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THE POSSIBILITY OF CONSENT

David Owens

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*.¹ 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).

1 Hume famously doubted the intelligibility of promising under-
2 stood as the exercise of normative power. Speaking of promising
3 in the *Treatise*, he says:

4
5 ‘tis one of the most mysterious and incomprehensible opera-
6 tions that can possibly be imagined, and may even be compared
7 to *transubstantiation*, or *holy orders*, where a certain form of
8 words, along with a certain intention, changes entirely the
9 nature of an external object, and even of a human creature²

10
11 What is worrying Hume? Here is a first stab: to be obliged to do
12 something is at least to have a serious reason to do it. Prior to my
13 promise, I have no reason to meet you at 4 pm. If my promise
14 binds me then it must create such a reason *ex nihilo*. But how can
15 I create a serious reason to do something simply by declaring that
16 I am hereby creating such a reason? To put it another way, how
17 can it make some sense for me to keep this promise simply
18 because I have declared that it does make some sense?

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

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

33
34 I suppose a person to have lent me a sum of money, on condi-
35 tion that it be restored in a few days; and also suppose that, after
36 the expiration of the term agreed on, he demands the sum: I
37 ask, *what reason or motive have I to restore the money?*³

38
39 ² David Hume, *Treatise on Human Nature* (Oxford: Oxford University Press, 1978),
40 p. 524.

41 ³ Hume, *Treatise*, p. 479.

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

10
11 In this case, it would do nobody any good and some people
12 (including the promisee) a great deal of harm for Hume to keep
13 his promise. Yet few moralists would allow that these facts alone
14 extinguish Hume's obligation to return the money.⁵ Whatever
15 Hume ought to do all things considered, they suppose that he has
16 a serious reason to return the money.

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

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

40 ⁴ Hume, *Treatise*, p. 482.

41 ⁵ Hume, *Treatise*, pp. 480–81.

1 may be satisfied without ensuring that breach of promise is any-
2 thing other than a bare wrong and this is so because mere declara-
3 tion plays a crucial role in creating that wrong.

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

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

34 Now let's turn to consent. Both promise and consent determine
35 who is wronged by a certain act but whilst promising creates an
36 obligation, consent abolishes it. A promise ensures that the promi-
37 seee is wronged by a breach that might otherwise be innocuous;
38 consent ensures that the consenter is not wronged by some deed
39 that would otherwise be far from innocuous. For Hume, the
40 problem of normative power was raised as much by the phenom-
41 enon of consent as by the practice of promising (and a similar
42 solution was required):

1 Were the interests of society nowise concerned, it is as unintel-
2 ligible, why another's articulating certain sounds, implying
3 consent, should change the nature of my actions with regard to
4 a particular object, as why the reciting of a liturgy by a priest, in
5 a certain habit and posture, should dedicate a heap of brick
6 and timber, and render it, thenceforth and forever, sacred.⁶

7
8 It is clear enough what Hume has in mind. If I invite you into my
9 home, at least part of what I am doing is to *permit* you to enter, is
10 to declare that you would not wrong me by entering. And such a
11 declaration can make all the difference between an innocuous
12 entry and a trespass. But how? How can I make it the case that you
13 wouldn't wrong me simply by communicating the intention of
14 hereby ensuring that you would not wrong me? If there is a serious
15 reason for you not to enter my house, how can I abolish that
16 reason by declaration?

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

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

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38 ⁶ David Hume, *Enquiry Concerning the Principles of Morals* (Oxford: Oxford University
39 Press, 1975), p. 208.

40 ⁷ J. Gardner and S. Shute, 'The Wrongness of Rape', in J. Gardner (ed.), *Offences and*
41 *Defences* (Oxford: Oxford University Press, 2007), pp. 11–12.

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

⁸ Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), pp. 82–3.

1 rather different phenomenon, namely the significance of choice.⁹
2 In ordinary talk, 'consent' is freely used where choice is what
3 really does the work; but we must differentiate and, I propose, the
4 best way of so doing is to reserve 'consent to X' for cases where you
5 (intentionally) communicate the intention of hereby making it
6 the case that someone would not wrong you by X-ing.

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

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

32 Furthermore, the fact that I have chosen X may actually *make* it
33 the case that X is in my interests rather than merely indicate that
34 this is so. People often enjoy things that they have chosen or
35 actively decided upon over things that merely happen to them
36

37 ⁹ The parallel between promise and consent is highlighted with a view to making
38 promising seem less problematic by Herbert Hart, 'Are There Any Natural Rights?',
39 *Philosophical Review* 64 (1955), p. 184; Judith Thomson, *The Realm of Rights* (Cambridge:
40 Harvard University Press, 1995), pp. 350–51; Seana Shiffrin, 'Promising, Intimate Relationships
41 and Conventionalism', *Philosophical Review* 117 (2008), pp. 500–01 and Gary Watson,
42 'Promises, Reasons and Normative Powers', in D. Sobel and S. Wall (eds), *Reasons for Action*
43 (Cambridge: Cambridge University Press, 2009), section 4.

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

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

36 I conclude that choice bears on the normative status of an
37 action where we have an interest in controlling such actions by
38 means of our choices. It is worth noting that this control interest
39

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

42 ¹¹ Scanlon, *What We Owe*, p. 253

1 is in play even when there is no question of anyone's being
2 harmed. Though many acts are wrongs because they harm some-
3 one's interests, some are wrongs for a rather different reason,
4 namely because they are unfair, an unfairness which need not
5 involve harm, e.g. where you get an unfair share of the proceeds
6 of our co-operative enterprise. Here the rest of us might both
7 benefit from and deserve to get a larger share of the products of
8 our joint enterprise, even if being 'deprived' of this share consti-
9 tutes no *harm* to us. Now just as citing the victim's choice is a
10 defence against the allegation that you wronged them by harming
11 them, so choice can rebut the allegation that your behaviour was
12 unfair to us. For example if we, your partners in the co-operative
13 enterprise, freely choose to grant you such generous terms, this
14 may well remove the unfairness. Our choice has normative signifi-
15 cance here because our interest in the distribution of these ben-
16 efits gives us an interest in controlling how they are distributed for
17 the reasons already canvassed.

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

35 This last point is particularly obvious where your action has
36 its impact on me even though there is no further interaction
37 between us. Do you wrong me by possessing some offensive
38 drawings? That might depend on whether you put them in a
39 place where I am likely to see them without choosing to. If I see
40 them only because I chose to see them then my objection to
41 being shocked is undermined and this has nothing to do with
42 whether I have communicated my choice to you or anyone else,

1 intentionally or otherwise. Nor does it depend on my views about
2 how my choice will affect the normative situation: perhaps I will
3 feel wronged by the sight of your drawings regardless. What gets
4 you off the hook (with regards to my shock) is simply that you
5 knew I would see them only if I chose to.

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

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

38 **3. Promise, Consent and Normative Interests**

40
41 So what is the function of consent? What does this social tool do
42 for us which can't be done by making choices? Consent enables us

1 to determine by declaration whether something constitutes a
2 wrongdoing. Who would benefit from having such a power? Crea-
3 tures with only non-normative control interests could get by
4 without. Human beings are not such creatures. We need to mould
5 our normative niche. But do we need the capacity to do so by
6 declaration?

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

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

35 Our lecturer example indicates that we have an interest in
36 controlling the normative situation by declaration. This interest in
37 controlling the normative situation comes apart from our interest
38 in controlling what happens in two ways. On the one hand, there
39 are cases in which we grant a privilege without either having or
40 communicating the intention that it be exercised. For example
41 one can invite people to a party whom one neither wants nor
42 expects to show up, a fact they may be well aware of. Here you give

1 them the right to show up without either having or communicat-
2 ing any intention that they show up. Perhaps you invite them for
3 form's sake and just don't care whether they show up. Perhaps you
4 invite them in order to ensure that they won't show up (they won't
5 come when invited by *you*, though they would have had your
6 partner invited them first). Either way, you have granted them the
7 right to attend.

8 Conversely, we sometimes communicate the intention that
9 someone be at our party without thereby consenting to their
10 being there, without thereby making it the case that their pres-
11 ence would not wrong us. Suppose I want Kate to attend but Kate
12 has had a falling out with my partner. I tell Kate 'I'd love you to
13 come but I prefer not to invite you myself. I would rather my
14 partner invite you and they will do so only if you ask them'. Here
15 I am telling Kate that I'd like her to come, without thereby con-
16 senting to her coming, even though I have an (independent)
17 power of consent. If Kate showed up without bothering to get
18 permission from my partner, Kate would be wronging us both
19 since neither of us has consented.¹²

20 Given the many different ways in which our choices can affect
21 the normative situation, why do we need a power of consent? Why
22 do we need to be able to control the normative situation directly
23 by declaration? I reckon we need consent to serve a normative
24 interest. Once more, the parallel with promising is suggestive. A
25 promisee can release the promisor from their promise, can
26 consent to non-performance. For Hobbes, all obligations – indeed
27 all wrongings – had their source in promising and so, for Hobbes,
28 the power of consent just *was* the power of release.¹³ Hobbes's
29 assimilation of these two normative powers is no more plausible
30 than the view of obligation which motivates it but the comparison
31 between consent and release remains illuminating. One who pro-
32 poses to substitute choice for consent may be asked to do the same
33 with the power of release. And the difficulties which confront the
34 project of substituting choice for release reveal the flaws in the
35 project of substituting choice for consent.

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

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

42 ¹³ Thomas Hobbes, *Leviathan* (Indianapolis: Hackett, 1994), p. 94.

1 fulfill a promise.¹⁴ This authority interest can be satisfied only if
2 the promisee has power of release. For a promise to bind it must
3 be both offered and accepted and so the promisor and the prom-
4 isee are on a par so far as the *creation* of the obligation goes; there
5 is no asymmetry of authority here. It is only with the power of
6 release that the desired asymmetry emerges. The promisee can
7 abolish the obligation by declaration and this declaration is effec-
8 tive whether or not the promisor accepts it; the promisor has no
9 similar power. This power of release employs the very mechanism
10 by which the obligation is imposed, the communication of the
11 intention to hereby change the normative situation. Merely
12 intending to promise does not bind you even if you somehow let
13 the promisee know of your intention. You must actually commu-
14 nicate the intention to bind yourself by way of this very commu-
15 nication. Similarly what releases is the intentional communication
16 of the decision to hereby release and not the decision itself. To act
17 in anticipation of release is to wrong the promisee. Indeed
18 outrage at being pre-empted in this way might lead the promisee
19 to abandon their intention to release.

20 Can we ground this power of release in the significance of
21 choice?¹⁵ That the power of release can be exercised without any
22 expression of choice suggests a negative answer. I can release you
23 from a promise whilst making it quite clear that I intend you to do
24 what you promised to do. Indeed the release might be my means
25 of getting you to perform, if I think you are more likely to do so ‘of
26 your own free will’. Conversely, I might decline to release you
27 from a promise, whilst making it clear that I couldn’t care less
28 whether you actually perform. Perhaps I extracted the promise at
29 the behest of a third party who wishes you to be held to it. This
30 two-way independence of choice and release is a product of the
31 independence of the interests these powers are here to serve.
32 Choice gains its normative significance from our non-normative
33 interest in controlling what happens around us; release gains its
34 normative significance from our normative interest in controlling
35 the obligations of those around us; and we can have the authority
36 interest in controlling the obligations of those around us whilst
37 lacking the interest in control over what actually happens.

38
39 ¹⁴ Owens, *Shaping the Normative*, ch. 6.

40 ¹⁵ Scanlon proposes to ground the need for ‘consent to agreements’ in the significance
41 of choice. See Scanlon, *What We Owe*, p. 260 and Thomas Scanlon *The Difficulty of Tolerance*
42 (Cambridge: Cambridge University Press, 2003), pp. 263–66.

1 Recall that promising generates bare wrongings. A promise can
2 ensure that behaviour the promisor has no interest in controlling
3 wrongs him. For example, Hume's creditor has no control interest
4 in whether the money Hume owes him is returned: since there is
5 no good in having the money, values of enjoyment, self expres-
6 sion, etc. do not apply. His debauchery ensures that his choices
7 are not a good indication of his interests. His social standing is
8 unaffected by secret theft, etc. Therefore his choices in this matter
9 lack normative significance. But he retains the power of consent,
10 the power to ensure that Hume would not be wronging him by
11 failing to return the money. So that power must be grounded in
12 something other than his interest in controlling what Hume does.
13 It must be grounded in some normative interest of his, in this case
14 an authority interest, an interest whose object is the right to the
15 promised act rather than the promised act itself.

16 17 **4. Permissive Interests**

18
19 In this section, I'll seek to establish two points. First, that there are
20 bare wrongings not created by a promise. Second, that we have an
21 interest in being able to authorise these acts by declaration and
22 that there is nothing unintelligible or paradoxical here. The latter
23 *permissive interests* are what ground the power of consent.

24 The wrong of rape is a bare wrongdoing.¹⁶ This might sound
25 absurd. Most rapists do their victim great physical or psychological
26 damage. But, as in the case of breach of promise, we must care-
27 fully disentangle secondary wrongs from the primary wrong they
28 accompany. In the case of promising, the primacy of the bare
29 wrongdoing comes out in two ways. First, there are cases in which the
30 primary wrong occurs without its usual accompaniments but
31 remains a serious matter. Second, the harms and other secondary
32 wrongs which typically accompany the bare wrong acquire much
33 of their normative significance from the context of bare wrongdoing
34 in which they occur. For example, where people rely on promises
35 to their detriment and so suffer material damage when the
36 promise is breached, outrage at being let down is reason-
37 able because breach of promise is independently wrongful. For

38
39 ¹⁶ Gardner, 'The Wrongness of Rape', pp. 3–8

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

4 So it is with rape:

5
6 It is possible, though unusual, for a rapist to do no harm. A
7 victim may be forever oblivious to the fact that she was raped if,
8 say, she was drugged or drunk to the point of unconsciousness
9 when the rape was committed and the rapist wore a con-
10 dom . . . Then we have a victim of rape whose life is not
11 changed for the worse, or at all, by the rape. She does
12 not . . . 'feel violated'. She has no feelings about the incident
13 since she knows nothing of it.¹⁷

14
15 Gardner goes on to stipulate that nobody else learns anything of
16 the rape and that the rapist dies soon afterward, so neither the
17 victim's social standing nor other people's sense of security
18 is affected. These stipulations notwithstanding, 'pure rape' as
19 Gardner calls it is a grave wrong.

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

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

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38 ¹⁷ Gardner, 'The Wrongness of Rape', p. 5. I have seen reports of some doctors' being
39 accused of drugging their patients and then abusing them whilst the patients were uncon-
40 scious. To make Gardner's point, we need not suppose that such incidents have no adverse
41 effects, only that their gravity is not proportional to the gravity of those effects. (And we
42 need not assume a female victim.)

1 interest in our choices controlling what happens to us. In a case of
2 'pure rape', I have no such interest. Since there is no physical or
3 psychological damage, nor risk of such we may suppose, there is
4 no role for judgement (good or bad) as to whether the risk is
5 worth it to me. Since I do nothing, no expressive value is at stake.
6 Since I do not experience it, my experience is not an issue. Since
7 nobody knows of the rape except for the rapist, there is no adverse
8 or unwelcome reaction to be faced and fear will not spread
9 through the land.

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

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

35 Hume thought consent unintelligible because he made two
36 assumptions. First, he assumed that all wronging must involve
37 action against the interests of the wronged. Second, he assumed
38 that if the wrongfulness of a wrong depends on how it affects our
39 interests then one cannot remove the wrongfulness of a wrong
40 merely by declaration. Hume's second assumption is sound but
41 it does not apply to bare wrongings. In their case, why shouldn't
42 one be able to affect the normative significance of the act by

1 declaration since its normative significance does not depend on
2 whether it promotes or undermines any human interest?

3 It will seem obvious to many that consent can have an impact
4 on the normative significance of deeds other than bare wrong-
5 ings. Furthermore, it may appear equally evident that, even in
6 the absence of consent, choice can affect the normative signifi-
7 cance of a bare wrong like rape. I'll deal with these queries in
8 order.

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

29 Even where consent is not an expression of choice, consent
30 may have an indirect impact on the significance of such injuries,
31 physical and psychological. You do not want sex with me. Given
32 the choice, you would rather not and you let me know as much.
33 But, for any number of reasons, you might *not* want it to be the
34 case that, should I go ahead anyway, that would make me a
35 rapist and you a rape victim.¹⁹ So you waive your veto, that is,
36 you communicate the intention of hereby making it the case
37 that should I go ahead despite your preferences, I would not be
38 raping you. And, we may suppose, you do so freely (the simple
39

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

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

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

17 I have said that to consent to X is to communicate the inten-
18 tion of hereby making it the case that X would not wrong you.
19 This formulation must be refined in the light of the previous
20 example. There, in consenting to sex, you don't set out to make
21 it the case that sex with you would not wrong you. You know
22 (and may indeed insist on the fact) that sex with you would still
23 wrong you. Nevertheless, there is way in which sex would wrong
24 you in the absence of consent and you intend to make it the
25 case that sex does not wrong you in that way. There is a consid-
26 eration against having sex with you which no longer applies
27 once you have consented to it. The aim of consent is to abolish
28 that consideration.

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

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

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

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

35 Perhaps our normative interests such as our permissive interests
36 are not independent of our non-normative interests. Still various
37 modes of connection would preserve the distinctness and irreduc-
38 ibility of our normative interests. It may indeed be no coincidence
39 that various normative interests cluster around the body, i.e.
40 around the very thing which is also the object of numerous non-
41 normative concerns, without it being the case that these norma-
42 tive interests are grounded in these non-normative concerns.

1 Rather each may be embedded in the other. The whole set of
2 bodily interests – normative and non-normative – may come in a
3 package whose elements can't either be pulled apart or arranged
4 in order of explanatory priority.²⁰

5
6 *Department of Philosophy*
7 *University of Reading*
8 *Reading RG6 6AH*
9 *d.owens@reading.ac.uk*

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