

“Abstract Methods, Duties of Care, and the Scope of Consent”

Review of Tom Dougherty, *The Scope of Consent*

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Consent, on a standard theoretical framework, is a way of giving permission or waiving a right. Dougherty’s book is about the “scope” of consent: which acts are permitted by a given act of consent? Along the way, Dougherty offers a view about what consent consists in and why it does its morally transformative work.

The book is an exemplar of careful analytic philosophy. Philosophers working on consent in that tradition will find it essential reading.

Following are more specific reactions that will, I hope, convey a more specific sense of the book, and also engage and critique it and the tradition it exemplifies.

1

What role should consent play in our ethical theorizing? There is a tendency in some discussions — especially of sexual consent — to try to do almost all of our ethics in terms of consent. One recognizes that an action is morally bad, and posits a new constraint on consent to explain how it’s nonconsensual, thereby explaining its badness.

Dougherty does briefly acknowledge (p. 14) that “consent is not a moral panacea” and that an “encounter can be consensual and yet be morally problematic on other grounds.” — it may violate a promise, for instance. Nevertheless, I suspect that Dougherty ultimately succumbs to the temptation to give too broad a role to consent.

A key idea of the book starts from the observation that one ought not act on an expression of consent unless the evidence makes it sufficiently clear that the consent is intended to cover that act. For example, Dougherty considers (136) a medical case in which someone agrees to a procedure in faltering English: the doctor ought to take extra steps to make sure the patient intends to give consent to the procedure in question.

How should we understand such duties of diligence? Here’s one natural idea: they are secondary duties about making sure one is complying with one’s duty not to act without consent. If the evidence leaves open whether the patient consents to a biopsy, one ought to make sure before proceeding. To do otherwise would be to be culpably cavalier about consent. At some points,

Dougherty expresses these duties in a way suggestive of this form.¹ But the view they ultimately defend is inconsistent with this natural interpretation. Instead of treating due diligence duties as second-order duties *about* respecting consent, Dougherty flattens them into first-order questions about consent itself.

Dougherty's view about the scope of consent depends centrally on the evidence — both the evidence one already has available, and the evidence that would be uncovered by an exercise of due diligence. Here is their (149) statement of the view:

Due Diligence Principle. At time *t*, an action *A* falls within the scope of the consent that *X* gives to *Y* if and only if

(i) at *t*, *X* gives consent, or prior to *t*, *X* has given consent and has not subsequently revoked this consent;

(ii) at *t*, the available reliable evidence sufficiently supports the interpretation that *X* intends their consent-giving behaviour to apply to *Y* performing *A*; and

(iii) at *t*, the enhanced reliable evidence also sufficiently supports this interpretation.²

For Dougherty, the evidence plays a *constitutive* role in setting the scope of *X*'s consent. The doctor receives an expression of consent in faltering English, and the available evidence insufficiently supports the interpretation that the patient intends to agree to a biopsy. Dougherty's Principle doesn't say the doctor should worry that they *might* not have consented to a biopsy — in fact, the doctor should be confident that they *haven't* done so. Perhaps after discharging the duty of diligence, the doctor will have enough evidence to support the interpretation that the patient intended consent to a biopsy. But that's not a matter of the doctor *gaining sufficient evidence* about consent — rather, the doctor now *makes it the case* that there is consent. This is quite a strange result.³

The problem generalizes. You ask me for permission to use my back yard while I am out of town; I nod my head and say “sure, that's fine, please enjoy it,” but a train comes by just as I start talking, so you can't hear my words. Then I rush off to catch my own train. You asked to use my yard because you want to meet a couple friends in a socially-distanced outdoor setting

¹ E.g. on p. 143: “The agent would have an investigative duty to ascertain whether the other individual is deliberately engaging in behaviour that constitutes consent.”

² P. 149. The “available reliable evidence” is the total relevant evidence *Y* has; the “enhanced reliable evidence” is the relevant evidence *Y* would have upon fulfilling their due diligence obligations. This review omits discussion of Dougherty's ch. 10 treatment of “relevance,” which he glosses as “reliability”.

³ The doctor might gain this evidence via further communicative acts from the patient, but this is not necessary. They might, for example, seek out further evidence by learning more about the patient's manner of speaking and familiarity with medical terminology. If the patient produces the faltering utterance at *t*₁, and the doctor undergoes such an investigation at *t*₂, and ends up with evidence sufficient to support the interpretation that at *t*₁ the patient intended their speech act to apply to a biopsy, then at *t*₁ the consent does not include a biopsy in its scope, and at *t*₂ it does, even though the patient has done nothing at all in the interim.

tomorrow, and my space is good for that. Under the circumstances, I think it's pretty plausible that you should think it likely, but not certain, that you have my consent to have a few friends over tomorrow. I heard and understood your question, and my body language looked the way it would if I were consenting. But there is room for doubt; you didn't hear what I said. (Might I have been saying "yes, but only if it's just you"? Or "yes, but not tomorrow"?)

Dougherty's view is inconsistent with this plausible description of the situation. Since your available evidence does not sufficiently support the interpretation that I intend my utterance to apply to you having a few people over tomorrow, your doing so is outwith the scope of my consent.

This is not an accidental feature of Dougherty's view; it derives from the central role they ascribe in the book to interpersonal justification in fixing what is consented to. The mistake, I think, derives from a too-broad conception of the *theoretical* scope of consent — one hinted at, but insufficiently respected, in the recognition that consent is not a moral panacea. In addition to the possibility of *independent* moral obligations that render consensual actions impermissible — as in the case where you promise your friend not to come to the party I invited you to — there are also *secondary* obligations deriving from the particular rights that consent waives, which do not themselves implicate whether consent obtains.

On the view I favour, when the train prevented you from hearing my response to your request to use my back yard, I *did* consent to your having friends over, but because your evidence left that question open, you have a duty of diligence to check to ensure that I did. If you flout that latter duty and have your friends over without double-checking, you wrong me by being too cavalier about respecting my property rights — you recklessly *risked* violating them — but you did not violate my property rights, because I did consent. Likewise, when the patient expresses their wish for a biopsy, but the doctor's evidence leaves open the possibility that they may not understand, they ought to double-check before digging in with their circular scalpel. If they don't, they treat their patient with insufficient care, but they don't assault them by violating their bodily integrity. Not all duties arising from questions about consent implicate the first-order question of whether there was consent.

I think something quite similar goes for many contemporary discussions of sexual consent, where consent is said to need to be "clear" and "enthusiastic," and where certain kinds of power differentials are thought to rule out the possibility of genuine consent. One recognizes that there is something morally amiss about sex with someone whose apparent consent is ambiguous or reluctant, or sex with one's student, and reaches to further constraints on genuine consent to explain what goes wrong. I and others have argued elsewhere that this is a mistake.⁴ Not every sexual wrong is sex without consent.

⁴ E.g. Kukla (2018), Ichikawa (2020), Srinivasan (2021) pp. 127–8.

Dougherty begins their book with a discussion of abstraction. “Like many philosophers,” they write in their opening sentence, “I have a talent for abstraction.” This turns out to be a self-deprecating joke about philosophers not noticing details of their environments. I recognize the philosophical stereotype being invoked. Philosophers are often interested in *deep* questions, and so may be tempted to think contingent features of reality a bit of a distraction. This may sometimes be legitimate — inquiry into mereological combination or the nature of causation may be well-advised to ignore the contingent social world.

Ethics is a more complicated case. Abstract ethical theorizing may be the correct methodology to decide fundamental theoretical questions, like whether pleasure is the ultimate moral value. But the closer our questions get to lived experience, the more abstraction risks missing the point. I’d put questions about consent, how it is communicated, and what rights it involves, into this latter category.

Dougherty’s treatment begins with the concrete — a nonfictional example involving sex and deception from an undercover spy. But, conforming to philosophical stereotype, it quickly becomes abstract. General principles are floated, rejected, and refined in response to a barrage of short named vignette counterexamples. (I counted 52 such stories.)

Many contemporary philosophers are comfortable using arbitrary and unusual stipulations to test the conceptual limits of principles under consideration. Dougherty’s book is well-representative of this tradition, and it does manifest its best virtues: it is careful, clear, and precise. Principles have names, and explanantia often have their own principles characterizing them. The chapters are short, each delivering two or three main points, which are helpfully summarized in the recaps at chapter end. The book is in many ways a paradigm of the analytic philosophical style — for better and for worse.

Many of Dougherty’s cases are simple and straightforward, and successfully illustrate a relevant point. *Joyride* (p. 54) describes a character “Anarchist” who is willing to let others use their property, but has never expressed that willingness. When “Joyrider” breaks into Anarchist’s car and takes it for a joyride before returning it, they violate Anarchist’s consent, thus showing that consent isn’t just a matter of one’s private willingness.

Still, abstraction has its costs. Many philosophers — and most non-philosophers who pick up the book — will be frustrated at some abstractions away from realism. This can interfere with clarity. Consider *Revocation Prank*, given to illustrate that withdrawing consent does not require uptake:

Revocation Prank. Chair welcomes new staff in their office and ends these meetings by saying, ‘I look forward to our next meeting.’ Chair intends to withdraw their consent to conversing with the staff member and to the staff member’s presence in their office.

Colleagues play a prank on foreign Post-Doc. Colleagues tell Post-Doc that when Chair ends the conversation in this way, Chair still intends to permit Post-Doc to be in the office. Colleagues say it is customary for a new staff member to silently admire Chair's bookshelves after the meeting. (78)

My complaint is not about the deception and uptake question. Rather, I think it far from obvious that the kind of cursory conversation-ending sentence indicated would typically or realistically be used to withdraw consent to one's presence in one's office. One might say something like that as an attempt to communicate that one considers the conversation over and wishes them to leave — compare yawning and saying “well, it's getting late” at the end of a dinner party. But expressing such a preference is not typically a withdrawal of consent. It's one thing to express a preference, and quite another to express an intention to reimpose a duty.⁵ (If Post-Doc or my party guests continue to linger, they violate a social norm, but are they plausibly guilty of *trespassing*?) In stipulating that Chair intends to revoke consent with their utterance, Dougherty is stipulating a quite unusual psychology. The abstractness of the thought experiment draws attention away from this fact, and, I fear, threatens to distort intuitions.⁶

Other cases get even stranger. Here are a few examples of thought experiments that readers suspicious of far-fetched abstract intuitions might find frustrating:

- *Telepathy*. (p. 89) “Deluded mistakenly believes that they can telepathically broadcast their thoughts. Deluded is having a drink with Date in a bar. Stranger asks Deluded whether they can try on Deluded's hat. Wanting to appear generous to Date, Deluded says, ‘Sure! Help yourself.’ However, Deluded attempts to telepathically communicate to Stranger, ‘Don't listen to what I am saying out loud! You are not allowed to take the hat!’” (Upshot: intention to communicate permission is not necessary for consent.)
- *Patriarchal Marriage*. (pp. 91–92) “Wife believes that her wedding vows have irrevocably waived her sexual rights against Husband. Several months into the marriage, Wife wants to have sex and says to Husband, ‘I know that you do not need my permission for sex, but would you like to have sex?’” (Upshot: intention to release a duty is not necessary for consent.)
- *Royal Swan*. (p. 119) “All swans are the legal property of Monarch. Monarch orders Subject to kill a swan but says, ‘However, you do not have my permission to do so.’ Monarch's intention is to put Subject in a bind whereby Subject commits treason either by refusing a royal decree or by damaging royal property.” (Upshot: directives are insufficient for consent.)

⁵ Dougherty says on p. 120 that the latter is necessary for revoking consent.

⁶ For the record, I agree with Dougherty that revoking consent does not require uptake; my discussion here is about whether cases like this are the best way to demonstrate that this is so.

Although the book opens and closes with discussions of sexual consent, sex is not a primary focus of the book. When it does touch on sexual matters, it does so lightly and at a high level of abstraction. Dougherty typically abstracts away from gender, using “they” pronouns for almost all of their thought experiment characters. (*Patriarchal Marriage* is a rare exception.) Chapter 4 touches on university affirmative consent policies, opining on how they should proportion punishment: comparing two thought experiments in that chapter, Dougherty writes that “an affirmative consent policy should ... punish Acting Without Behaviour less harshly than Acting Without Intention.” (63) Their advice, however, makes little contact with live policy questions; the case where they think universities should be lenient is a one where someone welcomes sexual penetration, fails to communicate this, and receives it anyway. Such a person would make no complaint, and so there would be no investigation or punishment.

3

The Scope of Consent is organized around an attempt to navigate two attractive ideas about consent: one should have control over what one consents to, and it should not be too difficult for others to know what one consents to. Both of these ideas seem morally important; but, Dougherty points out, emphasizing one is often at the expense of the other. Mental approaches to consent, for instance, do a good job capturing how consent is under one’s control, but fare poorly with respect to their ability to shape others’ behaviour. The discussion in the first two-thirds of the book is particularly clear and helpful in setting out this tension, and I found Dougherty’s careful treatment of mental and communicative approaches illuminating and accessible.

The view Dougherty ends up defending is meant to respect the central motivations on both sides. They argue in Chapter 8 that the reason consent is morally transformative is that it involves an *expression of will*, which can be used to justify action. If I remove your dog from your house because you asked me to walk him, I have an excellent justification against any potential challenge to my doing so: this is something you *asked me* to do, which is a way of consenting to it.

But asking isn’t the only way of consenting. In Chapter 9, Dougherty defends a disjunctive view of consent: one consents just in case one either does so via a *directive*, or via *giving permission*. In the case just mentioned, you gave a directive: you asked me to walk your dog. This was an expression of your own will, and as such it would be perfectly correct for me to cite it to defend my action, if challenged on the grounds of your rights.

Dougherty suggests that the same is true of permission, and that this is what motivates the disjunctive approach to consent, writing that “expressions of permission and directives are both expressions of the consent-giver’s will for how the consent-receiver acts.” (124) But permission is not in general a way to express one’s will about how someone acts. (Indeed, Dougherty gives a case (38) where they say someone expressly permits something while simultaneously expressing an instruction not to exercise it.) Permission-giving may be a higher-order expression of one’s

will about *normative* matters — expressing permission might involve the will that one oneself waive a duty — but that is quite different from the the expression of will involved in a directive, which is will about another party, and typically a non-normative matter. My wanting you to enter my apartment is very different from my wanting me to make it the case that you don't have a duty not to enter my apartment.

4

This book disavows and replaces Dougherty's earlier treatment of dealbreakers and consent. Their previous (2013) paper had it that sex is always nonconsensual if there is a 'dealbreaker' — a feature of the encounter to which the subject's 'will is opposed'.

The 2013 view implied that if someone is contemplating having sex with someone who has bigoted sexual preferences — if they are only willing to have sex with people with ten generations of all-European ancestors, say, or only people who were assigned male at birth — they seriously wrong their bigoted partners by keeping "offending" aspects of their own history private. This, some subsequent commentators have argued, was an implausible and overly demanding result.⁷ The new view avoids some of the old problems, but also creates new ones — arguably worse ones.

Suppose Jade is a trans woman who passes, and so cannot assume that the people she interacts with know that she is trans. While dancing at a club, she meets Sam, whose behaviour unambiguously expresses his will that she kiss him.

Dougherty's 2013 view problematically implied that if Sam has an unstated transphobic desire to avoid kissing trans women, Jade would violate Sam's consent by kissing him. Her status as trans is a dealbreaker; kissing a *trans* woman is outwith the scope of his consent — that's not something he intends to permit. The new view weakens the importance of Sam's private intentions. Dougherty doesn't discuss transphobia or racism in the book, but their stated rationale for this change is the publicity constraint on consent, which is one way of abstracting from these problems.

Instead of a focus on the private dealbreakers of the consent-giver, the new view emphasizes the importance of *evidence* about the proper interpretation of the consent-giving behaviour. On the Due Diligence view, stated above, if Jade's evidence leaves open the reasonable possibility that a stranger on the dance floor might have such a transphobic preference — *whether or not they actually do* — clause (ii) of the Due Diligence Principle fails, and kissing someone while trans falls outside the scope of their consent. In other words, *by complying with Sam's directive to kiss him, Jade would sexually assault him*. This would be so even if Sam is in fact perfectly happy kissing trans women. Unless there is available evidence that sufficiently supports his openness,

⁷ E.g. Lazenby & Gabriel (2018), Tilton & Ichikawa (2021)

trans people must refrain from kissing. I worry that this implication buttresses harmful stereotypes about trans people as ‘deceivers’.⁸

The problem generalizes. It’s not just about trans people — anyone who has a reasonable suspicion that someone might harbour a dealbreaker against them will face the same onus. Unless they acquire sufficient evidence that their partner intends their consent to apply to someone with all the properties they have, their consent fails to cover an interaction with them.

It’s also not just about sex. Dougherty repeatedly discusses the importance of a doctor acquiring evidence about exactly what procedure a patient is consenting to — but his view also implies that the doctor owes a duty of due diligence to ensure that the patient has no prejudiced dealbreakers about what *kind* of doctor they intend to permit to perform the procedure. Suppose a doctor works with a xenophobic population — it’s an open question, prior to specific investigation of an individual patient, whether they intend to permit foreign-trained doctors to operate on them. Dougherty’s view would require a doctor with a foreign medical degree (and a domestic license and certification) to acquire specific evidence about whether each patient intends for their consent to apply to a procedure by a doctor with a foreign degree. Otherwise the ensuing procedure is outwith the patient’s consent; it is, in other words, a physical assault. I find this result quite implausible even if the patient *does* have the xenophobic views in question; Dougherty’s view implies it *regardless* of whether they do, so long as the available evidence sufficiently leaves open the possibility. A version of this problem will recur for permission to walk across a lawn, or borrow a car, or enter a home, or shake one’s hand, or any of the myriad kinds of cases Dougherty discusses.

5

Theorizing about consent is difficult. My objections to Dougherty’s attempt notwithstanding, this book offers a worthy contribution to a challenging and important topic. Measured against the analytic literature to which they add, Dougherty’s book is a strong one: it is clear, deliberate, and careful, and motivated by plausible and sensitive moral starting-points. Their thoughtful treatment of the mental and communicative models for consent, and their articulation of the motivations underwriting them and the challenges facing them, is the best discussion I’ve ever read on the question of whether consent is a mental state.

The Scope of Consent would be a good choice for a graduate seminar or advanced undergraduate seminar in philosophy. I don’t think anyone could do much better, given the abstract methodology that Dougherty, like so many philosophers, is most fluent in. But as indicated above, I do have reservations about applying that methodology to this topic.

⁸ Cf. Bettcher (2007)

To give more substance to the reservation, I close with a few guiding principles that might generate a quite different treatment. I'm not complaining that Dougherty didn't write the book I'm describing — rather, I put forward these principles in an attempt to communicate more specifically, via contrast, what kind of book Dougherty *did* write, and also to indicate the contingency of the tradition it exemplifies.

1. Foreground questions about the theoretical scope of consent. What ethical role do we want it to play? How do we decide whether a given wrong involves a consent violation, or something else? When it does, does consent violation explain the wrong, or vice versa?
2. Consider sexual consent and sexual violence more specifically. Is it clear that consent to sex involves the same kind of “consent” as consent to the use of one's car? If it is, that's consent characterized at *quite* a high level of abstraction. There are important things to say about sexual consent that cannot be said in abstraction from gender in a sexist world.
3. Attend to the differences between permission and directives. Asking for something and permitting something do have some things in common, but they are very different in morally important ways.
4. Be interdisciplinary and intersectional. Much of the best work on consent has happened outside philosophy departments and outside the academy.

I like these principles. But do not misunderstand me: I support methodological pluralism; I do not mean to suggest that work on consent cannot be good unless it follows these rules. Indeed, *The Scope of Consent* is a counterexample to that generalization.⁹

References

- Bettcher, Talia Mae (2007). Evil Deceivers and Make-Believers: On Transphobic Violence and the Politics of Illusion. *Hypatia* 22 (3):43-65.
- Dougherty, Tom (2013). Sex, Lies, and Consent. *Ethics* 123 (4):717-744.
- Ichikawa, Jonathan Jenkins (2020). Presupposition and Consent. *Feminist Philosophy Quarterly* 6(4):4.
- Lazenby, Hugh & Gabriel, Iason (2018). Permissible Secrets. *Philosophical Quarterly* 68 (271):265-285.
- Kukla, Quill (2018). “That's What She Said: The Language of Sexual Negotiation.” As Rebecca Kukla. *Ethics* 129 (1):70-97.
- Tilton, Emily C. R. & Ichikawa, Jonathan Jenkins (2021). Not What I Agreed To: Content and Consent. *Ethics* 132 (1):127–154.
- Srinivasan, Amia (2021) *The Right to Sex*

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