

# Lies, Control, and Consent: A Response to Dougherty and Manson\*

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Tom Dougherty argues that culpably deceiving another person into sex is seriously wrong no matter what the content about which she is deceived. We argue that his explanation of why deception invalidates consent has extremely implausible implications. Though we reject Dougherty's explanation, we defend his verdict about deception and consent to sex. We argue that he goes awry by conflating the disclosure requirement for consent and the understanding requirement. When these are distinguished, we can identify how deceptive disclosure invalidates consent. This alternative explanation also allows for a response to Neil Manson's recent criticisms of Dougherty's argument.

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## I. INTRODUCTION

Most people agree that lies can invalidate consent. They also agree that it is seriously wrong to perform certain acts without valid consent. Were a surgeon to convince a patient to undergo an operation by lying about its risks, she would undermine the voluntariness of his decision, rendering his token of consent invalid. By performing the surgery, she would trespass on his body without his permission, which is a serious rights violation. However, in the context of consent to sexual relations, seemingly trivial lies are cut moral slack. It seems like moral overkill to claim that Owen's consent to sex with Riya is invalidated by her feigned interest in his favorite band, or that hers is invalidated by his pretense to have read *The Bell Jar*.

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Tom Dougherty disagrees. In a recent paper, he argues that culpably deceiving another person into sex is seriously wrong no matter the content about which she is deceived.<sup>1</sup> In doing so, he rejects a widely held view about the ethics of sexual relations:

*Lenient Thesis:* it is only a minor wrong to deceive another person into sex by misleading her or him about certain personal features such as natural hair color, occupation, or romantic intentions.<sup>2</sup>

Dougherty argues that any deception invalidates consent when it concerns (i) the sexual encounter and (ii) a deal breaker for the profferer of consent. Since it is seriously wrong to have sex with someone without his valid consent, Dougherty concludes that any deception that leads to sex is seriously wrong.

We argue that Dougherty's case against the Lenient Thesis is flawed because his explanation of why deception invalidates consent is mistaken. The explanation he offers appeals to a substantive view of consent that entails implausibly extensive duties for the recipients of consent, entails questionable wrongs to those who regret consent, and would allow subsequent approval to validate a consent token that was flawed at the time. Dougherty's mistake is to conflate the informational requirements for valid consent. That is, he conflates the *disclosure requirement* (what the recipient of consent must tell the profferer of consent) and the *understanding requirement* (what the profferer of consent must understand). When these requirements are distinguished, it becomes possible to identify how deceptive disclosure can render consent invalid by controlling the consent decision. We offer an analysis of the disclosure requirement that explains why the Lenient Thesis ought to be rejected without giving rise to implausible implications.

Though we offer our analysis in support of Dougherty's conclusion, the underlying explanation is of considerable importance. The view that Dougherty defends may be a minority position in the ethics of sexual relations, but in other domains in which consent operates it constitutes the majority view. For example, in contract law and medical ethics minor deception is taken very seriously. Were Dougherty mistaken in his conclusion, it would have serious implications for these domains.

1. Tom Dougherty, "Sex, Lies, and Consent," *Ethics* 123 (2013): 717–44.

2. *Ibid.*, 718. See also Alan Wertheimer, *Consent to Sexual Relations* (Cambridge: Cambridge University Press, 2003), 193; and Peter Westen, *The Logic of Consent* (Aldershot: Ashgate, 2004), 200.

## II. DOUGHERTY ON WHY DECEPTION INVALIDATES CONSENT

Before outlining Dougherty's argument, two points of clarification are in order. First, Dougherty does not claim that all deception invalidates consent. He claims only that someone's consent will be invalid if she is deceived about a matter that constitutes a deal breaker regarding the act to which she consents. Second, Dougherty gives three arguments for this claim, but only his final argument attempts an explanation of why deception invalidates consent. Given our interest in how and why deception invalidates consent, we focus exclusively on his third argument.

Dougherty starts with a widely accepted theory of rights. As competent adults, we have autonomy rights over our persons and property. These rights generate duties on others not to interfere. But we often want to authorize acts of interference. For example, I might want you to pierce my ears. I can permit this act by waiving my right against interference. I can ask you to pierce my ears, thereby releasing you from your duty not to trespass on my body in this specific way. When we waive our rights by giving consent, we authorize another person (or persons) to perform a circumscribed act (or acts). We thereby make it morally permissible for others to engage with us in ways that would otherwise be impermissible.

This explains the purpose and value of consent, but not why deception invalidates it. Dougherty derives his explanation from the Intentions Thesis, according to which "the rights that we waive are the rights that we intend to waive."<sup>3</sup> As Dougherty notes, our intentions are both restrictive and extensive. When I give you consent to pierce my ears, I intend to waive my rights in a restrictive way: I give you permission, not someone else; further, I give you permission to pierce my ears, not to trespass upon my body in some other way. However, my waiver is also extensive in that there are multiple ways you could permissibly go about piercing my ears: for example, you could use a gun needle with a sterilized stud or a hollow straight needle with a piercing cork. Many of our intentions are implicit. For instance, it goes without saying that when I ask you to pierce my ears I do not intend to waive my right against you trespassing on my body with unsterilized equipment.

Dougherty derives a substantive account of consent from this theory of rights and the Intentions Thesis. We call his view of consent the *intentions view*: "In consenting, we intend to allow a restricted range of possibilities, where these restrictions are both implicit and explicit. Any actual interaction with our persons or property is consensual only if this interaction falls within this restricted range of permitted possibilities. On this account of consent, if we object to events in virtue of any feature of them, then they lie outside the restricted range of possibilities to which we are

3. Dougherty, "Sex, Lies, and Consent," 734.

consenting. If these events nevertheless occur, then ‘what happened is not that for which consent was given.’”<sup>4</sup> This view explains why consent is invalidated when the recipient of consent deceives the profferer of consent about the act requiring consent and when that deception concerns a deal breaker: the profferer of consent did not intend to waive his rights against that; hence, he did not waive his rights against that.

Consider how the view would explain how Riya’s seemingly trivial deceit invalidates Owen’s consent to sex with her. On the intentions view, “people validly consent to sexual encounters only if they are willing to engage in these encounters, given all the features that these encounters have.”<sup>5</sup> Owen consents to sex with Riya {fan of his favorite band}; he does not—and would not—consent to sex with Riya {person indifferent to his favorite band}. By pretending to like the band, Riya hides a deal-breaking feature of the sexual act to which Owen is consenting. What happens—his having sex with a person indifferent to his favorite band—was not that for which he gave consent. Hence, according to the intentions view, her seemingly minor deception invalidates his consent to sexual relations.

### III. IMPLICATIONS OF DOUGHERTY’S ARGUMENT

The intentions view explains why deception about any deal breaker invalidates consent to sex, but it does so at the expense of extremely implausible implications concerning other aspects of consent. If deception invalidates consent, we therefore argue, the intentions view cannot be the correct explanation of how and why it does.

#### A. *Implications for the Recipients of Consent*

Consider a problem case Dougherty raises against his own view:

*Antique Skis:* Suppose Candace asks to store antique skis in Courtney’s basement, and Courtney agrees. Unbeknownst to both parties, the skis were once owned by Josef Stalin. If Courtney had known about their former owner, then she would not have let Candace store them.<sup>6</sup>

Counterintuitively, the intentions view implies that Courtney’s consent is invalid. Even though Candace does not deceive Courtney about the skis’ former owner, her consent is vitiated by the fact that she would never have agreed to store items that formerly belonged to Stalin. On the intentions view, if the profferer of consent objects to any feature of an event that “lie[s] outside the restricted range of possibilities” to which consent was

4. *Ibid.*, 736.

5. *Ibid.*, 736.

6. *Ibid.*, 737.

given, her token is invalidated.<sup>7</sup> This is what happens in *Antique Skis*: the restriction that Stalin not be a former owner of the skis is implicit but nevertheless binding.

Dougherty accepts that this is what his view implies, but he denies that Candace does anything wrong in storing the skis in Courtney's basement. Rather, he claims, "If a party has taken all reasonable measures to establish that the other party consents, and yet it turns out that she does not, then her justifiable ignorance provides her with a full excuse for moral wrongdoing."<sup>8</sup> What explains Candace's blamelessness, according to Dougherty, is not the validity of Courtney's consent, but Candace's justifiable ignorance of the skis' history. With this explanation, Dougherty accounts for our intuitions about Candace's innocence in a way that is consistent with the intentions view's implications about Courtney's consent.

But Dougherty skirts the issue of what due diligence in researching deal breakers consists in. He simply asserts that Candace's ignorance is justifiable. This suggests that Candace has taken "all reasonable measures" to ensure that Courtney's consent is valid. This might be true in the case of *Antique Skis*—Candace can reasonably assign a low probability to them having some deal-breaking feature, such as being owned by Stalin—but, as we now argue, for many cases of consent to sex it will not be true.

To see the problem, consider the following widely accepted claim: when recipients of consent have reason to believe that there is a substantial probability that some invalidating feature of consent obtains, they have a duty to check whether it does obtain. For example, a physician whose patient seems confused after an acute head trauma has a duty to assess his ability to make his own health care decisions before accepting his agreement to a risky proposed treatment. She has a duty to check because decision-making capacity is a necessary condition of valid consent and confusion after a head trauma indicates a substantial probability that the patient is at least temporarily incapable. A friend asking a favor just as a loud train passes should ask again instead of taking her friend's polite nod as an indication of consent. Awareness that one is being asked for consent is a necessary condition of validity, yet loud noises often impair our ability to hear things such as verbal requests for consent. These are examples that illustrate one party taking reasonable measures to check that the other has given valid consent when there is some doubt.

Checking whether someone has really given valid consent in cases where there is some doubt sometimes requires considerable time and effort. While you can simply ask the favor of your friend again, taking reasonable measures to ensure that the patient's consent is valid might in-

7. *Ibid.*, 736.

8. *Ibid.*, 738.

volve the time and expense of a psychiatric evaluation, a delay in the procedures that have been scheduled, extended efforts to contact a close relative, and so forth. Such extensive measures are justified by the serious wrong that would be involved in proceeding without valid consent.

The problem for Dougherty is that the intentions view extends the potentially invalidating features of consent. On Dougherty's view, consent is not merely invalidated by the profferer's incapacity or his failure to understand information that was available at the time of consent; it is also invalidated any time the act consented to lies outside the restricted range of possibilities to which the profferer was consenting. This means that consent will be invalid any time there is a fact concerning the act consented to that would constitute a deal breaker if known. In many cases of consent to sex, the duty to take reasonable measures to check for these deal breakers will be implausibly burdensome.

Imagine, for example, that Owen and Riya are near strangers, but after a successful first date they are about to have sex. It is highly probable that for at least one of them there is some fact about the other that would constitute a deal breaker if known. Perhaps Riya would not have sex with Owen if she knew exactly how many sexual partners he's had, that he watches *Keeping Up with the Kardashians*, that he didn't wash his hands when he last used the bathroom, who he was thinking about when they first kissed, who he voted for in the last election, the homophobic insults he once used in school, or that he privately believes that religious people are stupid. It may be unlikely that any individual such fact is a deal breaker, but it is quite likely that there is some fact that is. On the intentions view, then, both Owen and Riya have good reason to think that there is a substantial probability that the other's consent to sex will be invalid.<sup>9</sup> Yet, as the head trauma case illustrates, in similar situations there is a quite stringent duty to check for the feature that would invalidate consent. If we think that a delay of several hours and a (potentially expensive) psychiatric evaluation is worth it in order to substantially reduce the probability that consent to treatment is invalid, then surely in the case of consent to sex at least an hour of going through potential deal breakers is required—either that, or not engaging in the sexual activity at all.

9. An anonymous referee points out another troubling implication of this feature of Dougherty's view. It might be true that Riya would not want to proceed were she to know that (say) Owen watches *Keeping Up with the Kardashians*. However, it might also be true that other facts about Owen of which she is currently unaware would compensate for this fact. For example, perhaps his taste in television would not be a deal breaker if she also knew that he always stands up to bullies. Dougherty's choice of which unknown facts are relevant to the validity of consent now seems undermotivated. After all, if Riya would consent to sex with Owen ignorant of all these facts, and if she would consent to sex with Owen were she omniscient, why should it matter, normatively speaking, that she would not consent if she were aware of some facts about him while remaining unaware of other facts?

In sum, on the intentions view reasonable measures will often include a stringent duty to check for deal breakers. The intentions view entails these more extensive duties just in virtue of extending the list of potentially invalidating features of consent. Hence, not only does Riya have to avoid deceiving Owen about the band, but she also has a duty to actively check for other facts that might lead him to decide against sex. Presumably, her search for deal breakers has to be exhaustive enough that the probability that they engage in nonconsensual sex is very low. Discharging this duty involves a lot of work for people who want to have sex with anyone they don't know well, which seems highly implausible.

### *B. Implications for the Profferers of Consent*

According to Dougherty, "In consenting, we intend to allow a restricted range of possibilities, where these restrictions are both implicit and explicit. . . . If we object to events in virtue of any feature of them, then they lie outside the restricted range of possibilities to which we are consenting."<sup>10</sup> These restrictions apply to features of which the person proffering consent is unaware. On the intentions view, for consent to be valid it must be the case that "were [the profferer] aware of any of the features of the event, [he] would have to still be happy to go along with it."<sup>11</sup> If this were correct, however, it would collapse the difference between nonconsensual acts and a subset of consensual acts that the profferer comes to regret, thus implying that serious wrongs routinely befall profferers of consent.<sup>12</sup>

To illustrate the problem, imagine that Riya's deception turns out not to be dispositive of Owen's decision and, prior to the sexual encounter, there are no other deal breakers. But Owen, a hopeless romantic, intends their lovemaking to forge a deep and lasting spiritual connection. Afterward, he realizes that it was just a frenzied, carnal embrace. He is filled with regret. Had he known that the act would feel so meaningless afterward, he would never have waived his rights. Incredibly, the intentions view implies that Owen's consent to sex with Riya is invalidated by his postcoital objection to the nonspiritual nature of the act. And since nonconsensual sex is a serious wrong, it also implies that Owen is wronged by this sexual encounter.<sup>13</sup>

The main problem here is not that the boundaries of consent can be determined by fanciful implicit intentions. It is that the intentions view collapses the moral difference between nonconsensual acts and consensual acts that a person comes to regret. In any case in which someone

10. Dougherty, "Sex, Lies, and Consent," 736.

11. *Ibid.*, 736.

12. See Neil C. Manson, "How Not to Think about the Ethics of Deceiving into Sex," *Ethics* 127 (2017): 415–29, 424.

13. Dougherty, "Sex, Lies, and Consent," 722–27.

gives consent, comes to regret it, and concludes that, given what he knows now, he would not still be happy to proffer consent to the act, the intentions view implies that his consent was invalid.<sup>14</sup> To see this, consider two variants on the Owen and Riya case. In both cases, Riya sincerely disapproves of adultery. In the first case, she asks Owen if he is in a relationship, making it quite clear that cheating is unacceptable to her. Despite being married, he tells her that he is single. They have sex. Her consent seems invalid, and the intentions view can explain why. Riya waives her bodily rights against sex with Owen {person not in a relationship}. She does not—and would not—waive her bodily rights against sex with Owen {person in a relationship}. Hence, the act in which she engaged is not the act for which she waived her rights.

In the second case, Owen tells Riya the truth. Yet, weak of will, she has sex with him anyway. Afterward, she is wracked with guilt. Had she known how lousy it would feel to abandon her deeply held principles on a lustful whim, she would never have done it. Intuitively, her consent is valid; she has just come to regret an injudicious decision. But the intentions view cannot explain the distinction our intuitions track here. It implies that her consent is invalid because she objects to a feature of the act (sex with a person in a relationship) and, knowing what she does now about how bad it feels to have committed adultery, she would not still be happy to engage in that sexual encounter.<sup>15</sup>

By collapsing the moral difference between nonconsensual acts and this set of consensual acts that the profferer comes to regret, the intentions view implies that a lot of innocent acts inflict the wrong of a serious rights violation on consenting parties. After all, we frequently give consent to acts that turn out to be—or, perhaps, turn out to feel—rather different than we expected. If consent is invalidated every time the profferer objects to an experiential feature of the act after the fact, such that he

14. This objection only applies to cases of regret in which the profferer of consent would not have consented to the act if he had known what he knows now. There may be other cases in which he still feels regret and yet would still consent to it. We thank two anonymous referees for alerting us to these unproblematic cases of regret.

15. As an anonymous referee pointed out, were the intentions view temporally restricted—e.g., by indexing relevant features to the past or present—perhaps it could track our intuitions here. However, we think that Dougherty is right not to place temporal restrictions on the intentions view. What we do when we give consent is to waive our rights about some future act or acts. Were the intentions view amended so that only the features of the act that obtain at or before the time of giving consent are covered by the profferer's intentions, it would rule out intentions about the future without a principled reason. Not only would such an amendment be ad hoc, but it would also undermine the ability of the intentions view to explain key phenomena. Take, for example, contract law. A contract is rendered invalid when one of the parties does not perform as agreed (a future event). With a past/present restriction in place, it is unclear how the intentions view could explain this invalidity.



would have chosen differently if he had known, a lot of prima facie innocent sex and requested medical interventions will inflict the wrong of a serious rights violation. This strikes us as incredible. Any plausible account of consent ought to be able to distinguish between instances in which one's rights are violated and instances in which one has simply made a poor or regrettable decision.

### *C. Implications for Subsequent Consent*

Perhaps the clearest indication that the intentions view fails to do justice to our practice of consent is that it implies that subsequent consent is morally transformative. Just as the profferer may come to object to a feature of the act and so make his token of consent invalid after the fact, so he may come to approve of a feature to which he previously objected and thereby make his earlier token of consent valid. Imagine that Riya learns of Owen's deception and is surprised to find that she does not care that he was married. Perhaps it was a magical encounter, and she finds herself realizing that what was once a deal breaker is now inconsequential. She might even pass the intentions view's test for validity: knowing what she knows now, she would "still be happy to go along with it." The lack of objection to what was once an objectionable feature of the sexual act is morally transformative: by downgrading a deal breaker to a nondispositive fact, her token of consent is transformed from invalid to valid. This is an unhappy implication of the intentions view. Subsequent consent has few defenders, and Dougherty is unlikely to welcome it as a consequence of his view.

## IV. SHOULD WE ACCEPT THE LENIENT THESIS?

The Lenient Thesis is attractive because it seems to reconcile the widespread acceptance of deception in sexual relations with the widely held belief that nonconsensual sex is seriously wrong. However, while we reject Dougherty's argument, we do not reject his rejection of the Lenient Thesis. We agree that deception that conceals a deal breaker regarding the act that requires consent invalidates consent even if it is about some fact that seems trivial. We just do not agree with Dougherty's explanation of how and why it does.

It is important to get this explanation right because the Lenient Thesis is not widely held in other domains where consent plays a pivotal role. The standard view in contract law is that even minor fraudulent misrepresentation can render a legal contract null and void.<sup>16</sup> Likewise,

16. Duncan Kennedy, "Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power," *Maryland Law Review* 563 (1982): 563–658.

in medical care and clinical research deceiving someone about or concealing information expected to be relevant to his decision is taken very seriously.<sup>17</sup> Consistent with Dougherty's view, a central worry is that such deception (or withholding or misrepresentation of information) may invalidate a potential research participant's enrollment decision by concealing or obscuring some deal breaker.<sup>18</sup>

If the conditions for valid consent to sex are no different than the conditions for valid consent in these other domains, then whether the Lenient Thesis is true matters for much more than just sex. Alternatively, if the Lenient Thesis is true for consent in some domains but not others, then the underlying explanation must show some important difference between these domains. Either way, the ethics of consent is served by having an account that can explain when and why deception invalidates consent. In what follows, we offer an explanation that does not have the implausible implications of the intentions view but still implies that the Lenient Thesis is false.

## V. THE INFORMATIONAL REQUIREMENTS OF CONSENT

Our explanation is predicated on a distinction between two informational requirements for valid consent: the disclosure requirement and the understanding requirement. The disclosure requirement tells us what information must be provided to the profferer of consent in order for his consent to be valid. The understanding requirement tells us what the profferer of consent must understand in order for his consent to be valid. The intentions view locates the invalidating potential of deception in what the profferer must understand in order to waive his autonomy rights. As Dougherty points out, this "does not mean that [the profferer has] to achieve the impossible feat of being aware of every feature of an event in order to consent to it."<sup>19</sup> What it means is that were he to understand that the event had this feature, the validity of his consent would turn on whether he would still be willing to proffer consent. Deception invalidates consent when it conceals some fact about the event that, were the profferer to understand it, would dispose him to refuse consent. But this is where Dougherty goes awry. Deception has its effect on the validity of consent not through understanding but through disclosure. When the requestor of consent possesses information that would be dispositive of

17. Ruth Faden, Tom Beauchamp, and Nancy King, *A History and Theory of Informed Consent* (New York: Oxford University Press, 1986), 305–29; Paul Appelbaum, Loren Roth, Charles Lidz, Paul Benson, and William Winslade, "False Hopes and Best Data: Consent to Research and the Therapeutic Misconception," *Hastings Center Report* 17 (1987): 20–24.

18. Danielle Bromwich and Joseph Millum, "Disclosure and Consent to Medical Research Participation," *Journal of Moral Philosophy* 12 (2015): 195–219.

19. Dougherty, "Sex, Lies, and Consent," 736.

someone's decision about whether to give or refuse consent and when she has reason to think that it is dispositive, she is in a position to exert control over his decision. If she does so—by lying about a deal breaker—she invalidates his consent.<sup>20</sup> Hence, the invalidating potential of deception is properly located in what the recipient knows and ought to disclose, not what the profferer ought to understand.

To illustrate this, it helps to identify why deceiving someone about something relevant to his decision can be wrongful, even when it does not have the normative effect of invalidating consent. A natural explanation lies within the theory of rights that underlies Dougherty's view. "The animating thought" behind this theory of rights "is the familiar one that rights are intimately linked to our autonomy and agency. They mark out personal realms over which we have exclusive control, and our decisions determine exactly what may permissibly happen within these realms . . . this generates duties in other people to respect our wills: they must respect the choices that we make about what shall happen within these realms."<sup>21</sup> In fact, respect for individual autonomy involves more than just respecting someone's choices. It also generates a duty to allow them to make their own decisions without interference. When one party deceives another about a matter over which he has an autonomy right to decide for himself, she violates that duty by interfering with his decision-making. Deception is *pro tanto* wrong in such cases because it disrespects a competent agent's autonomy.

While it is *pro tanto* wrong to interfere with the decision-making of an autonomous agent by deceiving him, deception does not invariably invalidate consent. Whether it invalidates consent depends on whether the deception involves the deceiver successfully controlling the decision to consent. An explanation of why such controlling deception invalidates consent can again be derived from the widely accepted theory of rights. A competent agent can exercise his or her autonomy rights by giving consent. In doing so, an act that would otherwise be a rights violation is authorized. However, consent only has this normative effect if it is proffered voluntarily. The actions of other people, most notably the recipient of consent, can undermine the voluntariness of the profferer's consent decision by exercising illegitimate control over it.

The paradigmatic form of such illegitimate control is coercion. Suppose that Yadira wants Dashawn to give her fifty dollars. She might secure his agreement by threatening to post intimate pictures of him online. When he consents to give her the money, he does so under duress. Her interference

20. She would also be guilty of deceptive disclosure if she withheld a fact that she had reason to think would be dispositive in a context in which not disclosing it implicates something false. Imagine, for example, that a doctor withholds a serious side effect when disclosing a drug's side effects to a patient. She doesn't lie, but in this context she deceives by implicature.

21. Dougherty, "Sex, Lies, and Consent," 734–35.

is clearly illegitimate: she does not have the right to issue this threat. By attempting to control his decision, she violates her duty to respect his right to make his own decisions about what to do with his money. Furthermore, in this case her threat is also strong and credible enough to undermine the voluntariness of his consent, thereby rendering it invalid. Had she merely threatened to stroke his hair, for example, her threat would presumably not be strong enough to undermine the voluntariness of his consent because it would fail to be controlling.

Had Yadira known a little more about Dashawn, she could have taken a subtler tack. Imagine she knows that he is anxious about the refugee crisis. She tells him that she is collecting for a charity that supports child refugees, and she asks for a cash donation of fifty dollars. But she plans to keep it for herself. When Dashawn consents to give her the money, she controls him just as surely as she did in the coercion case. She knows that he would not give her the money if he knew that she was the final recipient, but he would if he thought his money was going to aid refugees. Yadira uses what she knows and has reason to believe is dispositive to bend Dashawn's will to her own. Rather than allowing him to make his own decision about what to do with his money, she uses deception to control the information he gets to consider in making his decision. However, she has no more right to provide him with false information than she had a right to threaten him with harm. Since her wrongful deception conceals a dispositive fact that she has reason to believe he is ignorant of, it undermines the voluntariness of his decision, rendering his consent invalid.

Our explanation of how deception can invalidate consent implies that the Lenient Thesis is false. Deception about a fact that is dispositive of someone's decision about whether to consent to sex and which the deceiver has good reason to think is relevant will render a token of consent involuntary. It might seem odd to us that someone's musical taste could be relevant to a choice of sexual partner. But it makes a difference to Owen, and the decision about whether to agree to sex with Riya is his to make. If he makes it clear that this feature of the sexual encounter is a deal breaker, then she has the opportunity to control his decision by lying to him. Since she has no right against him that he have sex with people indifferent to the band, her attempt at control is illegitimate. Since her lie conceals a fact that is dispositive of his decision about whether to have sex with her, her attempt at control succeeds. Her seemingly trivial lie undermines the voluntariness of his consent and renders it invalid.

## VI. IMPLICATIONS FOR THE ETHICS OF CONSENT

We have given an alternative explanation of why even seemingly minor deception can invalidate consent. When the recipient of consent exercises illegitimate control over the profferer's decision by deceiving him, she vi-

olates her duty not to interfere with his right to make his own decisions. When that deception successfully conceals a deal breaker, it renders the proffered consent invalid by undermining the voluntariness of the decision in a way similar to coercion. In addition to explaining why the Lenient Thesis is false, this explanation has the advantage of not giving rise to the implausible implications that plague the intentions view.

By distinguishing between the informational requirements of consent, we are able to give a straightforward diagnosis of *Antique Skis*. The relationship between disclosure and control explains why Courtney's consent to store the skis is valid and why Candace does no wrong (and so is blameless). Candace is in no better epistemic position than Courtney with regard to the skis' former owner. She is therefore not in a position to exert control over Courtney's decision by lying about this fact. Courtney's consent can therefore be perfectly valid even though it is true that were she to have known about the skis' history she would not have agreed to store them. Furthermore, this analysis does not give rise to stringent duties to investigate potential deal breakers and to abstain from actions requiring consent until they are unearthed. Provided that Owen and Riya avoid exercising illegitimate control over each other in disclosing personal information, they will discharge their duties of disclosure.<sup>22</sup>

Our view also preserves the distinction between nonconsensual acts and consensual acts that someone subsequently comes to regret. It thereby avoids the implication that people who proffer consent but then wish they had not are seriously wronged. Someone who was deceived about some fact that was dispositive for him and which the person requesting consent had reason to think would be dispositive has not given valid consent because he did not act voluntarily. On the other hand, someone who was given all the information that the requestor had reason to think would be relevant but regretted his decision afterward would not have been controlled. The fact of his regret is irrelevant to the validity of his consent and would not provide grounds for thinking that he had been violated.

Finally, our view does not imply that subsequent consent is valid either. Whether or not someone's decision to token consent at a time was illegitimately controlled depends on what was going on prior to and at that time. A decision taken in the past does not become less controlled in virtue of a change in the decision-maker's attitude toward it.

## VII. THE GRADABLE VOLUNTARINESS THEORY

In a recent response, Neil Manson defends the Lenient Thesis against Dougherty. He articulates a "gradable voluntariness theory" according to which "not all deception into consent invalidates consent. Only those

22. This might give rise to a worry about willful ignorance. We address that worry in Bromwich and Millum, "Disclosure and Consent," 208.

deceptions that misdirect the profferer of consent's decision to a particularly high degree do so: those that involve *strong* deal breakers."<sup>23</sup> Manson analogizes deceiving someone into tokening consent to coercing someone into tokening consent. The force of a threat can vary depending on the nature of the threat and the individual threatened. It is natural to think that weak threats do not undermine voluntariness enough to vitiate someone's consent, whereas sufficiently powerful threats do. Likewise, Manson claims, deception about a weak deal breaker will not undermine voluntariness enough to vitiate consent, but deception about a strong deal breaker will. Since facts about a potential lover's income, age, or taste in music are typically weak deal breakers, it follows that deception about them typically will not invalidate a token of consent.

Were this theory correct, it would also pose problems for our rejection of the Lenient Thesis.<sup>24</sup> If deception can undermine voluntariness to different degrees, then it is natural to understand this in terms of different degrees of illegitimate control. Deception about strong deal breakers would involve a sufficient degree of illegitimate control over the consent decision as to render the token of consent invalid. Deception about weak deal breakers would not be controlling enough to invalidate consent.

To evaluate this line of argument, we must examine Manson's conception of how voluntariness is gradable in the case of deception. According to Manson, the strength of a deal breaker depends on how close the possible worlds are in which the deal-breaking fact is not a deal breaker for that person. For example, if deception merely "tips the balance, the relevant counterfactual—if R were to know that *p* she would not consent—is true, but the counterfactual is only made true by a relatively small set of very close possible worlds."<sup>25</sup> In this case *p* is a weak deal breaker. But if all the possible worlds in which *p* is not a deal breaker were very distant, *p* would be a very strong deal breaker.

However, it is unclear why voluntariness is undermined less when there are closer possible worlds in which she would not mind about the deal-breaking fact. Suppose R cares enough about fidelity not to sleep with a married man, but this fact is highly contingent—in almost every close possible world it is not important enough to be a deal breaker. If her lying sex partner were to point this out to her the next morning—"If your life had been only slightly different, this would not have mattered to you"—we do not think this should make her feel better. It would be natural for her to respond, "But you deceived me into sex in *this world!*"<sup>26</sup> Pro-

23. Manson, "How Not to Think," 420.

24. Manson's other objections would not constitute objections to our view.

25. Manson, "How Not to Think," 419.

26. Natural among two philosophers, at least. To make the point more starkly, suppose that R declines sex with her husband's brother, who then sneaks into her bedroom and has sex with her under the pretense that he is her husband. It seems to us wholly ir-

vided that he has reason to believe that being married is a deal breaker for her in the actual world, he has just as much control over her whether there are close possible worlds in which it is not a deal breaker or not. All he needs is that it will sway her one way or the other.

In response, Manson might draw on the analogy with coercion. A weak threat might be enough to cause someone to comply, but not undermine voluntariness enough to render her actions nonautonomous. For example, suppose Bo wants Sinead to break Chuck's arm. If Sinead already hates Chuck, it might take only a weak threat to motivate her to do it. But she could not excuse herself on the grounds of duress, simply because the threat was sufficient to motivate her. However, if Bo credibly threatened Sinead's life, that would be a strong enough threat that she could, plausibly, claim that her action in breaking Chuck's arm was not voluntary in the sense needed to hold her morally responsible. By parallel reasoning, we might think that weak threats will not undermine the validity of consent, even when they successfully motivate someone to token consent, whereas strong threats will. In the context of coercion, then, voluntariness appears to be gradable.

But the analogy will not help. In the case of coercion and duress, we are concerned with what it would be reasonable for the agent to resist. If it would not be reasonable for her to resist the threat, then her voluntariness is undermined sufficiently that we regard her action as involuntary. But in evaluating a claim of duress we are interested in what it would be reasonable for this actual agent to resist. We are not making claims about what is resistible based on what she would resist in a nearby possible world. Just as it would be irrelevant to claim that an agent is not under duress because there is a nearby possible world in which he is not threatened, so it seems irrelevant to bring up a nearby possible world in which someone would consent to some act even if not deceived about it when he would not in the actual world.

Manson's theory does not support the relationship between voluntariness and the validity of consent that he supposes. Moreover, the analogy between coercion and deception fails: it makes sense to think of the controlling effect of successful threats varying in a way that it does not make sense to think of the controlling effects of deception varying. We conclude that Manson has not given us reason to think that voluntariness is gradable in the case of deception.

## VIII. CONCLUSION

Dougherty is correct that deceiving someone into sex renders her consent to sex invalid, but his explanation is flawed because he does not dis-

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relevant to the charge of rape whether there are close possible worlds in which she would have agreed to having sex with him.

tinguish the disclosure requirement for consent from the understanding requirement. Once these two informational requirements are distinguished, it is possible to explain how deception about a deal breaker invalidates consent by reference to illegitimate control. This account provides a unified explanation of the relationship between deception and consent across different spheres where consent matters.