

Would a Viable Consent App Create Headaches for Consequentialists?

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Abstract

Greater public awareness of the occurrence of sexual assault has led to the creation of mobile phone apps designed to facilitate consent between sexual partners. These apps exhibit serious practical shortcomings in realistic contexts; however, in this paper I consider the hypothetical case in which these practical shortcomings are absent. The prospect of this *viable* consent app creates an interesting challenge for consequentialism – one that is comparable to the objection that the theory justifies killing innocent persons to prevent large numbers of less serious harms like experiencing brief, painful headaches. I outline and reject the most straightforward way for consequentialists to address this challenge, and I argue that the empirical calculations at stake reveal something rarely appreciated: consequentialists ought to sometimes favour reinforcing deontological constraints in common-sense morality rather than seeking to undermine them.

1. Introduction

It can hardly be disputed that statistics related to sexual violence are alarming. In the United States, the estimated number of sexual assaults in 2021 was nearly 325,000 despite the percent of cases reported to police being only 22.9% (Thompson and Tapp, 2022). In Canada, rates of self-reported sexual assault remain constant despite declining rates for other violent and non-violent crime, and only 5% of women report that police found out about the most serious case of sexual assault they experienced (Cotter & Savage, 2019). In the UK, it is estimated that 618,000 women in England and Wales experienced some type of sexual assault in 2020 (Stripe, 2021), and in Scotland sexual crimes increased by 8% to the highest level since 1971, the first year for which data are available (Directorate, 2019). One might reasonably ask how to properly interpret these statistics or challenge the

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methods by which they were collected, but even the most conservative interpretations of the data reveal an unacceptable state of affairs.

Greater public awareness of the prevalence of sexual assault has led to the emergence of mobile phone apps designed to facilitate consent between sexual partners. Apps like *We Consent*, *Legal Fling*, *Consent Amour*, *Sasie*, and *UConsent* offer users a variety of methods for communicating and recording their consent prior to sexual encounters. The apps prompt users to answer questions to establish facts like their willingness to participate in various types of sexual activity, the partners with whom they are willing to engage in this activity, and users' self-reported levels of sobriety. Users can then coordinate their answers so they understand and agree to prospective sexual activity before it occurs. The promise of these apps is unmistakable. Mobile phones are ubiquitous in the lives of those fortunate enough to live in affluent circumstances, and it is certainly beneficial to help agents communicate prior to sexual activity. We ought to promote an expectation that the intentions of agents involved in sexual activity must be unambiguously understood, and the potential for consent apps to reduce non-consensual sexual activity makes them worthy of attention.

Yet my interest in consent apps is not directed at evaluating their practical merits. As I explain below, consent apps face such grave objections in practice that they do not merit much attention as a matter of applied ethics. Instead, my aim is to explore the prospect of an idealized consent app that is viable and then argue that it creates a challenge and an opportunity for consequentialists. The prospect of a viable consent app, as unlikely as it is in practice, leads to a challenge comparable to the objection that consequentialism sanctions killing innocent persons to prevent large numbers of less serious harms like experiencing headaches. The connection here is not obvious, I know, but I hope to convince readers that examining the relation between these topics tells us something interesting about consequentialism and its uneasy relationship with common-sense moral judgements. Consequentialism has a long history of providing justifications for common-sense judgements in some contexts while encouraging distrust of common-sense morality when its judgements conflict with promoting optimal outcomes.¹ My aim is to suggest that advocates of consequentialism ought to dig into the complicated details of this balancing act and the constraints associated with its long-term predictions. Thus, I intend to use the prospect of an ideal consent app to argue that

¹ For a classic discussion of this tension, see Sidgwick's (1981, ch. III, book IV) contrast of Bentham and Hume.

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it is beneficial for consequentialists to ensure that their theory is not presented as less complex than is required for its strongest interpretation.

I begin by noting the extensive shortcomings of consent apps in current circumstances. Next, I propose a hypothetical consent app that avoids these problems, and I predict that this viable app would cause sufficient inconvenience to prompt resistance despite its potential for reducing non-consensual sexual encounters. I then outline, and reject, the most straightforward way in which consequentialists could respond to this proposal. Finally, I argue that sophisticated versions of consequentialism should be willing to work through the complex details of different ‘lives for headaches’ challenges and remain open to the possibility that their empirical calculations will recommend revising common-sense morality so as to *reinforce* constraints on promoting the good rather than undermine them. This, I suggest, is a novel contribution to an already extensive literature on consequentialist measures to accommodate or reject common-sense moral judgements. Much has been written to defend *lives-for-headaches* trade-offs in principle, and much has been written to defend indirect strategies for capturing constraints on maximization in practical contexts like friendship, virtue, and integrity. Little, to my knowledge, has been written to consider the practical implications of different *lives-for-headaches* cases. Doing so in the context of an ideal consent app reveals the curious fact that consequentialism might justify more stringent constraints on maximization than is prescribed by our common-sense moral judgements.

2. Practical Problems for Consent Apps

As promising as they may seem in the abstract, consent apps have encountered broad condemnation from those who consider their practical implications. Numerous reservations have been expressed, but three related concerns stand out as the most decisive reasons to resist the widespread use of consent apps. First, and most obviously, the decisions recorded by the apps are static, *ex ante* snapshots of agents’ stated intentions that cannot capture the dynamic way in which consent can be withdrawn at any point during sexual relations. Although some apps might take steps to educate users about the dynamic nature of consent, the formalizing of *ex ante* agreement to sexual relations could discourage users from withdrawing consent if they feel that they have already committed themselves to a sexual encounter. Second, it is not unrealistic to think that initial statements of consent, if recorded by an app, could be used against victims of sexual

assault in legal proceedings given the way this information can unfortunately have a prejudicial impact.² Third, there is no way to guarantee that users will document their consent free of coercion, intoxication, deception, or other impediments to autonomous decisions. Agents can then end up operating with a false sense of confidence in the authenticity of their decisions (and those of their sexual partners), and recordings of these choices can again have prejudicial effects in legal proceedings.³

Beyond these initial problems, there are further concerns that potentially count against the use of consent apps. For example, one might view the underlying concept of consent as problematic. Quill R. Kukla (2018) argues, for example, that our sexual autonomy is better served by a complex language of sexual negotiation than by narrowly focusing on the necessary condition of consent.⁴ To make matters worse, the more that mobile apps capture the complexity of sexual negotiation by collecting contextual details, the more they invite privacy concerns related to the potential for the information they collect being stolen or exploited (Danaher, 2018, pp. 161–62). For all of these reasons, it is unlikely that a consent app for sexual activity is currently viable in terms of being able to enhance the agency of users without incurring unacceptable costs.

² In other words, statements of prior consent can contribute to what Audrey Yap (2017) describes as a *credibility excess* for those who fail to respect retractions of consent during sexual activity.

³ For a more detailed summary of problems with consent apps, see (Danaher, 2018).

⁴ The promise of a single concept that captures the complexity of sexual negotiation also leads to what Alisa Kessel (2019) identifies as a *cruel optimism*. She draws on work by Lauren Berlant (2011) to argue that consent promises protection and empowerment in sexual relations despite practical realities that prevent the realization of exactly these objectives: ‘Sexual consent promises a clear delineation between sex and rape; it promises an empowered articulation of desire; it promises protection against unwanted sex. It fails to live up to these promises because sexual consent – like all forms of consent – is enacted within multiple, simultaneous systems of oppression, even though its promise of voluntary exchange suggests that it is free of those oppressive entanglements’ (Kessel, 2019, p. 363). Yap (2019) makes a similar point about consent being insufficient to capture contextual details, like power relations, that can render sexual activity unjust while also making it more difficult for agents to conceptualize this injustice once consent has seemingly licenced the activity.

3. A Viable (Hypothetical) Consent App

Given these overwhelming practical limitations, there might seem to be no further reason to consider the significance of consent apps. Yet these apps merit consideration in the same way that John Harris (1975) prompts us to consider a survival lottery despite recognizing that the lottery is not practically viable. Recall that the survival lottery randomly draws names of individuals to be sacrificed whenever opportunities arise to save multiple persons by providing them the sacrificed person's healthy organs. The lottery is premised on transplant procedures being perfected, and Harris emphasizes that it would not be practically viable because of our inability to evaluate culpability for organ failure and a potential for corruption within the lottery system (1975, p. 87). The philosophical significance of his lottery is to provoke a theoretical rather than practical question: should we be relieved or disappointed that the lottery is not feasible? Most of us feel relieved that the lottery is not feasible because we find the scenario horrifying, yet Harris carefully stipulates that this lottery would *increase* overall life expectancy for each person. Thus, the significance of the lottery is the challenge it presents for us to articulate, and then justify or revise, our initial intuitive reactions to a scenario in which the lottery is implemented without practical shortcomings. A similar challenge arises for consent apps: should we be *relieved* or *disappointed* that these apps are not practically viable? My suspicion is that many people feel a sense of relief that these apps are not viable because many of us do not want to add awkward inconveniences to the subtleties of sexual communication. Even if an app existed that did not exhibit the practical shortcomings described above, many people would, I believe, still be reluctant to support the widespread use of such an app. Consider an idealized scenario in which an app is created unlike those that currently exist. What I have in mind is one that will at least make no persons worse off than if the app were not commonly used. This is what I will describe as a *viable* app in the sense that it avoids problems like privacy violations or exacerbating bias against victim testimony in ways that would make some users significantly worse off than if they had not used the app.

Of course, agents who have built up sufficient shared history with their sexual partner(s) might not benefit from a consent app in ordinary circumstances, but I proceed in what follows on the premise that a considerable number of sexual encounters would involve less risk of harm if agents were expected to explicitly communicate their intentions through the use of a viable consent app. As Japa Pallikkathayil (2020, p. 119) notes, even if we adopt affirmative consent standards,

‘adequately protecting people from unwanted sexual contact requires more verbal communication between new or relatively new sexual partners than is generally acknowledged’. Moreover, given statistics indicating that the majority of sexual assaults involve acquaintances rather than random attacks by strangers (Lopez *et al.*, 2020, and Stirling *et al.*, 2020), there is potential for a consent app to generate substantial results if it were to gain widespread acceptance.

It may be difficult to reflect on this idealized scenario without more specific details, so it is worth building a provisional sketch of what a viable app might look like. To begin, let us imagine that the app has an educational function and that much of the content it conveys is devoted to greater awareness concerning the prevention of sexualized violence. Thus, the app would provide users with explanations of concepts like informed consent, facts about the prevalence of rape myths, and examples illustrating the potential for power imbalances that render some persons especially vulnerable to sexual coercion. The app would also aim to ensure that users have absorbed this content. Much like the requirements to sign waivers before participating in activities like rock climbing, the app would ask users to confirm that they understand this information before engaging in sexual activity. Of course, most of us authorize waivers like these (and impenetrable software licencing agreements) without adequately grasping their details, so it would not be effective for the app to allow users to simply touch an ‘ok’ button. Instead, the app ought to be set up like Environment, Health, and Safety (EHS) software that provides interactive training modules with recurring skill testing in the context of situational examples.⁵ Users can complete modules at their own pace, but the app selects refresher questions to be answered before sexual activity.

This is only one possible option. My aim here is not to argue that this provisional sketch is the best way to avoid the practical shortcomings of existing apps. My aim is only to provide details to help us imagine a hypothetical scenario in which an app is genuinely viable. If you believe some other format is more likely to be viable, fill in those details as you see fit. For example, one could add upgrades to this provisional sketch like a scoring system for users to track and display their ongoing commitment to the prevention of sexualized violence, a method of integrating capacity-testing questions to detect excessive intoxication, and perhaps a way for users to

⁵ For an example of EHS software, see: <https://www.safetysync.com/index.html>. The software’s interactive format increases health and safety compared to passively educating users by distributing manuals that tend to go unread.

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coordinate deal-breakers for sexual activity.⁶ Readers can design their own ideal combination of these options. The point is for this hypothetical app to facilitate the securing of consent in an effort to prevent harmful sexual activity.⁷

With these prospective details in mind, there are two features I will stipulate for what counts as a viable consent app. Whatever details one imagines for this app without practical shortcomings, let us presume two things. First, the widespread adoption of a norm for agents to use this app prevents some non-trivial number of cases of sexual assault from occurring. The norm need not apply to persons living in long-term relationships, but the idea is that if a general expectation is established that people will use a viable app in new relationships and one-time sexual encounters, then rates of non-consensual sex will decrease either because some users refrain from committing non-consensual sexual acts after acquiring knowledge from the app or because their potential partners limit interactions with these individuals if they have not demonstrably completed the training the app provides. Second, let us also presume that the app is effective only if users must engage with it for some moderate amount of time directly before engaging in sexual activity. The app's content might be mainly delivered to users at their convenience, but I propose that a key feature of the app being effective would be that its refresher questions prompt users to confront the significance of consent while actively considering sexual activity.

To sum up, the scenario we ought to consider is captured by the following hypothetical claim:

Viable App

There exists some possible mobile phone app that would prevent a non-trivial number of sexual assaults from occurring without unreasonable practical shortcomings, though this app requires the attention of users for a moderate amount of time directly before engaging in sexual activity.

⁶ For discussions of sexual deal-breakers, see Dougherty (2013), Bromwich and Millum (2018), and Matey (2019).

⁷ The app I propose is compatible with various ways of understanding consent (e.g. Wertheimer, 2003; Dougherty, 2015; and Bolinger, 2019), and those who remain sceptical of consent as an ideal for sexual communication can still accept that communication promoting consent will reduce harm in non-ideal contexts. Moreover, as Dougherty (2018) argues, agents have a responsibility of *due diligence* to ensure their partners have unmistakably agreed to sexual activity, and this responsibility is consistent with a range of ways in which consent is understood.

To make the scenario as concrete as possible, let us assume that this consent app prevents at least five sexual assaults from occurring each month and that the moderate amount of time required for a user to engage with the app immediately prior to sexual activity is eleven minutes. Now we need to confront our analogue of Harris' question: if all practical shortcomings can be avoided, will people agree that a viable consent app ought to gain wide acceptance? Note that this is not to ask whether use of the app ought to be legally regulated. The question is whether most of us would agree that using a consent app ought to become a general social norm even if no legal measures are employed for enforcement.

I predict that common-sense morality does not currently support this norm. Thus, I predict that most people believe we are not morally obligated to accept the widespread use of an app that asks this much of users immediately prior to sexual activity. We can summarize this prediction with the claim:

Assaults for Convenience

There is some finite amount of inconvenience (including 11 minutes using a viable consent app) prior to sexual activity, such that it is permissible to allow five sexual assaults of innocent persons per month to avoid it.

Note that the question of whether one accepts or rejects *Assaults for Convenience* is different from the question of whether one believes that they, as a particular individual, have an obligation to use a viable consent app before sexual activity. Very few people will self-identify as individuals at risk of committing sexual assault, but they might still endorse a general norm of using an app before sexual activity.⁸ Still, I am pessimistic about broad support for the claim that we ought to accept the inconvenience of a viable consent app for the sake of the considerable benefits it could provide.

I concede in advance that I will not be providing detailed empirical data to support my suspicion that our existent common-sense moral

⁸ As with any general social norm, there will be those who ask why they should participate if they believe they will never stand to benefit, i.e., those who claim they are sufficiently educated about sexual consent that they face no appreciable risk of non-consensual activity to mitigate. Like those who speed because they claim to be exceptional drivers, or skiers who cross lift area boundaries because they think they can recognize avalanche dangers, most of these agents are probably overconfident about their abilities. Even if they are truly exceptional, however, they can recognize the social benefits of adhering to public norms that could provide significant benefits for others.

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judgements are consistent with *Assaults for Convenience*. It is a prediction based on the way most people have reacted to consent apps, affirmative consent standards, high-profile sexual assault cases, and the #Metoo movement.⁹ Barriers to communication that would establish sexual consent already exist because agents prefer to ‘avoid experiencing negative feelings such as embarrassment, shame, anxiety and guilt’ (Edwards *et al.*, 2022, p. 2411), so I think it is reasonable to anticipate additional intuitive resistance to a convention that would require significantly more time and formal clarification prior to sexual activity. The comparatively smaller shift to affirmative consent policies has drawn resistance because ‘some maintain that requiring affirmative consent will ruin the mood or spontaneity of a sexual experience’ (Jozkowski, 2016, p. 744). It seems safe to predict, then, that common-sense morality does not currently endorse the widespread use of an app requiring more time and effort compared to merely verbalizing enthusiastic consent.¹⁰

My prediction is also partly based on responses from colleagues who resist my description of the sacrifice at stake as one of *convenience* to protect individuals from assault. These colleagues argue that an expectation to use a consent app prior to sexual activity creates significant alienation by eliminating the spontaneity that enhances intimacy for sexual partners. Moreover, one might object that adopting a convention to use a consent app will lead to decreased opportunities for

⁹ Consider, for example, the highly publicized letter of protest against perceived #MeToo excesses that was signed by one hundred women in France including Catherine Deneuve (2018). One of the complaints in the letter was a perceived *reductio* that in the wake of #MeToo: ‘Next we’ll have a smartphone app that adults who want to sleep together will have to use to check precisely which sex acts the other does or does not accept’. It is conspicuous that none of the criticism the letter received took the possibility of consent apps as a legitimate option. Rather, it dismissed the *reductio* as an overreaction to #MeToo concerns. Perhaps critics anticipated practical shortcomings for consent apps, but none voiced such concerns. Instead, both sides of the controversy seemed to accept that a requirement to use a consent app would be an unacceptable restriction on sexual freedom.

¹⁰ Note that there is ambiguity when one predicts what is presently consistent with common-sense morality. For the advocate of common-sense morality as a position in normative ethics, one might claim that it refers to what a reasonable agent would accept with full information and an extensive process of wide reflective equilibrium. My concern, however, is not this idealized conception of common-sense morality. My concern is instead those moral judgements accepted in our current, imperfect landscape that consequentialists must accommodate or reject.

sex, because coordinating consent will make it more common for agents to notice incompatibilities in their desires, intentions, and respective deal-breakers.¹¹

These colleagues are not wrong about a viable consent app requiring sacrifice from agents who use it, and the term ‘convenience’ is admittedly a provocation until its terminological reference becomes clear in what follows. Yet it is interesting that some of us feel compelled to emphasize the significance of sexual spontaneity in human relationships despite the fact that it can hardly be as significant as being protected from sexual assault. No matter how we describe the sacrifice of using a viable consent app, it is not plausibly understood as a grave enough harm to make *Assaults for Convenience* an unremarkable premise, so it is conspicuous that some philosophers offer mitigating considerations in its favour.

Nonetheless, I recognize that anecdotal evidence is not sufficient to establish the claim at stake here. Rather, I am relying on the presumption that readers will suspect that *Assaults for Convenience* is currently a widely, if only tacitly, accepted part of common-sense morality. More conservatively, I am relying on the premise that it is sufficiently likely that this claim is part of common-sense morality that it merits philosophical attention. If you do not share this presumption, then I salute your faith in humanity and you need not read any further. For my part, I do not accept *Assaults for Convenience*. I will return to this in what follows, but I must emphasize that I am not arguing for this claim; rather, I am identifying it as a feature of common-sense morality that deserves scrutiny.

4. Consequentialism, Headaches, and an Apparent Asymmetry

Those familiar with prominent objections to consequentialism will have already noticed that the format of *Assaults for Convenience* has been arranged to mirror claims that have received detailed analysis from philosophers like Alastair Norcross (1997, 1998a, 1998b, 2009). In particular, the aggregative feature of consequentialism that so sharply divides it from its rivals is exemplified in the claim:

Life for Headaches

There is some finite number of headaches, such that it is permissible to kill an innocent person to avoid them. (Norcross, 1997, p. 135)

¹¹ An anonymous referee voiced this concern.

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This is a claim Norcross endorses, though he recognizes that it initially strikes most readers as morally objectionable. The claim captures an apparent injustice in the way consequentialism fails to attend to the distribution of harms and benefits across different persons, and it is therefore comparable to other influential objections to consequentialism grounded in justice-related concerns (e.g., Rawls, 1971, pp. 26–28; Nozick, 1974, p. 41; Scheffler, 1994, ch. 4; and Scanlon, 1998, p. 235). Nevertheless, Norcross offers arguments to support *Life for Headaches*. His goal is to undermine what he recognizes as a powerful intuition in common-sense morality – an intuition defended by philosophers who reject aggregation and endorse what is now known as the ‘no lives for headaches’ thesis (e.g., Ridge, 1998; Brennan, 2006; Otsuka, 2006; Kamm, 2007; Dorsey, 2009; Pummer, 2012; and Voorhoeve, 2014).

The asymmetry within common-sense morality between *Assaults for Convenience* and *Life for Headaches* is striking. If such a powerful intuition exists for most persons that we should not permit the death of an innocent person to relieve any number of headaches, then how can it seem so ordinary that a harm as severe as sexual assault should be permitted to avoid many cases of a much less serious harm like having to spend time interacting with a consent app? The cases are different, to be sure, but they are sufficiently similar that some explanation is required to make sense of the asymmetry and provide a justification for its continued acceptance or a proposal for revising common-sense morality.

Two solutions to this asymmetry come to mind. First, and most obviously, one can explain the asymmetry as part of a longstanding system of patriarchy that shapes our moral intuitions, and one can recommend revising our intuitions so as to consistently reject both *Life for Headaches* and *Assaults for Convenience*. Even if some feel that a viable app seems like an excessive restriction on sexual freedom, this intuition can be undermined by invoking some basic principles of feminism and noting that we are socialized to accept trading severe harms for convenience when it is primarily women (and the more marginalized members of this category) who are most likely to experience the harm.¹² Details of how this patriarchal indoctrination occurs vary, but all influential accounts (e.g.,

¹² Note that the details of the consent app discussed in this paper focus exclusively on the category of ‘women’ for the sake of scope, but categories of queer and trans persons are similar in terms of the vulnerability to sexualized violence. See Ison (2019) for an examination of some of the relevant similarities and differences.

MacKinnon, 1989; Butler, 1990; Haslanger 1995) offer explanations for how inequitable asymmetries exist within our common-sense morality and how we ought to be suspicious of intuitions willing to trade the security of women for conveniences that make them sexually available to men.

Much more could be said about this first way of addressing the prominent asymmetry between *Life for Headaches* and *Assaults for Convenience*. However, in this paper I am specifically interested in how the asymmetry ought to be addressed by consequentialists. Of course, sensible consequentialists ought to also accept feminist accounts of how patriarchy has shaped our intuitions when it comes to the burdens and benefits of sexual activity, but the aggregative element of consequentialism that Norcross presents so forcefully creates pressure from the other side of the asymmetry. Thus, a second solution that comes to mind is to use common-sense support for *Assaults for Convenience* as evidence in favour of the conclusion that *Life for Headaches* is not as unpalatable as it first appears. This is what I take to be the most straightforward consequentialist response to the asymmetry at stake: draw attention to the common-sense rejection of a viable consent app to undermine our confidence in the ordinary, common-sense rejection of *Life for Headaches*. The permissibility of allowing severe harms for some to prevent large numbers of less serious harms for others is an embarrassing result for consequentialism. Evidence to suggest that deontological intuitions in these cases are not as resolute as they seem could be offered to diminish the force of the ‘no lives for headaches’ thesis.¹³

Norcross, for example, appeals to the fact that we accept the permissibility of ordinary speed limits despite knowing that innocent lives could be saved if speed limits were reduced (1997, pp. 159–65; 1998b; 2009, p. 88). This is not his principal argument for accepting *Life for Headaches* – that argument employs a series of comparative claims for the permissibility of trading single harms for multiple cases of slightly less serious harms and then adds a transitivity

¹³ I will refer to *deontological* intuitions as features of common-sense morality that restrict impartial aggregation in our efforts to promote the good. However, I do not mean to suggest uniformity in what counts as a deontological intuition, since there may be various different types of intuitions that restrict aggregation. Similarly, I will refer to deontological constraints, or prohibitions, as features of common-sense morality (or ethical theories) that restrict aggregation, but there is not necessarily uniformity in the underlying justifications for these constraints. Thanks to Colin Macleod and an anonymous referee for encouraging me to clarify this point.

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claim to the series linking the worst of the harms to large numbers of the most trivial (1997, pp. 137–39). Nevertheless, the efforts to resist his argument are motivated by deep deontological intuitions, and Norcross' appeal to common practices like speed limits is an important strategic move for the consequentialist.¹⁴ By noting that common-sense intuitions are not consistent in their absolutism, consequentialists like Norcross can argue that these intuitions are unreliable. They can claim that absolutism in some of our deontological intuitions is best interpreted as hyperbole designed to avoid slippery slopes that might arise if we become too easily willing to sacrifice the interests of some to realize gains for others.

Consider, for example, claims made in the early stages of the coronavirus pandemic. When the idea of easing social distancing restrictions was first proposed, many were critical of those arguing that some number of deaths would be tolerable for the sake of stimulating economic growth.¹⁵ Some, like Andrew Cuomo, replied to the proposals for easing restrictions with claims like, 'We are not going to put a dollar figure on human life. First order of business is save lives. Period. Whatever it costs', and 'We are going to fight every way we can to save every life that we can' (Cuomo, 2020). Whatever the merits of maintaining social restrictions, the categorical claims made by those like Cuomo cannot be taken literally.¹⁶ They might display a depth of moral commitment, but they are not realistic as a matter of public policy. Whether it is disease prevention,

¹⁴ In fact, those seeking to defend full aggregation normally employ a mix of technical argumentation and efforts to undermine the intuitions that motivate partial constraints on aggregation. Derek Parfit (2003, p. 385), for example, argues that partial aggregation is only plausible because, 'Most of us are bad at judging the significance of large numbers.' John Halstead (2016) similarly claims that Alex Voorhoeve's (2014) justifications for partial aggregation are only as compelling as the common-sense intuitions that tacitly support them. Other noteworthy arguments against partial aggregation include: Hirose (2014), Privitera (2018), and Horton (2018).

¹⁵ This view was voiced by economic advisor to the White House, Stephen Moore: 'I'm not in any way disparaging the public health people. They are vital to this process. But you can't have a policy that says we're going to save every human life at any cost, no matter how many trillions of dollars you're talking about' (Dawsey, 2020).

¹⁶ Claims like these were not unique to the United States. Canada's chief public health officer, Dr Theresa Tam, stated, 'We cannot prevent every death, but we must prevent every death that we can' (CBC News, 2020).

construction codes, food and drug regulations, travel security initiatives, blood alcohol limits for driving a vehicle, environmental regulations, or playground safety standards, it is not always feasible to reduce the number of innocent lives at risk to zero.

Thus, the most straightforward way for consequentialists to address asymmetries in common-sense morality between absolute deontological prohibitions, on one hand, and apparent tolerance for severe harms to generate large numbers of trivial benefits, on the other, is to emphasize the tolerance side of this asymmetry. In the context of speed limits, Norcross (1997, p. 160) presumes that most of us will continue to accept the claim:

Lives for Convenience

We are not morally obligated to impose a national speed limit of 50 mph (or less).

Hence, Norcross takes our revealed preferences about speed limits as evidence that the absolutism in our moral intuitions is prescriptively unreliable and that we ought to place our confidence in the basic calculations that lead him to accept *Life for Headaches*.¹⁷

In the remainder of this paper I will argue that this solution is inadequate when it comes to how we ought to respond to the prospect of a viable consent app. There is, of course, something about the solution that has to be correct: if one is a consequentialist, then one must deny the legitimacy of moral intuitions that involve absolute prohibitions. In principle, consequentialism will permit the most awful harms one can imagine if the calculations are rigged to somehow outweigh these harms. Consequently, there is a sense in which consequentialism must accept *Assaults for Convenience* in the abstract, just as it must embrace all *lives-for-headaches* scenarios in the abstract if they are considered without any of the details that allow long-term consequentialist strategies to gain purchase. However, this rejection of absolutism in principle need not result in revising our intuitions to undermine deontological constraints in practice. This point is rarely noted in the *Lives for Headaches* literature because its contributors are understandably focussed on the point of principle at stake. My aim, however, is to point out that when consequentialists encounter intuitions like those prompted by

¹⁷ Tom Dougherty (2012) claims that repeated instances of accepting risk in everyday activities provides evidence for Norcross' *Life for Headaches* position. For further discussion of how the incorporation of risk affects arguments concerning aggregation, see Kumar (2015), Lazar (2018), Tadros (2019), and Horton (2020).

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Assaults for Convenience, they are not required to take these permissive intuitions at face value. Hence, they are not required to use them as Norcross uses intuitions regarding speed limits to advance the principles argument against deontological absolutes. Instead, consequentialists can move past the issue of what is permissible in principle and remain open to the possibility that long-term calculations justify reinforcing, rather than rejecting, our deontological intuitions in practical contexts. Consequentialists are therefore not required to evaluate *Lives for Convenience* and *Assaults for Convenience* equivalently, and they can give due consideration to the details that make the latter importantly different from the former.

5. Sophisticated Consequentialism and Personal Security

It is by now familiar that consequentialism avoids many of its deepest objections by recommending that agents adopt powerful *non-consequentialist* decision-making strategies to secure long-term results. This feature can be implemented via secondary principles in sophisticated versions of act-consequentialism, or it can be incorporated into criteria of right action for indirect versions of consequentialism like rule-consequentialism. It will not matter here which option one prefers, and I will presume a version of act-consequentialism for the sake of simplicity.¹⁸ The essential point is that direct efforts to maximize the good are sometimes self-defeating because of epistemic costs, collective action problems and unreliable precedent effects. Thus, consequentialists employ non-maximizing decision procedures for practical guidance, and these decision procedures include deontological prohibitions. For example, short-term goodness might be promoted by murdering innocents and redirecting their resources to famine relief, yet any sensible form of consequentialism will recommend socializing agents so that they are inhibited

¹⁸ One sometimes finds the secondary principles of act-consequentialism disparaged as ‘mere’ rules of thumb and rule-consequentialism proposed as a means of incorporating non-consequentialist features so they are forcefully ingrained as a matter of practical guidance. I do not share this interpretation of the distinction between direct and indirect consequentialism. Secondary principles can be deeply internalized (Railton, 1984), and indirect versions of consequentialism include disaster-avoidance exceptions to avoid absolutism (Hooker, 1995; 2000, pp. 126–36). Thus, reasons to prefer direct or indirect formulations of consequentialism are more appropriately understood in terms of theoretical considerations like the cogency of blameless wrongdoing rather than practical guidance.

from murdering innocents in all but exceptional contexts. Consequentialists cannot endorse absolute prohibitions in principle, but they will recommend that agents internalize constraints in practice that only give way in rare situations.

This brings us back to consent apps, headaches and the practical question of how to balance our ordinary decision procedures against opportunities to directly promote the good. In what circumstances should agents remain committed to long-term, non-consequentialist dispositions, and when should they be encouraged to pursue straightforward consequentialist math at the expense of regular deontological constraints? The answer to this question is complex, and consequentialists should not be too quick to presume that a single approach applies equally well in different contexts.

To see that this is so, it is worth considering Mill's influential discussion of justice in chapter five of *Utilitarianism* (1998). Mill's aim is to identify our intuitive sense of justice and argue that it is not as contrary to utilitarian morality as it appears. He separates the powerful sentiments associated with our justice-oriented judgements from their justifications, and he cautions against presuming that the intuitive force of these judgements indicates that they represent an objective feature of morality (1998, pp. 87–88). He argues that we ought to instead conclude that sentiments of justice are justified when they work toward the protection of our vital collective interests as agents bound together for the common good.¹⁹

Mill's incorporation of justice into utilitarianism is instructive when it comes to sorting out when consequentialism ought to endorse common-sense constraints on promoting the good. We recoil at the prospect of an innocent person being killed so that their resources are distributed to others who would more efficiently benefit from them, yet the consequentialist can plausibly embrace this common-sense reaction because of our shared and vital interest in protecting personal security. This point is crucial for Mill, and it

¹⁹ In Mill's words, 'The sentiment of justice, in that one of its elements which consists of the desire to punish, is thus, I conceive, the natural feeling of retaliation or vengeance, rendered by intellect and sympathy applicable to those injuries, that is, to those hurts, which wound us through, or in common with, society at large. This sentiment, in itself, has nothing moral in it; what is moral is the exclusive subordination of it to the social sympathies, so as to wait on and obey their call' (1998, p. 96). I take no stand here on whether to interpret chapter five as evidence that Mill defends rule-utilitarianism or a view of rights as secondary principles incorporated into act-utilitarianism. For discussions of this interpretive question, see Miller (2010, pp. 85–97), Brink (2013, pp. 214–33), and Turner (2015).

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is one we would do well to remember: the safeguards provided by the concepts of rights and justice must be powerfully insulated from direct consequentialist evaluations because their justifications depend on ensuring individual security and *the continuing expectation of security* in civil society (Sumner, 2006, p. 192; Miller, 2010, p. 105; and Eggleston, 2011, pp. 75–78). The impact on general promotion of the good is disastrous if agents have no assurances that their basic protections will not be suddenly revoked. Thus, consequentialists can adopt Mill's justification for insulating deontological considerations from outcome calculations, e.g. they can avoid sanctioning the murder of innocents for the sake of famine relief.

Things get more complicated when we revisit speed limits. If an expectation of security is such a vital component of promoting the good via deontological constraints, why would consequentialists like Norcross appeal to our apparent endorsement of higher speed limits? Why do we not feel threatened by the risk of vehicles and invoke Mill to argue against lives lost for the convenience of speed? Answers here require digging into details. Norcross is correct to claim that consideration of driving speeds is unlikely to support absolutism given how extreme the measures would need to be in order to avoid all non-culpable fatalities. Beyond that conclusion, however, our reasons for accepting elevated speed limits are varied. Some are probably not credible, owing to our unhealthy fascination with motorized vehicles and inaccurate presumptions that each of us is so smart, skilled or diligent that we would never be the ones involved in accidents. Other reasons, however, cannot be dismissed so easily. One might argue, for example, that fatalities associated with higher speed limits are justified because most of the fatalities will be other drivers who have arguably consented to the risks, or that some of the pedestrian fatalities are due to careless decisions on their part.²⁰ Once the data is narrowed to include only non-culpable pedestrians killed by speed limits elevated from, say, 30mph to 50mph, the number of deaths traded for convenience might be low enough to accept a permissive distribution of risk and benefit.

Moreover, there are specific features related to the risk of death from elevated speed limits that affect a consequentialist analysis of whether elevated limits are justifiable. The first is predictability with respect to the harm at stake. Even pedestrians are assured that

²⁰ Of course, even irresponsible pedestrians are owed protection from gratuitous harm, but to be analogous to *Life for Headaches* we ought to rule out pedestrians that, say, cross busy streets at night wearing dark clothing, *etc.*

they only risk being killed by cars if they are near roads with elevated limits. Furthermore, the risk of death from elevated speed limits does not disproportionately apply to any particular group of persons. Some socio-economic groups may be more likely to live near roads with elevated speed limits, but it is uncommon for certain groups of pedestrians to fear they are uniquely vulnerable to traffic accidents.²¹ Mill's argument for deontological protections is therefore not as strong in the case of speed limits, because no vital need to safeguard expectations of security exists in the same way safeguards are vital in other contexts. Reducing speed limits is smart social policy, but the argument for deontological constraint in this context is not obvious when elevated speed limits do not create anxiety for individuals in the same way that anxiety would increase if people thought they might suddenly be robbed or killed to benefit others in need of aid.

Now consider the appropriate consequentialist response to sexual violence. I should hope it is obvious how powerful the justification for deontological protection ought to be when it comes to a risk of harm so potentially devastating to the well-being of agents and so destructive to their expectation of personal security. Explanations differ when it comes to precise articulations of the wrongness of non-consensual sex and the most fundamental features of the harm it generates, but these differences only emerge from an underlying agreement that sex without consent is massively injurious to the autonomy, emotional faculties and basic psychological integrity of persons victimized by these acts.²² Beyond the conspicuous magnitude of this harm, consequentialists ought to recognize the way that sexual violence against women triggers a Mill-inspired argument for deontological protection: the violence undermines a *fundamental expectation of security* in the way it causes members of a vulnerable group to experience chronic anxiety about the possibility of being assaulted in a variety of circumstances. Even if those who identify as women have not directly experienced sexual violence, being reasonably informed about the state of their community will make it rational to be concerned for their personal security. Anyone who disagrees is fortunate enough to have never had to plan exit strategies from rooms in which they were alone with co-workers, set up buddy systems with friends to watch over their drinks at parties, refuse to accept rides

²¹ This is unfortunately not true for disabled persons (Kraemer and Benton, 2015).

²² To scratch the surface of work that examines the harms and wrongfulness of sexual violence, see Card (1991), Cahill (2001), McGregor (2005), Archard (2007), and Alcoff (2018).

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home that would otherwise be convenient, calibrate how amicable they ought to be so that they avoid unintended messaging, walk through parking lots with keys between their knuckles, question how much they trust romantic partners before being alone with them, etc., etc., etc. And for those who have experienced sexual violence directly, it is that much more reasonable to experience a continuously elevated state of fear and anxiety, if not debilitating post-traumatic stress, about the possibility of being subjected to another assault.²³ There is just no doubt that the prevalence of sexual violence is such that women experience exactly the kind of persistent lack of security that Mill warns us against and uses as a key premise in his consequentialist argument for constraints related to rights and justice.

As a result, consequentialists ought to be just as shocked and outraged as deontologists that our common-sense intuitions are, at best, ambivalent about the prospect of a viable consent app. The app would only result in one type of improvement in the overall problem of sexual violence, but a reduction in the occurrence of the kind of acquaintance rape that a viable app is designed to prevent would be a significant improvement. Thus, consequentialists should definitely not appeal to permissive intuitions about avoiding the use of a consent app the same way they might appeal to our intuitions that elevated speed limits are justifiable. In general, what I hope this discussion reveals is that we should not let the choices in standard philosophical examples fortify the misleading assumption that deontologists always defend common-sense protections for individuals and consequentialists always opt to undermine these protections to promote impartial goodness. Few deontologists are true absolutists, and the question of whether consequentialists ought to permit sacrificing individual interests for collective gains depends on complicated empirical predictions.

This much is familiar territory for those aware of the resources available to consequentialism, yet the preceding discussion is meant to specifically undermine the presumption that these resources can, *at best*, restrict impartial maximization so that consequentialism approximates the deontological components of common-sense morality without ever surpassing them. We are accustomed to thinking that consequentialist calculations are always structured so that direct maximization is limited so as to be just barely consistent with

²³ Note the brave and terrifying descriptions from Susan Brison (2002) and Karyn Freedman (2014) of the enduring psychological trauma they experienced as survivors of sexual assault.

common-sense morality; however, as a general presumption this relies on the premise that common-sense morality is synonymous with deontological constraint. As we have seen, reality is more complex than this pattern. It will seem unusual for consequentialists to complain that common-sense morality is *not deontological enough* in certain contexts, but this is precisely what consequentialists ought to say when common-sense morality too easily sacrifices the personal security of vulnerable agents for the sake of less significant gains.

Consider how rarely this point is acknowledged in the literature that explores the boundaries of consequentialism and competing deontological positions. Moderate deontological views incorporate a complex mix of obligations to promote good outcomes and side-constraints on how this promotion can permissibly proceed (e.g., Scanlon, 1998; Kamm, 2007; Darwall, 2009), but a tacit presumption underlying such views is that they present alternatives to consequentialism by capturing the moral constraints on aggregation present in common-sense morality that consequentialism can only, at best, approximate via indirect measures. It is normally presumed that these indirect measures merely, ‘attempt to mimic the intuitively plausible aspects of a non-consequentialist, deontological approach to ethics’ (Alexander & Moore, 2020), so that no conceptual space is left for measures within consequentialism to move *past* the thresholds of common-sense morality and recommend even more stringent practical commitments to deontological prohibitions. Moreover, consequentialists do themselves no favours by tacitly accepting the terms of this conceptual landscape and seeking only to undermine the intuitive force of constraints on aggregation to justify the sacrifices they must be willing to make in principle.²⁴ They ought to instead remain open to the ways in which empirical predictions might *reinforce* deontological constraints, and this is especially true in cases where common-sense judgements are insufficiently attuned to the needs of vulnerable populations.

6. Conclusion

Consequentialists ought to be disappointed, rather than relieved, that sexual consent apps exhibit such serious practical shortcomings that a viable app is unlikely in the foreseeable future. Consequentialists ought to be disappointed because these shortcomings contribute to

²⁴ A prominent example here is Joshua Greene (2007, 2014). For a consequentialist reply, see Woodcock (2017).

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a missed opportunity for improving the personal security of a large group of agents whose well-being is threatened by sexual violence that could be at least partly mitigated by a viable consent app. I have predicted that this conclusion is not presently consistent with the intuitions of common-sense morality, i.e. that most people are relieved to discover that they are not required to support the widespread adoption of an app that would inhibit the thrill of sexual spontaneity to protect the vital interests of a vulnerable population. Nevertheless, a key feature of consequentialism is a willingness to question the prescriptive authority of our common-sense moral judgements. Mill does optimistically propose that we can attribute some *pro tanto* authority to these judgements because of a cultural history that has arguably shaped them in ways that promote the good of the community (1998, pp. 69–71), but the progressive element of consequentialism arises from a willingness to scrutinize these judgements to ensure that they are consistent with our best estimates of what promotes long-term goodness. When it comes to intuitions supporting *Assaults for Convenience*, consequentialists ought to be highly suspicious of these intuitions given the likelihood that their history has been shaped by patriarchal indoctrination. At most, they reflect considerations outweighed by a competing judgement that sexual spontaneity is a luxury compared to the fundamental right of personal security that could be safeguarded with the widespread use of a viable consent app. Consequentialists may be more familiar with cases in which their progressivism involves breaking down common-sense moral judgements in favour of direct estimates of how to promote goodness, but there is no reason why the long-term calculations of consequentialism cannot result in revisions to common-sense morality that fortify deontological constraints to achieve long-term results.

In closing, it is worth noting that nothing presented here is designed to convince those partial to deontological theories that consequentialist justifications for deontological constraints are as compelling as those provided by theories like Kantianism or contractualism. Ultimately consequentialists must, like Norcross, bite the bullet and accept the possibility in principle of trade-offs between individual lives and distributions of benefits like headache relief.²⁵ Few deontologists will ever accept this result. My aim is only to point out

²⁵ For example, in his defence of Norcross' *Life for Headaches* thesis, Schönherr (2018, p. 218) observes, 'we may need to settle in with the seemingly unintuitive idea that the disvalue of a large number of very small bads can outweigh the disvalue constituted by a small number of very large bads'.

that consequentialists do themselves no favours in comparison to deontological rivals if they merely bite in-principle bullets without *also* promoting the resources their theory has to provide personal security for agents in realistic practical circumstances. For if they fail to articulate the practical resources consequentialism has to offer, the implicit assumption will be that the theoretical result from *Life for Headaches* can be straightforwardly extrapolated to any real-world cases in which the security of individual agents is potentially traded for very large numbers of small benefits to others. This would be a shame, because it should be a strength of consequentialism that it is responsive to the specific details of how goodness is best promoted in different circumstances. It is understandable, of course, why this point is not emphasized in the lives-for-headaches literature, since the aim of authors on both sides of that debate is to adjudicate question issue of absolutism in principle. Yet it is important to supplement this literature with the details of real cases to recognize the underappreciated conclusion that long-term consequentialist calculations could end up recommending deontological constraints that are *even more stringent* than what we currently find in our common-sense moral judgements.

Consequentialists ought to therefore remain open to the contingency of long-term calculations in practical applications of their theory when it comes to addressing cases that bear some likeness to thought experiments like *Life for Headaches*. They may never persuade those who hold the ‘no lives for headaches’ position, but consequentialists ought to nevertheless emphasize that the progressive nature of their theory will sometimes resist common-sense morality in order to *protect* vulnerable agents from having their interests unreasonably discounted.

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