

Intention and Sexual Consent

Can we give consent without intending to give consent? Philosophers have recently argued: no. Consent involves the waiving of a right or, at the very least, the releasing of another person from a duty that he or she would otherwise have toward you. Now, there are other ways that we can change what duties others have toward us that do not require intention. We can forfeit our rights (e.g. by attacking someone, or by abandoning our property). We might come to need help, resulting in another person suddenly holding a duty of beneficence. However, consent is special because of its voluntary nature.¹ If I hoodwink another person into rendering consent, we typically do not consider that person to have rendered morally valid consent. This might be true even if he has rendered *legally* valid consent. I may count on him failing to read the small print on a consent form, and so have legal permission to continue using him in my research study. However, moral philosophers would be loath to consider this consent fully voluntary – since the research subject did not intend to agree to partake in a study as described by the small print on the consent form.

You may have noticed that I have already made a few moves, and all of them are suspect. I have suggested that consent is voluntary, and that the voluntary nature of consent requires that consent be intentional. I have also suggested that misinformation or lack of information has the power to

¹ In *Shaping the Normative Landscape*, David Owens provides a thorough analysis and compelling theory of those obligations that we have in virtue of choice, versus other obligations. (Oxford University Press: 2012)

undermine morally valid consent, since it can result in situations in which people agree to do or allow what is outside the scope of their intentions. In this paper I am going to focus on the last of these moves. I will not delve into the interesting questions involved in determining whether all consent is voluntary, or whether all voluntary actions need be intentional actions.

Two philosophers have recently made strong cases for the power of misinformation or lack of information to undermine consent. Both implement the link between intentions and consent in order to describe the mechanism by which misinformation or lack of information undermines consent. One of these is Tom Dougherty in his paper, "Sex, Lies, and Consent," in which he argues that any person deceived about one of his "deal-breakers" related to a sexual encounter has not given morally valid consent to that encounter. Another such argument is by David Boonin - an argument he gives in his *A Defense of Abortion*, wherein he explains why it cannot be the case that a pregnant woman gives tacit consent to the fetus' use of her body. I will begin this paper by giving a brief explanation of the role of consent in the moral realm. Next, I will explain Dougherty's detailed argument for the conclusion that misinformation or lack of information about "deal-breakers" undermines sexual consent. (I will explain Dougherty's terminology shortly.) I will then explain Boonin's argument about tacit consent that supports Dougherty's premises.

After this exposition, I will go on to attack one of Dougherty's premises. My first attack will involve cases in which agents intend to consent to gambles, and intend to consent to have sex with people under certain descriptions, *de re*, rather than *de dicto*. I believe that these are cases that serve as counterexamples for the theories at hand. In the subsequent section of the paper I go on to suggest that even *deception* about deal-breakers might not always have the

power to undermine sexual consent. In both sections I craft my arguments by appealing to a proposal about the scope of rights. I suggest that we may have intentions regarding our sexual experiences that do not map onto the rights that we actually hold pertaining to those sexual experiences. In such cases, misinformation might result in us partaking in sexual activities with features to which we do not intend to consent. However, many of these cases are consensual.

As you can tell, my project here is very limited with regard to consent. I am not contending with the literature on consent, or even sexual consent, broadly speaking. I am investigating a particular question about the relationship between correct and full information and morally valid sexual consent – a relationship that has been explained recently by reference to intentions.

Section 1: The Role of Consent in the Moral Realm

Ordinarily we have obligations not to intimately touch, use, or harm each other's bodies and property. These obligations are sometimes referred to as duties not to trespass.² These duties constitute weighty moral reasons due to the welfare-related significance of individuals being able to control what happens to their bodies and property.³ These obligations can also be described as

² Philosophers on consent tend to say they pertain primarily to rights and duties related to trespass, following Judith Jarvis Thomson's account from *The Realm of Rights*, (Cambridge: Harvard University Press, 1990).

³ For a lengthy discussion of why sexual interference so harms individuals, see Wertheimer, Alan. *Consent to Sexual Relations*. Cambridge University Press. Cambridge: 2003. 89-118.

duties that correspond to bodily rights and property rights. When we render consent to another individual, we waive that individual's obligation to refrain from doing one of these things. In the language of moral rights, consent operates to waive our moral rights against being intimately touched, used, or harmed by the person to whom we have rendered consent. A particular act of sexual consent can waive some sexual rights and not others. Jones might waive her right against Smith engaging in vaginal intercourse with her, but retain her right against Smith engaging in anal intercourse with her.

There are many other questions about sexual consent that are morally contentious. For instance, is it possible for Jones to consent to future sexual activity, even if she does not wish to be involved in this activity in the future? Alternately, does consensual sex always require *present* consent? I will not investigate these questions here.

Sometimes trespass without consent is permissible because of an overriding moral reason. For instance, I may permissibly walk on your property if I need to do so in order to save a person lying injured on your land. It is not clear whether there are analogous cases in which overriding reasons justify sexual trespass. Even if one did not believe that all rights are absolute (e.g. one might think that one may permissibly infringe certain rights) he or she might still believe that sexual rights are absolute – that it is never permissible to have sex with a person against his or her will, no matter the consequences. I will not contend with this question here. However, there is a *related* question that will prove relevant to my discussion. Can one be blameless in an act of sexual trespass? Certainly, trespass without consent can be blameless when the trespassing agent justifiably believes that the trespassed person's right has been waived through consent. For instance, imagine that you beckon to your friend, using your hand, inviting

him to get into your car. I walk by and, not seeing your friend, I think you are beckoning me to get into your car. Delighted at the prospect of a ride home, I get in. I am trespassing. I was not invited into the car. Your right against me trespassing on your property has not been waived. However, I am also not blameworthy for this trespass. As we will see, there are cases in which agents are blameless for sexual trespass.

Finally, consent can be explicit or implicit. Boonin offers the example of a man leaving a tip for a waiter at a restaurant. He never speaks, writes, or gestures his consent to the waiter taking his money. He does not need to do so in order to render consent to the waiter taking his money. In this way, consent can be implicit.⁴ Dougherty and Boonin both agree that in order for implicit consent to be morally valid it must be the case that the consenter would agree, if asked, about whether he or she had meant to allow all of the particular events that transpired. For instance, Dougherty uses the example of a haircut.⁵ When we consent to a haircut, we implicitly consent to another person touching our heads, ears, shoulders, and necks. We consent to any of a variety of methods by which the haircutter could go about cutting out hair, as long as the end-product is, by and large, what we agreed it would be. If you asked me, “did you consent to your haircutter clipping around your left ear before tackling your bangs?” I would say yes. This does not mean that I ever considered for a moment what ordering of clips the hairdresser might implement. What matters is that, if I had known the ordering, I would have agreed to it.

Dougherty points out that, if the hairdresser dyed my hair pink after leading me to believe that he would dye my hair a handsome brown, it would be correct to say that he had done so non-

⁴ Boonin, David. *Defense of Abortion*. West Nyack, NY, USA: Cambridge University Press, 2002. ProQuest ebrary. Web. 9 April 2015.

⁵ Dougherty, Tom. “Sex, Lies, and Consent.” *Ethics*. Vol. 123; No. 4. p.723

consensually, despite the fact that I had consented to having my hair dyed. For this reason, Dougherty believes that consent is not *just* a matter of communication. Insofar as consent involves communication, that communication must carry content from a consenting agent's mind.⁶ (Otherwise, we would have to say that the hairdresser had my consent to dye my hair pink if he, for instance, believed on the basis of my laid-back attitude that I wouldn't really mind what color my hair turned out to be. This would be problematic even if I had intentionally communicated to him that I had a laid back attitude.)

These constraints on what counts as implicit consent play a powerful role in Dougherty's argument. Dougherty's project in "Sex, Lies, and Consent" is to show that deception can, in many more cases than we think, undermine sexual consent. However, his argument is such that he achieves a much more ambitious conclusion. Not only can deception undermine consent, but even misinformation or the lack of information can undermine sexual consent, even when no one is actively (or passively) deceiving each other. In the next section, I will fully explain his argument. Some parts of the explanation that I provide are inessential to my own analysis. However, Dougherty's conclusion is so counterintuitive, and relies so heavily on the clever moves of his argument, that I need to fully articulate these moves in order to make his position compelling, and in order for my objections to be at all interesting.

Section 2: The role of Intention in Explaining why Misinformation can Undermine Morally Valid Consent

⁶ Dougherty, 719; Footnote 5

Tom Dougherty points out that many people tell lies and otherwise misrepresent facts about their personal histories and achievements in order to persuade other people to have sex with them. Dougherty contends that this deceit is not the mild wrong that many of us believe it to be. Instead, it is a serious wrong, as it undermines the deceived individual's consent to the sexual act.⁷ Dougherty makes clear that the moral focus of his paper does not regard the wrong of deceit, *per se*, but instead, the wrong of the sexual encounter achieved by means of deceit. In order to describe the wrong in question, Dougherty uses the phrase: *deceive another person into sex*. In order to deceive another person into sex, that deceit must (a) regard something pertinent to the sexual encounter (including personal features about the deceiver), and (b) regard something that would be a "deal-breaker" for the deceived person if he or she had been acquainted with the truth.⁸ The topics of deceit referred to in (a) extend to personal features about the deceiver, such as the deceiver's nationality, religious beliefs, proclivities, educational background, career, facts about his or her body (e.g. whether one has had breast implants). Dougherty provides the case of Chloe and Victoria.⁹ Victoria is an environmentalist and animal lover. Chloe is a corporate lawyer and hunter. If Victoria knew these things about Chloe, she would not choose to have sex with Chloe. However, Chloe leads Victoria to believe that she is an environmental lawyer and animal lover. Victoria has sex with Chloe. On Dougherty's view, Chloe has had sex with Victoria without her morally valid consent, an act which is seriously wrong.

⁷ Dougherty, Tom. "Sex, Lies, and Consent." *Ethics*. Vol. 123; No. 4. P. 717-744.

⁸ The constraint of (b) prevents the topic of deceit from extending to just any fact such that, if it had been known to the deceived, would have led causally to a situation in which the sexual encounter did not occur.

⁹ Dougherty, 733-734

Dougherty's main argument runs as follows: (1) it is seriously wrong to have sex with someone without his or her morally valid consent; (2) deceiving someone into sex involves having sex with him or her without his or her morally valid consent; (3) hence, it is seriously wrong to deceive someone into sex. Dougherty provides three separate sub-arguments for premise (2) of his main argument. He names them: The Argument Against Sexual Moralism; The Argument from the Case of the Chihuahua; The Argument from a Substantive Account of Consent. I will focus on the last of these, since it best explains the relationship between intention and sexual consent. However, in the course of responding to this argument, I will address both of the other two sub-arguments for Premise (2). I will assume that Premise (1) is correct.¹⁰

Dougherty's Argument from a Substantive Account of Consent can be concisely described as follows:

- i. If A has provided morally valid consent to let B do X then A has waived her right against B not to do X.
- ii. If A has waived her right against B not to do X, then A has intended to waive her right against B not to do X.
- iii. If A is deceived regarding any of the features involved in B doing X, such that A would not waive her rights against B doing X if she was not deceived, then A has not intended to waive her right against B doing X.

¹⁰ In the course of defending Premise (1), Dougherty argues, against Wertheimer, that lack of consent is the *primary* and central wrong of rape, rather than harm. However, I will not describe this argument here as, whether or not the reader believes that non-consent is *more centrally* the wrong of rape than is harm, the reader will probably accept Premise (1).

- iv. Therefore, if A is deceived regarding any of the features involved in waiving her rights against B not to do X, such that A would not waive her rights against B not to do X if she was not deceived, then A has not provided morally valid consent to let B do X.¹¹

Let us assume that Premise (i) is true. If you prefer to investigate moral questions without reference to rights, you can just as easily characterize the point made in Premise (i) with something like the following: If A has provided morally valid consent to let B do X then A has released B from his duty/obligation/moral reason pertaining to her bodily autonomy not to do X.

Notice that premises (ii) and (iii) do not require that B deceives A in order for there to be a failure in the process by which A waives her right. A merely has to *be* deceived – that is, have misinformation or a lack of information, or even simply be failing to attend to the relevant information. The person who is engaging in the non-consensual sex with the deceived person might not be blameworthy at all. Imagine that Chloe had no idea that Victoria cared what kind of law she practiced. Imagine that they had spent the whole evening talking about movie stars and smoothies. If Chloe being a corporate lawyer is a deal-breaker for Victoria, Chloe would not have known. In this case, Chloe has non-consensual sex with Victoria – s he trespasses on Victoria’s sexual rights – even though she is not to blame for so doing.

David Boonin gives a non-sexual case that nicely demonstrates blameless trespass. Ted is at a restaurant and leaves money on the table while he eats. He does not mean for [all of] the

¹¹ Dougherty, 734-739

money to be a tip. He just was tired of sitting on the wad of money in his back pocket, and put it onto the table, meaning to collect some of it again before leaving. However, Ted forgets the money when he leaves the restaurant and the waiter understandably assumes that all of the money is a tip. The waiter takes the money.¹²

Now, Ted has unintentionally engaged in a social convention that communicates that all of the money left on the table is for the waiter.¹³ However, Ted's intentions with respect to the money were not part of what was communicated and so, for Boonin and for Dougherty, the communication was not sufficient to render consent. For Boonin and Dougherty, we can find out whether we have consented to any particular activity or allowance by asking ourselves: did we mean to consent? The answer for Ted in this case is: no. Since Ted did not render morally valid consent to the waiter taking his money, Ted never waived his property rights to the money. This means that, for the time that the waiter is in possession of Ted's money, before Ted goes back and secures it, the waiter is trespassing on Ted's property rights. However, he is clearly doing so blamelessly. He had every reason to think that Ted had consented to him taking the money. (Assume that the amount of money was within a reasonable range for being a tip.)

Even though Ted's situation is not one that involves misinformation or lack of information, just forgetfulness, we can still apply premises (ii) and (iii) of Dougherty's argument to the case. On this particular point, the conclusions drawn by both authors are the same, and (ii) and (iii) illustrate why.

¹² Boonin 156-157

¹³ Boonin notes that this social convention is a necessary (but not sufficient) condition for tacit consent – on that is not met by women who are thought by some to tacitly consent to the fetus' use of their wombs through the act of voluntarily having sex (Boonin, 163-164).

- ii. If Ted has waived his right against the Waiter refraining from taking all of the money on the table, then Ted has intended to waive his right against the Waiter refraining from taking all of the money on the table.
- iii. If Ted is deceived regarding (or merely forgets) any of the features involved in the Waiter taking all of the money on the table (e.g. the sum of the money on the table), such that Ted would not waive his rights against the Waiter taking all of the money on the table if he was not deceived (or if he remembered the sum he left on the table), then Ted has not intended to waive his right against the Waiter taking all of the money on the table.

In this way, no matter what it might be reasonable for the Waiter to interpret, Ted has not consented to the Waiter's act.

Section 3: Misinformation, Consent, and the Role of Intention

I believe that Premise (iii) of Dougherty's argument is mistaken because a person, A, can intend to waive her right against B doing X, even if, unbeknownst to A, B doing X involves something that would be a deal-breaker for A. This can happen in at least two ways. First, we can consent to gambles and lose them. Second, we can consent to something or someone, *de re* or *de dicto*.

Consider my trip to the thrift store, wherein I search for a shirt that is one hundred percent cotton. I find a shirt that I like. I cannot find a tag that includes information about the material content of the shirt. I ask the thrift store owner. However, she does not know the answer, since the shirt never had a tag since it came into her possession. We both speculate about the material. It feels soft. It doesn't feel synthetic. Nonetheless, I know that the shirt, if it is not cotton, might be very uncomfortable on a hot day – so if I knew that it was not fully cotton, I would not buy it. I do buy it. If the shirt is not cotton, have I consented to the transaction? Sure. I have consented because I took a particular gamble when I bought the shirt. I did not *intend* to consent to purchasing a shirt that is not cotton. However, I intended to consent to taking a gamble – to buying a shirt that might not be cotton.

Now, I have characterized Boonin and Dougherty as agreeing on matters of consent and intention, up until this point. However, Boonin's discussion about pregnancy, and the role that consent plays in the literature on abortion, poses a problem for Dougherty. While Boonin's waiter example (involving Ted, from above) gives us a compelling reason to think that a woman does not consent to an accidental pregnancy, even if she chose to have sex, it is nonetheless clear that an accidental pregnancy does not, itself, render an act of sex nonconsensual.

Consider, A has sex with B, knowing that there is a small chance that she might get pregnant. The sex that she has with B is sex that gets A pregnant. If she had known that the sex would involve impregnation, then A would not have agreed to have sex. However, she consents to the gamble – though not to the impregnation. In this way, A has sex that involves a feature that counts as a deal-breaker, for her. Yet, A has still consented to the sex.

Now, there are many pieces of information that might serve as deal-breakers when people make sexual choices. Some of these pieces of information are such that, if B does not reveal the information, A would never guess that it might be the case (e.g. that B has leprosy). For this reason, A does not consent to a gamble that involves a chance of contracting leprosy when she has sex with B. Further, there are plenty of cases in which A, for whatever reason, takes herself to be completely free of the risk of x, y, and z – while truly she is at risk. This is true in other cases of consent as well. I might assume that, because I am buying from a thrift shop, the money that I pay for a leather garment will not be a profit for the leather industry. After all, the clothing is being sold second hand. Yet, the thrift store might be run by the leather industry, and my money is part of their daily profit. But these cases are rare. Usually, when we consent to activities or purchases or the particular behavior of others, we do not *rule out* a wide range of possibilities for what might be involved. We might not consider all of the possibilities – but considering all of the possibilities is not essential for consenting to a gamble. After all, the woman who consents to sex and gets pregnant may have never considered the possibility that she would get pregnant. It is enough that, if she had considered all of the possibilities, she would have known that pregnancy was among them.

Do other acts of sex involve “consenting to a gamble”? Many of the cases that Dougherty would call non-consensual can be described as consenting to gambles. For instance, imagine that A has as her deal-breaker: B must be a Harvard graduate. That is, if she knew that he was not a Harvard student, she would not have sex with him. Of course, this does not need to be a gamble. A can ask B where he goes to school. However, A might not think about it, and assume that B is a Harvard student – given where she met him, etc. It seems that A cannot rule out the possibility that B is not a Harvard student. If afterwards she considered the situation, upon being asked, are

you sure he's a Harvard student, she could not say yes. So I think it is reasonable to say that she consented to a gamble. Of course, if B actively deceived A about being a Harvard student, then this is a different story. Consenting to gambles does not mean consenting to all possibilities – but just those we have not ruled out. When someone gives us information $\sim X$, and we believe them, we rule out X from the realm of possibilities. In this case, we do not consent to a gamble involving X.

Second, when A consents to B doing X, she intends to waive her right against a particular person doing a particular thing. However, her intentions will usually be characterized as consenting to a person, not to a set of descriptions that pick out the person, *de dicto* – and this limits the range features of the sexual case that can undermine her consent. If Boonin and Dougherty are correct that intention determines the scope of consent, then an intention about consent that is not *de dicto* cannot result in a *de dicto* scope of consent. Let me provide two cases:

A. Angela consents to having sex with whatever person won the race.

B. Angela consents to having sex with Bob, whom she likes very much, and Bob won the race.

In case A, Angela is consenting to the race-winner, *de dicto*. Let us assume that her intentions really are as described. In A, She would have sex with Bethany if Bethany had won the race. In case B, which I take to be more standard, Angela is consenting to have sex with the race-winner, *de re*. If Bob had not won the race, it would not change *who* she had consented to have sex with

(whereas, in case A, it would result in this change). After all, Angela would not have even described herself as consenting to the race-winner in B. She took herself to be consenting to Bob.

Now, these cases seem somewhat silly, but I think that there really are situations in which one person consents to another, *de dicto*. For instance, if a very religious person, A, only means to consent to have sex with her spouse, then a fake wedding ceremony, in which the priest is a fraud, really might undermine her sexual consent. However, in most cases we consent to have sex with a person, not to a list of descriptions that pick out that person. For this reason, changing the descriptors does not undermine the validity of our consent.

This explains why some misinformation about deal-breakers undermines sexual consent and some do not. Imagine that you would not have sex with me if you knew that I was religious, and I do not tell you that I am religious. You are probably not intending to consent to have sex with “the non-religious person here in front of you.” Instead, you are interacting with me – someone who you are thinking of, and relating to as “you” or “this person.” For this reason, the misinformation does not undermine your morally valid consent. You are consenting to have sex with exactly the person with whom you have sex. Whereas, you could actually hold the intention of consenting to sex with me in a conditional way – conditional on me being non-religious. Certainly if you ask me, “are you religious? I don’t want to have sex with you otherwise” and I lie, then my deception does undermine your sexual consent. In this strange case, you have intended to waive your sexual rights against a person under a certain description – a non-religious person. Deal-breakers matter for consent, but they have to actually transform someone’s intentions pertaining to consent into *de dicto* intentions – ones that could be frustrated by misinformation about descriptions.

In the movie, *Gattaca*, a young astronaut deceives everyone, including his lover, into thinking that he has a different identity in order to be a candidate for a space mission.¹⁴ His lover discovers his deception and is outraged. She suggests that he has taken sexual or, at least, romantic advantage of her. The young astronaut apologizes to her, but insists: but it was still me – it was still *me* whom you were with last night. What he says is sensible. Perhaps she would not have chosen to have sex with him if she knew who he was. His deception was certainly disrespectful of her agency, in the way characteristic of the wrong involved in most deception. Regardless, she did not intend to consent to have sex with a set of descriptions, like a name and a biography. She intended to consent to sex with a particular person – a ‘you’ whom she was touching and loving.

Section 4: Intention, Deception, and Consent

In this section I plan to make another case against the view that misinformation undermines consent when it pertains to a deal-breaker. Similarly, I will be arguing that we do not have *all* of the specific sexual rights that Dougherty and, perhaps, Boonin, allow. This section is independent of the last. I am starting again from square one. If you were not persuaded by my last analysis, you may still be persuaded by the one that follows.

¹⁴ DeVito, D., Shamberg, M., Sher, S., Niccol, A., Idziak, S., In Churgin, L. Z., Nyman, M., Columbia TriStar Home Video (Firm), (1998). *Gattaca*.

My plan is to first introduce a case of *deceiving someone into sex* that does not appear to undermine the sexual consent of the person who is deceived. Of course, that our intuitions tell us that this sex act is consensual is not enough to constitute an objection to the argument at hand. Dougherty has shrewdly pointed out that our conventional attitudes toward sexuality, a primary source of our intuitions about sexual cases, have historically given us a very poor window into the serious wrongfulness of some sex acts (e.g. marital rape, date rape), and have dangerously biased us against others that are, in fact, innocuous (e.g. interracial sex). Given that this is the case, I will follow up the presentation of this apparent counterexample with an analysis of the example in light of the of the Argument from a Substantive Account of Consent, and then defend it from the primary objection that could be raised by Dougherty's Argument Against Sexual Moralism. I argue here that, at the very least, Dougherty's conclusion is too strict. It assumes and requires that our sexual rights are so expansive as to give us authority over elements of our sexual interactions that are not properly the subject of our own discretion as right-holders. Dougherty's description of our moral rights includes parts that belong to the sole discretion of others.

Consider the following case:

Paternalistic Deal-Breaker:

Jo and Casey are having sex. Jo catches a slightly pained expression on Casey's face and asks Casey if the intercourse is hurting Casey. Casey knows that if Jo learns that the intercourse is

hurting Casey, that Jo will want to stop having sex with Casey immediately, for Casey's sake. Casey is in some pain but wants Jo to have a sexually satisfying experience. Casey says, "No, honey."

That Casey is experiencing pain is a feature of the sexual encounter. It is also a deal-breaker for Jo. That is, if Jo knew that Casey was in pain, Jo would not want to keep having sex. According to Dougherty, from the point of Casey's deception onward, Casey is having sex with Jo without Jo's morally valid consent. That is, Casey is blameworthy for an act which is a serious wrong.

This case demonstrates the ambition of Dougherty's thesis. Typically, an action like that performed by Casey strikes us as morally supererogatory – above and beyond the call to duty – rather than a failure of duty. Yet, Dougherty could reasonably say that the very fact that Casey's pain was a deal-breaker for Jo should suggest to us that Casey disregarded something of moral importance. Yet, was Casey's deceit sufficient to render Jo's participation in the sex act non-consensual? And is Casey's wrong best characterized as a violation of Jo's rights?

Let us see how another argument of Dougherty's can or cannot be applied to my proposed counterexample. In Dougherty's *Argument from the Case of the Chihuahua*, he compares a sexual encounter involving a form of deception (the case of Chloe and Victoria that I described early in the paper), one that many of us would take to be only mildly wrongful, with a non-consensual agreement outside the sexual realm. He contends that if we think the non-sexual case lacks morally valid consent, then we must also agree that the sexual case lacks morally valid consent. I will briefly describe the features of the cases.

Aisha deceives Dougherty into thinking that she is bringing a Great Dane to his apartment instead of a Chihuahua, because she knows (or suspects) that he would not allow a Chihuahua in his apartment. Dougherty believes that, in this case, we will all agree that he has not given his morally valid consent to the Chihuahua's entrance into the apartment, even though he agreed to let a Great Dane, which is also a dog, into the apartment.¹⁵ Similarly, if Chloe tells Victoria that she is an environmental lawyer and animal lover, when she is actually a corporate lawyer and hunter, in order to convince Victoria to have sex with her, and if Victoria would not have sex with Chloe if she knew Chloe's actual feelings toward animals and Chloe's real job, then Chloe's deception undermines Victoria's consent to the sexual act.¹⁶ That is, Victoria has not given morally valid consent to have sex with a corporate lawyer, even though she has given consent to have sex with an environmental lawyer, which is a type of lawyer. The morally relevant features of the cases, as regards consent, are the same. So, if we want to say that Aisha's deceit renders the dog-in-apartment agreement non-consensual, then we need also say that Chloe's consent renders her sexual encounter with Victoria non-consensual.

However, does the Chihuahua Case share all morally relevant features with *Paternalistic Deal-Breaker*? The fact that the dog in Dougherty's apartment is of a different (and more detested) breed than he was led to believe, and the fact that Victoria's sexual partner perpetrates the very sort of attacks on nature and animals that Victoria detests, both seem very much *the business* of Dougherty and Victoria. That Jo's partner is willing to voluntarily endure a little pain for Jo's sake seems to be none of Jo's business.

¹⁵ Dougherty, 732-733

¹⁶ Dougherty, 733-734

In fact, we can compare this case to a non-sexual scenario that appears perfectly consensual, despite involving the same kind of deception as *Paternalistic Deal-Breaker*.

Favorite Ring: Amy is selling her jewelry. She is particularly attached to a ring, and though she wants to sell it, she is also very sad about selling it. Quinn wants to buy the ring from Amy. Quinn senses Amy's hesitance and says, "I don't want to take something precious from you. Do you feel an attachment to that ring?" Amy says, "No, don't worry" and makes the sale.

This case is analogous to *Paternalistic Deal-Breaker*. Amy and Casey both deceive another into doing something that the other would not do if s/he knew the truth. Whether Casey and Amy endure a little suffering to do what they choose to do just does not seem to be the sort of detail about which Jo and Quinn need to know the truth in order for their consent to be morally valid.

This analogy shows that we can reject Dougherty's thesis without demanding *less* of consent within the sexual realm than we demand outside of it. Perhaps some topics of deceit undermine morally valid consent; the analogy between Aisha's Chihuahua and Chloe's deception of Victoria suggest as much. However, I have shown that The Argument from the Chihuahua does not extend to all cases of deceiving another person into sex. How does this case serve as an objection to Dougherty's Argument from a Substantive Account of Consent? Let me repeat my representation of the argument, so that we can refer to the premises in what immediately follows.

- (i) If A has provided morally valid consent to let B do X then A has waived her right against B not to do X.
- (ii) If A has waived her right against B not to do X, then A has intended to waive her right against B not to do X.
- (iii) If A is deceived regarding any of the features involved in B doing X, such that A would not waive her rights against B doing X if she was not deceived, then A has not intended to waive her right against B doing X.
- (iv) Therefore, if A is deceived regarding any of the features involved in waiving her rights against B not to do X, such that A would not waive her rights against B not to do X if she was not deceived, then A has not provided morally valid consent to let B do X.

Again, I will focus my attention on premise (iii). Recall that Dougherty defends premise (iii) by explaining that our intentions determine the scope of the specific rights we waive whenever we render consent. When Victoria waives her right against Chloe having sex with her, she is only waiving her right to the set of sexual scenarios to which she intends to be waiving her rights. She waives her right against Chloe, an environmental lawyer and animal lover, having sex with her. She does not waive her right against Chloe, a corporate lawyer and hunter, having sex with her.

Let us now examine premise (iii) and apply it to my apparent counterexample, *Paternalistic Deception*. Recall, Jo is deceived about the fact that Casey is in pain during their sexual encounter. Jo would not have sex with Casey if Jo knew that Casey was experiencing

pain. According to premise (iii), Jo has intended to waive the right against Casey having sex with Jo. In so doing, given the restrictions on Jo's intentions, Jo has intended to waive the specific right against Casey having sex with Jo when Casey is not in pain. Jo has *not* intended to waive the specific right against Casey having sex with Jo when Casey is in pain.

I will defend the following: Jo has no specific right against Casey that Casey not have sex with Jo when Casey is in pain. This is true *even though* Jo has a right against Casey that Casey not have sex with Jo. After defending these claims, I will explain how they constitute an objection to (iii).

Consider Dougherty's explanation of why the waiving of our rights should be linked to our intentions:

[Rights] mark out personal realms over which we have exclusive control, and our decisions determine exactly what may permissibly happen within these realms... Fundamentally, 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. If our choices are to maximally determine the permissibility of others' actions, then the rights that we waive must be the rights that we intend to waive. Only this arrangement leaves us fully sovereign over these realms.¹⁷

Look at the first sentence of this passage. Certainly, the decision about whether we will have sex with another is something that is within our exclusive realm of control, or, as might be more aptly called: realm of discretion. Additionally, there are many specific features of particular sexual encounters that we should be able to use to determine whether we want to partake in said encounters, features that are within our moral realm of discretion. For this reason, it makes sense

¹⁷ Dougherty, 734-735

to say that Victoria has a specific right against having sex with Chloe who is a corporate lawyer. However, there are other features of sexual encounters that are not within our own moral realm of discretion. As soon as we attempt to include information pertaining to another person's exclusive realm into the description of our own right, we *over-reach* and fail to describe an actual moral right that we hold.¹⁸

Of course, we might *intend* in a way that over-reaches into other people's realms of discretion. Consider Quinn and Amy from my earlier example. Quinn's explicit restrictions on his intention were such that he did not intend to waive his right against buying a ring if that ring was precious to Amy. "if that ring was precious to Amy" was the restriction, and it was a restriction that amounted to Quinn reaching into Amy's realm of discretion. However, just because Quinn's intention over-reaches does not mean that Quinn has a corresponding over-reaching right.

Paternalistic restrictions on our intentions are just the sort of restrictions that over-reach in this way. Seana Shiffrin says, "The essential motive behind a paternalist act evinces a failure to respect either the capacity of the agent to judge, the capacity of the agent to act, or the propriety of the agent's exerting control over a sphere that is legitimately her domain."¹⁹ If Shiffrin is correct, then when we try to describe Jo's right against Casey that Casey not have sex with Jo when Casey is in pain, then we are *not only* attempting to add a clause into Jo's right

¹⁸ It could well be that there is a certain set of information that is in a joint realm of discretion. However, I am here suggesting that Casey's pain is within Casey's exclusive realms of discretion.

¹⁹ Shiffrin, Seana Valentine. "Paternalism, Unconscionability Doctrine, and Accommodation." *Philosophy and Public Affairs*, Vol. 29, No. 3. 220

regarding that which is not within Jo's own exclusive realm of discretion, we are actually adding a clause that belongs exclusively in Casey's realm of discretion.

How does this amount to a critique of premise (iii) of Dougherty's Sub-Argument from Substantive Consent? Consider again the premise:

iii. If A is deceived regarding any of the features involved in B doing X, such that A would not waive her rights against B not to do X if she was not deceived, then A has not intended to waive her right against B not to do X.

The premise can be accurately re-described in this way:

If A is deceived into thinking that she is waiving her right against B doing X, but B doing X involves F and, if A knew that B doing X involves F, A would not waive her right against B doing X, then A has not intended to waive her right against B doing X.

The problem with premise (iii) is that A *has* intended to waive her right against B doing X, even in light of the deception, just not her right against B doing X involving F. Further, she has no specific right against "B doing X involving F" to waive as long as F is outside of the realm of her discretion. Let us work through this again with specific sexual examples:

I. A has a right against B not to have sex with her.

II. A has a right against B not to have sex with her while being a corporate lawyer/hunter

III. But A has no right against B not to have sex with her while B is in pain.

Now, A might intend to waive (I) and not (II). In this case, and in the context of the rest of Dougherty's argument, A has not consented to sex with B in which B is a corporate lawyer/hunter. Further, A might intend not to have sex with B if B is in pain. However, since A has no right against B having sex with her while B is in pain, it does not matter that A does not waive any such right. *In virtue of consenting to B having sex with A, A consents to B having sex with A while B is in pain. Why?* Because whether B is in pain during sex is a feature of the sexual encounter that is exclusively within B's realm of legitimate discretion. It is not a feature that can be built into any specific right belonging to A. As Dougherty wrote, "[rights] mark out personal realms over which we have exclusive control."²⁰

This does not mean that, if A knew that B was in pain, that A would have no means of retracting her consent to sex with B. A can refuse to waive her broad right against B having sex with A in light of finding out about *any* feature of a sexual encounter, even those outside her own realm of discretion. But this does not mean that B violates A's rights *whenever* B does not supply A with information about features that might motivate this choice.

Section 5: Does My Critique of Dougherty Betray Sexual Moralism?

²⁰ Dougherty, 734

Dougherty might respond to my objection to the sub-argument from Substantive Consent by asking: how are you distinguishing features within the deceived person's realm of discretion (features that can be built into a specific right) from those that are not? Dougherty says that the assumption that some features of a sexual encounter are morally more important than others is problematic because it differentiates core from peripheral elements of an encounter in a way that might not reflect the values and choices of any individual participant of that encounter.²¹ Such differentiation of sexual elements typically relies on religious, social, and historical conceptions of what is important about sex. For instance, we might think that B deceiving A about his religion undermines A's consent, and not think that B deceiving A about having attended Harvard undermines A's consent. Yet, it might matter *just* as much to A that B attended Harvard than that he is, say, Muslim.

Distinguishing between forms of deceiving another into sex need not involve Sexual Moralism. In the previous section I appealed to Shiffrin's explanation of why paternalistic choices over-reach into someone else's realm of discretion. If deception pertains to something that falls completely within the deceiver's realm of discretion (like whether or not one is in pain) then this could provide moral grounds for distinguishing this type of deception from certain others. I am not relying on Sexual Moralism to determine an individual's realm of discretion, which make up the contents of his or her rights. I am instead appealing to Shiffrin's account of the features of paternalism. There might very well be other features of sexual encounters which are similarly outside the realm of discretion of the person who is deceived.

²¹ Dougherty, 730

One way of guarding against Sexual Moralism when determining the features of a sexual encounter that can be written into our moral rights is to do as Dougherty does throughout his paper: appeal to analogous non-sexual scenarios and see if our intuitions (and laws) pertaining to consent match our guiding cases in the sexual realm.

Of course, it is not easy to determine whether popular intuitions about consent in the non-sexual realm are accurate either. We cannot, for instance, appeal to what would be consistent with consent in the business arena. If Adam tells Betty that he will not sell his house for less than \$200,000, when he would in fact sell it for as little as \$175,000, we do not think that that this deception undermines Betty's consent to pay \$200,000 for the house. "Business bluffing" does not undermine legitimate consent. Yet, imagine that Adam tells Betty that he will only stay in a romantic relationship with her if she engages in a particular type of sex with him. However, Adam, in fact, would stay in the relationship with Betty regardless. In this case, it seems at least plausible to say that Adam's deception undermines Betty's consent to that sexual encounter. Our acceptance of "business bluffing" does not seem to carry over into the sexual arena.²²

We might find adequate guidance by appealing to the constraints on informed consent used for human subjects in scientific research. After all, scientific studies sometimes involve bodily contact, invasive procedures, long-term health risks, emotional risks, and potential bodily integrity violations. Most institutional review boards demand that a human subject has been acquainted with any health, lifestyle, or privacy-related risk or benefit that the study might

²² Recall that Sarah Conly thinks that a boyfriend may permissibly achieve a sexual relationship with his girlfriend in this way, as sex is a legitimate item of negotiation in a romantic relationship. However, Conly does not discuss a version of this case in which the boyfriend is *bluffing* when he gives the girlfriend the options of breaking up or having sex.

involve.²³ Additionally, research subjects must be informed if their genetic material will be used in a particular way.

Appealing to the standards of informed consent for research subjects for guidance in the sexual realm will get us the result that *at least* the following topics of deceit undermine sexual consent: deceit about sexually transmitted diseases and infections; deceit about the number of sexual partners one has had in the past and the methods of protection against STDs and STIs used in those encounters; deceit about the use of birth control; deceit about one's intentions regarding the length or nature of the relationship; and deceit about whether the sexual encounter is being recorded using an audio or visual recording device.

Concluding Remarks:

I have argued that misinformation, and sometimes even deception, do not have as much power to undermine consent as philosophers like Tom Dougherty and David Boonin purport. Consent, even sexual consent, can be morally valid even when there are features of a sexual scenario to which we do not intend to consent – features that would have prevented us from

²³ The National Institutes of Health and the United States Department of Health and Human Services both appeal, in part, to the Belmont Report and its applications section, which covers the topic of informed consent (<http://www.hhs.gov/ohrp/policy/belmont.html>). Note that, according to the Belmont report, informed consent standards are breached if subjects are not given sufficient time to consider all of these facts and come to a decision.

rendering consent, if we had known about them. I argued that we might consent to a gamble that includes the possibility of X, even if X is a deal-breaker for us – and we would not have consented to X itself. I then argued that misinformation about a deal-breaker can only undermine consent if one intends to give consent to the individual picked out by a set of descriptors, *de dicto*. For these reasons, I argued that in most cases, misinformation does not undermine consent. Finally, I argued that, even as regards the features of a sexual encounter and a partner’s personal deal-breakers, some topics of deceit and not others have the power to undermine sexual consent.

Throughout this paper, I have described consent as a matter of rights-waiving. Though, at the start, I allowed that consent could be described in other moral terms, I chose to follow the lead of the philosophers writing on these particular issues, and focus on rights. However, I want to point out that there are advantages to adopting other ways of describing consent. If consent is the waiving of a right, then the right is either waived or it is not (or there might be situations in which we do not know if the right is waived, or where there exists some indeterminacy about whether it has been waived). However, there are many cases to compare in which there are varying degrees of misinformation stemming from deception, varying degrees of badness associated with alternatives in cases of coercion, in which we might want to say that consent has been undermined to greater and lesser degrees. Unless we are prepared to say that there is a threshold (perhaps at some marker determined by theorists of autonomy), then it seems that consent can be undermined more or less. Two acts can be consensual, but one can be *more* consensual than another. Some philosophers might use the term “weak agency” to describe a low degree of morally valid consent. I think these questions are worth our consideration, especially if the amount of, or the particular collection of intentions being thwarted by an act that undermines consent plays a role in the degree to which consent is morally valid.

Then again, it is important to remember that not all that is wrong with sex has to do with consent. Sometimes lying or misleading someone into a sexual scenario is wrong for the rich and varied reasons for which deception is often wrong. Sometimes duress does not undermine consent (especially when it is not combined with coercion), but soliciting a sexual act from someone in a situation of duress could involve the special wrongs associated with exploitation instead.

Lastly, whenever we critique a certain sexual behavior, it is important to keep sight of the values associated with that behavior, as well as its moral costs. It seems worth noting at least that we do not often hear of people whose lives have been traumatized by non-consensual sexual experiences resulting from information-gaps about their sexual partners pertaining to a set of sexual deal-breakers. A certain amount of deception, on the other hand, is invaluable. If any one of us were to reflect upon our romantic histories - our bad behavior during break-ups, our foibles during the performance of sexual acts, our most humiliating rejections, our bouts of neediness, numbness, or vitriol in relation to our past lovers – we would realize that, should all of this information be known to our prospective sex partners, no sane person would ever go to bed with us again. One of the best things about having a new lover is that one gets a ‘clean slate’ for a short period.²⁴ When we enter these encounters, we want the other to think we are cool and collected. We want this even when we are scared out of our minds that two eyes belonging to another human being are about to see us at our most vulnerable. When we are very lucky and we succeed in fooling our partners into thinking we are confident, sensual beings, spirited

²⁴ To be fair, Dougherty thinks this deception might be a necessary means for falling in love, in some cases, but the truth about any topic of deception that might be a deal-breaker must be disclosed before a sexual encounter (740).

negotiators of our sexual and non-sexual lives, unburdened by histories full of mistakes and misdeeds, well, for a little while at least, we become such creatures. What a wonderful thing.