THE POSSIBILITY OF CONSENT

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Abstract

Worries about the possibility of consent recall a more familiar problem about promising raised by Hume. To see the parallel here we must distinguish the power of consent from the normative significance of choice. I’ll argue that we have normative interests, interests in being able to control the rights and obligations of ourselves and those around us, interests distinct from our interest in controlling the non-normative situation. Choice gets its normative significance from our non-normative control interests. By contrast, the possibility of consent depends on a species of normative interest that I’ll call a permissive interest, an interest in its being the case that certain acts wrong us unless we declare otherwise. In the final section, I’ll show how our permissive interests underwrite the possibility of consent.

1. The Problem of Normative Power

On the face of it, we can often change the normative situation simply by communicating the intention of hereby changing the normative situation. For example, I can put myself under an obligation to meet you at 4 pm. by promising to meet you at 4 pm. To promise you this is just to communicate to you the intention of putting myself under this obligation to you by means of this very communication, namely the communication of an intention to put myself under this obligation. In promising, one alters one’s obligations by declaration. Now promising is not the only way of altering the normative situation by declaration: giving, commanding and indeed consenting all affect what obligations people have by means of an essentially similar mechanism. I shall say that promising, giving, commanding and consenting are all forms of normative power, by which I mean that they are all powers to change the normative situation by declaration.

1 This claim is familiar but not uncontroversial. I defend it in Shaping the Normative Landscape (Oxford: Oxford University Press, forthcoming).
Hume famously doubted the intelligibility of promising understood as the exercise of normative power. Speaking of promising in the *Treatise*, he says:

‘tis one of the most mysterious and incomprehensible operations that can possibly be imagined, and may even be compared to *transubstantiation*, or *holy orders*, where a certain form of words, along with a certain intention, changes entirely the nature of an external object, and even of a human creature.²

What is worrying Hume? Here is a first stab: to be obliged to do something is at least to have a serious reason to do it. Prior to my promise, I have no reason to meet you at 4 pm. If my promise binds me then it must create such a reason *ex nihilo*. But how can I create a serious reason to do something simply by declaring that I am hereby creating such a reason? To put it another way, how can it make some sense for me to keep this promise simply because I have declared that it does make some sense?

This diagnosis is along the right lines but more needs to be said about exactly why Hume doubts that mere declarations are a source of reasons for action. Hume (and many others) assume that reasons (or at least motives) for action have their source in facts about what is good for human beings, facts about what is in their interests. This is not egoism: other people’s interests can move me to action. Nor is it facile optimism: we frequently choose the lesser good over the greater. Hume simply doubts that people can sensibly aim at what will bring nobody any good. Given this Humean assumption, the problem is clear: I can’t change how my meeting you at 4 pm. will affect anyone’s interests simply by declaration. Therefore my declaration cannot be a source of reasons for action.

Scrutiny of Hume’s examples confirms the correctness of this diagnosis. For instance,

I suppose a person to have lent me a sum of money, on condition that it be restored in a few days; and also suppose that, after the expiration of the term agreed on, he demands the sum: I ask, *what reason or motive have I to restore the money?*³

For what if he be my enemy, and has given me just cause to hate him? What if he be a vicious man, and deserves the hatred of all mankind? What if he be a miser, and can make no use of what I would deprive him of? What if he be a profligate debauchee, and would rather receive harm than benefit from large possessions? What if I be in necessity, and have urgent motives to acquire something to my family? In all these cases, the original motive to justice would fail; and consequently the justice itself, and along with it all property, right and obligation.\(^4\)

In this case, it would do nobody any good and some people (including the promisee) a great deal of harm for Hume to keep his promise. Yet few moralists would allow that these facts alone extinguish Hume’s obligation to return the money.\(^5\) Whatever Hume ought to do all things considered, they suppose that he has a serious reason to return the money.

I’ll call breach of a valid promise which involves no action against any human interests a bare wronging. Normative powers are devices for manufacturing bare wrongings and Hume’s doubts about the intelligibility of normative power stem from his doubts about the status of bare wrongings. In the first of the above quotations, Hume asserts the impossibility of changing ‘the nature of an external object, and even of a human creature’ by a mere ‘form of words’. Here he is assuming that we can render some deed worthy of avoidance only by changing the non-normative situation in such a way that the occurrence of that deed would adversely affect some human interest. And we surely can’t make such changes simply by declaring that something is wrongful. Therefore we can’t make the deed any more worthy of avoidance simply by declaring it to be wrongful.

Two queries should be dealt with before moving on. First, it may be objected that the wrong of breach of promise is never created simply by declaration. All sorts of conditions need to be satisfied for a promise to bind: the declaration must have been made by a competent party, not acting under duress nor the victim of a trick, the action promised must be feasible and perhaps also morally permissible. Further conditions might be added but none of this resolves Hume’s difficulty. Each of these conditions

\(^4\) Hume, *Treatise*, p. 482.

may be satisfied without ensuring that breach of promise is anything other than a bare wrong and this is so because mere declaration plays a crucial role in creating that wrong.

Second, is Hume’s problem symptomatic of the philosopher’s obsession with marginal cases? Very few actual breaches of promise constitute bare wrongings. For one thing, promisees tend to expect promises to be kept and tend to act in reliance on them or at least feel disappointment when they are breached. For another, promisees tend to extract promises only when they have some interest in their fulfilment and this interest may be harmed whether or not they trust the promisor to keep their word. Finally, though we do put some weight on promises whose fulfilment will do nobody any good, they are hardly the promises we take most seriously. Why construct our account of promising around such an atypical instance of the breed?

If promising really does involve an exercise of normative power then this objection is misguided. Here we must distinguish the primary wrong of breach of promise from the secondary wrongs which often accompany it. True, promisees usually expect promisors to keep their promise. Why so? The most obvious answer is that they expect them to keep their promise because they think them obliged to keep it. So the secondary wrong of disappointing the promisee’s expectations exists only because there is thought to be a prior wrong of breach of promise. Furthermore, the harm to the promisee’s interests that often results from breach of promise may constitute a wrong to the promisee only because they received an assurance that it would not occur: the harm’s status as a secondary wronging depends on the breach’s status as a primary wrong. So if we want to understand what is really going on in the typical case of breach where the primary wrong generates various secondary wrongs, we would do well to focus on the marginal case to which Hume directs our attention, the case in which the primary wrong stands alone.

Now let’s turn to consent. Both promise and consent determine who is wronged by a certain act but whilst promising creates an obligation, consent abolishes it. A promise ensures that the promisee is wronged by a breach that might otherwise be innocuous; consent ensures that the consentor is not wronged by some deed that would otherwise be far from innocuous. For Hume, the problem of normative power was raised as much by the phenomenon of consent as by the practice of promising (and a similar solution was required):
Were the interests of society nowise concerned, it is as unintelligible, why another’s articulating certain sounds, implying consent, should change the nature of my actions with regard to a particular object, as why the reciting of a liturgy by a priest, in a certain habit and posture, should dedicate a heap of brick and timber, and render it, thenceforth and forever, sacred.⁶

It is clear enough what Hume has in mind. If I invite you into my home, at least part of what I am doing is to *permit* you to enter, is to declare that you would not wrong me by entering. And such a declaration can make all the difference between an innocuous entry and a trespass. But how? How can I make it the case that you wouldn’t wrong me simply by communicating the intention of hereby ensuring that you would not wrong me? If there is a serious reason for you not to enter my house, how can I abolish that reason by declaration?

In the case of promising, I traced Hume’s doubts about the possibility of normative power to his doubts about the existence of bare wrongings. The example of trespass fits that diagnosis nicely. It is not hard to imagine cases of trespass which constitute bare wrongings and even where trespass causes harm of some sort, we may well be able to argue, as we did in the case of promising, that such harms are by-products of the bare wrong of trespass.⁷ It is much less obvious that our diagnosis can cope with consent to sex or to a medical procedure. Are the wrongs, the violations of bodily integrity that would occur in the absence of consent, really bare wrongings?

I shall argue that the wrongs rendered innocuous by consent are all bare wrongings, are all wrongings which affect no human interest. And once their status as bare wrongings is acknowledged, there is no mystery about how mere declaration could affect their status as wrongings. It is perfectly intelligible to suppose that bare wrongings are created and abolished by declaration. To see how that might all be so, we must first distinguish exercises of the power of consent from other ways in which human choice can affect the normative situation.

2. Consent and Choice

The English word ‘consent’ and its cousins ‘permit’, ‘authorise’, ‘allow’ can refer to a form of promise. To consent to your driving my car tomorrow may involve agreeing to this i.e. promising you the use of my car. (Perhaps that is how Hume is employing the term.) But I shall use ‘consent’ to mark a phenomenon which shares in the mystery of promising without itself being a form of promise.

On my usage, consent involves not the granting of a right but just the waiving of it. To consent to S’s dentistry is to intentionally communicate the intention of hereby making it the case that S does not wrong you by whitening your teeth, etc. This intention can be communicated in any number of ways (silence can mean consent). On this usage, having consented to dentistry tomorrow, you may withdraw your consent. (There is no such thing as revoking a promise.) Or else, without actually withdrawing your consent, you may do things which make it impossible for S to take advantage of it: like traveling to another city. And you may do these things without yourself wronging S simply because you previously consented (rather than because you have aroused expectations and so forth). In consenting you undertake no obligation to ensure that others can take advantage of your consent. I don’t deny that an act of consent to dental treatment often implies some sort of agreement to co-operate with the dentist. Frequently there would be little point consenting to something unless you meant to facilitate its occurrence. But, as we shall see, this is not invariably true and even when it is true, in consenting to X you might just be communicating a present intention of allowing X to happen whilst retaining the option of calling things off: ‘OK go ahead but once I discover how painful the teeth-whitening actually is I might not be able to go through with it’ or else ‘OK you can do it provided I’m around to have it done’. Here you consent to a procedure without committing to it.8

Consent, like promise, raises the problem of normative power, yet the magic of consent receives much less attention than the magic of promising. I suspect that we are less troubled by the former because we tend to confuse the power of consent with a

rather different phenomenon, namely the significance of choice. In ordinary talk, ‘consent’ is freely used where choice is what really does the work; but we must differentiate and, I propose, the best way of so doing is to reserve ‘consent to X’ for cases where you (intentionally) communicate the intention of hereby making it the case that someone would not wrong you by X-ing.

Before focusing on the power of consent, let’s first consider the significance of choice. How might whether S wrongs you by doing X to you depend on your choices? Suppose S sticks a knife into me. If the knifing is part of a medical procedure which I have chosen rather than part of a mugging which I have not, it is unlikely to wrong me. But why? An obvious suggestion is this: choice bears on the normative status of an action where we have an interest in having the occurrence of such actions depend on our choices. On this hypothesis, the significance of choice reflects our interest in controlling what is done to us.

We may have such a control interest for quite a number of reasons. For one thing, the fact that someone has chosen to be subjected to a medical procedure may itself be a good indication that it is in their interests to be subjected to the procedure. Provided they are free to choose and well-informed, the patient may be the best judge of whether it is worth their while to suffer the pain and expense of surgery given the benefits that may be forthcoming. Similarly, the fact that someone has chosen to walk onto the football field may be the best indication that it is in their interests to participate in this contact sport with all the risks entailed. Here it is a good thing if what happens to one depends on one’s choices because what happens is more likely to be in one’s interests if one has chosen it. And whether X is likely to be in my interests is obviously relevant to the question of whether X wrongs me.

Furthermore, the fact that I have chosen X may actually make it the case that X is in my interests rather than merely indicate that this is so. People often enjoy things that they have chosen or actively decided upon over things that merely happen to them.

regardless of their choice. They enjoy choosing to enact something worthwhile like a football match. Here the enjoyability of the chosen activity enhances its value. One might have enjoyed the football match even if one had been forced to take part but such enjoyment would have a lesser (or at least a different kind of) value. Additionally (or alternatively), my voluntary participation in the match may be a good both for me and for others because it expresses my adherence to a certain valuable sporting tradition and my participation has this expressive significance only because it depends on my choice. In both of these ways, the fact that I have chosen to walk onto the football field may help to make it the case that others do not wrong me when they crush and tackle me.¹⁰

Choice often carries a further social meaning. For example, much of human life is governed by considerations of honor. Certain deeds attract admiration and bestow prestige whilst others humiliate or embarrass. Clearly it is in our interests to be admired because of rather than to be embarrassed by what happens to us and whether our interactions with others are a source of prestige or shame is frequently a function of whether we chose them. Take bodily exposure. Often it is not embarrassing to be observed naked or to be seen dressed as a fairy provided one has chosen to be so observed. One does not incur the same disdain when one’s appearance is obviously deliberate (acting, working as a model, swimming, etc.) and where this is so, it is in our interests to be able to choose whether we are exposed to public view. Other forms of social meaning are comparative. If I live in a society in which most people are allowed the choice of whether to wear a crash helmet whilst cycling, the fact that I (and people like me) are deprived of this choice will be demeaning. It carries the message that they are competent to decide this matter but I am not.¹¹ And this may be so whether or not choice has, in this instance, the other forms of social and psychological significance just described. Given that I have an interest in not being demeaned, I also have an interest in having the ability to control my headwear.

I conclude that choice bears on the normative status of an action where we have an interest in controlling such actions by means of our choices. It is worth noting that this control interest

¹⁰ Thomas Scanlon, What We Owe to Each Other (Cambridge MA.: Harvard University Press 1998), pp. 251–53; Raz, Morality of Freedom, pp. 84–88.

¹¹ Scanlon, What We Owe, p. 253
is in play even when there is no question of anyone’s being harmed. Though many acts are wrongs because they harm someone’s interests, some are wrongs for a rather different reason, namely because they are unfair, an unfairness which need not involve harm, e.g. where you get an unfair share of the proceeds of our co-operative enterprise. Here the rest of us might both benefit from and deserve to get a larger share of the products of our joint enterprise, even if being ‘deprived’ of this share constitutes no *harm* to us. Now just as citing the victim’s choice is a defence against the allegation that you wronged them by harming them, so choice can rebut the allegation that your behaviour was unfair to us. For example if we, your partners in the co-operative enterprise, freely choose to grant you such generous terms, this may well remove the unfairness. Our choice has normative significance here because our interest in the distribution of these benefits gives us an interest in controlling how they are distributed for the reasons already canvassed.

Having reviewed some of the ways in which having a choice can matter to us, we are now in a position to see how choice, operating independently of consent, can influence the normative situation. Recall that to consent to S’s X-ing was to intentionally communicate the intention of hereby ensuring that S does not wrong you by X-ing. Choice does its normative work rather differently. First, choice in the above examples has a non-normative object. The patient chooses to undergo surgery, the football player chooses to take the risk of being hit, etc. Their choices may ensure that certain physical assaults no longer wrong them but what they are choosing is the surgery and the risk, not the normative status of the assault. Second, it is the choice and not the communication of the choice which matters. If my choice makes it OK for the surgeon and the other players to touch me then provided they know of my choice, they are not blameworthy for so doing. It does not matter whether they learnt this fact because I intentionally let them know that this was my choice.

This last point is particularly obvious where your action has its impact on me even though there is no further interaction between us. Do you wrong me by possessing some offensive drawings? That might depend on whether you put them in a place where I am likely to see them without choosing to. If I see them only because I chose to see them then my objection to being shocked is undermined and this has nothing to do with whether I have communicated my choice to you or anyone else,
intentionally or otherwise. Nor does it depend on my views about how my choice will affect the normative situation: perhaps I will feel wronged by the sight of your drawings regardless. What gets you off the hook (with regards to my shock) is simply that you knew I would see them only if I chose to.

Despite these differences it is no surprise that the significance of choice and the power of consent are often equated. My sitting in the dentist’s chair, or walking onto the football field does have the effect of letting others know that I have made a certain choice. Furthermore I typically know that fact. Therefore it is usually the case that I intentionally communicate my choice by so acting. Finally, I typically know that my choice will have a certain effect on the normative situation. Therefore, it is usually the case that when I make a normatively significant choice I intentionally change the normative situation. Nonetheless the normative significance of my choice here need not depend on any of this. It might depend only on its being known that I have chosen (or am very likely to have chosen) the surgery or the game.

Consent needs to be communicated to be valid. It is noteworthy that the same is true of other exercises of normative powers such as promising and commanding. You are not wronging me by failing to show up at 4 pm. unless you have communicated to me the intention of hereby (i.e. by means of this very communication) obliging yourself to appear. Perhaps you can inwardly vow to meet me at 4 pm. but, even supposing such vows do bind, you do not owe it to me to appear. And this is so even if you happen to tell me about your vow (setting the effect on my expectations aside). Some might think that this is because a promise must be accepted by the promisee to be binding and nobody can accept a promise which hasn’t been communicated to them. I agree that binding promises must be offered and accepted but I doubt this is what explains the need for communication. An order need not be accepted to be valid but it must be communicated. I can’t put my subordinates under an obligation to do anything simply by performing an inner mental act. Even if they somehow learn of this act, they still haven’t been told to do anything and it is the telling which binds.

3. Promise, Consent and Normative Interests

So what is the function of consent? What does this social tool do for us which can’t be done by making choices? Consent enables us
to determine by declaration whether something constitutes a wronging. Who would benefit from having such a power? Creatures with only non-normative control interests could get by without. Human beings are not such creatures. We need to mould our normative niche. But do we need the capacity to do so by declaration?

You are giving a lecture at a conference with parallel sessions. In the way of these things, it is likely that a significant proportion of your audience is sitting in the room under a misapprehension as to whose lecture this is. They’ll discover their error once you start to speak and will likely wish to leave. But, at least in many social contexts, it is rather rude to leave a lecture once the speaker has begun. Without the ability to remove this element of rudeness, you are faced with the prospect of having to endure either the insult of a mass exodus or the restlessness of a captive audience. There is a way out. You can begin your talk by announcing your name and topic and inviting those who are here by mistake to take the opportunity to leave the room. Then (in many social contexts) they can leave without wronging you.

How should we understand this announcement of yours? One might construe it as the expression of a choice: you intend that those in the room under a misapprehension should leave. But this may not be what you intend at all. Haven’t we all found ourselves in talks unwillingly and then been unexpectedly entranced by the speaker and their subject? Mightn’t you imagine that the same will happen once you begin to speak? Entertaining such hopes, you do not intend that people leave just because they are there by mistake, nor are you trying to communicate such an intention. Rather your announcement is directed at the normative situation. You mean to alter the normative significance of their leaving the room should they (against your wishes) choose to do so. You mean to ensure that their departure would not be an insult by consenting to it. Thus, we have a power of consenting to X whose exercise involves no choice of X, no intention that X occur.

Our lecturer example indicates that we have an interest in controlling the normative situation by declaration. This interest in controlling the normative situation comes apart from our interest in controlling what happens in two ways. On the one hand, there are cases in which we grant a privilege without either having or communicating the intention that it be exercised. For example one can invite people to a party whom one neither wants nor expects to show up, a fact they may be well aware of. Here you give
them the right to show up without either having or communicating any intention that they show up. Perhaps you invite them for form’s sake and just don’t care whether they show up. Perhaps you invite them in order to ensure that they won’t show up (they won’t come when invited by you, though they would have had your partner invited them first). Either way, you have granted them the right to attend.

Conversely, we sometimes communicate the intention that someone be at our party without thereby consenting to their being there, without thereby making it the case that their presence would not wrong us. Suppose I want Kate to attend but Kate has had a falling out with my partner. I tell Kate ‘I’d love you to come but I prefer not to invite you myself. I would rather my partner invite you and they will do so only if you ask them’. Here I am telling Kate that I’d like her to come, without thereby consenting to her coming, even though I have an (independent) power of consent. If Kate showed up without bothering to get permission from my partner, Kate would be wronging us both since neither of us has consented.  

Given the many different ways in which our choices can affect the normative situation, why do we need a power of consent? Why do we need to be able to control the normative situation directly by declaration? I reckon we need consent to serve a normative interest. Once more, the parallel with promising is suggestive. A promisee can release the promisor from their promise, can consent to non-performance. For Hobbes, all obligations – indeed all wrongings – had their source in promising and so, for Hobbes, the power of consent just was the power of release. Hobbes’s assimilation of these two normative powers is no more plausible than the view of obligation which motivates it but the comparison between consent and release remains illuminating. One who proposes to substitute choice for consent may be asked to do the same with the power of release. And the difficulties which confront the project of substituting choice for release reveal the flaws in the project of substituting choice for consent.

Promising is here to serve the promisee’s authority interest, an interest in having a certain form of control over the normative situation, in being able to choose whether others are required to

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12 I’m not consenting conditional on my partner’s consenting since my consent is redundant once they have consented.

fulfill a promise. This authority interest can be satisfied only if the promisee has power of release. For a promise to bind it must be both offered and accepted and so the promisor and the promisee are on a par so far as the creation of the obligation goes; there is no asymmetry of authority here. It is only with the power of release that the desired asymmetry emerges. The promisee can abolish the obligation by declaration and this declaration is effective whether or not the promisor accepts it; the promisor has no similar power. This power of release employs the very mechanism by which the obligation is imposed, the communication of the intention to hereby change the normative situation. Merely intending to promise does not bind you even if you somehow let the promisee know of your intention. You must actually communicate the intention to bind yourself by way of this very communication. Similarly what releases is the intentional communication of the decision to hereby release and not the decision itself. To act in anticipation of release is to wrong the promisee. Indeed outrage at being pre-empted in this way might lead the promisee to abandon their intention to release.

Can we ground this power of release in the significance of choice? That the power of release can be exercised without any expression of choice suggests a negative answer. I can release you from a promise whilst making it quite clear that I intend you to do what you promised to do. Indeed the release might be my means of getting you to perform, if I think you are more likely to do so ‘of your own free will’. Conversely, I might decline to release you from a promise, whilst making it clear that I couldn’t care less whether you actually perform. Perhaps I extracted the promise at the behest of a third party who wishes you to be held to it. This two-way independence of choice and release is a product of the independence of the interests these powers are here to serve. Choice gains its normative significance from our non-normative interest in controlling what happens around us; release gains its normative significance from our normative interest in controlling the obligations of those around us; and we can have the authority interest in controlling the obligations of those around us whilst lacking the interest in control over what actually happens.

14 Owens, Shaping the Normative, ch. 6.
15 Scanlon proposes to ground the need for ‘consent to agreements’ in the significance of choice. See Scanlon, What We Owe, p. 260 and Thomas Scanlon The Difficulty of Tolerance (Cambridge: Cambridge University Press, 2003), pp. 263–66.
Recall that promising generates bare wrongings. A promise can ensure that behaviour the promisor has no interest in controlling wrongs him. For example, Hume’s creditor has no control interest in whether the money Hume owes him is returned: since there is no good in having the money, values of enjoyment, self expression, etc. do not apply. His debauchery ensures that his choices are not a good indication of his interests. His social standing is unaffected by secret theft, etc. Therefore his choices in this matter lack normative significance. But he retains the power of consent, the power to ensure that Hume would not be wronging him by failing to return the money. So that power must be grounded in something other than his interest in controlling what Hume does. It must be grounded in some normative interest of his, in this case an authority interest, an interest whose object is the right to the promised act rather than the promised act itself.

4. Permissive Interests

In this section, I’ll seek to establish two points. First, that there are bare wrongings not created by a promise. Second, that we have an interest in being able to authorise these acts by declaration and that there is nothing unintelligible or paradoxical here. The latter permissive interests are what ground the power of consent.

The wrong of rape is a bare wronging. This might sound absurd. Most rapists do their victim great physical or psychological damage. But, as in the case of breach of promise, we must carefully disentangle secondary wrongs from the primary wrong they accompany. In the case of promising, the primacy of the bare wrongdoing comes out in two ways. First, there are cases in which the primary wrong occurs without its usual accompaniments but remains a serious matter. Second, the harms and other secondary wrongs which typically accompany the bare wrong acquire much of their normative significance from the context of bare wrongdoing in which they occur. For example, where people rely on promises to their detriment and so suffer material damage when the promise is breached, outrage at being let down is reasonable because breach of promise is independently wrongful. For

16 Gardner, ‘The Wrongness of Rape’, pp. 3–8

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analytical purposes, the central cases of breach of promise are the statistically peripheral ones in which no harm aggravates the primary wrong.

So it is with rape:

It is possible, though unusual, for a rapist to do no harm. A victim may be forever oblivious to the fact that she was raped if, say, she was drugged or drunk to the point of unconsciousness when the rape was committed and the rapist wore a condom. Then we have a victim of rape whose life is not changed for the worse, or at all, by the rape. She does not ‘feel violated’. She has no feelings about the incident since she knows nothing of it. 17

Gardner goes on to stipulate that nobody else learns anything of the rape and that the rapist dies soon afterward, so neither the victim’s social standing nor other people’s sense of security is affected. These stipulations notwithstanding, ‘pure rape’ as Gardner calls it is a grave wrong.

Where the victim discovers what has happened to them, the secondary wrongs kick in. They would be rightly outraged and probably shattered. And when the rape is experienced as it occurs, this experience is traumatising, even when no physical damage is done, precisely because it is the experience of a great wrong. It is crucial to grasp the order of explanation here: if what made rape wrong were the brute fact that it tended to have a shattering or traumatising effect on those who became aware of it, a tranquilizer could render it innocuous.

Consent to sexual relations is a paradigm case of an exercise of the power of consent. Merely by intentionally communicating the intention of hereby authorizing you to have sex with me, I ensure that you do not commit the egregious wrong of rape, whatever other wrong you may do me. But if rape is a bare wronging and if, as we saw a moment ago, choice gets no purchase on bare wrongings, this power of consent cannot be based on the significance of choice. Choice is normatively significant where we have an

17 Gardner, ‘The Wrongness of Rape’, p. 5. I have seen reports of some doctors’ being accused of drugging their patients and then abusing them whilst the patients were unconscious. To make Gardner’s point, we need not suppose that such incidents have no adverse effects, only that their gravity is not proportional to the gravity of those effects. (And we need not assume a female victim.)
interest in our choices controlling what happens to us. In a case of ‘pure rape’, I have no such interest. Since there is no physical or psychological damage, nor risk of such we may suppose, there is no role for judgement (good or bad) as to whether the risk is worth it to me. Since I do nothing, no expressive value is at stake. Since I do not experience it, my experience is not an issue. Since nobody knows of the rape except for the rapist, there is no adverse or unwelcome reaction to be faced and fear will not spread through the land.

Of course rape and other violations of bodily integrity are usually dreaded quite independently of the damage involved. This fear is clearly a cost to those who suffer it but the normative significance of this dread is unclear. Why should ‘pure rape’ be regarded as demeaning and humiliating given that the victim’s other interests are quite untouched by it? Compare an actual ‘pure’ rape with someone who (deliberately) only imagines committing ‘pure rape’ on an acquaintance. The real and imaginary rapes are equally harmless we may suppose. The acquaintance would doubtless prefer that this not be imagined and may even fear its being imagined. But fear of imaginary rape lacks the normative significance of fear of real ‘pure rape’ and, one might suppose, this is because the wrong of imagining rape (if wrong it be) is much less grave than the wrong of committing it.

We’ve now established that (in our social world) there is at least one bare wronging not created by a promise: the wrong of rape. Consent operates on that wrong, a wrong on which choice gains no purchase. Furthermore, consent operates directly only on the bare wrong: one can’t abolish merely by declaration those secondary wrongs which occur in the course of most rapes. I can’t make it the case that I am not wronged by a serious physical injury, for instance, simply by declaring that this is so. The significance of the injury depends on its affecting my interests (including my control interests) and though my choices might influence how it affects my interests, my declarations alone will not.

Hume thought consent unintelligible because he made two assumptions. First, he assumed that all wronging must involve action against the interests of the wronged. Second, he assumed that if the wrongfulness of a wrong depends on how it affects our interests then one cannot remove the wrongfulness of a wrong merely by declaration. Hume’s second assumption is sound but it does not apply to bare wrongings. In their case, why shouldn’t one be able to affect the normative significance of the act by
declaration since its normative significance does not depend on whether it promotes or undermines any human interest?

It will seem obvious to many that consent can have an impact on the normative significance of deeds other than bare wrongings. Furthermore, it may appear equally evident that, even in the absence of consent, choice can affect the normative significance of a bare wrong like rape. I’ll deal with these queries in order.

As to the first, an expression of consent is often also an expression of choice, of an intention that the act consented to should actually occur as a result of the consent. And where this is so, the normative character of a physical injury may be transformed by the choice. Think of the difference between a lover’s bite and a rapist’s. Purely qua physical injury, they are on a par but one exacerbates the wrong of rape whilst the other may enhance the good of sex. Since for many lovers being able to control whether you are bitten is a good thing, their choice turns the bite into a good thing. By contrast, lobotomisation or (voluntary) enslavement can’t be good in the same way whether chosen or not.18 Doubtless choice makes some difference in their case but not such as to prevent these acts from wronging us. Hence consent does not appear to affect their normative character. The case of simple killing is more complex. Lying on the battlefield mortally wounded and in great pain, perhaps I can consent to being put out of my misery by a comrade. Here consent is significant as an expression of choice and if I have enough of an interest in being able to choose death in these circumstances, it may ensure that the killing does not wrong me.

Even where consent is not an expression of choice, consent may have an indirect impact on the significance of such injuries, physical and psychological. You do not want sex with me. Given the choice, you would rather not and you let me know as much. But, for any number of reasons, you might not want it to be the case that, should I go ahead anyway, that would make me a rapist and you a rape victim.19 So you waive your veto, that is, you communicate the intention of hereby making it the case that should I go ahead despite your preferences, I would not be raping you. And, we may suppose, you do so freely (the simple

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18 They may have instrumental value but not value for their own sake.

19 Consenting might even be a way of ensuring that no sex took place. A rapist aroused by the idea of rape would be discouraged by consent.
THE POSSIBILITY OF CONSENT

fact that you don’t intend me to have sex with you need not entail the presence of a consent-invalidating duress). You could stop me but you prefer the easier option of exercising control over the normative situation. Here, because your consent is not an expression of your choice I might still be wronging you by persisting in the face of your reluctance. But I would not be committing the egregious wrong of rape and that fact alters the significance of any secondary wrongs in so far as their significance depends on the context in which they occur rather than on their intrinsic character as injuries. Your fear is no longer fear of rape and your distaste or disgust are not reactions to the experience of rape. The marks I leave are not lover’s bites – they may well be a focus of embarrassment or even resentment – but nor are they remnants of a rape. By removing the primary wrong, your consent changes the character of these secondary wrongs.

I have said that to consent to X is to communicate the intention of hereby making it the case that X would not wrong you. This formulation must be refined in the light of the previous example. There, in consenting to sex, you don’t set out to make it the case that sex with you would not wrong you. You know (and may indeed insist on the fact) that sex with you would still wrong you. Nevertheless, there is way in which sex would wrong you in the absence of consent and you intend to make it the case that sex does not wrong you in that way. There is a consideration against having sex with you which no longer applies once you have consented to it. The aim of consent is to abolish that consideration.

Turning to the second query, can sex that has been chosen constitute rape? It must be so if the interest which generates the wrong of rape is an interest in being wronged by sex unless you declare otherwise. And it is so. Someone chooses to be raped where they intend that the rapist have sex with them after they have explicitly refused their consent. This choice is perverse but by no means impossible and the choice may well make a difference to the character of what transpires. For one thing, it may lessen, or even in some cases abolish the wrongfulness of the secondary effects of the rape. But the primary wrong remains: to have sex in the teeth of an explicit refusal is to rape (a fact which may arouse the rapist). “No” means No’ even where the perpetrator is correct in supposing that the victim wishes them to go ahead.

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I conclude that to explain the significance of ‘pure rape’ and of its antidote consent, we must ground the wrong of rape not in some interest supposedly compromised by the rape itself but rather in a normative interest, in an interest in its being the case that one is wronged by the rape unless one consents to it. This is what I call a permissive interest. And this interest is in play even though it is not under threat. Just as breach of promise need not harm the authority interest, so rape need not harm this permissive interest. Nevertheless, a regard for the normative status of these wrongings will prevent the conscientious from committing them.

Our objection to rape is just one aspect of our concern with bodily integrity. I am seriously wronged by medical procedures to which I do not consent, however beneficial and risk free they may be. I am mildly wronged when someone removes a hair from my head as a souvenir whilst I’m asleep. I may even be wronged by cannibals who desecrate my dead body. There are often secondary wrongs here, wrongs tied to risk of harm, or psychic distress or public humiliation but the primary wrong is clearly a violation of bodily integrity, a violation which is objectionable regardless of whether there is a loss of some form of bodily control which I might sensibly value.

The cluster of normative interests around the body encourages the thought that all such interests must be connected with non-normative interests, interests in control over what happens to our body. Imagine a world in which nobody has much interest in physical sexual activity – human beings have learned to reproduce and gain erotic pleasure in other ways – and yet vestigial sexual organs remain (rather like the appendix). In such a world, could ‘pure rape’ have anything like the significance it has in our own lives? And doesn’t that indicate that the weighty permissive interests we have with respect to sex are embedded in those weighty non-normative interests that surround sexual activity as presently constituted?

Perhaps our normative interests such as our permissive interests are not independent of our non-normative interests. Still various modes of connection would preserve the distinctness and irreducibility of our normative interests. It may indeed be no coincidence that various normative interests cluster around the body, i.e. around the very thing which is also the object of numerous non-normative concerns, without it being the case that these normative interests are grounded in these non-normative concerns.
Rather each may be embedded in the other. The whole set of bodily interests – normative and non-normative – may come in a package whose elements can’t either be pulled apart or arranged in order of explanatory priority.20

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