

Coerced Consent with an Unknown Future*

Tom Dougherty

University of North Carolina at Chapel Hill, Chapel Hill, United States

Correspondence

Tom Dougherty, University of North Carolina at Chapel Hill, United States.
Email: tom.dou@gmail.com

Abstract

It is hard enough giving an account of how coercion undermines the consent of someone who knows full well the consequences of her choices. But in the wild, coerced consent is even more ethically complex because people are often unsure or misled about what will happen if they refuse to consent. In this essay, I discuss how coercion can invalidate consent under conditions of imperfect information. To explain how consent is invalidated in this way, I argue for the “Subjective Principle.” According to this principle, a sufficient condition for the invalidity of consent is that the consent-giver either believes or has a credence that they would suffer a penalty for refusing to consent, this penalty is illegitimate, and this belief or credence causes them to consent.

It is hard enough giving an account of how coercion undermines the consent of someone who knows full well the consequences of their options.¹ But in the wild, coerced consent is even more ethically complex because people are often unsure or misled about what will happen if they refuse to consent. This can happen for many reasons. Others can be menacing and demanding, while leaving room for doubt as to whether they are actually making threats or what exactly they are threatening. And even without being threatened, people can be fearful of how others would respond to their withholding consent.

*For helpful feedback and criticism, I would like to thank Johann Frick, Zöe Johnson King, audiences at Princeton University and the University of North Carolina at Chapel Hill, participants in Johann Frick’s graduate seminar on *Relational and Non-Relational Morality* at Princeton University and my graduate seminar on *Coercion and Consent* at the University of North Carolina at Chapel Hill, and an anonymous reviewer.

¹For accounts of how coercion undermines consent in cases of full information, see (Hurd 1996; Alexander 1996; Wertheimer 2003; Conly 2004; Pallikkathayil 2011; Owens 2007; Tadros 2016; Ferzan 2019; Dougherty 2019). Here and elsewhere, except where gender is relevant for our discussion, I use “they/them/their” as gender-neutral pronouns for scholars and for individuals in examples, both for the reasons given in (Dembroff and Wodak 2018) and to avoid making assumptions about scholars’ gender identities.

To speak to common experiences like these, a theory of consent has to address consent given while the future remains unknown. This requires going beyond most of the literature on coerced consent as this has focused on cases of full information.² Elsewhere, there is a mature literature on how a consent-giver must be informed of risks in order to give valid consent, but this has not addressed the converse question of when consent is invalidated because the consent-giver believes that there are risks associated with refusing to consent.³ Meanwhile, in the literatures on the ethics of risk and defensive harm, scholars have considered how an agent's evidence affects whether their action infringes a patient's right.⁴ But these discussions have not addressed how the patient's evidence bears on whether their consent is sufficiently free from duress that the consent waives a right. So while there is a body of theory around the borders of our topic, there is a need to make roads into its heartland. That is what I hope to offer in this essay by investigating how coercion can undermine consent under conditions of imperfect information.

To make this task tractable, I will hone in on consent that fits the following model. First, this consent is given to someone performing an action that would otherwise constitute a moral transgression. I will say that the consent is "valid" when it succeeds in releasing someone from their duty not to perform this action and "invalid" when the action remains a breach of this duty.⁵ I will focus on cases in which someone consents to avoid suffering an illegitimate penalty. By calling a penalty "illegitimate," I mean that the penalty would wrong the consent-giver, with a paradigmatic penalty being physical violence.⁶ I do not require that the consent-receiver be the source of the penalty. Since it will be helpful to have a shorthand term that refers to consent that fits this model, I will coin the (admittedly imperfect) phrase, "coerced consent with an unknown future." I believe that consent could also

²I will discuss the following notable exceptions to this trend. Larry Alexander (1996: 172-173) states a view that is similar to the Subjective Principle that I defend. Alan Wertheimer (2003: 166) discusses a case in which someone obtains another person's consent through a threat to impose a risk. In an essay concerning rights against harm and forfeiture, Jonathan Quong (2015: 262) defends a "fact-relative" principle governing the "transfer, waiver, and forfeiture" of rights as depending on "what the right-holder actually does."

³For discussion of the requirement that consent is valid only if a consent-giver is informed about certain risks, see (Faden & Beauchamp 1986; Manson & O'Neill 2007; Millum and Bromwich 2018; Dougherty 2020). In the literature on sexual deception, there has been discussion about what a consent-giver must know about a sexual encounter (Hurd 1996; Alexander 1996; Dougherty 2013; Tadros 2016; Liberto 2017; Manson 2017; Lazenby & Gabriel 2018; Bromwich & Millum 2018; Matey 2019).

⁴For works focusing on risk imposition, see (Thomson 1986; McCarthy 1997; Zimmerman 2008, 2014; Frick 2015; Kumar 2015; Oberdiek 2017). For works focusing on defensive harm, especially in war, see (Thomson 1991; Ferzan 2012; Otuska 1994, 2016; McMahan 2002: 398-411, 2005, 2009: 167-173; Frowe 2008; Quong 2009, 2012; Lazar 2009, 2015; Tadros forthcoming). For works discussing both risk imposition and defensive harm, see (Quong 2015; Burri 2020). Another nearby topic is bluffs: Kimberly Ferzan (2017) discusses how intentional bluffs can have the same moral effect as if these were sincere.

⁵The terminology of valid and invalid consent is standard in bioethics and popular within normative ethics. Within the criminal law, the term "consent" is commonly used as a success term to refer to an act that is necessarily normatively efficacious. On that terminology, what I call "invalid consent" would be described as e.g. the absence of consent. In (Dougherty forthcoming), I argue that the valid/invalid consent framework should be generalized to allow for consent that reduces the gravity of a wrongful action without making that action permissible.

⁶I remain neutral on the question of how to make the notion of "illegitimacy" precise for the purpose of theorizing the coercion that invalidates consent. There are various answers in the literature. Alexander (1996) and Alan Wertheimer (2010) claim that such a sanction must be a rights-infringement. David Owens (2007) claims that the consent-receiver must wrong the consent-giver in virtue of how they obtain the consent. Japa Pallikkathayil (2011) claims that the consent-giver must have a "legitimate demand" against the consent-receiver imposing the sanction. In (Dougherty 2019), I defend the view that the consent-receiver must have a certain type of complaint against the imposition of the sanction.

be invalidated by coercion that does not fit this model, but I leave discussing this for another occasion.⁷

This essay's question is which normative principle explains how consent can be invalidated by coercion with an unknown future. The right principle will not only predict the correct results about when consent is invalidated. It will also be explanatory in the sense that it specifies the *grounds* for the consent's invalidity. Answering this question is philosophically challenging since there can be a tension between two competing considerations. On the one hand, if someone gives consent to an encounter because they believe that they otherwise face an illegitimate penalty, then they may view the encounter as a violation. On the other hand, if the consent-receiver has neither caused this belief, nor is aware of it, then they may resist being described as someone who has engaged in a non-consensual interaction. Because of this tension, any answer to this essay's question will be unappealing in one light. This is true of my own answer. Riding roughshod over the consent-receiver, I defend the "Subjective Principle": if a consent-giver either believes or has a credence that they would suffer a penalty for refusing to consent, this penalty is illegitimate, and this belief or credence causes them to consent, then their consent is invalid.

This essay is organized as follows. In Section 1, I motivate and clarify the Subjective Principle, before defending it against rival principles that also focus primarily on the consent-giver. In Section 2, I argue against principles that focus on the consent-receiver's causal relation to the consent-giver's belief or credence that they face a penalty for refusing to consent. In Section 3, I consider principles that focus on the consent-receiver's epistemic relation to the consent-giver's belief or credence that they face a penalty for refusing to consent. As a guide to the content of this essay, our discussion will cover cases involving sexual violence and abusive relationships, but the principles under discussion are intended to apply to consent generally and not only to sexual consent.

1 | SECTION 1. THE SUBJECTIVE PRINCIPLE AND RIVAL PRINCIPLES THAT FOCUS ON THE CONSENT-GIVER'S PERSPECTIVE

In this Section, I will state and motivate the principle that I endorse for explaining the invalidity of coerced consent with an unknown future. This is the "Subjective Principle." To motivate it, I will look at how the principle can explain various phenomena and then offer a further argument in its favor.

Let us start with cases in which someone has an outright belief that they will suffer a penalty if they do not consent, but this belief is false. This can occur when the consent-receiver is making a threat, but the threat is a bluff. For example, a perpetrator could threaten to assault someone if they do not consent and yet be unwilling to follow through the threat. Alternatively, a perpetrator may intend to follow through but be unable to execute this intention. For example, the perpetrator and their victim may be unaware that a third-party would intervene to prevent the assault.

There are also cases in which the consent-receiver leaves the consent-giver unsure whether they will suffer a penalty if they do not consent. For example, a perpetrator could threaten that if their

⁷The list of omitted topics includes, but is not exhausted by, (i) proposals that induce consent by attaching benefits to the option of giving consent; (ii) constraints on decisions from social structures and norms; (iii) forms of pressure that involve undermining someone's agency without affecting their options e.g. by overwhelming them with emotion or depleting their energy; and (iv) consent that is given because a consent-giver fears that withholding consent will not make a difference to the consent-receiver's behavior. Since the principle that I defend — the Subjective Principle — concerns the imposition of penalties, it does not cover these topics. Still, if the Subjective Principle is correct, then this suggests that a broader account should also focus on the consent-giver's credences and beliefs when addressing these other topics.

victim does not consent, then the perpetrator will spin the chamber of a gun containing one bullet and fire at the victim (Wertheimer 2003: 166).⁸ This would expose the victim to a risk of being shot, but at the time at which they decide whether to consent, they would not know whether they would be shot. Uncertainty can also arise if a perpetrator is unclear about their intentions. A perpetrator may have several reasons for leaving it ambiguous whether they are making a threat. The perpetrator may aim to retain plausible deniability as to whether they are engaging in coercion. They may want flexibility about how to respond to refusal: they have both the option of doing nothing and pretending they never made a threat and the option of imposing a penalty with the rationale that they forewarned their victim. Alternatively, the perpetrator may create uncertainty to make it hard for their victim to engage in cost-benefit calculations, thereby tempting the victim to choose the “safe” option of compliance out of risk aversion. And sometimes, a perpetrator may have none of these ploys consciously in mind as it may not be transparent to them whether they intend to be making a threat or not.⁹

These cases lead me to adopt the view that what matters for the validity of someone’s consent is not the actual penalties that they face but rather their beliefs or credences about these penalties. I will group these beliefs and credences together as the consent-giver’s “doxastic attitudes.” This view can be supported by the following argument. Each individual is sovereign over their personal domain. This domain includes their person and property and is surrounded by a protective perimeter of claim-rights (henceforth “rights” for brevity).¹⁰ To enable the individual to interact with others, the individual has the authority to relax this protection by giving consent. By giving consent, they relax this protection by expressing their will to others. However, their protection is relaxed only if they consent of their own free will. They can consent of their own free will while being moved by instrumental considerations. For example, the individual can freely give sexual consent for the sake of procreation, and they can freely give medical consent to avoid the spread of a disease. However, it may be the case that the individual does not freely consent if they aim to avoid a penalty that another agent would impose on their withholding consent. Whether this is the case depends on the legitimacy of the penalty. If the penalty is legitimately imposed, then it must be accepted as part of the background landscape of the individual’s decision-making: the penalty is morally akin to a hardship like disease. However, if the penalty is illegitimate, then the individual is coerced, and in that respect, they do not consent of their own free will. Now in general the illusion of a penalty can be just as coercive as the reality of a penalty. For example, if someone is forced to dance because another person is pointing a gun at them, then they are equally coerced whether the gun is loaded or not. Thus, to determine whether an individual’s will be free, we look not to the facts on the ground but the individual’s

⁸Outside of the context of discussing consent, Niko Kolodny (2017: 92) argues that a wrong-making feature of some threats to do wrong is that these threats make it sufficiently likely that the threatener commits this wrong. There is a further debate about whether someone is harmed by being subjected to a risk even if the risked outcome never materializes. If risks are harms, then threats to expose consent-givers to risks in the case of non-consent can be handled in the same way as common garden threats of harm. For discussion of whether risk is a harm, see (Finkelstein 2003; Oberdiek 2017). For an argument that if a wrongful harm is caused by a risk, then the wrongfulness of the harm can be ameliorated or aggravated by the size of the risk, see (Lazar 2015).

⁹For helpful discussion on this point, I am indebted to Zoe Johnson King.

¹⁰The concept of a claim-right originates with Wesley Hohfeld (1923). The idea that a sovereign individual is protected by a perimeter of claim-rights originates with H. L. A. Hart (1982: 183-4).

doxastic attitudes about their circumstances. Since consent is morally significant only as an exercise of the individual's free will, the validity of the consent in turn depends on these doxastic attitudes.¹¹

Following this argument, we arrive at the following principle:

Subjective Principle. X's consent to Y is invalid if

- (i) X either believes or has a credence that X would suffer a penalty for refusing to consent;
- (ii) this penalty would be illegitimate; and
- (iii) X's belief or credence causes X to consent.¹²

We should note two points about this principle. First, the Subjective Principle states only a sufficient condition for someone's consent being invalid. Since the principle does not state a necessary condition, we can endorse the principle while allowing that someone's consent can be invalidated for other reasons: e.g. they are insufficiently informed, they lack capacity for giving consent, or they are subject to a type of duress that does not involve the prospect of a penalty. Second, because of this sufficient condition, the Subjective Principle can explain why consent is invalid in the cases that we have considered so far. Because the Subjective Principle concerns a consent-giver's beliefs, it can explain why their consent is invalidated by a threat of harm that they falsely believe will arise (e.g. bluffs). Because the principle concerns the consent-giver's credences, it can explain why their consent is invalidated either by a perpetrator imposing a risk of harm of which the consent-giver is aware or by a perpetrator keeping the consent-giver uncertain whether the consent-giver will suffer the harm. Thus, the principle has two sources of support. First, it is motivated by its explanatory power to return intuitive verdicts about cases, and second it is motivated by the foregoing argument, according to which whether someone consents of their own free will turns on their factual beliefs about the penalties that they face.

While I endorse that argument in the respect that I take it to provide the correct rationale for the principle that governs coerced consent with an unknown future, I acknowledge that it is not a knock-down argument by any means. In particular, let me flag upfront that it is controversial in the respect that it focuses on the consent-giver at the expense of the consent-receiver. To see why this is

¹¹This could be buttressed by Quong's (2015: 262) defense of a fact-relative view of whether one has transferred, waived, or forfeited one's rights over an evidence-relative view according to which what matters is whether an agent has evidence that one has transferred, waived, or forfeited these rights:

"...there are good reasons why transfer, waiver, and forfeiture should depend on what the right-holder actually does: it grants the right-holder a more effective degree of control over the right, something that is typically of central importance in the justification of the right. The point, for example, in Alice having claim rights against certain forms of non-consensual contact is to grant Alice an important element of control over her body. But if Alice can lose this right depending on what others reasonably believe she has done, rather than anything she has actually done, the right is less effective in securing one of its central aims. In sum, whether A has waived, transferred or forfeited one of her rights depends on A's actual behavior, and not purely on the beliefs of others."

¹²With respect to sexual consent, Alexander (1996: 172-173) endorses a similar view:

"If Vera believes Alvin has threatened her, even if he has not, and even if her belief that he has is unreasonable, then she does not consent to sex with him; and, if he is aware of her mistake or of a high risk that she has made the mistake, he may be guilty of raping her."

Like many philosophers of the criminal law, by "consent," Alexander means what I mean by "valid consent." Alexander holds that consent consists in an intention to forego an objection to another person's action. Alexander's thought is that because Vera believes Alvin is threatening her, Vera does not forego her objection to sex with Alvin. My defense of the Subjective Principle does not rest on any conception of what constitutes consent (and so is open to people who deny that consent requires this type of intention).

controversial, note that a consent-receiver has an interest in being morally free to act in various ways. When the consent-receiver needs consent to perform an action, the consent-receiver has less moral freedom if they receive invalid consent than they would have if they receive valid consent. If the consent-receiver is not responsible for the consent-giver's belief that they will be penalized for withholding consent, and the consent-receiver is unaware that the consent-giver has this belief, then the consent-receiver could act on the consent in good faith. So the conclusion of the foregoing argument imposes moral constraints on consent-receivers who act in good faith, and in this respect, the principle is insensitive to their interests in moral freedom. Given that there is potentially a clash of interests between the consent-giver and the consent-receiver, any normative principle will come with some theoretical cost. This is why finding the correct normative principle is philosophically difficult and why we are unlikely to find knock-down arguments in favor of any principle. Since the foregoing argument is not knock-down, it needs to be supplemented by criticism of rival principles and of the arguments that may be offered in defense of these rivals. The remainder of this essay offers this criticism.

Before we consider rival principles that bring the consent-receiver onto the scene, let me say why the Subjective Principle does better than rival principles that also primarily focus on the consent-giver. To do so, let us consider some ways of removing, modifying, or adding to the Subjective Principle's clauses.

The Subjective Principle's clause (ii) states that the penalty is in fact illegitimate. By removing this condition, we would arrive at a rival principle that implies that consent is invalidated by legitimate penalties. But that implication is implausible. Suppose that a sports player is refusing to take part in steroids testing. The coach threatens to cut them from the team unless they take the test. This threat imposes a legitimate penalty on the player's option of refusing to consent to the test. But if the player consents to avoid this penalty, then this would not invalidate the player's consent to the test. This illustrates that someone's consent is not invalidated merely because they consent to avoid a penalty. To invalidate consent, this must be an illegitimate penalty.

Note that in this respect, clause (ii) is fact-relative: it concerns whether the penalty is in fact illegitimate. We could reach a principle that caters even further to the consent-giver by substituting a clause like:

(ii*) the consent-giver believes that this penalty would be illegitimate.

But it is implausible that if a consent-giver has a true descriptive belief that they face a penalty for withholding consent, but they have a false normative belief that this penalty is illegitimate, then this false normative belief invalidates their consent.¹³ Suppose that the coach's threat leads the player to agree to the test while falsely believing that the coach would be usurping their authority by dropping them from the team. Because the player has this false belief, the player consequently falsely believes that the coach is threatening to impose an illegitimate penalty in the event that they refuse to consent. However, this false normative belief would not invalidate the player's consent to the steroids test. It would not do so even if the player had good evidence for their belief—perhaps, a reputable source has misled them about the terms of the coach's contract. Interestingly, this shows that a consent-giver is not always in a position to know whether they are consenting freely and whether they are giving valid consent at the time at which they give consent. That conclusion might seem surprising, but it is the right one to draw. If the player later

¹³This point is made by Alexander (1996: 171-172) and Hallie Liberto (forthcoming). This point causes *prima facie* trouble for the view that consent-giving requires an intention to waive a right. For an attempt to accommodate this point on behalf of this view, see (Alexander 1996: 173). For criticism of this attempt, and an argument that this type of example shows why we should reject the aforementioned view, see (Liberto forthcoming).

learned that the coach did have the authority to drop them, then they would have to accept that their consent to the test was valid even though they did not appreciate this at the time.

The Subjective Principle's clause (iii) requires that the consent is caused by the consent-giver's credence or belief that they face a penalty for refusing to consent. By removing this clause, we would end up with a rival principle that implies that consent is invalidated by coercion that does not causally affect the consent-giver's decision-making. However, that implication is implausible. Suppose that you invite your father to stay with you for a holiday because you want to spend time with him despite his anti-social tendencies. Before he arrives, your father becomes paranoid that you will back out of hosting and threatens to destroy your childhood possessions if you do. You are disturbed by the threat, but it does not affect your decision-making: you still want him to stay because you want to spend time with him despite his anti-social tendencies. Since the threat did not causally affect your consent, the threat does not invalidate your consent, and your father would not be a trespasser in your home. Certainly, he would not be trespassing if the causally ineffective threat came not from your father but from your sister, whose motive was to avoid hosting your father herself. By contrast, if the threat — whether from your father or sister — did cause you to consent, then your consent would be invalid.

Finally, we could arrive at a rival principle by adding the following clause:

(iv) the consent-giver's belief or credence is appropriately supported by their evidence.

By adding this clause, a rival principle would avoid implying that someone's consent is invalidated when they have made a mistake when forming their beliefs or credences about the penalties that they face. The mistake could be that they form a belief in a penalty when their evidence does not support this belief. Or their mistake could be that their credence in the penalty is higher than the credence that would be supported by their evidence. This is not uncommon. We can become anxious about the future turning out badly, and anxiety can cause us to overestimate risks. On the grounds that the consent-giver is responsible for making a mistake, we might conclude that the mistake should not disadvantage the consent-receiver. Since the consent-receiver would be disadvantaged by their moral freedom being constrained in virtue of their receiving invalid consent, we might conclude that the consent-giver's mistake should not render the consent invalid.

I am sympathetic to this argument for including clause (iv), and I have no strong objection to including the clause. However, ultimately, I think that we should neither be moved by the argument nor include the clause. Suppose that a consent-receiver is aware that the consent-giver lacks evidence for their mistaken belief that the consent-receiver would turn violent if the consent-giver refused to consent. For example, perhaps the consent-receiver can see that the consent-giver is terrified. Yet the consent-receiver also knows that the consent-giver lacks good evidence that the consent-receiver would turn violent. Suppose that the consent-receiver reasons as follows, "I know that this person is consenting because they are afraid that I will violently attack them if they refuse to consent. But I know that I will not attack them, and they have no evidence that I will. They have just made a mistake when forming their false belief. Since they must take responsibility for this belief, they have to accept that their consent is valid." This reasoning is not cogent. Once the consent-receiver grants that the consent is given in order to avoid violence, that settles the fact that the consent-receiver cannot justify acting on the consent. This is the case even though the consent-giver lacks evidence to support their belief.¹⁴

¹⁴I postpone until Section 3 my argument that consent is invalidated even when the consent-receiver is unaware that the consent-giver is attempting to avoid a penalty. I allow that if a consent-receiver lacks evidence of this, then they act blamelessly. My argument holds even if the consent-giver makes their mistake in a morally objectionable way e.g. on the basis of racist stereotyping. I note that adding this detail complicates the case in ways that will trigger other intuitions that muddy the waters. Arguably, someone wrongs another person by interacting with them on the basis of racist stereotypes, and there may be a special wrong of causing someone to blamelessly engage in wrongful action because one holds racist attitudes towards them. We should separate these independent wrongings and the blamelessness of an innocent consent-receiver from the invalidity of the consent.

2 | SECTION 2. RIVAL PRINCIPLES THAT FOCUS ON THE CAUSAL ROLE OF THE CONSENT-RECEIVER

While the Subjective Principle focuses only the doxastic attitudes of the consent-giver, some of its rivals also focus on the causal connection between these attitudes and the consent-receiver's actions or omissions. In this Section, I will argue against these rivals.

To motivate one of these rival principles, consider the view that coercion is objectionable because it involves manipulating someone or using them as a mere means. To manipulate or use someone is an intentional endeavor: it is to make someone else into a tool for pursuing one's own ends.¹⁵ If we think that this is the feature of coercion in virtue of which it invalidates consent, then we might endorse a principle like the following:

Intention Principle. X's consent to Y is invalid if

- (i) X either believes or has a credence that X would suffer a penalty for refusing to consent;
- (ii) this penalty would be illegitimate;
- (iii) X's belief or credence causes X to consent;
- (iv) Y has performed an action that caused X to have this belief or credence (or Y omitted an action that would have caused X not to have this belief or credence); and
- (v) Y performs this action (or omits this action) out of an intention for X to have this belief or credence.¹⁶

Clauses (iv) and (v) include parentheses about omissions in light of the possibility that a consent-receiver intentionally omits to disabuse the consent-giver of a false belief that has not been caused by the consent-receiver's behavior. We will turn to omissions shortly.¹⁷

Before I argue against the Intention Principle, let me clarify the dialectic between it and the Subjective Principle. The Intention Principle is just the Subjective Principle with additional clauses—clauses (iv) and (v). (The same will be true of some of the other rival principles that I go on to discuss.) Consequently, the Intention Principle states a sufficient condition that is narrower than the sufficient condition stated by the Subjective Principle. As such, the Subjective Principle shares all of the Intention's implications, but the reverse is not true. Accordingly, the Intention Principle is a rival to the Subjective Principle in the following two senses. First, if the Intention Principle can explain all the explananda, then we do not need the stronger Subjective Principle to explain these. In that respect,

¹⁵This is a characteristically Kantian objection to coercion. In general, Kantian ethics primarily morally evaluates "maxims" for action which include the agent's motives when performing the action. The Kantian objection to coercion is that it precludes consent in the sense that a victim cannot share the agent's ends. For Kantian accounts of coercion, see (O'Neill 1985: 262-263; Korsgaard 1996: 139-141). There are also ways to motivate this idea without drawing heavily on Kantian theory. For example, Danielle Bromwich and Joseph Millum (2018) claim that consent is invalidated when someone exercises illegitimate control over another person's decision. Bromwich and Millum do not explicitly discuss whether this requires that an intention to control this person's behavior, but a natural interpretation of "control" in these contexts is that it is intentional.

¹⁶Insofar as the Intention Principle concerns insincere threats, it is a close cousin of Ferzan's (2017: 172) principle that "when a person, without justification or excuse, acts in a way that she knows is likely to be understood by the "interpreter" as an alteration of their Hohfeldian relations, and the interpreter believes that those relations have been so changed, then the actor's behavior will have the same normative effect as if the act had been sincere."

¹⁷If omissions are causes, then these clauses could accordingly be simplified. For the view that omissions are not causes, see (Beebe 2004). For the view that omissions are causes, see (McGrath 2005).

the Intention Principle threatens to leave the stronger Subjective Principle inadequately motivated. Second, if the Subjective Principle and the Intention Principle are interpreted as explanatory principles that specify the grounds of the invalidity of someone's consent, then these principles disagree about these grounds. The Intention Principle asserts, and the Subjective Principle denies, that these grounds include the consent-giver's intentional actions or omissions.

However, precisely because the Intention Principle states a sufficient condition that is narrower than the sufficient condition stated by the Subjective Principle, the Intention Principle is too weak. The Intention Principle cannot explain cases in which the consent-receiver is unaware that they have caused someone to fear a penalty. There are various reasons why a consent-receiver might underestimate how much fear they inspire in others. For example, a violent spouse could think of themselves as fundamentally a decent person, who is occasionally provoked into uncharacteristic anger.¹⁸ Because they have a distorted self-image, they could fail to realize that their partner fears violence in response to withholding consent. Second, a consent-receiver might fail to empathize with what it is like to be disempowered. Suppose that a boss engages in *quid pro quo* sexual harassment by offering an employee an undeserved work benefit in return for sex. Since declining the deal would leave the employee in the *status quo*, and the employee is not entitled to the benefit, this proposal would not impose an illegitimate sanction on the employee's option of withholding consent. Therefore, the boss could make the proposal without intending to impose such a sanction. However, a proposal like this often also connotes an implicit threat, whether the threat is intended or not.¹⁹ The employee is likely to infer that if the boss is willing to break company rules in the pursuit of their own sexual satisfaction, then there is a risk that the boss is also willing to break these rules by retaliating against non-compliance. Consequently, what is intended as a mutually beneficial offer can be interpreted as an implicit threat to impose a sanction. Whatever the reason, let us suppose that a consent-receiver is unaware that they have caused a consent-giver to have a belief or credence that they will be sanctioned for failing to consent. But let us also assume that their behavior has caused the consent-giver to have a credence that the consent-receiver would sanction them for refusing to consent. If the consent-giver acts on the basis of this credence, then their consent is invalid.

These examples should lead us away from the idea that consent is invalidated by the consent-receiver intentionally controlling the consent-giver's behavior. In its place, we could drop the Intention Principle's clause (v), and endorse a principle like the following:

Causation Principle. X's consent to Y is invalid if

- (i) X either believes or has a credence that X would suffer a penalty for refusing to consent;
- (ii) this penalty would be illegitimate;
- (iii) X's belief or credence causes X to consent; and
- (iv) Y has performed an action that caused X to have this belief or credence (or Y omitted an action that would have caused X not to have this belief or credence).

The Causation Principle allows that consent is invalidated in virtue of the consent-receiver's causal relation to the consent-giver's doxastic attitude even if the consent-receiver neither intends this relation to hold, nor is aware that it does hold.

¹⁸For the self-deception of domestic abusers, see (Stark 2007: 246).

¹⁹Stephen Schulhofer (1998) makes this point as part of their discussion of the epistemic nuances of workplace offers and threats with respect to sexual coercion case law.

The Causation Principle could be motivated on the grounds that it handles all the cases that we have considered so far. The principle could also be motivated by combining two ideas. The first idea is the following:

Wronging Claim. For any illegitimate penalty, Y wrongs X either by causing X to believe or have a credence that X will suffer this penalty for refusing to consent to Y (or by omitting an action that would have caused X not to have this belief or credence).

The Wronging Claim both has some intrinsic plausibility and follows from the general view that an agent wrongs a deliberator by infringing on their entitlement to deliberate as if they are free from illegitimate penalties.²⁰ The second idea is that someone's consent is invalidated when the consent-receiver wrongs the consent-giver in virtue of how the consent-receiver obtains their consent. This is David Owens's (2007) Injury Account of how duress invalidates consent.²¹ Applying the Injury Account to our topic, we would arrive at the following principle:

Wronging Principle. X's consent to Y is invalid if

- (i) X either believes or has a credence that X would suffer a penalty for refusing to consent;
- (ii) this penalty would be illegitimate;

²⁰This general view is defended in the literature on the wrongfulness of coercion. Along these lines, James Shaw (2012: 167) defends:

"Permissible Deliberation. If one is permitted to deliberate about performing action A at all, one is entitled to deliberate as if one could perform A free of any sanction on its performance that would constitute a wrong."

Similarly, Stephen White (2017: 218) endorses the "Deliberative Security Thesis" which is that one wrongs another person by undermining their deliberative security understood as follows:

"Deliberative Security. A person has deliberative security with respect to a particular option P if she can, given the circumstances, rationally proceed on the assumption that whether others act permissibly does *not* depend on whether she chooses in favor of P."

²¹Owens's Injury Account governs how all normative powers, including promise, are invalidated by duress and deception. Owens (2012: 235) subsequently updated and re-named the view insofar as it applies to the normative power of promise:

"The Infringement Account: Promises induced by duress or misrepresentation are invalid where by getting someone to promise in that way you wrong them (i.e. you infringe some right of theirs.)"

Using "consent" as a success term, Japa Pallikkathayil (2011: 14) defends a similar view:

"in order to have the power over the proceedings that is needed to make consent possible, a person's options must not be impermissibly constrained, at least not in ways that are deliberatively significant, and perhaps not at all."

For Pallikkathayil (2011: 12), an individual's options are impermissibly constrained when the individual has a legitimate demand against another person constraining their options in this way. If legitimate demands correlate with wrongings, then Pallikkathayil's account converges with Owens's. Like Owens, Pallikkathayil (2011: 16-19) develops this idea into a comprehensive account of how duress undermines all discretionary normative powers. The Injury Account could be fortified by approaching the issue of how coercion undermines consent in terms of interpersonal justification. In (Dougherty 2019), I argue that a consent-receiver cannot justify their behavior to the consent-giver by appealing to the consent when the consent has been obtained via the consent-receiver wronging the consent-giver. I argue that because the consent-giver has a complaint against the consent-receiver with respect to the way that the consent has been obtained, the consent-receiver retains their complaint against the action that the consent-receiver performs on the basis of the consent. For discussion of the role of interpersonal justification in contractualist moral theory, see (Scanlon 1998; Frick 2016). Owens's (2007, 2012) defense of the Injury Account does not focus on interpersonal justification but instead on the claim that its predictions are more intuitive than those of the "Fault Account," according to which X's exercise of a normative power with respect to Y is invalid in virtue of the fact that it was impermissible for Y to induce X to exercise the normative power.

- (iii) X's belief or credence causes X to consent; and
- (iv) Y has wronged X in virtue of Y's role with respect to how X has formed this belief or credence.

The Wronging Principle and the Causation Principle differ only with respect to their clauses (iv). The Causation Principle's clause (iv) is that Y causes X's doxastic attitude (or has omitted an action that would prevent this attitude). The Wronging Principle's clause (iv) is that Y wrongs X in virtue of Y's role regarding how X forms this doxastic attitude. The gap is bridged by the Wronging Claim, according to which Y wrongs X in virtue of causing X to form this doxastic attitude (or omitting an action that would have prevented this action). Therefore, the Wronging Principle and the Wronging Claim jointly entail the Causation Principle.

However, the Wronging Principle states an excessively narrow sufficient condition. There are cases in which consent is invalidated even though the consent-giver's doxastic attitudes do not arise from the consent-receiver wronging them. Suppose that Leo emails their new roommate Ally asking to use their bread-making machine while they are away on their meditation retreat. Ally emails back, "I'm off to the retreat now, and I can't be contacted until it is over. I'm not generally inclined to let people use my stuff. However, in the last apartment that I lived in, I refused a request like this, and I got bullied as a result. Since I don't want to go through all that again, I am letting you borrow the breadmaker." This comes as a surprise to Leo, who has been exemplary in their behavior towards Ally and has done nothing to cause Ally to fear bullying. Since Leo can no longer communicate with Ally, Leo is now causally disconnected from Ally's doxastic attitudes. Therefore, Leo has not wronged Ally either by causing Ally to have this belief or by omitting to correct this belief. Yet Leo lacks Ally's valid consent. Therefore, the Wronging Principle is excessively narrow.

Can the Causation Principle explain the invalidity of Ally's consent? To explain this, a proponent of the principle could try appealing to the claim that Leo's act of seeking consent caused Ally's belief that they would face a sanction. But it is incidental to the example that Leo sought Ally's consent: the consent would be just as invalid if Leo received the email unsolicited. Alternatively, a proponent of the Causation Principle could try appealing to Leo's omissions of actions that would have reassured Ally before leaving for the retreat. But this maneuver leads to a separate worry that clause (iv) of the Causation Principle is vacuous: if all that is required for a causal connection is that there was something that the consent-receiver could have done to reassure the consent-giver, then clause (iv) is satisfied nearly all the time. We can press this point by considering a case in which, prior to receiving consent, a consent-receiver had had no contact at all with the consent-giver. Suppose that out of the blue you receive a long letter addressed to you from Jones of Llandysul inviting you to give a lecture at their invitation-only conference and to stay in their guest room. At first, this letter charms, but flummoxes, you because you have neither met Jones nor been to Llandysul—you have to look it up on a map. As you read on, you are distressed to discover that Jones is inviting you because they are worried that otherwise you will spread malicious lies about their conference. You begin to realize that a villain has been impersonating you to menace Jones. Since Jones is consenting because they believe that you will otherwise slander their conference, you would not have their valid consent to attend the conference and stay with Jones. Now over the course of your life, you have omitted various actions that would have made Jones believe that you would not slander their conference. For example, last year, you could have flown to Wales, met with Jones, and reassured them of your gentle nature. But given that you had no idea of Jones's existence prior to receiving the letter containing their consent, it is hard to believe that your omitting this course of action has anything to do with why their consent is invalid. In other words, it is implausible that these omissions ground the invalidity of Jones's consent. But if that is right, then we must turn our backs on the Causation Principle as an explanatory principle that specifies the grounds of the invalidity of consent that is coerced with an unknown future.

3 | SECTION 3. RIVAL PRINCIPLES THAT FOCUS ON THE EVIDENCE OF THE CONSENT-RECEIVER

In the last Section, we looked at rival principles that concern the consent-receiver's causal role in bringing about the consent-giver's credence or belief that they will be penalized for failing to consent. We saw that these principles did not give satisfactory accounts of various cases.

When confronted with these cases, we may be struck by the fact that the consent-receivers have evidence that the consent-givers believe that they face penalties.²² This feature might suggest that we went wrong in looking for principles that posit a *causal* connection between the consent-receiver and the consent, and instead we should be looking for principles that posit an *evidential* connection.

Positing an evidential connection could be motivated by a big picture view of rights and duties. According to a common view of rights, a patient's (claim-)right against an agent correlates with a directed duty that the agent owes to the patient (Hohfeld 1923; Thomson 1990). On one version of this view, these rights and directed duties have the function of constraining an agent's conduct.²³ In order for these rights and duties to constrain the agent's conduct, it may seem that these rights and duties must be suitably epistemically accessible to the agent. Now if the patient gives valid consent to the agent, then this waives a right against the agent and releases the agent from a directed duty. Therefore, it may seem that the agent must have suitable epistemic access to whether they receive valid consent. Therefore, it may seem that insofar as coercion invalidates consent that an agent receives, this invalidating effect must be epistemically accessible to the agent.²⁴

To formulate specific principles along these lines, let us distinguish two types of evidence. On the one hand, we can have *generic* evidence that our actions bear certain risks. For example, we have evidence that in general the activity of driving imposes a risk of harm on pedestrians as there is always some chance that a driver, however conscientious, loses control of the vehicle. Similarly, we have evidence that in general whenever we receive consent from someone, there is always some chance that they

²²This evidence is available to the aforementioned violent spouse and sexual harasser who have failed to take on board this evidence when forming their beliefs. By saying that we may be struck by this fact, I do not mean to imply that we should think that the consent-receiver's possession of certain evidence is sufficient for the consent being invalid.

²³Zimmerman (2014: 120) defends the view that rights are relative to the agent's evidence on the grounds that this explains their moral significance: there is a clear connection with what the agent is permitted to do. Quong (2015: 257) links rights with reasonable demands in endorsing the view that we "only have claim rights against others that they refrain from causing us harm when our demand that others refrain from performing the harmful act is reasonable, or else when our demand that others refrain would be reasonable but for a lesser-evil justification or an agent-centred or relational prerogative to impose harm." In a similar vein, Victor Tadros (2016: 208) claims that the "primary function of X's duties is to constrain X's practical reasoning." Similarly, one would hold that the validity of consent is relative to the consent-receiver's evidence if one simultaneously holds the view that valid consent makes the consent-receiver's actions permissible and the view that permissibility is "evidence-relative" in the sense that facts about the permissibility of an agent's action supervene on the agent's evidence (rather than the facts of their circumstances). For discussion of evidence-relative permissibility, see (Parfit 2011: 150-164).

²⁴This argument will not persuade everyone. First, Judith Jarvis Thomson (1990: 77) agrees that rights constrain conduct, while also maintaining that an agent can infringe someone's right against harm even when the agent has no way of knowing that their action causes the harm (Thomson 1990: 229). Second, Quong (2015: 257) agrees that the initial assignment of the rights that a patient holds against an agent needs to be epistemically accessible to that agent on the grounds that it must be reasonable to demand that the agent respects the patient's rights. However, Quong (2015: 261-262) denies that an agent must have epistemic access to whether the patient transfers, waives, or forfeits the right. Helen Frowe (2015: 272) questions whether these two claims cohere:

"It's not clear how Quong can endorse an objective account of the dispossession of claims. If the soldiers' evidence is that the villagers have forfeited or waived their claims, why would it be reasonable to demand the soldiers' compliance with the correlative duties?"

are consenting to avoid an illegitimate penalty. On the other hand, we can have *specific* evidence of risks. For example, we can have evidence that on a particular occasion, a specific instance of driving imposes a particularly high risk e.g. because weather conditions are bad. Similarly, we can have specific evidence that it is particularly likely that a certain consent-giver is attempting to avoid a penalty. For example, we might notice that they look fearful or that they have no other discernible reason for giving consent.

Having drawn this distinction, we can see that there are two extra evidential conditions that could be posited by rival principles. Let us start with a rival principle that includes the condition that the consent-receiver has specific evidence that the consent-receiver consents to avoid a penalty:

Specific Evidence Principle. X's consent to Y is invalid if

- (i) X either believes or has a credence that X would suffer a penalty for refusing to consent;
- (ii) this penalty would be illegitimate;
- (iii) X's belief or credence causes X to consent; and
- (iv) Y has specific evidence that X consents because X has this belief or credence.

The effect of adding clause (iv) is that the Specific Evidence Principle does not imply consent is invalid when the consent-receiver's only reason to think that the consent-giver consents to avoid a sanction is the consent-receiver's generic evidence that there is always a chance that any consent-giver consents for this reason.

The Specific Evidence Principle could be motivated by the idea that a consent-receiver is entitled to rely on the presumption that they receive valid consent so long as they lack specific evidence that this is not the case. Let us consider two arguments along these lines.

The first argument concerns consent's role in managing risks. In defense of the view that consent consists in observable behavior, Renée Bolinger (2019: 187) notes that consent "enables agents to participate in close interactions" and allows agents "to 'own' the risks" associated with these interactions. In Bolinger's example, if a surgeon discloses the risks of surgery to a patient, then the patient's consent allows the surgeon to lay hands on the patient's body and absolves the surgeon of responsibility for the risks of the surgery. This is a premise that Bolinger (2019: 189) offers in support of their conclusion that consent consists in external behavior and does not require an unobservable intention.²⁵ Another premise is the following claim:

Consent performs its risk-managing functions only if the consent is observable (Bolinger 2019: 188).

Although Bolinger does not discuss the conditions under which consent is valid, this appeal to the risk-managing functions of consent would also support a conclusion about the conditions under which consent is valid. This is because consent must be valid to morally affect risks:

Consent performs its risk-managing functions only if the consent is valid.

Therefore, if Bolinger is right that appealing to consent's risk-managing functions supports the conclusion that it must be observable whether consent is given, then this appeal would also support the conclusion that it must be observable whether the consent is valid:

²⁵Bolinger deserves the credit for the insight that if consent's functions support the conclusion that consent requires observable behavior, then these functions also support the conclusion that consent does not require a mental intention. For work that defended only the antecedent of this conditional claim, see (Dougherty 2015; Healey 2015).

Consent performs its risk-managing functions only if it is observable that the consent is valid.

This is a consequence of Bolinger's (2019: 188-189) claim that "at the very least, [an agent] must be able to track the facts about whether [a consent-giver] has given her a permission" to perform a certain action. Now, Bolinger (2019: 190, 196) claims that for it to be observable whether consent has been given, the consent-giver's behavior must conventionally signify that they are giving consent unless the following exception obtains: the consent-receiver has specific evidence that the consent-giver does not intend to give consent by this behavior. Along similar lines, we might conclude that it must be observable that the consent is valid, so long as the consent-receiver does not have specific evidence that an invalidating condition obtains.

The second argument concerns the ethics of risk imposition. It seems permissible for someone to perform an everyday action when they have no way of knowing that a harm will arise from the minuscule risk associated with the action. For example, it seems permissible to perform the action of starting a gas stove that is in perfect condition even if this action improbably causes a gas leak that ultimately kills one's neighbor (Thomson 1986: 177-178). To justify these everyday risk impositions, Michael Zimmerman (2008: 33-41) argues that when faced with uncertainty, an agent's obligations depend on their evidence.²⁶ Even if the agent has the generic evidence that starting a gas stove always imposes a tiny risk of a fatal gas leak, this risk is so minuscule that the agent is permitted to take the risk. For it to be the case that this action is impermissible, the agent would need to have specific evidence that the action has an unusually large risk of causing the gas leak. On the grounds that a patient's rights correlate with the agent's obligations, Zimmerman (2008: 80) concludes that a patient's rights also turn on the agent's evidence.²⁷ As such, a patient has a right against being exposed to risks of harm, but these risks are calculated on the basis of the agent's evidence rather than the patient's evidence (Zimmerman 2008: 87). While Zimmerman does not discuss consent, Zimmerman's view of risk-impositions can be extended to cover the risks of consent-giving.²⁸ Every consent-receiver has generic evidence that there

²⁶Similarly, Rahul Kumar (2015: 47, 42) claims both that "whether [an individual] has been *wronged* by having [a] risk imposed on [them] turns on whether doing so is permitted by a principle that is justifiable to anyone" and also that these principles must be sensitive to the fact that the "permissibility of conduct must be reasonably epistemically accessible to an individual thinking about what courses of action are open to her."

²⁷Zimmerman (2008: xii) summarizes their argument:

"Given that our overall moral obligation is to choose that option that is the best prospect under the circumstances, which is itself in part a function of the evidence that is available to us; and given that this overall obligation is determined by the relative weights of the various *prima facie* obligations that we have; and given, finally, that whatever rights others hold against us are correlative to at least some of these *prima facie* obligations, it follows that the rights that others hold against us are themselves in part a function of the evidence available to us."

See also (Zimmerman 2014: 113-140).

²⁸In fact, Zimmerman's entire view has even stronger implications for consent. For Zimmerman, facts about duties and rights are entirely relative to the evidence of an agent. However, clauses (i)-(iii) of the Specific Evidence Principle do not mention the agent's evidence. The nearest principle that is consistent with Zimmerman's entire view is the following:

- Evidence-Relative Principle. X's consent to Y is invalid if there is an illegitimate penalty, such that Y has evidence that
- (i) X either believes or has a credence that X would suffer this penalty for refusing to consent; and
 - (ii) X's belief or credence causes X to consent.

The objections that I go on to offer to the Specific Evidence Principle would also apply to that principle. Zimmerman (2014: 117-118) explicitly notes that their view has implications that will strike some as counterintuitive. For further criticism of an entirely evidence-relative view of consent, see (Tadros 2016: 242).

is always a tiny risk that any consent-giver is motivated to avoid a sanction. Accordingly, we might conclude that intuitively this risk is small enough that the consent-giver may permissibly take the risk. Therefore, acting on someone's consent would be impermissibly risky only if the consent-receiver had specific evidence that the consent-giver is motivated by a belief or credence that the consent-giver otherwise faces a sanction.

While these are natural extensions of Bolinger's and Zimmerman's arguments, Bolinger and Zimmerman would do well to find ways to resist these extensions because the Specific Evidence Principle is implausible.²⁹ To see this, consider a real-world case of third-party coercion, in which the source of the coercion is not the consent-receiver. In the context of an abusive relationship, Victor Burnham threatened Rebecca Burnham with violence unless she attempted to stop passing motorists and solicit sex from them (Westen 2004: 139-140). Because Rebecca Burnham consented to avoid a violent attack, her consent was invalid. This result would hold even if we supposed that Rebecca Burnham was a sufficiently convincing actress that a motorist had no specific evidence that she was motivated by a background threat. If the roadside location of the solicitation seems suspicious, then we can imagine a variant of the case in which an abuser threatens their victim into soliciting sex at a bar that people often visit in order to seek casual sexual encounters. If we fill in the background details of the case in a certain way, then a consent-receiver may have no specific reason to suspect that consent-giver is subject to coercion from a third-party. This ignorance would excuse the consent-receiver from blame. But the ignorance would not render the coeree's consent valid.

To press this point, note that third-party coercion is only one of several problems along these lines. To motivate the Specific Evidence Principle, we just considered two arguments. These arguments did not specifically address coercion, as opposed to any of the other necessary conditions for consent's validity. Therefore, if these arguments support the conclusion that a consent-receiver must have specific evidence that the consent-giver acts under duress, then these arguments would equally support similar conclusions concerning the other necessary conditions for valid consent. One of these is the necessary condition that the consent-giver must have sufficient capacity. For example, in the case of sexual consent, consent is invalid when given by a minor. Yet a consent-receiver could have sex with someone while lacking evidence that they are a minor. Perhaps, the minor has the physical appearance of someone ten years older than them, and the minor has shown the consent-receiver a fake passport that looks so much like the real thing that it would convince an immigration official. In those circumstances, the consent-receiver would lack specific evidence that they are having sex without the minor's valid consent. Yet the consent would be invalid simply because it came from a minor.

I take both the Burnham case and the minor case to undermine the motivations that we considered for the Specific Evidence Principle, and I take the Burnham case to show that the principle is false. However, these cases do not undermine an alternative principle that focuses on a consent-receiver's generic evidence:

²⁹For Bolinger, I suggest that this would involve finding a more nuanced link between consent's risk-managing function and the thesis that consent consists in behavior. For Zimmerman, I suggest that this would involve denying that their prospective account of obligation applies to the directed duties that are correlates of claim-rights. Zimmerman (2014: 120) resists denying this because of the worry that rights would "lose much of their moral significance. If, as the Correlativity Thesis states, rights entail obligations, then it is clear how they can play a highly significant role in determining what we ought to do." This motivation strikes me as insufficient to justify the counterintuitive implications for when people's sexual rights are infringed. This is partly because of a point that I note in the concluding Section of this essay: even if rights do not bear on what an agent prospectively ought to do, rights could retain moral significance for determining who is a victim of misconduct. By severing the prospective account of obligation from rights, Zimmerman could retain that account without acquiring implausible commitments concerning when people's sexual rights are infringed.

Generic Evidence Principle. X's consent to Y is invalid if

- (i) X either believes or has a credence that X would suffer a penalty for refusing to consent;
- (ii) this penalty would be illegitimate;
- (iii) X's belief or credence causes X to consent; and
- (iv) Y has generic evidence that there is always some risk that X consents because X has this belief or credence.

I flag that clause (iv) states a condition that is trivially satisfied, and in that respect, there is only a slender difference between the Generic Evidence Principle and the Subjective Principle.

Before we discuss this difference, let us consider how the Generic Evidence Principle might be motivated. One motivation appeals to the idea that a consent-receiver acts on the basis of invalid consent only if they are responsible for their action. To see why this might bring generic evidence into play, consider Jeff McMahan's view of what it is for an agent to wrong a patient. McMahan (2005: 401) claims that an agent wrongs a patient only if the agent is *responsible* for doing so:

Whether you are wronged is not a matter only of what happens to you. It also depends on facts about agency and responsibility. A falling boulder or a charging tiger may harm you but not wrong you. Moral responsibility is a precondition of wronging.³⁰

McMahan (2005: 401) illustrates this point by claiming that if a villain throws a person off a cliff, then the falling person does not wrong a sunbather by landing on them since the "threat posed by the [falling person] is not a product of his responsible agency."³¹ Similarly, McMahan (2005: 397) considers a case in which a "villain has secretly tampered with a cell phone in such a way that" pressing send will detonate a bomb that kills a victim. McMahan (2005: 401) argues that the cell phone operator does not wrong the victim by pressing send because the cell phone operator "cannot know that he poses" the danger. By contrast, McMahan argues that if a conscientious driver loses control of a vehicle in a freak accident and runs down a pedestrian, then the driver wrongs the pedestrian. This is because the driver "voluntarily engaged in a risk-imposing activity and is responsible for the consequences when the risks he imposed eventuate in harms" (McMahan 2005: 394).³² Even though the conscientious driver is not culpable (i.e. blameworthy) for causing the harm, he is still responsible for it since he voluntarily took to the road "knowing that this would involve a tiny risk that he would lose control of this dangerous object" (McMahan 2005: 394).

³⁰For McMahan, the fact that the agent is responsible for a harm is significant because this makes the agent liable to being harmed by the victim in self-defense. This is the so-called moral responsibility account of liability to defensive harm. Michael Otsuka (1994, 2016) also endorses this account and defends it by appealing to the idea of fairness. For this defensive harm to be justifiably imposed, it must be the case that it is fair for the agent to suffer this harm. This brings responsibility onto the scene, since it is fair to impose on an agent the consequences of the gambles that they responsibly take (Otsuka 1994: 91, 2016: 62-65, citing Dworkin 1981: 293). See also (Gordon-Solmon 2018: 546). For criticism of appealing to fairness in support of the responsibility account of liability to defensive harm, see (Burri 2020). For criticism of the moral responsibility account of liability to defensive harm, see (Frowe 2008; Lazar 2009; Quong 2009; Ferzan 2012).

³¹This is Thomson's (1991: 287) case, but Thomson's analysis differs from McMahan's. Thomson argues that the falling person infringes a right of the sunbather, with the consequence that the sunbather may kill the falling person in self-defense.

³²McMahan's full view is that there must be the right sort of causal connection between the relevant risk-taking behavior and the subsequent harm. Suppose a parent is aware that conceiving a child may start a causal chain that eventuates in the child growing up to become a killer (McMahan 2005: 398). The parent's awareness of this risk does not mean that the parent is responsible for the deaths caused by the child's killing. McMahan argues that this is explained by the absence of an appropriate causal connection between the parent's act of conception and their child's killing.

Similarly, we might think if a consent-receiver is aware that there is always some risk that a consent-giver is acting on a belief or credence that they otherwise face a penalty, then the consent-receiver would be responsible for wronging a consent-giver when this risk materializes.

This brings us most of the way to a defense of the Generic Evidence Principle. But it does not bring us all the way as the argument only concerns cases in which the consent-receiver is aware of the tiny risk. There remains the possibility that the consent-receiver has evidence of the tiny risk but has not taken on board this evidence when forming their doxastic attitudes. This scenario also arises for risk-imposing activities like driving. It is conceivable that a driver is unaware that conscientious driving imposes a tiny risk of harm on pedestrians even though they have generic evidence of this risk. Although McMahan does not discuss this possibility, I suggest that if McMahan wishes to explicate responsibility in epistemic terms, then the right thing for McMahan to say is that the driver's evidence means that they ought to be aware of this risk. Because they ought to be aware of the risk, their ignorance amounts to negligence. On the assumption that negligent ignorance is a ground of responsibility, the driver would therefore be responsible for the tiny risk. Similarly, we could take the position that a consent-receiver is responsible for wronging a consent-giver if they negligently fail to attend to the generic evidence of the tiny risk that any consent-giver is under duress. This position would accommodate the fact that Rebecca Burnham did not validly consent even if the relevant consent-receiver fails to be aware that there is a tiny risk that any consent-giver is consenting to avoid suffering violence from a third party.

But since this generic evidence is universally available, the Generic Evidence Principle has dovetailed with the Subjective Principle in the sense that both principles have the same substantive implications about when consent is invalid. This is because the principles differ only in the respect that the Generic Evidence Principle contains an additional clause (iv) that specifies an extra condition, and this condition is universally satisfied. There remains a difference between the principles insofar as they are interpreted as explanatory principles that specify the grounds of the invalidity of someone's consent. Unlike the Subjective Principle, the Generic Evidence Principle implies that the invalidity of the consent would be partly grounded in the fact that a consent-receiver has generic evidence that there is a tiny risk that the consent-giver is motivated by a belief or credence that they face the penalty.

Given the extensional convergence between the Subjective Principle and the Generic Epistemic Principle, not much hangs on our choice between them. Consequently, it seems improbable that there are arguments that will decisively tell in favor of one principle over the other, especially if these arguments stay local to considerations concerning consent. Still, I think that we can find some reason to reject the Generic Epistemic Principle by changing topics to innocent misappropriations of others' property. Typically, when we make use of an item of our own property, we do so oblivious of the tiny risk that it has been replaced by a qualitatively identical object that belongs to someone else. Yet it is conceivable that this scenario obtains. Suppose that you have an electric blue leather jacket with distinctive wearing. You attend a house party and throw it on a pile of coats in the host's spare bedroom. Against all odds, another guest leaves an identical electric blue leather jacket with the same distinctive wearing. You accidentally put this on when you leave the party, discovering your mistake only when you later find the guest's wallet in an inner pocket. Because you made an innocent mistake, you are blameless. But even so, you infringed another person's property right by taking home their coat. Not only is this the intuitive way to describe walking off with someone else's property, it is also reflected by the fact that you are obliged to bear the costs of undoing the effects of your action: you would have to return the coat rather than say that the guest has to come to meet you to pick it up. It seems artificial to say that the fact that you infringe the guest's property right is explained by the fact that you have generic evidence that there is always a tiny risk that what clearly appears to be your jacket is in fact

someone else's. Instead, the more natural thing to say is that this is simply explained by the fact that the jacket belongs to the guest.³³ But if we take this view of the grounds of an accidental infringement of a property right, then we should take a similar view of the grounds of an accidental right-infringement that occurs in virtue of someone giving invalid consent. Just as your generic evidence that there is a tiny risk that the jacket belongs to someone else is not part of the grounds of why you infringe the owner's property right, similarly we should say that a consent-receiver's generic evidence that there is a tiny risk that the consent-giver is under duress is not part of the grounds of why the consent-receiver infringes a right of the consent-giver by acting on the consent.

The coat example also suggests how we might reconcile the Subjective Principle with McMahan's view of wronging. We have two options. The first option is to say that you are responsible for taking the guest's coat in light of your generic evidence that even though the guest's coat has the distinctive markings of your coat, there is always some risk that it belongs to someone else. This would preserve McMahan's view of wronging and their claims about the grounds of responsibility. But since the generic evidence is no ground of the invalidity of consent, we should conclude that while infringing a right by acting on invalid consent may coincide with a wronging, the infringement would not be identical with the wronging: because these events have different grounds, it follows that they are not identical.³⁴ The second option is to say that you are responsible for taking the guest's coat simply in virtue of the fact that you voluntarily took the coat. According to this option, your evidence or doxastic attitudes would not ground this responsibility. If we deny that these epistemic factors ground responsibility for the materialization of a risk of harm, then we would need to find an alternative way to distinguish the risk imposed by the oblivious cell phone operator, who voluntarily uses their cell phone, from the risk imposed by the conscientious driver. One alternative would be to draw distinctions between different types of activities and say that driving is a characteristically dangerous activity while operating a cell-phone is not.³⁵ If we adopt this alternative, then we could appeal to the danger inherent in driving as a ground that explains both why drivers ought to be aware of the danger and also why a voluntary driver is responsible for harms that eventuate from this danger. Since the nature of the activity explains these facts about responsibility and these facts about the beliefs that the agent ought to have, we do not need to explain these facts about responsibility in terms of these facts about the beliefs that the agent ought to have. I leave open the question of which of these two options is best and also the question of whether we should accept McMahan's view of wronging in the first place.

4 | CONCLUSION

We have considered various arguments that might be offered for and against different principles governing the invalidity of coerced consent with an unknown future. These do not exhaust the full range of possible arguments and principles. For example, we have not considered complex hybrid principles that specify disjunctions of conditions that would invalidate consent. Accordingly, the conclusion of this essay is qualified: of the principles and arguments that we have considered,

³³Indeed, I suspect that McMahan may well agree with this claim while insisting that you do not *wrong* the rightful owner of the jacket given you are not responsible for infringing a right of theirs.

³⁴R. Jay Wallace (2019: 10-11) draws a similar distinction between failing to comply with a duty or claim and wronging someone in virtue of this failure. On Wallace's view, wronging requires "the attitude of indifference to or contempt for [a victim's] specific claims."

³⁵Another possibility might be to appeal to Susanne Burri's (2020) proposal that "an activity should count as foreseeably risk-imposing if an agent may morally permissibly perform it only if she abides by certain duties of care."

the Subjective Principle has the most support from this collection of arguments. According to the Subjective Principle, a sufficient condition for the invalidity of consent is that the consent-giver either believes or has a credence that they would suffer a penalty for refusing to consent, this penalty is illegitimate, and this belief or credence causes them to consent. There are rival principles that include further restrictions on this sufficient condition—restrictions that concern the consent-receiver's causal or epistemic connection to the consent-giver's doxastic attitudes. But these rival principles are either insufficiently powerful to explain all the cases of invalid consent that we have considered or they have implausible implications for what grounds the invalidity of someone's consent.

I will end with a broader conclusion for a theory of rights. A desideratum on this theory is that it specifies the respects in which a right is morally significant. A natural option is to say that a patient's right against an agent is morally significant because the right matters for the agent's deliberation. This option has appealing implications for cases in which an agent's action bears a risk of causing harm. However, if we broaden our attention to include cases of coerced consent like the Burnham case, then the view looks unappealing. For these cases, our intuitions are driven by the idea that someone like Burnham is a victim of wrongdoing. This makes salient a different theoretical role for a right to play. Separately to guiding an agent's deliberation, a right can be morally significant in determining whether a patient is a victim of wrongdoing. If we make the assumption that a right plays a unique moral function, then our previous discussion implies that we should take seriously the possibility that the concept of a right is a patient-centered concept bearing on victimhood rather than an agent-centered concept bearing on deliberation. But it seems plausible to me that we do better to reject the uniqueness assumption and instead allow that rights have both a role to play in defining victimhood and a role to play in guiding an agent's deliberation. This would be to view a right as being significant for a patient as well as an agent. The fact that a right has this dual significance should be no surprise because a right is a moral relationship between these two individuals.

REFERENCES

- Alexander, L. (1996). The moral magic of consent II. *Legal Theory*, 2, 165–174.
- Beebe, H. (2004). Causing and nothingness. In L. A. Paul, E. J. Hall, & J. Collins (Eds.), *Causation and Counterfactuals* (pp. 291–308). Cambridge, MA: MIT Press.
- Bolinger, R. (2019). Moral risk and communicating consent. *Philosophy and Public Affairs*, 47, 179–207.
- Bromwich, D., & Millum, J. (2018). Lies, control, and consent: a reply to Dougherty and Manson. *Ethics*, 128, 446–461.
- Burri, S. (2020). Morally permissible risk imposition and liability to defensive harm. *Law and Philosophy*. Advanced online publication. <https://doi.org/10.1007/s10982-019-09368-0>.
- Conly, S. (2004). Seduction, rape, and coercion. *Ethics*, 115, 96–121.
- Dembroff, R., & Wodak, D. (2018). He/she/they/ze. *Ergo*, 5, 371–406.
- Dougherty, T. (2013). Sex, lies, and consent. *Ethics*, 123, 717–744.
- Dougherty, T. (2015). *Yes means yes*: consent as communication. *Philosophy and Public Affairs*, 43, 224–253.
- Dougherty, T. (2019). Why does duress undermine consent? *Noûs*. Advanced online publication. <https://doi.org/10.1111/nous.12313>.
- Dougherty, T. (2020). Informed consent, disclosure, and understanding. *Philosophy and Public Affairs*, 48, 119–150.
- Dougherty, T. (Forthcoming). Sexual misconduct on a scale: gravity, coercion, and consent. *Ethics*.
- Dworkin, R. (1981). What is equality? Part II: equality of resources. *Philosophy and Public Affairs*, 10, 283–345.
- Faden, R., & Beauchamp, T. (1986). *A History and Theory of Informed Consent*. Oxford: Oxford University Press.
- Ferzan, K. (2012). Culpable aggression: the basis for moral liability to defensive killing. *Ohio State Journal of Criminal Law*, 9, 668–697.
- Ferzan, K. (2017). The bluff: the power of insincere actions. *Legal Theory*, 23, 168–202.
- Ferzan, K. (2019). Consent and coercion. *Arizona State Law Journal*, 50, 951–1006.
- Finkelstein, C. (2003). Is risk a harm? *University of Pennsylvania Law Review*, 151, 963–1001.
- Frick, J. (2015). Contractualism and social risk. *Philosophy and Public Affairs*, 43, 175–223.

- Frick, J. (2016). What we owe to hypocrites: contractualism and the speaker-relativity of justification. *Philosophy and Public Affairs*, 44, 223–265.
- Frowe, H. (2008). Equating innocent threats and bystanders. *Journal of Applied Philosophy*, 25, 277–290.
- Frowe, H. (2015). Claim rights, duties, and lesser-evil justifications. *Proceedings of the Aristotelian Society Supplementary Volume*, 89, 267–285.
- Gordon-Solmon, K. (2018). What makes a person liable to defensive harm? *Philosophy and Phenomenological Research*, 97, 543–567.
- Hart, H. L. A. (1982). *Essays on Bentham: Studies in jurisprudence and Political Theory*. Oxford: Clarendon Press.
- Healey, R. (2015). The ontology of consent: a reply to Alexander. *Analytic Philosophy*, 56, 354–363.
- Hohfeld, W. N. (1923). *Fundamental Legal Conceptions*. New Haven, CT: Yale University Press.
- Hurd, H. (1996). The moral magic of consent. *Legal Theory*, 2, 121–146.
- Kolodny, N. (2017). What makes threats wrong? *Analytic Philosophy*, 58, 87–118.
- Korsgaard, C. (1996). *Creating the Kingdom of Ends*. Cambridge: Cambridge University Press.
- Kumar, R. (2015). Risking and wronging. *Philosophy and Public Affairs*, 43, 27–51.
- Lazar, S. (2009). Responsibility, risk, and killing in self-defense. *Ethics*, 119, 699–728.
- Lazar, S. (2015). Risky killing and the ethics of war. *Ethics*, 126, 91–117.
- Lazenby, H., & Gabriel, I. (2018). Permissible secrets. *Philosophical Quarterly*, 68, 265–285.
- Liberto, H. (2017). Intention and sexual consent. In U. Heuer & M. Smith (Eds.), *Philosophical Explorations*, 20 Issue sup II: The normative significance of intentions, 127–141.
- Liberto, H. (Forthcoming). Coercion, consent, and moral mechanisms. *Ethics*
- Manson, N. (2017). How not to think about the ethics of deceiving into sex. *Ethics*, 127, 415–429.
- Manson, N., & O'Neill, O. (2007). *Rethinking Informed Consent in Bioethics*. Cambridge: Cambridge University Press.
- Matey, J. (2019). Sexual consent and deception about one's self. *Philosophy and Phenomenological Research*. Advanced online publication. <https://doi.org/10.1111/phpr.12659>.
- McCarthy, D. (1997). Rights, explanations, and risks. *Ethics*, 107, 205–225.
- McGrath, S. (2005). Causation by omission: a dilemma. *Philosophical Studies*, 123, 125–148.
- McMahan, J. (2002). *The Ethics of killing: Problems at the Margins of Life*. New York: Oxford University Press.
- McMahan, J. (2005). The basis of moral liability to defensive killing. *Philosophical Issues*, 15, 386–405.
- McMahan, J. (2009). *Killing in War*. New York: Oxford University Press.
- Millum, J., & Bromwich, D. (2018). Understanding, communication, and consent. *Ergo*, 5, 45–68.
- Oberdiek, J. (2017). *Imposing Risk: A Normative Framework*. New York: Oxford University Press.
- O'Neill, O. (1985). Between consenting adults. *Philosophy and Public Affairs*, 14, 252–277.
- Otsuka, M. (1994). Killing the innocent in self-defense. *Philosophy and Public Affairs*, 23, 74–94.
- Otsuka, M. (2016). The moral-responsibility account of liability to defensive killing. In C. Coons & M. Weber (Eds.), *The Ethics of Self defense* (pp. 51–68). Oxford: Oxford University Press.
- Owens, D. (2007). Duress, deception, and the validity of a promise. *Mind*, 116, 293–315.
- Owens, D. (2012). *Shaping the Normative Landscape*. Oxford: Oxford University Press.
- Parfit, D. (2011). *On What Matters, Volume 1*. Oxford: Oxford University Press.
- Pallikathayil, J. (2011). The possibility of choice: three accounts of the problem of coercion. *Philosophers' Imprint*, 11, 1–20.
- Quong, J. (2009). Killing in self-defense. *Ethics*, 119, 507–537.
- Quong, J. (2012). Liability to defensive harm. *Philosophy and Public Affairs*, 40, 45–77.
- Quong, J. (2015). Rights against harm. *Proceedings of the Aristotelian Society Supplementary Volume*, 89, 249–266.
- Scanlon, T. M. (1998). *What We Owe to Each Other*. Cambridge MA: Harvard University Press.
- Schulhofer, S. (1998). *Unwanted Sex*. Cambridge MA: Harvard University Press.
- Shaw, J. (2012). The morality of blackmail. *Philosophy and Public Affairs*, 40, 165–196.
- Stark, E. (2007). *Coercive Control: The Entrapment of Women in Personal Life*. Oxford: Oxford University Press.
- Tadros, V. (2016). *Wrongs and Crimes*. Oxford: Oxford University Press.
- Tadros, V. (Forthcoming). *To do, to Die, to Reason Why*. Oxford: Oxford University Press.
- Thomson, J. J. (1986). *Rights, Restitution, and Risk*. Cambridge MA: Harvard University Press.
- Thomson, J. J. (1990). *The Realm of Rights*. Cambridge MA: Harvard University Press.
- Thomson, J. J. (1991). Self-defense. *Philosophy and Public Affairs*, 20, 283–310.
- Wallace, R. J. (2019). *The Moral Nexus*. Princeton NJ: Princeton University Press.

- Wertheimer, A. (2003). *Consent to Sexual Relations*. Cambridge: Cambridge University Press.
- Wertheimer, A. (2010). Consent to Sexual Relations. In F. Miller & A. Wertheimer (Eds.), *The Ethics of Consent* (pp. 195–120). Oxford: Oxford University Press.
- Westen, P. (2004). *The Logic of Consent*. Ashgate: Ashgate Publishing.
- White, S. (2017). On the Moral Objection to Coercion. *Philosophy and Public Affairs*, 45, 199–231.
- Zimmerman, M. (2008). *Living with Uncertainty: The Moral Significance of Ignorance*. Cambridge: Cambridge University Press.
- Zimmerman, M. (2014). *Ignorance and Moral Obligation*. Oxford: Oxford University Press.

How to cite this article: Dougherty T. Coerced Consent with an Unknown Future. *Philos Phenomenol Res.* 2020;00:1–21. <https://doi.org/10.1111/phpr.12718>