

Consent to sexual interactions

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Abstract

The way in which consent to sexual interactions is understood in the US is undergoing a transformation. Many universities, sometimes at the behest of lawmakers, are moving to adopt ‘affirmative consent’ policies, which define consent in terms of affirmative behavior that goes beyond mere silence or lack of resistance. Although these policies are a move in the right direction, I argue that their content has not been properly understood. In particular, the circumstances in which nonverbal behavior may communicate consent are more limited than might be apparent. And even though these circumstances can be abstractly identified, it is difficult to give people adequate guidance about when some of them obtain. Moreover, I argue that no matter how the allowance for nonverbal behavior is construed, affirmative consent policies unnecessarily prohibit interactions that people may have reason to engage in. I propose an alternative policy that remedies these problems with the affirmative consent policies that are currently being implemented. And I note that the justification for this alternative policy does not turn on any special features of the university setting. Instead, the account I give suggests grounds for reforming the law as well.

Keywords

consent, affirmative consent, sex, sexual interactions, sexual assault, rape

The way in which consent to sexual interactions is understood in the US is undergoing a transformation. Until recently, it was commonplace to take silence or lack of resistance to constitute consent to sexual interactions. While this is still generally true in the law,

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many universities, sometimes at the behest of lawmakers, are moving to adopt ‘affirmative consent’ policies. These policies define affirmative consent in terms of affirmative behavior that goes beyond mere silence or lack of resistance. Consider, for example, the definition of affirmative consent given in legislation recently enacted in California: “‘Affirmative consent’ means affirmative, conscious, and voluntary agreement to engage in sexual activity. . . . Lack of protest or resistance does not mean consent, nor does silence mean consent” (California Legislative Information, 2014). Although the affirmative consent movement is associated with the slogan ‘yes means yes’, affirmative consent policies tend not to require verbal agreement. Affirmative behavior may consist in words, but may also consist in ‘clear’ or ‘unambiguous’ actions.¹

In this article, I explain why silence and lack of resistance ought not standardly be taken as giving consent in the sexual context. In this respect, affirmative consent policies are a move in the right direction. I argue, however, that the content of these policies has not been properly understood. In particular, the circumstances in which nonverbal behavior may clearly communicate consent are more limited than might be apparent. And even though these circumstances can be abstractly identified, it is difficult to give people adequate guidance about when some of them obtain. Moreover, I argue that no matter how the allowance for nonverbal behavior is construed, affirmative consent policies unnecessarily prohibit interactions that people may have reason to engage in. I propose an alternative policy that remedies these problems with the affirmative consent policies currently being implemented. While further development of this alternative would be needed before it could be adopted, the schema I provide is a promising step forward. And I note that the justification for this alternative policy does not turn on any special features of the university setting. Instead, the account I give suggests grounds for reforming the law as well.

Consenting through omissions

People’s rights prohibit certain ways of interacting with them without their consent. By consenting, one overrides the barrier to the permissibility of another’s action that stems from one’s rights. In this way, the power to consent enables people to shape their interactions with others by exercising discretion over what they are permitted to do. As I noted above, it is commonplace to associate consent to sexual interactions with an omission, that is, not physically or verbally resisting. But a movement is underway to associate consent with some kind of affirmative act.² What reasons might there be for taking one set of practices to be superior to the other? Tom Dougherty has recently argued that, although in principle omissions can communicate consent, in practice generally they will 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. (Dougherty, 2015: 230)

Dougherty takes these multiple interpretations of silence in this context to introduce ambiguity that makes it difficult for silence to communicate consent. Call this the *ambiguity objection* to communicating consent through omissions.

This objection misconstrues how consenting behavior may be related to other aims a person has. Suppose Antonia wants to borrow Brian's car. There are any number of reasons why he might say 'yes'. He might, for example, want to appear generous in front of other friends. And it might not matter for this purpose whether he actually thereby permits Antonia to borrow the car or merely appears to do so. Nonetheless, when he understands that his words will quite reasonably be interpreted by her as consenting, he does in fact give her permission, whatever else he may be attempting to do.³ Likewise, when silence is the understood by all to communicate consent, it does not particularly matter if the primary reasons why one is silent are orthogonal to changing others' permissions. If one remains silent because one wants a meeting to end but one understands that this communicates consent to a proposal, one has indeed consented to the proposal.⁴

Contrast the ambiguity objection with what I will call the *intentionality objection*. Here the worry is not that there are other things you might be trying to do by not physically or verbally resisting. Instead, the worry is that you might not be intentionally doing anything at all.⁵ In order for consent to adequately reflect one's authority to determine others' permissions, it must be intentionally given. But some research indicates that temporary paralysis is not uncommon in traumatic sexual encounters.⁶ 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.

The intentionality objection is not the only significant objection to associating consent with omissions in the sexual context. Let us turn next to the *burdensomeness objection*. Consider once again the example of silence in response to the meeting chair's call for objections. As A. John Simmons (1981: 81) 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 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. Speaking, one might argue, is not burdensome in the way physical resistance is. Regardless, I suggest that this convention is unreasonably burdensome in another important respect. Here, the burden lies in the lack of control this convention gives one over how others interact with one. 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.⁷

So, the intentionality objection and the burdensomeness objection both provide good reason to reject associating consent with omissions in the sexual context. They suggest different ways in which relying on omissions in this context is at odds with enabling people to shape their interactions with others by exercising discretion over what they are permitted to do.

Understanding affirmative consent policies

Affirmative consent policies are a positive movement away from problematic omissions standards. As I noted, these policies require that consent be communicated through some affirmative act. And they typically allow that both verbal and nonverbal behavior can communicate consent. Although ‘verbal’ sometimes connotes only what is spoken, here I take this category to also include the use of written words and sign language.

If consent is to enable people to shape their interactions with others, the behavior used to communicate consent must not be easily misunderstood. I take it that is why these policies typically specify that the behaviors must be clear or unambiguous. In what follows, I consider when nonverbal behavior can actually meet this standard. But before turning to that investigation, it will be useful to distinguish between three dialectical roles any kind of consenting behavior may occupy. First, consider solicited consent. You might ask to borrow my car, and I might say ‘yes’ in response, thereby giving you solicited consent. Next, consider unsolicited consent. I might notice that you need a car and tell you that you may borrow mine without any prompting by you. I might even offer to lend you my car out of the blue. And in both these cases, my consent would be unsolicited. Finally, in this context, it is worth considering a special case of unsolicited consent, which I will call presupposed consent. I may ask or tell you to do something and thereby convey my consent to that action. I might, for example, ask you to move my car so that I can avoid a parking ticket. A presupposition of this request is that I consent to you moving my car. Presupposed consent is worth singling out for attention here because unsolicited consent to sexual contact does not typically take the form of an announcement of one’s willingness to engage in such contact. Instead, typically unsolicited consent is presupposed in one’s solicitation of another’s consent. For example, a presupposition of a request to have sex is that one consents to having sex.

In each of the examples just given, consent is given by affirmative verbal behavior. Nonverbal behavior can in principle communicate solicited, unsolicited, and presupposed consent. Let us begin with solicited consent. Suppose you ask to borrow my car and I respond by tossing you my keys. It makes sense to interpret my action as communicating consent for two reasons. First, given your request, it is clear both that we are in a context in which my consent is at issue and what the object of my consent would be, namely, borrowing my car. Second, my action facilitates the action to which I am giving consent. If instead of tossing my keys, I responded to your request by tossing you a candy bar, there would be no particular reason to take this behavior to communicate consent. You would still be waiting for my reply.

It is more difficult for nonverbal behavior to communicate unsolicited consent. If I tossed you my keys out of the blue, there would be no particular reason to take this action to communicate consent to borrow my car. I might be showing off my key chain or killing time with a game of catch. But with enough context, successful communication might still be possible. Suppose that you have just been lamenting that since your car is in the shop it will take you considerably longer than usual to run your afternoon errands. And I respond to your comments by tossing you my keys. Here, although you have not asked to borrow my car, your comments make that possibility more salient than it would otherwise be. And so when I perform an action that facilitates borrowing my car, it *might* not be unreasonable to interpret me as communicating consent through my actions. Here, though, much about the background matters. If we are mere acquaintances, you would likely respond to my action with confusion or incredulity. And notice that your puzzlement would not just be because your lack of familiarity with *me* makes it difficult to interpret my behavior. At least in this cultural context, lending a car to someone who is a mere acquaintance would be unexpected. And this would make it difficult for this possibility to be salient enough to provide a clear interpretation of my action even given your need.

Finally, let us turn to presupposed consent. In order for nonverbal behavior to communicate presupposed consent, that behavior must communicate the request or command that presupposes consent. Social practices can facilitate this. Suppose you are at a wedding reception where many people are dancing. A stranger approaches you and silently ‘offers’ you his hand. Here the gesture of an outstretched hand communicates a request to dance and that request presupposes that the stranger consents to dance with you. Now suppose you place your hand in his and you wordlessly proceed to the dance floor. Given the clarity of his request, your nonverbal behavior can meet the two criteria laid out above: it is clear what you would be consenting to and your actions facilitate what you are consenting to.

Patterns of behavior between individuals can also enable nonverbal behavior to convey requests or commands. Suppose every week for the last several months I have asked for your help carrying my groceries up to my apartment. Today, I glance down at the groceries and give you a ‘pleading’ look. Given the pattern of the last several months, it would be reasonable for you to interpret me as asking for help with my groceries. And that request presupposes that I consent to your interaction with them.

Let us turn to considering the implications of this investigation for sexual consent. We have seen that it is relatively straightforward how nonverbal behavior can clearly communicate solicited consent when the solicitation itself is sufficiently clear. This is also true in the sexual context. Suppose, for example, Andrew asks Beth if she wants to have sex. Beth might respond by kissing Andrew, by beginning to remove her clothing, or by tossing Andrew a condom. When Andrew’s question frames their interaction, any of these actions can reasonably be interpreted as agreeing to Andrew’s proposal.

But it is more challenging for nonverbal behavior to clearly communicate unsolicited consent, including in the special case of presupposed consent. Here the prospect of successful communication depends on the contextual salience of various possibilities, the background of social expectations, and the history of interactions between the parties. These factors must make it sufficiently clear both that one is consenting and what

one is consenting to. I will now argue that special features of the sexual context make it difficult for one object of consent to be uniquely salient and limit the clarity of the background social expectations that are relevant both to identifying behavior as conveying consent to something and identifying the object of that consent. This means that much of the work must be done by the history of interactions between the parties.

Let us begin with a problem with identifying a uniquely salient potential object of consent. The kinds of sexual actions that could be thought to facilitate further sexual contact are sometimes undertaken as ends in themselves. For example, in one way, kissing facilitates further sexual contact by moving two people closer together. But kissing might be undertaken for its own sake and not as a means to any further activity. This can make it challenging to determine what the object of consent is if consent is communicated by nonverbal behavior (see Anderson, 2005a).

Next, consider two ways in which the background of social expectations may be unclear in the sexual context. First, the social context we bring to bear on the interpretation of others' behavior in the sexual context is deeply shaped by the prevalence of omissions standards in which consent is presumed unless resistance is given. Against this background, it is not surprising that students presented with affirmative consent policies express confusion about what kinds of behavior count as expressing consent (see Bennett, 2016). We lack a stable set of expectations about how people will express their sexual choices in the context of an affirmative consent standard.

Second, research suggests some differences in how men and women interpret certain kinds of behavior, with men interpreting people's behavior as showing more interest in pursuing sexual activity than women do (see Anderson, 2005a; Lindgren et al., 2008). Some studies focus on interactions that include verbal behavior, like conversations that are not explicitly about sex. Others focus on nonverbal behavior, like maintaining eye contact. Although these studies are typically not about interpretations of consent, they suggest a problem for using nonverbal behavior and inexplicit verbal behavior to communicate consent. As we have seen, the possibility of interpreting another's behavior as communicating consent depends heavily on the context in which the behavior occurs. Differences in the extent to which men and women perceive their interaction to be sexually charged pose a problem for arriving at the same interpretation of behavior that might potentially communicate consent.

One recent but small study focusing directly on how consent is expressed seems to support differences in how men and women treat nonverbal behavior as an expression of consent, with only 10 percent of women indicating that they express consent to sex using body language or nonverbal cues and 61.2 percent of men indicating that they interpret their partners' as consenting on the basis of body language or nonverbal cues (Jozkowski, 2011; see also Jozkowski and Peterson, 2013; Kitroeff, 2014).

This is, of course, just one study. Significantly more research would need to be done to confirm this finding. It is also worth emphasizing some important limitations of all of the research just described. The subjects of these studies are almost exclusively college students. Study subjects are also predominantly White. And the studies focus on heterosexual interactions.⁸ In the light of these limitations, policy makers considering affirmative consent policies would do well to commission further research. But the research as it

stands presents compelling reason to question the reliability of nonverbal behavior to communicate consent to sexual interactions between men and women.

To be clear, I have not argued that successful nonverbal communication of presupposed consent and other forms of unsolicited consent between people with no shared sexual history is impossible. I have argued only that there are significant obstacles to the success of such communication, making it unreliable. And this has important consequences for how we understand even the relatively unproblematic case of nonverbal solicited consent. We cannot reliably infer presupposed consent from people's nonverbal behavior precisely because we cannot reliably interpret them as requesting or inviting sexual contact through these actions. But this just means that a sufficiently clear solicitation of consent must in general be verbal. This leaves us with the conclusion that, between parties with no shared sexual history, affirmative consent policies generally require verbal consent unless one is nonverbally responding to a verbal request.⁹

But this implication of affirmative consent policies is far from obvious. To see how easy it is to misconstrue the implications of the policy, consider how a reporter covering the new affirmative consent policies answers a question raised by a student about those policies:

“Can you at least use body language instead of always having to ask out loud?” Yes. California's definition and the revised language going into effect in the fall in New York are clear on this point. Body language and physical cues (say, a clear nod) would count, though both warn that consent can be revoked at any time. (Keenan, 2015)

Notice two interesting features of the way the reporter answers the student. First, the reporter seems to affirm that nonverbal behavior can communicate consent without being prompted by asking ‘out loud’. But what we have seen is that, outside of the context of repeated interactions, it is difficult to clearly ask for consent to sexual contact using nonverbal behavior. And without a clear request, it is difficult for nonverbal behavior to clearly communicate a reply. Second, notice that the example of nonverbal behavior the reporter gives is of a clear nod. But nodding is a conventional sign for ‘yes’ that comes very close to, and perhaps even ought to be counted as, a kind of verbal behavior. Of course, one reporter's confused reply to a student's question does not by itself cast doubt on the possibility of adequately educating people about the contexts in which nonverbal behavior may be a reliable way of communicating consent. But it is worth noting the way in which the relevant distinctions are not transparent.

So far, I have focused on the status of nonverbal behavior between parties who do not share a sexual history. Now, let us consider parties who do. Recall that if I ask for your help carrying my groceries every week, I might be able to silently convey my request with simply a look. Likewise, suppose that every time Andrew and Beth get together, Andrew asks Beth if she wants to have sex and she agrees. After asking out loud a few times, he might be able to convey the same question with a playful look and a glance at the bedroom door. And she might respond by beginning to kiss him, thereby responding affirmatively to his request.

I see no reason to doubt the possibility of reliable nonverbal communication between people who have prior experiences with each other. And these methods might even be

rich enough to allow for reliable communication in novel circumstances, that is, in circumstances that do not follow a preestablished pattern. There is, though, some ambiguity about when one knows another person well enough to trust this form of communication. And that makes it difficult to give people guidance about when they may transition from one form of communication to another.

I take this discussion to have shown that nonverbal behavior is generally a clear communicator of consent only when it occurs in response to a verbal solicitation of consent or in the context of an established sexual relationship. The first qualification means that there is less room for communicating through nonverbal behavior in interactions between new or relatively new sexual partners than one might have thought. The second qualification opens up considerable space for communication through nonverbal behavior. But there is no clear specification of what constitutes an 'established' sexual relationship readily available. So, in this case, affirmative consent policies are not as action-guiding as would be ideal.

The modifiable consent standard

I have argued that the allowance affirmative consent policies make for communicating consent through nonverbal behavior is both more limited and less helpful than might be apparent. But, however, this allowance is interpreted, there is a further problem with affirmative consent policies. Consider the following example. After being in a sexual relationship for a while, one day Andrew steps up behind Beth, puts his arms around her, and begins kissing her neck. There is no mechanism for affirmative consent policies as they are presently written to countenance this kind of interaction. These policies are typically clear that consent to sexual contact on one occasion does not imply consent to sexual contact on another occasion. And in this case, Beth has engaged in no affirmative behavior to consent to the sexual contact. So, it seems that these policies must treat what Andrew is doing as akin to what the stranger on the subway does when he fondles his unwitting victim. And of course it may very well be that Beth does not welcome this form of interaction, and hence that there is very little difference between the two cases. But it seems possible for people to want to be able to interact in this way with each other, that is, to be able to initiate and receive sexual contact without some affirmative sign of consent in the moment.¹⁰

If there were no way to combine the freedom to engage in this form of interaction with consent's role in enabling people to exercise discretion over others' permissions, then the loss of this kind of freedom would be unproblematic. But there is a fairly straightforward way of accommodating the interest people may have in this kind of interaction. Andrew and Beth could have a conversation in advance about what kinds of sexual contact they agree they will permit in the future while reserving the power to revoke consent at any time. A policy allowing this possibility would enable people to determine for themselves how much unwanted sexual contact they are willing to risk in order to obtain experiences of intimacy that are not preceded by affirmative behavior in the moment.

Such a policy might be formulated as follows:

The Modifiable Consent Standard: consent to sexual contact requires a verbal or nonverbal affirmation of a verbally articulated object of consent, unless either:

1. The parties have verbally consented to modify this policy in their interactions. Note that the parties remain free to rescind this modification at any time. Or:
2. The parties have developed a reliable method of nonverbal communication through repeated interactions. Note that the only way to begin developing such a method without subjecting others to an unreasonable risk of miscommunication is by verbally agreeing to do so.

Clause (2) bears a noteworthy relationship to clause (1). If everyone acted as they ought, the only exception to the default standard would be articulated by clause (1). But clause (2) acknowledges that even when people have taken unreasonable risks in the formation of a reliable method of nonverbal communication, they may nonetheless develop such a method. And once they have done so, worries about miscommunication no longer support requiring verbal communication.

The modifiable consent standard requires verbal or nonverbal affirmation of a verbally articulated object of consent unless either of the two exceptions hold. The consentor may respond to this articulation rather than give it, as when Beth responds to Andrew's proposal to have sex by kissing him. There is a difficult question about how specifically the object of consent must be articulated. In all consenting contexts, some reliance on the social understanding of the activities in question is inevitable. For example, when borrowing a car, one need not specify each and every turn one intends to make while driving. Instead, parties rely on some conception of what it is reasonable to expect borrowing a car to involve, and how these expectations may be modified by explicit stipulation. Determining how specifically the object of consent needs to be articulated in the sexual context requires determining when there is a sufficiently robust shared social understanding of the activity in question. Although this is a task would need to be undertaken in order to fully flesh out the modifiable consent standard and make it a viable candidate for implementation, I set it aside here. Any policy that leaves behind the problematic omissions standards will need to give some account of what people are consenting to when they give their consent. And thus settling this issue does not tell between competing alternatives to omissions standards.¹¹

Notice that the modifiable consent standard allows for a variety of changes to consenting practices. There are three important elements of potential changes to a consenting practice. First, partners may consider the duration of the proposed change. In the example above, I consider the possibility that Beth and Andrew might want to allow sexual contact that is not preceded by affirmative consent in the moment in all of their interactions. But others might want to change their consenting practice only on a single occasion. This possibility may be especially salient for new sexual partners. Still others may want an altered consenting practice to obtain only under certain conditions, for example, so long as they remain in a monogamous sexual relationship, or only in private, or only while on vacation.

The second important element of potential changes to a consenting practice concerns the signaling strategy it employs. Beth and Andrew want to allow sexual contact that is not preceded by affirmative consent in the moment. That amounts to agreeing to use an omissions standard. But one might also have more nuanced signaling preferences. One might agree, for example, that initiating sexual contact requires affirmative consent but

that once that has been secured, no further checking in is requiring to initiate other sexual activities during that very interaction.

Finally, consider the scope of the sexual interactions governed by the altered consenting practice. One might take the proposed change to apply to any potential sexual act. But one might also prefer a more nuanced practice. For example, partners might choose an omissions standard for any sexual act that they have previously performed together but require explicit affirmative consent for anything new.

In these ways, the modifiable consent standard gives sexual partners considerable freedom to shape the terms of their interactions. This freedom, however, presents two practical problems. First, one might worry about how to interpret agreements to change a consenting practice. Here too it is important to try to minimize the potential for miscommunication. Thus, we must consider how explicit partners must be about what they are agreeing to change. This is a more extensive version of the problem of identifying appropriately described objects of consent that all alternatives to omissions standards face.

Requiring some explicit reference to each of the three elements of an altered consenting practice can go some distance toward arriving at a sufficiently clear understanding of such a practice. One might, for example, move to a very capacious use of the omissions standard by saying ‘no need to check in about anything’ and specifying some duration like ‘tonight’ or ‘from now on’ or ‘as long as we are dating’. Even so, understanding the content of such agreements unavoidably requires some reliance on context and salience. The agreements are about sexual acts and thus rely on some sense of what constitutes a sexual act. For this reason, some extra degree of explicitness might be needed to include even highly novel sexual acts in the scope of the agreement.¹²

The second practical problem the modifiable consent standard faces concerns the possibility that people may make poor choices about what kinds of risks they are prepared to face and what kinds of interactions they are prepared to participate in. But this worry is at least to some extent mitigated by the ongoing possibility of revoking consent at any time both to any specific interaction and to the consenting policy one previously accepted. If, for example, Beth finds that Andrew surprises her too often with sexual contact she does not want, she retains the freedom to revise what she consents to.

The modifiable consent standard allows consent to play its role in enabling people to shape others’ permissions while giving people the freedom to engage in a variety of forms of sexual contact. Moreover, the policy resolves the difficulty affirmative consent policies faced about giving people guidance about how established a sexual relationship must be before it is reasonable to rely on nonverbal behavior. I suggest, then, that the modifiable consent standard provides a better way of addressing the problems of omissions standards.

Campus codes verses criminal laws

As I indicated at the outset, affirmative consent policies are gaining most traction in the university setting. Sometimes this is at the direction of lawmakers and sometimes not. But in the US, there has been comparatively little movement toward changing the criminal law in a similar way.

Notice, though, that the intentionality objection and the burdensomeness objection to omissions standards did not turn on any special features of the educational context. These were reasons for rejecting omissions standards across the board. Likewise, the freedom and clarity secured by the modifiable consent standard are valuable not only in the educational context but more generally.

So, the case for the modifiable consent standard is not limited to the educational context. That said, it may be that colleges and universities have additional reasons to adopt the modifiable consent standard, or perhaps even more stringent standards that do not allow modification. These additional reasons may stem from the special aim of educational institutions or from the special vulnerability of student populations. I will not consider these possibilities here. I note only that if there are such additional reasons, they have played no role in my argument. The case for the modifiable consent standard rests only on considerations that are relevant for people in general.

If the prevalence of omissions standards were the only relevant injustice in the law, I would take the case I have made for the modifiable consent standard to speak strongly in favor of the legal adoption of that standard. Unfortunately, however, there are a myriad of interacting injustices that make the case for legal reform murkier. One might plausibly think that sexual offenses are handled in problematic ways by the criminal justice system in the US. For example, one might worry about the status of sexual offender registries. One might also plausibly worry about racial disparities in sentencing and other manifestations of racism in the criminal justice system in the US.

Nonideal theory faces a difficult question about how to proceed in the face of these interacting injustices. Of course, if we could, we should fix everything at once. But the inability to do so is yet another nonideal aspect of our situation. Here I will not attempt to argue that is appropriate or wise to attempt to reform the law regarding consent to sexual interactions while these other injustices remain. I note only the strength of the case for the modifiable consent standard given what people care about in the sexual context.

Objections

Is everyone a rapist?

The modifiable consent standard is sharply at odds with the expectations and experiences of most people in the US. Many people – both men and women – regularly act in ways that are contrary to that standard. Does that mean that many and perhaps even most sexually active people in American society are guilty of rape or sexual assault? And if so, would that not be a *reductio* of the view?

To consider this question, let me begin by examining a controversy about consent with some similarities to the current issue. Before the rise of the informed consent doctrine in the 20th century, doctors typically had a more paternalistic relationship to their patients.¹³ They did not always seek consent for medical interventions. Were doctors working with this more paternalistic model of the doctor–patient relationship regularly guilty of battery?

Framing the question in this way overlooks an important difference between two kinds of moral mistakes one might be making. The doctors in question were operating

with a widely shared but morally imperfect understanding of the rights of their patients. Both they and their patients took doctors to have more authority and patients to have less autonomy than they ought. But this is a different mistake from violating even the imperfect norms that were publicly accepted. Of course, both expectation-conforming and expectation-defying moral mistakes might result in patients being seriously harmed in ways that go beyond the lack of autonomy. And there is a way in which expectation-conforming mistakes might be more pernicious than expectation-defying mistakes because there is often no easy way to avoid or challenge wrongs that widely shared social norms endorse. So, I am not suggesting that the former mistake is always or even often less morally serious than this latter. But they are different mistakes – failing to see the imperfections of widely shared norms and violating those norms are different ways of failing the people with whom one is interacting, and it would be reasonable for the victims of those failures to have different attitudes toward them.

With this in mind, let us return to the question of whether doctors were regularly guilty of battery before the rise of the informed consent doctrine. There are important similarities between what those doctors were doing and more commonplace cases of battery. Both involve treating people as having less of a say over what happens to their bodies than they are entitled to. Is this similarity enough to justify labeling the doctors' actions as battery despite the difference noted above? I doubt there is a strong case to be made either way other than via considering the rhetorical usefulness of such a label. But even if it turns out to be appropriate to describe what the doctors were doing as battery, noticing the difference between their actions and expectation-defying cases of battery suggests that the claim 'but then all doctors are guilty of battery' cannot be used as a *reductio* of an argument in favor of greater patient autonomy in medical decision-making.

In the medical case, doctors did not take the permissibility of some interventions to depend on the consent of patients. In the sexual case, omissions standards are problematic in a similar though slightly different way. Although omissions standards treat consent as relevant, they specify how consent is given in a way that leaves people with less control over the kinds of sexual contact they receive than they ought to have. Acting in accordance with the widely accepted omissions standard is not making the same mistake as ignoring the physical or verbal resistance that standard countenances as an expression of dissent. But it does still treat people as having less of a say over the sexual contact they receive than they are owed. The extent to which this failure results in harms beyond the lack of control varies. The subway rider might be upset or even traumatized by being fondled by a stranger while Beth might feel positively about being kissed unexpectedly by Andrew. Rejecting omissions standards does not require treating these cases as morally indistinguishable, nor does it require treating them as on a par with cases in which the expression of dissent is ignored. Noticing these nuances suggests that, however the term 'rape' ought to be used, the claim 'but then most sexually active people are guilty of rape' cannot be used as a *reductio* of an argument in favor of giving people more control over the sexual interactions in which they are involved. I have argued that the modifiable consent standard is the appropriate way to remedy the defects of omissions standards. If that argument is successful, then people who do not abide by this

standard are failing their partners, though in a way that differs in important respects from those who violate even the imperfect norms that are presently widely shared.¹⁴

The loss of something valuable

One might worry that a standard requiring the verbal articulation of the object of consent would, as Stephen Schulhofer (1998: 272) puts it, ‘impose a degree of formality and artificiality on human interactions in which spontaneity is especially important’. Schulhofer raises this concern to suggest an advantage of affirmative consent policies that allow nonverbal behavior to communicate consent over a policy requiring a verbal ‘yes’. Although the modifiable consent standard is not as stringent as the policy Schulhofer is criticizing, it is worth considering the extent to which this objection may be pressed against it.

First, let us consider more carefully the nature of what might be lost. There are several values that might be relevant. Schulhofer mentions spontaneity. One might think it is important that it be possible to engage in sexual interactions that are open ended, where the parties have not decided in advance what will happen. There is also a kind of intimacy involved in seeing the manifestation of sexual desire in the way someone moves or talks and responding in kind. One might be worried about the potential loss of this kind of intimacy if people are required to discuss what they are comfortable doing. Finally, one might think there is some value in maintaining some amount of mystery between sexual partners. It may be exciting not to know exactly what one’s partner is thinking and having to always be transparent to one’s partner might require too much self-revelation.

Let us compare how the omissions standard, the affirmative consent standard, and the modifiable consent standard treat the values of spontaneity, intimacy, and opacity. The omissions standard places no constraints on the manifestation of these values. But that, after all, was part of the problem with that standard. In allowing unfettered spontaneity and fairly robust opacity, the omissions standard fails to take seriously the importance people place on not being subjected to unwanted sexual contact. The key to moving beyond the omissions standard is finding an appropriate way to balance these competing values.

The affirmation consent standard and the modifiable consent standard approach this problem in different ways. The promise of the affirmative consent standard is to largely preserve spontaneity and intimacy while curtailing opacity only in salutatory ways by requiring some affirmative behavior. But I have argued that things are not quite so simple. On the affirmative consent standard, adequately protecting people from unwanted sexual contact requires more verbal communication between new or relatively new sexual partners than is generally acknowledged. This involves a cost in both spontaneity and opacity. And even in the context of long-term relationships, the affirmative consent standard constrains spontaneity by requiring some kind of affirmative behavior in the moment.

In contrast, on the modifiable consent standard, even new sexual partners may agree to change their consenting practices. So, the policy rules out only the possibility of completely silent sexual contact between people who have not agreed to change the

standards or developed reliable methods of nonverbal communication. To be sure, even this very minimal limitation does affect the manifestation of the values of spontaneity, intimacy, and opacity. New sexual partners may not rely exclusively on body language, thus limiting the potential for the kind of intimacy described above. The possibility for spontaneity is likewise limited. Unless they agree to change their consenting practices, new sexual partners must be explicit about the objects of consent. And since they must share some view about the object of consent or the changed consenting practice they adopt, they cannot be fully opaque to one another. But these limitations really just amount to the requirement that sexual partners be on the same page with one another about what they are up to. And beyond this very minimal constraint, the modifiable consent standard allows people to balance for themselves the values of spontaneity, intimacy, and opacity against the desire to avoid unwanted sexual contact. I suggest, therefore, that that modifiable consent standard is a more promising way of moving away from the problematic omissions standard.

I have taken the objection considered in this section to focus on the loss of something valuable. There is a somewhat different but perhaps related worry that the proposed policy unduly constrains 'normal' or 'natural' sexual interactions. While I agree that, the proposed policy conflicts with what many people now regard as normal, this conflict is to be expected whenever injustice is deeply ingrained in a society. Omissions standards reflect just such an injustice. So, it is not surprising that movements away from this standard may seem jarring.

Implementation problems

Nonetheless, perhaps the extent to which the proposed policy differs from current social expectations generates a serious practical problem for enforcement. HM 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. (Malm, 1996: 163; see also Schulhofer, 1998: 58)

Once again, the modifiable consent standard is not as extreme as the one Malm is arguing against. But the same objection might still be pressed.

Consider two replies. First, notice that laws that are clearly required by justice are not always easy to enforce against a background of misguided 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 appropriate. Addressing this difficulty requires that serious thought be put into how to change the problematic attitudes. But that does not mean there should not be laws against this kind of killing.

Second, it is worth emphasizing that there are several necessary conditions on valid consent. If my argument has been successful, in the sexual context, a verbal articulation

of the object of consent is among those conditions unless either of the two excepting clauses obtain. 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 proceeding in the absence of the affirmation of a verbally articulated object of consent.¹⁵ Of course, that failure 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.

Furthermore, notice that law may appropriately distinguish between those who intentionally act without another's consent, those who do so negligently, and those who do so even though they have taken due care to avoid acting without another's consent.¹⁶ Those in this last category do not merit criminal sanction. The law thus has room to avoid penalizing those involved in innocent miscommunications. This nuance may help overcome the temptation to view the modifiable consent standard as requiring too much of participants in sexual interactions.

Vulnerability to pressure

The foregoing objections suggested grounds on which the modifiable consent standard might be thought to be too restrictive. The final objection I will consider instead suggests that the modifiable consent standard is too permissive. One might worry that by giving people the freedom to revise their consenting practices, this standard opens up the possibility that people will be subjected to pressure to modify their consenting practices, pressure from which they would prefer to be immune.¹⁷

Recall that the argument for the freedom secured by the modifiable consent standard turned on the idea that there are some interactions not countenanced by the affirmative consent standard that people may want to engage in. The objection above pushes us to compare how much people generally value these kinds of interactions with how much they wish to avoid the kind of pressure the objection identifies. But a closer look at the relevant kind of pressure suggests that analogues are present in all consenting practices. Suppose Alex meets Bella at a party and begins chatting with her. Consider three ways their interaction might go depending on the consenting practice in place:

The Omissions Standard: Alex begins kissing and fondling Bella. Bella would rather not be touched in this way, but she does not want to appear difficult. So, she does not resist.

The Affirmative Consent Standard: Alex says, "You're not one of those prudes who doesn't hook up, are you?" Bella would rather not hook up, but she does not want to appear prudish. So, she expresses willingness to hook up.

The Modifiable Consent Standard: Alex says, "You're not one of those stuffy girls who insists on talking about everything, are you?" Bella would rather not modify the consenting practice in place between her and Alex, but she does not want to appear stuffy. So, she agrees to use an omission standard in their interaction.

In each of these cases, Alex's potential response to Bella gives her reason not to exercise her rights in the way she would otherwise prefer. The possibility of this kind of pressure is present in each of the consenting practices. So, the desire to avoid this kind of pressure does not tell between them. Rather, what this directs us toward are the limits of what a consenting practice can secure by itself apart from deeper changes in the culture surrounding sex.

The other conditions on valid consent

As I observed in the 'Implementation problems' section, meeting the standard governing the communication of consent satisfies just one of the necessary conditions on valid consent. It is worth highlighting the significant amount of work that remains to be done with respect to the other conditions. Recall that the California legislation requires that consent be affirmative, conscious, and voluntary. This article has been focused on investigating the requirement that consent be affirmative. But that should not be taken to imply that the other conditions are clear or uncontentious.

Consider the voluntariness requirement. In order for consent to be given voluntarily, it must not be coerced. But what counts as coercion, or what counts as consent-nullifying coercion, is a matter of debate.¹⁸ There are of course clear cases. The use or threat of violence invalidates consent. But as we saw in the 'Vulnerability to pressure' section, people can face a wide range of more subtle pressures to engage in sexual interactions. A full account of consent to sexual interactions would need to settle which if any of these pressures invalidate consent.¹⁹ Although, as I noted above, it is unclear how any consenting practice could fully immunize people from pressure altogether.

There are also pressing questions about when one is competent to give consent. Recent legislation stipulates that people who are unconscious cannot give consent. I argued in the 'Consenting through omissions' section that consent may only be given through intentional action. And that explains why consent cannot be given while unconscious. But which kinds of impairment falling short of unconsciousness are incompatible with giving consent? The California legislation holds that a person cannot give consent if he or she is 'incapacitated due to the influence of drugs, alcohol, or medication, so that the complainant could not understand the fact, nature, or extent of the sexual activity'. This gloss on what constitutes being incapacitated nicely tracks the concerns with intentionality described in the 'Consenting through omissions' section. But critics of affirmative consent legislation rightly point out that what this means in practice is problematically unclear.²⁰

But even without fully settled views on how coercion and incapacitation affect consent, it is worth noting how requirements governing these conditions interact with the modifiable consent standard. A coerced or incapacitated 'yes' cannot constitute consent. But perhaps less obviously, coercion can invalidate previously given consent. If, for example, a person uses force in a way that prevents another from withdrawing consent, the consent that was previously voluntarily given is no longer valid because the victim lacks the freedom to which he or she is entitled.²¹

Incapacitation's relationship to previously given consent is a bit subtler. If one becomes incapacitated, one does not lose one's freedom to withdraw consent, but one

is unable to act on that freedom. In general, we should understand people as consenting to sexual contact on the condition that they are both free and able to withdraw consent at any time. Suppose Andrew and Beth agree to have sex. During their interaction, Beth faints. Is Andrew permitted to continue while Beth is unconscious? No, because what Beth consented to was conscious sex not unconscious sex. Without prior discussion of this specific circumstance, consent to sex while unconscious cannot be assumed.

Given this, consider another possible interaction between Andrew and Beth. They have agreed to have sex, but during their interaction Beth ceases to participate. May Andrew proceed? Affirmative consent policies that require continuous affirmation of consent will say ‘no’ because Beth has ceased to give affirmative consent. I agree that Andrew should not proceed but I suggest that this is the wrong explanation for why. Andrew should not proceed because the nature of Beth’s participation raises red flags about whether coercion or incapacitation is affecting her ability to withdraw consent. In other words, the problem here lies in assessing whether the other conditions on valid consent have been met rather than in the lack of affirmative behavior itself.

Conclusion

I have argued that, in the sexual context, consent requires an affirmation of a verbally articulated object of consent unless participants have verbally agreed to a different policy or have developed a reliable method of nonverbal communication. We have very strong reasons to move away from allowing omissions to communicate consent to sexual contact. But properly understood, the affirmative consent standard is more constraining than might initially be apparent and less action-guiding than would be ideal. And it needlessly prevents people from engaging in a kind of sexual contact they may value. The modifiable consent standard rectifies these problems. This standard gives people as much sexual freedom as is consistent with allowing consent to play its role in enabling people to exercise discretion over others’ permissions.

Author’s note

The author received helpful feedback on earlier versions of this article from audiences at the University of Pennsylvania, Harvard University, Northwestern University, the University of Rochester, the UCLA Ethics Workshop, the NYU Political Philosophy Workshop, the Cornell Workshop on Moral Philosophy, the New Work in Political Philosophy conference at The Hebrew University of Jerusalem, and the Seoul National University Workshop in Political Theory.

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Notes

1. Some policies, though, contain a warning about the possibility of miscommunication if one relies on nonverbal behavior. See, for example, Duke University Student Affairs (2019).
2. I assume in what follows that consent must be given through an action, though that action might in principle be an omission rather than an affirmative act. A few philosophers have argued, to the contrary, that consent might be given solely through the formation of a mental state. See Hurd (1996) and Alexander (1996, 2014). For a helpful reply to this strategy, see Dougherty (2015). For a critical reply to Dougherty, see Alexander et al. (2016). Alexander et al. are moved by examples like *Wanted Sex*, in which Sue wants to have sex with Sam but does not want to communicate that to Sam. Sam has sex with Sue without any communication of consent and in fact in the face of her resistance. Alexander et al. claim that in this case Sam has acted culpably since he did not have good evidence of Sue's mental state, but he has not actually crossed any moral boundary because he did exactly what Sue wanted him to do. Here, I think there is a deep disagreement with Dougherty about the nature of the relevant moral boundary. Dougherty maintains, and I agree, that facts about permissibility have to be in some important sense public. This means that the power to consent is best understood as the power to change what is permissible for others in a way that could potentially be action-guiding for them. A mere attitude is not public in the right kind of way. That is why an attitude alone could not constitute consent. But fully defending this view would require an examination of the nature of permissibility facts and their relationship to facts about blameworthiness, which I cannot undertake here.
3. Supposing, of course, that the other conditions on valid consent have been met, for example, that there is no consent-invalidating coercion. Some of Dougherty's alternate interpretations of silence in response to the proposal at the meeting raise the possibility that that the silence is explained by some independently consent-invalidating condition like coercion. But it is important to distinguish this kind of ambiguity from the more general ambiguity Dougherty seems to identify. In the text, I argue that there is one particular kind of consent-invalidating condition that is especially relevant in the sexual context.
4. I have suggested that it is in principle possible to consent through an omission. Proponents of the views discussed in note 2, which hold that communication is not needed for consent, might interpret these cases differently. Rather than seeing consent as given by an omission, they might take these cases to support the view that communication is not needed for consent. I doubt, however, that these cases alone tell in favor of one view or the other apart from the deeper theoretical issues described in note 2. I take it to be uncontroversial that silence can sometimes be a communicative act. And the interpretation of these cases I suggest is thus at least an open possibility.
5. This is among the multiple interpretations Dougherty considers of silence in the sexual context. But he does not note its distinctive significance. See Dougherty (2015: 252).
6. For a helpful discussion of studies regarding this issue, see Anderson (2005a). For a discussion of more recent studies, see Russo (2017).

7. Dougherty includes not having time to make up one's mind among the alternative interpretations of silence in response to the meeting chair's proposal. It is worth considering this as another way in which using silence to communicate consent might be unreasonably burdensome, though it immediately invites the question of how much time people ought to have to consider whether to consent. And this is likely to differ depending on the context. It might not be unreasonable for the chair to say something like, 'if I hear no objections by next week, the proposal will pass'. In contrast, in the sexual context, it does not seem reasonable to impose any time limit beyond which inaction will constitute consent. I take it that is because the deeper issue in the sexual context is the one about control mentioned in the text above.
8. For a helpful discussion of these problems, see Lindgren et al. (2008).
9. This is not to say that miscommunication is impossible when relying on verbal behavior. But a verbal request or invitation to engage in sexual contact resolves ambiguity about whether parties are in a context in which consent to sexual contact is at issue. And as I go on to suggest in the third section, the kind of verbal behavior that is relevant for reducing the prospect of miscommunication must also specify the kind of sexual contact that is at issue. In these ways, verbal communication about consent to sexual contact mitigates the main sources of potential misunderstanding that are present in nonverbal communication.
10. In a recent article, Dougherty (2018) notes a version of this problem and suggests a somewhat different solution.
11. For a very helpful discussion about how to specify the objects of consent, see Millum and Bromwich (2018).
12. I am indebted to an anonymous reviewer for prompting me to consider this issue. For a helpful discussion of how context affects the scope of objects of consent, see Millum and Bromwich (2018: 52–55).
13. The best way to specify and implement requirements of informed consent in the medical context is still a matter of controversy. But I take it to be relatively uncontroversial that patients were owed more discretionary authority in medical decision-making than they had before the informed consent doctrine became a fixture of medical ethics. For a helpful discussion of the informed consent doctrine, see Joffe and Truog (2010).
14. One might think that until an alternative to the omissions standard is publicly promulgated, it may in fact be permissible for people to act according to that standard, or at least not blameworthy to do so, because people reasonably believe that they have received consent even if that belief is mistaken. Assessing these suggestions would require working out the relationship between a person's reasonable beliefs and facts about permissibility and blameworthiness. I take the nature of both of these categories of moral evaluation to be contentious. So, I will not attempt to formulate the discussion in terms of them. But a fuller treatment of the difference between expectation-conforming and expectation-defying moral mistakes would involve considering how these failures are related to evaluations of permissibility and blameworthiness. I am indebted to an anonymous reviewer for prompting me to consider this issue.
15. For an example of how this might be done, see Schulhofer (1998: 283).
16. For a helpful discussion of the appropriate standards of care when obtaining consent, see Dougherty (2018).
17. For a helpful discussion of how more choice is not always better, see Dworkin (1982).
18. For a general overview of this issue, see Wertheimer (1987).

19. For some discussions of this issue, see Wertheimer (2003), Conly (2004), and Anderson (2005b).
20. See, for example, Marciniak (2015: 56).
21. For an account of coercion that develops this theme, see Pallikkathayil (2011).

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