

Informed Consent: Autonomy and Self-Ownership

DAVID ARCHARD

ABSTRACT *Using the example of an unconsented mouth swab I criticise the view that an action of this kind taken in itself is wrongful in respect of its being a violation of autonomy. This is so much inasmuch as autonomy merits respect only with regard to 'critical life choices'. I consider the view that such an action is nevertheless harmful or risks serious harm. I also respond to two possible suggestions: that the action is of a kind that violates autonomy; and, that the class of such actions violates autonomy. I suggest that the action is wrongful in as much as it is a bodily trespass. I consider, and criticise, two ways of understanding how morally I stand to my own body: as owner and as sovereign. In respect of the latter I consider Arthur Ripstein's recent defence of a sovereignty principle. Finally I criticise an attempt by Joel Feinberg to explain bodily trespass in terms of personal autonomy.*

Introduction

Consider the action of inserting a swab into someone's mouth without her agreement, yet harmlessly, painlessly, and without coercion or deception. Most will surely judge that the person swabbed has nevertheless been wrongfully treated. In what follows I want to try to make clear what this wrong might be, and I shall do so, first, by carefully distinguishing it from other wrongs. Some may nevertheless judge that the action is not, taken for itself, wrongful. I wager that those who so judge are in a minority. But since the contrary judgement is my starting point I ask that these sceptics reason conditionally. If — as most think — inserting a swab into someone's mouth *is* wrong, what might this wrong be? I trust that my argument may then either persuade the sceptics that there is indeed a wrong done, or give them a better and more informed sense of why they were right to hold in the first place that no wrong has been done.

To repeat, this putative wrong must first be distinguished from others. For instance, a distinct and further wrong is done if the saliva sample obtained by means of the swab is processed and used for certain ends. Most obviously the saliva sample can procure DNA information that, in turn, might identify the probable perpetrator of a crime, assist fundamental research into the human genome, or detect medical conditions. Clearly great goods may be produced and great harms may be averted by using this information: the criminal is removed from the performance of further terrible crimes, the otherwise fatal condition is treated, and the carrier of the lethal infection is quarantined.

Yet if the DNA information was used without the person's consent then he would have been wronged. If someone voluntarily submitted to a mouth swab only on condition that the information thereby obtained would remain confidential to the doctor or researcher, then the wrong would be done in divulging that information to third parties. This wrong would normally be understood as the violation of a general right

to privacy, or, quite distinctly, as a breach of confidentiality between researcher and subject. In sum, a wrong is done in inserting the swab in a person's mouth without her consent. A further, and distinct, wrong would be done in using the swab to obtain and make use of DNA information from the swab.

The wrong done in taking a mouth swab without consent may be outweighed by the envisaged good produced or harms averted if the sample is processed and the information gained used as suggested. The manner in which the swab is obtained involves no wrongdoing other than the ignoring of the person's consent. This is the case if, for instance, the person swabbed were sleeping open-mouthed, thereby obviating the need forcibly to hold her mouth open, or to administer a drug, or to lie about what was about to be done. The person is thus neither coerced nor deceived. Nevertheless there is a *pro tanto* reason not to take the swab without the person's agreement.

Is the swab taker's behaviour to be simply and straightforwardly understood as a criminal act? In English common law the unconsented swab taking could be categorised as battery. It is not assault in that it is not, as envisaged above, an act which causes the other to apprehend immediate and unlawful violence. This is how assault is defined in most common law jurisdictions. But, in principle, any touching of another person, however slight and trifling, may amount to a battery. The absence of consent here is crucial and the law recognises that we implicitly consent to the quotidian bumps and brushes of modern urban life. The taking of the swab is, however, not consented to. Is it battery? Blackstone in his Commentaries wrote that the 'least touching of another's person wilfully, or in anger, is a battery'. He justified this claim with the comment that the law 'cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it: every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner.'¹

That the least touching of another, at least in anger, may be a battery, was affirmed in a 1704 English case.² But Blackstone's comments are suggestive rather than fully explanatory. In what sense precisely is every man's person sacred such that the law should not distinguish between any degree of 'violence' from mere touching to grievous wounding? Why is 'meddling' 'in any the slightest manner' a violation of a fundamental right? The fact that our imagined case of unconsented swab taking could be prosecuted as a crime does not resolve the puzzle of why it should be. It is to the matter of why it might be a wrong that this piece is devoted. That it is wrong does not of course show that it should be criminalised. I take it that the swab taking is wrong. I do not take it that it should be legally prohibited.

Autonomy

The wrong is done in inserting the mouth swab without consent. Were consent to have been obtained no wrong would, *ceteris paribus*, have been done. Since consent functions precisely to confer legitimacy on actions that would, absent consent, be wrong we start here with the presumption that the swab taking is wrong. Why is consent to this action required? Those who insist upon the need to get informed consent in these circumstances normally appeal to the ideal of autonomy. The imperative to secure informed consent to any medical intervention or to participation in any medical research is viewed as a core precept of medical practice. The obtaining of consent is said by the

principal defenders of the requirement to be, in turn, a 'specification' of the principle of respect for individual autonomy. It is as much a specification of this principle as the requirements upon doctors to 'tell the truth' and to 'protect confidential information'.³ In other words taking the swab without consent is an instance of failing to respect autonomy.

What then is it that must be respected? By general agreement it is not the capacity of individuals to make independent, rational choices. This, it can be agreed, varies across individuals. Rather it is the fundamental interest all individuals have in making decisions in whatever concerns their own lives, free from external coercion and from manipulation — by such illicit means as brainwashing and involuntary intoxication — of their beliefs and preferences. The right of individuals to make such choices deserves respect for so long as the choices are, in a specified minimal sense, autonomous, that is to say, informed, voluntary and rational. If somebody who is sufficiently autonomous chooses not to have a swab taken then it is disrespecting their autonomy to do so.

But why should the exercise of autonomy, thus understood, be respected? Kantians deny that Kant himself is a proper source of an answer to this question. What they understand as autonomy — namely the exercise of practical reason in conformity with the moral law — merits respect but it is some distance removed from what is meant by most of those who now use the term autonomy. 'Contemporary accounts of autonomy have lost touch with their Kantian origins, in which links between autonomy and respect for persons are well argued; most reduce autonomy to some form of individual independence, and show little about its ethical importance.'⁴ By autonomy in the modern non-Kantian sense is meant personal independence in leading my life as I and not others sees fit.

Thus a more obvious source than Kant is J. S. Mill who does not use the term 'autonomy' but instead speaks of 'individuality', 'originality', and 'spontaneity'. Mill of course defends the familiar liberal principle that persons should be left free to pursue their own lives so long as they do not cause harm, against their will, to others. To the repeated question, 'But why should we respect this freedom of individuals?' Mill's own answer is equivocal. In particular it remains notoriously unclear whether on Mill's account autonomy has an intrinsic or an instrumental justification. Is it that autonomy is valuable inasmuch as the exercise of autonomous choice does as a matter of fact conduce to what is best for the individual? Or is it that choosing for oneself is itself constitutive of what it is to lead a good life?

This dispute over how Mill intended to justify the exercise of autonomy can fortunately be laid to one side. For what seems clear is that the value of autonomy is to be found in *the leading of lives*. Whether autonomy is valued intrinsically or instrumentally it is valued within the context of lives rather than in respect simply of isolated decisions. Mill speaks of a person's 'own mode of laying out his existence'.⁵ In this vein also Gerald Dworkin comments that autonomy is concerned with 'a whole way of living one's life and can only be assessed over extended periods of a person's life'.⁶ In somewhat similar terms Joel Feinberg writes that 'the most basic autonomy-right is the right to decide how one is to live one's life, in particular how to make the critical life-decisions'.⁷

This point can also be made by making the crucial distinction between what counts as an exercise of autonomy and what, as an exercise of autonomy, is sufficiently valuable to merit the protection of 'the most basic autonomy-right'. Deciding where to cross a road, what dessert to order, what colour curtains to buy, what television

programme to watch, may all count as exercises of autonomous choice. Yet they do not merit being described as ‘critical life-decisions’. Deciding whom to marry, what political party to join, what profession to pursue, by contrast, do merit being so described. However although the basic thought here expressed by Mill, Dworkin and Feinberg seems perspicuous it is open to various interpretations.

First, these important (‘critical’) autonomous decisions might be thought of as the ones whose temporal scope is extended, whose impact is long-lasting. Thus the choice of any particular meal covers only its preparation and consumption, but a decision to become a vegetarian could endure for a whole lifetime, or at least a significant part thereof. This cannot be or cannot be only what is intended. Many relatively trivial decisions are long lasting but can hardly be properly described as ranging over ‘a whole way of living one’s life’: growing a moustache, selecting a phone number, painting your front door red. By contrast a life-ending decision — such as one to shoot yourself — or a major life-changing decision, such as one to amputate a limb — can be taken quickly and have immediate effect.

The second way to understand the thought about the relationship of autonomy to whole lives is by appeal to the class of autonomous decisions. What matters in the leading of a life, it might be argued, is not that this or that particular decision is autonomous. Rather it is important that we can *in general* make autonomous decisions. What makes for an autonomous life, and one that in consequence is valuable, is that throughout one’s life I can and do on the whole and for the most part make autonomous decisions.

This second interpretation is surely too broad and imprecise. We are concerned with identifying what merits being described as the exercise of ‘the most basic autonomy-right’. It is true then that a life goes better if crucial decisions are made autonomously. It certainly goes well if *all* or the *majority* of decisions are autonomous, but then it does so only inasmuch as it is true, or probable, that the critical decisions are autonomous. A life does not go significantly better or worse if I do not autonomously choose what to eat this forthcoming Thursday or Friday. But it does, normally, go markedly worse if I cannot autonomously choose whom to marry, which job to do, what religion or none to practise, and so on.

Thus the best way to understand what lies behind the comments of Mill, Dworkin and Feinberg is that an autonomous decision is valuable insofar as it concerns a matter critical to the leading of a life. A critical decision in this sense is one that makes a substantial difference to the person’s life — what projects he can undertake, what he finds worthwhile and rewarding in life, what gives his life purpose and value. One’s whole manner of going on or ‘mode of existence’ is affected by such decisions. The decisions Feinberg cites — those of choosing a career, electing to get married, deciding whether or not to have children — are classic examples of life-changing moments. Of course marriages and jobs can be short-lived, and children can be given up for adoption after their birth. Let us say then that an autonomous decision is critical in the intended sense for being significant and, normally, enduring in its impact on one’s life.

If my analysis is correct then it is hard to see how an unconsented mouth swab represents an assault on personal autonomy. How does a fleeting intrusion into a mouth cavity by a Q-tip, even if unwelcome and uninvited, subvert the ability of its victim to lead her life as she chooses? How is this ignoring of my wishes a ‘critical’ or ‘enduring’ or ‘life-changing’ moment? My conclusion is that the wrong of taking the mouth swab cannot be understood by appeal to the idea of respecting personal autonomy.

Before I suggest a better way to think about the wrong in question let me respond to various challenges to my interim conclusion. The first can be found in the ideas of Onora O'Neill. She was quoted earlier repudiating the Kantian provenance of the modern ideal of autonomy as individual independence, enshrined in the demand for free and informed consent. For her it makes no sense to think of that demand as giving effect to Mill's defence of a creative liberty to make different 'experiments in life'. Nevertheless she does think that 'principled autonomy', properly rooted in Kant's ethics, can deliver important moral obligations that should regulate our dealings with one another. Of particular importance are those obligations to avoid coercion and deception. Here then for her lies the true importance of the requirement of informed consent. The obligations to avoid coercion and deception 'provide the basis for informed consent; conversely where free and informed consent is given, agents will have a measure of protection against coercion and deception'.⁸

In the envisaged example of the unconsented swab taking the agent is neither coerced nor deceived. This would be true if she was held down and her mouth forcibly opened; or if she was threatened with violence to secure her compliance. It would be true if she were told some lie in order to obtain her agreement. This lie could have been about the nature of the action or about its purposes.⁹ However I imagined that the swab could be taken whilst she slept open-mouthed and that even in these circumstances she would be wronged so long as she did not consent. Consent might be absent either because the swab taker ignored a prior expression of dissent to this action or because he simply failed to ask for and secure the consent. If this is how we specify the example I cannot see that the requirement to obtain her consent protects her in this particular instance against coercion and deception.

But perhaps we should think not in terms of what is wrong with this isolated act of swab taking but what it might, if uncensored and undeterred, bring in its wake. The need to obtain informed consent in this case can be justified as prophylactic — minimizing if not entirely eliminating uninvited harms and injustices. Imposing a duty upon medical personnel to consult with their patients or subjects, and giving these persons a right to refuse or to accede to any proposal, is an important way of ensuring that they do not suffer any ills, or serious risks thereof, of which they are not fully aware or which they are not prepared to undergo. Beauchamp and Childress point out that this was historically the original motivation for devising a principle of informed context.¹⁰ At the forefront of the minds of those who devised such conventions as the Nuremberg Code of Ethics with its absolute requirement of consent to all participation in medical research were the abhorrent practices of Nazi physicians, nurses and scientists who engaged in experimental research upon prisoners without their knowledge or willing agreement.

It should be noted that the prophylactic argument is open both to the Kantian who thinks of the wrongs to be prevented as violations of our duties not to coerce and to deceive, and to the Millian who is concerned to protect an agent's choice of 'mode of existence'. Indeed it is open to the defender of any particular theory of moral harms and ills. The argument, importantly, does not purport to show that the mouth swab is wrong because it is a violation of the principle of respect for autonomy. Rather it attempts to show that an insistence upon the obtaining of informed consent is the best protection against wrongs that may or may not include further and more general breaches of autonomy.

A prophylactic argument specifies risks that a particular action carries and in virtue of which the action is impermissible. We can distinguish between two kinds of risks — those of ‘remote harms’ and those to which the conclusion of a slippery slope argument points. I will take each in turn. Andrew von Hirsch points out that in certain situations my otherwise innocent actions may risk serious ‘remote’ harms.¹¹ For von Hirsch the harms are remote not in any literal sense of their temporal or spatial remove but rather in the sense that they depend upon certain contingencies, and chiefly the actions of others. For instance my overtaking on a blind bend only endangers other road users if another car is in fact travelling from round the bend. Here the riskiness of the conduct ‘depends on the existence of a contingency, but where it is not known or knowable to the actor *ex ante* whether that contingency will materialise in the particular situation’.¹² Now of course the swab taker may not know, for instance, that as he takes the swab the actions of others will cause the victim to suffer an involuntary movement (jerking her head, snapping her mouth shut) such that the insertion of the swab causes injury. Of course this is possible but I set such contingencies to one side. The example can be constructed, and was so constructed, to eliminate these possibilities. In their absence a wrong is, arguably, still done by inserting the swab without consent.

A slippery slope argument attempts to show that what follows from a putatively permissible action is one that is undoubtedly impermissible, from which outcome can be derived a judgement as to the impermissibility, all things considered, of the initial action. I have allowed that there is a *pro tanto* reason not to take the swab, but that the wrong in question might not so great as to rule it out if significant benefits could thereby be obtained or significant ills avoided. However a slippery slope argument could be used to show that the significant wrongs that must follow in the wake of tolerating a single mouth swab would swamp any such benefits or avoided harms. For simplicity’s sake I shall assume that the benefits and harms in question have to do with the obtaining and use of DNA information.

A slippery slope argument can take a rational or an empirical form.¹³ In its rational form the argument is that the permissibility of what is evidently impermissible can validly be deduced from the initial, and putatively unproblematic, permissibility of the action in question. I started from the presumed judgement that taking an unconsented mouth swab *is* wrong. Yet it might still be permissible all things considered if great good could be produced or great harm averted by making certain uses of the swab. However allowing that a single painless mouth swab is permissible, all things considered, does not license the judgement that *any* means of obtaining the relevant information are allowable. This might need to be spelled out. But I assume the reader can envisage intolerably brutal modes of obtaining the information and satisfy herself that *these* cannot be justified by an appeal to the all things considered permissibility of the token swab taking.

In its empirical form the argument would be that, as a matter of fact, greater wrongs would be done in the longer term and broader social context if we were to sanction the mouth swab. An empirical claim needs supporting evidence. For instance we would need to show that personnel licensed to take mouth swabs under specified circumstances and for limited purposes would inevitably and unchecked move on to ever more vicious yet gratuitous assaults on individuals. It is unclear, to say the least, how evidence of such developments could be produced — either from what we know of mouth swabbing by authorised persons or from the allowing of actions similar to mouth swabbing which are also constrained by specific conditions and purposes.

I conclude that neither a remote harms analysis nor a slippery slope argument shows the painless and harmless yet unconsented taking of a mouth swab to be terribly wrong because of what might follow rather than because of what it represents in its own right. Remember that the prophylactic argument was entertained not in order to try to show that a swab taking violates autonomy but rather to show that it is nevertheless very wrong. My interim conclusion, to repeat, is that the wrong of taking the mouth swab cannot be represented as a violation of the principle of respect for autonomy.

Here are two ways a defender of the view that it is might still respond. First, the taking of the mouth swab is the *kind* of action that violates the principle of respect for autonomy.¹⁴ It is of a kind, in one sense, simply in virtue of the fact that it is unconsented. It is true that every act done without the consent of the other fails to respect the other's autonomy. But remember that I distinguished between what is an exercise of autonomy and what, as an exercise of autonomy, merits the protection of a right to autonomy or by a principle of respect for autonomy. I argued that what merits protection are critical choices about how to live one's life. Painlessly taking a mouth swab without one's consent is wrong, if it is wrong, in the same way that the merest brushing against another's body without their consent is. In neither instance, so I would argue, is the wrong one that can be spelled out as interfering with the capacity of the individual to live her life as she chooses. But *that* is how defenders of a principle of informed consent wish to justify its importance.

Taking the mouth swab is, in another sense, of a kind that also includes amputating a limb, blinding a person, performing unnecessary brain surgery, and perpetrating other gross interferences with a person's body. The kind in question is simply that of crossing the physical boundaries of the person against her will. In due course I try to capture the wrong thereby done. But note that in the present context the thought is that the taking of the mouth swab disrespects a person's autonomy and does so not simply in virtue of defying the person's wishes but inasmuch as it is of a kind with all physical intrusions upon the person's body.

However it now seems clear that the suggested kind is not perspicuously related to the putative wrong of disrespecting autonomy, where respect for autonomy is conceived as valuable for allowing individuals to make 'critical' decisions about how to lead their lives. There is a kind of intrusion upon the person that *does* interfere with life-choices and the members of *this* kind form a sub-set of all possible intrusions upon the person. The remaining set of all possible intrusions upon the person comprises those that *do not* deny persons their critical life choices. Put in a much simpler way, lopping off a limb or performing a lobotomy without your agreement significantly subverts your ability to lead your chosen life; brushing against your person, and — I would argue — painlessly taking a mouth swab do not.

Perhaps I am mistaken in seeking to delimit the relevant kind of actions by reference to their consequences — in this context, those actions that seriously impact upon a person's ability to lead her life as she chooses. Intrusions upon autonomy may all be united by something else, namely their representative significance. Joseph Raz, for instance, argues that any instance of coercion or manipulation treats its victim 'as an object rather than as an autonomous person'. The consequences of any such instance may be 'negligible'. Nevertheless,

[t]he natural fact that coercion and manipulation reduce options or distort normal processes of decision and the formation of preferences has become the

basis of a social convention loading them with meaning regardless of their actual consequences.¹⁵

The apparently inconsequential violations of autonomy — such as a swab taking — nevertheless breach the general prohibition against any interference with autonomy, a prohibition which has ‘conventional and symbolic or expressive character’ and which ‘transcends the severity of the actual consequences’ of any particular action.¹⁶

In other words an inconsequential or barely consequential breach of autonomy is nevertheless properly treated as grave just because it is a breach of autonomy. This is so because a convention accords it this significance, and the justification of having such a convention appeals to the consequentially serious breaches of autonomy. Doing *x* is not in itself very wrong and has no bad consequences. However we properly load the doing of *x* with the sense of wrongfulness because *x* is of a kind with actions that do have very bad consequences. As I will argue below the claim that the taking of the mouth swab is the *kind* of action that violates the principle of respect for autonomy is, once disambiguated, unpersuasive. But I also want here to say the following. Whosoever sees the swab taking as a breach of autonomy does not, I suspect, see it as inconsequential and as only conventionally or ‘symbolically’ wrong. Inasmuch as it is a violation of autonomy they see it as being as wrong as any consequentially momentous violation.

Second, the loading of the inconsequential autonomy breach with great significance is, at least according to Raz’s argument, conventional not natural. Any convention can be challenged, and it is thus entirely proper to ask why we *should* see the swab taking as wrongful. What would the justification of this particular convention be? Remember that an appeal to some version of the prophylactic argument is, if my previous comments are warranted, not open to a defender of the convention.

Third, it is far from clear that the idea of such a convention has general application. The wider thought is that for a class of acts the wrongfulness attached to those of them with more serious consequences is symbolically or expressively extended to those that have minor or no consequences. Take the class of insults. These can range from extremely minor comments, barely noticed if noticed at all, to grossly offensive and greatly wounding slanders. It would surely sound odd to characterise a barely noticed jibe as loaded with all the significance of cruel and hurtful abuse. The convention does not seem to operate here. But if the convention operates only in the case of breaches of autonomy we are owed an explanation of why.

Raz’s quoted comments clearly imply that autonomy-denying actions can vary in their ‘actual’ consequential seriousness. But this may be beside the point. Perhaps what is wrong with any breach of autonomy is not to be found in its consequences but in its treatment of the other as an object and not as an autonomous person. The wrongfulness of the action lies in the disregard one person has for the other’s status. But objectifying treatment also varies in its seriousness even if it need not vary in its consequential impact. It is clearly much worse to enslave but benevolently treat another than momentarily to treat a waiter, for instance, as no more than a tray carrier. Our envisaged swab taker need not view the other as beneath contempt. Swab taking might be motivated by a fundamental disrespect for the other but it need not be. Conversely disrespect might be shown by the manner in which someone threatens to take the swab but does not do so. If it is said that the disrespect is shown in the very fact of not obtaining consent or discounting its absence the reply is simple. That

consent is needed to legitimise what otherwise is wrong does not tell us what is wrong with what is not consented to. Why exactly is it disrespectful to take the swab without permission?

I said that that there are two ways in which someone might, against my interim conclusion, still insist that the wrong of the taking of the mouth swab is a violation of the principle of respect for autonomy. The first, which I have just criticised, is that taking the swab is the *kind* of action that violates autonomy. The second way is by arguing that the *class* of unconsented mouth swabs, conceived as a set of actions, does violate autonomy.¹⁷ This claim needs disambiguating. If the claim is that each and every instance of unconsented mouth swab taking is a violation of autonomy then that claim is directly contradicted by my interim conclusion. In that case the claim in question amounts to a simple denial without further argument of my conclusion. I assert that an unconsented mouth swab does not deny autonomy; my opponent says that it, and every similar instance of taking swabs, does. But thus far no counter-argument has been provided.

If the claim is that some set of mouth swab takings *taken as a set* denies autonomy then it bears scrutiny. But note that now that it is a different kind of claim. I say that a single unconsented mouth swab does not deny autonomy; the counter claim is that a set of mouth swabs does. This may well be true but it is beside the point. Constant repetition or an aggregation of individually trivial and permissible acts may indeed constitute a wrongful violation of autonomy. My continually and repeated brushing up against you, or lightly tapping your arm, or faintly stroking your hand or my doing any of these things over an extended period of time will most probably seriously interfere with your making choices of how to lead your life. But that does not, and cannot, show that a single instance of unconsented person-brushing or hand-stroking has the same effect. The point made here is the familiar one that what may be true of the class of entities, taken as a whole, need not be true of any single member of that class, and vice versa.

Self-Ownership

What then might be wrong with taking the mouth swab without the consent of the person concerned? Here is my suggestion, and I offer it both inasmuch as it would appear to be the only reasonable alternative to some version of respect for autonomy and insofar as it has great plausibility in its own right. In very simply stated terms the mouth swab is a *trespass* upon the body of that person. ‘Trespass is a claim-infringing intrusion or invasion.’¹⁸ I use, and continue to use, this term as the best that is available, whilst remaining acutely conscious of the term’s problematic juristic and proprietary implications, both of which are criticised below. Note immediately that the wrong of bodily trespass is independent of any harm that is done in and by the trespass, and of the manner in which the trespass is achieved. I trespass upon your property if I cross over the line that marks its limits. I can do so without causing harm thereby; I do not disturb the ground on which I lightly and for the merest moment step. Similarly I have imagined that the taking of a mouth swab from an open-mouthed sleeper involves no harm. Yet it is a trespass upon that person’s body nonetheless.

Furthermore, I can cross boundaries with hostile intent — as an invader does — but I can also do so with no such intent but nevertheless without permission — as an illegal

immigrant does. We can thus distinguish between the wrong of trespass as such and trespass committed under circumstances or with consequences or with further intentions such that a distinct wrong is done. For example, under English common law the act of trespass — stepping foot without permission upon another's land — is not as such a crime, although it may be pursued as a civil wrong. Aggravated trespass is a crime, and the aggravation consists, in English law, in the intention to disrupt or to intimidate those taking part in lawful activity upon the other's land.¹⁹ As it is with trespass upon land so it can be with trespass upon a person.

However, there is this important difference. In the case of bodily trespass, in contradistinction it would seem to property trespass, it matters greatly where the other trespasses. Broadly speaking we can say, 'Merely set one foot across any part of my property and you do me wrong wherever you trespass'. In the case of the body we can and should recognise diversity. Although we may think of the human body as a well-defined, continuously bounded entity its various parts nevertheless have a different significance to and sensitivity for the person. In the first instance there is a difference between a touching of skin and the penetration of an orifice. The phenomenological evidence is striking. Consider how much of an invasion, an intrusion upon what we feel to be our intimate space, is a dentist's probing of our mouth cavity, compared with a doctor's taking of a pulse or exploration of a sore limb. In the second place humans are sexed beings and our physical embodiment is the site of our sexuality. Thus touching certain parts of our body and penetrating certain orifices has a special meaning for us. In particular an unconsented sexual bodily trespass occasions its victim special hurt, or assaults central interests of the person.

All of the above has been expressed in the most general — and, hopefully, unexceptional — terms. It is not important to the argument of this piece that a broader philosophical thesis about the body should be adumbrated and defended. What matters is that we should be able to acknowledge that bodily trespass is a basic and distinctive wrong. By this I mean that what is wrong with bodily trespass cannot adequately be captured by speaking in other terms such as respect for autonomy. A full explication of the wrong, along with a more careful specification of the ways in which different instances of such trespass can wrong us, is beyond this present article. My concern here is only to suggest what is wrong about taking the swab given that it is not best explained as being wrong for violating its victim's autonomy.

Philosophy has been notoriously reticent about the body. When philosophers do talk about the body they do so within the context of very specific metaphysical and epistemological concerns.²⁰ However the issue presently under consideration — what makes a bodily trespass wrong — is a fundamental normative matter. It is important to understand how I may bodily know myself and the world, in what sense I am my body or what follows for the kind of individual I am that my body is of a certain kind. Yet resolution of these epistemological and metaphysical questions may not, it seems to me, help us greatly to know if bodily trespass is a basic and distinctive wrong, and if so why. Nevertheless I offer for criticism two distinct but both erroneous ways of metaphysically conceiving of the relationship between a person and her body; and then criticise two models of how morally I stand in respect of my body.

First, the body is not merely an instrument of the self's purposes, something which I *have* and of which I make use as I would an object in the world. But neither is it, second, that my self is simply identical with my body, that I *am* my body. I stand in a

particular, intimate relation to my body but that relationship is neither one of possession nor one of identity. This becomes a little clearer if we think of the role that embodiment plays in capturing the wrongfulness of various actions. If I lie to you or slander you I wrong you but I do not trespass upon your body. What I wrong is not you inasmuch as you are your body. On the other hand if I assault you or rape you I *do* trespass upon your body but I do not wrong you in the same way as I would if I damaged or set foot upon your property. What I wrong is an embodied self but not you inasmuch as you stand to your body as you do to your worldly possessions.

In what follows I try to make more sense of the wrongfulness of bodily trespass by critically examining two models — the proprietary and the sovereignty — of the moral, rather than metaphysical, relationship in which I stand to my body. According to the proprietary model of self-ownership I own myself and hence I own my body. Judith Jarvis Thomson, for instance, thinks that claims against bodily intrusion are property claims and that people own their bodies. She also thinks that since I *am* my body it makes sense to say that people's bodies are their First Property, whereas everything else owned is their Second Property.²¹

The proprietary idea of bodily or self-ownership is open to two important albeit very different kinds of criticism. The first holds that such an idea is incoherent; the second that speaking of self-ownership has morally unacceptable implications. Let me consider each in turn. To Kant, G. A. Cohen attributes the logical rather than normative claim that the idea of self-ownership is self-contradictory: only persons can own things but persons cannot also be things. As Cohen points out, the argument to this conclusion, such as it is, depends on the assumption that only things can be owned. Such an assumption is entirely question-begging and there seems no good reason not to allow that persons fall into the class of that which can be owned.²²

Distinct from the claim that it is incoherent to think of persons as owning themselves is that thinking of them in this way has morally unacceptable implications. In particular two implications seem to follow: that individuals may sell themselves; that individuals are entitled to the income from the use of their bodies. I summarise each in turn. First, an influential critique of prostitution, a market in human organs, and surrogacy contracts, by way of central examples, holds that the sale of the body or of bodily services involves the morally unacceptable commodification of persons and their bodies. Second, self-ownership implies a right to the receipt of income from exercises of ability and effort that can properly be viewed as one's own. Thus self-ownership permits any differences in natural endowments within a *laissez-faire* economy to result in income differences; and a *laissez-faire* economy is in turn justified by the fact that interferences with a person securing entitlement to the full return from his own efforts may be viewed as a violation of self-ownership. 'The polemically crucial right of self-ownership is the right not to (be forced to) supply product or service to anyone.'²³ The right of self-ownership thus generates a libertarian theory of distributive justice that is tolerant of significant economic inequality.

Neither of these implications needs, however, to follow from a bare statement of self-ownership. Ownership is, as Judith Thomson says, 'no more than a cluster of claims, privileges, and powers'.²⁴ For Tony Honoré ownership comprises a number of 'incidents', that is rights, maximal possession of the set of which denotes full 'liberal' ownership.²⁵ Now what it means for X to own something is that X should possess some but not necessarily all of the incidents. Further, there may be reasonable restrictions

on the ownership of some classes of things that are specified precisely by the owners' of those things not having all of the rights that constitute full liberal ownership.²⁶ Thus we could say that what it is for X to own herself is that she should have the core right to exclude others from her use but lack the right to alienate herself and the right to income from her self. Indeed we might further argue that the core right to exclusive use of one's own self is best protected by denying the person any right to alienate her self.

So we could think of the swab taking as a bodily trespass which violates its victim's core self-ownership right to exclusive use of her own person. This may suffice but I suspect there remains a problem with explaining certain kinds of bodily trespass in terms *only* of such a right. Take the case of rape. G. A. Cohen thinks that the principle of self-ownership need not be what motivates one's moral objections to some uses of a person's body. If, he suggests, this principle is the only basis for condemning rape then 'prostitution would have to be regarded as just a particular use (by the prostitute) of her rights over her body'.²⁷ Cohen thinks that a principle of self-ownership alone could not deliver moral condemnations of *both* rape and prostitution. If rape is a 'violent borrowing' of a body then prostitution must only be a 'peaceful hiring' of the same, and hence morally innocent. Yet Cohen, it seems, wants to allow us to condemn prostitution for the fact that it is the sale of that which should not be sold.

Leave to one side the question of whether that is why prostitution is wrong. Without further comment rape on this type of account is only wrong because what is one's own is 'borrowed' without your agreement. Yet *that* doesn't seem to capture the specific, and enormous, wrongfulness of rape. For it implies that rape's wrongfulness stands on all fours with any other unconsented borrowing. Whether it is your book, your car or your body, something that is yours has been borrowed without your say so. Your body is merely and for a while taken out of your exclusive use without your agreement. Where this approach goes badly wrong is in failing to capture the significance for the victim of the assault upon one's sexual being that a rape represents. Strictly and barely speaking trespass is merely a step too far. But we want also to be able to represent the significance of further and essential features of a rape. These have to be do with where the other steps, how the step is made, and what the other is doing in taking this particular step too far. Bodily trespass as such, even a concept of which allows for aggravated trespass, cannot, I suspect, represent all that is wrong with rape.²⁸

The alternative model of the moral relationship in which a person stands in relation to his body is that of *sovereignty*. Mill himself uses this language: 'Over himself, over his mind and body, the individual is sovereign.'²⁹ Sovereignty is a juristic concept used to define the scope of legitimate authority over a given domain. A state is sovereign over its territory in that it has rights in respect of what goes on within that territory, rights which are violated when that territory is entered without the state's permission. Similarly a person exercises sovereignty over his own body.

The formulation is not helpful. My body is not best understood as a 'domain' or 'space' over which I exercise authority. When you insert a swab into my mouth without my consent you are not best described as defying my sovereign will over that realm which lies within my rightful jurisdiction. Perhaps Mill's language is not to be taken literally but rhetorically: to be sovereign over one's self is just to be entitled not to have things done to one without permission. No further juristic implications were intended by the use of the term. Yet, as with self-ownership, the idea of sovereignty over a corporeal domain does not begin to explain the particular wrongfulness of some

instances of bodily trespass. A sexual bodily trespass is normally more wrongful than a non-sexual one. The juristic model can only explain this as being a more serious flouting of the sovereign will within a sphere of rightful authority. However it is not the degree of flouting of the will that explains the different degrees of wrongfulness. It is what the trespass signifies to the person. Consider this analogy. If a foreign army tramples over a sacred site the injury caused to those to whom the site is hallowed cannot be captured by speaking only of a trespass on another's soil or of the flouting of the other's rightful jurisdictional control of the site.

Arthur Ripstein has recently defended a sovereignty principle as his alternative to the Millian harm principle to legitimate uses of state power. Moreover he instances harmless trespass upon one's property (entering your home and taking a nap in your bed) and upon one's person (touching you without your permission) as precisely the kinds of wrongdoing that the harm principle fails to capture.³⁰ My concern is not whether Ripstein has indeed made a successful case for abandoning Mill's harm principle in favour of the sovereignty principle.³¹ It is rather whether what Ripstein means by 'sovereignty' captures what is wrong with a bodily trespass like the harmless swab taking.

The sovereignty principle captures an ideal of each person as rightly independent from others in respect of an entitlement to use her own powers to set and pursue her own purposes. 'Use and injury exhaust the space of possible violations of sovereignty'.³² An unauthorized touching by A of B is wrong because A thereby uses B's powers for his purposes, even if he does not interfere with A's use of her own powers, nor reduce these powers (as he might by injury). Ripstein disallows an 'indirect strategy' in defence of the harm principle, one that would appeal to the costs of not proscribing a type of action; each and every prohibited token action must be prohibited on account of *its* harms.³³ By analogy each and every use of another's powers must be wrongful in its own right, and not because failure to condemn it encourages or entails a general appropriation of others' powers; or subverts an individual's continued assurance of and security in the use of her powers.

But if this is the case I am not persuaded that the isolated swab taking is wrong for being a use of another's powers for his purposes. Consider in the example under discussion that the swab taking is absent-minded and unmotivated. It does not serve any of the swab taker's purposes and it seems strained to say that he uses the victim's powers. Compare employing a sleeping man's heavy breathing to blow out candles; or his recumbent form to block a draft. The complaint of the victim would surely not so much be, 'You are using what is mine to use' but simply 'You have crossed the boundary of my person and invaded my body'.

A Further Thought

The idea of bodily trespass as a basic and distinctive wrong is best elucidated in terms either of property in one's self, or of a jurisdictional domain over which the person exercises his will. But could we not still try to give an account of bodily trespass in terms of personal autonomy? I now consider such an attempt, which is due to Joel Feinberg who favours a version of the sovereignty model.

Feinberg argues for a direct relationship between autonomy, or self-rule, and bodily self-ownership in the following manner. Personal choice, he says, is about 'where and how to move my body through public space'.³⁴ Feinberg thinks as he does because he

envisages self-rule as sovereignty exercised over a personal domain that extends beyond the will to one's body and even to one's 'breathing space'. Moreover he thinks that this sovereignty should be untrammelled: 'one is entitled to absolute control of whatever is within one's domain however trivial it may be'.³⁵

On Feinberg's account the same degree of wrong is done to an owner however significant the trespass and however serious the harm done to the property by the trespasser. This might be plausible if one was thinking simply in terms of ownership and thus seeing the wrong as no more than an infringement of property rights. However the account does not sit easily, as Feinberg himself recognises, with the ideal of autonomy when this is cashed out in terms of a 'right to decide how one is to live one's life, in particular how to make the critical life-decisions'.³⁶ For here we do want to make distinctions between degrees of wrongfulness in terms of the extent to which someone is stopped from leading the life she chooses.

Moreover an ideal of bodily sovereignty does not seem to play the right kind of role in justifying the exercise of personal choice. Crucial here is the asymmetry between doing things with one's body and having things done to one's body. In the first place the analogy with the sovereign nation-state that Feinberg himself invokes breaks down. A nation does wrong in crossing without permission the boundaries of another sovereign state. The wrong is that of invasion. Yet it certainly does not follow that nation-states, sovereign over their own territory, have a right to move through international space. Indeed doing so would precisely amount to invading other nation-states. In the context of sovereign nation-states there simply is no 'public space'. Yet Feinberg seems to think that a right not to have one's own bodily space invaded is necessarily correlate with a right to move one's body through public space.

In the second place talk of a right to move one's body through public space does not accurately capture what is essentially involved in the exercise of autonomy. Denying someone the right of private, silent religious contemplation is not best viewed as the violation of a right of the devotee to move his body through public space. Many important life-choices are not about what to do with one's own body but what to think or believe, and — one of Feinberg's own examples — what virtues to cultivate. The contents of such choices are not essentially or significantly about bodily movements. Feinberg's attempt to explain personal autonomy in terms of bodily sovereignty fails.

Conclusion

The dialectic of this piece has, I hope, been relatively simple and straightforward. By common consent the taking of a mouth swab without her consent — even if done painlessly, without causing harm, and without any information thereby gained being used — is wrong. The orthodox view would be that the failure to obtain consent for such an action disrespects autonomy. However if autonomy is understood as being about leading one's own life, it is hard to see how the swab taking violates autonomy. Rather the action constitutes a bodily trespass. I have a right to protest against the mouth swab being taken; it is for me to give or to withhold permission. Absent my permission the other's action wrongs me. If I am to state in colloquial terms why the other's action is wrongful I do much better to say, 'This is my body and I decide what is done to it' than to say, 'This is my life and I decide how to live it'.

Yet, if bodily trespass is a basic and distinctive wrong, it remains obscure why. Or, rather, attempts to spell out what is wrong either by appeal to the idea that I own my body or by appeal to the distinct idea that I rule my body are of limited use. We still lack a proper appreciation of the differential wrongness of different kinds of bodily trespass, and may be committed by such spellings out to further contentious claims. Nevertheless if I am right about why the unconsented mouth swab taking is wrong we have at least indicated a further fruitful — and as yet neglected — line of moral enquiry, namely why exactly bodily trespass is wrong.

David Archard, *Department of Philosophy, Furness College, Lancaster University, Lancaster LA1 4YG, UK. d.archard@lancaster.ac.uk*

Acknowledgements

Some of the ideas defended in this article were first advanced in a paper published as ‘Informed Consent and the Grounds of Autonomy’ in Thomas Nys, Yvonne Denier and Toon Vandervelde (eds.), *Autonomy and Paternalism: Reflections on the Theory and Practice of Health Care*, Ethical Perspectives Monograph Series 5 (Keuven: Peeters, 2007). The present article is a substantially different and greatly expanded piece. I am grateful to audiences at Leuven and CREUM, Montreal, who provided helpful criticisms on earlier versions of this piece. It has also benefited at a ‘Work in Progress’ session from the incisive criticisms of my colleagues at Lancaster University: Garrath Williams, Alison Stone, Cain Todd, Rachel Cooper, John O’Neill, Neil Manson, Sean Crawford, and Brian Garvey. Finally, I am very grateful for the helpful comments of the Editors and two anonymous referees for the *Journal of Applied Philosophy*.

NOTES

- 1 William Blackstone, *Commentaries on the Laws of England, Volume III Of Private Wrongs* (1768), facsimile edition (Chicago & London: Chicago University Press, 1979), p. 120.
- 2 *Cole v. Turner* (1704) 90 ER 958.
- 3 Tom L. Beauchamp & James F. Childress, *Principles of Biomedical Ethics*, 4th edn. (Oxford: Oxford University Press, 1994), p. 127.
- 4 Onora O’Neill, ‘Some limits of informed consent’, *Journal of Medical Ethics* 29 (2003): 5.
- 5 John Stuart Mill, *On Liberty* [1859], ed. with an Introduction by G. Himmelfarb (Harmondsworth: Penguin, 1974), p. 133
- 6 Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1988), pp. 15–6.
- 7 Joel Feinberg, *Harm to Self*, Volume Three of his *The Moral Limits of the Criminal Law* (Oxford: Oxford University Press, 1986), p. 54.
- 8 Onora O’Neill, *Autonomy and Trust in Bioethics* (Cambridge: Cambridge University Press, 2002), p. 97.
- 9 The law on rape recognises such a distinction. Consent can be vitiated by fraud in the inducement or in the *factum* (as to the person committing the rape or as to the nature of the act).
- 10 Beauchamp & Childress op. cit., p. 142.
- 11 Andrew von Hirsch, ‘Extending the harm principle: “Remote harms” and fair imputation,’ in A. P. Simester and A. T. H. Smith (eds.) *Harm and Culpability* (Oxford: Clarendon Press, 1996), pp. 259–276.
- 12 Von Hirsch op. cit., p. 263.
- 13 Bernard Williams, ‘Which slopes are slippery?’ in his *Making Sense of Humanity, and Other Philosophical Papers 1982–1993* (Cambridge: Cambridge University Press, 1995), pp. 213–223.

- 14 This argument was suggested by comments made in discussions with Colin Macleod, although the form the argument takes is not directly attributable to him.
- 15 Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), p. 378.
- 16 *Ibid.*
- 17 This argument was suggested by comments made in discussion with Jerry Dworkin, although the form the argument takes is not directly attributable to him.
- 18 Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, MA: Harvard University Press, 1990), p. 205.
- 19 Section 68, Criminal Justice and Public Order Act (1994).
- 20 A good recent collection is Mike Proudfoot (ed.), *The Philosophy of Body* (Oxford: Basil Blackwell, 2003).
- 21 Thomson op. cit., p. 225.
- 22 G. A. Cohen, 'Self-ownership: Delineating the concept', in his *Self-Ownership Freedom and Equality* (Cambridge: Cambridge University Press, 1995), pp. 211–2.
- 23 Cohen op. cit., p. 215.
- 24 Thomson op. cit., p. 225.
- 25 A. Honoré, 'Ownership', in A. G. Guest (ed.) *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 1961), pp. 107–47.
- 26 Alan Carter, *The Philosophical Foundations of Property Rights* (Hemel Hempstead: Harvester, Wheatsheaf, 1988), pp. 4–8.
- 27 Cohen op. cit., p. 244.
- 28 See my 'The wrong of rape', *Philosophical Quarterly* 57, 228 (2007): 374–393.
- 29 Mill op. cit., p. 69.
- 30 Arthur Ripstein, 'Beyond the harm principle', *Philosophy and Public Affairs* 34:3 (2006): 215–245.
- 31 For recent criticism of Ripstein's case see Colin Bird, 'Harm versus sovereignty: A reply to Ripstein', *Philosophy and Public Affairs* 35:2 (Spring 2007): 179–194.
- 32 Ripstein op. cit., p. 235.
- 33 *Ibid.*, pp. 222–9.
- 34 Feinberg op. cit., p. 54.
- 35 *Ibid.*, p. 55.
- 36 *Ibid.*, pp. 54–5.