

University of San Diego

Digital USD

Faculty Scholarship

Law Faculty Scholarship

2016

Consent does not require communication: A reply to Dougherty.

Larry Alexander

University of San Diego, larrya@sandiego.edu

Follow this and additional works at: https://digital.sandiego.edu/law_fac_works



Part of the [Law Commons](#)

Digital USD Citation

Alexander, Larry, "Consent does not require communication: A reply to Dougherty." (2016). *Faculty Scholarship*. 22.

https://digital.sandiego.edu/law_fac_works/22

This Article is brought to you for free and open access by the Law Faculty Scholarship at Digital USD. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Digital USD. For more information, please contact digital@sandiego.edu.



LARRY ALEXANDER, HEIDI HURD, PETER WESTEN

CONSENT DOES NOT REQUIRE COMMUNICATION: A REPLY
TO DOUGHERTY

(Accepted 26 August 2016)

Tom Dougherty argues that consenting, like promising, requires both an appropriate mental attitude and a communication of that attitude.¹ Thus, just as a promise is not a promise unless it is communicated to the promisee, consent is not consent unless it is communicated to the relevant party or parties. And those like us, who believe consent is just the attitude, and that it can exist without its being communicated, are in error.²

Or so Dougherty argues. We, however, are unpersuaded. We believe Dougherty is right about promises, but wrong about consent. Although each of us gives a slightly different account of the attitude that constitutes consent, we all agree that consent is constituted by that attitude and need not be communicated in order to alter the morality of another's conduct.

Consider the following scenario, which we shall call *Wanted Sex*:

Sue wants Sam to have sex with her. Yet she is afraid that if she communicates that to him, he might think she is "easy" or "trashy" and ultimately reject a long-term relationship with her, a relationship she desires.

One night, Sam begins making sexual advances with Sue. Sue wants him to proceed, but she says nothing to encourage him and indeed resists him with some force at each step of the way. This resistance does not deter him, and ultimately they have sex.

Sue is delighted. Things worked out just as she had hoped. Sam had sex with her, but she was able to communicate that she was not consenting to it.

¹ Tom Dougherty, "Yes Means Yes: Consent as Communication," 43 *Phil. & Pub. Aff.* 224 (2015).

² See Larry Alexander, "The Ontology of Consent," 55 *Analytic Phil.* 1 (2014); "The Moral Magic of Consent (II)," 2 *Legal Theory* 165 (1996); Heidi Hurd, "The Moral Magic of Consent," 2 *Legal Theory* 121 (1996); Peter Westen, *The Logic of Consent* (2004), 4–5.

Later, however, after proudly confiding the event to a friend, her attitude changes. For as her friend pointed out, Sam was willing to have sex with her despite likely believing she was not consenting. Was that not a demonstration that Sam does not respect her, given his willingness to ignore her apparent lack of consent? Sue's delight at how things had transpired now turns to indignation.

Here is our verdict on *Wanted Sex*. Sue is right to feel indignant. If Sam believed there was a significant risk that she was not consenting, then Sam acted culpably. And indeed, such culpability might well be sufficient to justify his being criminally punished, e.g., for attempt. But Sam did not *wrong* Sue. He did not cross her moral boundary without her consent. Sue knew all the relevant facts at the time she and Sam had sex and yet wanted the act to occur. She surely did not feel wronged at the time the contact (the rights-based boundary-crossing) occurred, and that is because she was not wronged.

If *Wanted Sex* fails to convince you, here is a second scenario, a variant of a scenario one of us has used before, which we shall call *Pool Party*.

Jane and Jim, college seniors, have been going out together for a couple of years. But recently they had a terrible spat and are not talking to each other. Jane has decided to throw a pool party at her sorority house for all her friends. And although she still is not on speaking terms with Jim, she feels she can't very well not invite him. So she tells her younger brother Ken, who is on the college football team with Jim, to tell Jim at practice that she is having a pool party and that he's invited.

Ken, however, does not like Jim. So at practice he tells Jim that Jane is having a pool party and that she wanted Ken to tell Jim that Jim was *not* invited.

Jim is upset and angry that Jane is not inviting him to her party. He decides that he will crash the party anyway. So on the day of the party, Jim shows up in his swimming trunks at Jane's party. Jane sees him there and thinks nothing of it. After all, she invited him, or so she believes. In any event, she is glad he came, as that shows he is not too angry with her. Nevertheless, she does not speak to him at the party, nor does he speak to her.

Later, Ken expresses surprise that Jim came to the party, for, as he sheepishly confesses, he had told Jim the opposite of what Jane had asked him to convey. Jane now realizes that Jim probably believed he was showing up at her party against her wishes and is now even angrier at him than she had been.

Again, our verdict is that although Jim may well be culpable for coming to a party to which he believed he was not invited, he committed no wrong, no trespass, in coming. For he had Jane's

CONSENT DOES NOT REQUIRE COMMUNICATION

consent to that. She wanted him to come and was glad he did. The “garbled” communication did not change that.

As we said, we agree with Dougherty that promises require communication. And we agree with the reasons he gives for this requirement. Promises create obligations to the promisees, obligations that the promisees may find unwelcome and wish to reject at the outset or release later. And they create expectations and give rise to reliance.

Consent, on the other hand, merely removes a moral (and sometimes legal) barrier. If it is not communicated, as in *Wanted Sex*, or miscommunicated, as in *Pool Party*, those to whom consent is given may not realize that those barriers are down and that they have permission to cross the consenter’s moral (and legal) boundary. But so what? They have no duty to cross, only a permission to do so. The failure of communication may defeat the consenter’s purpose in consenting, but that does not mean the consenter’s permission – the consent – does not exist.

Dougherty points out that if the attitudinal view of consent is correct, as we maintain, then presumably the revocation of consent will also be attitudinal and will require no communication, a point with which we also agree. But, says Dougherty, that would mean that people could acquire duties without realizing it. After having been given consent and thus relieved of a duty not to cross the consenter’s moral or legal boundary, that duty can then be restored by the change of the consenter’s attitude and without any communication of that change.

But we see no problem here. So go back to *Pool Party* and assume that Jane did *not* want Jim to come, but that her sorority sister Karen, who disliked Jane and wanted to play a prank on her, told Jim that Jane *had* invited him. When Jim shows up at Jane’s sorority house, she may be furious and accuse him of trespassing, which in fact he is. But he is doing so nonculpably and should not be subject to any sanction. His lack of awareness of his duty that is the correlative of Jane’s lack of consent is not a trap that has walked into to his detriment. Just as one can act culpably but commit no wrong, as Jim did in the original *Pool Party*, one can nonculpably commit a wrong, which is what Jim does in this version of *Pool Party*. So long as blame and punishment properly attach to a wrongful action only if that

action is motivated or accompanied by a culpable mental state (as we believe is the case), someone who unwittingly does wrong (as Jim does in this hypothetical) faces no unfair threat of recrimination.

One last point. The communicative aspect of promising is usually unproblematic, as it typically consists either of uttering certain idiomatic words or phrases (such as "I promise," or "yes," or "I do"), or invoking certain behavioral signals that are conventionally understood to substitute for those words (such as a nod of the head in response to the query "do you promise?"). But as most are well aware, whether a particular communication is one of consent or nonconsent, and for what acts and over what duration, is a quite fraught and controversial inquiry in which words, gestures, silences, and context are all in play. Dougherty avoids wading into this morass. He posits the necessity of communication, but avoids opining on what counts as such. We think it desirable to keep the already difficult issue of the required mental attitude separate from the question of what counts as its communication. But if consent consists of both attitude and communication, then we could not tell if someone consented without asking if they successfully communicated the requisite attitude. We think Jane consented to Jim's attending her party in the original *Pool Party*, and Sue consented to sex with Sam in *Wanted Sex*, even though no communication of their positive attitudes occurred.

Although to this point we have been dealing with the conceptual point regarding the ontology of consent, Dougherty's position also creates dilemmas for the criminal law. We have seen that, if consent to sex is defined as an attitude (which is indeed how numerous jurisdictions now define it), the law can successfully account for an actor's culpability in cases like "Wanted Sex" without having to attribute a sexual wrong to him. In contrast, if consent to sex were defined as both an attitude and a communication (which is how Dougherty would revise the law's definition), the law could not account for the distinctive harm a person suffers when she is subjected to sexual intercourse against her wishes.

Now how would Dougherty construct a criminal code to deal with nonconsensual sex? For us, because consent consists of attitude (A) alone, and leaving aside degrees of belief and the reasonableness of belief, there are only four possibilities to consider:

CONSENT DOES NOT REQUIRE COMMUNICATION

- (1) A, and the defendant's belief that A. No wrong and no culpability.
- (2) A, but the defendant's belief that \sim A. No wrong, but culpability.
- (3) \sim A, but the defendant's belief that A. Wrong, but no culpability.
- (4) \sim A, and the defendant's belief that \sim A. Wrong and culpability.

Dougherty on the other hand has four possible combinations of facts and four possible combinations of belief about those facts to consider. (Communication – C – of A can exist without the defendant believing that C exists, and the defendant can believe that C exists when it does not. Defendant can hear a “yes” and misunderstand it to have been a “no,” and vice versa.) Thus, we can get the following possibilities:

Facts

- (1) A and C. No wrong.
- (2) A, but \sim C. Wrong.
- (3) \sim A, but C. Wrong.³
- (4) \sim A and \sim C. Wrong.

The Defendant's Beliefs

- (5) A and C. No culpability.
- (6) A and \sim C. Culpability.
- (7) \sim A, but C. Culpability.
- (8) \sim A and \sim C. Culpability.

The two problematic combinations consist of Fact (1) with Belief (6), and Fact (2) with Belief (6). In (2)/(6), the victim has A but does not express C, and the defendant correctly believes that A exists but that C does not. In other words, the defendant correctly believes the victim has the attitude of consent but has not communicated that she does. For Dougherty, the defendant is as culpable here as he is in combinations (4)/(8), a quite problematic conclusion. Perhaps even more problematic is Dougherty's treatment of the combination (1)/(6). Dougherty would view this as culpable but not wrong. But the only reason it is culpable is that the defendant did not believe C was present when it was. In that situation, the “victim” has the attitude

³ With respect to (3), we assert that one can communicate consent without having the relevant attitude, as when a fearful victim communicates that she is consenting although she abhors what she believes the defendant intends and is communicating “consent” out of fear of the consequences she believes defendant is threatening.

of consent (A) and communicates consent (C), and the defendant correctly believes that the attitude is present but fails to notice the communication of it. (He correctly infers A independently of C.) Dougherty would have to regard the defendant as guilty of attempting nonconsensual sex. We think this is clearly overkill.

The source of these problems is that Dougherty treats as constitutive of consent a communication that we regard as only evidentiary (and hence only relevant to culpability). For us, the communication of consent is not sufficient to establish consent – consider again the case of a fear-induced communication of consent.⁴ Nor is it necessary, as consent can be inferred by means other than a communication, and may exist so as to eliminate another's wrongdoing without there being any basis for inferring it at all.

*University of San Diego School of Law,
San Diego, CA, USAE-mail: larrya@sandiego.edu*

*University of Illinois College of Law,
Champaign, IL, USA
E-mail: hhurd@illinois.edu*

*University of Michigan Law School,
Ann Arbor, MI, USA
E-mail: pkw@umich.edu*

⁴ See note 3.