Tom Dougherty, The Scope of Consent, (Oxford: Oxford University Press, 2021), 192 pages. ISBN: 9780192894793. Hardback: $70.00.

In *The Scope of Consent*, Dougherty defends a theory of the nature and scope of consent. Dougherty’s book is a substantial contribution to the debate about both the nature and scope of consent and should be essential reading for those working in this area. Dougherty’s book is clearly-written and well-argued.

Dougherty positions their view as a response to and rejection of the view that “we consent to someone performing an action partly by intending to permit them to perform that very action” (p. 1). Instead, Dougherty’s view (the Evidential Account) is comprised of three features: (1) “consent is an expression of the will,” (2) “the scope of consent depends on the consent-receiver’s evidence,” and (3) “the scope [of consent] also depends on any evidence that the consent-receiver has a duty to acquire” (2). Feature (1) is about the nature of consent; Dougherty claims that consent is an external communicative behavior. Turning to feature (2), Dougherty addresses the content of what an agent consents to. For Dougherty, “our intentions do not determine which token actions are authorized by our consent;” rather, “the range of authorized actions is fixed by the correct way for our consent-giving behavior to be interpreted” (p. 2). The things we consent to are not necessarily what we intend to consent to; they are what our behavior is correctly interpreted (by consent-receivers) to indicate about the content of our intentions. How to correctly interpret one’s consent-behavior is a matter of the evidence available to the consent-receiver; for the consent-receiver to do their due-diligence, their evidence must meet two further conditions, namely that “we [the consent-giver] must reasonably accept that this evidence bears on how we should be interpreted,” and “recipients of our [the consent-giver’s] consent must reasonably accept that this evidence bears on how we should be interpreted” (p. 2). Evidence that meets these two conditions is what Dougherty calls “reliable evidence” (p. 2). Lastly, if there is further reliable evidence that the consent-receiver is obligated to acquire, then this evidence also determines the scope of the consent-giver’s consent. Dougherty calls this extra reliable evidence “enhanced reliable evidence” (p. 2). Overall, consent is an expression of the will regarding the behavior of others. The scope of our consent is determined by what the consent-receiver reasonably understands us to be consenting to, given their reliable evidence (and any additional reliable evidence they are duty-bound to acquire). Or, as Dougherty puts it, “consent involves deliberately expressing one’s will, and the scope of consent is fixed by certain evidence concerning how the consent should be interpreted” (p. 8). This yields that result that “an action falls within the scope of someone’s consent when both the available reliable evidence and the enhanced reliable evidence sufficiently support interpreting the consent-giver as intending the consent-giving behavior to apply to this action” (p. 10).

In chapter 1, Dougherty gives introductory remarks. In chapter 2, Dougherty articulates what they find to be the most compelling argument for the mental state view (The Autonomy Argument), according to which “consent is an expression of our autonomy, and since our intentions are always under our control, consent consists in our intentions” (p. 8). Dougherty agrees that, as it relates to achieving the autonomy protecting role of consent, the mental view does slightly better than the behavioral view (p. 33). In chapter 3, Dougherty argues that, based on the Autonomy Argument, defenders of the mental view should endorse the view that the relevant mental state involved in consenting is the agent’s “permissive intentions” (p. 35), which are intentions “with a normative content,” namely “to release that person from a duty” (p. 39). Dougherty explains that, for the mental view, the scope of one’s consent is fixed by one’s permissive intentions. In chapter 4, Dougherty argues for the behavioral view of consent (and against the mental view) with to the Publicity Argument, which holds that consent is an essentially public phenomenon. Dougherty defends this argument by appealing to the similarities between consent and promises (which are public). Additionally, Dougherty appeals to the fact that others’ mental states are not public, which makes them unable to fulfill the functions that we want consent to serve. In chapter 5, Dougherty outlines the successful communication version of the behavioral theory. Here, Dougherty outlines the Control Argument, according to which consent involves successful communication, because this allows consent-givers to control their autonomy. In chapters 6 and 7, Dougherty rejects the successful communication view. Dougherty then defends the Evidential Account. In chapters 8 and 9, Dougherty develops their version of the behavioral view, the expression of the will view, according to which “consent involves a deliberate expression of one’s will” (p. 102). In chapters 10 and 11, Dougherty develops the view of the scope of consent mentioned in the previous paragraph.

I’ll now offer some mild-criticism, which shouldn’t detract from how excellent this book is. As someone who has studies the ethics of consent, I have adopted the view that most of what really matters in questions of consent can be answered without getting caught up in the metaphysics of consent. In my work on the ethics of consent, I have never relied on a theory of the ontology of consent or its scope. In fact, in my work, I make it very clear that my view fits with any of the extant views of the nature of consent. This sets up my main criticism of Dougherty’s project: the answers to applied questions in the ethics of consent don’t hinge on the correct metaphysics of consent. This is the case, because all the theories of consent agree on questions of permissibility and blameworthiness for consent transgressions, even if they disagree about the nature of consent. Consider the following case:

**Miscommunicated Consent:** A mentally agrees to have sex with B. B does not know this and proceeds with sex anyway.

For mentalists (who say that consent consists merely in a mental state), this exchange involves valid consent. For proponents of the behavioral view (who say that consent consists in merely an external performative act) or hybrid views, this exchange does not involve valid consent. Although these positions seem miles apart, the dispute ends up being *close to* merely verbal. The different views agree about how to morally assess B’s actions. All the mentalists agree that, although A did consent to B’s behavior, B’s actions are blameworthy, because he believed he violated A’s consent. Although B is culpable for having sex with A without having the justified belief that she consented, it is nonetheless true that A consented to B. The mentalists hold that A, *objectively*, consented to sex with B, while also holding that, *subjectively*, B acted culpably. The non-mentalists also agree that B’s actions are blameworthy, but they explain this in terms of A not having consented at all to B. So, although they disagree about the nature of consent (and whether A has consented in the above scenario), the differences don’t matter for the purpose of evaluating blame. All the views about the nature of consent agree that B acts wrongly in Miscommunicated Consent.[[1]](#footnote-1)

Dougherty is extremely thorough and thus anticipates a concern like this (p. 61-64 and in related ways on p. 82-84). Dougherty agrees that both views would converge on B having acted wrongly in this case. Dougherty poses a case like Miscommunicated Consent and then a variant:

“Acting Without Intention. X acts in Y’s personal domain, and Y does not intend to release X from a duty not to act in this way” (p. 61).

In Miscommunicated Consent, it would be as if A did not mentally agree to sex with B, and B proceeded anyway, thinking that A had not consented. Dougherty argues that the wrong in Acting Without Intention is a graver wrong than the one in Miscommunicated Consent (p. 62). If this is correct, then the metaphysics would matter for assessing blame. But, I am not convinced that there is any moral difference between these cases. Dougherty relies on the reader’s intuition that Acting Without Intention is worse than Miscommunicated Consent. It seems to me that both cases involve having sex with someone while believing that they have not consented. In Miscommunicated Consent, the person who does this has the good luck to be having sex with someone who wills this action. But, I don’t generally think that moral luck has an effect on blame. So, although the views differ as to whether consent occurs in these cases, they converge on what matters, namely our ability to assess the permissibility of actions in the subjective sense required for blameworthiness. Whether we call this “consent” does not affect the issue.

What does this mean for Dougherty’s project? I think it means that while questions about the metaphysics of consent are interesting and important, more energy should be devoted to applied issues going forward.

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1. I borrow the previous section from Samuel Director, “Between Competent, Consenting Adults: Essays on Consent and Cognitive Impairment,” PhD Dissertation, University of Colorado, Boulder, 2021 p. 5-6. [↑](#footnote-ref-1)