Consenting is a familiar part of everyday life. One might consent to a friend’s use of one’s car, to a doctor’s touch, or to a lover’s embrace. In the absence of one’s consent, one’s rights typically prohibit these actions. But one’s consent overrides this prohibition. Consenting thus enables us to shape our interactions with others in significant ways. But despite how ubiquitous and important consenting is, theorists disagree about how exactly one consents. Does one consent by having a certain kind of mental state, by engaging in some kind of observable behavior, or through some combination of the two? In this paper, I defend the last of these options. I then consider the implications of this view for recent debates about consent to sexual interactions, and consider the relationship between the moral and legal norms governing consent in this context.

1. Three Views of Consent

On the mental state view, some kind of mental state is necessary for valid or effective consent and observable behavior is not necessary. On the behavior view, some kind of observable behavior is necessary for valid consent and mental states are not necessary. On the hybrid view, mental states and observable behavior are both needed for valid consent. Note that all of these views agree that there are further conditions on valid consent. Suppose, for example, one holds that one consents by having a certain kind of mental state, e.g. an intention. One might still think that this mental state does not suffice to waive the prohibitions associated with one’s rights if it is the product of certain kinds of coercion, deception, or incompetence. The details of these defeating conditions are themselves the subject of much debate. But advocates of all three views of consent that I am

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1 Unfortunately, the literature on consent labels the three views I will be discussing in different ways. I have chosen labels with the aim of making the content of each view as clear as possible.
considering recognize these defeating conditions in their broadest outlines. In what follows, I consider each view in turn.

1.1 The Mental State View

Let us begin by considering the mental state view. Advocates of this view disagree about which particular mental state is necessary for consent. For example, Heidi Hurd holds that consent consists in intending that the receiver of consent perform the action to which consent is given. In contrast, Larry Alexander holds that consent consists in “mentally accepting without objection another’s crossing one’s moral or legal boundary…” Although I will return to the question of how we ought to understand the mental states of the consenter when I discuss the hybrid view, for now it suffices to have these examples in mind.

Why associate consenting with a mental state? This view is motivated by connecting consenting with autonomy. Recall that consenting enables people to reshape the prohibitions associated with their rights. The mental state theorist claims that the ability to reshape prohibitions in this way is an important reflection of one’s autonomy. And one exercises one’s autonomy by forming mental states like intentions.

I have two responses to this view, one quick and the other involved. The quick response is just to question why we should privilege mental states as expressions of autonomy. One might think that raising one’s arm is no less an expression of one’s autonomy. Fully pursuing this line of response, however, would require a long detour through the philosophy of action. Instead, I want to pursue what I take to be a deeper problem with the mental state view. I suggest that the mental state theorist misconstrues the sense in which respect for autonomy is connected with our

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understanding of consent. Our rights protect our ability to live our lives as we see fit. But importantly our rights must be compatible with others also living their lives as they see fit. And in order to do this, they must be able to navigate around our rights in their decision making. But if we can exercise our rights by consenting through mental states that are not accessible to others, they will not be able to conduct their own decision making in the appropriate ways. For example, if I think to myself that I am waiving the prohibitions associated with my rights with respect to my car but never share those thoughts with you, you would seem to be making a serious mistake if you simply take it. In this way, the mental state view seems to overlook the status of consenting as a part of a system of rights that coordinates our attempts to live autonomously.\(^5\)

Mental state theorists have a potential response to this concern. Although I think this response is ultimately unsuccessful, examining it will be instructive and I will draw on materials from this response in my engagement with the behavior view and the hybrid view. The mental state theorist can agree that you would be making a mistake if you simply take my car without any evidence of my mental states but insist that it is important to be precise about the nature of the mistake you would be making. Such theorists invoke a distinction between impermissible actions and blameworthy actions. While violating another’s rights is impermissible, it may not be blameworthy depending on what the agent believed or should have believed about the rights in question.\(^6\)

Mental state theorists do not develop the distinction between impermissibility and blameworthiness as much as would be ideal given the important role the distinction plays in their views. In order to get a better sense for how this distinction operates, I am going to draw on T.M.\(^5\)

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\(^5\) This objection is similar in some respects to Tom Dougherty’s recent argument against the mental state view. See Tom Dougherty, “Yes Means Yes: Consent as Communication,” *Philosophy & Public Affairs* 43, 3 (2015): 224-253. But there are also some important differences between my argument and his, and I consider those differences in Sec. 1.3.

\(^6\) Alexander's formulation of the distinction between what he calls wrongdoing and what he calls culpability does not, on the face of it, address the question of what one should have believed. See Alexander, “The Ontology of Consent,” 102-103. Hurd’s discussion seems to include considerations of what one should have believed as among the factors relevant to blameworthiness. See Hurd, “The Moral Magic of Consent,” 132.
Scanlon’s account. There are, of course, other ways of thinking about this distinction. Those who prefer another account may focus less on the details of what follows and more on the general way in which commitments regarding this distinction affect our understanding of how consent operates.

Scanlon begins by distinguishing between the deliberative and critical uses to which we can put moral principles: “As guides to deliberation, moral principles answer a question of permissibility: ‘May one do X? They also explain the answer by identifying the considerations that make it permissible to do X under the circumstances in question.” Importantly, in their deliberative role, moral principles also identify the appropriate level of care one should take in forming one’s beliefs about relevant considerations.

In contrast, in its critical role, a moral principle “is used as the basis for assessing the way in which an agent went about deciding what to do on some real or imagined occasion.” It is in this activity of assessment that the question of blameworthiness arises. An agent is blameworthy for an action if “the action shows something about an agent’s attitudes towards others that impairs the relations that others can have with him or her.” So, on this account, an agent can be blameworthy for an action that is not, in fact, impermissible. Suppose, for example, a person attempts to add rat poison to another’s beverage but instead merely adds sugar. In this case, the agent did not in fact act contrary to the considerations bearing on her action, but her attitudes impair the relations others can have with her. And likewise, one might be excused and hence not blameworthy for an action that was impermissible, as, for example, when one acts out of extreme fear.

With this distinction between impermissibility and blameworthiness in hand, let us return to the case in which I have the mental state associated with consent regarding your use of my car but I

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have not communicated this to you or given you evidence of it. In these circumstances, if you ask yourself whether you may take the car, the answer you should arrive as is ‘no’. And so, if you take the car in these circumstances, what you are doing is blameworthy even though you are not actually acting contrary to my rights, in much the same way as if you added sugar to my beverage hoping to add rat poison.\(^\text{13}\) Given this, it is no surprise that we typically associate consent with actions rather than mental states. We typically form our beliefs about others’ mental states on the basis of their actions. But the mental state theorist holds that to take consent to occur through these actions is to confuse what consent is with what gives us evidence for consent’s occurrence.

Recall that my objection to the mental state view was that it overlooks the way in which our rights coordinate our attempts to live our lives as we see fit. By distinguishing between impermissibility and blameworthiness, the mental state theorist is able to draw our attention to the important role our beliefs about rights play in shaping our conduct. So, the initial reply of the mental state theorist is, in effect, to suggest that it is our beliefs about rights rather than the rights themselves that serve the coordinating function I described.

Nonetheless, shifting our attention to beliefs about rights rather than the rights themselves does not suffice to rescue the mental state view. Consider an agent who is trying to act in accordance with her duties. She knows that she ought not take others’ property without their consent. The mental state view directs her to look for evidence of others’ mental states in order to comply with this principle. But the view countenances the wrong kinds of evidence. Suppose, for example, that Antonia overhears Brian talking to a friend on the phone. Brian says, “Of course I am willing to let Antonia borrow my car,” though he does not know that Antonia is listening. This gives Antonia very good evidence of Brian’s mental states. If consent consists in having a certain

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\(^{13}\) There is, though, one additional wrinkle in this situation that is worth noting. The action might be impermissible because it is reckless. That is, failing to take adequate care to avoid violating others’ rights might be impermissible whether or not their rights are violated. But this is an importantly different ground for holding the an action to be impermissible, a ground which is largely orthogonal to the question of when one’s rights are violated.
kind of mental state, it seems that Antonia also has very good evidence that Brian consents to her use of his car. But noticeably, we do not typically act on this kind of evidence of other’s mental states. If Antonia took the car under these circumstances, Brian might protest, “But I never told you that you could borrow my car!” The mental state theorist might insist that this aspect of our consenting practices is poorly supported given what consent is. But recognizing consent’s role in coordinating our actions makes this practice completely understandable. Overheard evidence does not help Brian and Antonia coordinate because Brian does not realize that he has given it, and so has no idea he should update Antonia if he changes his mind about whether she may borrow his car.

The mental state theorist has no principled reason for rejecting overheard evidence of one’s mental states. But allowing agents to guide themselves using this kind of evidence is in tension with the coordinating function of consent. The lesson, then, is that we cannot simply resituate the coordinating function of consent by focusing on our beliefs about other’s mental states. Doing so gives us the wrong directives about how to guide ourselves.

2.2 The Behavior View

The behavior view claims that some kind of observable behavior is necessary for morally valid consent, behavior that need not be accompanied by any particular mental states. The relevant behavior might be identified in different ways. Perhaps it is behavior that in some way conventionally signals consent. I will return to this issue when discussing the hybrid view. For now, it suffices to consider this example.

This view will generally have the same implications as the hybrid account because one will generally engage in the relevant behavior only if one has the relevant mental states. But it is worth considering what happens when the two views come apart. Alan Wertheimer, who once endorsed the behavior view, suggests this example:
A mammogram reveals suspicious areas in B’s breast. A tells B that he wants to do a biopsy under general anesthesia, and, if positive, perform a lumpectomy. B appears to be listening, but is not paying attention. A asks her to sign a consent form authorizing both procedures (if necessary). B pretends to read the form, but thinks that A will only be doing a biopsy. She signs.14

Wertheimer tentatively suggests that B may have given valid consent because A has done enough to establish that B understands what she is doing, and so may permissibly perform both procedures.15 But if understanding what she is doing is not a condition on valid consent, why would A need to do anything to determine whether B meets that standard? In order to explain why that standard is deliberatively relevant, it needs to be construed as one of the conditions on valid consent.

I suggest that there is a way of getting the conclusion that the doctor may permissibly perform both procedures while maintaining that the patient did not consent. To see how, consider another case. Suppose Brian’s twin brother is playing a prank on Antonia. So, he pretends to be Brian and then gives Antonia permission to use Brian’s car. Although one might be tempted to think that Antonia does nothing wrong in taking the car in these circumstances, here there is no temptation to think that Brian has consented.

Scanlon’s view seems to vindicate this assessment. The question ‘May one do X?’ is answered both by examining the considerations for and against doing X as well as the appropriate level of care one should take in forming one’s beliefs about relevant considerations. So, on his view, it might well turn out that both Antonia and the doctor act permissibly. But that need not reflect consent being given in either case. Instead, they act permissibly because they both do all that they ought to determine whether consent has been given. One way of putting the problem with Wertheimer’s view is that he assumes a conception of valid consent on which it necessarily changes

15 More recently, Wertheimer has defended a view that distinguishes between ‘valid consent’ and ‘morally transformative’ consent, with intentional action associated with the former but not necessarily the latter. See Franklin G. Miller and Alan Wertheimer, “Preface to a Theory of Consent Transactions: Beyond Valid Consent,” in The Ethics of Consent: Theory and Practice, ed. Franklin G. Miller and Alan Wertheimer (Oxford: Oxford University Press, 2009) 79–106. I suspect this new view also involves a failure to properly distinguish between impermissibility and blameworthiness.
what is permissible, but at the same time implicitly works with a conception of permissibility that does not cohere well with that conception of consent.

The tight connection between consent and changes of permissibility makes more sense in the context of a rather different conception of permissibility. Some, like Judith Jarvis Thomson, deny that what an agent knew or should have known makes a difference to the permissibility of her actions.\textsuperscript{16} Instead, permissibility is determined by the objective facts. If so, then it seems that what Antonia does is impermissible, though perhaps not blameworthy. After all, Brian certainly does not consent. The proponent of the behavior view insists that the biopsy case is different because the patient does engage in some relevant behavior. But this once again leaves it mysterious how the patient’s level of understanding comes to be deliberatively relevant for the doctor. If the patient consents by behaving in a certain way, it would seem that that behavior is all the doctor needs to attend to.

I suggest, then, that regardless of how one thinks about permissibility, it makes more sense to think of the patient in Wertheimer’s case as not consenting. The doctor should be attempting to determine whether the patient understands what she is doing. And this is best explained by taking her mental states to be relevant to whether or not she gives valid consent.

2.3 The Hybrid View

Having observed the problems that the mental state view and the behavior view face, we are now in a position to consider the hybrid view. Recall that on the hybrid view certain kinds of mental states and certain kinds of observable behavior are both necessary for valid consent. Here I am going to consider which kinds mental states and which kinds of behavior are relevant.

Beginning with the relevant mental states will guide our view of the relevant behavior. In

order for consent to play its role in a system of rights, the behavior that signifies consent must be undertaken intentionally. Suppose Brian is prone to sleepwalking. If he nods at Antonia’s request to borrow her car in such a condition, this does not constitute consent. Of course, if Antonia had no reason to think that Brian was sleepwalking when he nodded, she may be blameless for taking the car under these circumstances. But if she knew that he were sleepwalking, she could not take herself to have his consent. And this suggests that the moral principles governing consent identify intentional action as a necessary condition for valid consent.

But we should be careful about further specifications of the mental states associated with intentional action. It is easy to slide from the thought that consent must involve an intentional action to the thought that consent must involve an intention to consent.17 But consenting need not be the sole or even primary aim of an agent who gives consent. For example, if Antonia asks to borrow Brian’s car, there are any number of reasons why he might say ‘yes’. He might want to appear generous to his other friends, to avoid being pestered about the matter by Antonia in the future, or to head off requests from others to borrow the car. And it may not matter for any of these purposes whether Antonia’s permissions actually change. That is, it may not matter to Brian whether he is actually giving his consent or merely appearing to do so. And for this reason it may not be entirely apt to describe him as intending to consent. But giving Brian the power to mislead Antonia about her permissions by saying ‘yes’ without intending a change in permissions is in tension with seeing consent as playing a role in a system of rights that coordinates our actions. Such a power could only serve to make coordination more difficult. So, reflection on this sort of case suggests that what really matters for consent is that Brian understands that his behavior expresses consent, whether or not he actually intends to consent. What kinds of behavior express consent?

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17 Dougherty seems to make such a slide: “Since consent must be intentional, everyone should agree that an intention is necessary for morally valid consent” (Dougherty, “Yes Means Yes,” 229). And he elsewhere suggests that what is being communicated on his view is the intention to consent (Dougherty, “Yes Means Yes,” 230).
This will be settled by communicative conventions and interpretative activities that associate behavior with consent. I will consider this issue in more detail in Section 2. But with this general idea in mind, we thus arrive at the following view: valid consent requires that an agent intentionally engage in behavior that she understands expresses consent.

It is worth contrasting this view with another recent articulation of the hybrid view. Tom Dougherty argues for a hybrid view in a way that involves some important similarities to my argument but also some significant differences. And these differences lead him to a different understanding of the behavior and mental states that are relevant for consent. I will briefly explain Dougherty’s argument and where I think it goes wrong.

Dougherty’s argument proceeds as follows:

1. Consent has certain valuable functions.
2. “These functions are achieved through altering relationships of accountability, which are constituted by people’s rights.”
3. Altering these relationships of accountability requires that people have “common belief concerning which rights are created or eliminated.”
4. This common belief requires public behavior, typically communication, that “signifies the exercise of the normative power.”

Therefore, consent requires public behavior, typically communication.

The first two steps of this argument resemble the argument I gave in Section 1.1 against the mental state view. But there are important differences. I am going to discuss the differences and then suggest that the way in which Dougherty rejects the mental state view sets up problematic arguments for his own view.

Dougherty motivates the rejection of the mental state view and his own argument for the hybrid view by developing a lengthy analogy with promising. Let us begin by considering how this analogy tells against the mental state view. While consent waives a duty that stems from a right, promising creates a duty and a corresponding right. And Dougherty suggests that no one seriously

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18 Dougherty, “Yes Means Yes,” 250.
19 Dougherty, “Yes Means Yes,” 250.
20 Dougherty, “Yes Means Yes,” 250.
entertains a mental state view of promising. And when we consider the functions that promising plays, it is not surprising why. How could a mere mental state invite reliance, for example? Likewise, a mere mental state does not seem capable of achieving the functions associated with consent. Dougherty associates consent with three valuable functions. By waiving the duties our rights impose on others, consent enables intimacy, the alteration of our bodies and our property, and mutual use of those objects. But how could a mere mental state facilitate something like intimacy?

I take the three valuable functions Dougherty associates with consent to all be examples of the ways in which consenting and the rights associated with that power enable us to coordinate our attempts to live our lives as we see fit. So, in one way, the difference between the functions we associate with consent is quite minimal. But, importantly, in describing our rights as establishing relationships of accountability, Dougherty sometimes includes questions of blame and sometimes not. And this makes a significant difference to how we understand premise 3 in his argument, i.e. that altering these relationships of accountability requires that people have “common belief concerning which rights are created or eliminated.” He describes two people as having common belief that $p$ just in case: each believes that $p$; each believes that the other believes that $p$; each believes that the other believes that they believe that $p$; and so on. Are such beliefs really necessary for valid consent, i.e. for changing the permissions people have? Here are three arguments that suggest not.

First, consider a case in which communication is difficult. Suppose Adam and Ben are settlers in the Americas in the mid-1700s. Ben has to travel back to Europe to take care of some

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21 Dougherty, “Yes Means Yes,” 234.
22 For the focus on permissibility, see Dougherty, “Yes Means Yes,” 227, especially footnote 9. For the switch to blame, see Dougherty, “Yes Means Yes,” 245.
25 I am indebted to James Shaw for prompting me to consider this kind of example.
family business but plans to return in time to plant crops in his field. When he arrives in Europe, he realizes that he will have to stay much longer than expected. He writes to Adam, “You may plant crops in my field.” Adam receives the letter some months later. When considering whether he is permitted to plant crops in Ben’s field, does Adam need to consider whether Ben believes he has received the letter? Knowing that trans-Atlantic communication is not very reliable, Adam may reasonably think that Ben does not have adequate evidence to support a belief that Adam has received the letter. Ben can at most hope that he has.

Dougherty acknowledges that the beliefs associated with common belief can be held more or less confidently, and suggests that the confidence required for valid consent varies with the stringency of the duties that would be violated in the absence of valid consent. This does not help with the case under consideration for two reasons. First, it is plausible to think that the stakes in this case are not trivial. For example, planting this year might significantly effect how Ben can use the land in subsequent years. So, Adam would be seriously wronging Ben if he planted in his field without his permission. And that suggests that relatively high confidence is needed. Second, notice that I have described the case as one in which Ben does not have adequate evidence to form the relevant belief at all. So, it is not merely that he holds this belief without a high level of confidence. Thus, Dougherty’s view suggests that it is impossible to give valid consent in these circumstances.

I take this conclusion to be counterintuitive. And it is important to see that the conclusion cannot be rescued by introducing a distinction between impermissibility and blameworthiness. One might try to suggest that Adam would be blameless if he planted in Ben’s field regardless of whether he was permitted to do so. But if Adam ignored or acted contrary to a condition on valid consent, it is difficult to see how he could be blameless.

Moreover, once we have the distinction between impermissibility and blameworthiness in view, we can give a different explanation of the significance of some of the beliefs that figure in
Dougherty’s account. It is important that Adam believe that Ben has engaged in the relevant behavior accompanied by the relevant mental states. Suppose, for example, that Ben’s letter is lost at sea. If Adam proceeds to plant in the absence of the letter, his action will involve problematic reasoning for which he is blameworthy. In this way, the significance of Adam’s beliefs can be accounted for without incorporating those beliefs in the conditions on valid consent.

Let us move on, then, to the second argument against the common belief condition on valid consent. Dougherty indicates that this condition is needed to make sense of how consent could alter the relationships of accountability that are constituted by people’s rights. In the course of this discussion, Dougherty’s argument trades on an important ambiguity. And when this ambiguity is settled, either his account of rights is implausible or the common belief requirement is unsupported.

Dougherty draws on an argument of Stephen Darwall’s that normative principles must be public because “we cannot intelligibly hold someone accountable for complying with an inaccessible esoteric principle.”26 Dougherty then argues:

This argument gets us as far as the conclusion that the principles governing accountability must be public. But we should note that Darwall’s rationale naturally extends to the specific means by which we hold each other accountable. Insisting on our rights is a key means by which we hold each other accountable. Just as we cannot hold each other accountable for complying with inaccessible principles, we cannot do so for complying with inaccessible rights. So which rights we have must be a public matter. … [T]he rationale for the publicity requirement naturally extends to the normative powers by which we create and eliminate rights. If these powers did not operate publicly, then it would not be public which rights are in play.27

There are two ways of interpreting the idea of accessibility that figures in this argument. On the first, accessibility requires that our rights be the sort of things about which others can form beliefs without too much difficulty. Darwall’s contrast with ‘esoteric’ principles suggests this reading. But this is a much weaker requirement than the common belief condition, which requires that all the

27 Dougherty, “Yes Means Yes,” 245.
involved parties actually have the same beliefs about the rights in question. That is an implausible standard with respect to our rights. Others’ false belief about one’s rights do not necessarily undermine the existence of those rights.\footnote{Some rights may, of course, be conventional and so depend in some sense on the beliefs of others in general. But even in this case the rights are not dependent on the beliefs of specific others.} Suppose, for example, that a racist believes that members of some racial group do not have certain rights. This does not mean that the rights cease to exist. And if our rights do not require common belief, it is unclear why changes in the duties associated with those rights brought about through consent would require common belief.

My third argument against the common belief condition replies to a potential objection to the second argument. Dougherty might draw on his analogy with promising to suggest that, although the existence of our rights does not depend on common belief, changes to our rights do. And indeed it seems quite plausible that promising requires common belief. But I suggest that this reflects a special feature of promising. The recipient of a promise has the authority to accept or reject it. In this way, the creation of a promissory obligation depends on the exercise of both parties’ authority with respect to such obligations. In contrast, the recipient of consent has no authority with respect to whether her permissions are altered. Suppose, for example, that Antonia prefers to borrow Brian’s car rather than another friend’s car because Brian’s car is fancier. If the other friend consents to her use of his car, Antonia will not be able to truthfully tell Brian that she has no other way to get to her destination. So, Antonia might strongly prefer that her friend not give her consent to use his car. But she cannot stop him from doing so.

It is an interesting question why promising and consenting operate in these different ways. I will not be able to pause to examine that issue here. For my purposes in this argument, it suffices to observe that this difference between promising and consenting explains why the former requires common belief. Since promising involves a kind of joint exercise of authority, both parties must understand what is happening. But since consenting does not involve this kind of joint exercise of
authority, there is no similar reason to think that it requires common belief.

We have then three reasons for doubting the common belief condition on valid consent. First, this condition implausibly makes consent impossible in circumstances in which communication is unreliable, and a distinction between impermissibility and blameworthiness can explain the limited significance beliefs have in such circumstances. Second, our rights do not depend on common belief about their existence and so it is unclear why exercises of those rights through consent would require common belief. Third, the common belief condition on promising stems from a feature of promising that consenting does not share. In light of these considerations, we ought to reject the common belief condition on valid consent.

Recall that Dougherty proceeds to the behavior condition on valid consent described in the fourth premise of his argument from the common belief requirement. So, without the common belief condition, Dougherty’s argument for behavior as a condition on valid consent does not go through. The argument I gave in Sec. 1.1 against the mental state view, however, remains a viable route to the behavior condition. Recall that that argument rested on the way in which the mental state view directs us to attend to the wrong sources of evidence about others’ mental states. And with that problem in view, we arrive at the version of the hybrid view that I have defended in this section.

2. Sexual Consent

I now turn to considering the application of my hybrid view of consent to the case of consent to sexual interactions. In this context, some practices associate consent with an omission, e.g. not physically or verbally resisting. Other practices associate consent with some affirmative action, e.g. affirmative verbal or physical behavior. What reasons might there be for taking one set of practices to be superior to another?
2.1 Omissions

Dougherty suggests that, although in principle omissions can signify consent, in practice they will generally be inadequate. He considers the following example:

“If a chair of a meeting announces that she will take silence as assent to a proposal, and it is clear that her colleagues have no other reasons for being silent, then their silence can communicate their assent. I suspect examples like these are rare in practice, since silence typically admits of multiple interpretations. For example, the chair’s colleagues may be inhibited from disagreeing with more powerful coworkers, they may not have had time to make their minds up, they may prefer that others are the ones to object to the proposal, or they may simply prefer that the meeting does not drag on any longer.” (230).

Dougherty takes these multiple interpretations of silence in this context to introduce ambiguity that makes it difficult to take the silence to signify consent. But recall the lesson of the multiple reasons why Brian might say ‘yes’ in response to Antonia’s request to borrow his car. Having reasons that are orthogonal to consent motivate one’s consenting behavior does not invalidate consent. And this is no less the case when omissions rather than affirmative actions signify consent.

Notice that this objection to Dougherty’s application of his view does not rest on the objection in the previous section to the common belief condition on valid consent. Even if one endorsed such a condition, there is an important further question about what the beliefs involved in common belief must be about. If one endorses my diagnosis of what is relevant about the mental states of a person giving consent, then none of the alternative interpretations of the motivation for silence in the example stand in the way of taking silence to signify consent in a way that supports common belief in consent’s occurrence. So, even relative to that standard, these alternative interpretations do not stand in the way of valid consent.

Now consider the sexual context. In this context, Dougherty suggests that the person from whom consent is required “could still be deciding whether to consent, this person could be unwilling but afraid, this person could be temporarily paralyzed by the sexual encounter, and so on.”
Consequently, inactivity is likely to be too ambiguous for sexual consent.” (252) Although Dougherty treats all of these alternative interpretations as on a par, the last potential interpretation is importantly unique. If a person is temporarily paralyzed by the sexual encounter, her inactivity is no longer intentional behavior. Instead, she is like Brian when he sleepwalks. And so her inactivity cannot satisfy the conditions on valid consent.

Some research indicates that this kind of paralysis is not uncommon in traumatic sexual encounters. Given this, although omissions can in principle express consent, communicative conventions that associate omissions with consent in this context are problematic. Such conventions associate meaning with behavior that may regularly be unintentional. And this runs contrary to the aim of coordinating our actions.

But I do not think that this the only significant problem with taking omissions to express consent in the sexual context. I suggest that conventions that associate omissions with expressions of consent in this context are unreasonably burdensome. Return to the example of silence in response to the meeting chair’s call for objections. As A. John Simmons points out in his treatment of this case, a convention requiring one to lop off one’s arm in order to express dissent to the chair’s proposal the would be deeply problematic because of the burdens involved in doing so. And for that reason, a person’s omission of such an action should not be taken to express consent. Likewise, consider a convention that takes one to be consenting to a sexual encounter unless one physically resists. Such a standard requires people to risk serious physical injury in order to avoid consenting. And that is unreasonably burdensome.

One might doubt that this argument supports an objection to a convention that takes one to be consenting to a sexual encounter unless one verbally resists. After all, speaking need not be

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burdensome in the way physical resistance is. But I suggest that this convention is unreasonably burdensome in another important respect. This standard licenses potentially unwanted interactions before saying ‘no’ is even a salient possibility. For example, consider the subway rider who begins fondling a stranger on the train. By the time the stranger realizes what is happening and says ‘no’, some amount of unwanted sexual touching has already occurred. Given the significance many people attach to being able to make sexual choices for themselves, this seems seriously problematic. So, there are then two significant reasons against taking omissions to express consent in the sexual context. First, doing so overlooks the extent to which omissions may not be instances of intentional behavior in this context. Second, doing so involves unreasonably burdening those who do not consent.

2.2 Affirmative Behavior

Let us turn then to practices associating consenting with some kind of affirmative behavior. This behavior could be verbal or nonverbal. Is there any reason to favor a practice that associates sexual consent only with affirmative verbal behavior?

In at least some non-sexual contexts, nonverbal behavior can express consent. Suppose Antonia asks Brian to borrow his car and Brian responds by tossing her his keys. Here there are no particular conventions associating this behavior with consent. But it makes sense to interpret Brian’s action as expressing consent for two reasons. First, given Antonia’s request, it is clear that Antonia and Brian are in a context in which consent is at issue. If Brian tossed Antonia his keys out of the blue, there would be no particular reason to take this action to express consent. He might be showing off his key chain, killing time with a game of catch, or preparing to ask Antonia to put his keys away. Second, Brian’s action facilitates the action to which he is giving consent. If instead of tossing his keys, Brian responded to Antonia’s request by tossing her a cookie, there would be no
particular reason to take this behavior to express consent. She would still be waiting for his reply.

Might consent work in the same way in sexual contexts? Consider an example of Dougherty’s: “suppose that in the context of an established sexual relationship, Sam places a condom on his partner, Craig. Sam’s action could clearly communicate to Craig his consent to sex, even if words are never used.” (251). This case seems to meet the two criteria I laid out above: (1) it is clear the parties are in a context in which consent is at issue, and (2) Sam’s action facilitates the action to which he is giving consent. In this way, it seems prima facie appropriate to take Sam’s nonverbal behavior to express consent.

Nonetheless, there are four important risks involved in taking nonverbal behavior to express consent in the sexual context. First, in many cases although it will be clear that the parties are in a context in which consent is at issue, it may often be less clear what one would be giving consent to the other to do. In Antonia and Brian’s case, it is clear what the object of consent is because Brian’s action is a response to Antonia’s request. And in Sam and Craig’s case, there may be no other salient actions that Sam’s action could facilitate. But there may often be more ambiguity regarding this issue. For example, in one way kissing facilitates penetration as it moves two people closer together. But kissing might also be thought of as an end in itself and not a means to some further activity, or instead as facilitating some further activity, e.g. fondling, but without any aim of permitting penetration.31

Second, in the heat of the moment, one’s judgments may be clouded by one’s desires. This may make one more likely to see in others’ behavior what one wants to see. And this should make us wary of relying on our interpretations of others’ behavior in this context.

Third, since omissions have historically conventionally been associated with consent in the sexual context, nonverbal behavior lost the expressive power it might otherwise have had. Actions

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31 For a helpful discussion of this issue, see Michelle Anderson, “Negotiating Sex.”
that might otherwise have expressed consent are largely irrelevant to whether consent is being given if one is operating in a context in which omissions signal consent. And this recent history may confuse the interpretation of behavior that might have otherwise been clear.\textsuperscript{32}

Finally, research suggests that men and women interpret nonverbal behavior in different ways. This poses a special problem for taking nonverbal behavior to express consent in heterosexual relationships.\textsuperscript{33}

In light of these problems, we should consider whether associating consent with nonverbal behavior with allows consent to adequately play its role in coordinating our actions. While the foregoing considerations suggest not, it might be suggested on the other side that associating only verbal behavior with consent forecloses a certain kind of sexual activity that many people value. One might worry that a standard requiring verbal consent would, as Stephen Schulhofer puts it, “impose a degree of formality and artificiality on human interactions in which spontaneity is especially important.”\textsuperscript{34}

This concern suggests a possible intermediary position: verbal behavior is required unless another standard has been verbally agreed upon. This position combines the protections offered by the verbal standard with the flexibility to move to a more capacious standard. So, sexual partners could agree to practices that allow for greater spontaneity.

Furthermore, notice that the verbal standard is compatible with two rather different kinds of sexual interactions. One might ask one’s partner at the outset something like, “How about sex?” Alternatively, one might ask one’s partner about each new sexual activity, e.g., “How about kissing?”

The latter interaction may involve less spontaneity than the former. But a verbal standard does not in itself require this second way of interacting. So, one might retain a great deal of the spontaneity of the interaction by an initial act of consent to sex. And if one is not prepared to consent to sex at the outset, this seems like precisely the circumstance in which checking in about each new sexual activity is appropriate.

If we combine the observation about the possibility of initial consent to sex and the suggestion that one may agree with one’s partner to adopt a more capacious standard, then the verbal consent requirement really only rules out the possibility of completely silent sex with someone with whom one has not previously agreed to change the standards. This, I think, is a relatively minor limitation given the importance people place on having control over when and with whom they have sex.

2.3 Verbal Consent and the Law

The foregoing discussion suggests that agents who are trying respect the rights of others ought to look for verbal expressions of consent in the sexual context. This claim reflects the greater likelihood of errors in interpreting nonverbal behavior in the sexual context and the relatively low cost associated with this kind of caution. What does this mean for what the law governing consent in the sexual context ought to be like?

The law sometimes demands less of us than morality. For example, the law may not require one to be charitable to others, but morality might. The laws governing sexual consent are not plausibly thought of in this manner. Protecting the integrity of our bodily rights is one of the law’s chief aims. So, a law that demanded less of us than morality requires in this area would be

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36 Of course, even when one consents in this way, one may still change one’s mind. And in these cases, one is still free to revoke one’s consent.
On the flip side, the law sometimes requires more of us than morality demands. For example, it might not be a serious moral wrong or even wrong at all to jaywalk when one can clearly see that there is no traffic anywhere near, but the law does not carve out such exceptions. On this model, it might be possible to argue that the law ought to use a verbal consent standard, but that it might sometimes be morally permissible for agents to use less caution than the law demands. Since I have already argued that morality supports a verbal consent standard in the sexual context, I do not think that the law and morality are related in this way in this context. But I do think that there are reasons for the law to employ a verbal consent standard that go beyond those I surveyed in the previous section.

Consider two important reasons for adopting a verbal consent standard in the law. First, notice that the law was complicit in and, indeed, key in maintaining the problematic omissions standards for consent in this context. And notice that those standards disproportionately harmed women, who are more commonly the recipients of uninvited sexual contact. Given this, one might think that there is strong reason for the law to do as much as it can to protect women’s sexual autonomy as a remedial measure. And given the tendency for men to interpret women’s behavior differently than women do, a verbal consent standard would do more to protect women’s autonomy in the sexual context than a standard allowing nonverbal behavior to express consent.37

Second, notice that given the lack of clarity in what constitutes consent created by the necessary move away from omissions standards, a verbal consent standard would provide considerable and much needed clarity about the kinds of conduct that are prohibited and permitted. Consider Lani Remick’s helpful discussion of this consideration:

As with any legally proscribed behavior, when potential perpetrators are not given adequate notice of what sorts of conduct are prohibited, the resulting fear that innocent men will be thrown in jail leaves decisionmakers reluctant to return convictions and undermines public confidence in the law.

A legitimate and effective criminal law, therefore, should make the division between criminal and noncriminal conduct clear so that potential perpetrators may conduct themselves accordingly and designated decisionmakers may render their verdicts with a clear conscience. The proposed [verbal consent] standard avoids this problem, making it perfectly clear what sorts of behavior are acceptable and unacceptable: a freely-given “yes” means “yes,” and “no” means “no.”

It might be objected that the value of this kind of clarity is undermined by the extent to which it is at odds with current practices. H.M. Malm succinctly summarizes this objection:

A law that defined all sexual activity that is not preceded by a verbal question and answer period as rape would be so contrary to experience as to be farcical. Thus rather than bringing extra protection to women, such a law might actually set back reform because jurors would likely disregard a standard so at odds with their own experience, and substitute their own ideas of what ought to be rape for the instructions given.

I suggest two replies to Malm’s concern. First, notice that even clearly required laws are not always easy to enforce against a background of misguided moral views. Consider the difficulty one might have in getting a jury to convict members of a lynch mob for murder in circumstances in which lynching is commonly seen as an appropriate form of community enacted justice. But that does not mean there should not be laws against this kind of murder.

Second, as I mentioned at the outset, there are several necessary conditions on valid consent. If my argument has been successful, a verbal expression of consent is among those conditions. But this does not mean that the law must treat all violations of the necessary conditions on valid consent as the same or on a par. So, for example, the use of violence or the threat of violence might be treated as a more serious crime than the failure to obtain verbal consent.

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38 L.A. Remick, “Read Her Lips,” 1140-1141.
40 And in this same vein, it is worth acknowledging that a verbal consent standard is not a cure-all. Such a standard must be combined with the understanding that a coerced ‘yes’ does not produce valid consent.
would still need to be treated as significant if the law is to pay more than lip service to this condition of valid consent. But the recognition that this offense is different in important respects from others may help juries overcome their initial biases. I suggest, then, that there are important reasons for moving toward a verbal consent standard in the law that go beyond the moral reasons agents have to use such a standard to guide themselves.

3. Conclusion

I have argued that valid consent requires that an agent intentionally engage in behavior that she understands expresses consent. This hybrid view of consent is motivated by reflection on the role consent plays in a system of rights that coordinates our actions. This function of consent gives us strong reasons not take omissions to express consent in the sexual context. Moreover, given that nonverbal behavior is prone to misinterpretation in the sexual context for a variety of reasons, the coordinating function of consent is also best realized in this context by taking verbal behavior expressing consent to be a necessary condition on valid consent. While this would involve a rather significant change to our practices, it is a change that is called for by regard for our rights.