Sexual Agency and Sexual Wrongs: A Dilemma for Consent Theory

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Abstract

On a version of consent theory that tempts many, predatory sexual relations involving significant power imbalances (e.g. between professors and students, adults and teenagers, or employers and employees) are wrong because they violate consent-centric norms. In particular, the wronged party is said to have been *incapable* of consenting to the predation, and the sexual wrong is located in the encounter's nonconsensuality. Although we agree that these are sexual wrongs, we resist the idea that they are always nonconsensual. We argue instead that it is possible for students, teenagers, employees, etc. to fully consent to sexually predatory encounters; denying as much renders survivors of predation vulnerable to compounding harms. Survivors face a dilemma: give up either their understanding of their experience as wrong, or their self-conception as an agent capable of consenting. We call the latter phenomenon *agential demotion*.

1 Introduction

Consent looms large in discussions of sexual ethics. This is hardly surprising; nonconsensual sexual contact is a serious wrong, so when there is no consent, one should refrain from sex. So much, so obvious. But one might think that there are important central ideas in sexual ethics that do not, and perhaps even should not, feature consent. If so, the near-*exclusive* focus on consent in discourse about sexual ethics is a mistake.

In this paper, we contribute to a growing body of literature that suggests that this is so.[1] We are focused on a particular kind of sexual violation, involving predatory sexual encounters to which victims freely consent. Such encounters, we think, *are* serious sexual violations — and explaining those wrongs falls under the project of sexual ethics — but they are *not* plausibly wrong because they violate consent-centric norms. Approaches to sexual ethics that exclusively emphasize consent, therefore, cannot accurately explain these violations.

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[1]Our focus is quite different from another recent kind of critique of consent theory. Some theorists have challenged the ubiquity of "consent" talk in sexual ethics on the grounds that mismatches some paradigms of good sex. When sex is thoroughly mutual and collective, for instance, or offered rather than requested, consent language might not quite fit. See e.g. Kukla (2018), Gardner (2018), or Ichikawa (2020) for arguments along these lines.

The problem isn't merely theoretical. It's not *just* that we misunderstand what's going on in these cases. There is also a compounding harm. The consent framework *itself* can harm survivors of sexual predation, because it doesn't allow them to conceive of themselves as full agents, while also recognizing the moral violation they have suffered. They face an unjust dilemma: give up on the idea that they were wronged, or endorse a kind of *agential demotion*.

We'll focus on two kinds of cases: exploitative sexual relationships between minors and adults, and adult sexual relationships involving significant power imbalances, such as relationships between athletes and coaches, students and teachers, or employees and employers.

The paper will proceed as follows. We begin in §1 by motivating and characterizing the consent-emphasizing framework we will resist. §2 will introduce our central cases — one involving sex between an adult and an underage teenager, and one involving sex between a professor and his student. We'll argue that these cases involve sexual wrongings that are not well-explained by a lack of valid consent. The sexual wrongs we posit may not be recognized by their victims, so our diagnosis has implications on questions about first-person authority about sexual violation; we discuss them explicitly in §3. §§4–5 introduce our key notion of *agential demotion* — an important and underappreciated cost of explaining sexual violations of the sort we are considering in terms of consent. Those harms have a lot to do with the significance of ascription of *competence* to sexual decision-making, which we discuss in §§6–7. §8 relates our discussion to other recent discussions in sexual ethics.

2 The Consent Framework

We begin with some clarifications about how we're using "consent".

In the philosophical literature, consent is standardly thought of as a way of waiving a right against some conduct or activity. You generally have the right not to have your body sliced open with a scalpel, but if you consent to a medical procedure, the doctor may perform that action without violating your rights. Likewise, you have the right not to have your body touched in sexual ways, but you can waive that right by consenting to sexual contact. Following standard conventions, we specify that consent is "valid" when it genuinely waives that right. (If you agree to something under sufficient duress, or with insufficient understanding of it, you don't give valid consent, and so you retain your right against it happening.) For terminological specificity, we'll use "consent" in ways such that genuine consent must be valid. ("Invalid consent" is not genuine consent; compare "counterfeit money".)

One virtue of the consent framework is that it provides a plausible diagnosis of the kind of sexual violation involved in paradigmatic rapes, and extends it to other similar cases where consent is clearly violated.[2] Someone who sexually penetrates another person by force against their obvious will inflicts a grievous harm, subjecting the victim to a kind of contact against which they have a strong claim-right; the consent framework extends this story to cases where the victim does not actively resist, but also does not consent — cases, for instance, where someone is incapacitated, and so does not attempt to fight off their assailant, or cases where they comply out of fear for what will happen if they do not. Consent theory explains why victims in these cases also suffer a serious violation.

Criminal codes typically encode sensitivity to this particular kind of harm, in which lack of consent plays a central explanatory role. While we have some ambivalence about the

[2] See Cahill (2001, ch. 6).

way in which criminality is used to enforce sexual ethics,[3] we have no quarrel with the idea that consent does play *an* important normative role that ought to be recognized in law, and it may well be that its legibility in the legal system is an important virtue of the consent framework.[4]

Recognizing the similarity between forcible rape and other cases of sexual contact without consent improved people's understanding of sexual ethics. However, we are less impressed by an additional tendency we often see, extending the treatment to a further category of sexual violations that do involve at least apparent consent to sex. If the consent framework is the only way one knows how to talk about sexual wronging, then sound moral sensibilities generate pressure to describe some such cases — some cases involving sex between adults and minor teenagers, for instance — as nonconsensual. While we respect some of these motivations, we'll argue that denying consent in these cases is both a theoretical and a moral mistake.

3 Our Central Cases: Sexual Violations with Consent

Here are two cases that will frame much of our discussion. Both involve sexual wrongs; the consent framework invites us to explain those wrongs via lack of consent. As we'll explain in the subsequent sections, we think this is a mistake, both because it misunderstands what consent is, and, consequently, because it asks the victims in these cases to *demote* themselves, in their own self-conception, from full agency.

Our cases are fictional thought experiments, but we hope our readers will recognize them as realistic. Indeed, they are closely based on specific real-life examples that we know well.

Case 1: Teenager Lily, a 15-year-old girl, goes to a show and meets Kyle, a 22-year-old man. They experience mutual attraction, and soon develop a sexual relationship. Lily is enthusiastic about their relationship, including the sexual activity, which she often actively seeks out. For example, she proactively engineers occasions where her parents will be away long enough for her to invite Kyle over to have sex with her. Lily's attraction to Kyle is explained in part by their relative power imbalance: he has a car and a driver's license, for instance, and she likes that. Kyle is also much more sexually experienced then Lily, and she likes that too. Lily is proud to have attracted an adult, whom she sees as more mature, worldly, and powerful than herself or her peers. And she derives a particular pleasure from behaving in ways that excite him and satisfy his desires.

Following pretty mainstream liberal intuitions (though not ones without their dissenters[5]), we condemn such sexual relationships. In particular, we think Kyle seriously wrongs Lily in a way deeply connected to the sexual component of their relationship. But as we'll discuss below, we do *not* think, as many are tempted to, that this is because their sexual contact isn't consensual.

Here is our second case. Like the first, it is based closely on real-world cases we know.

[3] We are sympathetic to some of the reservations voiced in Srinivasan (2021) and Yap and Emerick (2023), for instance.

[4] So we agree with both central ideas in West (2009): (1) there are good reasons for criminal law to treat consensual and nonconsensual sexual contact very differently, but also (2) there are other important moral and social questions, not well-suited for the criminal justice system, that cannot be well-articulated in the consent framework.

[5] E.g., Rubin (1984, 143); Foucault (1988, 204–5).

Case 2: Student Taylor, a 20-year-old university student, enrols in a course taught by Gregory, a professor in his mid-40s. Impressed by both his knowledge and his charm, she gradually develops an infatuation with him, which he notices and cultivates. He starts mixing in personal messages along with his academic feedback in emails and office hour conversations; as their correspondence becomes more intimate, he also starts including sexual innuendo. All of this is flattering and exciting to Taylor, who never imagined that her sophisticated professor would have any interest in someone like her. One day, after Gregory expresses frustration with his marriage and "accidentally" admits overtly that he is attracted to Taylor, she kisses him. They go on to have a secret affair that lasts a couple of months.

Many would condemn Gregory's treatment of the student Taylor. We count ourselves among them: Gregory inflicts serious harm on Taylor, and universities have good reason to prohibit relationships like this one. Indeed, Gregory, as described, acts with more deliberate guile and manipulation than we stipulated that Kyle did in the Lily case. But, as in the case of Lily, we don't think we should justify such prohibitions on the grounds that relationships like this could never be consensual. We think there often *is* consent in such cases, but that a significant sexual violation occurs nevertheless.[6]

A characteristic feature of both our cases is that we have victims of sexual misconduct who seem to be enthusiastic participants in the sexual relationship. This generates some anxiety about how to characterize them. Liberal principles may motivate one to defer to the individuals — who are *we*, one might ask, to tell people like Lily and Taylor what relationships they can and cannot freely choose to enter into?

While we disagree with such libertarian verdicts about which relationships are permissible, we recognize and respect a key motivation behind them: a concern about undue paternalism, and an insistence on recognizing people's sexual agency, including teenagers' and students'. There *is*, we recognize, an important painful history of reactionary sexual moralism — and sexual minorities were its particular victims: mainstream intuitions about what kind of sexual relationships *could really be valuable* have played central roles in the maintenance of homophobic norms, for instance. Our central argument against the consent framework will turn out to be an expression of these kinds of agency-affirming values.

Our project is in no way a defense of relationships like those in our central cases. We agree with the mainstream contemporary consensus that they are sexual wrongs. But we dispute the mainstream *explanation* for these wrongs. We turn more specifically to this explanation now.

4 The Consent-Theoretic Explanation

The story we resist is a simple one: cases like *Teenager* and *Student* involve wrongs because they involve sex without consent. Lily, a legal child, *cannot consent* to sex with an adult,

[6] Amia Srinivasan also argues that cases like Student are both consensual and problematic. She focuses particularly on distinctively pedagogical failures in sexualising student–teacher relationships. Drawing on a psychoanalytic framework, Srinivasan argues that "the student's longing for epistemic power" can result in a misplaced desire for the teacher themself. (Srinivasan, 2021, 131) Any teacher who allows that desire to take a sexual valence is failing as a teacher because they did not harness those intense feelings to further pedagogical ends. (She also thinks such relationships often contribute to sex discrimination.) Our focus is both narrower and more specifically moral: even setting aside whether Gregory is a bad teacher or contributing to a bad culture, there is an important sense in which he wrongs Taylor — despite her consent. Moreover, it is a distinctively sexual wrong; quite different from other ways in which one might educate someone badly.

so the contact Kyle has with her amounts to nonconsensual sex. And because Gregory has a substantial *power imbalance* over Taylor, his student, she cannot consent to sex with him.

We think this consent-theoretic explanation plays quite strong roles in the public imagination, and that it also sometimes tempts theorists and policymakers. We rarely see explicit commitments to it in the academic literature, but given its role in public consciousness, we think it is important to respond to it. As we'll argue below, we think the consent-theoretic story is both false and harmful.

The consent story is especially widespread in cases like *Teenager*. Indeed, according to a popular belief, so-called "age of consent" laws enshrine into law the idea that children and teenagers younger a certain threshold cannot consent to sex. This is a mistake. Criminal codes do not typically have much to say about whether young people do or can give consent; rather, so-called "age of consent" laws delineate the circumstances under which someone's consent is *relevant* to whether one commits a criminal offence by having sex with them.[7] Here, for instance, is the pertinent section of the Canadian Federal Criminal Code:

> when an accused is charged with [one of several sex crimes] ... in respect of a complainant under the age of 16 years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge.[8]

In other words, sexual contact with a child younger than the age of 16 is a crime, *whether or not they consent*. This is not at all the same as saying that such children *cannot consent*. Even many official documents, however, do express this idea as concerning who *can* and *cannot* consent to sexual activity. Canada's Department of Justice website's page on "Age of Consent to Sexual Activity" does so, even though the actual code, quoted above, does not.[9] We offer the Canadian Criminal Code as just one example, but it is quite typical in this respect.[10]

One sees similar invocations of consent in discussion of cases like *Student*. Those who advocate bans on student–professor sexual relationships, for example, sometimes express their rationale for them in terms of the limited possibilities for consent when there are significant power imbalances. Coleman (1988, 120–1), for instance, argues on psychoanalytic grounds that student attraction towards professors is a result of 'transference,' concluding that there is no consent:

> If the reason is transference, the dependent person is damaged per se because she never actually consented to sex. By definition she is unaware of unconscious motivations and thus is damaged by a sexual relationship she never actually agreed to—a sexual relationship with the powerful person rather than with the idealized person she created. Coleman (1988, 123)

[7] Indeed, the label, "age of consent," though widely used to describe these laws, is not used in the relevant statutes themselves.

[8] R.S.C. 150.1(1).

[9] As of 20 January, 2022, this language is online at https://www.justice.gc.ca/eng/rp-pr/other-autre/clp/faq.html.

[10] We agree with the mainstream idea that there are *some* cases of underage sex in which consent is impossible. It is widely recognized that valid consent has to be at least minimally *informed* — one cannot consent to something about which one has a deeply impoverished understanding. We think it fairly plausible that most or all *young* children have an insufficient comprehension of sex to consent to it. So we do not quarrel with the mainstream idea that there is no consent when it comes to sex with young children. But we think it is a mistake to extend that treatment to older children like Lily. While we agree that adults should be prohibited from sexual relationships with 15-year-olds, we will argue below that the rationale for this ban must not be that they cannot consent to them.

Such ideas remain live. In a 2018 interview, Canadian novelist Heather O'Neill discussed the sexual harassment involved in relationships between university students and instructors, affirming that "is no consent in a power relationship like that."[11] Critics of prohibitions on student–teacher relationships also tend to focus on the consent question, supposing that such prohibitions presuppose that consent is impossible.[12] If you do a Google search around keywords like "consent sex power imbalance," you'll find many confident assertions along similar lines, e.g.:

- "Unequal power dynamics, such as engaging in sexual activity with an employee or student, also mean that consent cannot be freely given."[13]
- "Power imbalances can make it difficult to recognize if consent is freely given, and can even make consent impossible."[14]
- "Pennsylvania also recognizes that power imbalances in certain relationships make consent impossible, regardless of age."[15]
- "Strictly from a legal context, a power imbalance negates consent. If there is the potential for any form of coercive influence, consent cannot be given."[16]

We hope it is clear at this stage that the consent-theoretic explanation of the wrongs in our central cases is widely accepted; within mainstream discourse, it is the default view.

We reject the consent-theoretic explanation, for a variety of reasons. First, we're impressed by extant arguments in literature against assimilating the problems with power imbalances to a lack of consent,[17] and the thought that too-inflationary notions of consent threaten to undermine consent's potential moral explanatory power.[18]

Moreover, although the quotes given above clearly attest to the widespread tendency to treat power imbalances like those at play between Taylor and Gregory as inconsistent with sexual consent, there are also reasons to interpret this thought as not quite serious. After all, it is very widely held, including by all parties to this debate, that sex without consent is rape, and that rape is a serious criminal matter. But even amongst those who support bans on student–teacher relationships, one does not typically see calls for criminal sexual assault prosecution in cases like Gregory's.[19] This, we think, reflects a tacit awareness that the consent framework isn't quite the right one for these cases.

There is, to be sure, a terminological question at play here: should we use "consent" in a stronger way that rules out its application in our central cases, or in a weaker way that is easier to achieve, but less morally important? We want to suggest that the best way to progress on this question is to attend more explicitly to questions about what we want the idea of consent to do. As we understand it, consent is especially important for illuminating agency, autonomy, and competence. As we'll argue at length below, we think some of the

[11] https://www.nationalobserver.com/2018/01/10/analysis/award-winning-author-slams-twisted-perk-university-jobs-after
[12] E.g. Young (1996).
[13] https://www.rainn.org/articles/what-is-consent
[14] https://dancesafe.org/introduction-to-navigating-power-dynamics/
[15] https://pcar.org/laws-policy/age-consent
[16] https://www.mypacertimes.com/home/2021/8/17/pacer-pillowtalk
[17] E.g. West (2009), Fischel (2019, 15), Srinivasan (2021, 127–8).
[18] E.g. Ichikawa (2020, 24).
[19] Sometimes professors engage in behaviour with their students that do provoke calls for criminal sanction, but this happens when they engage in sexual behaviour that would have been criminal, even had the victim not been their student — if, for instance, a professor drugs his student and sexually penetrates her while she is unconscious. This is rape, but not because she is his student.

implications of the consent-theoretic explanation have implications in these domains that are both false and harmful.

The cases we focus on in this paper cast one tension into particularly stark relief. There is often divergence between first- and third-person assessments of consent, whether it is a genuine expression of someone's autonomy, and whether it thereby renders an encounter morally permissible. In the following section we consider the epistemic features of this tension by discussing an anxiety concerning self-knowledge. Shouldn't people themselves be best-placed to know when they have consented, when they have refused, and when they are being mistreated? If so, aren't Lily and Taylor's participation in their relationships excellent evidence that they are permissible? In short, should we accept *first-person authority* about sexual mistreatment against oneself? We turn now to a discussion of several precisifications of that question.

5 First-Person Authority

There are many domains in which first-person authority (FPA) ought to be respected, for both epistemic and ethical reasons. We have both epistemic and ethical reasons to treat someone as the final and decisive authority on their gender identity, for instance.[20]

For our purposes, FPA is understood to capture an epistemic difference between first-personal and third-personal perspectives in a given domain. When someone has FPA, they are in a better position to know things in that domain, compared to others.[21] In this section we argue (i) that there is *no* FPA for judgments to the effect that one isn't being sexually mistreated, (ii) that there *is* FPA for judgments to the effect that one is being sexually mistreated, and (iii) that there is FPA for judgments to the effect that one is consenting *or withholding* consent.

Part of our skepticism about FPA for judging that one isn't being sexually mistreated derives from the observation that in some cases of sexual predation, the predatory harm itself is partly epistemic. Victims of predatory grooming, for example — as well as many others — are often *strategically placed* by their abusers in bad epistemic positions. Lauren Leydon-Hardy (2021, 140) calls this phenomenon "epistemic infringement". Paradigm examples of epistemic infringement include predatory grooming, gaslighting, and propaganda. Such cases, by design, are ones where there is often no FPA about the abuse. These are cases where a clear-eyed third-party might much more easily recognize the harmful dynamics of the relationship.[22]

The failures of FPA are not limited to epistemic infringement. In **Teenager** and **Student**, we don't need to assume that Lily and Taylor are misled, or that their access to evidence about their situation is constrained, or that their self-trust is eroded.[23] Neverthe-

[20] See especially Bettcher (2009).

[21] This comparative claim is different from other claims that sometimes travel under the name 'first-person authority' — Cartesian approaches regarding infallibility (Shoemaker, 1988), (Burge, 1996), (Gertler, 2001), (Chalmers, 2003), for instance, or Wittgensteinian approaches regarding conversational practices (Wright, 1998), (Bar-On, 2004).

[22] It is no accident that perpetrators of this kind of abuse also make a point, as part of their strategy, of carefully managing their relationships with their victims' trusted circle (Leydon-Hardy, 2021, 140).

[23] This is not to deny that many examples fitting the pattern of our thought experiments involve epistemic infringement; if in the course of their flirtation and relationship, the professor repeatedly gaslights the student, isolating her from other sources of support, and using strategic outbursts to prevent her from interrogating her situation more clear-headedly, it fits Leydon-Hardy's pattern as well as ours. We think many relationships between students and instructors, and between teenagers and adults, are, unfortunately, like this. But not all are — and we wish to emphasize that there is a serious wrong done even in cases

less, it may not occur to them until much later, if ever, that they have been wronged.[24]

Strictly speaking, FPA is best thought of as applying to judgment types, rather than subject-matters. There is no incoherence in the idea, for instance, that one might have excellent epistemic grounds to know that one is in condition F, when one is, but be extremely poorly situated to know that one *isn't* in F, when one isn't.[25] To take one obvious example illustrating this asymmetry, let F be the condition that one is alive. If someone believes they themself are alive, that is extremely strong evidence that they are indeed alive; one should trust their testimony about such matters. There is FPA for beliefs that one is alive. But there is no FPA for the belief that one is *not* alive. Someone's expressing such a belief is quite poor grounds for accepting it; third-party judgments are much more reliable.[26]

The judgment that one *has* been sexually violated is one that enjoys pretty strong FPA. (It is not infallible, the way the judgment that one is alive presumably is. But it is still quite reliable, typically more than third-personal judgments.) But the judgment that one has *not* been sexually violated may enjoy no such privileged status. In some cases, specific epistemic factors can make it particularly hard to recognize sexual violations from the first-personal perspective. It can be difficult, for instance, to acknowledge harm to oneself, especially when, like many teenagers, one has a strong aspiration to adult habits and responsibilities. Moreover, in cases where victims of sexual violation minimize, downplay, or dismiss their experiences, it can be morally important not to take those declarations as the final authority on the matter.

We do, however, accept FPA for judgments about whether one *consents* to sexual activity. Subjects are in a better position to know whether they have consented (or withheld consent) than are third parties. This does not amount to the claim that a subject's judgments concerning their consent is infallible.

Why think that subjects are in a better position to know whether or not they are consenting as compared to third parties? The exact explanation will depend on one's favoured theory of consent, but we think that on quite a wide variety of approaches to consent, there is good reason to accept FPA. If one thinks that consent is attitudinal — e.g. constituted by (or analogous to) beliefs, intentions, or desires — then it is *prima facie* plausible that subjects enjoy privileged but fallible first-person access to their own consenting attitude in the same way that they enjoy privileged but fallible first-person access to their own beliefs, intentions, and desires. Beliefs, intentions and desires can be held privately, and in such cases third-parties may have no access (let alone equal access) to those attitudes.

Furthermore, if consent is attitudinal it is not likely to be one that we simply undergo (e.g. the belief "it is cold" in response to walking outside during winter). It is closer to a mental *act*, more akin to Korsgaard's (2009, 39) description of rational mental states as "active states of normative commitment." Sustained normative commitments are not likely to be states that can be better (or equally) apprehended by third-parties, given their close connection to one's own reasons for acting. See also (Parrott, 2015) for an account where FPA about attitudes is justified by agential authority rather than epistemic access.

Some theorists reject attitudinal approaches to consent, but not for reasons that undermine our case for FPA. Tom Dougherty, for example, has argued that consent requires communication, on the grounds that the privacy of intentions "[fail] to appreciate consent's role in shaping how we are accountable to each other" (2015, 246). Thus he argues that it

without epistemic infringement.

[24] Cf. Hines and Finkelhor (2007, 306).

[25] This idea will be familiar to epistemological disjunctivists about perception (Soteriou, 2016, 117–154). See also the position of non-symmetric epistemic accessibility (Williamson, 2000, 165–170).

[26] Williams (1978, 289–299) gives this example; it is also in (Sosa, 2007, 14).

is important to include communication in our definition of consent in order to explain how, why, and when permissions have been granted or revoked.

The alternative, then, is to adopt a *performative* account of consent, according to which consent is not a privately held state, but a communicative act. On one way of developing the view, it is central to consent that this communicative act expresses a particular kind of attitude — a desire or an intention or some such. On this view, we have every reason to accept FPA, for the same reasons as on the attitudinal view: the consenter is best-placed to know what attitudes they have. People are also generally better-placed than others to know which attitudes their communicative acts express.

On another way of developing the performative view, certain communicative acts constitute consent themselves, without relying centrally on the private attitudes they express. One might suspect that this approach makes FPA about consent less plausible. If consent just is the uttered "yes," then it might seem that the first-person does not enjoy privileged access relative to a third-party. Given the publicity of the speech act, all parties are on equal footing to know when one has consented. But the prospect of "unintentional consent" — the exact cases that look like counterexamples to FPA — is dubious. Indeed, it is precisely these reasons that typically motivate stronger attitudinal constraints on performative theories.[27]

Further, the social emphasis on explicit, ongoing, and enthusiastic verbal or non-verbal communication presupposes FPA about consent. There is something deeply morally important that the consentee knows, something that their partner cannot know unless they are told. Namely, we need to be told whether our partner consents to begin with, whether that consent is sustained, and when (if) that consent is revoked.

We note also that, even if one *were* convinced by communicative approaches to consent that the consent-receiver has a special epistemic status that may rival that of the consent-giver, while this might undermine the letter of FPA, it would not do so in a way that challenges its broader role in our paper. It's one thing to say that consent-receivers may also have privileged access to facts about whether someone consented; this doesn't even remotely suggest that *third-party* judgments about consent, from people who did not participate in the conversation, or even witness it, could be more reliable than first-personal ones. The dialectical opponent we're engaging is someone who says that *society broadly* knows better than Lily and Taylor, whether they consented to their sexual relationships. Arguing that their sex partners might also have important insights into whether they consented, perhaps comparable to their own, will not help challenge their professed consent.

Given FPA, Lily and Taylor's judgment that they consented is quite a good indication that they did in fact consent. Of course, their judgment isn't *infallible.* So it is still appropriate to consider and respond to reasons to doubt it in this case; we'll consider several arguments along these lines throughout this paper.

Given our endorsement of FPA about consent and sexual wronging, and against FPA for judgments that one isn't being sexually mistreated, our cases have the following features: the subject does not, at the time, know they are experiencing a form of sexual predation, but they do, at the time, know they have consented. We think this is sadly quite common; for many survivors of sexual predation, understanding the predation won't come until far later, if at all, especially in cases like ours, where consent is arguably present. Furthermore, the consent-based framework puts such survivors beginning to recognize their experiences in a dilemma: if the wrongfulness of the encounter implies that it was nonconsensual, survivors

[27] See e.g. Alexander (2014) or Schnüringer (2018, 25–6).

cannot be right that their experience was one of being seriously sexually wronged *and* be right that they consented.

6 Agential Demotion

On the view we oppose, cases like *Teenager* and *Student* are bad because they are not genuinely, fully, consensual. (So Lily and Taylor were self-deceived to think they were.) Moreover, more generally, when there is sex between adults and minor teenagers, or when there is morally impermissible sex between two parties with a significant power imbalance (as between a teacher and a student), there is some temptation to claim that the survivor was not even *capable* of consenting.

Thus, on a strong version of the consent framework that tempts many people, there is no room for survivors to (a) articulate the moral impermissibility of the sexual activity they participated in, while (b) conceiving of themselves as full agents with the capacity to consent. The consent framework forces the unhappy choice of which to give up. The harm of giving up (a) is perhaps the more obvious; but we think it's also a very serious loss to deny oneself the status of an agent fully capable of consenting.

We will call this denial "agential demotion":

> A agentially demotes B when: (i) B is an agent capable of consenting, and (ii) A conceives of B to have compromised agency incapable of consenting.

Agential demotion is also a phenomenon that can occur in domains outside of sexual ethics. An adult child might agentially demote their parent when that parent consents to a risky medical procedure. A person might agentially demote their spouse when their spouse consents to an ill-advised financial contract. And of course, parents might agentially demote their teenage child when they discover their child has been sexually active. In all cases, agential demotion is a failure to appreciate someone in their full capacity as an agent.

Agential demotion can occur either interpersonally or intrapersonally. When it occurs interpersonally, it can motivate A to act against B's expressed interests, place restrictions on B's sphere of influence, or undermine B's standing as an agent in the eyes of others.

Something particularly interesting happens in intrapersonal cases, where A is B. Here, the consent-based framework requires survivors of sexual wrongs to agentially demote *themselves* in order to preserve their understanding that their experience was one of violation. This is an epistemic loss — a movement from knowledge to false belief — that can also involve psychological distress and loss of epistemic confidence. In some cases, agential demotion might, akin to a kind of "self-fulfilling prophecy," lead to a true loss of agency. Given the role of social position in agency, third-personal agential demotion is also damaging to agency, but we are especially interested in the compounding harms deriving from people's self-conceptions as incapable of consent.

Survivors of predatory sexual relationships who agentially demote themselves are put in a very bad position. To be wrong about one's own competence is to be wrong about a deep and morally important feature of oneself. This (perceived) error might invite a skeptical line of reasoning in which one's mistake was not one-off, but systematic: an indication of one's limitations as an epistemic agent rather than the perverse nature of one's circumstances. The epistemic failing might further interact with other negative self-regarding judgments common to many survivors of sexual predation: feelings that they are "bad" "broken" or "flawed."

On some theories, positive self-regarding attitudes are necessary components of autonomy itself (Govier (1993), McLeod (2002, 103–131)). On these views, a survivor who comes to believe that their judgments regarding their own competency are unreliable might plausibly lack the self-trust necessary for full autonomy. But even if you do not think that self-trust is a *necessary* condition for autonomy, one can consider the undermining effects that self-doubt has on one's conviction to pursue a wide swathe of activities one finds meaningful. If you doubt your own competence you might come to distrust your desires more generally, yield decision-making to others, and forgo opportunities for (non-predatory) sexual experiences and relationships.

In arguing for an ethical framework that leaves conceptual space for survivors to freely (indeed enthusiastically, and in an ongoing way) consent to morally impermissible sexual activity, we have two aims. The first is to resist a popular account of cases like *Teenager* and *Student*. The second is to circumvent the harms of self-directed agential demotion for survivors.

One of the central ideas in Linda Alcoff's (2018) *Rape and Resistance* is the moral importance of allowing survivors to exercise agency in conceptualizing their experiences. Agential demotion curtails one's ability to determine for oneself crucial aspects of sexual experience: whether one consented, whether one's desires were genuine, the moral significance of the interaction, etc. Coming to believe that one's agency was compromised at a time when one took oneself to be an agent fully capable of consenting can also interfere with epistemic confidence which, in turn, can make it more difficult to recognize one's desires, let alone pursue them.

A key harm of sexual violation, Alcoff argues, consists in "its effects on our capacity to become effective agents involved in the making of our sexual selves. Effective agency requires a sphere for exploration and experimentation and the hermeneutical space to generate one's own interpretations of one's experiences and desires" Alcoff (2018, 143). Although Alcoff is more focally concerned with the impact that sexual *violence* has on our agency (where our cases are moral violations we would describe as nonviolent) the secondary effects of agential demotion are harmful along the same dimensions.

Cases of agential demotion are ones in which the survivor consented (and so was capable of consenting), but was forced in their own self-conception to demote themselves from full agency, in order to recognize their experience was one of sexual violation. Below, we'll offer arguments that Lily and Taylor were fully competent to consent, and further explicate the compounding harms of agential demotion.

7 Competence and the Harms of Agential Demotion

One way to retain consent theory, in light of our cases, would be to deny that Lily and Taylor's sexual relationships were consensual, holding that genuine consent — valid consent — is inconsistent with the predatory nature of those relationships. Maybe Lily and Taylor were not even *capable* of consenting, due to the particular dynamics of their inappropriate relationships.

Someone might ask: must the consent theorist really say they're *incapable* of consenting? Isn't it enough, to tell the consent-based story they want to tell about cases like ours, that they did not *in fact* consent? We do not find this strategy very convincing. If one thinks that Lily and Taylor could have consented but in fact did not, what more was it that one thinks they would have needed to have done in order to consent (especially in light of the fact that Lily and Taylor take themselves to have consented)? We can think of no plausible

answer that vindicates the consent theorists' judgments here. What other reason could there be to deny that valid consent is present in these cases, than the idea that the victims in question weren't capable of it? We note also that the modally strong language is ubiquitous in consent discourse, including many of the examples we quoted in §3.

A natural strategy to argue that consent is impossible would focus on whether Lily and Taylor are *competent* to token or withhold consent. As discussed in §3, "Age of Consent" laws codify the circumstances wherein sexual activity is a crime, rather than the age at which a person is competent to consent. However, public reception of these laws trend toward interpretations wherein "Age of Consent" tracks competency. In a recent comparative study of consent legislation in Europe, Guangxing Zhu and Suzan van der Aa (2017) write that the age of consent "is an important legal mark that symbolizes when young people are considered *capable* to... give their 'free and full' consent to sex" and "[f]rom the perspective of the children, as long as they are under the age of consent, they are considered *incompetent* to give valid consent to sexual activities." Zhu and van der Aa (2017, 15, emphasis ours) Insofar as "age of consent" is received as a proxy for competence, it would be natural to think that the reason why Lily did not token consent is because she was not competent to do so. For Taylor, who is a legal adult, one might reason along lines similar to the popular literature we discussed in §3: regardless of her age, power imbalance renders consent impossible.

Competence, it is widely recognized, is necessary for morally transformative valid consent.[28] Severe intoxication, for instance, is inconsistent with genuine consent, because it renders the intoxicated individual incompetent with respect to the decision to consent. Many have argued that the same is true of certain intellectual disabilities, and, one might think, perhaps the same goes for being underage, and in other circumstances wherein there is a large power imbalance.

People who are not competent to consent to sex might nevertheless still be regarded as agents broadly construed, insofar as they still have the capacity to act. Acts come in many forms; one may express agency by signing a contract or giving a speech, but also via much smaller and less conspicuous acts. Prolonged looking or furrowing a brow can be expressions of agency, as well as walking, talking, and raising one's arm. (A notion of agency that does not build ableist intuitions into them must not rely too heavily on either (i) assumed motor skills, or (ii) complex hierarchies of belief-desire pairs, extended diachronic planning, or intense self-scrutiny.)

Our notion of agential demotion is focally concerned with competence. When someone is deemed competent to perform an action (drive a car, token consent, teach) they are expected to pass a certain threshold of understanding and ability. This threshold is often thought to involve diachronic planning and an ability to predict the consequences of one's actions (Freedman, 1975), as well as "the capacity for understanding and communication, and the capacity for reasoning and deliberation" (Buchanan and Brock, 1989, 23). Agential demotion occurs when someone is wrongly treated or thought of as lacking these agential competences.

If someone genuinely lacks capacities necessary for agency — if one is genuinely incapable of valid consent — then it is no error to treat them as if they are incapable of consent. But when someone *is* capable of diachronic planning, predicting consequences, understanding, and communication, and is nevertheless agentially demoted, that demotion mismatches reality. It is also often harmful. If a third party agentially demotes someone, they fail to attribute them the respect and autonomy they deserve. Or if genuine agents are brought — by self-doubt, gaslighting, or other means — to agentially demote themselves, then they

[28] E.g. Wertheimer (2003, 215).

will conceive of themselves as lacking key agential capacities, which may even have the downstream effect of their actual loss of agency.[29]

Biomedical ethical literature grapples with the difficulties of measuring competence and providing a satisfying theory of it. Constructing protocols for testing competence is difficult and necessary, as consent (in particular "informed consent") plays a central role in determining the ethical permissibility of medical interventions. Although analogies between sexual consent and medical consent are imperfect, we think the discussion of competence in biomedical ethics can be illuminating for sexual ethics as well.

A central question in bioethical literature on competence concerns whether to think of it as a *general* capacity, or instead to focus on more fine-grained, decision-relative capacities. Either view, we think, will imply that agential demotion is often a substantial harm.

Benjamin Freedman (1975) exemplifies the generalized competence view, holding that "responsibility" (his term for "competence") should not be assessed relative to any particular decision. "[T]he "responsibility" which we require is to be predicated not on the nature of the particular choice," he writes, "but on the nature of the patient/subject. What we need to know is whether he is a responsible man ("in general," so to speak)." (Freedman, 1975, 35).

On this view, denying that someone is competent to token consent implies that they lack the capacity for responsibility tout court. This is obviously an extreme verdict. By contrast, acknowledging that someone is generally competent to token consent prevents one from denying or disregarding someone's true tokening of consent simply because one disagrees with the decision. If we deem someone "responsible" (i.e. competent), we are obligated to honor their tokening of consent. The only alternative is to deny them responsibility altogether. The idea that teenagers and college students are *generally* incompetent in this way is obviously a non-starter.[30] But might there be a more circumscribed, domain-relative version of this strategy that rules out consent in our central cases?

8 Incompetence within a Domain

Buchanan and Brock's *Deciding for Others* gives an example of a domain-relative treatment of competence. "A competence determination," they write, "is a determination of a particular person's capacity to perform a particular decision-making task at a particular time and under specified conditions" (Buchanan and Brock, 1989, 18). Competence determinations vary relative to multiple axes: the domain of the decision, the complexity of information, changes in the subject or environment, and the stakes of the decision. According to the examples they provide, making medical decisions and making decisions about entering into contracts will belong to different domains, as will driving a car and solving differential equations. But Buchanan and Brock's decision-relativity goes further than that — it's not merely that different competences apply to different domains. Even within a single domain — the choice of whether to pursue a particular surgical procedure, for instance — whether one counts as having (enough) competence to decide depends on which decision is being contemplated. Higher degrees of competence may be necessary, according to Buchanan and Brock, to be competent to consent to a course of treatment judged harmful, than would

[29] Compare Langton (2009) on "maker's knowledge", Fricker (2007, 47–8) on how being doubted as a knower can undermine knowledge, or Haslanger (2017, 15) on ideologies making themselves true.

[30] By contrast, this is a very plausible diagnosis of the wrong one commits when engaging in sexual contact with *young* children. The consent-theoretic explanation of those cases, we think, is a fine one.

be required for a course of treatment judged helpful. This is assessed by others — such as clinicians — rather than those making the decisions.[31]

So Buchanan and Brock suggest that competence is both *domain* relative — one can be competent in some areas, but not others, and *perceived-prudence* relative — one can be competent to make a decision perceived as good, but not to make one perceived as bad, even within a single domain. Let's consider each form of relativity in turn, when applied to cases like Lily's and Taylor's.

Start with domain-relativity. Perhaps Lily is competent generally, but incompetent to decide whether to have sex. This has the advantage of accommodating the intuitive fact that she manifestly is competent to make many other decisions. And Taylor, a legal adult, is plausibly competent to do even more things than Lily is — she can vote, and decide whether to get a tattoo — but incompetent to decide whether to have sex with her professor.

The most obvious way to do this would be to demarcate the realm of sexual decision-making as one to which their competence does not extend. But while this is slightly better than saying they're incompetent in general, there are still, in our view, serious problems related to agential demotion with this strategy.

Sexual agency — and competence to make decisions in one's sex life — is itself important. On the view we're considering, although Lily is in a good position to know that she is a competent agent in general, she must doubt whether she is competent to make decisions in sexual contexts. This reduces the scope of Lily's purported incompetence, but the same harms arise: Lily (1) loses knowledge, (2) is put in a position to doubt herself, and (3) becomes vulnerable to the psychological distress that can arise from (1) and (2).

Moreover, it is manifestly false that people like Lily have no competence to make sexual decisions. It is widely recognized, for example, that teenagers like Lily can be competent and responsible enough to decide whether to have sex with their teenage peers.[32] And, just as we pointed out above that teenagers can be competent enough to be responsible for wrongdoing, so too can they be responsible for *sexual* wrongdoing; a teenager who rapes someone, for instance, is rightly held responsible for that action. So it's not the case that teenagers are insufficiently competent to make sexual decisions.

And what goes for Lily, goes even more obviously for Taylor, who is a legal adult.

We suspect that positing a general incompetence in the sexual domain may share a common error with an influential (1996) paper by Heidi Hurd. While Hurd's project is largely orthogonal to our main point, identifying the parallel and diagnosing the error may help illuminate our discussion of consent and autonomy.

In her "second identity thesis," Hurd posited a close connection between the conditions necessary for culpability and the conditions necessary for valid consent. On Hurd's view, it is precisely those circumstances which would have excused someone from moral blame for wrongful sexual contact, which are necessary for morally transformative consent to sex. (If one commits sexual violence on pain of the threat of death, one is, perhaps, not culpable —

[31] See Table 1.1 in Buchanan and Brock (1989, 53) for illustration.

[32] As recently as the 1990s, this was a subject of controversy. Oberman (1994) discusses a 1993 case in which teenage boys were arrested, but not prosecuted, for various sex crimes related to sexual activity with teenage girls. The relevant California statute did *not* include an exception for perpetrators close in age — so a literal reading of the criminal codes implied that *anyone*, including a young teenage boy, who has sex with a young teenage girl, commits an offense. The District Attorney's office explained that it had a policy not to file charges in cases of consensual sex between teenagers. Oberman's article argues against such policies, and against age-based exceptions to the criminalization of sex with minors. (California's statute still does not include an absolute exemption for minor teenagers close in age. Sexual penetration of any 17-year-old, by any 17-year-old (unless they are married) remains a misdemeanor offense under California Penal Code 261.5(b).)

and if one "consents" to sex under a similar threat, that agreement is not morally transformative.) Hurd's idea and the one contemplated here both suggest that certain factors — being a teenager, say — prevent one from responsible decision-making in a domain.

This idea has surprising consequences. We agree with contemporary liberal orthodoxy that there is no consent to sex in cases of severe intoxication. This thought, plus Hurd's identity thesis, implies that severe intoxication is also inconsistent with culpable sexual assault — an obviously unacceptable conclusion. It is neither an adequate moral nor legal defense, against a rape accusation, that one was so drunk at the time that they have no memory of the interaction.

Hurd recognizes the revisionary implications of her view. She agrees that intoxication should be no excuse for sexual assault, but argues on this basis that it should also not invalidate consent. To do so, she suggests, might allow rape victims to unfairly "externalize responsibility for what they voluntarily do." "On pain of condescension," Hurd writes, "we should be loath to suggest that the conditions of responsibility vary among actors, so that the drunken man who has sex with a woman he knows is not consenting is responsible for rape, while the drunken woman who invites sex is not sufficiently responsible to make such sex consensual." (Hurd, 1996, 141)

To contemporary readers, Hurd's stance can feel quite callous. We ourselves have no attraction to it. But we discuss it for two reasons. First, we perceive a striking parallel between Hurd's treatment and idea that teenagers don't have the relevant competence to make decisions about sex. And *that* line, we think, *does* represent a central thread in the contemporary imagination. The problems with Hurd's view vividly illustrate where the thought goes, when taken to its logical conclusion. The implication that teenagers can't be culpable for sexual wrongs shows that this cannot be correct. Hurd's view and the one we are imagining share a common problem: an abstraction from the particular asymmetric interactions involved in sex and consent.

Second, although Hurd's stark statement of her view does feel outdated, we do think that remnants of the thought persist, both in the public imagination and in the law. The website for *Stop It Now*, a non-profit organization dedicated to fighting child sex abuse, for example, includes this line: "Even if a child or underage teen gives permission or acts willingly, this never implies consent. A child is never accountable."[33] "Accountable" is a surprising word in this context; it is a word associated primarily with blame. While *Stop It Now* was obviously writing with the best of intentions, and we agree that adults must never have sexual contact with children, we do not think evoking questions about whether to *blame* the child for them is the way to make the point (even if, as here, the answer offered is no).

There are material effects of this way of thinking. In 2017, a Minnesota woman was denied entry to a bar, because she was heavily intoxicated. She was lured under false pretenses to a private residence, whereupon she blacked out. When she woke up, the stranger she'd come home with was penetrating her vagina with his penis. She made a rape complaint, on the grounds — absolutely standard in recent decades — that incapacitation via intoxication is inconsistent with valid consent, and at first secured a conviction. The conviction was overturned in 2020, however, on the grounds that Minnesota's criminal statutes involving incapacitation required that the intoxicating substances be "administered to that person

[33] https://www.stopitnow.org/ohc-content/why-permission-from-a-child-or-underage-teen-doesnt-count\T1\textgreater, accessed 29 January (Stop It Now 2022). This page also includes a commitment to the idea that children and young teenagers are "developmentally not able to make decisions about some things, including when to engage in sexual behaviors," and that they cannot consent. For reasons explained above, we reject those theoretical commitments, even while applauding the central social aims.

without the person's agreement." Since she had voluntarily consumed the alcohol and narcotics in question, she did not count as "incapacitated", under the restrictive statute in the Minnesota Criminal Code at the time.[34]

We're not sure what motivated that restriction in the Minnesota law, but it's not hard to imagine that the kind of argument Hurd offered, emphasizing "personal responsibility", may have been a part of it. When it was brought to salience in this case it was widely recognized to be intolerably victim-blaming, but the statute was on the books for many decades until that time, and was used in 2020 to overturn a conviction for what we can easily recognize as rape.

What all of this suggests, in our view, is a separation of three kinds of questions: the conditions required for culpability for harm, the conditions required for validity of consent, and the conditions required for sex to be permissible, rather than violative. Hurd collapses at least the first two, and the competence strategy we've been considering seems to imply this too. Consent theorists and much public discourse collapse the latter two. And there seems to be some temptation at least in the public imagination to collapse all three. But maintaining plausible verdicts about sexual harms and culpability for them, while avoiding the error and harm of agential demotion, requires distinguishing all three.

9 Narrower Incompetence

Perhaps you are convinced by our argument that Lily and Taylor aren't incompetent with respect to sexual decisions tout court, but still wish to pursue the domain-relative incompetence strategy by restricting the category to a particular *kind* of sexual decision-making.

For example, in recognition of the fact that teenagers can give valid consent to sex with their peers, one might restrict the domain to decisions concerning sexual activity with individuals who are older than her. Or perhaps the size of the age-gap is relevant: perhaps Lily is not competent to make decisions within the domain of "sexual activity with individuals 4+ years older than her." Even then, one might need to be more specific about the kind of sexual activity she is engaging in. Perhaps she is competent to consent to a kiss, but not to penetrative intercourse. The scope of the domain of Lily's incompetence is narrowed further: Lily is incompetent to make decisions in the domain: "substantial sexual contact with individuals 4+ years older than her."

We don't find this strategy satisfying either. The notion of a *domain*, we think, is being gerrymandered according to one's judgments of permissibility. If that is right, then judgments about Lily's competence are being reduced to the claim that Lily is only competent to make sexual decisions in the domain: "sexual activity that is ethically permissible" or perhaps "sexual activity that does not put Lily in harm's way."

We have several concerns about the resulting picture.

First, it sacrifices the intended explanatory role that "competence" was supposed to play: Lily's lack of competence was supposed to explain her inability to token consent. The domain-based strategy we're contemplating says that she's incompetent *because* the action contemplated — sex with Taylor — is a bad one. The badness of any such sex, then, can't be explained by her incompetence. Which means in turn that it cannot be explained by her lack of genuine consent. In short, this strategy gives the order of explanation in the wrong direction.

[34]The decision overturning the conviction is *Minnesota v. Khalil*, 072720 MNCA, A19-1281. The relevant statute is Minn. Stat. §609.341, subd. 7. It was amended in 2021 to remove this restriction, largely due to reactions to the case we describe.

There is a deeper problem. Attributing incompetence to decision-making in these cases via incompetence throughout a domain — no matter how finely specified, even assuming it could be delineated in a principled way — just gives the wrong result with respect to the moral agency of people like Lily. Although as we've made clear, we *do* agree with mainstream liberal intuitions condemning Kyle's sexual relationship with Lily, we think it is a serious misdescription of the way he wrongs her to assimilate it to nonconsensual sex. Lily's agreement to have sex with Kyle — indeed, her enthusiastic, affirmative actions that included seeking it out — *are* morally relevant to the situation. To say otherwise would be to say that Kyle's action is morally equivalent to the possible case where she refuses his sexual advances and he sexually penetrates her anyway. In other words, it's to say that she has no say in the matter of whether he has her permission to touch her in sexual ways — clearly the wrong result. The domain-relativity of competence cannot explain this, consistent with invalidating their consent.[35]

This brings us to perceived-prudence-relevance. The competence denier, we now see, faces pressure to say that in our cases, the victim lacks competence to consent, but retains competence to *refuse*, even with respect to the same question. So maybe the best strategy is to relativize competence, not (merely) to domains, but to the particular contents of decisions being made.

This is built into the Buchanan and Brock account: competence is relative to a benefit/risk assessment. For example, when a decision is made, if the "net balance [is] substantially better than [it is] for possible alternatives" then the level of decision making competence required for consent to be valid is "low/minimal" (Buchanan and Brock 1989, 53). And conversely, if the "net balance [is] substantially worse than for another alternative or alternatives" then the level of decision making competence required for consent to be valid is "high/maximal." In medical settings this means that someone must be highly competent in order to consent to something that is very bad for them, but need only be minimally competent to consent to something that is substantially better (or best) for them.

But one would be prima facie suspicious if a doctor's assessment of competence was perfectly aligned with their judgments about what is good for the patient. If a patient was deemed competent only to make decisions their doctor judged would bring no harm to them — if the patient is free to choose anything they like, so long as it's the exact thing the doctor thinks they should do — invoking the notion of "competence" begins to look like a cover for paternalistic attitudes. Competence assessments are important in part because they empower subjects to *decide for themselves* — this might include making decisions that deviate from third-party assessments about what is good for them.

What are the prospects for this strategy in denying consent in our cases? There may be sexual fates so heinous, or harmful, or debilitating, that no one is competent to consent to them.[36] The question is whether Lily's and Taylor's relationships are bad for them *to such a degree* that it would require a higher level of competence to consent to it than she in fact had. Intuitions may vary, but we certainly don't think so.

There is historical precedent for disagreeing with us in this matter, but it is now widely

[35]This thought echoes one of the central ideas of West (2009), with which we agree.

[36]Nielsen (2010) says this is the case for sexual activities that undermine autonomy. See Fischel (2019, 32–35). Wertheimer (2003, 228) attributes a view like this to MacGregor (1994): "if a woman's choices fail to promote her good, it is evidence that ... her consent is not legitimate." But we suspect Wertheimer is misreading McGregor. In the passage he cites (MacGregor, 1994, 244–5), McGregor is expressing the familiar point that valid consent requires the presence of one's full capacities — if one is intoxicated, for instance, there is no valid consent. Her invocation of promoting a woman's good has to do with her metaethical explanation for *why* consent is inconsistent with this kind of incapacitation.

recognized as illiberal. In an American criminal proceeding in the 1960s, for instance, a court convicted a man of aggravated assault in what we would now recognize as a likely consensual BDSM scene. (The 'victim' did not complain; the case was brought to law enforcement by third parties.) The court held that "it is a matter of common knowledge that a normal person in full possession of his mental faculties does not freely consent to the use, upon himself, of force likely to produce great bodily injury."[37] Few contemporary liberals would describe this case as just.

We think the sexual relationships between Kyle and Lily, and Gregory and Taylor, were bad for Lily and Taylor, but they were not bad for them *because* they didn't consent; nor were the encounters so heinous that they were incapable of consenting. The consent framework does not allow room for analyzing these cases or similar cases in such a way. This is no marginal failure — cases like Lily and Taylor's are common.

Further, we think that the people who are wronged in cases like this are harmed in the first instance by the sexual violation, *and then* harmed *again* via agential demotion. This moral harm, we think, also leads to political errors. Some opponents of institutional prohibitions on student–professors relationships assume that they depend for their justification on the assumption that students are incompetent to consent to sex with professors, and draw out worries about agency, in the service of arguing against such bans.[38] One of the central implications of our paper is that it can be perfectly appropriate to condemn and forbid a class of relationships, without assuming that they would have to be nonconsensual.[39]

10 Objections and Replies

10.1 Deception and First-Person Authority

We argued in §4 that the judgment that one consents to sex enjoys first-person authority, as part of our case for a less all-encompassing notion of sexual consent. One might object to this line along the following grounds: consent can pretty easily be invalidated, by conditions for which we should not expect FPA to obtain.[40] For example, Dougherty (2013) famously argued that if there is a hidden "dealbreaker" about the sexual encounter, a token of consent does not waive the right against that encounter. This can easily happen without the consent-giver's knowledge. If, for example, A agrees to have sex with B, falsely believing B to be wearing a condom — where they wouldn't have agreed if they'd known that they weren't — the sex that follows happens without A's valid consent, but A is not in a particularly strong position to recognize this. So, the objection concludes, there is not FPA for judgments about whether one has consented, weakening our case for the presence of consent in our central cases. (Recall from §1 that throughout this paper, we use "consent" in a way that includes only "valid" consent.)

We have two things to say in response to this objection, one more committal, and one less committal. Our less committal response is to point out that while this approach to

[37] People v. Samuels, 250 Cal. App. 2d (1967). https://law.justia.com/cases/california/court-of-appeal/2d/250/501.html

[38] "Proponents of consensual relationship bans argue that [relationships between students and professors] are always harmful to the student because, no matter what the student may believe, no affiliation between a professor and a student is ever truly consensual. In support of that position, proponents contend that students are *incapable* of giving effective consent to a sexual relationship with a professor." (Young, 1996, 280–1, emphasis in original.)

[39] Cf. Srinivasan (2021, 127–8).

[40] Thanks to a referee for pressing this objection to us.

dealbreakers and consent does imply that there are some cases where someone might be poorly-placed to tell whether they have given consent, the respect in which they might challenge FPA is not one that undermines the use FPA plays in our broader argument. As in our discussion of §4, these are cases where the consent-receiver may have special access whether there is consent, even access that in some cases might be thought superior to that of the consent-giver.[41] But they do not generalize in any straightforward way to the idea that *third parties with no intimate knowledge of the interaction* are better-placed to identify whether there is consent. Saying that in our central cases, Kyle and Gregory might actually be better-placed to recognize consent than Lily and Taylor are, for example, does not help the consent theorist explain why there is no consent in these cases.

We also have a more committal response. We actually deny that Dougherty's dealbreaker framework challenges FPA to judgments about consent at all. We think the most plausible way to understand Dougherty's idea is not, in fact, as a constraint on whether there is valid consent. Rather, it is a proposal about the *content* to which one is consenting — what Dougherty in their more recent work calls the "scope" of consent.[42] More generally, we are convinced by the arguments of Tilton and Ichikawa (2021) that this focus on content is the proper way to think about issues about deception and consent. In the case sketched above, *A did* give valid consent — it was consent to *sex with a condom*. It was not consent to *sex without a condom*. *A* gave that particular consent, and enjoys FPA with respect to that fact. The problem here isn't that by removing the condom, *B* invalidated *A*'s consent in a way *A* could not recognize — it's the straightforward explanation that *B* did something that *A* never consented to.

So we do not think that considerations about deception and consent pose a significant challenge to our invocation of FPA for consent. Subjects who are deceived about dealbreakers enjoy strong FPA about what they consented to, just as we think the victims in our central cases do too.[43]

10.2 Consent and Coercion

The other obvious way one might deny consent in our central cases is to cite *coercion*. When one agrees to something under sufficient duress, it is not valid consent. Might one argue that this is happening in our central cases?

There certainly are cases somewhat similar to ours, which involve sex with coercion that vitiates consent. The obvious such cases are quite unlike the cases we have stipulated. (Imagine a professor who demands sexual favours in exchange for giving a passing grade.) Lily and Taylor do not *feel pressured* to engage in their sexual relationships. In a straightforward sense, they pursue them because they want to.

Insofar as cultural expectations and social scripts were operative in the cases we are interested in, one might wonder to what extent Lily and Taylor's agency was undermined by them despite not *feeling pressured* by them. Indeed, part of what makes social scripts pernicious is the ease in which we internalize them through the process of enculturation.

[41] Even this needs to be qualified, since the consent-giver will almost always be better-placed than the consent-receiver to know *what their dealbreakers are*, even if they're not particularly well-placed to recognize whether those features obtain.

[42] Dougherty (2021). For what it's worth, Dougherty themself seems to agree with us about our interpretation of Dougherty (2013) — see Dougherty (2021, 4–3).

[43] We here bracket worries about whether Dougherty (2021) is correct that sex involving a dealbreaker always ends up involving a consent violation. We don't think they do, but consider that discussion orthogonal to our project here. See Lazenby and Gabriel (2018) or Tilton and Ichikawa (2021) for discussion.

Perhaps it is possible to be socially coerced — in a morally important sense — without experience or awareness of the ways in which social coercion acts upon us.

Patriarchal and heteronormative settings do plausibly undermine agency to some degree. Some have gone as far as to say that the internalization of patriarchal and heteronormative cultural scripts is sufficient to undermine consent entirely.[44] We are not attracted to this extreme view. We agree with Quill Kukla (2021) that full autonomy, in particular full sexual autonomy, is an unhelpful ideal for measuring consent. More realistically, autonomy as we actually experience it falls short of being ideal, and we are able to token consent nevertheless. One upshot is that it is possible to identify different ways in which autonomy can be promoted, or as they say, there are ways we can "scaffold" autonomy in order to empower people. We agree with Kukla that it is possible to consent with compromised autonomy.

11 Sexual Wrongs and Victim Preferences

By arguing for the limits of consent-based approaches to sexual ethics, we put ourselves in good company. Notably, Ann J. Cahill and Elise Woodard have introduced categories of consensual but nevertheless morally bad sex: *unjust sex*, and *bad sex*, respectively. Our project is different from theirs in important ways. Although we agree with Cahill and Woodard that the bad cases they consider are consensual and harmful, they explain the harms by invoking subversion of a person's will or redirection of their desires to serve others' ends. Our cases resist such a diagnosis; so there are instances of impermissible consensual sex wherein the moral badness is not explained in Cahill and Woodard's terms.

Ann J. Cahill helpfully distinguishes between acts of sexual violence, and sexual acts that should be located in an "ethical gray area": acts that are consensual, but unjust. Examples of *unjust sex* include ones in which, "sex was the least bad option," when there was "significant pressure to have sex with a partner," and when "acquiescing to their partner's sexual requests or demands was the easiest and/or quickest way to achieving on of their own needs or desires (sleep, for example)," among others (Cahill, 2016, 751). In these cases, a person's will is recruited for the *wronging* party's interests, pleasure, and ends.

Elise Woodard's category of "bad sex" falls into at least three (related) types. The first includes sex that occurs as a result of psychological pressure and calculated trade-offs (Woodard, 2022, 309). The second kind captures encounters in which one consents to sex as a result of social coercion. If one is consenting as a result of the kind of pressure that arises from social expectations (e.g. that the person who pays for dinner is "owed" sex), then it may be a case of bad sex. Such expectations might be internalized or structural. Finally, Woodard describes cases of "epistemically unsafe sex," wherein one suspects that one's consent was modally irrelevant. One might token consent to avoid finding out that one's consent is actually irrelevant — that the other party would have proceeded regardless.

Although they don't deny the presence of consent in these cases, Woodard and Cahill both explain the badness of bad sex in terms of trade-offs and coercion. The circumstances surrounding the sexual encounter are hostile to the individual's ability to pursue their desires free from undue influence, and diminishes their sense of agency.

We also focus on an agency-related harm: agential demotion. But that is a secondary harm, related to how one is forced to conceptualize first-order sexual harms, given consent

[44] Cf. Carole Pateman: "The "naturally" superior, active, and sexually aggressive male makes an initiative, or offers a contract, to which a "naturally" subordinate, passive woman "consents." An egalitarian sexual relationship cannot rest on this basis; it cannot be grounded in "consent." (Pateman, 1980, 164)

theory. The sexual violations themselves do not depend on coercion or trade-offs. Lily and Taylor conceived of their sexual activity as a true expression of their desires, and they were not self-deceived. They did not consent to sex to avoid exhaustion or emotional distress, nor did they suspect that their consent was modally irrelevant.

Nor did Lily or Taylor have a focal experience of being pressured. Of course, the first-personal *experience of* pressure needs to be distinguished from the tacit ways in which one conforms to social expectations or scripts, either by cultivating one's desires in particular ways, or in how one acts. Lily and Taylor's experience may be well-described in the latter terms (tacit conformity), but not the former (social coercion manifested as the experience of pressure). This, we think, distinguishes their experiences from Cahill's rubric of unjust sex or Woodard's rubric of bad sex. There are cases where someone ends up badly harmed as a partial result of pursuing desires they genuinely regard as their own.[45]

Bad sex and unjust sex involve circumstances in which sex was the least bad option. A subject must consent to sex, or else navigate the emotional fallout of their refusal, discover that their consent was modally irrelevant, or experience the discomfort of perceived norm violation, etc. In these cases, the wronged parties see themselves as being worse off relative to the comparative baseline wherein the wronging party *never proposed or suggested sex.*

By comparison, in our cases Lily and Taylor don't merely think sex is their least bad available option. They are excited by the prospect; they see themselves as *better off* relative to the comparative baseline wherein sex was never even suggested, and not because the relationship is a means to a further good (e.g. a job, or promotion). Nevertheless, Lily and Taylor are wronged.

Diagnosing the kinds of harm that can arise in relationships with significant power imbalances is local, specific, and context sensitive. We think that it is morally relevant that Lily and Taylor desired their relationships with Kyle and Gregory, but we do not endorse the inference that the presence of desire — and the exercise of will in the absence of coercion — automatically puts a relationship in ethical good standing. As Alcoff writes, "Police, prosecutors, friends, assholes, ask: did you want it? Did you enjoy it? Or they may never voice these words but wonder all the same." (Alcoff, 2018, 131) Putting survivors in a position where they must answer those questions negatively, or else have their claims to harm dismissed, is a moral mistake.

So what *does* explain the wrongs that Kyle and Gregory commit? We're more confident that there are wrongs here — and that the lack of consent isn't the right explanation for them — than we are in any particular positive story about where the wrongs do come from. Indeed, we suspect that a pluralistic approach to diagnosing these wrongs may ultimately be correct; we don't see any reason to expect that any story so simple as the consent framework would be fully adequate to the complex moral landscape of these kinds of cases. As such, a complete story here would, by necessity, be outside the scope of this paper, but we will here gesture a bit at some of the kinds of considerations we find promising.

One idea we *won't* pursue is the idea that Kyle and Gregory commit *non-directed* wrongs. They plausibly do so — they each contribute to harmful and patriarchal social patterns, and make the world worse, even irrespective of their effects on their sexual partners. But this isn't an explanation for the harms we have in mind. After all, we wish to explain why Lily and Taylor might eventually properly come to feel that *they themselves* have been victimized; non-directed wrongs clearly can't explain that.

[45] MacGregor (1994, 246–7) suggests that some activities are so unlikely to be enjoyable, that it provides reason to *presume* that there was no consent; but here she is making a proposal about the criminal burden of proof, not the conditions for genuine consent.

In general, one can harm someone by compromising their interests; when one does so contrary to an obligation, one wrongs them. Not everything with interests is an agent. You can harm a plant by depriving it of sunlight. It's less obvious whether one can have obligations to plants, but if one can, one could wrong a plant in the same way, without violating its agency.

People, including teenagers and students, *are* agents. When one harms someone while violating an obligation towards a person, one wrongs them — whether or not one is acting against their preferences. Sexual relationships with adults are typically harmful to teenagers. We do not assume that there is a unified theoretical explanation for why this is so; we think a more "particularist" treatment is quite plausible. Whatever their theoretical explanation, such harms are widely recognized, which is why our society includes a social order that obliges adults not to inflict such harms upon them. And so likewise with relationships between students and professors. The obligation not to cause those harms is why these relationships constitute wrongs.

Here are five further tentative thoughts about the harms in our central cases; each would need to be worked out in much further detail, but we include them as suggestive ways to extend our project in a more positive direction.

First, sexual relationships can involve, to greater or lesser extent, a *pretense of egalitarianism*. A student or teenager might feel empowered by their new standing as a sexual partner. This can make their relative social, educational, and economic disadvantages harder to recognize or acknowledge.

Second, sexual relationships are typically personally and emotionally *intimate*. There are exceptions, but our central cases certainly match this generalization. Sex involves deep vulnerability. Entering into a sexual relationship of this kind *thereby* places one in a mutually recognized position of trust. It is extremely plausible that this kind of relationship itself creates special duties of care that extend beyond the duties one holds to arbitrary members of one's society, or students in one's classroom. This may help explain why, given their sexual relationship, Gregory owes it to Taylor — in a way he does not owe it to his other students — to conduct his personal life in a way that prioritizes her emotional well-being.

Third, it is plausible that there are special duties of care towards children in one's society, or one's students. Unlike duties of care that are generated by being in an intimate relationship (as described above) these are duties that adults and teachers owe to children and students because of their particular social role. This may help distinguish the cases we focus on from other kinds of examples of sexually exploitative predation, such as that practiced by so-called "pick-up artists". The "pick-up artist" who wrongs another patron at a bar by attempting to manipulate them does not plausibly do so because they are violating a role-specific duty of care.

Fourth, age-based criminal restrictions on sexual interactions and policies prohibiting student–professor relationships are relatively straightforward to implement, and carry less collateral damage, than would any policy we can think of that would ban things like pick-up artists. So there may be good practical reasons to focus on cases like ours, even if there is a broader pattern of similarly objectionable conduct.

Finally, while we are open to the idea that there are *some* examples of sexual relationships matching the patterns of our central cases where there is no serious harm done, we do think there is good reason to think that harm is more the norm.[46] The testimony of many victims

[46] Adult retrospective assessment of their sexual relationships as a minor (relationships with significant age-gaps) can vary widely (Lassri et al., 2022). There is also a noted difficulty in drawing causal rather than correlational connections between statutory sexual relationships and quantitative assessments of harm

of such relationships is overwhelming evidence that at least often, they are harmful, even if they are consensual and freely chosen. In retrospect, for example, it is obvious to many survivors of such experiences that they would have been better off, had the relationship never been proposed. In other cases, survivors might justify their past decisions by continuing the pattern of relationship formation they would otherwise discontinue. These outcomes are sufficiently common to render them foreseeable. One plausibly wrongs someone by engineering circumstances you have excellent reason to believe they will correctly later regret, whether or not the harm actually eventuates.

12 Conclusion

The consent framework for sexual ethics is helpful for moral understanding in many cases. It captures the continuity between forcible rape and other acts of sexual violence wherein an agent's right against bodily contact is transgressed. It does not, however, capture many everyday cases in which an agent is harmed or wronged in the sexual dimension of their life despite their consent.

Our cases feature sexual agents who consented to sexual encounters that were nevertheless predatory and morally impermissible. We argue that the consent based framework puts them in a dilemma: either give up on the idea that one's experience was one in which one was seriously harmed or wronged, or else agentially demote themselves. The former distorts moral understanding and enables abuse, and the latter leads to the harms of agential demotion, including loss of epistemic confidence, psychological distress, and in some cases, the genuine loss of agency.

The way out of the dilemma is to weaken the connection between consent and sexual wronging. This is the way to understand the kinds of sexual wronging we focus on without agential demotion. It is both theoretically and morally important to explain these sexual violations, and to do so without asking their victims to deny their own agency.[47]

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(Hines and Finkelhor, 2007). However, some retrospective testimony affirms a causal connection (Hunter, 1990, 291). Graduate students who had consensual sexual contact with their educators appraise those encounters more negatively in retrospect, "many currently perceive the contact as extremely exploitative and harmful" (Glaser and Thorpe, 1986, 43).

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