**Anna Videbaek Smith - Does morally valid consent require communication?**

**Introduction**

This essay will argue that morally valid consent requires communication by outlining Dougherty’s account of performative consent and defending it against objections. Section 1 introduces Dougherty’s three-step argument for consent requiring communication. In section 2, I evaluate Alexander *et al*.’s objection against step 1, which claims that promises generate obligations while consent does not, meaning we cannot infer from the fact that promises require communication that consent does. I reject this objection, as I claim consent *does* generate obligations and even if it did not, I contend the objection has undesirable implications for Alexander *et al*. Section 3 considers a *reductio ad absurdum* objection, which suggests that Dougherty’s account has undesirable implications regarding different actors’ culpability. I argue it fails, as Dougherty’s account does not commit us to viewing B and D as equally culpable, and even if it did, it is not necessarily an undesirable implication.

Following Dougherty (2018, p. 410), I consider X to give morally valid consent for Y to ϕ, if X releases Y from their duty not to ϕ. It is widely accepted that morally valid consent must be informed, voluntary, and not involve deception (Schnüriger 2018, p. 23). What else is needed for morally valid consent is contested. Attitudinalist theorists, including Alexander *et al*., consider consent to merely be a mental state (Anderson 2022, p. 4). Hence, if the consent is voluntary, informed, and does not involve deception, adopting the appropriate mental state, e.g. intending to consent, is sufficient. According to performative theorists, like Dougherty, either verbal or non-verbal communication is also needed (Gerver 2020, p. 27). It should be noted that the vast majority of performative theorists, including Dougherty (2015, p. 229), consider the appropriate mental state to be necessarythough not sufficient for morally valid consent.

**Section 1: Dougherty’s Account**

This section outlines Dougherty’s three-step argument for consent requiring communication. It then motivates my focus on step 1 and the account’s implications.

In the first step, Dougherty justifies a comparison between consent and promise. Recall Dougherty (2015, p. 232) considers morally valid consent to release Y from a duty otherwise owed to X not to ϕ. This has a three-part dyadic structure: X controls the duty insofar as they release Y from it; if Y violates the duty, they wrong X in a specific and personal way; and if this happens, Y ought to somehow make it up to X (Dougherty 2015, p. 232). Depending on the severity of the duty, this could be by apologising, providing compensation, or facing criminal charges. Dougherty (2015, p. 233) considers promise to be “the counterpoint” to consent since the former creates duties while the latter eliminates them. If I promise you tickets to the theatre, I acquire a duty to get you tickets to the theatre. This has the same three-part dyadic structure as consent: you control the duty insofar as you can release me from it; if I break the promise, I wrong you in a specific and personal way; and if this happens, I ought to make it up to you, e.g. by apologising (Dougherty 2015, p. 233). Hence, Dougherty justifies the comparison between consent and promise by illustrating that they are each other’s counterpoints with the same three-part dyadic structure.

In step 2, Dougherty establishes that promises require communication. They point out that promising has certain functions in human society. They create expectations and invite reliance on them, facilitating trust, cooperation, and coordination (Dougherty 2015, pp. 237-38). For promises to fulfil these functions, there must be accountability (Dougherty 2015, p. 238). I.e., the promisee must be able to confront the promisor if the promise is broken. A prerequisite for accountability is common belief. That is to say, for the promisee to effectively confront the promisor if the promise is broken, both must believe that the promise took place and that the other person believes the promise occurred (Dougherty 2015, p. 238). Consequently, Dougherty (2015, p. 240) claims that “communication enters the picture as the only reliable way to guarantee common belief [in the promise]”. Thus, Dougherty concludes that promises require communication.

Given the comparison between promise and consent, and that promises require communication, step 3 provides a parallel argument for consent requiring communication. Dougherty (2015, p. 244) notes that consent has certain crucial functions; it allows for intimacy, e.g. through sexual consent, and alterations, e.g. through medical consent. Additionally, it allows people to share their belongings, as seen when I borrow my parents’ car. For consent to fulfil these functions, there must be accountability – i.e., if Y violates X’s consent, X can confront Y and expect Y to make it up to them (Dougherty 2015, p. 250). For this accountability to take place, there must be a common belief in whether consent was given (Dougherty 2015, p. 244). In other words, X and Y must both believe that X did not consent, and they must both believe the other person believes X did not consent. Dougherty (2015, p. 244) claims that “creating this common belief will require public behaviour, and typically this public behaviour must be communication”. Overall, by comparing consent and promise, and establishing that promises require communication, Dougherty concludes that consent requires communication.

My contribution to the debate lies in evaluating objections to Dougherty’s account. In section 2, I evaluate Alexander *et al*.’s objection to step 1. I focus on this step for two reasons. Firstly, it seems to be the most fundamental step, as step 3 relies on steps 1 and 2, yet even those who disagree with Dougherty’s conclusion grant that promises require communication (e.g., Alexander *et al*. 2016, p. 655). Secondly, when comparing promise and consent, there is a risk of begging the question. This is because, among normative powers (i.e., a type of agential ability to alter rights and obligations (Koch 2018, p. 32)), some require communication while others do not. Hence, the worry is that by choosing to compare consent to promise – a normative power generally thought to require communication – Dougherty *presupposes* that consent requires communication (Renzo 2022, p. 51). Thus, Dougherty’s comparison between consent and promise must be fully justified.

In section 3, I evaluate Alexander *et al.*’s *reductio* objection, which claims that, because Dougherty’s account has undesirable implications about different actors’ culpability, we ought to reject it. I find this to be a uniquely potent objection since our contemporary debates about consent have their roots in the feminist struggle to protect women’s sexual agency in legal settings (Ward 2020, pp. 24-25). Consequently, if Dougherty’s account has problematic implications regarding criminal culpability, that is a strong reason to reject it.

**Section 2: Challenging Step 1**

This section outlines and evaluates Alexander *et al*.’s objection against step 1 of Dougherty’s account. I reject it, as consent does generate obligations, and even if it did not, the objection has undesirable implications for Alexander *et al*.

Alexander *et al*. contend that promise and consent are not sufficiently similar, meaning we cannot infer that consent requires communication from the fact that promises do. They claim the key difference is that promises generate obligations while consent does not (Alexander *et al*. 2016, p. 657; Alexander 2014, p. 106). When X promises Y to ϕ, X acquires an obligation to ϕ. When X gives Y consent to ϕ, however, Y does not acquire an obligation to ϕ. It merely becomes permissible for Y to ϕ. So, if something generating an obligation plays a role in it needing to be communicated, promises can require communication without consent requiring communication.

I reject this for two reasons. Firstly, I counter that consent *does* generate obligations. To make this argument, I draw on Shiffrin (2008, p. 500), who claims that when X gives Y consent to ϕ, X “becomes obligated not to raise complaints that she otherwise could make about entry into her personal space”. This seems plausible if consent is to fulfil the functions outlined in section 1. For example, if my parents consent to me borrowing their car, they cannot then complain about my borrowing their car. Alexander *et al*. might respond that while consent does generate this obligation, it is merely a subsidiary side-effect. The primary moral impact is still giving permission to ϕ, while the primary moral impact of promising is generating a duty to ϕ. I find this unconvincing, though, as we can provide an account of consent which centres around the obligation generated. Bolinger (2019, p. 6), for example, claims that the core function of consent is “to redistribute moral risks in a way that creates space for valuable exercises of agency”. This can be illustrated using an example. Imagine A asks their doctor, B, to perform a surgery that is not strictly necessary but would improve A’s quality of life. If A could consent to the surgery without acquiring an obligation not to complain about B performing the surgery, it would be morally risky for B to perform the surgery (Bolinger 2019, p. 6). A might later sue B or request compensation. However, because consent gives rise to this obligation, it “change[s] this equation by allowing [A] to ‘own’ the risks, insulating [B] from the costs of the gamble” (Bolinger 2019, p. 6). Of course, A retains their right to complain if the surgery is performed inadequately, but by consenting, A relinquishes their right to complain about the fact that the surgery was performed. Hence, this obligation can be viewed as central to consent, as it mitigates the moral risk otherwise involved in surgery, sex, etc., challenging Alexander *et al*.’s objection.

Nonetheless, let us for the sake of argument assume that consent does not generate obligations. I still contend that the objection does not do the work Alexander *et al*. need it to do. This is because, if the fact that something generates an obligation helps explain why it must be communicated, this gives rise to undesirable implications for Alexander *et al*. Consider reversing a promise. When Y releases X from their promise to ϕ, X’s duty to ϕ is eliminated. Consequently, following Alexander *et al*.’s line of argument, it seems you can reverse promises without communication, as this does not generate an obligation. Yet, as Alexander *et al*. (2016, p. 655) accept the folk view of promises, which claims that both making and reversing promises require communication, this is an undesirable implication. Next, consider withdrawing consent. When X withdraws their consent for Y to ϕ, Y reacquires a duty owed to X not to ϕ. Accordingly, if something generating an obligation plays a role in it needing to be communicated, it seems that withdrawing consent must be communicated. This is an undesirable implication for Alexander *et al*. (2016, p. 657), as they explicitly state that neither giving nor withdrawing consent requires communication. Therefore, even if we grant that consent does not generate obligations, I contend this objection has undesirable implications for Alexander *et al*.

Thus, I find Alexander *et al*.’s objection to step 1 of Dougherty’s account unconvincing, as consenting does generate obligations, and even if it did not, the objection has undesirable implications for Alexander *et al*. Hence, I assert that step 1 of Dougherty’s argument holds.

**Section 3: The *Reductio* Objection**

This section introduces and evaluates Alexander *et al*.’s *reductio ad absurdum* objection to Dougherty’s argument. I reject it, as I claim we can accept Dougherty’s account without finding B and D equally culpable. Even if Dougherty’s account commits us to this, I can argue it is not necessarily an undesirable implication.

Alexander *et al*. (2016, p. 658) claim that if we adopt Dougherty’s account, we must accept some undesirable implications about the culpability of different actors. To illustrate this, they provide two examples. In *Wanted Sex*, A desires to have sex with B but does not communicate this either verbally or non-verbally to avoid coming across as ‘easy’ (Alexander *et al*. 2016, p. 655). Despite this, B ends up having sex with A. According to an attitudinalist approach, B does not wrong A, as A had the appropriate mental state, such as intending to consent, and assuming B thought A had the appropriate mental state, B is not culpable (Alexander *et al*. 2016, p. 656). According to the performative view, though, B wrongs A, as A did not communicate consent, and B is culpable as they knew that A did not communicate consent (Dougherty 2019, p. 392). In *Unwanted Sex*, C does not want to have sex with D, and C does not communicate consent either verbally or non-verbally. D knows all of this but still has sex with C (Dougherty 2019, p. 391). According to both the attitudinalist and performative approaches, D wrongs C, as C did not consent, since they neither adopted the appropriate mental state nor communicated a want to have sex with D (Dougherty 2019, p. 391). Both accounts agree that D is culpable, as they were aware of C’s lack of consent (Dougherty 2019, p. 391). According to Alexander *et al*. (2016, p. 659), the problem is “for Dougherty, the defendant is as culpable [in *Wanted Sex*] as he is in [*Unwanted Sex*], a quite problematic conclusion”. Their worry seems to be that *Unwanted Sex* is more morally problematic than *Wanted Sex*, yet Dougherty’s account fails to capture this by considering B and D equally culpable. As this is an undesirable implication, we ought to reject Dougherty’s account.

I will respond to this objection in two prongs. Firstly, I argue that we can accept Dougherty’s account without viewing B and D as equally culpable. One might worry that Alexander *et al*. seem to view culpability as binary. This would explain why, if Dougherty’s account considers both B and D culpable, they *must* be *equally* culpable. If they do in fact make this assumption, they fail to justify it, seemingly taking it for granted. However, I contend that intuition points towards culpability being a spectrum. To illustrate this, I point out that different laws from different time periods and continents distinguish between degrees of culpability. The American Penal Code, first introduced in 1962, distinguishes between four levels of culpability. In descending order, they are acting ‘purposely’, ‘knowingly’, ‘recklessly’, and ‘negligently’ (Robinson 1980, p. 815). Similarly, Classical Roman law distinguished between two levels of culpability: ‘dolus’, or ‘evil intent’, and ‘culpa’, meaning ‘negligence’ (Zaibert 1998, p. 479). This distinction persists in nearly all of Continental European law to this day. While the law does not necessarily track morality, the fact that laws two millennia apart from different regions distinguish between degrees of culpability, suggests there is something intuitively plausible about that idea. Thus, if Alexander *et al*. want to hold that culpability is binary and that this explains why Dougherty’s account *must* view B and D as equally culpable, I claim the burden of proof is on them.

Alexander *et al*. might respond that they agree culpability comes in degrees, but they maintain that Dougherty’s account commits us to view B and D as falling on the same point on the spectrum. I find this unconvincing, though. Recall that the vast majority of performative theorists, including Dougherty, consider the appropriate mental state to be necessary for morally valid consent. Hence, I can use this to explain why Dougherty’s account is not committed to viewing B and D as equally culpable. This is because, while B knew A did not communicate consent, B thought A had the appropriate mental state. D, on the other hand, knew that C neither communicated consent nor had the appropriate mental state. Thus, this difference may explain why, while B and D are both culpable according to Dougherty’s account, the latter is more so than the former.

Let us for the sake of argument assume that Dougherty’s account commits us to viewing B and D as equally culpable. This leads me to the second prong of my rejection of the *reductio* objection, as I contend that it is not necessarily an undesirable implication. To justify this, I employ Dougherty’s distinction between ‘the permissibility question’ and ‘the badness question’. The former asks whether someone behaves permissibly and the answer to this will be binary (Dougherty 2019, p. 392). The badness question asks how wrong or bad someone’s behaviour is, and this comes in degrees (Dougherty 2019, p. 392). When we apply this distinction to *Wanted Sex* and *Unwanted Sex*, it seems both B and D act impermissibly, but that D’s actions are much worse than B’s. This leads Dougherty (2019, p. 393) to state that “we can consequently hold that agents are [equally] morally culpable of acts that are wrong to differing degrees”. This assumes that the permissibility question tracks culpability, which can be made more plausible by rewording it as something along the lines of “does someone knowingly act impermissibly?”. Therefore, using Dougherty’s distinction between the permissibility and badness questions, I can consider B and D equally culpable, while still capturing the intuition that *Unwanted Sex* is more morally problematic than *Wanted Sex*.

Overall, I reject Alexander *et al*.’s *reductio* objection, as accepting Dougherty’s account does not commit us to viewing B and D as equally culpable. Even if it did, it is not necessarily a problematic implication as we can distinguish between the permissibility and badness questions.

**Conclusion**

This essay has argued that morally valid consent requires communication by outlining Dougherty’s performative account and defending it against objections. Section 1 introduced Dougherty’s three-step argument for consent requiring communication. First, Dougherty established a comparison between consent and promise, as they are each other’s counterpoint with the same three-part dyadic structure. They then argued that promises require communication since promises fulfil their functions through accountability which requires common belief. Finally, given the comparison between consent and promise, Dougherty provided a parallel case for consent requiring communication. Section 2 outlined Alexander *et al*.’s challenge to the comparison between consent and promise. I rejected it, as consenting does generate obligations, and even if it did not, the objection has undesirable implications for Alexander *et al*. Section 3 introduced the *reductio* objection, which contends that we ought to reject Dougherty’s account given its undesirable implications about actors’ culpability. I countered that Dougherty’s account does not commit us to viewing B and D as equally culpable, and even if it did, it is not an undesirable implication, as I can distinguish between the badness and permissibility questions.

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