

PEDOPHILIA
AND
ADULT-CHILD SEX

A Philosophical Analysis

STEPHEN KERSHNAR



Pedophilia and Adult-Child Sex

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To my brother and sister, experts on Spargo Road, Jade Winds, and Mitzi.

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Introduction

This book provides a philosophical analysis of adult-child sex. The activity intuitively strikes many people, including myself, as sick, disgusting, and wrong. The problem is that it is not clear whether these judgments are justified and whether they are aesthetic or moral. By analogy, many people find it disgusting to view images of obese people having sex, but it is hard to see what is morally undesirable about such sex. Here the judgment is aesthetic. This book looks at the moral status of such adult-child sex. In particular, it explores whether those who engage in adult-child sex have a disease, act wrongly, or are vicious. In addition, it looks at how the law should respond to such sex given the above analyses.

WHY WE SHOULD BE SKEPTICAL OF OUR FOLK KNOWLEDGE ABOUT ADULT-CHILD SEX

Most people in response to discussions of adult-child sex claim that they do not need scientific studies to tell them that adult-child sexuality is harmful, bad, wrong, imprudent, and ugly. They claim to know these things without reference to, or even caring about, empirical studies on the topic. That is, they claim they do not need any “stinkin’” studies like the following: meta-analyses of children who have had such sex in a non-forced manner, whether people in the past had sex with children and teens, whether people in pre-industrial tribes still have such sex, and whether our closest relatives, bonobos, do so. Here I argue that they are wrong. My thesis is the following.

Thesis: Skepticism. We should be skeptical about what we know about the effect of adult-child sex on children.

Argument

- (P1) We should be skeptical about what we know about children in general.
- (P2) We do not have much specialized knowledge about children’s sexuality.
- (P3) If we should be skeptical about what we know about children in general and we do not have much specialized knowledge about children’s sexuality, then we should be skeptical about what we know about the effect of adult-child sex on children.

(C1) Hence, we should be skeptical about what we know about the effect of adult-child sex on children. [(P1)–(P3)]

Premise (P1) (We should be skeptical about what we know about children in general) rests on the following two assumptions.

Assumption #1: Widespread Error. People make widespread errors that reflect a flawed general knowledge of children.

Specifically, they act on things that they do not know and think they know things that they don't know.

Assumption #2: Widespread Error to General Skepticism. If people make widespread errors that reflect a flawed general knowledge of children, then we should be skeptical about what we know about children in general.

The first assumption can be seen in several areas. One area is control.

Assumption #1a: Control. People think they have control over their children in areas they don't.

An example of this has to do with good traits. Parents think they can have an enormous influence on their children.¹ Genetic effects are quite strong; parental effects are surprisingly not. Twin research studies show that parents' child-rearing practices have little to no effect on life expectancy, overall health, happiness, and self-esteem.² Parents might have a small effect on smoking drinking, and drug problems, but not a large one. They have little effects on their child's success. By "success," I mean high income and educational achievement. Parents have little to no effect on their children's intelligence, grades, and income and wealth.³ Also, parents have little to no effect on character traits (for example, conscientiousness and agreeableness) and values (for example, religious attitudes and behavior and political attitudes and behavior).⁴ Parents have little or no effect on teen pregnancy and adult sexual behavior.⁵

A second area is children's behavior.

Assumption #1b: Behavior. People misunderstand children's behavior and how to nurture desirable behavior.

One example of this has to do with relationships. Parents are notorious for prioritizing their relationships with their children over the one between each other. But children's emotional well-being and security are

more affected by the relationship between the parents than by the direct relationship between the parent and child.⁶

A second example has to do with excessive praise. Parents often engage in excessive praise. But excessive praise of the wrong sort distorts children's motivation for the worse.⁷

A third example has to do with arguing and lying. Parents do not see the tradeoff between their children arguing and complaining and their lying. In families where there was less deception, and thus more honesty, teens were more likely to argue and complain. Parents did not always realize the tradeoff.⁸

A fourth example has to do with diversity. Parents value diversity in schools as a way of teaching their children how to interact with people from different racial and ethnic groups. The more diverse the high school, the more students self-segregate by race within the school and the fewer interracial friends they have. That is, more diversity leads to more racial division.⁹

A fifth example has to do with racial preferences. People assume that racism has to be learned. There is evidence that babies prefer interactions with people of their own race and pre-school children have striking racial preferences.¹⁰ A plausible explanation of this is that there is a genetic preference toward members of the same race.

A third area is danger.

Assumption #1c: Danger. People misperceive the danger to children and how to reduce it.

First, consider abduction. One in a million children is abducted. On average, if one wanted her child to be kidnapped and held overnight by a stranger, she'd have to leave the child outside and unattended for 750,000 years. That is a twentieth of the rate of drowning and a fortieth of the risk of a fatal car accident.¹¹ Abduction-murders are less than 1% of the child-mortality rate.

Second, consider tradeoffs. People sometimes think that safety should not be traded off for other things. Consider, for example, today's over-protective parenting. Yet they often trade off safety for other things. For example, people spend money on vacations or a college fund rather than a sprinkler system for their house.¹²

Third, people also trade off some safety concerns for other safety concerns, but do so without an accurate understanding of such concerns. People often misunderstand how to increase safety. For example, forty years ago, two-thirds of children walked or biked to school; now 10 percent do. A generation ago, 70 percent of children played outside; now 30 percent do.¹³ Similarly, in the United Kingdom in 1971, 80 percent of third-graders walked to school. By 1990, only 9 percent did so. Now even fewer do so.¹⁴ Given that more than twice as many children are hit by

cars driven by parents taking their children to school as by other kinds of traffic, when more parents drive their kids to school to prevent them from being abducted, this arguably increases the number of children who get killed.¹⁵

Even commonly believed dangers turn out to be false. Despite urban myths about poisoned candies and apples with razor blades, no child has ever been killed or seriously injured by Halloween treats.¹⁶

Fourth, consider concern for ritual or satanic abuse. In the 1980s and early 1990s, there were many stories and discussions in the media of ritual or satanic abuse of children.¹⁷ There were high-profile prosecutions in California, Minnesota, and Nebraska in the 1980s. The most famous was the outrageous McMartin preschool case that was the focus of two different CBS *60 Minutes* stories. The concern for such abuse was so widespread that it was respectfully discussed in a number of major magazines and television news shows. It was respectfully discussed in professional psychiatric and psychological journals. It also was the focus of a number of fiction and non-fiction books.

The notion that satanic or ritual child abuse took place was a myth and the trials turned out to be witch hunts. A 1994 National Center on Child Abuse and Neglect-sponsored study of allegations of ritualistic sexual abuse found not a single case of group-organized sexual abuse. These prosecutions and stories were widespread. This led to debunking articles in high-profile magazines such as *New Yorker*, *Harper's*, *National Review*, *Vanity Fair*, *Redbook*, *Mother Jones*, *Village Voice*, and *Playboy*. The claim that such ritualistic abuse occurred was attacked on such shows as CBS's *60 Minutes* and *48 Hours*, ABC's *Primetime Live* and *20/20*, and PBS's *Frontline*. In retrospect, that this was a hoax was obvious. There was no reliable evidence of human sacrifice, ritual celebrations, or organized abuse rings. The lack of defectors from these alleged groups made this even more obvious that such cults did not exist.

Fifth, consider recovered memories. In the 1980s, the use of recovered memories to discover sexual abuse of children grew rapidly.¹⁸ More than twenty states changed their laws to better allow the treatment to be used in prosecutions.

Later, experts strongly criticized this treatment as unreliable and eventually this criticism was covered in mainstream periodicals such as the *New York Times*, *Time*, and *Newsweek*; news programs such as ABC's *20/20* and *Primetime Live*; and a number of books. All emphasized how this treatment can and did harm innocent people accused of sexual abuse. The treatment eventually looked absurd as patients "recovered" memories of being abducted by alien beings and UFOs.

Premise (P2) (We do not have much specialized knowledge about children's sexuality) rests on the following. This premise is supported by two assumptions.

Assumption #2a: Counterintuitive Studies. The studies about childhood sexuality are strongly counterintuitive.

One example of this is positive and neutral responses to adult-child sex. A significant number of the boy and girl participants in adult-child sex have positive or neutral responses to it, although many had a negative response as well.¹⁹ In discussions of it in the major media, or even around the watercooler, as far as I can tell, this fact about it never comes up.

A second example concerns child-sex crimes. Some empirical estimates of the pedophilia-related facts differ sharply from what many people believe. Judith Levine states that despite the widespread fear of stranger-pedophiles, in one estimate more than half and on some accounts almost all child sexual abuse occurs from their family members or parental substitutes. She states that child-sex crimes against strangers are rare, although incest is not.²⁰ Also, contrary to popular belief, Levine states that the vast majority of criminal-pedophiles do not ravage small children. Rather, they look at child pornography. They're not even true pedophiles in that their desired objects are adolescents. They are hebephiles.²¹

Assumption #2b: Experience. Most people do not have much experience with childhood sexuality.

The ones who had some such experiences are likely to misremember them.²² Nor have we heard many firsthand accounts. If studies about childhood sexuality are strongly counterintuitive and most of us do not have much experience with childhood sexuality (nor have we heard many firsthand accounts), then we do not have much specialized knowledge about children's sexuality.

Premise (P3) says if we should be skeptical about what we know about children in general and we do not have much specialized knowledge about children's sexuality, then we should be skeptical about what we know about the effect of adult-child sex on children. (P3) rests on the notion that someone should be skeptical about what he knows about an area if he lacks either general or specific knowledge about it.

Table 0.1 summarizes these results.

We now turn to objections to this argument.

OBJECTIONS

One objection asserts that the argument fails to respect folk knowledge. This is aimed at premise (P1). The objector claims that people have folk knowledge in many areas. Because they have folk knowledge elsewhere

Table 0.1.

Knowledge about children	Issues	
General	Parental Influence	Parents have little to no effect on: <ol style="list-style-type: none"> 1. Life expectancy 2. Health 3. Happiness 4. Self-esteem 5. Intelligence 6. Educational success 7. Income and wealth 8. Character traits (for example, conscientiousness and agreeableness) 9. Values (for example, religious attitudes and behavior and political attitudes and behavior) 10. Sexuality (for example, teen pregnancy and adult sexual behavior)
General	Behavior	Counterintuitive facts about: <ol style="list-style-type: none"> 1. Relationships 2. Excessive praise 3. Arguing/Lying 4. Diversity 5. Early race preferences
General	Danger	People have or had misperceptions about: <ol style="list-style-type: none"> 1. Abduction 2. Trading off other things for safety 3. Trading off safety for safety 4. Ritual or satanic abuse 5. Recovered memories
Specific	Studies	Studies about childhood sexuality are strongly counterintuitive: <ol style="list-style-type: none"> 1. Positive and neutral responses to adult-child sex 2. Child-sex crimes
Specific	Experience	We do not have much experience with childhood sexuality

and it is valuable there, they likely have it and it is valuable in the context of adult-child sex. For example, the objector continues, many people would rightly claim they don't need studies to know that the United States is more violent now than in the last forty years, former alcoholics cannot drink socially, men own most of the wealth in this country, women almost never press fake rape charges, and being a police officer is more dangerous than being a farmer or truck driver.

This objection fails. First, the fact that someone or some group has folk knowledge in one area is weak evidence that they have it in a second. This is undermined when they are shown to lack folk knowledge on important issues in that area. For example, someone who is a natural at cooking need not have a similar knack for clothes.

Second, even if people have some instances of folk knowledge, they do not know when they have it. That is, they lack second-order knowledge of when they have it. They don't even know how often they have it. This makes it doubtful that folk knowledge is a useful guide to policy. For instance, all above purported cases of folk knowledge are false.²³ A simple way to put this is that we often think that we know something when we don't.

A second objection is that this sort of empirical data is irrelevant to people's moral position on adult-child sex. An objector might claim that these data are irrelevant because adult-child sex is wrong regardless of whether it is harmful or has empirically discoverable negative consequences.

The problem with this is that aside from the no-consent objection, the other prominent objections—harm, exploitation, and unnecessary risk—all relate to effects of such sex on children's well-being. The no-consent objection is that such sex is wrong because children cannot or have not given valid consent. Even the concern about consent is not entirely independent of well-being as we are not especially concerned about whether children consent to activities such as Cub Scouts, kosher eating, and Bar Mitzvah training. This is most likely because these activities are not dangerous. Another problem is that it's not an objection to the argument at all. The argument was about skepticism concerning effects, and had nothing to do with wrongness.

CONCLUSION

Here I argued that we should be skeptical about what we know about the effect of adult-child sex on children. My argument rested on three notions. First, we should be skeptical about what we know about children in general. The second notion is that we do not have much specialized knowledge about children's sexuality. The third notion is that if studies about childhood sexuality are strongly counterintuitive and most of us do not have much experience with childhood sexuality (nor have we heard many firsthand accounts), then we do not have much specialized knowledge about children's sexuality. If this is correct, then in deciding what to think about adult-child sex we cannot use folk knowledge to test our philosophical evaluation of it or even to lessen our confidence in the conclusion of such an evaluation. This book consists of our philosophical evaluation of adult-child sex. Here is an overview.

OVERVIEW

In chapter 1, I argue that a pedophile is a person who has frequent and intense pedophilic desires (analyzed below) concerning individuals who appear to be in a pre-pubescent stage. This analysis excludes those who sexually desire children who look like adults and includes those who sexually desire those who are not children but look like them. This definition has several advantages over the clinical definition found in the fourth edition of *Diagnostic and Statistical Manual of Mental Disorders*, although the latter's defects might be the price for an operational definition. Here, then, is how I define the key terms.

- *Pedophilic Desire*: A pedophilic desire is an inclination in an adult to have sex with a child.
- *Pedophilia*: A person has pedophilia if and only if he has relatively frequent and intense pedophilic desires.
- *Pedophile*: A pedophile is someone who has pedophilia.

This definition allows non-pedophiles to have infrequent or weak pedophilic desires.

In chapter 2, I provide a two-part framework to determine whether pedophilia is a mental disorder. Following Jerome Wakefield, I adopt the following framework that, roughly, a condition is a mental disorder if and only if the condition causes harm and the harm results from a dysfunction in a mental mechanism. I argue that it is not clear that pedophilia satisfies the dysfunction-criterion. First, if a mental mechanism has a dysfunction, then it fails to perform its natural function. A natural function is an effect that is part of the evolutionary explanation of the existence and structure of the mechanism. There are several reasons to believe that pedophilia has an evolutionary explanation.

In evolutionary terms, one would expect thoughts (or behaviors) that are selected for by evolution or associated with conditions that are so selected to be widely held (or done) by human beings in our culture, humans in other cultures and times, and apes. This is because a feature in human beings that significantly frustrates reproductive fitness would likely be selected against, whether directly or indirectly. If a feature is widespread and persists over evolutionary development, then it probably has some connection or compatibility with fitness-enhancing genes, however indirect. All conditions are present to some degree, although there is less evidence for pedophilia being widespread in our culture than its occurring across humans in other cultures and times and in apes. In the end, there is evidence against its being a dysfunction, but it is not strong. I should note that this argument is tempered by the notion that a failure might occur because of the complexity of normal sexual development. From an engineering perspective, sometimes genetic flaws occur

because natural selection has not yet figured out how to avoid a flaw and the cost of keeping it is not high.

It is also unclear whether pedophilia satisfies the harm-condition. There is little evidence that pedophiles have less pleasure than non-pedophiles or that they suffer because of pedophilia by itself. They might suffer because they are unable to act on their desires or because they are punished severely when they do. Either might be the relevant harm if their inability to act on their desires or tendency to be punished reflects the rational preferences of members of their population. This depends on whether others' responses are rational and this in turn depends on the moral status of such sex. By analogy, consider that in the recent past gays suffered for similar reasons (and still do in many places).

On some accounts, the relevant harm is harm to others, specifically children. However, it is unclear what type of pedophilic acts should ground judgments about this type of harm (for example, all adult-child sex or only those with willing participants). Also, it is unclear whether such sex, when the children are willing, is harmful. At least some of the studies undermine our confidence in the notion that adult-child sex with *willing* child participants is always or usually harmful. The limited and controversial data on long-term harm suggests that it is unclear whether it is harmful. Given that there is weak evidence that pedophilia is not a dysfunction and mixed evidence on whether it is harmful, we cannot be confident that it is a mental disorder.

In chapter 3, I look at whether adult-child sex is wrong. Adult-child sex involving willing participants has an unclear moral status. It is not clear whether non-forward-looking (roughly, deontological) reasons show it to be wrong. That is because in cases of willing participants, it does not invariably involve wrong-making features such as a right-infringement, a failure to satisfy counterfactual consent, exploitation, or an incorrect motivation.

One objection to my analysis is that even if it is all correct, it fails to capture the notion that there is something wrong, bad, blameworthy, or otherwise negative about pedophiles as such and adults who engage in adult-child sex as such. This is misleading. My analysis simply provides reason to reject the general condemnation of adult-child sex. It in fact assumes or entails that child-rapists act wrongly, people who have sex with children because they enjoy the children's pain are vicious, and people who believe that adult-child sex endangers children for no good reason and do so anyway are blameworthy. It allows for negative judgments about many pedophiles and others who engage in adult-child sex. It also allows that some adult-child sex, perhaps even some in the real world, is not wrong and does not involve vicious or blameworthy adults. The relative frequency of such cases is an empirical question and not one that can be answered through anecdote or armchair speculation. The above analysis attempts to highlight those conditions that allow the em-

pirical investigation to be focused on relevant factors. This investigation might involve, for example, a child's knowledge of the relevant facts relating to sex or the harm that this particular instance of willing adult-child sex will bring about.

The next two chapters set out notions underlying chapter 3 in greater depth. Chapter 4 looks at the nature of consent, how it works, and how it applies to adult-child sex. Chapter 5 looks at the nature of exploitation, whether it is wrong, and how it applies to adult-child sex. Both are part of the broader inquiry into whether such sex is morally wrong.

In chapter 6, I assess the forward-looking (roughly, consequentialist) reasons for and against such sex. These factors are difficult to assess. When both participants are willing, the risk of long-term harm is unclear. There is reason to believe that in some cases (for example, force, genital contact, and father figures) there is a risk of significant harm. The relevance of forward-looking considerations also depends in part on whether the standard objections to consequentialism or other forward-looking theories succeed.

In chapter 7, I assess the moral status of the people who have pedophilic desires and fantasies and conclude that they are not necessarily vicious. They do not always have a pro-attitude toward an intrinsic or relevant instrumental evil. In the context of fantasies, their intensity is not always disproportionate to their object. Some pedophilic desires and fantasies are vicious, but this is true for many types of desires and fantasies.

Such fantasies are likely vicious on an Aristotelian character-based theory of vice. This is because on an Aristotelian theory, a virtuous individual has those emotions and acts that allow an individual to flourish in some range of societies (perhaps including his own) and sexually desiring individuals with whom he is not allowed to have sex or who cannot sexually reciprocate might hinder flourishing. However, the Aristotelian theory is problematic insofar as it conflicts with intuitions that individual attitudes and acts are by themselves virtuous or vicious.

Such pedophilic desires and fantasies do not wrong anyone either on deontic or consequentialist grounds. If every wrong act wrongs someone, then it is not wrong to enjoy such fantasies. This is because such desires and fantasies do not always infringe on someone's claim or make someone worse off. Nor are they vicious or irrational.

In chapter 8, I argue that the state should punish a sex-related act only if it infringes on a moral right, punishing the sex-act-type would maximize the good (or, perhaps, the good for some group), and the procedure by which people are punished respects rights, is reliable, and does not impose an unreasonable risk. I argue that a practical test for the second and third conditions is whether the punishment satisfies a cost-benefit analysis and intermediate scrutiny. Intermediate scrutiny allows the state to punish an act-type only if (1) the state has a substantive (legitimate and important) state interest, (2) punishment directly advances that interest,

and (3) what is punished and the severity of punishment are the least restrictive alternative. I then argue that given the value in preventing child rape and incest, both of which are extremely harmful, it seems plausible that the criminalization of willing adult-child sex passes the practical tests. I expressed some concern, however, as to whether armchair evaluations of empirical effects are enough to warrant criminal punishment, let alone significant criminal punishment. This is particularly true given the historical role of such armchair evaluations in other policy areas.

In summary, then, this book looks at the nature of pedophilia and whether it should be understood as disease. It also looks at the related notion of adult-child sex. In particular, it looks at whether such sex is wrong or vicious and whether it should be criminalized. The book also explains why adult-child sex is often wrong, bad, or blameworthy and what we think is negative about many pedophiles and adults who engage in it.

NOTES

1. For a summary of the literature, see Bryan Caplan, *Selfish Reasons to Have More Kids: Why Being a Great Parent Is Less Work and More Fun Than You Think* (New York: Basic Books, 2011), ch. 2.

2. For life expectancy, see Anne Herskind et al., "The Heritability of Human Longevity: A Population-Based Study of 2872 Danish Twin Pairs Born 1870–1900," *Human Genetics* 97 (1996): 319–323; Anatoli Yashin et al., "Half of the Variation in Susceptibility to Mortality Is Genetic: Findings from Swedish Twin Survey Data," *Behavior Genetics* 29 (1999): 11–19. For health, see Kaare Christensen et al., "A Danish Population-Based Twin Study on General Health in the Elderly," *Journal of Aging of Health* 11 (1999): 49–64; Pia Svedberg et al., "Age and Sex Differences in Genetic and Environmental Factors for Self-Rated Health: A Twin Study," *Journal of Gerontology* 56 (2001): 171–178; Raija Leinonen et al., "Genetic Influences Underlying Self-Rated Health in Older Female Twins," *Journal of the American Geriatrics Society* 53 (2005): 1002–1007; Jennifer Harris et al., "Age Differences in Genetic and Environmental Influences for Health from the Swedish Adoption/Twin Study of Aging," *Journal of Gerontology* 47 (1992): 213–220. For the happiness claim, see David Lykken, *Happiness: The Nature and Nurture of Joy and Contentment* (New York: St. Martin's Press, 2000), 57. For self-esteem, see K. S. Kendler et al., "A Population-Based Twin Study of Self-Esteem and Gender," *Psychological Medicine* 28 (1998): 1406.

3. For the claim about intelligence, see Thomas Bouchard et al., "Sources of Human Psychological Differences: The Minnesota Study of Twins Reared Apart," *Science* 250 (1990): 23; Robert Plomin et al., "Variability and Stability in Cognitive Abilities Are Largely Genetic Later in Life," *Behavior Genetics* 24 (1994): 214; Danielle Postuma et al., "Genetic Contributions to Anatomical, Behavioral, and Neurophysiological Indices of Cognition," in Robert Plomin et al., eds., *Behavioral Genetics in the Postgenomic Era* (Washington, DC: American Psychological Association, 2002), 143; John Loehlin et al., "Hereditry, Environment, and IQ in the Texas Adoption Project," in Robert Steinberg and Elena Grigorenko, eds., *Intelligence, Heredity, and Environment* (Cambridge: Cambridge University Press, 1997), 123. For the claim about grades, see Karri Silventoinen et al., "Heritability of Body Height and Educational Attainment in an International Context: Comparison of Adult Twins in Minnesota and Finland," *American Journal of Human Biology* 16 (2004): 544–555; Francois Nielsen, "Achievement and Ascription in

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4. See character traits and values. For the claim about character traits, see John Loehlin, "Resemblance in Personality and Attitudes Between Parents and Their Children," in Samuel Bowles et al., eds., *Unequal Chances: Family Background and Economic Success* (Princeton: Princeton University Press, 2005), 198; Thomas Bouchard, "Genes, Environment, and Personality," *Science* 264 (1994): 1700–1701; Rainer Riemann et al., "Genetic and Environmental Influences on Personality: A Study of Twins Reared Together Using the Self- and Peer Report NEO-FFI Scales," *Journal of Personality* 65 (1997): 449–475; John Loehlin et al., "Heritabilities of Common and Measure-Specific Components of the Big Five Personality Factors," *Journal of Research in Personality* 32 (1998): 431–453. For the claim about religious values, see Laura Koenig et al., "Stability and Change in Religiousness During Emerging Adulthood," *Developmental Psychology* 44 (2008): 532–543; Laura Koenig et al., "Genetic and Environmental Influences on Religiousness: Findings for Retrospective and Current Religiousness Ratings," *Journal of Personality* 73 (2005): 471–488; Thomas Bouchard et al., "Genetic Influence on Social Attitudes: Another Challenge to Psychology from Behavior Genetics," in Lisabeth DiLalla, ed., *Behavior Genetics Principles: Perspectives in Development, Personality, and Psychopathy* (Washington, DC: American Psychological Association, 2004), 92–95. For the political claim, see Peter Hatemi et al., "Is There a 'Party' in Your Genes?" *Political Research Quarterly* 62 (2009): Tables 3, 5; Thomas Bouchard and Laura Koenig, "Genetic and Environmental Influences on the Traditional Moral Values Triad—Authoritarianism, Conservatism, and Religiousness—as Assessed by Quantitative Behavior Genetic Methods," in Patrick McNamara, ed., *Where God and Science Meet*, vol. 1 (Westport, CT: Praeger, 2003), 27–29; John Alford et al., "Are Political Orientations Genetically Transmitted?" *American Political Science Review* 99 (2005): 153–167.

5. For the claim about teenage pregnancy, see Mary Waldron et al., "Age at First Sexual Intercourse and Teenage Pregnancy in Australian Female Twins," *Twin Research and Human Genetics* 10 (2007): 440–449; Joseph Rogers et al., "Nature, Nurture and First Sexual Intercourse in the USA: Fitting Behavioural Genetic Models to NLSY Kinship Data," *Journal of Biosocial Science* 31 (1999): 29–41. For the claim about adult sexual behavior, see Lynn Cherkas et al., "Genetic Influences on Female Infidelity and Number of Sexual Partners in Humans: A Linkage and Association Study of the Role of the Vasopressin Receptor Gene (AVPR1A)," *Twin Research* 7 (2004): 649–658; Khytam Dawood et al., "Genetic and Environmental Influences on Sexual Orientation," in Yong-Kyu Kim, ed., *Handbook of Behavior Genetics* (New York: Springer, 2009), 271; Victor Jockin et al., "Personality and Divorce: A Genetic Analysis," *Journal of Personality and Social Psychology* 71 (1996): 288–299; Hans-Peter Kohler et al., "Is Fertility Behavior in Our Genes? Findings from a Danish Study," *Population and Development Review* 25 (1999): 253–288.

6. See Po Bronson and Ashley Merryman, *NurtureShock: New Thinking about Children* (New York: Twelve, 2009), 184 citing Mark Cummings, "Marital Conflict and Children's Functioning," *Social Development* 3 (1994): 16–36 and Mark Cummings et al., "Children's Responses to Everyday Marital Conflict Tactics in the Home," *Child Development* 74 (2003): 1918–1929.

7. See Bronson and Merryman, *NurtureShock*, 20–21; Jennifer Henderlong and Mark Lepper, "The Effects of Praise on Children's Intrinsic Motivation: A Review and Synthesis," *Psychological Bulletin* 128 (2002): 83–95; and Claudia Mueller and Carol Dweck, "Praise for Intelligence Can Undermine Children's Motivation and Performance," *Journal for Personality and Social Psychology* 75 (1998): 33–52.

8. See Bronson and Merryman, *NurtureShock*, 148.

9. See *ibid.*, 60–61 and James Moody, "Race, School Integration, and Friendship Segregation in America," *American Journal of Sociology* 107 (2001): 679–716.

10. See K. D. Kinzler et al., "Accent Trumps Race in Guiding Children's Social Preferences," *Social Cognition* 27 (2009): 623–634; F. E. Aboud, *Children and Prejudice* (Cambridge, MA: Blackwell, 1989).
11. See L. Skenazy, *Free-Range Kids: Giving Our Children the Freedom We Had without Going Nuts with Worry* (San Francisco: Jossey-Bass, 2009), 16.
12. See Steven Pinker, *The Better Angels of Our Nature: Why Violence Has Declined* (New York: Viking, 2011), 446.
13. See Pinker, *The Better Angels of Our Nature*, 445; Skenazy, *Free-Range Kids*.
14. See Hanna Rosin, "The Overprotected Kid," *Atlantic*, March 19, 2014.
15. See Skenazy, *Free-Range Kids*, 176; Pinker, *The Better Angels of Our Nature*, 446.
16. See Caplan, *Selfish Reasons to Have More Kids*, 103.
17. See Philip Jenkins, *Moral Panic: Changing Concepts of the Child Molester in Modern America* (New Haven: Yale University Press, 1998), ch. 8.
18. See *ibid.*
19. See Bruce Rind and Philip Tromovitch, "A Meta-Analytic Review of Findings from National Samples on Psychological Correlates of Child Sexual Abuse," *The Journal of Sex Research* 34 (1997): 237–255. See, also, Bruce Rind et al., "A Meta-Analytic Examination of Assumed Properties of Child Sexual Abuse Using College Samples," *Psychological Bulletin* 124 (1998): 22–53, esp. 44 and 46.
20. See Judith Levine, *Harmful to Minors: The Perils of Protecting Children from Sex* (New York: Thunder's Mouth Press, 2002), 26–29.
21. See *ibid.*
22. Imagination and fake photographs can affect adults' memories of their childhood. See, for example, M. Garry et al., "Imagination Inflation: Imagining a Childhood Event Inflates Confidence That It Occurred," *Psychonomic Bulletin & Review* 3 (1996): 208–214; K. Wade et al., "A Picture Is Worth a Thousand Lies: Using False Photographs to Create False Childhood Memories," *Psychonomic Bulletin & Review* 9 (2002): 597–603. This suggests that adult memories can be affected by imagination-affecting factors.
23. For the notion that violent crime (specifically murder and rape) has declined from the 1970s, see *FBI Crime Reports and National Crime Victimization Survey* (Washington: U.S. Bureau of Justice Statistics, 2009); FBI, "Section II: Crime Index Offenses Reported" (1996). For the notion that many former alcoholics still drink socially, Dawson et al.'s 2002 study found that 18 percent of alcoholics returned to low-risk drinking; see Deborah Dawson et al., "Recovery from DSM-IV alcohol dependence: United States 2001–2002," *Addiction* 100 (2005): 281–292. For the notion that women own more than half the private wealth in the United States, see Peter Klein and Angelica Berrie, *A Passion for Giving: Tools and Inspiration for Creating a Charitable Foundation* (New York: John Wiley & Sons, 2012). For the notion that a significant number of rape charges are false, the U.S. Department of Justice (1997) provides an estimate of 8 percent; see Lawrence Greenfield, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault* (U.S. Department of Justice, 1997), 7. A British Home Office Study (2005) put the percentage at 8 percent. See L. Kelly et al., "A Gap or a Chasm? Attrition in Reported Rape Cases," *Home Office Research Study* 293 (2005). A literature summary notes that the studies vary greatly, but a number of the studies put the percentage at 8 percent or higher, although many of the studies on this topic are flawed. See Philip Rumney, "False Allegations of Rape," *Cambridge Law Journal* 65 (2006): 128–158. For the notion that being a truck driver or farmer is more than being a police officer, see the fatality rates as reported in U.S. Department of Labor, "Census of Fatal Occupational Injuries Summary, 2012," Bureau of Labor Statistics, August 22, 2013.

ONE

Pedophilia and Adult-Child Sex

In order to assess whether pedophilia is pathological and vicious and whether adult-child sex is wrong, bad, and should be illegal, it is helpful to have an account of them. This chapter provides such an account.

In the context of pedophilia, here is how I define the key terms.

- *Pedophilic Desire*: A pedophilic desire is a desire in an adult to have sex with a child.
- *Pedophilia*: A person has pedophilia if and only if he has relatively frequent and intense pedophilic desires.
- *Pedophile*: A pedophile is someone who has pedophilia.

This definition allows non-pedophiles to have infrequent or weak pedophilic desires. Pedophilic desires are distinct from hebephilia, which is the desire to have sex with pubescent individuals (roughly, ages thirteen to sixteen).¹ The boundaries here are not clear because there is some evidence that men find youthful women to be sexually attractive (roughly age seventeen) and there is some evidence that many prefer youthful women to women of other ages.² Such women are just outside the ordinary range for hebephilic desires and in some cases might not be distinguishable. Because of the widespread nature of this desire and because a similar pattern is found among other primates, it is likely that the desire for young fertile females is at least in part genetic.

When referring to pedophiles, I shall use the male pronoun. This is because the vast majority of individuals who engage in pedophilia are men. One study found 99 percent of child molesters are men.³

The above accounts leave open the way in which the term “child” should be understood.⁴ For example, a child might be defined in physical (specifically pre-pubescent stage), mental, or chronological terms. For the purposes of pedophilia, a child should be defined in physical terms. To

see this, consider a seven-year-old who due to a genetic abnormality looks and sounds like a curvaceous twenty-year-old. We would not label an adult a pedophile just because he is attracted to her. The same is true if she also has the mental ability of a seven-year-old. Nor would we think that an adult is a pedophile just because he is attracted to a developmentally disabled (retarded) twenty-year-old, even if the woman has the mental age of a seven-year-old. Hence, for the purposes of pedophilia, “child” should not be defined in terms of chronological age or mental ability.

Next consider a twenty-year-old who due to a genetic abnormality looks and sounds like a seven-year-old. We would think that someone is a pedophile if he is attracted to her and he has relatively frequent and intense similar desires. An interesting portrayal of a woman who appears much younger is found in a *Law & Order: Special Victims Unit* episode that focuses on a woman with Turner syndrome.⁵

For the purposes of pedophilia, then, “child” should be defined in physical terms, specifically in terms of sexual development. In this context, “child” means “human being with prepubescent sexual development or the appearance thereof.” Hence, we end up with the following definition:

- *Pedophile*: A person is a pedophile if and only if he or she has frequent and intense desires to have sex with individuals who are or appear to be in a pre-pubescent stage.

An objector might assert that a pedophile is attracted to an individual with pre-pubescent sexual development or the appearance thereof and the mind of a pre-pubescent child.⁶ The objector’s idea is that pedophiles are aroused by a child’s innocence. This objection seems to get wrong cases like the twenty-year-old who attracts the same adults who are also attracted to seven-year-olds who look their age. Both cases of attraction seem to involve the same arousal pattern. In any case, my analysis (being less demanding) is compatible with the objector’s account.

This definition differs from clinical and legal definitions. According to the American Psychiatric Association’s *Diagnostic and Statistical Manual of Mental Disorders*, fourth edition, text revision (DSM-IV-TR), pedophilia is a paraphilic disorder. The essential features of paraphilia are recurrent, intense sexually arousing fantasies, sexual urges, or behaviors that occur over six months and that involve nonhuman objects, the suffering or humiliation of oneself or one’s partner, or children or non-consenting adults.⁷ Under the DSM-IV-TR 302.2, the specific criteria for pedophilia are the following.

1. Over a period of at least six months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual ac-

- tivity with a prepubescent child or children (generally age thirteen years or younger);
2. The person has acted on these sexual urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty;
 3. The person is at least age sixteen years and at least five years older than the child or children in [the first criterion].⁸

It should be noted that the DSM definition has an operational feature because it is in part designed to help medical professionals and others identify and treat pedophiles rather than setting out necessary and sufficient conditions for pedophilia. This design likely led to the inclusion of practical considerations.

My definition has several advantages over the clinical definition, although to be fair they fulfill different functions. First, my definition avoids the six-month period requirement found in the DSM-IV-TR's first condition. A pedophile might have recurrent and intense pedophilic desires for three-month periods with three-month periods between them in which he has little sexual drive and the above definition makes this impossible for someone who nonetheless seems to be a pedophile.

Second, unlike the second condition, my definition is compatible with the notion that a pedophile might have neither acted on his pedophilic desires nor does it cause him distress or interpersonal difficulty, and this seems intuitively correct. One can imagine a pedophile who fantasizes about having sex with children but does not act on it for moral reasons or because he fears the harsh punishment that would follow were he caught. Similarly, one can imagine a pedophile, perhaps with a psychopathic personality, for whom the desires cause neither distress nor interpersonal difficulty. We can further imagine a psychopath who has the desire but does not act on it for fear of punishment and yet does not suffer distress or interpersonal difficulty.

Third, unlike the first condition, my definition does not allow for mere fantasies with regard to adult-child sex. The fantasy condition is too broad because not all fantasies are sexual and because a fantasy might not involve or be connected to the subject being sexually aroused by adult-child sex. For example, it is at least possible that a person fantasizes about watching adult-child sex with his gay lover because the lover enjoys it and it leads to great sex between the lover and the person having the fantasy.

Fourth, the five-year difference is irrelevant. It is possible that a twenty-year-old looks and sounds like a seven-year-old. Another twenty-year-old who was attracted to her would be a pedophile even though he would not satisfy the five-years-older requirement. The sixteen-years-or-older requirement depends on whether individuals become adults at sixteen. If this is mistaken, then this minimum age requirement is also mistaken.

Consider, for example, *Sweet Sweetback's Baadasssss Song* (1971), which portrays a prostitute having sex with a young towel boy at a brothel. If the actress playing the prostitute had sex with the boy to make the film more realistic but did not desire him, then this would not have been an instance of pedophilic or hebephilic sex because of the absence of desire.

This account does not require that pedophiles be more aroused by children than adults or that they prefer sex with children rather than adults. That is, it does not require pedophilia to be a primary sexual orientation. Sexual preference for children over adults is required for pedophilia if it is viewed as a type of sexual orientation.⁹ The idea here is that our interest is in assessing people who are often sexually aroused by children regardless of what else arouses them. So, for example, it is possible for pedophiles to also have paraphilias (for example, fetishism and sexual sadism).

On an account that differs both from the DSM-IV-TR and mine, the definition of "pedophile" is a matter of legal convention.

For the purposes of this publication the term "pedophile" when used will be defined as a significantly older individual who prefers to have sex with individuals legally considered children. Pedophiles are individuals whose erotic imagery and sexual fantasies focus on children. They do not settle for child victims, but, in fact, clearly prefer to have sex with children. The law, not puberty, will determine who is a child.¹⁰

The above definition, which comes from the U.S. Department of Justice, has a practical purpose (law enforcement) that likely explains its adoption. This definition makes it arbitrary how the state should define "child." Were the state to define Asian women in their twenties as children, adults who have sexual relations with them would be pedophiles. Also, if the law were to change, then a person could go from being a pedophile to not being one without any change in his intrinsic properties. Both results are absurd.

In this book, I shall assume the following account of sex.¹¹ A sexual desire is a distinct and fundamental way of desiring contact with another's body and the pleasure that such contact brings about. An activity is sexual if and only if it tends to fulfill the agent's sexual desire. A sexual desire is, on the analysis presented here, perverted if and only if the form of the desire is statistically abnormal (that is, a statistical outlier). If this account is correct, then sex is not essentially a complex form of interpersonal awareness, means of communication, or means to other ends.¹² Genital contact is not necessary for sex because of the possibility of parallel sexual acts.¹³ Consider, for example, cybersex.¹⁴ Adult-child sex is sex involving an adult and a child, with the latter understood in the above sense.

In summary, a pedophile is a person who has frequent and intense pedophilic desires with individuals who are or appear to be in a pre-pubescent stage. This argument rested on intuitions about sexual desire for persons who are children but look like adults and for persons who are not children but look like them. This definition has several advantages over a clinical definition, although the latter's defects might be a price for an operational definition.

Given that our society condemns pedophiles and views them as sick and perverted, a natural question is whether they are in fact mentally ill. The next chapter discusses this issue. In particular, it looks into whether a pedophile's way of thinking is defective in the way required for mental illness. This inquiry builds on the above account of the nature of pedophilia and adult-child sex.

NOTES

1. See Ryan Hall and Richard Hall, "A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues," *Mayo Clinic Proceedings* 82 (2007): 458. Note judging by the sex portrayed in various pornography sites, particularly Hentai (Japanese animated pornography), many consumers have hebephilic desires. See, for example, Huge Hentai, <http://www.hugehentai.net/>, September 5, 2009.

2. David Buss, *The Evolution of Desire*, 2nd ed. (New York: Basic Books, 2003), 51–54.

3. See G. G. Abel and N. Harlow, "The Abel and Harlow Child Molestation Prevention Study," in *The Stop Child Molestation Book* (Philadelphia: Xlibris, 2001); D. M. Vandiver and G. Kercher, "Offender and Victim Characteristics of Registered Female Sexual Offenders in Texas: A Proposed Typology of Female Sexual Offenders," *Sex Abuse* 16 (2004): 121–137. Some older literature reviews put the figure at 80 percent to 95 percent male. A. Kenneth Fuller, "Child Molestation and Pedophilia: An Overview for the Physician," *The Journal of the American Medical Association* 261 (1989): 602.

4. This issue is raised by M. Ashley Ames and David Houston, "Legal, Social, and Biological Definitions of Pedophilia," *Archives of Sexual Behavior* 19 (1990): 333–342.

5. See James Hayman, dir., *Law & Order: Special Victims Unit*, NBC Season 8: Episode 2, September 26, 2006.

6. I owe this objection to Neil Feit.

7. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, Revised 4th ed. (Washington, DC: American Psychiatric Association, 2005), 566.

8. See *ibid.*, 571.

9. See George Gaither, "Pedophilia as a Sexual Orientation?" *Archives of Sexual Behavior* 31 (2002): 485–486 arguing for this position.

10. See Kenneth Lanning, "Child Molesters: A Behavioral Analysis," http://www.missingkids.com/en_US/publications/NC70.pdf, June 11, 2010.

11. The idea for this account comes in part from Alan Goldman, "Plain Sex," *Philosophy and Public Affairs* 6 (1977): 267–287.

12. For the former account, see Thomas Nagel, "Sexual Perversion," *Journal of Philosophy* 66 (1960): 5–17. For the latter account, see Robert Solomon, "Sex and Perversion," in Robert Baker and Frederick Elliston, eds., *Philosophy and Sex* (Buffalo: Prometheus Books, 1975), 268–287.

13. For a defense of this position, see Greta Christina, "Are We Having Sex Now or What?" *Ms.* (November/December 1995): 60–62.

14. For a discussion of whether cybersex is sex, see Louise Collins, "Is Cybersex Sex?" in Alan Soble and Nicholas Power, eds., *The Philosophy of Sex: Contemporary Readings*, 5th ed. (Lanham, MD: Rowman & Littlefield, 2008), 117–131.

TWO

Pedophilia and Mental Disorder

In this chapter, I argue that pedophilia is not a mental disorder. Before looking at the argument, we might consider why this issue matters. The moral status of an act is independent of whether it springs from a disorder. For example, a hypochondriac who steals medicine to treat himself acts wrongly even if the theft was motivated in part by his hypochondria. Responsibility is also arguably distinct from whether a person's thought or act flows from a disorder. For example, even if alcoholism is a disorder that produces an internal compulsion to drink, it still does not follow that a full-blown alcoholic is not responsible for the harm he causes if he continues to work as a surgeon or pilot.

The issue of mental disorder matters for four reasons. First, it matters because it might affect how we think we should respond to pedophiles. If pedophilia is a disorder, then it is likely permissible to encourage pedophiles to get treatment for it, assuming effective treatment is available. Indeed, on some accounts, it is permissible to coerce people to get treatment if they have committed a crime and the disorder makes it more likely they will reoffend. Second, if pedophilia is a disorder, then it is undesirable because it is unhealthy and we want or have a reason to be healthy. Health is the degree to which all or part of an organism functions well. It is on the same continuum as disorder, but on the positive side. Third, if disorders undermine responsibility to some degree, and this is not obvious, then this is another reason to think pedophilia undesirable. Fourth, if pedophilia is a disorder, then we should try to eradicate its causes or ameliorate its effects.

Whether a type of intense and recurrent sexual desire is a disorder is independent of whether acts based on this desire are wrong, bad, harmful, vicious, or warrant punishment, or whether the agent is morally responsible for so acting. Consider a person with an antisocial personality

disorder who is unable to adequately empathize or sympathize with others. Were he to embezzle money, on some accounts, he might still have acted wrongly, badly, etc. and be morally responsible for doing so, even though his act was causally connected to a disorder. It is not even clear that a person is never blameworthy for having a disorder or allowing it to strengthen. On some accounts of *akrasia* and internal compulsion, a subject can be in part blameworthy for having them, or for having them to a certain degree, if he did not take steps to eliminate or weaken the irrational desire and knew, or should have known, that he ought to have done so. This might be true, for example, for some substance abusers.

In the next part of the chapter, I briefly sketch out an account of a mental disorder. In the last part, I argue that pedophilia is probably not a disorder.

PEDOPHILIA AND MENTAL DISORDER

Mental Disorder

Roughly, a disorder is a disease, disability, or injury. On the account I adopt, a disorder is a harmful dysfunction. More specifically, I will adopt a modified version of Jerome Wakefield's theory of disorder.¹

A condition is a disorder if and only if the following are true:

1. *Criterion #1: Harm.* The condition causes some harm or deprivation of benefit to the subject (or, perhaps, to a relevant third party).
2. *Criterion #2: Dysfunction.* The harm or deprivation of benefit results from the inability of some internal mechanism to perform its natural function, wherein a natural function is a process that is part of the evolutionary explanation of the existence and structure of the mechanism.

The harm-condition is a prerequisite for the dysfunction-condition. Hence, if the relevant harm is not present, then neither condition is met.

The third-party-harm-condition is controversial. It is likely necessary to explain some disorders currently viewed as mental disorders (for example, antisocial, borderline, and narcissistic personalities). On the other hand, it is not clear that disease should depend on extrinsic facts about a subject, especially ones that involve his relation to others. The underlying idea here is that a disorder is a feature of an individual, not a population. One might wonder whether this includes genetic damage carried by one person but only likely to harm someone (their child) when two carriers mate. Consider, for example, Tay-Sachs disease. On this account, such genetic problems are causes of disorder, but not themselves disorders.

In addition, the harm cannot come about solely from a direct sustaining cause external to the subject. If violent men bash gay males, this by

itself does not show that male homosexuality is harmful in the sense relevant for a disorder. The connection between a dysfunction and harm has to be mediated in certain ways. I discuss this mediation below.

A couple of things are worth noting about the dysfunction-condition. The failure of an internal mechanism to fulfill its natural function is a matter of degree. If there is no threshold that separates when the mechanism fails versus when it is merely not performing well, then there might be conditions that are neither clearly diseased nor healthy.

A change in an individual's body might inhibit one mechanism and enhance another. For example, opposable thumbs might reduce tree-related mobility but increase tool use. The dysfunction-condition might have to be tweaked to focus on overall reproductive fitness when a condition enhances one mechanism and inhibits another.

On Wakefield's account, a mental disorder is a disorder involving a mental mechanism. This is captured in (2).

A condition is a mental disorder if and only if the following are true:

1. *Criterion #1: Harm.* The condition causes some harm or deprivation of benefit to the subject (or, perhaps, to a relevant third party).
2. *Criterion #2: Dysfunction.* The harm or deprivation of benefit results from the inability of some mental mechanism to perform its natural function, wherein a natural function is a process that is part of the evolutionary explanation of the existence and structure of the mechanism.

This theory is superior to its main rivals.

Wakefield requires that the harm or deprivation of benefit to the person be judged by the standards of the other person's culture. I reject this requirement. First, it makes disorders culturally relative. Thus, if two doppelgangers live in different cultures, it is possible that one has a disorder and the other does not even though they are qualitatively identical. Second, in some cases, this prevents cultures from being mistaken about whether something meets this condition. For example, if a culture mistakenly judges lesbianism to be intrinsically harmful, then lesbianism satisfies the harm-condition, regardless of whether it is actually harmful. Similarly, a violent culture might judge psychopathy not to be a harm-and-benefit-deprivation and it intuitively seems possible that the culture is wrong. Third, there is an issue as to the level of cultural judgment. The culture might judge certain things (for example, pain) as harmful and then be mistaken about whether a condition (for example, lesbianism or psychopathy) causes it. Eliminating the culture-relative-judgment requirement eliminates these concerns.

Let us briefly review the argument for the above theory. One type of disorder theory is value-free. The dominant version focuses on biological dysfunction. This dysfunction is identified either in terms of statistical deviance, biological disadvantage, or natural function.² The biological-

dysfunction theory has several advantages. It links the notion of health to physiological processes, allows for an intersubjective understanding of health, prevents it from being dependent on what individuals or groups desire, and distinguishes it from features of well-being that are separate from physiological processes. However, the specific versions (statistical deviance, biological disadvantage, or natural function) of the pure dysfunction theory fail and hence it fails.

The first version, statistical-deviance theory, fails because a statistically deviant feature is not always a disorder and a disorder can be statistically frequent. For example, high intelligence is statistically infrequent and not a disorder. Also, tooth decay can be statistically frequent.

The second version, biological disadvantage theory, holds that a disorder is an intrinsic condition that reduces longevity or fertility. One problem is that there are disorders that are intrinsic conditions and do not have these effects. Consider, for example, chronic pain and certain types of mental illness that do not decrease longevity or fertility. Even if there were no such disorders, they are possible. Also, even when a person is restored to normality in longevity and fertility, it does not follow that his disorder goes away. The biological disadvantage theory also runs into trouble when a physiological condition enhances survival at the expense of reproduction or vice versa. On some accounts, longevity is a subordinate goal of natural function to reproductive fitness.³ This is true even if evolution focuses on populations as well as individuals because, then, population's longevity is a means to reproductive fitness.

It is not clear that the third version, natural-function theory, is distinct from the biological-disadvantage theory. In any case, the natural-function theory fails because the failure of a natural function that is not harmful need not be a disorder. For example, if a tonsil fails and this does not produce any harm, this is not a disorder. The failure might produce some harm, for example, increased risk of sore throat, but it need not and this is all that is needed for the point here.

A second type of disorder theory is the family of pure value-laden theories. This version is value-laden because it focuses on what is wrong, bad, or bad for someone. Among the common versions are theories that focus on harm and internal sustaining causes that are harmful or increase the risk of harm.

On the first version, harm theory, a disorder is a condition that is harmful or brings about harm. On variants of the theory, a disorder is an undesirable condition or, perhaps, an undesirable intrinsic condition. Something is undesirable if it is bad for the subject or socially disvalued. Both judgments rest on value-judgments. Given the socially disvalued condition, this makes disorders culturally relative and this is counterintuitive. Also, some variants of this theory are overinclusive because conditions like criminality, poverty, and bad luck are undesirable conditions, but not disorders.

On the second version, internal-sustaining-cause theory, a person has a disorder if he has a condition other than his rational beliefs and desires, such that he is suffering or at an increased risk of suffering an evil (for example, pain) in the absence of an external-direct-sustaining cause.⁴ The sustaining-cause condition ensures that this account focuses on physiological conditions rather than external forces. For example, it rules out black skin being a disorder even if it leads to Ku Klux Klan-related evils because the cause of these evils is an external-direct-sustaining cause. The model has an objective criterion because it focuses on the objective fact regarding the chance of death, pain, and so on, and the presence of a direct sustaining cause. It also has a value-laden criterion because it mentions suffering an evil and because values determine what beliefs and desires are rational. This theory is inferior to Wakefield's because it has too little focus on biological dysfunction. For example, in deciding whether homosexuality, deafness, and some types of hypomania are disorders, it seems relevant to separate out the issues of biological failure and harm. It is possible that homosexuality, deafness, and some forms of hypomania involve the inability of some mental mechanism to perform its natural function and yet they do not make life go worse for people with these conditions. It is even possible that they make such people's lives go better, perhaps by causing them to be a part of a warm-and-loving community. If the rationality-condition collapses into the harm-and-benefit-deprivation-condition, then the second version approximates Wakefield's theory.

If the sustaining cause version does approximate Wakefield's theory, there is the following test for a mental disorder: a condition is a disorder if and only if it involves harmful dysfunction. Harmful dysfunction is filled out in terms of the harm- and dysfunction-conditions listed above. Because much of the literature on pedophilia focuses on disease and because it is not an injury, in what follows I will use "disease" and "disorder" interchangeably.

ON WHETHER PEDOPHILIA IS A DISORDER

Here is my argument that pedophilia is not a mental disorder.

(P1) If pedophilia does not satisfy both the dysfunction- and harm-conditions, then it is not a mental disorder.

(P2) Pedophilia does not satisfy the dysfunction-condition.

(C1) Hence, pedophilia is not a mental disorder. [(P1), (P2)]

I will also argue that pedophilia fails to satisfy the harm-condition, although this is not necessary for it to avoid being a mental disorder.

Premise (P1) (If pedophilia does not satisfy both the dysfunction- and harm-conditions, then it is not a mental disorder.)

Premise (P1) rests on the assumed notion of a disorder.

Premise (P2) (Pedophilia does not satisfy the dysfunction-condition.)

Premise (P2) rests on the following. First, if a mental mechanism has a dysfunction, then it fails to perform its natural function. Pedophilia does not involve a mental mechanism in the subject failing to perform its natural function. A natural function is a function that is part of the evolutionary explanation of the existence and structure of the mechanism.

There are several reasons to believe that pedophilia has an evolutionary explanation.⁵ In evolutionary terms, one would expect thoughts or behaviors that are selected for by evolution or associated with conditions that are so selected to be (1) widely held by (or done by) human beings today, (2) held by (or done by) human beings across history and cultures, and (3) held by (or done by) apes. This is because a feature in human beings that significantly frustrates reproductive fitness would likely be selected against, whether directly or indirectly. If a feature is so widespread, then it probably has some connection to fitness-enhancing genes, however indirect. All three conditions are present to some degree with respect to pedophilia even though the exact degree is controversial.

Satisfaction of the three conditions is evidence of a connection of pedophilia to fitness-enhancing genes. In cases where we know the relevant mechanism and we know that some widespread condition is dysfunctional, the satisfaction of the three conditions does not provide us good reason to believe that the condition is connected to such fitness-enhancing genes. Examples of such an evidentiary override include cancer and tooth decay.

There is currently no quantifiable threshold that sets the specific level at which a condition is not a dysfunction. Rather, the judgment here is a crude one that judges the relative distance of a condition from paradigmatic dysfunction and natural function. For example, one might consider whether pedophilia is closer to paradigm dysfunction (for example, schizophrenia or Alzheimer's) or paradigm function (for example, heterosexual sexual desire for healthy, fertile women). This closeness test suggests that some conditions might be in the grey area.

The evidence for pedophilia being widespread rests on self-reports and penile responses. In one study of two hundred university males, 21 percent reported some sexual attraction to small children, 9 percent reported sexual fantasies involving children, and 5 percent reported having masturbated to sexual fantasies of children.⁶ Another study of 280 students found that 22 percent of males and 3 percent of females reported sexual attraction to a child.⁷ Various studies have found that a significant

group of the male population has pedophilic penile responses.⁸ It is also worth noting that studies found that 9 percent of university male students described having sexual fantasies involving children and roughly 5 percent to 7 percent of males reported some hypothetical likelihood of having sex with children were no one to know and were there no punishment.⁹

Both types of studies have come under criticism. Ron Langevin argues that the first self-reported study (Briere and Runtz), properly interpreted, found that only 4 percent of undergraduate males report some attraction to children. He also notes that there are problems with the reliability of phallometric testing.¹⁰

Langevin's criticisms are unconvincing. Multiple studies have found that 12 percent to 32 percent of community and college samples of men have reported sexual attraction to children or exhibited penile response to pedophilic stimuli.¹¹ This is understood as studies of men in normal populations who have not molested children. One researcher concluded that arousal to pedophilic stimuli does not always accompany pedophilic behavior.¹² In Hall et al.'s study, 20 percent of normal male subjects self-reported pedophilic interest and roughly 25 percent exhibited penile arousal to pedophilic stimuli that equaled or exceeded arousal to adult stimuli.¹³

Adult-child sex has occurred across cultures. Adult-child sex occurred in Hawaiian history and Polynesia.¹⁴ Male-boy anal intercourse occurred in the Siwans (Siwa Valley, North Africa).¹⁵ In Tahiti, prepubertal females were publicly sexually active with adults in the early 1800s.¹⁶ Sexual practices between men and boys also occur in New Guinea in the Etoro and Kaluli.¹⁷ In the Etoro of New Guinea, from about age ten, boys would have oral sex regularly with older men to facilitate the boys' growth.¹⁸ In Melanesian societies (societies located in the West Pacific around Papua New Guinea, Fiji, and the Solomon Islands) it is common.¹⁹ The presence of a sex practice in less modern cultures is noteworthy because these are likely more similar to conditions under which human beings evolved than current developed societies.

Such sex also occurred in less exotic places and times. In medieval times it was not uncommon for men to be married to women as young as ten.²⁰ Adult-child sex was an accepted practice in China, Japan, Africa, Turkey, Arabia, Egypt, and the Islamic areas of India.²¹ It was also common and accepted in ancient Greece. Even in England the age of consent was ten until the late 1800s and was only abolished because of concerns about prostitution.²²

Pedophilia is distinct from adult-child sex. In animals, however, it is reasonable to use the latter as evidence of the former. This is not to say that it is strong evidence. Adult-child sex occurs in bonobos.²³ Bonobos are closer to humans genetically than any other animal group, including chimpanzees.²⁴ It also occurs in other animals.²⁵

Alan Dixson argues that primates do not exhibit pedophilia in the same way that human beings do. He appears to view pedophilia, in this context, as a marked, and often exclusive, sexual preference for children as sex partners, often accompanied by an inability to form adult sexual relationships with adults.²⁶ Also, in animals, adults tend to limit penetration and ejaculation to contact with mature females, that is, to procreative sexual activities.²⁷ However, sexual preference for children over adults is not essential to pedophilia.²⁸ Nor is penetration or full-blown ejaculation essential to it.

There is also likely a genetic role in predisposing individuals to be attracted to children.²⁹ The most common onset of pedophilia is during adolescence and pedophiles often have sex with children before the pedophiles are fifteen.³⁰ By itself, this does not show that pedophilia is compatible with natural functions, because disorders can have genetic causes. For example, sickle-cell anemia also has a genetic origin.

A proponent of pedophilia as a disorder might claim that the absence of pedophilia is even more widespread, so the argument could cut in the opposite direction. However, its widespread presence today and across different times and cultures (especially primitive ones), and in our closest animal cousins suggests that it is not strongly selected against by past evolutionary forces. This is enough, *prima facie*, to prevent it from being a biological dysfunction.

Were pedophilia associated with other diseases, it would be evidence, albeit weak evidence, that pedophilia frustrated a natural function, however, indirectly. This is because, in general, diseases involve dysfunction and so anything that is connected to diseases (perhaps as a cause, effect, or sharing one of these) is connected to dysfunction. Kenneth Zucker points out that associated factors are irrelevant to whether pedophilia by itself is a mental disorder.³¹ Even if this is correct, association with mental disorders might still be some evidence of dysfunction.

The evidence about association with disorders and undesirable traits is mixed. On the one hand, some studies found that pedophiles have been found to be normal on the major personality dimensions, particularly on the two that are clinically relevant.³² On the other hand, other studies have found that pedophiles have lower IQs than average, low self-esteem, and emotional immaturity.³³ Other studies and literature reviews have found that it is common for them to suffer another psychiatric or personality disorder.³⁴

The studies on the differences between incarcerated pedophiles and other incarcerated people varied with the study. Child offenders had higher scores on scales related to neuroticism, psychoticism, and social introversion. The study's authors interpreted this as reflecting differences in interpersonal relations and social alienation and a higher degree of trait anxiety with anger and lower degree of self-esteem.³⁵ Pedophiles in residential outpatient programs had a higher rate of depression or anxie-

ty.³⁶ However, as Richard Green points out, the direction of the causal arrow between pedophilia and the psychiatric problems accompanying pedophilia is unclear.³⁷ The social consequences of pedophilia might explain the accompanying problems.

I am unable to find any evidence as to whether pedophiles have a lower level of reproductive fitness than others, although the lower IQ and emotional immaturity might make them less able to attract or retain partners with whom to reproduce. In general, lower IQ correlates with a higher rate of poverty, dropping out of school, unemployment, injury, divorce, out-of-wedlock births, welfare usage, and criminality.³⁸ If these lessen an individual's level of reproductive fitness, then it is plausible that pedophiles have a lower level of reproductive fitness.

It is worth noting that gays also have a lower level of reproductive fitness. In one study, only 38 percent of heterosexual couples did not have children, while 78 percent of lesbian couples and 90 percent of gay couples did not have children.³⁹ Gays also have higher rates of mental disorders than non-gay populations.⁴⁰ Gay men are four times more likely to suffer depression than straight men.⁴¹ Laumann et al. found that homosexuals were less likely than heterosexuals to say they were extremely or very happy (60.8 percent versus 46.7 percent) and more likely to say they were fairly unhappy or unhappy most of the time (19.5 percent versus 11.5 percent).⁴² It is not clear whether the greater depression level and lower happiness level count as harm because it is not clear the degree to which these effects result from homosexuality, as opposed to bigotry or some other external cause, and whether homosexuality is a contingent feature of people who are currently gay.

To the extent that homosexuality is not a mental disorder, the combination of higher rates of associated mental disorders and a lower level of reproductive fitness is not sufficient evidence for dysfunction. Alternatively, it might be that homosexuality is a biological dysfunction, but not a harmful one. Given the lower level of happiness and higher level of depression in gays, the latter is unclear.⁴³ Perhaps a proponent of the notion that pedophilia is a disorder might claim that the unhappiness of gays has an external sustaining cause (irrational homophobia) not present in pedophiles. If some argument along these lines cannot be supported, then there is a concern about whether a plausible theory of disease that categorizes pedophilia as a disorder will similarly categorize homosexuality.

In conclusion, while the evidence is mixed, it appears that on the whole pedophilia does not satisfy the dysfunction-condition for a mental disorder. On Wakefield's theory, if a mental mechanism has a dysfunction, then it fails to perform its natural function. A natural function is a function that is part of the evolutionary explanation of the existence and structure of a mechanism. In evolutionary terms, one would expect thoughts or behaviors that are selected for by evolution or associated

with conditions that are so selected to be (1) widely held by (or done by) human beings today in our culture, (2) held by (or done by) human beings across cultures and history, and (3) held by (or done by) apes. If a feature is so widespread, then it probably has some connection to fitness-enhancing genes, although the connection might be indirect. While it is unclear whether all three conditions are present to a sufficient degree, condition (1) is particularly controversial, and the second two indices are likely present.

In some accounts where pedophilia was associated with other diseases, it might be evidence, albeit weak evidence, that pedophilia frustrated a natural function, perhaps indirectly. This is because, in general, diseases involve dysfunction and so anything that is connected to diseases (perhaps as a cause, effect, or sharing one of these) is connected to dysfunction. That it is evidence is controversial, because it might be thought mistaken to count a condition as itself a disorder merely because it is associated with another disorder. There is some evidence, albeit mixed evidence, that pedophilia is associated with other mental disorders and other undesirable traits.

More on Premise (P2) (Pedophilia does not satisfy the harm-condition.)

Premise (P2) also rests on the following. If something is a relevant type of harm, then an internal condition causes the person a harm or deprivation of benefit. It is unclear whether this criterion is met.

Harm is a setback to someone's interest.⁴⁴ The harm-condition usually focuses on harm to the subject. This is Jerome Wakefield's interpretation.⁴⁵ Some mental disorders are by themselves harmful to the subject. For example, depression and anxiety disorders are by themselves bad for those who have them. A non-essential feature of a depressive personality disorder is usual mood dominated by dejection, gloominess, cheerlessness, joylessness, and unhappiness.⁴⁶ Generalized anxiety disorder includes clinically significant distress and excessive anxiety and worry.⁴⁷ There is little evidence that pedophilia is bad for the pedophile in this way. Other disorders might be harmful via external sustaining causes. For example, were some criminality to have a genetic linkage and were it to bring harm via conviction, incarceration, and unemployment, the genetic origin might be a cause of a disorder even though the harm has an external cause.⁴⁸

On some accounts, pedophilia is bad for a subject because it blocks an objective-list good. An objective-list good is one that is good for an individual regardless of whether it brings him pleasure or whether he wants it.⁴⁹ Examples might include true beliefs, agency, and virtue.⁵⁰ These accounts fail if, as I believe, there are no objective-list goods. They also fail if pedophilia does not block these goods.

The harm cannot come about solely from a direct sustaining cause external to the subject. For example, if in the United States in the 1960s gays were frequently isolated, discriminated against, beaten, or killed by people who disapproved of their lifestyles, then being gay was harmful, but not in the way required for disease. Whether this is because the harm had an external sustaining cause or because its cause was irrational depends on the particular theory of a disorder.

I have not been able to locate any data that show that pedophiles have less pleasure than others. One might expect that they would because they are less able to act on their desires. Elsewhere Robert Spitzer and Jerome Wakefield assume that pedophilic desires are harmful because the desires are either frustrated or harm children, but present no evidence for these claims.⁵¹

Even were there evidence of such frustration, it is unclear whether the mere frustration of desires is sufficient to make something harmful, at least in the relevant sense. Consider a woman with a strong sex drive who is a lesbian in the Middle East. In her country, there is little opportunity for lesbian sex. Perhaps this is because such sex is criminally punishable and considered a sin. She might be extremely sexually frustrated, but intuitively this is not enough to show that her lesbianism is harmful in the sense required for a mental disorder. This is because the frustration, which is a harm, is the result of others' choices, rather than the condition itself. On the other hand, we might think that mental disorders focusing on antisocial, borderline, and narcissistic personalities are mental disorders because they tend to bring conflict with others and that conflict makes people with those traits unhappy. The American Psychiatric Association's fourth edition of *Diagnostic and Statistical Manual of Mental Disorders* takes this view. If we limit harm to frustration caused by others' rational attitudes toward persons with these traits (or the behaviors that characterize them), then much rests on whether a population's attitudes toward those who have the trait in question are rational.

There is a concern that a major role for the rationality of a population's attitudes and treatment of a behavior makes what appears to be a scientific notion (mental disorder) depend on moral and policy facts. For example, whether homosexuality is a disorder would depend in part on whether belief in God is rational, whether the Bible reliably indicates what God permits, whether the Bible condemns homosexual acts, and so on. This is unavoidable if the harm-condition for a disorder depends on whether the external cause of the harm reflects rational attitudes in others. If this is correct, then moral and policy factors are part of what makes something a mental disorder. For example, they explain why some of the personality disorders (for example, antisocial personality disorder), paraphilias (for example, fetishism and sexual sadism), and hypomania are disorders. Aside from irritability and aggressiveness in dealing with others, the criterion for antisocial personality disorder does not indicate that

the disorder makes the subject unhappy.⁵² The same is true for paraphilias, which are recurrent, intense arousing fantasies, sexual urges, or behaviors involving nonhuman objects, the suffering or humiliation of oneself or one's partner, or children or other unconsenting persons that occur over a period of at least six months.⁵³ This includes pedophilia.

On this account, whether pedophilia is a disorder depends on whether a population's disapproval of it is rational. This in turn might depend on whether pedophilic desires are wrong, bad, vicious, harmful, or inefficient. Alternatively, it might be related to whether adult-child sex has any of these features. The rationality of disapproval gets more complex if we relativize disapproval to various factors, such as the dominant values in society versus correct values and to facts versus believed facts.

Some empirical estimates of the pedophilia-related facts differ sharply from what many people believe. Judith Levine states that despite the widespread fear of stranger-pedophiles, more than half and on some accounts almost all child sexual abuse occurs with their family members or parental substitutes. She states that child-sex crimes against strangers are rare, although incest is common.⁵⁴ Also, contrary to popular belief, Levine states that the vast majority of criminal-pedophiles do not ravage small children. Rather, they look at child pornography. They're not even true pedophiles in that their desired objects are adolescents. They're hebephiles.⁵⁵

It is unclear whether the rational disapproval should attach to the facts or to what people believe are the facts. The former is more plausible as we think it irrational to have or act on beliefs that are systematically false. On the other hand, we often blame people for not taking rational precautions even when all they had were anecdotes about a threat.

There is also a question as to whether the harm-condition is satisfied if the condition leads to harm to others. The concern here is that disease intuitively seems to be bad for the subject, but this interpretation of the harm-condition shifts the focus to others. On this account, a disorder is one that can harm society rather than the subject. Such a shift might be necessary to explain why psychopathy, sociopathy, borderline personality, etc. are mental disorders. On some accounts, harmless adult-child sex (assuming there is any) is not wrongful.⁵⁶ This is obviously controversial and has been challenged by a number of theorists on the grounds that such sex is unconsented to, fails various hypothetical consent conditions, or is exploitative. The consent theory has been criticized because it is irrelevant because children cannot consent. We make them do things all the time. Sometimes they are willing and, depending on the account, this might be an analogue to consent. The hypothetical consent theory has been criticized in that such consent is evidence of a permission-granting factor rather than consent itself. The exploitation condition has been criticized because it is not obvious that when such sex involves a willing child

participant it usually, let alone always, involves an unfair distribution of the benefits of such sex.⁵⁷

Let us assume that grounds other than harm do not explain why such sex is wrong, although this is obviously extremely controversial. Let us consider whether adult-child sex is harmful to children. This is not a direct consideration of pedophilia because not all pedophiles have such sex and not all people having such sex are pedophiles. Nevertheless, if such desires are bad for children and society, it is likely because it leads to such sex.

If the agent harms someone and the harm could have been avoided, this is evidence that he is bringing about worse results than he otherwise could have. Adult-child sex might be thought to cause either short-term or long-term harm to the child. The short-term harm is less likely when children are willing participants and their willing participation results from their preferences. However, this is not enough to show that it is unlikely. In addition, long-term harm is generally what matters. Children are constantly made to do things that harm them in the short term because of their or others' long-term interests. For example, they are yelled at or are made to go to the dentist. This is harmful in the short run because it temporarily makes them unhappy.

In addition, if adult-child sex involving willing children does not produce long-term harm, then harm does not make such sex wrong. There is some evidence for this, albeit controversial evidence. Researchers in the area, Bruce Rind and Philip Tromovitch drew the following conclusion.

We found that, contrary to the implications and conclusions contained in previous literature reviews that were focused on biased samples, in the general population, CSA [Child Sexual Abuse] is not associated with pervasive harm and that harm, when it occurs, is not typically intense. Further, CSA experiences for males and females are not equivalent; a substantially lower proportion of males report negative effects. Finally, we found that conclusions about a causal link between CSA and later psychological maladjustment in the general population cannot safely be made because of the reliable presence of confounding variables. We concluded by cautioning that analysis at the population level does not characterize individual cases. When CSA is accompanied by factors such as force or close familial ties, it has the potential to produce significant harm.⁵⁸

The authors found that in terms of the long-term effects of childhood abuse on college students, 74 percent of males and 41 percent of females found the experience positive or neutral.⁵⁹ In addition, they also found that this might overstate the harm caused to females by willing sexual participation because there is some evidence that most of the female CSA was unwanted.⁶⁰ Other researchers have found that once other variables are controlled for, such as emotional neglect, physical and psychological

abuse, and family disruption, the relationship between CSA and maladjustment disappears.⁶¹

Note Rind and his fellow researcher's studies were *extremely* controversial. They have come under criticism on a number of grounds. One criticism of Rind et al., "A Meta-Analytic Examination of Assumed Properties of Child Sexual Abuse Using College Samples," was that the study was too dependent on a single-source and outdated data set.⁶² Second, the study was criticized because it included unpublished data. Third, the study used a biased data set because it focused on college students who are in general high functioning.⁶³ Fourth, because children can't consent to sex, Rind et al.'s analyses involving the consent variable were meaningless and morally questionable.⁶⁴ Fifth, the studies pooled together used different definitions of sexual abuse.⁶⁵ Sixth, some people argued that meta-analysis is dubious, at least in the way that Rind et al. used it.⁶⁶ Seventh, it was alleged that the point of the article was to allow men to rape male children.⁶⁷ For a defense of Rind et al. against these criticisms, see a most helpful article by Scott O. Lilienfeld.⁶⁸

Other reviews have found that CSA correlates with psychological problems, causes them, and these problems occur pervasively for those who have experienced CSA.⁶⁹ In addition, note that on the study's own terms, roughly three-fifths of females and one-fourth of males reported some sort of long-term negative reaction. Thus, the sex does appear to be harmful at least in some cases, although it is unclear to the degree that this is true of willing participants.

Also, as the authors point out, there are problems with the definition of CSA because it was based on moral and legal criteria rather than empirical or phenomenological ones. While this chapter discusses some of the harms that often accompany some adult-child sex below, much of it likely involves unwilling sex. Even so, there might well be reason to wonder whether the various studies cohere. If the reader finds this study unconvincing, and many people do, then this is a good reason to view adult-child sex, and perhaps the pedophilia that sometimes causes it, as harmful to someone beside the pedophile. If one further assumes that a condition that is harmful to others satisfies the harm-condition for a mental disorder, pedophilia likely satisfies the harm-condition for a mental disorder. Perhaps a more limited conclusion is in order: pedophilia leading to adult-child sex satisfies the harm-condition.

There are other studies that purport to show that adult-child sex with willing child participants is in general not harmful to children.⁷⁰ There are also anecdotal accounts from college students who as children had participated in adult-child sex and who report positive or neutral reactions toward it.⁷¹ The conflict of studies is enough to show that there is a good reason to suspend judgment on the question of whether the harm-condition is satisfied.

Victims of child abuse experience the greatest psychological damage when the abuse occurs from force, genital contact, or father figures (for example, family members, priests, or coaches).⁷² The effects of abuse appear to vary greatly, with some victims being quite resilient and others being severely injured.⁷³ Children who suffer long-term abuse by pedophiles are significantly more likely to have a series of disorders, including affective disorders (for example, depression), anxiety disorders (for example, post-traumatic stress disorder), eating disorders (for example, anorexia in females), substance-abuse disorders, and to make serious attempts at suicide.⁷⁴ These children also have problems with long-term intimacy and feelings of guilt and shame over their role in the incident.⁷⁵ They also have a lower level of education and higher frequency of unemployment, although it is unclear if this is explained by other factors.⁷⁶ It is unclear to what degree these studies focus on unwilling participants.

Even if adult-child sex were found to be harmful, we might want to distinguish between convention-independent and convention-dependent harm. The latter involves harm that comes about only because society has adopted certain attitudes or practices. Consider, for example, *Palmore v. Sidoti*, 466 U.S. 429 (1984). In this Supreme Court case, a white woman who had married a black man and lived with him in the South was in a child-custody dispute with her ex-husband. The trial court ruled in favor of the ex-husband on the basis that in a racist atmosphere the child would likely be harmed by social stigmatization. The Supreme Court reversed on the ground that in the Constitutional context, this harm ought not to be given significant weight in deciding whether the mother should lose custody. If a similar approach is used in deciding what harms count or what weight to be given harm, then the correctness of the conventional rejection of adult-child sex must be assessed before its costs and benefits can be weighed out. If the badness of harm counts against an act even if the harm is caused by mistaken or vicious attitudes, then this distinction is irrelevant.

As mentioned above, the view of adult-child sex varies between times and places. This variation does not establish that such sex is not harmful or that, if it is harmful, the harm is convention-mediated; rather it is to suggest that these are empirical issues and that even our current data might be culture-specific.

Adult-child sex might bring about long-term harm because it encourages the rape or exploitation of unwilling children. In the absence of data, this sort of claim is hard to assess. In the area of pornography, there is a debate as to whether pornography makes rape more or less frequent. There is at least some evidence that pornography is a substitute for rape.⁷⁷ Assessing this claim about adult-child sex requires data and I am unaware of any on the topic. Furthermore, even if there is some encouragement in some cases, this does not explain why adult-child sex is wrong in those cases in which there is no encouragement of rape or in

which the general encouragement-effect is outweighed by benefits to one or both participants. It also doesn't explain the wrongness of adult-child sex in terms of what the adult does to the child participant, although this is not part of a general analysis of harm-to-others analysis.

In conclusion, then, it is unclear whether adult-child sex is harmful in a way necessary for a mental disorder. First, it is not clear that it always causes either short-term or long-term harm, particularly when the focus is on adult-child sex with willing participants. Nor is it clear that it usually causes such harm. Second, if it is harmful, it is not clear whether the harm comes solely from mistaken or vicious attitudes in society. If it does, then it is convention-mediated harm. This is analogous to the social stigmatization that used to accompany having mixed-race parents as in *Palmore v. Sidoti* (1984). It is not clear whether such harm shows pedophilia or other desire for adult-child sex to be a disorder or merely shows society's response to be wrong.

If one views harm-based theories as focusing on an act's expected outcome, then the harm also depends on various facts that are difficult to ascertain. That is, without some assessment of the magnitude of cost if things go poorly, benefit if things go well, or the probability of each occurring, focusing on expected outcome is pure guesswork. There are also description issues that plague expected-outcome theories. For example, consider a teacher-pedophile in Calcutta has sex with a bright homeless girl with whom she is empathetic because the teacher had herself been a homeless girl in Calcutta. To assess the expected outcome, we would need to know whether the probability is for all adult-child sex, all adult-child sex in Asia, all adult-child sex in Calcutta, all lesbian adult-child sex in Calcutta, all lesbian adult-sex in Calcutta involving an empathetic adult, etc. If there is no reason to privilege one description over another, and it is hard to see what that reason would be, then expected-outcome theories fail to get off the ground.

The argument that pedophilia is a mental disorder in part because it leads to expected harm is problematic. First, it is not clear that the expected outcome is harmful, at least when the sex involves willing participants. Second, expected-harm theories themselves might be doubted. This is in part because of problems in identifying the relevant description. This is also in part because it is not clear why the expected outcome, rather than the actual outcome, should make an act right or wrong. Expected outcome does intuitively appear to matter with regard to the agent's blameworthiness, but not the status of his act. Third, if the expected harm is convention-mediated, then it is unclear whether the act is wrong or whether society's response to it is wrong.

Hence, it is unclear whether pedophilia satisfies the harm-condition. There is little evidence that pedophiles have less pleasure than non-pedophiles or that pedophilia by itself causes them to suffer. On some accounts, the relevant harm-condition includes harm to others, specifically

children. However, it is unclear what type of pedophilic acts should ground judgments about this type of harm (for example, all adult-child sex or only those with willing participants) and for some types the harmfulness or expected harmfulness of it is unclear. In short, while the data are mixed, premise (P3) is at least as likely, and probably more so, than its denial.

CONCLUSION

In this chapter, I provided a two-part framework to determine whether pedophilia is a mental disorder. Following Jerome Wakefield, I adopted the following framework.

A condition is a mental disorder if and only if the following are true:

1. *Criterion #1: Harm.* The condition causes some harm or deprivation of benefit to the person (or, perhaps, to a relevant third party).
2. *Criterion #2: Dysfunction.* The harm or deprivation of benefit results from the inability of some mental mechanism to perform its natural function, wherein a natural function is a process that is part of the evolutionary explanation of the existence and structure of the mechanism.

I argued that it is not clear that pedophilia satisfies the dysfunction-criterion. If a mental mechanism has a dysfunction, then it fails to perform its natural function. A natural function is an effect that is part of the evolutionary explanation of the existence and structure of the mechanism. There are several reasons to believe that pedophilia has an evolutionary explanation.

In evolutionary terms, one would expect thoughts (or behaviors) that are selected for by evolution or associated with conditions that are so selected to be widely held (or done) by human beings in our culture, by humans in other cultures and times, and by apes. This is because a feature in human beings that significantly frustrates reproductive fitness would likely be selected against, whether directly or indirectly. If a feature is widespread and persists over evolutionary development, then it probably has some connection or compatibility with fitness-enhancing genes, however indirect. All conditions are present to some degree, although there is less evidence for pedophilia being widespread in our culture than its occurring across cultures and times and in apes. In the end, there is evidence from this criterion, but it is not strong evidence that pedophilia is not a dysfunction.

It is also unclear whether pedophilia satisfies the harm-criterion. There is little evidence that pedophiles have less pleasure than non-pedophiles or that they suffer because of pedophilia by itself. They might suffer because they are unable to act on their desires or because they are

punished severely when they do. Either might be the relevant harm if their inability to act on their desires or tendency to be punished reflects the rational preferences of members of their population. Whether the harm is relevant thus depends on whether others’ responses are rational and this in turn depends on moral issues. On some accounts, the relevant harm is harm to others, specifically children. However, it is unclear what type of pedophilic acts should ground judgments about this type of harm (for example, all adult-child sex or only those with willing participants) and for some types the harmfulness or expected harmfulness of it is unclear. At least some of the studies cast doubt on whether adult-child sex with willing child participants is always or usually harmful. The limited and controversial data on long-term harm suggests that there is evidence for this criterion, but again it is not strong.

Even if pedophilia is not a mental disorder, adult-child sex might still be wrong and the desire to engage in it vicious. That the issue of sanity is distinct from issues of wrongness and vice can be seen in that plenty of sane people commit violent and hateful acts such as rape and battery. Many more want to do these things but don’t. Like those who attack others, their thoughts are vicious. Perhaps those who engage in adult-child sex also think and act wrongly and have vicious desires. In the next five chapters, we explore these issues.

Table 2.1 summarizes these findings.

Table 2.1.

Criterion	Test	Result
Dysfunction	1. Mental mechanism fails to perform its natural function.	Unclear 1. Some evidence that evolution has not strongly selected against it. 2. Unclear whether it lessens reproductive fitness.
	2. Natural function is identified by the mechanism’s evolutionary explanation.	
Harm	Mental condition brings about harm.	Unclear 1. Harm to self is unclear. There is little evidence on whether it harms the pedophile’s well-being and also unclear whether disapproval- and punishment-related harm is relevant. 2. Harm to others is unclear. Pedophilic acts harm unwilling children. In cases of willing participants, it is less clear.

NOTES

1. See J. C. Wakefield, "The Concept of a Mental Disorder," *American Psychologist* 47 (1992): 373–388; J. C. Wakefield, "Diagnosing DSM-IV, part 1: DSM-IV and the Concept of Disorder," *Behavior Research and Therapy* 35 (1997): 633–649; J. C. Wakefield, "Normal Inability Versus Pathological Inability," *Clinical Psychology: Science and Practice* (1997): 249–258.

2. For versions of the statistical-deviance theory, see H. Cohen, "The Evolution of the Concept of Disease," in A. L. Caplan et al., eds., *Concepts of Health and Disorder: Interdisciplinary Perspectives* (Reading, MA: Addison-Wesley, 1981), 209–220; R. E. Kendell, "The Concept of Disease and Its Implications for Psychiatry," *British Journal of Psychiatry* 127 (1975): 305–315; L. King, "What Is Disease?" in A. L. Caplan et al., eds., *Concepts of Health and Disorder: Interdisciplinary Perspectives* (Reading, MA: Addison-Wesley, 1981), 108–118; J. G. Scadding, "Diagnosis: The Clinician and the Computer," *Lancet* 2 (1967): 877–882. The biological-disadvantage and natural-function theories might not be distinct as the former is often filled out in terms of the latter. Also, some theorists adopt combinations of these theories. For example, Christopher Boorse combines the natural-function and statistical theories in that he focuses on the degree to which an individual deviates from species-typical functions, where deviance is identified in part on statistical grounds. See C. Boorse, "On the Distinction between Disease and Illness," *Philosophy and Public Affairs* 5 (1975): 49–68; C. Boorse, "What a Theory of Mental Health Should Be," *Journal for the Theory of Social Behavior* 6 (1976): 61–84; C. Boorse, "Health as a Theoretical Concept," *Philosophy of Science* 44 (1977): 542–577; C. Boorse, "A Rebuttal on Health," in J. M. Humber and R. F. Almeder, eds., *What Is Disease?* (Totowa, NJ: Humana Press, 1997), 3–143. For other theories that combine these approaches, see Kendell, "The Concept of Disease and Its Implications for Psychiatry," 305–315; J. G. Scadding, "Diagnosis: The Clinician and the Computer," *Lancet* 2 (1967): 877–882; J. G. Scadding, "The Semantic Problem of Psychiatry," *Psychological Medicine* 20 (1990): 243–248. Note some of these theories focus on disease rather than disorder or malady.

3. See Wakefield, "The Concept of a Mental Disorder," 378.

4. See Charles Culver and Bernard Gert, *Philosophy in Medicine: Conceptual and Ethical Issues in Medicine and Psychiatry* (New York: Oxford University Press, 1982). Note that they focus on a malady rather than a disorder. On my account, the notions are identical.

5. Much of the evidence here comes from Richard Green, "Is Pedophilia a Mental Disorder?" *Archives of Sexual Behavior* 31 (2002): 467–471.

6. See J. Briere and M. Runtz, "University Males' Sexual Interest in Children: Predicting Potential Indices of 'Pedophilia' in a Non-Forensic Sample," *Child Abuse & Neglect* 13 (1989): 65–75.

7. See K. Smiljanich and J. Briere, "Self-Reported Sexual Interest in Children: Sex Differences and Psychosocial Correlates in a University Sample," *Violence and Victims* 11 (1996): 39–50.

8. See G. C. N. Hall et al., "Sexual Arousal and Arousability to Pedophilic Stimuli in a Community Sample of Normal Men," *Behavior Therapy* 26 (1995): 681–694; L. V. Quinsey et al., "Penile Circumference, Skin Conductance, and Raking Responses of Child Molesters, and 'Normals' to Sexual and Nonsexual Visual Stimuli," *Behavior Therapy* 6 (1975): 213–219; O. Fedora et al., "Sadism and Other Paraphilias in Normal Controls and Aggressive and Nonaggressive Sex Offenders," *Archives of Sexual Behavior* 21 (1992): 1–15; K. Freund and R. Costell, "The Structure of Erotic Preference in the Nondeviant Male," *Behaviour Research and Therapy* 8 (1970): 15–20.

9. For both, see Briere and Runtz, "University Males' Sexual Interest in Children," 65–75. For the latter, see also J. Briere et al., "Attitudes toward Sexual Abuse: Sex Differences and Construct Validity," *Journal of Research in Personality* 26 (1992): 398–406.

10. See Ron Langevin, "Yes, Virginia, There Are Real Pedophiles: A Need to Revise and Supervise, Not Eliminate DSM," *Archives of Sexual Behavior* 31 (2002): 488–489.

11. This interpretation can be found in Hall et al., "Sexual Arousal and Arousability to Pedophilic Stimuli in a Community Sample of Normal Men," 682. They cite Haywood et al., "Subjective versus Objective Measures of Deviant Sexual Arousal in Clinical Evaluations of Alleged Child Molesters," *Psychological Assessment* 2 (1990): 269–275; Fedora et al., "Sadism and Other Paraphilias in Normal Controls and Aggressive and Nonaggressive Sex Offenders," 1–15; K. Freund and R. J. Watson, "Assessment of the Sensitivity and Specificity of a Phallometric Test: An Update of Phallometric Diagnosis of Pedophilia," *Psychological Assessment* 3 (1991): 254–260; R. R. Franzel and R. A. Lang, "Identifying Sexual Preferences in Intrafamilial and Extrafamilial Child Sexual Abusers," *Annals of Sex Research* 2 (1989): 255–275; H. E. Barbaree and W. L. Marshall, "Erectile Responses among Heterosexual Child Molesters, Father-Daughter Incest Offenders, and Matched Non-Offenders: Six Models," *Journal of Consulting and Clinical Psychology* 59 (1989): 70–82; Briere and Runtz, "University Males' Sexual Interest in Children," 65–75.

12. See Hall et al., "Sexual Arousal and Arousability to Pedophilic Stimuli in a Community Sample of Normal Men," 682; G. C. N. Hall, "Validity of Physiological Measures of Pedophilic Sexual Arousal in a Sexual Offender Population: Reply Quinsey and Laws," *Journal of Consulting and Clinical Psychology* 58 (1990): 889–891; P. B. Schoouten and W. T. Simon, "Validity of Phallometric Measures with Sex Offenders: Comments on the Quinsey, Laws, and Hall Debate," *Journal of Consulting and Clinical Psychology* 60 (1992): 812–814.

13. See Hall et al., "Sexual Arousal and Arousability to Pedophilic Stimuli in a Community Sample of Normal Men," 690.

14. See M. Diamond, "Selected Cross-Generational Sexual Behavior in Traditional Hawai'i: A Sexual Ethnography," in J. Feierman, ed., *Pedophilia: Biosocial Dimensions* (New York: Springer, 1990), 422–444 citing M. Pukui et al., *Nana I Ke Kumu* (Vols. 1 and 2) (Honolulu: Queen Lili Uokalani Children's Center, 1972) and R. C. Suggs, *Marquee Sexual Behavior* (New York: Harcourt, Brace and World, 1966).

15. See C. S. Ford and F. A. Beach, *Patterns of Sexual Behavior* (New York: Harper & Row, 1951), 131–132.

16. See D. Oliver, *Ancient Tahitian Society*, 2nd ed. (Honolulu: Honolulu University Press, 1974).

17. See R. Bauserman, "Man-Boy Sexual Relationships in a Cross-Cultural Perspective," in J. Geraci, ed., *Dares to Speak: Historical and Contemporary Perspectives on Boy-Love* (Norfolk, England: Gay Men's Press, 1997).

18. See Bauserman, 1997.

19. See G. Herdt, *Ritualized Homosexuality in Melanesia* (Berkeley: University of California Press, 1984), 1–81.

20. See P. Nobile, "Introduction," in W. Kramer, ed., *The Normal and Abnormal Love of Children* (Kansas City, MO: Andrews & McMeel, 1976).

21. See R. Trumbach, "London's Sodomites: Homosexual Behavior and Western Culture in the Eighteenth Century," *Journal of Social History* 11 (1977): 1–33.

22. See Eric Bullough, "History in Adult Human Sexual Behavior with Children and Adolescents in Western Societies," in J. Feierman, ed., *Pedophilia: Biosocial Dimensions* (New York: Springer, 1990), 69–90.

23. See F. B. M. de Waal, "Sociosexual Behavior Used for Tension Regulation in All Age and Sex Combinations among Bonobos," in J. Feierman, J., ed., *Pedophilia: Biosocial Dimensions* (New York: Springer-Verlag, 1990).

24. See Polina Perelman et al., "A Molecular Phylogeny of Living Primates," *PLoS Genetics* 7 (2011). For this interpretation of this theory, see Eric Michael Johnson, "Bonobos Are Genetically Closer to Humans Than Chimpanzees Are," *The Primate Scrapbook*, <http://ericmjohnson.posterous.com/bonobos-are-genetically-closer-to-humans-than>, July 27, 2011.

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27. See F. B. M. de Waal, "Sociosexual Behavior Used for Tension Regulation in All Age and Sex Combinations among Bonobos," 1990.

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29. G. R. Gaffney et al., "Is There Familial Transmission of Pedophilia?" *Journal of Nervous and Mental Disease* 172 (1984): 546–548.

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36. See Raymond et al., "Psychiatric Comorbidity in Pedophilic Sexual Offenders," 786–788.

37. See Richard Green, "Is Pedophilia a Mental Disorder?" *Archives of Sexual Behavior* 31 (2002): 467–471.

38. See Richard Herrnstein and Charles Murray, *The Bell Curve: Intelligence and Class Structure in American Life* (New York: The Free Press, 1994), ch. 5–12.

39. See Dan Black et al., "The Economics of Lesbian and Gay Families," *Journal of Economic Perspectives* 21 (2007): 53–70.

40. See S. D. Cochran, "Emerging Issues in Research in Lesbians' and Gay Men's Health: Does Sexual Orientation Really Matter?" *American Psychologist* 56 (2001): 931–947; T. G. M. Sandfort et al., "Same-Sex Sexual Behavior and Psychiatric Disorders: Findings from the Netherlands Mental Health Survey and Incidence Study," *Archives of General Psychiatry* 58 (2001): 85–91.

41. See Paul Flynn and Matthew Todd, "Pride and Prejudice for Gay Men," *The Observer*, February 20, 2011, <http://www.guardian.co.uk/society/2011/feb/20/gay-men-depression-the-velvet-rage>.

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44. Joel Feinberg, *Harm to Others* (New York: Oxford University Press, 1984), 31–36.

45. See Robert Spitzer and Jerome Wakefield, "Why Pedophilia Is a Disorder of Sexual Attraction—at Least Sometimes," *Archives of Sexual Behavior* 31 (2002): 499–500.

46. See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed. (Arlington, VA: American Psychiatric Association, 2000), 789.

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50. For the notion that these are among objective-list goods, see Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 42–45.

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54. See Judith Levine, *Harmful to Minors: The Perils of Protecting Children from Sex* (New York: Thunder's Mouth Press, 2002), 26–29.

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56. See Stephen Kershner, "The Moral Status of Adult-Child Sex," *Public Affairs Quarterly* 15 (2001): 111–132; Stephen Kershner, "Paedophilia," in Ruth Chadwick, ed., *Encyclopedia of Applied Ethics* (Waltham, MA: Academic Press, 2010).

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58. See Bruce Rind and Philip Tromovitch, "A Meta-Analytic Review of Findings from National Samples on Psychological Correlates of Child Sexual Abuse," *The Journal of Sex Research* 34 (1997): 237–255. See, also, Bruce Rind et al., "A Meta-Analytic Examination of Assumed Properties of Child Sexual Abuse Using College Samples," *Psychological Bulletin* 124 (1998): 22–53, esp. 44 and 46. See, also, Michael Ingram, "Participating Victims: A Study of Sexual Offenses with Boys," *British Journal of Sexual Medicine* 6 (44) (1979); Frits Bernard, "Pedophilia: A Study of Psychological Consequences for the Child," in M. Cook and G. Wilson, eds., *Love and Attraction* (Oxford: Pergamon, 1979); Larry L. Constantine, "The Effects of Early Sexual Experiences: A Review and Synthesis of the Research," in Larry L. Constantine and Floyd M. Martinson, eds., *Children and Sex* (Boston: Little Brown, and Co., 1981), 217–244, esp. 238–242.

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63. See D. Spiegel, "The Price of Abusing Children and Numbers," *Sexuality and Culture* 4 (2000): 63–66.

64. See M. A. Hagen, "Damaged Goods? What, if Anything, Does Science Tell Us about the Long-Term Effects of Childhood Sexual Abuse?" *Skeptical Inquirer* 25 (2001): 54–59 and Spiegel, "The Price of Abusing Children and Numbers," 63–66.

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66. See J. A. Paulos, "Statistical Misconduct: Meta Don't Mean Better," www.abcnews.go.com/sections/science/WhosCounting/paulos990701.html.

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70. In addition to Bruce Rind et al., "A Meta-Analytic Examination of Assumed Properties of Child Sexual Abuse Using College Samples," *Psychological Bulletin* 124 (1998): 22–53, see also Ingram, "Participating Victims"; Bernard, "Pedophilia"; Constantine, "The Effects of Early Sexual Experiences," 217–244, esp. 238–242. I make no claim with regard to the ultimate scientific validity of these studies.

71. C. K. Li et al., *Children's Sexual Encounters with Adults: A Scientific Study* (Buffalo: Prometheus Books, 1993), 122.

72. J. B. Murray, "Psychological Profile of Pedophiles and Child Molesters," *Journal of Psychology* 134 (2000): 211–224; C. Bagley, "The Prevalence and Mental Health Sequels of Child Sexual Abuse in a Community Sample of Women Aged 18 to 27," *Canadian Journal of Community Mental Health* 10 (1991): 103–116; C. Bagley et al., "Vic-

tim to Abuser: Mental Health and Behavioral Sequels of Child Sexual Abuse in a Community Survey of Young Adult Males," *Child Abuse & Neglect* 18 (1994): 683–697.

73. Hall and Hall, "A Profile of Pedophilia," 465.

74. P. J. Fagan et al., "Pedophilia," *The Journal of the American Medical Association* 288 (2002): 2458–2465; H. H. Filipas and S. E. Ullman, "Child Sexual Abuse, Coping Responses, Self-Blame, Posttraumatic Stress Disorder, and Adult Sexual Revictimization," *Journal of Interpersonal Violence* 21 (2006): 652–672; R. C. Hall et al., "Sexual Abuse in Patients with Anorexia Nervosa and Bulimia," *Psychosomatics* 30 (1989): 73–79.

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76. See Bagley et al., "Victim to Abuser," 683–697.

77. See Todd Kendall, "Pornography, Rape, and the Internet," http://www.law.stanford.edu/display/images/dynamic/events_media/Kendall%20cover%20+%20paper.pdf, July 19, 2010. For an argument that there is an inverse correlation between access to pornography correlates and changes in the frequency of rape, see Anthony D'Amato, "Porn Up, Rape Down," Northwestern Public Law Research Paper No. 913013 (June 23, 2006), <http://ssrn.com/abstract=913013>.

THREE

The Wrongness of Adult-Child Sex Involving Willing Participants and Non-Forward-Looking Reasons

THE NATURE OF ADULT-CHILD SEX

In this chapter, I argue that it is not clear that adult-child sex between willing participants is necessarily, invariably, or even probably wrong from a non-forward-looking perspective. That is because in cases of willing participants, it does not invariably involve right-infringements, failure to satisfy counterfactual consent, exploitation, or an incorrect motivation. In the following two chapters, I discuss consent and exploitation because these notions and their moral role are closely related to the discussion in this chapter.

When considering the moral status of adult-child sex, we might consider such sex is always wrong, always *prima facie* wrong, or not wrong at all. An act is *prima facie* wrong when it has features that normally make it wrong, but which might not make it wrong in a particular instance. For example, it is normally wrong to lie, but sometimes lying might be necessary to avoid an even greater evil.

THE MORAL STATUS OF ADULT-CHILD SEX

Whether adult-child sex is wrong depends on whether one has a duty to refrain from acting or thinking in certain ways. This chapter focuses on acts. An act might be wrong because of a forward-looking reason (a reason that looks forward in time or to the future) or a reason that is not forward-looking. Non-forward-looking reasons are typically backward-looking. Backward-looking reasons, for example, include a reason that

looks backward in time or to the past. They appeal to what has already happened. There might also be present-looking reasons. With regard to non-forward-looking explanations, adult-child sex might be thought to be a non-forward-looking fundamental wrong or wrong because it infringes on the child's rights, fails to respect the child's counterfactual consent, exploits the child, is badly motivated, or is wrong for other reasons.

This backward-looking/forward-looking distinction differs from the consequentialist/non-consequentialist distinction. Crudely, the latter focuses on whether the right maximizes the good. On some theories, the act in question can precede, follow, or occur simultaneous to the relevant good (or bad).

Non-forward-looking reasons include reasons that are present at the time the act is performed or, perhaps, completed. For example, if an act is wrong because it infringes on someone's right and the right-infringement occurs at the same time the act is performed, then the wrong-making feature does not precede or follow it. A non-forward-looking reason does not look exclusively to the future. Thus, it might refer to a reason that occurs in the past or present or that is not in time. This chapter looks solely at non-forward-looking reasons. The idea for this limited focus is that even if forward-looking reasons establish that such sex is usually wrong, they will likely not show that such sex is always wrong in the actual world, let alone necessarily wrong.

My list of non-forward-looking explanations of the wrongness of adult-child sex is not exhaustive. For example, I will not discuss purported reasons that claim that such sex violates God's commands or that it is not natural. The former is implausible if one rejects theism or accepts it but rejects the divine command theory. Divine command theory asserts that acts are obligatory because God commands them and wrong because he forbids them. The Bible does not explicitly prohibit adult-child sex. The unnatural-explanation is implausible if we can't make sense of natural versus unnatural acts or if unnatural acts are not necessarily wrong (or, perhaps, not *prima facie* wrong). My assumption is that the purported explanations below are the most plausible ones.

In this chapter, I assume that child rape (or sex with an unwilling child) is very harmful, a horrendous wrong, and warrants severe punishment.

An objector might argue that my approach sets the bar too high for it seems to hold that an account of the wrongness of adult-child sex is successful only if it explains the wrongness of all such instances of adult-child sex. That is, it assumes that a successful account must explain why such sex is invariably wrong for non-forward-looking reasons (that is, wrong in the actual world and close possible worlds). However, the objector might continue, the advocates for each of those accounts would say

that her account has the virtue of explaining why some instances of adult-child sex are wrong and others are not.

The objection is mistaken. First, most of the explanations of the wrongness of adult-child sex (for example, right-infringement and consent) aim to show that it is invariably wrong or almost invariably so. With the exception of one of my earlier articles, other authors do not allow that there are a non-significant number of instances of permissible adult-child sex.¹ Second, the interesting issue given the law, conventional morality, and philosophical literature is whether such sex is always *prima facie* wrong, at least on non-forward-looking grounds. I mean to challenge this position.

NON-FORWARD-LOOKING THEORIES

Theory #1: Adult-Child Sex Is a Non-Forward-Looking Fundamental Wrong

On one account, adult-child sex is a fundamental (or basic) wrong. A fundamental wrong is the minimal fact or set of facts that make an act wrong. For example, on a Kantian theory, an act is wrong in virtue of the fact that it involves an agent treating a person merely as a means.² On a utilitarian theory, an act is wrong in virtue of the fact that an agent brings about less utility (or, perhaps, expected utility) through her act than another act available to her. On an adult-child-sex theory of fundamental wrongness, an act is wrong in virtue of the fact that an adult has sex with a child. Because the wrong-making feature occurs when the act does, this is not a forward-looking theory. Note that some types of fundamental wrong-making theories (for example, utilitarianism) are forward-looking.

Adult-child sex does not have the sort of basic wrong-making feature that explains why an act is wrong. That is, it is likely wrong because it has some other feature (for example, the adult infringes on the child's right, exploits her, or acts from a bad motive). One way to see this is that no general moral theory could (without redundancy) mention adult-child sex. Another way to see this is that there might be a shared explanation for why sex with a child is wrong and why other acts that negatively affect a child's future are wrong. Alternatively, there might be a shared explanation for why sex with children is wrong and why sex with developmentally disabled (retarded) individuals is wrong. If one of these shared explanations is correct or if there is a shared explanation with other wrongful acts, then this is not a fundamental wrong. When the shared explanation involves an additional fact (for example, it is unnatural or God prohibited it), then such sex is not a fundamental wrong.

Theory #2: Adult-Child Sex Infringes on the Child's Right

It is uncontroversial that child rape is wrong. It is wrong for some of the same, if not all of the same, reasons that adult rape is wrong. It might be the horrific nature of child rape that explains the intense outrage that is now directed at all adult-child sex. It is not clear that all adult-child sex is rape. To see whether it is, we have to consider whether children can consent and what happens to their rights.

On a common account, adult-child sex is wrong because the adult infringes on someone's rights. This assumes that children have rights. This assumption conflicts with the notion that infants and very young children lack rights. It is in tension with the notion that they have their rights held in trust by parents or other guardians because they lack autonomy.³ The assumption also fits uneasily with the intuitions that parents may prevent children from doing certain things, force them to do other things, and have significant discretion in raising them. The rights-in-trust view is widely defended in the literature.⁴

The notion that children have rights is necessary to explain constraints on what we may do to children. In particular, it is necessary to explain why brutalizing children is wrong in terms of what is done to the children. For example, beating a child is wrong because of what is done to the victim of the beating. This contrasts with theories that explain the wrongness of brutalizing children in terms of what is done to their parents, what effect this has on the brutalizing agent, or a failure to promote the good. For example, it intuitively seems that the main reason that child rape is wrong is because of what is done to the child. It is not because child rape infringes on the parents' rights, makes the rapist a vicious person, or fails to maximize utility.

There is a concern as to whether the relevant children's right in the context of adult-child sex is a freedom right or a welfare right. This distinction likely tracks the distinction between the will and benefit theories of rights. The autonomy-based theory of rights is called the "will theory of rights." This theory asserts that rights function to protect choices. As such they always include a Hohfeldian power plus the other Hohfeldian elements over which the power ranges.⁵ I should mention that on my version of the will theory, rights are constituted by claims, although these claims are often accompanied by powers. On this theory, rights protect choices and only beings that can make choices have rights. This theory entails that all rights can be lost, whether via waiver or forfeiture, and that beings who cannot make autonomous choices do not have rights. On this theory, then, non-human animals do not have rights.

In contrast, the interest theory asserts that rights function to protect interests. As such they are constituted by a claim.⁶ On this theory, then, it is unclear whether all rights can be lost and those who have rights are

those who have interests. On this theory, then, non-human animals do have rights.

On some accounts, there are different types of rights and these types cut across the will and benefit theories. Freedom rights protect self-determination. Welfare rights protect against certain kinds of harm. The former is justified by autonomy and the latter by interests other than the interest in autonomy. The distinction is not sharp because welfare rights arguably include freedom rights insofar as individuals have an interest in self-determination. Also, freedom rights arguably include welfare rights insofar as pain and suffering hinder self-determination. In any case, the discussion in this section covers both types.

The usual explanation for why adult-child sex infringes on the child's right is that the child does not provide valid consent. Valid consent consists of an intentional and voluntary grant of permission to another. The intentionality condition requires an adequate understanding of the nature and consequences of the sexual activity. The central role of valid consent is compatible with both theories of rights and both types of rights.

There is an issue as to whether in adults valid consent temporarily eliminates or suspends the right against sexual contact or whether adults have a right not to be subject to sexual interaction without valid consent. The former allows for a more intuitively satisfying account of the content of the right to control one's body because it avoids complex rights, such as the following: a person has a right to not have his body controlled by another unless he makes a promise or consent or warrants punishment or attacks another and so on. On such complex accounts, rights do not explain when involuntary body contact is permissible and when it is not, but rather follow from an analysis of its moral status. This intuitively seems to deprive rights of their explanatory role. However, for the purpose of this chapter, either account will do.

This explanation can be seen in an argument from Igor Primoratz. Primoratz argues that the child does not provide valid consent to sex with an adult in part because she lacks the competence to do so.⁷ He argues that this is because the child has an insufficient understanding of the psychological, physical, and social aspects of sex, particularly relative to the adult's understanding. In particular, he notes, the child often looks for sympathy and affection, whereas the adult looks for sexual gratification. Primoratz also argues that any consent given would be involuntary. He argues that the child is subordinated by adults. In support of this, he cites the asymmetry in physical and psychological maturity and power in adults and children that reflects the way in which children are brought up. Because such asymmetry is absent in sex between children, the same argument does not apply to sex involving only children.

Objection #1: It is possible that children give valid consent.

One immediate objection is that because the notion of child that is relevant to pedophilia concerns in part individuals with adult minds but pre-pubescent physical development, it is at least possible that there are children who voluntarily give consent and are competent to do so. Because it is not clear this is any more than a logical possibility, the lack-of-valid-consent argument might explain what is wrong with actual cases of adult-child sex, even if it fails to explain what is wrong in some possible cases or if consent renders them permissible.

Objection #2: We involve children in many activities without their valid consent.

A second objection that has been raised against the valid-consent theory is that we do many things to children without their valid consent.⁸ For example, parents often impose medical exams and treatment on unwilling children. They also send their children to school and religious ceremonies and force them to stay with relatives they despise despite their explicit opposition. If the parents' actions in these cases are sometimes permissible, and surely they are, then valid consent is not a necessary condition for permissible activities involving children.

The same is true for consent that is real, but still not valid. This might occur with regard to religious ceremonies that children agree to because they are coerced into doing so or lack any understanding of the nature of a ceremony, let alone a particular type of ceremony. The consent is invalid on some theories because it is involuntary or uninformed or because it is given by an individual who is not morally responsible.

Opponents of adult-child sex might respond that consent is relevant, perhaps even necessary, when the activity in question significantly harms the child or poses a risk of significant harm to her. Consider, for example, consent to a risky type of surgery. However, this explanation likely redirects the explanation of the wrongness of adult-child sex from the lack of valid consent to harm.⁹ What drives this response is the concern to avoid harm to the child rather than to respect her wishes. Harm-based wrongness is discussed in the previous chapter and briefly below. I argued in the previous chapter that when the child is willing, it is unclear whether such sex is invariably or usually harmful.

The objector might claim that a necessary condition for acting without the child's consent or willing participation is that the action benefits the child, as opposed to harming her. But note that we often coerce children to do things that are good for other family members and bad for the child (for example, go to a sister's dance recital or stay at a strict aunt's house for a night when the parents attend a wedding) and this does not intuitively seem wrong. In addition, given that that the child might not like doing these things, this is harmful in a minor way. The objector might

instead claim that avoiding harm or risk of harm is a necessary condition for paternalism. This would conflict with our intuitions in the dance-recital and strict-aunt cases.

In addition, if adult-child sex involving willing children does not produce long-term harm, then the response fails to show that such sex is wrong. There is some evidence for this, albeit controversial evidence that was mentioned in the previous chapter.

Objection #3: In some cases, children give valid consent.

A third objection is that children can give valid consent. The idea here is that the threshold for valid consent is a function of the consenters' competence, knowledge, and voluntariness, and it varies with the context, specifically with the costs and benefits that are at risk.¹⁰ This threshold notion can be seen in two of the models for disclosure in the context of informed consent to medical treatment.¹¹ On the reasonable-person model, the physician must disclose information that a reasonable person would find pertinent. Pertinence is a matter of how significant the information would be to the reasonable person. On the subjective model, adequate information depends on the specific informational wants or needs of the individual. The former model considers factors like competence, knowledge, voluntariness, and cost-benefit analysis in determining what a reasonable person would find significant. The latter considers them in determining what information an individual wants or needs. For example, required disclosure to a developmentally disabled child facing life-saving surgery might differ from that required for a competent adult considering risky cosmetic surgery.

In the context of adult-child sex, an objector might argue that some children can give consent that exceeds the threshold. For example, the benefits of life-saving surgery might result in a low threshold for valid consent to such surgery. This might arise when a hospital considers the consent of an anxious, confused, and heavily drugged octogenarian. In contrast, a different threshold might apply when he consents to be euthanized or to donate all of his money to a cultlike church. Some adult-child sex involves willing child participants. Some researchers actually make a stronger claim, namely that some children's participation in adult-child sex is free and competent.¹² I find this implausible. Whether their willingness counts as valid consent depends on the context, specifically the costs and benefits that are at risk.

To see the role of context-dependency in the context of sexual consent, consider the following case.

Island Lovers: Al and Betty are stranded on a tropic island. They are isolated there and will be for the rest of their lives. Al is a normal-functioning twenty-five-year-old. Betty is a developmentally disabled (retarded) twenty-five-year-old who has the mental abilities of a

twelve-year-old. She has been sterilized and knows it. After years on the island, they fall in love and both very much want to have sex with the other. Were they to have sex both would greatly enjoy it.

It is hard to see what is wrong with the sex in this case, at least in part because Betty is a willing participant and, given the context, gives valid consent. However, were Betty back in London, it is not clear that we would treat her consent to other things as valid. For example, we might not view her attempt to consent to various investment schemes as valid, even though she is the same person in both scenarios. If this is correct, then the level of willing participation that counts as valid consent to sex depends on the context. The context includes the cost-and-benefit risks and this varies with the activity (for example, sex versus investment) and location (for example, need for money on a tropical island versus in London). If one concludes that these cases, or context-dependency, show that valid consent is not necessary for morally acceptable sexual contact, then the original no-valid-consent argument against adult-child sex fails.

It might be thought that this shows only that context is valid for some kinds of consent, not that it is relevant for consent to sex. However, it is unclear why valid consent would be contextual for some matters, but not others. That is, aside from the particular distribution of harms and benefits that ordinarily accompanies sex, it is hard to see why sex is unique in requiring a valid-consent criterion that is independent of context. This is even less plausible given that the validity of Betty's consent intuitively seems to depend on context.

An objector might claim that the cases given above do not show that valid consent is not required—only that what is required for valid consent varies with the context. Furthermore, the objector might continue, there is no discussion of what might be required for valid consent in this context. A theory of context-sensitivity should specify what aspects of consent are required for validity under varying conditions. On some accounts, the aspects include the minimum degree to which consent is voluntary and informed and the degree to which the consenter is autonomous or, perhaps, morally responsible. Consent might be viewed as an attitude, a performance, or both.¹³ My argument is neutral on this issue.

There are two ways in which consent might be sensitive to context. On one model, what is required for moral consent (that is, waiving a claim) might be constant across contexts, but the legal recognition or weight given to instances of consent might be context-sensitive. The analogy here is to knowledge where, on some accounts, the threshold for justification is constant. Some theories assert the opposite. They hold that the strength of evidence required for justification varies with the context.¹⁴ On this model, for example, the law might recognize the sexual consent of minimally developmentally disabled women or patients in the early stages of dementia, not because they gave valid consent, but rather be-

cause their willing participation is desirable. Here some, if not all, children do not consent because they are legally unable to do so.

If what matters is willing participation, then there is no reason to believe that children cannot willingly participate. After all, we allow them to willingly participate in other activities involving both their peers and adults. Consider, for example, a child's participation in beginning to study for his Bar Mitzvah with a rabbi or taking part in a play that has adults in it.

An objector might claim that this does not recognize the differences between children, patients, and developmentally disabled women. However, it is doubtful that they differ along a single dimension. Just as children differ in their emotional and cognitive capacities, the same is true for individuals with dementia, development disabilities (retardation), schizophrenia, antisocial personality disorder, and so on.

On a second model, what is required for valid consent is context-sensitive.¹⁵ If this second model is correct, then what is required for moral and legal consent likely varies with the expected costs and benefits that individuals face when in the relevant situation. The likely explanation of this variation is that consent serves to protect consenters' interests rather than because it is an autonomous choice. Note that a consenter's interests might include autonomy-related facts.

An interpretation of this context-sensitive model that holds that the bar for consent varies in a systematic way with the costs and benefits (including autonomy-related costs and benefits) would have to explain why the model systematically tracks net harm and yet is not a stand-in for it. Perhaps this argument can be made, but I am unaware of such an argument in the literature. If children cannot give valid consent, because in the actual world they lack the relevant capacities, then both models are beside the point because consent is not relevant in deciding what may or may not be done to children.

If this second model is correct, then consent likely acts as evidence of what can reasonably be expected to harm or not harm the consenter. Because the concern for avoiding harm is likely best understood to be a forward-looking concern, I shall sidestep it here. That this is a forward-looking concern can be seen in that were the sex known to pose little threat of harm, the bar for consent would intuitively seem to be lowered accordingly. In addition, were we in some bizarre world where such sex was necessary for the adult to survive or achieve some other important good, the bar might also be lowered.

While not necessary to preserve adult lives, adult-child sex is frequent in some cultures because it is likely thought to be tied to some important good. I note the obvious here: the beliefs that motivate these conventions are false and any good that comes about is the result of the convention. In the Siwans (from North Africa), for example, most men engage in anal intercourse with boys as part of romantic relationships.¹⁶ In the Etoro of

New Guinea, from about age ten, boys would have oral sex regularly with older men to facilitate their growth.¹⁷

On this second model of consent, context-sensitive threshold for valid consent, what matters is harm (or, perhaps, expected harm) to children who have sex with adults and the former's consent or willingness to participate is at most evidence of expected harm. To see this, note that the risk level used to set the bar for consent, or perhaps willing participation, is likely just a cost-benefit analysis of such sex. Given this, it is hard to see what role consent or willing participation plays other than being something that affects, or often affects, costs and benefits.

Note that the usual explanation for the importance of consent is that it is necessary to respect an individual. The respect might be for her status as a person, autonomous agent, rational decision maker, etc. It is not clear whether or why this respect allows for a context-dependent threshold for valid consent. This is true even if context determines the degree to which it is wrong to override someone's valid consent.¹⁸ Let us set this concern aside.

In this context, an individual is willing to do something when she has attitudes or does actions that share a certain family resemblance. These include wanting to do something, agreeing to do it, trying to do it, requesting to do it, etc. I leave it open which of these, if any, are necessary or sufficient for the sort of willing that is relevant in this context. How willing an individual is to do something is a matter of degree and the degree rests in part on the intensity of the relevant desires and the amount of knowledge, voluntariness, and competence. The same is true for consent. Willingness differs from consent, at least on some versions of consent, in not being a speech act.¹⁹

There are issues relating to what a willing or consenting individual must know. For example, in order to be willing or to consent to sex, a child might have to know facts about the nature of sex, adult-child sex, sex with a particular adult, or sex with a particular adult under certain conditions. Because this concern plagues all consent-related issues in applied ethics, this problem of filling in the relevant good is not unique.

In summary, in cases of willing participation, adult-child sex is probably not wrong because it infringes on someone's right. The focus here should be on the child's right. This is because the usual reason that people think adult-child sex is wrong is because it wrongs the child. If so, then it is the child's right that the adult infringes. Because an act to which someone gives valid consent does not infringe on the act recipient's right, the issue arises whether the lack of valid consent explains what is wrong with adult-child sex. There are several reasons to doubt that it does. First, in the context of pedophilia, a child is a human being with prepubescent physical development or the appearance thereof. Hence, it is at least possible that some children are competent to validly consent and voluntarily do so. However, this might strike some as merely of theoretical interest.

Second, we do many things to children without their valid consent (for example, we make them go the dentist and to church). Moreover, we allow them to willingly participate in activities (for example, kickball) to which they do not validly consent because, by hypothesis, they cannot do so. It is not clear why adult-child sex should be different. If the explanation is made in terms of the concern for harm, then we have likely changed our focus from rights to harm. Third, it is not clear that children don't give valid consent. The threshold for competence, knowledge, and voluntariness depends on context and it is not clear where the threshold is in this context or whether children (for example, twelve-year-olds) who consent to sex exceed it. Some people think that two children engaging in sex play might exceed the threshold for giving valid consent, which then raises the question why the same is not true when one of the children does similar acts with an adult.

Theory #3: Adult-Child Sex Is Wrong Because It Infringes on the Parents' Rights

A different theory is that what is wrong with adult-child sex is that it infringes on the parents' rights or, perhaps, those of the child's guardian.²⁰ The problem with this claim is that opponents of adult-child sex usually think that such sex is wrong because it wrongs the child, but on this account it does not wrong them. Rather, on this account, it wrongs the parents. The opponent might respond that the adult holds the child's rights in trust similar to the way in which a trust executor holds the beneficiary's rights to property. Note that beneficiaries have rights in the property held in their behalf; they merely lack the power to execute them. In contrast, on this account children lack rights, or at least rights against sex with adults, and hence the analogy fails. Still, the opponent might bite this bullet and concede that the parents alone are wronged via adult-child sex. This fails to explain the wrongness of some incest (where the person holding the child's rights exercises those rights to consent), which is likely a belief held by most opponents of adult-child sex. The trust executor theory also can't explain the wrongness of adult-child rape when the child's executor gives the rapist permission.

Theory #4: Adult-Child Sex Is Wrong Because It Risks the Child's Future for No Good Reason

Another theory holds that what is wrong with adult-child sex is that the adult takes an enormous risk with the child's future. In having sex with him or her, the adult risks a lifetime of harm to the child for at most a relatively minor gain in short-term pleasure. The opponent might claim that it is much like shooting one's gun up in the air to celebrate New Year's Eve in that the gain is small and the risk of harm is enormous.²¹

One response is that the claim that such sex imposes much risk on willing child participants is controversial among specialists.

A second response is that this is a covert harm-based explanation of the wrongness of such sex, not a right-based one, because the real concern motivating this objection is with harm, or the risk of harm. This response is less convincing if a deontological analysis can be given. If such an analysis can be given, then the objector could claim that this sex imposes a right-infringing risk. Even if this is correct, the moral claim, and arguably the empirical claim, concerning willing children being put at serious risk has not been made in the philosophical or scientific literature. Perhaps this will change in the future.

A third response is that some children might give valid consent to take these risks. Whether in real-world scenarios children actually do so depends on the threshold level for such valid consent to occur and the particular child's level of competence, knowledge, and voluntariness. The former factor in turn depends on the riskiness of such sex. This might depend in part on what the actual risks of harm are and its actual risk is an empirical question for which the answer cannot be assumed or even discovered through data or anecdotes that include many unwilling participants.

Theory #5: A Child's Consent to Sex Is Subject to Manipulation and Hence Invalid

A fifth theory holds that children's willingness and consent are subject to manipulation. In particular, the concern is that adults will direct children's beliefs, desires, emotions, or reasoning in such a way as to get them to consent when they otherwise would not or should not. If manipulation is powerful enough it undermines the degree that the child is really willing to do something or the voluntariness of her consent. In this way, it is similar to coercion. However, this is not a distinct problem for adult-child sex. The same problem arises for attempts to get a child to commit to Bar Mitzvah classes or to not engage in child-child sex. There is a distinct problem here only if there are different or greater worries concerning adult-child sex. If what is different is the risk of harm, then this is likely a harm-based analysis, rather than a right-based one.

Theory #6: Adult-Child Sex Fails to Respect the Child's Counterfactual Consent

On a sixth account, adult-child sex is wrong because of the lack of counterfactual consent. Robert Ehman argues that nonconsensual sexual interactions with children are permissible if the child conceived as capable of mature judgment would be likely in fact to consent to the interaction.²² On his account, the justification of sex (or any other interaction) between adults and children does not require that an adult know the

counterfactual assessment of the sex. On this theory, it only requires that the adult has good reason to affirm that the child conceived as capable of mature judgment will have good reason to consent to the sexual interaction, that is, judge that it is in accord with her goals and values. The moral wrong of a violation of this duty is independent of any psychological harm that might result from the sex.

On Ehman's account, what is needed is a biographical judgment as to what the child would consent to if he had the information and freedom sufficient for him to be capable of valid consent. The question is one of narrative consistency about what we know about the child. However, it is not a purely narrative account. The focus of Ehman's account is on the preferences of the child conceived of as capable of mature judgment. These preferences rest on goals and values that the child would likely have if he had the information and independence to provide valid consent. The biographical judgment does not rest on the goals and values that the child has good reason to have. This account is designed to respect the child by respecting his goals and values. At the same time, however, it is designed to screen out the effects of the child's ignorance and subordination, incapacities that might interfere with the identification and expression of the child's goals and values.

One objection here is that this theory permits some harmless adult-child sex when the child, conceived as capable of mature judgment, enjoys the sex, sex brings no long-term harm, and the child's values and goals are compatible with the sex. Because Ehman does not intend to rule this out, however, it is not an objection to his theory.

A second objection is that counterfactual consent will be indeterminate in many cases if it rests on goals and values that the child has not yet formed and is not destined to form in one way rather than another. The problem gets worse if the goals and values of the adult are not continuous with those of the child.²³ However, the deontic status of an act cannot be indeterminate. Perhaps the goals and values are future ones that make the past act right or wrong, so this objection might be unsuccessful.

A third objection is that hypothetical consent, like a hypothetical contract, is best understood as merely a guide to the moral factors that explain the moral status of an action or policy rather than to the factor that explains their status.²⁴ A related objection is that it is possible that a person hates herself and would consent to harmful adult-child sex because of her desire to have her life go worse.²⁵ If so, then adult-child sex that is harmful, exploitive, etc. might be permissible because of the girl's warped psychology. If the counterfactual consent is constrained so that only those acts of consent that are rational or in the subject's interest are given weight, then whatever explains this constraint is the relevant explanatory factor. On such an account, counterfactual consent is likely merely a guide to what promotes the child's interest, because the explanatory factor is most likely the value attached to an individual's life going

well.²⁶ Let us leave aside whether a life goes well only if it goes well according to her own enduring standards.

Theory #7: Adult-Child Sex Is Wrong Because It Is Exploitative

On a seventh account, adult-child sex is wrong because it is exploitative. What exploitation consists of is controversial. On the best account, it occurs in the context of a mutually beneficial transaction when the stronger party uses his superior position to take an unfair share of the transaction surplus from the weaker and desperate party.²⁷ On this account, exploitation is wrong because it is unfair. The relative strength of the two parties is a function of external conditions, specifically their circumstances and the resources available to each of them. The transaction surplus is the combined net benefit that the parties receive by transacting. There is a concern about how a transaction that is mutually beneficial and to which both parties give valid consent might be wrong, but let us set aside this concern.²⁸

One objection to the exploitation-based account of wrongness is that it makes the permissibility of adult-child sex depend on how much enjoyment or guilt the adult feels. If the adult feels very guilty, then he did not gain an unfair share of the transaction surplus. Also, if the child's gain in sympathy and affection exceeds the adult's gain in sexual satisfaction, then the sex will not be exploitative. This problem occurs even if we take an *ex ante* view of exploitation (exploitation-making facts occur before or at the time of the transaction) because the expected gain need not favor the adult given each party's knowledge of things such as the adult's likely feelings of guilt and the child's strong desire for affection and sympathy. This result is incorrect if, as some theorists claim, adult-child sex is wrong even if the child enjoys it and incurs no significant or net harm from it.

When the adult benefits more from the sex than the child, the transaction might be made fair if the adult provides the child with significant educational or financial benefits. It might be claimed that such additional benefits are not part of the sex, but there is no reason that the transaction shouldn't be understood more broadly to include both the sex and the connected goods and services. By analogy, a cost-benefit analysis of a golf outing for an individual might include not only the narrow costs and benefits (for example, price paid and the pleasure received while playing), but other broader costs and benefits as well (for example, friendships and job contacts made during the game). One reason to include such benefits is that they are closely related to the sexual interaction. This is analogous to the way in which playing golf is worthwhile for some people in part as a way of making friends. There the golf leads to the player making friends and the chance to make friends in part motivates the decision to play golf. This is also similar to how other features of sex

(for example, cuddling and post-coital conversation) are distinct from it, but often accompany it.

It might be objected that while all of these points show that exploitation does not necessarily explain the wrongness of adult-child sex, it does so in many cases. This might be true but such a claim needs empirical support. In addition, it fails to support the widespread claim that adult-child-sex opponents make, which is that such sex is necessarily wrong, at least for individuals with the type of psychology that human beings have in the sort of circumstances in which they actually live.

Theory #8: Adult-Child Sex Is Wrong Because It Is Badly Motivated

On an eighth account, adult-child sex is wrong because the adult acts from a bad motive; specifically he is indifferent or hostile to the child's well-being.²⁹ A related account is that such sex is wrong because it involves the adult objectifying the child.³⁰ One immediate objection to this account is that motivation is not a wrong-making fact. The underlying idea here is that mental states like motivation and knowledge go toward an agent's blameworthiness for an act, not toward whether it is wrong. This allows us to say, which we sometimes do want to say, that someone did the right act for the wrong reason or the wrong act but for the right reason. It also allows us to say that someone is blameworthy even though he didn't do anything wrong.³¹

A defender of this account might respond that there are certainly crimes I can commit only if I act from a "corrupt motive." Consider giving a gift to a politician; this is okay as long as I do it because I'm hoping for an illegal quid pro quo. However, it is not the motive, but the attempt to make such a trade that is illegal and this can be specified by the agent's intention rather than his motive.

A second objection is that there are cases in which adults have had sex with children without acting from indifference or hostility. Consider the cases mentioned in the previous chapter. They might be mistaken about whether the sex is damaging to the children, but, even if so, it does not follow that they act from an incorrect motivation.

Pedophiles and those who engage in adult-child sex are not necessarily the same. Nevertheless, the former provide some evidence about the latter. That pedophiles are sometimes mistaken or act from a motive that is not terrible is made more likely by the fact that they frequently have conditions that lessen their blameworthiness. Specifically, on some accounts, they are less bright, less well emotionally balanced, have other mental disorders, and have a genetic predisposition to pedophilia. They sometimes act on a script that were it true would suggest their motives are not especially bad. More specifically, and using some of the same studies mentioned above, they have lower IQs than average, low self-esteem, and emotional immaturity.³² Some studies have found that it is

common for them to suffer another psychiatric or personality disorder.³³ There is also likely a genetic role in predisposing individuals to be attracted to children.³⁴ The most common onset of pedophilia is during adolescence and such adolescents often have sex with children before reaching fifteen.³⁵ They sometimes see their actions as involving love and mutuality.³⁶ It is likely that not all adults who have sex with children have these responsibility-undermining factors. However, the presence of such factors lessens the degree to which some adult participants in adult-child sex are blameworthy or act from bad motives. They do not make the act wrong.

Theory #9: Adult-Child Sex Is Wrong for Different Reasons

On a ninth account, adult-child sex is wrong or almost always wrong for non-forward-looking reasons, but the reason varies depending on the context. Depending on the context, the wrong-making feature might be the lack of willing participation, exploitation, or the adult's motive. Perhaps this is right, although it fails to establish that adult-child sex is invariably wrong. An act is invariably wrong if it is always wrong (whether *prima facie* or actually wrong) when it involves individuals similar to the ones in the actual world. If there is reason to doubt that exploitative acts are wrong and that wrongness does not rest on the agent's motive, then this multifactor explanation fails. This theory depends on whether one or more of the above accounts succeeds in explaining why some acts in general, let alone adult-child sex, are wrong.

My sense is that the intuitions that generate the multiple-factor theory really focus on harm. This is because the outrage that accompanies discussion of adult-child sex intuitively seems disproportionate if the concern is merely that in a mutually beneficial trade the adult received more than his fair share or that the adult had an improper motivation.

Summary

In conclusion, then, it is not clear that adult-child sex between willing participants is necessarily, invariably, or even probably wrong from a non-forward-looking perspective. The fundamental wrongness of adult-child sex is certainly not proved. When the participants are willing, it is not clear whether it infringes on the child's rights. Nor is it clear whether it conflicts with counterfactual consent, exploitation, or a bad motive. Even if it did invariably or intermittently have one or more of these last three features, there is some reason to doubt whether they are relevant to assessing whether an act is right or wrong. Hence, it is not clear whether non-forward-looking reasons explain the wrongness of adult-child sex. Table 3.1 summarizes these findings.

CAPTURING THE MORALLY PROBLEMATIC FEATURES OF ADULT-CHILD SEX

One concern with my analysis is that even if it is all correct, it fails to capture the notion that there is something wrong, bad, blameworthy, or otherwise negative about pedophiles and adults who engage in adult-child sex. This is misleading insofar as my analysis assumes or entails that child-rapists act wrongly, people who have sex with children because they enjoy the children's pain are vicious, and people who believe that adult-child sex endangers children for no good reason and do so anyway are blameworthy. Hence, my analysis allows for negative judgments about many pedophiles and others who engage in adult-child sex. It also allows that some adult-child sex, perhaps even some in the real world, is not wrong and does not involve vicious or blameworthy adults. The relative frequency of such cases is an empirical question and not one that can be discovered through anecdote or armchair speculation. The above analysis attempts to highlight those conditions that allow the empirical investigation to be focused on relevant factors. This might involve, for example, the harm that this particular instance of willing adult-child sex will bring about or likely bring about, or what the child knows about what is involved in such sex. That pedophiles are sometimes mistaken or act from a motive that is not terrible is made more likely by the fact that they frequently have conditions that lessen their blameworthiness. Specifically, on some accounts, they are less bright, less well emotionally balanced, have other mental disorders, and have a genetic predisposition to pedophilia.

CONCLUSION

It is not clear whether non-forward-looking reasons show adult-child sex to be wrong. That is because cases of willing participants do not invariably involve right-infringements, failure to satisfy counterfactual consent, exploitation, or an incorrect motivation.

Given the role of consent with regard to the right-infringement and counterfactual-consent issues, it is helpful to look at it in greater depth. The next chapter does so. It discusses how consent works and whether children can reason well enough to authorize sex with an adult. Also, given the concern over exploitation, it is important to determine whether a person can act in an exploitative manner and, if so, whether doing so is wrong. Chapter 5 addresses exploitation-related issues.

Table 3.1.

Explanations of Why Adult-Child Sex Is Always Wrong	Reason to Doubt Explanation
It is a non-forward-looking fundamental wrong.	Adult-child sex is not by itself a basic wrong-making feature.
It infringes on the child's right.	<ol style="list-style-type: none"> 1. It is logically possible for a child to give valid consent (prepubescent development does not necessarily track competence). 2. We may do things to children without their valid consent. 3. It is not clear that children do not give valid consent.
It infringes on the parents' rights.	<ol style="list-style-type: none"> 1. If such sex is wrong, it is because it wrongs the child. 2. This theory can't explain the wrongness of adult-child rape when the child's parents give the rapist permission.
It is wrong because it risks the child's future for no good reason.	<ol style="list-style-type: none"> 1. It is unclear whether such sex imposes immense risk on willing child participants. 2. This is a harm-based explanation of the wrongness of such sex and thus is forward-looking.
It is wrong because a child's consent to sex is subject to manipulation.	<ol style="list-style-type: none"> 1. This is not a distinct problem for adult-child sex as opposed to other adult-child activities. 2. If what is different is the risk of harm, then this is a harm-based account and thus forward-looking.
It fails to respect the child's counterfactual consent.	<ol style="list-style-type: none"> 1. Some children might give counterfactual consent. 2. Counterfactual consent is indeterminate if the child's future goals and values are indeterminate. 3. Counterfactual consent is merely a guide to other moral factors.
It exploits the child.	Adult-child sex does always exploit the child.
It is badly motivated.	<ol style="list-style-type: none"> 1. Bad motivation does not make an act wrong. 2. Not all adult participants act from indifference or hostility.
It is wrong for different reasons in different contexts.	Intuitions that support this theory focus on harm.

NOTES

1. See Claudia Card, "What's Wrong with Adult-Child Sex?" *Journal of Social Philosophy* 33 (2002): 170–177; David Benatar, "Two Views of Sexual Ethics: Promiscuity,

Pedophilia, and Rape," *Public Affairs Quarterly* 16 (2002): 191–201; Igor Primoratz, "Pedophilia," *Public Affairs Quarterly* 13 (1999): 99–110; Robert Ehman, "What Really Is Wrong with Pedophilia?" *Public Affairs Quarterly* 14 (2000): 129–140. For a nice summary, see Igor Primoratz, "Pedophilia," in Alan Soble, ed., *Sex from Plato to Paglia: A Philosophical Encyclopedia*, Vol. 2 (Westport, CT: Greenwood Press, 2006), 760.

2. There is debate over whether valid consent is sufficient for treating someone as an end. For a defense of this claim, see Thomas Mappes, "Sexual Morality and the Concept of Using Another Person," in Thomas Mappes and Jane Zembaty, eds., *Social Ethics: Morality and Social Policy*, 3rd ed. (New York: McGraw-Hill, 1987), 248–262. For a claim that it is not sufficient, because the agent must also consider the interests of the person toward whom he acts, see Howard Klepper, "Sexual Exploitation and the Value of Persons," *The Journal of Value Inquiry* 27 (1993): 479–486.

3. For the former view, see Jan Narveson, *Respecting Persons in Theory and Practice: Essays on Moral and Political Philosophy* (Lanham: Rowman & Littlefield, 2002), 265. For the latter, see Joel Feinberg, "The Child's Right to an Open Future," in William Aiken and Hugh LaFollette, eds., *Whose Child? Children's Rights, Parental Authority, and State Power* (Totowa: Littlefield, Adams and Company, 1980), 124–153; H. Tristram Engelhardt Jr., *The Foundations of Bioethics*, 2nd ed. (New York: Oxford University Press, 1996), 375–410.

4. One interesting account that asserts that children have the same natural rights but different role-based rights is Samantha Brennan and Robert Noggle, "The Moral Status of Children: Children's Rights, Parents' Rights, and Family Justice," *Social Theory and Practice* 23 (1997): 1–26.

5. See, for example, H. L. A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Clarendon, 1982); Carl Wellman, *A Theory of Rights* (Totowa, NJ: Rowman and Allenheld, 1985); Hillel Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994).

6. See, for example, David Lyons, *Rights, Welfare and Mill's Moral Theory* (New York: Oxford University Press, 1994); Neil MacCormick, "Rights in Legislation," in P. Hacker and J. Raz, eds., *Law, Morality and Society: Essays in Honour of H. L. A. Hart* (Oxford: Oxford University Press, 1977), 189–209; Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986); Matthew Kramer, "Rights without Trimmings," in Matthew Kramer et al., *A Debate over Rights* (New York: Oxford University Press, 1998), 7–111.

7. Primoratz, "Pedophilia," 99–110.

8. See Ehman, "What Really Is Wrong with Pedophilia?" 129–140; Stephen Kersnar, "The Moral Status of Adult-Child Sex," *Public Affairs Quarterly* 15 (2001): 111–132; Benatar, "Two Views of Sexual Ethics: Promiscuity, Pedophilia, and Rape," 191–201.

9. T. Leahy, "Sex and the Age of Consent," *Social Analysis: The Journal of Cultural and Social Practice* 39 (1996): 27–55.

10. See Alan Wertheimer, *Consent to Sexual Relations* (New York: Cambridge University Press, 2003). For similar approaches, see Willard Gaylin, "The Competence of Children: No Longer All or None," *Hastings Center Report* 12 (1982): 33–38, esp. 35; Allen Buchanan and Dan Brock, *Deciding for Others: The Ethics of Surrogate Decision Making* (Cambridge: Cambridge University Press, 1989), 51–70; Dan Brock, "Children's Competence for Health Care Decisionmaking," in Loretta Koppelman and John Moskop, eds., *Children and Health Care* (Boston: Kluwer Academic Publishers, 1989), 181–212. These requirements are compatible with both autonomy-based and fairness-based models of consent. For the former, see Ruth Faden and Tom Beauchamp, *A History and Theory of Informed Consent* (New York: Oxford University Press, 1986). For the latter, see Franklin Miller and Alan Wertheimer, "Preface to a Theory of Consent Transactions: Beyond Valid Consent," in Franklin Miller and Alan Wertheimer, eds., *The Ethics of Consent: Theory and Practice* (New York: Oxford University Press, 2010), 79–106.

11. For a discussion of these models, see Tom Beauchamp and James Childress, *Principles of Biomedical Ethics*, 4th ed. (New York: Oxford University Press, 1994), 148–150.

12. See Leahy, “Sex and the Age of Consent,” 27–55; T. Sandfort, “Pedophile Relationships in the Netherlands: Alternative Lifestyle for Children?” *Alternative Lifestyles* 5 (1983): 164–183.

13. See, for example, P. Kazan, “Sexual Assault and the Problem of Consent,” in Stanley G. French et al., eds., *Violence against Women: Philosophical Perspectives* (Ithaca: Cornell University Press, 1998), 27–42. Some researchers actually make a stronger claim, namely that some children’s participation in adult-child sex is free and competent.

14. See, for example, Keith DeRose, “Assertion, Knowledge, and Context,” *Philosophical Review* 111 (2002): 167–203; Keith DeRose, “Contextualism and Knowledge Attributions,” *Philosophy and Phenomenological Research* 52 (1992): 913–929; Stewart Cohen, “Contextualist Solutions to Epistemological Problems: Scepticism, Gettier, and the Lottery,” *Australasian Journal of Philosophy* 76 (1998): 289–306.

15. For such a model, see Wertheimer, *Consent to Sexual Relations*.

16. See C. S. Ford and F. A. Beach, *Patterns of Sexual Behavior* (New York: Harper & Row, 1951), 131–132.

17. See R. Bauserman, “Man-Boy Sexual Relationships in a Cross-Cultural Perspective,” in J. Geraci, ed., *Dares to Speak: Historical and Contemporary Perspectives on Boy-Love* (Norfolk, England: Gay Men’s Press, 1997).

18. For the claim about overrides, see Heidi Hurd, “The Moral Magic of Consent,” *Legal Theory* 2 (1996): 121–146, esp. 142–145.

19. For an argument that consent is not a speech act, see Larry Alexander, “The Moral Magic of Consent (II),” *Legal Theory* 2 (1996): 165–174.

20. For an argument for this position, see Jan Steutel, “Adult-Child Sex and Parental Authority,” unpublished manuscript.

21. On a side note, it is not clear that it is dangerous to fire a gun straight up in the air because the bullets slow down enough when they descend that they might not be moving fast enough to kill someone. See Brian Palmer, “Watch Out for Falling Bullets: Is It Dangerous to Fire a Gun into the Air?” *Slate*, <http://www.slate.com/id/2289894/>, accessed April 9, 2011.

22. Ehman, “What Really Is Wrong with Pedophilia?” 129–140.

23. See Primoratz, “Pedophilia,” 760.

24. Ronald Dworkin makes this criticism of hypothetical-contract theories. Ronald Dworkin, “The Original Position,” in Norman Daniels, ed., *Reading Rawls* (New York: Basic Books, 1975), 16–53.

25. For a defense of the notion that a person might want her life to go worse, see Ben Bradley, *Well-Being and Death* (New York: Oxford University Press, 2009), 30–40.

26. See Judith Jarvis Thomson, *The Realm of Rights* (Cambridge: Harvard University Press, 1990), 187–188.

27. Alan Wertheimer, *Exploitation* (Princeton: Princeton University Press, 1996).

28. For an argument that exploitation is not wrong, see Stephen Kershnar, “Exploitation: It Doesn’t Exist and Wouldn’t Be Wrong if It Did,” in Paul Omoyefa, ed., *Basic Applied Ethics: A Multidisciplinary Approach* (2008), forthcoming.

29. For a discussion of the motive-based theory, see Card, “What’s Wrong with Adult-Child Sex?” 170–177. For the notion that sex, if permissible on Kantian ground, must include humanity-affirming attitudes or emotions, see Jean Hampton, “Defining Wrong and Defining Rape,” in Keith Burgess-Jackson, ed., *A Most Destable Crime: New Philosophical Essays on Rape* (New York: Oxford University Press, 1999), 118–156. For the notion that this will not solve the Kantian problem, see Alan Soble, “Sexual Use,” in Alan Soble and Nicholas Power, eds., *The Philosophy of Sex: Contemporary Readings*, 5th ed. (Lanham, MD: Rowman & Littlefield, 2008), 259–288.

30. The idea for this account comes from Raja Halwani, "Virtue Ethics, Casual Sex, and Objectification," in Alan Soble and Nicholas Power, eds., *The Philosophy of Sex: Contemporary Readings*, 5th ed. (Lanham, MD: Rowman & Littlefield, 2008), 337–349.

31. Also, some motivation-based accounts are in part circular if they involve the following claims: an act is right if and only if it satisfies the relevant duty. Sometimes, the relevant duty is to be motivated by duty, that is, to do the right thing because it is the right thing to do.

32. Ryan Hall and Richard Hall, "A Profile of Pedophilia: Definition, Characteristics of Offenders, Recidivism, Treatment Outcomes, and Forensic Issues," *Mayo Clinic Proceedings* 82 (2007): 462; R. Blanchard et al., "IQ, Handedness, and Pedophilia in Adult Male Patients Stratified by Referral Source," *Sex Abuse: A Journal of Research and Treatment* 19 (2007): 285–309; J. M. Cantor et al., "Intelligence, Memory, and Handedness in Pedophilia," *Neuropsychology* 18 (2004): 3–14.

33. See L. J. Cohen and I. I. Galynker, "Clinical Features of Pedophilia and Implications for Treatment," *Journal of Psychiatric Practice* 8 (2002): 276–289; N. C. Raymond et al., "Psychiatric Comorbidity in Pedophilic Sex Offenders," *The American Journal of Psychiatry* 156 (1999): 786–788; V. Egan et al., "Sexual Offenders against Children: The Influence of Personality and Obsessionality on Cognitive Distortions," *Sex Abuse* 17 (2005): 223–240.

34. G. R. Gaffney et al., "Is There Familial Transmission of Pedophilia?" *Journal of Nervous and Mental Disease* 172 (1984): 546–548.

35. A. Kenneth Fuller, "Child Molestation and Pedophilia: An Overview for the Physician," *The Journal of American Medical Association* 261 (1989): 604; G. G. Abel and N. Harlow, "The Abel and Harlow Child Molestation Prevention Study," in *The Stop Child Molestation Book* (Philadelphia: Xlibris, 2001).

36. K. V. Lanning, *Child Molesters: A Behavioral Analysis*, 4th ed. (Alexandria, VA: National Center for Missing and Exploited Children, 2001); L. J. Cohen et al., "Heterosexual Male Perpetrators of Childhood Sexual Abuse: A Preliminary Neuropsychiatric Model," *Psychiatry Quarterly* 73 (2002): 313–336; E. W. Chow and A. L. Choy, "Clinical Characteristics and Treatment Response to SSRI in a Female Pedophile," *Archives of Sexual Behavior* 31 (2002): 211–215; L. Lawson, "Isolation, Gratification, Justification: Offenders' Explanations of Child Molesting," *Issues in Mental Health Nursing* 6–7 (2003): 695–705.

FOUR

How Consent Works

In this chapter, I briefly sketch out an account of consent. I then apply this account to some children's and teens' willingness to engage in sex.

THE NATURE OF CONSENT

Feature #1: Hohfeldian Context

Consent has, roughly, the following structure.

Consent: Necessarily, one person consents to a second's act only if the first intentionally or knowingly waives a claim against the second's act and the act satisfies the description associated with the waiver.¹

Thus, consent results in the person to whom consent is given having a liberty to do an act (that is, no duty not to do it), where the act was previously wrong because of the consenter's right (that is, claim).²

In some areas, such as political obligation, "consent" refers to promises as well as the above consent-notion.³ A promise has the following structure.

Promise: Necessarily, one person promises to a second to do an act only if the first intentionally or knowingly waives his liberty against the second to refrain from doing the act and the act satisfies the description associated with the waiver.

This provides only a necessary condition for consenting to be moral transformation. The same goes for a promise.

These accounts can be converted into sufficient conditions for moral transformation by adding further conditions. The additional conditions are that the person making the waiver is competent and informed and her waiver is voluntary.⁴ On one account of voluntariness condition, con-

sent is voluntary when it is not unjustly coerced.⁵ Unjust coercion occurs when one person coerces a second via right-infringement.

Terminology differs, but on one account the speech-act that is given by a person without satisfying one of these conditions (competence, information, or voluntariness) is not consent. On another account, because the speech-act alone is consent, such an act is consent, but not valid consent. We will use the second locution, although nothing rests on it.

Feature #2: Ontology

Valid consent occurs when one person waives a claim by using a term (or behavior) with conventional meaning to communicate to another her intention to waive the claim under conditions that result in such a waiver.⁶ Consent, like a promise, has a bootstraplike quality.

Consent is a type of speech-act that, at least when valid, is constituted by a mental state and act.⁷ Because consent requires the consenter to have the right intention, it is not merely a behavioral fact. Because consent has illocutionary force and such force is given via an act, consent involves an act. A sentence has illocutionary force when the speaker uses words to do something, such as change a legal or moral relation between people.⁸

If this is correct, then consent requires the consenter to have certain thoughts (specifically, intentions). One argument is that children, the developmentally disabled, and others often do not have such thoughts before sex and hence cannot give valid consent. In particular, an individual must have the following thoughts to give consent to sex.

- I intend to temporarily eliminate a claim against contact (or, perhaps, sexual contact) held against another.
- I intend to use a particular conventional expression.
- I intend to eliminate the claim via the conventional expression.

People can have these intentions in different degrees because of the different degree to which people can recognize how claims work, how one eliminates them via conventional terms, and what the claim describes. For example, when consenting to chemotherapy, different consenter might have different degrees of understanding of chemotherapy, claims, speech-acts, and so on.

An individual can also consent by promising to follow a set of rules. These might include rules of which the consenter is not aware. That is, an individual might promise to follow the set of rules (whatever they might include), though he might not be aware of what some of the particular rules are, and that the consent is morally transformative despite his not having an intention about the particular rule of which he was unaware. If there are a set of implicit rules concerning sex, then consent can occur in this manner. By analogy, when a customer is in a restaurant, the soup-or-salad rule allows him to order only one without paying extra, even if he

is not aware of this particular rule. A customer is bound by it insofar as he consents to obey default restaurant rules. When adults have sex, the parameters of sexual interaction are usually set by implicit rules.

Feature #3: Thresholds

There are two models of the thresholds required for valid consent. By thresholds, I mean the degree to which a consenter must be competent or informed and her consent voluntary for her consent to be valid. Here is the first model.

Model #1: Constant Threshold. The conditions for valid consent do not vary with context.

On this account, there are set thresholds for competence, knowledge, and voluntariness that hold across all contexts. The legal recognition attached to the consent or its moral weight might vary, but this is due to considerations other than those that make consent valid or invalid. For example, this might include the consequences of allowing consent to be legally recognized in various contexts.

Here is the second model.

Model #2: Variable Threshold. The conditions for valid consent vary with the context.

By analogy, consider the contextual thresholds for legally valid consent. First, consider knowledge. The law allows people to gamble despite being presented with little, if any, information on gambling odds or how the games work. It requires much more information for consent to medical treatment. The law also allows people to marry with little disclosure from the would-be spouse, but requires considerable disclosure to buy a house. Second, consider voluntariness. The law allows intoxicated people to consent to gamble, but not to get tattooed. Third, consider competence. Confused thought patterns that are found in some elderly people legally might not invalidate consent to life-saving surgery, but might invalidate an attempt to revise a will.

The issue is whether the threshold for morally valid consent varies with context or whether it is constant with a context-dependent threshold for legally valid consent. On both models, it is hard to see how there can be a borderline region of competence, knowledge, and voluntariness, where consent is neither morally valid nor invalid. This is because such a region would be one in which another individual neither has nor lacks a duty to a consenter and this intuitively seems incoherent.

If autonomy justifies consent, then there is a reason to accept the *Variable Threshold* model. There are two versions of this model corresponding to right- and good-based accounts of the morally transformative function of consent. On one version of this model, a moral-responsibility-based

side-constraint explains the transformative function. The feature that underlies this side-constraint might be, depending on the theory, a capacity or an exercise of a capacity to guide one's own life. On a second version of the *Variable Threshold* model, a moral-responsibility-based value explains it. The value is a self-shaping life.

On various accounts, an individual is morally responsible because he *has the capacity* to determine his mental states via other mental states, be responsive to reasons, understand the true and the good and use this understanding to revise his inner self, form a coherent network of mental states and actions, be the source of his thoughts or actions, or exercise countercausal freedom.⁹ On other versions of these theories, and ones I favor, an individual is morally responsible to the degree he *exercises the relevant capacity*. By responsible, I mean apt for praise or blame.¹⁰

Both accounts leave open the parameters of autonomy. They leave open whether responsibility attaches primarily to local states of affairs, such as a particular choice, or global state of affairs, such as the shaping of extended portions of a person's life. They also leave open whether responsibility is a property an individual has at a particular time or over an extended period of time.

Almost all the theories of moral responsibility support the *Variable Threshold* model. On almost every account, the demands of consenting in a way that makes the consenter morally responsible depend on situational factors that vary with context. They so vary because different contexts place different demands on competence, knowledge, and voluntariness. For example, the knowledge of options required for autonomously deciding to buy a house might be greater than that for autonomously making a medical decision because medical contexts more often have reliable-and-beneficent authorities. Hence, if a moral-responsibility-based feature explains the moral transformative function of consent and if moral responsibility in different decisions (and areas) sets different demands for competence, knowledge, and voluntariness, then the threshold for these conditions will vary with the context.

Parallel reasoning applies to interest-based accounts of the morally transformative function of consent. Here, also, there are right- and good-based accounts. Similar to the above reasoning, the demands of consenting in a way that makes the consenter's life go better (or promotes people's interests more generally) depend on situational factors that vary with context.

A similar thing is true for fairness-based accounts of consent. This is again because the demands of consenting in a way that is fair depend on situational factors that vary with context. For instance, it might be fairer, given the difference in information available about the products, to require a higher level of informed consent for one who buys a house than one who buys a car.

We are now in a position to set out the theoretical factors that determine whether children and teens can validly consent to sex.

CONSENT TO SEX IN TEENS AND CHILDREN

Whether a child gives valid consent depends on whether she performs the relevant speech-act and whether she is sufficiently competent and informed and her doing so is sufficiently voluntary. Teens perform speech-acts. Children past a certain age also do so.

On the first version of the *Variable Threshold* model, it is not clear whether children have the relevant capacity or exercise it with sufficient care to autonomously consent to sex or even to be autonomous in general. This is particularly true if a child (for example, an eleven-year-old) does not sufficiently understand the nature of sex or understands it but is pressured into it by the presence of influential teens or adults. Here the quality of decision making depends on the particular individual and particular context. Perhaps, in general, children do not have the clarity of thought and understanding to make choices in a way that should constitute valid consent. This strikes me as plausible, but it depends on the particular theory of moral responsibility and the degree to which an individual satisfies it. For instance, children might be responsive to reasons, but incapable of understanding the true and the good and using this understanding to revise their inner selves.

Also, a philosophical argument is needed as to where the threshold is with regard to the degree to which the moral-responsibility-making feature is present. Roughly, there needs to be a specific degree to which someone can determine his thoughts and actions or have them respond to reasons that constitutes having enough autonomy to be able to validly consent. It is hard to see what would ground such a specific threshold and, in any case, it is theory dependent. It is also counterintuitive in that significantly less intelligent people, people from different times (for example, medieval times), and people with various defects (for example, antisocial personality disorder) intuitively seem to be in the borderline area of responsibility. They appear to be very mildly praiseworthy or blameworthy for their thoughts and actions. The same is true for older children and younger teens.

On the second version of the *Variable Threshold* model, the threshold for competence, information, and voluntariness varies with the connection between consent and a self-shaping life. In the context of sex, this depends at least in part on the relation between sex and a self-shaping life. Sex might affect a self-shaping life because it is important to a self-shaping life or because it is connected to other things that are important to it. By analogy, we think there is a low bar for valid consent to playing kickball because, in general, playing kickball is not very important to a

self-shaping life and not connected to other things that are important to it. We think there is a high bar for suicide for the opposite reason.

In general, sex by itself is not very central to a self-shaping life. For example, consider the following.

Al and Bob both live for ninety years and have equally pleasurable lives. They also have families, friends, knowledge, and awareness of beauty that are equally good and equally good for them. Al, however, has a lot more and much better sex over his lifetime because Bob's wife has medical issues. The extra pleasure Al gets from sex is counterbalanced by the extra pleasure Bob gets from playing music, reading literature, and attending plays.

Al's life does not intuitively seem more self-shaped than Bob's life. Another example is this:

Charles went to Cornell in the mid-1980s. Because he was good-looking, funny, athletic, and a member of a popular fraternity, he had frequent sex and very satisfying sex with many good-looking women. Charles chose between attending Cornell and West Point. Had he gone to the latter, he would have had sex less frequently and less satisfying sex.

It does not intuitively seem that Charles's life would have been less self-shaped were he to attend West Point solely in virtue of the sex-related differences. Hence, in general, sex by itself is not very central to a self-shaping life.

Sex does not seem very closely related to other things that are important to a self-shaping life. Some groups (for example, Jews) have more sexual partners than other groups.¹¹ There is little reason to believe that this contributes to making them more autonomous.¹² In one study, teens who had sex early had less antisocial behavior and better relationships.¹³ Other studies, however, find such sex has negative effects.¹⁴ Regardless of which is correct, it is not clear that what makes lives go better or worse makes them self-shaped. Any effects probably vary between individuals and contexts and likely do not fit a clear pattern. In any case, an argument is needed here showing that, in general, sex significantly affects things that are important to a self-shaping life. I am not aware of any.

On one account, children have a right to an open future and things that they might willingly participate in might violate their ability to shape their lives in the future.¹⁵ The notion that a child has a right to an open future might explain why, for example, it is wrong to sterilize a child who willingly agrees to it because you cut off his opportunity for future procreation. It also might explain, for example, why allowing children to drop out of school in the eighth grade might drastically cut down on the possibilities for their future and therefore not be something adults should allow children to choose.¹⁶

The argument here is that children that engage in sex “consensually” (especially with those older than they are) have a much higher chance of being unable to have healthy sexual relationships when they are older and the good of a healthy sex life is part of one’s right to an open future. The first claim about early-age-and-willing sex endangering the ability to engage in or likelihood of having a healthy sexual relationship is an empirical claim and, as far as I can determine, not one that has been empirically shown.

The notion that there is a right to an open future is an odd one because if rights are justified by autonomy, there does not appear to be anything about a child’s current capacity to shape his life (or his exercise of this capacity) that justifies the right. Rather, the right is likely justified by the child’s future interests. It is this concern that explains why adults today must leave open some options (education, marriage, and children) but not others (a simple but ignorant life and an unthinking acceptance of the parents’ values and religion). However, if the concern is for the child’s future interests, then the argument against sex should be filled out in terms of what will benefit the child rather than in terms of autonomy or autonomy-based rights. Such an argument is just the age-old argument from the harm principle, which will be discussed in the discussion of forward-looking reasons and adult-child sex that occurs in chapter 6.

In summary, then, on the first version of the *Variable Threshold* model, it is unclear whether children have the relevant capacity to reason or actually do reason with sufficient care to autonomously consent to sex or even to be autonomous in general. This depends on the particular theory of moral responsibility and on the particular individual and situation. On the second version of the *Variable Threshold* model, the threshold for competence, information, and voluntariness varies with the connection between consent and a self-shaping life. As with the first version, the connection varies with the individual and context. In general, there is little evidence that the connection is often strong.

CONCLUSION

In conclusion, a person gives consent just in case she intentionally waives a claim in another. She gives valid consent just in case she is sufficiently competent and informed and consents voluntarily. The context determines what is required for sufficient competence, knowledge, and voluntariness. Depending on the theory, the threshold depends on what is required for her to be morally responsible for her consent or the extent to which her consent contributes to a self-shaping life. Filling this out depends on theories of moral responsibility and self-shaping lives as well as the facts about children’s and teens’ capacities.

NOTES

1. The idea for this account comes from work by Heidi Hurd and Larry Alexander. Heidi Hurd gives a sufficient condition for consent that reduces consent to a fine-grained intention that must match what the second person does. See Heidi Hurd, "The Moral Magic of Consent," *Legal Theory* 2 (1996): 121–146, esp. 134. Larry Alexander provides a sufficient condition that reduces consent to a forgoing of objection to, roughly, what the second does. See Larry Alexander, "The Moral Magic of Consent (II)," *Legal Theory* 2 (1996): 165–174, esp. 168.

2. An objector might argue that the definition seems to allow me to consent to my adult son's marriage, but this restatement seems to rule that out, since my son would not wrong me if he married without my consent. The problem with this is that the adult son's marriage was not previously wrong because of the consenter's right.

3. See A. John Simmons, "Political Obligation and Consent," in Franklin Miller and Alan Wertheimer, eds., *The Ethics of Consent: Theory and Practice* (New York: Oxford University Press, 2010), 305–328.

4. See John Kleinig, "The Nature of Consent," in Franklin Miller and Alan Wertheimer, eds., *The Ethics of Consent: Theory and Practice* (New York: Oxford University Press, 2010), 3–24; Franklin Miller and Alan Wertheimer, "Preface to a Theory of Consent Transactions: Beyond Valid Consent," in Franklin Miller and Alan Wertheimer, eds., *The Ethics of Consent: Theory and Practice* (New York: Oxford University Press, 2010), 79–106.

5. See Alan Wertheimer, "Voluntary Consent: Why a Value-Neutral Concept Won't Work," *Journal of Medicine and Philosophy* 37 (2012): 226–254.

6. The idea for this comes from John Searle, "What Is a Speech Act?" in Max Black, ed., *Philosophy in America* (Ithaca: Cornell University Press, 1965), 221–239.

7. For the notion that consent must occur via a speech-act, see S. J. Schulhofer, "The Feminist Challenge in Criminal Law," *University of Pennsylvania Law Review* 143 (1995): 2151–2207, esp. 2181; J. McGregor, "Force, Consent, and the Reasonable Woman," in Jules Coleman and Allen Buchanan, eds., *In Harm's Way: Essays in Honor of Joel Feinberg* (New York: Cambridge University Press, 1994), 242. Against this view is the argument of Heidi Hurd and Larry Alexander that because consent is an exercise of will and the exercise of will is a mental state (or event), consent is a mental state (or event). See Hurd, "The Moral Magic of Consent," 135–138 and Alexander, "The Moral Magic of Consent (II)," 165.

8. See John Austin, *How to Do Things with Words* (Oxford: Oxford University Press, 1975).

9. For theories that view autonomy as focusing on the relation between mental states, see Harry Frankfurt, "Freedom of the Will and the Concept of a Person," *Journal of Philosophy* 68 (1971): 5–20; Gerald Dworkin, "The Nature of Autonomy," *GRAZER Philosophische Studien* 12/13 (1981): 203–213. For reasons-responsive theory, see John Martin Fischer and Mark Ravizza, *Responsibility and Control* (Cambridge: Cambridge University Press, 1998). For the true-and-good-and-self-revision account, see Susan Wolf, "Sanity and the Metaphysics of Responsibility," in Ferdinand Schoeman, ed., *Responsibility, Character, and the Emotions* (New York: Cambridge University Press, 1987), 46–62; Susan Wolf, *Freedom within Reason* (New York: Oxford University Press, 1990). For the coherence theory, see Laura Waddell Ekstrom, "A Coherence Theory of Autonomy," *Philosophy and Phenomenological Research* 53 (1993): 599–616. For the countercausal freedom account, see Roderick Chisolm, "Human Freedom and the Self," in Derek Pereboom, ed., *Free Will* (Indianapolis: Hackett Publishing Co., 1997), 143–155.

10. The idea for this comes from Robert Kane, *The Significance of Free Will* (New York: Oxford University Press, 1998), 4. The focus here is on moral-responsibility-related praise and blame. Praising something for its beauty, for example, involves a different type of praise if it is a legitimate type of praise at all.

11. For Jewish Americans having more sexual partners, see Robert Michael et al., *Sex in America: A Definitive Survey* (Boston: Little, Brown and Company, 1994), ch. 5.

12. They might be more autonomous because they have greater education, more money, or are smarter, but these are independent factors. For the claim that Jews have greater education, note that they are strongly overrepresented in the Ivy League; see Ron Unz, "The Myth of American Meritocracy: How Corrupt Are Ivy League Admissions?" *The American Conservative*, November 28, 2012. For the notion that they have greater income than other religious groups, see Lisa Keister, "Religion and Wealth: The Role of Religious Affiliation and Participation in Early Adult Asset Accumulation," *Social Forces* 82 (2003): 173–205. For the notion that they have greater intelligence, see Jon Entine, *Abraham's Children: Race, Identity, and the DNA of the Chosen People* (New York: Grand Central Publishing, 2007), ch. 13.

13. See Jeanne Marie Kerns, "Study: Teens Having Sex Early May Control Delinquency Later in Life," *Yahoo Voices*, November 17, 2007, <http://voices.yahoo.com/study-teens-having-sex-early-may-control-delinquency-662285.html?cat=25>, citing K. P. Harden et al., "Rethinking Timing of First Sex and Delinquency," *Journal of Youth and Adolescence* 37 (2008): 373–385. For the claim about relationships see Anna Mikulak, "Does True Love Wait? Age of First Sexual Experience Predicts Romantic Outcomes in Adulthood," Association for Psychological Science, October 17, 2012, <http://www.psychologicalscience.org/index.php/news/releases/does-true-love-wait-age-of-first-sexual-experience-predicts-romantic-outcomes-in-adulthood.html>, citing K. P. Harden, "True Love Waits? Age at First Sexual Intercourse and Relationship Quality in Young Adulthood," *Psychological Science*, forthcoming. The latter address the lack of measurable relationship differences between adolescents who began sex early (younger than fifteen) and on time (ages fifteen to nineteen). People who start later than nineteen do better than both groups. When in relationships, teen sex does not hurt grades. See "Teen Sex Not Always Bad for Grades: Study," *Associated Press*, August 16, 2010.

14. For the notion that teen sex reduces teenage academic achievement and makes teens more likely to be depressed and attempt suicide, see Robert Rector, "Teenage Sexual Abstinence and Academic Achievement," The Heritage Foundation, October 27, 2005, <http://www.heritage.org/research/reports/2005/10/teenage-sexual-abstinence-and-academic-achievement>; Robert Rector et al., "Sexually Active Teenagers Are More Likely to Be Depressed and to Attempt Suicide," Center for Data Analysis Report, June 3, 2003, <http://www.heritage.org/research/reports/2003/06/sexually-active-teenagers-are-more-likely-to-be-depressed>.

15. For this idea, see Joel Feinberg, "The Child's Right to an Open Future," in William Aiken and Hugh LaFollette, eds., *Whose Child? Children's Rights, Parental Autonomy, and State Power* (Lanham, MD: Rowman & Littlefield, 1980), 124–153.

16. For a discussion of this idea, see Dena Davis, "The Child's Right to an Open Future: Yoder and Beyond," *Capital University Law Review* 26 (1997): 93–105; *Yoder v. Wisconsin*, 406 U.S. 205 (1972).

FIVE

Exploitation

It is often asserted that adult-child sex is wrong because it is exploitive. This assertion is unconvincing if, as I argue below, exploitation is not a real property. Even if it were a real property, it would not make actions wrong. The notion that exploitation is not a real property but even if it were it would not be wrong is defended below. Even if exploitation were a real property and one that makes actions wrong, it is unclear how often such sex is exploitative. Whether it is depends on whether the adult participants get an unfair share of the sexual enjoyment or other benefits from the sex. This depends on the facts surrounding the particular circumstances. For example, if a child gains as much as the adult via pleasure or feelings of closeness, then the sex lacks the disproportionate benefits that characterize exploitation. Also, if the adult were to feel guilty after the interaction so that he gains less than the child, the sex would not be exploitative. To see the role of context in assessing the exploitation of sex, let us consider the case *Island Lovers*.

Al and Betty are stranded on a tropic island. They are isolated there and will be for the rest of their lives. Al is a normal-functioning twenty-five-year-old. Betty is a developmentally disabled (retarded) twenty-five-year-old who has the mental abilities of a twelve-year-old. She has been sterilized and knows it. After years on the island, they fall in love and both very much want to have sex with the other. Were they to have sex both would probably greatly enjoy it.

Here the sex would be exploitative if Al uses his superior functioning ability relative to Betty to take an unfair share of the benefits of the sex. This might be the case, but depends on the context. It might vary by the day. A parallel analysis occurs were Betty a teen or a child.

Unlike the sexual world, the business world is often considered a moral free zone in which roughly equal parties compete for profits. The

one exception is exploitation, roughly where a stronger party takes advantage of a much weaker party. The issue of exploitation comes up in contract law where unconscionable contracts are voidable, the debate over sweatshops, and laws protecting vulnerable workers by ensuring minimum wages, overtime pay, and safe working conditions. The concept of exploitation is used to justify laws against organ sales and price gouging. In this chapter, I argue for two surprising theses: exploitation doesn't exist and what is normally viewed as exploitation is morally permissible. The chapter contains three parts: an account of exploitation, an argument that it doesn't exist, and an argument that what is taken to be exploitation is morally permissible.

THE NATURE OF EXPLOITATION

The Nature of Wrongful Exploitation

Our interest here is in the sense of exploitation that is a concern in the business world and that is normally thought to be wrong and thought to be relevant to adult-child sex as well. In the most general sense, one person exploits a second when the first takes advantage of the second's weakness. In this sense, one tennis player can exploit another's lack of conditioning. This sense does not pick out something that is wrong.

Before moving to the notion of wrongful exploitation that I will use in this chapter, it is first helpful to set out a few notions. Consider the notion of a transaction surplus. A transaction is an exchange and the transaction surplus is the benefit that accrues to the two transacting parties. This is a function of the distance between their reservation prices. The seller reservation price is the minimum price that the seller would (or should) accept to sell a good. The "should" here is a function of the seller's self-interest and I leave open the issue of whether the seller's gain is relative to his own estimation of his interest or his actual interest. Similarly, the buyer reservation price is the maximum price that the buyer would (or should) accept to buy a good.

Note that there is an issue as to whether an exploitation-theorist can provide a principled account of whether the reservation price should be set according to each party's perceived interest or actual interest. If she cannot do so, then it is unclear whether there is a correct notion of exploitation. A principled account might depend on the degree to which exploitation is a subjective account of a party's perception of her bargaining circumstances or an objective account of those circumstances.

The *ex ante* transaction surplus is the expected surplus before the agreed-upon exchange occurs. This is because an apparently unfair transaction might, through some fortuitous circumstances, end up being very beneficial to the vulnerable party. For example, if a large landowner uses

the desperate financial status of a sharecropper to pressure the latter into purchasing apparently worthless swampland, the transaction might be judged one-sided from the perspective of the two parties' expected return. If the swampland is later found to contain valuable mineral deposits, the transaction is more beneficial *ex post* (after the exchange occurs) to the sharecropper than *ex ante*.

Consider the notion of a bargaining position. A party's bargaining position consists of a party's resources and circumstances. These include both objective features (for example, other options) and subjective features (for example, needs and wants). This does not include the party's bargaining ability, which includes her information, toughness, patience, and perceptiveness. These generally correspond to those features over which a party has more direct control and, on some accounts, for which she is responsible.

Using these two notions, we can set out the notion of exploitation.

Wrongful Exploitation: One person wrongfully exploits a second if and only if the first uses his superior bargaining position to take an unfair share of the transaction surplus.¹

On some accounts, exploitation need not involve a transaction at all. If so, then my concern for wrongful exploitation is a concern about transaction-exploitation, which on these accounts will be one type of exploitation.

There are three ways this definition of wrongful exploitation might be thought incomplete. A first condition might be thought to be that the stronger party (that is, the party in the superior bargaining position) knowingly or intentionally takes unfair advantage of the weaker party's position. The problem with this is that this makes exploitation a function of the mental states of the transacting parties and this is unappealing to those who view the moral status of an act as depending on what is done to the persons and not what the agent is thinking or intending. The latter is arguably relevant to the blameworthiness of the agent and not the status of his act. This is what allows us to say that a person did the wrong thing but for the right reasons or vice versa.

A second condition might be thought to be that the unfair share of the transaction surplus is to be viewed from the *ex ante* perspective. My account is neutral on this requirement. One approach would be to accept this additional condition. Another approach would be to reject my account on the grounds that the second condition is just a way of filling out the above mental-state condition because the *ex ante* perspective looks at what the parties know at the time the agreement is negotiated.

A third condition might be that the weaker party is desperate. This is to rule out cases in which there is enormous pressure on the basis of proposed gain that the stronger party offers to an already well off weaker party. For example, if a recent lawyer and business school graduate gets \$150,000 job offers from a series of law firms, but job-related stock op-

tions from an investment bank valued at \$1.5 million, the pressure to accept the latter job might be intense. However, this does not look exploitative. One concern here is that exploitation is a function of pressure (whether objective or subjective) and the pressure might be intense due to the graduate's nearly compulsive desire to become rich. Because nothing in this chapter depends on this issue, my account is neutral with regard to it.

Note that on my account, the parties gain or usually gain from the transaction. This differs from accounts of exploitation that require that one party be harmed.² Also, my account allows persons to give valid consent to the transactions. This differs from those that require that the parties be coerced (assuming coercion invalidates consent) or that there be a defect in consent.³ My account is not conceptually linked to a general theory of wrongful action. This differs from accounts that fill out exploitation in the Kantian sense that it involves treating someone merely as a means.⁴ My account has the advantage of picking out an act-type that is independent of other wrong-making features (for example, injustice and harm) and instead focusing on what really appears to be objectionable about exploitation, the unfairness of the agreement. This account is consistent with theories of Marxist exploitation that assert that the proletariat is exploited because it does not receive a fair share of what it produces.⁵

The Distinction between Bargaining Position and Ability Is Unclear

Before proceeding a quick note is in order. The above account assumes that there is a morally relevant difference between bargaining position and ability, because only the former is relevant to exploitation. The reason for this is that bargaining ability is something that a person can more directly control or something for which she is responsible. Note, however, that one can be responsible for her poor bargaining position. For example, consider a poor single mother who is negotiating in Thailand against a large international corporation regarding a job in a sweatshop. One can imagine a case where the woman was married and rich and then became poor and homeless when she killed her husband and then squandered her money gambling.

In addition, given the role of genetics and childhood education in shaping persons' abilities, it is not clear that they are responsible for their bargaining ability. This rests on a controversial claim about responsibility that lies outside the scope of this chapter. The underlying assumptions here are that if there are factors (genetics and the environment) for which a person is not morally responsible and if these factors necessitate that person's feature or act about a person, then he is not responsible for that feature or act.⁶ If there is no principled reason to distinguish between bargaining position and ability, then exploitation is probably not a distinct wrong. In what follows I'll leave this concern aside.

EXPLOITATION DOES NOT EXIST

Exploitation Involves an Unfair Price

In this section, I argue that exploitation doesn't exist. Exploitation involves the unfair distribution of the transaction surplus, which in turn is a function of whether or not the agreement has a fair price. If, as I argue below, there are no fair or unfair prices, then exploitation does not exist. My argument, then, is the following.

(P1) If exploitation exists, then there are fair and unfair prices.

(P2) It is false that there are fair and unfair prices.

(C1) Hence, exploitation does not exist. [(P1), (P2)]

The first premise rests on the above analysis of exploitation. My denial of exploitation will focus on the second premise. There are roughly six theories of what makes a price fair. My argument is to show that all six fail and that the failure of the most plausible theories of a fair price shows that it is probably not a real property.

Some people deny that exploitation entails an unfair price.⁷ The denial has to explain why exploitation is a distinct type of wrong. This explanation might involve a different ground of wrongness or a shared ground (for example, injustice or contempt) that is uniquely expressed in exploitation. I do not see a plausible candidate for this type of theory.

There Are No Fair and Unfair Prices

The first theory of a fair price is maximizing theory.⁸

Maximizing Theory: A price is fair if and only if it maximizes value in this case or in the relevant range of cases.

The relevant value might be the good, parties' well-being, transaction surplus, or some other value. Viewed in terms of the good this theory fails because paradigmatic unfair prices might maximize the good. To see this, consider the following case.

The Boat Case. B's boat has capsized and he has been swimming for hours near the center of a large and seldom frequented lake. He is nearing exhaustion when A's boat approaches. A says to B: "You may climb into my boat and avoid drowning only if you promise to pay me \$50,000 within three days."⁹

If A has no money and instead bargains to have B pay to save the lives of five Sudanese children, and this turns out to cost \$50,000, then this price maximizes the good. However, this is arguably a paradigmatic unfair price.

When the price is filled out in terms of benefit to the transacting parties, a similar conclusion follows. Imagine that the five children are A's

and that his well-being is intimately tied to their well-being. Again, the price would end up being fair despite our contrary intuitions. One response that a maximizing theorist might make is that what matters is the intrinsic goodness for the parties, not the use to which the money is put. However, money and many other benefits are extrinsically good for persons and hence this response is confused.

A second theory is the egalitarian theory.

Egalitarian Theory: A price is fair if and only if it distributes the transaction surplus equally.

Equality might be viewed in terms of the distance between the actual and reservation prices or in terms of utility each party receives at a particular price. To see what is wrong with either consider the next case.

Lecherous Millionaire. A Pakistani businessman pays for the life-saving surgery of five Pakistani children each year. An attractive Indian woman wants him to pay for her daughter rather than a Pakistani girl. They agree that the businessman will pay for the expensive surgery that alone can save the child's life provided that the woman becomes his mistress for six months. No one else will pay for the life-saving surgery.

This appears to be another paradigmatic case of exploitation. Yet because the Indian woman would have given up far more to save her daughter, she gains more both in terms of utility and in terms of the distance between the actual price and her reservation price. Hence, the equality theory does not entail that this is an unfair price.

One reason to insist on an equal distribution of transactional benefits is that one is more likely to get it.¹⁰ Another reason is that some goods are positional. A positional good is one whose value is a function of the amount one has in comparison to others.¹¹ Insisting on an equal distribution makes sense if the other transacting parties are competitors for things that can be purchased via the positional goods. Neither the likelihood of getting an equal share nor the role of positional goods provides a justification of understanding fair price in terms of an equal distribution of the transaction surplus.

In addition, the equality theory does not take into account the role of desert. For example, in some transactions, one person contributes most of the work. On some accounts of desert, although not accounts I accept, it is not clear that the benefits of the transaction should be split equally when desert enters the case. This leads us to the third theory.

Consider desert theory.

Desert Theory: A price is fair if and only if it is deserved.

The content of this theory depends on what grounds desert. If desert rests on virtue alone, then the fair price depends on the virtue of the two persons to the transaction.¹² If desert rests on actions alone, then the issue

arises as to whether the relevant feature of an action is the actor's hard work in performing it, the sacrifice that accompanies it, or the extent that the act contributes to the desired outcome.¹³ Both virtue- and act-based accounts are implausible, as can be seen by considering how the fair price would differ in isolation cases.

Consider the virtue theory of desert. On this account, the fair price should differ between two persons who differ in virtue, even when they buy the same product from the same seller. This is implausible. For example, it does not intuitively seem that a fair price for Mother Theresa is less than that for the average consumer. This is price discrimination (price is a function of its value to the consumer) and it does not align with our intuitions about fair prices.¹⁴

Actually, one might not have this intuition. For example, there is a restaurant in Philadelphia which charges different prices to different customers, depending on what they can afford, and no one complains. Also, college scholarships are in effect price discounts. Still, even on these accounts, the price differences do not track differences in virtue.

Consider next the act-desert theory. On this account, the fair price should differ when two sellers sell identical goods to the same buyer under the same circumstances depending on the effort, sacrifice, or contribution that went into producing the good. However, differences in effort or sacrifice might be the result of inefficient or outdated means of production and this does not seem relevant to the fair price. For example, when one person digs holes with a backhoe and the other uses a shovel, it seems odd that the fair price for equally sized holes would vary wildly. This is true even though the person digging holes with a shovel puts in greater effort and sacrifices more to dig the hole.

Contribution does not depend on hard work or effort, but, instead, depends in part on supply and demand (that is, a market).¹⁵ One problem is that if this account presupposes a market, then it will be relative to the relevant market. This prevents it from being an independent standard that can be used to assess outcomes in different markets.

A second problem with the act-desert theory is that it is not clear which baseline should be used to measure two parties' contribution to the transaction surplus. Consider *The Boat Case* and let us add that the seller's reservation price is \$5 and the buyer's reservation price is \$5 million. It is hard to see how in principle to pick out the degree of transaction surplus contributed by each person given that without either party there is no transaction surplus. In any case, there is no indication that focusing on contribution will generate the intuitively fair price. Given the causal role of the stronger-positioned parties in *The Boat Case* and *Lecherous Millionaire*, it might well be the case that the price is tracking contribution despite its intuitive unfairness. If contribution is measured according to the degree of profit, then it might be thought to just be a way of getting at the market valuation of each party's contribution.

Contribution might be measured according to the concept of marginal product. However, as Amartya Sen argues, this is not a good measure of how much each person (or factor) contributes. Rather, it is meant merely to guide the allocation of additional resources.¹⁶

Because effort, sacrifice, and contribution all have strongly counterintuitive results with regard to fair price, it is doubtful whether desert in the context of transactions tracks some property of acts. In other areas of desert (for example, deserved well-being), it is plausible that desert rests on virtue. Good people who accidentally wrong others do not deserve to suffer. They should compensate their victims—on the principle that the actor should pay rather than the victim—but this does not show that desert does not rest on virtue. Similarly, bad people who accidentally benefit others do not deserve to have lives that go very well. Thus, there is reason to think that desert does not track acts. This brings us to the next theory.

A fourth theory is that fair price is a fundamental moral notion. By this I mean that its justification does not rest on another concept or principle. On some accounts, this is also true of desert, rights, or the good, and so this would not be unique. The problem with this account is that there does not seem to be a set of consistent intuitions from which we could infer the existence of such a fundamental property. For example, in some cases the fair price intuitively seems to track the contract price. Consider when some businessmen negotiate for a better price for their goods than do others. The negotiated price intuitively seems fair, especially when neither side is desperate. This is true even if two parties negotiate for different prices for the same product. For example, if two gas distributors negotiate for five-cent different prices for their product, it doesn't intuitively seem that one price is fairer than the other. It could be that fairness allows for a range of prices, but then it gets harder to see what makes the range fair. In addition, if the range does not have sharp boundaries, then the property of fair price is vague and it is not clear if real properties can be vague. Some properties like cloudy and wet seem to be vague, but the fuzzy boundaries might be due to epistemic considerations, in which case this boundary issue goes away. Alternatively, the properties might not be real properties.

In other cases, the fair price intuitively seems to track contribution (consider, for example, the shovel-and-backhoe case above). In other cases, for example, *The Boat Case* and *Lecherous Millionaire*, it intuitively seems to track the outcome in a hypothetical market. Hence, there does not appear to be a unified pattern of intuitions and this is not what we would expect if fair price were a fundamental moral notion.

A fifth theory is market theory.

Market Theory: A price is fair if and only if it is a price that is found in the relevant market.

The market might be viewed as a guide to an individual's contribution. However, that would make it a type of desert theory. For market theory, the market should be viewed as a separate ground of fairness.

The market can't be the actual one because the issue is whether the agreed-upon price is exploitative. Because the agreed-upon price is the actual market price, at least when there is no coercion present, the price would always be fair on this theory. The alternative version is to focus on a hypothetical market. This is Alan Wertheimer's theory, the most developed theory of exploitation.¹⁷

The theory must pick out which hypothetical market is relevant and explain why it is relevant. It is not clear what market should be preferred. The market in question could be the efficient, average, or reasonable market. The choice of markets here is arbitrary. The efficient market is relevant only if exploitation is wrong because it is inefficient. However, the concern for efficiency is a maximizing justification and we saw earlier that this doesn't provide a satisfactory theory of fair prices.¹⁸ This also provides a forward-looking theory of fair prices and we are looking for a backward-looking one.

The average market is arbitrary because we would need to average over a number of markets. This requires that we identify the right markets. This description poses a problem in terms of the product purchased (for example, small boat rides to desperate swimmers, small boat rides, boat rides, or rescue trips), the area (for example, the United States; the United States and Mexico; or the United States, Mexico, and Central America), and the time (for example, past year, past decade, or future decade). It also makes the moral status of a transaction in one market depend on the specifics of other markets. It is unclear what would explain this dependence.

The reasonable market is one in which the participants have certain traits. One relevant trait is the bargaining position and ability of the relevant buyers and sellers. Without a theory explaining why some level of these factors should be chosen this theory is incomplete. For example, in the context of boat rides, we would need to determine the number of boaters and their willingness to hold out for high prices. A similar thing is true of the participants' knowledge and rationality. In addition, the whole motivation for looking at the hypothetical market is unclear. In particular, it is unclear why the price in other markets explains why a price in a very different market is unfair.

A sixth theory is rationality theory.¹⁹

Rationality Theory: A price is fair if and only if it is one to which rational parties would agree.

The idea here is that the rational price is one that is just or fair. One way this might be filled out is to view the fair price is one that would occur in a market that satisfies the Rawlsian principles, particularly the Difference

Principle.²⁰ This principle states, roughly, that wealth distribution is just if and only if wealth is distributed equally except when an unequal distribution benefits the worst-off group. This is part of a larger project whereby distributive justice aims to distribute the benefits of social cooperation and do so in a way that reflects the equal value of the persons who cooperate.

One immediate problem with this theory occurs if rational parties think that prices should track the actual market. On Rawls’s account, persons in the original position would make choices that benefit the worst off and ensure equal opportunity. This can arguably best be established through direct transfer of wealth to the worst off, rather than some principles that are inefficient because they interfere with the ability of prices to communicate information.²¹ By focusing on a direct wealth-transfer, the poor could be helped in a more efficient manner than via principles that address prices. The greater efficiency would arguably benefit everyone, including the worst off.

Another problem concerns the Rawlsian project. If one views Rawls’s project as infringing on private property rights, then the principles derived from it are unhelpful.²² Alternately, if one views it as a heuristic guide to what is fair or just, then it presupposes that there is such a thing as a fair price. There are likely better ways to discover it.²³

Also, it does not appear that an agreement has to be rational to be fair. If valid consent by competent parties, even when the agreement is irrational, intuitively seems to make an agreement just or fair, then rationality is not a necessary condition for fairness. To see this, consider the following.

Mismatch: Consider the following lifetime well-being amounts (for example, lifetime utility) for the following marriage combinations. The first number is the male’s, the second the female’s. Assume that the coupling combination has no effect on third parties and that the parties are aware of the payoff values.

Table 5.1 illustrates the marriage combinations.

Given this payoff scheme, it is irrational for Al to marry Betty and Bob to marry Alice, but if they consent to do so (when sane, aware of the relevant facts, etc.) then they are morally bound. This set of facts is possible. People often make suboptimal decisions concerning marriage, edu-

Table 5.1.

	Alice	Betty
Al	100/ 100	25/25
Bob	25/25	100/100

cation, jobs, and so on. This does not make them insane, ignorant of the relevant facts, and so on. Nor does it make them irrational in the sense of their being unable to engage in instrumental reasoning about their and others' interests or not doing so. If binding consent requires near perfect rationality, then most instances of consent are morally ineffective.

The conditions under which the parties form an agreement also intuitively appears to be relevant. If they form a rational agreement when one party is desperate, then the agreements in *The Boat Case* and *Lecherous Millionaire* would be fair in virtue of being rational given the circumstances of each of the parties. If the theory requires fair choosing conditions, then if rationality plays a role at all, it is at most part of the justification of a fair price.

Here is a summary of the argument. Absent force, fraud, or theft, the business world is often considered a moral free zone in which roughly equal combatants compete for profits. The one supposed exception is exploitation, roughly when a stronger party takes advantage of a much weaker party. I argued that if exploitation exists, then there are fair and unfair prices and that it is false that there are fair and unfair prices. The first notion rests on the definition of "exploitation"; the second on the failure of the most plausible theories of fair prices. Table 5.2 gives a summary of the failure.

Because the above theories of a fair price are the most plausible and because they all fail, there are probably no fair or unfair prices. Exploitation involves the unfair distribution of the transaction surplus, which in turn is a function of whether or not the agreement sets a fair price. Because there are no fair or unfair prices, exploitation does not exist. In what follows, we will consider whether exploitation would be wrong were it to exist.

IF EXPLOITATION EXISTS, THEN IT IS NOT WRONG

Exploitation Is Wrong Only if There Are New Duties That Conflict with the Agreement

The argument for this claim is the following.

- (P1) If exploitation is wrong then the stronger party to a transaction incurs a new duty that can conflict with the agreement.
- (P2) The stronger party to a transaction does not incur a new duty that can conflict with the agreement.
- (C1) Hence, exploitation is not wrong. [(P1), (P2)]

The first premise rests on the following assumptions. First, a wrongful action always wrongs someone. More specifically, it violates someone's claim. That is, it fails to satisfy a duty owed to her. Second, there is no perfect positive duty to strangers. This in part rests on volunteerism

Table 5.2.

Theory	Price Is Fair Because	Objections
Maximization	Price maximizes transaction surplus in particular case or range of cases.	Exploitation can maximize the good.
Egalitarian	Price provides an equal distribution of the transaction surplus.	<ol style="list-style-type: none">1. An equal distribution is not always fair. Consider contribution, hard work, and sacrifice.2. Some transactions that appear to be exploitative have a distributive that gives the weaker party better than an equal distribution.
Desert	Price is deserved.	<ol style="list-style-type: none">1. Desert does not track acts.2. Candidate grounds (contribution, hard work, and sacrifice) presuppose a market.
Primitive	Price is a fundamental property.	This does not intuitively seem to be a fundamental moral property.
Market	Price is found in the relevant market. <ol style="list-style-type: none">1. Actual Market2. Hypothetical Market (Consider average, efficient, and reasonable markets.)	<ol style="list-style-type: none">1. Actual market price is satisfied. See <i>The Boat Case</i>.2. Hypothetical market is unprincipled (no reason to look at it) and arbitrary (no reason to favor one over another).
Rationality	Price is rational. <ol style="list-style-type: none">1. Rawlsian Price (Price satisfies Rawlsian principles.) <ol style="list-style-type: none">1. Rational Agreement	<ol style="list-style-type: none">1. Reject Rawlsianism and, in any case, it is arguably satisfied.2. Parties have rationally agreed.3. Consent need not be rational to be valid. See <i>Mismatch</i>.4. This begs the question because we need fair choosing conditions.

when there are no special relations (roughly, duties owed to friends and family) or a person whom the agent has harmed.

An objector might claim that an agreement is morally binding only if it is conscionable. On this objection, the conscionable clause refers to a fair price, but, as argued above, we have reason to doubt that prices are fair or unfair.

The issue of whether exploitation is wrong is odd because we are considering whether an act-type that doesn't exist would have certain properties if it did. The idea here is that if there were such a thing as an unfair price and the rest of the elements of exploitation are present, then

the resulting act would not be wrong. This is analogous to an argument that an atheist might give in explaining why if the divine command theory were true, morality would be arbitrary. Divine command theory asserts that acts are wrong because, and only because, God prohibits them. The atheist might even assert that it is impossible for God to exist and still argue for the entailment.

There Are No New Duties That Conflict with the Agreement

The second premise rests on the notion that when a person enters into a mutually beneficial transaction, he does not incur a duty to provide a certain level of benefits. This is because the *ex post* duty has no plausible ground. This can be seen in that there are four grounds of duties. There are duties that correlate with or are identical to natural rights (duties an individual has in virtue of being a person or, perhaps, sentient). There are duties that result from valid commitments, that is, promises or consent. On some accounts, there are duties that are grounded in special relations. These are, roughly, duties owed to family or friends. There are also duties that might be grounded in the fact that the duty holder in the past unjustly harmed another.

None of these are present in the case of purported exploitative agreements. The stronger party does not violate a natural right of the weaker party unless we assume that the weaker party has a right against exploitation, which begs the question. The valid-commitment duties are just those set out in the agreement. Because the transacting parties are not necessarily family or friends and because the stronger party need not have previously harmed the weaker party, the last two grounds do not apply.

Even if there is a duty to rescue, and I doubt it, the rescue must still generate a price. The issue still arises as to whether some prices are wrong and this existence of this duty does nothing to address this issue.

Objections

Four objections might be raised against this argument.

First, an objector might reject my focus on whether the agent wrongs another. She might assert that we should adopt a subject-centered account of wrongfulness. An account is subject-centered if it focuses on the actor, rather than the person toward whom the agent acts. On a subject-centered account, an action is wrong when the agent's attitude toward another fails to view him as an end. On this account, the agent's attitude is irrational because he fails to think or act toward something in accord with its value. The objector might further assert that this is precisely what is done in the case of exploitation. This might explain, for example, why

exploitation is often thought to violate the Kantian requirement that we not treat a person merely as a means to an end.

This subject-centered account of wrongfulness differs from an object-centered account that focuses on the person toward whom the agent acts. Typically on this account, an agent acts wrongfully if and only if he infringes on a claim of the person toward whom the agent acts. On this account, the centrality of claims has to do with the notion that respecting someone as an end is solely a matter of whether her boundaries are respected.

The problem with this objection is that the subject-centered account is incorrect. The wrongfulness of an attitude is likely a function of the intention or plan to use another as part of one's project. However, the intention or plan is wrong because it will infringe on someone's claim. That is what distinguishes plans that respect others from ones that do not do so. An example of the former is when the patient plans to pay a physician for medical advice. An example of the latter occurs when the patient plans to beat it out of him.

In addition, even on the subject-centered account, a transaction that involves getting the valid consent of the other transacting party in a mutually beneficial transaction does not disrespect the other person. One explanation might be that it is the stronger party's willingness to limit his use of others to agreed-upon terms that constitutes an attitude of respect for others.

Second, an objector might claim that in desperate conditions a weaker party does not give valid consent and hence exploitation is wrong even under the object-centered account. However, consider the following case.

Black Mamba: During an expedition into Africa, a highly venomous black mamba bites a wealthy scientist. He is quickly taken to the house of a local doctor who offers to sell him the doctor's only portion of mamba antivenin for the market price. The scientist quickly agrees and signs a contract. He is then given the antivenin. After a month of lying near death, the scientist recovers. He then refuses to pay, arguing that the contract is invalid since his consent was coerced.²⁴

The scientist is obligated to pay the agreed-upon price. This is true despite coercive or quasi-coercive conditions that led to the sale. If such high-pressure conditions undermine the voluntariness of the scientist's agreement, then the mere fact that a party's promise is involuntary does not invalidate it. Alternatively, if such high-pressure conditions do not make a promise involuntary, then the same can be said in the context of exploitation.

Michael Davis objects that in the context of a necessity contract (roughly, an agreement made when one party is subjectively and objectively desperate), the moral rule is that the desperate party is obligated to pay the contract price only if it is fair. Davis argues that this rule is

justified because it alone provides an incentive for others to benefit desperate parties while at the same time not offering an unfair contract.²⁵ This objection should be rejected. The rule assumes that there are fair and unfair prices, but if the above argument succeeds, this distinction is illusory.

In addition, if the rules about obligation are non-consequentialist, and Davis likely thinks they are, then incentives do not justify them. This is because facts about incentives are not facts about past and present events or states of affairs, but rather focus on the future. As such they are irrelevant to most non-consequentialist theories. Also, incentives for other people who are considering entering into a contract in the future are relevant to assessing duties accompanying people who already agreed to a particular contract only if one adopts a rule-consequentialist approach or something like it. Such an approach is not consistent with non-consequentialism.

If the incentive-based argument is consequentialist, then the argument does not clearly succeed. This is because a rule allowing unfair prices, were there such a thing, might benefit the desperate more than one allowing only fair prices because the former might do more to benefit desperate parties as it provides a greater incentive for people to anticipate and efficiently respond to emergencies.

Third, an objector might claim that exploitation is a free-floating wrong. The idea is that certain acts are wrong even though they don't wrong anyone. Examples of this might include bestiality and other forms of sexually deviant behavior done by fully willing participants. If this is not a type of wrongful act, and I do not think it is, then this objection fails. In addition, exploitation is usually thought to wrong the person who is exploited. If this is correct, then this explanation is not on the right track.

Fourth, exploitation might be thought to involve a failure to act beneficently toward others. Alternatively, it might involve the agent failing to maximize the good. However, this objection falls flat because in some cases exploitation does maximally benefit others. For example, in *The Boat Case* the boat owner uses the money to save Sudanese children. In so doing, he likely satisfies his duty of beneficence and maximizes the good. Exploitation is not necessarily opposed to the duty of beneficence and hence the latter will not explain the wrongfulness of the former.

In summary, then, I argued that exploitation is not wrong. This rests on the following notions: if exploitation is wrong then the stronger party to a transaction incurs a new duty that can conflict with the agreement and the stronger party to a transaction does not incur a new duty that can conflict with the agreement. The former notion rests on the following. First, before the agreement, there is no (perfect) duty to a stranger to give him a certain amount of benefits. Second, if the stronger party has a duty to provide a certain amount of benefits to the weaker party, then the duty must be a new one. Third, the new duty can require an amount of bene-

fits that diverges from the agreement. The second notion rests on the idea that there is no ground for a new duty. Table 5.3 is a summary of why the most plausible purported grounds fail to ground a new duty.

Hence, if exploitation exists then it is not wrong. This is because there is no candidate duty that can explain its wrongfulness. We should also reject objections to this argument based on the notion that exploitation is a subject-centered or free-floating wrong or that it involves invalid consent or the failure to satisfy the duty of beneficence.

CONCLUSION

In this chapter, I argued that exploitation does not exist and that if it did exist, then it wouldn't be wrong. The first conclusion rests on the claim that exploitation involves transactions involving unfair prices and the claim that there are no unfair prices. The latter conclusion rests on the claim that exploitation is wrong only if there are new duties to strangers and there are no such duties. As a result, exploitation cannot justify laws against unconscionable contracts, organ sales, price gouging, and sweat-shops.

In summary, then, contrary to a common assertion, adult-child sex is not wrong because it is exploitive. This is because exploitation is not a real property. Even if exploitation were a real property, it does not make actions wrong. Even if exploitation were a real property and one that makes actions wrong, such sex does not always have a pattern of disproportionate benefits that would characterize exploitation were it a real property.

The last three chapters argued that it is unclear whether non-forward-looking reasons show that adult-child sex is always wrong. This was not shown because cases of willing participants do not invariably involve right-infringements, failure to satisfy counterfactual consent, exploitation, or an incorrect motivation. This conclusion was neither strength-

Table 5.3.

Theory	Explanation	Objection
Natural Right	The weaker party has a right against the stronger party to certain benefits.	There is no such right.
Commitment	The stronger party promised to give the weaker party certain benefits.	The agreement is the promise.
Special Relation	The stronger party has a special relation to the weaker party.	There is no special relation.
Harm	The stronger party will harm the weaker one if the former does not give certain benefits.	Distinguish refusing to benefit and harming.

ened nor weakened by subsequent discussions of whether children can reason well enough to authorize sex with an adult and whether exploitation is wrong. Still, adult-child sex might usually or, perhaps, always be wrong because it has bad results. We now turn to this issue.

NOTES

1. My account is heavily influenced by Alan Wertheimer's analysis in *Exploitation* (Princeton: Princeton University Press, 1996).

2. See Allan Buchanan, *Ethics, Efficiency, and the Market* (Totowa: Rowman and Allanheld, 1985), 87; Nancy Holmstrom, "Exploitation," *Canadian Journal of Philosophy* 7 (1997): 353–369, esp. 357; J. F. Tormey, "Exploitation, Oppression, and Self-Sacrifice," *Philosophical Forum* 5 (1974): 206–221, esp. 207–208; S. Munzer, *A Theory of Property* (Cambridge: Cambridge University Press, 1990), 171; J. Reiman, "Exploitation, Force, and the Moral Assessment of Capitalism: Thoughts on Roemer and Cohen," *Philosophy and Public Affairs*, 14 (1985): 30–65; A. Levine, *Arguing for Socialism* (London: Verso, 1988), 66–67.

3. The accounts requiring coercion include Holmstrom, "Exploitation," 357; S. Benn, *A Theory of Freedom* (Cambridge: Cambridge University Press, 1988), 138; R. Goodin, "Reasons for Welfare: Economic, Sociological, and Political—But Ultimately Moral," in J. Donald Moon, ed., *Responsibility, Rights, and Welfare* (Boulder: Westview Press, 1988), 19–54; Reiman, "Exploitation, Force, and the Moral Assessment of Capitalism," 30–65; Eric Moore, "Desert, Virtue, and Justice," *Social Theory and Practice* 26 (2000): 417–442. The account requiring a defect in consent includes Andrew Levine, *Arguing for Socialism*; John Hill, "Exploitation," *Cornell Law Review* 79 (1994): 631–699.

4. See Buchanan, *Ethics, Efficiency, and the Market*, 87; Munzer, *A Theory of Property*, 171; W. Kymlicka, *Liberalism, Community, and Culture* (Oxford: Clarendon Press, 1989), 114.

5. See G. A. Cohen, "The Labor Theory of Value and the Concept of Exploitation," *Philosophy & Public Affairs* 8 (1979): 338–360.

6. For an argument in support of this claim, see Peter van Inwagen, "The Incompatibility of Responsibility and Determinism," in M. Bradie and M. Brand, eds., *Bowling Green Studies in Applied Philosophy*, Vol. 2 (Bowling Green: Bowling Green State University, 1980), 30–37.

7. See, for example, Allen Wood, "Exploitation," *Social Philosophy and Policy* 12 (1995): 147.

8. J. F. Nash argues that the transacting parties should maximize the product of their utility-gains from the transaction. J. F. Nash, "The Bargaining Problem," *Econometrica* 18 (1950): 155.

9. The idea for this case comes from Robert Nozick, "Coercion," in S. Morgenbesser et al., eds., *Philosophy, Science and Method* (New York: St. Martin's Press, 1969), 440–472, esp. 449.

10. See Richard Schelling, *The Strategy of Conflict* (New York: Oxford University Press, 1963).

11. See Richard McAdams, "Relative Preferences," *Yale Law Journal* 102 (1992): 1–104.

12. The notion that desert rests on virtue can be seen in Thomas Hurka, *Virtue, Value, and Vice* (New York: Oxford University Press, 2001), ch. 1–3; Thomas Hurka, "The Common Structure of Virtue and Desert," *Ethics* 112 (2001): 6–31; Kristjan Kristjánsson, "Justice, Desert, and Virtue Revisited," *Social Theory and Practice* 29 (2003): 39–63; Eric Moore, "Desert, Virtue, and Justice," *Social Theory and Practice* 26 (2000): 417–442. See Feldman, "Adjusting Utility for Justice: A Consequentialist Reply to the Objection from Justice," *Philosophy and Phenomenological Research* 55 (1995): 567–585; Shelly Kagan, "Equality and Desert," in Louis P. Pojman and Owen McLeod, eds.,

What Do We Deserve? (New York: Oxford University Press, 1999), 6–31; Neil Feit and Stephen Kershnar, “Explaining the Geometry of Desert,” *Public Affairs Quarterly* 18 (2004): 273–298. Feldman’s examples allow for act-based desert; Hurka and Feit/Kershnar focus on virtue-based desert. However, none of these persons’ theories would have to be modified much if they were to recognize the other desert ground.

13. For the contribution theory, see Stephen Kershnar, “Immigrants and Welfare,” *Public Affairs Quarterly* 16 (2002): 39–61. For the effort theory see James Rachels, “What People Deserve,” in John Arthur and William Shaw, eds., *Justice and Economic Distribution*, 2nd ed. (Englewood Cliffs: Prentice Hall, 1991), 136–148; Wojciech Sadurski, *Giving Desert Its Due: Social Justice and Legal Theory* (Dordrecht: D. Reidel, 1985), 134–135; George Sher, *Desert* (Princeton: Princeton University Press, 1987), ch. 4; David Miller, *Social Justice* (Oxford: Oxford University Press, 1976), 109. For sacrifice theory, see Joel Feinberg, “Doing and Deserving,” in *Doing and Deserving* (Princeton: Princeton University Press, 1970), 55–94. For a broader pluralist account, see Sher, *Desert*; Owen McLeod, “Desert and Wages,” *Utilitas* 8 (1996): 205–221.

14. The notion that price discrimination is wrong is discussed in Daniel Kahneman et al., “Fairness as a Constraint on Profit Seeking: Entitlements in the Market,” *American Economic Review* 76 (1986): 728–741; William Landes and Richard Posner, “Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of the Law of Altruism,” *Journal of Legal Studies* 7 (1978): 83–128.

15. The idea for this point comes from John Christman, “Entrepreneurs, Profits, and Deserving Market Shares,” *Social Philosophy & Policy* 6 (1988): 1–16.

16. See Amartya Sen, *Inequality Examined* (Cambridge: Harvard University Press, 1992), 119.

17. For Wertheimer’s hypothetical-market theory, see Wertheimer, *Exploitation*, ch. 7. Wertheimer claims that the hypothetical market theory explains the medieval notion of a fair price. Wertheimer, citing A. W. B. Simpson, “The Horwitz Thesis and the History of Contracts,” *University of Chicago Law Review* 46 (1979): 533; Raymond de Roover, “The Concept of the Just Price: Theory and Economic Policy,” *Journal of Economic History* 18 (1958): 420–421.

18. Daniel Hausman argues that we can assess individual actions in a perfectly competitive economy. Daniel Hausman, “Are Markets Morally Free Zones?” *Philosophy & Public Affairs* 18 (1989): 317–333. It doesn’t follow from this that there is a property of a fair price.

19. Rational bargaining approaches can be seen in David Gauthier, *Morals by Agreement* (Oxford: Clarendon Press, 1986), esp. 145. Gauthier argues that the two sides should pick the price that maximizes the minimum utility of any party to the transaction. J. F. Nash’s argument that transacting parties should maximize the product of their utility-gains from the transaction might also be viewed as a rational theory of prices. Nash, “The Bargaining Problem,” 155–162.

20. John Rawls, *A Theory of Justice* (Cambridge: The Belknap Press of Harvard University Press, 1971).

21. The notion that wealth transfer might be better accomplished via direct transfer rather than via legal rules is discussed in A. Mitchell Polinsky, *An Introduction to Law and Economics*, 2nd ed. (Boston: Little, Brown and Company, 1989), ch. 15.

22. Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), ch. 7.

23. This point comes from Ronald Dworkin, “The Original Position,” *University of Chicago Law Review* 40 (1973): 500–533.

24. This example comes from Stephen Kershnar, “A Liberal Argument for Slavery,” *Journal of Social Philosophy* 34 (2003): 510.

25. See Michael Davis, “Necessity and Nozick’s Theory of Entitlement,” *Political Theory* 5 (1977): 219–232.

SIX

The Wrongness of Adult-Child Sex Involving Willing Participants and Forward-Looking Reasons

Adult-child sex involving willing participants has an unclear status from the perspective of forward-looking considerations. When both participants are willing, the risk of long-term harm is hard to estimate. There is reason to believe that in some cases (for example, force, genital contact, and father figures) there is a risk of significant harm. The relevance of forward-looking considerations depends in part on whether the standard objections to consequentialism or other forward-looking theories succeed.

THE MORAL STATUS OF ADULT-CHILD SEX

This chapter focuses on forward-looking reasons. The idea is that, as we saw in the previous chapter, the backward-looking reasons do not clearly show that adult-child sex involving willing participants is necessarily or even actually always wrong. This chapter looks at whether forward-looking reasons show either to be true. If the reader found the previous chapter unconvincing, then he or she might consider this chapter to address the issue of whether forward-looking reasons alone are sufficient to make such sex wrong regardless of whether other reasons do so.

On a forward-looking theory, an act is wrong because it brings about bad results. Under the most common version, consequentialism, an act is wrong when, and only when, it brings about worse results than another act available to the agent. Act-consequentialist theories focus on act-tokens (particular acts) rather than act-types (act-properties). So our interest here is whether adult-child-sex acts usually have worse results than other

acts available to agents. This will depend on the particular adult, child, and circumstances in which they have sexual contact. Hence, a consequentialist conclusion will leave the door open for exceptions.

Harm

One guide to bad results focuses on harm. Harm is a setback to someone's interest.¹ If the agent harms someone and the harm could have been avoided, this is evidence that he is bringing about worse results than he otherwise could have.

Adult-child sex might be thought to cause either short-term or long-term harm to the child. The short-term harm is less likely when children are willing participants and their willing participation results from their preferences. However, short-term lack of harm is not enough to show that harm is unlikely. In addition, long-term harm is generally what matters. Children are constantly made to do things that harms them in the short term because of their or others' long-term interests (for example, they have to share with their siblings, are disciplined, and made to go to the dentist).

An objector might note that if there is short-term harm and all else is equal, then it's still wrong. However, if something causes short-term harm and either has no other effects or its other effects balance out, then it does cause long-term harm in the sense that over a long period of time an individual's interest is set back. If one instead views long-term harm as harm that is present toward or at the end of the long period of time, then short-term harm does not matter as much.

In addition, if adult-child sex involving willing children does not produce long-term harm, then the response fails to show that such sex is wrong. There is some evidence for this, albeit controversial evidence. Here I will refer back to the discussion of research in chapters 2 and 3.² As previously noted, these studies are *extremely* controversial and have come under criticism on an array of grounds. For now, I will assume merely that the data is mixed.

Adult-child sex might bring about long-term harm because it encourages the rape or exploitation of unwilling children. In the absence of data, this sort of claim is hard to assess. By analogy, there is a debate as to whether pornography makes rape more or less frequent.³ Assessing this claim about adult-child sex requires data and I am unaware of any on the topic. Furthermore, even if there is some encouragement in some cases, this does not explain why adult-child sex is wrong in those cases in which there is no encouragement or in which the encouragement-effect is outweighed by benefits to one or both participants. It also doesn't explain the wrongness of adult-child sex in terms of what is done to the child-participant, although such an explanation is not part of consequentialism.

We have reason to be wary of the argument that adult-child sex is necessarily wrong or always wrong in the actual world because it is always harmful. Here I refer back to the discussion in chapter 2. First, it is not clear that adult-child sex always causes either short-term or long-term harm, particularly when the focus is on adult-child sex with willing participants. Second, if it is harmful, it is not clear whether the harm comes solely from mistaken or vicious attitudes in society or from the act itself. If it does come from mistaken or vicious attitudes, then it is convention-mediated harm. The harm would then be analogous to the social stigmatization that used to accompany having mixed-race parents as in *Palmore v. Sidoti* (1984). It is not clear whether such harm shows the act to be wrong or merely shows society's response to be wrong.

Expected Outcome

If one views forward-looking theories as focusing on an act's expected outcome, then harm also depends on various facts that are difficult to ascertain. That is, without some assessment of the magnitude of cost if things go poorly, benefit if things go well, and the probability of each occurring, focusing on expected outcome is pure guesswork. There are also description issues that plague expected-outcome theories. For example, consider where a physician-pedophile in Bangkok has sex with a bright girl in an orphanage with whom he is empathetic, having himself been orphaned in Vietnam. To assess the expected outcome, we would need to know whether the probability is for all adult-child sex, all adult-child sex in Asia, all adult-child sex in Bangkok, all man-girl sex in Bangkok, all man-girl sex in Bangkok involving an empathetic adult, and so on. If there is no reason to privilege one description over another, and it is hard to see what that reason would be, then expected-outcome theories fail to get off the ground.

In conclusion, the argument that adult-child sex is actually always or necessarily wrong because it leads to expected harm is problematic. First, it is not clear that the expected outcome is harmful, at least when the sex involves willing participants. Second, the results of applying expected-harm theories themselves are controversial. This is in part because of problems in identifying the relevant description. This is also in part because it is not clear why the expected outcome, rather than the actual outcome, should make an act right or wrong. Expected outcome does intuitively appear to matter with regard to the agent's blameworthiness, but not the status of his act. Third, if the expected harm is convention-mediated, then it is unclear whether the act is wrong or whether society's response to it is wrong.

Rules

Even if act-consequentialism does not show that adult-child sex is always or usually wrong, a critic might claim that rule-consequentialism does. Rule-consequentialism asserts that what makes an act wrong is that it does not satisfy the rule or rules that would bring about the best results.⁴ Versions of rule-consequentialism differ. On one account, an act is morally wrong if and only if it is forbidden by rules the acceptance of which would actually maximize the good. Other versions focus on what would maximize the expected good, focus on rule-compliance rather than rule-acceptance, and make adjustment for when there is more than one set of rules that has maximally good results. Consider the rule: *adults may not have sex with children*. The critic's idea is that this rule, if it were accepted (or complied with) by all (or most) people, would produce better results than any alternative rule. More specifically, the rule is included in the set or sets of rules that would bring about the best results.

The rule-consequentialist argument is unconvincing. If rule-consequentialism fails, even on consequentialist grounds, then the argument does not get off the ground. There are a series of standard objections to rule-consequentialism. First, rule-consequentialism is either extensionally equivalent to act-consequentialism or it is incoherent.⁵ Second, rule-consequentialism addresses an epistemic issue (given our limited knowledge and biases, what procedure is most likely to generate right acts?) rather than the metaphysical issue (what makes an act right?) and it is the latter that is central to moral theory.⁶ Third, rule-consequentialism cannot handle conflicts of rules.⁷ Fourth, the theory has to provide a non-arbitrary degree of compliance or acceptance and it is not clear that it has the resources to do so.

Even if some version of rule-consequentialism is true, there still needs to be an argument as to why the best rule would prohibit adult-child sex, particularly when the child is willing, her parents consent, and, perhaps also, the society in which the adult and child live does not disapprove of such sex. The idea behind the lack of disapproval is that on some accounts, the rule-consequentialist should not count the costs of getting people to move away from their current moral beliefs.⁸ Without this condition, the moral rules that a population currently holds might be terrible but better than other sets because of the high cost of getting people to change their minds. Such rules might allow women, blacks, and Jews to be subordinated. In addition, failure to screen out this cost might result in relativism about moral codes as it would be more costly to move some societies to a new set of rules than to move others. The critic might respond that the relevant rule should cover all adult-child sex, not just such sex when the child is willing, has the parents' consent, and society does not disapprove, but such a response needs support.

In short, the argument that adult-child sex is wrong because it is forbidden by the optimal rules is problematic. First, it is not clear that rule-consequentialism is true. Second, if true, it is not clear why the best rules prohibit adult-child sex, even in cases involving willing children. Third, even if the best rules prohibit adult-child sex in cases involving willing children, it is not clear if the issue of whether the harm is convention-mediated is relevant. If such mediation is present, then the rules making such sex wrong might apply only to those cultures that have the relevant conventions.

Summary

Table 6.1 summarizes these findings.

CONCLUSION

Adult-child sex involving willing participants has an unclear status insofar as forward-looking considerations are hard to estimate. When both

Table 6.1.

Explanations for Why Adult-Child Sex Is Always Wrong	Reason to Doubt Explanation
Adult-child sex harms children.	<ol style="list-style-type: none"> 1. It is not clear that it always causes short-term harm. 2. It is not clear that it always causes long-term harm. 3. If it is harmful, it is not clear whether the harm comes solely from mistaken or vicious attitudes in society.
Adult-child sex can be expected to harm children.	<ol style="list-style-type: none"> 1. It is unclear whether expected-harm theory is true. 2. If expected-harm theory is true, it is unclear whether such sex produces an expected harm (rather than benefit). 3. If expected-harm theory is true and such sex produces an expected harm, it is unclear whether the harm is convention-mediated.
Adult-child sex is forbidden by optimal rules.	<ol style="list-style-type: none"> 1. It is unclear whether rule-consequentialism is true. 2. If rule-consequentialism is true, it is unclear whether the best rules would always prohibit such sex. 3. If rule-consequentialism is true and the best rules prohibit such sex, it is unclear whether the harm is convention-mediated.

participants are willing, the risk of long-term harm is unclear. There is reason to believe that in some cases (for example, force, genital contact, and father figures) there is a risk of significant harm. The relevance of forward-looking considerations depends in part on whether the standard objections to consequentialism or other forward-looking theories succeed.

Regardless of whether adult-child sex is wrong, pedophilic desires and fantasies might still be thought to be morally problematic. Even if they are not the result of a mental illness, the desires and fantasies still might be thought to be vicious (that is, the opposite of virtuous). This might be thought to be similar to how those with rape fantasies might not have an illness, but still intuitively seem defective. Like rape fantasies, pedophilic desires and fantasies intuitively seem to be directed at inappropriate objects, involve unrealistic scenarios, and do not have the consent of those who feature prominently in them. The next chapter considers the status of these desires and fantasies.

NOTES

1. Joel Feinberg, *Harm to Others* (New York: Oxford University Press, 1984), 31–36.
2. See Bruce Rind and Philip Tromovitch, "A Meta-Analytic Review of Findings from National Samples on Psychological Correlates of Child Sexual Abuse," *The Journal of Sex Research* 34 (1997): 237–255. See, also, Bruce Rind et al., "A Meta-Analytic Examination of Assumed Properties of Child Sexual Abuse Using College Samples," *Psychological Bulletin* 124 (1998): 22–53, esp. 44 and 46; Michael Ingram, "Participating Victims: A Study of Sexual Offenses with Boys," *British Journal of Sexual Medicine* 6 (44) (1979); Frits Bernard, "Pedophilia: A Study of Psychological Consequences for the Child," in M. Cook and G. Wilson, eds., *Love and Attraction* (Oxford: Pergamon, 1979); Larry L. Constantine, "The Effects of Early Sexual Experiences: A Review and Synthesis of the Research," in Larry L. Constantine and Floyd M. Martinson, eds., *Children and Sex* (Boston: Little Brown, and Co., 1981), 217–244, esp. 238–242.
3. There is at least some evidence that pornography is a substitute for rape. See Todd Kendall, "Pornography, Rape, and the Internet," http://www.law.stanford.edu/display/images/dynamic/events_media/Kendall%20cover%20+%20paper.pdf (July 19, 2010). For an argument that there is an inverse correlation between access to pornography correlates and changes in the frequency of rape, see Anthony D'Amato, "Porn Up, Rape Down," Northwestern Public Law Research Paper No. 913013 (June 23, 2006), <http://ssrn.com/abstract=913013>.
4. For classic statements of it, see R. B. Brandt, *Ethical Theory* (Englewood Cliffs, NJ: Prentice Hall, 1959); J. O. Urmson, "The Interpretation of the Moral Philosophy of J. S. Mill," *Philosophical Quarterly* 10 (1953): 144–152; S. Toulmin, *The Place of Reason in Ethics* (Cambridge: Cambridge University Press). For more recent accounts, see Brad Hooker, *Ideal Code, Real World: A Rule-Consequentialist Theory of Morality* (Oxford: Oxford University Press, 2000); T. Mulgan, *The Demands of Consequentialism* (Oxford: Oxford University Press, 2001).
5. See J. J. C. Smart, "Extreme and Restricted Utilitarianism," *The Philosophical Quarterly* 6 (1956): 344–354.
6. The idea for this objection comes from Smart, "Extreme and Restricted Utilitarianism."

7. See B. Eggleston, "Conflicts of Rules in Hooker's Rule-Consequentialism," *Canadian Journal of Philosophy* 37 (1997): 329–350.

8. This idea and the two arguments that follow come from Brad Hooker, "Rule Consequentialism," *Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/consequentialism-rule/>, July 19, 2010.

SEVEN

Pedophilic Fantasies

EVALUATING PEDOPHILIC DESIRES

Pedophilic desires and fantasies are not necessarily vicious. They do not always involve a pro-attitude toward an intrinsic or relevant instrumental evil. In the context of fantasies, their intensity is not always disproportionate to their object. Such fantasies are likely vicious on an Aristotelian character-based theory of vice. However, such a theory is incorrect insofar as it conflicts with intuitions that individual attitudes and acts are virtuous or vicious. More specifically, the intuitions are that attitudes and acts are virtuous (or vicious) in themselves independent of whether the person having or doing them is virtuous.

Desires and fantasies about having adult-child sex do not wrong anyone. If every wrong act wrongs someone, then it is not wrong to enjoy having such desires or such fantasies. This is true on both object- and subject-centered theories. This is because such desires and fantasies do not always infringe on someone's claim or make someone worse off, nor are they vicious or irrational as required by the most plausible subject-centered theories.

Pedophilic Desires Are Not Necessarily Vicious

As argued in chapter 1, a pedophile is defined in terms of frequent and intense pedophilic desires with individuals who are or appear to be in a pre-pubescent stage. It is worth considering whether these desires are intrinsically vicious or wrong. The issues are distinct because an attitude can be vicious and not wrong. For example, a person might violently resent a rival male for a woman in whom he is interested. Because the resentment does not wrong the rival, it is not wrong, even though it is

vicious. The issue in this section is whether the pedophilic thoughts are constituents of, or reflective of, a bad moral character.

Pedophilic arousal does not necessarily correlate with pedophilic behavior.¹ There is some evidence that pedophilic arousal is found in some normal men and correlates with adult heterosexual arousal.² Thus, the viciousness of pedophilic desires and fantasies is an issue that might arise with regard to many adult males.

Roughly, sexual fantasies are imagined scenarios that are intended to (or generally do) bring about sexual arousal.³ The scenario need not occur. That is, fantasies are sometimes scenarios that never did and never will occur. Pedophilic sexual fantasies are sexual fantasies involving pedophilic desires. Desires are felt when perceiving real-world events or having fantasies. The latter sometimes involves an immediate experience of one's desire in the context of non-actual scenarios.

A Theory of Vice

A bad moral character is a network of mental states or dispositions to act or think in ways when the network is bad to have. The badness is moral. It need not be bad for the subject. This is because virtue and what makes someone's life go better do not necessarily align.

Consider Thomas Hurka's recursion theory of virtue and vice. A recursion theory of virtue and vice focuses on a repeatable structure that characterizes virtues and vices.⁴ On Hurka's more general account, there are three types of clauses that together capture the nature of intrinsic goodness and badness. The first clause type is the base clause. These specify first-order intrinsic goods and evils. "BG" stands for "base good" and "BE" for "base evil."

(BG) Pleasure and knowledge are intrinsically good.

(BE) Pain and false belief are intrinsically bad.

There might be other objective-list elements in (BG) besides pleasure and knowledge. The same might also be true of (BE).

The second clause type is the recursion clause. These are clauses that relate the value of having the correct attitudes toward objects. They also set out the nature of virtue and vice. The proposition names stand for "loving good," "loving evil," "hating good," and "hating evil." In this context, I shall use "bad" and "evil" interchangeably.

(LG) If x is intrinsically good, loving (desiring, pursuing, or taking pleasure in) x for itself is intrinsically good.

(LE) If x is intrinsically evil, loving x for itself is intrinsically evil.

(HE) If x is intrinsically evil, hating (desiring or pursuing the non-existence of or being pained by the existence of) x for itself is intrinsically good.

(HG) If x is intrinsically good, hating x for itself is intrinsically evil.

The object of the recursion clauses can be a first-order or higher-order good and evil. For example, one can have a virtuous or vicious attitude toward another attitude. The theory is recursive because these clauses operate in the same way with different-level objects.

There might be other conditions. One condition might be that an attitude must have an appropriate intensity level. For example, an overpowering love of a minor good might not be very good in itself. A second condition might be that the value of an object has agent-relative conditions. For example, it seems intrinsically better for a father to love *his son's love for him* rather than merely *some son's love for his father*.

On Hurka's theory, the attitude of loving consists of more specific attitudes. To love something is to desire it obtain, actively pursue it, or take pleasure in it when it obtains. People typically love states of affairs. States of affairs are abstract entities that are similar to descriptions or scenarios. They obtain when what they describe actually occurs. Also, on his account, there are two modes to love something: it can be loved for itself or because it is good. This second mode of love depends on a prior judgment that it is intrinsically good. This recursive account might be extended to cover instrumental goods (things that bring about intrinsic goods) or inherent goods (things the contemplation of which is intrinsically valuable, for example, sunsets). Whether it should be extended depends on whether it intuitively seems intrinsically good for someone to love these as well. Parallel principles apply to the attitude of hating.

A third type of clause identifies virtue and vice. This type focuses on intrinsic goods and evils identified by the above recursion clauses. These clauses identify properties that supervene on a person's attitudes. Here "bad" and "evil" refer to the same thing.

(VR) The virtues are those attitudes to goods and evils that are intrinsically good.

(VI) The vices are those attitudes to goods and evils that are intrinsically evil.

On this account, then, virtue and vice are features of a person's attitudes. While Hurka does not specify the determinant of a person's overall character, on one development of his theory a person as a whole is virtuous or vicious based on the number, ratio, and intensity of his virtuous and vicious attitudes.

Hurka's theory of desert involves combination of base goods and evils and virtues and vices. Here are his principles.

- The combination of virtue and pleasure in the same person's life is intrinsically good.
- The combination of vice and pleasure in the same person's life is intrinsically bad.
- The combination of virtue and pain in the same person's life is intrinsically bad.

- The combination of vice and pain in the same person's life is intrinsically good.
- Desert-goods and desert-evils are those identified by clauses (1)–(4).

There is a common structure to virtue and desert. Like the principles of virtue and vice, positive-positive and negative-negative combinations are intrinsically good and positive-negative and negative-positive combinations are intrinsically bad. Also, the role of virtue and vice in the principles of desert import the recursive structure into his account of desert. Hurka argues that the similar structure suggests that the more fundamental good is appropriate responsiveness to values.

Hurka's account has several advantages over other theories of virtue. First, it allows virtue to have the same structure as desert and both to have a similar relationship to the basic good. This unified structure is appealing because it suggests that there are basic metaphysical relations that account for the structure of higher-order intrinsic goodness.

Second, it links virtue to mental states. This allows us to view virtue as a function of what goes on in someone's head. On this account, asserting that strength and agility are virtues is mere metaphor. This has the advantage of explaining why virtue produces a disposition to behave in certain ways, without making the disposition constitute virtue. A similar thing is true of vice. On a purely dispositional theory, moral character in general and moral character traits in particular are nothing more than dispositions to behave in certain ways under normal conditions. This does not cohere with the notion that a person's being virtuous or vicious explains his disposition to behave in certain ways.

Third, it helps to clarify the relationship between virtue and responsibility by focusing on the responsibility that a person has for his attitudes. That is, a person is responsible for virtue (or vice) to the extent to which she is responsible for her attitudes.

Fourth, the account provides an appealing account of a number of particular virtues and vices. For example, it explains vices that occur because a person's attitudes don't fit their objects (for example, callousness as not caring about another's pain and shamelessness as not caring about one's higher-level evil) or fit their objects but are disproportionate (for example, selfishness as caring more about one's own lesser good than others' greater good).

Fifth, it categorizes virtue as a type of intrinsic good, thereby allowing it to be commensurate with other intrinsic goods. This explains our intuition that virtue is valuable in itself and can be weighed against other goods.

A Theory of a Loving Attitude

Central to Hurka's theory is the notion of a loving attitude. This notion needs to be filled out. On my theory, roughly, what grounds vice is a person having a pro-attitude toward an evil scenario (or a con-attitude toward a good scenario). This proposition captures this notion.

- *Pro-Attitude Theory*: A subject's attitude is vicious if and only if he has a pro-attitude toward an object that is evil in itself or would be evil in itself were it to obtain (or a con-attitude toward an object that is good in itself or would be good in itself were it to obtain).

This theory looks at whether a person has a positive orientation toward evil. This captures the central intuition of Hurka's recursion theory, which is that it is vicious for persons to have a positive attitude toward (love, prefer, desire, act to bring about, and so on) evil things. A pro-attitude toward an object is an attitude that contains a proposition describing the event plus another attitude that somehow supports the occurrence of the event. This attitude might or might not have a truth-value. For example, it might be emotive or prescriptive. This theory entails that the actuality and the belief about the actuality of the fantasized event is irrelevant, although these factors might be evidence of the presence or intensity of an incorrect pro-attitude.

One advantage of the theory is that the pro-attitudes are fine-grained. Pro-attitudes are fine-grained in that they can be directed at particular states of affairs. These states of affairs are captured by (and, perhaps, identical to) propositions. Since propositions are fine-grained, so are the attitudes toward them. When pro-attitudes are directed at the effects of having certain fantasies, the scenario is not the object of the pro-attitude. This allows us to distinguish a person's attitudes toward the fantasy itself from those directed at its effects. These effects might be positive (for example, helping the subject make love to a spouse to whom she has grown less attracted) or negative (for example, the subject finds that these fantasies lead to his objectifying women).

One issue is whether pleasure is necessarily a type of pro-attitude. A proponent of the pro-attitude theory might reject this because pro-attitudes alone explain why certain mental states are vicious. Pleasures and pro-attitudes are distinct and need not align.⁵ To see this, notice that a person, Charles, can consistently accept the following.

- I would find it pleasurable to experience Don's raping Erica.
- I have a con-attitude toward Don raping Erica.

The con-attitude might be filled out in terms of whatever characterizes pro- and con-attitudes. Con-attitudes might consist of Charles's preferring that it not occur, his judging that the rape is morally wrong or bad,

his having certain non-cognitive attitudes toward it (for example, he emotes negatively toward it), and so on.

In addition, it is likely that some people have attitudes like those regarding Don's raping Erica. Many women have rape fantasies, but it seems implausible that they have pro-attitudes toward rape (62 percent of women have had a rape fantasy).⁶ A common theme in romance novels, which are largely written for women, is the rape of the lead character.⁷ Nearly all women have no interest in acting out a realistic fantasy of rape.⁸ A similar thing is true of many of the violent events depicted in movies, video games, and television shows.

An objector here might claim that these women have both a pro-attitude and a con-attitude toward being raped: a pro-attitude toward being raped—in enjoying the fantasy—and a con-attitude toward being raped—in believing that it would be frightening, humiliating, painful, and so on. He might further claim that it is a fairly normal feature of our mental lives that we have pro- and con-attitudes toward the same state of affairs. If this is correct, then my notion that pleasure is not necessarily a pro-attitude toward a state of affairs weakens.

One problem with the objection is that it fits uneasily with the phenomenology of rape fantasies. My discussions with women suggest that such fantasies are not characterized by mixed or oscillating feelings as would be true were they to have mixed attitudes toward something. Such mixed or oscillating feelings occur, for example, when one considers the death of a loved one who has a terminal illness and is suffering. Also, when someone has contradictory attitudes toward something, the combination of such attitudes intuitively seems irrational. This occurs, for example, when a mother understands that the evidence suggests that her son committed a terrible crime and yet refuses to believe it. The feeling of irrationality might occur in the attitude-holder or external observer. This sense of irrationality is also not intuitively present in the usual rape fantasies.

Were a woman's pleasure toward a rape fantasy to be a pro-attitude and therefore vicious and were she also to have a strong con-attitude toward being raped, the combination of her attitudes might still be virtuous if the latter were weightier. An attitude's weight might be a function of its intensity, duration, and, perhaps, another factor (for example, relation to conscious awareness). We might still say, then, that a woman's rape-fantasy attitudes are virtuous, although this involves a virtuous dislike outweighing a vicious pleasure.

Pedophilic Fantasies Are Not Necessarily Vicious

Here is an argument in support of the claim that pedophilic fantasies are not necessarily vicious.

(P1) If pedophilic thoughts and fantasies are always vicious, then they always involve a pro-attitude toward or indifference to an intrinsically bad thing.

(P2) Pedophilic thoughts do not always involve a pro-attitude toward or indifference to an intrinsically bad thing.

(C1) Hence, pedophilic thoughts and fantasies are not always vicious.

[(P1), (P2)]

Premise (P1) rests on the conjunction of Hurka's theory and the pro-attitude theory of vicious pleasures.

Premise (P1) might have to be rephrased in terms of indifference to or pleasure in part of an intrinsically bad scenario or, perhaps, a scenario that would be intrinsically bad were it to obtain. This depends on what sort of things are intrinsically bad. In what follows, I ignore this complication.

Premise (P2) rests in part on the assumption that some pedophilic fantasies are not intrinsically bad. As imagined, some such scenarios do not involve a pro-attitude toward a first-order or higher-order evil. A first-order evil is pain or suffering.

Pedophilic desires are not themselves first-order evils because they do not necessarily involve pain or suffering. In fact, they rarely do if, as is likely the case, people have pedophilic fantasies because they are sexually pleasurable. Higher-order vicious attitudes involve someone having a pro-attitude at the thought of another in pain or suffering or another intrinsically evil object (or a con-attitude toward the opposite).⁹ The object need not involve someone actually in pain or suffering, merely the thought that they are. If some pedophilic fantasies focus on depictions of mutually satisfying sex, and some likely do, then they do not always involve someone taking pleasure at another's pain or suffering. There is some evidence that some pedophiles do not have sadistic fantasies. One study found that most sex offenders against minors were not aroused by sexually aggressive stimuli involving children.¹⁰ Hence, they do not involve a higher-order evil. Some pedophilic fantasies might involve pleasure at someone suffering (sadistic pedophilic fantasies), but this is probably not true for all.

Objection #1: It is vicious to enjoy fantasies that endanger children.

Given the harm that often accompanies sexual abuse of minors, one might think that an adult who enjoys the thought of sex with children takes too great a risk of acting on that thought and harming a child. Hence, the adult is insufficiently concerned with children's well-being. This indifference to the well-being of others might be seen as selfishness (putting too much weight on one's own well-being), callousness (not caring about another's suffering), or other vicious attitude. Depending on the theory, what matters here is likely the risk of harm the adult believes

is posed by the sex. It is not the risk itself because this is external to the person's mental states.

This risk-based theory of why such fantasies are vicious raises the issue of description-relativity. If what matters is what the agent perceives to be the risk and he believes the risk to be insignificant, then he is at most negligent with regard to enjoying the fantasy and putting children at risk. Negligence has little to no relation to viciousness because people often do not choose to be negligent or develop habits that lead to negligence.¹¹ In other words, negligence need not, and often is not, accompanied by an attitude of hostility or indifference to others. Hence, some negligent attitudes toward pedophilic sex are not vicious, even if they pose an unjustifiable risk of harm to children. This occurs when the imagined script involves mutually pleasurable sex between willing adults and children however unrealistic and risky the script.

This view of negligence having little relation to viciousness conflicts with common sense. In support of the notion that negligence and blameworthiness are related, George Sher argues that people are blameworthy for traits (for example, pedophilia) that were negligently adopted or retained or that were not under the agent's control.¹² This raises the issue of whether such a factor lessens an individual's control over pedophilia and whether lessened control of a trait reduces its viciousness. Sher argues that it is appropriate to blame a person for having vicious traits because they reflect who he is. This is true even if the person is neither responsible nor worthy of punishment for these traits. It is unclear whether blame for traits includes judging the trait-holder virtuous or vicious. If blameworthy entails vice, then this opens the door to judge people who enjoy pedophilic fantasies to be vicious, even if the subject was unaware of the risk the fantasies pose. Blameworthiness might be thought to entail vice because the reasoning (or lack thereof) that grounds the first also grounds the second.

Pedophilic fantasies do not in themselves pose a risk to the child. Even sadistic pedophilic pleasures are not vicious as long as the pro-attitude is sufficiently fine-grained. For example, if a person takes one type of pleasure or a pro-attitude toward a child-sexual-suffering scenario (that the scenario is sexy) but not another (that it would be good were such a scenario to occur), then his fantasy is not vicious. This is because it is the event's occurrence that is bad, not its sexiness, and hence taking pleasure in the latter is not vicious. It is not clear if pedophilic fantasies are so fine-grained. Consider fantasies that might be considered analogous. Hentai cartoons appear to depict hebephilic sex and seem intended to suggest that such scenarios are sexy.¹³ It is unclear whether the producers intend to convey the message that they want the scenario to occur or that it would be morally good were it to occur. Nor is it clear whether consumers always or usually adopt such a message. If hebephilic fantasies always suggest such scenarios are sexy but need not contain a pro-atti-

tude, then such fantasies are vicious only when they contain a pro-attitude toward the occurrence of the adult-teen sex (or, perhaps, painful adult-teen sex).

Objection #2: Pedophilic fantasies are vicious because the subject takes pleasure in an instrumentally bad thing.

It might be objected that pedophilic fantasies are vicious because the subject takes pleasure in something that is instrumentally bad, that is, a means to doing something bad. Here the issue is whether pleasure in instrumentally bad things is vicious. It is not clear that pleasure in (or a pro-attitude toward) an instrumentally bad scenario is in itself vicious. For example, consider a high school student who fantasizes about humiliating a fellow student as a means of achieving acceptance among his fellow athletes. This fantasy then leads him to humiliate the hapless victim in the fantasized manner (for example, by urinating on him). It is not clear that the fantasy is vicious even if it leads to an intrinsically bad result, the victim suffering, because the hazer lacks a pro-attitude toward the suffering.

If a pro-attitude toward an instrumentally bad object is vicious, then the issue arises whether instrumental badness is relative to the effects of the attitude on the real world or the effects the sex has in the fantasy world. It is likely the latter. This is because viciousness intuitively seems to be an intrinsic property of a person and, in particular, a feature of his mental states. For example, it intuitively seems that a person can be vicious even if he is a brain in a vat and his experiences are imposed by an experience machine.¹⁴ The same is true for someone paralyzed from the neck down. If some pedophilic fantasies involve sex that has no bad effects in the fantasized world, then such fantasies are not instrumentally bad in the relevant way. The antecedent is plausible in some cases because some fantasies likely focus on short-term scenarios and others likely paint a rose-colored story, however unrealistic.

Objection #3: Pedophilic fantasies are vicious because they have disproportionate intensity.

It might also be objected that pedophilic fantasies are vicious because the intensity level of pro-attitude is disproportionate. This depends on the pro-attitude intensity toward the scenario being disproportionate to the goodness of the fantasized scenario (for example, the pleasure the couple gets in the scenario). If the intensity is disproportionate and if this grounds vice, then the fantasy is vicious. Note that it is odd to assert that the wrongness of pedophilic fantasies depends on something like how much pleasure the person with the fantasy takes from it in relation to

what is going on in the fantasy, but this is implied if disproportionate intensity grounds vice.

Objection #4: Pedophilic fantasies are vicious because virtuous people would not have them.

It might be objected that attitudinal theories of vice are incorrect. Rather, the objector claims, vice is primarily a property of a person's whole character and only secondarily a property of his attitudes. On a different theory of a vicious or indifferent attitude, an attitude is vicious if it is one that would not be held by a perfectly virtuous person. This is Aristotle's theory.¹⁵ On one version of this theory, a virtuous person is one who has the disposition to act in certain ways in certain types of situations and, perhaps, for a certain range of reasons. If this is combined with the notion that the disposition results largely from the golden mean in emotion and action, then what is at issue is whether the golden mean allows for pedophilic desires or fantasies. If the golden mean attaches to the age of a sexual partner, then it probably rules out such desires or fantasies. There is at least some reason to think that the golden mean does attach to age. The golden mean captures those emotions and acts that allow an individual to flourish in some range of societies (perhaps including his own) and sexually desiring individuals with whom he is not allowed to have sex or who cannot sexually reciprocate might hinder flourishing.

Thomas Hurka puts forth an argument for recursive theory of virtue and against the character theory. The theory rests on the notion that virtue and vice are primarily properties of mental states (for example, desires, motives, preferences, and feelings) and actions and only secondarily properties of dispositions and characters (networks of attitudes).¹⁶ Hurka argues for this in part on the basis of ordinary intuitions. In particular, he argues that we can make virtue-attributions apart from any connection to long-lasting traits. Consider these examples.

Dog-Kicker: You are walking down the street and you see Bill kick a dog from an evident desire to hurt the dog just for the pleasure of doing so.

Donor: Your companion stops to give \$20 to a homeless person, apparently from concern for that person for her own sake.

Hurka argues that we ordinarily say that the first act was vicious and the second was generous without having to assert that either act issued from a stable disposition or character that would produce similar actions in similar circumstances. Hurka also argues that we value a motive or act the same regardless of whether it is done from a stable disposition or character.

The best explanation for these intuitions and related valuation is that mental states and acts are primary bearers of virtue and vice. While Hur-

ka does not explicitly state this, his theory fits nicely with the idea that a person's disposition or character is virtuous on the basis of the virtue of the primary bearers of virtue and vice, mental states and acts, thereby making dispositions and characters derivative bearers. That is, what makes a person vicious is that she has vicious thoughts or does vicious things, not vice versa.

A critic of Hurka's argument might respond that a vicious kick, no doubt, warrants such a judgment, but it is not enough to say "vicious person," meaning more than the doer of a vicious kick. The point here is that the description is enough to warrant a judgment that the act or mental state that brought the act about (for example, desire or intention) is vicious. This is true even if the person who did the act or had the thought is not, all things considered, vicious.

Conclusion

There might be strong prudential or consequentialist reasons to prefer that people not have pedophilic desires. The having of such desires might lead to child rape or molestation, sexual frustration in pedophiles, an intrusion into civil liberties as the police pursue pedophiles, wasteful parental protection, and so on. These reasons do not support the notion that such desires are vicious, only that they are not good for an individual or population. By analogy, whether homosexual desires are vicious does not depend on whether they maximize an individual's well-being or a population's utility.

In summary, pedophilic desires are not necessarily or always vicious. They do not always involve a pro-attitude toward an intrinsic or relevant instrumental evil. In the context of fantasies, they are not always disproportionate to their object. Such fantasies are likely vicious on an Aristotelian character-based theory of vice. However, such a theory is incorrect insofar as it conflicts with intuitions that individual attitudes (and acts) are virtuous or vicious. Again, there might be prudential or consequentialist reasons to prefer that people not have such desires or enjoy such fantasies, but this does not make such desires vicious. Some, and perhaps many, pedophilic fantasies are vicious. This is especially true of sadistic ones. This is likely true of other types of fantasies and it is unclear whether pedophilic fantasies are more likely vicious. Table 7.1 summarizes these conclusions.

Pedophilic Desires and Fantasies Are Not Necessarily Wrong

Some pedophilic fantasies are acts. The idea here is that if someone intentionally wills an event then he does an act and, in some cases, people having pedophilic fantasies intentionally will events. The event consists

Table 7.1.

Ground of Vice	Pedophilic Fantasies
Pro-attitude toward evil	Not always present in pedophilic fantasies
Disproportionate pro-attitude toward good	Not always present in pedophilic fantasies
Satisfies the golden mean	Not the criterion for vice

of the individual experiencing an imagined scenario. If some pedophilic fantasies are acts, then they can be right or wrong.

Object-Centered Theories

In this section, I argue that having a pedophilic desire or running a pedophilic fantasy is not necessarily wrong, even if it is willed. If one person wrongs a second, then there are two theories of what makes an act wrong. The first is an object-centered theory. It holds that what makes an act wrong is some feature of the person toward whom the agent acts. This theory is object-centered because it focuses on the person acted on, that is, the object of an act. The object-centered theory assumes that an act is wrong if it wrongs someone. It fills out a wrong in terms of right- or duty-infringement, unfairness, or exploitation. On this theory, an act is wrong if it infringes on the object's claim or affects him in some way. This is because right- and duty-centered theories focus on claims and the fairness and exploitation theories focus on the well-being of the person toward whom the agent acts. By definition, one person has a claim against a second if and only if the second owes the first a duty.

Pedophilic desires and fantasies are not necessarily wrong on an object-centered account. The person having the fantasy does not infringe on anyone's right. First, the fantasy might not be directed at an actual person. Second, people likely do not have a right (that is, a claim) to their image or to not be thought of in certain ways. The standard justifications of private property—efficiency, autonomy, mixing-labor, and desert—do not apply to one's image or the way others think about someone.

The efficiency justification does not apply because the cost of enforcing a prohibition on thinking about people in certain ways likely outweighs the benefit of doing so. The autonomy justification does not apply because one person merely thinking about a second does not limit the second's ability to think or act in any way. The mixing-labor objection does not apply because a person does not mix his labor into her image. The desert justification does not apply because if we adopt Hurka's account of desert, the person with the fantasy is not always, and perhaps

not usually, lessening desert satisfaction by pairing virtue with pain or vice with pleasure.

Nor do such desires and fantasies necessarily affect the person who is the object of the desire or fantasy. In some cases, they might have a causal effect on the person's well-being, for example, if they lead to a sexual assault, but then the wrongness is a feature of the agent's acting on the desire or fantasy rather than his choice to have or attend to them. This is because the two are distinct and separately controlled.

An objector might claim that we have an uneasy sense that using someone's image in a sexual fantasy involves objectionable appropriation. He might note that it is plausible that people have a reason to want their image not to be used in others' sexual fantasies. The objector might protest that surely there is some good reason for a student, for example, to want that her image not be used in her professor's sexual fantasy life.

The problem with this objection is that the most likely reason for someone not wanting her image to be used by others is based on aesthetics or safety. It is aesthetically distasteful to find unattractive people or those with whom one does not want a sexual relationship of any sort fantasizing or masturbating over one's image. Aesthetic distaste does not pose a problem for the above theory because it is not a moral concern. There are also safety concerns. If another person is fantasizing or masturbating over one's image, there might be a legitimate fear that the person with the fantasy might harass or assault the person whose image he is using. This does not show that the use of the image itself is wrong. Rather, it shows, at most, that making it known that one is so using another's image is wrong. The same is true for certain ways of acting on it. These wrongs are distinct from use of the image by itself.

That the objection is not to the use of the image by itself can also be seen in that the reason intuitively seems to go away when its use is not tied to sex or violence. For example, were a man marooned on a tropical island to imagine his elderly neighbors making Christmas cookies, the neighbors do not intuitively seem to have grounds for complaint. This is true regardless of whether they know the marooned man is so using their image. Were the wrong the use of the image by itself, they would have such a ground.

If image usage is not a right-infringement (where a right is, or includes, a claim), exploitative transaction, or does not by itself bring about physical or psychological harm, then there likely is no other wrong-making feature that is always present. This is in part because this list likely exhausts the object-centered wrong-making factors. The uneasy sense is better explained by the aesthetic- or safety-based concerns than by positing a new type of object-centered wrong-making feature.

Such a fantasy can be wrong if the person who runs it in his head promised another not to do so. This special case is not enough to show that it is wrong in cases when no such promise was made. In this case, it

is the promise breaking that makes it wrong, not running the fantasy itself.

Subject-Centered Theories

It might be thought that a pedophilic fantasy is necessarily wrong because it violates a subject-centered side-constraint.¹⁷ A constraint is subject-centered if it depends primarily on a property of the agent, that is, the subject of an act. The property of the agent might be the value of his acting in accord with rationality or virtue or his having a correct attitude (for example, a correct intention or motive). The idea behind the rationality requirement is that morality is a part of rationality and it is the incorrectness of irrationality that explains the wrongness of immoral action. The idea behind virtue is that it is the concern for an individual's own virtue that explains why non-consequentialism is true. Consider the following case.

Tradeoff: Bad guy never lies. He tells good guy that he (bad guy) will kill five innocent people if good guy doesn't kill one innocent.

The reason that it would be wrong for the good guy to kill the one innocent (on some virtue theory) is that in so doing he would make himself vicious in some way; the specific way would depend on the particular virtue theory. This concern for virtue also explains why an agent should not have certain attitudes toward others.

None of these theories are particularly plausible if the explanation is filled out in terms of the badness of irrationality or vice because there can be cases where killing, torturing, or battering innocents will prevent even more irrationality or vice from occurring in others. Think of cases analogous to *Tradeoff*. For example, think of a case when a person can do one vicious act as a means of preventing five other vicious acts by another. If the explanation for the side-constraint is not filled out in terms of the badness of irrationality or vice, then it is hard to see how the subject-centered theory could be true. In any case, none of these subject-centered side-constraints necessarily rule out pedophilic fantasies.

One might wonder whether this sounds like consequentialism, not virtue theory. Trading off good things within a person's life might be explained by virtue theory; maximizing virtuous acts across people does not seem to be. If correct, this supports the notion that a virtue-based account of a side-constraint cannot be filled out in terms of irrationality and thus the connection between virtue and side-constraints is mysterious.

It is not irrational to engage in pedophilic fantasies if rationality is filled out in terms of individual or aggregate self-interest and if in some cases pedophilic fantasies maximize both. This is sometimes true, at least if we consider possible cases. If rationality is filled out in moral terms,

then the proponent of the subject-centered side-constraint against pedophilic fantasies likely begs the question. In any case, she has the burden of filling out what aspect of morality explains the constraint. The rationality-based side-constraint cannot be a purely formal requirement like universalization because such a requirement can be met. For example, it is possible to universalize the following maxim: if someone is in a situation when pedophilic fantasy benefits someone and harms no one, then he enjoys the fantasy.¹⁸

If the above arguments against the viciousness of pedophilic desires and fantasies are successful, then it is not necessarily wrong to engage in pedophilic fantasies because they are vicious. The above arguments depend on an attitudinal rather than character-based theory of virtue.

In addition, there are a number of reasons to think that virtue does not by itself ground rightness and vice does not by itself ground wrongness. That is, there is reason to think that rightness and wrongness are not notions that can be constructed out of virtue-based properties. If this is correct, then even if it were shown that pedophilic thoughts were necessarily connected to vice, that showing by itself cannot establish that such thoughts are necessarily wrong. The same is true for acts based on such thoughts. Here are some of the reasons.

First, if virtue is an intrinsic property and rightness is an extrinsic property, then the latter does not rest on the former.¹⁹ The notion that virtue is an intrinsic property is based on the notion that it is a property of a person's mental state or network of such states and both are intrinsic features of a person. The notion that rightness is an extrinsic property is based on the notion that a right-making feature is the effect that an act has on individuals other than the agent.

Second, assume that an agent's motive (or overall character) alone makes the agent's act right or it does not.²⁰ If it does, then it is impossible for a virtuous person to act wrongly. This intuitively seems incorrect. It is possible that a virtuous person does an act that causes catastrophic harm to innocents and such an act intuitively seems wrong. For example, consider a scientist who, acting from the best intentions, tries to find a cure for a deadly epidemic. However, her testing accidentally causes a new and far worse epidemic. If the motive alone does not make an act right, then an additional factor must make an act right. It is likely that the additional factor is some feature of the act that is independent of virtue, such as a factor relevant to deontological or consequentialist theories.

Third, virtue-based accounts of rightness sometimes view rightness as an act done from a virtuous motive or total motivational state.²¹ This type of theory entails that whatever a vicious person does is wrong (for example, both her doing an act and her refraining from doing it) and this intuitively seems incorrect.²² Also, this theory does not seem capable of explaining how a person can do the right act for the wrong reason or vice versa.²³

Even if the virtue-based account of rightness focuses on what a virtuous person would do, would characteristically do in the relevant circumstances, or would advise someone else to do rather than their actual motive or total motivational state, the virtue-based account still fails.²⁴ The problem is that the right act sometimes depends on the agent lacking relevant virtues. For example, a callous person should act to get rid of her callousness.²⁵ There are also problems with each of the specific models. For example, the advice model assumes that a virtuous person would always give correct advice but advice infallibility does not follow from virtue, even complete virtue.

Subject-centered accounts of side-constraints are likely false because they do not explain why morality contains side-constraints. Even if the subject-centered account is plausible, the two most plausible versions, rationality- and virtue-based constraints, do not explain why pedophilic fantasies are wrong. This is because in some cases it is rational and not vicious to have such fantasies.

Conclusion

In conclusion, then, a pedophilic fantasy is not necessarily wrong. On the object-centered view, the individual who runs such a fantasy in his head does not necessarily wrong someone by doing so. On the subject-centered view, running the fantasy is not necessarily irrational or vicious. Table 7.2 summarizes these results.

If having a desire is an act, the analysis is parallel to that for fantasies.

CONCLUSION

This chapter argues that pedophilic desires and fantasies are not necessarily vicious. They do not always involve a pro-attitude toward an intrinsic or relevant instrumental evil. In the context of fantasies, their intensity is not always disproportionate to their object. Such fantasies are likely vicious on an Aristotelian character-based theory of vice. However,

Table 7.2.

Theory	What Makes an Act Wrong Someone	Why a Pedophilic Fantasy Is Not Wrong
Object-centered	It infringes on a claim of the person acted on or worsens his well-being.	A pedophilic fantasy by itself does not <i>wrong someone</i> . Specifically, it does not infringe on someone's claim or worsen his well-being.
Subject-centered	The agent who has such fantasies is irrational or vicious.	<ol style="list-style-type: none"> 1. A pedophilic fantasy by itself is not necessarily irrational or vicious. 2. The subject-centered theory is false.

such a theory is incorrect insofar as it conflicts with intuitions that individual attitudes and acts are virtuous or vicious. Some pedophilic desires and fantasies are vicious, but this is also true for many other types of desires and fantasies.

Pedophilic fantasies are also not necessarily wrong. On the object-centered theory, every wrong act wrongs someone and pedophilic fantasies do not necessarily wrong someone. On a subject-centered account, such a fantasy is wrong when it is irrational or vicious and pedophilic fantasies are not necessarily irrational or vicious.

In the previous four chapters I've argued that pedophilic desires and fantasies are not necessarily vicious or wrong and that it is unclear whether adult-child sex is wrong. A distinct issue is whether such sex should be illegal. Arguably, some acts should be illegal even when they are not always wrong or vicious and, perhaps, not even usually so, because of the risk they impose on others or because they are very costly. In the next chapter, we explore whether adult-child sex should be illegal. This involves setting out a theory of what justifies punishment and whether this justification applies to such sex.

NOTES

1. See Gordon C. Nagayama Hall et al., "Sexual Arousal and Arousability to Pedophilic Stimuli in a Community Sample of Normal Men," *Behavior Therapy* 26 (1995): 681–694.

2. *Ibid.*

3. Stephen Kershnar puts forth a similar account in Stephen Kershnar, "The Moral Status of Sexual Fantasies," *Public Affairs Quarterly* 19 (2005): 301–315.

4. See Thomas Hurka, *Virtue, Vice, and Value* (New York: Oxford University Press, 2001); Thomas Hurka, "The Common Structure of Virtue and Desert," *Ethics* 112 (2001): 6–31.

5. The distinction between pleasure in a fantasy and lack of a desire to actualize the fantasized scenario can also be found in Christopher Cherry, "When Is Fantasising Morally Bad?" *Philosophical Investigations* 11 (1988): 112–132, esp. 119.

6. See Jenny Bivona and Joseph Critelli, "The Nature of Women's Rape Fantasies: An Analysis of Prevalence, Frequency, and Contents," *Journal of Sex Research* 46 (2009): 33–45. For other studies that show many women have rape fantasies, see Joseph Critelli and Jenny Bivona, "Women's Erotic Rape Fantasies: An Evaluation of Theory and Research," *Journal of Sex Research* 45 (2008): 57–70; H. Leitenberg and K. Henning, "Sexual Fantasy," *Psychological Bulletin* 117 (1995): 469–496.

7. See C. Thurston, *The Romance Revolution: Erotic Novels for Women and the Quest for a New Sexual Identity* (Urbana: University of Illinois Press, 1987).

8. See S. R. Gold et al., "Two Studies of Females' Sexual Force Fantasies," *Journal of Sex Education & Therapy* 17 (1991): 15–26.

9. For a defense of this theory of virtue and vice, see Hurka, "The Common Structure of Virtue and Desert," 6–31; Hurka, *Virtue, Vice, and Value*, ch. 1–4.

10. See Paul Okami and Amy Goldberg, "Personality Correlates of Pedophilia: Are They Reliable Indicators?" *The Journal of Sex Research* 29 (1992): 297–328.

11. The notion that persons are often not responsible for negligence can be seen in Michael Zimmerman, "Moral Responsibility and Ignorance," *Ethics* 107 (1997): 410–426; Michael Zimmerman, "Controlling Ignorance: A Bitter Truth," *Journal of So-*

cial Philosophy 33 (2002): 483–490. For the notion that people cannot be directly responsible for ignorance, see Gideon Rosen, “Skepticism about Moral Responsibility,” *Philosophical Perspectives* 18 (2004): 295–313; Gideon Rosen, “Culpability and Ignorance,” *Proceedings of the Aristotelian Society* 103 (2003): 61–84; Gideon Rosen, “Kleinbart the Oblivious and Other Tales of Ignorance and Responsibility,” *Journal of Philosophy* 105 (2008): 591–610. On this account, it follows that people cannot be directly responsible for acting on ignorance. George Sher also gives a nice argument for this position, but rejects it in the end. George Sher, “Out of Control,” *Ethics* 116 (2006): 285–301.

12. See George Sher, “Blame for Traits,” *Nous* 35 (2001): 146–161; Sher, “Out of Control,” 285–301; George Sher, *Who Knew? Responsibility without Awareness* (New York: Oxford University Press, 2009). There is some suggestion that genetic factors play a role in pedophilia. See G. R. Gaffney et al., “Is There Familial Transmission of Pedophilia?” *The Journal of Nervous and Mental Disease* 172 (1984): 546–548.

13. For example, see <http://www.hentaimedia.com>, May 26, 2010.

14. The idea for this comes from Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 42–45.

15. See Aristotle, *The Nichomachean Ethics*, J. E. C. Weldon, trans. (Buffalo: Prometheus Books, 1987).

16. Thomas Hurka, “Virtuous Acts, Virtuous Dispositions,” *Analysis* 66 (2006): 69–76.

17. For the notion of a side-constraint, see Nozick, *Anarchy, State, and Utopia*, 28–33. For the distinction between subject (agent) and object (victim or patient), see Samuel Scheffler, “Introduction,” in his *Consequentialism and Its Critics* (Oxford: Oxford University Press, 1988), 9–11; Francis Kamm, *Intricate Ethics: Rights, Responsibilities, and Permissible Harms* (Oxford: Oxford University Press, 2008).

18. If one thinks that the consequent cannot be a statement of fact, then the maxim is as follows: if someone is in a situation when pedophilic fantasy benefits someone and harms no one, then he may enjoy the fantasy.

19. The idea for this objection is Ramon Das, “Virtue Ethics and Right Action,” *Australasian Journal of Philosophy* 81 (2003): 324–339.

20. The idea for this objection comes from Das, “Virtue Ethics and Right Action,” 324–339.

21. See Michael Slote, *Morals from Motives* (New York: Oxford University Press, 2001).

22. See David Copp and David Sobel, “Morality and Virtue: An Assessment of Some Recent Work in Virtue Ethics,” *Ethics* 114 (2004): 514–554, esp. 548–549.

23. See Michael Brady, “Against Agent-Based Virtue Ethics,” *Philosophical Papers* 35 (2004): 1–10.

24. See Rosalind Hursthouse, *On Virtue Ethics* (Oxford: Oxford University Press, 1999), 30; Linda Zagzebski, *Virtues of the Mind* (Cambridge: Cambridge University Press, 1996), 233; Christine Swanton, “A Virtue Ethical Account of Right Action,” *Ethics* 112 (2001): 32–52, esp. 39.

25. See Brady, “Against Virtue-Based Ethics,” 9; Robert Johnson, “Virtue and Right,” *Ethics* 113 (2003): 810–834.

EIGHT

Criminalization

PERMISSIBLE STATE PUNISHMENT

In this chapter, I set out the conditions for a liberal state to punish someone for sex and then apply it to adult-child sex. This discussion of the conditions is mostly a listing of my conclusions. An in-depth defense of this theory is a book-length project. The discussion begins with the theoretical conditions for punishing sex and then moves to some practical ways in which these conditions can be filled out. I then attempt to apply these filled-out conditions to adult-child sex.

Theoretical Conditions

The state should punish someone for engaging in some type of sex if and only if the following conditions are met.

Condition #1: Justice. The type of sex infringes on a moral right.

Condition #2: Good. Punishing the sex-act-type would maximize the good (or, perhaps, the good for some group).

Condition #3: Procedure. The procedure by which people are punished respects rights, is reliable, and does not impose an unreasonable risk.

These conditions should apply whether state punishment is justified by rights, desert, fairness, crime prevention, moral education, calling people to account, utility, or so on. Also, the state criminalizes something just in case it makes people who do it liable for punishment.

These three conditions might have to be slightly modified if it is permissible to trade off a minor loss in one condition for significant gains in another.

Note that even if the state does not punish something, the victim might still receive compensation and the act in question might still be

deterred through the tort system. State punishment is not the only way, and not always the best way, of deterring activities.¹

The idea behind the first condition is that justice binds the state. This is because people in general have to respect people's rights and this includes people who work for the government. Even when the government is legitimate, unless the authorization involves a waiver of rights, citizens retain their rights (or at least those rights that have not been waived). A government is legitimated when citizens have a duty to obey the law. The best theories of state legitimacy leave people's rights in place. Here are the standard theories of legitimacy.

Consent Theory. The duty [to obey the law] rests on consent.²

Associative Political Obligation. The duty rests on the receipt of benefits from a just and mutually beneficial cooperative enterprise.³

Role-Relative Obligation. The duty rests on a person's occupation of a role (for example, citizen).⁴

Rationality. The duty rests on the rationality of coordination. Coordination presupposes people have a duty to follow the law.⁵

Instrumentalism. The duty rests on people being better able to satisfy their moral duties by submitting to authority than by making their own decisions.⁶

Democracy. The duty rests on the duty to have a democratic system or obey the outcome of a democratic process.⁷

Consensus Theory. The duty rests on the consensus of a collection of people (or, perhaps, a reasonable consensus).⁸

Gratitude Theory. The duty rests on the gratitude of people for the benefits the government provided them.⁹

Some theories might respect rights depending on how they are filled out. Consider Rationality and Gratitude theories. The theories that do not require the state to respect its citizens' rights are the least plausible ones. Consider, for example, Democracy and Consensus theories.

The idea behind the second condition is that even when the government can punish someone consistent with justice, the government should act only when it makes the world a better place or at least improves it for some relevant population (for example, actual people). This might be because people consent to government coercion to make their lives go better. Other grounds such as associative political obligations, rationality, democracy, and consensus likely require this condition, whether explicitly or implicitly. Not all of the theories require this condition. For example, instrumentalism and gratitude theory do not. So the second condition should be seen to depend on the theory of state legitimacy. I think that the legitimacy of the state depends on consent, but my argument does not depend on this claim.

The third condition requires that the procedure by which people are punished respects rights, is reliable, and does not impose an unreasonable risk. This is a procedural (and risk-focused) duty to make sure that

one acts reasonably with respect to others' rights. The three requirements in the third condition are designed to ensure this. This sort of concern is likely what in part explains Due Process requirements in the Constitution and the wrongness of endangering others even when no harm results. For example, were coercive interrogation to produce unreliable confessions, then such a method of interrogation would be right-infringing because it is done to a person not yet found guilty, an unreliable means of gathering evidence, and imposes an unreasonable risk on persons who did not commit the crimes for which they are accused.

On one interpretation, the third condition is an epistemic requirement that addresses whether a government is blameworthy in using a particular system of punishment or in punishing a particular individual. The idea here is that what someone believes or knows goes to her blameworthiness, rather than the deontic status of her act. If so, then this condition goes beyond permissible state punishment and addresses the broader issue of when state action is morally problematic.

Other conditions have also been asserted to be necessary and/or part of the jointly sufficient conditions for morally permissible state punishment. These include the activity in question brings about non-trivial harm and is wrong, the agent deserves punishment, and the state should express the wrongness of the agent's action.¹⁰ Some of these conditions likely accompany the above three conditions. For instance, wrongness and harm are often tested for by the justice- and good-conditions. This expressive condition is likely implicit in the procedure condition insofar as the latter requires the state to show that it has a substantive state interest in expressing an idea. This condition has been criticized on the basis that harsh treatment is neither an effective nor appropriate means by which to express the message that certain acts are wrong.¹¹

The desert requirement is commonly found in retributivist and some consequentialist theories. It combines the wrongness condition with a culpability condition. It has come under a series of criticisms, such as issues of why in the context of punishment desert grounds permissions or duties when it doesn't do so in other contexts (for instance, economic contexts). Also, it might be wondered whether desert-based arguments depend on more fundamental moral principles (for example, right-forfeiture and fairness) that do all the justificatory work. Later in this chapter, I'll return to this condition.

The above conditions are abstract. We need a more concrete test to apply them to the real world. We now turn to such a test. The practical conditions below are supposed to track the theoretical conditions, but are more workable. They are more workable in that they give more guidance as to what to look for in determining whether an act-type should be criminalized. This is similar to the way we make various scientific notions operational when testing for them through scientific studies.

Practical Conditions

Here are the practical conditions designed to fill out the above theoretical conditions while at the same time allowing for state punishment. Consider the first condition.

Condition #1: Justice. The type of sex infringes on a moral right.¹²

This condition is the same as the first theoretical condition. The idea here is that justice consists of, and only of, moral rights. The idea is that justice consists of the deontic demands that constitute respecting an individual as an end, person, intrinsically valuable being, and so on. These demands comprise rights. On this vision, rights are claims, that is, duties one person owes someone. The hope here is that identifying rights is a less Herculean task than identifying the demands of justice. Still, this is an abstract notion and depends on the best theory of rights and an application of it.

Consider the second condition.

Condition #2: Cost-Benefit Analysis. Punishing the sex-act-type passes a cost-benefit analysis.

If costs and benefits are viewed in terms of human interest and money is used as a stand-in to measure individual and aggregate interests, then economic models are a useful way to figure out whether punishing an activity makes the world a better place.

One test that might be used to supplement an economic cost-benefit analysis is whether the sex is harmful and the harm is not trivial. The idea here is that when there is no harm or the harm is trivial, it is unlikely that criminalization passes a cost-benefit analysis. It is also worth noting that psychological distress is harmful. This distress can be to third parties, so the harm can include the harm to a scared population, victim's parents, and so on.¹³ The right-infringement requirement, though, prevents this being able to justify victimless crimes.

Consider the third condition.

Condition #3: Procedure. The state should satisfy intermediate scrutiny.

The procedure by which people are punished must respect rights, be reliable, and not impose an unreasonable risk. The condition is likely met if intermediate scrutiny is satisfied. It is satisfied just in case the state has (1) a substantive (legitimate-and-important) state interest, (2) punishment directly advances that interest, and (3) what is punished and the severity of punishment are the least restrictive alternative.¹⁴

The idea here is that there can be harms that the state does not have an interest in preventing. This might include paternalistic protections. For example, consider a state law that prohibits unmarried women from having sex as a way of protecting them from becoming less eligible for mar-

riage. It might also include protection of moral codes, especially religious ones. For example, consider a prohibition on blasphemy. It might be thought that the right-infringement condition would perform this same function, but on some accounts of rights, various acts involve people infringing their own rights. This might occur on theories that hold that certain self-harming acts involve people treating themselves merely as a means.

Too Strong or Too Weak?

There is concern that these conditions should allow people to be punished for failing to support a public good or acting consistently with a solution to a coordination (collective action) problem. The former is a good that is non-excludable (people cannot be effectively prevented from enjoying the good) and non-rival (one individual's consumption does not limit others' consumption). Examples are roads, air traffic control, and environmental protection. A solution to a coordination problem comes about when the outcome of individuals' choices depends in part on others' choices. An example is the side of the street on which each person drives.

The concern is that the above test is either too demanding, in that it does not require participation in projects that the state ought to allow, or not demanding enough, in that it requires participation in projects that the state ought not to allow. An example of the former might be anti-water-pollution laws; an example of the latter is a tobacco-free society that is supported by an overwhelming majority. Democratic procedures might generate democracy-based rights that allow morally dubious projects to satisfy the Justice condition.

For example, consider when people vote to zone alcohol sales from a large county. Because of the democratic process by which this is approved, the punishment of acts that violate the prohibition might be viewed as a right derived from democratic rights. If alcohol use were sufficiently harmful and were the prohibition empirically shown to be effective at reducing the harm, the prohibition might also pass the cost-benefit-analysis and intermediate-scrutiny tests. It might even be a public good insofar as an alcohol-free environment for children and teens might be used as non-rivalous (one family's benefit from it does not diminish others' benefit) and non-excludable (once the environment is established, families cannot be effectively prevented from receiving the benefit). A similar thing might be claimed of a pornography-free Internet and bans on gambling, cigarettes, hate speech, and gay bath houses. All might be justified because of the public good of denying children and teens access to these goods.

Here the right and intermediate-scrutiny requirements have to be taken seriously. Proponents must show that these laws do not infringe on

moral rights, including moral rights derived from the agreement legitimizing the government (for example, the Constitution). The state must also show that the punishment actually does directly advance a state interest and that punishing the activity is the least restrictive alternative. This showing must be based on more than anecdotes and armchair sociology. Also, the state must show that its interest is substantial and must provide an argument, whether based on law, history, or political theory.¹⁵ Depending on the account of legitimate state interest, this might block criminal laws based on legal moralism, paternalism, or religion.

PERMISSIBLE STATE PUNISHMENT AND ADULT-CHILD SEX

Argument

Here is an argument as applied to adult-child sex.

(P1) If the state should punish people for doing an act, then the act is right-infringing and punishing those who do it passes a cost-benefit analysis and intermediate scrutiny.

(P2) In the case of willing adult-child sex, it is not the case that the act is right-infringing and punishing those who do it passes a cost-benefit analysis and intermediate scrutiny.

(C1) Hence, the state should not punish people who engage in willing adult-child sex. [(P1), (P2)]

Premise (P1) rests on the three practical conditions that test for permissible state punishment. Premise (P2) rests on the arguments regarding rights, cost-benefit analysis, and intermediate scrutiny. I discuss but do not endorse the above argument because I am unsure whether the second premise is true. Let us consider the three conditions in (P2).

Condition #1: Rights

Consider first rights. In chapter 3, I argued that in cases of willing participation, adult-child sex is probably not wrong because it infringes on someone's right. The focus here is on the child's right. This is because the usual reason that people think adult-child sex is wrong is because it wrongs the child. If so, then it is the child's right that the adult infringes. Because children are unable to provide valid consent, such sex is thought to be right-infringing. However, there are several reasons to doubt that it is.

First, in the context of pedophilia, a child is a human being with prepubescent physical development or the appearance thereof. Hence, it is at least possible that some children are competent to validly consent and voluntarily do so. However, this might strike some as merely of theoretical interest. This is also true if a child is understood in chronological

terms. If a child is analyzed in terms of limited mental ability, then it is unclear whether this is possible.

Second, we do many things to children without their valid consent (for example, we make them go to the dentist and to church). Moreover, we allow them to willingly participate in activities (for example, kickball) to which they do not validly consent because, by hypothesis, they cannot do so. It is not clear why adult-child sex should be different. If the explanation is made in terms of the concern for harm, then we have likely changed our focus from rights to harm.

Third, it is not clear that children don't give valid consent. The threshold for competence, knowledge, and voluntariness depends on context and it is not clear where the threshold is in this context or whether children who consent to sex exceed it (for example, twelve-year-olds). Some people think that two children engaging in sex play might exceed it, which then raises the issue why the same is not true when one of the children does a similar act with an adult.

To see how this might work in law, here is how the Model Penal Code treats consent (Section 2.11: Consent).

1. In General. The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negates an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.
2. . . .
3. Unless otherwise provided by the Code or by the law defining the offense, assent does not constitute consent if:
 - 3a. it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense; or
 - 3b. it is given by a person who by reason of youth, mental disease or defect or intoxication is manifestly unable or known by the actor to be unable to make reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense.

The issue then would be whether to negate (3a) and (3b) in a way analogous to how these conditions do not allow for people who wrestle with children or coach them to wrestle with one another to be guilty of battery. Here battery is understood as either unlawful physical contact or undesired physical touching.¹⁶ Adults in these circumstances are not guilty of battery because consent was given by, depending on the account, the child or a legally relevant adult.

An objector might argue that what is wrong with adult-child sex is that it infringes on the parents' rights or, perhaps, those of the child's guardian.¹⁷ The problem with this claim is that opponents of adult-child sex usually think that such sex is wrong because it wrongs the child, but on this account it does not wrong them. Rather, on this account, it wrongs

the parents. The opponent might respond that the adult holds the child's rights in trust similar to the way in which a trust executor holds the trustee's rights to property. Note that trustees have rights in the property held in their behalf; they merely lack the power to execute them. In contrast, on this account children lack rights, or at least rights against sex with adults, and hence the analogy fails. Still, the opponent might bite this bullet and concede that the parents alone are wronged via adult-child sex. This fails to explain the wrongness of incest, which is likely a belief held by most opponents of adult-child sex. It also can't explain the wrongness of adult-child rape when the child's parents give the rapist permission.

Condition #2: Cost-Benefit Analysis

If costs and benefits are viewed in terms of human interest and money is used as a stand-in to measure interests, then economic models are available to determine whether punishing an activity makes the world better. The notion of money as a stand-in for interest rests on three assumptions. First, people's willingness to spend money on different things tends to track their relative preferences for them. Second, their relative preferences tend to track the degree to which those things make their lives go better. Third, these factors can be aggregated.¹⁸ How useful a cost-benefit analysis is as a measurement of what tradeoffs make people's lives go better depends in part on how it compares to other ways of measuring tradeoffs.

My estimate of the costs and benefits of punishing willing adult-child sex here is crude because of the data available. My conclusions are that the analysis is quite difficult in the area of willing child participants and in any case it has not been done.

The benefits of criminalizing such sex include the costs per sexual incident times the number of incidents prevented. Prevention might occur via deterrence (general or specific), incapacitation, or treatment. Another benefit is the degree to which parents, children, and other community have less fear as well as the costs associated with higher levels of fear.

Consider the benefits of criminalization of adult-child sex involving willing child participants. Consider first the benefits of criminalizing all adult-child sex, including unwilling sex. The Centers for Disease Control estimates that the lifetime cost of each victim of child maltreatment is \$210,012.¹⁹ Child sexual abuse is only one kind of maltreatment and it is not clear whether it is more or less costly than other types of child maltreatment. This cost vastly underestimates the cost because while it includes such out-of-pocket costs as childhood health care, adult medical care, child welfare, criminal justice costs, and special education, it does not include pain and suffering. Sex offenders (of which child molesters

are only one type) are less likely than other criminals to be rearrested for any offense after discharge from prison (43 percent versus 68 percent), but they are more likely to be rearrested for a sex crime after discharge (5.3 percent versus 1.3 percent). This is relevant to adult-child sex because 70 percent of men in prison for a sex crime are there for sex with a child. This includes 4,300 child molesters.²⁰

Consider next the costs of criminalizing adult-child sex. The average sex offender with a child as victim serves three-and-a-half years in prison.²¹ The out-of-pocket cost per year for the state is \$34,135.²² There is also the opportunity cost to the prisoner of not working for the year and pain and suffering of incarceration. The average per capita income for U.S. residents in 2012 was roughly \$48,000.²³ There are also opportunity costs to the individual of lost benefits other than income loss, costs to an employer of lost profits, costs to the state of lost taxes, and pain and suffering for the incarcerated. Assuming that these additional costs equal \$18,000 (I made this number up), the total cost per year of incarceration is, roughly, \$100,000. When multiplied by three and a half years average sentence, the total equals \$350,000.

This assumes that economic costs are, roughly, a correct measure of moral costs in the case of the one who is punished—assuming he is guilty. A critic of this notion might argue that he deserves the treatment he receives and therefore this is a good rather than evil. Even on a moral retributivist account, however, the costs to the people involved might be relevant to whether, when, and how much the state should punish.

If each punishment of an adult for child molestation prevents (via incapacitation or deterrence) two incidents of such sex (I made this number up), then the benefits of the punishment are more than \$400,000, exceeding the cost of the three-and-a-half-year sentence. If it prevents fewer, then the numbers become closer. Note there is considerable concern in the literature about the degree to which punishment deters crime and, as far as I can tell, there is no deterrence data specific to child molestation.

Further note that this crude back-of-the-envelope calculation leaves out the enormous costs of investigating and convicting individuals, the benefit of reduced fear among parents, incapacitation and deterrent effects not tied to child molestation, and other significant costs and benefits. For example, there might be widespread benefits for having childhood become less sexualized. It might even be a public good. There might be benefits from avoiding vigilante justice. Also, these data are not closely tied to adult-child sex, let alone such sex with willing children. Worse, the estimates depend on the efficiency of punishment in preventing such sex and here studies are needed.

There is a debate over the degree to which punishment functions as a deterrent at all.²⁴ For example, both first-time and repeat offenders have little knowledge of the law or likely punishment severity.²⁵ Various

psychological states such as anger and the desire for revenge and deliberation-reducing factors such as intoxication, impulsiveness, and peer pressure often prevent rational planning.²⁶ In addition, for some criminals, crime is rational because of the low likelihood of being punished for doing a crime. For example, in one study, only 2 percent of indictable offenses resulted in the offender being convicted.²⁷

Whether criminalizing adult-child sex involving willing children passes a cost-benefit analysis gets murkier because the willingness condition might result in more child rape not being reported or not successfully prosecuted. Adults might claim the child consented or children might be shamed into not reporting on the basis of their being convinced that they consented when they didn't. By analogy, sex crimes against adults are a significantly underreported crime and it is unclear whether the role of consent in authorizing such sex contributes to this problem. Legalizing such willing sex might also lead to more child pornography. There is an issue as to whether pornography in general leads to more or less rape. It is plausible that the same is true for child pornography.

I have a strong intuition that the risk of legalizing willing adult-child sex is far too great given the tremendous harm that is posed by child rape and incest. However, I do not have data or studies to support this claim. A cost-benefit analysis includes not only the probability of a permitted act-type producing bad results happening, but also the magnitude of the harm were it to occur. If the harm is severe enough, so that the aggregate is a significantly bad result, then there is reason to disallow it even if we are unsure about the probability of the act bringing about that result.

Condition #3: Intermediate Scrutiny

As argued above, because of the nature of punishment, (1) the state has a substantive (legitimate-and-important) state interest, (2) punishment directly advances that interest, and (3) what is punished and the severity of punishment are the least restrictive alternative. Consider (1). It is clear the state has an interest in preventing child rape. It also likely has an interest in preventing incest because it involves harm to others.

Next, consider (2) and (3). It is unclear whether punishing willing adult-child sex advances this interest. It would appear to do so based on the above intuitions favoring such punishment, but that reasoning rests on speculation and not empirical study. This is problematic because for many issues anecdotes and empirical speculation are not sufficient for knowledge. By analogy, consider whether animated child pornography whets the appetite of pedophiles (thereby increasing child rape) or acts as a substitute for it (thereby decreasing it). It is hard to see the answer can be gotten without empirical study. A similar thing is true for whether permitting adult-child sex with willing participants would increase or decrease child rape, molestation, and incest.

Given the large number of adults interested in sex with children and the likely shortage of children who are similarly interested, this would not appear to be a good outlet for decreasing adult-child sex. If the willingness defense were to become a shield by which child-rapists and molesters were to reduce the likelihood of arrest or conviction and discourage such crimes from being reported, then the law permitting willing adult-child sex would produce a lot of harm. This strikes me as plausible. This is made more likely if consent were to enable more rapes and reduce the frequency with which they are reported. In one recent study, roughly a third of rapes and sexual assaults of women were reported.²⁸ Given that 15 percent to 20 percent of women are raped during their lifetime, this is a large number of unreported attacks.²⁹ Specifically, roughly twelve million rapes go unreported. In adult sex, such a cost is tolerated because of the significant benefits that accompany adult couples having sex. Without a reason to believe that similar benefits accompany adult-child sex, the case for allowing a lack-of-willingness (or -consent) defense weakens. The same is true for a law under which consent negates a material condition for statutory rape.

The estimates for adult-child sex vary greatly, but an average of various studies found it occurs with surprising frequency. One estimate made by combining studies found the frequency at an estimate of 17 percent for boys and 28 percent for girls.³⁰ A different study that combined studies found the rates to be 7.2 percent for boys and 14.5 percent for girls.³¹

It is unclear whether intuitions about the effects of prohibiting a type of sex are enough to justify punishing people who engage in it. This is particularly true when the rule allowing punishment is less restrictive than it might otherwise be. The degree to which a rule allowing punishment is restrictive depends on the number of act-types that make one liable for punishment and the severity with which people are punished for doing them.

By analogy, consider adult-teen sex and the following case.

Case #1: Young Mother (Jodi Wilgoren, New York Times)

FALLS CITY, Neb., Aug. 29, 2005—On Sunday evening, Matthew Koso tipped three ounces of formula into his five-day-old daughter's mouth, then hoisted her atop his shoulder in hope of a burp. On Tuesday morning, he is scheduled to be arraigned on charges for which the newborn is the state's prime piece of evidence.

Mr. Koso is twenty-two. The baby's mother, Crystal, is fourteen. He is charged with statutory rape, even though they were wed with their parents' blessing in May, crossing into Kansas because their own state prohibits marriages of people under seventeen.

The Nebraska attorney general accuses Mr. Koso of being a pedophile; they say it is true love. "We don't want grown men having sex with young girls," said Jon Bruning, the attorney general. "We make a lot of

choices for our children: we don't allow them to vote; we don't allow them to drink; we don't allow them to drive cars; we don't allow them to serve in wars at age thirteen, whether they want to or not; and we don't allow them to have sex with grown men."³²

Also, consider the general pattern from the same article.

In Nebraska, as in many other states, intercourse between someone who is nineteen and someone younger than sixteen is classified as statutory rape. It is illegal here even if the couple is married at the time. [E]xperts said it was extremely rare for a man to be prosecuted for statutory rape when he has married his minor partner. A judge in Syracuse last September delayed a one-and-a-half-to-three-year prison sentence until this summer so that a thirty-eight-year-old defendant could marry a pregnant sixteen-year-old; in Florida in 2001, charges were reduced to a misdemeanor when a seventeen-year-old married the thirteen-year-old girl expecting their second child, and he received six months' probation.

Consider whether the state should punish Matthew Koso. Such punishment might be bad in particular cases such as this one. Specifically, it is plausible to think that punishing Matthew Koso is bad for him, his wife, and baby. This has a trivial feel to it because it is (almost) always the case that punishment is bad for the one who is punished and his family. On the other hand, there might be wider benefits of such punishment as a way to reduce the frequency of adult-teen dating, sex, and marriage. The reduction might occur via expressions of wrongness, deterrence, incapacitation, treatment, and so on.

There also might be wider costs. Some experts claim that vigorous enforcement of statutory rape law might discourage pregnant and sexually active adolescents from getting counseling services and medical care.³³ In deciding whether to have a more restrictive marriage policy, the proponents of such a policy should bear the burden of showing that it will directly advance a substantive state interest. It is unclear whether armchair speculation by itself about the effects of different criminalization schemes is enough to show that the burden of intermediate scrutiny has been met.

There is good reason in general to doubt whether armchair evaluations of empirical effects are reliable enough to warrant criminalization. The history of the prosecution of people for homosexuality, interracial sex and marriage, polygamy, marijuana, alcohol, pornography, and so on leads to doubt as to whether people's intuitive sense of empirical harm is accurate enough to warrant significant punishment. In several areas, such as guns, abortion, drug legalization, and pornography, there are strong controversies as to whether various changes in the criminal law have made us more or less safe and whether less restrictive alternative laws might have had similar effects with much less punishment.³⁴ This under-

mines our confidence in our ability to assess laws that prohibit adult-child sex, although whether they undermine it to a degree that results in intermediate scrutiny blocking the case for punishing willing adult-child sex is hard to assess.

CONCLUSION

I argued that the state should punish sex only if it infringes on a moral right; punishing the sex-act-type would maximize the good (or, perhaps, the good for some group); and the procedure by which people are punished respects rights, is reliable, and does not impose an unreasonable risk. I argued that a practical test for the second and third conditions is whether the punishment satisfies a cost-benefit analysis and intermediate scrutiny. Intermediate scrutiny allows the state to punish an act-type only if (1) the state has a substantive (legitimate-and-important) state interest, (2) punishment directly advances that interest, and (3) what is punished and the severity of punishment are the least restrictive alternative. I then argued that given the value in preventing child rape and incest, both of which are extremely harmful, it seems plausible that the criminalization of willing adult-child sex passes the practical tests. I expressed some concern, however, as to whether armchair evaluations of empirical effects are enough to warrant criminal punishment, let alone significant criminal punishment. This is particularly true given the historical role of such armchair evaluations in other policy areas.

NOTES

1. For the notion that the tort system can have many of the same effects as the criminal justice system (for example, deterrence), see Randy Barnett, "Restitution: A New Paradigm of Criminal Justice," *Ethics* 87 (1977): 279–301. For the notion that tort law can be used to reduce harm to an efficient level, which then can be used to define and deter wrongdoing, see Robert Cooter and Thomas Ulen, *Law & Economics*, 4th ed. (New York: Pearson/Addison-Wesley, 2004), ch. 8–9.

2. For a classic statement of consent theory, see Thomas Hobbes, *Leviathan*, C. B. Macpherson, ed. (New York: Penguin Books, 1968); John Locke, *Two Treatises of Government*, Peter Laslett, ed. (New York: Cambridge University Press, 1988).

3. See H. L. A. Hart, "Are There Any Natural Rights?" *Philosophical Review* 64 (1955): 185–191; H. L. A. Hart, "Legal and Moral Obligation," in A. I. Melden, ed., *Essays in Moral Philosophy* (Seattle: University of Washington Press, 1958), 83–107; John Rawls, "Legal Obligation and the Duty of Fair Play," in S. Hook, ed., *Law and Philosophy* (New York: New York University Press, 1964), 3–18.

4. The three bases for roles are the internal goals that appear to accompany certain activities (for example, medical care should be given out on the basis of ill health), social meaning (the type of good that the activity produces in the life of a particular collection of people), and the convention or common understanding of the tasks that constitute a job. The idea that goods have internal goals can be seen in Bernard Williams, "The Idea of Equality," in Joel Feinberg, ed., *Moral Concepts* (New York:

Oxford University Press, 1970), 163–164. The social-meaning account can be seen in Michael Walzer, *Spheres of Justice* (New York: Basic Books, 1983), 88n.

5. The idea here is that necessity is what justifies political authority. See George Klosko, *The Principle of Fairness and Political Obligation* (Lanham, MD: Rowman & Littlefield, 1992); Elizabeth Anscombe, “On the Source of Authority of the State,” *Ratio* 20 (1978): 160; John Locke, *A Letter Concerning Toleration*, J. Tully, ed. (Indianapolis: Hackett, 1982), 26.

6. The idea for this approach comes from Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 38–69; Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1990), 214. Raz argues that one way to establish that one person has authority over a second occurs when the second is likely better able to comply with the reasons that apply to him if he accepts the directives of the alleged authority as binding and tries to follow them.

7. For an argument that democracy is in line with value and duties fundamentally located in individuals, see Andrew Altman and Christopher Heath Wellman, “The Deontological Defense of Democracy: An Argument from Group Rights,” *Pacific Philosophical Quarterly* 89 (2008): 279–293.

8. The idea for this approach comes from John Rawls. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996). Rawls argued that the basic principles that govern society be ones to which reasonable people can agree.

9. See A. D. M. Walker, “Political Obligation and the Argument from Gratitude,” *Philosophy and Public Affairs* 17 (1988): 191–211; A. D. M. Walker, “Gratefulness and Gratitude,” *Proceedings of the Aristotelian Society* 81 (1980–81): 39–55. For an argument to the contrary, see George Klosko, “Political Obligation and Gratitude,” *Philosophy and Public Affairs* 18 (1989): 352–358; George Klosko, “Four Arguments against Political Obligations from Gratitude,” *Public Affairs Quarterly* 5 (1991): 33–48.

10. Douglas Husak argues that some constraints can be derived from the criminal law itself. These include the activity to be punished must produce non-trivial harm and wrong, the agent must deserve punishment, and the state must carry the burden of proof. Among other conditions he argues for are that the offenses in question pose substantial risk. He then argues that infringements on the right not to be punished require that the state satisfy something like intermediate scrutiny before criminalizing an activity. See Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (New York: Oxford University Press, 2008), 55–177. For the notion that state punishment should convey to the offender and community the wrongness of the offense, see Joel Feinberg, “The Expressive Function of Punishment,” in Joel Feinberg, *Doing and Deserving* (Princeton: Princeton University Press, 1970), 95.

11. For discussion of these criticisms, see R. A. Duff, “Punishment, Communication, and Community,” in Matt Matravers, ed., *Punishment and Political Theory* (Oxford: Hart Publishing Co., 1999), 48; Andrew von Hirsch, “Punishment, Penance, and the State,” in Matt Matravers, ed., *Punishment and Political Theory* (Oxford: Hart Publishing Co., 1999), 69; Toni Massaro, “Shame, Culture, and American Criminal Law,” *Michigan Law Review* 89 (1991): 1880.

12. The right requirement can be seen in Joel Feinberg, *Harmless Wrongdoing: The Moral Limits of the Criminal Law* (New York: Oxford University Press, 1988), 144.

13. For the notion that offense is a type of harm, see A. P. Simester and Andrew von Hirsch, “Rethinking the Offense Principle,” *Legal Theory* 8 (2002): 269.

14. For an application of intermediate scrutiny as a requirement for criminalization, see Husak, *Overcriminalization*, 127–132.

15. In the context of the Constitution, the notion of legitimate, substantial, and compelling state interests has not been well developed. See Stephen Gootlieb, “Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication,” *Boston University Law Review* 68 (1988): 917; Bhagwat Ashutosh, “Purpose Scrutiny in Constitutional Analysis,” *California Law Review* 85 (1997): 297.

16. The idea for the definition comes from Henry Campbell Black, *Black’s Law Dictionary*, 5th ed. (St. Paul, MN: West Publishing Co., 1979).

17. For an argument for this position, see Jan Steutel, "Adult-Child Sex and Parental Authority," unpublished manuscript.

18. The idea for this comes from Stephen Kershner, "Giving Capitalists Their Due," *Economics and Philosophy* 21 (2005): 65–87.

19. See Centers for Disease Control and Prevention, "Child Abuse and Neglect Cost the United States \$214 Billion: Rivals Cost of Other High Profile Public Health Problems," February 1, 2012, http://www.cdc.gov/media/releases/2012/p0201_child_abuse.html. It summarizes, "The Economic Burden of Child Maltreatment in the United States and Implications for Prevention," <http://www.sciencedirect.com/science/journal/aip/01452134>.

20. This data comes from staff, "Sex Offenders Four Times More Likely to Be Arrested for Another Sex Crime: Crime Statistics," Crime in America.Net, March 11, 2010, <http://crimeinamerica.net/2010/03/11/sex-offenders-four-times-more-likely-to-be-arrested>, citing Patrick Langan et al., "Recidivism of Sex Offenders Released from Prison in 1994" (NCJ-198281) Bureau of Justice, <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1136>.

21. See *ibid.*

22. See Vera Institute of Justice, "The Price of Prisons: What Incarceration Costs Taxpayers" (2012), <http://www.vera.org/download?file=3495/the-price-of-prisons-updated.pdf>.

23. See World Bank, "World Development Indicators," World DataBank (2011), <http://www.databank.org/data/views/reports/tableview.aspx?isshared=true&ispopular=country&pid=2>, accessed April 24, 2013.

24. The idea for this point and some of the evidence for it comes from Douglas Husak, *Overcriminalization*, 145–146. For a general skeptical discussion of the role of deterrence, see Paul Robinson and John Darley, "Does Criminal Law Deter? A Behavioural Science Investigation," *Oxford Journal of Legal Studies* 24 (2004): 173–205.

25. See David Anderson, "The Deterrence Hypothesis and Picking Pockets at the Pickpocket's Hanging," *American Law & Economic Review* 4 (2002): 295–313.

26. See David Farrington, "Developmental Criminology and Risk-Focused Prevention," in Mark Maguire et al., eds., *Oxford Handbook of Criminology*, 3rd ed. (New York: Oxford University Press, 2002), 657.

27. See Andrew Ashworth and Michael Redmayne, *The Criminal Process*, 3rd ed. (Oxford: Oxford University Press, 2005), 138.

28. From 1994 to 2010, the rate of rapes and sexual assaults of women that were reported ranged from 29 percent to 41 percent. See Michael Planty et al., "Female Victims of Sexual Violence, 1994–2010," U.S. Department of Justice, March 2013, p. 7, <http://www.bjs.gov/content/pub/pdf/fvsv9410.pdf>.

29. One study found that 18 percent of women in the United States have been raped during their lifetime. See Dean Kilpatrick et al., "Drug-Facilitated, Incapacitated, and Forcible Rape: A National Study," National Crime Victims Research & Treatment Center, February 1, 2007, <https://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf>. A similar percentage was found in Patricia Tjaden and Nancy Thoennes, "Extent, Nature, and Consequences of Rape Victimization: Findings from the National Violence against Women Survey," U.S. Department of Justice Office of Justice Programs, January 2006, <https://www.ncjrs.gov/pdffiles1/nij/210346.pdf>, 7.

30. See Bruce Rind et al., "A Meta-Analytic Examination of Assumed Properties of Child Sexual Abuse Using College Samples," *Psychological Bulletin* 124 (1998): 22–53.

31. See K. M. Gorey and D. R. Leslie, "The Prevalence of Child Sexual Abuse: Integrative Review Adjustment for Potential Response and Measurement Biases," *Child Abuse & Neglect* 21 (1997): 391–398.

32. Jodi Wilgoren, "Rape Charge Follows Marriage to a 14-Year-Old," *New York Times*, August 30, 2005, http://www.nytimes.com/2005/08/30/national/30baby.html?pagewanted=all&_r=0.

33. See Patricia Donovan, "Can Statutory Rape Laws Be Effective in Preventing Adolescent Pregnancy?" *Family Planning Perspectives* 29 (January/February 1997), 33.

34. Various studies have found that concealed handguns and legalized abortion reduce crime. For the former, see John Lott Jr., *More Guns, Less Crime: Understanding Crime and Gun Control Laws* (Chicago: University of Chicago, 1998). For the latter, see John Donahue III and Steven Levitt, "The Impact of Legalized Abortion and Crime," *Quarterly Journal of Economics* 116 (2001): 379–420; Steven Levitt, "Further Evidence That Legalized Abortion Lowered Crime: A Response to Joyce," *Journal of Human Resources* 39 (2004): 29–49. It has also been argued that pornography reduces rape and that violent movies reduce violence. For the former, see Todd Kendall, "Pornography, Rape, and the Internet," September 2006, <http://obu-investigators.com/xuk/porn/clemson/kendall.pdf>. For the latter, see Gordon Dahl and Stefano Della Vigna, "Does Movie Violence Increase Violent Crime?" *The Quarterly Journal of Economics* 124 (2009): 677–734. These studies are extremely controversial and some have come under strong criticism.

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