

Review of Tom Dougherty, *The Scope of Consent*

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Philosophical progress is often made by carefully prying apart interrelated but distinct questions. To this end, Tom Dougherty helpfully distinguishes two questions about consent:

1. What is consent?
2. What determines the scope of consent?

The first question pertains to the ontology of consent. For example, is it a mental state or a behavior? The second question pertains to the range of actions rendered permissible by one's consent. For example, do I consent only to the range of actions I *intend* to permit, or do conventions play a more central role?

To illustrate, suppose I consent to you staying in my (alas, fictional) Summer home when I'm not there. The first question asks: what makes this consent? Was it enough for me to mentally assent to you staying there, or did I also have to communicate this? The second question asks: What range of actions is permitted by my act of consent? Have I agreed just to let *you* stay there, or is it also OK for you to bring your partner? How about your dog?

As the title suggests, Dougherty's *The Scope of Consent* foregrounds the second question while also offering a novel answer to the first. The question of scope is important for both

practical and theoretical reasons, despite being heretofore unexplored. Practically, we need to know not only *whether* someone consented but also what they consented to. Theoretically, as Dougherty highlights, certain objections to accounts of consent's nature come into view by thinking about its scope.

Dougherty's monograph is a model of analytic ethics of consent, serving as an introduction to contemporary analytic frameworks for theorizing about consent while being clear, precise, and honest about the merits of competing views. It offers a compendium of novel cases and arguments that philosophers of consent will think through for years to come, and it sets the agenda for work on the scope of consent. It is also a model monograph: it is accessible while being nuanced, engaging, and (perhaps most importantly to some readers) relatively short.

Although the questions of consent's nature and scope are distinct, they are importantly interrelated. Indeed, accounts of the former often motivate accounts of the latter. Dougherty considers three packages of views, each containing an account of consent, a principle determining the scope of consent, and a core argument motivating each.

**1. Mental Account:**

- a. **View of Consent:** Mental State View
- b. **Principle for Scope:** Permissive Intention Principle
- c. **Key Argument:** Autonomy Argument

**2. Successful Communication Account:**

- a. **View of Consent:** Successful Communication View
- b. **Principle for Scope:** Successful Communication Principle

- c. **Key Argument:** Control Argument
3. **Evidential Account:**
- a. **View of Consent:** Expression of Will View
  - b. **Principle for Scope:** Due Diligence Principle
  - c. **Key Argument:** Interpersonal Justification Argument

Dougherty rejects the first two in favor of the third. For the sake of space, I'll briefly highlight key features of the alternative views before focusing my attention on Dougherty's.

*The Mental Account.* On the Mental State View of consent, possessing the appropriate mental state is both necessary and sufficient for consent. This view is motivated by the Autonomy Argument, on which consent is normatively significant because it is an expression of our autonomy, particularly our ability to control moral boundaries. This idea motivates the Mental State view, for we can more easily control these boundaries if we need only to *mentally* waive our rights; communication poses a further burden. The Mental State View motivates the Permissive Intention Principle, according to which an action falls within the scope of an agent's consent if and only if she intends to release someone from their duty not to perform this action (modulo no conflicting intentions). The Autonomy argument motivates this principle because there is little value to controlling *whether* one consents unless one also controls what one gives consent *to*. On this principle, whether bringing your dog to my Summer home falls under the scope of my consent depends on whether I intend to release you from your duty to not bring him.

*The Successful Communication Account.* The Successful Communication View of consent denies that a mental state is sufficient for consent. Like all Behavioral Views (including Dougherty's), it claims something more is needed, given that consent is a public phenomenon (this is the 'Publicity Argument'). According to the Successful Communication version, this something more is (unsurprisingly) successful communication: an agent gives consent if and only if she successfully communicates to the consent-receiver that she is giving them permission to perform some action. Here successful communication requires uptake. This view is motivated by the Control Argument, on which we don't really control others' behavior if they are not acting *because* we consented. This argument further motivates the Successful Communication Principle: an action falls within someone's consent when the consent-receiver successfully interprets the consent-giver as intending to permit the relevant action via their behavior. For example, whether bringing your dog falls under the scope of my consent depends not only on whether I *intend* to permit it but also on whether I successfully communicate this permission to you.

Although these two accounts disagree about whether mental states are sufficient for consent, they converge in endorsing an Intention Condition on the scope of consent:

**Intention Condition.** An action A falls within the scope of the consent that X gives to Y only if X intends to release Y from their duty not to perform A.

One of Dougherty's central claims is that we should reject the Intention Condition on both intuitive and theoretical grounds. Dougherty offers a range of thought experiments to illustrate that an action can fall within the scope of someone's consent without a

corresponding permissive intention. For example, suppose that I consent to you bringing your dog to my Summer home, saying, "Please, bring your dog!" I explicitly think you have a Golden Retriever when forming my permissive intention, when you actually have a Labrador Retriever. Intuitively, I still consent to you bringing your Lab, even though I only intended to release you from your duty not to bring your (sadly non-existent) Golden. This intuition holds even if I privately intended for you *not* to bring a Lab. (Compare Dougherty's *Parking* and *Date Mistake* cases on pp. 93--94.) Public meaning trumps private intentions when they conflict. Dougherty refers to this insight as the *Mistake Objection*.

In addition to rejecting the Intention Condition, Dougherty also rejects both the Mental State and Successful Communication Views of consent. Instead, they propose an alternative Behavioral View, one on which consent requires behavior but not uptake. On their Expression of Will View, an agent can consent either by expressing permission or by issuing a directive, e.g. a request or invitation. Expressing permission requires deliberately engaging in behaviors that indicate that the consent-giver is releasing the consent-receiver from a duty, while issuing a directive involves deliberately performing a directive speech act addressed to the consent-receiver.

Dougherty replaces the Intention Condition with a Due Diligence Principle. According to this principle, 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 their consent-giving behaviour to apply to this action" (10; see also p. 149). Evidence is reliable if and only if both the consent-giver and the receiver must reasonably accept that this evidence bears on how the consent

ought to be interpreted. Available evidence is evidence that is *actually* available, even if the consent-receiver is not aware of it. (Epistemologists might interpret this as evidence the agent is *in a position* to know.) Enhanced reliable evidence includes evidence that the consent-receiver has a duty to acquire. Relevant evidence may include conventions and context, including knowledge about the consent-giver. Dougherty tells us, “No evidential source is privileged, and each is defeasible” (140).

In our dog example, my friend might look to conventions regarding home invitations, facts about previous exchanges, and her knowledge of me and my preferences. She also has a duty to acquire evidence: here she may simply ask me. Whether the evidence sufficiently supports the interpretation is context- and stake-sensitive, depending partly on the consequences of misunderstanding.

Dougherty’s views about consent and its scope are supported by the Interpersonal Justification Argument, on which “consent is morally significant as a consideration that the consent-receiver could appeal to in order to justify their behaviour to the consent-giver” (149). The resulting package---the Expression of Will View, Due Diligence Principle, and Interpersonal Justification Argument---is the *Evidential Account*.

Dougherty’s account has many virtues. Being multi-faceted, it offers rich and context-sensitive normative judgments. It centers the role of conventions and evidence in a helpfully illuminating way. It is methodologically self-conscious and rigorously argued, informed by intuitions across a rich array of cases and bolstered by big picture arguments.

Despite these virtues, I now turn to a few critical remarks concerning internal consistency, methodology, and normative guidance.

My first concern is about the internal stability of Dougherty's account. Dougherty claims that whether one consents depends in part on whether one *deliberately* expresses one's will. Whether one consents is within one's control; one cannot consent inadvertently or accidentally. However, the scope of consent is *not* in the agent's control. This results in an unexplained mismatch between whether *consent* is in our control and whether its *scope* is. Why would consent be in one's control, but scope not be? Why not go in for a view on which consent, too, can be inadvertent?

Dougherty recognizes this explanatory burden and admits that dropping the deliberateness condition would yield a more unified view. They then express a tentative willingness to amend their view so that one can deliberately *or unintentionally* consent. However, they remain reluctant to embrace this concession because they think this view yields implausible verdicts regarding consent to sex, writing, "I do not find it plausible that someone could appeal to negligent behaviour to justify sexual activity" (114).

There are two problems with this response. First, Dougherty is arguably already committed to the view that we can inadvertently consent to sexual activity. Consider again the Mistake Objection, on which public meaning trumps private meaning. Imagine that Alex asks Blake whether Blake would like Alex to "give neck" to him. Blake agrees, thinking that "give neck" means to kiss his neck, rather than to perform oral sex. Presumably, there is some way to fill in the details such that Dougherty's account would yield the verdict that oral sex fell within the scope of Alex's consent, given the relevant

available and enhanced evidence. Second, given that Dougherty thinks there can be many other nearby wrongs *besides* those of acting without consent (such as acting with disregard and acting without being controlled), it's especially unclear why they shouldn't simply accept the possibility of accidental consent and explain intuitions to the contrary in terms of other wrongs.

My second concern pertains to methodology. Although Dougherty seeks to be methodologically self-conscious, many of the objections to the Intention Condition are motivated by a variety of complexly contrived and *recherché* cases, typically characterized by the consent-giver having a false belief. For example, some consent-givers have false beliefs about whether they meet the conditions for consent or what rights they have. These cases are meant to illustrate the possibility of consenting without permissive intentions.

However, I don't always have clear intuitions in the cases Dougherty describes, regarding whether there is consent or not. While I agree there's something fishy going on in these cases, my intuitions are not fine-grained enough to discern whether the fishiness derives from consent, scope, agent-evaluation, or simply the artificial nature of the examples. Further, Dougherty does not explicitly consider a natural reply on behalf of proponents of the Intention Condition. Defenders of it may accept the implication that there was no consent and attempt to capture intuitions to the contrary by arguing that the consent-receiver is nonetheless *blameless* for acting on perceived consent. Indeed, the Due Diligence Principle risks collapsing questions about the scope of consent with questions about whether it was permissible to *act* on (perceived) consent.



To address the issues posed by overly relying on thought experiments, Dougherty supplements their account with the Interpersonal Justification Argument. When an agent expresses their will for how another person behaves, that person can appeal to this expression to justify their corresponding behavior. However, it's not clear that the results of the Interpersonal Justification test will always support the conclusions Dougherty aims to support. The test is too coarse-grained. First, we can often tell a story where conclusions opposing Dougherty's own are supported. For example, we can imagine a consent-receiver protesting some of their verdicts on behalf of the consent-giver, claiming, "I acted as I should given my evidence! It was your duty to disclose your highly specific preferences!" or, "If I had gathered more evidence, it would have supported that you consented!" Second, the Interpersonal Justification argument doesn't obviously tell us whether the wrong in question pertained to the scope of consent or some other worry, such as blameworthiness or how the consent was procured. For example, the consent-receiver may have received consent yet have a difficult time justifying his action because he lacked sufficient evidence of consent. Alternatively, as Dougherty notes, the consent-receiver may be unable to justify his action because he coerced the consent (p. 153). Yet acting outside the scope of someone's consent seems importantly different from acting epistemically culpably or with coerced consent. The Interpersonal Justification Argument is too coarse-grained to distinguish between them.

My final worry pertains to normative guidance. The question of scope is important partly because---as consent-givers, receivers, and third parties---we need to know which actions are permitted or licensed by a token act of consent. However, Dougherty's view makes it very difficult to determine the scope of consent, much less settle disputes concerning it. For one, it is extremely demanding. To determine whether an act falls within someone's

consent, we need to know what evidence the consent-giver must reasonably accept as bearing on the correct interpretation of their behavior, where reasonableness is a primitive notion. In addition, we need to know the costs and stakes of investigation and to compile and crunch information about conventions, context, history, and personality. The Due Diligence Principle requires us to not only have a grip on complex normative notions, but also to engage in complex moral reasoning and accurately balance moral, prudential, and epistemic considerations against each other. This is not just a matter of needing to rely on normative intuitions---a limitation Dougherty recognizes---but further needing to engage in a great deal of normative theorizing to render any definitive verdicts.

This makes it especially difficult to satisfactorily resolve disagreements on Dougherty's picture. Presumably, consent-givers and -receivers will disagree about what actions reasonably bear on the interpretation of a consenter's behavior. In the cases Dougherty gives, many facts are stipulated, including that the agent consented in the first place and how fine-grained to individuate the *type* of behavior the consent-giver engages in. We are thus in a privileged position relative to both the consent-receiver and giver. Like examiners, we also have the answer key: we know the verdicts that both intuition and the Interpersonal Justification Argument yield.

This approach is problematic in two respects. First, it's not clear why this privileged perspective is the right one to embody, especially when consent-receivers themselves cannot always appeal to the stipulated descriptive facts or primitive normative judgments regarding reasonableness. Someone cannot plausibly justify acting on consent they didn't know was given (contra Chapter 8.2); they can arguably justify---and not

merely excuse---acting on evidence of consent if they had misleading evidence of it (contra Chapter 10.2). Second, this approach fails to provide normative guidance in messy real-life cases, where descriptive and moral facts---such as the stakes or costs of investigation and what interpretations count as reasonable---are not specified and the perspectives of disputants differ. Yet the scope of consent matters in part because we need normative guidance to avoid perceived and actual harm, prevent and resolve interpersonal conflict, and adjudicate responsibility.

I know that Dougherty would have thoughtful and illuminating responses to each of these concerns. *The Scope of Consent* is an impressive and tightly argued text, which will serve as essential reading on the topic. I recommend this book to anyone interested in consent and its scope.

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