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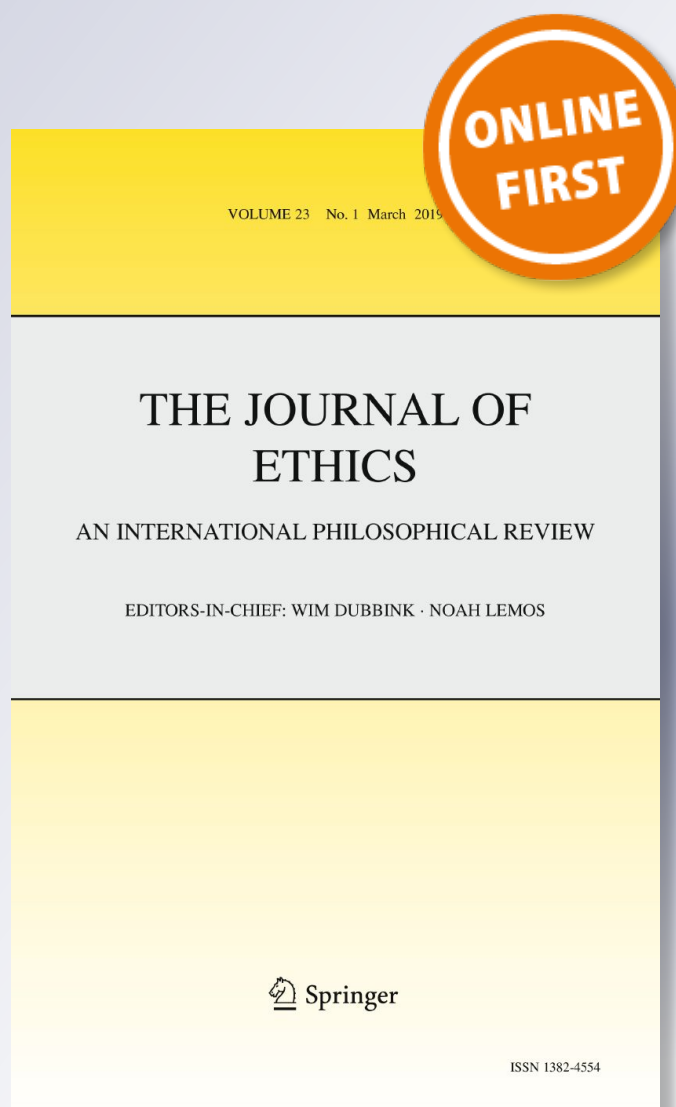
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The Volenti Maxim

Peter Schaber¹ 

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Abstract

This paper discusses the *volenti non fit injuria maxim* (the *volenti maxim*). The *volenti maxim* states that a person is not wronged by that to which she consents, provided her consent is valid. I will argue, however, that the *volenti maxim* does not apply to all instances of valid consent. In some cases the consentor is wronged even if his consent is valid. Valid consent can only release others from consent-sensitive duties, not from consent-insensitive duties. If the consentee flouts a consent-insensitive duty the consentee wrongs the consentor and thereby commits a wrong.

Keywords Consent · Consent-sensitive duties · Exploitation · Waiving rights · Moral magic

1 Introduction

This paper discusses the *volenti non fit injuria maxim* (the *volenti maxim*).¹ The *volenti maxim* states that a person is not wronged by that to which she consents (Feinberg 1984, pp. 115; Bergelson 2010, p. 177; Dempsey 2013, 2018). The consentor is not wronged, it has to be added, if her consent is valid. As Joel Feinberg puts it: “*Volenti* is most plausible when it denies title to complain only to him whose consent was fully voluntary, and a person’s consent is fully voluntary only when he is a competent and unimpaired adult who has not been threatened, misled, or lied to about relevant facts ...” (Feinberg 1984, p. 116). Valid consent is consent that meets certain procedural requirements: On the standard view valid consent should be voluntary, informed and given by someone who is competent to consent (see Bullock 2018; Kleinig 2010).² Consent does change the normative situation only if it is valid.³ If the consent is valid the consentor is, the advocates of the *volenti maxim*

¹ For the history of the maxim see Dempsey (2018).

² Whether this view of valid consent is correct is not subject of this paper.

³ Some think that being valid is a necessary condition, some think that it is a sufficient condition for being morally effective.

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argue, not wronged by the act to which she consented. The consentor is not wronged even if the act in question is morally wrong all things considered.

Is it true that a consentor cannot be wronged by that to which he gives valid consent? I will argue that the *volenti maxim* does not hold for all acts of valid consent. There are cases in which the consentor is wronged even if her consent is valid.⁴ In such cases the consentor is unable to release others from their (moral) duty. It will be argued that the consentor is unable to do so because by consenting she can only release others from consent-sensitive duties not from consent-insensitive duties. If the consentor is not able to release the other person from her duty he is wronged by the act she consented to.

Sections 1 and 2 present the argument why it is supposed to be the case that a consentor is never wronged by that to which she consents. In Sect. 3 an example will be discussed where consent does not release the consentee from all her duties, since it involves a consent-insensitive duty. In Sects. 4 and 5 I will show why consentors can release others only from consent-sensitive duties. In Sect. 6 the scope consent-sensitive duties will be discussed. In the concluding Sect. 7 the objection will be discussed that there are only consent-sensitive and no consent-insensitive duties.

2 Waiving One's Rights

There is a strong and a weak interpretation of the *volenti maxim*.⁵ The strong interpretation holds that the consentor always waives the relevant right by giving valid consent and cannot be wronged if this is the case. According to the weak interpretation the consentor only has the power to waive certain rights and gives valid consent only when she waives one or more of these rights. The *volenti maxim* would certainly be true on the weak interpretation. The consentor would not be wronged by an act she consented to if the relevant right is one that can be waived by the consentor. In cases in which the rights can be waived by consent no wrong is done to the consentor. I will argue here against the strong interpretation. And I will do so for two reasons:

- (a) It is the standard understanding of the *volenti maxim*. In her Handbook chapter “The *Volenti maxim*” (Dempsey 2018) Dempsey writes that “the *volenti maxim* means what it says: “to one who consents, no wrong is done”” (Dempsey 2018: 187). This would not be what the *volenti maxim* says on the weak interpretation. It would not say “to one who consents, no wrong is done”, it would rather say “to one who consents, sometimes no wrong is done”. Feinberg also deals with the strong interpretation of the *volenti maxim*. He writes: “The more interesting question is whether a person can ever be *wronged* by conduct to which he has fully consented. There is a principle of law which emphatically answers this question in the negative: *Volenti non fit injuria* (“To one who has consented no

⁴ This concerns a moral not a legal wrong. For the latter see Dempsey (2018) and Kleinig (1979).

⁵ I owe this point to an anonymous reviewer.

- wrong is done”)" (Feinberg 1984: 115). And finally the same seems to hold for Vera Bergelson's understanding of the volenti maxim: "As the famous maxim goes"—she writes—"volenti non fit injuria: "a person is not wronged by that to which he consents"" (Bergelson 2010: 165).
- (b) The second reason I will deal with the strong interpretation is that the weak interpretation would be trivially true. There can be no doubt that we are able to waive certain rights by consent and thus make it the case that we are not wronged by the acts we consented to. The weak interpretation of the volenti maxim could only be wrong if we could waive no rights by consent. Consent would then never have a normative force and all acts consented to such as for instance consented sex, consented haircuts, consented medical treatment, consented property exchange would wrong the consenter and be wrong as a wronging of the consenter. This would be a rather bizarre view. I take it that it is worthwhile to discuss the more challenging and controversial idea that to one who validly consents no wrong can be done.

Thus let us focus on the strong interpretation of the volenti maxim. Why is the volenti maxim supposed to be true? A person is wronged if her rights are violated. The consenter would be wronged by the act she consented to if her rights were thereby violated. The consenter would, on the other hand, not be wronged if her rights were not violated by the consented act. Advocates of the volenti maxim think that the rights of the consenter are not violated by the act she consented to because the consenter *waived* the right against the consentee not to perform the consented act (Feinberg 1986, p. 177). If B consents to A's doing x, B's rights are not violated by A doing x even if doing x was wrong all things considered.⁶

The act in question might still be morally wrong as the wronging of third parties. Take, for instance, the adultery case: A consents to having sex with B who is married to C. A's rights are not violated and she is thus not wronged by B. B wrongs, I assume, his partner C by committing adultery. B does not wrong A, but B wrongs C. B thus commits a wrong by wronging C, not by wronging A. What B does is thus wrong all things considered. A's consent "conveys a 'stained permission'—a right to do a deed that remains wrong, albeit not a wrong *to her*" (Hurd 2018, p. 49). As Hurd writes:

"(C)onsent is a moral game-changer. While it may not do all the work that is required to reverse the morality of others' actions, it eliminates any claim that such actions are wrongs to the person who gives consent" (Hurd 2018, p. 52).

⁶ A wrongs B by acting with no or invalid consent. It is important to note that not all wrongings result in equally bad states of affairs for the victim. B would wrong A if he took A's car without A's consent, and he would also wrong B if he used A's pencil without A's consent. The former would, however, be worse for A than the latter. And because the volenti maxim concerns the deontic status of consented acts the eudaimonic aspect of consent does not play a role in this paper. I owe this point to an anonymous reviewer.

If B has sex with A without her consent B wrongs A by violating her rights. If B has sex with A with her consent B does not wrong A because A has waived her right. B commits a wrong, however, by wronging C. B does not flout a duty B has to A. B flouts a duty B has to C. B thus commits a wrong by wronging C.

Bergelson thinks that a consented act can be wrong without being either a wronging of the consentor or a wronging of third parties. On her view certain acts are bad as such and should not be performed. She writes:

“Killing or hurting another is bad per se. The fact that a person may be legally justified in, say, killing another in self-defense does not make the killing as morally neutral as borrowing a book; it is still regrettable ... Bringing about a regrettable state of events is bad and should be avoided” (Bergelson 2006, pp. 61).

Intentionally inflicting harm on a person, for instance, is wrong as such. According to her such acts are wrong, but do not wrong the person if she has validly consented to it. They are still wrong, but not as a wronging. They are neither a wronging of the victim nor—unlike the adultery case—a wronging of third parties. As Bergelson puts it:

“Consent should always be at least a partial defense, because it defeats at least one aspect of harm, namely, the violations of rights ... A partial justification does not make a wrongful act right, it only makes it less wrongful compared to an identical but nonconsensual act” (Bergelson 2010, p. 181).

The acts Bergelson has in mind are said to be wrong without wronging someone. There might be acts this applies to. One might think that certain acts are wrong without wronging someone. Take David Owens' example: “If I concrete over the Grand Canyon, I have committed a wrong by disregarding its aesthetic value even if I have thereby wronged nobody” (Owens 2012, p. 45). They are, however, wrong due to what they do to the victim. Intentionally harming someone, for instance, is wrong due to what is thereby done to the victim. It is difficult to understand how such an act might be wrong even though it is no wrong to the victim. Acts that are wrong because of what they do to the victim can only be wrong as wrongings of the victim. If inflicting harm on a person A is wrong it is wrong as a wronging of A.

According to the *volenti maxim* the consentor does always waive the relevant right by validly consenting. And because the consentor waives the relevant right by giving valid consent, her rights are not violated and she is thus not wronged by the act to which she consented. The *volenti maxim*, however, would not be correct if there were cases where the relevant right could not be waived by valid consent. Are there such cases? As I will argue there are indeed such cases.

3 The Caring Mother

Consider the following example⁷: A grown-up son asks his mother regularly for money. She always gives him the money he wants to have. He does not care about her and gets as much as possible. She has regularly difficulties to make her ends

⁷ I owe this example to Erasmus Mayr.

meet. The mother herself is not happy with what she does. She thinks that she should stop giving him money and hopes that he will start taking responsibility for his own life. But then she satisfies his requests and gives him the money he is asking for, always telling him that it was the last time she was ready to give the money he asked for. The son has her valid consent. She knows what she is doing and she is not coerced or deceived neither by her son nor by any third party. Would it be inappropriate for her to complain about what he does to her? Well, he exploits her by taking unfair advantage of her.⁸ Could she thus not complain about being wronged by being exploited by him?

Provided that the mother has given valid consent, one could say that she consented and thus waived the right she has over her money. She is therefore not wronged and may not complain about what her son does to her. Others might blame him for exploiting his mother, but she is not in a position to do so. However, whether this is a correct description of the case depends on the normative effect the mother's consent has. How does her consent change the normative situation? I think that her consent is morally effective in the following way: By consenting she waives her property rights over her money. And because she does waive these rights, her property rights are not violated. He does not steal her money. He would have done so if she had not given her consent. But she did consent and her money is therefore taken, not stolen. And because her property rights are not violated she may not complain that her son has stolen her money. He does, however, exploit her by taking unfair advantage of her. Is she thus wronged by being exploited despite having consented to it?⁹

First, one has to ask whether she is exploited by her son. Consent makes it the case that it is no theft, but is it an act of exploitation? Her consent has changed the nature of the act, one might argue, in various respects: As her consent made it the case that what her son did was no theft, her consent also made it the case that what he did was no exploitation. Thus she is not wronged by him because she is not exploited by him.

I think, however, that this is not true. The act is no theft but still an act of exploitation because non-consent is built into the definition of theft but not into the definition of exploitation. Theft is taking the property of someone else without the owner's consent. Exploitation is taking unfair advantage of someone. This is what the son does regardless of whether his mother consents to his taking her money. The lack of consent is not part of the definition of exploitation. This is the case, regardless of whether the victim of exploitation consents. Thus the mother is still exploited, even though she consented to what her son does to her. Consent has not changed the nature of the act in this respect. It is still an act of exploitation.

⁸ As Zwolinski and Wertheimer put it: "In its broadest sense, transactional/micro-level exploitation involves an agent, A, taking unfair advantage of another agent, B" (Zwolinski and Wertheimer 2016, p. 13). This is at least one way to exploit someone.

⁹ Feinberg writes: "B's consent is a waiver of his right, hence if A's action causes B harm (in the sense of a set-back interest) it does him no wrong ..."; Feinberg (1984), 215.

4 Consent-Sensitive Duties

One might concede this and still say that it is no wronging of the mother. As Feinberg puts it: “Exploitation is ... often wrong, even when because of prior voluntary consent, it does not violate the other’s right, wrong him, or treat him unjustly” (Feinberg 1986, p. 178). We should not agree with Feinberg. I think that the mother is wronged by her son. This becomes clear when we look at the normative work that is done by valid consent. In what way is valid consent morally effective?

By giving valid consent the consenter waives a right she has against the consentee. By waiving a right the consenter releases the consentee from the duty that corresponds to the right the consenter has against the consentee. Thus, valid consent releases others from “consent-sensitive duties” (Tadros 2016, pp. 204). Consent-sensitive duties are conditional duties. They obtain if no consent has been given. They do not have the form (1) “You ought not do x to A”; they rather have the form (2) “You ought not do x to A if A does not consent to you doing x to her”. As Tadros puts it: “When X owes a consent-sensitive duty to Y not to v: (1) X owes a duty not to v; (2) Y can release X from his duty by consenting to v; (3) If X vs without Y’s consent, X wrongs Y, but not if Y consents” (Tadros 2016, p. 204).

Duties that are not consent-sensitive have the following form of a narrow scope duty:

$$O(\neg x). \tag{1}$$

Consent-sensitive duties, on the other hand, have the following form of a wide scope duty:

$$O(\neg c \rightarrow \neg x) \& c \rightarrow \neg O(\neg x) \tag{2}$$

You should not do x if no consent has been given. It is not the case that one should not do x. It is rather the case that one should not do x *if* no consent is given. Valid consent would make it the case that the $\neg x$ would not obtain anymore: $\neg x$ only obtains if $\neg c$ obtains. And if consent is given the consentee does not have a duty not to do x.

The more precise description of what happens in such cases is this: $O(\neg c \rightarrow \neg x) \& c \rightarrow \neg O(\neg x)$ is a consent-sensitive duty. If no consent is given the duty can only be satisfied by not doing x. If consent is given the duty can be satisfied also by doing x. Consent-insensitive duties have no consent condition. “You should not exploit others” or “you should not humiliate others” are examples of consent-insensitive duties. These duties can only be satisfied by not performing the act one should not perform. So if you should not exploit others you can only satisfy this duty by not exploiting others. Consent does not release you from this duty simply because it is not a consent-conditional duty. Consent does not change the duty. Valid consent releases others from consent-sensitive duties but it does not release others from consent-insensitive duties.

Here is an example of such a consent-conditional duty: I ought not to cut A’s hair without her consent. If I cut her hair without her consent I would violate a duty I have towards her. And I would do so because she has not consented. I am under the following wide-scope duty $O(\neg c \rightarrow \neg x) \rightarrow c \rightarrow \neg O(\neg x)$ (for instance, you ought not

to cut my hair if I do not consent to it and if I consent you are not under a duty not to cut my hair)). Without valid consent, you can satisfy the wide-scope duty only by not doing x ; if the other person consents to you doing x you can satisfy your duty by doing x as well as by not doing x (for instance, by cutting her hair as well as by not cutting her hair). The duty is not that you ought not do x ; the duty is that you ought not do x without the other person's consent.

5 Moral Magic?

Some authors think that there is something magical going on when consent does its normative work. Hurd writes: "Consent can, by itself, turn a battery into a handshake; a sexual assault into a kiss; a trespass into a dinner party; a theft into a gift; and the commercial appropriation of a name and likeness into a biography. Moral magic." (Hurd 1996, also Hurd 2018, p. 48).

I think, however, that there is nothing magical about how consent changes the normative situation. If the consent condition (without her consent) is met, you can satisfy the duty even if you do x . This is how conditional duties work. Take the example of another conditional duty: A should not ask B any questions if B has not told A that he may do so. The duty would be: $O(\neg A \rightarrow \neg \text{questions})$. If A tells B that B may ask him some questions B can satisfy his duty by doing so. There is no question of how the normative change is brought about in such cases, there is only the question whether conditional duties obtain: "Is B under a conditional duty not to ask A any questions if A does not tell him that he may do so?" However, if B has this duty, A changes the normative situation simply by satisfying the relevant condition of the duty in question. In the same vein, the question is not "How does consent change the normative situation?", the question is rather "Is there a consent-sensitive duty not to do x unless A consents (that is: Is there a duty of the form: $\neg c \rightarrow \neg x \rightarrow c \rightarrow \neg O(\neg x)?$)?" If this is the case, consent does change the normative situation simply by satisfying the given consent condition.

Cutting someone's hair is wrong if and only if it is done without the target's consent. Doing it without the other's consent is the wrong-making property in such a case. The objects of consent-sensitive duties have no further wrong-making property. If, for instance, $\neg c \rightarrow \neg x$ holds, x is not wrong as such. If, on the other hand, there is a consent-insensitive duty $O(\neg y)$, then y has a wrong-making property which makes it the case that it is wrong to do y . Exploiting people is an example of such an act: It is wrong to exploit people.¹⁰ The duty not to exploit others is a consent-insensitive duty. Valid consent cannot release others from consent-insensitive duties because it cannot eliminate the wrong-making property of the acts in question, for

¹⁰ See Feinberg (1986), 178: "(I)t is wrong because deliberately setting back another's interest for the sake of one's own gain ... is something we ought not to do, even when the other can have no grievance against us."

instance, exploiting someone. If one exploits another person one commits a wrong by wronging the victim, even if the victim has consented to it.

By being wrong I mean that the act has one or more wrong-making properties. These wrong-making properties may in certain situations be outweighed by other moral considerations and are then not wrong all things considered (see also McMahan 2002, p. 190). If, however, they are not outweighed by other moral considerations they are wrong and should not be performed. Consent does release others from a duty not to perform acts that are only wrong if they are not consented to. Consent cannot release others from a duty not to perform acts that have other wrong-making properties.

Take again our example: The mother releases her son from his duty not to violate her property rights. She does so because the duty not to take her money is a consent-sensitive duty: It is the duty not to take her money without her consent. But she cannot release him from his duty not to exploit her. The latter is a consent-insensitive duty. He flouts this duty and wrongs her.

6 The Scope of Consent-Sensitive Duties

Let us have a closer look at consent-sensitive duties. We are able to control the deontic status of the acts that are the objects of consent-sensitive duties others have towards us. By consenting we make it the case that we are not wronged by the consented act as we otherwise would have been. There are reasons why we should be able to control the deontic status of certain acts. Take acts such as cutting someone's hair or having sex with others. We have sometimes reasons to allow and sometimes reasons not to allow others to cut our hair or to have sex with us. This holds, of course, for many other types of action. We have sometimes reasons to release others from their duties; and we have sometimes reasons not to release them from their duties. The normative power to consent enables us to be responsive to reasons to release others from their duties. This does not imply that all my acts of consent are always reason responsive. I could give consent to another person out of mere caprice. In such a case I would not be reason-responsive. Still the power to be able to consent to having a haircut allows you to respond to the reasons you have. You could not respond to these reasons if others had a consent-insensitive duty not to cut your hair.

The fact that it is good to have the normative power to release someone from a certain duty should be understood as the reason why we have the relevant normative power. We should be able to release others from the duty not to cut our hair because we may have reasons to do so. This might explain why the duty not to cut another person's hair is a consent-sensitive and not a consent-insensitive duty. The fact that it is good to have the normative power of consent is a sufficient condition for having the normative power of consent.

One might argue, however, that we might sometimes have reasons to release others from the duty not to exploit us. Consider a case where I desperately need another's assistance to stay alive. He offers me assistance on condition that I pay him \$ 10,000. Say that this is ten times as much than what people are normally paid

for this kind of assistance. I consent to giving him the required amount of money. He exploits me by taking unfair advantage of me. Yet, it seems that I had reasons to release him from his duty not to exploit me. On closer inspection, however, by consenting to the deal I'm not consenting to being exploited. I consent to the deal because I want to stay alive. I have reasons to choose the necessary means to stay alive and I have no reason to release him from his duty not to exploit me.

7 Are There No Consent-Insensitive Duties?

Consenters would, however, never be wronged by that to which they consent if there were no consent-insensitive duties, that is, if all duties others have towards me were consent-sensitive duties. Consenters would never be wronged even in cases where the consented act was wrong all things considered. Consented acts could be wrong as a wronging of third parties. But if there were no consent-insensitive duties consented acts could not be wrong as acts wronging the consentor. As I have said, Bergelson holds the view that certain acts such as killing and hurting others are bad as such and could be wrong without wronging anyone (see Bergelson 2006, pp. 61; 2010, pp. 178). This, however, could not be the case if all duties were consent-sensitive. If so, consent would eliminate the wrong-making properties of the acts consented to. The mother's consent would release her son from his duty not to exploit her. The consent to be killed would release the other person from the duty not to kill others. The consent to being harmed would do the same with the duty not to harm other people. Thus, if there were no consent-insensitive duties consented acts could only be wrong if third-party rights were violated. They would, however, never wrong the consenters who validly consent.

Yet, the view that there are no consent-insensitive duties has implausible consequences. What we do to others who are able to consent could only be wrong as acts not having been consented to by the victims. Take the example of acts of exploitation. The duty would not be "You should not exploit others"; the duty would rather be "You should not exploit others without their consent". So if you exploit another person you would only wrong her if she had not consented to the act. The fact that you exploit her might, of course, be a reason that speaks against performing the act. If she released you from the duty not to exploit her you would get what Heidi Hurd's calls a "stained permission" (Hurd 1996, pp.123). What the consentee does is permissible. There is still something that could be held against performing the consented act. Yet, what she did would not wrong the consentor because she would—provided the duty not to exploit others would be a consent-sensitive duty—release the consentee from her duty not to exploit the consentor.

If there were no consent-insensitive duties the same applied to acts of killing, severely harming and degrading people. Severely harming would be wrong if and only if the victim did not validly consent to it. Causing severe harm as such would never make an act wrong. The same would apply to degrading, torturing, and killing people: These acts would only be wrong because the victims did not by consenting release the perpetrators from their duty not to degrade or to torture or to inflict

serious harm on them. Degrading someone or causing him serious harm would as such not be a wrong-making property. This, however, is a highly implausible view.

Some might argue that valid consent changes the nature of the acts concerned. The consentor is not seriously harmed if she consents to the harming act. But as I have argued in Sect. 3, consent changes the nature of acts only if consent is part of the description of the type of act consented to. Theft, for instance, is the taking of property without the owner's consent. So if the taking of property is done with the owner's consent it cannot be theft anymore. Acts such as inflicting serious harm on people or exploiting them, however, do not contain any reference to consent. Exploitation was understood in the above mentioned case as taking unfair advantage of another person. Whether this is the case does not depend on the consent of the person who is exploited. If it is wrong it remains wrong as an act consented to.

8 Conclusion

The *volenti maxim* tells us that a consentor is not wronged by that to which he consents if his consent is valid. If A consents to B's doing x, A is not wronged by B doing x because A has waived her right that B does not do x by consenting to it. I have argued that the consentor can be wronged in cases where she gives valid consent. Valid consent releases others from a consent-sensitive duty. Valid consent cannot release others from a consent-insensitive duty. The consentor cannot waive the right which corresponds a consent-insensitive duty. If the consentee flouts a consent-insensitive duty he wrongs the consentor. She would be wronged because the consentee had flouted a duty the consentor cannot release him from.

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