

Sex, Lies, and Consent*

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How wrong is it to deceive someone into sex by lying, say, about one's profession? The answer is *seriously* wrong when the liar's actual profession would be a deal breaker for the victim of the deception: this deception vitiates the victim's sexual consent, and it is seriously wrong to have sex with someone while lacking his or her consent.

I. DECEITFUL SEDUCTION

According to a popular dating website, both men and women, on average, say that they are two inches taller and earn \$20,000 more than one would expect.¹ Now it may be that these are innocent errors (though expensive ones for tax returns), or that rich and tall people find it particularly hard to meet partners in person. But in our more cynical moments, we may suspect that this is intentional deception. Why the tangled webs? Some may only want conversation over cappuccino, or a warm arm next to theirs in the movie theater. But others' aims will include sex. We might say that these people are "lying to get laid," if we wanted a snappy phrase. But it would be an inexact phrase insofar as the relevant moral phenom-

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1. "The Big Lies People Tell in Online Dating," <http://blog.okcupid.com/index.php/the-biggest-lies-in-online-dating/> (accessed on February 1, 2013).

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enon is deception, and some lies, understood as false assertions, do not deceive. In a notorious pickup joint where never a true word has been said, the regulars will not be fooled by tall tales, sweet nothings, and puffery. Indeed, in circumstances where lies are expected, telling the truth would itself be deceptive. Similarly, when certain expectations are in place, silence itself can be a form of communication and hence deceive.²

Deceiving someone into sex is wrong. No surprise here: mother told us as much. But *how* wrong? I speculate that most people think that the wrongness depends on the type of deception involved. Impersonating someone's spouse is seriously wrong but not so with run-of-the-mill falsehoods like "I'm not fussed about mess," "I'm 27 years old," "I went to Harvard," "I haven't had implants," "I *don't* want a relationship," "I *do* want a relationship," and even the simple "I like you." As Alan Wertheimer notes, "prevailing moral norms" are quite "permissive" with respect to sexual deception, and so while people "may think it sleazy if a male lies about his marital status, affections, or intentions in order to get a woman into bed, . . . many do not think this is a particularly serious matter." Along these lines, Jeffrie Murphy states that if a seducer misrepresents himself as "unusually sensitive and caring," then this involves "a minor kind of fraudulent misrepresentation . . . [that] is not utterly without moral taint," but he finds "it hard to get *deeply* indignant about these cases."³ These are criticisms—no one would be proud to have brought up a sleazy child—but ones that are far milder than those made of serious sexual misconduct. I will attempt to persuade you that much more severe criticisms are in order, arguing against the following thesis:

Lenient Thesis. It is only a minor wrong to deceive another person into sex by misleading her or him about certain personal features such as natural hair color, occupation, or romantic intentions.

We should understand this thesis as the claim that there are some trivial aspects of one's identity, about which it is not seriously wrong to deceive

2. For example, if it is common knowledge that someone is expected to disclose a sexually transmitted disease, then a failure to make any disclosure may communicate to the other person an absence of the disease. This is not to say that all forms of concealment are deception, though. I am currently omitting to mention the color of my eyes and hence concealing it from you, but I am not deceiving you about it.

3. Wertheimer himself rejects these norms. Peter Westen notes that a similar view is common concerning the related, though separate, legal issue, observing that "most judges and commentators [would] find it normatively untenable . . . that an actor, who entices a woman to engage in sexual intercourse by falsely telling her that he is a high-ranking executive . . . absent other defenses on his part, would be guilty of rape." Alan Wertheimer, *Consent to Sexual Relations* (Cambridge: Cambridge University Press, 2003), 193; Jeffrie Murphy, "Women, Violence and the Criminal Law," in *In Harm's Way: Essays in Honor of Joel Feinberg*, ed. Jules Coleman and Allen Buchanan (Cambridge: Cambridge University Press, 1994), 219; Peter Westen, *The Logic of Consent* (Aldershot: Ashgate, 2004), 200.

someone in order to get them into bed. Examples of this run-of-the-mill deception might include deception about one's sexual history, one's attitudes toward pets, or even how funny one finds the other person. Against the Lenient Thesis, I will argue that even with run-of-the-mill deception, culpably *deceiving another person into sex* is seriously wrong. In making this claim, I stipulate this italicized phrase to be understood as follows. First, the deception must concern the sexual encounter. Since each person is an essential part of the sexual encounter, one is deceived about the sexual encounter by deception about the other person. For example, this would include deception about whether this person is using birth control, about his or her profession, or about his or her mental attitudes.⁴ Second, the deception must concern a *deal breaker*—a feature of the sexual encounter to which the other person's will is opposed. This requires more than concealing an undesirable feature. It must be the case that the other person is all things considered unwilling to engage in the sexual encounter, given that it has this feature. This is a significant qualification as it lets off the hook, for example, someone pretending to like a stranger's umbrella simply to strike up conversation that eventually leads to sex. (At least the qualification lets the deceiver off the hook, so long as knowing the truth about the other person's lukewarm opinions of the umbrella would not change the deceived person's willingness to have sex at the crucial moment.)

My argument is based on the fact that not only coercion can vitiate consent; deception can do so too. Since coercion and deception are Kant's paradigms of "treating someone as a mere means," I think of this as a Kantian insight, though one that is acceptable to friends of other moral theories. To illustrate, suppose you tell me that you propose applying some chestnut brown hair dye to my hair. Excited at the prospect of brunette locks, I say that you may do so. However, you have been mischievously concealing the fact that it is really pink dye. Here I only gave you a moral permission to give my hair a chestnut color. Since the pink color of the dye was a deal breaker for me, I did not validly consent to what you did.⁵ Similarly, I will argue that when someone is deceived into

4. Some commentators have thought that promises, e.g., of marriage would not constitute deception about the sexual encounter, since the promises concern the future rather than the present sexual encounter. But this overlooks the fact that "one who makes a promise of love and marriage to another also conveys something much more concrete—a statement of fact about a matter of which the speaker has special knowledge. In avowing such feelings, the speaker represents that his heart and mind are at that moment filled with the committed intentions and deep emotions of which he speaks." Moreover, someone's intentions affect the nature of the sexual encounter: casual sex is different from sex where parties have further romantic intentions. Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit': A Feminist Rethinking of Seduction," *Columbia Law Review* 93 (1993): 374–472, at 466–67.

5. There is an orthogonal controversy about whether consent consists in one's mental attitudes or one's communications. I will not engage in this debate here, but in passing I

sex, the deception vitiates the victim's sexual consent. Since it is seriously wrong to have sex with someone without her morally valid consent, deceiving someone into sex is seriously wrong. Thus, my main argument runs:

1. Having sex with someone, while lacking her morally valid consent, is seriously wrong.
2. Deceiving another person into sex involves having sex with that person, while lacking her morally valid consent.
3. Therefore, deceiving someone into sex is seriously wrong.

A few people may already be sympathetic to a conclusion along these lines. For example, Wertheimer notes that "current social norms may understate the seriousness of sexual deception"⁶ and suggests that sexual consent may be vitiated by deception about one's marital status, an affair with a partner's sister, one's views on contentious moral issues like abortion, one's feelings, or one's intentions to marry.⁷ But many people will find my conclusion false, if not high-minded folly, and so I will attempt to defend it by offering subarguments for each premise in turn. Then I will discuss three important issues concerning my conclusion. First, it is not the deception that is seriously wrong but the sexual act. (To avoid confusion, it may help to stress that my term of art, "deceiving someone into sex," includes the sexual act.) Second, in addition to wrongness, there is a further issue of *culpability*. One can commit any wrong, even serious wrongs, in a blameless manner. So we may excuse those who act with a

would note that this example shows that if the communications view is correct, then we must interpret someone's communications on the basis of her underlying intentions. If I say, "you may carry out your plans," then the phrase "your plans" concerns what you actually plan. But I do not properly consent because I do not intend to permit you to dye my hair pink. For "mental-attitude" accounts of consent, see Heidi Hurd, "The Moral Magic of Consent," *Legal Theory* 2 (1996): 121–46; Larry Alexander, "The Moral Magic of Consent II," *Legal Theory* 2 (1996): 165–74. For "communication" accounts, see Wertheimer, *Consent to Sexual Relations*; Joan McGregor, *Is It Rape? On Acquaintance Rape and Taking Women's Consent Seriously* (Aldershot: Ashgate, 2005).

6. Wertheimer, *Consent to Sexual Relations*, 199.

7. Although claiming not to have "resolved the question as to when consent to sexual relations should be regarded as" morally valid (213), Wertheimer's position is close to the one I defend, as he maintains that as "a general principle, we might think that A's deception should generally undermine the moral and transformative power of consent because it precludes B from being able to decide whether engaging in sex with A is in her interests or compatible with her values. As a moral matter, I think this is basically correct" (193). Wertheimer leaves this judgment about sexual consent at the level of intuition, which is a controversial dialectical ploy, given the popularity of the Lenient Thesis. I hope to buttress this judgment by contributing arguments in its defense. However, as we will shortly see, Wertheimer would disagree with my claim that all nonconsensual sex is seriously wrong; instead, he maintains that the seriousness of the wrong depends on the expected harm involved to a victim. Wertheimer, *Consent to Sexual Relations*.

full excuse, such as being reasonably ignorant about the deal breakers in question. Third, we can clarify the seriousness of the wrong in question by noting its commonalities with sex with an unwilling comatose person.

In making this argument, I will discuss general assumptions about moral rights. Specifically, I will address such issues as the implications of our right to bodily autonomy, the moral significance of harm, and the nature of consent and its relationship to intentions. To foreshadow, one issue that I will not be discussing is whether we should consider deceiving someone into sex as a form of rape. This turns on an orthogonal debate about whether we should apply the term “rape” to all forms of nonconsensual sex.⁸ I leave this terminological choice to the reader. My interest is only in the substantive issue of serious wrongness. Another issue that I will not address is the legal issue of what laws we should have in place concerning sexual deception, since this issue brings in further practical complications.⁹

Before we begin, let me briefly make a point about methodology.¹⁰ Since the Lenient Thesis is popular, I accept that my conclusion will offend some common intuitions. This is always a cost whenever moral philosophy engages in one of its characteristic functions of challenging conventional wisdom. However, I suggest these intuitions do not deserve the

8. Catharine MacKinnon argues that rape laws should be reformed so that the concept of consent does not feature in them. On her proposal, rape should be conceived of as forced sex. MacKinnon, “Feminism, Marxism, Method and the State,” *Signs: Journal of Women in Culture and Society* 8 (1982): 635–58, at 650, 655. However, perhaps the majority position is that rape should be defined in terms of the absence of consent. See, e.g., Susan Estrich, “Rape,” *Yale Law Journal* 95 (1986): 1087–1184, at 1095–96, 1132–33; David Archard, “The Wrong of Rape,” *Philosophical Quarterly* 57 (2007): 374–93; McGregor, *Is It Rape?*

9. Stephen Schulhofer argues that there are evidential problems in establishing whether someone culpably deceived another into sex, and there are difficulties in framing a law that penalizes only seriously wrong misconduct. Additionally, he suggests that the law may be influenced by the fact that victims of deception are partially self-deceived, believing and not believing at the same time, and they may indeed welcome some forms of deception as part of the fantasy of erotic experience. While these issues remain unresolved, Schulhofer suggests that “it may be too soon to reach a judgment about the kinds of misleading comments that should be considered illegal in matters of sexual intimacy. . . . It may be preferable [as a matter of law] to leave to the individual the decision whether to believe, whether to rely, and whether to assume the risk of deception by trusting the other party.” Similarly, Wertheimer maintains that the “permissive approach to sexual deception embodied in the law may derive in part from ‘line-drawing’ difficulties” concerning how to distinguish “morally serious deceptions” from “puffing” or “storytelling,” and in part from “evidentiary difficulties” in establishing what the deceiver said and whether he was intending to deceive. In light of these points, with respect to the law, Wertheimer suggests that “for ‘administrative reasons’ it may be sensible to assign the burden of fraud to dispensers of information in the commercial arena and to the recipients of fraud in the sexual arena.” Stephen Schulhofer, *Unwanted Sex* (Cambridge, MA: Harvard University Press, 1998), 154–58; Wertheimer, *Consent to Sexual Relations*, 199–204.

10. Thanks to an anonymous reviewer for pressing me to clarify my methodology here.

status of considered judgments that are fixed points in our theorizing; instead, our intuitions about sexual ethics are ripe for a philosophical critique. During recent decades, popular views of sexual morality have been in flux. We now see that some intuitions of recent generations both failed to take seriously enough some sexual offenses, and other intuitions were based on overly restrictively conservative and moralistic views of sex. We are making some welcome progress in these regards, but it would be complacent to assume that we have gone far enough. And indeed I will argue that we have not. Deception's threat to sexual consent is not taken seriously enough, and this derives partly from the fact that a concern with, say, someone's income is not seen as a good reason for deciding to have sex. In light of our reasons for being suspicious of shifting views about sexual morality, we should aim to test claims about sexual ethics against general moral considerations outside of the sexual domain. Following this method will show that intuitions in favor of the Lenient Thesis conflict with more firmly held convictions about autonomy, rights, and consent.

II. WHY NONCONSENSUAL SEX IS SERIOUSLY WRONG

I will begin with the less controversial premise of my main argument—that having sex with someone who does not validly consent is seriously wrong. To be fully clear, the premise concerns only morally valid consent. This is defined as the consent that someone must have in order not to wrong the consentor by violating a right of hers. Consequently, it is the consent that makes permissible some actions that would otherwise be impermissible. Morally valid consent requires more than mere agreement. For example, agreement must be freely given, and so highly intoxicated agreement would not count as morally valid consent. Now I imagine many readers will be antecedently sympathetic to the claim that it is seriously wrong to have sex with someone while lacking her morally valid consent. For example, Robin West describes the claim that “nonconsensual sex is wrong in all circumstances, and so wrong as to be properly regarded as a serious crime” as a “basic moral claim.”¹¹ Indeed, within the literature on sexual consent, the majority position is that this claim identifies “the wrong of rape.”¹² Still the thesis requires defense, since an alternative, harms-based approach to the ethics of sex does not make consent foundationally important. Moreover, defending the premise will make clear the argumentative burden that will fall on my second premise—that

11. Robin West, “Sex, Law and Consent,” in *The Ethics of Consent: Theory and Practice*, ed. Franklin G. Miller and Alan Wertheimer (Oxford: Oxford University Press, 2010), 221–50.

12. Estrich, “Rape”; John Gardner and Stephen Shute, “The Wrongness of Rape,” in *Oxford Essays in Jurisprudence*, ed. J. Horder (Oxford: Oxford University Press, 2000); Archard, “The Wrong of Rape.”

someone does not give her morally valid consent to sex when she is deceived into sex.

The Rights-Based Argument

To introduce my first subargument, consider Joan McGregor's observation 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."¹³ Here McGregor has in mind coercive sex, but I am confident she would agree that her rationale extends to all forms of nonconsensual sex. In arguing for this claim, I make the following assumptions that are standard within rights theory.¹⁴ We have moral claim-rights (henceforth "rights") over our persons and property. These include so-called negative rights against interference: the moral default is that others may not lay hands on, nor damage, our persons or property. These rights over our persons and property consist in more specific rights against particular actions by particular individuals. We move away from the default by giving other people our morally valid consent, thereby waiving some specific rights. For example, a customer may waive her rights against a hairdresser touching her hair but not other parts of her body. These waivers are typically revocable—at any point, the customer can take back her consent and reimpose her rights.

The moral significance of these rights is that typically it is morally impermissible for someone to wrong another person by infringing her rights.¹⁵ How wrong it would be to violate a right depends on its stringency. The stringency of a right against a form of behavior depends on the importance to us of someone engaging in this behavior against our will.¹⁶ Now controlling the sexual contact that others have with us is centrally important to us. This is not to say that sex has to be an active, emo-

13. Joan McGregor, "Force, Consent, and the Reasonable Woman," in Coleman and Buchanan, *In Harm's Way*, 236. See also McGregor, *Is It Rape?*

14. Here I broadly follow Judith Jarvis Thomson's landmark account in her *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990).

15. Most rights theorists allow that there are usually some benefits that justify infringing a right, although they deny that maximizing utility is always a justification. But even when infringing is permissible, the right leaves a "moral residue" in the need for an apology and possible compensation; *ibid.*, 84.

16. A fully detailed explanation of rights' stringency would take us into an orthogonal controversy between so-called interest theories and will theories about whether rights protect our interests or our choices. My point is neutral with respect to this debate. Both sides accept that our rights over our sex lives are more stringent than our rights over our lawns, and that this is explained in the fact that lawn trespass is less important to us than bodily trespass. For a recent discussion of the debate between these two theories, see Matthew H. Kramer, N. E. Simmonds, and Hillel Steiner, *A Debate over Rights* (Oxford: Oxford University Press, 1998).

tionally meaningful part of someone's lifestyle. But it is crucially important that her sexual choices determine how her sex life goes. For example, the "prostitute and the celibate greatly value their integrity as sexual beings, even whilst they do not value the exercise of their sexuality."¹⁷ And we can accept this point while leaving open the grounds of this importance—whether we contingently find sexual autonomy important, whether we are biologically hard wired to find it important, or whether it has an objective importance, even if we fail to recognize this importance.¹⁸ This importance of sexual control explains the stringency of their sexual rights.¹⁹ In light of this stringency, it is seriously wrong to violate someone's sexual rights. One would violate these rights unless one has her morally valid consent to sex.

The Argument from Serious Sexual Wrongs

My second subargument operates by inference to the best explanation. The explananda in question are the following two data. The first datum is that it is seriously wrong to have sex with someone by means of disguising the sexual nature of the encounter or by impersonating her spouse. Consider the following fictional examples. When naive and uneducated Dewey Dell arrived at a physician's seeking an abortion, it was seriously wrong for the assistant to cajole her into sex by telling her that the appropriate medical procedure was for him to penetrate her. When Milady mistook D'Artagnan for her lover in her ill-lit boudoir, it was seriously wrong of D'Artagnan knowingly to take advantage of her mistake to have sex with her.²⁰ The second datum is that it is seriously wrong to have sex with an unconscious person against her will. For example, in Pedro Almodóvar's *Hable Con Ella*, it was seriously wrong for the caregiver, Benigno, to have sex with the chronically comatose patient, Alicia. I maintain that the best explanation of each of these data, considered in isolation from the other, is that the offenders lacked their victim's morally valid consent. I will call this the "Consent Explanation":

Consent Explanation. The seriousness of the wrongs both of sex by means of egregious deception and of sex with an unwilling uncon-

17. Archard, "The Wrong of Rape," 391.

18. For the contingent view see Murphy, "Women, Violence and the Criminal Law"; Scott Anderson, "Prostitution and Sexual Autonomy," *Ethics* 112 (2002): 748–80, at 774; for the biological view, see Alan Wertheimer, "Consent and Sexual Relations," *Legal Theory* 2 (1996): 89–113, at 100; for the objective interest view, see Archard, "The Wrong of Rape."

19. For a related argument, see Archard, "The Wrong of Rape."

20. William Faulkner, *As I Lay Dying* (New York: Vintage, 1990); Alexandre Dumas, *The Three Musketeers*, trans. Lord Sudley (New York: Penguin, 1995). Patricia Falk documents real world analogues in her survey of legal cases in her "Rape by Fraud and Rape by Coercion," *Brooklyn Law Review* 64 (1998): 39–180.

scious person is explained by the fact that the victim did not validly consent to the sex.

Since it is uncontroversial that Alicia, Dewey Dell, and Milady did not offer morally valid consent to sex, the Consent Explanation correctly predicts that Benigno, the assistant, and D'Artagnan acted seriously wrongly.

Are other explanations at least as good? Alan Wertheimer outlines the main alternative: "As a first approximation, we might say that the wrongness of an act is a function of three factors: (1) its *expected* or *ex ante* harm to a victim, (2) A's culpability for that act, and (3) the actual harmful consequences of A's act, although (3) is controversial as it turns on the right view about moral luck."²¹ I will call this view the "Harm Explanation":

Harm Explanation. The seriousness of the wrongs both of sex by means of egregious deception and of sex with an unwilling unconscious person is explained by the harm suffered by the victim.

Thus stated, the explanation includes the view that the wrongness of a sexual offense depends only on harm; and it also includes the view that a sexual act can be wrong simply because it is nonconsensual, but the *seriousness* of the wrong is determined by the amount of harm. Now if a friend of the Harm Explanation considers violation of consent as a harm, then the Harm Explanation and the Consent Explanation are consistent. Therefore, if someone intends the Harm Explanation to be an alternative to the Consent Explanation, then the relevant harm cannot simply be the harm of having unwilling sex. Instead, one would have to point to harms like physical harms, experiential harms, and ensuing psychological harms. For Wertheimer, the crucial morally relevant type of harm is experiential harm, and so sexual deception is wrong when the action "is of a type that is likely to lead to experiential harm even though A's action has not harmed B in this case."²² Consequently, Wertheimer's view entails a view of deceiving someone into sex that is different from the one I am defending. Wertheimer takes a hard line with deception that is likely to result in experiential distress, but he is unwilling to judge that someone pretending to have a Harvard degree has committed a serious offense, even if his lie has "causal impact" on the victim's decision to have sex.²³

The Harm Explanation is particularly attractive with respect to coercive sex, which is typically conceived of as sex obtained by physical force

21. Wertheimer, *Consent to Sexual Relations*, 96. For another view that ties "moral gravity" to "differences in degree of harm," see Joel Feinberg, "Victims' Excuses: The Case of Fraudulently Procured Consent," *Ethics* 96 (1986): 330–45, at 341.

22. Wertheimer, *Consent to Sexual Relations*, 203.

23. *Ibid.*, 192.

or threats of physical harm.²⁴ We cannot offer a proper account of the full extent of the wrong of violent rape, unless we mention the harms suffered by victims. This would appear to provide a strong motivation for the Harm Explanation.

However, the Harm Explanation is inadequate when it comes to explaining the serious wrongness of sex with the unconscious or by egregious forms of deception. The reason why is simple: as John Gardner and Stephen Shute have noted, there need be no harm involved.²⁵ The sex itself may not be physically damaging. Since the victims are unaware of having nonconsensual sex, they do not suffer experiential harms. And if these crimes remain undetected, then the victims will not suffer psychological harms later. Nonetheless, even when entirely harmless, sex with the unconscious and sex by means by egregious forms of deception are still seriously wrong.

On this point, Wertheimer has argued that sex with unconscious people is *likely* to be harmful.²⁶ But I am not aware of any investigation into whether this empirical claim about probabilities is correct. Indeed, I am doubtful that any such investigation could be carried out, given the obvious difficulties with getting good evidence about the frequency of harm caused by, say, sex with the comatose. Furthermore, I doubt that our robust judgment that nonconsensual sex with the comatose is seriously wrong is based on armchair speculation about these frequencies. Moreover, this judgment of ours is not hostage to the outcomes of an empirical investigation into this frequency. Even if, as an act-type, non-consensual 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. One could imagine a case of sex with a comatose person where the perpetrator took precautions that virtually ensured the sexual assault would be undetected. Nevertheless, this action would still be seriously wrong.²⁷

Moreover, the Consent Explanation can accommodate the initial motivation for the Harm Explanation—the virtual platitude that harm is

24. But why only threats of *physical* harm? For an argument that threats of psychological harm can vitiate consent, see Sarah Conly, "Seduction, Rape, and Coercion," *Ethics* 115 (2004): 96–121.

25. Their counterexample to the Harm Explanation is drug-induced "utterly harmless rape perpetrated on a sexually aroused but somatic victim and leaving no trace on her memory or body." Gardner and Shute, "The Wrongness of Rape," 198.

26. Wertheimer, *Consent to Sexual Relations*.

27. The same points could be made about deception by means of spousal impersonation. However, cases of undetectable impersonation are rare, with twin impersonation cases being the most realistic. For an actual example of twin impersonation, see Falk, "Rape by Fraud," 67.

an important part of the explanation of why physically coercive sex is so bad. One can consistently hold that the nonconsensuality of physically coercive sex is sufficient for its being seriously wrong, while maintaining both that its particularly harmful nature is *also* sufficient for the action to be seriously wrong and that harm makes nonconsensual sex *even worse*. Indeed, as a fully general pattern, harm makes an action worse, even though its nonconsensuality is itself sufficient for the action's wrongness. If a stranger trespasses in your garden, then her action is wrong in virtue of the fact that she lacks your consent. But it is worse if she thereby ruins the flower beds. The Consent Explanation that I advocate here does not claim that harm never makes a moral difference. It merely maintains that if a sexual encounter is nonconsensual, then this feature makes it seriously wrong.

III. WHY THE DECEIVED DO NOT CONSENT

Before proceeding to defend my second premise—whenever someone is deceived into sex, she does not validly consent to the sex—let me rehearse the dialectic. I have so far argued for the claim that having nonconsensual sex with someone is seriously wrong. By “nonconsensual sex,” I intended sex without the victim's morally valid consent.²⁸ In doing so, I postponed much of the heavy lifting of the main argument to the defense of my second premise. This means that in this section I cannot simply claim that on one particular conception of consent, the deceived party does not consent to sex. I must make the case that the deceived party does not give her *morally valid* consent to sex. Moreover, I suspect that few would antecedently agree since my target thesis seems right to many:

Lenient Thesis. It is only a minor wrong to deceive another person into sex by misleading her or him about certain personal features such as natural hair color, occupation, or romantic intentions.

And I speculate that people hold this view because they think that the deceiver would have the victim's morally valid consent. I will offer three subarguments to the contrary.

The Argument against Sexual Moralism

My first subargument aims to remove a key source of opposition to my second premise, by arguing that the Lenient Thesis cannot be grounded on an acceptable account of morally valid consent. To focus our discus-

28. As such, this premise is acceptable to different theorists who operate with distinct conceptions of morally valid consent. Thanks to an anonymous reviewer for pressing me to address this point.

sion on run-of-the-mill deception, suppose that Chloe meets a hippie, Victoria, on a night out. Victoria makes it clear that she wants to have sex only with someone who shares her love of nature and peace. Consequently, Chloe falsely claims to have spent time in a war zone as a humanitarian, when in fact she was there on military service. When Victoria asks whether she likes animals, Chloe omits the truth—"only to eat or to hunt"—and pretends to love petting them and watching them in the wild. As a result of this deception, the two spent a night together. My claim is that Victoria did not validly consent to sex with Chloe. I expect that most friends of the Lenient Thesis will insist that Victoria did validly consent to sex, even if they disapprove of Chloe's deception on other grounds.

What account of morally valid consent could support the Lenient Thesis? A natural first thought is that Victoria consented because she was willing to have sex and indicated as much by means of speech or behavior. On this simpleminded account, if a competent person freely agrees to sex, then she consents. But this simpleminded account is implausible. For everyone should agree that Milady did not properly give her morally valid consent to the nocturnal poseur, D'Artagnan. To separate the cases of Milady and Victoria, the Lenient Thesis can only plausibly be based on a more sophisticated account of consent that makes a fundamental distinction between different features of a sexual encounter. On this view, someone does not validly consent to a sexual encounter when deceived about its "core" features, such as the interaction's not being a genuine medical procedure or the other person's not being one's usual romantic partner. When someone is misled about these core features, then her will is not sufficiently implicated in the act for it to be consensual.²⁹ But

29. David Archard adopts an approach along these lines, which is based on a gradable notion of voluntariness: "There are aspects of a sexual act—what, why, and with whom—about which, and there are also degrees to which, a person may be misled in respect of that act. The more completely a person is misled, the less willingly she can be said to engage in that act, and the more wronged she is if she does engage in that act. She is wronged to the extent that her will is not implicated in the act and it does not express her free choices" (50). This allows Archard to maintain that false proclamations of love need not vitiate sexual consent, on the grounds that this deception is slight enough that the will of the deceived is still sufficiently "implicated." But this analysis is inconsistent with Archard's own account of the requirement of informed consent. Here Archard states that "the person does not need to know everything, only everything that would make a real difference to whether or not she consented" (46). This claim is in tension with the gradable voluntariness approach since the claim implies that all forms of deceiving someone into sex are nonconsensual. This is because ignorance of any deal-breaker makes "a real difference to whether or not" one consents. So if false proclamations of love lead to someone being deceived into sex, then she does not validly consent. Her will is opposed to the encounter, given it is an encounter with someone who does not love her, and this is enough to make it the case that she does not validly consent. David Archard, *Sexual Consent* (Oxford: Westview, 1998).

on the other hand, someone may validly consent even when misled about the encounter's peripheral features, such as the other person's natural hair color, occupation, or romantic intentions.³⁰

We can see the problem with this account of consent by starting to investigate how to draw the distinction between the core and periphery. There are some controversial borderline cases. A Cuban spy, masquerading as a dissident, marries a Florida woman but leaves her when his operational orders dictate. A British undercover policeman starts a relationship with an environmentalist in order to infiltrate her activist group. A Palestinian man pleads guilty to seducing an Israeli woman by falsely telling her that he was unmarried and Jewish.³¹ And the list goes on. Now I do not suppose that adherents of the Lenient Thesis will have uniform intuitions about whether the deceived person validly consents in each of these cases. People can agree that there is an important distinction between different features of a sexual encounter while disagreeing about how to draw this distinction. But what is important, for our purposes, is the nature of the debate about whether someone's religion, ethnicity, or political values count as a core feature of the sexual encounter. This is a debate about which features of a sexual encounter are objectively important enough to count as one of its core features. The lack of uniformity in people's intuitions about the cases simply reflects their differing views about the objective importance of religion, ethnicity, or political views for sex.

30. This loosely parallels the legal distinction mentioned by Joel Feinberg between "deception about what is consented to and deception about collateral matters for the purpose of inducing the victim to consent." As Rollin Perkins puts it, deception about the nature of the sexual act—"fraud in the *factum*"—vitiates legal consent, on the grounds that "what happened is not that for which consent was given." But deception about collateral matters of fact—"fraud in the inducement"—does not vitiate legal consent. Stephen Schulhofer notes that in practice only two forms of deception are generally recognized as being punished by law—"fraud as to the nature of the act and impersonation of a woman's husband." Spousal impersonation counts on the grounds that it changes the nature of the sexual act into adultery. The law goes wrong, in my view, in ignoring the fact that the other person is a constituent of the sexual act. Rollin M. Perkins, *Perkins on Criminal Law*, 1st ed. (New York: Foundation, 1957), 856; Feinberg, "Victims' Excuses," 331; Stephen Schulhofer, "Taking Sexual Autonomy Seriously: Rape Law and Beyond," *Law and Philosophy* 11 (1992): 35–94, at 88.

31. Rick Bragg, "Ex-Wife Is Suing Cuba over a Spy's Deception," *New York Times*, August 15, 1999 (accessed on February 1, 2013 at <http://www.nytimes.com/1999/08/15/us/ex-wife-is-suing-cuba-over-a-spy-s-deception.html>); Rob Evans and Paul Lewis, "Former Lovers of Undercover Officers Sue Police over Deceit," *Guardian*, December 16, 2011 (accessed on February 1, 2013, at <http://www.guardian.co.uk/uk/2011/dec/16/lovers-undercover-officers-sue-police>); Jo Adetunji and Harriet Sherwood, "Arab Guilty of Rape after Consensual Sex with Jew," *Guardian*, July 21, 2010 (accessed on February 1, at <http://www.guardian.co.uk/world/2010/jul/21/arab-guilty-rape-consensual-sex-jew>).

As such, the Lenient Thesis rests on an objectionably moralized conception of sex.³² It assumes that some features of a sexual encounter are morally more important than others. In this way, our moral norms about sexual morality are skewed because of common assumptions that some reasons are good reasons for deciding not to have sex, but other reasons are not. Compare McGregor on legal norms: “It is worth speculating on the reasons for the law’s unsympathetic reaction to victims of sexual fraud. . . . The general lack of sympathy [in cases such as someone impersonating a famous fashion photographer] is because it is believed that the women acted out of ignoble motives—the desire to get into the fashion industry, to have sex with famous people, and to exchange sex for an employment opportunity.”³³ Though common, this appraisal of sexual motivations is a hangover from unacceptably moralistic views of sexuality and has survived into more enlightened times only because it has managed to avoid being subjected to proper critical scrutiny. For once we do call it into question, I hope that you will agree that it will not do. One of the key achievements of waves of sexual liberation has been the promotion of a sexual pluralism that allows each individual to pursue his or her own conception of the sexual good, so to speak. Appropriately valued, sexual autonomy permits “individuals to act freely on their own unconstrained conception of what their bodies and their sexual capacities are for.”³⁴ As such, it is up to each individual to determine which features of a sexual encounter are particularly important to her. The religion of a sexual partner is an important part of a sexual encounter for someone if and only if that person decides that it is. Similarly, whether or not a partner’s views about peace and animals are an important part of Victoria’s sexual encounters is down to Victoria. In light of this point, it is not surprising that we can find counterexamples to a view of sexual consent

32. Considering sex by means of false promises, Murphy tentatively makes this point explicitly: “We could coherently conceptualize as rape any sex obtained through fraudulent inducement so long as the nature of the inducement itself does not provide strong evidence that the victim does not value sexuality in the way characteristic of the norms we seek to protect. A woman trading sex for the promise of a mink coat would reveal such deviation and thereby reveal an interest less worthy of protection.” Murphy, “Women, Violence, and the Criminal Law,” 222 (italics removed from the original). An editor of *Ethics* has pointed out that there is a sense in which my own position rests on a moralized conception of sex, insofar as I take violations of sexual rights to be serious wrongs. But to be clear, what I am valuing here is not any particular form of sex but rather individuals’ sexual *control* over whom they have sex with and how. And I remain neutral on the grounds of this value, so I am happy to ground it in the contingent fact that people happen to find this control highly important to them.

33. McGregor also speculates that “often what is at work is the suggestion that if these women are so gullible, naive, and stupid, then they get what they deserve when they consent to fraudulent claims,” McGregor, *Is It Rape?*, 187.

34. Stephen Schulhofer is here discussing the appropriate “legal protection of autonomous choice” in his “Taking Sexual Autonomy Seriously,” 70.

based around the distinction between objectively core and peripheral features. Suppose that Jiang willingly engages in group sex with his boyfriend Isaiah and another man, Antonio. In doing so, Jiang consents to various kinds of sexual acts involving both men. At one point, Jiang mistakenly thinks that he is engaged in one of these kinds of acts with Isaiah, when in fact he is engaged in it with Antonio. Since Jiang is willing to have sex with Antonio at this point, the sex is consensual, even though Jiang is mistaken about a purportedly “core” feature of the encounter—whether it is sex with his boyfriend. The reason why it is consensual is that Jiang has decided that this feature is irrelevant in these specific circumstances. The moral significance of this feature, and indeed any feature, depends on Jiang.

This point may seem to call only for a minor revision to the view of consent that we are considering. It might seem that the problem lies only in positing objectively important features of a sexual encounter. Instead, one could make this importance a subjective matter, relativizing the distinction between core and peripheral features to each person in the circumstances in which she finds herself. For example, a partner’s religion may be a core feature to someone with religious views; but whether a sexual partner is someone’s ongoing romantic partner may be a peripheral feature to someone else on a particular occasion. Now there is nothing inherently problematic with this relativization. Indeed, I welcome movement in this direction. But the crucial point is that this relativization is scarcely, if at all, open to a friend of the Lenient Thesis. For how are we to distinguish between the core and peripheral features for each person? The most principled way to do so is to distinguish the features that someone considered relevant to her decision to have sex from those that she considered irrelevant.³⁵ In the language of the law, we might say that the core features are simply those that the victim considered “material” to her decision to have sex. But if we take this line, then we should conclude that someone does not consent to sex when she is deceived into sex. For, by my stipulative definition, someone is deceived into sex when she forms a false belief about a *deal breaker*: the deception conceals a feature of the sexual encounter that makes a decisive difference to the victim’s decision to have sex.³⁶ To put this point in terms of our earlier example: the fact

35. In proposing a new tort for sexual fraud, Jane Larson defends this standard for the “materiality” of a misrepresentation. “One who fraudulently makes a misrepresentation of fact, opinion, intention, or law, for the purpose of inducing another to consent to sexual relations in reliance upon it, is subject to liability to the other in deceit for serious physical, pecuniary, and emotional loss caused to the recipient by his or her justifiable reliance upon the misrepresentation.” Thus what matters, on Larson’s proposal, is whether the misrepresentation “substantially influenced” the victim’s decision to have sex. Larson, “Women Understand So Little,” 462–64.

36. One of the rankings that Feinberg considers for gradations of voluntariness focuses on the different effects that deception may have on a victim’s decision making. However, he suggests that “a more interesting, and perhaps more useful, way of ranking the false beliefs

that Chloe is a soldier would count as a core feature of the sexual encounter precisely because this feature of Chloe is important enough to Victoria to make the difference between whether or not she is willing to have sex with her. So to resist my claim that someone fails to consent whenever she is deceived into sex, someone would have to find a different way of drawing the distinction between subjectively core and peripheral features. I am doubtful that anyone could find a systematic way of drawing the distinction, let alone that she could adequately motivate this way of doing so.³⁷

The Argument from the Case of the Chihuahua

To introduce my second subargument, let us set aside sex for a moment and consider a different example. Suppose that Aisha asks me to let her dog into my apartment. Knowing that I loathe Chihuahuas, Aisha falsely says that it is a Great Dane, and I hand over my key. Imagine my surprise and fright, then, to come home to find a Chihuahua scuttling around my floor like an overgrown furry cockroach. I say to Aisha, reasonably enough, that this Chihuahua is not the agreed upon Great Dane. Aisha acknowledges the difference is undeniable. But she replies that I had consented to the arrangement since I had agreed to let her dog into my home. Aisha's reply will not do, I am afraid. Aisha has effectively trespassed

that might be created and exploited by a deceiver" involves distinguishing whether inducements involved promises or threats and harms or nonbenefits. Feinberg, "Victims' Excuses," 341–44.

37. One possibility is to maintain that deception only vitiates morally efficacious consent when it is particularly unexpected. In the context of advocating reforms to rape law, Joan McGregor makes an "appeal to expectations in a potential sexual relationship" in order to ground a legal distinction between the exaggeration, promises, and flattery that are normal, expected parts of courtship from serious cases of deception. With respect to successful deception that affects someone's decision to have sex, McGregor states that "having sex with an imposter is not going to result in indifference on the part of the victim. On the other hand, finding out that your lover is not exactly the person you thought—he does not have a Harvard degree, does not come from a famous family, and is not rich—will not be met with such disbelief and deep sense of harm." While McGregor is here only addressing the legal issue of which laws should be in place, there is a parallel position to be taken on the moral issue: one could maintain that only unexpected deception vitiates consent. Along similar lines, one might hold that consenting to sex under circumstances in which one has good reason to think one may be the victim of deception is consenting to taking the risk that one is being deceived—even about "deal-breaking" facts. Either way, an appeal to expectations is unpromising in an account of morally valid consent because people's expectations are simply based on the frequency of the wrong in question, and this frequency has no intrinsic moral significance. If spousal impersonation became sufficiently widespread, with the consequence that victims did not react with "disbelief" upon learning that they had been deceived, then spousal impersonation would be no better for that fact, nor would it thereby become consensual. This is a pattern that we observe across the board. In nonsexual domains, the fact that a certain type of fraud is widespread and therefore expected does not make it the case that a genuinely deceived victim offers morally valid consent to a con. Thanks to an editor of *Ethics* for pressing me to address this point and for his or her formulation of it. McGregor, *Is It Rape?*, 181–89.

upon my property. The fact that I agreed to admit *some dog* does not mean that I agreed to admit *that dog*.³⁸ What I consented to let into my home was a Great Dane, and that dog was not a Great Dane.

There are superficial differences between the cases—an apartment is not the same as a body and a dog's entrance is not the same as sexual contact. But the soldier and dog-owner cases are alike in all morally relevant respects, which are as follows. The victim has a right to control others' behavior within her personal space. The deceiver would act impermissibly if she invades the personal space without the victim's morally valid consent. The victim's will is opposed to what the deceiver in fact intends. The deceiver manages to obviate this obstacle to her plan by means of deception. This deception means that the victim's acquiescence does not count as morally valid consent. My aim here is to use the case of Aisha to illustrate this pattern, so that once we are primed, we will see it in the case of Chloe as well.

This is particularly clear if the deceived person explicitly thinks of, and voices, the restrictions on her consent. Suppose I say to Aisha, "You may bring in your dog as long as it isn't a Chihuahua—I won't stand to have such an unpredictable dog where I live." If I have thought and said this, then it is clear that I have not consented to her bringing in her Chihuahua. I have insisted on my moral right against having a Chihuahua in my apartment, and so Aisha would violate this right by bringing one in. Similarly, suppose that Victoria had explicitly said to Chloe, "I'm willing to have sex with you on the assumption that you love animals and have never been in the military; but I am unwilling to do so otherwise. You're an animal-lover and not a soldier, aren't you?" Since Chloe knows she is a soldier who is, at best, indifferent to animals' welfare, she cannot reasonably consider herself to have Victoria's morally valid consent if she deceives Victoria on these points. Victoria has insisted on her right against sexual contact with a soldier who is indifferent to animals, and so Chloe would violate this right by making such contact with her. But if this is right, then we must reject the view that someone consents to sex when she is deceived into sex by means of run-of-the-mill deception.

This point is enough to show that run-of-the-mill deception can vitiating sexual consent. So if you also agree that nonconsensual sex is seriously wrong, then you would have to reject the Lenient Thesis:

Lenient Thesis. It is only a minor wrong to deceive another person into sex by misleading her or him about certain personal features such as natural hair color, occupation, or romantic intentions.

But I wish to press this line of objection further. The explicitness of the communicated consent shoves into the face of the deceiver the fact that

38. For elaboration of this general point, see, e.g., Alexander, "The Moral Magic of Consent II."

she lacks the victim's morally valid consent. However, the explicitness is not necessary for the absence of this consent. It would also be sufficient that the deceiver knows about the victim's deal breakers. If Aisha knows that I am unwilling to have a Chihuahua in my apartment, then she cannot consider herself as having my morally valid consent when she hides the breed of her dog. Once we become alert to this fact, we will also see that if Chloe knows that Victoria is unwilling to sleep with soldiers, then she also cannot consider herself to have Victoria's morally valid consent.

Of course, knowledge of another person's deal breakers is hard to come by, particularly in light of the fact that someone's reasons for having sex can be opaque even to herself. But this knowledge also is unnecessary for a deceiver to lack a victim's valid consent. For suppose that Aisha is uncertain about whether I am against Chihuahuas in my apartment; still, she decides to deceive me about the breed of her dog *in case* I might refuse to admit a Chihuahua. Since her deception is aimed at the possibility that I am unwilling to admit a Chihuahua, and she knows this possibility actually obtains, she cannot reasonably consider herself to have my valid consent to admitting such a dog. And once more, when we are sensitive to this moral pattern, we will see the same is true with respect to sexual consent. Since Chloe deceives Victoria with the purpose of preventing Victoria's deal breakers getting in the way of sex, she cannot reasonably take herself to have Victoria's morally valid consent.

The Argument from a Substantive Account of Consent

My third subargument is the most controversial since it relies on a substantive account of consent. (But should you end up unpersuaded of this account, let me stress that the previous two subarguments do not rely on any particular substantive account of consent and are consistent with a less demanding account than the one I proceed to offer.)

I wish to motivate my account by leaning on the theory of rights I introduced earlier. We saw that we have (moral claim-)rights over our persons and our property, and we can waive specific rights against particular interactions with particular individuals. So what fixes the set of rights that we waive? I suggest the following answer:

Intentions Thesis. The rights that we waive are the rights that we intend to waive.³⁹

The animating thought behind this thesis is the familiar one that rights are intimately linked to our autonomy and agency. They mark out personal realms over which we have exclusive control, and our decisions

39. As well as waiving rights, we can also forfeit rights. This forfeiture can be unintentional. For example, a would-be murderer would unintentionally forfeit her right not to be killed if her victim acts in self-defense. Thanks to editors of *Ethics* for pressing me to address this point.

determine exactly what may permissibly happen within these realms. Having these personal realms is crucial to our leading our lives in the ways that we should like. Fundamentally, this generates duties in other people to respect our wills: they must respect the choices that we make about what shall happen within these realms. If our choices are to maximally determine the permissibility of others' actions, then the rights that we waive must be the rights that we intend to waive. Only this arrangement leaves us fully sovereign over these realms.

In addition, the Intentions Thesis makes an account of consent continuous with the standard account of promise. It is uncontroversial that intentions fix the bounds of promises: the promises you make are those that you take yourself to be making. If there has been some confusion about a promisor's intentions, then the promisee must accept as final a sincere statement about what the promisor had in mind. (The promisee may have a separate complaint that the promisor has created in her a legitimate, but unfulfilled, expectation, but this takes us outside the ethics of promise, since promises are intentionally undertaken obligations.) Now consent and promise are closely related moral phenomena. By giving consent, we release others from obligations; by making promises, we place ourselves under obligations. We should expect these normative powers to operate on similar lines. The Intentions Thesis delivers this result.

Next we should observe that our intentions about waivers are typically both restrictive and extensive. Our intentions are *restrictive* insofar as we want to permit certain forms of behavior but not others. For example, we let hairdressers cut our hair but not stroke our hands. Meanwhile, our intentions are *extensive* insofar as there are always multiple courses of action that could realize the permitted behavior. There are countless permutations of snips that fall within any hairdresser's permitted range. Now, in general, the restrictions on our intentions are both explicit and implicit. Consider an intention unconnected to consent. Suppose Aisha intends to buy a puppy. She may explicitly have restricted herself to dogs in a shelter. But there will also be implicit restrictions on her intention. If she is like most prospective dog owners, then Aisha will not have considered the possibility that puppies can have rabies. Despite this, unless she is quite the eccentric, she does not intend to buy a rabid puppy. This restriction on her intention is entirely implicit. This is a general feature of intentions, which is thus shared by our intentions for rights-waivers: these typically have both implicit and explicit restrictions. For example, when I intend to waive my rights against Aisha bringing around her dog, I do not intend to permit her to bring around a rabid dog, even if I do not explicitly consider or mention rabies.⁴⁰

40. Explicit communication is unnecessary. If Aisha tells you that she intends to get a puppy, then you would infer that it is not the case that she wants to get a rabid puppy. We assume that conversational participants make utterances that are informative but will not waste everyone's time with excessive detail. Since it is common ground that I would not

These points about intentions, in conjunction with the independently attractive Intentions Thesis, lead us to the following account of consent. In consenting, we intend to allow a restricted range of possibilities, where these restrictions are both implicit and explicit. Any actual interaction with our persons or property is consensual only if this interaction falls within this restricted range of permitted possibilities.⁴¹ On this account of consent, if we object to events in virtue of *any* feature of them, then they lie outside the restricted range of possibilities to which we are consenting.⁴² If these events nevertheless occur, then “what happened is not that for which consent was given.”⁴³ This does not mean that we have to achieve the impossible feat of being aware of every feature of an event in order to consent to it. But it does mean that, were we aware of any of the features of the event, we would have to still be happy to go along with it. A consequence of this account is that it is not always transparent to people whether they are giving their morally valid consent to particular events in the world. But this is simply a consequence of the fact that the features of particular events are sometimes opaque to agents. And this is a welcome consequence: any account of consent must predict that Milady did not give her morally valid consent to sex with D’Artagnan even though at the time she thought she was properly consenting to what happened.

Applying this general account of consent to sex, people validly consent to sexual encounters only if they are willing to engage in these encounters, given all the features that these encounters have. Thus, this account of consent implies that when someone is deceived into sex, the sex is nonconsensual. For the deception has concealed a deal-breaking fea-

want a rabid Great Dane in my apartment, I need not mention this explicitly to Aisha, when communicating the range of my consent to Aisha. Thanks to an anonymous reviewer for prompting me to address this point.

41. This point holds even when someone has bad reasons for refusing to have sex with someone. We can all agree that racist prejudice is a morally abhorrent reason for any action. Nonetheless, when racists only decide to have sex with people of their own race on the basis of this prejudice, then they are consenting only to sex with people of their own race. When it comes to consent, we must respect other people’s wills as they actually are, not as they ought to be.

42. An anonymous reviewer has pointed out that one potential cost of this account of consent is that it would require our having a grip on how to individuate events and identify their features. But I doubt any full ethical theory can get away without ever having to individuate events, and in any event, I suggest that this cost is actually quite slight. Moreover, to make use of this account of consent, we do not need a fancy theory of the metaphysics of events. For the most part, we can rely simply on our intuitive judgments about what features an event has, and ask whether someone would have been happy to go along with the event, given that it has each of these features.

43. This principle often governs the law’s view of consent when the deception amounts to “fraud in the factum”—deception concerning the “core nature” of the act. See n. 30. Perkins, *Perkins on Criminal Law*, 856.

ture of the sexual encounter. As a result, the sexual encounter lies outside the range of possibilities that the victim intends to consent to. Therefore, whenever someone is deceived into sex, she does not validly consent to the sex, even in the case of run-of-the-mill deception, for example, about her partner's attitudes concerning peace and animals.

I have grounded this account of consent on the basis of three independently attractive motivations: a standard background theory of rights, the Intentions Thesis, and a general view of intentions. All of these are general motivations from outside of the sexual domain. They lead to an account of consent that entails that someone does not properly consent when deceived into sex. This result will seem counterintuitive to many, and this is some cost to the account. However, I would deny that an intuition that, say, Victoria consents to sex with Chloe deserves the status of a considered judgment around which we frame our ethical theory. For one, I have just offered two independent subarguments against such a claim. For another, we should be wary of our intuitions about sexual morality, since we often observe that recent generations' intuitions turn out to be mistaken. And we have excellent evidence that an intuition is mistaken if it conflicts both with the conclusion of the Chihuahua argument and with general considerations from other ethical domains, such as the ones that I have just used to motivate my favored account of consent.

That said, I would find it worrying if my account of consent has overly strong implications for the way consent functions in other aspects of our lives, and these implications contradicted relevant considered judgments of ours. Consider other aspects of our lives besides sex. Suppose Candace asks to store antique skis in Courtney's basement, and Courtney agrees. Unbeknownst to both parties, the skis were once owned by Josef Stalin. If Courtney had known about their former owner, then she would not have let Candace store them. Despite her opposition to this feature of the skis, are we really to say that Courtney did not validly consent to their presence in her basement?⁴⁴

I take this to be the most troubling challenge to my account of consent. I fully accept that this account implies that Courtney does not properly consent, and it is clear that Candace behaved blamelessly. As a result, we might be tempted to say that the reason why is that Candace had Courtney's morally valid consent. But we must be cautious about jumping to conclusions too hastily, for the correct analysis of this case is more subtle. The feature that is priming us to judge Candace innocent is not the existence of Courtney's consent. Rather, it is the fact that Candace is justifiably ignorant of the skis' history. As such, she would have a full excuse for acting in the way she did. And we can see that it is this excuse that is guiding our intuitions, by imagining instead that Candace does know

44. Thanks to an anonymous reviewer for pressing this type of objection.

both of the skis' history and of Courtney's unwillingness to store sporting equipment once owned by bloodthirsty dictators. By making these modifications to the case, it structurally resembles the case in which Aisha tries to sneak her Chihuahua into my apartment. As such, I hope you agree that in this version of the case Candace does not have Courtney's valid consent, and that this explains why Candace acts wrongfully in storing the skis. Now whether Courtney validly consents depends on facts about Courtney—it depends on the nature of her mental attitudes or utterances. Whether Courtney validly consents does not depend on Candace's epistemic state. Since Courtney does not consent when Candace knows the skis were Stalin's, equally she does not consent when Candace is ignorant of this fact. As a result, we can see that Courtney does fail to properly consent in the original case, and our intuitions about Candace's innocence are explained fully by Candace's justifiable ignorance.

Still, we may have a related worry that is not tied to intuitions about cases. We might worry that in taking a strict line about what each party consents to, the account of consent forces us to forgo mutual benefits of cooperation. Since the scope of each party's consent is marked by their intentions, and both parties may permissibly be ignorant about whether an interaction is covered by these intentions, everyone may be worse off in virtue of being unable to form common knowledge about which interactions are consensual. As a result of failing to align their expectations about consensuality, they may bear unnecessary costs or forgo possible benefits.⁴⁵

My response to this worry is threefold. First, we should take care not to overstate the scope of this concern. On my account of consent, it will often be possible to form these shared expectations through communication. So when consent is particularly important, as in the case of sexual rights, each party has more moral reason to communicate about their intentions. Admittedly, this response's force is limited by the fact that it would not cover cases in which each party is unable to discover whether the interaction is consensual. This may be particularly likely in the case of sexual consent if people are not always sure what their reasons for deciding to have sex are and what their deal breakers are.⁴⁶ Second, if a party has taken all reasonable measures to establish that the other party consents, and yet it turns out that she does not, then her justifiable ignorance provides her with a full excuse for moral wrongdoing. So considerations of her moral ledger would provide her with no significant disincentive to cooperation. Third, in the case of property rights, our choices of laws can take into account further benefits of mutual cooperation. To encourage this cooperation, we may prefer a property system that pro-

45. Thanks to an anonymous reviewer for prompting me to address this concern.

46. Thanks to an editor of *Ethics* for correcting me on this point.

fects innocent people who act in good faith from bearing costs. Along these lines, someone might have legal protection if she has come to rely on a nonconsensual agreement, so long as the nonconsensuality arises from factors of which she could not reasonably be expected to be aware. Suppose Courtney is curious about why the letters “J. S.” are engraved on the skis and, upon investigating, comes to discover their history; consequently, she objects to the arrangement as not being what she signed up for. One legal possibility is that if Candace has come to materially rely on the arrangement, then she may continue storing the skis, either for the terms of the lease or for enough time for her to make alternative arrangements. In order to offer an incentive for cooperation, we may prefer a property rights scheme that includes measures like this that aim to protect people who inadvertently partake in nonconsensual property transactions. Or we may not—the debates about various property schemes are complex, and I will not enter into them now. My point here is that if we are particularly concerned with facilitating cooperation involving property, then we can so mold our property laws in these sorts of ways. But these considerations do not plausibly extend to bodily rights, since we are unwilling to trade bodily protection off against the possible benefits of mutual coordination and cooperation. Consequently, any acceptable legal system would require anyone to desist from a bodily interaction, upon discovery that the other party does not validly consent. As such, the rectificatory duties in the event of infringing bodily and property consent may diverge, and this is a consequence of valid bodily consent being significantly more morally important than valid property consent.

IV. BENIGN DECEPTION, CULPABILITY, AND THE SERIOUSNESS OF THE WRONG

So far I have defended both premises of my main argument, which together entail my conclusion that culpably deceiving someone into sex is seriously wrong:

1. Having sex with someone, while lacking her morally valid consent, is seriously wrong.
2. Deceiving another person into sex involves having sex with that person, while lacking her morally valid consent.
3. Therefore, deceiving someone into sex is seriously wrong.⁴⁷

47. Some people are surprised by an implication of the thesis that culpably deceiving someone into sex is seriously wrong: two individuals can simultaneously seriously wrong each other by mutually deceiving each other into sex. But even if this implication is unexpected, we should accept it. For people can simultaneously wrong each other in the same way. By analogy, consider a fistfight. Each person may lose the right to complain about the other's behavior. But from a bystander's perspective, we can see that each has acted badly in

Having completed my argument, I wish now to discuss three points about my conclusion.

First, let me stress that the serious wrong here is the nonconsensual sex, rather than the deception in itself. Indeed, deception sometimes plays benign, and even desirable, roles in attraction and sexual relationships. Sarah Buss observes that in “many good human lives, the beloved falls in love with the lover because and only because he initially gives her a misleading impression of who he is and of his intentions.”⁴⁸ Someone may harmlessly misrepresent how interested she is in her date’s tales, and often one does best to conceal one’s love until it is reciprocated.⁴⁹ Further, people may want to be deceived. Sometimes, we may want “to encounter reality indirectly, obliquely transformed” out of an enjoyment of the magic of romance.⁵⁰ And in relationships, we do not always endorse the way that we would react to certain truths about our partners, perhaps out of jealousy or insecurity. As a result, we may prefer that they lie to us so as not to incite these reactions in us.

These points are well taken. However, I deny, and Buss does not suggest, that these points legitimize deceiving someone into sex. For no matter how benign the deception in other respects, if it vitiates someone’s sexual consent, then this leads to seriously wrong misconduct. The possible benefits of romance and relationships would not justify having non-consensual sex with someone. So if someone deceives another person for the sake of their mutually falling in love, then the price she will have to pay is abstinence until she is sufficiently confident that the false beliefs are not part of the other person’s reasons for having sex. Moreover, I speculate that much of the harmless or welcome subterfuge that features in attraction and relationships does not hide deal breakers and hence does not lead to deceiving people into sex. If someone would still choose to have sex with another person, were the veil of ignorance lifted, then her sexual consent is unaffected by the deception.

Second, in addition to the serious wrongness of acts, there is the further issue of agents’ culpability for performing wrong acts. I am assuming the standard view of culpability, which includes deliberately doing wrong, being aware that one does wrong, and taking an excessive risk of doing wrong. Thus someone is culpable for serious wrongdoing if she deliberately aims to deceive another person into sex, if she foresees that her actions will lead to her deceiving another person into sex, and if she recklessly takes an excessive risk of deceiving someone into sex. These

assaulting the other. We do not judge their behavior as morally neutral simply because the other is treating them in the same way.

48. Sarah Buss, “Valuing Autonomy and Respecting Persons: Manipulation, Seduction, and the Basis of Moral Constraints,” *Ethics* 115 (2005): 195–235, at 220–21.

49. *Ibid.*, 221.

50. *Ibid.*, 226.

points about culpability are very familiar. But I want to briefly discuss the implications of recklessness for our topic. Suppose that Chloe lied about her career simply to avoid the conversation taking an awkward turn that might disrupt her smooth pickup technique. Still, Chloe should realize that she was taking a risk that Victoria's belief that Chloe was an animal-loving humanitarian ends up a crucial part of her reason for consenting to sex. Indeed, when sexual partners deceive each other about themselves, there is frequently some risk, however small, of this deception leading to nonconsensual sex. This is because of the epistemic limitations people face. It is hard for people to know what other people's reasons are for deciding to have sex. Further, deception "is a pervasive possibility in sexual encounters and relationships" in light of "the peculiarly implicit nature of sexual communication," which makes miscommunication likely when "endearments and gestures of intimacy are not used to convey what they standardly convey."⁵¹ Whether taking these risks counts as recklessness depends on how much risk it is acceptable to take. So how much of a risk may we take of deceiving another into sex? This is a difficult applied question, and I doubt that we can give it a precise answer in the abstract. Instead, the best we can do is to characterize the types of consideration to which we should attend when analyzing particular cases. On one side are the costs to a policy of avoiding deception. Honesty can come at a loss of privacy. Additionally, if people cautiously forgo sexual encounters, and it turns out that these would have been consensual, then they miss out on any benefits of these encounters. On the other side is the seriousness of the moral wrong of nonconsensual sex. We would have to weigh these considerations on a case-by-case basis.⁵² But given the seriousness of the moral wrong, I suspect that we will often judge that people have strenuous duties to reduce the risk of deceiving another into sex, and it would be hard to justify the status quo in which "society, wisely or unwisely, generally expects [potential victims] to assume the risk of misrepresentation in intimate relationships."⁵³

Third, a comparison between deceiving someone into sex and having sex with an unconscious person is enlightening because they are

51. Onora O'Neill, "Between Consenting Adults," *Philosophy and Public Affairs* 14 (1985): 252–77, at 269.

52. This touches on an important issue that is linked to our main topic of deception: concealment. This raises the question of what duties people have to inform their sexual partners about themselves to avoid false beliefs about deal breakers. But this question is a nuanced one. Toward the goal of mutually consensual sex, some epistemic labor may be required on both sides. If someone has a highly idiosyncratic sexual preference—say, he only wants to sleep with people whose star sign is Pisces—then it may be his responsibility to disclose this preference, rather than his partner's responsibility to inquire into whether he has this preference.

53. Schulhofer, "Taking Sexual Autonomy Seriously," 54.

wrong for the same reason. Suppose that someone took highly effective precautions to ensure that his chronically comatose victim suffered no physical harm and never found out about his having sex with her. Why is his action wrong? My answer is twofold: the victim has a stringent right against sexual contact, which is based in the importance of her sexual autonomy, and he has violated this right by having nonconsensual sex with her. I have argued that these features are present when someone deceives another into sex. And so to avoid equating these cases, one would have to find a sufficiently morally important disanalogy. What could this be?

We can put to one side several irrelevant differences. First, there will be several counterfactual claims true of a victim of deception, such as “if the victim had inquired further, she might have avoided being attacked,” and we might think that similar claims could not be made about an unconscious victim.⁵⁴ This points to the deceived victim’s ability to avoid the fraud. However, some deception will be virtually undetectable, and some unconscious victims also have the ability to avoid attacks. If a victim passes out drunk, then one could say that “if the victim had drunk less, she would have avoided being attacked.” But this does nothing to diminish the wrong she suffers. And this is a fully general point: wrongs are not diminished because victims could have avoided them. Stranger rape is no less bad simply because the victim could have avoided it “by never leaving home without a (reliable!) army.”⁵⁵ Second, one might claim that victims of deception *ought* to have avoided deception, presumably in the prudential sense of “ought.” But again, a similar point can be made of some unconscious victims. It is prudent not to drink so much that one passes out around people who are liable to have sex with unconscious victims. So there is no disanalogy and again, this point about prudence does not diminish the wrong perpetrated by offenders. Third, one might claim that some victims of deception can be complicit in their deception and thereby bear partial responsibility for it. For example, if Victoria wants to believe that Chloe is a humanitarian animal lover, then this may make her less skeptical than she would ordinarily be. However, this point would do nothing to improve our view of deceiving people into sex when the victims are not complicit in any way. And more importantly, someone’s complicity does not diminish the other person’s wrongdoing. We can see this if we consider cons. Suppose Carlo runs a Ponzi scheme. Some of his victims are entirely innocent of any negligence on their parts; other victims believe Carlo partly because they want to believe him. I

54. Thanks to an anonymous reviewer for stressing the need for me to address these putative disanalogies.

55. Judith Jarvis Thomson, “A Defense of Abortion,” *Philosophy and Public Affairs* 1 (1971): 47–66, at 59.

hope you agree that Carlo acts just as badly when he cons either type of victim. What this shows is that even if we grant for the sake of argument that some victims are responsible for their deception, this does not diminish the wrongdoing of the perpetrator. In the words of David Archard, we must avoid the “danger of having a zero-sum picture of responsibility for a crime. This picture imagines that the more that a person contributes by her behavior or negligence to bringing about the circumstances in which she is a victim of a crime, the less responsible is the criminal for the crime he commits. A crime is no less unwelcome or serious in its effects, or need it be any the less or malicious in its commission, for occurring in circumstances which the victim helped to realise.”⁵⁶ This general point applies as much to sex as to Ponzi schemes.

There is, however, at least one morally important difference between the two types of nonconsensual sex. Victims of unconscious sex are likely to suffer a greater dignitary harm than victims of deceptive sex, insofar as the former victims are likely to feel that they have been more violated than the latter victims. However, I suggest that this is simply a consequence of the fact that the latter victims mistakenly accept the Lenient Thesis. Many people who are deceived into sex do not consider themselves to have suffered a serious moral wrong. In light of this, they do not consider themselves to be gravely disrespected. However, if it were more widely realized that the Lenient Thesis is false, then this difference between unconscious and deceptive sex would disappear. Both sets of victims would then realize that they have suffered a grave affront to their sexual autonomy. So there is a morally relevant difference, but one that would evaporate if the correct view of sexual deception were more widely accepted. Are there other differences beside? I cannot think of any, but for reasons of space, I will not pursue this inquiry further here. Instead, I will simply make the provocative suggestion that if everyone rejected the false Lenient Thesis, then deceiving someone into sex would be in the same moral ballpark as having sex with an unconscious person. If others wish to reject this rough moral equation, then I pass the challenge to them to find further moral differences.

V. CONCLUSION

To summarize, I have argued that deceiving someone into sex vitiates her consent to sex, and it is seriously wrong to have sex without someone’s valid consent to sex. Therefore, deceiving someone into sex is seriously wrong. The seriousness of this wrong is widely recognized when the deception involves, say, spousal impersonation. But it is wrongly overlooked in the case of run-of-the-mill deception.

56. Archard, *Sexual Consent*, 139.

My conclusion may appear prudish or reactionary. But I would resist this characterization. Instead, it is the inevitable consequence of placing the proper value on our sexual autonomy. Ultimately, my stance is motivated by the thought that someone has the right to decide down to the very last detail what comes into sexual contact with her body, and this is a particularly important right. For example, Victoria's rights over her sex life extend to deciding the interests in animals or peace of the people she sleeps with, or for that matter their incomes or favorite colors. The Lenient Thesis goes wrong because it objectionably trivializes some of these choices. But the truth is that it is Victoria's prerogative to choose not to have sex with someone in virtue of any feature of her whatsoever, and "taking away the power to consent to sexual relationships, to control this most personal part of our domain, is an extremely grave and serious injury."⁵⁷ Since deceiving someone into sex involves disrespecting her sexual choices, my thesis calls for more autonomy in our sex lives. As such, we should not see it as a prudish or reactionary thesis but a liberating one.

57. McGregor, "Force," 235.