Just Bargains: When is Consent Coerced?

Jeffrey A. Gauthier
Department of Philosophy
University of Portland
5000 N Willamette Blvd
Portland OR 97203
503-943-7542
gauthier@up.edu

Submitted to
62nd Annual Northwest Philosophy Conference

Word Count: 3005

Just Bargains: When is Consent Coerced?

Abstract:

While virtually all social theorists agree that the consent of a disadvantaged party to coercive offers cannot count as legitimate, what counts as coercion remains in dispute. Even if consent to an offer such as "your money or your life" is obviously coerced, that the unequal bargaining conditions characterizing a broad range of consensual contracts should count as similarly coercive remains in doubt. Writers advocating workers' and women's rights have often argued that unjust background conditions render a broad range of employment and sexual offers made to workers and women respectively coercive. On the other hand, many contractarians resist the claim that oppressive background conditions invalidate the consent of disadvantaged parties, even if such offers would be rejected in the absence of those unjust conditions.

In my presentation, I argue that these contractarian arguments for validating consent under oppressive background conditions fail to recognize significant harms that such consent entails for the material welfare and autonomy of the disadvantaged parties. Arguments such as that of Wertheimer fail to address the critical issue of how a class of consensual transactions may reinforce the "non-ideal circumstances" that ostensibly necessitate them. Likewise, respect for the right of consent is plausible only if we can assume that the options available to the consenting party offer her a reasonable prospect of promoting her interests. As I will argue, members of socially *advantaged* classes have often sought to de-legitimate and legally restrict the "offers" that threatened to place their own material interests at risk, all without imperiling their moral autonomy thereby.

"Just Bargains: When is Consent Coerced?"

While virtually all social theorists agree that the consent of a disadvantaged party to coercive offers cannot count as legitimate, what counts as coercion is a matter of much dispute. While no one would question the claim that that assent to the robber's demand for money in the classic "your money or your life!" scenario is coercive and not valid consent, sharp disagreement exists as to whether a broader range of offers made under unjust or otherwise unequal bargaining conditions should count as coercive. Writers advocating workers' and women's rights have often argued that oppressive background conditions render a number of common employment and sexual offers made to workers and women respectively coercive (see for example MacKinnon 1989: 175, 247-48. and Daniels 1987). On the other hand, many contractarians resist the claim that unequal or oppressive background conditions invalidate the consent of disadvantaged parties, even if such offers would be rejected in the absence of those unjust conditions.

The argument against taking unjust background conditions as an impediment to valid consent rests on two broad sets of considerations. The first of these gives priority to respect for an agent's choices and the general capacity of people to license sub-optimal conditions by means of their consent. On this view the positive right to contract must be respected if we are to honor their rights at all (see for example, Gardner and Shute 2008: 208). A second argument for generally ignoring inequalities between contractors is consequentialist, holding that the freedom to contract is the best means for disadvantaged parties to better their situation and to improve their conditions. On this view, paternalist restrictions that restrict offers because of the unequal bargaining positions of the parties are generally seen as failing to bring about the best

consequences for the disadvantaged party. In morality and the law we ought to take a permissive approach to valid consent because of its beneficial effects, especially for those least well off.

I argue that arguments for dismissing the coercive potential of background conditions typically fail to account for significant harms that "bargaining" under such conditions entails for disadvantaged parties. In particular, I intend to show that the influential consequentialist approach of Alan Wertheimer underestimates what would be needed to show that a broad range of contracts under conditions of inequality meet a criterion for non-coercion. Notably, in arguing that consensual transactions are desirable for parties facing "non-ideal circumstances," Wertheimer and others fail to address the critical issue of how inegalitarian bargaining may be coercive by reinforcing the non-ideal circumstances that ostensibly make it attractive in the first place.

In discussing the question of coercive contracts I shall assume, without argument, Wertheimer's "moralized" account of coercion, one that has been used in other recent analyses as well (Cudd 2006, Conly 2004). On this account, A's offer to B is coercive only if it meets two criteria: (1) A leaves B with no reasonable choice other than to accept her proposal; (2) accepting A's offer leaves B worse off than B has a right to be with respect to A (Wertheimer 2003: 167; 1987: 30-31).[1] On such a moralized account to categorize a transaction as coercive is

[1] Wertheimer defends the moralized account by means of examples. Consider a lifeguard who, upon spotting individual in distress, offers rescue on the condition of a large cash payment. Although such a proposal leaves the person in distress better off than they would be without it, one has a right to expect more of a lifeguard. Rejecting the offer would leave the recipient worse off than she has a *right* to be, and thus she can legitimately claim to have been coerced to make the payment. Wertheimer likewise notes that not all offers the refusal of which leave the recipient worse off than before need be coercive. A district attorney's offer to a criminal defendant to accept non-prosecution for a serious crime in exchange for a guilty plea to a lesser crime, for example, places the defendant in a worse situation than she was prior to the offer. Plea bargaining does not give rise to charges of coercion, however, because the defendant is not worse off vis-à-vis the prosecutor than she has a right to be. For Wertheimer, examples such as these demonstrate that it is not simply the consequences of B's refusing an A's offer that make the offer coercive, but the effect of the refusing the offer on the relationship between A and B. A coerces B only if "A proposes to violate B's rights (or fails to fulfill an obligation to B) should B reject A's proposal" (Wertheimer 2003: 170).

also to render it morally impermissible. Other authors have usefully employed a morally neutral or empirical concept of coercion in which some forms of coercion are morally and legally legitimate (for example Cohen 1988, Dubois Cook 1972). In using a moralized conception of coercion for the purposes of this paper, I do not mean to imply any criticism of these approaches. Because Wertheimer is the focus of most of my criticisms here, however, I shall assume a moralized conception of coercion, though substantially the same criticisms could be developed using an empirical conception.

Secondly, because of my focus on contractarian schemes that are open to consequentialist arguments, I am setting aside deontological versions of contractarianism that defend a relaxed standard for consent on more clearly libertarian lines. I shall assume that "freedom of contract" is not sacred, and that the adverse consequences of unrestricted contracting on the parties themselves, as well as those on third parties, may justify regulation or restriction.

Why Inequality does not Matter

Consequentialist contractarian arguments for maintaining a relatively relaxed standard for valid consent rest on the claim that a restrictive approach would deprive relatively disadvantaged parties of a range of opportunities to improve their situation. While variously disadvantaged people might prefer ideally to resist offers that fall short of their most desired outcome, it would be a mistake to understand this as a problem for consent inasmuch as consensual bargaining is always a response to non-ideal circumstances. As Michael Trebilcock has noted, "If everyone possessed all the endowments needed to pursue any life plan he wished, contracting would be unnecessary" (1993:79). As the argument goes, the relatively disadvantaged benefit from the

ability of advantaged parties to make a wide array of self-interested offers—offers that they likely would not make at all in a more restrictive environment. As Wertheimer puts it:

> It is scarcity and constraints that explain the need for morally transformative consent…. [A]n adequate set of principles of valid consent must be applicable to the *non-ideal* circumstances in which people find themselves (2003: 191-92).

Despite the general desirability of contacts under non-ideal conditions, theorists such as Wertheimer grant that consent to some types of proposals may be regarded as invalid because "of the social consequences of regarding such arrangements as morally or legally permissible" (181). He argues, for example, that a case in which an applicant for employment is offered a job on the condition of sexual relations with the employer makes the applicant worse off than she has a right to be vis-à-vis her employer. This is because of the generally adverse consequences for prospective employees that would follow from permitting employers to make such proposals. In their absence, employers will still make job offers, and are likely to do so on generally more desirable terms than when sex-for-employment proposals are allowed (181). This is consistent with Wertheimer's broader view that whether or not transactions arising from unjust distributions of wealth and power ought to be permitted ultimately hangs on the effects of that policy: "If it turns out that permitting exploitative transactions that arise from unjust inequalities *lessens* the pressure to remove those inequalities…then there is a case for prohibiting those transactions" (Wertheimer 1996: 308). Because Wertheimer's approach permits moral and legal entitlements against certain kinds of proposals based upon their adverse social consequences for a disadvantaged class, determining whether consent to a proposal is coerced (and thus invalid) requires careful attention to the social consequences of a contractual practice.

Still, according to Wertheimer, this condition does not mean that consent to an exploitative offer granted against background conditions of inequality is *necessarily* invalid. To show this, Wertheimer asks us to consider the proposal of a "lecherous millionaire." B, whose "child will die unless she receives expensive surgery for which the state will not pay," receives an offer from A, a millionaire, to pay for the surgery on the condition that B becomes his mistress (164). Although the lecherous millionaire's blatant exploitation of B's circumstances is hardly praiseworthy and likely immoral, Wertheimer finds nothing in A's offer that violates B's moral or legal rights. B is no worse off than she was prior to the offer, and, critically, A has no moral and surely no legal obligation to spend his fortune on B. Moreover, restricting A's capacity to make such offers (e.g., by making them an illegal form of sexual extortion as suggested by authors such as Stephen Schulhofer), would not benefit B or people who are generally facing B's circumstances (Schulhofer 1998: 114-15). It would simply make such "beneficial" offers illegal and so less likely to occur. Of course, B may "feel coerced" in that she (correctly) perceives that she has no reasonable choice other than to accept A's exploitative and degrading terms given the background condition of her poverty and lack of access to health care. Wertheimer contends, however, that such *feelings* are no grounds for invalidating her consent to A's offer. B's lack of options in the face of the proposal and the background conditions that occasion it, are red herrings as far as coercion is concerned.

To demonstrate this point, Wertheimer compares lecherous millionaire's proposal to that of a physician (A) who offers a patient with gangrene (B) the choice of signing a consent form authorizing him to amputate her leg or to face likely death. Here too, the consenting party may feel that she has no reasonable choice other than to submit to the terms of the proposal, but no one would believe that this renders her consent invalid: "Although B may reasonably believe that

she has 'no choice' but to opt for amputation, we do *not* say that B's consent to amputation is not morally transformative because it is coerced by her circumstances. We would hardly charge A with battery on the grounds that he operated without B's valid consent..." (172-73). On Wertheimer's account, we should not confuse the constraints occasioned by unfortunate background conditions with coercion in any morally or legally relevant sense.

Why Inequality Should Matter

In Wertheimer's myriad examples of coercive and non-coercive proposals, he asks us to consider how these might occasion the recipient's (B's) choice between a two non-ideal outcomes. In the gangrene example the choice is between amputation and death; in the lecherous millionaire it is between a woman's sexual servitude and the death of her child. As Mark Kelman points out, however, getting a full sense of some of the critical differences between the examples requires that we consider not only the non-ideal options that are directly negotiated in the contract, but the preferred one assumed to be ruled out of play by the background conditions of the transaction (Kelman 2006: 965).[2] Consider one plausible version of B's preference order for the gangrene example:

(1) B goes on living with both legs intact;

(2) B goes on living with one leg amputated;

(3) B dies with both legs intact.

Other things equal, B would clearly prefer (1), an option that would eliminate any seriously harmful outcome. (1), however, is ruled out by the physical condition that is assumed in the

[2] Kelman takes up this heuristic in defending his claim that the problems that Wertheimer seeks to address are better approached "by thinking about *power* and the *redistribution* of power rather than coercion" (2006: 965). It is my intention to show that Wertheimer's use of his examples raise problems even using his own coercion-based account.

example. Thus, her non-ideal preference for (2) over (3) prompts her to accept the physician's proposal.

Now consider B's preference order in the lecherous millionaire example:

(1) B's child has life saving surgery and B is not in sexual servitude to A;

(2) B's child has life-saving surgery and B is in sexual servitude to A;

(3) B's child dies for lack of life-saving surgery and B is not in sexual servitude to A.

Wertheimer argues that, as in the gangrene example, B's first preference is ruled out by the background conditions of the example. Whereas in the first example a life cannot be saved without the amputation of a gangrenous leg, here "a child will die unless she receives expensive surgery for which the state will not pay" (Wertheimer 2006: 164). Because background conditions cannot coerce, and because neither proposal violates a right of B (B has a right neither to a cure to gangrene without amputation nor to a millionaire's largesse), B cannot be understood to be coerced into accepting her second best preference.

That said, certain differences between the two examples stand out. In the first place, the millionaire is clearly *exploiting* B's disadvantageous circumstances in a way that the physician is not. By contrast, we need not believe that the physician is in any way taking advantage of B's suboptimal circumstances to benefit himself in making his offer, as the millionaire clearly is. More importantly, B's situation in the gangrene case is the result of certain physical facts, while the cost of a child's surgery and the state's refusal to cover it are socially constructed states of affairs. Even in a health care regime in which all medical expenses were socialized, B could still face a physician's proposal to amputate a gangrenous leg. The same cannot be said for the proposal of the lecherous millionaire, where B's lack of any reasonable alternative other than

consent to A's plan is a result of various socially contingent public practices. To get a better handle on the implications of this distinction, it is useful to consider an example in which Wertheimer does see the proposal as violating the protocols of valid consent—where the proposal makes the recipient worse off than has a right to be, thus rendering her consent invalid.

In the case of the applicant offered a job on the condition of sexual relations with the employer, we can assume that the preference order for the applicant would be something like the following:

(1) B is employed and is not obligated to have sexual relations with A;

(2) B is employed and is obligated to have sexual relations with A;

(3) B is unemployed and is not obligated to have sexual relations with A.

In claiming that A's offer makes B worse off than she has a right to be, Wertheimer implies that, in this particular case, B is entitled to a fair opportunity to obtain her first preference and does not have to "settle for second best." To compel her to give up on her most preferred outcome would be to deny her a right to compete fairly for employment opportunity. Presumably the idea here is that if A can make a sexual quid pro quo employment proposal that threatens to deprive B of (1), then B is being denied her employment rights. In other words, B's having a fair opportunity to realize her first preference is a necessary condition for her rights to be respected.

But why is this not the case for the mother whose child is in need of surgery? Presumably, Wertheimer would reply that offers such as that of the millionaire, while exploitative and probably immoral, have the potential to improve the conditions of mothers facing similarly difficult situations. On his consequentialist approach, it is acceptable to prohibit unfair or exploitative transactions if doing so would compel the powerful to transact on fairer terms. Forbidding potentially harassing employers from offering sexual quid pro quos is

acceptable because it does nothing to reduce the employers' need for labor, but only forces them to conduct labor negotiations more fairly. As noted earlier, however, Wertheimer sees establishing a right against sexual extortion as simply curtailing a class of transactions altogether, leaving those who might welcome them worse off than before.

Such a response, however, overlooks at least two important facts. In the first place, at least in Wertheimer's example, a right to health care for one's dependents would render the questions concerning a right against sexual extortion moot. In asserting that his lecherous millionaire example is one in which a person has no right to her first preference and must "settle for second best," Wertheimer simply assumes that no moral right to health care exists. Inasmuch as such a right would make B's otherwise undesired sexual bargaining unnecessary, it is hard to see why this is so. Secondly, even if the example were constructed without reference to poverty and health care to judge that recipients have no right against sexual offers because their prohibition would reduce the number of potentially attractive sexual proposals seems shortsighted and overly narrow. Even if the rich and lecherous were less inclined to pursue poor and destitute women with their sexual proposals, this need not mean that the interests of poor women or of women generally would be harmed in the long run.

To see why this is so, it is necessary to take a broader view of how particular transactions shape, and take shape within, markets. More is at stake here than a one-time transaction between "A and B." For one thing, the gendered character of the exchange, in which a male seeks sexual advantages by exploiting an impoverished woman (put into desperation by her motherhood no less), raises a set of important concerns. As some feminists have argued, the legitimation of prostitution contracts reinforces a condition in which women are cast as men's sexual servants (see for example Pateman 1988: 208. See also, Satz 1995: 80, O'Connell-Davidson 2002: 84-98). Even setting aside third party concerns, however, assessing the consequences for contractors of a permissive

consent policy for sexual contracts must go beyond simply tallying the lost opportunities if sexual offers of this sort were banned. Critically, because most people have a strong preference for making their sexual choices free from the constraints of market forces, the only people who might welcome such offers are the very worst off. These people, in turn, with their highly restricted alternatives, are those worst positioned to bargain for the benefits that they need. As Norman Daniels has argued with respect to hazard pay, over time, the institutionalization of a marketplace for undesirable high risk work does not tend to benefit the people who take it on, but rather increases the background inequalities that made the work attractive to them in the first place (Daniels 1987: 55). These same considerations lie behind As Scott Anderson's recent argument that sanctions against sexual contracts may function to protect those women who are least well-off from the interference of market forces on sexual choices (Anderson 2002: 777). Making certain kinds of transactions impermissible and thereby invalidating consent to them reduces the likelihood that the worst off parties will find themselves having to succumb to such offers and thereby contributing to a lowering the baseline for others in similar circumstances.

Although Wertheimer is correct that the patient with gangrene and the woman who cannot pay her child's medical expenses may both be understood to face a choice that is "forced" by background circumstances, the cases are asymmetrical as concerns the moral consequences of permitting the offers of the doctor and the millionaire respectively. A patient facing a hard medical choice is not helped by making it impermissible for a physician to pose the choice. There is no marketplace for disease such that by making certain kinds of medical proposals impermissible patients can compel doctors to make better proposals in the future. In the case of offers that exploit unjust background conditions, in at least some cases, restricting the right of privileged parties to make such offers can serve to prevent the formation of markets that would serve to worsen the inequalities that occasion them.

Selected Bibliography

Anderson, Scott A. "Prostitution and sexual autonomy: Making sense of the prohibition of prostitution." *Ethics* 112 (2002): 748-80

Cohen, G.A. *History, Labor, and Freedom: Themes from Marx*. New York: Oxford University Press, 1988.

Conly, Sarah. "Seduction, Rape, and Coercion," Ethics 115 (October 2004): 96–121.

Cudd, Anne. *Analyzing Oppression*. New York: Oxford University Press, 2006.

Daniels, Norman. "Does OSHA Protect Too Much?" *Moral Rights in the Workplace*, ed. Gertrude Ezorsky. Albany: State University of New York Press, 1987, pp. 51-60.

Dubois Cook, Samuel. "Coercion and Social Change." *Coercion*, ed. Roland Pennock and John Chapman (Chicago: Aldine Atherton, 1972), pp. 107–43.

Gardner, John and Stephen Shute. "The Wrongness of Rape." *Oxford Essays in Jurisprudence*. Ed. Jeremy Horder. New York: Oxford University Press, 2000, pp193-217.

Kelman, Mark, "Thinking about Sexual Consent," *Stanford Law* Review 58 (January 8, 2006): 935-987.

MacKinnon, Catharine. *Toward a Feminist Theory of the State.* Cambridge: Harvard University Press, 1989.

O'Connell Davidson, Julia. The rights and wrongs of prostitution. *Hypatia* 17 (2002): 84-98.

Pateman, Carole. *The sexual contract.* Stanford: Stanford University Press: 1988.

Satz, Debra. Markets in women's sexual labor. *Ethics* 106 (1995): 63-85

Schulhofer, Stephen J. *Unwanted Sex: The Culture of Intimidation and the Failure of Law*. Cambridge Ma. Harvard University Press.

Trebilcock, Michael. *The Limits of Freedom of Contract.* Cambridge, Ma. Harvard University Press, 1993.

Wertheimer, Alan. *Coercion.* Princeton, N.J.: Princeton University Press, 1987.

____. *Consent to Sexual Relations.* New York: Cambridge University Press, 2003.