, Culpability, and the Law of Rape' 13 *Ohio State Journal of Criminal Law* 397.

<sup>48</sup> The successful communication analogue of the Choice Account is the *Successfully Communicated Choice Account*.

Several authors defend versions of the Choice Account. For example, according to Peter Westen, a person consents if they ‘choose for themselves... what other persons do to them.’<sup>49</sup> MacKinnon explicitly endorses Westen’s version of the Choice Account.<sup>50</sup> Similarly, according to Heidi Hurd, for one person to consent to another person’s actions involves the first person ‘intending the actions’ of the second.<sup>51</sup>

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

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

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

<sup>49</sup> Westen (n 22) 3. Westen’s is an account of consent in the criminal law. Westen also claims that desire or acquiescence are also individually sufficient for consent. But desire and acquiescence are poor candidates for consent. For why acquiescence is a poor candidate, see Alexander, ‘The Ontology of Consent’ (n 47) 107. Desire is a poor candidate because it is possible both to desire that another person perform an action without consenting, and to consent to them performing an action without desiring it.

<sup>50</sup> MacKinnon (n 1) 440–41, citing Westen (n 22) 3.

<sup>51</sup> Hurd (n 47) 131. There has been much debate about whether it is possible for one person to intend the actions of another. On one hand, Luca Ferrero argues that one

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

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person can intend both the actions of another, and states of affairs more generally. On the other hand, Larry Alexander and Neil Manson deny that one person can intend the actions of another. But Manson's own view of consent seems, at least *prima facie*, to require one person to intend the actions of another. On Manson's view, a necessary condition for R's consent is that 'R intends S to recognise [R's intention]'. This seems to be an example of R intending S's action. Luca Ferrero, 'Can I Only Intend My Own Actions?' in David Shoemaker (ed), *Oxford Studies in Agency and Responsibility*, vol 1 (Oxford University Press 2013); Alexander, 'The Moral Magic of Consent (II)' (n 47) 166; Alexander, 'The Ontology of Consent' (n 47) 107; Manson (n 46) 3320–3321; *ibid* 3329.

Act, a person consents if he ‘agrees by choice’, where this seems to mean nothing more than ‘chooses’.<sup>52</sup> In each case, the object of the X’s choice is Y’s action.<sup>53</sup>

If the Choice Account is correct, then there is no reason to believe that the Moral Argument is sound. This is because, if the Choice Account is correct, then there is no reason to believe the Joint Action Explanation. Instead, the best explanation for why individuals do not infringe each other’s rights in cases like *Tango* is that each of them *consents* to what the other does to them. The easiest way to see this is to consider some general constraints on joint action. First, if X and Y perform a joint action, then each of them intends that they perform the joint action. For example, if Bert and Amelia Tango together, then Bert intends that he and Amelia Tango together.<sup>54</sup> Second, if X

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<sup>52</sup> Sexual Offences Act, s 74. This section also requires that they have the ‘freedom and capacity’ to make that choice. I take these to be conditions not on whether someone consents but on whether that person’s consent is *valid*. For discussion, see Kimberly Kessler Ferzan and Peter Westen, ‘How to Think (Like a Lawyer) About Rape’ (2017) 11 *Criminal Law and Philosophy* 759. For further criticisms of the framing of section 74, see Jennifer Temkin and Andrew Ashworth, ‘The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent’ [2004] *Criminal Law Review* 328; Victor Tadros, ‘Rape Without Consent’ (2006) 26 *Oxford Journal of Legal Studies* 515.

<sup>53</sup> As David Owens puts it, each of these choices ‘has a non-normative object’. David Owens, *Shaping the Normative Landscape* (Oxford University Press 2012) 168.

<sup>54</sup> See Michael Bratman, ‘I Intend That We J’, *Faces of Intention* (Cambridge University Press 1999).



intends to perform some joint action with Y, and X knows that their performing that joint action involves Y performing some individual action, then X intends that Y perform that individual action. For example, if Bert intends that he and Amelia Tango together, and Bert knows that their Tangoing together involves Amelia placing her hands on Bert's shoulders, then Bert intends that Amelia place her hands on his shoulders. If the Choice Account is correct, then this constitutes Bert's consenting to Amelia's placing her hands on his shoulders.

Similar reasoning applies in Gardner's 'straight sex' scenario. First, if the man and the woman have penetrative sex together, then the woman intends that they have penetrative sex together. Second, if the woman intends that they have penetrative sex together, then she intends that the man penetrate her vagina with his penis.<sup>55</sup> If the Choice Account is correct, then this constitutes her consenting to his penetrating her vagina with his penis.

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

But the Choice Account is incorrect. Though perhaps initially plausible, it faces two important objections, either one of which is sufficient to show that the Choice Account is incorrect. The first is that intending another person's action is *insufficient* for consent. The second is that it is *unnecessary*. Consider first the objection that intending

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<sup>55</sup> Assuming that 'penetrative sex' here means sex that involves the man penetrating the woman's vagina with his penis, and the woman knows this.

another person's actions is *insufficient* for consent. This is familiar from cases of entrapment, in which X intends that Y performs the action *and thereby wrong X*. As an example of a case of entrapment, Govert den Hartogh discusses the legal case of *Bink*:

*Bink*.<sup>56</sup> A prisoner collaborated with the police to entrap a fellow inmate, Bink, into a conviction for assault. The prisoner 'actually intended Bink to attack him; he had only failed to express his intention, at least to Bink, for the obvious reason that this would have been the surest way to frustrate it.' Bink attacked the prisoner.

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

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

*Borrow*.<sup>57</sup> Jess wants to skip class and go to a party, and asks to borrow Betty's car. If Betty does not consent, Jess will go to class. Betty thinks

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<sup>56</sup> See Govert Den Hartogh, 'Can Consent Be Presumed?' (2011) 28 *Journal of Applied Philosophy* 295, 301. This case is based on *New York v Bink* 444 N.Y.S.2d 237 (1981). See also den Hartogh's example of intending that someone take your car so that you can claim the insurance money. *ibid.* For another example of entrapment, see *The High Ground* in Tadros (n 46) 210.

<sup>57</sup> Tadros (n 46) 209.

it Jess's decision whether to skip class, but wants Jess to go to class.

Betty says to Jess: 'take my car if you want to, but I really want you to go to class.'

In *Borrow*, Betty consents to Jess taking her car. She thereby waives her right against Jess taking her car, and releases Jess from the correlative duty. But Jess does this without intending that Jess take the car. Reflecting on *Borrow*, it is clear it is possible for one person to consent to another person's action without intending that action.<sup>58</sup>

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

#### D. The Normative Power Account of Consent

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

*Normative Power Account:* For X to consent to Y's action is for X to choose that Y's action not infringe X's rights.<sup>59</sup>

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<sup>58</sup> See also David Owens, who says that 'consenting to  $\phi$ -ing... involves... no intention that  $\phi$ -ing occur'. Owens (n 53) 173.

<sup>59</sup> The successful communication analogue of the Normative Power Account is the *Successfully Communicated Normative Power Account*.

The Normative Power Account also comes in several variations. For example, according to Victor Tadros, for X to consent to Y's action involves X 'intend[ing] directly to release' Y from a duty that Y owes to X not to perform that action.<sup>60</sup> For Larry Alexander, the object of the intention is not the duty but the correlative claim right.<sup>61</sup> For David Owens, for X to consent to Y's action is involves X intending to hereby make it the case that Y's action does not wrong X. The object of X's intention the normative status of Y's action.<sup>62</sup> The general feature of the Normative Power Account is that the object of X's intention is not Y's action itself, but rather the normative status of Y's action: whether Y's action infringes X's claim right, or breaches a duty that Y owes to X, or wrongs X.

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

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

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

<sup>60</sup> Tadros (n 46) 211. For Tadros, X must also attempt to communicate that intention.

<sup>61</sup> See Alexander, 'The Ontology of Consent' (n 47) 107.

<sup>62</sup> For Owens, X must also intentionally communicate that intention. See Owens (n 53) 165.

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

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

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

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

*Better Marriage*. As in *Patriarchal Marriage*, but Frank has sex with Enid only when she initiates it, and he is guided entirely by her wishes. He would not dream of having sex with Enid against her will.<sup>63</sup>

Intuitively, in *Better Marriage*, it is implausible that Frank violates Enid's right against him having sex with her. There are at least two considerations that support this intuitive judgment. First, we can ask whether a third party would be morally required to use force to prevent Frank from having sex with Enid.<sup>64</sup> Surely not. Generally, though, if one person violates another's sexual rights in this way, then a third party is required to use necessary and proportionate force to stop him from having sex with her.<sup>65</sup> Second, even if the sex involved Frank penetrating Enid's vagina with his penis, courts faced with *Better Marriage* would not hold that Frank commits the *actus reus* of

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<sup>63</sup> [Name Redacted] has independently formulated a similar example.

<sup>64</sup> Considering what is morally required of a third party is a standard methodology for considering whether something amounts to a fact-relative wrongdoing. For that strategy applied to the question of whether someone consented, see Alexander, 'The Ontology of Consent' (n 47) 105; Kimberly Kessler Ferzan, 'The Bluff: The Power of Insincere Actions' (2017) 23 *Legal Theory* 168. More generally, claim rights are the grounds of duties of assistance on the part of third parties. See Helen Frowe, 'Claim Rights, Duties, and Lesser-Evil Justifications' (2015) 89 *Aristotelian Society Supplementary Volume* 267.

<sup>65</sup> For the intervention to be required, perhaps there is an additional requirement that the intervention is not excessively burdensome for the third party. But even if it were burdensome, the intervention would remain permissible.

rape.<sup>66</sup> This is because it is implausible that Frank has infringed Enid's right against his having sex with her.

In *Better Marriage*, then, it is implausible that Frank infringes Enid's sexual rights. However, as Victor Tadros persuasively argues, on the Normative Power Account, it is impossible for individuals like Enid to consent. Tadros explains that this is because these individuals cannot form the relevant intentions to consent. Accordingly, we can call Tadros's argument the Intentions Argument.<sup>67</sup> The Intentions Argument proceeds as follows. On the Normative Power Account, for Enid to consent requires her to *intend* to waive the right. But Enid cannot form the intention to waive the relevant right. This is because she believes that she does not initially possess a claim right against Frank having sex with her, so she believes it is impossible for her to waive that right. Enid cannot form the intention to do something that she believes is impossible.<sup>68</sup>

The Intentions Argument is sound. If the Normative Power Account is correct, then Enid cannot consent. Nevertheless, Frank does not infringe Enid's rights. From this it follows that Gardner correctly diagnoses the following feature of the Normative

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<sup>66</sup> See Sexual Offences Act 2003, s1(1).

<sup>67</sup> See Tadros (n 46) 211. See also Westen (n 22) 31–32.

<sup>68</sup> Although I have formulated the Intentions Argument in terms of Enid's inability to form the intention to waive a right, parallel formulations are available for the other variations of the Normative Power Account. For example, if Enid believes that Frank does not owe her the relevant duty, then Enid cannot form the intention to release him from that duty.

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

While perhaps initially plausible, the Joint Action Explanation is unlikely to provide the most fundamental or most general explanation for why individuals in cases like *Better Marriage* do not infringe each other's rights. To see why, consider a case in which the relevant action is not a joint action but simply something that one person does individually, such as *Massage*:

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

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



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

#### E. The Hybrid Account of Consent

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

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

- (1) X intends that Y's action not wrong X; or
- (2) Both:

- (a) X has no intentions regarding whether Y's action wrongs X;
- and
- (b) X chooses Y's action.

The Hybrid Account is a disjunction of two conditions. Condition (1) states the Normative Power Account. As such, all cases of consent according to the Normative Power Account are also cases of consent under the Hybrid Account. But Condition (2) avoids the counterintuitive consequences of the Normative Power Account in cases like *Better Marriage*. The intuitive result in these cases is that there is consent. The Hybrid Account delivers this result. This is because Condition (2)(b) of the Hybrid Account states the Choice Account. In cases like *Better Marriage*, X intends that Y perform the action in question. Now, we saw above that this feature of the Choice Account commits it to counterintuitive results in entrapment cases such as *Bink*. On the Choice Account, the prisoner in *Bink* consented to Bink's attacking him. But this is not the intuitive result. Intuitively, while the prisoner in *Bink* intended that Bink attack him, he did not thereby consent to Bink's attacking him. This is because, in addition intending that Bink attack him, the prisoner intended that Bink's attack wrong him. This is an intention regarding the normative status of Bink's action. While the normative intentions in entrapment cases are a problem for the Choice Account, they are not a problem for the Hybrid Account. This is because condition (2)(a) of the Hybrid Account delivers the intuitively correct result that they are not cases of consent.<sup>69</sup>

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<sup>69</sup> There might be some circumstances in which both conditions (2)(a) and (2)(b) are met, but where intuitively X does not waive their right against Y's action. The question

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

This argument against the Joint Action Explanation depends on the adequacy of the Hybrid Account. Can the No Consenter reject the Hybrid Account? Here is one way they might try. Suppose X and Y engage in some joint action. In that case, X intends that Y perform some individual actions that partly constitute the joint action. On the Hybrid Account, if X intends that Y wrong X by performing these individual actions, then Y's individual actions do actually infringe X's rights. For example, if Bert and Amelia Tango together, then Bert intends that Amelia place her hands on his shoulders. If Bert also intends that Amelia's placing her hands on his shoulders wrong him, then on the Hybrid Account, she does in fact infringe his right against her doing so. If this is incorrect, then there must be something wrong with the Hybrid Account.

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here is not whether X consents to Y's action—X *does* consent Y's action—but rather whether X's consent is *morally valid*. This will in turn depend on whether it is valuable for X to have the power to waive the right in such circumstances. For a sketch of considerations that bear on whether it might be valuable for X to have that power, see Owens (n 53) 166–168.

Though this might seem implausible, I suggest it is correct. This is easiest to see in cases in which we imagine Bert telling Amelia explicitly, ‘I intend both that you touch me in ways that partly constitute our Tangoing together, and that you wrong me by doing so.’<sup>70</sup> If at this stage, Amelia Tangoes with Bert, she thereby infringes his rights.

The same is true in the sexual case. It is possible for the woman in Gardner’s ‘straight sex’ scenario to both intend that the man penetrate her vagina with his penis, and also intend that he wrongs her by doing so. On the Hybrid Account, the woman in this scenario does not consent to the man’s penetrating her vagina. It follows that if he nevertheless penetrates her vagina, he thereby infringes her rights. Again, this is easiest to see in cases in which we imagine her telling him explicitly, ‘I intend both that you penetrate my vagina with your penis, and that you wrong me by doing so.’ If at this stage, he penetrates her vagina, he thereby infringes her rights.<sup>71</sup>

When a person has rights against another person performing an action, the Hybrid Account prioritizes the rightholder’s normative intentions regarding that

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<sup>70</sup> This is different from the case in which Amelia culpably deceives Bert into believing that she has consented. Amelia’s culpable deception is plausibly sufficient for her to *forfeit* the relevant rights. See Ferzan (n 64).

<sup>71</sup> Owens is therefore correct when he claims that ‘sex that has been chosen [can] constitute rape.’ Owens (n 53) 181. See further, text accompanying fn 72, below. Even if Owens is wrong about this, cases like these are little help for the No Consenter, as they do not exhibit the kind of mutuality that makes it ‘ideal’ in the sense that the Main Argument requires.

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

## 5. Conclusions

In this essay, I have argued against the No Consent Thesis, which states that if sex is ideal, then consent is unnecessary. I have claimed that the Main Argument for the No Consent Thesis rests on the Joint Action Premise, which states that if two people do something together, then consent is unnecessary. I have suggested that it is possible to distinguish two arguments in support of the Joint Action Premise. The first is an argument from the *metaphysics* of sexual joint action, whereas the second is an argument from its *moral* significance. I have argued that both the Metaphysical Argument and the Moral Argument are unsound. Accordingly, I have argued, neither supports the Joint Action Premise. Consequently, the Main Argument gives us no reason to believe the No Consent Thesis. On the contrary, we should accept the Commonsense View: If you have sex with someone without their consent, you thereby infringe that person’s rights.

The case against the Moral Argument and the Metaphysical Argument yields several valuable lessons. Consider first the case against the Moral Argument. In making

this case, we have learnt that two influential accounts of what consent is—the Choice Account and the Normative Power Account—both face problems. One important lesson is that sexual offences law could not adopt either of these accounts without importing its problems into the law.

As we saw from our discussion of *Bink* and *Borrow*, the Choice Account faces two problems: intending that an action occur is neither sufficient nor necessary for consenting to that action. *Bink* and *Borrow* concerned non-sexual actions, but the same is true for sexual actions. X's intending that Y sexually penetrate X is insufficient for X to consent to Y's sexually penetrating X. Owens acknowledges this explicitly. Thinking of rape as non-consensual sex, Owens says, 'sex that has been chosen [can] constitute rape... Someone chooses to be raped where they intend that the rapist have sex with them after they have explicitly refused their consent.'<sup>72</sup> Owens is explicit, then, that it is possible for X to intend that Y sexually penetrate X without consenting to Y's penetrating X. Conversely, it is possible for someone to consent to penetration without intending that it occur. To see this, consider *Job Interview*:

*Job Interview.* Ursula really wants Tariq to penetrate her vagina with his penis. If Ursula does not consent to his penetrating her, then Tariq will prepare for his upcoming interview. While Ursula thinks it would be better for Tariq if he were to prepare for his interview, she thinks that whether he chooses to do this instead of penetrating her is ultimately his

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<sup>72</sup> *ibid.*

responsibility. She tells him, 'I permit you to sexually penetrate me'  
despite intending that he prepare for the job interview instead.

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

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

If on the other hand the law were to adopt a Normative Power Account of consent, then in *Better Marriage* Frank would commit the *actus reus* of rape. Since no court faced with *Better Marriage* would hold that Frank commits the *actus reus* of rape, the law could not adopt a Normative Power Account of Consent.

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

Now consider the case against the Metaphysical Argument. In making that case we have seen the importance of being clear about precisely what a person consents to. We have learnt that when two people have sex together, each of them consents not to

the whole of the sexual joint action but instead to those individual actions of their partner that partly constitute it, such as penetration and envelopment. Thinking about things this way has four attractive features.

First, it diffuses an important part of the No Consenter's critique of conceptualising rape law and sexual morality in terms of consent.<sup>73</sup> That critique proceeds as follows. Consent, as we saw above, presupposes that the consent-giver is passive in respect of the action to which they consent. If rape is non-consensual sex, then, a woman who consents to sex is passive in respect of the sex—sex is something that another person, typically a man, does *to* her. Conceptualising rape law and sexual morality in terms of women's consent to sex with men, so goes the No Consenter's critique, is objectionable because it involves conceptualising women as passive with respect to sex.

Given that we now accept that each sexual partner must consent lest their partner infringe their rights, the No Consenter's critique faces a puzzle.<sup>74</sup> If both the man and the woman consent to the sex, then both of them must be passive in respect of the sex. In respect of the sex, it is not possible for either to be the active partner, the 'doer'. The puzzle for the No Consenter is this: If both the man and the woman consent

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<sup>73</sup> This critique is present in Gardner (n 1); Palmer (n 1); MacKinnon (n 1); Natasha McKeever, 'Can a Woman Rape a Man and Why Does It Matter?' [forthcoming] *Criminal Law and Philosophy*; Anderson (n 24); Kukla (n 8).

<sup>74</sup> For example, it is now legally possible for a man to be the victim of rape.



to the sex, and consent presupposes the passivity of the consentor, then who is active in respect of the sex?<sup>75</sup>

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

The second attractive feature of thinking about things this way is that doing so explains why the law formulates the wrong of rape in terms of non-consensual *penetration*.<sup>76</sup> Since penetration is something that another person does to you, it involves

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<sup>75</sup> There are parallel puzzles that arise when neither partner is a woman. Similar issues arise with respect to MacKinnon's views on pornography: How can pornography portray women as passive when, as in gay male pornography, it doesn't portray any women at all? For discussion, see Leslie Green, 'Pornographies' (2000) 8 *Journal of Political Philosophy* 27, 32–35.

<sup>76</sup> The wrong of rape, which lawyers often call the *actus reus* of rape, is outlined in section 1(1) of the Sexual Offences Act 2003, which provides, in relevant part: '(1) A person (A) commits an offence if—

(a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis, [and]

your negative claim rights over your person. Third, thinking about things this way highlights a potential risk of defining rape instead—as some theorists have suggested we should—in terms of non-consensual sex.<sup>77</sup> To the extent that sex is a joint action, it is a category error to think that we consent to sex. It is not the joint action of having sex together to which each partner consents. Rather, each individual consents to those actions of their sexual partner that partly constitute their having sex together.

A fourth attractive feature of thinking about things this way makes perspicuous an important case for law reform. While the law criminalises non-consensual penile penetration of the vagina as rape, it does not at present adequately criminalise non-consensual vaginal envelopment of the penis. If the Commonsense View and the Conceptual Premise are both correct, then the man has a relevant claim right against what the woman does to him—namely, envelop his penis with her vagina. If that is correct, then the law should plausibly criminalise non-consensual envelopment in a way that recognises it as a moral wrong of comparable seriousness to rape.<sup>78</sup>

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(b) B does not consent to the penetration’.

<sup>77</sup> David Archard, ‘The Wrong of Rape’ (2007) 57 *The Philosophical Quarterly* 374.

<sup>78</sup> For suggestions along these lines, see McKeever (n 73); Siobhan Weare, “‘Oh You’re a Guy, How Could You Be Raped by a Woman, That Makes No Sense’: Towards a Case for Legally Recognising and Labelling “Forced-to-Penetrate” Cases as Rape’ (2018) 14 *International Journal of Law in Context* 110. I take their arguments to be broadly in the correct vein, though I have my reservations about the details of their arguments and their proposals for law reform.

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