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Sexual Deception and Sexual Consent: A Reply to Tom Dougherty

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Introduction

Not so long ago, up until the earlier parts of the 20th century, almost all sex was illegal.¹ If an unmarried man had sex with an unmarried woman it was fornication. If an unmarried man had sex with a married woman, or vice versa, it was adultery. If a man enticed a woman into bed through the promise of marriage then he committed seduction. If either one of them was white and the other was black then both could be found guilty of miscegenation. If both were male then it was sodomy. If both were female then both were guilty of some kind of abomination, though the law was not quite sure what it was. Even married couples were not able to have just any kind of sex. If they had the wrong kind of sex then they too committed sodomy. The only sex that was tolerated was heterosexual, copulative, marital intercourse. Sexual autonomy was simply not something that was recognised in law (Rubinfeld 2013: 1381). Traditional rape law, defined in common law as sexual intercourse 'by a man with a woman, not his wife, by force and against her will' (i.e. without her consent) (Posner & Silbaugh 1996: 5), sought not to protect sexual freedom, but rather to uphold a particular system of sexual morality. The reason why judges viewed rape to be a particularly disdainful crime was because of its defilement of women. The purity of women and girls was held to be destroyed by non-marital sex: to rape was to 'shame and dishonour' (Morgan 1826: 351) a woman, it was to 'make a whore' (Cotton 1641: 14) of her.

In the last several decades sexual autonomy has emerged as something of a fundamental right. Slowly over time the idea that rape law functioned to protect women from defilement lessened and in the 1950's it came to be thought of more as a means to protect the sexual freedom of women, though its definition remained largely unchanged with both non-consent and force still jointly required. Convictions were hard to come by as a result of the difficulty of proving both the presence of force, which was evidenced only by the 'utmost' or at least 'reasonable resistance' of the victim, and the absence of consent (Schulhofer 1992: 38). For the most part there were, and largely still are, only two forms of non-forcible sex that were deemed worthy of criminal punishment: firstly, fraud as to the nature of the act, e.g. disguising sex as a medical procedure such as in *Boro* (1985) when a man who identified himself as a doctor informed a patient that she had a fatal disease that could

¹All references to the law here are references to American law. The reason for this is that information about American law is the most readily available and easiest to come by. It should be noted that the developments of sexual autonomy protections across Europe and North America largely follow the same trajectory.

be cured by serum transferable by sexual intercourse, and, secondly, the impersonation of a woman's husband. A wave of reforms followed and by the mid 1960's the resistance requirement was abolished, the language of the law changed so as to omit the mention of non-consent, the focus of court cases was to be switched from the conduct of the woman, i.e. whether she put up sufficient resistance and whether she said "no," to that of the man, and the crime of rape was to be split into three categories corresponding to various degrees of the severity of harm caused to the victim.

Come the 1970's a new wave of criticism and development of sexual autonomy protections surfaced, this time more feminist in orientation. Rather than solely seeking changes in the law feminists set out to bring about a cultural shift through various consciousness raising endeavors such as organising speak outs about the prevalence of sexual assault and setting up rape crisis centres (Brownmiller 1999: 196). Once again concerns were raised about the difficulties of obtaining convictions for rape, but a new set of worries were also raised related to the ordeal of victims and the impact of stereotypes about male roles and female sexuality upon credibility judgments of when male aggression amounted to force. More effective responses were sought and rules of evidence were improved so as to exempt complainants from being interrogated about their sexual histories. The language of rape law became gender neutral as it became possible for men to also be raped, and the marital exemption was finally removed (Schulhofer 1992: 38). The law was further criticized for failing to take a woman's "no" at face value, with courts and commentators reporting that women would often say no when they actually meant yes, and that men could not be expected to take seriously a woman's refusals unless it was accompanied by physical struggle. Hence Catharine MacKinnon writes that 'if rape laws existed to enforce women's control over access to their sexuality, as the consent defense implies, no would mean no...' (MacKinnon 1989: 175). However, this criticism only went so far, for often there is no "no": victims often remain silent, paralysed by fear and passively resigned to acquiescing.

In the last few years as a consequence of the overdue recognition of the sexual harassment, pressure and violence that women, and to a much lesser extent men, are regularly subject to on university campuses many American universities have revised their sexual misconduct policies so as to require the clear, unambiguous and affirmative consent of all parties to a sexual encounter. In what can be viewed a contribution to the continuation of this movement to protect sexual autonomy, Tom Dougherty (2013) has argued that deceiving someone into sex is seriously morally wrong whenever the deception concerns a deal breaker of the victim, i.e. a feature of the sexual encounter to which the other person's

will is opposed. While I share both Dougherty's commitment to sexual autonomy and his misgivings about the permissibility of sexual deception, there are elements of his argumentation that require significant amendment if the commitment to upholding sexual autonomy is to be fulfilled. In this paper I set out to make the necessary amendments.

Dougherty's argument against sexual deception is based upon the claim that deception can vitiate consent. To support this claim Dougherty provides three arguments. I will take issue with one of these three arguments, namely, the 'argument from a substantive account of consent.' Dougherty claims that his substantive account of consent is the only arrangement that can guarantee each individual's sexual autonomy (Dougherty 2013: 734-735).² I will show that Dougherty's substantive account of consent constitutes an attitudinal account of consent. Attitudinal consent theorists claim that forming the intention to consent is sufficient to in fact consent. I argue that attitudinal accounts of consent are always unacceptable because merely forming a private intention to consent is always insufficient to in fact consent. I argue that only performative accounts of consent that demand communication of consent are acceptable. Consequently, Dougherty's substantive account of consent is unacceptable and must be replaced by a performative account of consent if the goal of protecting sexual autonomy is to be achieved. Further to this I will propose that the performative account of consent ought to be supplemented by a hyper-explicit definition of sexual consent if Dougherty's aim of protecting sexual autonomy is to be fulfilled. By "hyper-explicit" I mean that the means by which people can communicate consent to sex ought to be fixed in order to eliminate the possibility of misunderstanding over whether consent has been given.

I will proceed in the following stages: in chapter 1 I will describe and explain Dougherty's main argument for the conclusion that deceiving someone into sex is seriously morally wrong. In chapter 2 I will describe and explain Dougherty's argument from a substantive account of consent. In chapter 3 I will argue that Dougherty's favoured substantive account of consent is unacceptable because it is an instance of an attitudinal account of consent, and all attitudinal accounts of consent are unacceptable. I argue that only a performative account of consent is acceptable and thus Dougherty's substantive account of consent must be replaced with a performative account of consent. In chapter 4, in reference to recent developments in the sexual misconduct policy of American universities, I will demonstrate

²The reader may be wondering what exactly it is that makes the substantive account of consent "substantive."

To this I am unable to provide an explanation, I am merely following Dougherty's labelling of the account of consent that he provides.

that leaving undefined what constitutes a communicated act of consent to sex runs the risk of leaving sexual autonomy unprotected. I will argue that if Dougherty's goal of protecting sexual autonomy is to be fulfilled then the performative account of consent ought to be supplemented by a hyper-explicit definition of sexual consent.

Chapter 1: Sex, Lies and Consent

Dougherty (2013) speculates that most peoples' attitudes towards one person deceiving another person into sex largely depend upon the type of deception involved. So, while most people will think that impersonating someone's partner in order to get sex is seriously wrong, this is not so with 'run-of-the-mill falsehoods' (Dougherty 2013: 718) like "I went to Harvard", "I'm 27 years old," "I *do* want a relationship," "I *don't* want a relationship," or even the simple "I like you." Dougherty claims that prevailing moral norms are generally quite permissive with respect to sexual deception, and while people might think it sleazy for a person to lie about their marital status, profession, or intentions in order to get someone into bed, most do not believe this to be a particularly serious matter that warrants the label of serious sexual misconduct. As such, Dougherty claims, most people are committed to the following thesis:

Lenient Thesis. It is only a minor wrong to deceive another person into sex by misleading her or him about certain personal features such as hair colour, occupation, or romantic intentions (Dougherty 2013: 718).

According to the Lenient Thesis, there are some trivial features of one's identity about which it is not seriously wrong to deceive someone in order to get them into bed. Contrary to the Lenient Thesis, Dougherty aims to persuade us that far more severe criticisms are in order, taking the following principle as his starting point:

The Principle of Sexual Autonomy. Each person has the right to decide, down to the very last detail, what comes into sexual contact with her body [and when] (Dougherty 2013: 744).

Dougherty argues that a consequence of the special importance that we attach to the principle of sexual autonomy is that even with run-of-the-mill deception, deliberately *deceiving another person into sex* is seriously morally wrong. The italicized phrase is to be understood as follows. Firstly, the deception must concern the sexual encounter. Since each person is an essential part of the sexual encounter, one is deceived about the sexual encounter when one is deceived about the other person. Secondly, the deception must concern a *deal breaker*, i.e. 'a feature of the sexual encounter to which the other person's will is opposed' (Dougherty 2013: 719). It must be the case that the other person is all things considered unwilling to engage in the sexual encounter given that it has this feature.

It is up to each individual to decide which features of a sexual encounter are centrally important for them. If some feature makes a decisive difference to an individual's decision to have sex then that is sufficient to render that feature a deal breaker, regardless of its content. This qualification lets off the hook, for example, someone pretending to like a stranger's bag in order to initiate a conversation that eventually leads to sex, so long as knowing the truth of the other person's opinion about the bag would not change the deceived person's willingness to have sex (Dougherty 2013: 719).

Dougherty's argument concerns only *morally valid consent* (MVC herein). Dougherty defines this as 'consent that someone must have in order not to wrong the consenter by violating a right of hers' (Dougherty 2013: 722). It is the consent that makes permissible some otherwise impermissible act. This qualification is required to make clear that not every instance of what appears to be consenting is sufficient to legitimate an act. For example, a "yes" given at gunpoint is insufficient to legitimate the act for which agreement was given. Thus we may say that coercively obtained consent does not constitute MVC.

Dougherty's argument against sexual deception is based on the fact that just as coercion can vitiate consent, deception can also. To illustrate:

[S]uppose you tell me that you propose applying some chesnut brown dye to my hair. Excited at the prospect of brunette locks, I say that you may do so. However, you have been mischievously concealing the fact that it is really pink dye. Here I only gave you moral permission to give my hair a chesnut colour. Since the pink colour of the dye was a deal breaker for me, I did not validly consent to what you did (Dougherty 2013: 719).

Similarly, Dougherty argues that when someone is deceived into sex, the deception vitiates the victim's sexual consent. Since it is seriously wrong to have sex with someone without their MVC, deceiving someone into sex is seriously morally wrong. To illustrate Dougherty's position consider one of his examples:

Soldier

[S]uppose that Chloe meets a hippie, Victoria, on a night out. Victoria makes it clear that she wants to have sex only with someone who shares her love of nature and peace. Consequently, Chloe falsely claims to have spent time in a war zone as a

humanitarian, when in fact she was there on military service. When Victoria asks whether she likes animals, Chloe omits the truth – 'only to eat or hunt' – and pretends to love petting them and watching them in the wild. As a result of this deception, the two spend the night together (Dougherty 2013: 728).

Dougherty claims that Victoria did not validly consent to sex with Chloe. It is a deal breaker for Victoria that any potential sexual partner she is willing to have sex with shares her love of peace, nature and animals. If Victoria is deceived into sex by being misled about a person's commitment to these deal breakers, then Victoria cannot be said to have validly consented to the sex. Chloe deceived Victoria into sex by misleading her about her commitment to peace, nature and animals, and so Chloe does not have Victoria's MVC. Thus, according to Dougherty, Chloe is guilty of serious moral wrongdoing. Dougherty remarks that the serious moral wrong that occurs here concerns the nonconsensual sex and not the deception itself.

In order to emphasise just how wrong he takes deceiving someone into sex to be, Dougherty makes the provocative suggestion that deceiving someone into sex is in the same moral ballpark as having sex with an unconscious person. He draws this parallel on the basis of them both being wrong for the same reason: both victims have had their right against nonconsensual sex violated. Dougherty takes this to be the inevitable consequence of placing the proper value on sexual autonomy. He claims that although the unconscious victim is likely to feel that they have suffered a graver violation than the victim of deception, this is only because of the widespread and mistaken acceptance of the Lenient Thesis. Once it is more widely recognised that the Lenient Thesis is false, victims of deception will realise that there is no morally relevant difference between the two: they both constitute a grave affront to sexual autonomy (Dougherty 2013: 743-744).

To bring the strands of Dougherty's main argument together:

The Argument against Sexual Deception

Premise 1) Having sex with someone, while lacking her morally valid consent, is seriously [morally] wrong.

Premise 2) Deceiving another person into sex involves having sex with that person, while lacking her morally valid consent.

Conclusion) Deceiving someone into sex is seriously [morally] wrong (Dougherty

Before moving on to assess Dougherty's argument it will be useful to make a point about his methodology in order to show why what may appear to be the “go to” class of objections are ineffective against him. According to this class of objections, the conclusion of Dougherty's argument commits him to claiming that some individuals are guilty of serious sexual misconduct when intuitively their behaviour warrants much milder criticism, or perhaps no criticism at all. Consider the following example:

Reggae

Jane and Patch are high school sweethearts and have been a couple for 10 years. Patch is an avid reggae fan and frequently goes to his favourite music venue Cosies to get a dose of his favourite genre of music. When Cosies host a reggae night Patch attends: he would not spend the evening in and have sex with Jane if he knows that there is a reggae night at Cosies. Knowing this, Jane omits to tell Patch that she received a flyer through the letter box this morning notifying people that there is an impromptu reggae night at Cosies starting at 9.00pm. At 9.00pm Jane asks Patch if he wants to have sex. Evidently aroused, Patch agrees.

On Dougherty's assessment Jane's actions are seriously morally wrong. Jane deceived Patch into sex by deceiving him about one of his deal breakers, and so cannot be said to have Patch's MVC to the sexual encounter. What's more, according to Dougherty, from the moral point of view Jane's wrongdoing is on a par with having sex with an unconscious person. I suspect that this result will seem highly counterintuitive to many. Some people will think that Jane's behaviour is mere playful seduction of her long term partner, while others will think that while Jane has done something wrong, she surely has not committed the wrong of having sex with Patch without his consent. On the basis of the counter-intuitiveness of this assessment of *Reggae*, and numerous other examples that one could think up, one may be tempted to reject Dougherty's conclusion. But, this objection carries no weight. Dougherty acknowledges that since the Lenient Thesis is widely accepted his conclusion will offend the intuitions of many (Dougherty 2013: 721). However, Dougherty is arguing that these intuitions do not deserve the status of considered judgement that they currently enjoy. Given that over recent decades views of sexual morality have changed considerably – we have seen that some sexual offences have not been taken seriously enough, while other beliefs about sexual morality were based on overly conservative views

of sex – we should view our sexual intuitions as ripe for philosophical critique. Dougherty's point is that our firmly held commitment to the principle of sexual autonomy demands that we take sexual deception far more seriously than we currently do, and that means a damning condemnation of Jane's behaviour in *Reggae*.

Chapter 2: The Substantive Account of Consent

In support of premise 2 of the argument against sexual deception Dougherty provides three sub-arguments. In this chapter I will describe and explain one of these sub-arguments, namely, 'the argument from a substantive account of consent' (Dougherty 2013: 734). In chapter 3 I will go on to argue that Dougherty's substantive account of consent is an unacceptable account of consent and that it undermines his aim of protecting sexual autonomy. I label this argument *Sub-argument 2a* to distinguish it from sub-arguments 2b and 2c that will be discussed at the end of chapter 3.

Dougherty's argument is motivated by his firmly held commitment to the principle of sexual autonomy. According to Dougherty, an individual's sexual autonomy is constituted by their right to control the sexual contact that others have with them down to the very last detail (Dougherty 2013: 744). Dougherty claims that only a substantive account of consent can ensure each individual's sexual autonomy. In order to construct the substantive account of consent Dougherty makes the following assumptions that he claims are standard within rights theory. We all have moral claim rights³ (herein "rights") over our persons and property. These include negative rights against interference: the default moral position is that others are not permitted to interfere with our persons or property. We move away from the default and thereby waive some specific rights against particular interactions with particular individuals by giving them our MVC. The set of rights that we waive is fixed by the following thesis:

Intentions Thesis. The rights that we waive are the rights that we intend to waive (Dougherty 2013: 734).

The Intentions Thesis is motivated by the intimate connection that exists between rights and autonomy. Rights mark out the personal realms over which we may have exclusive control and the decisions that we make determine what may permissibly take place within these realms. These rights generate duties in others to respect the choices that we make about what may permissibly happen in these realms. If our choices determine the permissibility of others' actions within these realms, then the rights we waive must be the

³ Claim rights are rights that entail duties or obligations owed by others to the rights holder. They take the form: A has a claim that B ϕ *if and only if* B has a duty to A to ϕ . Claim rights are to be contrasted with liberty rights which do not entail corresponding duties on others, they take the form: A has a privilege to ϕ *if and only if* A has no duty not to ϕ .

rights that we intend to waive. Dougherty claims that this is the only arrangement that leaves us fully sovereign over these realms (Dougherty 2013: 735).

Our intentions about rights waivers are both restrictive and extensive. They are restrictive in the sense that we permit some forms of behaviour but not others. For example, we allow our hairdresser to cut our hair but not to touch our legs. They are extensive in the sense that there are always multiple courses of action that can realise the permitted behaviour. There are numerous forms of snips that lie within the hairdresser's permitted range. The restrictions on our rights waivers are both explicit and implicit. Consider an example provided by Dougherty that is unconnected to consent. Suppose Aisha intends to buy a dog. She may explicitly restrict herself to only buying a dog from a shelter. If Aisha is to be a typical dog owner she will not explicitly be considering the possibility that some dogs have rabies. Nevertheless, Aisha does not intend to buy a rabid dog. This restriction is wholly implicit (Dougherty 2013: 735). These are general features of intentions that are shared by our intentions for rights waivers that collectively generate the following substantive account of consent:

Substantive Account of Consent

In consenting, we intend to allow a restricted range of possibilities, where these restrictions are both implicit and explicit. Any actual interaction with our persons or property is consensual only if this interaction falls within the restricted range of permitted possibilities. On this account of consent, if we object to events in virtue of any feature of them, then they lie outside the restricted range of possibilities to which we are consenting. If these events nevertheless occur, then 'what happened is not that for which consent was given' (Perkins 1957: 856) (Dougherty 2013: 736).

Applying this account to sex, a person validly consents to a sexual encounter only if they are willing to engage in the encounter given all of its features. Thus, the account of consent implies that when someone is deceived into sex, the sex is nonconsensual, for the deception has concealed a deal breaking feature of the encounter. The sexual encounter lies outside of the restricted range of possibilities that the victim intended to consent to. Therefore, any time someone is deceived into sex, when deceived about a deal breaker, they have not consented to it.

Chapter 3: Consent as Communication

Having described and explained Dougherty's argument from a substantive account of consent I will now show that the argument is unsuccessful and so does not achieve the goal of protecting sexual autonomy that Dougherty is aiming at. I argue that it is unsuccessful because the substantive account of consent that Dougherty proposes is an instance of an attitudinal account of consent, and all attitudinal accounts of consent are, I argue, unacceptable. I argue that only a performative account of consent is acceptable, and so only a performative account of consent can achieve the goal of protecting sexual autonomy. In making my argument I will in part rely on the reasons that Richard Healy (2015) provides to show that attitudinal accounts of consent are unacceptable in order to demonstrate that Dougherty's (2013) substantive account of consent is unacceptable.⁴⁵

On the whole, participants in the debate over what consent consists in fall into one of two camps: those who adopt an "attitudinal view" and those who adopt a "performative view"⁶. The attitudinal view is the view that consent can be given by adopting the appropriate mental state. The most plausible candidate for this mental state is intending.⁷ Heidi Hurd

⁴For a recent exchange between a proponent of an attitudinal account of consent and a proponent of a performative account of consent see: Alexander, L. (2014). 'The Ontology of Consent,' *Analytic Philosophy*, 55: pp.102-113. & Healy, R. (2015). 'The Ontology of Consent: A Reply to Alexander,' 56: pp.354-363.

⁵In a 2015 paper entitled '*Yes means Yes: Consent as Communication*' Dougherty himself argues that attitudinal accounts of consent are unacceptable, but he does not acknowledge that this conclusion is inconsistent with his advocacy of a substantive account of consent in his 2013 paper – '*Sex, Lies and Consent*'.

⁶The term "performative" is taken from J.L.Austin (1962), *How To Do Things With Words*. Cambridge, Mass: Harvard University Press.

⁷As an alternative, Peter Westen (2004) argues that consent consists in the mental state of *acquiescing* in the consented-to conduct. But this criterion is too weak, for, one can acquiesce without consenting. For example, when I entered the first year of secondary school as an 11 year old the final year students would push in front of me in the lunch queue. At first I would stand my ground, but I very quickly realised that the older students would not give up and would continue pushing me with ever increasing force until my resistance was overcome. Finally I would give up and forfeit my place in the queue. We do say that I acquiesced in being moved out of the line, but we would definitely not say that I consented to it. Additionally, Govern Den Hartogh (2011) has shown why sexual desire is a poor candidate: it seems quite possible for someone to give their consent to something that they do not desire. For example, one might consent to sex with a person whom they do not desire in exchange for money that they need to buy food. On the other hand, it also seems quite possible for someone to withhold their consent to something that they do desire. For example, I might have the opportunity to have sex with a person whom I find

takes consent to consist in intending 'the actions of the persons receiving consent' (Hurd 1996: 131). Additionally, Larry Alexander takes consent to consist in an intention to 'forgo one's moral complaint against another's act' (Alexander 1996: 166).⁸ The intention must be formed by a competent agent who is free from both coercion and significant deception if the consent is to be morally valid. On the attitudinal view, a person's forming the intention to consent is necessary and sufficient for consent. The performative view holds that intention is necessary for consent but denies that it is sufficient, claiming that communication is also required for consent. Communication need not be verbal. For example, if an ice cream vendor is suggesting putting chocolate sauce on my ice cream by holding up the bottle of sauce for me to see, then my nod would communicate permission for him to add the sauce. A performative view can, in principle, allow any form of successful communication to issue consent. At this stage the notion of communication is likely to seem vague, and I will endeavour to achieve greater clarity in chapter 4. The important point to note for now is that the debate between advocates of attitudinal views and performative views of consent are not debates about what communication of consent consists in, but rather whether communication is required at all.

The substantive account of consent that is favoured by Dougherty (2013) is an attitudinal view. According to the substantive account, the rights that we waive are fixed by the Intentions Thesis. While communication can provide evidence of which rights we have waived, it plays no role in fixing which rights we have waived. Rather, it is our private intentions that fix which rights we waive. In Dougherty's example Aisha explicitly restricts herself to only buying a dog from a shelter and implicitly maintains her right not to buy a rabid dog. The former involves communication, perhaps Aisha communicated this restriction verbally or communicated it non-verbally by only visiting shelters in her hunt to buy a dog, while the latter involves no communication. But, in both instances it is solely Aisha's private intention that fixes what she does and does not permit, with the communication that takes place in the former case merely providing evidence of Aisha's intentions.

extremely attractive, and so desire to have sex with them, but withhold my consent to sex because I am in a committed relationship (Den Hartogh 2011: 300).

⁸There is a discrepancy between Hurd's view and Alexander's view. On Hurd's (1996: 166) account the relevant mental state is the state of 'intending the actions of the person's receiving consent.' On Alexander's (2014: 108) account the relevant mental state is the intention of 'waiving one's right.' Alexander (2014: 108) objects to Hurd's view by pointing out that one cannot intend another's act, one can only intend one's own act. My refutation of attitudinal accounts of consent does not depend upon settling this dispute and so I will not discuss it any further.

However, I am going to argue that merely adopting the relevant private intention is always insufficient for consent, and so attitudinal accounts of consent, such as Dougherty's substantive account, are unacceptable. I will argue that in addition to adopting the relevant private intention, consent also always requires communication. More specifically, my claim here is that Dougherty's substantive account of consent is unacceptable because the Intentions Thesis is false. To demonstrate this claim I will show that consent plays an important normative role in our lives, and that this role can only be played successfully if agents can *in principle* know whether or not consent has been given. People's mental states are opaque to one another. Consequently, the mere formation of the intention to consent, with no corresponding publicly observable communication of that intention, is always insufficient to enable others to know whether or not consent has been given. The only way to provide agents with access to knowledge of whether or not consent has been given is by communicating whether or not consent has been given. Thus, for consent to play its normative role it must be communicated.

The role of consent is to enable independently autonomous agents to interact with each other in a range of valuable ways, e.g. sexual relations, the sharing of property, taking part in contact sports, whilst at the same time relating to one another as autonomous agents (Healy 2015: 358). According to this view, consent is important not just because it gives agents control over their own rights, i.e. their rights against interference with their persons and property, but also because it gives agents control in relation to other agents. Otherwise stated, consent is important not only in relation to me and my own rights, but also in relation to us and our normative relationship. Spelling out the role of consent this way makes sense of the fact that we do not only value the *possession* of the power of consent as a means to bringing about valuable interactions, but that we also value the *recognition* by others that these interactions can only come about *because* we have given our consent. This recognition lets us know that other people's interactions with us are governed by a respect for our consent. To take an example, it does not just matter to A that B is having sex with her and that she consented to have sex with B. It also matters to A that B is having sex with her only because she consented, and so B is treating A as someone who has authority over her body and thus control over whether or not they have sex. Similarly, it also matters to B that A is only having sex with him because he has consented.

Recognising that each individual is the sole authority over their persons and property, and

making sure that our actions are guided by respect for this control is largely constitutive of valuable interaction. For the most part, we only relate to one another in morally appropriate ways if we recognise, and respond appropriately, to this fact. For A and B to have valuable sexual relations it is not enough that both A and B subjectively decide to have sex with each other. Each must also relate to the other as someone who has authority over whether they engage in sexual relations. It is only by letting their actions be guided by whether or not the other person has consented do A and B relate to each other in this way.

If consent is to fulfill its role, then it must be possible for both A and B to have *mutual knowledge* of whether or not consent has been given or revoked, where it being possible for both A and B to have this mutual knowledge means that both have access to the information that determines whether or not consent has been given or revoked (Healy 2015: 358). The reason for this is that in order for A and B to relate to one another as autonomous agents they need to establish whether or not the other has given consent, and then assign importance to this information in their practical deliberations. In the present example this means that A and B must not engage in sexual contact with each other unless each are sure that they have the other's consent. Consider first the situation from B's perspective: if B has no access to the information that determines whether A consented then B has no basis upon which to form a belief about whether A consented. Consequently, A's consent, or lack thereof, cannot figure in B's practical deliberations, and so B cannot use this information as a reason to act at all, and so B's actions cannot be guided by respect for A's autonomous choice. Only if it is possible for B to know whether or not consent has been given can it play this role. And now consider the situation from A's perspective: it is not only important to A that she has subjectively consented to sex with B, it is also important that A knows that B only has sex with her because she has consented. Thus, B's inability to know whether or not consent has been given is equally a problem for both A and B: it prevents A and B from engaging in valuable forms of interaction with each other whilst at the same time relating to one another as autonomous agents. So, it is only if both A and B can know whether or not consent has been given can they engage in sexual relations in a way that is respectful of the other's autonomy.

The key point is that consent simply cannot fulfill its normative role of enabling independent autonomous agents to engage in valuable forms of interaction with each other, whilst at the same time relating to each other as autonomous agents unless it is possible for those involved to know whether or not consent has been given. So, in terms of the present example, for consent to play its role it must be possible for both A and B to have mutual

knowledge of whether or not consent has been given or whether or not consent has been revoked. This means that:

- 1) A must know that she has given her consent to B.
- 2) It must be possible for B to know A has given her consent.
- 3) A must be able to know that B can know that A has given her consent (and vice versa) (Healy 2015: 359).

It follows that consent can only play its normative role if it is communicated. The reason for this is that A's subjective mental state of intending is opaque to B, and vice versa. Only A has direct access to her own mental states, and only B has direct access to his own mental states. If consent is nothing more than a mental state then A and B do not have access to the information of whether or not consent has been given by the other, and so they cannot have mutual knowledge of each other's consent. Since they cannot know whether the other has consented if consent is nothing more than a mental state, they cannot engage in valuable relations with each other at all. But if the role of consent is to manage these relations, such as those between A and B, then consent must require communication, since it cannot fulfill its role if it is not communicated.

It is important to note the qualification that it is only the *possibility* that agents can have mutual knowledge that consent has been given and not mutual knowledge as such that is required for consent. If A communicates consent to B, but B does not recognise that consent has been given, then A has still consented. If B nevertheless proceeds to have sex with A then it is true that the role of consent goes partially unfulfilled: B's actions are not guided by respect for A's autonomy and so A and B are not relating to one another as autonomous agents, thereby devaluing the interaction. However, although the role of consent goes partially unfulfilled, A autonomously authorising B to engage in sexual behaviour with her is something that only A has control over and does not depend on recognition from B. For, making A's consent depend upon recognition by others would partially take the power of consent out of A's hands, and a key part of consent's role is to give each agent full control over their persons and property. The key point then is that consent cannot, even *in principle*, play the role of managing the relations between agents unless both agents have some way of accessing the information that determines whether or not the other consented. Taken together these considerations support the requirement that consent must be communicated. In light of this insight we can diagnose the key failing of the substantive account of consent to be the falsity of the Intentions Thesis. We might say

that 'what you do in your own mind is not enough to waive your rights in the public sphere' (Dougherty 2015: 251).

The attitudinal theorist may protest that there are contexts in which communication is not necessary to establish mutual knowledge in consent. For example, at the end of an epistemology lecture the lecturer says 'if nobody has any further questions then you are all free to leave.' The lecture theatre is silent for one full minute. It is reasonable for the students to then get up and exit the lecture theatre, taking the one minutes silence following the lecturer's statement to constitute his consent to the action. This, the attitudinal theorist may argue, is an instance of consent which does not require communication.

However, while communication is necessary to enable mutual knowledge on the performative view, this does not need to take the form of explicit verbal communication. Nonverbal communication can also establish a mutual knowledge about one's consent. We can interpret the lack of the students' response following the lecturer's statement as the lecturer communicating his consent. Alternatively, we could maintain that the lecturer's behaviour falls short of communication, but still constitutes intentional public behaviour that signifies his permission to the students exiting the lecture theatre. On either interpretation, we would be requiring public behavior and not mere intention.

A further response that a proponent of the attitudinal view might raise is that we can think of intentions as public things, and if intentions are public then they can generate the mutual knowledge that facilitates consent's ability to play its role. We would expect such a response from a behaviourist proponent of an attitudinal view of consent. The behaviourist holds that for any mental state (beliefs, desires, intentions etc.) there is some outward observable behaviour that corresponds to it. According to this view unless there is a demonstrable difference in behaviour there is no difference in mental state. If there is no difference in my behaviour when intending to waive my right against other people taking, for example, my car and intending to uphold my right against other people taking my car then there is no grounds for attributing the former mental state rather than the latter.

Yet, if a proponent of the attitudinal view took this view then the difference between the attitudinal view and the performative view would collapse. If an attitudinal theorist were to claim that publicly observable behaviour is a necessary condition for intending to consent, and so a necessary condition for consenting, then it would seem that proponents of the performative view would be in agreement with them. But, as we've seen, Hurd (1996) and

Alexander (1996&2014), and all other proponents of attitudinal views of consent (see footnote 6), do mean to distinguish between themselves and proponents of the performative view of consent, and so such a response is not available to them.

From the preceding discussion it ought to be clear that Dougherty's substantive account of consent does not achieve the goal of protecting sexual autonomy. A person exercises their sexual autonomy by waiving their right against another person coming into sexual contact with them. Yet, for the reasons outlined above, one cannot waive a right merely by adopting the intention to do so. Rather, waiving a right requires that one communicate one's intention to do so. It follows that, as the only acceptable account of consent, only a performative account of consent can protect sexual autonomy.

Chapter 3.1: Consequences of the Failure of the Substantive Account of Consent

It has been shown that the argument from a substantive account of consent fails. Taking each in turn, let us consider where this leaves Dougherty's two other arguments for premise 2 of the argument against sexual deception.

Sub-argument 2b) The Chihuahua Argument

Sub-argument 2b) in support of premise 2 of the argument against sexual deception operates by drawing an analogy between the functioning of consent in spheres of life other than the sexual and the functioning of consent in the sexual sphere. Consider the following example:

Dog Owner

Suppose that Aisha asks me to let her dog into my apartment. Knowing that I loathe Chihuahuas, Aisha falsely says that it is a Great Dane, and I hand over my key. Imagine to my surprise and fright, then, to come home to find a Chihuahua scuttling around my floor like an overgrown furry cockroach. I say to Aisha, reasonably enough, that this Chihuahua is not the agreed upon Great Dane. Aisha acknowledges the difference is undeniable. But she replies that I had consented to the arrangement since I had agreed to let her dog into my apartment. Aisha's reply will not do, I am afraid. Aisha has effectively trespassed upon my property. The fact

that I agreed to admit some dog does not mean that I agreed to admit that dog. What I consented to let into my home was a Great Dane, and that dog was not a Great Dane (Dougherty 2013: 732-733).

Dougherty argues that, whatever differences exist between them, comparing his *Soldier* case, as presented in chapter 1, with *Dog Owner* will reveal that the two cases are alike in all morally relevant respects. Suppose that both Victoria, the hippie character from *Soldier*, and Aisha have explicitly voiced the restrictions on their consent so that the offenders are aware of their restrictions. It is the victim's right to control the behaviour of others within her personal space: Victoria's body in *Soldier* and Aisha's apartment in *Dog Owner*. The deceiver would act impermissibly if he invaded the victim's personal space without her MVC: Chloe requires Victoria's MVC if she's to have sex with her, and I require Aisha's MVC if I'm to leave my Chihuahua in her apartment. The victim's will is opposed to that which the deceiver intends: Victoria is opposed to having sex with an animal eating soldier, and Aisha is opposed to having an irritating Chihuahua in her apartment. The deceiver circumvents these obstacles by means of deception: Chloe lies about her humanitarian work and her love for animals, and I lie about the breed of my dog. The presence of deception in each case renders the victim's consent morally invalid: deception vitiates consent in both cases. If this is right, Dougherty claims, then we must reject the view that someone consents when she is deceived into sex, even by run-of-the-mill deception (Dougherty 2013: 732-734).

In order for the failure of the argument from the substantive account of consent to impact upon the Chihuahua argument the failure of the substantive account of consent would have to effect some disanalogy between *Soldier* and *Dog Owner*, but no disanalogy arises. Consider what happens when we replace the substantive account of consent with the performative account of consent in the analogy. Though we don't yet have a specification of the particular form of communication that a performative act of consent must take, it is clear that an explicit declaration of consent suffices to constitute an act of consent. The analogy between *Soldier* and *Dog Owner* is drawn on the basis of the supposition that both Victoria and Aisha have explicitly voiced the restrictions on their consent. The explicitly declared consent is vitiated by deception on deal breakers in both cases.

Sub-argument 2c) The Argument from Sexual Moralism

Sub-argument 2c) in support of premise 2 of the argument against sexual deception aims to

remove a key source of objection to premise 2 by arguing that the Lenient Thesis cannot be grounded on an acceptable account of consent. The argument runs as follows. Dougherty points out that proponents of the Lenient Thesis must draw a distinction between those things that are, and those things that are not, acceptable to deceive another person about in order to get them into bed. Otherwise stated, the proponent of the Lenient Thesis must draw a distinction between appropriate and inappropriate deal breakers: deception about appropriate deal breakers vitiates consent, but deception about inappropriate deal breakers does not vitiate consent. However, Dougherty (2013: 729) claims that while people will agree that there is an important distinction to be drawn between appropriate and inappropriate deal breakers, most are likely to disagree about where to draw this distinction. What's more, any place that the line is drawn assumes that some features of a sexual encounter are objectively more important than others. Consider, for example, *Harvard*:

Harvard

Jill is peculiar in that she is only turned on by men who have law degrees from Harvard. Jill meets Jack on a night out. Jack has a philosophy degree from Princeton, but lets Jill believe that he has a law degree from Harvard. Jill and Jack have sex.

Proponents of the Lenient Thesis are disposed to claim that Jack is not guilty of serious sexual misconduct. This is because where one went to university is not seen as a good reason for deciding to have sex. Dougherty's thought is that giving sexual autonomy its appropriate value shows that it is up to each individual to decide what their deal breakers are: drawing a line between appropriate and inappropriate deal breakers takes this decision out of their hands. In this fashion, our moral norms about sexual morality are skewed because of common assumptions that some reasons are good reasons to have sex, while others are not. As such, the Lenient Thesis rests upon an objectionably moralised conception of sex (Dougherty 2013: 730).

In order for the failure of the argument from the substantive account of consent to impact upon the argument from sexual moralism it would have to be the case that it renders at least one of the argument's premises false or disrupts the inference from the premises to the conclusion. Both the truth of the premises and the inference from the premises to the conclusion are safe in spite of the failure of the substantive account of consent: the first premise of the argument is that the proponent of the Lenient Thesis must draw a distinction

between appropriate and inappropriate deal breakers. That the substantive account of consent fails does nothing to change this. The second premise of the argument is that a criterion for any acceptable account of consent is that the account does not draw a distinction between acceptable and unacceptable deal breakers. That the substantive account of consent fails does nothing to change this criterion. Thus it still follows that the Lenient Thesis must be rejected.

Chapter 4: The Need for a Hyper-Explicit Definition of the Act of Sexual Consent

I have argued that only a performative account of consent is acceptable because consent can only play its normative role if it is possible for agents to know whether or not consent has been given. Further to this I have argued that communication is the only reliable means of providing agents with access to knowledge of whether or not consent has been given. However, in chapter 3 I left unanswered the question of what constitutes a communicated act of consent. In this chapter, in reference to recent developments in the sexual misconduct policy of American universities, I will demonstrate that leaving open what constitutes a communicated act of consent to sex runs the risk of leaving sexual autonomy, the very thing that Dougherty is concerned to protect, unprotected. I will argue that if Dougherty's goal of protecting sexual autonomy is to be fulfilled then the performative account of consent ought to be supplemented by a hyper-explicit definition of sexual consent.

Leaving open what constitutes a communicated act of consent to sex, where leaving open what constitutes communication of consent is to allow that any form of communication can in principle issue consent, can lead to a misunderstanding between agents of whether or not consent has been given. Such misunderstanding can lead to violations of sexual autonomy. For example, if consent is poorly understood because, for instance, A thinks that action x does not communicate consent to sex, but B does think that action x communicates consent to sex then misunderstanding is likely to arise between A and B that can lead to non-consensual sex. If A does not consent to sex with B, but A performs some action that leads B to falsely believe that A consented to sex, and so B has a false belief that there is mutual knowledge of consent, and B proceeds to have sexual intercourse with A on the basis of this belief then what arises is not an instance of consensual sexual intimacy, but rather a grave violation of A's sexual autonomy: A is choosing not to have sex with B, yet sexual intercourse nevertheless occurs. Whether or not B is culpable for the violation of A's sexual autonomy is not an issue that I will discuss. Rather, my concern here is solely to point out that by leaving open what constitutes communication of consent to sex there is grave danger that sexual autonomy is not protected. Consequently, the utility of consent as the means by which sexual autonomy is protected is thereby limited if there is not mutual knowledge of what actions constitute communication of consent to sex.

This worry is not merely theoretical, but has a real life manifestation. To see this consider

recent developments in sexual misconduct policies across American universities. Following shocking statistics⁹ on sexual assault on university campuses many American universities have reformed their policies regarding sexual misconduct. The reform that has received most attention has been the move of several American universities to introduce definitions of consent as requiring communication. Thus, in their new code of conduct Harvard University state that 'willingness and permission must be communicated unambiguously,' Yale University's new code now defines consent as a 'positive, unambiguous, and voluntary agreement,' and the University of Michigan's code states that consent consists of a 'clear and unambiguous agreement, expressed in mutually understandable words or actions.'¹⁰ Further to this, the State of California has made it compulsory for higher education institutions to adopt an affirmative standard for consent:

“Affirmative consent” means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent.¹¹

The media has captured the essence of all of these policies in one snappy phrase: “yes means yes.” However, a 2015 poll by the Washington Post-Kaiser Family Foundation has shown that American students are deeply divided over what exactly constitutes “yes”.¹²

⁹The 2007 Campus Sexual Assault Study found that 19% of female students had experienced sexual assault since entering university. Cristopher Krebs, Christine Lindquist, Tara Warner, Bonnie Fisher, and Sandra Martin, 'The Campus Sexual Assault (CSA) Study,' *Final Report Prepared for the National Institute of Justice* (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>. See also: Sofi Sinozich and Lynn Langton, 'Rape and Sexual Assault Among College-Age Females, 1995-2013,' NCJ 248471, *Special Report, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics*, December 2014, www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf.

¹⁰ “Definitions: Consent,” Office of Sexual Assault Prevention & Response, Harvard University, <http://osapr.harvard.edu/pages/consent>, “Definition of Sexual Consent,” *Yale Sexual Misconduct Policies and Related Definitions*, Sexual Misconduct Response at Yale, <http://smr.yale.edu/yale-sexual-misconduct-policies-and-related-definitions>; “Definitions: Consent,” Student Sexual Misconduct Policy, University of Michigan, <http://studentsexualmisconductpolicy.umich.edu/definitions>.

¹¹ California Senate Bill 967 (2014), http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB967.

¹² Washington Post-Kaiser Family Foundation Survey of College Students on Sexual Assault (2015), <http://apps.washingtonpost.com/g/page/national/washington-post-kaiser-family-foundation-survey-of-college-students-on-sexual-assault/1726/>. 'College Students Remain Deeply Divided Over What Consent

The poll of 1053 male and female students aged 17-26 found that in each of the following three scenarios: undressing, taking off clothes, and nodding, at least 40% of participants said that the action constituted consent and at least 40% said it did not. Among women participants 38% said that getting a condom establishes consent for further activity; 44% said that the same is true if someone takes of their clothes, and; 51% said a nod of agreement signals consent. Further to this, the poll showed that women were much less likely than men to infer consent from sexual foreplay. To quote from interviews that followed the polling one woman pointed out that 'a nod can be miscommunicated and manipulated,' while another woman stated that 'foreplay could just be that, it doesn't mean the same thing to most people.'¹³ What this poll data shows is that even though sexual conduct policies have shifted in response to the problem of pervasive sexual assault such that consent is now defined as requiring communication, there is still widespread disagreement about what constitutes communication of consent. In light of such widespread disagreement there is potential for misunderstanding between individuals: one party to a sexual encounter might believe that consent has been communicated while the other party does not: a non-consensual sexual encounter may result. This limits the effectiveness of “Yes means Yes” policies as a response to the problem of pervasive sexual assault, and this is precisely the problem that the policy was introduced to address remains.

The apparatus of the performative account of consent and the phrasing of the “Yes means Yes” policies make such disagreement possible. The performative account of consent, as we have been understanding it up until now, leaves open what constitutes communication of consent. Similarly, the ways in which the “Yes means Yes” policies are phrased leaves open what constitutes communication of consent. In so far as there is a looseness to what constitutes an act of consent, the possibility of disagreement and misunderstanding remains.

Actually Means,' *The Washington Post* (2015),
https://www.washingtonpost.com/local/education/americas-students-are-deeply-divided-on-the-meaning-of-consent-during-sex/2015/06/11/bbd303e0-04ba-11e5-a428-c984eb077d4e_story.html.

¹³In addition to the Washington Post-Kaiser Family Foundation poll further evidence in support of the thesis that there is disagreement about what constitutes communication of consent to sex that can lead to misunderstanding over whether consent has been given include: a 2014 survey of student attitudes to sexual assault at MIT university found that a fifth of female respondents and a quarter of male respondents agreed that "when someone is raped or sexually assaulted, it's often because the way they said 'no' was unclear or there was some miscommunication." See <http://web.mit.edu/surveys/health/MIT-CASA-Survey-Summary.pdf>. Additionally, Deborah Tannen's (1992) “miscommunication” model of acquaintance rape suggests that rape often, though of course not always, comes about as a result of miscommunication and misinterpretation of ambiguous signals given by those who are part of the encounter.

We can frame the dialectic of the recent changes in the sexual misconduct policy of American universities in terms of the preceding discussion. We've seen that consent plays an important normative role in our lives of enabling independently autonomous agents to interact with each other in a range of valuable ways. By default we all possess rights against others interfering with our persons or property, and we each have corresponding duties not to interfere with the persons or property of others. There are times when we want to move away from the default arrangement of rights and duties to bring us together with other people. Consent provides us with a way to achieve this: by giving our MVC we are able to waive our rights against non-interference and release others from their duties not to interfere with us. In this manner we are able to successfully coordinate our actions, navigate the landscape of rights and duties, and bring ourselves together with others when we request. The changes in the sexual misconduct policies of American universities follows the same pattern. The pervasive sexual assault problem is, in part, a problem of ineffective coordination of actions between individuals, and a resultant unsuccessful navigation of the landscape of rights and duties: rights are not being respected and duties are not being fulfilled. The policy changes are intended as a solution. However, to the extent that people can communicate consent to sex in numerous ways, yet disagree about the ways in which consent can be communicated, there is a significant danger that misunderstanding arises between agents that results in an ineffective coordination of actions. Consequently, the effectiveness of the policy change as a means of mitigating the problem sexual assault and protecting sexual autonomy is limited, and as such the problem remains unresolved.

I am not doubting the benefits of a move towards affirmative consent policies, in fact I very much welcome a move in this direction and have no doubt that it is a useful step in tackling the problem of sexual assault. Rather, what I am expressing doubt about is the extent to which the normative role of consent, in this case in the sexual realm, can be achieved while there is such a looseness to what constitutes an act of consent. To minimise the possibility of the occurrence of sexual violations that arise because of misunderstanding over whether consent has been communicated I propose to hyper-explicitly fix definitions of what constitute communication of sexual consent. Hyper-explicitly fixing the definition of consent means that only some particular utterance or action will be sufficient for communication of consent. I leave the exact wording of this explicit definition of consent up to policy makers. And, we might even leave it up to individuals themselves to fix what constitutes communication of consent to sex if they are

in a long term relationship with one another, though such freedom ought not to be permitted between those who are strangers or relative strangers. Fixing the definition of consent so as to require an explicit and particular form of communication will go a long way to eliminating misunderstandings of whether consent has or has not been communicated. In this way, violations of sexual autonomy that come about because of misunderstanding over whether consent has been given are at best eliminated and at worst minimised.

I suspect that this proposal will strike many as objectionably paternalistic. It is likely to be objected that restricting the means by which people can consent to sex is to interfere with the most private parts of their lives, and as such interferes with their autonomy over the means by which they chose to give consent. However, I have no doubt that reducing a person's autonomy over the means by which they communicate consent is a small price to pay for giving people greater autonomy over their sexual lives. And, If Dougherty is to fulfill his commitment to protecting sexual autonomy he ought to embrace such a proposal.

Conclusion

To summarise what has been achieved: I have described and explained Dougherty's argument against sexual deception. I have also described and explained Dougherty's argument from a substantive account of consent for the claim that deception vitiates consent. I have argued that if Dougherty is to uphold his commitment to protecting sexual autonomy then he must, firstly, give up the substantive account of consent and replace it with a performative account of consent, and, secondly, supplement the performative account of consent with a hyper-explicit definition of sexual consent.¹⁴

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Abstract

Motivated by a commitment to protect sexual autonomy, Tom Dougherty (2013) has argued that deceiving someone into sex is seriously morally wrong whenever the deception concerns a deal breaker of the victim, i.e. a feature of the sexual encounter to which the other person's will is opposed. While I share both Dougherty's commitment to sexual autonomy and his misgivings about the permissibility of sexual deception, there are elements of his argumentation that require significant amendment if the commitment to upholding sexual autonomy is to be fulfilled. In this paper I argue that if Dougherty is to uphold his commitment to protecting sexual autonomy then he must, firstly, replace his preferred account of consent, which is an attitudinal account of consent that maintains that consent consists solely of the formation of the private intention to consent, with a performative account of consent that maintains that in addition to the formation of the private intention to consent, a communicative act is also required for consent. Secondly, I argue that the performative account of consent ought to be supplemented with a hyper-explicit definition of sexual consent.

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