

Triggered by alarming statistics about sexual violence on campuses,¹ both the U.S. federal government and public opinion have recently put more pressure on schools to improve prevention.² In response, several

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1. Launching the “It’s on Us” initiative to reduce sexual assault, President Obama cited a “one in five” statistic based on the Campus Sexual Assault Study of 2007, funded by the National Institute of Justice, which found that 19 percent of female students experienced sexual assault since entering college. Christopher Krebs, Christine Lindquist, Tara Warner, Bonnie Fisher, and Sandra Martin, “The Campus Sexual Assault (CSA) Study,” *Final Report Prepared for the National Institute of Justice* (2007), www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf. A different picture is suggested by the most recent National Crime Victimization Survey, which found that during the period from 1995 to 2013, “the rate of rape and sexual assault was 1.2 times higher for nonstudents (7.6 per 1,000) than for students (6.1 per 1,000).” Possible explanations of the discrepancy between the statistics include the differing definitions of sexual assault (for example, whether terms like “rape” are used in surveys), the different populations surveyed, and the different ways in which the surveys were carried out. Sofi Sinozich and Lynn Langton, “Rape and Sexual Assault Among College-Age Females, 1995–2013,” NCJ 248471, *Special Report, U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics*, December 2014, www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf.

2. On April 4, 2011, the U.S. Department of Education’s Office for Civil Rights (OCR) released a “Dear Colleague” letter, which voiced a growing concern at levels of sexual violence on American campuses and reminded universities of their responsibilities under Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681, et seq., www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf. Enacted in March 2013, the Campus Sexual Violence Elimination Act (“The Campus Save Act”) requires tertiary-level educational institutions receiving federal funding to educate students and staff on the prevention of sexual violence and assault. On May 1, 2014, an OCR press release named fifty-five universities currently under investigation for failing to comply with

universities have reformed their policies concerning sexual misconduct. Much of the ensuing debate has focused on the procedures for deciding complaints of sexual misconduct,³ but in addition, one specific reform has proved controversial: the introduction of definitions of consent as requiring communication. Several schools have voluntarily adopted such a definition. For example, Harvard University's new code states that "willingness and permission must be communicated clearly and unambiguously," Yale University's code defines sexual consent "as positive, unambiguous, and voluntary agreement," and the University of Michigan's code defines consent as requiring "clear and unambiguous agreement, expressed in mutually understandable words or actions."⁴

Title IX: www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-i. In 2014, a U.S. Senate report concerning a national sample of 440 higher education institutions found that over 40 percent of schools have not investigated a single sexual assault in the last five years. Claire McCaskill, "Sexual Violence on Campus: How Too Many Institutions of Higher Education Are Failing to Protect Students," *Report Prepared by the U.S. Senate Subcommittee on Financial & Contracting Oversight—Majority Staff*, 2014, www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf.

3. The debate has largely taken place in the media and blogosphere. In July 2014, a joint statement from twenty-eight members of the Harvard Law School Faculty addressed Harvard's new policy on sexual harassment and sexual violence. The statement outlined concerns about the lack of fairness and due process in the procedures that decide cases of alleged sexual misconduct, concerns about how the new sexual harassment policy had been formed, and a concern about its broad definition of sexual harassment, with specific mention of its regulations concerning intoxication. "Rethink Harvard's Sexual Harassment Policy," *Boston Globe*, October 15, 2014, www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html. Yale Law Professor Jed Rubenfeld discussed strategies for tackling rape on campus. As well as a concern about the affirmative consent standard, Rubenfeld raised a concern that some disciplinary tribunals are staffed by individuals without adequate training and expertise for adjudicating complaints, a concern about the laxness of evidential standards for disciplinary hearings, and a concern about the codes' handling of intoxicated sex. Jed Rubenfeld, "Mishandling Rape," *New York Times*, November 15, 2014, www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html. In addition, there are further questions about how to align college disciplinary hearings with criminal proceedings, about whether legislation is the most effective way of moving the student community toward an affirmative consent culture, about whether disciplinary hearings should be public, and about blameworthiness for sexual misconduct—an issue that arises when students violate codes through sincere mistakes.

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

Meanwhile, the State of California has made state funding of postsecondary educational institutions conditional on adopting an affirmative standard for consent:

“Affirmative consent” means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent.⁵

The new campus codes vary in the letter of their definitions, but typically allow that nonverbal behavior can count as communication.

These definitions raise the question of whether communication is required for morally valid consent. In this context, let us say that consent is “morally valid” when, all else equal, it succeeds in generating a moral permission.⁶ If morally valid consent requires communication, then an affirmative consent standard would merely prohibit sexual encounters that, on independent grounds, are morally impermissible. However, if morally valid consent does not require communication, then an affirmative consent standard would prohibit some sexual encounters that are otherwise morally permissible.⁷ Such a standard would prohibit a sexual encounter on campus, even though an identical sexual encounter would be morally permissible off-campus. As such, the standard would raise concerns both about the extent of universities’ restrictions on students’ sexual lives and about the fairness of imposing significant penalties on students who violate these codes. Perhaps such a standard could still be justified on consequentialist grounds if it reduces sexual violence, but it would be an unhappy means for bringing about this end.

“Definitions: Consent,” Student Sexual Misconduct Policy, University of Michigan, <http://studentsexualmisconductpolicy.umich.edu/definitions>.

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

6. Elsewhere, “consent” is used more broadly to refer to any sort of agreement, including promises, contracts, and nonbinding collective planning. The “all else equal” clause is needed, as consensual activity can be wrong on other grounds, for example, adultery.

7. I say “otherwise” in light of an anonymous referee’s observation that the code itself may change what is morally permissible.

In this article, I will take up the question of whether morally valid consent requires communication. While the campus code reforms make this question timely, it has had an enduring importance for the normative foundations of rape law. Accordingly, there is already a mature philosophical debate, in which some participants argue that a noncommunicated intention can be sufficient for morally valid sexual consent, while others maintain that communication is required.⁸ Moreover, besides sex, consent plays other important roles in our lives. We invite people into our homes, let them use our property, and agree to medical treatment and research. So generally we should like to know when, if ever, consent must be communicated to permit actions that would otherwise be morally impermissible.⁹

I will argue that a private intention is insufficient for morally valid consent. Instead, morally valid consent always requires public behavior, and this behavior must take the form of communication in the case of high-stakes consent. Here I allow that we can communicate through nonverbal behavior,¹⁰ and by “high-stakes” consent, I mean consent that is necessary for avoiding a serious moral wrong, with sexual consent as a paradigm of high-stakes consent.

To defend this position, I will start by explaining why the contemporary debate has reached an impasse through appeals to intuitions about cases of noncommunicated intentions to consent—intuitions that appear to reasonably vary from person to person. Instead, to resolve the

8. As well as this debate about morality, there is a related debate concerning the desirability of requiring communication in rape law, particularly concerning the implications for what counts as evidence of rape. See H. M. Malm, “The Ontological Status of Consent and Its Implications for Rape Law,” *Legal Theory* 2 (1996): 147–64, at p. 159; L. A. Remick, “Read Her Lips: An Argument for a Verbal Consent Standard in Rape,” *University of Pennsylvania Law Review* 141 (1993): 1103–51; Michelle J. Anderson, “Rape Law Reform Based on Negotiation: Beyond the No and Yes Models,” in *Criminal Law Conversations*, ed. Paul H. Robinson, Stephen P. Garvey, and Kimberly Kessler Ferzan (Oxford: Oxford University Press, 2009).

9. By focusing on permissibility, I will not discuss blameworthiness. Since students can make honest mistakes, this raises issues about the procedural protections relating to complaints of misconduct. Thanks to an anonymous referee for raising this point.

10. There has been speculation that although the codes permit nonverbal communication in principle, in practice campus disciplinary hearings will only consider verbal communication as communication. My thesis implies that this would risk finding individuals guilty of nonconsensual sex even though their partners had unambiguously communicated consent through nonverbal behavior. However, I note that we lack serious evidence that this speculation is well founded.

debate, we need an argument grounded in more general theoretical considerations. Accordingly, I will situate consent as one normative power that sits alongside the normative power of promise; both powers alter the rights that we hold against each other.¹¹ When we ask why promises must be communicated, we will see that analogous reasons hold for consent: both normative powers structure the ways in which we are publicly accountable to each other, and these relations of accountability play valuable functions. Thus, by exploring the connection between consent and promise, we can avoid a fraught appeal to intuitions about cases and find an argument for the conclusion that high-stakes consent is morally valid only with communication. I will end by applying this conclusion to the design of campus codes.

I

Let us say that the “attitudinal view” is that morally valid consent can be given simply by adopting a certain mental attitude. The most plausible candidate for this attitude is *intending*.¹² Heidi Hurd construes consent as intending “the actions of [the persons receiving consent],”¹³ while Larry Alexander conceives of consent as an intention to “forgo one’s

11. The link between promise and consent has proved fruitful elsewhere. Seana Shiffrin, “Promising, Intimate Relationships, and Conventionalism,” *Philosophical Review* 17 (2008): 481–524, at pp. 500–501; Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, Mass.: Harvard University Press, 1990), pp. 350–51; and Gary Watson, “Promises, Reasons and Normative Powers,” in *Reasons for Action*, ed. David Sobel and Steven Wall (Cambridge: Cambridge University Press, 2009), pp. 155–78, at p. 165, as cited in David Owens, *Shaping the Normative Landscape* (Oxford: Oxford University Press, 2009), p. 166.

12. For why sexual desire is a poor candidate, see Govern Den Hartogh, “Can Consent Be Presumed?” *Journal of Applied Philosophy* 28 (2011): 295–307. For the relation between intention and desire, see Richard Holton, *Willing, Wanting, Waiting* (Oxford: Oxford University Press, 2009). Peter Westen has proposed that “acquiescence” constitutes factual consent, although he holds there is no single answer as to what constitutes morally valid consent. Peter Westen, *The Logic of Consent* (Aldershot, UK: Ashgate, 2004), pp. 4–5, 141 et passim. For an argument that acquiescence is insufficient for morally valid consent, see Larry Alexander, “The Ontology of Consent,” *Analytic Philosophy* 55 (2014): 102–13, at p. 101.

13. Heidi Hurd, “The Moral Magic of Consent,” *Legal Theory* 2 (1996): 121–46, at p. 131. Hurd’s account is vulnerable to Den Hartogh’s objection that if one leaves one’s car in the woods with the intention that it is stolen, then a thief would still infringe your property right by taking your car without your consent. Den Hartogh, “Can Consent Be Presumed?” p. 301.

moral complaint against another's act."¹⁴ Of course, this intention would have to be formed by a competent agent who is free from coercion and serious deception. But when such a person forms the intention, the attitudinal view will consider this necessary and sufficient for morally valid consent.

Since consent must be intentional, everyone should agree that an intention is necessary for morally valid consent.¹⁵ But the "performative view" denies that a mere intention can be sufficient, countering that valid consent also requires communication.¹⁶ This view can draw further moral distinctions between encounters without communicated consent.

14. Larry Alexander, "The Moral Magic of Consent II," *Legal Theory* 2 (1996): 165–74, at p. 166; Alexander characterizes this mental state as equivalent to a choice "to waive one's right correlative to the other's duty not to act" (p. 166). See also Alexander, "The Ontology of Consent," at p. 107. However, an anonymous referee has pointed out that this characterization looks circular, raising the possibility of a regress of intentions that one would need to form in order to consent.

15. In earlier work, Alan Wertheimer denied an intention is necessary. Wertheimer distinguished what he called the "performative view" that an appropriate communication of consent is sufficient for morally valid consent from the "hybrid view," which claims that a mental state and communication are both necessary. Alan Wertheimer, *Consent to Sexual Relations* (Cambridge: Cambridge University Press, 2003), p. 144. There, Wertheimer "opts for a performative account of consent" (p. 147). He allowed that the choice between the performative view and the hybrid view will rarely make a practical difference, but he noted that they reach different conclusions about, for example, a case in which an inattentive patient thinks that she is only authorizing a biopsy when she signs a consent form for a lumpectomy that her physician has explained (p. 148). Wertheimer hesitantly suggested that the physician has done enough to ascertain that the patient is consenting, and so the patient's expression of consent makes it morally permissible to proceed with the lumpectomy. By contrast, the hybrid theorist would view the action as impermissible, even though she would allow that the physician would not be blameworthy given her evidence. More recently, Wertheimer has defended a nuanced view according to which "valid consent" must be intentional, while "morally transformative" consent that justifies another person's action need not be intentional. 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), pp. 79–106. Thanks to an anonymous reviewer for suggesting that I clarify Wertheimer's view. For arguments for the claim that unintentionally performing a speech-act would not waive a right, see David Archard, *Sexual Consent* (Oxford: Westview, 1998), p. 4; Joan McGregor, *Is It Rape? On Acquaintance Rape and Taking Women's Consent Seriously* (Aldershot, UK: Ashgate, 2005), pp. 126, 130–31. For further problems with a performative view that denies that intentions are necessary, see Alexander, "The Ontology of Consent," pp. 103–4.

16. The term "performative" is from J. L. Austin, *How to Do Things with Words* (Cambridge, Mass.: Harvard University Press, 1962).

So just as violence makes nonconsensual sex worse, the absence of any intention to consent can also make nonconsensual sex worse. This allows for a graded view of sexual misconducts, and so performative theorists may disagree about the further question of which forms of misconduct to apply the term “rape” to. What unites the performative theorists is their claim that morally permissible sex requires communicated consent.

The performative view should allow that we can communicate through nonverbal behavior. If a hairdresser were suggesting shortening a fringe, then her client’s nod would create a moral permission. In this context, the nod expresses a message. Indeed, a speaker can even communicate with an omission, so long as the context ensures that the omission expresses a message. 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.¹⁷ 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. Still, the performative view should allow that in principle any form of successful communication can issue valid consent. Thus, the debate between the attitudinal view and the performative view is not about whether communication must be explicit or verbal; it is about whether communication is required at all.¹⁸

Since the two views will disagree about cases where someone has not communicated her intention to consent, the debate has tended to focus on these cases. But this approach has had limited success, as people’s intuitions about these cases diverge. The literature contains several examples of philosophers registering opposing intuitions about

17. A. John Simmons, “Tacit Consent and Political Obligation,” *Philosophy & Public Affairs* 5 (1976): 274–91, at pp. 278–79.

18. In addition, the debate concerns what is required for *actual* consent. Both views can allow that in exceptional circumstances, *hypothetical* consent is sufficient for creating permissions (for example, for urgent surgery on an unconscious patient).

noncommunicated intentions to consent,¹⁹ sometimes concerning structurally analogous cases,²⁰ and even about the very same case.²¹ There would appear to be room for reasonable disagreement at the level of intuition about these cases.

So we must look elsewhere to move forward the debate. Accordingly, we might consider the complaints that people can make. It might seem that if someone intends to consent to an interaction, then she engages in the interaction voluntarily, and so cannot complain about it.²² But if she cannot complain about the interaction, then it seems that she is not wronged by the interaction. And if she is not wronged, then the interaction must have been consensual. So, if we accept this line of reasoning, then we should embrace the attitudinal view.

However, the performative theorist has a plausible reply. She can respond that even if someone intends to consent to an interaction, she can still complain if she has not properly invited the interaction. It is one thing for people to happen to behave in the way that we wish; it is another for them to do so *because* they are guided by our requests. The performative theorist can add that only publicly communicated consent can appropriately guide our interactions with each other. Accordingly, the performative theorist can say that a victim's complaint can simply be

19. For appeals to cases of noncommunicated consent in support of the attitudinal view, see Alexander, "The Ontology of Consent," pp. 105–6. For examples of appeals in favor of the performative view, see Den Hartogh, "Can Consent Be Presumed?," p. 301; and Owens, *Shaping the Normative Landscape*, p. 571.

20. For example, Wertheimer frames a case in which men had no good reason to believe that a woman, who was feigning protest, actually welcomed sex. (This is a hypothetical variant on the infamous Morgan case in which the victim did not welcome sex.) Meanwhile, Larry Alexander frames a case of a foreigner whose poor grasp of a language leads her to mistakenly utter a term meaning "don't" when she means to utter a term meaning "do." These cases are structurally analogous in that they involve agents falsely believing that they are having sex with someone who is opposed to this sex. Yet Wertheimer takes his case to support the performative view on the basis of his intuition that the men acted impermissibly, and Alexander takes his case to support the attitudinal view on the basis of his intuition that the man did nothing wrong. Alan Wertheimer, "What Is Consent? And Is It Important?" *Buffalo Criminal Law Review* 3 (2000): 557–83, at p. 571; Alexander, "The Ontology of Consent," p. 105.

21. Heidi Hurd has the intuition that a deaf-mute quadriplegic who intends to consent would validly consent; Alan Wertheimer has the opposite intuition. Hurd, "The Moral Magic of Consent," p. 137; Wertheimer, *Consent to Sexual Relations*, p. 147.

22. Rubenfeld raises a voluntariness objection in "Mishandling Rape." Thanks to a reviewer for the argument from complaints.

that the interaction is not consensual because she did not communicate consent. Thus, the issue of complaints leads us back to the original standoff between the performative and attitudinal views.

Still, this discussion suggests a more fruitful place to look.²³ The performative theorist's reply appealed to the idea that consent must publicly structure our relationships with each other. Indeed, several philosophers have endorsed the performative view on these grounds.²⁴ But more needs to be said about the importance of the public faces of our relationships. After all, the attitudinal theorist holds that attitudinal consent alters our "normative relationships" insofar as these relationships concern how we may permissibly treat each other. She simply denies that consent must make these alterations in a public way. So to avoid begging the question, the performative theorist must provide an independently motivated argument for why consent must operate publicly.

II

To provide this argument, I first need to discuss consent's role in a theory of rights. Consent releases people from duties that are owed by one person to another. These duties have a dyadic structure. If you consent to someone entering your home, you release her from a duty not to trespass that *she* owed *to you* in three respects. First, you controlled this duty insofar as you could release her from it. Second, by trespassing, she would have wronged you. You would have a specific personal complaint against her, separate from the generic complaint that she has behaved impermissibly—a complaint that anyone might make. Third, by trespassing, she

23. Less fruitfully, Hurd has defended the attitudinal view on the grounds that consent is voluntary, and that coerced communication would not constitute consent. But Wertheimer has responded that the performative theorist can allow that only uncoerced communication is valid. Hurd, "The Moral Magic of Consent," p. 136; Wertheimer, "What Is Consent?" p. 571. In addition, Wertheimer has defended the performative view on the grounds that it best explains why individuals are not culpable when they lack evidence of someone's unwillingness to engage in an encounter. But Alexander has responded that the attitudinal view can also provide this explanation on the grounds that someone's culpability depends on her evidence. Wertheimer, "What Is Consent?" pp. 570–71; Alexander, "The Ontology of Consent," pp. 104–5.

24. Wertheimer, *Consent to Sexual Relations*, p. 148; McGregor, *Is It Rape?* p. 125; Den Hartogh, "Can Consent Be Presumed?" p. 301; Leslie Green, "Should Law Improve Morality?" *Criminal Law and Philosophy* 7 (2013): 473–94, at p. 491.

would have to make it up to you.²⁵ This would typically involve an apology to repair the damage done to your relationship. But if she causes you an unavoidable loss when trespassing, then she would incur a duty to “make you whole” by compensating you. In these three ways, the duty constitutes a moral relationship between you and her.²⁶ These dyadic duties correlate with “claim-rights” (henceforth, “rights”).²⁷ So you have a right against her trespass, which you can waive by giving consent.

As such, consent is the counterpoint to promise. Consider someone’s promise to her partner to be sexually monogamous. By promising, she gives herself a duty not to be unfaithful, and she gives her partner a right against her infidelity. This duty has the same three structural features. Her partner can release her from this promise; breaking the promise would wrong her partner; and she would have to make it up to her partner for breaking the promise (though it is likely that penitent deeds would be more appropriate than cash). This promissory obligation is a dyadic duty that one person owes to another. While consent eliminates these duties and waives these rights, promise creates these duties and these rights. Both are normative powers that determine which dyadic duties and rights exist.²⁸

25. In this way, rights leave a “moral residue” when infringed. Thomson, *The Realm of Rights*, pp. 82–98.

26. For discussion of “directed duties” or “bipolar obligations,” see Henry Sidgwick, *The Methods of Ethics*, 5th ed. (London: Macmillan, 1893), p. 218; Margaret Gilbert, “Scanlon on Promissory Obligation: The Problem of Promisees’ Rights,” *Journal of Philosophy* 101 (2004): 83–109; Michael Thompson, “What Is It to Wrong Someone? A Puzzle about Justice,” in *Reason and Value: Themes from the Moral Philosophy of Joseph Raz*, ed. R. Jay Wallace, Philip Pettit, Samuel Scheffler, and Michael Smith (Oxford: Clarendon Press, 2004), pp. 333–84; Gopal Sreenivasan, “Duties and Their Direction,” *Ethics* 120 (2010): 465–94.

27. This terminology derives from Wesley Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning,” in *Fundamental Legal Conceptions as Applied in Judicial Reasoning, and Other Legal Essays*, ed. Walter Cook (New Haven, Conn.: Yale University Press, 1920), pp. 23–64. For an account that applies it to morality, see Thomson, *The Realm of Rights*.

28. Although I will not defend theorizing promise as a normative power to create rights, I suggest that this provides the best account of the dyadic nature of promissory duties. The view contrasts with seeing promissory duty as a duty to take part in useful conventions. David Hume, *A Treatise of Human Nature*, ed. L. A. Selby-Bigge (Oxford: Clarendon Press, [1738] 1888); John Rawls, “Two Concepts of Rules,” *Philosophical Review* 64 (1955): 3–32; John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971). For the criticism that a practice-based duty is not targeted at the promisee, see Thomas M. Scanlon, “Promises and Practices,” *Philosophy & Public Affairs* 19 (1990): 119–226; and Thomas M. Scanlon, *What We Owe to Each Other* (Cambridge, Mass.: Harvard University

Connecting promise and consent offers us leverage with the debate about whether consent must be communicated.²⁹ No one seriously debates whether a noncommunicated intention is enough to create a promissory duty. We can exploit this point when theorizing consent.

A performative view of promise coheres poorly with an attitudinal view of consent. Consider how promise and consent can be jointly embedded in complex moral agreements. For example, someone can exchange a promise for another person's consent. Suppose Paula and Tim agree that Tim can use Paula's car while she is away, and Tim will water her plants. It would be odd to think that Paula can give this consent without communication, but Tim must communicate to establish the reciprocal promise. In addition, the same utterance can express both promise and consent. For example, Paula might write to Tim, allowing him to stay in her house, and promising that she will stock her fridge. It would be odd to think that she successfully issues her consent before she has set pen to paper, but she needs to communicate to make the promise. Instead, it is natural to think that both types of rights-transaction must be made in a common currency.

Next, consider how consent can be reversed. Typically, when someone gives her consent, she can withdraw this consent later.³⁰ By revoking the consent, she reasserts the right that she had previously waived. Correlatively, she reimposes on the other person the duty that she had eliminated. Now, if we adopt an attitudinal view of consent, then we should presumably adopt an attitudinal view of revoking consent. This would mean holding that a mere intention can reimpose a duty on another person. For example, Paula could reimpose on Tim a duty not to trespass by forming an intention to revoke her consent to his staying in her house. So Paula could reimpose this duty on Tim without having communicated this to Tim. But according to a performative view of promise, Paula would have to communicate with Tim in order to impose

Press, 1998). For a related objection to Scanlon's assurance-based view of promises, see Gilbert, "Scanlon on Promissory Obligation," p. 107.

29. The closest discussion is David Owens's. Having defended the view that consent involves communication, Owens notes that "the same is true of other exercises of normative powers such as promising and commanding." Owens, *Shaping the Normative Landscape*, p. 171.

30. There may be limits; for example, a landlord cannot immediately revoke her consent to a tenant's occupation of her property.

a promissory duty on herself. This combination of views is awkward. Tim has morally weightier reasons to know when he reacquires a duty than he has to know when Paula has acquired a duty. So Tim has stronger interests in knowing when Paula revokes her consent than he has in knowing when she makes a promise. Yet Tim's interests in knowing when Paula makes a promise are part of the explanation of why Paula must communicate this promise. So we should wonder why Tim's stronger interests in knowing when he reacquires a duty do not also mean that Paula must communicate in order to revoke her consent.

Now, consider how promises are reversed. This can happen in two ways. First, someone could refuse the promise when it is offered. As J. L. Austin noted, a promise requires "uptake" on the part of the promisee.³¹ Seana Shiffrin has recently observed that uptake need not require an explicit acceptance of the promise. Instead, uptake can involve simply not rejecting the promise.³² Suppose Tim writes Paula a long email, which ends with a promise to get her a ticket for the theatre. In her reply, Paula does not mention the ticket. Even though Paula has not formally accepted the promise, she has acknowledged receipt of the email and has not rejected Tim's promise. As a result, Tim would be obliged to get the ticket. However, if Paula had replied that she did not want Tim to get her a ticket, then Tim's promise would not have received "uptake," and so would not bind him. In this way, Tim has a normative power to bind himself through promises, which interacts with Paula's normative power to refuse promises. Just as Tim needs to communicate his promise, Paula needs to communicate when refusing a promise.

The same is true of the second way in which a promise can be reversed. After a promise has been made, the promisee can release the promisor. For example, Paula might initially accept Tim's promise of the ticket, yet later change her mind. She could release Tim from his duty to get her a ticket, but this would require communicating to Tim that she is releasing him. So whether Paula refuses Tim's promise on the spot or later releases him from his promise, she needs to communicate in order

31. Austin, *How to Do Things with Words*, p. 117.

32. Shiffrin's account allows, but does not require, us to hold that a promise always comes into existence at the point at which it is communicated to the promisee; we could then hold that the promisee can release the promisor at any subsequent point, including the moment immediately after the promise is communicated. Shiffrin, "Promising," p. 491.

to reverse his promissory duty and to give up the right that she had gained. By contrast, if Paula merely forms an intention to reverse the promise, then this is not enough to give up her right. However, the attitudinal view of consent holds that for consent, a mere intention can waive a right and release another person from a duty; for example, Paula would waive her right against Tim's trespass by forming an intention, such as an intention to forgo complaining about Tim entering her home.³³ But if Paula's will is sufficiently powerful to waive a right and eliminate a duty in the case of consent, then we should wonder why her will is not powerful enough to do so when releasing Tim from his promise. If communication is needed to release someone from a promissory duty, why is communication not also needed to transfer the consent that releases someone from a duty? The attitudinal view of consent is in tension with a performative view of reversing promises.

III

By looking at how promise and consent alter which rights are in play, we saw that combining a performative view of promise with an attitudinal view of consent creates an anomaly within a theory of rights. In some contexts, a mere act of the will is able to change which rights and duties we have; elsewhere, the will is impotent without the aid of communication. This difference calls out for explanation, on pain of seeming *ad hoc*. So is there a good reason why only promise, and not consent, requires communication? I will argue that there is not. Indeed, once we investigate the grounds of why promises require communication, we will see that analogous grounds hold in the case of consent.

So why must a promissory duty be communicated? As a first step, let us look for the effects of this communication. One effect is that the promisee becomes aware of the promise, and hence the existence of the promissory duty. Another effect is that the promisor becomes aware that the promisee is aware of the duty. In turn, the promisee is aware of *this* awareness of the promisor. And so on. In this way, communicating a promise creates "common belief" in the promise:

33. Alexander, "The Moral Magic of Consent II," p. 166; Alexander, "The Ontology of Consent," p. 107.

Two people have 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.³⁴

Common belief in a promissory duty ensures both that the duty is public and that both parties recognize the public nature of the duty. By “public,” I mean that the duty must not be a matter of private knowledge to only one party.³⁵ Since the parties may hold these beliefs more or less confidently, there is room for variation concerning how strong the common belief is.

This common belief facilitates promises’ ability to play valuable functions in our lives. We can group these functions into three loose camps. First, promises can play *informational* functions, which have an instrumental value for either the promisor or the promisee. Promises can create expectations, and invite reliance on these expectations.³⁶ By inviting reliance, a promisor offsets the risk that the promisee bears when deliberating on these expectations. The promisee faces less risk since the promisor would bear responsibility for disappointing these expectations. Accordingly, the promisee could claim compensation for unavoidable losses caused by her disappointed expectations. This reliance allows us to cooperate in extended ways, and creates the trust that allows us to take on ambitious projects.³⁷ Second, promises can play *agential* functions. By accepting a promise, a promisee’s agency extends so that she controls a promisor’s duty. If the promisor is motivated to behave morally, then the promisee will also control the promisor’s action. In this

34. Standardly, the hierarchy of beliefs is infinite. This may seem psychologically unrealistic. But high levels of the hierarchy make no practical difference. Let “qualified common belief” involve only the first two levels. My argument would only require that a promise generates qualified common belief.

35. The general public need not know about the duty. The promise need not be announced through Twitter, for example. Thanks to an anonymous reviewer for this point.

36. Neil MacCormick, “Voluntary Obligations and Normative Powers I,” *Proceedings of the Aristotelian Society*, Supplementary Volume 46 (1972): 59–78.

37. For extended cooperation, see H. A. Prichard, “The Obligation to Keep a Promise,” in *Moral Writings*, ed. Jim MacAdam (Oxford: Oxford University Press, 2002), pp. 257–65. For trust and projects, see Charles Fried, *Contract as Promise* (Cambridge, Mass.: Harvard University Press, 1981), pp. 8, 13.

way, promises give us the authority to determine what others may do. We may value this authority because it allows us to predict others' behavior and coordinate with them, but we may also value this authority for its own sake.³⁸ For example, we can ensure that others act in ways we desire, such as to ensure that they do not divulge our guilty secrets.³⁹ Third, promises play *relationship-building* functions. As with other voluntary obligations, promises can create bonds that put us in special relationships with each other.⁴⁰ In particular, promises can enable intimate relationships to develop in morally healthy ways, both by creating commitment and by protecting individuals from imbalances of power within a relationship.⁴¹

Promises play these functions because they make a promisor accountable to the promisee. This accountability requires common belief in the promise. For promises to play these functions in a minimal way, the promisee needs to be aware of the promissory obligation. Without this awareness, promises would lead neither to assurance, to trust, nor to relationships. This grounds the minimal requirement that the promisee is aware of the promise.⁴² In addition, promises play these functions better because the promisor is aware that the promisee can hold her accountable. A promisor gains additional reasons for acting from the prospect of being confronted by the promisee in the event that the promise is broken. To confront the promisor, the promisee would need to be aware that she can hold the promisor to account for complying with the duty. So for this accountability to provide the promisor with reasons for action, the promisor must be aware that the promisee is aware that she can hold the promisor to account. In turn, since the

38. David Owens, "A Simple Theory of Promising," *Philosophical Review* 115 (2007): 51–77.

39. Scanlon offers this example when grounding promissory obligation in the value of assurance. Scanlon, "Promises and Practices," pp. 207–8; Scanlon, *What We Owe to Each Other*, pp. 302–4; Michael Pratt notes that we have both "experiential" and "transpirational" reasons for seeking assurance. Michael Pratt, "Promises and Perlocutions," in *Scanlon and Contractualism*, ed. Matt Matravers (London: Frank Cass, 2003), pp. 93–119, at pp. 101–2.

40. Raz, "Promises and Obligations," p. 228; Daniel Markovits, "Contract and Collaboration," *Yale Law Journal* 113 (2004): 1417–1518.

41. Shiffrin argues that promises facilitate relationships based on equal mutual respect by creating trust that protects one individual from being vulnerable to a more powerful individual. Shiffrin, "Promising."

42. See Fried, *Contract as Promise*, pp. 40–41.

promisee is aware of *this* awareness of the promisor, the promisee can have greater credence in her expectations, and greater control over the promisor's actions. Finally, the goods constituted by bonds, relationships, and trust are only realized when there is mutual recognition of the relevant promises. A secret pledge of loyalty is all well and good, but only a public declaration will alter people's social relationships in a way that each can derive value from.⁴³ This point also applies to people's actions in light of their commitments. For these actions to contribute to a valuable relationship, it is not enough merely for a promisor to behave as promised. In addition, both parties must realize that the promisor is behaving in this way *because* she has made the promise. Thus, committed relationships derive value from both parties understanding that, through commitment, each party is making herself accountable to the other. In this way, accountability can have constitutive value, as part of these valuable relationships. This complements the instrumental value that accountability can have in serving other interests of ours. Both forms of value derive from the common belief in the promise, which underpins the relationship of accountability.

Our explanation proceeds with the assumption that promises are governed by rules that enhance promises' ability to play these valuable functions.⁴⁴ Attractively, this assumption means that we do not need to choose between the informational, agential, and relationship-building functions as *the* ground of promissory obligation. We can let all these grounds enter our account of promise, by holding that the rules governing promise are sensitive to all of them. This strikes me as a desirable result. In light of the importance of these functions, it seems plausible that these functions each feature in the explanation of why promises are binding. It would seem an unlikely coincidence for promises to play these functions and for promises to give us moral reasons, but for these reasons not to be grounded in these functions. Moreover, we can motivate the thought that normative powers are rule-governed on independent grounds. For example, varieties of contractualism, Kantian ethics, and rule-consequentialism will each take a rule-based approach to

43. Marriages and civic unions are paradigms of how public commitments constitute the value of certain relationships.

44. For defense of a rule-governed conception of promise, see Raz, "Promises and Obligations," pp. 219–28.

promise. If we assume that promises are governed by rules that enable them to best play the aforementioned functions, and that promises best play these functions when the promisor is publicly accountable to the promisee, we can see why the rules governing promises would require common belief in the promise.

So far, our explanation shows why promisor and promisee need common belief in the promise. Communication enters the picture as the only reliable way to guarantee common belief across the range of cases that will regularly arise in our lives. So long as the communication brings about this common belief, it does not matter what form this communication takes. No doubt, common belief is typically established through explicit, verbal promises. But implicit communication can also create common belief. For example, if someone orders food at a restaurant, then she implicitly communicates that she is undertaking an obligation to pay at the end of the meal. Similarly, a promise could be communicated through nonverbal behavior. A nod at an informal charity auction could undertake an obligation to pay for the lot.

It is instructive to compare voluntary assumptions of obligation that border on promises. Suppose I bring us lunch on Monday, and you reciprocate by bringing us lunch on Friday. This pattern repeats over several weeks. Even if we never formally discuss the matter, there will come a point at which we have entered into an implicit agreement. From this agreement, we will each end up with obligations to play our parts in our informal convention. Our previous actions will have created a common belief between us that we are each accountable to the other for bringing lunch on our designated days. These obligations are morally similar to paradigmatic promises, and so we might wonder whether these obligations are implicit promissory obligations. I think we might be in two minds on this point, precisely because we might be in two minds about whether to consider our actions as communication. If we keep playing our roles in the convention, and we know that the other person will interpret our actions as indicating an acceptance of the convention, then this would appear a form of implicit communication. Alternatively, we might think of these arrangements as voluntarily creating expectations, without communication.⁴⁵ But in that case, we should conclude

45. For example, we might hold that one communicates only when one intends as a means or an end that another person interprets one's behavior in a certain way, thereby

that the obligations are not a species of implicit promise. Little of substance hangs on whether we taxonomize these voluntary obligations as implicit promises. The important point is that creating public relationships of accountability always requires voluntary behavior that indicates to another person a willingness to assume an obligation. Typically, this behavior must take the form of communication, in order to generate the common belief necessary for the ensuing relationships of accountability.

IV

Having seen why promises require communication, let us move toward consent. To make this transition, consider a phenomenon that stands between the two: reversals and modifications of promises. We saw earlier that someone can reject a promise at the time at which it is offered or release the promisor afterward. Let us now add that a promisee can also modify a promise by relaxing one of its terms. Earlier, I took it as a datum that a mere intention is insufficient to reverse a promise, and we can add the same for modification. Instead, outward behavior is necessary, and typically this will require communication. Why is this so?

We can explain this datum along similar lines to before. Our normative power to dissolve or modify promissory obligations should be explained in terms of how these changes play valuable functions for us. For our own sakes, we may not actually want the promisor to carry out her promise. Alternatively, we may prefer that she does not do us a favor, lest we later feel beholden to her in some way. Or we may simply prefer that she perform an action from her own inclination, rather than from a sense of duty. For the sake of the promisor, we may wish to relieve her of a burden that she would incur by carrying out the promise. For both our sakes, we may wish to renegotiate a moral pact on new terms that are more mutually beneficial than the old. Again, these salutary functions require that both promisor and promisee share a common belief that the promise has been reversed or modified. These functions operate through altering the relations of accountability that people stand in to each other, and this accountability requires common belief. On the grounds that the rules

denying that one communicates when one acts merely foreseeing as an unintended side effect that another person will interpret one's behavior in this way.

governing reversals and modifications of promise are shaped to allow promises to perform these functions, we arrive at rules that require both parties to have common belief in a promise reversal or modification.

Most of the time, this common belief will require communication. Again, this communication could be achieved implicitly or through non-verbal behavior. For example, shaking one's head could communicate that an offer of a promise is being refused. But could common belief arise without communication? It seems that it might arise in a subsequent modification of a promise. Suppose you promise to bring me oranges at 8 AM on the first of each month for a year, for which I will receive delivery in person.⁴⁶ However, you repeatedly deliver at 9 AM from January to May. Although I have an easy opportunity to complain, I fail to do so. By June, we might think that I can no longer complain when you turn up at 9 AM one day. We might think that my repeated failure to complain has modified the promissory agreement. My omissions might modify the agreement because you could reasonably interpret my omissions as indicating that I do not mind about the late delivery. But we might hesitate from saying that I have communicated to you that I am modifying a term of the promise.

But should we hesitate? There is at least a reasonably strong case that I have actually communicated with you. I have modified the promise only if two conditions are met. First, you and I both must think that I lack other reasons for failing to object. For example, if it would be costly for me to object, then my failing to object would not indicate that I wished to change our agreement. Second, we both must think that I was aware of your failure to deliver on time and that I had decided not to object. If these two conditions hold, then it follows that I intentionally chose not to object partly because I was willing to relax this term of the agreement. But if I fail to object in a context in which I know that these omissions will unambiguously indicate a willingness to modify the promise, then my omissions would appear to communicate this modification. This scenario looks like a special case in which omissions perform the communicative role that actions usually play. We could see this case as similar to the case of the chair who announced that she would take silence as assent. On these grounds, I am on balance inclined to see this promise

46. Thanks to an anonymous reviewer for this case and for classifying it as modification through the course of performance.

modification as communication by omission. That said, the matter is delicate, and others might reasonably see the case as involving modification without communication. Consequently, they may see cases like this as exceptions to the general rule that reversals and modifications of promises require communication. If so, we should still all agree on the weaker claim that reversing or modifying a promise requires voluntary action or omission that signifies the reversal or modification. The case should not lead us to conclude that a private intention is enough to reverse or modify the promise. At most, the case should lead us to relax our conception of what forms of public behavior can play the role that communication typically does.

Once we allow that omissions and implicit nonverbal behavior can signify a reversal or modification of a promise, the question arises as to how clear this signification must be. As we saw before, omissions rarely succeed in communicating precisely because omissions can usually be interpreted in different ways. This interpretive ambiguity creates risk. For example, you would be interpreting my previous failures to object about late delivery as indicating that I will not object in the future. This interpretation is appropriate only if there are no relevant differences between the past and the future deliveries. Perhaps I eat breakfast later in winter and spring, and so it was only from June that I wanted oranges to be available at 8 AM. If so, I would mind late delivery only from June onward. If you cannot rule out possibilities like these, then you would be taking a risk in interpreting my failure to object as a modification of the promise. For the modification of the promise to take normative effect, how much interpretive risk can there be? This depends on the stringency of the duty. Being without oranges for an hour may be an inconvenience, but there are worse things in life, even when it is a breakfast hour. So a promise to deliver oranges is a relatively low-stakes promise. On the other hand, if the promise were to deliver medicine, then the stakes would be raised. A high-stakes promise is one in which the promisor is accountable to the promisee in a particularly important way. To reflect this importance, communication would need to be correspondingly clear, for this communication to successfully modify the promise. This point holds for promise reversals as well as modifications, and for communicative actions as well as omissions. In general, the tolerable level of ambiguity in a promise modification or reversal depends on the weight of the promissory obligation.

v

We have seen why making, reversing, and modifying promises require public behavior: public behavior is necessary for creating common beliefs that allow promises to play valuable functions. Once we are alert to this pattern, it is easy to find consent's place within it. Like promise, consent plays various functions within our lives. First, consent enables *intimacy*. Against a backdrop of duties shielding the private aspects of our lives, consent facilitates intimacy when it is invited. Second, consent enables *alteration*. Against a backdrop of duties protecting the integrity of our bodies and property, consent facilitates invited interactions that involve invasion or local damage. Medical consent paradigmatically plays this function, but so does consent to the repair of one's roof. Third, consent enables *mutual use*. Against a backdrop of property rights that specify which possessions are our own, consent allows us to share these possessions. The same can be true of our bodies: a life model can consent to an artist's portrait, for example. In short, while we have standing duties that keep the lives of strangers apart, consent allows us to bring our lives together when we request. As with promise, these valuable functions enter the explanation of why we have a normative power of releasing others from duties. Moreover, this normative power plays these functions maximally valuably by securing a common belief in the change in our moral relationships. Not only must each party have the belief that the consent exists, but each must also be assured that the other also has this belief. As with promises and their reversal, creating this common belief will require public behavior, and typically this public behavior must be communication.

To bring out the importance of public behavior in creating common belief, it will help to consider a response on behalf of the attitudinal view. An attitudinal theorist might counter that promises and consent serve our interests in different ways.⁴⁷ Since promises create new moral relationships, promises can only serve our interests when both parties are mutually aware of the promises. But the attitudinal theorist could argue that consent controls existing relationships, by giving us the option of allowing others' actions. The attitudinal theorist could argue that our interest in preventing unwanted interactions could be satisfied, even if

47. Thanks to an anonymous referee for the objection that follows.

we are not sure whether others know of our consent. This interest would be satisfied by their noninterference, whatever they or we think. Thus, the attitudinal theorist could hold that consent can serve our interests without mutual belief in the consent. Consequently, she could object that even though promises require communication, consent does not.

However, this defense overlooks the relationship between consent and accountability. This relationship underlies the value of consent, since consent plays its functions by transforming the ways in which we hold each other accountable. Here it is important to note that the normative rules governing when valid consent has been given are equally normative rules governing when valid consent has not been given. So at stake is the issue of what is required both to relax and to maintain the ways in which we are accountable to each other. In light of this point, consider an insight of Stephen Darwall's. Darwall argues that normative principles must be public whenever we use these principles to govern attitudes like blame. These attitudes arise "from a distinctively interpersonal (or second-personal) perspective in which we presuppose that the standards to which we hold one another are available to everyone in common."⁴⁸ To appropriately blame someone for failing to conform to a normative standard, these standards must be public, as "we cannot intelligibly hold someone accountable for complying with an inaccessible esoteric principle."⁴⁹ 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. Some of these rights are

48. Stephen Darwall, "Agreement Matters: Critical Notice of Derek Parfit, *On What Matters*," *Philosophical Review* 123 (2014): 79–105, at p. 98, citing and drawing upon Stephen Darwall, *The Second-Person Standpoint* (Cambridge, Mass.: Harvard University Press, 2006). Darwall's proposal is an elaboration on the Rawlsian insights that a "publicity condition" is a "constraint on the right" (Rawls, *A Theory of Justice*, p. 115) and that persons are "self-originating sources of valid claims." John Rawls, "Kantian Constructivism in Moral Theory," *Journal of Philosophy* 77 (1980): 515–72, at p. 546. For discussion of Rawls on publicity, see Andrew Williams, "Incentives, Inequality and Publicity," *Philosophy & Public Affairs* 23 (1998): 225–47.

49. Darwall, "Agreement Matters," p. 98.

“natural” rights—the rights that we have as the moral default. These natural rights will be specified by principles of justice. So a requirement that principles of justice be public ensures that our natural rights are public. But the 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. In this key respect, promise and consent are on a par as normative powers that determine which rights we have.

By allowing private intentions to determine consent, the attitudinal view fails to appreciate consent’s role in shaping how we are accountable to each other. This public accountability is both instrumentally and constitutively valuable for us. The instrumental value arises from the fact that public consent is particularly effective at protecting our interests in controlling our interactions with each other. Even if we restrict ourselves to our interest in excluding others from making unwanted contact with our personal zones, this interest is best served through a system of public accountability. Consider how the performative view of consent functions in this regard. Requiring consent to be communicated allows us to hold each other accountable by making claims like, “You and I both know that your acting this way is impermissible because I have not communicated to you that you are permitted to act in this way.” When we share a common belief with others that we could make such a claim, our abilities to control our personal spheres are more secure. By enhancing this ability, a system of public accountability will better promote our interest in preventing unwanted interactions with others. Even if this interest would be promoted to some extent by a requirement that a consent-giver must form an intention to consent, the interest would be better promoted by the requirement that she communicate consent.

In addition to this instrumental value, public accountability also has constitutive value for us because it partly determines the meaning of our interactions with each other. This parallels the way in which we saw that promises can have constitutive value as parts of committed relationships. Requiring that consent be public means that in morally consensual interactions, a consent-giver can think or say, “You and I both know that your acting this way is permissible because I have communicated consent.” Reciprocally, a consent-receiver can think or say, “You and I both know that my acting this way is permissible because you have communicated consent.” In these ways, common belief in consent

assures both parties that their interactions are governed by respect for their consent. This assurance is crucial for how we interpret each other's actions. For example, for morally desirable medical interventions, a patient must confidently interpret her physician's actions as motivated by a desire to respect the patient's consent. But the patient can interpret the physician's actions as guided by respect for her consent only if the patient and physician have a common belief that the patient has consented to the physician's actions. Reciprocally, a physician will not be happy proceeding with a medical intervention unless patient and physician share a common belief that the intervention respects the patient's consent. By influencing how both parties interpret the interaction, the public face of a consensual interaction colors the meaning of the interaction for them. This meaning determines the value of the interaction, and hence we derive constitutive value from these interactions. The attitudinal view goes wrong because private intentions are not enough to determine whether this public bond of accountability is dissolved or maintained. Only public behavior can achieve this.

By now, we should be familiar with the thought that although public behavior is required for creating common belief in consent, this need not be explicit, verbal communication. Nonverbal communication can also align people's beliefs about consent. Again, we should ask whether there are contexts in which communication is unnecessary. A potential exception is an analogue of the earlier case of oranges delivery. Suppose you start to take a shortcut across the foot of my garden. You do this regularly enough that it becomes clear that I have noticed your habit without complaining. If this pattern continues, then it seems plausible that eventually I will have implicitly granted you a temporary easement. As with the promise to deliver oranges, we have two options. My marginally preferred option is to see these omissions as a form of communication. But an alternative option is to see these omissions as a form of intentional behavior that, while falling short of communication, still signifies consent to the shortcut. Either way, we would be requiring meaningful public behavior, and not a mere intention, for my consent to be transferred.

In discussing how public behavior can reverse or modify a promise, we saw that this behavior must be less ambiguous the more important the promise is. A similar point applies concerning low-stakes and high-stakes consent. If Hannah is gesturing to a stranger that she intends to

move his parked bicycle, which prevents her from unlocking her own, then mere eye contact from the stranger may be a clear enough form of communication for her to proceed. But if Hannah is the stranger's physician, and she is proposing a medical procedure, then eye contact will not be sufficiently clear for her to proceed. As a trend, we can expect that the higher the stakes, the more clear the communication of consent must be. To the extent that a duty is stringent, public behavior must not admit of multiple interpretations in order to release someone from this duty. This will determine the height of the bar for the specificity of verbal consent or for the clarity of contextual indicators of nonverbal consent.⁵⁰ The clarity of the communication will influence the degree of each party's common belief. The higher the stakes, the more confident each will need to be about what has been communicated. Indeed, if the stakes were sufficiently high, then communication must be so clear that both parties achieve not just common belief in the consent, but common *knowledge* of it.⁵¹

The relevant notion of clarity is one that will be speaker-relative. Communication may be clear when a native speaker utters a certain sentence, and yet it may be unclear what the same sentence communicates when uttered by someone who is newly grasping the language. In addition, the relevant notion of clarity will also be audience-relative. The bike-owner's eye contact may be sufficiently clear as a way of communicating his consent to Hannah moving his bike if she is an adult, but it may be overly ambiguous as a form of communication, if Hannah is a child. In these ways, clarity in communication is an epistemic consideration that is sensitive to the communicative and interpretive capabilities of both parties.

To bring out the way in which clarity in communication makes epistemic considerations matter for the performative view, let us contrast it with the attitudinal view. The attitudinal view does not give

50. Thanks to an anonymous reviewer for this way of putting the point, and for pressing me to clarify the relationship between the stakes of the consent and the issue of when unambiguous communication is required.

51. Stakes might matter in a different way. While this article focuses on the debate about whether actual consent requires communication, stakes plausibly bear on the separate issue topic of hypothetical consent: the lower the stakes, the more acceptable hypothetical consent is as a substitute. Thanks to Michael Otsuka for connecting the topic with hypothetical consent.

epistemic considerations a role in determining how consent creates moral permissions. On the attitudinal view, private intentions constitute the morally valid consent that creates permissions, and communication merely provides evidence of which permissions independently exist. By contrast, the performative view should give a role to epistemic considerations in fixing when consent is morally valid. Successful communication involves a listener being aware that the speaker is communicating, and being aware about what is being communicated. This awareness admits of degrees, and so we need to ask which degree of belief a listener must have for a speech-act to have successful uptake. When the speech-act is an exercise of a normative power that alters our duties and rights, the required degree of belief will vary with the stringency of these duties and rights. In this way, the performative view naturally leads to a concern with two types of epistemic considerations: the listener's understanding that communication has taken place, and the listener's understanding of what has been communicated. These types of understanding constitute the publicity and clarity of a communication of consent.

As such, epistemic considerations bear on the performative view's stance on indirect communication of consent. Indirect communication can generate morally valid consent, and this is particularly clear in some institutions. Suppose a hospital has a procedure in which two nurses explain an intervention with low risks to a patient, before he signs an informed consent form in their presence. If the hospital is set up in the right way, then a physician could permissibly perform the low-risk intervention while relying on the nurses' testimony that the patient had signed the form. In this way, the patient could successfully indirectly communicate with the physician. The nurses would be human intermediaries in the communication between patient and physician; in these roles, the nurses would be loosely analogous to the electronic intermediaries through which we communicate over large distances.⁵² Of course, this verdict would depend on the reliability of the testimony. If the hospital's records are in disarray, if there is only one intermediary who is an inexperienced trainee, or if there are insufficient safeguards to ensure

52. There are important differences in the way that each acts as an intermediary. Conversations with nurses typically involve efforts to ensure comprehension, while electronic communications do not. Thanks to an anonymous reader for this point.

that each nurse's self-interest is tightly aligned with his professional obligations, then the physician may need to check the consent forms herself. Moreover, for invasive or consequential surgery, the stakes would be raised, and so a higher standard of clarity would be needed. Consequently, a physician may even need to be present when the patient signs these forms, or to discuss the forms again with the patient. The guiding principle is that communication of medical consent must reach a threshold of clarity concerning the existence and content of the consent, and the location of this threshold depends on the seriousness of the medical procedure.

VI

Drawing these strands of argument together, we can diagnose the central error of the attitudinal view of consent. The attitudinal view fails to recognize that since consent is a normative power that changes which rights are in play, and since which rights are in play must be public, consent must operate publicly. In this respect, consent is similar to promise—another normative power that alters our rights. The rules governing each power admit of a similar explanation. This explanation has four central claims.

Functions: The normative power plays certain valuable functions.

Accountability: These functions are achieved through altering relationships of accountability, which are constituted by people's rights and duties.

Common Belief: For the normative power to alter these relationships of accountability, these people must have common belief concerning which rights are created or eliminated.

Publicity: This common belief requires public behavior that signifies the exercise of the normative power.

In addition, I have argued that the requisite type of public behavior depends on the stringency of the rights and duties:

Stakes: The more stringent the right and duty, the more accountable people must be. The higher the stakes, the clearer the meaning of the

public behavior must be. In the case of high-stakes consent, the public behavior must take the form of unambiguous communication.

In this way, consent and promise must operate publicly in order to generate the common belief that ensures that rights have a practical upshot by framing mutually recognized relations of accountability—relations that have both instrumental and constitutive value for us. This insight is only accommodated by the performative view of consent, and is lost on the attitudinal view, which holds that private intentions can operate normative powers. If we wanted a slogan to summarize this critique of the attitudinal view, we might say that what you do in the privacy of your own mind is not enough to waive your rights in the public sphere.⁵³

These lines of argument have been deliberately abstract, in order to open up a fresh approach to the question of whether morally valid consent requires communication. But my conclusion has concrete applications. We can bring it to bear on the practical issue with which we began—sexual ethics and the normative foundations of codes against sexual assault. I have argued that the necessary clarity of consent depends on whether this is high-stakes or low-stakes consent. Sexual consent is a paradigm of high-stakes consent, and so each party needs to have a correspondingly high degree of common belief in each other's consent. This is necessary for creating and maintaining accountability in sexual encounters. This accountability both has instrumental value, in protecting individuals from uninvited sex, and also constitutive value, in determining the meaning of sexual encounters for participants. Accordingly, sexual consent needs to be unambiguously communicated.

However, unambiguous sexual consent will not always require explicit, verbal consent. To pick an easy case, 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. As such, this nonverbal behavior can communicate and establish a sufficiently confident common belief in the consent. But equally there are also contexts in which nonverbal behavior is likely to be ambiguous. This ambiguity is more likely between strangers, as acquaintances have more evidence to guide their interpretation of each other's nonverbal behavior. In addi-

53. Thanks to Laura Schroeter for this slogan.

tion, ambiguity is more likely whenever nonverbal behavior can be explained by multiple motives. This makes silence and omission less likely to successfully communicate high-stakes sexual consent. In realistic cases involving strangers, there is typically more than one plausible explanation of someone's verbal and nonverbal activity. This person could still be deciding whether to consent, this person could be unwilling but afraid, this person could be temporarily paralyzed by the sexual encounter,⁵⁴ and so on. Consequently, inactivity is likely to be too ambiguous for sexual consent. Further, we saw that clarity in communication is speaker-relative and audience-relative. This means that ambiguity is more likely when alcohol is involved, since inebriation can diminish people's abilities to send and receive signals through nonverbal behavior. Similarly, ambiguity is more likely in communication between individuals who are relatively inexperienced and who are still learning how to communicate with nonverbal behavior and how to interpret nonverbal behavior.⁵⁵ Limited communicative ability in a speaker and limited interpretive ability in a listener are likely to preclude the clear communication needed for sexual consent. Factors like these can combine in such a way that in a particular context, nonverbal behavior fails to adequately communicate consent. In such a context, unambiguous consent would require that explicit communication be sought.

This analysis highlights that there are two mistakes to be avoided with respect to the ethics of sexual consent. One mistake is to be too stringent in requiring that consent always be explicit or verbal. This condition is frequently not met in practice, and yet this does not mean that a significant amount of sexual behavior is wrong because nonconsensual. But acknowledging this point should not tempt us into making the opposing mistake of being too lax with what sorts of implicit, nonverbal behavior can communicate consent. For example, it is not enough that on the balance of probabilities, an instance of nonverbal behavior is more plausibly interpreted as communicating consent than not, in the way that a

54. See Ann W. Burgess and Lynda L. Holmstrom, "Coping Behavior of the Rape Victim," *American Journal of Psychiatry* 133 (1976): 413–18; Grace Galliano, Linda Noble, Linda Travis, and Carol Puechl, "Victim Reactions during Rape/Sexual Assault: A Preliminary Study of the Immobility Response and Its Correlates," *Journal of Interpersonal Violence* 8 (1993): 109–14; Anderson, "Rape Law Reform Based on Negotiation," p. 297.

55. In addition, extreme intoxication may incapacitate someone from giving valid consent.

weather forecast of a 55 percent chance of rain implies rain. This communication would be unacceptably unclear, given that we are dealing with high-stakes consent.

We can bring these points to bear on the design of campus codes regulating sexual misconduct. If we abstract from all the other complexities with the codes, and aim only to capture the moral principle regulating consensual sex, these codes should state that unambiguous communication is required. But when implementing the code, the appropriate interpretation of “unambiguous” will be context-sensitive. Consequently, the range of behaviors that would count as conforming with such a code will vary from case to case. The same nonverbal behavior could be unambiguous when it occurs between experienced, long-term sexual partners, and yet ambiguous between inexperienced and intoxicated strangers. To create a campus culture in which these points are recognized, it will not be enough that codes are officially stated; in addition, universities ought to provide guidance on how context bears on the appropriate interpretation of the codes’ terms. So while it is morally appropriate for the definitions in codes to contain terms like “unambiguous,” these codes ought to be embedded in a practice that publicizes the context sensitivity of these terms.

This point about morality is of course only one consideration among many when framing policy. The appropriate formulation of definitions of consent in codes would need to take into account both the broader institutional and social aspects of campus cultures, in order to evaluate the consequences of adopting one definition or another. Consequently, I do not intend my argument to entail any firm conclusion about the appropriate lettering of campus codes. My point here is merely that, whatever other objections the new wave of campus code reforms faces, it is no objection to them that affirmative consent standards pursue worthy social goals of reducing sexual violence through the problematic means of misclassifying otherwise morally innocent encounters as nonconsensual. As far as morality is concerned, yes does indeed mean yes.