

Spring 1-1-2017

# Consent: Coercion and Undue Inducement

Eric Lee

University of Colorado at Boulder, [eric.lee@colorado.edu](mailto:eric.lee@colorado.edu)

Follow this and additional works at: [https://scholar.colorado.edu/phil\\_gradetds](https://scholar.colorado.edu/phil_gradetds)



Part of the [Applied Ethics Commons](#), and the [Bioethics and Medical Ethics Commons](#)

---

## Recommended Citation

Lee, Eric, "Consent: Coercion and Undue Inducement" (2017). *Philosophy Graduate Theses & Dissertations*. 57.  
[https://scholar.colorado.edu/phil\\_gradetds/57](https://scholar.colorado.edu/phil_gradetds/57)

This Dissertation is brought to you for free and open access by Philosophy at CU Scholar. It has been accepted for inclusion in Philosophy Graduate Theses & Dissertations by an authorized administrator of CU Scholar. For more information, please contact [cuscholaradmin@colorado.edu](mailto:cuscholaradmin@colorado.edu).

CONSENT: COERCION AND UNDUE INDUCEMENT

by

ERIC LEE

B.A., Philosophy, University of Colorado, 2004

B.S., Electrical and Computer Engineering, University of Colorado, 2004

A thesis submitted to the  
Faculty of the Graduate School of the  
University of Colorado in partial fulfillment  
of the requirement for the degree of  
Doctor of Philosophy  
Department of Philosophy

2017

This thesis entitled:  
Consent: Coercion and Undue Inducement  
written by Eric Lee  
has been approved for the Department of Philosophy

---

David Boonin

---

Claudia Mills

Date\_\_\_\_\_

The final copy of this thesis has been examined by the signatories, and we find that both the content and the form meet acceptable presentation standards of scholarly work in the above mentioned discipline.

Lee, Eric (Ph.D., Philosophy)

Consent: Coercion and Undue Inducement

Thesis directed by Professors David Boonin and Eric Chwang

In all areas of our life, consent plays a central role in determining the moral status of our actions. In the areas of healthcare and medical research, obtaining valid consent from the patient is of utmost importance. Traditionally, it is believed that the consent of the patient is valid if and only if the following three conditions are met: disclosure, capacity, and voluntariness. This dissertation focuses on the last requirement, voluntariness. Under what conditions is consent given voluntarily? At the very least, voluntariness requires freedom from certain kinds of manipulation or interference. I will explore two methods of manipulation that are purported to undermine voluntariness: coercion and undue inducement. Regarding coercion, I will argue that it never invalidates consent, and that this shows that voluntariness is not necessary for valid consent. Regarding undue inducement, I will argue that it does not, or is very unlikely to, invalidate consent, and that we should reject the standard solution proposed to prevent it.

## CONTENTS

### Chapter

1. Introduction .....	1
2. 3rd-Party Coercion and Consent .....	6
2.1. 2nd-Party vs. 3rd-Party Coercion, Valid vs. Invalid Consent, and Other Terminology .....	6
2.2. Views on 3rd-Party Coercion and Consent .....	10
2.3. Cases in which it is Permissible for Recipient to Act on Victim’s Consent Token .....	13
2.4. Cases in which it is Impermissible for Recipient to Act on Victim’s Consent Token .....	21
2.5. Summary.....	29
3. Voluntariness and Consent.....	31
3.1. The Voluntariness Condition.....	31
3.2. No-Choice Definitions of Voluntariness .....	33
3.3. Agent-Interference Definitions of Voluntariness .....	34
3.4. Replacing the Voluntariness Condition.....	53
3.5. Summary.....	58
4. Undue Inducement and Consent.....	59
4.1. Analyzing Undue Inducements .....	59
4.2. Undue Inducements as Coercive Offers.....	62
4.3. Undue Inducements as Seductive Offers .....	70
4.4. Summary.....	89
5. Undue Inducement in Medical Research.....	90

5.1. Undue Inducement - The Problem and the Standard Solution .....	91
5.2. Undermining the Standard Solution .....	97
5.2.1. Absolute Number of Unduly Induced Participants .....	99
5.2.2. Relative Number of Unduly Induced Participants .....	103
5.2.3. Summary of 5.2 .....	107
5.3. Rejecting the Standard Solution .....	108
5.3.1. Undue Therapeutic Inducements .....	108
5.3.2. Applying the Standard Solution to Undue Therapeutic Inducements .....	112
5.3.3. Rejecting the Standard Solution for Undue Monetary Inducements .....	116
5.3.4. Summary of 5.3 .....	121
Bibliography .....	122

TABLES

Table

1. Number of Unduly Induced Participants .....97

## **Chapter 1**

### **Introduction**

Valid consent has the moral power to transform the impermissible into the permissible. In normal circumstances, if I come up to you and start cutting open your body, I am committing an impermissible assault. On the other hand, if you have a ruptured appendix, I'm a doctor, and you ask me to treat you, then my impermissible assault may be morally transformed into a permissible life-saving surgery. Whether this transformation is successful depends largely on whether your consent is valid. And the prevailing view is that valid consent must be given voluntarily.

Under what conditions is consent given voluntarily? At the very least, voluntariness requires freedom from certain kinds of manipulation or interference. If a mugger threatens to kill you unless you hand over your money, acquiescing does not constitute voluntary consent. The mugger coerces you, and coercion undermines voluntariness. Thus, your consent is robbed of moral power- your agreement to hand over your money does not make it permissible for the mugger to take it. Or, suppose that I offer a large sum of money in exchange for participating as my medical research subject. Some may consent to participate because they are in desperate need of money and have no choice but to accept my offer. Others may be so dazzled by my offer that they consent to participate against their better judgment. A popular view is that that these people have not consented voluntarily. They have been unduly induced by my offer, and undue inducement is a type of manipulation that undermines voluntariness. If this is



correct, then these participants have not given their valid consent, and it is impermissible for me to experiment on them.

This dissertation explores the relationship between valid consent and these two kinds of manipulation: coercion and undue inducement. In Chapter 2, I begin by looking at a unique type of coercion known as “3rd-party coercion”. Cases of 3rd-party coercion involve 3 distinct parties: the coercer, the person being coerced, and the recipient of consent. For example, suppose that Louise threatens to kill Tina unless Tina consents to Dr. Yap pulling out some of her teeth. In this case, Louise is the coercer, Tina is the person being coerced, and Dr. Yap is the recipient of consent. Whether Tina’s consent can be valid is controversial. Joseph Millum’s view is that 3rd-party coercion always invalidates consent, and so, Tina’s consent cannot be valid. I will argue that Millum’s view is mistaken, and that 3rd-party coercion never invalidates consent. Consent may be invalid for other reasons, but never due to 3rd-party coercion. But if this true, then there is a potential problem.

If Tina’s consent can be valid even though it is coerced, then it is not clear why the same could not be said in the case of the mugger. The mugger coerces your consent by threatening you, just as Louise coerces Tina’s consent by threatening her. So, if we accept that 3rd-party coercion does not invalidate consent, then it may commit us to the view that coercion of any kind does not invalidate consent.

This latter view may seem absurd, but it is exactly what I intend to defend in Chapter 3. Not only will I argue that coercion itself never invalidates consent, but I will argue that voluntariness is not a necessary condition for valid consent. To be clear, I will not be arguing that involuntary consent is always valid. Even though voluntariness may not be necessary for valid consent, there may be some other condition that is necessary. I will propose such a condition, though its truth is not necessary for showing that voluntariness is not necessary for valid consent. And regardless of whether you agree with my

proposed condition, the argument made in this chapter will require us to reshape our current understanding of valid consent.

In Chapter 4, I will move on from coercion to the second kind of manipulation: undue inducement. Undue inducement is a term that appears primarily in the medical ethics literature. The main concern is that offering large sums of money to participate in medical research is morally problematic because doing so may compromise the validity of consent. But exactly what constitutes undue inducement is controversial. Some argue that undue inducements are offers that coerce, while others argue that they are offers that seduce. I will consider various versions of both kinds of accounts and argue that none of them, except one, can show that undue inducement invalidates consent. For the one account that can, I will argue that under its definition, most offers are unlikely to actually be undue inducements.

Several of the arguments in Chapter 4 rely on a particular interpretation of the following assumption: part of what it means for an inducement to be “undue” is that it is excessive. Call this assumption the “Excessiveness Requirement”. Arguably, my interpretation of the Excessiveness Requirement is uncharitable and sidesteps the core worry about undue inducements without directly addressing it. So, in Chapter 5 I will consider a charitable interpretation of the Excessiveness Requirement. Moreover, Chapter 4 focuses on the relationship between undue inducement and consent in the context of a single consentor. However, discussion of undue inducement usually takes place in the context of multiple consentors. I will also address this concern in Chapter 5. Using the charitable interpretation of the Excessiveness Requirement in the context of multiple consentors then leads to the following worry. Increasing the attractiveness of offers to participate in medical research will increase the number of unduly induced participants. And the proposed solution for this worry is to prohibit offers that are too attractive. The remainder of Chapter 5 is split up into two parts to address both the worry and its proposed solution.

In the first part, I will argue that the above worry is not justified. There is no good reason to believe that increasing the attractiveness of an offer will have the net effect of unduly inducing more people. As you increase the attractiveness of an offer, you will also increase the number of duly induced participants. However, showing that the worry about undue inducement lacks justification may not be enough to warrant a rejection of its proposed solution. Even though we may be unsure of whether the problem really exists, perhaps we should keep offers small just to be on the safe side. In response to this, I will argue, in the second part of Chapter 5, that we should not prohibit offers that are too attractive.

In summary, this dissertation can be thought of as defending two main conclusions. The first main conclusion is that voluntariness is not necessary for valid consent. This is significant because the predominant view, which seems extremely plausible, is that coerced consent cannot be valid. But as we will see in Chapters 2 and 3, this traditional understanding of consent is mistaken. We need to change the way we think about consent. This is not only theoretically significant, but it is also relevant in practice. For example, doctors need to evaluate whether consent is valid in order to avoid seriously wronging their patients. Requiring doctors to make judgments about voluntariness when voluntariness isn't necessary for valid consent may lead to serious moral mistakes that can significantly harm the patient.

The second main conclusion of this dissertation is that we should stop trying to prohibit large inducements to participate in medical research. There is a lot of support for the status quo view that we should keep offers on the small side to avoid undue inducement. But analysis of the concept of undue inducement doesn't support this view (Chapter 4), and even under the most charitable interpretation of "undue inducement", we should still allow larger inducements (Chapter 5). Review boards and other regulatory agencies are currently instructed to reject research proposals that recruit participants with

offers that are “too good”. This is a serious mistake. Not only does this prevent potentially beneficial research, but it harms those individuals who would greatly benefit from such offers.

## Chapter 2

### 3rd-Party Coercion and Consent

It seems obvious that coercion invalidates consent in cases involving only two parties. However, in cases involving three parties, it is controversial whether coercion invalidates consent. I argue that 3rd-party coercion does not invalidate consent.

#### 2.1: 2nd-Party vs. 3rd-Party Coercion, Valid vs. Invalid Consent, and Other Terminology

Paradigmatic cases of coercion involve two parties. Typically, one party issues a threat to another party in order to coerce the latter to take some action. For example, Mugger threatens to kill Victim unless Victim hands over her money. If Victim complies and hands over her money, then Mugger has coerced Victim into handing over her money. I will refer to these kinds of cases as “two-party” cases or cases of “2nd-party coercion”.

When Victim gives her money to Mugger, she is agreeing to hand over her money in exchange for her life. Following the language of other philosophers, we can describe Victim’s act of handing over her money as a signification, or token, of her consent (Millum 2014, Wertheimer and Miller 2010). However, even though Victim tokens consent, this does not make it permissible for Mugger to take her money. Victim’s consent can make Mugger’s act permissible only if her consent is valid. This is the power of valid consent. Valid consent can morally transform an impermissible act into a permissible one. If you take my car without my valid consent, you are stealing my car and doing something morally

impermissible. However, if I give valid consent to you using my car, then I have morally transformed your action of taking my car from something impermissible, stealing, into something permissible, borrowing. Invalid consent, on the other hand, is morally impotent. In the case of Mugger, even though Victim tokens consent, her consent is invalid due to Mugger's coercion. So, it is still impermissible for Mugger to take Victim's money.

There are limits to the power of valid consent. Valid consent may fail to make an act permissible because there may be other moral reasons to avoid performing that act. For example, suppose that you give your valid consent to Nurse M to draw some of your blood. However, also suppose that Nurse M has previously made a promise to some other party that she would not draw your blood. Or, perhaps Nurse M knows that drawing your blood will lead to a chain of events that will result in many people being seriously harmed. Whatever the situation, it is clear that there can be some moral reason to refrain from acting on your consent even though your consent is valid. Therefore, valid consent is not sufficient for permissibility. Moreover, valid consent is not always necessary to make an act permissible. For example, if you are drunk or unconscious, it may be permissible for a doctor to perform emergency surgery on you without your valid consent. Still, there is a large range of cases in which the permissibility of an action will turn on whether consent is valid.

Another way to think about the moral power, and limits, of valid consent is in terms of waiving one's right (e.g. Dougherty 2013). By giving valid consent you are waiving one of your rights. When you give your valid consent to Nurse M to draw some of your blood, you waive your right against the nurse sticking you with a needle. However, waiving your right may not be enough to make an act permissible because the permissibility of that act may depend on more than just you waiving your right. In this case, the permissibility of drawing your blood also depends on whether it is wrong for Nurse M to break her promise. If it is wrong for Nurse M to break her promise, then it is wrong for her to draw your blood even though you have waived your right against her doing so. And, waiving your right may not be necessary to

make an act permissible. A doctor may permissibly perform emergency surgery on an unconscious person even though that person is unable to waive her right against the doctor interfering with her body.

Some find the use of “valid consent” to be redundant and “invalid consent” to be contradictory because “consent” alone implies moral transformation (Kleinig 2010). I agree that “consent” often seems to imply moral transformation. However, it is convenient to use terms such as “invalid consent”, “coerced consent”, “undermined consent”, etc. To see why it is helpful, compare the following situations.

*Invalid Consent Token:* Mugger threatens to kill Victim unless Victim agrees to hand over her money. Victim agrees to hand over her money.

*No Consent Token:* Mugger threatens to kill Victim unless Victim agrees to hand over her money. Victim refuses to hand over her money.

In both cases, it is impermissible for Mugger to take Victim’s money. However, there is an important difference between the two cases. In *Invalid Consent Token*, Victim acquiesces to Mugger’s threat, but in *No Consent Token*, Victim resists Mugger’s threat. Designating consent as “invalid” allows us to easily distinguish between these two kinds of cases. On Kleinig’s usage, we would have to say that Victim does not consent in either case, and then use some other term to describe what is happening in *Invalid Consent Token* (Kleinig uses “assent”). There is nothing objectionable about Kleinig’s usage. The preference here is merely personal and the arguments that follow do not depend on which vocabulary we use.

In cases of 2nd-party coercion, the party issuing the threat is also the recipient of the victim’s consent token. Mugger both issues the threat and receives Victim’s consent token when Victim hands over her money. However, in cases of 3rd-party coercion, the consent transaction between two parties (the victim and the recipient of victim’s consent token) is being manipulated by a 3rd party (the coercer). To see this, let us modify the previous two-party example into a three-party one. Suppose that Mugger threatens to kill Victim unless Victim buys a piece of art from Bystander. Mugger is a 3rd party that is

using coercion to manipulate the consent transaction between Victim and Bystander. If Victim complies and gives her money to Bystander in exchange for a painting, she expresses to Bystander an agreement to the transaction that takes place. So, in addition to whatever she expresses to Mugger, Victim tokens consent to Bystander to the transfer of money. And whether it is permissible for Bystander to take Victim's money will depend, at least in part, on whether Victim's consent to Bystander is valid. I will refer to these kinds of cases as "three-party" cases or cases of "3rd-party coercion".

There are some cases of coercion that may appear to be three-party cases, but are better understood to be two-party cases. If the mob threatens to beat you up unless you pay them protection money, it is irrelevant that one mobster issues the threat while another comes by next week to collect the money. The mob acts collectively, and in doing so, the mob is a 2nd-party coercer. In general, if the recipient of consent is acting in concert with the coercer, then the recipient of consent is part of the coercing party and we have a case of 2nd-party coercion. On the other hand, if the recipient of consent is an independently acting party and is not complicit in the coercion, then we have a case of 3rd-party coercion.

Cases of 3rd-party coercion that are relevant to our discussion all share the same structure regarding the roles of the three parties. Joseph Millum has a useful system of generic names for these roles, and I borrow it here (Millum 2014). First, we have Victim, the party who is coerced into tokening consent. Second, we have Recipient, the party receiving Victim's consent token. Third, we have Coercer, the party that is coercing Victim. In two-party cases the same names can be used but with "Coercer" and "Recipient" referring to the same party. Some cases will use specific names instead of the generic ones.

There are differing accounts of coercion, but our discussion does not rely on any particular one. Our three-party cases will rely on the same coercive features present in two-party cases that are uncontroversially coercive on all prominent accounts (Nozick 1969, Wertheimer 1987). The most important feature is that Coercer threatens to make Victim worse-off or to violate her rights unless she



yields to his demands. Moreover, most of the following cases are taken from the 3rd-party coercion literature where coercion is assumed to be present.

## **2.2: Views on 3rd-Party Coercion and Consent**

It is controversial whether 3rd-party coercion invalidates Victim's consent. Mallery et al. argue that there are some cases where Victim may be coerced by a family member (Coercer) into getting a medical procedure and that Victim's consent to the doctor (Recipient) for said medical procedure is valid (Mallery et al. 1986). Likewise, Miller and Wertheimer argue that the issue at hand is a matter of fairness, and that when Recipient acts fairly towards Victim, Victim's consent token is morally transformative (Miller and Wertheimer 2010). On the other hand, Millum argues that illegitimate 3rd-party coercion always undermines consent (Millum 2014).<sup>1</sup> Appelbaum also appears to argue that consent is invalidated by 3rd-party coercion (Appelbaum 2009). Millum has the most developed, and most recent, account on the relationship between 3rd-party coercion and consent. His view also opposes the one I defend in this chapter. So, I will explain his account in more detail.

### *Millum's Account*

Millum's account has two parts. The first part argues that 3rd-party coercion always invalidates consent. He defends this claim by analyzing the following case.

*Cash Transfer:* Coercer tells Victim that he will beat her up unless she gives Recipient \$500.

Victim gives Recipient the cash, which he puts in his mattress for safekeeping. Later, having escaped Coercer's clutches, Victim asks Recipient for the money back (Millum 2014, p.117).

---

<sup>1</sup> Millum considers some coercion to be legitimate. For example, threatening to break up with one's partner may be a legitimate threat to make, and thus it would be legitimate coercion (Millum 2014).

According to Millum, it is clear that Recipient ought to give the money back to Victim. It is not just that it would be a morally good thing for Recipient to do. Victim has a right to get the money back, and the best explanation for this is that Victim's consent token to Recipient was never valid. Victim's consent is invalid because Coercer is controlling Victim's decision for her, but "valid consent requires that the person who has the authority to make the decision make that decision herself" (Millum 2014, p.118). This line of reasoning does not depend on any specific facts about *Cash Transfer*, and so Millum concludes that 3rd-party coercion always invalidates consent. Nevertheless, even though Victim's consent token is always invalid in cases of 3rd-party coercion, Millum acknowledges that it may still be permissible for Recipient to proceed with the act that Victim tokens consent to in some cases. This leads us to the second part of Millum's account.

This second part of Millum's account argues that it is permissible for Recipient to act on Victim's invalid consent token "if and only if doing so represents a reasonable joint decision" for Recipient and Victim (Millum 2014, p.113). "Joint decision-making involves each party taking the viewpoint of the other as seriously as her own and deciding on this basis what to do. If they do that, then neither Victim nor Recipient takes advantage of the situation of the other" (Millum 2014, p.121). Millum uses the following case to explain joint decision-making.

*Bike Sale*: Coercer threatens to beat Victim unless she sells her bike (to someone who is not Coercer) for \$100 and then gives the \$100 to Coercer. Recipient is moving to a new city and could do with a bike to get to work; he can't afford to give away \$100 because then he will not be able to afford a bike (Millum, 2014, p.121).<sup>2</sup>

---

<sup>2</sup> I slightly modified the wording for clarity. Here is the original wording: "Coercer threatens to beat Victim unless she sells her bike for \$100. Recipient is moving to a new city and could do with a bike to get to work; he can't afford to give away \$100 because then he will not be able to afford a bike."

Millum analyzes the case as follows. He begins by considering how Recipient and Victim would rank certain options, keeping Coercer's threat fixed and ignoring any other-regarding preferences and values.

The three relevant options, according to Millum, are:

*Gift*: Victim doesn't give bike to Recipient & Recipient gifts \$100 to Victim.

*Sale*: Victim sells bike to Recipient for \$100.

*Beating*: Victim doesn't sell bike to Recipient & Coercer's threat is carried out.

Victim's rankings from most preferred to least:            *Gift > Sale > Beating*.

Recipient's rankings from most preferred to least:        *Sale > Beating > Gift*.

*Gift* is Recipient's least preferred option, and it is too unreasonable to be a live option for her. Likewise, *Beating* is Victim's least preferred option and the consequences are too bad to make it a reasonable option for her. If both were to take the other's viewpoint seriously, then it is clear that the most reasonable option for them to take jointly is *Sale*. This is why, according to Millum, it is permissible for Recipient to buy Victim's bike even though Victim's consent to the sale is invalid. From here on out, I will refer to this part of Millum's view as "RJD" (short for "reasonable joint decision").

#### *Strategies for Defending an Account of 3rd-Party Coercion and Consent*

Millum's account shows that there are two general categories of 3rd-party coercion cases. In the first category of cases, it seems wrong for Recipient to act on Victim's consent token (e.g. it seems wrong for Recipient to keep Victim's money in *Cash Transfer* even if Victim tokens consent to it). In the second category of cases, it seems permissible for Recipient to act on Victim's consent token (e.g. it seems permissible for Recipient to buy Victim's bike in *Bike Sale* if Victim tokens consent to it). A complete account of 3rd-party coercion and consent must explain why Recipient acts impermissibly in the first category of cases, but permissibly in the second.

Millum's strategy is to use the first category of cases (Recipient acts impermissibly) to argue that 3rd-party coercion always undermines consent. Because of this, he needs to come up with some explanation for why it is permissible for Recipient to act on Victim's consent token in the second category of cases despite Victim's consent token being invalid. Hence, his account of RJD.

I will use the opposite strategy. I will argue that the second category of cases (Recipient acts permissibly) shows that 3rd-party coercion does not invalidate consent. Of course, this means that I need to explain why Recipient acts impermissibly in the first category of cases given that 3rd-party coercion does not invalidate Victim's consent. I will do this by showing that in the first category of cases, either 1) Recipient acts impermissibly, but not because Victim's consent is invalid or 2) Victim's consent is invalid, but not due to 3rd-party coercion.

Throughout my argument, I will rely on Mallery's insight that cases of 3rd-party coercion are analogous in many ways to cases of natural duress. The only difference is that in cases of natural duress, there is no Coercer that threatens Victim. Rather, it is Victim's circumstances that "threaten" her. For example, suppose you have life-threatening appendicitis and getting an appendectomy (a surgical procedure that removes the appendix) is the only chance you have at survival. You go to the hospital and consent to the doctor to perform the appendectomy.<sup>3</sup> The appendicitis poses a "threat" to your life- if left untreated, it will kill you. Like a coercive threat, natural duress creates a situation in which Victim must choose amongst options, each of which makes her worse off than she was before the situation, and one of which requires Victim to token consent to Recipient.

### **2.3: Cases in which it is Permissible for Recipient to Act on Victim's Consent Token**

In the case of *Bike Sale*, it seems permissible for Recipient to act on Victim's consent token, i.e. for Recipient to buy Victim's bike. Millum argues that his account of RJD correctly explains why it is

---

<sup>3</sup> Example taken and modified from Mallery 1986.

permissible. I will show that RJD is false, and then argue that the correct explanation for why Recipient acts permissibly is that Victim's consent is valid, even though she is being coerced by a third party.

### *Problems with Millum's RJD Account*

Millum argues that it is permissible for Recipient to act on Victim's invalid consent token if and only if doing so represents a reasonable joint decision, the view that I refer to as "RJD". In *Bike Sale*, Recipient's buying Victim's bike is a reasonable joint decision, and thus, it is permissible for Recipient to buy the bike. For reference:

*Bike Sale*: Coercer threatens to beat Victim unless she sells her bike (to someone who is not Coercer) for \$100 and then gives the \$100 to Coercer. Recipient is moving to a new city and could do with a bike to get to work; he can't afford to give away \$100 because then he will not be able to afford a bike (Millum 2014, p.121).

According to RJD, in order for some action to represent a reasonable *joint* decision, in addition to being reasonable for Victim, it is necessary that the action be reasonable for Recipient. If acting on Victim's consent token is unreasonable for Recipient, then it is impermissible for Recipient to take that action. But this is false. Even if buying the bike is completely unreasonable for Recipient, he is permitted to do so. We may judge Recipient's action as imprudent or irrational, but clearly it is not immoral.

To prove this, let us modify Recipient's preferences to reflect the situation I have just described. Suppose that Victim's bike is too large for Recipient and Recipient would not be able to use the bike for commuting. Because of this, buying Victim's bike for \$100 is an unreasonable alternative. Like the *Gift* option that Millum says is unreasonable, Recipient would be out \$100 and still unable to commute to work. The ranking of Recipient's options remain unchanged, but *Sale* (Recipient buys Victim's bike for \$100) is now an unreasonable alternative for Recipient. According to RJD, because buying the bike is unreasonable for Recipient, it would no longer represent a reasonable joint decision. However, surely it

is still permissible for Recipient to act on Victim's consent token and buy her bike. Not only is it permissible, but Recipient's willingness to sacrifice her own interests to help Victim could be judged as morally praiseworthy. So, RJD is false and it cannot be the correct explanation for why it is permissible for Recipient to act on Victim's consent token.

Objection: This argument only shows that a reasonable joint decision is not necessary for Recipient to act permissibly on Victim's consent token. Perhaps a more charitable interpretation of Millum's view recasts the "if and only if" to an "if": it is permissible for Recipient to act on Victim's invalid consent token *if* doing so represents a reasonable joint decision. In other words, perhaps a reasonable joint decision is sufficient (though not necessary) for permissibility.

Reply: This charitable interpretation cannot save Millum's view. Notice that an act being representative of a reasonable joint decision *alone* is not sufficient for permissibility. This would entail that in cases of 3rd-party coercion, it is always permissible for Recipient to take some action independently of whether Victim actually tokens consent to that action. But this is not plausible. In *Bike Sale*, suppose that even though selling the bike would represent a reasonable joint decision, Victim does not want to do what is reasonable, and she refuses to sell the bike to Recipient so that she may spite Coercer. It is not permissible for Recipient to unilaterally take (steal) Victim's bike, even if Recipient forces Victim to take money in exchange, just because *Sale* represents a reasonable joint decision. No surprise then that Millum doesn't claim that an act being representative of a reasonable joint decision *alone* is sufficient for permissibility. Instead, Millum argues that RJD is sufficient to make some act permissible when Victim tokens consent to that act. In other words, it is necessary for Victim to token consent to an act before RJD can even come into play.

But, if Victim must token consent to the act in order for Recipient to act permissibly, then this implies that Victim's consent token still has the moral power to make an act permissible in cases of 3rd-party coercion. And all RJD does, under the charitable interpretation, is to show that an act being a

reasonable joint decision is sufficient to make Victim's consent token morally transformative. In other words, what Millum has done with his account of RJD is essentially to show that Victim's consent token can be valid in cases of 3rd-party coercion. But this contradicts the first part of his account in which he argues that 3rd-party coercion invalidates consent. And the first part of his account is supposed to motivate the need for RJD to begin with.

So, a major flaw with RJD is that it seems to embrace two opposing views: that 3rd-party coercion renders consent invalid and that this "invalid" consent token can still be morally transformative. I will now argue that because Victim's consent token can still be morally transformative, we should just accept that 3rd-party coercion does not invalidate consent. And we do not need to make any appeals to reasonable joint decisions in order to show this.

#### *The Correct Explanation of Bike Sale*

The correct explanation for why it is permissible for Recipient to buy Victim's bike is that Victim gives valid consent to the transaction. As noted earlier, valid consent can morally transform an impermissible act into a permissible one. To illustrate, consider a variation of *Bike Sale* that has no 3rd-party coercion. Leela has a bike and Fry has \$100. Fry, like Recipient in *Bike Sale*, could do with a bike to commute to work. He proposes to Leela that she sell her bike to him for \$100. Leela has no interest in selling her bike and responds "no". Given that Leela has not given her valid consent to the sale of her bike, it would be impermissible for Fry to respond by simply taking her bike and forcing her to accept the \$100.<sup>4</sup> On the other hand, suppose that Leela had found Fry's offer attractive and responded to his

---

<sup>4</sup> I am not implying that not giving one's valid consent requires one to reject the proposal explicitly. We could modify the example such that Leela simply doesn't hear Fry's proposal and continues on her way. Such a modification will not affect the impermissibility of Fry forcing Leela to transact.

Also, I am assuming that Fry does not have any extraneous moral reasons to force Leela to transact. For example, Fry himself is not being coerced, Fry does not need to buy Leela's bike in order to save someone's life, etc.

proposal with a “yes”. Assuming her consent is valid, it is now permissible for Fry to buy her bike. This is the moral power of valid consent. It can transform a morally impermissible act into a permissible one.

Now in *Bike Sale*, where there is 3rd-party coercion, why think that Victim’s consent is valid? The key to answering this question is to examine how Victim’s lack of consent would affect the permissibility of Recipient’s action. Suppose that Victim does not want to sell her bike in spite of Coercer’s threat, and she does not token consent to the sale of her bike. Without Victim’s consent, it would be wrong for Recipient to force Victim to sell her bike for \$100. On the other hand, suppose that Victim would rather sell her bike than receive a beating from Coercer. She agrees to sell her bike to Recipient and tokens consent to the transaction. It now seems permissible for Recipient to buy Victim’s bike. It is no coincidence that buying the bike becomes permissible once Victim tokens consent. Victim’s consent token morally transforms the permissibility of Recipient’s action. But, her consent token can have this power only if it is valid. Thus, in *Bike Sale*, valid consent best explains why Recipient acts permissibly when acting on Victim’s consent token. And, if Victim’s consent is valid in the presence of 3rd-party coercion, then 3rd-party coercion does not invalidate consent.

Objection: It is not valid consent but paternalistic concern for Victim’s welfare that explains the permissibility of Recipient’s action. If selling her bike is best for Victim’s welfare, then it is permissible for Recipient to buy Victim’s bike. If keeping her bike is best for Victim’s welfare, then it is impermissible for Recipient to buy Victim’s bike. Consent, or lack thereof, is merely evidence of what is in Victim’s interests, but it does not explain the permissibility of Recipient’s action.

Reply: Concern for Victim’s welfare (or simply “welfare” from here on out) may seem like a reasonable explanation for how Recipient may act in the case just discussed. However, it seems reasonable only because Victim consents to the action that also happens to be best for her welfare. If we consider a case in which Victim does not consent to the action that is best for her welfare, we will see



that welfare is a problematic explanation for what Recipient is permitted to do. Consider the following variation of *Bike Sale*.

*Bike Sale – Welfare*: Coercer threatens to beat Victim unless she sells her bike (to someone who is not Coercer) for \$100 and then gives the \$100 to Coercer. Recipient is moving to a new city and could do with a bike to get to work; he can't afford to give away \$100 because then he will not be able to afford a bike. Selling the bike is in Victim's interests but she refuses to sell her bike to Recipient. Nevertheless, Recipient forces Victim to sell her bike to him because it is in her best interests.

If you believe that Recipient should not force Victim to sell her bike against her will in *Bike Sale – Welfare*, then valid consent, and not welfare, correctly explains what Recipient is permitted to do. However, I suspect that not everyone shares this intuition. Some may believe that Recipient is permitted to force Victim to sell because it is best for Victim's welfare. But the problem with this view is that it robs consent of its moral power in too many cases.

To see this, consider a case that is similar to *Bike Sale – Welfare* but lacks any 3rd-party coercion. *Bike Sale – Medicine*: Lisa has a medical condition that requires \$100 to treat. The treatment is non-invasive and has zero-risk of causing harm. Without treatment, she will suffer a harm equivalent to Coercer's beating in *Bike Sale*. Bart is moving to a new city and could do with a bike to get to work; he can't afford to give away \$100 because then he will not be able to afford a bike. Lisa could sell her bike to Bart for \$100 and use the money to pay for treatment. Selling the bike would be in Lisa's interests, but she refuses to sell her bike to Bart. Nevertheless, Bart forces Lisa to sell her bike to him because it is in her best interests.

*Bike Sale – Medicine* is the same as *Bike Sale – Welfare* except that Coercer has been replaced by Lisa's medical condition. If concern for Victim's welfare permits Recipient to force Victim to sell her bike in *Bike Sale – Welfare*, then it also permits Bart to force Lisa to sell her bike. To claim otherwise seems

completely arbitrary. We would be saying that Lisa has the moral authority to prevent paternalistic intervention, but Recipient does not, just because a medical condition instead of a person is the source of the threat.

However, if it is permissible for Bart to force Lisa to transact against her will, then it is not clear when, if ever, consent is morally transformative. There is nothing particularly unique about Lisa's situation. Many of us will have to make decisions about how to deal with our own health problems or other risks to our well-being. If Lisa's consent is morally inert, then so is each of ours every time we make a decision that affects our welfare. Of course, one might believe that consent was never really the source of moral transformation in these cases, and that welfare has always done the moral work. But, if so, then it is largely meaningless to talk about whether consent is ever valid since welfare ultimately determines what is permissible, and it would certainly be pointless to claim that 3rd-party coercion invalidates consent. But for those who believe that valid consent has moral power, valid consent provides the best explanation for why it is permissible for Recipient to act on Victim's consent token in *Bike Sale*, and this entails that 3rd-party coercion does not invalidate consent.

I am not suggesting that paternalism is never justified. If the risks are severe enough, for example, then Recipient may be permitted to intervene against Victim's will. However, if consent is ever morally transformative, then there will be some cases in which Recipient should respect Victim's decision even if it is not in Victim's best interests, including some cases of 3rd-party coercion.

Also, I am not suggesting that valid consent always explains why it is permissible for Recipient to act on Victim's consent token. Victim's consent may be invalid for some other reason (e.g. Victim lacks the capacity to give valid consent but happens to token consent anyway, or Victim misunderstands the nature of Coercer's threat) and concern for Victim's welfare may correctly explain why it is permissible for Recipient to act on Victim's consent token. Or, if Recipient must act on Victim's consent token to save someone else's life, then this may be the correct explanation for why Recipient acts permissibly.

Nevertheless, there will be 3rd-party coercion cases, such as *Bike Sale*, in which it is permissible for Recipient to act on Victim's consent token because it is valid, and this is enough to show that 3rd-party coercion does not invalidate consent.

Objection: If 3rd-party coercion does not invalidate consent, then a clever Coercer could just get an accomplice to act as Recipient. Coercer knows that if he were to get Victim's money by threatening her life, her consent would be invalid and it would be wrong for him to take the money. But, if Coercer coerces Victim to give her money to Recipient, then her consent is valid and Coercer is able to get Victim's money by skirting the moral rules.

Reply: First, I am not arguing that consent is always valid in cases of 3rd-party coercion, and nothing I have argued for entails that claim. I argue that 3rd-party coercion itself never invalidates consent, but that does not guarantee that Victim's consent will be valid. There are better explanations for the invalidity of Victim's consent in three-party cases, and these will be discussed in the next section.

Second, if Coercer hires Recipient as an accomplice, then Victim's consent to Recipient is invalid. But, this does not contradict the claim that 3rd-party coercion does not invalidate consent. As discussed earlier, once Recipient becomes an accomplice, Recipient becomes a member of the coercing party, and this is no longer a case of 3rd-party coercion. Coercer and Recipient act together as the coercing party, and this becomes a case of 2nd-party coercion. So, Coercer cannot avoid breaking the moral rules simply by colluding with Recipient.

Third, coercing Victim to give her money to somebody else does not absolve Coercer of wrongdoing. In cases of 3rd-party coercion, Victim tokens consent to Recipient. When this consent token is valid, it transforms the moral relationship between Victim and Recipient, not between Victim and Coercer. Coercer still wrongs Victim by making her worse off and/or violating her rights.

But what about a variant of the objection in which Recipient and Coercer are not in cahoots, but Coercer is confident that Recipient will give Coercer some of the money? Perhaps Recipient and Coercer

love each other but Recipient is unaware of Coercer's threat to Victim. If Victim's consent is valid, then it is permissible for Recipient to take Victim's money. Since it is now Recipient's money, Recipient has the right to give it to Coercer, and so Coercer permissibly receives Recipient's money. Has Coercer successfully skirted the moral rules? The answer is still no. The first reply above applies here. Depending on other facts about the case, Victim's consent to Recipient may be invalid for other reasons. Again, this will be discussed in the next section. Moreover, the third reply above also applies here. Regardless of whether Victim's consent transforms the permissibility of Recipient's actions, Coercer has still wronged Victim by threatening her. However, even if Coercer wrongs Victim, this does not obviously resolve the question of who rightly owns the money if Recipient permissibly takes it from Victim. Intuitively, the money is still Victim's, but this seems to contradict the view that Victim's consent to Recipient is valid. We will explore this problem in more detail in the next section.

#### **2.4: Cases in which it is Impermissible for Recipient to Act on Victim's Consent Token**

Valid consent explains why Recipient is permitted to act on Victim's consent token in some cases of 3rd-party coercion, but an explanation is now required for why it is impermissible for Recipient to act on Victim's consent token in other cases. Earlier I suggested that the case of *Cash Transfer* falls into this category of cases. However, as we will see later, it is not quite right to think of *Cash Transfer* as a case in which it is impermissible for Recipient to act on Victim's consent token. Fortunately, there are other cases we can examine. I will argue that in these cases, cases in which it is impermissible for Recipient to act on Victim's consent token, either 1) it is impermissible for some reason unrelated to the validity of Victim's consent or 2) Victim's consent is invalid, but not due to 3rd-party coercion.

To begin, consider the following case from Millum:

*Pimp Without Pay*: Coercer tells Victim that he will beat her up unless she has sexual relations with Recipient. Victim proposes to Recipient that they have sexual relations in a private room— Coercer will infer what has happened. Recipient agrees (Millum 2014, p.119).

Coercer is clearly coercing Victim into having sex with Recipient. However, Recipient may act impermissibly by having sex with Victim for reasons that have that have nothing to do with the validity of Recipient's consent. For example, suppose Recipient is married and made a promise to his partner to be monogamous. Or, suppose that Recipient should refuse to have sex with Recipient in order to discourage the practice of pimps coercing people to have sex. Or, suppose that Recipient has Ebola and is on his way to be quarantined. Recall that the power of valid consent is limited and does not guarantee that it is permissible for Recipient to act on Victim's consent token. In the preceding examples, Recipient acts impermissibly regardless of whether Victim's consent is valid. So, these kinds of variations of *Pimp Without Pay* do nothing to show that 3rd-party coercion invalidates consent, and the correct explanation of why it is impermissible for Recipient to act on Victim's consent token has nothing to do with the validity of Victim's consent.

Now, consider Millum's analysis of *Pimp Without Pay*. Millum believes that Victim's consent to Recipient is invalid due to the coercion of a 3rd-party (Coercer). The invalidity of consent is normally a sufficient explanation for the impermissibility of Recipient's act. Nevertheless, Millum argues that Recipient's act is impermissible for the following reason. Instead of having sex with Victim, Recipient should go to the private room with her but refrain from having sex (Millum 2014). Coercer will still infer that Victim and Recipient have had sexual relations, but Victim will be able to avoid the beating without actually having to have sex with Recipient. If this option is available, and Victim prefers it, then it is impermissible for Recipient to act on Victim's invalid consent token.

I agree that the availability of this option, and Victim's preferences, can make it impermissible to act on Victim's consent token. However, I also believe that this shows that 3rd-party coercion does not

invalidate consent. To begin with, let's make this option explicit in the following version of *Pimp Without Pay*.

*PWP - Available*: Coercer tells Victim that he will beat her up unless she has sexual relations with Recipient. There are three options available to Victim and Recipient.

1. Victim and Recipient do not go to the private room and do not have sex.
2. Victim and Recipient go to the private room and have sex.
3. Victim and Recipient go to the private room and do not have sex.

Both Victim and Recipient are aware of all three options. These options are all available in the sense that Recipient is willing to go along with any one of them.

Suppose that Victim explicitly rejects the option of going to the room and not having sex (option 3). Victim is worried that Coercer will discover their deception and give Victim an even harsher beating. Victim tells Recipient that she would rather play it safe and have sex with Recipient in order to avoid any chance of a beating. Because of this, Victim tokens consent to Recipient to have sex. In this scenario, it is permissible for Recipient to act on Victim's consent token and have sex with her. However, if Victim had not consented to having sex, then it would have been impermissible for Recipient to force Victim to go into the room and have sex. Again, the permissibility of Recipient's act depends on whether Victim tokens consent to that act, which implies that her consent is valid. Therefore, the mere availability of option 3 does not render Victim's consent to option 2 invalid. Her consent clearly has moral power in *PWP - Available*.

On the other hand, consider a modification to *PWP - Available* in which Recipient eliminates option 3.

*PWP - Unavailable*: Coercer tells Victim that he will beat her up unless she has sexual relations with Recipient. There are only two options available to Victim and Recipient.

1. Victim and Recipient do not go to the private room and do not have sex.

2. Victim and Recipient go to the private room and have sex.
3. ~~Victim and Recipient go to the private room and do not have sex.~~ (Unavailable)

Both Victim and Recipient are aware of all three options. Option 3 is unavailable in the sense that Recipient refuses to go along with it.

Suppose that Victim prefers option 3 and tokens consent to it. However, Recipient refuses and says he is only willing to go along with option 1 or 2. Because of this, Victim tokens consent to have sex with Recipient (option 2) because that is now the only way for her to avoid Coercer's beating.

Victim's consent to option 2 is either valid or invalid. If her consent is valid, but for some reason it is impermissible for Recipient to act on Victim's consent token, then obviously the impermissibility cannot stem from Victim's consent being invalid. Moreover, if her consent is valid, 3rd-party coercion cannot invalidate consent. However, if Victim's consent is invalid, then it cannot be due to 3rd-party coercion. Recall that in *PWP - Available*, Victim tokened consent to option 2 and her consent was valid. Regarding 3rd-party coercion, there is no difference between *PWP - Available* and *PWP - Unavailable*. The only differences are 1) Recipient's behavior- Recipient makes option 3 available in the former case but eliminates this option in the latter case and 2) Victim's preferences- Victim prefers option 2 to option 3 in the former case but prefers option 3 to option 2 in the latter case. Neither of these differences changes the fact that Coercer coerces Victim. So, if Victim's consent is invalid in *PWP - Unavailable*, it can't be due to 3rd-party coercion. The invalidity must be attributed to either 1) or 2). In fact, Millum agrees. Millum says such behavior by Recipient is tantamount to coercion (Millum 2014). But if Millum is correct, then clearly it is because of Recipient's 2nd-party coercion, and not Coercer's 3rd-party coercion, that Victim's consent is invalid.

This version of *Pimp Without Pay* is one situation in which the invalidity of Victim's consent is not due to 3rd-party coercion. But, is there reason to believe that Victim's consent is never invalid due to 3rd-party coercion itself? I believe the answer is yes, and the way to show it is to draw an analogy

between cases of 3rd-party coercion and cases of natural duress. For any 3rd-party coercion case in which it seems that Victim's consent is invalid, we can create a natural duress variant in which everything is the same except we replace Coercer's threat with a natural duress situation. The natural duress situation replicates exactly the options available to Victim and Recipient. For example, here is a natural duress variant of *Pimp Without Pay*.

*Strange Disease*: Linda has a strange disease. The disease is not currently causing Linda any harm. But, if she continues to do nothing, the disease will harm her. The amount of harm is equivalent to the harm of being beaten by Coercer from *Pimp Without Pay*. However, having sex with Bob will cure the disease. Linda proposes to Bob that they have sex. Bob agrees.

Typically, natural duress does not undermine consent. If it did, then you would never be able to give your valid consent to a doctor to treat you. Linda's strange disease does not prevent her from being able to give her valid consent to Bob to have sex, just like having appendicitis would not prevent you from being able to give valid consent to a doctor to perform an appendectomy.

If it is possible for Linda to give her valid consent to Bob, then it is also possible for Victim to give her valid consent to Recipient in *Pimp Without Pay*. This should not be surprising given the analysis for *Bike Sale* in the previous section. If having sex with Recipient is the only way for Recipient to avoid Coercer's beating, and she prefers having sex to being beaten, then her consent makes it permissible for Recipient to have sex with her, and thus her consent must be valid.

Of course, as pointed out earlier, this does not guarantee that Victim's consent will be valid. We can introduce elements to the 3rd-party coercion case such that Victim's consent becomes invalid. But we can also introduce these elements to the natural duress variant to invalidate consent. This shows that it is this new element, and not 3rd-party coercion itself, that invalidates consent. For example, suppose that in *Pimp Without Pay*, Coercer drugs Victim so that she will agree to have sex with Recipient. We can then suppose that in *Strange Disease*, Linda is also drugged (perhaps she is bitten by an insect that



produces the drug as its venom) and this causes her to agree to have sex with Bob. In both cases, consent is invalid. However, the invalidity cannot be due to 3rd-party coercion- there is no 3rd-party coercion in *Strange Disease*. Consent is clearly invalid due to the drug rendering Victim and Linda unable to competently give consent.

Objection: Millum's case of Cash Transfer is an exception to the above and it shows that 3rd-party coercion does in fact invalidate consent. For reference:

*Cash Transfer*: Coercer tells Victim that he will beat her up unless she gives Recipient \$500.

Victim gives Recipient the cash, which he puts in his mattress for safekeeping. Later, having escaped Coercer's clutches, Victim asks Recipient for the money back (Millum 2014, p.117).

It seems that Recipient ought to give the money back to Victim and the reason why is clear: Victim never gave her valid consent to the transaction. Intuitively, Victim's consent is invalid due to 3rd-party coercion and nothing else. Moreover, we can prove this by considering this natural duress variant:

*Addict*: Louise is addicted to hot sauce. She has \$500 and knows that if she keeps it she will spend it all on hot sauce. She will derive no pleasure from eating the hot sauce, and will experience harm equivalent to the beating Coercer threatens in *Cash Transfer*. To avoid this outcome she gives the \$500 to Gene. Louise then goes to rehab and beats her hot sauce addiction. She finds Gene and asks him to give her money back.

In *Addict*, it does not seem like Gene is morally obligated to give Louise \$500. But the only relevant difference between *Addict* and *Cash Transfer* is the absence of 3rd-party coercion. So, 3rd-party coercion invalidates consent as shown by these cases.

Reply: At the beginning of this section I mentioned that it is not correct to think of *Cash Transfer* as a case in which it is impermissible for Recipient to act on Victim's consent token. This is because Millum's analysis ignores the permissibility of the act that Victim actually tokens consent to. Before Victim asks for the money back, Victim tokens consent to Recipient taking the money. *Cash Transfer* is

supposed to show that Victim's consent is invalid, but Millum does not even address the permissibility of Recipient taking the money- the act that Victim is actually tokening consent to. This is strange given that he implicitly relies on this distinction for *Bike Sale*. In *Bike Sale*, Victim tokens consent to the sale of the bike. This is analogous to Victim tokening consent to giving Recipient the money in *Cash Transfer*. Victim asking for the money back in *Cash Transfer* would be analogous to Coercer's threat going away before Victim gives Coercer the money, and Victim asking Recipient to give the bike back in exchange for Recipient getting his money back. In *Bike Sale*, Millum obviously focuses the discussion on the act that Victim tokens consent to.

So, a complete moral analysis of *Cash Transfer* requires an explanation for both 1) the permissibility, or impermissibility, of Recipient acting on Victim's consent token for Recipient to initially take the money and 2) the permissibility, or impermissibility, of Recipient keeping the money after Victim escapes Coercer's threat and asks for the money back. I argue that the correct explanation of both 1) and 2) entails that Victim's consent can be valid despite the presence of 3rd-party coercion.

Under certain conditions, valid consent is the only reasonable explanation for why it is permissible for Recipient to take Victim's money in the first place. Suppose that Victim prefers Recipient taking her money to Coercer beating her, Victim explicitly asks Recipient to take her money, there is no other way to prevent Coercer's beating than for Recipient to take the money, and nobody else is otherwise harmed or has their rights violated by Recipient taking the money. Under these conditions, it is clearly permissible for Recipient to take Victim's money.

We can then use the same analysis that we used in *Bike Sale* to show that valid consent is the correction explanation for why it is permissible for Recipient to act on Victim's consent token. Again, we should consider what would happen if Victim did not token consent to Recipient taking the money. Suppose that Victim prefers Coercer's beating and she refuses to hand over the \$500 to Recipient. It would then be wrong for Recipient to take Victim's money against her will. Victim has the right to choose

how to respond to Coercer's threat, and her consent, or lack thereof, determines whether it is permissible for Recipient to take the money. But this is true only if Victim's consent is valid.

We are now left with the question of whether Recipient ought to give the money back to Victim. I agree that it *seems* like Recipient is obligated to give the money back to Victim, but I'm not convinced that Recipient actually has this obligation. If there is reason for Recipient to return Victim's money, then I argue that it is because Recipient benefits unfairly from Coercer's wrongdoing. However, I accept that this reason may not be sufficient for obligating Recipient to return the money to Victim. We may criticize Recipient for keeping the money, but it may still be permissible for Recipient to do so.

To see why paying back Victim is a matter of fairness, and not one of invalid consent, consider the following variant of *Cash Transfer* in which Recipient does not benefit from Coercer's wrongdoing.

*Cash Trash*: Coercer tells Victim that he will beat her up unless she gives Recipient \$500. Victim gives Recipient the cash. Recipient soon realizes how ridiculous it is that someone would just give him \$500, and decides that the money must be fake or that keeping it will only lead to trouble. So, he throws it away and moves on. Later, having escaped Coercer's clutches, Victim asks Recipient for the money back.

In *Cash Trash*, Recipient no longer has Victim's money and does not benefit at all from Coercer's wrongdoing. Because of this, it is completely unfair to require Recipient to pay Victim \$500 out of his own pocket. Recipient did nothing wrong by taking Victim's money, and requiring Recipient to pay would be unfairly punishing him for Coercer's wrongdoing.

However, it may be that Recipient still owes Victim something because it is still wrong, after all, that Victim should suffer from Coercer's wrongdoing. But it hardly seems plausible that Recipient should owe the entire \$500. Moreover, if Victim could be compensated by taking \$500 from Coercer, then clearly Recipient should not owe anything at all. Part of what explains these judgments is not that

Victim's consent is invalid, but the fact that Recipient acted permissibly when taking Victim's money. An act that was permissible only because Victim's consent made it permissible.

Now, you might find my view of *Cash Transfer* to be unsatisfactory because it cannot account for the stronger claim that Recipient is obligated to return Victim's money. And this may tempt you toward the rival view that Victim's consent is invalid due to 3rd-party coercion. However, I believe this would be a mistake. As shown earlier, the validity of Victim's consent is the only thing that can explain why it is permissible for Recipient to initially take Victim's money. So, if your view is that Victim's consent is invalid, then you must also commit to the view that it is morally wrong for Recipient to take Victim's money. Victim could be begging and pleading for Recipient to take the money so that Coercer will not beat her. And Recipient could simply be trying to help Victim out, even promising to give the money back to Victim later. But none of this changes the fact that Victim's consent is coerced. And so, with the rival view, you still have to say that it is morally wrong for Recipient to help Victim by taking the money. Surely this is implausible.

On the other hand, the account I have defended, that 3rd-party coercion does not invalidate consent, correctly explains why it is permissible for Recipient to help Victim by taking the money. Recipient acts permissibly because Victim's consent is valid. This may commit us to the view that Recipient is permitted to keep Victim's money, but we can at least explain why it seems like Recipient is obligated to return the money. It is unfair for Recipient to keep the money and benefit from Coercer's wrongdoing. And so, the best overall analysis of *Cash Transfer* entails that 3rd-party coercion does not invalidate consent.

## **2.5: Summary**

In some cases of 3rd-party coercion, it is permissible for Recipient to act on Victim's consent token. In some of these cases, the only explanation for why it is permissible is that Victim's consent is

valid. However, in other cases of 3rd-party coercion, it is impermissible for Recipient to act on Victim's consent token. In these cases, either 1) it is impermissible, but not because Victim's consent is invalid or 2) Victim's consent is invalid, but not due to 3rd-party coercion. So, regardless of whether it is permissible for Recipient to act on Victim's consent token, 3rd-party coercion does not invalidate consent.

## Chapter 3

### Voluntariness and Consent

The following claim seems extremely plausible: if your consent is not given voluntarily, then your consent is invalid. However, in this chapter I will argue that this claim is false. I will consider two different definitions of “voluntariness” and show that under either definition, voluntariness is not necessary for valid consent. I will then propose that in place of voluntariness, consent is valid only if the recipient of consent is not obligated to alter the choice situation of the person tokening consent.

#### 3.1: The Voluntariness Condition

As discussed in Chapter 2, valid consent is morally transformative. Typically, it would be impermissible for someone to cut you open and remove one of your kidneys. But, suppose your kidney is badly damaged and a doctor must remove it to save your life. Your valid consent has the power to morally transform the impermissible act of removing your kidney into a permissible one.

It is widely agreed that in order to be valid, consent must be given voluntarily. The Nuremberg Code is a set of ethical principles that was established in response to appalling medical experimentation conducted by Nazi scientists during the Second World War. Its first principle states that “The voluntary consent of the human subject is absolutely essential.”<sup>5</sup> Let’s refer to this principle as:

---

<sup>5</sup> See also: Beauchamp, 2010, p.57; Kleinig, 2010, p.12; Feinberg, 1986, p.174, 188; Wertheimer, 1987, p.21; The International Ethical Guidelines for Biomedical Research Involving Human Subjects, 2002; and The Office of Human Research Protections IRB Guidebook, 1993.

*The Voluntariness Condition:* voluntariness is necessary for valid consent.

In addition to being codified in various guidelines regarding medical research and uncontroversially accepted by many philosophers, the voluntariness condition also seems obviously true. Consider the following case.

*Blood Draw:* A doctor threatens to kill you unless you consent to having your blood drawn.

Afraid for your life, you consent to the procedure.

Your consent in *Blood Draw* is clearly invalid. You did not voluntarily agree to have your blood drawn—the doctor coerced your consent by threatening your life. Moreover, the plausibility of the voluntariness condition is not limited to the context of medical ethics. If Quinn’s consent to have sex with Parker is not given voluntarily, then Quinn’s consent is obviously invalid. If a mugger threatens to kill you unless you hand over your money, your consent to do so is not valid. You do not voluntarily choose to hand over the money.

Questions about the voluntariness of consent always take place in the context of a person being confronted with a particular set of choices. If you are ill, you can choose to be treated or not. In the case of the mugger you must choose between your life and your money, but you cannot choose both. According to the voluntariness condition, your choice in these situations must be voluntary in order for your consent to be valid. But, there is disagreement over exactly what constitutes voluntariness. We can group the most common definitions of voluntariness into one of two categories: “no-choice” definitions and “agent-interference” definitions. According to no-choice definitions, whether consent is voluntary does not depend on the causal source of the choice situation. The available choices may be the result of certain background conditions, nature, or the actions of some other moral agent. It simply does not matter. If you have “no choice” but to consent, then your consent is involuntary.<sup>6</sup> According to agent-interference definitions, the voluntariness of consent *does* depend on the causal source of the choice

---

<sup>6</sup> For examples, see: Atiyah, 1982; Fisher, 2013, p.360; Frankfurt, 1973, p.83; and Olsaretti, 1998, p.71.

situation. These definitions stipulate that voluntary consent is one that is free of certain kinds of interference from other people.<sup>7</sup> If your consent is involuntary, then there must be another moral agent who is causally responsible for your choice situation.<sup>8</sup>

Both kinds of definitions provide intuitively plausible accounts of what it means for consent to be voluntary. However, I argue that voluntariness is not necessary for valid consent under either kind of definition. Many philosophers have done a sufficient job showing why no-choice definitions cannot be consistent with the voluntariness condition. In the next section, I will briefly review their arguments. I will then argue that voluntariness is not necessary for valid consent even if we assume an agent-interference definition of voluntariness.

### **3.2: No-Choice Definitions of Voluntariness**

No-choice definitions of voluntariness focus on the relationship between the choice situation and the person making the choice. Some of these definitions describe cases of involuntary consent as situations where the person has to consent because she has “no choice” or has no reasonable alternative. In *Blood Draw*, a doctor threatens to kill you unless you consent to a blood draw. You have “no choice” but to consent to the blood draw because there is no reasonable alternative. Other definitions focus on psychological states created by the choice situation. The doctor’s murderous threat is so unnerving that it may overbear your will or create an irresistible pressure for you to comply. It is this state of your psyche or your will that makes your consent involuntary. These conceptions of voluntariness are intuitive, and they are consistent with the voluntariness condition in some cases.

---

<sup>7</sup> For examples, see: Beauchamp, 2010, p.57; and Kleinig, 2010,p.13.

<sup>8</sup> Wertheimer raises this distinction when discussing different analyses of coercion (Wertheimer, 198, p.202).



However, as other have shown, there are many other cases where your consent is clearly valid even though you have “no choice” but to consent.<sup>9</sup>

To see this, we can modify *Blood Draw* so that the doctor’s threat is no longer the causal source of your choice situation, but the set of choices available to you remains unchanged. Suppose that your choice situation is a result of natural duress. For example, you are suffering from some illness that will kill you if left untreated. In order to cure your illness, the doctor must draw some blood. Your choice is still between death and a blood draw. And because the stakes of your choice situation are the same, there is still no reasonable alternative to getting your blood drawn and you still have “no choice” but to consent to the procedure. Or, if you prefer, your will is overborne by the threat of dying from the illness and you are psychologically compelled to consent to the procedure. Either way, your consent is involuntary according to no-choice definitions of voluntariness.

But clearly your consent can be valid in this case even though you have “no choice”. It is absurd to suggest that you cannot give your valid consent to a procedure that will treat some terrible natural illness. Nature can create any number of life-threatening choice situations (being trapped under a rock, terminal cancer, etc.) where you have “no choice” but to consent to a life-saving option. Regardless, in most circumstances, it would be impermissible for someone to cut off your arm to free you from the rock, or for a doctor to treat your cancer, without your valid consent. So, consent can still be valid even when you have “no choice” but to consent. In other words, if we define voluntariness using no-choice definitions, voluntariness is not necessary for valid consent.

### **3.3: Agent-Interference Definitions of Voluntariness**

Agent-interference definitions of voluntariness identify a voluntary choice as one that is free of certain kinds of interference from other people. The primary way that someone can diminish the

---

<sup>9</sup> Wertheimer, 1987. Radcliffe Richards, 2010.

voluntariness of consent is by using coercion. Defining voluntariness in this way is intuitively appealing because it seems obvious that you do not give your consent voluntarily if someone is “forcing” you to do so. Your consent in *Blood Draw* is not voluntary because the doctor is coercing your consent. Most, if not all, agent-interference definitions of voluntariness agree that coercion is a kind of interference that undermines voluntariness, though some definitions will also include other forms of interference. Because of this, we will begin by focusing on whether it is true that consent is involuntary only if it is free of another’s coercion.

Most of the discussion will not require us to choose between different accounts of coercion. All accounts of coercion agree that people can coerce. However, not all accounts agree that *only* people can coerce. Some accounts argue, for example, that economic conditions can coerce. This need not worry us. Regardless of which account of coercion we adopt, agent-interference definitions require that a person is doing the coercing. So, strictly speaking, according to agent-interference definitions, it is not that voluntariness requires freedom from *any* coercion, but rather it is that voluntariness requires freedom from *another’s* coercion.

Defining voluntariness in this way avoids the problem we saw with no-choice definitions. Cases of natural duress show that no-choice definitions are incompatible with the voluntariness condition. However, agent-interference definitions can easily handle these cases. In cases of natural duress, there is no person who coerces your consent. An illness may force you to choose between dying and getting surgery, or the job market may force you to choose between relocating and being unemployed. But in neither of these cases does someone use coercion, or any other kind of voluntariness-diminishing interference, to create your choice situation. According to agent-interference definitions, this means that you can give your voluntary consent in cases of natural duress. So, there will be no lack of voluntariness that prevents you from giving your valid consent to life-saving surgery, or to employment on the other side of the country. Thus, agent-interference definitions can preserve the voluntariness

condition in cases where no-choice definitions cannot. However, I will argue that even under agent-interference definitions of voluntariness, voluntariness is not necessary for valid consent.

Although agent-interference definitions can handle cases of natural duress, they cannot handle cases of 3rd-party coercion. As argued in the previous chapter, consent can still be valid when a 3rd-party, and not the recipient of consent, is coercing the victim. Briefly, suppose that Coercer threatens to beat up Victim unless Victim sells her bike to Recipient. There are at least some situations in which the permissibility of Recipient buying Victim's bike depends entirely on whether or not Victim consents to the sale. This implies that Victim's consent is morally transformative, i.e. valid. So, Victim is able to give her valid consent to the transaction even though Coercer is coercing her to do so. However, according to agent-interference definitions of voluntariness, Victim's consent is not voluntary because her choice is not free from another's coercion. So, if we define voluntariness using agent-interference definitions, consent can be both valid and involuntary in cases of 3rd-party coercion. Thus, voluntariness is not necessary for valid consent.

Objection: A small modification to agent-interference definitions solves the problem. Simply define voluntary consent as consent that is free from *Recipient's* coercion. In other words, consent is voluntary only if the recipient of consent is not the one who is doing the coercing. This definition is plausible because the Coercer's coercion affects the relationship between Coercer and Victim. But, the consent relationship is between Recipient and Victim. This modified definition allows for consent to be voluntary in cases of 3rd-party coercion. Victim's consent to sell the bike to Recipient is voluntary because Recipient is not the one who is coercing Victim's consent. So, Victim's valid consent is voluntary, and the voluntariness condition is preserved. Moreover, this modified definition still gets the explanation correct in standard cases of 2nd-party coercion. If Recipient and Coercer are the same person (i.e. Recipient threatens to beat up Victim unless Victim sells the bike to Recipient), then Victim's

consent to the sale is invalid because it is not free of Recipient's coercion. So, a modified version of agent-interference definitions is consistent with the voluntariness condition in all cases.

Reply: Modifying agent-interference definitions of voluntariness in this way will not be enough to show that voluntariness is necessary for valid consent. There are cases where your consent is still valid even though the recipient of your consent coerces your consent. Consider the following.

*Misguided Doctor: Your physician, Dr. M, happens to be developing an experimental treatment for Ebola. In order to test its efficacy, Dr. M needs live human subjects who are infected with the Ebola virus. However, Ebola is a rare disease and Dr. M cannot find any test subjects. To remedy this, Dr. M decides to infect her own patients. During a routine checkup, Dr. M inspects the inside of your mouth using a tongue depressor that she laced with the Ebola virus. Dr. M then tells you that she has just infected you with the Ebola virus and says you will die unless you consent to her experimental treatment. The experimental treatment will be extremely painful but it gives you the best chance of being cured. You consent to the treatment.*

I argue that in *Misguided Doctor*, your consent is valid even though it is given involuntarily. First, I will focus solely on the question of whether your consent is voluntary. Then, I will focus on the question of whether your consent is valid.

*Misguided Doctor: Is Your Consent Voluntary?*

Let's begin by dealing with the question of whether your consent is voluntary in *Misguided Doctor*. According to our modified agent-interference definitions, consent is voluntary only if the recipient of consent is not coercing consent. In *Misguided Doctor*, Dr. M is the recipient of your consent, and it seems intuitively plausible to me that she has coerced you into consenting to the experimental treatment. However, this intuition alone is a thin defense, and no defense at all if you do not share this intuition. Moreover, there are several alternative views that would argue that Dr. M does not coerce

your consent. The first view says that Dr. M harms you when she infects you with Ebola, and then makes a non-coercive offer to treat you. The second view says that Dr. M's proposal is a warning, and thus not coercive. I'll explain these accounts in more detail and argue that they give incorrect assessments of *Misguided Doctor*.

### *The Non-Coercive Offer View*

Dr. M does not threaten to infect you with Ebola. Rather, she just infects you and thus harms you. Harming you is wrong, but it is not the same thing as coercion. If you go to get a flu shot, someone harms you when they prick you with a needle, but they do not coerce you into doing anything. We may say that that the wrong of Dr. M harming you is equal to or even worse than coercion, but it is still not coercion. After harming you, Dr. M offers to treat your infection, but offers cannot coerce. So, there is no point in *Misguided Doctor* at which Dr. M coerces you. All we have is a non-coercive harming followed by a non-coercive offer.

I agree that infecting you with Ebola is a harm that itself is not coercive. But, this does not entail that Dr. M does not coerce you. Consider the following.

*Confession*: You have been captured by the police. They want you to confess to a murder that you did not commit. They place you in a room and start beating you up. After this initial beating, they say "confess to the murder." You remain silent and they beat you again. For the second time, they say, "confess to the murder." You give in and confess.<sup>10</sup>

In typical cases of coercion, the coercer expresses a threat verbally, "confess or I'll beat you up." However, in *Confession*, the coercer expresses the threat by harming you. The message is clear, "confess to the murder or we'll keep beating you up." The beating in itself, or on its own, may not be coercive,

---

<sup>10</sup> Example taken and modified from Nozick 1969, p.444.

but the police still coerce your confession. They use the initial beating to threaten a future harm, and the threat of this future harm is coercive.

*Misguided Doctor* is analogous to *Confession*. Dr. M initially harms you by infecting you with Ebola. The message Dr. M sends is clear, “consent to my treatment or the Ebola I just infected you with will kill you.” Even though infecting you with Ebola is a harm that in itself, or on its own, is not coercive, it plays a similar role as the initial beating in *Confession*. The initial harm, infecting you with Ebola, is used to threaten a future harm, dying from Ebola, and the threat of this future harm is coercive. So, Dr. M coerces your consent.

Objection: There is still an important difference between *Confession* and *Misguided Doctor* that explains why there is coercion in the former case but not the latter. In *Confession*, it is the threat of the next beating that coerces you into confessing. The police threaten to add another harm on top of whatever else they have already done. But in *Misguided Doctor*, there is no threat of inflicting more harm than what has already been done. It is not as if Dr. M is threatening to infect you again or somehow make the already administered infection worse or more harmful if you do not consent. The harm you will experience in the future has already been put into place by past harms. But it is a threat to inflict additional harm in the future, harm that has not yet been put into place, that is necessary for coercion. And because Dr. M does not threaten to inflict such a further harm, she does not coerce your consent.

Reply: I don’t think the presence of coercion can turn on this distinction. Coercion can be present even if there is no threat to inflict more harm in the future. To see this, consider the following variation of *Confession*.

*Treatment*: You have been captured by the police. They want you to confess to a murder that you did not commit. They place you in a room, beat you up, and stab you in the arm. After doing this they say “confess to the murder and we will bring in a doctor to give you painkillers and

treat your wound.” If your stab wound goes untreated, you are at high risk of getting an infection. If the infection becomes severe, you may need to have your arm amputated to survive. You give in and confess.

In *Treatment*, the police do not threaten to inflict more harm on top of what they’ve already done. The consequences of not confessing to the murder will be the result of harms that the police have already inflicted on you. However, I do not think it is plausible that your confession is not coerced in *Treatment*. Like *Confession*, there is still future harm to be experienced and the police are responsible for this future harm. Whether this harm comes about from the police beating you up some more or from withholding treatment for the wounds they already inflicted on you makes no difference, you are coerced into confessing either way.

With regard to future harm, *Misguided Doctor* is no different from *Treatment*. In *Misguided Doctor*, the consequences of not consenting to Dr. M’s experimental treatment are the future harms that will come about from your Ebola infection. These are not additional harms that Dr. M threatens to inflict on you, but Dr. M is responsible for these harms just as the police are responsible for the future harms that will fall upon you in *Treatment*. So, given that your confession is coerced in *Treatment*, your consent is coerced in *Misguided Doctor*.

#### *The Non-Coercive Warning View*

Even if it is incorrect to think of Dr. M’s proposal as a non-coercive offer, one might still argue that there is no coercion in *Misguided Doctor*. Parts of Nozick’s discussion on coercion suggest that Dr. M does not coerce your consent, but rather Dr. M issues a non-coercive warning. To see this, let’s begin by looking at the following passage.

“I have in mind cases where no one threatens to inflict some damage on Q if he does A, but someone sets things up so that damage is automatically inflicted if Q does A. It’s not that if you

do A, I will bring about a consequence which you consider to be bad, but rather that I now do something (the doing of which is not conditional upon your doing A) which is such that if you do A after I have done this thing, there will be a consequence which you consider to be bad. Though in such situations a person is deterred from doing something, it is not obvious to me that he is coerced into not doing it.”<sup>11</sup>

Nozick then argues that the following case can be construed as a situation of this sort.

*Heart Attack:* Your mother tells you that she will have a heart attack if you do A. You refrain from doing A.

It is not that she will choose to have a heart attack, she just knows that she will. By telling you this, she has worsened the consequence of doing A because now you will feel enormously guilty if you do A. Your mother is not threatening to inflict any damage on you. Rather, she just set things up (by telling you she will have a heart attack) so that if you do A, enormous guilt will be automatically inflicted on you. Nozick believes that by telling you that she will have a heart attack, your mother is issuing a nonthreatening warning (or simply “warning”). However, warnings do not coerce, only threats do. So, your mother does not coerce you into not doing A.

*Misguided Doctor* can also be construed as a situation of this sort. Technically, Dr. M has not threatened to inflict some damage on you if you refuse to consent to the treatment. Rather, Dr. M has set things up (by infecting you with the virus) so that if you refuse to consent to treatment, the harmful effects of the Ebola virus will be automatically inflicted on you. According to Nozick’s analysis, it seems that Dr. M may simply be warning you of what will happen if you refuse to consent. Thus, strictly speaking, Dr. M does not coerce your consent.

One way to respond to Nozick’s view is to point out any relevant differences between *Misguided Doctor* and *Heart Attack*. One potential difference is that Dr. M chooses to set up the bad outcome (she

---

<sup>11</sup> Nozick, 1969, p.444.



infected you with the Ebola virus), while your mother does not (she does not choose to give herself a heart attack, nor did she voluntarily set things up in the past to make it the case that she will now have a heart attack if you do A). The following pair of cases draws out this difference more clearly.

*Boulder 1*: I notice that there is a boulder perched precariously above the road. As you are about to drive through I let you know that if you drive down the road, the boulder will fall on you. You do not go down the road.

*Boulder 2*: I choose to place a boulder precariously above the road. As you are about to drive through I let you know that if you drive down the road, the boulder will fall on you. You do not go down the road.

In *Boulder 2* I chose to set up the bad outcome of the rock falling on you if you go down the road, but in *Boulder 1* I did not. Moreover, it's plausible that I coerce you into not going down the road in *Boulder 2* but not in *Boulder 1*. If *Misguided Doctor* is analogous to *Boulder 2* and *Heart Attack* analogous to *Boulder 1*, then perhaps someone's choosing to set up the bad outcome explains the difference in coercion.

However, I do not think this approach will work. Although your mother suffering a heart attack is a bad outcome of you doing A, it is not the only bad outcome. In Nozick's analysis of *Heart Attack*, it is the feeling of guilt about giving your mother a heart attack that is the relevant bad outcome of you doing A. And Nozick is explicit that your mother voluntarily chooses to worsen this latter bad outcome (the guilt) by telling you that she will have a heart attack if you do A (Nozick 1969, p.445). You will feel more guilt, "enormously guilty", because you ignored her warning. Had she refrained from warning you that she will have a heart attack, you might still have felt some guilt, but not nearly as much. So, even though your mother doesn't choose to have a heart attack, and even though she never set things up to make it the case that she will have a heart attack if you do A, she does choose to tell you that she will have one. And so, in both *Heart Attack* and *Misguided Doctor*, the person chooses to set up the bad

outcome of you doing (or not doing) something. Your mother chooses to make you feel enormously guilty if you do A, and Dr. M chooses to make you suffer from Ebola if you do not consent to her treatment. So, a difference in the matter of choosing cannot explain why Dr. M does not coerce you.

Another potential difference between the two cases is that Dr. M violates your rights and your mother does not. Dr. M worsens the consequences of you rejecting her Ebola treatment by infecting you with Ebola. Dr. M does not have the right to do this. On the other hand, your mother worsens the consequences of you doing A by telling you she will have a heart attack. Perhaps she has the right to tell you this. Or, if one wants to avoid talk of rights, your mother does nothing wrong by telling you she will have a heart attack, but Dr. M does something wrong when she infects you. Perhaps this difference can explain why Dr. M coerces you while your mother does not.

But, there is a problem with this approach. Can the difference between a warning and a threat turn on this difference? It is not clear to me that it does. Suppose that your mother does not have the right to interfere with your choice by telling you she will have a heart attack, or that it is wrong for her to do so. It still seems plausible to me that her statement is still a warning and not a threat. If this is true, then the fact that Dr. M wrongs you does not show that she coerces you. Moreover, Nozick's analysis of these types of cases clearly focuses on whether the consequences of doing A will be automatically inflicted or brought about, and not whether one is acting permissibly or within her rights. So, I will not attempt to show that the case of *Misguided Doctor* is somehow different than Nozick's cases of nonthreatening warnings. Rather, I will argue that setting things up so that the consequences are automatically inflicted makes no difference to whether or not one coerces.

Let's begin by considering the following case.

*Drowning 1: P and Q are on a boat. P threatens to throw Q overboard and let Q drown unless Q gives P \$10,000. Q agrees to give P \$10,000.*

This is a paradigmatic case of P coercing Q. No plausible account of coercion would say otherwise. Now, let us make a small change to *Drowning 1*.

*Drowning 2: P and Q are on a boat. P tells Q that 1) she is going to throw Q overboard no matter what and 2) she will let Q drown unless Q gives P \$10,000. Q agrees to give P \$10,000.*

The only difference between *Drowning 1* and *Drowning 2* is that in *Drowning 2*, Q will suffer an additional consequence if she complies with P's demands. In addition to losing \$10,000, Q will also get pushed overboard and then rescued. Of course, there is a chance the rescue will fail, and being pushed overboard itself is harmful. So, this additional consequence makes Q's options worse overall in *Drowning 2* than in *Drowning 1*. But proposing to make Q worse off by demanding more from her doesn't make P's actions any less coercive. The mugger doesn't avoid coercing you by demanding both your money and your watch instead of just one or the other. So, there is no difference between *Drowning 1* and *Drowning 2* that can justify saying the P coerces Q in the former but not the latter. And because it is entirely uncontroversial that P coerces Q in *Drowning 1*, it follows that P coerces Q in *Drowning 2*.

Now, let us make another small change, this time to *Drowning 2*.

*Drowning 3: P and Q are on a boat. P is about to make the proposal from Drowning 2. But, P realizes that doing so will give Q a chance to run away before P can push Q overboard. So, P sneaks up on Q and pushes her overboard. While Q is flailing in the water, P proposes to let Q drown unless Q gives P \$10,000. Q agrees to give P \$10,000.*

P has made Q worse off in *Drowning 3* than she is in *Drowning 2*. By guaranteeing that Q has no chance to avoid being pushed overboard, P increases the probability that Q will drown if she does not comply with P's demands. Worsening the consequences of not complying does not eliminate coercion. The mugger doesn't avoid coercing you by threatening to torture you before she kills you. If anything we might say that P's actions are more coercive given that the consequences of not complying are made

worse. This difference between *Drowning 2* and *Drowning 3* is not enough to justify saying that P coerces Q in the former but not the latter. And because P coerces Q in *Drowning 2*, P also coerces Q in *Drowning 3*. Moreover, P has made things worse for Q in *Drowning 3* by setting things up (by pushing Q overboard) so that the consequences of not complying are automatically inflicted on Q. So, Nozick's analysis is incorrect, and setting things up to have the consequences automatically inflicted does not show that coercion is absent.

The reasoning used in the *Drowning* cases also applies to the case of *Misguided Doctor*. First, consider the following base case.

*Misguided Doctor 1: During a routine checkup, Dr. M threatens to infect you with the Ebola virus unless you consent to an experimental treatment. You consent to the treatment.*

Like *Drowning 1*, *Misguided Doctor 1* is an uncontroversial case of coercion. To maintain symmetry with the *Drowning* cases, we can also assume in *Misguided Doctor 1* that Dr. M is not interested in infecting you with the Ebola virus before testing the treatment on you. Perhaps she first wants to see what the treatment will do to a non-infected human. In any case, this assumption makes no difference to whether Dr. M coerces you.

Second, we make the same change to *Misguided Doctor 1* that was made to *Drowning 1*.

*Misguided Doctor 2: During a routine checkup, Dr. M tells you that 1) she is going to infect you with the Ebola virus no matter what and 2) she will administer an experimental treatment if you consent to it. You consent to the treatment*

Again, the only difference is between *Misguided Doctor 1* and *Misguided Doctor 2* is that Dr. M presents you with worse options overall in the latter case- your compliance results in you being infected with Ebola in addition to having to go through the experimental treatment. But this does not make Dr. M's actions any less coercive. So, Dr. M is still coercing your consent to treatment in *Misguided Doctor 2*.

Third, we make the same change to *Misguided Doctor 2* that we made to *Drowning 2* and we end up with the original *Misguided Doctor* case. We simply suppose that Dr. M does not want to give you a chance to run out of the office once she tells you that she will infect you with the Ebola virus. So, she uses the tongue depressor to secretly infect you. This worsens the consequences of noncompliance. You can't escape infection in *Misguided Doctor*, so Dr. M has raised the probability (compared to *Misguided Doctor 2*) that you will suffer the effects of the Ebola virus if you do not consent to treatment. If anything, this strategy is more coercive than her actions in *Misguided Doctor 1* or *2*. And she implements this strategy by making sure the consequences of noncompliance (the harmful effects of the Ebola virus) will be automatically inflicted on you. So, Dr. M coerces your consent in *Misguided Doctor*.

#### *Defining Coercion and Voluntariness*

Still, I understand that one might want to define "coercion" as a very specific kind of technique that one may use to manipulate others. And it may be that when you use the technique of setting things up to automatically inflict harm, you are carrying out something like coercion, but not quite coercion itself. Indeed, suppose that Dr. M doesn't even try to get your consent, but instead physically forces you to be her test subject. She may still get what she wants, but she does not use coercive threats to achieve her goals. Perhaps she has moved beyond coercion and into the territory of something like "direct force".

If one prefers an account of coercion that entails that Dr. M does not coerce you, so be it. Ultimately, the question is not whether Dr. M coerces your consent, but whether your consent is voluntary. Under agent-interference definitions of voluntariness, voluntary consent must be free from certain kinds of interference from others. The only kind of interference we have been focusing on is coercion because coercion uncontroversially undermines voluntariness. So, in *Drowning 1* and *Misguided Doctor 1*, where it is uncontroversial that consent is coerced, consent is also involuntary.

Now, as we move from *Drowning 1* to *Drowning 3* and from *Misguided Doctor 1* to *Misguided Doctor*, you may say that at some point, P and Dr. M, respectively, stop using coercion and start using a different technique. However, it does not seem plausible that at some point between the first and the last case, involuntary consent becomes voluntary.

In all three *Drowning* cases, Q consents to giving P \$10,000. In *Drowning 1*, Q's consent is involuntary because P coerces Q's consent. But suppose that in *Drowning 2* your preferred account of coercion rejects that P coerces Q. Should we then conclude that Q voluntarily consents to giving P \$10,000? No. Recall, that the only difference between *Drowning 1* and *Drowning 2*, is that the terms of P's deal are worse in *Drowning 2*- Q will still get pushed into the water if she agrees to give P \$10,000, but at least she will be subsequently rescued by P. Assessing Q's consent as involuntary in *Drowning 1* but voluntary in *Drowning 2* would be like saying that handing over your wallet to a mugger is not done voluntarily, though it would have been voluntary had the mugger demanded that you also hand over your watch. This is not plausible. Now suppose that your preferred account of coercion rejects that P coerces Q in *Drowning 3*. But, the only difference between *Drowning 2* and *Drowning 3* is that P makes the consequences of Q's noncompliance worse by guaranteeing that Q cannot attempt to escape P before P pushes Q overboard. To say that Q's consent to give P \$10,000 is voluntary in *Drowning 3* would be like saying that you do not voluntarily hand over your wallet to a mugger who keeps his gun in his holster, but you do voluntarily hand over your wallet to a mugger who has knocked you to the ground and placed his gun to your temple. Again, this is not plausible. It follows then that your consent in *Misguided Doctor* is given involuntarily even though under some accounts, Dr. M technically does not coerce you.

Objection: It is plausible that your consent is voluntary in *Drowning 3*. Consider the following variation.

*Drowning Choice*: P throws Q overboard. P proposes to rescue Q if Q gives P \$10,000. Before Q can agree to anything, R and S come onto the scene and make their own proposals. R proposes to save Q if Q agrees to marry R, and S proposes to save Q if Q agrees to join S's cult. All of these proposals are unappealing to Q, but Q finds P's proposal to be the least offensive. So, Q agrees to give P \$10,000.

It seems plausible that Q voluntarily chooses P's rescue services. In fact, Q's choice can be just as voluntary as it would be if no one had thrown Q overboard (suppose Q accidentally tripped and fell into the water).

Reply: Even if it is true that Q's choice is voluntary in *Drowning Choice*, it does not follow that Q's choice is voluntary in *Drowning 3*. I take it that part of what makes it seem plausible that Q's choice is voluntary in *Drowning Choice* is the additional options opened up by R and S. Now that Q has a way to avoid drowning and to also avoid losing \$10,000, it may be that Q voluntarily chooses to go along with P's proposal. However, this option is not available in *Drowning 3*. And so *Drowning Choice* should not convince us that Q's consent is voluntary in *Drowning 3*.

Moreover, what seems voluntary about Q's choice in *Drowning Choice* can be explained in the following way. Q's choice between P's proposal, R's proposal, and S's proposal may be voluntary. It does not seem that unreasonable to say that Q voluntarily chooses P's proposal over R's proposal. Nobody forced or coerced you into choosing P's proposal over R's proposal. However, it is unreasonable to say that Q voluntarily chooses to give P \$10,000 over drowning. To emphasize the difference, consider the following case.

*Many Threats*: Suppose that three muggers each make a proposal. Mugger A says that if you give her \$1,000, she will not kill you and she will get rid of Mugger B and Mugger C. Mugger B says that if you give her \$500, she will not kill you and she will get rid of Mugger A and Mugger

C. Mugger C says that if you give her \$200, she will not kill you and she will get rid of Mugger A and Mugger B. Mugger C is offering the best deal, so you agree to give her \$200.

Like *Drowning Choice*, we may say that between the three proposals, you voluntarily choose Mugger C's. Perhaps it is correct to say that nobody is forcing or coercing you to choose Mugger C's proposal over Mugger A's. But, it does not follow that you voluntarily choose to give Mugger C \$200 over dying. Your consent to give Mugger C \$200 is just as involuntary as it would be had there been only one mugger demanding \$200.

In summary, although I find it highly plausible that Dr. M coerces your consent, it is enough that Dr. M interferes with your choice situation in such a way that renders your consent involuntary. And having shown that consent is involuntary in *Misguided Doctor*, we now turn to the question of whether your consent is valid.

#### *Misguided Doctor: Is Your Consent Valid?*

According to the voluntariness condition, voluntariness is necessary for valid consent. And as we just saw in *Misguided Doctor*, your consent to Dr. M's treatment is not given voluntarily. It then follows that your consent to Dr. M must be invalid. However, I argue that your consent to Dr. M is, in fact, valid. This may seem implausible at first, but consider the following. Valid consent is morally transformative. It has the power to make an impermissible action permissible. Typically, in a case of natural duress, it would be impermissible for a doctor to give you an experimental Ebola treatment without your valid consent. However, if you give your valid consent to the treatment, then it is permissible for the doctor to proceed. In the case of *Misguided Doctor*, not only is it permissible for Dr. M to administer the treatment, but it is permissible because you consent to it. Your consent only has this moral power if it is valid. So, your consent must be valid.



After having infected you with the Ebola virus, Dr. M has only two courses of action open to her. She can 1) refrain from giving you the experimental treatment or 2) give you the experimental treatment. Given that you are already infected with the Ebola virus, and Dr. M's treatment is your best chance at a cure, you consent to the treatment. Based on this, it seems clear that it would now be wrong for Dr. M to refrain from giving you the experimental treatment. But if this is true, and her only other option is to give the treatment, then it must be permissible for her to treat you. On the other hand, suppose instead that you had decided differently. Suppose that you thought Dr. M's treatment would leave you worse off than letting the Ebola virus run its course. Or perhaps you do not wish to help Dr. M with her research. So, you refuse to consent to treatment. If this is what you decide to do, it would then be wrong for Dr. M to administer the experimental treatment. As we can see, it may be permissible for Dr. M to administer the treatment, and whether it is permissible turns on whether you consent to the treatment. This entails that your consent is valid. If your consent is valid even though it is involuntary, then voluntariness is not necessary for valid consent.

Objection: The reason that it is permissible Dr. M to administer the treatment is not because you consent to it, but because Dr. M has harmed you and she has an obligation to repair the harm. The only way she can do this is by giving you the treatment, and so she is obligated to do so. If she is obligated to treat you, then it follows that it is permissible for her to treat you. So, it is this obligation that accounts for the permissibility of giving you the treatment, and your consent has nothing to do with it.

Reply: I agree that Dr. M may be obligated to administer the treatment to you. But this does not show that your consent is invalid. If you refuse the treatment, Dr. M is not obligated to treat you as reparation. In fact, if you refuse treatment, it would be morally wrong for Dr. M to then administer the treatment. Dr. M is only obligated to treat you if you consent to it. But again, this entails that your consent is valid.

Objection: If your consent is valid in *Misguided Doctor* even though it is given involuntarily, then one's consent must also be valid in other cases of coercion. Suppose a mugger threatens "your money or your life" and you consent to the mugger taking your money. According to the previous arguments, the mugger's coercive threat does not invalidate your consent. So, it must be permissible for the mugger to take your money. But this is absurd.

Reply: *Misguided Doctor* is not analogous to the case of the mugger. In typical cases of coercion, the coercer will have at least the following courses of action available to her. The coercer can either 1) carry out the threatened consequence for noncompliance, 2) carry out the threatened consequence for compliance, or 3) retract the threat and refrain from carrying out any consequences. For example, in the mugger case, the mugger can either 1) kill you, 2) take your money, or 3) retract her threat and let you leave with both your money and your life. You may consent to the mugger taking your money, but you only do so because the mugger has eliminated option 3) from *your* choice situation. But, option 3) is still available in the mugger's choice situation, so to speak. And because of this, your consent to 2) does not make it permissible for the mugger to take your money. Your consent is invalid, and in a sense irrelevant, because what the mugger ought to do, regardless of whether you choose your money or your life, is to retract her threat and let you go.

However, in the case of *Misguided Doctor*, option 3) has been eliminated from both your choice situation and Dr. M's choice situation. Dr. M cannot simply undo the Ebola infection. She cannot retract her threat and let you leave with both your "money" and your "life" so to speak. Remember, she has set things up specifically so that the consequences of not consenting will be automatically inflicted. So, Dr. M can choose only between option 1) and option 2). And the permissible course of action will be the one that you consent to. Again, this just means that your consent is valid.

Objection: Dr. M clearly wrongs you by making you her experimental test subject. By saying that your consent is valid, we exonerate Dr. M of wrongdoing. Her treating you is morally no different than a

doctor treating her patient under normal conditions of valid consent. Dr. M is able to skirt the moral rules by setting things up so that your consent would be valid. This is absurd and we should reject the claim that your consent is valid.

Reply: It is true that Dr. M has wronged you, but this does not entail that your consent is invalid. Dr. M certainly wronged you when she infected you with the Ebola virus. The fact that your consent to treatment is valid does not change this. In general, doing something wrong does not then prevent you from doing the right thing. For example, it is wrong of me to beat you up. However, after having done so, it is permissible for me to take you to the hospital. The fact that I now act permissibly to aid you does not exonerate me of wrongdoing for beating you up.

This is also true in cases of consent. Suppose that I hit you with my car, breaking your leg. You are taken to the hospital and consent to having surgery to fix your leg. The fact that I wronged you doesn't entail that your consent to the doctor is invalid. There is no problem in claiming both that I wronged you and that it is permissible for the doctor to perform surgery on you. Now, suppose instead that it was the doctor who hit you with her car. She was running late for work and was speeding down the road when she struck hit you, breaking your leg. Not wanting to get in trouble, nor wanting to be even later for work, she leaves you in the middle of the road. Someone else finds you and takes you to the hospital. The surgeon on call is the very doctor that broke your leg. Your valid consent is still needed to make it permissible for the doctor to operate. And the fact that the surgeon now acts permissibly by treating you does not absolve her of breaking your leg. She does not skirt any moral rules by acting on your valid consent. Likewise, Dr. M acts permissibly by administering the treatment that you validly consent to. It was still wrong of her to infect you with Ebola, and she is not absolved of this wrongdoing.

## Summary

Modified agent-interference definitions of voluntariness define voluntary consent as consent that is free from certain kinds of interference (e.g. coercion) from the recipient of consent. This definition is consistent with the voluntariness condition (the principle that voluntariness is necessary for valid consent) in cases of natural duress, cases of 3rd-party coercion, and typical cases of 2nd-party coercion. However, the case of *Misguided Doctor* shows that one's consent can be valid even though it is not voluntary. Thus, voluntariness is not necessary for valid consent.

### 3.4: Replacing the Voluntariness Condition

Although voluntariness is not necessary for valid consent, the voluntariness condition does seem to be in the vicinity of some condition that is necessary for valid consent. When determining whether consent is valid, we tend to focus on the person tokening consent: Is she informed? Does she have the capacity to reason? Is her choice voluntary? Etc. The voluntariness condition in particular tries to identify some quality about the choice situation from her perspective. Agent-interference definitions of voluntariness obviously incorporate the actions of other agents, but they still focus on how the interference affects the choices available to the person tokening consent. But, the consenters's choice situation is only part of the story. The case of *Misguided Doctor* shows that the recipient's choice situation is also relevant to whether consent is valid. This may sound initially implausible, but the notion of consent, after all, requires that there be a recipient of consent. And the power of valid consent transforms what it is permissible for the recipient to do. But, what is permissible for the recipient to do will depend in part on what options are open to her.

So, what is necessary for valid consent is not that consent be voluntary. Rather we need a condition that captures both the choice situation of the person tokening consent and of the person receiving that consent. I propose the following.

*The Obligation Condition: Consent is valid only if the recipient of consent is not obligated to alter the choice situation of the person tokening consent.*<sup>12</sup>

For example, in a typical mugger case, the mugger creates the following choice situation for you: hand over your money or die. The mugger is obligated to alter the choice situation by allowing you to leave with both your money and your life. So, your consent to hand over your money is not valid. On the other hand, suppose you walk into a coffee shop, order a cup of coffee, and the barista creates the following choice situation for you: hand over your money or no coffee for you. The coffee barista is not obligated to alter the choice situation by letting you have the coffee for free, nor are they obligated to alter the choice situation in any other way. Barring any other complications, if you agree to hand over your money in exchange for the coffee, your consent to the transaction is valid.

To be clear, the obligation here is not an all-things-considered obligation. It may be the case that the recipient of consent is obligated to alter the choice situation for extraneous reasons- perhaps many people will die if she does not. The obligation is one that stems from wronging the person tokening consent. In other words, consent is valid only if the recipient of consent wrongs the person tokening consent by not altering the choice situation.

Moreover, the justification for the obligation cannot be that consent would be invalid in the current choice situation. Consider again a typical mugger case. The mugger creates the following choice situation for you: hand over your money or die. The mugger is obligated to alter the choice situation by allowing you to leave with both your money and your life. However, the mugger is not obligated to make this alteration because failure to do so results in your consent being invalid. Rather, the mugger is obligated to do so because you have the right to leave with both your money and your life, or the

---

<sup>12</sup> Conditions similar to this have been proposed elsewhere. Miller and Wertheimer argue that whether B's consent to A is valid depends on whether A has treated B fairly (Miller and Wertheimer, 2010, p.94). Millum argues that "In general, if Recipient has another option available to him, which he could easily take, and which Victim would prefer to him going along with Coercer's demands, he should not proceed on her token of consent" (Millum, 2013, p.119).

mugger makes you worse off, etc. The Obligation Condition itself is suggested to be a necessary condition of valid consent. So, it cannot be the invalidity of consent that generates the obligation. The question of whether the recipient is obligated to alter the choice situation comes prior to the question of whether consent is valid.

I believe that the Obligation Condition correctly identifies valid consent in all the cases that the voluntariness condition is meant to. The difference being, of course, that the Obligation Condition gets cases like *Misguided Doctor* right.

First, we have just seen the Obligation Condition at work in typical cases of 2nd-party coercion. Your consent to give your money to the mugger is not valid because the mugger is obligated to alter your choice situation by allowing you the option of having both your life and your money. In general, 2nd-party coercion will invalidate consent because the coercer is obligated to alter your choice situation by retracting her threat. Of course, in cases like *Misguided Doctor*, coercer is not obligated to retract the threat because doing so is not possible. But in the case of *Misguided Doctor*, I have already argued that your consent is valid. So, these sorts of cases are not a problem for the Obligation Condition.

Second, consider cases of natural duress. Suppose that you are trapped under a rock. If you are not freed soon, you will die. P finds you and asks you what she can do to help. You consent to P cutting off your arm in order to save your life. If P has no other options, then it seems plausible that your consent is valid and it is permissible for P to cut off your arm. However, suppose instead that you had asked P to roll the rock off of you. P is very strong and could easily move the rock, but she doesn't feel like moving it. Instead, P tells you that she is willing to cut off your arm. You would rather have P move the rock, but since your only options are to have P cut off your arm or to die, you consent to P cutting off your arm. But your consent does not make it permissible for P to cut off your arm. P ought to alter your choice situation so that P moving the rock is a live option. It is wrong of her to close off this choice, and this invalidates your consent to the cutting off of your arm. One may disagree and believe that not

only is P is under no obligation to propose to move the rock, but that your consent makes it permissible for P to cut off your arm. But, this is perfectly consistent with the Obligation Condition. Assuming all other necessary conditions of valid consent have been met, the Obligation Condition would agree that your consent is valid if P is not obligated to make available the option of P moving the rock.

Finally, consider cases of 3rd-party coercion. Suppose that Coercer threatens to beat up Victim unless Victim gets plastic surgery. Victim goes to Doctor and consents to having plastic surgery. If Surgeon can do nothing about Coercer's threat and cannot alter Victim's choice situation, then Victim's consent to the plastic surgery is valid. On the other hand, if Victim instead wants Surgeon to call the police and Surgeon refuses to do so, then Victim's consent to the plastic surgery is obviously invalid. It is not permissible for Surgeon to operate because she should call the police instead.

We could also consider a variant of this case in which Recipient is Coercer's accomplice. Suppose Surgeon is working together with Coercer. Intuitively it seems that Victim's consent to surgery would be invalid. But this is true only if Surgeon is obligated to alter the choice situation. If Surgeon is in a position to get Coercer to retract the threat, then she is obligated to do so and this explains why Victim's consent is invalid. On the other hand, suppose that Surgeon cannot stop Coercer even though the two are working together. If this is the case, then Surgeon is permitted to act on Victim's consent token. If Surgeon truly cannot do anything about Coercer's threat, and Victim's only options are to get plastic surgery or to receive a beating, then Surgeon is permitted to perform the surgery if Victim tokens consents to it. In a way, this is no different than Dr. M being unable to retract the threat of dying from Ebola in *Misguided Doctor*. In both cases, we may say that Victim's consent is valid, while also saying that the doctors are guilty of wronging Victim. Dr. M is permitted to treat you, but Dr. M still wronged you by infecting you to begin with. Likewise, Surgeon is permitted to perform surgery on you, but she still wronged you by helping Coercer put you in this situation to begin with.

If you are familiar with the literature on coercion, the Obligation Condition may look familiar. Nozick's analysis of coercion says that only threats can coerce. Threats are proposals that make you worse off relative to some baseline. Sometimes this baseline is the morally expected course of events (Nozick, 1969). If we morally expect the recipient to alter the choice situation, then Nozick's baseline and the Obligation Condition identify the same thing. For example, we morally expect the mugger to let you go with both your money and your life, the mugger's proposal makes you worse off relative to this baseline, and so the mugger's proposal is a threat. Regarding the Obligation Condition, the mugger is morally obligated to alter your choice situation by making available the option of you leaving with your money or your life. Alan Wertheimer uses the same moral baseline to distinguish threats from non-threats, and also argues that only threats coerce.

What is the difference between the moral baseline in these analyses of coercion and the Obligation Condition? It's possible that they are actually one and the same, and that a proposal will be a threat (according to Nozick and Wertheimer) if and only if the recipient is obligated to alter the choice situation. Even so, there is still a difference between the moral baseline and the Obligation Condition. For Nozick and Wertheimer, the moral baseline is used to identify threats. Threats are only one necessary element of coercion, they are not sufficient for coercion. On the other hand, the Obligation Condition makes no claims about what counts as coercion. Rather, the Obligation Condition suggests that consent is valid only if the recipient of coercion is not obligated to alter the choice situation. Whether the other necessary elements of coercion are present is a further question, but one whose answer is irrelevant as far as the Obligation Condition is concerned. And so, the moral baseline and the Obligation Condition may overlap in some respect, but they are not the same.



### 3.5: Summary

So, we can see that it was never really coercion, or the lack of voluntariness, that invalidates consent. Rather, it is the recipient's relationship to the choice situation that can invalidate consent. Of course, we could save the voluntariness condition by defining voluntariness as follows: consent is voluntary if and only if the recipient of consent is not obligated to alter the choice situation. But doing so would make one's consent "voluntary" in name only. The plausibility of the voluntariness condition is based, at least partly, on our intuitions of what the word means across a broad range of contexts and its proper usage. That is why we evaluated the voluntariness condition based on intuitively plausible no-choice and agent-interference definitions of voluntariness. I don't think that "voluntary" intuitively means anything like "the recipient of consent has no obligation to alter the choice situation", and defenders of the voluntariness condition would agree. They don't take "voluntariness" to mean anything like this. Better to just abandon the voluntariness condition altogether. And let me emphasize that this is not just a verbal issue. In core cases of coercion, most of us seem to have a clear sense of what it means for consent to be given involuntarily. And it is a widely held belief that such involuntariness is incompatible with valid consent. I have argued that we are seriously mistaken about this, regardless of how we use words.

## Chapter 4

### Undue Inducement and Consent

In medical research, inducements are used to recruit individuals for participation in clinical trials. For example, a researcher developing a new drug may offer you \$1000 to be her test subject. Some people believe that such inducements can be undue, and that undue inducements invalidate consent. However, there is significant disagreement over what constitutes an undue inducement and how they invalidate consent. In this chapter I will go over different conceptions of undue inducement and determine whether any of them can show that undue inducement is sufficient to invalidate consent. I will argue that all accounts of undue inducement, with the exception of one, fail to show that undue inducements invalidate consent. The only account that can succeed defines an undue inducement as an offer that causes one to consent against her better judgment. However, I will argue that under this definition, many offers are unlikely to actually be undue inducements.

#### 4.1: Analyzing Undue Inducements

We can divide different analyses of undue inducements into two camps. One camp argues that an inducement is undue only if it coerces an individual to accept the offer (Beauchamp et al. 2002, McGregor 2005, Todd 2001). Let's refer to this conception of an undue inducement as a "coercive offer". The other camp argues that an inducement is undue only if it impairs an individual's judgment (Ballantyne 2006, CIOMS 2002, Grady 2001, Grant and Sugarman 2004, Wertheimer and Miller 2008).

Let's follow Alan Wertheimer and refer to this conception of an undue inducement as a "seductive offer" (Wertheimer, 2011, p.149).

Although accounts differ on how undue inducements invalidate consent (via coercion or via impairing judgment), there is one important conceptual feature that they all share. Part of what it means for an inducement to be undue is to be excessive. For example, an offer of \$10 to participate in a research trial is not much of an offer. But offer \$10,000 to participate and some will begin to accuse the inducement of being undue. Accusers will say that \$10,000 is too attractive, excessive. And it is this feature of undue inducements that leads to either coercion or impaired judgment. Because of this, I will consider the following to be a conceptual requirement for any account of undue inducement.

*The Excessiveness Requirement:                    If X is an undue inducement, then any offer that is more attractive than X is also an undue inducement.*

This conceptual requirement is not only assumed in the literature, but it also serves to distinguish undue inducements from other morally problematic offers. For example, consider employers who offer extremely low wages. Some will argue that this is morally wrong and that there is some minimum wage that all employers should offer. Offers of low wages may be morally problematic, but the problem clearly can't be that the employer's offer is excessive. So, although these offers may be morally problematic, they are not undue inducements. I bring this up now because there are many cases to follow, and I want to make it clear that I am not arguing that the inducements in these cases are always morally unobjectionable. Rather, these cases are used solely to draw conclusions about undue inducement.

I should also make it clear that I am not endorsing any particular analysis or definition of "undue inducement". The relationship between undue inducement and consent is only one of several issues we may want to consider in determining the correct definition of undue inducement. Moreover, some may

believe that the correct definition need not show that undue inducement invalidates consent. If this is true, then as far as the correct definition goes, it may be irrelevant whether I am successful in showing that such undue inducements do not invalidate consent. But, it is still important to know whether or not undue inducements invalidate consent under whichever definition ends up being correct.

Moreover, in this chapter I will focus on undue inducement in the context of a single consenter. We will examine how offers of varying attractiveness interact with the consent of one person. This will be sufficient for answering the question of whether undue inducement is sufficient for invalidating consent. However, focusing on a single consenter does not capture all that is worrisome about undue inducement. When an inducement is used to attract multiple consenters, a new problem arises. Discussion of this problem will be postponed until the next chapter.

### *Roadmap*

The remainder of this chapter will be organized as follows. In Section 4.2, we will look at accounts that define undue inducements as coercive offers. Each of these accounts will attempt to identify some similarity between a coercive offer and a coercive threat, and then use this similarity to argue that coercive offers invalidate consent either by undermining voluntariness or by violating the Obligation Condition. As a reminder:

*The Obligation Condition: Consent is valid only if the recipient of consent is not obligated to alter the choice situation of the person tokening consent.*

I will argue that none these accounts show that undue inducements invalidate consent.

In Section 4.3, we will look at accounts that define undue inducements as seductive offers. The first kind of account argues that any mere impairment in judgment is sufficient to invalidate consent, either by undermining competence, undermining voluntariness, or violating the Obligation Condition. I will argue that none of these accounts show that undue inducements invalidate consent. The second

kind of account argues that judgment must be impaired to a certain extent, enough to cause one to consent against her better judgment, in order to invalidate consent. While this account may show that undue inducements invalidate consent, I will argue that in combination with the Excessiveness Requirement, this account will have the result that not many offers will actually be undue inducements.

I'll often use "coercive offers" and "seductive offers" in place of "undue inducement" in order to emphasize which kind of account is currently under discussion.

#### **4.2: Undue Inducements as Coercive Offers**

Let's use the following example as an illustration of an undue inducement as a coercive offer.

*Poor Matt:* Matt is extremely poor. He has no home, no financial resources, and no readily available options that will improve his situation. A pharmaceutical company offers Matt \$10,000 to participate in a clinical trial that is testing a new drug. Matt finds this offer to be irresistible. He cannot stand the idea of spending another night with an empty stomach and nowhere warm to sleep. \$10,000 will go a long way to improving his situation. He has "no choice" but to accept the offer. The pharmaceutical company's inducement coerces Matt to participate, thus invalidating his consent.

The first thing that needs to be addressed is whether or not it is even conceptually possible for such an offer to be coercive. I will argue that even if a "coercive offer" is conceptually incoherent, they can be made to be conceptually coherent, and so we still have to answer the question of whether such offers invalidate consent. There are two ways that these offers can invalidate consent, either by undermining voluntariness or by violating the Obligation Condition. I will argue that none of these accounts show that undue inducements, as coercive offers, invalidate consent.

### *Coercive Offers and Conceptual Coherence*

Many believe that coercive offers are conceptually incoherent (Emmanuel 2004, Grady 2001, Lemmens and Elliott 1999, Wertheimer and Miller 2008). Inducements are offers, and offers cannot coerce, only threats can coerce. For example, if the pharmaceutical company had instead said to Matt, “participate in our clinical trial or we will kill you!”, then they would be using a threat to coerce Matt’s participation. But, by saying “participate in our clinical trial and we’ll give you \$10,000”, they are making an offer, and their inducement cannot coerce his participation by definition.

We can avoid settling the question of whether coercive offers are conceptually possible for our discussion. Generally, when someone argues that undue inducements are coercive, they propose that undue inducements have feature X, and having feature X makes them coercive. For example, an undue inducement has the feature of giving an individual “no choice” but to consent. If an individual has “no choice” but to consent, then her consent is coerced. Others will object, arguing that having feature X does not make something coercive, or having feature Y is necessary for coercion and coercive offers lack feature Y.

However, even if we accept that coercive offers are not strictly coercive, they may still share some feature with coercion that makes them incompatible with valid consent. For example, one may argue that coercion invalidates consent because threats give you “no choice” but to consent. If coercive offers also give you “no choice” but to consent, then they also invalidate consent. And so, “coercive offers” may share some feature, X, with coercion, and X may be sufficient to invalidate consent even though X alone is not sufficient to make the offer coercive. This means that we can evaluate whether having feature X makes an inducement incompatible with valid consent while remaining neutral about whether undue inducements are literally coercive. So, I’ll continue to use “coercive offers” to refer to undue inducements because they may invalidate consent for the same reason as coercion, even though they may not technically be coercive.

### *Coercive Offers and Voluntariness*

Most arguments for the view that coercive offers invalidate consent assume that coercion undermines voluntariness and that voluntariness is necessary for valid consent. Wertheimer and Miller have done a good job summarizing and refuting these views (Wertheimer and Miller 2008).<sup>13</sup> I will give a brief review of their arguments. Defenders of coercive offers typically identify one of the following as the relevant shared feature between coercive offers and coercive threats: 1) an individual finds herself in an unacceptable situation if she rejects the coercive offer 2) a coercive offer is significantly more attractive relative to the individual's other options and 3) a coercive offer takes advantage of an individual's vulnerability.

According to the first feature, coercive offers invalidate consent because the consentor must accept the offer in order to avoid an unacceptable situation. In *Poor Matt*, going another night without food and shelter is an unacceptable situation for Matt. Wertheimer and Miller argue that the unacceptability of an individual's situation if she rejects an offer does not invalidate consent. For example, suppose that Q has a malignant tumor that is likely to kill her in one year unless she has surgery. A surgeon, P, offers to perform this surgery for Q. If Q declines P's offer, then she will find herself in dire straits. In order to avoid this unacceptable situation, Q agrees to the surgery. However, Q's consent to P's offer is clearly valid.

According to the second feature, coercive offers invalidate consent because the inducement is significantly more attractive compared to the consentor's other alternatives. The focus here is not on the unacceptability of the alternatives. Rather, the focus is on how attractive the offer is relative to the alternatives. For example, in *Poor Matt*, one might argue that it is the fact that having \$10,000 is

---

<sup>13</sup> Technically Wertheimer and Miller argue that these features do not make an offer coercive. But we can use the same arguments to show that these features do not invalidate consent.

significantly better than being hungry and homeless that explains why Matt's consent is invalid. Again, Wertheimer and Miller argue that this condition is not sufficient to invalidate consent. For example, suppose that P offers Q \$1000 to mow P's lawn. Mowing the lawn will take one hour. Q is not necessarily poor, or in any other sort of vulnerable position. Q may have a great job where she makes \$500 an hour. Regardless, Q may find P's offer to be irresistible because there is nothing else Q could do in the next hour that will be as lucrative. But, the relative attractiveness of P's offer does not invalidate Q's consent to the transaction.

According to the third feature, coercive offers invalidate consent by taking advantage of an individual's vulnerability. For example, we might consider Matt to be vulnerable because he is poor and homeless. Offering money to participate in clinical research takes advantage of this vulnerability. Wertheimer and Miller use the following example to show that vulnerability does not invalidate consent. Suppose that Q needs to sell her house quickly because she is moving to another city. Her desperation puts her in a vulnerable position regarding the sale of her house. P makes an offer lower than Q's list price and Q accepts. P's offer takes advantage of Q's vulnerability, but P's offer does not invalidate Q's consent to the transaction.

So, even though coercive offers may share one of above features with coercive threats, none of these features is incompatible with valid consent. And so, undue inducements understood as coercive offers are not sufficient to invalidate consent. However, the assumption so far has been that coercion invalidates consent by undermining voluntariness. The previous chapter argues that voluntariness is not necessary for valid consent. If you accept this argument, then it might be that Wertheimer and Miller's arguments show only that coercive offers do not undermine voluntariness. If we focus instead on the Obligation Condition, then perhaps there is some other shared feature between coercive offers and coercive threats that shows how coercive offers invalidate consent.



Objection: It may be that none of the above features alone is incompatible with valid consent. But all three taken together is sufficient to invalidate consent. And if coercive offers have all of the above features, then coercive offers invalidate consent.

Reply: All three features taken together will not be enough to invalidate consent. Consider Wertheimer and Miller's vulnerability case. Q needs to sell her house quickly because she is moving to another city. Her desperation puts her in a vulnerable position regarding the sale of her house. Suppose further that the reason she is moving is that she is developing a serious, life-threatening allergy to the pollens found only where she currently lives. Moreover, she cannot afford to move unless she sells her house. P makes an offer lower than Q's list price and Q accepts. All three features are present in this case. First, Q must accept the offer in order to avoid the unacceptable situation of dying in her current location. Second, P's offer is significantly more attractive than the alternative of dying in her current location. Third, P's offer still takes advantage of Q's vulnerability. Despite all of this, P's offer does not invalidate Q's consent to the transaction.

### *Coercive Offers and the Obligation Condition*

According to the Obligation Condition, consent is invalid if the recipient of consent is obligated to alter the consenter's choice situation. Typically, the recipient does this by making some other option available to the consenter. Failure to meet the Obligation Condition can explain why coercive threats usually invalidate consent. When a mugger threatens to kill you unless you hand over your money, she violates the Obligation Condition because she ought to make available the option of you leaving with both your money and your life. Perhaps coercive offers are similar, creating a choice situation in which the recipient is obligated to make some other option available. This sentiment has been expressed in the literature in two different ways. First, some suggest that the recipient of consent effectively "closes off" the option of rejecting the offer (e.g. Feinberg 1989). If this is the case, then coercive offers may violate

the Obligation Condition because the recipient of consent is obligated to make available the option of rejecting the offer. Second, others seem to suggest that in cases of coercive offers, both options (accepting the offer and rejecting the offer) are bad in some sense (e.g. McGregor 2005). If this is the case, then coercive offers may violate the Obligation Condition because the recipient of consent is obligated to make some third option available. I will argue that coercive offers do not violate the Obligation Condition in either of these ways, and thus they do not invalidate consent.

Before we get to the arguments, it may be helpful to point out that the current discussion will be relevant even if you reject the Obligation Condition. In the previous chapter I mentioned that the Obligation Condition shares a similarity with the moral baseline used by Nozick and Wertheimer to distinguish threats from offers. So, arguments that the recipient is obligated to alter the choice situation can be recast as arguments that recipient's "offer" makes the consenter worse off relative to the moral baseline. Or, in other words, recipient's "offer" is really a threat. And perhaps it is this shared feature of making one worse off relative to the moral baseline that invalidates consent. So, regardless of whether you agree with the Obligation Condition, analysis of the following arguments is necessary for completing the larger project of understanding the relationship between undue inducements and consent.

Some argue that coercive offers, like coercive threats, effectively "close off" the option of rejecting the offer. For example, suppose a mugger threatens to kill you unless you hand over your money. You only have five dollars on you. Comparing your options, it is clear that you should give up your money. You are rationally compelled to acquiesce to the mugger's threat. The mugger has "closed off" the option of keeping your money by making it extremely unattractive for you to do so. If the problem is that the mugger ought to reopen the option of you keeping your money by removing the attached consequence of killing you, then we can explain the invalidity of your consent by appealing to the Obligation Condition. According to the Obligation Condition, your consent to hand over your money

is invalid because the mugger is obligated to make available the option of you keeping your money and your life.

Now, let's see how this analysis can be applied to the case of *Poor Matt*. The pharmaceutical company offers \$10,000 to Matt to participate in their clinical trial. Comparing his options, it is clear to Matt that he should accept the offer. He is rationally compelled to do so. The pharmaceutical company has effectively "closed off" the option of rejecting the offer by making the offer so attractive. The pharmaceutical company is obligated to reopen the option of rejecting the offer, either by withdrawing the offer or by making it substantially less attractive. Otherwise, the company's offer violates the Obligation Condition, and Matt's consent is invalid.

However, the pharmaceutical company has no such obligation. "Closing off" an option by offering a much better option does not violate the Obligation Condition. Consider the following case.

*Better Job*: You hate your current job. A prospective employer comes across your CV and offers you a new job. This job is in a better location, has great benefits, and pays triple your current salary. The work you will be doing is the same, so you will still hate what you do. But, how could you possibly refuse their offer? You couldn't! You will not be made any worse off regarding job satisfaction, and you will be made significantly better off otherwise.

This job offer is so attractive, it has effectively "closed off" the option of you refusing it and sticking with your current job. However, there is nothing morally problematic with the employer's offer. They are not obligated to reopen the option of you refusing the job by withdrawing their offer or by making their offer substantially less attractive.

The second way coercive offers may violate the Obligation Condition is that the recipient of consent is obligated to make some additional option available to the consentor. The idea here is that coercive offers, like coercive threats, create a choice situation in which all the options are bad. For example, in the case of coercive threats, the mugger's threat leaves you with only two options: your

money or your life. It is wrong that these are your only options and the mugger ought to allow you the better option of keeping both your money and your life. Likewise, some believe that the problem in *Poor Matt* is that the pharmaceutical company's offer leaves Matt with only bad options: remain cold and hungry or participate in medical research. It is wrong that these are his only options, and he ought to have some other option made available to him, perhaps some other form of employment. And, according to the Obligation Condition, if this option is not made available to him, then his consent to be a research subject is invalid.

Even if we assume that the pharmaceutical company ought to provide an option that is better than both the status quo and being paid to participate in medical research, this would not show that coercive offers invalidate consent. There are two different ways that such an obligation might be met. The first way is for the pharmaceutical company to increase the amount of the offer. The second way is for the pharmaceutical company to make a different kind of offer. Either way, the obligation to provide a better option shows that coercive offers are not undue inducements.

The first way the pharmaceutical company may fulfill their obligation is to increase the amount of their offer. For example, in *Poor Matt*, the pharmaceutical company offers Matt \$10,000 to participate in their research. If \$10,000 is not enough, then let's say a \$20,000 offer would be sufficient. So, under this interpretation, \$10,000 is a coercive offer but \$20,000 is not. However, one conceptual requirement of an undue inducement is that if X is an undue inducement, then any offer that is more attractive than X is also an undue inducement (i.e. the Excessiveness Requirement). This means that if \$10,000 is an undue inducement, then \$20,000 is as well. If \$20,000 is an undue inducement but not a coercive offer, then coercive offers are not undue inducements.

The second way the pharmaceutical company may fulfill their obligation is to make a different kind of offer. For example, in *Poor Matt*, suppose the pharmaceutical company is obligated to offer Matt something else besides money to participate in research. Suppose that offering him a job as a janitor

fulfills this obligation. It then follows that offering Matt a job is not a coercive offer. However, this suggests that the problem with coercive offers has nothing to do with the amount, or attractiveness, of an offer. Rather, the problem seems to be that money itself is the kind of thing that is wrong to offer in exchange for participation in medical research. But this is not consistent with the concept of undue inducement. As stated earlier, the one thing that people actually agree on is that undue inducements are undue because they are excessive, not because they are of the wrong kind. So, if coercive offers are problematic because of their type, coercive offers are not undue inducements.

#### **4.3: Undue Inducements as Seductive Offers**

Another conception of undue inducements is that inducements are undue only if they impair judgment. The following case illustrates an undue inducement as a seductive offer.

*Heartburn:* A pharmaceutical company is developing a drug to treat heartburn. The company needs to test the safety of the drug by examining its effects on healthy human subjects.

Preliminary trials suggest that there is a 50% chance of experiencing adverse effects from the drug. In order to induce people into participating, the company offers \$1000 in exchange for testing the drug. Lisa sees an advertisement for this trial in the newspaper. The \$1000 offer is very tempting and it starts to cloud Lisa's judgment. Even though she is informed that there is a 50% chance that she will experience adverse effects from the drug, Lisa irrationally starts to believe that it is very unlikely that she will be one of the participants who will be adversely affected. The \$1000 offer is impairing her judgment in such a way that participating seems better than it actually is, making it more likely that she will accept the offer. She decides to participate in the study.

The pharmaceutical company's offer impairs Lisa's judgment and seduces her into participating. Because of this, she is unduly induced.

*Heartburn* gives us a rough idea of what seductive offers are, and all accounts agree that a seductive offer is one that impairs judgment. But there is some disagreement, or at least some ambiguity, regarding the answers to the following questions.

1. What kind of judgment must be impaired in order for an offer to be seductive?
2. To what degree must one's judgment be impaired in order to make an offer seductive?

Regarding question 1, one answer is to define seductive offers such that only impairments to one's prudential judgment count. Another answer is to define seductive offers such that impairments to one's moral judgment also count. I will argue that under the latter definition, seductive offers are not sufficient to invalidate consent.

There are also two responses to question 2. The first is to define seductive offers such that any mere impairment is sufficient to make an offer seductive. I will argue that mere impairments are not sufficient to invalidate consent. So, defining seductive offers in this way means that seductive offers are not sufficient to invalidate consent. The second response to question 2 is to define seductive offers such that judgment must be impaired to the extent that one consents against her better judgment. I will argue that under this definition, most inducements that impair to such an extent are unlikely to be undue because of the Excessiveness Requirement.

### *Prudential Judgments vs. Moral Judgments*

Most agree, or assume, that impairment in prudential judgment is sufficient to make an offer seductive. This impairment is usually described in one of two ways. Seductive offers impair judgment by causing people to 1) overestimate the prudential benefits of the inducement or 2) underestimate or ignore the prudential risks of accepting the offer. However, some authors argue that an inducement can also be seductive if it causes the individual to make the wrong moral judgment. Ruth Macklin considers the following to be a paradigmatic case of undue inducement.

*Sleep Study:* In 1980, Bernadette Gillcrist died while participating in a sleep study that paid \$100 per day. The sleep study was recruiting normal, healthy volunteers, but Bernadette had anorexia nervosa and lied about her condition in order to qualify for the study. Her death was not causally related to the sleep study. During the study, Bernadette died from cardiac arrest due to self-induced vomiting.

Based on *Sleep Study*, Macklin argues that “The principle emerging from this paradigm is as follows: Inducements are undue if they prompt subjects to lie deceive, or conceal information that, if known, would disqualify them as participants in a research project” (Macklin 1981, p.2). And she concludes that in general, “If a potential subject engages in illegal or unethical behavior (in this case, lying) in order to obtain a considerable sum of money, then the offer constitutes an undue inducement” (Macklin 1981, p.3). A similar view is held by Grant and Sugarman who argue that inducements are undue when participants are induced even though they have a strong moral aversion to participating. As an example, Grant and Sugarman suggest that “to deliberately induce religious people to work on the sabbath by offering large incentives would involve an attempt to get them to act against what they see as their duties”, and that such an inducement would be undue (Grant and Sugarman 2004, p.728).

However, even if such offers are morally problematic, they do not invalidate consent. Take Macklin’s *Sleep Study*. It’s true that Bernadette should not have been allowed to participate in the study if the researchers had discovered the truth about her medical condition. But this shows only that the researchers should not accept applicants who are not qualified. It does not show that Bernadette’s consent was invalid. In general, even though it may be impermissible to act on one’s consent, this does not entail that their consent is invalid. Valid consent guarantees only that you have waived your right or that the recipient doesn’t wrong you by doing what you have consented to. The recipient may have other reasons that prevent them from acting. For example, suppose that A and B each promise C that they will not sleep with each other. A and B break their promises and mutually consent to sleep with

each other. It may be impermissible for A and B to have sex because they have promised not to, but this does not entail that their consent is invalid. Likewise, it may be impermissible for the researchers in *Sleep Study* to allow Bernadette to participate, but this does not entail that her consent is invalid.

Of course, it's still possible that Bernadette's consent was invalid. But if so, the better explanation for the invalidity of her consent is that her decision to participate seems imprudent. If you have a serious medical condition, as Bernadette did, then participating in medical research seems like the kind of thing that could seriously contravene your prudential interests (assuming that the research is not designed to treat your medical condition). Especially so if your medical condition disqualifies you from the study. So, Bernadette's case does not show that impaired moral judgment is sufficient to invalidate consent. At best, the case is neutral between whether it is poor prudential judgment or poor moral judgment that is relevant to the status of Bernadette's consent.

Because of this, consider instead a case where one makes the wrong moral decision but the right prudential decision.

*Daycare 1:* Sasha has a doctor's appointment scheduled for next week to have a wart removed from her finger. She is at work when she gets notified that the doctor has an immediate opening. In order to make the appointment, Sasha will have to leave work right now. She works at a daycare and is the sole supervisor of all the children. The children are currently taking a nap. Sasha figures that the children will be ok while she is gone, and that she'll be back before they wake up. She goes to the doctor and agrees to have her wart removed.

*Daycare 1* shows that being induced to make a poor moral judgment does not invalidate consent. Sasha is putting the safety of the children at risk in exchange for the convenience of having her wart removed one week early. This is the wrong moral judgment. However, it is implausible that her consent is not morally transformative. The doctor has her permission to remove her wart, and the doctor does nothing to violate her rights, or to wrong her, by doing so. It's possible that if the doctor knows what Sasha has



done, then the doctor should not remove the wart in order to discourage this behavior. But, again, this does not show that Sasha's consent is invalid.

Objection: *Daycare 1* is not analogous to *Sleep Study*. In *Sleep Study*, Bernadette is offered a monetary inducement while in *Daycare 1*, there is no monetary inducement. Many people believe it is monetary inducements in particular that are morally problematic. For example, the satisfaction of helping a family member may be a permissible inducement to donate one's kidney, but money is not. Moreover, Bernadette is consenting to medical research, while Sasha is consenting to medical treatment. Some people believe that the requirements for valid consent in medical research are different from those in cases of medical treatment.

Reply: I do not believe that the type of inducement (monetary vs. convenience) makes a difference in what we should say about whether consent is valid. Nor do I believe that the context of consent (medical research vs. medical treatment) makes a difference in what we should say about whether consent is valid. But instead of arguing for these views, let's instead modify *Daycare 1* so that it is analogous to *Sleep Study* with respect to these issues.

*Daycare 2*: Rosita is interested in participating in the same sleep study as Bernadette. Rosita also works at a daycare where she is the sole supervisor of the children. Rosita gets notified that there is an opening in the sleep study, but she will have to come immediately to the clinic in order to register. The children are currently taking a nap, so Rosita decides to leave them alone, go register for the study, and try to make it back before they wake up. Rosita goes to the clinic, is approved as a qualified candidate, and agrees to participate in the sleep study. Rosita, like Bernadette in *Sleep Study*, is induced by a monetary offer to participate in medical research. And like Sasha in *Daycare 1*, Rosita is induced to make the wrong moral judgment. Rosita's consent, like Sasha's, is clearly valid. The researchers do nothing to violate Rosita's rights, or to wrong her, by

allowing her to participate. Again, the researchers may have other reasons to disallow her participation, but invalid consent is not one of them.

*Daycare 1* and *Daycare 2* show that being induced to make poor moral judgments does not invalidate consent. So, if the definition of seductive offers includes impairments to moral judgment, then seductive offer do not necessarily invalidate consent. On the other hand, one might reject the inclusion of impaired moral judgments (e.g. Wertheimer 2010), and restrict the scope of seductive offers to impaired prudential judgments. We'll now turn our attention to such accounts.

### *Degree of Impairment*

Judgment can be impaired to varying degrees, and any account of seductive offers should specify to what extent judgment must be impaired in order for an offer to be seductive. Based on the various descriptions of seductive offers, there are two accounts we ought to consider. Sometimes seductive offers are described as simply “clouding” or “distorting” judgment (e.g. Grady 2001). This suggests that any mere impairment in judgment makes an inducement undue. I will use “mere impairment” to refer to this degree of impairment. On the other hand, seductive offers are also described as taking place when an offer causes one to consent “against her better judgment” (e.g. CIOMS 2002, p.46). This suggests that impairment must be significant enough to cause one to make the wrong decision. I believe that “wrong” here can be interpreted in one of two ways. First, a wrong decision is one that seriously contravenes one’s interest. Second, a wrong decision is one you make only because you are impaired. In other words, had you not been impaired, you would have made a different decision. We will not need to decide which interpretation of “wrong” is correct. In most cases I take it that our unimpaired judgment leads to a decision that will not seriously contravene our interests. But regardless, I will assume that either kind of wrongness can be sufficient for seduction under this account. I’ll refer to impairments of this degree as “significant impairments”.

The degree to which judgment must be impaired in order for an offer to be seductive is one matter. The degree to which judgment must be impaired in order to invalidate consent is another. Concerning the latter, there are three possibilities worth considering. Seductive offers may invalidate consent by 1) undermining competence 2) undermining voluntariness or 3) violating the Obligation Condition. I will now argue that under each of these possibilities, only significant impairment can invalidate consent.

### *Impairment and Competence*

One necessary condition for valid consent is that one has to be sufficiently competent, or have sufficient decision-making capacity, to give consent. This is why young children, some of the mentally disabled, and those who are extremely drunk are considered unable to give valid consent. Though most authors assume that seductive offers invalidate consent because they undermine voluntariness, it is reasonable to think, as Janet Radcliffe Richards does, that seductive offers invalidate consent by undermining competence (Richards 2009). Like alcohol, inducements can impair judgment. And if alcohol can invalidate consent by diminishing decisional-capacity, then the same could be said for seductive offers. However, I will argue that mere impairments to judgment do not undermine competence to the point that valid consent cannot be given.

To begin, our decision-making process is never perfect. Any number of things can impair our judgment to some degree: how tired we are, our subconscious biases, our current mood, etc. Moreover, it is likely that some people are better at reasoning than others. But we still believe that one can be competent enough to consent in the presence of these impairments.

*Coffee:* Dale has a doctor's appointment early in the morning. He didn't have time to drink his morning cup of coffee, and so his mind is a little foggier than usual and this slightly impairs his judgment. The doctor asks to draw some blood and Dale consents.

Clearly Dale is competent enough to give his valid consent even though he missed his morning coffee. Being tired may impair his judgment, but the impairment is not significant enough to render him incompetent. Why is this impairment insignificant? Two plausible reasons come to mind. First, it seems unlikely that Dale's decision will be affected in the absence of caffeine. Second, it seems unlikely that Dale is going to make a decision that seriously contravenes his interests. It is not as if he is in a drunken stupor. His mind may be foggy, but he is still competent. And so, it can't be that any mere impairment in judgment causes one to be incompetent.

Now compare *Coffee* to the following.

*One Dollar:* Shelly is offered \$1000 to participate in a research trial. \$1000 is an attractive amount of money, and Shelly irrationally overestimates the value of the offer by 0.1%. In other words, she is responding to the offer as if it were \$1001 instead of \$1000. Based on this irrational belief, she consents to participate.

Like Dale, it seems implausible that this minor impairment renders Shelly too incompetent to give her valid consent. And it seems implausible for the same reasons. This minor impairment is extremely unlikely to affect the outcome of Shelly's decision. The difference between \$1000 and \$1001 dollars is insignificant, and it seems probable that she will make the same exact decision, whatever it is, that she would have made had she not been impaired. Second, it is unlikely that this minor impairment will cause Shelly to make a decision that seriously contravenes her interests. It is not as if Shelly is saying to herself, "for an extra dollar I'd be willing to do anything!", or that she is so dazzled by the prospect of getting an extra \$1 that her brain can't process the risks. She is still competent enough to give valid consent even though she is slightly impaired.

Objection: Even though it is unlikely, it is still possible that this impairment renders Shelly too incompetent to give her valid consent. Depending on the situation, the difference between \$1000 and \$1001 could be significant, and that extra \$1 could make all the difference. Or, perhaps Shelly is very

poor and \$1000 does dazzle her to the point that she completely ignores the risks. In these cases, it seems plausible that Shelly fails to meet the competence condition for valid consent.

Reply: Even though these scenarios are possible, they seem unlikely. And it would still be true that in general, such impairments would not render one too incompetent to give their valid consent. More importantly, it is still true that mere impairment does not invalidate consent. If the impairment becomes severe enough to change the outcome of one's decision or to cause one to make a decision that seriously contravenes their interests, then this impairment is significant by definition. And this objection would show only that impairment must be significant in order to invalidate consent. But if impairments are not severe enough to have such effects then they are mere impairments. And as shown by the cases above, mere impairment is not enough to diminish competence to the point that you cannot give your valid consent.

### *Impairment and Voluntariness*

Perhaps the problem with seductive offers is not one of competence but one of voluntariness. Like coercive offers, seductive offers are often assumed to invalidate consent because they undermine voluntariness (e.g. McGregor 2005). This is plausible if we think of the person making the offer as a seducer who is trying to manipulate or control you in a morally objectionable way. Impairing your judgment is simply a tool the seducer uses to control you, just as threatening you is a tool the coercer uses to control you.

In general, there is nothing morally objectionable about someone trying to get you to do something by offering something else in exchange. I may try to get someone to work for me by offering them money. I may try to get people to attend a meeting by offering to provide lunch. But in these cases I am trying to induce people to voluntarily accept my offers by giving them reason to do so. These can be referred to as cases of due inducement. Seductive offers, on the other hand, try to circumvent

rationality and induce people by impairing their reason, getting them to act against their better judgment. This undermines voluntariness. If I try to get you drunk because you won't agree to my offer while sober, then it seems plausible that your drunken consent would not be valid. And it is not just because of the effect of alcohol on your cognition. There seems to be something morally objectionable about me manipulating you in this way.

However, mere impairment in judgment is not sufficient to undermine voluntariness. To see this, consider the following case.

*Better Offer:* Denise is considering accepting an offer of \$500 to participate in a clinical research trial. There are some risks to participating, but after thinking it over Denise decides it is in her best interests to accept the offer. Denise's judgment is not impaired by the offer and participating is the right decision for her. If Denise consents to participation, her decision would be voluntary and her consent valid. However, before she has a chance to accept the offer, the researchers inform Denise that they misprinted the offer amount in their advertisement. They let her know that they are actually offering \$1500. Denise can hardly believe it. \$1500 advances her interests significantly more than \$500. She is so excited at the prospect of tripling her expected payment that she irrationally starts to overestimate the value of \$1500. She eagerly gives her consent to the researchers.

Denise's judgment is impaired by the \$1500 offer, and so this offer is seductive. However, the researchers are not manipulating Denise in a morally objectionable way. They are simply correcting their mistake and letting her know that she will be receiving \$1500 instead of \$500. The fact that the actual offer impairs her judgment is a nonissue because a) it does not cause Denise to do something that seriously contravenes her interests. Given that accepting \$500 is in Denise's interests, it is likely that accepting \$1500 is in her interests. And b) the impairment does not affect the outcome of Denise's decision. Again, given that without impairment Denise was ready to accept the \$500 offer, it is likely

that her unimpaired judgment would also be to accept the \$1500 offer. So, because Denise is not being manipulated in a morally objectionable way, we ought to consider her consent voluntary. Thus, mere impairment does not undermine voluntariness.

Objection: Just because accepting the \$1500 offer happens to be in Denise's interests, it does not follow that her decision to participate is voluntary. Certain kinds of manipulation can be morally objectionable even if you are being manipulated into doing something that is good for you.

*Throffer:* Lisa is sick but there is a medical procedure that can treat her. Undergoing this procedure is in Lisa's interests. The doctor threatens to harm Lisa unless she consents to the procedure. Lisa consents to the procedure.

The doctor's threat is morally objectionable and it coerces Lisa's consent. Thus, Lisa's consent to the procedure is not given voluntarily.

Reply: Although the doctor's behavior may seem coercive, and her threat morally objectionable, it is not clear that it actually undermines Lisa's voluntariness. Suppose that Lisa wants to have the medical procedure and was prepared to give her voluntary consent before the doctor threatened to harm her. The doctor was under the mistaken impression that Lisa was about to refuse. It seems plausible that although it is wrong for the doctor to threaten to harm Lisa, Lisa's consent is voluntary because she wants to get the procedure done independently of the doctor's threat. The doctor does not manipulate her into doing something that she is unwilling to do.

Now, you might think that all I have shown is that Lisa's consent *would have* been voluntary had there been no threat, not that her consent is in fact voluntarily. Consider the follow case. Oxfam steals twenty dollars from you. Had Oxfam had asked you for twenty dollars, you would have voluntarily given them your money. But, just because you would have done this voluntarily does not mean that you voluntarily let Oxfam steal your money. Likewise, Lisa's consent is not voluntary even though it would have been had the situation been different.

But there is a key difference between the Oxfam case and *Throffer*. In the Oxfam case, you do not token consent to them to take your money, they simply steal it. So of course you did not voluntarily consent to them stealing it, you never tokened consent to anything. To make the case analogous, Oxfam would have to propose something like “please give us twenty dollars or we will harm you”. If you were already planning on giving Oxfam \$20 irrespective of their threat, suppose you are in their office about to hand over your \$20, I find it plausible to say that they have not coerced you into donating. They may have attempted to coerce you, and it is wrong of them to do so, but their attempt at coercing has failed because you were already planning on doing what they wanted you to do.

Moreover, we can tweak the *Throffer* case to emphasize the voluntary nature of Lisa’s consent. Suppose that before Lisa even goes to the doctor, she knows that the doctor will threaten to harm her if she does not consent to the procedure. She doesn’t care because she wants this particular doctor to treat her. So, she goes to the doctor knowing that there will be a threat, the doctor makes the threat, and she consents to the treatment. Again, I don’t find it plausible to say that Lisa involuntarily gives her consent. Lisa is not being manipulated in a morally objectionable way because she is not being manipulated at all.

I should also note that Lisa’s consent being voluntary does not entail that her consent is valid. Her consent may still be invalid for other reasons. For example, you might think that there is something morally objectionable about the range of options allowed by the doctor, and that the doctor is obligated to alter Lisa’s choice situation. If so, then the Obligation Condition could be used to explain why Lisa’s consent is invalid even though her consent is given voluntarily. I am not arguing that this is the correct assessment. Rather, I am suggesting that if you strongly believe that Lisa’s consent is invalid, this does not necessarily commit you to the conclusion that Lisa’s consent is involuntary.

Regardless, even if you disagree and still believe that Lisa’s consent is involuntary, there is an important difference between *Throffer* and *Better Offer*. *Throffer* is not a typical case. The doctor’s



proposal is a mix of both an offer to perform the medical procedure and a threat to harm Lisa if she refuses. These mixed proposals have been coined as “throffers”. In *Throffer*, it is the threatening half of the doctor’s proposal that is morally objectionable. And it is only the threat, and not the offer, that could plausibly undermine Lisa’s voluntariness. However, *Better Offer* is not a case of a throffer. The researchers do not threaten to harm Denise if she does not consent. And so there is nothing morally objectionable about their offer that undermines Denise’s voluntariness.

### *Impairment and the Obligation Condition*

The conclusion of the last chapter argued that voluntariness is not necessary for valid consent. Instead, what is necessary for valid consent is expressed by the Obligation Condition.

*The Obligation Condition: Consent is valid only if the recipient of consent is not obligated to alter the choice situation of the person tokening consent.*

One might argue that mere impairment invalidates consent because it violates the Obligation Condition. When an offer impairs someone’s judgment, even to a minor degree, perhaps the recipient of consent is obligated to alter the choice situation by providing an option that does not impair the consenter’s judgment. However, I will argue that this is not plausible. Altering the choice situation will require the recipient to offer something better than the original offer, or offer something worse than the original offer. If the recipient is obligated to make a better offer, then the original offer is not an undue inducement because the Excessiveness Requirement will not be met. But, if the offer is worse than the original offer, then the recipient is not obligated to make it.

If the recipient is obligated to make a better offer, then the original offer that impairs judgment is not an undue inducement. Consider again the case of *One Dollar* in which Shelly is seduced into overestimating a \$1000 offer by \$1. If the researcher is obligated to make an offer that does not impair judgment, and a \$2000 offer meets this obligation, then \$2000 does not impair Shelly’s judgment. But,

as discussed earlier, one conceptual requirement of an undue inducement is that if an offer is an undue inducement, then a more attractive offer must also be an undue inducement (i.e. the Excessiveness Requirement). A \$2000 offer is more attractive than a \$1000 offer, but the assumption in the objection is that \$2000 will not impair judgment. So, the \$1000 offer cannot be an undue inducement.

On the other hand, one might argue that a less attractive offer must be made by the recipient of consent. Presumably this is because less attractive offers are less likely to impair judgment, and thus less likely to unduly induce. This view is consistent with the Excessiveness Requirement. But, the problem is that it is not plausible that the recipient of consent actually has this obligation. Consider again *Better Offer* in which Denise is prepared to give her valid consent to a \$500 offer which does not impair her judgment but is in her interests to accept. However, she is then given the option to accept a \$1500 offer which does impair her judgment. According to the current line of reasoning, the researchers are obligated to retract all offers, or to replace the \$1500 offer with the \$500 offer, etc.

However, there is no justification for such an obligation. The \$1500 offer may impair Denise's judgment, but it does not affect the decision she would have made had she not been impaired, and it does not make her worse off. In fact, the offer clearly makes her better off as she receives an extra \$1000. It is not plausible that mere impairment could generate such a moral obligation for the recipient of consent when there is no reason to think that the consentor is being harmed or her rights violated in any way. So, mere impairment is not enough to violate the Obligation Condition.

Objection: Claiming that there is no justification for an obligation to lower the offer begs the question. Suppose that offering in *Better Offer*, \$500 results in valid consent and offering \$1500 does not. It then makes sense to say that the firm should not offer \$1500. Their obligation is not generated by any harm that results from Denise accepting the \$1500 offer. Rather, they are obligated to lower their \$1500 offer because otherwise they would be doing the research without her valid consent, which would be wrong even though not harmful.

Reply: This objection misinterprets the Obligation Condition. The Obligation Condition itself specifies a necessary condition for valid consent. If Denise's consent to the \$1500 offer is truly invalid, then there has been some failure to meet one of the necessary conditions of valid consent. It may be a failure to meet the Obligation Condition, but the reason for this failure cannot be that Denise's consent to the \$1500 offer would be invalid. This begs the question. The obligation in the Obligation Condition must arise from the nature of the choice situation, not from the quality of consent. For example, if you have a right to both your money and your life, then the mugger's threat, "your money or your life", restricts an option that you have a right to. The Obligation Condition is not met because the mugger is obligated to make this restricted option available to you. So, your consent to the mugger to take your money is invalid. In contrast, the researchers in *Better Offer* do not propose to restrict an option that Denise has a right to. And there does not appear to be any other reason that could justify an obligation for the researchers to lower their offer.

Objection: Mere impairment in judgment is sufficient to generate an obligation for the recipient of consent to make a less attractive offer that does not impair. To see this, consider the following variation of *Better Offer*.

*Wine Offer*: Instead of increasing their offer from \$500 to \$1500, the researchers get Denise drunk on very expensive and delicious wine and then get her to accept the \$500 offer. Denise loves wine and she loves getting drunk, so getting to drink all that expensive wine is a big additional benefit to her. Denise drunkenly consents to participate in the research trial.

Adding the wine to the \$500 offer doesn't harm Denise, it benefits her. Nor does getting her drunk affect her decision to accept, she was prepared to accept the \$500 offer without the wine. So, Denise is only merely impaired when she consents in *Wine Offer*. Despite this, it seems that her consent is invalid. The researchers are obligated to make the lesser offer of \$500 without getting her drunk on the wine first. *Wine Offer* is analogous to *Better Offer*. Instead of wine impairing Denise's judgment, we have an

additional \$1000 impairing Denise's judgment. If the researchers are obligated to make the \$500 without the wine, then they are also obligated to make the \$500 offer without the additional \$1000.

Reply: *Wine Offer* is not analogous to *Better Offer*. The key difference is the relationship between the offer and the impairment. In *Wine Offer*, Denise is not impaired by the offer- she is impaired by the consumption of alcohol. To see this, consider two possible interpretations of what is being offered. Under the first interpretation, prior to getting Denise drunk, the researchers offer the entire package of an evening of drinking expensive, delicious wine in addition to \$500. Denise may or may not be impaired when she consents to this offer (the total package of wine and money), but regardless, it is her consent to this entire offer that we should be evaluating. The fact that she may drunkenly reiterate her consent after she has already accepted the offer is irrelevant. So, if this is how we ought to interpret the offer, *Wine Offer* doesn't show that Denise's consent in *Better Offer* is invalid.

Under the second interpretation, the researchers are offering \$500 after they have gotten her drunk. An evening of drinking expensive, delicious wine is not part of the offer. Moreover, the offer does not impair Denise's judgment, the alcohol does. This is not analogous to *Better Offer*. In *Better Offer*, the impairment is caused by the offer. The researchers do not impair Denise's judgment and then make a \$1500 offer to her in this impaired state. They offer her \$1500 and then her judgment becomes impaired. What is unique about undue inducement is that the offer itself causes the impairment. You cannot make the offer without bringing about the impairment. Or, at the very least, is not obvious if this could be done easily or done at all.

This difference is morally relevant for the following three reasons. First, getting Denise drunk on wine is not being used to give Denise reason to participate. Getting her drunk is used to circumvent her reason. If not, then the researchers can simply wait until she is sober to ask for her consent. Offering Denise \$1500 instead of \$500 on the other hand is being used to rationally motivate Denise to participate. The former kind of manipulation seems morally objectionable while the latter does not. Yes,

the \$1500 offer also happens to impair her judgment, and this is not ideal. But, trying to wrongfully manipulate someone is still different than trying to appeal to one's reason.

Second, different options are available to the researchers in the two cases. As pointed out earlier, the researchers in *Wine Offer* can wait until Denise is sober before offering her the \$500. However, the researchers in *Better Offer* cannot do this. Even if the researchers wait between making the offer and eliciting consent, presumably the offer would still have the same judgment impairing effect for some people. The fact that the researchers in *Wine Offer* have the option to receive consent from Denise while she is unimpaired partly explains why they may be obligated to alter her choice situation. But this option is not available to the researchers *Better Offer*, and so *Wine Offer* does not show that the researchers also have this obligation in *Better Offer*.

Third, the additional benefit of the \$1000 in *Better Offer* can only be consented to while in an impaired state, not so for the additional benefit of wine in *Wine Offer*. In order to make the cases analogous, we would have to stipulate that in *Wine Offer* there is some benefit to participating in research that Denise she can get only if she consents while drunk. And this cannot be a benefit conditionally imposed by the researchers (e.g. "consent while drunk and we'll give you an extra \$1000") for they do not impose this constraint in *Better Offer*. It is hard to imagine how this would work, but I have to say that if it truly were the case that there was some benefit to participation that Denise could only get if she consents while drunk, then we ought to rethink whether her consent is truly invalid. Of course, other factors would be relevant as well. For example, Denise may be so drunk that she does not meet the competence condition for valid consent. In any case, if the impairment from alcohol is on a par with the mere impairment from the \$1500 offer, then it is not at all clear that Denise's consent would be invalid in this situation.

### *Significant Impairment and the Excessiveness Requirement*

As we have seen, mere impairments do not invalidate consent. They do not undermine competence, they do not undermine voluntariness, and they do not violate the Obligation Condition. When impairments are so minor that they neither affect the outcome of the consenters' decision nor cause the consenters to make a decision that contravenes their interests, they do not invalidate consent. Because of this, one may want to define seductive offers such that an offer must significantly impair judgment in order to be an undue inducement.

However, many offers that significantly impair judgment are unlikely to actually be undue inducements under this definition. This is because this definition is in tension with the Excessiveness Requirement. I will argue that as we increase the attractiveness of an offer, the offer is less likely to significantly impair judgment. And if significantly impairing judgment is a necessary condition of an undue inducement, then it follows that increasingly attractive offers will not unduly induce. Such offers cannot be undue inducements according to the Excessiveness Requirement.

My argument rests on two plausible assumptions. First, as you increase the attractiveness of an offer, the more likely that your unimpaired judgment would be to accept the offer. Second, as you increase the attractiveness of an offer, the more likely that accepting the offer would be in your interests. In other words, as you increase the attractiveness of the offer, the more likely it is that accepting the offer is the right decision and so the less likely your judgment will be significantly impaired. To see this, let's begin with this case.

*Growing Offer:* A pharmaceutical company is offering \$100 to participate in their clinical research trial. Participation increases the risk of kidney stones and hair loss. The \$100 offer significantly impairs Lin's judgment and she accepts it against her better judgment.

Now suppose we could increase the size of the pharmaceutical company's offer to \$1,000. It is likely that Lin will accept the \$1,000 offer given that she accepts the \$100 offer. But, the risks of participating in

the trial stay exactly the same. So, accepting \$1,000 is better with regards to Lin's interests than accepting the \$100 offer. However, even \$1,000 may not be enough to make participation the right decision for Lin. Then suppose that we increase the offer to \$10,000 or to \$100,000. As the attractiveness of the offer goes up, it seems more and more likely that we will reach some point at which accepting the offer will be in Lin's interests. And because of this, it also seems more likely that Lin's unimpaired judgment would be to accept the offer.

Suppose this turning point is at \$10,000. If \$100 was enough to unduly induce Lin, then \$10,000 ought to unduly induce Lin according to the Excessive Requirement: if x is an undue inducement, then any offer that is more attractive than x is also an undue inducement. But, if \$10,000 is an undue inducement, then by the current definition of undue inducement, Lin must be significantly impaired by the offer. Being significantly impaired means that the impairment causes Lin to make the wrong decision. But we just stipulated that \$10,000 is the point where accepting the offer becomes the right decision. And so, the pharmaceutical company's \$100 offer cannot be an undue inducement. It may be morally problematic because it impairs judgment, but it is not morally problematic because it is excessive- which is a defining characteristic of an undue inducement.

In general, the problem with the current definition of undue inducement is the following. The Excessiveness Requirement tells us that part of what it is to be an undue inducement is that the inducement is excessive. The more attractive you make the inducement, the more excessive it is. However, the current definition of undue inducement also requires that an undue inducement significantly impairs one's judgment, which means that the impairment causes you to make the wrong decision in accepting the offer. But, by making the offer more attractive, the more likely it is that accepting it will be the right decision, and thus the less likely it will be an undue inducement. So, any offer for which there is a more attractive offer that does not significantly impair your judgment cannot

be an undue inducement. Most offers would seem to have this property because making an offer increasingly attractive will be increasingly better for your interests.

Alternatively, tension with the Excessiveness Requirement may indicate that we ought to reject the Excessiveness Requirement. But I don't think complete abandonment of the Excessive Requirement is a good idea. As seen, there is deep and varied disagreement over what undue inducement is, but the one thing that everybody seems to agree on is that undue inducements are excessive in some sense. So, modification of the Excessiveness Requirement may be warranted, but abandonment is not. Although I think that the Excessiveness Requirement, as is, captures the most plausible notion of excessiveness for undue inducement, modifications are worth considering. Discussion of these modifications will take place in the next chapter as they are particularly relevant when considering multiple consenters.

#### **4.4: Summary**

There are various ways to define undue inducement, but one necessary condition is that an inducement is undue only if it is excessive (i.e. the Excessiveness Requirement). How you define undue inducement beyond that will determine whether it is true that undue inducement invalidates consent. For most accounts that define an undue inducement as a coercive offer, undue inducement does not invalidate consent. The "coercive" property of the offer is simply not sufficient to undermine voluntariness or it does not generate an obligation for the recipient to alter the choice situation. The one account of coercive offers that avoids this result runs into problems with the Excessiveness Requirement. Accounts that define an undue inducement as a seductive offer run into the same problems. Under definitions that allow offers that merely impair judgment to be undue inducements, undue inducement does not invalidate consent. On the other hand, restrictive definitions that admit only offers that significantly impair judgment will run into problems with the Excessiveness Requirement.



## Chapter 5

### Undue Inducement in Medical Research

In the area of medical research, people worry that offering large monetary payments to participate in research will unduly induce potential subjects into participating. Naturally, people feel that to avoid undue inducement we should keep incentives to participate on the smaller side. Let's call this approach to preventing undue inducement "the standard solution". In this chapter, I argue that the standard solution is seriously mistaken.

In section 5.1, I will discuss the problem of undue inducement and the standard solution in more detail. I will argue that there is only one conception of undue inducement under which the standard solution is defensible. This definition identifies undue inducements as those offers that seduce people against their better judgment. In the previous chapter I argued that this definition is problematic. However, we will see that for the purpose of defending the standard solution, these problems can be avoided.

In section 5.2, I will argue that the standard solution rests on a questionable assumption. The assumption is that more attractive inducement will unduly induce more people. There are two ways to interpret "more people". Under one interpretation, the assumption is plausible but undue inducement is not problematic. Under the other interpretation, the assumption is no longer plausible. So, the standard solution is not justified either way.

In section 5.3, I will argue that we ought to abandon the standard solution. Therapeutic incentives are analogous to financial incentives in that both can unduly induce participants. However, the standard solution leads to an absurd result in the case of therapeutic inducements. So, we ought to reject the standard solution in the case of monetary inducements as well.

### **5.1: Undue Inducement - The Problem and the Standard Solution**

#### *The Standard Solution*

As we saw in the previous chapter, there are many definitions of undue inducement. Regardless of which account people prefer, it seems that the solution is always the same. Keep the size of offers small to prevent undue inducement. The CIOMS (Council for International Organizations of Medical Sciences) guidelines state that “payments in money or in kind to research subjects should not be so large as to persuade them to take undue risks or volunteer against their better judgment” (CIOMS 2002, p.46). The Institutional Review Board (IRB) guidebook states that “the IRB should review both the amount of payment and the proposed method of disbursement to assure that neither entails problems of coercion or undue influence. Such problems might occur, for example, if the entire payment were to be contingent upon completion of the study or if the payment were unusually large” (IRB Guidebook, Chapter 4, Section I). This response to undue inducement, keeping offers small, is what I call the “standard solution”. The standard solution is not workable if we define undue inducements as coercive offers.

#### *The Standard Solution and Coercive Offers*

For most accounts of undue inducements as coercive offers, the standard solution is inappropriate because there is no problem to be solved. Undue inducements are often thought to be coercive, or coercive-like, because 1) an individual finds herself in an unacceptable situation if she

rejects the offer, 2) the offer is significantly more attractive relative to the individual's other options, 3) the offer takes advantage of an individual's vulnerability, or 4) the offer is so good that it "closes off" the option of rejecting it. However, as we saw in the previous chapter, none of these conditions are sufficient for invalidating consent. And so, any attempt to prevent such offers is unwarranted.

But there is one account of undue inducements as coercive offers that may warrant a solution. According to this account, offers are coercive, or coercive-like, if both the option of accepting the offer and the option of rejecting it are bad options. But, even if this is a problem that ought to be addressed, the standard solution would only worsen the problem, not alleviate it. For example, suppose that offering \$500 to participate in research is an undue inducement because accepting is a bad option, but rejecting it is also a bad option. The standard solution says that we should offer less money, let's say \$250, in order to prevent undue inducement. But, by offering \$250, we make the option of accepting the offer worse. \$500 is a better option than \$250. So, the standard solution does not solve the problem of undue inducement if we define it in this way.

### *The Standard Solution and Seductive Offers*

Defining undue inducements as seductive offers provides a more promising defense of the standard solution. Seductive offers invalidate consent when they impair judgment to the degree that the consentor makes the wrong decision in accepting the offer. Let's refer to impairment of this degree as "significant impairment". A decision's being wrong in this context can be understood as a decision that is prudentially bad for the consentor or a decision the consentor would not have made had she been unimpaired. In the previous chapter I argued that such seductive offers are unlikely to be undue inducements because they are in tension with the Excessiveness Requirement.

*The Excessiveness Requirement:*                    *if X is an undue inducement, then any offer that is more attractive than X is also an undue inducement.*

As you increase the size/attractiveness of the offer, the more likely it is that accepting the offer is not the wrong decision, and so it is unlikely that such offers are undue inducements. It seems to follow then that the standard solution is misguided since offers to participate in research are unlikely to be undue inducements to begin with.

However, this is too quick. One may argue that that the Excessiveness Requirement is too restrictive and that there are more charitable interpretations of undue inducement. These interpretations require only small changes to the Excessiveness Requirement and paint a more plausible picture of undue inducement.

The first charitable interpretation defines excessiveness in terms of judgment impairment, and not in terms of “undueness”.

*Excessiveness Requirement\*:*                    *if X impairs judgment, then any offer that is more attractive than X also impairs judgment.*

According to Excessiveness Requirement\*, it does not matter whether a more attractive offer results in a mere impairment or a significant impairment. Undue inducements are excessive in virtue of impairing judgment at all. This does not entail that any impairment in judgment is sufficient for undue inducement. We can still stipulate that it in addition to meeting Excessiveness Requirement\*, undue inducements must also significantly impair judgment. Doing so allows one to preserve the notion of excessiveness while maintaining that undue inducement is sufficient to invalidate consent. The upshot is that undue inducement will only take place within a range of values with an upper limit.

For example, suppose that a \$500 offer significantly impairs Tina’s judgment and Tina consents to the offer. If a \$500 offer impairs Tina’s judgment, then it is plausible that a \$1000 offer will also impair Tina’s judgment. But suppose that it is in Tina’s interests to accept \$1000 and that she would have accepted \$1000 had she been unimpaired. Thus, Tina’s judgment is only merely impaired by the \$1000 offer. Regardless, this more attractive offer impairs Tina’s judgment, so Excessiveness

Requirement\* is met. Furthermore, because Tina’s judgment is significantly impaired by the \$500 offer, it is an undue inducement. The \$1000 offer on the other hand is not an undue inducement. So, no offers above \$1000 are likely to be undue inducements, but there appears to be a range of offers below \$1000 that are undue inducements.

The second charitable interpretation rejects the monotonicity of The Excessiveness Requirement and modifies it by specifying that an undue inducement need only be excessive for a range of values.

*Excessiveness Requirement\*\*:* *there is some range of values such that if X is an undue inducement and within this range, then any offer that is more attractive than X and within this range, is also an undue inducement .*

To see the effect of Excessiveness Requirement\*\*, consider the following. Suppose that Tina will not accept any offer less than \$500 to participate in research. At \$500 she will accept, but only because the offer significantly impairs her judgment. At \$4000, she will also accept because her judgment is significantly impaired. However, at \$10,000 the offer no longer significantly impairs her judgment. It’s plausible that Tina’s judgment will be significantly impaired for any offer within the \$500 to \$10,000 range. So, within the range of \$500 to \$10,000, inducements significantly impair judgment and some notion of excessiveness is met. Thus, the inducements in this range are undue inducements.

For our purposes, both interpretations amount to the same thing: there is some range of offers that will seduce consenters against their better judgment and this is morally problematic because their consent will be invalid. It is important to note that changing The Excessiveness Requirement does not change what is necessary for undue inducement to invalidate consent. As the previous chapter showed, seductive offers invalidate consent only when the offer causes a significant impairment. This is true independently of how one interprets The Excessiveness Requirement. The Excessiveness Requirement may dictate whether such offers are rightly called “undue inducements”, but it does not change what is

necessary for valid consent. So, moving forward, “undue inducement” will be used to identify any offer that a) induces a person to consent against her better judgment (i.e. the impairment is significant) and b) meets some charitable interpretation of The Excessiveness Requirement. Defining undue inducement in this way prevents the standard solution from being easily dismissed.

Defense of the standard solution is further strengthened when considering the problem of undue inducement in the context of multiple consenters. Until now, we have focused on the relationship between inducements and consent in the context of a single consenter. But the standard solution is not designed to prevent a single consenter from being unduly induced. As Ruth Macklin notes, the concern seems to be that “the greater the monetary payment, the more potential subjects are unduly influenced to participate” (Macklin 1989, p.1).

For example, suppose that offering \$100 to participate in research impairs Tina’s judgment. This impairment causes her to make the wrong decision in accepting the offer and thus her consent is invalid. Perhaps undue inducement could be avoided if we made the offer more attractive to the point where accepting it would no longer be the wrong decision for Tina- let’s say \$500. However, a \$500 will also recruit more participants. Suppose that Gene and Louise would be seduced to accept a \$500 offer against their better judgment. The larger offer would result in more people being unduly induced into making the wrong decision, and so, better to keep offers smaller.

Objection: Ezekiel Emanuel argues that there is no problem of undue inducement in medical research (Emanuel 2005). His argument relies on a particular definition of undue inducement. According to Emanuel, it is not sufficient for undue inducement that the offer significantly impairs the consenter’s judgment. Impaired judgment must lead “to excessively risky, imprudently risky behavior that a reasonable person would not otherwise do” (Emanuel 2005, p.10). Review boards do not approve medical research that is excessively risky, and so Emanuel concludes that there is no problem of undue inducement in medical research.

Reply: There are several problems with Emanuel's view. First, consider Emanuel's argument that excessive risk is necessary for undue inducement. According to Emanuel, typical instances of swimming, driving a car, working in a mine, and many other activities are all reasonably risky, but they are not excessively risky. Offering money to participate in these reasonably risky activities is not morally problematic, and so such offers cannot be undue inducements. Thus, Emmanuel concludes that excessive risk is a necessary condition for undue inducement. However, this argument is invalid. Suppose we agree that swimming is not excessively risky, and we also agree that offering Michael \$100 to go swimming is not morally problematic. It does not follow that excessive risk is necessary for undue inducement. It is possible that the offer is not an undue inducement because Michael's judgment is not significantly impaired by the offer.

Second, Emanuel's appeal to risks that a "reasonable person" would take undermines his argument. Again, let's take a look at Emanuel's examples. Going swimming may be reasonably risky for some, but not to those who do not know how to swim. Similarly, it is not clear in what sense "working in a mine" is reasonably risky. If it is the only job available to me, then perhaps. But if I have much better employment opportunities, then working in a mine seems unreasonably risky. That being said, it seems implausible that what may be reasonably risky for one person could then determine whether someone else is unduly induced. For example, suppose that participating in a research trial is reasonably risky for me, but unreasonably risky for you. Nonetheless, a \$500 offer to participate has significantly impaired your judgment and you accept. According to Emanuel's account, it seems that your consent is valid in virtue of the risk being reasonable to me. This is not plausible.

But perhaps my interpretation of Emanuel here is uncharitable. Perhaps the idea is not that swimming is reasonably risky for everyone in virtue of being reasonably risky for some. Rather, whether a risk is reasonable or not for a given individual is determined by what a reasonable person would do in their position. So, a reasonable person in the position of someone who knows how to swim would judge

swimming to be a reasonable risk, while a reasonable person in the shoes of someone who does not know how to swim would judge swimming to be an unreasonable risk. This interpretation of Emanuel’s “reasonable person” standard for excessive risk might seem more charitable, but this interpretation render’s his argument invalid. As Schonfeld et al. argue, review boards could not prevent undue inducement by banning excessively risky research based on this standard (Schnofeld et al. 2005). Review boards approve of research before anyone is actually recruited. So, the review board could not make a determination of whether the risks of the research are reasonable for the actual participants. At best, they could conclude that most people would find the risks of a particular research trial to be reasonable. But this cannot prevent undue inducement in the way that Emanuel claims. And so, undue inducement is still a live concern.

## 5.2: Undermining the Standard Solution

The standard solution rests on the assumption that larger offers will unduly induce more people than smaller offers. However, the plausibility of this assumption turns on how we interpret “more” people. It might mean that the *absolute* number of people being unduly induced increases with a larger offer. By “absolute number of people”, I mean the total number of people being unduly induced irrespective of the total number of people participating. Or, unduly inducing “more” potential subjects might mean that the *relative* number of people being unduly induced increases with a larger offer. By “relative number of people” I mean the percentage of people being unduly induced (i.e. the number of people being unduly induced relative to the total number of people being induced). To see the difference, consider the three research trials in the following table.

	# unduly induced participants	Total # of participants	% of participants who are unduly induced
Trial A	5	50	10%
Trial B	15	150	10%
Trial C	15	300	5%

Table 1: Number of Unduly Induced Participants



If we compare Trial A to Trial B, we can see that Trial B unduly induces 10 more people than Trial A. So, as far as the absolute number of people is concerned, Trial B unduly induces more people. However, both Trial A and Trial B unduly induce the same relative number of people. They both unduly induce 10% of their participants. Now compare Trial A to Trial C. Trial C, like Trial B, also unduly induces 10 more people than Trial A. So, Trial C also unduly induces more people in the absolute sense than Trial A. But, Trial C unduly induces less people in the relative sense. Trial C unduly induces only 5% of its participants whereas Trial A unduly induces 10% of its participants.

If the worry with larger offers to participate in research is about the absolute number of people being unduly induced, then Trial B and C are equivalent, but both are worse than Trial A. On the other hand, if the worry is about the relative number of people being unduly induced, then Trial A and Trial B are equivalent, but both are worse than Trial C.<sup>14</sup>

As stated earlier, the standard solution rests on the assumption that larger offers unduly induce more people than smaller offers. If we interpret “more” in an absolute sense, then this assumption is plausible. As we increase the size of offers, more people will be attracted to participate. Some of these participants will be unduly induced, and so the absolute number of unduly induced participants will increase. However, in section 5.2.1 I will argue that we should not worry about whether the absolute number of unduly induced participants goes up as we increase the size of offers. Rather, we should worry only about whether the relative number of unduly induced participants goes up as we increase the size of offers. So, we should dismiss the standard solution if it is justified by this interpretation of its underlying assumption.

---

<sup>14</sup> The usage of “absolute” and “relative” may be confusing here because these terms are also used to describe the absolute and relative differences of percentages themselves. For example, the absolute difference between 10% and 10% is zero. I do not intend to use “absolute” and “relative” to refer to the difference in percentages. I use “absolute” and “relative” to refer directly to the number, or magnitude, of people being unduly induced.

On the other hand, if we interpret “more” in a relative sense, then the assumption that larger offers unduly induce more people than smaller offers is no longer plausible. I will argue in section 5.2.2 that we have good reason to doubt that larger offers increase the relative number of unduly induced participants.

### **5.2.1: Absolute Number of Unduly Induced Participants**

In this section I will begin by arguing that undue inducement cannot be eliminated by keeping offers small. In other words, the standard solution must allow for some people to be unduly induced into participating in medical research. Given that the standard solution must be willing to allow some number of people to be unduly induced, I will then argue that we should be concerned only with the relative number of people being unduly induced.

Even if we keep offers small, some people are still likely to be unduly induced. For some people, a smaller offer will still be quite attractive. If someone is poor and in desperate need of money, then offering a small amount of money to participate in medical research may be an attractive option. If they overestimate the benefit of the offer and agree to participate against their better judgment, then they are unduly induced. Indeed, several authors believe that undue inducement is most likely for those in economically vulnerable situations (e.g. Beauchamp 2002, Lemmens and Elliot 1999). I do not argue that all who are economically vulnerable will be unduly induced by small offers. For some, accepting a small offer to participate in medical research may be the right decision. The point is that as you decrease the size of an offer, you are merely targeting a smaller population of people who will find that offer attractive. And these people are still at risk of undue inducement.

Because of this, one may think that we should take the standard solution to the extreme and eliminate all offers to participate in research. No money would be offered and so there would be no risk of undue inducement. But this is not so. There are some incentives to participate in medical research

that simply cannot be eliminated. If no additional benefits are being offered to participate in medical research, then presumably we are targeting those who will be motivated to participate for altruistic reasons. But altruism itself is an incentive to participate. And there is no reason to think that people will not overestimate the altruistic value of their participation and be seduced into making the wrong decision. For example, suppose Gene believes that participating in medical research will help millions of people when in fact it is only like to help thousands of people. If his judgment wasn't impaired by the prospect of helping others, then he would not be induced to participate. So, Gene is unduly induced. Moreover, altruism is not the only incentive that cannot be eliminated. People may be incentivized to participate in medical research for therapeutic benefits, and therapeutic incentives may also unduly induce (undue therapeutic inducements will be discussed in detail in section 5.2 of this chapter).

Objection: Undue inducement in medical research is a serious concern. If it can't be eliminated by keeping offers small, then we shouldn't conduct any medical research at all.

Reply: This view is absurd. Undue inducements are morally problematic because they invalidate consent. But in non-research medical contexts, it is also possible for consent to be invalid. There is no way to eliminate the possibility of a patient giving invalid consent to medical treatment. But we do not conclude that we ought to put a ban on providing healthcare because of this risk. We may do the best we can to minimize the possibility of invalid consent, but presumably the benefits of providing healthcare outweigh the risk of some instances of invalid consent. Likewise, it would be rash to conclude that we ought to ban medical research because of the risk of undue inducement. Perhaps we should do what we can to minimize the possibility of undue inducement. But if the benefits of medical treatment itself outweigh the risk of invalid consent, then it's likely that the benefits of some medical research outweigh the risk of undue inducement.

So, we must be willing to accept some non-zero level of undue inducement in order to carry out medical research. I will now argue that given this, we should be concerned only with whether more attractive offers increase the relative number of people being unduly induced.

Suppose that Trial A offers \$100 to participate, 50 people are induced into participating, and 5 of those 50 people are unduly induced. Let's suppose that Trial A is permissible and we are willing to allow 5 people to be unduly induced. Trial B offers \$500 to participate, 150 people are induced into participating, and 15 of those 150 people are unduly induced. If Trial A is permissible, then Trial B is permissible. To see this, suppose we split up Trial B into three separate sub-trials: Trial B1, Trial B2, and Trial B3. We put one-third of the people from Trial B into Trial B1, one-third into Trial B2, and one-third into Trial B3. So, each of these sub-trials has 50 participants, and each has 5 participants that are unduly induced. Each of the three sub-trials is identical to Trial A in terms of the number of people participating, and the number of people being unduly induced. If Trial A is permissible, then Trial B1 is permissible because it is identical to Trial A. Using the same reasoning, Trial B2 and Trial B3 are both permissible. Splitting up Trial B into three separate sub-trials is morally inert. There is nothing morally questionable about splitting up a trial into three separate sub-trials. So, if Trial B1, Trial B2, and Trial B3 are each individually permissible, then Trial B is permissible.

Here is another way to look at this argument. Medical research is not a singular event. There are many clinical research trials that take place over time. So, after Trial A is over and done with, there will be another clinical research trial, Trial Z. Suppose Trial Z offers \$10 to test a new drug. Trial Z induces 1000 people to participate, and only 1 of those people is unduly induced. If we only care about the absolute number of people being unduly induced, then Trial Z may be impermissible. If one is concerned with absolute numbers of undue inducement, then it is irrelevant that Trial Z is a different research trial than Trial A. However, it is implausible to think that Trial Z is impermissible because Trial A caused us to hit an absolute limit of people that we can permissibly unduly induce. If we are willing to allow 5 people

to be unduly induced for the sake of 50 being duly induced for one clinical trial, we should be willing to allow this for every clinical trial. So, we should only care about whether the *relative* number of people being unduly induced goes up as we increase the size of the offer.

Objection: The flaw in this reasoning is that as you increase the size of an offer, the absolute number of participants who are unduly induced increases. But you do not thereby increase the benefits gained by the research. For example, consider Trial A from above. Trial A offers \$100 for participation, 50 people are induced into participating, and 5 of those 50 people are unduly induced. Suppose that Trial A provides 30 units of benefit to society. Trial A is permissible and we are willing to allow 5 people to be unduly induced in order to get 30 units of benefit. If we increase the offer to \$500, 150 people will be induced into participating, and 15 of those 150 people will be unduly induced. However, increasing the size of the offer does not thereby increase how much Trial A benefits society. 30 units of benefit may be enough to outweigh the harm of 5 people being unduly induced, but it may not be enough to outweigh the harm of 15 people being unduly induced. So, we should also be concerned with the absolute number of people being unduly induced.

Reply: This is not quite right. There will be some correlation between the number of participants and the benefit of the research. In order for research to be useful, you must recruit enough participants to have a sufficient sample size. As your sample size increases, the more confident you can be in the results of your study. As an extreme, consider if Trial A only recruited one subject. Trial A would likely be worthless and provide no benefit to society. As you increase the number of recruits, the better the results of the research, and the more benefit we get for society. Now, there is no reason to think the benefits of research increase indefinitely as the number of participants grows. But this is not a problem. If 50 participants is a large enough sample size to gain 30 units of benefit, then you can simply cap the number of participants in the study to 50, even if you attract more than 50 people. For example, if you offer \$500 to participate in Trial A, you will attract 150 participants, 15 of which will be unduly induced.

But, if you randomly select 50 of those 150 participants, then we will expect only 5 participants to be unduly induced. So, the \$500 offer with the participation cap results in the same absolute number of unduly induced participants as the \$100 offer. And so, there is no need to be concerned with whether larger offers increase the absolute number of participants who are unduly induced.

It's extremely likely that increasing the attractiveness of an offer will increase the absolute number of people being unduly induced. But as we have seen, this is not morally problematic. So, we ought to abandon the standard solution if this is the assumption that is supposed to justify it.

### **5.2.2: Relative Number of Unduly Induced Participants**

On the other hand, if larger offers increase the relative number of unduly induced participants, then we have problem. But, there are two reasons to doubt that this is the case. First, I will argue that increasing the attractiveness of offers will also *duly* induce new participants. If more people are duly induced into participating, then this counteracts the growth of the relative number of people being unduly induced. Second, I will argue that as offers become more attractive, people who were originally unduly induced by smaller offers will become duly induced by larger offers. This also counteracts the growth of the relative number of people being unduly induced.

#### *Duly Inducing New Participants*

Due inducements are offers that do not cause potential research subjects to irrationally discount the risk of participating in the trial. Here is an example of a due inducement outside of the clinical research context. Suppose that you are trying to sell your car. To you, the car is worth \$500 and you will not accept any offer lower than that. I am looking to buy a car and offer you \$300. You rationally decline my offer. I raise my offer to \$600 dollars and you rationally accept. I induced you to sell your car by

increasing my offer. Because my offer did not cause you to exercise poor judgment, you were duly induced by my offer.

There is no reason to believe that people behave differently in the medical research context. For example, suppose that for Lisa, it is irrational to accept the risk of participating in some clinical trial for \$50, but rational to accept this risk for \$100. If we offer her \$50 to participate, Lisa will rationally decline the offer. If we increase our offer to \$100, Lisa will rationally accept the offer. It is certainly possible that Lisa will be unduly induced by our larger offer. But there is no reason to believe that all participants that are induced by a larger offer have been unduly induced. Increasing the size of the offer will result in some participants rationally accepting it.

Empirical evidence about undue inducement supports this claim. In a study conducted by Bentley and Thacker, pharmacy students were asked to respond to a questionnaire about one of nine hypothetical research trials (Bentley and Thacker 2007). The hypothetical research trials varied by three different levels of risk and three different levels of monetary payments. The results of the study showed that students were increasingly willing to participate in the hypothetical trial as payment levels increased. However, increasing levels of monetary payment did not affect students' assessments of the risks. In other words, increasing the offer duly induced more people into participating without unduly inducing more people into participating. The same conclusion was reached in similar studies conducted by Halpern et al. and Dunn et al. (Halpern et al. 2004, Dunn et al. 2008).

So, as we make offers larger, more people will be duly induced into participating. Even if we assume that there will be some additional people that are unduly induced by larger offers, there will also be additional people that are duly induced by larger offers. This is just one factor that counteracts the relative growth of unduly induced participants as offers become more attractive.

To help visualize this effect, consider the following analogy. Suppose we have two balloons. The volume of one balloon represents the number of unduly induced participants in some clinical trial. Let's

call this balloon “Balloon U”. The volume of the other balloon represents the number of duly induced participants in the same trial. Let’s call this balloon “Balloon D”. As we increase the size of the offer, the number of participants will increase. So, increasing the size of the offer is like blowing air into the balloons. Some of the air will go into Balloon U, increasing its volume. But this alone is not problematic, for this represents only an increase in the absolute number of people being unduly induced. The worry should be whether Balloon U is growing bigger relative to Balloon D. But, some of the air will also go into Balloon D as we increase the size of the offer. So, an increase in the number of new participants who are duly induced counteracts the relative growth of Balloon U.

#### *Duly Inducing Original Participants*

As offers increase in attractiveness, some participants who were originally unduly induced will become duly induced, and this also counteracts the relative growth of unduly induced participants. As argued in the previous chapter, as the attractiveness of the offer grows, the less likely you are to be significantly impaired by the offer, and thus the less likely you are to be unduly induced. To review, consider this case.

*Growing Offer:* A pharmaceutical company is offering \$100 to participate in their clinical research trial. Participation increases the risk of kidney stones and hair loss. The \$100 offer significantly impairs Lin’s judgment and she accepts it against her better judgment.

Now suppose we could increase the size of the pharmaceutical company’s offer to \$1,000. It is likely that Lin will accept the \$1,000 offer given that she accepts the \$100 offer. But, the risks of participating in the trial stay exactly the same. So, accepting \$1,000 is better with regards to Lin’s interests than accepting the \$100 offer. As the attractiveness of the offer goes up, it becomes more and more likely that we will reach a point at which accepting the offer will be in Lin’s interests. And because of this, it also becomes more likely that Lin’s unimpaired judgment would be to accept the offer. If Lin’s judgment



is no longer significantly impaired by an offer, she is no longer unduly induced even though she may have been unduly induced by a lesser offer. So, as we increase the size of the offer, some participants will stop being unduly induced and become duly induced into participating. Again, even if we assume that more attractive offers unduly induce new participants, the relative growth of this group will be counteracted by people switching from being unduly induced by less attractive to being duly induced by more attractive offers. And note that the effect here is two-fold. When a person moves from being unduly induced to being duly induced, this decreases the absolute number of unduly induced participants while simultaneously increasing the absolute number of duly induced participants. The following analogy illustrates this two-fold effect. Suppose you have 5 apples and I have 9 apples. I have 4 more apples than you. You give me one of your apples. I gain 1 more apple compared to what I had before, but you also lost an apple. So, I actually gain 2 more apples relative to you- I used to have 4 more apples than you but now I have 6 more apples than you.

We can visualize this effect using our balloon analogy. Recall that both balloons are growing as we increase the size of the offer. We have an increase in the absolute number of unduly induced participants, but we also have an increase in the absolute number of duly induced participants. Now, let's add the two-fold effect of duly inducing participants who were originally unduly induced. This effect can be represented by a hole in Balloon U that causes a leak. This hole counteracts the growth of Balloon U. Moreover, because the participants that are leaking out of Balloon U are becoming duly induced, the air that is leaking out of Balloon U is being funneled directly into Balloon D, increasing the rate at which Balloon D is growing. This also counteracts the relative growth of Balloon U.

This does not prove that larger offers do not result in a higher percentage of unduly induced participants. It's possible that Balloon U is somehow still managing to grow faster than Balloon D despite everything working against it. But these factors ought to deflate any intuitive plausibility to the claim

that increasing the size of an offer increases the relative number of unduly induced participants. And if this assumption is no longer plausible, then the standard solution lacks any justification.

Moreover, imagine what would happen as the offer becomes extremely large. At an offer of one billion dollars, it seems like it would be prudentially beneficial for almost everyone to accept. This means that virtually no one would be unduly induced by such an offer. And so, as offers become extremely large, it seems impossible for there to be an increase in the relative number of unduly induced participants. This proves that making larger offers counteracts the relative number of unduly induced participants. This counteraction doesn't just keep the relative number from increasing. It is powerful enough to eventually decrease the relative number of unduly induced participants. Of course, an offer of one billion dollars is not realistic. And for the range of offers that is realistic, it is possible that the relative number of unduly induced participants increases as the size of the offer increases. But I am not attempting to show that this is not possible. The point is that the proponent of the standard solution is not justified in assuming that this possibility is the most plausible one.

### **5.2.3: Summary of 5.2**

Undue inducements are offers that seduce people to accept them against their better judgment. Concerns about undue inducement have led us to the standard solution: keep offers small. This solution is based on the assumption that increasing the size of the offer will increase the number of people being unduly induced. However, if we interpret this assumption as a worry about an increase the absolute number of people being unduly induced, then there is no problem with larger offers, and the standard solution is unjustified. On the other hand, if we interpret this assumption as a worry about an increase in the relative number of people being unduly induced, then we have good reason to seriously doubt that larger offers have this effect. First, as offers increase in size, there is an influx of new participants who

are duly induced. Second, as offers increase in size, some participants who were originally unduly induced will become duly induced. And so, the standard solution is still unjustified.

### **5.3: Rejecting the Standard Solution**

Not only does the standard solution lack justification, but I will now argue that it is seriously problematic. People seem to worry the most about monetary inducements, so I will argue specifically that we should not limit financial incentives in order to prevent undue inducement.

In the following sections I argue that we should reject the standard solution. I begin by arguing that non-monetary benefits can also unduly induce. Specifically, the potential for improving one's health, i.e. therapeutic benefit, can be an undue inducement (section 5.3.1). That therapeutic benefits may unduly induce is not contested in the literature, but it is worth discussing briefly. Next, I argue that the standard solution is wrong for undue therapeutic inducements (section 5.3.2). Finally, I argue that if the standard solution is wrong for undue therapeutic inducements, then it is also wrong for undue monetary inducements (section 5.3.3).

#### **5.3.1: Undue Therapeutic Inducements**

Most of the discussion on undue inducement focuses on monetary inducements, but it is widely recognized that other kinds of incentives unduly induce as well. The CIOMS guidelines suggest that if a clinical trial offers free medical care to participants, then this offer may unduly induce (CIOMS 2002). In addition to official guidelines, many authors agree that therapeutic incentives may unduly induce.<sup>15</sup> This claim is uncontroversial because there is nothing special about money in its ability to cause bad

---

<sup>15</sup> Grady, 2001, p.43. Ballantyne, 2008, p.187. McGee, 1997, p.199. Also, there is a closely related literature on therapeutic misconception. It is not clear that therapeutic misconception is the same as undue therapeutic inducement. However, some analyses of therapeutic misconception sound similar to the analysis of undue therapeutic inducement in this paper (see Horng and Grady, 2003).

judgment. There are many things that people value: video games, vacationing, internet fame, etc. There is no reason to believe that money may cloud someone's judgment while these other goods do not. Improving one's health is just another one of these goods. The following example illustrates this.

Abe has cancer. His doctors have tried several treatments but Abe's cancer persists. There is a clinical trial that is testing a new anticancer drug. The drug might cure Abe's cancer but there are serious risks. Potential adverse effects include lifetime blindness and chronic pain. If Abe does not participate in the trial he has 3 years before his cancer will kill him. During these 3 years the cancer will grow but it will not affect the quality of his life. After these 3 years the cancer will kill him quickly. Abe finds the prospect of curing his cancer to be irresistible. Because of this, he starts to irrationally believe that it is very unlikely that he will experience any adverse effects from the experimental drug. If he could reason more clearly, his better judgment would tell him to avoid participating in this clinical trial. Ultimately, Abe agrees to participate. Thus, he is unduly induced by the potential therapeutic benefit of the trial.

As we can see, therapeutic inducements can significantly impair judgment in the same way as monetary inducements. Because of this, therapeutic inducements are morally on a par with monetary inducements. They are both morally problematic because they can either cause someone to agree to something that contravenes their interests, or cause someone to agree to something only because they were impaired by the offer. If significant impairment is sufficient to invalidate consent in the case of monetary offers, then it ought to be sufficient to invalidate consent in the case of therapeutic offers.

Also, there is no reason to believe that the assumption made by the standard solution wouldn't apply to therapeutic inducements. The standard solution assumes that the larger the offer, the more people will be unduly induced into participating. Even though we saw problems with this assumption in section 5.1, let's ignore them for now. From the perspective of the standard solution, you can avoid undue inducement by keeping offers small. For example, if you offer Jane \$500 to participate in medical research, she may be unduly induced. But if you only offer her \$5, her judgment won't be impaired and

she won't be seduced into participating. The same could be said for therapeutic inducements. Consider Abe's case once again. Suppose there is a clinical trial for a different anticancer drug that has the same serious risks, but it cannot cure Abe's cancer. Instead, the drug delays how long it will take for the cancer to kill him by 3 days. The therapeutic benefit of this anticancer drug is substantially lower than the one in the original example. It's plausible that Abe is less likely to be impaired by this offer and that he won't be seduced into participating. So, therapeutic inducements can be undue, and they are analogous to undue monetary inducements.

Objection: In the context of clinical research, monetary inducements are morally different from therapeutic inducements. It is not appropriate to risk one's health in exchange for money, but it can be appropriate to risk one's health in exchange for improving one's health. For example, it is inappropriate to sell one's kidney for any amount of money. On the other hand, it can be appropriate to have one's kidney removed if the kidney has a cancerous tumor. So, monetary inducements are morally problematic in a way that therapeutic inducements are not. So, undue monetary inducements are morally different than undue therapeutic inducements.

Reply: There are two interpretations of what is "inappropriate" about risking one's health in exchange for money. Under the first interpretation, offering someone money in exchanging for risking her health is inappropriate because it disrespects her and treats her as a commodity. Under the second interpretation, risking one's health in exchange for money is inappropriate because health is objectively more valuable than money. However, both interpretations are inconsistent with the standard solution. In other words, supporting either of these interpretations requires one to reject the standard solution. However, the conclusion I argue for in this paper is that we should reject the standard solution. So, the standard solution, so to speak, is not at liberty to make this objection.

Under the first interpretation, risking one's health in exchange for money is inappropriate because it disrespects people and treats them as commodities.<sup>16</sup> However, the standard solution assumes that it can be appropriate to risk one's health for a small financial gain. Again, the CIOMS guidelines state that "Payments in money or in kind to research subjects should not be so large as to persuade them to take undue risks or volunteer against their better judgment" (CIOMS 2002, p.46). So, in the case of a heartburn drug trial, the standard solution may require that researchers offer no more than \$10 for participation in order to prevent undue inducement. However, if offering someone \$100 to participate in the trial treats her as a commodity, then so does offering her \$10. If anything, smaller monetary offers just treat participants as less valuable commodities. So, the standard solution is inconsistent with this interpretation.

Under the second interpretation, risking one's health in exchange for money is inappropriate because health is objectively more valuable than money. Again, the standard solution assumes that it can be appropriate to risk one's health for a small financial incentive. Consider the case of the heartburn drug trial in the previous paragraph. The standard solution may require that researchers offer no more than \$10 for participation in order to prevent undue inducement. However, under the current interpretation, offering someone \$100 to participate in the trial is inappropriate because her health is more valuable than \$100. But if this is true, then clearly their health is also more valuable than \$10. So, offering \$10 would also be inappropriate. In fact, any monetary offer would be inappropriate if health is objectively more valuable than money. So, the standard solution is inconsistent with this interpretation.

To summarize, one might believe that undue monetary inducements are not morally equivalent to undue therapeutic inducements in the context of clinical research. One might believe that risking one's health in exchange for money is morally problematic in a way that risking one's health in exchange for improving one's health is not. However, this concern is inconsistent with the assumptions made by

---

<sup>16</sup> For a more thorough discussion on commodification, see Anderson (1990).

the standard solution. The standard solution assumes that it can be appropriate to risk's one health in exchange for small monetary payments. So, the standard solution remains committed to the view that undue monetary inducements are morally equivalent to undue therapeutic inducements.

### **5.3.2: Applying the Standard Solution to Undue Therapeutic Inducements**

Because undue monetary inducements and undue therapeutic inducements are relevantly analogous, the reasoning that leads to the standard solution also leads to an analogous solution for undue therapeutic inducements. Analogous solution: we should reduce therapeutic benefits in order to decrease the likelihood of undue inducement. I will now use "standard solution" to also refer to this analogous solution. So, the standard solution suggests that we should make the therapeutic treatments of clinical research less effective in order to decrease the likelihood of undue inducement. This solution is absurd. To see this, consider the following example.

Dr. H has developed a new electronic device that prevents epileptic seizures when surgically implanted in a patient's brain. Preliminary trials show that the device successfully prevents seizures 99% of the time. Surgically implanting the device has the potential to cause immediate and permanent vision loss, impaired language function, and memory loss. All of these risks stem from the surgery itself, not from the device. Even though the preliminary trials are promising, a comprehensive trial on patients with epilepsy is needed to determine the efficacy and safety of these devices.

An IRB is deciding whether or not to approve a clinical trial testing the efficacy and safety of Dr. H's device. The IRB believes that the potential therapeutic benefits of this device may unduly induce individuals with epilepsy into participating in this trial. Because of the risk of undue inducement, the IRB decides that the therapeutic benefits of the trial must be lowered. The IRB reasons that by lowering the therapeutic benefits of the device, it is less likely that people will be unduly induced into participating. This is the same reasoning that the IRB would use for a clinical trial that uses monetary inducements.

In reviewing the preliminary trials of the device, the IRB discovers that a minor adjustment in the internal electronics of the device decreases its effectiveness at preventing seizures to 10%. So, instead of preventing seizures 99% of the time, the device will prevent seizures only 10% of the time. This minor adjustment must be made before implanting the device in the patient. Once the device is implanted, it cannot be readjusted. It is important to note that this adjustment does not change any of the risks associated with participating in the trial. As mentioned earlier, all of the risks come from the surgical procedure that implants the device, not the device's internal electronic configuration. Motivated by concerns of undue inducement, the IRB instructs Dr. H to adjust the device so that it is less effective at preventing seizures.

The IRB's decision to decrease the therapeutic benefit of the device in order to lower the likelihood of undue inducement is absurd. To reiterate, the IRB is claiming that it is permissible to test a medical device that is 10% effective, but it is not permissible to test a device that is 99% effective, even though the risks of getting either device are exactly the same.

The problem is that the standard solution significantly harms those individuals who are the worst off. Let us grant that reducing the therapeutic benefit of a clinical trial will make some individuals less likely to be unduly induced (let "J" designate one of these individuals). There are also other individuals who may be induced, duly or unduly, by the reduced therapeutic benefit (let "K" designate one of these individuals). The standard solution attempts to prevent J from being unduly induced at a great cost to K. The cost to K is great because K is likely to be poorly off. Only the most desperate individuals, like K, will be willing to accept offers of reduced therapeutic benefits that have no corresponding reduction in risks. However, suppose instead that we offer a greater therapeutic benefit. If K is induced by the smaller benefit, then clearly K will also be induced by a greater benefit that carries the same risk. If K is poorly off, then the greater benefit is likely to make K significantly better off than



the smaller benefit. So, the standard solution significantly harms K. Further examining the case of Dr. H will make this clear.

The IRB has instructed Dr. H to make the device 10% effective at preventing seizures. The individuals most likely to benefit from such a device are those who are the worst off. Tina suffers from severe epilepsy. She has 100 epileptic seizures a year. For Tina, even a 10% reduction in seizures is worth the risks of getting the device. Now, according to the standard solution, there are other individuals who are less likely to be unduly induced by the less effective device. Gene's epilepsy is less severe than Tina's. He has 10 epileptic seizures a year. For Gene, a 10% reduction in seizures is not worth the risks of getting the device. Gene is less likely to be unduly induced by the less effective device because his epilepsy is not severe. So, we can see that the standard solution attempts to prevent Gene from being unduly induced.

However, the standard solution does this at great cost to Tina. Tina has the potential benefit of eliminating 10% of her seizures with the less effective device. However, if we were able to test the more effective device, we know that Tina would also be induced by this offer. If she judges that getting the less effective device is in her interests, then certainly she will judge that getting the more effective device is in her interests. Remember, the risks of getting either device are the same. By offering the more effective device, Tina gets the benefit of eliminating 99% of her seizures instead of eliminating only 10% of her seizures, without having to incur more risk. A device that is 99% effective will provide a substantial benefit over one that is only 10% effective, and this is accentuated by Tina's being so poorly off to begin with. So, the standard solution is absurd because it significantly harms those who are the worst off.

Objection: The standard solution in the case of Dr. H seems absurd only because the IRB has approved a device that is 10% effective. At 10% effectiveness it's possible that the benefits of the trial

do not justify the risks. The review board may conclude that there is no version of the device that can be permissibly tested. Thus, the standard solution avoids being committed to absurdity.

Reply: This objection may work in the case of Dr. H, but there are other variations of the case that avoid this objection. Suppose instead that a pharmaceutical company has developed a drug, Drug X, that treats cancer. The drug is expected to have a success rate of 50% but there are some risks associated with the treatment. A review board correctly decides that a clinical trial of Drug X is permissible. A week later, a different pharmaceutical company finishes developing Drug Y. Drug Y also treats cancer but is expected to have a success rate of 80%. Being treated with Drug Y carries exactly the same risk as being treated with Drug X. If the standard solution is correct in assuming that more attractive offers will unduly induce more participants, then the review board may conclude that it is not permissible to run a clinical trial of Drug Y.

Again, this seems absurd. The standard solution is saying that there are some medical treatments that are just too good. Because they are so effective, they may unduly induce some people, and so it is impermissible to research them. But this completely ignores the harm to those that would benefit from the better treatments. The only people who are likely to agree to participate in less effective medical research are those who are already the worst off. Their current condition is so bad that even less effective treatments are worth the risk. The standard solution ignores their plight and tells them that they cannot have access to more effective treatments because some other people might be at risk of undue inducement.

Objection: We can avoid the absurd result of the standard solution by modifying it in the following way. Instead of offering the same device to each person, offer each person a different device based on how severe their medical condition is. Since Tina's condition is severe, offer her the more effective device knowing that she is unlikely to be unduly induced by it. Since Gene's condition is less severe, offer him the less effective device since he is likely to be unduly induced by the more effective

device. By doing this, we avoid unduly inducing Gene without having to compromise Tina's well-being. So, by keeping medical benefits on the lower side relative to each individual, we avoid undue inducement without having to sacrifice one person's interests for another's.

Reply: This modification does not salvage the standard solution. If Tina is unlikely to be unduly induced by the more effective device, then we should still offer her the most effective device possible. Remember, the risks of getting the device are independent of how effective the device is. So, if it is permissible to offer Device A to Tina because she is unlikely to be unduly induced by it, then clearly it is permissible to offer her Device B, which is more effective for the same amount of risk. So, the modified standard solution gets this case wrong- we should not keep medical benefits on the lower side for Tina.

In Gene's case, relativizing the offer doesn't make any sense. If we are worried that Gene is going to be unduly induced by the more effective device, then this means that accepting the offer would be against his better judgment. However, if this is true, then the last thing we want to do is to try and induce him with a less effective device. If accepting the more effective device goes against his better judgment, then accepting the less effective device, which is just as risky, is an even worse decision. Even if we are confident that Gene is going to reject the offer of a less effective device, there is no reason to risk unduly inducing him with the lesser offer. We should refrain from making any offer at all to Gene. So, the modified standard solution also gets this case wrong- we should not keep medical benefits on the lower side for Gene.

### **5.3.3: Rejecting the Standard Solution for Undue Monetary Inducements**

If the standard solution is absurd in the case of undue therapeutic inducements, then we should reject the standard solution in the case of undue monetary inducements. We should reject the standard solution because undue monetary inducements are relevantly analogous to undue therapeutic inducements. As we saw in section 5.3.1, therapeutic inducements are no different than monetary

inducements in their ability to impair judgment. And if the standard solution rests on the assumption that more attractive offers will unduly induce more people, then this applies to both monetary offers and therapeutic offers. In the case of undue therapeutic inducements, the standard solution was problematic because it significantly harms those individuals who are the worst off. I will now argue that this is also true in the case of undue monetary inducements.

The standard solution significantly harms those individuals who are who are willing to accept less attractive monetary offers. Consider the following example. Researchers are testing a new drug treatment for heartburn. Preliminary trials suggest that there is a 50% chance of experiencing adverse effects from the drug. Adverse effects include mild headache and nausea. In order to induce people into participating, researchers offer \$100 in exchange for testing the drug. Suppose that an IRB finds that \$100 is likely to unduly induce. So, the IRB instructs researchers to offer only \$10. Our two potential participants are Bob and Marie. Bob is not too badly off when it comes to money, and he is merely looking to earn some additional cash for an upcoming spring break trip. On the other hand, Marie is extremely poor and is looking to earn some money to pay for basic necessities.

Marie is likely to be the one who is induced by the \$10 offer. Because Marie is so desperate for money, it is likely to be in her interests to test the drug. On the other hand, Bob is likely to be the one who is prevented from being unduly induced by the smaller offer. Bob will not benefit as much as Marie from \$10, so it is less likely that Bob will find it in his interests to accept the \$10 offer. If Marie is induced by the \$10 offer, then she will also be induced by a \$100 offer. Again, there is no difference in risk between the two offers. However, \$100 would make Marie substantially better off than \$10. So, the standard solution attempts to make it less likely that Bob is unduly induced at a great cost to Marie. Thus, we should reject the standard solution.

Objection: Intentionally crippling a treatment is worse than refraining from giving money. This is because positively acting to harm is worse than merely refraining from benefiting. This explains why the

standard solution is absurd for undue therapeutic inducements but reasonable for undue monetary inducements.

Reply: A terminological distinction is needed. In this section I have used “harm” to mean “make worse off”. However, positively acting to harm and refraining from benefitting can both be understood to make people worse off. So, I will use “actively harming” to refer to the kind of harming the objection has in mind when it claims that intentionally crippling a treatment is positively acting to harm. There are two reasons why it is incorrect to interpret the standard solution for undue therapeutic inducements as *actively* harming.

First, it is true that I argue that reducing therapeutic benefits significantly harms certain individuals. These individuals are harmed in the sense that the less attractive offer makes them significantly worse off relative to a more attractive offer. However, when the objection argues that crippling a treatment *actively* harms individuals, it incorrectly uses the more attractive offer as the baseline. In the context of recruiting for clinical research, actively harming should be relativized to making no offer at all. In other words, A actively harms B only if A makes B worse off relative to A making no offer at all. To see this, consider a case where a pharmaceutical company, for financial reasons, decides to cancel a clinical trial for an experimental drug. Participating in such a clinical trial would have been therapeutically beneficial for B. Making no offer to participate in the trial makes B worse off than offering B to participate in the trial. However, the pharmaceutical company does not actively harm B by cancelling the clinical trial. Rather, the company refrains from benefitting B. Likewise, if an IRB instructs Dr. H to make the epilepsy device less effective, they are making Tina worse off than she would have been relative to a more effective device. However, the offer of the less effective device still makes Tina better off than no offer at all. So, even though Tina is significantly harmed by the IRB’s decision, harming Tina is best understood as refraining from benefitting Tina, not as *actively* harming her.

Second, modifying Dr. H's case shows that it is incorrect to interpret the standard solution for undue therapeutic inducements as actively harming. Suppose, as before, that Dr. H develops a device that is 99% effective at eliminating seizures. At the same time, Dr. L has independently developed a device that is 10% effective at eliminating seizures. Getting either device requires the same surgery, so the risks of getting either device are exactly the same. Dr. H and Dr. L both submit proposals to run clinical trials on their respective devices. An IRB reviews both proposals but only approves Dr. L's device. The IRB reasons that testing Dr. L's device is permissible because the less attractive therapeutic benefits are less likely to unduly induce. On the other hand, testing Dr. H's device is impermissible because the attractive therapeutic benefits are likely to unduly induce. Again, the IRB's decision is absurd. They are claiming that between two devices that are equally risky, it is permissible to only test the less effective device. However, in this modified example, no device is intentionally crippled. So, the motivation for supposing that this was a case of positively acting to harm has been removed, yet the standard solution produces the same absurd result.

Objection: Doctors have an obligation to bring about the best health outcomes for patients. In the case of therapeutic inducements, this obligation requires that we provide the largest therapeutic benefits possible, even if it risks unduly inducing some people. However, there is no corresponding obligation in the case of clinical trials that offer monetary inducements. Doctors are not obligated to provide patients with the largest financial benefits possible. So, in cases of monetary inducements, there is no overriding obligation that permits us to unduly induce.

Reply: First, this objection is inconsistent with the standard solution. The standard solution assumes that it is permissible to duly induce people with small monetary offers. If this is true, then it is not obligatory for doctors to bring about the best health outcomes for patients. For example, suppose that \$10 duly induces Marie to participate in the clinical trial. By accepting this offer, Marie now has a 50% chance of suffering adverse effects to her health. If there was an obligation to bring about the best

health outcomes for patients, then this offer would be impermissible. However, according to the standard solution, this offer is permissible.

Second, whether or not doctors have an obligation to bring about the best health outcomes for patients does not explain why we should not reduce therapeutic inducements. Suppose that Gene is unduly induced by the more effective version of Dr. H's device. This means that for Gene, the health risks of the device outweigh the health benefits of the device. In other words, offering the more effective device does not produce the best health outcome for Gene. So, by offering the more effective device, doctors would be violating their obligation to bring about the best health outcome for Gene. So, an obligation to bring about the best health outcomes cannot explain why it is permissible to unduly induce in the case of therapeutic inducements.

Objection: We need therapeutic benefit to be untainted for validity of the trial. After all, the whole point of the clinical trial is to test whether or not a particular therapeutic treatment is effective, not some crippled version of it. However, lowering monetary inducements does not change the therapeutic treatment. So, lowering monetary inducement does not compromise the validity of the trial.

Reply: Limiting the size of monetary inducements also compromises the validity of clinical trials. In order to produce reliable results, a sufficient number of people need to participate in the clinical trial. The fewer participants there are, the less reliable the study. However, monetary inducements are primarily offered to recruit more participants. So, reducing the monetary benefit of an experimental intervention makes the intervention less attractive to potential participants. So, fewer individuals will participate in the trial and the results of the study will become unreliable. For example, \$10 may not be sufficient to recruit enough participants to test the heartburn drug given the risks. If too few people are willing to participate in the trial, then the results of the study will be unreliable. So, if the validity of a trial justifies the risk of undue therapeutic inducements, then it also justifies the risk of undue monetary inducements. Thus, we should reject the standard solution.

#### **5.3.4: Summary of 5.3**

In medical research, undue inducements are offers that cause individuals to participate against their better judgment. The standard solution for preventing undue inducement is to limit the attractiveness of offers. However, this is a bad solution. This is clear in the case of research that provides a potential therapeutic benefit to participants. Applying the standard solution to cases of undue therapeutic inducements leads to absurd results. However, undue therapeutic inducements are relevantly analogous to undue monetary inducements. And in both cases, the standard solution significantly harms those who are the worst off. Because of these similarities, we should also reject the standard solution for undue monetary inducements.



## Bibliography

- Anderson, Elizabeth S. 1990. "Is Women's Labor a Commodity?" *Philosophy & Public Affairs* 19 (1): pp. 71-92.
- Anderson, Scott. 2015. "Coercion." In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta, Summer 2015. Metaphysics Research Lab, Stanford University. <http://plato.stanford.edu/archives/sum2015/entries/coercion/>.
- Appelbaum, Paul S., Charles W. Lidz, and Robert Klitzman. 2009. "Voluntariness of Consent to Research: A Conceptual Model." *Hastings Center Report* 39 (1): 30–39. doi:10.1353/hcr.0.0103.
- Atiyah. 1982. "Economic Duress and the Overborne Will." *Law Quarterly Review* 98 (197).
- Ballantyne, Angela. 2008. "Benefits to Research Subjects in International Trials: Do They Reduce Exploitation or Increase Undue Inducement?" *Developing World Bioethics* 8 (3): 178–91.
- Beauchamp, Tom L., Bruce Jennings, Eleanor D. Kinney, and Robert J. Levine. 2002. "Pharmaceutical Research Involving the Homeless." *Journal of Medicine and Philosophy* 27 (5): 547-564.
- Beauchamp, Tom L. 2010. "Autonomy and Consent." In *The Ethics of Consent*, edited by Franklin G. Miller and Alan Wertheimer, 55–78. Oxford University Press.
- CIOMS (Council for International Organizations of Medical Sciences). 2002. *International Ethical Guidelines for Biomedical Research Involving Human Subjects*. Geneva:.
- Dougherty, Tom. 2013. "Sex, Lies, and Consent." *Ethics* 123 (4): 717–44. doi:10.1086/670249.
- Emanuel, Ezekiel J. 2004. "Ending Concerns About Undue Inducement." *The Journal of Law, Medicine & Ethics* 32 (1): 100–105.
- Emanuel, Ezekiel J. 2005. "Undue Inducement: Nonsense on Stilts?." *American Journal of Bioethics* 5 (5): 9.
- Eyal, Nir. 2012. "Informed Consent." In *The Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta, Fall 2012. Metaphysics Research Lab, Stanford University. <http://plato.stanford.edu/archives/fall2012/entries/informed-consent/>.
- Feinberg, Joel. 1988. *Harm to Self*. Vol. 3. New York: Oxford University Press.

- Fisher, Jill A. 2013. "Expanding the Frame Of 'voluntariness' in Informed Consent: Structural Coercion and the Power of Social and Economic Context." *Kennedy Institute of Ethics Journal* 23 (4): 355–79.
- Frankfurt, Harry. 1973. "Coercion and Moral Responsibility." In *Essays on Freedom of Action*, edited by Ted Honderich, 65. Routledge and Kegan Paul.
- Grady, Christine. 2001. "Money for Research Participation: Does it Jeopardize Informed Consent?" *The American Journal of Bioethics* 1 (2): 40-44.
- Grady, Christine. 2012. "Money for Research Participation: Does It Jeopardize Informed Consent?" *The American Journal of Bioethics* 1 (2): 40–44.
- Grant, Ruth W. and Jeremy Sugarman. 2004. "Ethics in Human Subjects Research: Do Incentives Matter?" *Journal of Medicine and Philosophy* 29 (6): 717-738.
- Hornig, Sam and Christine Grady. 2003. "Misunderstanding in Clinical Research: Distinguishing Therapeutic Misconception, Therapeutic Misestimation, & Therapeutic Optimism." *IRB: Ethics and Human Research* 25 (1): pp. 11-16.
- Kleinig, John. 2010. "The Nature of Consent." In *The Ethics of Consent: Theory and Practice*, edited by Franklin G. Miller and Alan Wertheimer, 3–24. Oxford University Press.
- Lemmens, Trudo, and Carl Elliott. 2012. "Guinea Pigs on the Payroll: The Ethics of Paying Research Subjects." *Accountability in Research* 7 (1): 3–20.
- Macklin, Ruth. 1981. "'Due' and 'Undue' Inducements: On Paying Money to Research Subjects." *IRB: Ethics and Human Research* 3 (5): 1–6.
- Macklin, Ruth. 1989. "The Paradoxical Case of Payment as Benefit to Research Subjects." *IRB: Ethics and Human Research* 11 (6): pp. 1-3.
- Mallory, Stephen D., Bernard Gert, and Charles M. Culver. 1986. "Family Coercion and Valid Consent." *Theoretical Medicine and Bioethics* 7 (2).
- Mcgee, Glenn. 1997. "Subject to Payment?" *JAMA: The Journal of the American Medical Association* 278 (3): 199-200.
- McGregor, Joan. 2005. "Undue Inducement' as Coercive Offers." *American Journal of Bioethics* 5 (5): 24.
- Miller, Franklin G., and Alan Wertheimer. 2010. "Preface to a Theory of Consent Transactions: Beyond Valid Consent." In *The Ethics of Consent: Theory and Practice*. Oxford University Press.
- Millum, Joseph. 2014. "Consent Under Pressure: The Puzzle of Third Party Coercion." *Ethical Theory and Moral Practice* 17 (1): 113–27.

Nozick, Robert. 1969. "Coercion." In , edited by Sidney Morgenbesser, Patrick Suppes, and Morton White, 440. *Philosophy, Science, and Method :essays in Honor of Ernest Nagel*. New York: St. Martin's Press.

Office for Human Research Protections. 1993. *IRB Guidebook*.

Olsaretti, Serena. 1998. "Freedom, Force and Choice: Against the Rights-Based Definition of Voluntariness." *Journal of Political Philosophy* 6 (1): 53–78. doi:10.1111/1467-9760.00046.

Radcliffe Richards, Janet. 2010. "Consent with Inducements: The Case of Body Parts and Services." In *The Ethics of Consent*, edited by Franklin G. Miller and Alan Wertheimer, 281–304. Oxford University Press.

Todd, Caroline. 2012. "Research Participation and Financial Inducements." *The American Journal of Bioethics* 1 (2): 60–61.

Wertheimer, Alan. 1987. *Coercion*. Princeton, New Jersey: Princeton University Press.

Wertheimer, A. and F. G. Miller. 2008. "Payment for Research Participation: A Coercive Offer?" *Journal of Medical Ethics* 34 (5): 389-392.

Wertheimer, Alan. 2011. *Rethinking the Ethics of Clinical Research: Widening the Lens*. New York: Oxford University Press.