

Wrongs and Crimes

Chapter 11

Threats and Consent

Note: This is a draft chapter from a long book on criminalization entitled Wrongs and Crimes that I am in the process of completing. It is one of four chapters on consent. I hope that it is reasonably self-standing (though, obviously, all apparent egregious errors are shown to be brilliant insights in other parts of the book).

Victor Tadros

Threats and deception can undermine valid consent. When do they do so? Why do they do so? What affects the gravity of the resultant wrongdoing? And when should the conduct that the victim does not consent to be criminalized as a result? Although these questions are general I will explore them in the important and difficult realm of wrongful penetrative sex. This chapter is concerned with threats, the next with deception.

Work on sexual wrongdoing generates sharp disagreement, not only about what we should think, but also about how we should think about it. Some are hostile to the use of my standard philosophical method in this context, especially the use of unusual hypothetical cases. Using this method, some think, trivializes sexual wrongdoing, or fails to show respect to victims of wrongdoing.

In employing this method, I aim at a clearer and deeper grasp of sexual wrongdoing. As we will see, the nature and scope of sexual wrongdoing is by no means obvious. We owe it to victims and potential victims of sexual wrongdoing to use the tools that are best suited to develop a clear and deep grasp of that wrongdoing. The use of examples and arguments, that has

helped many of us make progress across moral, political, and legal philosophy, can assist us in this endeavor.

My aim in using examples is the opposite of trivialization - it is to explore not only what makes sexual conduct wrong, but also the facts that can make it gravely wrong. It is regrettable that there has been little systematic work on the gravity of sexual wrongdoing in particular. The criminal law cannot plausibly be used to control all sexual wrongdoing. This is both because some sexual wrongdoing is insufficiently serious to warrant state punishment, but also because there are other social and legal mechanisms for regulating and controlling sexual wrongdoing. Criminalization should normally be reserved for the most serious sexual wrongdoing. And the criminal law ought appropriately to distinguish between more and less serious instances of sexual wrongdoing, both by distinguishing offence categories and at the sentencing stage. Understanding what makes sexual wrongdoing more or less serious, then, has great practical importance.

I do not make direct policy suggestions in this chapter. Its aim is only to explore the limits and gravity of sexual wrongdoing. As we saw in chapter x, decisions about criminalization turn on a range of facts beyond the wrongness of the conduct - especially the effects of criminalizing conduct. Investigating the scope and gravity of wrongdoing helps us to answer a more limited question: the question of the liability of wrongdoers to state punishment. An investigation into the scope and gravity of sexual wrongdoing is an important starting point for a more complete investigation into criminalization.

Here is the structure of the chapter. Section I explores how threats and coercive offers work, and provide an account of when they are effective. Section II responds to a narrow view of which threats undermine consent: when what is threatened is wrong. It shows three ways in which the narrow view is mistaken. Section III is concerned with offers. It explains why offers can be coercive even when it would have been permissible not to make the

offer, and the offer improves the situation of the victim compared with its not being made. Section IV is concerned with the gravity of wrongdoing.

I. Effective Threats

Almost everyone agrees that sex secured by threats of death or serious bodily injury ought to be criminalized. Almost everyone agrees that it ought to be criminalized as rape. Historically, the law has been quite restrictive about which other threats render sex criminally wrongful. Typically, legislatures explicitly restrict the relevant threats to threats of violence, or are vague about which threats count. Economic threats, threats of loss of employment, threats to reputation, and threats of prosecution, have often been used to secure sex; victims are often traumatized when sex is secured through these threats; and the relevant conduct is often clearly and seriously wrong. Yet the law has often failed to criminalize seriously wrongful conduct of this kind.¹

One explanation is that it is difficult to draw the line between serious and trivial instances of wrongful conduct. Line-drawing in this area is undoubtedly difficult, but we should not abandon the task at the outset. Difficult line-drawing problems arise in many areas of the criminal law. These problems do not generally lead lawmakers to abandon the criminalization of seriously wrongful conduct.

The criminal law could expand the range of threats that undermine consent by type - include threats to employment, or to reputation, or of prosecution, and the law may seem more acceptable. But if this is the right response it is a compromise that is made for reasons of clarity and certainty. There will be threats that do not fall within these categories that are equally grave and that the law will not capture. At least at first, we should aim to grasp the deeper reasons why certain threats undermine valid consent, and

¹ See, also, S Schulhofer *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Cambridge, Mass.: Harvard UP, 1998) ch.7.

the gravity of the wrongdoing that results. We can then determine what practical measures will best track these deeper considerations whilst preserving a reasonable degree of clarity and certainty.

Threats are normally made either to cause the person threatened to do something, or to cause the person threatened not to prevent the threatener, or another person, from doing something. For example, a threat of violence may induce the victim of the threat to perform a sex act or it may induce the victim not to prevent the threatener from performing a sex act – for example by escaping, or calling for help. Is it morally worse for X to force Y to perform the sex act than to force Y not to prevent X from performing the sex act? Perhaps, but I leave that question aside. For brevity, when I say that X forces Y to have sex with him, I mean to capture both cases where Y performs the sex act and cases where Y does not prevent X from doing so.

We are concerned with threats that undermine valid consent to sex. Such threats typically work thus: X owes Y a duty not have sex with Y without her consent; X expresses to Y that if Y does not have sex with him, X will execute this threat; X does this in order that Y has sex with him; and in order to avoid him executing the threat, Y has sex with him.

Offers are structurally similar. X owes Y a duty not to have sex with Y without Y's consent; X expresses to Y that if Y does not have sex with him, X will not do something that he has offered to do in return for sex; X does this in order that Y has sex with him; and in order to ensure that he does what he offers to do, she has sex with him.

The question of coercion is often approached through the unnecessary detour of distinguishing threats from offers. As we will see, it can be wrong to secure sex either through threats or coercive offers, and the wrongness is similar in either case. Given this, we can safely avoid the question how to distinguish threats from offers and concentrate directly on wrongful sex. I will continue to use the language of threats and offers where they seem most appropriate without aiming to make progress on how the distinction is best drawn.

A threat or offer renders sex wrongful only if it is effective in undermining valid consent to sex. In order to establish this, we should investigate what makes a threat effective – what makes it true that the Y had sex with X in response to the threat, so that if certain further conditions of wrongdoing are fulfilled, the threat undermines valid consent.

It is obviously insufficient for effectiveness that X threatens Y and X has sex with Y. Y's performance of the sex act may have nothing to do with X's threat. The threat and the sex act must have some relationship with each other. Here is a more tempting view:

The Counterfactual View: A threat or offer is effective if and only if Y would not have had sex with X but for X making the threat.

Counterfactual thinking in the area of sexual wrongdoing is very tempting. But we should be wary of this way of thinking.² A threat can be effective, and can render sexual wrongdoing grave, even when the victim would have had sex with the wrongdoer without the threat, and the sex would not have been wrongful. Consider:

Preemptive Threat: Nina goes on a date with Dick, intending to have consensual sex with him. Thinking that she will not consent, Dick threatens Nina with violence. Terrified, Nina responds to the threat by having sex with Dick.

Dick has wrongful sex with Nina in virtue of the threat he has made. The fact that Nina would have consented does not render Dick's threat ineffective, and does not render Dick's conduct permissible. Hence, the *Counterfactual View* wrongly identifies the necessary conditions for a threat to be effective.

² In the next chapter, we will see further problems with counterfactual thinking in this area in the context of sex secured by deception.

Perhaps it might be argued that Nina would not have had sex at exactly this time and exactly this way if Dick had not threatened Nina. Nina has a right not only to determine whether she has sex with Dick, but also the time and way in which they have sex.³ But this does not best explain why the threat is effective and undermines consent in *Preemptive Threat*. Where Dick's threat is a dominant and direct explanation of Nina's decision, what Nina would have decided had the threat not been made seems irrelevant. The *Counterfactual View* thus wrongly identifies the necessary conditions for a threat to be effective.

It also wrongly identifies the sufficient conditions for a threat to be effective. A decision can counterfactually depend on whether a threat is made in a range of ways. Counterfactual dependence is sometimes insufficient to make a threat effective in the right way to undermine valid consent because the threat is superseded by facts that make consent valid. Consider:

Sex Life: Mike and Jo are in a long-term relationship, and their sex-life has declined. Mike threatens Jo that if she does not have sex with him he will have sex with Jo's sister, who has always been attracted to Mike. They argue, and then reconcile. Because they have argued, Jo sees how bad their sex life has become. They talk through why their sex life has declined. They commit to turning things around, and their sex life improves.

Let us suppose, plausibly enough, that Mike's initial threat is wrongful. Jo's decision to have sex with him counterfactually depends on this threat. But yet

³ This idea has affinities with David Lewis's attempt to rescue a counterfactual theory of causation. See 'Causation as Influence' (2000) 97 *Journal of Philosophy* 182. Deficiencies in this view are nicely exposed in J Schaffer 'Causation, Influence, and Effluence' (2001) 61 *Analysis* 11.

Mike's threat may not be effective in undermining valid consent. Rather, it may cause Y to consent for reasons that make consent valid.

Of course, in cases like *Sex Life*, consent may be invalid for other reasons – for example because Jane is in other ways dominated by Mike. I suggest only that consent could be valid in a case like this because the threat has been superseded by the more proximate reasons why Jo decides to have sex with Mike.

When we assess the effectiveness of a threat, then, we should identify its actual role in explaining Y's decision rather than considering what Y would have agreed to had she not been threatened. If Y's decision is a direct response to X's threat, X's threat is effective.

II. Wrongful Threats Without Threatening What is Wrong

Suppose that X owes Y a consent-sensitive duty not to do something and Y does not prevent X doing that thing in virtue of a threat or offer that X has made. Whether X's threat or offer to Y undermines Y's valid consent depends on two things. First, the opportunity that Y has to secure things she has reason to value. And second, the importance to X that he can use his resources to secure performance of the action. These reasons, I will argue, help to explain why threats and offers undermine valid consent to sex in a range of cases where they would not undermine valid consent to other kinds of act.

i) *The Permissible Baseline View*

To illuminate and defend this view, I consider a range of ways in which it departs from a familiar narrow view. It might be argued it is wrong for X to secure his ability to act by making an effective threat if and only if X threatens

to do something that would be wrongful, or offers to do something that he is required to do. Call this the *Permissible Baseline View*.⁴

Here is the rough idea. If Y is permitted not to do something, and X threatens her that if she does not do that thing, he will act wrongly, X wrongly constrains Y's choices. She ought not to have to do anything at all in order to ensure that X does not act wrongly; his decision not to do so should not depend on what she does. Threats undermine consent by depriving their victims of options that they are entitled to have – in this case, the option of X refraining from acting wrongly without Y acting.

However, when a person threatens another with doing something that he is permitted to do, he improves her choice situation over simply doing that thing. She cannot complain about him performing the threatened act, as doing so is not wrong. If performing that act is not wrong, it is not wrong to do something that is at least as good for her. By making a threat that he will perform a permissible act if she does not act in a certain way, she has the option that he performs the permissible act. And she has another option – she can avoid him performing the permissible act by complying with the threat. He cannot wrong Y by providing her with an additional option over his acting permissibly, for she can always ensure that he does the permissible act by refraining from complying with the threat. Therefore he does not wrong her by securing her action by threatening her with a permissible act.

Here is the argument more precisely. Suppose that X sincerely and credibly expresses to Y that if Y does not *v*, X will *w*. X thus gives Y two options: either she *vs* or X *ws*. In that case, Y is at least as well off as she would be were X simply to *w*; for Y is in a position to ensure that X *ws*. If X *wing* is

⁴ Something like this view is suggested in H Hurd 'The Moral Magic of Consent' (1996) 2 *Legal Theory* 121, 144-5. It is also somewhat close to the view in A Wertheimer *Consent to Sexual Relations* (Cambridge: CUP, 2003) ch.8 and L Alexander 'The Moral Magic of Consent II' (1996) 2 *Legal Theory* 165.

wrong, X wrongly constrains Y's choices. He denies her an option that she is entitled to: the option of X refraining from *w*ing without Y *v*ing.

However, if the effect of X *w*ing is insufficiently bad for Y to render it wrong for X to *w*, it cannot be wrong for X to give Y a broader range of options than he will give her if he simply *w*s. By threatening Y that if she does not *v* he will *w*, X gives Y a broader range of options than she would have were he simply to *w*. She can secure X *w*ing by refraining from complying with the threat, and that would leave her no worse off than she would be were X simply to *w*. She just has an extra option: the option of avoiding X *w*ing by her *v*ing. Her having this option cannot make her worse off. X thus improves her situation relative to the baseline of what it is permissible for him to do by making the threat. Improving her situation relative to that baseline is not wrong.

i) *The Disvalue of Options*

One way to challenge the *Permissible Baseline View* is to show that X can make Y worse off by giving her extra options. Extra options can make us worse off.⁵ We know this from:

Sophie's Choice: A Nazi sincerely and credibly tells Sophie that he will kill both of her children, Jan and Eva, if she does not select one to be killed. Sophie chooses Eva to be killed.

The conduct of the Nazi in *Sophie's Choice* seems clearly worse than that of the many Nazis who killed Jewish children. Why is this? Does he not give Sophie an option that other Nazis failed to provide to mothers? And in that way,

⁵ See, more generally, G Dworkin 'Is More Choice Better than Less?' (1982) 7 *Midwest Studies in Philosophy* 47.

does he not do more than other Nazis to ensure that her preferences are satisfied?

But Sophie surely is worse off for having the choice whether the Nazi kills Jan or Eva than she would be were the Nazi simply to have killed Eva (or, for that matter, Jan). And even if she is not worse off, she has good reason not to want to have the choice she is given. The Nazi acts especially wrongly in inflicting this choice on her rather than simply killing one of her children.

Here are three reasons why. First, having the choice is itself distressing – making it involves vividly imagining the death of each of her children in turn, and evaluating how bad that will be. She may attempt to avoid thinking about the choice in this way but this will be very difficult. Making the choice is itself harrowing, then.

Second, in making the choice, she will likely express greater love for one of her children over the other. Even if she does not intend to express this – if she attempts randomly to select one child over the other – she will appear to express greater love for one than the other. This will be both painful, and will harm the child who is chosen to die.

Third, and I think most importantly, through her choice she is involved in Eva's death. It is awful to be involved in one's own child's death in this way. Even when one makes a forced choice, one is still haunted by that choice. Perhaps it might be argued that it is irrational for her to regret being involved where she is not responsible for that involvement. I doubt that this is irrational – as I argued in chapter x, our reasons to respond to our involvement in some event do not depend only on our responsibility for that involvement. But even if it is irrational, it is inevitable that she will be haunted by her involvement.

Now compare:

Cop Threat: Bobby, a police officer, has discovered compelling evidence that Han, Yolanda's husband, has committed armed robbery, for which he will serve several years in prison if he is convicted. Bobby tells

Yolanda that he will bury the evidence if she has sex with him. To avoid him doing this, she has sex with him.

Bobby is permitted, or even required, to do what he implicitly threatens Yolanda that he will do if she does not have sex with him – to give the evidence to the prosecuting authorities. His doing this will render Yolanda very badly off. He gives her an option to avoid this outcome by having sex with him, and her having this option may seem to improve her situation. How, then, does he wrong her by giving her this option?

The badness of giving her a choice partly explains this. First, as in *Sophie's Choice*, it is distressing for Yolanda to have this choice. She can save her husband from a terrible fate, but only by doing something that she may well be disgusted by. Second, suppose that she does not have sex with Bobby in order to secure her sexual integrity, but in doing so seals her husband's fate. She may well find this distressing and difficult to live with. Third, if she decides not to have sex with Bobby, she will be involved in the trial and punishment of her husband, at least in the sense that she had an opportunity to avoid his suffering this fate.

Now suppose that she chooses sex with Bobby, and she makes her choice according to what she most values. This suggests that she values *her choosing* sex with Bobby more than *her choosing* Han's trial and punishment. But it does not follow that she values sex with Bobby more than Han's trial and punishment, where her choice is not involved, or that she prefers *her choosing* sex over Han's trial and punishment when that is not chosen by her. She may value Han being tried and punished where she lacks a choice over whether this occurs to sex with Bobby. The fact that she has a choice makes a difference to the value of what is chosen. For this reason, Bobby may render Yolanda worse off by giving her a choice, and this partly explains why Bobby's threat undermines the validity of Yolanda's consent.

ii) *Acting Without Justification*

The argument in the previous section illuminates one thing that is wrong with the *Permissible Baseline View*, but the view has a more serious deficiency.

The argument from the disvalue of choice shows that the *Permissible Baseline View* is wrong even if we accept the following premise:

No Wrong Without Comparative Harm: if it is permissible for X to put Y in a certain state, X does not wrong her by giving her the choice of being either in that state, or in a better state.

The disvalue of choice shows that one person can put another in a worse state by giving her an extra option. Threatening to act in a permissible way expands a person's options, but doing this may be wrong because it can be wrong to give the person a choice between options that she has reason not to want.

Here I mount a more powerful objection to the *Permissible Baseline View* by showing that we should not accept *No Wrong Without Comparative Harm*. The general objection to this view is that it is sometimes permissible to harm a person for the sake of a certain goal, but it would wrong the person to harm her to the same degree without securing that goal. When one person threatens another with a permissible act to secure sex, he may use his threat to make her worse off without securing the goal that would justify doing so. Doing this can render sex wrongful.

Suppose that X makes Y better off than he could permissibly make her by giving her the option of avoiding some bad outcome if she does what he wants. Suppose, also, that X could permissibly make Y worse off than he makes her because doing so serves certain valuable goal: for example, making Y worse off might protect other people from being even worse off. X's permission to make Y worse off, in such cases, is conditional. He may do so only if he fulfils the goal that justifies making Y worse off – that he protects other people against being even worse off. It would be wrong for him to make

Y worse off if he does achieve this goal. Furthermore, if X makes Y worse off without achieving his goal, he wrongs Y.

To illustrate this view, begin with a different kind of case where one person can make another person worse off only if he achieves a valuable goal:

Birth and Joyride: Sally is about to give birth. Dave can get her to the hospital on time only if he takes Chris's car. Dave takes Chris's car, but does not take Sally to the hospital with it; rather he goes for a fun ride around the city.

Let us suppose that Dave is permitted to take Chris's car to take Sally to the hospital. By taking his car for a fun ride around the city, Dave renders Chris no worse off than he would be had Dave acted permissibly. Some may conclude that Dave does not wrong Chris. These people may still believe that Dave wrongs Sally. But Chris has no right against Dave taking his car for a fun ride around the city.

But this view cannot be right. Chris has a right that Dave does not use his car without his Chris's consent. The importance of Sally being taken to the hospital explains why there is a narrow exception to this right. But this does not imply a more general exception that permits Dave to take Chris's car for any other reason. The limit on Chris's right depends not only on *there being* a goal that is sufficiently valuable to justify performing the action; it depends on this goal being achieved. Dave may wrong Chris even if Chris is better off than he would have been had Dave used his car to take Sally to the hospital – say because the joyride is shorter than the ride to the hospital.

The view that Dave acts wrongly in *Birth and Joyride*, I should say, does not depend on the controversial idea that intentions are relevant to permissibility (although, incidentally, I think they are). Even those who deny that intentions are relevant to permissibility can agree that it is insufficient to justify harming a person that the person could have been harmed for the sake of some justifying goal where the justifying goal is not secured. The justifying

goal cannot do its justifying work if the person acts in a way that does not achieve that goal (at least if the person knows the goal will not be achieved). In that case, the rights infringement has not been justified, and consequently the right-holder is wronged all things considered.

Things are a little bit more complicated in *Cop Threat*, but a similar argument applies. Bobby is permitted to render Yolanda worse off by giving evidence of Han's crime to the prosecuting authorities. Yolanda's interest against Bobby harming her in this way is outweighed by the importance of bringing Han to justice. It does not follow that Bobby may act in any way that harms Yolanda, where he does not bring Han to justice. That is so even if the harm that he inflicts on Yolanda is less than the harm that he could permissibly inflict on her were he to bring Han to Justice. In other words, *if* Bobby is going to bring Han to justice, he may render Yolanda worse off. But Yolanda retains a right against him rendering her worse off if he does not bring Han to justice.

When he threatens Yolanda, he uses the fact that he can make Yolanda worse off than she is to secure unwanted sex with her. Suppose that when he has sex with her, he makes her worse off than she would be were he neither to have sex with her nor to bring Han to justice, but better off than she would be were he not to have sex with her but to bring Han to justice. He cannot justify making her worse off than she would be were he neither to have sex with her nor bring Han to justice by appealing to the value that would be secured by bringing Han to justice. He has not achieved this goal, so he cannot use it to justify making her worse off. Just as in *Birth and Joyride*, when Bobby makes Yolanda worse off without achieving the relevant justifying goal, he violates her rights - specifically, her right that he makes her worse off only if he does

so with justification. This explains why Bobby not only violates his professional duty, but also wrongs Yolanda.⁶

Against this, it might be argued that we should not draw conclusions about *Cop Threat* from *Birth and Joyride*. In *Birth and Joyride*, Chris cannot make Dave take Sally to the hospital. When considered from his perspective, the harm that is inflicted on him necessarily comes without the good that could have justified it. In contrast, in *Cop Threat*, Yolanda can ensure that Bobby gives the evidence to the police – she can do so by resisting Bobby’s threat. When considered from her perspective, the harm that is inflicted on her does not necessarily come without the good that could have justified it.

But this difference is not decisive, and may be irrelevant. Bobby intends Yolanda to have sex with him. He thus intends to harm Yolanda without doing the thing that would justify harming her in this way. Suppose that Bobby is sincere. After Yolanda has sex with him, he refrains from giving evidence about Han’s crime to the prosecuting authorities. He cannot appeal to the value of bringing Han to justice in helping to justify making Yolanda worse off in this way because he intends not to bring Han to justice.

Perhaps it might be argued that this wrongly implies that Bobby would not wrong Yolanda were he to have sex with her and then give the information to the prosecuting authorities. But there is an obvious response to this concern: if Bobby does this, he harms her both by having sex with her that she does not want, and by ensuring that Han is prosecuted. The first harm cannot be justified by value of Han being prosecuted, for inflicting that harm on Yolanda is unnecessary for securing the goal of bringing Han to justice.

Perhaps, in response, it might be argued that as Yolanda could have avoided Bobby harming her without justification, he has not wronged her.

⁶ It seems that Wertheimer believes that X does not wrong Y in cases like this. See his brief analysis of a somewhat similar case, *IRS*, in *Consent to Sexual Relations*, 182.

However, the fact that Bobby left it open to Yolanda to bring about the justificatory good that would have permitted him to harm her to a greater degree hardly exonerates him when she, as he intends, does not bring about this good. Again compare *Birth and Joyride*. Suppose that Chris could have caused Dave to take Sally to the hospital, but he was not required to do this. The fact that Chris could have ensured that Dave secured the benefit that would have justified the harm inflicted on him hardly shows that Dave did not violate his rights.

To reinforce this idea, note that Bobby may be permitted to bring some outcome about that harms Yolanda, but Yolanda may be permitted not to cause Bobby to do so. The fact that Yolanda could do so is, at least in that case, irrelevant. In *Cop Threat*, Bobby has an institutionally grounded duty to bring Han to justice. Yolanda lacks this duty. And given Yolanda's relationship with Han, she has powerful reasons not to harm him. Furthermore, Yolanda has powerful reasons not to harm herself by causing Bobby to bring Han to justice. Bobby may have a decisive reason not to give Yolanda the option of having sex with him where he could otherwise bring Han to justice. Yolanda, in contrast, may have strong reasons to take the option that he gives her. The fact that she could have ensured that Han is brought to justice is, in that case, irrelevant.

Here is another way to put the point. Yolanda has a right that Bobby harms her only if he brings about a justificatory benefit. He harms her without the justificatory benefit. The fact that she could have caused herself to be harmed with the justificatory benefit by refusing to succumb to his threat cannot exonerate him. For she need not have caused herself to be harmed, realizing the justificatory benefit, and she may have good reason not to do so. If Bobby chooses not to bring about the justificatory benefit, he is required not to harm her, and he has violated her right that he not do so.

What if Yolanda *is* required to cause Bobby to bring Han to justice? Has he not violated her rights by having sex with her in that case? The case for this might seem somewhat weaker, but I think that he has still violated her

rights. By threatening her, he has given her an opportunity to act wrongly that he hopes that she will take, and if she takes that opportunity he has made her worse off without justification. He ought not to give her this opportunity to act wrongly, especially if he does so with the intention that she takes it. Given this, he can hardly appeal to the fact that it was wrong for her to succumb to the threat in claiming that her rights have not been violated.

The explanation that I have offered for the intuitive view that Bobby wrongfully has sex with Yolanda in *Cop Threat* extends to a wide range of threats to perform permissible acts. Many threats to act permissibly are effective because executing the threat harms the person threatened.

For example, it may be permissible for one person to give embarrassing information about another to the newspapers even though doing so will ruin the other person's reputation. If the first person secures sex from the second by threatening to do this, the first threatens to do something that he is permitted to do. But he is permitted to do this, even though it harms the second, because doing so serves some further valuable goal (or, at least, a permission to do this secures some further valuable goal). If the first person secures sex with the second by threatening this, he harms the second without the justification that he would have were he to give the information to the newspapers, and hence this is a case of wrongful sex.

Similarly, it may be permissible for one person to sack another given her poor performance at work. It would be wrong for him to secure sex with the second by threatening to do this, because the justification that he has for harming her by sacking her cannot justify his having sex with her where this makes her worse off.

The argument also provides at least part of the solution to the more general thorny problem of blackmail.⁷ The cases that I have been discussing

⁷ For an excellent critical overview of existing theories of blackmail, see M Berman 'Blackmail' in J Deigh and D Dolinko *Oxford Handbook of Philosophy of Criminal Law* (Oxford: OUP 2011). I lack the space to consider Berman's

are just like standard blackmail cases, except that it is sex rather than money that is provided by the victim. Unlike many familiar explanations of the permissibility of criminalizing blackmail, the explanation offered has the merit of explaining in a direct and straightforward way the relationship between the moral wrongness of blackmail and the reasons the state has to criminalize it.⁸ A person may be permitted (morally, legally, or both) to perform some harmful act because of the value of that person performing the act, or the value being permitted to do so. But this does not imply a more general right to use one's permission to perform the act to achieve certain other ends, such as sex or financial transfers, where the value that explains the permission to perform those acts is not secured.

iii) Exploiting Weakness

So far, we have seen that X may have wrongful sex with Y in virtue of his making an effective threat even when he threatens to do something that he is permitted or required to do. In such cases, X exploits Y's circumstances – in particular, the circumstances where harming her is permissible for the sake of certain ends – to secure sex with her.

In evaluating the significance of a threat, though we must bear in mind not only the actual costs that a person will bear if the threat is executed, but also her perception of those costs. A person might be vulnerable to threats not because it is possible to harm her, but because it is possible to do something

solution, which aims to show that the token act threatened is in fact wrongful in virtue of the motivations with which the blackmailer would act.

⁸ Berman argues, rightly in my view, that familiar solutions to the problem of blackmail that explain why the law prohibits it, but do not explain why it is morally wrong, are unsatisfying – surely some of the central reasons to criminalize blackmail are the reasons that make blackmail wrong.

that she believes will harm her, or something that she has a strong aversion to.

Phobias are the clearest example,⁹ though the issue extends well beyond this narrow case. Suppose that Y is phobic about X *v*ing. X threatens to *v*. X's threat is likely to be effective. Yet if X executes his threat, he does not do something that Y actually has a reason not to want. A person who is phobic about being in confined spaces does not have a reason to disvalue being in a confined space, for example.

It might be responded that when Y's phobia makes X *v*ing disvaluable. She will suffer if X *v*s. But whilst that is often true, it need not be true. Phobias motivate people because of their perception that they will suffer were the relevant thing to happen. Their motivational effectiveness does not depend on the accuracy of this perception. Confronting the thing that she is phobic about might lead the phobia immediately to evaporate; nevertheless her phobia may have a powerful hold on her.

Similarly, the gravity of the threat in *Cop Threat* depends not only on what Y should rationally prefer. It also depends on her perception of the execution of the threat. Let us suppose that Y acts wrongly in having sex with X – she wrongly participates in his obstruction of justice, and his subversion of his role as a police officer. Y may nevertheless be excused from taking this option, given the consequences for her and those she loves if she takes it, and given the pressure that she is under. If X achieves his goal of having sex with Y, he harms her without justification. The fact that she could have done what she felt compelled not to do is irrelevant.

This is one reason why tests for rape that ask whether a reasonable person would have responded to the threat by having sex with the defendant are under-inclusive – they leave people vulnerable to having their weaknesses exploited.

⁹ On which, see also Wertheimer *Consent to Sexual Relations* 185.

III. Coercive Offers

The argument offered in the previous section cannot be extended to offers that seem coercive. For example, a hotshot lawyer offers legal advice to a desperate person who is seeking asylum only if she has sex with him. Or a man offers to pay the debt that a woman owes to a gangland boss who is threatening her family only if she has sex with him. Can we extend our analysis to explain these cases?

I'll focus on the following case, but the analysis can be extended to the above cases. Consider:

Expensive Treatment: Betty's son needs very expensive treatment to save his life that she cannot afford. Don, who is wealthy, offers to pay for the treatment if she has sex with him.

Let us suppose that Don is permitted not to pay for the treatment. Is it permissible for him to offer to pay for it in exchange for sex? It seems not; but some argue that appearances are deceiving.¹⁰

One immediately troubling feature of the case is that Betty seems to have no real choice but to accept this exchange. Losing her son is such a bad alternative that sex with Don does not seem optional. It may seem that what Don does is no different from forcing Betty to have sex with him. Furthermore, Don seems wrongly to exploit the terrible circumstances that Betty is in to secure what he wants from her.

But this does not fully explain the case. Compare:

Expensive Treatment 2: As *Expensive Treatment*, but Don does not ask Betty for sex. Rather, he says: I will pay for your son's treatment; all I ask in return is that you paint my house.

¹⁰ See Wertheimer *Consent to Sexual Relations* 175.

Betty has no real option but to paint Don's house. Yet it does not seem wrong for Don to ask for the house to be painted in return for funding the treatment. What Don does is not morally akin to forcing Betty to paint his house.

It is sometimes thought that the scope of sexual wrongdoing is narrower than the scope of exploitation for property and services.¹¹ Comparing *Expensive Treatment* and *Expensive Treatment 2* suggests otherwise, at least in some cases. It seems that Don is entitled to seek something in return for paying for Betty's son's treatment, but not sex. But why should it be much worse to leave a person without the option not to have sex than to leave the person without the option not to paint a house?

The answer is in part due to the intimate nature of sex, and the resulting psychological distress that unwanted sex might cause.¹² But this is not the only reason. People value sexual integrity. What I mean by this is not simply that they choose when to have sex and with whom. I mean that their sex lives, as a whole, are governed by certain values and commitments that they endorse. Sexual integrity can be realized in many ways. A person might value a sex life in which she only has sex that she values for its intrinsically valuable properties. Or she might value a monogamous sex life. Or she may value a wild sex life – one in which she has sex with whoever she wants when she wants it. As people value, and value deeply, shaping their sex-lives according to their values, we have powerful reasons to provide them with adequate opportunities to do so.

House-painting integrity is much less important to people. People do not typically value a life of house-painting that they value only for its intrinsically valuable properties, or that is exclusive to a particular house, or a wild house-painting life – one in which the person paints whichever house she wants when she wants.

¹¹ Schulhofer thinks there are reasons on both sides. See *Unwanted Sex* 116.

¹² See Schulhofer *Unwanted Sex* 117-8.

In *Expensive Treatment*, Don provides Betty with an overwhelming extrinsic goal that she could achieve by having sex with him – to save her son’s life. Don leaves Betty without an adequate opportunity to develop sexual integrity. Hence, in choosing to put the condition of sex on his offer to pay for the treatment rather than paying without such a condition, Don deprives Betty of the opportunity to have something that she has powerful reasons to value – sexual integrity. This is not true in *Expensive Treatment 2*.

Still, a puzzle remains. Don provides Betty with an opportunity that he could permissibly deprive her of – the opportunity to save her son’s life. If he has sex with her, he makes her worse off than she would be were he to pay for her son’s treatment with nothing in return. But he makes her much better off than she would be were he to do nothing, as he is permitted to do.

Furthermore, *Expensive Treatment* and *Cop Threat* differ in the following respect. In *Cop Threat*, Bobby threatens Yolanda with harm – by securing her husband’s conviction. In contrast, in *Expensive Treatment*, if Don does nothing, he does not harm Betty. We generally require a justification for harming others. We do not generally require a justification for failing to help others; indeed, I stipulated that Betty is not entitled to help from Don. This helps to explain why we are inclined to see Bobby as making a threat in *Cop Threat*, but we see Don as making an offer in *Expensive Treatment*.

Nevertheless, it seems wrong for Don to secure sex with Betty in *Expensive Treatment*. Here is Don’s situation. He is permitted to use his resources either to save Betty’s son, or for some other goal. However, *if* he chooses to save Betty’s son, it is wrong for him to demand sex in return. This is so even though he would make Betty better off by making this offer than she would be without it.

So here is the puzzle in brief. Don seems to act wrongly even though he sacrifices his money, when he is not obliged to do so, and in doing so makes both Betty and her son better off. But although this is somewhat puzzling, the problem is no different from one that arises in a range of

contexts. We should be confident that there is a solution to the puzzle. If there is a solution in these other contexts, there should be a solution here.

I restrict myself to a single example to illustrate the more general puzzle:

Racist's Three Options. The lives of fifty white people and fifty black people are in peril. Derek, a racist, is the only person capable of saving anyone. He has three options –

- 1) rescue no one;
- 2) rescue only the whites, causing Derek to lose his foot.
- 3) rescue everyone, causing Derek to lose his foot.

Derek, let us suppose, is not required to rescue anyone. He would not act wrongly if he did nothing, for rescuing anyone comes at a very high cost to him. Nevertheless, it would be wrong for him to rescue only the whites. If Derek saves the whites he must save the blacks as well.

This is because if he chooses to save the whites, he can also save the blacks at no extra cost to himself. If Derek is willing to bear the cost of losing a foot for the sake of rescuing the whites, he must also rescue the blacks. This is so simply in virtue of the fact that if he could rescue 50 people at no cost to himself, he must do so. If he has chosen to rescue the whites at the cost of a foot, he can rescue 50 people at no additional cost to himself. That is sufficient to require him to do so.¹³ But if Derek is required to rescue the 50 blacks, he renders them better off than he could permissibly render them.

Some might think that this conclusion in *Racists Three Options* depends on the fact that Derek is no worse off if he rescues everyone than if he rescues only the Whites. But the same conclusion seems warranted even if Derek

¹³ For a similar analysis of a closely related case, see D Parfit 'Future Generations: Further Problems' (1982) 11 *Philosophy and Public Affairs* 113, 131.

must bear some extra cost by rescuing everyone, as long as the extra cost is small. For example, if rescuing everyone cost an extra £10 over rescuing only the whites, Derek must do so.

The idea that underlies this judgement is as follows. Derek need not sacrifice his foot to rescue anyone. But if he chooses to sacrifice his foot to save some, he must then save everyone. Here's the deeper explanation why we should think this. Derek is free to shape his life in the light of what he values. This explains why he is not required to sacrifice his foot for the sake of rescuing others. Now suppose that he values the lives of the whites more than his foot, and so plans to rescue them. *Given that decision*, he cannot offer the value of his foot as a reason not to rescue the blacks. He must point to something else that justifies his failure to do so. But if doing so is cost-free, or is low-cost, he cannot justify this failure. Therefore, if he decides to rescue the whites, he must rescue the blacks as well.

A somewhat similar idea explains *Expensive Treatment*. Don need not sacrifice his money for the sake of Betty's child. Now suppose that he is willing to do this. He can either rescue Betty's child without demanding sex with Betty, or he can do so and demand sex with Betty. He may keep his money, but if he decides to pay the money in a way that rescues the child, he must do so in a way that protects Betty's control over her sex life.

Here is another way to see this. Suppose that Don forms the conditional intention to give Betty his money to save her child if she will have sex with him. He is then required to drop the condition and give the child his kidney and receive nothing in return rather than execute his conditional intention. For it is not at all important that he secures sex with Betty - sex that Betty does not want - and it is very important that Betty's sexual integrity is protected.

We can articulate this in the same way as we did in *Racist's Three Options*, though doing so is crude. The 'extra cost' to Don of simply rescuing Betty's child rather than rescuing Betty's child and securing sex is small. The

difference in cost to Betty, in contrast, is very large. Imposing this high extra cost on Betty for the sake of the benefit he will secure cannot be justified.

This way of expressing things is crude because it treats Don's inability to secure sex with Betty, sex that she does not want, as a cost to Don. But this way of putting things falsely does as though Don suffers a loss when he does not secure sex with Betty under these conditions. Don may want sex with Betty, and may find it frustrating that he cannot secure sex with her. There may even be a sense in which his life would go better if he had sex with her in these conditions. But his failure to be able to secure sex with her in these conditions cannot plausibly support a permission to choose saving her child with the condition of sex over simply saving her child. Either there is no value to Don in securing sex with Betty in these conditions, or if this is valuable to Don, the value is irrelevant in assessing which options are open to him.

Some may doubt the argument offered so far for the following reason. It is often permissible to put conditions on the provision of great benefits others, even when those conditions are of little value to the person offering the benefit, and fulfilling them is very burdensome to the beneficiary. Indeed, this might seem true in the sexual realm.

Consider:

Cash for Sex: Ben wants to have sex with Kath. He offers her £1000000 in return. Kath is already well off, but would be much better off with £1000000.

It may seem permissible for Ben to have sex with Kath. Even if it is not, this does not seem a case of *coercive* sex in any way that is comparable with *Expensive Treatment*.

The main difference between *Expensive Treatment* and *Cash for Sex* is one I noted earlier. In *Expensive Treatment*, Betty is left with no real opportunity for sexual integrity. The only way that she can ensure that she has the sex life that she sets out to have involves the death of her child. The

difference to Betty between Don unconditionally paying for the treatment and his doing so only on condition that Betty has sex with him is an adequate opportunity for sexual integrity. In contrast, in *Cash for Sex*, Kath has a perfectly good opportunity for sexual integrity. Her choice is whether to give it up for the money. Ben may give her an overwhelming reason to give it up, but she has a perfectly adequately opportunity not to do so. Hence, either Ben acts permissibly, or if he acts wrongly his wrongdoing is nowhere near as grave as Don's. I think he acts permissibly.

The argument in this section also helps to resolve a disagreement about the philosophical foundations of sexual offences. Nicola Lacey suggests that the criminal law should aim to protect sexual integrity.¹⁴ John Gardner and Stephen Shute disagree.¹⁵ They claim that whilst sexual integrity is valuable, a person does not act wrongly as long as they respect sexual autonomy. This is so even if the person exercising her autonomy compromises her sexual integrity.

There is an element of truth in both views. A person need not act wrongly by inducing another person to compromise her sexual integrity for some reward, even if the inducement is certain to be sufficient to lead to the compromise. *Cash for Sex* suggests this. In this sense, Gardner and Shute are right that the law need not protect sexual integrity – it is sufficient that sexual autonomy is protected.

But the value of sexual integrity nevertheless underpins sexual wrongdoing, and helps to explain the role of the law, as Lacey suggests. The value of sexual integrity explains why it is coercive to make certain offers in return for sex, and why sexual wrongdoing occurs when these offers are

¹⁴ In *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Oxford: Hart, 1998).

¹⁵ 'The Wrongness of Rape' in J Gardner *Offences and Defences: Essays in the Philosophy of Criminal Law* (Oxford: OUP, 2007).

accepted. Such coercive offers violate sexual autonomy, it might be argued. But even if so, the value of sexual integrity explains why this is true.

Let me summarize the view that has been defended. Suppose that X offers Y that he will *v* if she *ws*. Whether such an offer is coercive depends on two things. First, there is the difference that it makes to Y whether she *ws* or not. This is not simply a matter of the costs that this imposes on Y, but on whether she is left with an adequate opportunity to pursue things that she, for good reason, values, or may value. Second, there is the difference that it makes to X whether Y *ws* or not. Again, this difference is not simply to be understood as a matter of costs. X's reasons to value Y *wing* do not depend, or do not only depend, on whether Y *wing* makes X better off. There may be some things that Y could do that make X better off, but, at least in this context, he has no reason to value Y doing these things. Let us call this the *Exploitation View*, in virtue of the fact that it explains sexual wrongdoing by identifying different ways in which one person may exploit his power over another, or by exploiting another's circumstances.

iv) Why the Bad Effects of Moral Principles Don't Falsify Them

Perhaps it will be objected that the *Exploitation View* is false in virtue of its bad effects. Suppose that morality does not give those in Don's position the option of offering their money in return for sex. And suppose that Don is keen to comply with the moral demands that apply to him, but will do what he prefers within the constraints of morality. Now suppose that Don ranks his options as follows:

- 1) Save Betty's child and have sex with Betty.
- 2) Keep his money
- 3) Save Betty's child without having sex with Betty.

Don will choose 2) – he will comply with the moral demands that apply to him if he does either 2) or 3). He ranks 2) over 3). So he will choose 2). But 2) renders Betty worse off than 1). A moral obligation that aims at protecting Betty leaves Betty worse off in these circumstances.¹⁶ To put this idea in contractualist language: Betty has a reason to reject a principle that restricts Don from making this offer to her.

This objection seems more important than it is. First note that if it is valid, it also applies in a problematic way to *Racist's Three Options*. Suppose, as I have suggested, that morality requires Derek to rescue the blacks if he chooses to rescue the whites. Suppose also that Derek is keen to comply with the moral obligations that apply to him, but will do whatever he prefers within the range of morally permissible acts. Now suppose that Derek's racist tendencies are very powerful. He would rather rescue only the whites than rescue no one, but he would rather rescue no one than rescue the whites and the blacks. If it is wrong for Derek to rescue only the whites, he will rescue no one. But it is much better that Derek rescues the whites than that he rescues no one. Yet it is not at all plausible that Derek acts permissibly if he rescues only the whites.

More generally, our moral obligations do not depend on the effects of our having those obligations given the actual dispositions that people have. The fact that people who are motivationally deficient will make things worse if certain moral principles apply does not falsify those moral principles. The fact that some racists will rescue fewer people if it is wrong for those in Derek's position to rescue only the whites does not vitiate the moral requirement to rescue both the whites and the blacks.

We can see how implausible it is that moral rules are sensitive to motivational deficiencies by considering:

¹⁶ In *Consent to Sexual Relations*, Wertheimer suggests that incentive effects of this kind determine whether consent is valid. See 180-1.

Cool: In some world, it is considered very cool to act wrongly. People strongly want to be cool. If it is morally wrong to save people from the dire consequences of extreme poverty, many people will do so, in order to appear cool. If it is not morally wrong to do so, they will not.

It being morally wrong to save people from extreme poverty has excellent consequences. Indeed, there may be very few downsides of this being morally wrong. Those in extreme poverty, it might be argued, have a reason to reject a principle that permits people to rescue those in extreme poverty. Yet it is not at all plausible that this makes it morally wrong to save people from extreme poverty.¹⁷

It may be that because there are unscrupulous people, the *Permissible Baseline View* would have better consequences than the *Exploitation View*. This does not make the *Permissible Baseline View* true.

v) *Motivation, Morality and the Law*

The fact that Betty has an interest in Don making the exploitative offer to her, when compared with doing nothing, may provide a reason for the state not to criminalize Don's conduct. Criminalization may make those in Betty's position worse off. Those in Don's position will be provided with an incentive not to make exploitative offers, and this may make those in Betty's position worse off. A law that seems designed to protect Betty thus may end up harming her.

This concern does not extend to all cases. If those like Don are not permitted to secure sex with those like Betty, they will likely fritter away their money on useless projects. A similar concern may be less powerful in the case of hotshot asylum lawyers – those who cannot secure sex with clients may

¹⁷ This also follows from, and helps to support, the first person account of wrongdoing defended in chapter x.

nevertheless go on to represent clients without aiming to secure sex. True, there may be a disincentive to the sexually voracious to become hotshot lawyers. But I doubt that this concern is sufficient to justify a legal permission on hotshot asylum lawyers to secure sex with their clients.

Even if there is a decisive reason against criminalizing Don's behaviour, as some might believe,¹⁸ his conduct may be criminally wrong, in the sense that it is the kind of conduct that warrants public blame and punishment through the criminal justice system. There is a decisive reason against publicly blaming and punishing him, even though he is liable to public blame and punishment.

But there may not be such a reason. It is difficult to predict the effects of criminalizing Don's behaviour. Criminalization may incentivize those in Don's position to keep their money rather than making coercive offers to those in Betty's position, and that counts against it. But criminalization may also have indirect positive effects that outweigh any disadvantage to those in Betty's position. Prosecuting sex obtained through coercive offers may improve the situation of potential victims of sexual wrongdoing more generally, by helping to foster respect for sexual integrity by public support for the uniform condemnation and punishment of sexual wrongdoers. It is difficult to know how great these benefits are, and whether they are sufficient to outweigh disadvantages to those in Betty's position.

I suspect that the main way in which criminal law is effective in changing behaviour, at least in the area of serious interpersonal wrongdoing, is through fostering and reinforcing attitudes about wrongdoing that then directly shape interpersonal relations, rather than providing direct incentives to people who are motivated to act wrongly not to do so. And if this is right, the value of ensuring that the law properly responds to failures to respect

¹⁸ Larry Alexander draws a conclusion like this in 'The Moral Magic of Consent II' 170-1.

sexual autonomy and integrity by punishing it when it arises may well outweigh disadvantages to those in Betty's position.

But whatever the answer to this question, those who secure sex through making exploitative offers, as in *Treatment 1*, are liable to public blame and punishment; whether they ought to be punished all things considered depends on the answer to difficult empirical questions. We should not conclude too quickly, from the fact that we sometimes wish to incentivize coercive offers, what the answers to these questions are.

IV. The Gravity of Wrongdoing

Suppose that X has wrongful sex with Y in virtue of the fact that X has made a wrongful threat or offer to Y, and that threat was effective in causing Y to have sex with X. What considerations affect the gravity of X's wrongdoing?

Answering this question is extremely important, for at least three reasons. First, the strength of our reasons to criminalize wrongdoing depends at least in part on the gravity of the wrongdoing. Some sexual wrongdoing may be insufficiently grave to warrant criminalization at all. Second, the demands of fair labeling require us to decide not only whether some sexual wrongdoing ought to be criminalized, but also whether it ought to be criminalized as rape. And this depends on gravity. Third, the magnitude of punishment that a person renders herself liable to also depends at least in part on the gravity of wrongdoing.

My investigation is limited to differences that threats might make to the gravity of sexual wrongdoing. I leave a range of important questions aside; most importantly, those concerned with the *mens rea* of the offender.

i) *The Effects on Victims*

It might be argued that the gravity of sexual wrongdoing depends on the effect of the wrongdoing on the victim, or on the effects that the wrongdoer

could reasonably have predicted his wrongdoing to have. Many people think that rape is wrong in virtue of the fact that rape blights the lives of victims, leading to severe psychological trauma, depression, and suicidal tendencies. They might argue that the gravity of an instance of sexual wrongdoing depends either on its actual effects, or on the effects that the wrongdoer could reasonably have predicted it to have, or on both.

These ideas would help to explain why the gravity of the threat affects the gravity of the wrongdoing, at least in part. The psychological impact of the sex will often depend, at least in part, on the prospect of the threat being carried out - sex with a knife to one's throat, for example, is especially terrifying because of the vivid prospect of being killed, and terrifying attacks may well typically have worse effects on their victims.

However, the gravity of the threat is only one fact amongst many that makes a difference to the effects of sexual wrongdoing. Many other things determine the effects of the wrongful sex on different victims, such as psychological differences between victims and differences in their support networks. If the gravity of sexual wrongdoing depends primarily on its effects, these differences are very important in determining gravity.

It is plausible that differences in the effects of sexual wrongdoing partly determine its gravity. It is less attractive to believe that the difference in the gravity of two instances of sexual wrongdoing is solely determined by the differences in their effects on victims. There are inherent qualities of wrongful sex that affect the gravity of wrongdoing independently of its effects. This should not be surprising. As we saw in the previous chapter, the importance of consent-sensitive duties is not reducible to the protection of a person's well-being. It would be surprising if these other sources of sexual wrongdoing were irrelevant to the question of gravity.

There are several ways to illustrate that this is also the intuitive view. Here are three. First, the view that the gravity of a rape depends only on its effects has the implausible implication that it is *much* less bad to have wrongful sex with a person who will not suffer grave psychological effects

than a person who will. But even if there is a difference in gravity between these cases, the difference does not seem profound. Consider the rape of a person who has been involuntarily intoxicated, and who does not remember the rape occurring as a result. It is hard to believe that this rape is not very grave in virtue of the fact that the rape has less serious effects on the victim.

Second, consider a victim who is raped several times by a group of men who threaten her with violence if she attempts to resist. The acts of the last perpetrator might have less additional effect on the victim than the earlier rapes. Suppose that they do. It is not very plausible that the acts of the last perpetrator are significantly less wrongful in virtue of this fact. It might be thought that this conclusion is warranted only because the rapists act together, and are thus jointly responsible for all of the rapes. But the same conclusion would equally be warranted in cases where the last rapist arrives late on the scene, without his having participated in the earlier rapes.¹⁹

Third, many sexual assaults have effects on a person for the remainder of their lives. The view that the gravity of the wrongdoing depends on its effects implies that it would be much less bad to rape a person later in life than earlier in life because the negative psychological effects of the latter rape would not last as long as the psychological effects of the former. Again, this is hard to believe. Compare killing: it is much more harmful to kill a person who would otherwise have lived for many happy years than to kill a person who would otherwise have lived for fewer less happy years. The difference in the gravity of these wrongs is much less pronounced.²⁰ The same thing is true of rape.

¹⁹ As may have been the case in *Johnson v State*, 94 S.W.3d 344 (Ark. App. 2002).

²⁰ See, also, J McMahan *The Ethics of Killing: Problems at the Margins of Life* (Oxford: OUP, 2002) ch.3.

Some might doubt that the gravity of sexual wrongdoing depends in any way on its effects. Here is why they might draw this conclusion.²¹ Sexual wrongdoing does not merely cause victims to react negatively; the negative reactions of victims to rape are warranted. They are warranted in virtue of the wrongness of the conduct. And the gravity of these reactions ought to be proportionate to the gravity of the wrongdoing. So the gravity of the wrongdoing does not depend on the gravity of its effects – on the contrary, the gravity of the *warranted* effects of sexual wrongdoing depend on the gravity of the wrongdoing. As unwarranted effects of sexual wrongdoing cannot affect its gravity, the gravity of sexual wrongdoing does not depend on its effects.

This argument is not persuasive for two reasons. First, the gravity of wrongdoing depends in part on its warranted effects independently of the facts that make these reactions warranted. The fact that rape victims are warranted in feeling violated by their assailants does not make this effect of rape irrelevant to the gravity of wrongdoing. Warranted reactions can still be regrettable, and can exacerbate the gravity of the wrongdoing. Compare grief. The grief of the parents at the killing a very small child is warranted, but it also helps to make the killing of very small children especially grave.

More importantly, the gravity of sexual wrongdoing depends in part on its unwarranted effects. For example, victims of rape often experience deep but unwarranted feelings of shame and guilt for the attack they have suffered. These feelings can be debilitating. The fact that the feelings are unwarranted does not make them irrelevant to the gravity of wrongdoing – the fact that rape has this effect on victims provides a reason against committing rape, and helps to explain the gravity of the wrongdoing.

Overall, the effects of sexual wrongdoing make a difference to the gravity of the wrongdoing. But it is less plausible that they are all that matter. What else does?

²¹ For related discussion, see Gardner and Shute ‘The Wrongness of Rape’.

ii) *A Doubt About the Gravity of the Threat*

In the case of sexual wrongdoing secured by threats, one obvious idea to explore is that the gravity of wrongdoing secured by a threat depends on the gravity of what is threatened. An analogous idea seems plausible in the case of coercive offers: the gravity of the wrongdoing depends on the gravity of the situation that the person will be left in if the offer is not fulfilled. For ease of expression, I will focus on the gravity of threats, but what I say can be extended to coercive offers.

It seems obvious that the gravity of the threat should make a difference to the gravity of sexual wrongdoing secured by that threat – sex secured by a threat of death seems worse than sex secured by a threat of loss of employment. But is this true independently of the effects that these different threats typically have on their victims?

Let us begin with a doubt. Suppose that X threatens Y that he will *v* if Y does not have sex with him, intending that she responds to the threat by having sex with him. If his threat is effective, and Y has sex with him, he does not execute his threat. As X intends Y to respond to the threat, he does not intend to *v*. And as his threat is effective, he does not in fact *v*. How can the gravity of his wrongdoing then depend on the gravity of *v*ing, given that he neither *vs*, nor intends to do so?

To illustrate this concern, consider:

Two Rapes: Harry threatens Jane with a broken arm if she does not have sex with him. Ivan threatens Kate with two broken arms if she does not have sex with him. Harry and Ivan are equally confident that their threats will be effective. Both threats are in fact effective. Harry and Ivan thus rape Jane and Kate respectively. Jane and Kate are identical in all salient respects. They are equally terrified by the encounters, and

equally traumatized afterwards. The encounters thus have equal effects on their lives afterwards.

Obviously, it is worse to break both of a person's arms than it is to break one of their arms. But can this make a difference to the gravity of the rapes?

The argument offered above might lead us to think not. The wrongdoing that Ivan threatens is graver than the wrongdoing that Harry threatens. But Ivan does not intend to break two arms, and he does not in fact break two arms, just as Harry does not intend to break an arm, and he does not in fact break an arm. Their threats are made in order to secure sex with their victims. What they threaten does not occur, and they do not intend it to occur. What, then, is the difference between them?

iii) *Offender and Victim Dispositions*

Perhaps it might be argued that the gravity of the threat is significant because it indicates how unwilling the victim was to have sex with her assailant. If X wrongly secures sex with Y, the gravity of his wrongdoing depends on how unwilling Y was to have sex with X. If X secures sex with Y using a less serious threat, Y was less unwilling to have sex with X than if X secures sex with Y by issuing a more serious threat.

This argument obviously fails. One reason is that Y's degree of unwillingness does not depend on the actual gravity of X's threat. It more plausibly depends on how grave Y judged it to be. More importantly, we are not entitled to conclude from the fact that Y responded to a grave threat that she was powerfully unwilling to have sex with X. That depends on whether she would have responded in the same way to less grave threats. If X secured sex with Y by issuing a grave threat, but Y would have responded in the same way to a trivial threat, Y was not powerfully unwilling to have sex with X. For example, in *Two Rapes* we are not entitled to conclude that Kate is less willing to have sex with Ivan than Jane is with Harry. That plausibly depends on

whether Kate would have had sex with Ivan were she threatened with a broken arm, but her response to Ivan cannot tell us that.

Perhaps it might be argued that the gravity of the threat is a good rough proxy for what we really care about – how unwilling the victim was to have sex with the person who threatened her. But this is doubtful for two reasons. First, it seems intuitive that the gravity of X's threat makes a difference to the gravity of his wrongdoing independently of how willing the victim was – Ivan's wrongdoing seems worse than Harry's even if Kate would have responded to the threat of a broken arm in the same way.

Second, the view that the gravity of wrongdoing depends on willingness runs up against a problem that we noticed earlier when considering *Preemptive Threat*: X may wrong Y even if Y would willingly have had sex with X without being threatened. What matters is the quality of the actual encounter, and not what Y would have done were other things to have occurred. The same thing seems true of the gravity of sexual wrongdoing. If the defendant secures sex by threatening violence, the fact that the victim would have had sex with him were he to have threatened much less, or nothing at all, seems irrelevant.

Here is an alternative view. It might be argued that if X issues a grave threat to Y, he demonstrates that he is willing to have sex with Y even if she is very powerfully unwilling to do so. This is not true if he issues a much less grave threat. But this idea also runs into difficulties. First, a person who makes a less grave threat does not demonstrate that he is unwilling to secure sex with a victim who is powerfully disposed not to have sex with him. That depends on not on the actual threat that he uses, but on the threats that he would have been willing to use were Y to have refused. Suppose that X secures sex with Y by making a less grave threat. Had this threat failed, he would have made a much graver threat. X's attitude to Y's willingness to have sex with him seems no better in this case than it is in the case where he makes the graver threat in the first place.

More importantly, whilst a person's dispositions can make a difference to some kinds of moral judgement, they do not normally make a difference either to whether an act is wrong, or to the gravity of wrongdoing. We can see the first thing clearly from Derek Parfit's case:

Coffee: D, a violent person, forms an intention to get a coffee at his local coffee shop. V is the barista. D asks for his coffee and V serves him. If V had not served him, D would have killed V and served himself.²²

X has terrible dispositions. But these dispositions do not render his act of buying coffee wrong. More generally, it seems doubtful that dispositions can affect either whether an act is wrong, or the gravity of the wrongdoing.²³ A person with bad dispositions is a bad person in virtue of these dispositions. But when the dispositions have not been realized, they cannot render acts wrongful, or affect the gravity of wrongdoing. The fact that X would threaten Y with a graver wrong to secure sex cannot affect the gravity of his sexual wrongdoing when he threatens less. The gravity of his wrongdoing more plausibly depends on what he actually threatens than on what he would threaten were these threats ineffective.

Earlier, I rejected the view that the victim's willingness to have sex with the wrongdoer determines the gravity of the wrongdoing. But there is a closely related view that seems true. My central reason for rejecting the significance of the victim's willingness to have sex with the wrongdoer is that this willingness might play no role in the victim's decision to succumb to the threat. The threat might render the victim's willingness causally irrelevant.

²² *On What Matters vol.1* (Oxford: OUP, 2011) 216.

²³ Not everyone agrees. In 'The Doctrine of Illicit Intentions' (2006) 34 *Philosophy and Public Affairs* 39, Alec Walen argues that dispositions can make a difference to wrongdoing. For further doubts, see V Tadros 'Responses' (2013) 32 *Law and Philosophy* 241, 287-8.

Preemptive Threat exemplifies that possibility. But the fact that a threat is causally effective in explaining a person's decision to have sex does not imply that facts that would have rendered her willing to have sex with the wrongdoers are causally ineffective.

Consider:

Mockery: Paul and Mary are seventeen years old. They have been dating for a while. Paul wants to have sex with Mary, but Mary feels she is not ready. Paul tells Mary that if she does not have sex with him he will tell her friends, who will mock her. Paul has sex with Mary.

There are different explanations why Mary might decide to have sex with Paul. On one variation, the threat plays no causal role, or only an indirect causal role, in explaining Mary's decision. Alternatively, it may completely dominate other explanations of Mary's decision – she has sex with Paul only to avoid mockery and for no other reason.

In another variation of the case, Mary decides in part in virtue of the threat, but in part in virtue of the fact that she is sexually attracted to Paul, and is at least somewhat motivated to develop their relationship in this way. If the threat is causally significant in Mary's decision, Paul's sex with Mary may be wrongful. But the wrongdoing may be less grave in virtue of Mary's other motivations. A similar thing might be true in cases where Mary responds to Paul's threat simply because she is not strongly disinclined to have sex with Paul.

This helps to explain why many people are not inclined to see all wrongful sex secured by threats as rape, and to see some sex secured by threats as insufficiently serious to fall within the scope of the criminal law. A victim may have been disposed to have sex with the wrongdoer, or only weakly disposed not to do so, and these dispositions may play an important role in explaining her decision to have sex with the wrongdoer. This can be true even if she is threatened, and the threat is causally effective. Her

dispositions, in that case, make a difference to the gravity of the wrongdoing, not simply because she has those dispositions, but because those dispositions play an important role in shaping her decision to have sex with the wrongdoer.

iv) *Options*

Recall *Two Rapes*. Perhaps it might be argued that Ivan's wrongdoing is graver than Harry's in virtue of the options that they leave their respective victims with. Jane has these options: either have sex with Harry or suffer a broken arm. Kate has these options: either have sex with Ivan or suffer two broken arms. Kate's options are worse than Jane's. Ivan causes a person to have a worse set of options than Harry. Therefore Ivan's wrongdoing is graver than Harry's.

In response, some might argue that it is valuable for a person to have extra options, or better options, only if she will select the extra option, or the better option. On this view, Kate's options are worse than Jane's only if Kate would select the option that Jane has, but that she lacks, were she to have it – in this case the option of a broken arm. If Kate would not select a broken arm were she to have had Jane's options, Jane's options are no better for Kate than her current options. If that is right, Ivan's wrongdoing is graver than Harry's only if Kate would have selected a broken arm had Ivan threatened only that. As it is stipulated that Jane and Kate are identical in all salient respects, Kate would not have selected a broken arm had she had Jane's options. Therefore Ivan's wrongdoing is no graver than Harry's.

This response seems to rely on the mistaken idea that one's only reason to have an option is that one will select the option. But this seems false. A person might prefer having more options on a menu to fewer, for example, because then the choice that she makes will be an expression of her autonomy. The act of selecting between options may, in itself, enhance the value of the option selected. We see the selection independent value of

options even more clearly in big life choices. It is better to live in a society where I choose to be an academic rather than one where I am assigned the job of being an academic. In the former society, the decision to be an academic is an expression of autonomy. This is not true, or much less likely true, in the latter society.

However, the fact that options have selection-independent value has limited importance in cases of sexual wrongdoing. In order for an unselected option to contribute to the expression of my autonomy, my unselected option must have sufficient value. The value of choosing to be an academic is not enhanced by the provision of extra valueless options, such as the option of breaking my arm with a hammer.

In the case of threats, the alternative options are typically valueless. Kate has little reason to value Jane's better option of suffering only a broken arm if she would not choose this option. This extra option could hardly improve the value of her choice to have sex with Ivan. Furthermore, the fact that Jane may be torn between her options, where Kate is not, hardly makes things better for Jane. In fact, it may make things worse - as in *Cop Threat* when one is presented with awful options, deliberation is painful, and one may prefer it that one's fate is not the product of one's deliberations.

The selection-independent value of options may make more of a difference in cases where the threat is much less grave. A person who has sex to prevent a much more trivial threat being executed might be more inclined to see the sex that she has as an expression of her autonomy than one who has sex to prevent a much more serious threat being executed. But this would only explain why the gravity of the threat affects the gravity of wrongdoing in cases where threats are less serious. Beyond a certain level of threats, it would lack explanatory power.

Overall, I find it hard to believe that Ivan's wrongdoing is worse than Harry's in virtue of the options they make available to their victims. Where sex is secured through a threat of serious harm, the value of a set of options to the victim do not seem inherently morally important.

v) *Exploiting One's Ability to Act Wrongly (And Related Ideas)*

Here is another idea. Suppose that Harry and Ivan sincerely threaten their victims. The earlier suggestion that they did not intend to harm their victims is, then, false. They conditionally intend to harm their victims – if Jane and Kate do not respond to their threats. As Ivan conditionally intends to do something worse than what Harry conditionally intends to do, his subsequent wrongdoing is graver.

One doubt about this idea is that it implies that the gravity of a threat can affect the gravity of wrongdoing when the threat is sincere, but not when it is insincere. The effectiveness of their threats depends not on sincerity but on credibility. But, it might be argued, the gravity of sexual wrongdoing does not depend on whether the threat that a person makes is sincere. If one person rapes another by putting a gun to her head, the gravity of the wrongful sex may depend on whether he intends to pull the trigger, but the difference does not seem profound.

Here is a second doubt. Suppose that Harry and Ivan make sincere threats – they conditionally intend to inflict the harm threatened on their victims. It is no doubt worse for Ivan to form his conditional intention than it is for Harry to form his, simply in virtue of what he conditionally intends. But it is not clear how this difference can affect the gravity of the sexual wrongdoing when the threat is effective, and the relevant condition is not fulfilled.

Compare:

Two Robberies: Larry and Mike are both desperate for money. Larry intends to rob a bank. He also intends that if the robbery is unsuccessful, he will kill his rich uncle to secure his inheritance. Mike also intends to rob a bank. He also intends that if the robbery is unsuccessful, he will kill his rich uncle and his rich aunt to secure his

inheritance. Larry and Mike each successfully rob their respective banks, and kill no one.

As it is more seriously wrongful to kill two people than one, Mike's conditional intention is worse than Larry's, and forming this intention is morally worse. But this does not plausibly affect the gravity of the bank robbery. It might similarly be argued that although it is worse for Ivan to form his conditional intention than it is for Larry to form his conditional intention, this does not impact on the gravity of their sexual wrongdoing.

Still, there seems to be a difference in the two cases. The rough difference is that the conditional intentions in *Two Rapes* are more closely related to the conduct than the conditional intentions in *Two Robberies*. How can this difference be characterized more precisely in a way that is morally compelling?

Here is how: people have the power to form future plans, conditionally or unconditionally, to act wrongly. Having this power can help us to get what we want. But it is normally wrong to use this power to get what we want. When we do so, we treat acting wrongly as optional, and this is in itself wrong. When we secure an end by the wrongful use of this power, our action of securing the end is wrong, and the gravity of the wrongdoing depends on the gravity of the wrong threatened.

To see the force of this idea, note that it can be wrong to force others to act in a certain way by threatening to act wrongly, even when it would be permissible to use force to achieve the relevant end. For example, suppose that you wrongly take my car keys. It may be permissible for me to use some degree of force to get them back. But suppose that I sincerely and credibly threaten you that if you do not give them back I will shoot your children. Not only is it wrong to threaten you in this way, it seems wrong to secure my car keys in that way. The gravity of the wrongdoing seems a function of the gravity of the wrong I threaten.

Given this, it should not surprise us that the gravity of the wrongdoing that a person threatens affects the gravity of sexual wrongdoing. When X wrongly threatens Y that X will wrong Y if Y does not have sex with him, X uses his ability to act wrongly to secure sex with Y. It is wrong for him to use his ability to act wrongly in this way. The gravity of the wrong that he perpetrates when he uses this ability in this way depends on the wrongness of using this ability to secure sex. And the gravity of the wrongdoing of using this ability to secure sex depends on the gravity of the wrongdoing threatened.

Recall *Two Rapes*. Harry and Ivan both secure sex by threatening wrongdoing. They use their ability to act wrongly to secure sex. The gravity of the wrong of securing sex with their victims in this way depends on the wrongness of using this ability. And that depends on the gravity of the wrong that the person threatens to perform. Harry uses his ability to break an arm to secure sex. Ivan uses his ability to break two arms to secure sex. It is worse to use the latter ability than the former, because it would be worse to perform the latter act than the former. Therefore Ivan's wrongdoing is worse than Harry's.

Here are two objections to this view. First, earlier we saw that it can be wrong for X to secure sex with Y by threatening to do something that it is permissible for him to do. Doesn't the account of gravity offered here imply that such acts would not be grave at all? It wouldn't. One simple reason is that I only claim that the gravity of the wrongdoing threatened makes a difference to the gravity of the wrongdoing that results from the threat. I don't claim that this is the only thing that affects gravity.

More importantly, though, the account offered can easily be extended to threats to act permissibly. Recall *Cop Threat*. I argued that Bobby has wrongful sex with Yolanda even though he threatens to do something that he is morally required to do. Here is why. Bobby threatens to do something that will harm Yolanda. He would be justified in harming Yolanda in this way. But in making the threat to harm Yolanda to secure sex, he cannot appeal to

this justification, for he intends to harm Yolanda without bringing about the result that would justify doing so.

A similar idea helps to explain why the police officer's wrongdoing is grave. When we consider why it is wrong for him to make the threat, we consider the harm that the act threatened will inflict on Yolanda, but not the justification that he would have for inflicting that harm – he cannot appeal to this justification in explaining why his threat lacks gravity because he does not intend to bring the relevant justificatory fact about. He wrongly uses the harm that his justified act would cause to Yolanda to secure sex with her. Because the harm that he threatens to inflict on her would be grave, it is also gravely wrong for the police officer to secure sex by making that threat.

A second objection: this view cannot explain the wrongness of securing sex through insincere threats. If X makes an insincere threat to Y, it might be argued, he does not use his ability to act wrongly to secure sex with Y. This seems clear from the fact that one person may secure sex from another by making a credible threat that he knows he cannot execute.

Consider:

False Hostage: Ron takes Maddy's child hostage and locks him in a remote cabin. He threatens Maddy that he will kill the child if she does not have sex with him. He knows, but she does not, that the police have already taken the child to safety. She complies with his demand.

Ron's threat is credible but insincere. Not only does he fail to form an intention to harm the child if she does not comply, he could not do so. His threat, and the sexual wrongdoing that results, seems gravely wrong nevertheless in virtue of the gravity of what he has threatened.

Ron does not exploit his ability to act wrongly– he lacks that ability. But a closely related explanation can be offered why his conduct is gravely wrong. He creates in Maddy's mind the prospect of his acting wrongly. He

cannot bring this prospect about. But he creates in Maddy the belief that he can, and he uses this prospect to secure sex with her.

The fact that he will not, and cannot, execute this act may make a difference to the gravity of the wrongdoing. I am sympathetic to the idea that it does. But the gravity of sexual wrongdoing plausibly depends on the gravity what the wrongdoer threatens even when these threats are insincere, for even in this case the prospect of serious wrongdoing is exploited to achieve Ron's sexual aims.

Conclusion

It is typically wrong for one person to secure sex with another through threats, whether those threats are sincere or not. It is typically wrong to do so even if the person threatened has no reason to respond to the threats. It is also wrong to secure sex through certain kinds of coercive offers. This depends on the circumstances that the person who is subject to the offer will be left in if she does not accept. The importance of sexual integrity helps to explain why sex is an inappropriate kind of 'payment' in return for a person doing what he offers to do, at least if he leaves her with no adequate opportunity for sexual integrity.

The gravity of sexual wrongdoing depends in part on the effect of wrongdoing on the victim. It also depends on whether the victim was disposed to have sex with the offender, on condition that those dispositions appropriately explain her decision to have sex with him. In at least some circumstances, it may also depend on the value of the options that the victim is left with. It depends in a more direct way on the gravity of the wrongdoing, or the harm, that the person is threatened with. And finally it may also depend, to some extent, on whether the threat is sincere or insincere.

How the law should be formulated depends on a range of questions about the effects of the law on behaviour that are largely beyond the scope of this chapter. But these judgements about gravity are a starting point for

thinking about how to criminalize sex secured by threats, on the plausible assumption that a person's liability to punishment depends on the gravity of their wrongdoing.