

Penultimate version, to appear in Applied Epistemology, ed. Jennifer Lackey (Oxford University Press, forthcoming 2019); please cite to final version

The Epistemology of Consent

Alexander A. Guerrero

alex.guerrero@rutgers.edu

Moral, legal, and political philosophers have spent a great deal of time thinking about what consent *is*, and how consent can play the apparently transformative role that it appears to with respect to making some otherwise impermissible and objectionable conduct permissible and unobjectionable. These are hard and important metaphysical and moral questions.

In this chapter, I draw attention to the fact that—depending on our account of what consent is—there may be hard and important *epistemological* questions about consent as well. I will suggest that debates about consent often mistake epistemological issues for metaphysical ones. People who defend so-called “affirmative consent” views sometimes are accused of, or even take themselves to be, offering a new (and controversial) view about the nature of consent. I think this is a mistake. I argue that the right way of understanding “affirmative consent” requirements is as a view about what is required, epistemically speaking, before one can justifiably believe that another person has consented. This view will be justified, if it is, because of background views about epistemic justification and the way in which epistemic justification interacts with moral norms governing action. Embracing an “affirmative consent” standard does not commit one to embracing either an “attitudinal/mental” view (consent requires only the right mental attitude) or a “performative/behavioral” view (consent requires the right mental attitude *plus* some communicative performance regarding that attitude) of the nature of consent.

In this chapter, I offer a necessary component of any plausible view of what consent is, and then set out plausible norms governing the epistemology of consent, given this component. I then discuss the implications of this view in two real-world contexts in which consent figures prominently: consent to sex and consent to medical treatment. Importantly, the focus throughout is on moral questions, not legal ones. The aim of the chapter is to clarify what is required for various actions to be morally permissible. There is then the further question of how, or whether, the law (and comparable policies of, say, universities) should be crafted to align with morality. I discuss this question only briefly, although it is obviously an important part of the full “affirmative consent” discussion.

Here is an overview of the argument:

1. Consent requires that a person have a specific mental state. More specifically, an agent, A, consents to some state of affairs, SA, only if A has an attitude (implicit or explicit) of affirmative endorsement toward SA.
2. Consent, when present, makes morally permissible some conduct that would otherwise be morally impermissible.

3. An agent, B, can non-culpably act as if another person, A, consents to some state of affairs, SA, only if B has a justifiable belief that A has an attitude of affirmative endorsement toward SA.

I will suggest that we should accept (1). Indeed, I am inclined toward something stronger; namely:

(Attitudinal View): Consent is a mental attitude toward a state of affairs. Specific mental attitudes are necessary and sufficient for consent. More specifically, an agent, A, consents to some state of affairs, SA, *if and only if* A has an attitude of affirmative endorsement toward SA.

The Attitudinal View says that mental attitudes are not only necessary for consent, but also that they are sufficient for consent. I will not give a defense of this view in this chapter, but I think that hesitation in embracing the Attitudinal View is typically the result of a failure to appreciate the truth and moral significance of (3). In particular, there are cases that appear to be similar to each other, but which differ in this respect:

No Consent: an action of B's that is wrong because A did not consent to B's action, and B's action is morally impermissible without A's consent

Objectionable Moral Risk: an action of B's that is wrong because B took an objectionable moral risk with respect to whether A consented or not, given B's epistemic standing with respect to the question of whether A consented

In some cases of Objectionable Moral Risk, people might misdiagnose the moral problem as one of No Consent. The wrong in these cases might not be that the person did not consent. The wrong might be that the person did not have a justified belief that the person did consent, and, as (3) makes clear, it is morally objectionable to act as if one did have such a justified belief when one did not. Furthermore, acting in a case where one takes an objectionable moral risk regarding another's consent is a way of disrespecting that person, and acting without sufficient regard for that person's standing as a moral agent—it is just a different way of doing this than acting without that person's consent.

Additionally, in some cases, the relevant state of affairs to which the person does or does not have an attitude of affirmative endorsement can include facts about the state of affairs with respect to communication and explicit performance. For example, Joe might have an attitude of affirmative endorsement to *this* state of affairs:

Talk: Moe asks if I want to have sex and then we talk about it and then (if the conversation goes well) we have sex.

while *not* having an attitude of affirmative endorsement toward this state of affairs:

No Talk: Moe has sex with me without us ever talking about it.

In such a case, conversation or verbal performance will be relevant to whether any sex between Joe and Moe is consensual, but because of Joe's specific attitudes, not because of the nature of consent.

Part One of the chapter will explain and make the case for (1) and (3), and will discuss why some might have required something like expression or communication as part of the metaphysical account of what consent *is*. I will suggest that cases people have used to motivate the “performative” view of the metaphysics of consent really just motivate an appreciation of (1) *and* (3), and should leave us agnostic about whether the “attitudinal” or “performative” view of consent is correct.

Part Two of the chapter will focus attention on the epistemological details concerning justifiable belief about whether others consent to some state of affairs. The claims defended here are related to broader issues concerning the interaction of moral and epistemic norms, part of a debate about what I have called “moral epistemic contextualism”¹ and what others have discussed under the heading of “moral encroachment.”² The basic set of questions concerns (a) the management and justification of our beliefs (typically the jurisdiction of epistemic norms), and (b) the use of our beliefs as the basis of action, in high stakes moral contexts. Part Two continues the overall argument of the chapter, focusing on the epistemology of consent:

4a. Whether (i) it is *justifiable* for B to believe that A consents to some state of affairs, SA, or (ii) whether B *knows* that A consents to SA, depends, in part, on the moral context, the moral stakes of the situation.

or

4b. Whether it is morally objectionable for B to *act based on* justified belief or knowledge that A consents to SA—and whether B is non-culpable for *acting as if “A consents to SA” is true*—depends, in part, on the moral context.

These two premises both suggest that the moral stakes matter. But they make different suggestions as to how they matter. The first, (4a), suggests that moral stakes affect epistemic considerations of justification and knowledge. The second, (4b), suggests that moral stakes affect what we can do on the basis of propositions that we believe—even propositions that we justifiably believe or know. It could be that both of these suggestions are correct, that only one of them is, or that neither of them is correct. I will discuss

¹ Alexander A. Guerrero, “Don’t Know, Don’t Kill: Moral Ignorance, Culpability, and Caution,” *Philosophical Studies* (2007), p. 69 (henceforth “DKDK”). Although I used the phrase “moral epistemic contextualism” in that paper, in the commonly accepted terminology that is now standard in the epistemological literature, the view I discuss would be better described as a form of “subject-sensitive invariantism,” where the subject sensitivity comes from the moral stakes in question. I discuss this at greater length in Part Two.

² James Fritz, “From Pragmatic Encroachment to Moral Encroachment,” *Pacific Philosophical Quarterly* (2017); Michael Pace, “The Epistemic Value of Moral Considerations: Justification, Moral Encroachment, and James’ ‘Will To Believe’,” *Noûs* 45(2) (2011), pp. 239–268; Rima Basu, “Can Beliefs Wrong?,” *Philosophical Topics* 46 (1):1-17 (2018); Sarah Moss, *Probabilistic Knowledge* (OUP, 2018); Georgi Gardiner, “Evidentialism and Moral Encroachment,” in *Believing in Accordance with the Evidence: New Essays on Evidentialism* (ed. Kevin McCain, Springer, 2018); Rima Basu & Mark Schroeder, “Doxastic Wronging,” in Brian Kim & Matthew McGrath (eds.), *Pragmatic Encroachment in Epistemology* (Routledge, forthcoming).

these possibilities in Part Two, arguing that we should accept at least one of (4a) or (4b). The argument then continues:

5. Some cases in which consent is important are, as a result, cases with high moral stakes, and so B must possess more/stronger evidence (the result of perhaps correspondingly more investigation) in order for B (a) to justifiably believe that A consents or (b) to non-culpably act as if A consents.

6. In particular, cases for which sexual or medical consent are important are cases in which there are high moral stakes.

7. In cases in which B is contemplating an action which is permissible only if A consents to states of affairs involving sexual activity or medical intervention, B must possess more/stronger evidence (perhaps requiring greater investigation) (a) to justifiably believe that A consents, or (b) to non-culpably act as if A consents.

Exactly what “more” a person must do will be context dependent. But it is plausible that this is what makes “affirmative consent” the normatively appropriate standard with respect to sexual consent: an epistemic account about when we can justifiably believe that other have consented to engaging in sexual activity, or about when we can permissibly act on such a belief, *not* a metaphysical claim about when there is consent. We can remain agnostic regarding whether the “attitudinal” or “performative” account of the nature of consent is correct while embracing “affirmative consent” ideas. I will make similar suggestions with respect to informed consent requirements in the medical context.

I. Consent and Beliefs about Consent

What is consent? Let’s start by demarcating some central, uncontroversial properties of consent.

First, consent is always attached to an agent: consent is always *someone’s* consent, it always has a subject. I consent, or you consent, or she consents, or we consent.

Second, consent always concerns some specific object: there is always *something* that someone is consenting *to*, even if that something has imprecise or underspecified boundaries. I consent to the surgery, you consent to be governed by this person for the next 4 years, he consents to having sex with that man later this evening, they consent to allowing the car dealership to withdraw \$10,000 from their bank account. To remain suitably abstract to cover the broad range of things to which consent can be given, I suggest that we adopt the view that consent is always consent to a state of affairs with some (perhaps imprecisely specified) temporal duration. These states of affairs will often include the actions of other people, but they may only involve the granting of certain (perhaps unexercised) permissions to particular people. These are two uncontroversial descriptive claims about consent: consent always has a subject and consent always has an object.

Here is a third uncontroversial claim about consent: when it exists, it is morally transformative. Consent alters how it is morally permissible to treat or to engage with the subject of the consent, the consenting

person(s). The precise alteration involved depends on the state of affairs to which consent has been given. When there is consent, some states of affairs are morally permissible which would have previously been morally impermissible.³

We could countenance something like “superfluous” consent—something like consent, but in cases in which it is not needed, and in which it does nothing, morally speaking. I consent to the continued existence of tomatoes. You consent to my continuing to have a relationship with my parents. They consent to 1917 having been earlier in time than 1922. And so on. But this is a parasitic use of the idea of “consent.” The main reason this is so is that consent is plausibly connected to moral permissions or moral rights that we have regarding what we can permissibly do and how we can be permissibly treated by other agents. A short story here goes like this: we have various moral rights, these rights come along with correlative duties that others have (typically negative duties: duties not to harm us, touch us, rule over us, impede us in going over here or over there, and so on), and consent releases some people from these duties vis-à-vis us.⁴ But I have no moral right regarding whether tomatoes continue to exist, whether you continue to have a relationship with your parents, and so on. So, this is not real consent; this is playing at consent, or joking about consent.

Let us take these three claims as accepted by all: consent has a subject, consent has an object, and consent is morally transformative. The controversy comes not with noting *that* consent is morally transformative, but in giving an account of *why* or *how* it has this effect. There are two main views, the “attitudinal view” and the “performative view.”

A. The Attitudinal View

On the “attitudinal” view, consent is a mental state that an individual might have, an attitude toward some real or imagined state of affairs. On this metaphorical picture, there is the terrain over which we as individuals get to move as we see fit, over which we get to govern. This is the province of our autonomy, the real and metaphorical space over which our beliefs, attitudes, commitments, and values ought to determine what happens. These are the things that we get to have control, or that we normatively *ought* to have control over, at least, even if it doesn’t always work out this way.

The suggestion on the attitudinal view is that an agent, A, consents to some state of affairs, SA, if and only if A has a particular attitude toward SA. Consent is morally important on this view because consent is essentially a part of an individual’s attitudinal map, a plot of where she’d like to go—based on her values—if it were (as it should be) up to her.

The precise details of the required attitude or mental state are a matter of some debate. On one view, the attitude is an *intention* with some specific content.⁵ On another view, the attitude is one of *acquiescing* in

³ Of course, consent alone may not be *sufficient* to make an act morally permissible. The fact that someone consents to sex does not make it permissible to have sex with that person if by doing so one will thereby kill 100 other people (fill in the details as you like).

⁴ Tom Dougherty has a nice discussion of this picture in, “‘Yes Means Yes’: Consent as Communication,” *Philosophy & Public Affairs* 43, no. 3 (2015).

⁵ Heidi M. Hurd, “The Moral Magic of Consent,” 2 *Legal Theory* 121 (1996).

the consented-to conduct.⁶ On yet another view, the mental state is an attitude of waiving one's right that some particular conduct not occur, where this is a matter of being disposed not to object to another's conduct based on that right.⁷ On another, the attitude might be a desire.

On the view that I find most plausible, the attitude is one of what we might call "affirmative endorsement" toward some state of affairs, SA. This attitude might be a combination of beliefs, desires, and intentions, but it is perhaps most plausible just to think of it in terms of a robust pro-attitude toward SA. "Robust" and "affirmative" in the previous sentences are meant to indicate the depth and relative integration of the attitude in the agent's overall set of beliefs, desires, and values. What it is meant to rule out are the "pro-attitudes" that can be generated toward states of affairs simply by dramatically and artificially limiting the option set of states of affairs that the agent believes might be brought about. "Your money or your life" might lead one to have a highly contingent pro-attitude toward the state of affairs in which you give the robber all of your money. But this will just be, on this terminology, "mere" acceptance or "mere" endorsement" or a "non-robust" pro-attitude toward that state of affairs.

Of course, spelling out the details here is notoriously difficult, as a quick assessment of the literature on coercion and exploitation makes evident. We will end up owing an account of when baselines are artificial (rather than "natural"), when a choice stems from an agent's "deep" (rather than "shallow") values, or when a choice counts as an authentic and robust expression of an agent's autonomy, rather than something else. And it is made more difficult because, of course, when the agent hands over her money, rather than foregoing her life, this *is* a deep reflection of what she values, what really matters to her, and so on. Trying to specify the kinds of backgrounds against which an agent can count as *consenting* to some state of affairs is a difficult task.

In real life, we acknowledge that some situations are so fraught with compromise and coercion that consent is impossible (or something close to that). Consider, for example, rules that mandate that all sex between correctional officers and people who are currently incarcerated counts as non-consensual. The important point is that we need to operate with a relatively thick understanding of the normative significance of agreement to some state of affairs obtaining, an understanding on which agreement is related to foundational ideas of autonomy and self-respect.⁸ On this view of "robust" or thick agreement, it can be reasonable to refuse to agree to a bad situation, even if that situation is not the worst situation, and even if that situation is better than one's other options. And we cannot assume the robustness or reasonableness of agreement to some state of affairs simply because on the agent's ranking of the options that she faces, that state of affairs is her highest-ranked option.

To focus on relatively clear cases of consent, we can restrict our focus to those cases in which the balance of A's affirmative endorsement of or pro-attitude toward some state of affairs, SA, is due to positive

⁶ Peter Westen, *The Logic of Consent* (2004), pp. 25-63. Or see Kimberly Ferzan, "Consent, Culpability, and the Law of Rape," *Ohio State Journal of Criminal Law* 13 (2016), pp. 397-439. On Ferzan's view, the person giving consent must only have the view that another person's action is "okay with them."

⁷ Larry Alexander, "The Moral Magic of Consent (II)," 2 *Legal Theory* 165 (1996); and Larry Alexander, "The Ontology of Consent," *Analytic Philosophy* Vol. 55, No. 1 (2014), pp. 102-113.

⁸ For discussion, see Alexander A. Guerrero, "Political Functionalism and the Importance of Social Facts," in *Political Utopias*, (OUP, 2017, edited by Kevin Vallier and Michael Weber).

features of SA—features of SA that appear as good or valuable to A, by the lights of A’s evaluative framework—rather than due to the badness of features of A’s alternatives, SA1, SA2, etc. This is a placeholder of a view, but it will be sufficient for the purposes of this chapter.

B. The Performative View

The performative view of consent maintains that although having a particular mental attitude is *necessary* for an agent to consent, this is not *sufficient* for consent.⁹ Instead, the performative view requires a particular mental attitude *plus* a communicative act of some kind (whether verbal or non-verbal) that serves to communicate the existence of this mental attitude.¹⁰ This kind of view focuses less on the moral importance of allowing individuals to follow their moral map through autonomy-central aspects of the world, and more on an explicitly interpersonal dance of non-permission, explicit waiver, and subsequent specific permission.

On this view, although it is important that A have the appropriate mental attitude toward SA, that is, by itself, not enough to do anything morally transformative. Instead, the fact of A’s mental attitude toward SA must be communicated *to B*, in order for anything morally transformative to occur. In the standard case, we imagine that SA includes B doing something to or with A, something that would otherwise be morally impermissible. A, by both having the appropriate mental attitude and communicating this fact to B, *waives* a certain kind of moral right against B, *eliminates* a moral duty that B otherwise would have with respect to A, and thereby *makes morally permissible* action of B’s that involves A and which would otherwise be morally impermissible. All of this happens through some public communication—in the standard case, some communication (verbal or non-verbal) directly from A to B.

There is more that could be said about both the attitudinal and the performative views of consent. For now I want to draw attention to two other claims.

First, both of these views are committed to (1) or something like it:

1. Consent requires that a person have a specific mental state. More specifically, an agent, A, consents to some state of affairs, SA, only if A has an attitude (implicit or explicit) of affirmative endorsement toward SA.

This is worth stressing in part because some have discussed views on which consent is *just* about the requisite kind of performative or communicative act. On this kind of view, in relatively normal

⁹ At least this is the view that has most recently been referred to as the “performative” view by Tom Dougherty, among others. Dougherty, “Yes Means Yes.” Alan Wertheimer discussed a view that he called the “performative view” on which no particular mental state is even *necessary*. On that view, which he defended in early work, an appropriate communication of consent is sufficient for consent. Alan Wertheimer, *Consent to Sexual Relations* (Cambridge: Cambridge University Press, 2003), p. 144.

¹⁰ This view, described by some as the “hybrid” view, is presented and defended in, for example, David Owens, “The Possibility of Consent,” 24 *Ratio* 402 (2011); and Franklin G. Miller & Alan Wertheimer, “Preface to a Theory of Consent Transactions: Beyond Valid Consent,” in Franklin G. Miller and Alan Wertheimer, eds., *The Ethics of Consent* (2010).

conversational contexts (involving competent speakers of the language, etc.), saying “I consent to SA” would be both necessary and *sufficient* for consent, whether the person had any particular mental attitude or mental state or not. We can call these “bare performance” views of consent.

These kind of views run into a host of problems. We might, for example, think that saying “I consent to SA” in a particular context might be the result of fear, intimidation, and a host of other considerations compatible with the person having a robust attitude of *non-endorsement* toward SA. On either the moral entitlement to chart one’s own course over this terrain or the moral waiver views of consent, it is hard to see why this utterance would be morally transformative. Even if we treat cases in which there is coercion or duress differently than normal contexts, we still might think a simple assertion of “I consent to SA” (made on a whim, or whatever) might be troublingly little basis for others to rest on, particularly if SA includes things like performing surgery on A, sending A to war, or having sex with A. It is plausible that the mental state behind the assertion is what really matters. Even if we don’t go this far, we might think that it definitely does matter, even if it is not all that matters.

Some who might have been tempted by these “bare performance” views of consent might have been worried about what we might call “innocent recipients.” These people are the recipient of what looks for all the world like perfectly valid consent, but which is actually the product of something other than the usual causal chain that runs from a mental attitude of affirmative endorsement toward SA to a communicative act of “I consent to SA.” Instead, the “I consent to SA” they receive is the product of someone else’s hypnosis, coercion, deception, or some kind of spontaneous and unreflective impulse. (Obviously, the case is different if the recipients of what looks like consent are themselves responsible for getting the person to engage in the speech act.) These “innocent recipients” have, by hypothesis, done nothing wrong. They may have even been very careful to ask the person in question all the right questions. The “bare performance” views can say: the person said “I consent to SA,” and either there was no coercion, duress, etc., or the recipient of the consent was not aware of it nor responsible for it, so: morally transformative consent.

But one needn’t adopt this implausible view of consent in order to say plausible things about innocent recipient cases. Recall, for example, claim (3):

3. An agent, B, can non-culpably act as if another person, A, consents to some state of affairs, SA, only if B has a justifiable belief that A has an attitude of affirmative endorsement toward SA.

This claim does not imply, implausibly, that the person who says “I consent to SA” while under hypnosis actually does consent to SA. But it does allow that what an innocent recipient does may be morally non-culpable, if her belief is justifiable.

Note, however, that (3) is just a necessary condition on morally non-culpable action—there will be other conditions that would likely have to be satisfied as well. One of those conditions might be that A actually does consent to SA. If that is correct, then it may seem that the “innocent recipient” is back on the hook. Even if they satisfy (3), this other condition may *not* be satisfied, and so it may not be morally permissible for the innocent recipient to act as if A consents.

Again, however, there is something more plausible that we can say, if we endorse a related principle regarding the distinction between moral blameworthiness and objective moral wrongdoing:

Mistaken Belief: If B has a justifiable belief that A has an attitude of affirmative endorsement toward some state of affairs, SA, then B is not culpable for acting as if A consents to SA—even if it turns out that A does not consent to SA, and even if this means that what B does (given that A does not consent to SA) is objectively morally wrong.

If we accept Mistaken Belief, then in some cases in which “innocent recipients” act without actual consent, they do something that is objectively morally wrong, but for which they are not blameworthy.¹¹

C. Knowing Other Minds

If we accept this as a response to the worry of “innocent recipients,” then we have no reason not to accept what seems independently plausible: consent requires that the consenting individual have a specific mental attitude toward some state of affairs. But this leaves all of us with a problem: the problem of other minds. There is a familiar kind of deep philosophical skepticism here: how can we even know that the people around us even *have* minds. Let us leave that worry aside, as moral concerns about consent only really get off the ground if we are engaging with creatures with minds. Still, given the mental state component of consent (whether it is all that is required, or just part of what is required), there will be the hard issue of when we have a justifiable belief that a person has the requisite mental attitude.

There are several significant difficulties here. The first is just the familiar difficulty about knowing what is going on in the minds of other people. This is just a generalization of the problem Whitney Houston focuses on:

How will I know (Don't trust your feelings)
How will I know
How will I know (Love can be deceiving)
How will I know
How will I know if he really loves me

¹¹ This is, arguably the correct response to a case such as the one that Wertheimer discusses in defending the “bare performance” view (which he calls the “performative” view) against the view on which a mental state and communication of that mental state are both necessary for morally transformative consent. Wertheimer discusses a case in which an inattentive patient thinks that she is only authorizing a biopsy when she signs a consent form for a lumpectomy, although her physician did explain the procedure and the form to the patient (p. 148). Wertheimer suggested that the physician did enough to ascertain that the patient consented, and so the expression of consent makes it morally permissible to perform the lumpectomy. A more plausible view, I think, is that performing the lumpectomy in these circumstances (when the patient does not possess a mental state endorsing or authorizing this state of affairs) is objectively morally wrong, although not morally blameworthy, and perhaps “subjectively” morally permissible, if one wants to countenance this category.

There are various sources of evidence we might have to help us assess whether a particular person has a particular mental state, such as the mental state of being in love with Whitney Houston.

One of these is the direct testimony of the person whose mental states are in question. We might (if not too shy) ask the person directly, and see what they say. This is defeasible evidence, of course. The person might have reasons to misrepresent their mental states, or they may be self-deceived about their own mental states.

A second source of evidence is the testimony of third-parties regarding the person in question's mental states. Maybe their best friend made an inquiry on your behalf, and they report back to you. Again, this is defeasible evidence, with even more ways of going astray; it inherits all of the possible problems with direct testimony, as well as possible concerns about third-party deception, misrepresentation, miscommunication, and so on.

A third source of evidence, which is just a more general category that encompasses the first two, is all of the perceptual and observational evidence we might gather regarding the person's behavior (actions, reactions, emotions) or the behavior of others that might be used to draw inferences about the person's mental states. As with the other sources, there are familiar ways in which this can go wrong. Indeed, we are even capable of being misled as to whether some entity even *has* mental states. Assuming we get that right, we can still be in significant error regarding the nature and specific content of those mental states. As Houston herself suggests, there are familiar sources of error in this regard. One is biased or misleading interpretation of evidence due to one's psychology and background investment through processes described by such labels as "motivated reasoning," "emotional reasoning," "confirmation bias," and so on. Subtly misread actions, facial expressions, and similar ostensible clues to the inner life of others are the bread and butter of many artistic creations: songs, films, Jane Austen novels. These are things that can be hard to get right. On the other hand, we often feel we know exactly what another person feels or believes or endorses: because they tell us, because we can see it all over their face, because of what they do.

The empirical literature on what is called "mindreading" suggests some skepticism about our abilities in this arena is warranted. Shannon Spaulding, summarizing that literature, notes:

Most people think of themselves as pretty good at understanding others' beliefs, desires, emotions, and intentions. However, social psychologists have discovered that we are significantly worse at mindreading than we think we are... We consistently and substantially overrate our ability to accurately judge others' mental states and interpret social interactions... the consensus from the empirical literature is that mind misreading is very common.¹²

Spaulding discusses some of the implications of this, noting particularly some of the common causes of mind misreading: "(1) we are too cognitively taxed to engage in thorough information search, (2) we pay attention to superficial cues, (3) we are biased by self-interest, (4) we fail to understand our own mental

¹² Shannon Spaulding, "Mind Misreading," *Philosophical Issues*, 26, Knowledge and Mind, (2016), p. 423.

states, (5) and we inappropriately deploy stereotypes.”¹³ Obviously, there will be cases involving belief about the consent of others in which these potential sources of mindreading error are present.

Importantly, it is plausible that the more experience that we have interacting with a person, the easier it is to correctly infer what their mental states are, based on what they say and do, based on what we observe of them. This might help us avoid attending to superficial cues and using stereotypes in interacting with others. There are ways of helping to pay greater attention to avoid self-interest biases, and familiar ways of getting more and better evidence about what a person’s mental attitudes are toward various possible or actual states of affairs.

In the case of the mental state relevant for consent, which I have described as an attitude of affirmative endorsement toward some state of affairs, there are some further issues worth discussing explicitly.

First, the attitude of affirmative endorsement might vary in its details depending on the state of affairs toward which it is directed. In particular, it might be connected to more or less emotional and affective response and to very different kinds of emotional responses, it might be more or less phenomenologically vivid, it might be more or less transparent and known to the individual whose attitude it is (even if we want to require that it always be at least somewhat introspectively available), and it might be more or less integrated into the person’s overall set of beliefs, values, and other psychological attitudes. As a result, the attitude of affirmative endorsement might be relatively passive or active in its effects. Sometimes we consent to states of affairs that do not require us to *do* very much at all, just to accept the state of affairs. On other occasions, consent to a state of affairs will be connected to all kinds of other intentions and actions. In these ways, consenting to serious surgery is different than consenting to having your picture appear in your employer’s monthly newsletter. Consenting to take part in a religious conversion ceremony is different than consenting to sex. Consenting to be governed by a candidate whom one views as an effective but uninspiring pragmatist is different than consenting to be governed by a candidate whom one idolizes and loves. Consenting to join the army is different than consenting to be the emergency contact listed on a friend’s medical form. This kind of diversity is not well captured by views that require that the mental state in question be an intention or a desire, or so it seems to me. Sometimes the attitude is connected to or even caused by intentions and desires. But it need not always be.

Second, in addition to knowing whether a person has the mental attitude of affirmative endorsement toward some state of affairs, there is the difficulty of knowing precise (or even relatively precise) facts about the state of affairs toward which the person has the attitude, particularly given the aforementioned diversity with respect to those attitudes. The *object* of consent is clearly of crucial importance, and on this account it is a component (the object) of the relevant mental attitude. But it is also hard to know the boundaries of the state of affairs to which consent has been given, even when one knows that the person in question possesses an attitude of affirmative endorsement to some state of affairs. There are some practices that aim to fix the object of consent with precision. Consider, for example, the work that goes into drafting explicit contractual language, or that guides the creation of multi-page forms in the medical context aimed at securing “informed” consent to a particular medical procedure. But these are the exceptional case. Many of our interactions do not involve this much clarity—either to the subject whose

¹³ Spaulding (2016), p. 434.

consent it is, or to those of us who may be interested in what, if anything, the person consents to. This is one reason, for example, that we might expect consent to sexual activity to be a complicated matter, and why it is normatively important to be attuned to the details of what is going on with the other person throughout the duration of a sexual encounter. A person might not have explicit views about the exact states of affairs to which they are consenting when beginning certain activities, even if they begin with some kind of consent to states of affairs in some general category.

Third, an additional difficulty is that the specific mental attitude of the person consenting is subject to change over time, depending on the temporal duration of the state of affairs to which the person consents. Very different than promises or legal contracts, it is plausible that consent can be withdrawn or altered at any moment up until the consented-to state of affairs is concluded. If the state of affairs I have consented to has not yet begun or is still ongoing, I can withdraw my consent. Even if a person says that “I consent to SA” while possessing the requisite mental attitude regarding SA, they might still change their mind (no longer having the attitude of endorsement toward SA), without being able to say anything. In such a case, it is plausible that they no longer consent to SA. A person scheduled for surgery who is conscious but can no longer communicate, but who decides that she doesn’t want the procedure and no longer has an attitude of affirmative endorsement to the state of affairs in which the procedure is conducted, no longer consents to the surgery, although it may be true that she previously had consented to it. This is one reason to make as certain as possible that consent in a particular case is likely to be stable over time. Now, it is true that in some cases, if a person’s consent is made known to others at time T1, if it is altered or revoked or newly withheld at time T2, that may leave those others in the position of “innocent recipients” if they have not been apprised of this change from T1 to T2. But that does seem to be the situation people are in under those circumstances. And that follows on either the Attitudinal or the Performative views of consent, given that both require that the person *currently* have a specific mental attitude—not just that they have *had* the specific mental attitude at some point in time.

A fourth difficulty is that, once we have noted that consent involves a mental attitude of affirmative endorsement toward some state of affairs, there is the question of whether it can include *implicit* attitudes of affirmative endorsement as well as explicit ones. And then there would be the question of whether both implicit and explicit attitudes of affirmative endorsement both are of equal normative significance. There are different ways of understanding implicit attitudes. On one understanding of them, they differ from explicit attitudes in being both relatively *automatic* and *introspectively inaccessible*. This is the sense of “implicit” people use when speaking of, for example, implicit bias. A second sense of “implicit” is more familiar from discussion of implicit or tacit belief, where the difference concerns whether a representation with a certain content is actually “present” or “occurrent” in one’s mind in a certain way. So, for example, in the case of belief, one might believe some proposition *p* explicitly if a representation with that content is actually present in the mind, whereas one believes some proposition *p* only implicitly or tacitly if one believes *p*, but the mind does not currently possess a representation with that content. In the case of attitudes of affirmative endorsement, we might say that one can have an attitude of affirmative endorsement toward some state of affairs either explicitly (where the person is presently conscious of this attitude and is attending to it) or implicitly (where the person has this attitude toward the state of affairs, but is not presently conscious of this attitude nor is she attending to it). Of course, in both cases, an account is still owed about what it is to believe or to possess an attitude.

It is very plausible that we believe things beyond those things that we are presently attending to. I believe that there is not a monkey sitting on my shoulder as I type this. I believe that my car is where I parked it earlier today. I believe that the Library of Congress has a copy of John Rawls's A Theory of Justice. And so on. I believed these things implicitly or non-occurently, prior to writing those sentences. While coming to think about them, or while writing them, or just after writing them, I believe them explicitly and occurently. These beliefs are not automatic, nor are they introspectively inaccessible. That is not the relevant sense of "implicit" here. Similarly, it seems that we have many implicit attitudes toward states of affairs. I hope that my cousins in Miami are doing well. I regret that I never had a chance to meet my paternal grandfather. I consent to having my photograph on the departmental website. And so on. Again, I think I had these attitudes implicitly or non-occurently, prior to writing those sentences. After or while writing them, I attend to those attitudes, making them explicit. But I don't think I thereby create new attitudes that I didn't previously possess.

Of course, in the context of consent, it may be controversial whether implicit attitudes can ever be sufficient to do the normative work we expect from consent. I think they can play this normative role. It is plausible, for example, that I currently have the implicit attitude of affirmative endorsement toward this state of affairs: that if I have suffered a devastating and debilitating accident, then I am treated by medical professionals to the best of their abilities, even if I am not conscious and cannot discuss their plans with them. I think we have lots of standing attitudes of affirmative endorsement of this sort, and they are (most of the time) held only implicitly, at least until they are brought to our attention and thereby made explicit. It is true that in the vast majority of cases of consent, there will be occasion to make an attitude of affirmative endorsement toward some state of affairs shift from being implicit to being explicit, as the state of affairs is presented to one for consideration and response. But I think that in many of cases of what people call "imputed" or "counterfactual" or "hypothetical" consent, there is actual consent, although it is implicit—in the same way that I actually believe that there is not a monkey sitting on my shoulder, although (prior to writing this sentence) I believe that only implicitly. This is controversial, however, and some might not follow me in thinking this.

We might bypass some of these difficulties if we switched from talk of attitudes to talk of traits, understood as "broad-track dispositions to behave and cognize" in particular ways.¹⁴ If we went that route, we could talk not of our attitudes of affirmative endorsement, but instead about our dispositions to respond in various ways toward various states of affairs. Roughly: we respond positively and attractively (in various ways) to those states of affairs that we endorse, and negatively and aversively (in various ways) to those that we do not endorse or that we reject.

Thinking of consent in this way would be revisionary, but mostly because we are used to thinking of consent only in relatively explicit, discrete, episodic modes; something close to saying "I do" or signing our name on a dotted line—rather than as a standing trait or disposition. But if we think about what seems to be the correct normative picture in the case of, for example, consent to sexual activity, it is not obvious to me that this other dispositional, fluid, responsive picture of consent is a non-starter. Indeed, it might seem plausible, depending on what the object of consent is in a particular case. Although we can promise without saying "I promise to _____," much of our promising does involve actual explicit

¹⁴ See Edouard Machery, "De-Freuding Implicit Attitudes," in Implicit Bias and Philosophy, Volume 1: Metaphysics and Epistemology (Michael Brownstein and Jennifer Saul, eds., OUP 2016).

statement to that effect. Consent is mostly not like that. We consent to all kinds of things, all day long, without ever once saying the word “consent.” And it is not obvious that some kind of relatively fluid, dispositional account is a non-starter when we think of consent. Consider, for example, the view discussed earlier, on which the relevant mental state is an attitude of waiving one’s right that some particular conduct not occur, where this is a matter of being disposed not to object to another’s conduct based on that right.¹⁵ But I will leave this issue to the side, here, however, hoping only to have convinced the reader that implicit attitudes might well be part of the picture of the metaphysics of consent.

A fifth and final difficulty is that if we accept that a mental attitude of affirmative endorsement is at least a component of consent, then we should be open to the possibility that consent itself comes in degrees, rather than only being a binary, all or nothing state. The clearest route to this conclusion would be to accept a picture on which attitudes of affirmative endorsement toward states of affairs come in degrees. In some cases, we might completely endorse a state of affairs, or completely reject it. But in other cases, our attitude toward the state of affairs might be more mixed. I might have an attitude of tentative but affirmative endorsement—I’m at 70%, not 100%. As a result, we should think that I “kind of” consent to the state of affairs, or that I mostly consent, or we might say that the encounter was largely or mostly consensual. This is perhaps an unsettling realization, since it might be nice to think consent comes entirely in black or white. But I think that is implausible as a characterization of actual moral life. We arguably should, as a moral matter, strive to engage with other in ways that are entirely consensual, rather than mostly consensual or only somewhat consensual. But it seems a mistake to think that all interactions must be classified as fully or not-at-all consensual as a conceptual matter. And so it is not an embarrassment for an account of the metaphysics of consent that it has this feature. This, again, seems to push us away from seeing consent as any kind of analogue of promise.

We might try to avoid this conclusion by identifying some distinctive kind of attitude that is the ‘consent’ pro-attitude, and which we either have or do not have toward all possible states of affairs. Or we could identify some threshold point such that ‘consent’ only exists if one has the attitude of affirmative endorsement that registers at or above this threshold. Such responses should be familiar from discussion of degrees of belief and attempts to avoid various problems that arise when we think of belief as something other than an on-or-off notion. I don’t think these responses are particularly plausible or needed, and I won’t at any rate pursue them further here.

In this section, I have argued for a particular picture of the metaphysics of consent, one on which, crucially, a person consents to a state of affairs, SA, only if the person has a particular mental state: namely, an attitude of affirmative endorsement to SA. I suggested that both Attitudinal and Performative views of consent should endorse this necessary condition. And I suggested that with this component comes a host of distinctive difficulties. The attitude of endorsement itself can be different in its nature and connection to other mental states and attitudes, depending on the state of affairs toward which it is directed. The attitude of endorsement will have a particular object, a particular state of affairs, but the precise boundary of that object can be unsettled and/or difficult to discern. And the attitude of endorsement can change over time, be implicit as well as explicit, and plausibly comes in degrees. Noting these components of the metaphysics of consent is essential for getting clear on the subject of the

¹⁵ Larry Alexander, “The Moral Magic of Consent (II),” 2 *Legal Theory* 165 (1996); and Larry Alexander, “The Ontology of Consent,” *Analytic Philosophy* Vol. 55, No. 1 (2014), pp. 102-113.

next section: the difficulty and complexity that can be involved in the epistemology of consent—knowing whether a person consents to some state of affairs, the robustness of that consent, whether the person continues to consent to that state of affairs, and what precisely it is to which the person consents. I will suggest that none of this is easy and, given the moral significance of consent, it complicates the epistemological story we should tell.

II. High Moral Stakes and the Epistemology of Consent

It is morally important for us to know whether other people consent to various states of affairs. This is particularly true in cases in which the states of affairs do or might involve *us* doing things to and with other people that would be impermissible without their consent. In the previous part of the chapter, I offered the following claim:

3. An agent, B, can non-culpably act as if another person, A, consents to some state of affairs, SA, only if B has a justifiable belief that A has an attitude of affirmative endorsement toward SA.

I also suggested that we should accept this claim:

Mistaken Belief: If B has a justifiable belief that A has an attitude of affirmative endorsement toward some state of affairs, SA, then B is not culpable for acting as if A consents to SA—even if it turns out that A does not consent to SA, and even if this means that what B does (given that A does not consent to SA) is objectively morally wrong.

Both of these claims fix our attention on whether an agent has a *justifiable* belief that another person consents to some particular state of affairs. We might also want to *know* that another person consents to some particular state of affairs, to the extent that knowledge encompasses both justification and truth of the proposition believed, as well as some (controversial to state) connection between those two things. Thus, we might endorse an even stronger necessary condition than (3):

(3—knowledge): An agent, B, can morally permissibly act as if another person, A, consents to some state of affairs, SA, only if B *knows* that A has an attitude of affirmative endorsement toward SA.

This condition might be thought appropriate, at least if we are looking to describe objective permissibility, rather than mere subjective permissibility (if we want to countenance this latter category).

So, we have moral reasons to be concerned with whether we justifiably believe or know that other people consent. And there are reasons, spelled out in the previous part of the chapter, to see this as somewhat difficult, due to the metaphysical facts about consent: in particular, due to the fact that consent includes as a significant component whether other individuals have particular mental states.

A. Moral Stakes, Moral Encroachment, and Justification

Here is a natural question: does the moral significance of these beliefs about consent affect how much individual agents must do in order to be *justified* in holding these beliefs, or to count as *knowing* that a person consents to a specified state of affairs?

In earlier work, I suggested the following:

“The more morally significant the actions that a belief in *p* (or absence of a belief in *p*) will support or license, the more stringent the epistemic demands that must be met before one can act as if one is justified in believing that *p*. Importantly, this ‘increase’ in the epistemic demands is required by moral considerations, not epistemic ones. We might also think that what is at stake, morally, in believing *p* actually alters when one is justified in believing *p*, but I am primarily concerned just with the question of when one is justified in acting as if one is justified in believing *p*.”¹⁶

This suggests two relevant possibilities, which are reflected in these two different components of (4):

4a. Whether (i) it is justifiable for B to believe that A consents to some state of affairs, SA, or (ii) whether B knows that A consents to SA, depends, in part, on the moral context, the moral stakes of the situation.

or

4b. Whether it is morally objectionable for B to *act based on* justified belief or knowledge that A consents to SA—and whether B is non-culpable for *acting as if* “A consents to SA” is true—depends, in part, on the moral context.

These two claims both suggest that the moral stakes matter. But they make different suggestions as to how they matter. The first, (4a), suggests that moral stakes affect epistemic considerations of justification and knowledge. The second, (4b), suggests that moral stakes affect what we can do *on the basis of* propositions that we believe—even propositions that we justifiably believe or know. It could be that both of these suggestions are correct, that only one of them is, or that neither of them is correct. I think that we should accept at least one of (4a) or (4b), and will try to make that case here.

It is worth briefly connecting these views to other related views regarding ways in which non-epistemic considerations (considerations that do not have ‘some sort of intimate connection with truth’¹⁷)—whether pragmatic or moral—can affect epistemic justification and knowledge.

Some have argued that there is a connection between knowledge and action, so that if one knows that *p*, then *p* is warranted enough to justify you in ϕ -ing, for any ϕ .¹⁸ But if one goes in for that kind of claim—

¹⁶ Guerrero (2007), p. 69.

¹⁷ J.J. Ichikawa and M. Steup, “The Analysis of Knowledge,” in E.N. Zalta (ed.) The Stanford Encyclopedia of Philosophy (2016), <https://plato.stanford.edu/archives/win2016/entries/knowledge-analysis/>

¹⁸ Jeremy Fantl and Matthew McGrath, Knowledge in an Uncertain World (OUP, 2009), p. 66, building on earlier work of theirs: “Evidence, Pragmatics, and Justification,” Philosophical Review (2002), pp. 67-

tying epistemic considerations regarding knowledge to considerations of when one is justified in acting, or when one is justified in using p in some chain of reasoning—then one might argue that non-epistemic features seem to affect what one can permissibly do, either on pragmatic or moral grounds. The easiest way to see this is to compare pairs of cases in which individuals in each of the cases have the same evidence or justifying basis for a belief, but what they are planning on going on to do on the basis of that belief is different. Consider:

Imagine two different people, each of whom is attempting to assess whether there are any people inside an abandoned house. The first person, Jack, is attempting to determine whether anyone is inside because he is trying to determine how many people live in the town. The second person, Jill, is attempting to determine whether anyone is inside because she is charged with demolishing the house.¹⁹

Now imagine that Jack is just curious about this, nothing important or official turns on his count. And imagine that Jack does what is ever required for him to come to justifiably believe that there is no one in the house. Perhaps he asks some people who live nearby, knocks on the door, peeks his head inside, yells a few times, and then comes back and does this a week later. If he sees no sign of anyone after having made these investigations, it is plausible that he has done enough to justifiably believe that no one lives in the house. And, if it is true that no one lives in the house, then it seems plausible that he *knows* that no one lives in the house.

But then consider Jill, who is investigating the question of whether anyone lives in the house because her construction company is charged with demolishing it. Imagine that she does all the same things as Jack in terms of investigation. She asks some people who live nearby, knocks on the door, peeks her head inside, yells a few times, and then comes back and does this a week later. If she sees no sign of anyone after having made these investigations, is it plausible that *she* has done enough to justifiably believe that no one lives in the house? And, if no one lives in the house, is it plausible that she *knows* this?

Given what they have done to investigate and given their evidence, it is very natural to think both (a) that Jack justifiably believes that no one lives in the house and that Jack knows that no one lives in the house; and (b) that Jill is not justified in believing that no one lives in the house and that, even if it is true that no one lives in the house, that she does not know that.

One reason we might believe (b) is that we accept the connection between knowledge and justifiable action articulated above, and we do not yet think that Jill would be justified in demolishing the building based on her belief that no one lives in the building, so we infer that she must not *know* that no one lives

94; and “On Pragmatic Encroachment in Epistemology,” Philosophy and Phenomenological Research (2007), p. 558-589. And compare: “If a subject knows that p , then she is in a good enough epistemic position to rely on p in her practical reasoning” from J. Brown (2008? 2013??); and “Where one’s choice is p -dependent, it is appropriate to treat the proposition that p as a reason for acting iff you know that p ,” from John Hawthorne and Jason Stanley, “Knowledge and Action,” The Journal of Philosophy (2008), p. 578.

¹⁹ Guerrero (2007), p. 68.

in the building.²⁰ This line of reasoning can be used to motivate what has come to be called “subject-sensitivity,” the claim that “the truth-value of a knowledge attribution depends on features of the attribution’s subject’s environment that are not paradigmatically epistemic features.”²¹ Perhaps the most common form of subject-sensitivity that has been discussed is sensitivity to stakes, with most of the emphasis having been on the practical stakes to the agent, but with some now focusing on the moral stakes involved. James Fritz formulates the basic argument schema here as follows:

- (1) Knowledge-Action Link: If *S* knows that *p*, then *S* is warranted enough to act (believe, prefer) as if *p*.
- (2) Action-Environment Link: Feature *F* of *S*’s environment (where *F* is not a paradigmatically epistemic feature of an environment) makes a difference as to whether *S* is warranted enough to act (believe, prefer) as if *p*.
- (3) Therefore, Subject-Sensitivity: The truth-value of a knowledge attribution depends on features of the attribution’s subject’s environment that are not paradigmatically epistemic features.²²

The suggestion would then be that features of Jill’s environment make a difference to whether she is warranted enough to act as if *p*, and if she cannot act as if *p*, then she must not know that *p*. Why should we accept that (2) is true, that it is the non-epistemic features, namely the stakes, that are doing the work? The answer: because of cases like the one involving Jack.

This argument, if accepted, gets us to subject-sensitivity, and to versions of both pragmatic and moral encroachment (we can identify Jack and Jill cases varying the stakes along both personal prudential or pragmatic dimensions, or moral dimensions). This, in turn, lends support to (4a), once we note that consent is of high moral significance:

- 4a. Whether (i) it is *justifiable* for B to believe that A consents to some state of affairs, SA, or (ii) whether B *knows* that A consents to SA, depends, in part, on the moral context, the moral stakes of the situation.

This is fine as far as it goes, but it does require one to sign on to the Knowledge-Action Link to get to subject-sensitivity or stakes-sensitivity. And we might be tempted to reject that claim, or claims like it.²³

We might also find that accepting pragmatic and/or moral encroachment is a high price to pay; one that might independently give us pause. One worry is that it is troubling to accept the idea that Jack and Jill can have the exact same evidential support for some proposition, such as the proposition that no one is in the house, and yet be in different places in terms of epistemic justification or knowledge with respect to

²⁰ James Fritz has a nice presentation of argument schemas of this kind in his “Pragmatic Encroachment and Moral Encroachment,” *Pacific Philosophical Quarterly* (2017), pp. 4-6.

²¹ Fritz, “Pragmatic Encroachment and Moral Encroachment,” p. 1.

²² Fritz, “Pragmatic Encroachment and Moral Encroachment,” pp. 4-5.

²³ See, for example, Jennifer Lackey, “Sexual Consent and Epistemic Agency,” this volume.

that proposition.²⁴ A second worry is that it can seem that this encroachment of the moral or pragmatic on the epistemic is introducing these concerns in the wrong place, putting weight on the epistemic side, rather than on the practical side concerning what a person is going to *do* with what she believes or even knows. Reflecting on Jill's situation, we might not object to Jill holding the belief that the house is empty, and she could even use this belief for a whole bunch of purposes—just not all purposes.

If we move away from some simple knowledge-action connection, we might accept something like (4b) in thinking about the Jack and Jill cases. Recall:

4b. Whether it is morally objectionable for B to *act based on* justified belief or knowledge that A consents to SA—and whether B is non-culpable for *acting as if* “A consents to SA” is true—depends, in part, on the moral context.

The Knowledge-Action Link suggests that if we know that *p*, then we can always *act as if p*. But we might decide that we don't want to go in for pragmatic and moral encroachment, for a host of reasons. We might then sever this connection, and say: sure, given that they have exactly equivalent evidence, Jack and Jill are either *both* justified in believing that no one is in the house, or *neither* of them is. Either they both know, or they both don't know. But leave those epistemic questions aside. The important difference these cases bring out is a practical one. They each believe *p* with a certain level of justification, based on a certain set of evidence. Beliefs at that level of justification, based on that kind of evidence, can warrant some actions, but not all actions.

On this picture, there are normative limits on what the beliefs can be used to rationalize or justify or ground, based on the level of justification of those beliefs. Jack can non-culpably do what he is contemplating doing, based on a belief that is as justified as his is. But Jill cannot non-culpably do what she is contemplating doing, based on a belief that is as justified as hers is. On this kind of view, we might reject (4a) while endorsing (4b).

There is more that might be said here, but it seems that in response to Jack and Jill kinds of cases we are left with two possible views:

View One: Moral Encroachment: moral stakes can affect epistemic justification and knowledge. Contexts differ, morally speaking, in that they differ in the moral significance of the actions under consideration which a belief in *p* (or absence of belief in *p*) will or might license or be used to justify in that context. As the moral stakes increase, the exact same level of evidentiary support can result in different consequences with respect to whether an individual justifiably believes that *p* or whether they know that *p*. In Jack's context, he justifiably believes and knows that there is no one in the house. In Jill's context, she does not justifiably believe or know that there is no one in the house.

²⁴ For arguments in this direction, see Georgi Gardiner, “Evidentialism and Moral Encroachment,” in Believing in Accordance with the Evidence: New Essays on Evidentialism (ed. Kevin McCain, Springer, 2018).

View Two: Scope of Use Tied to Epistemic Justification: moral stakes can affect what actions we can take based on certain beliefs, depending on the level or kind of justification we have for those beliefs. In particular, as the moral stakes increase, beliefs that would have been “actionable” for us might become “unactionable”²⁵ with respect to certain actions—incapable of supporting, justifying, or being the rational ground for those actions—despite nothing changing about the justification with which we hold the beliefs in question. Jack’s belief that there is no one in the house can serve as justification for the action he is contemplating. Jill’s belief cannot serve as justification for the action she is contemplating. Jill’s belief could serve this ground if she came to hold it with even greater justification—by, for example, investigating much more extensively within the house.

If we endorse View One, then we should endorse (4a). If we endorse View Two, then we should endorse (4b). If we accept both View One and View Two, then we should accept both (4a) and (4b). And these two views are not incompatible.

In the foregoing, I hope to have made it plausible that in responding to Jack and Jill cases, we should endorse at least one of these two views, and so we should accept at least one of (4a) or (4b). It is outside the scope of this chapter to argue decisively for one or both of these views, but let me at least say that View Two should be familiar. As I noted in previous work, “[w]e might think that legal rules of evidence are based on similar considerations—there might be cases in which an agent is justified in believing *p* as a result of hearsay, but we don’t think that a belief formed on these grounds should be used as grounds on which to punish someone.”²⁶ In general, we will require that beliefs be held with greater confidence and with greater evidential support if those beliefs are going to be the basis on which we take morally significant actions—assuming that not taking those actions is a clearly morally permissible option. The slogan here is something like: *scope of use should be sensitive to strength of justification*. As one’s justification for belief increases, one can use that belief for more purposes, and in particular, for more morally serious purposes, in terms of deliberation and action.

There is a question of whether we should think knowledge is different than justified belief, or whether it represents something of a special case. Perhaps *knowledge* requires a level of justification such that knowledge is always fully actionable, always capable of serving as a rational justifying ground for actions dependent on the known proposition. This is certainly what is suggested by those defending the Knowledge-Action link and similar claims. In that case, the level of justification for knowledge would have to be quite high, at a level of justification such that it permits full actionability, across all contexts, even morally serious ones. If that is so, then it would suggest that neither Jack nor Jill have sufficient justification to constitute knowledge in the abandoned house case, since it seems that neither of them is permitted to perform actions such as destroying the house.

Another possibility is that although we are always permitted to act on what we know, and to take any actions at all that are dependent on the known proposition, this is true only in the sense of *objective* permissibility, rather than *subjective* permissibility. The thought here relies on the idea that individual

²⁵ This terminology comes from Guerrero (2007), p. 69.

²⁶ Guerrero (2007), p. 70.

agents may not always know that they know the things they in fact know.²⁷ Let's say there is some proposition *p*, such that it is the case that if *p* is true, then a number of "*p*-dependent" actions are permissible, and if *p* is false, then those *p*-dependent actions are impermissible. Trivially, then, if knowledge of a proposition requires that the proposition be true, then knowledge of *p* entails that all *p*-dependent actions are permissible. But that is permissible in an *objective* permissibility sense: permissible given the objective facts of the world. There may still be an issue of blameworthiness or the related idea of moral culpability or subjective permissibility, as distinct from objective moral rightness or objective permissibility. Here's why: the agent may not know that they know—they may not even believe that they know. And they may have inadequate justification for the belief that they know that *p*.

So, I might be in a situation where I in fact know that *p*, but it would still be morally blameworthy for me to act as if I know that *p*, because I do not know that I know that *p*. I might not even *believe* that I know that *p*. Imagine the person who, pressing Jill, asks: but do you *know* that no one is in the house? Even if Jill has the evidence that Jack has, and even if in fact this evidence is sufficient to justify a belief that the house is empty, and even if it is true that the house is empty, she still might pause, and might well say "no." This could be because the bar for knowledge is high, as contemplated earlier. But it could also be

²⁷ We do not *always* know that we know the things we know, and any account of knowledge should be able to accommodate that fact. The reason I think this is that even though we will be aware of our evidence and corresponding justification for some proposition, with that evidence and corresponding justification rising to a level sufficient for knowledge, we still might not know whether the proposition supported by the evidence is true. Some accounts of knowledge will rule out this possibility, or come close to doing so, by requiring so much in the way of evidence and justification. Consider, for example, the idealized, strong conception of knowledge discussed by Hintikka:

Suppose we say that evidence for a proposition, P, is conclusive iff it is so strong that, once one discovers it, further inquiry cannot give one reason to stop believing P. The concept of knowledge used by many philosophers seems to be a strong one on which one knows P only if one's evidence for P is conclusive in this sense. It is plausible that the KK principle holds for this strong concept of knowledge.

J. Hintikka, "Knowing that One Knows," *Synthese* 21 (1970), pp. 145-6. But this is, as Hintikka acknowledges, an unrealistically strong conception of knowledge. And even conclusive evidence in this sense is not enough to guarantee *truth*. Even leaving that aside, it is plausible that we know many things for which we do not have conclusive evidence in this sense. Our ordinary concept of knowledge is not like this strong one.

Still, many have defended the so-called "KK principle" and luminosity about knowledge, where the KK principle says that, for any proposition *p*, if one knows that *p*, then one knows that one knows it. For a variety of attacks on the KK principle, see William Alston, "Level-Confusions in Epistemology," *Midwest Studies in Philosophy* 5 (1) (1980), pp. 135–150; Richard Feldman, "Fallibilism and Knowing that One Knows," *Philosophical Review* 90 (2) (1981), pp. 266–282; and Timothy Williamson, *Knowledge and Its Limits* (2000). For recent defenses of that principle, see Robert Stalnaker, "Luminosity and the KK Thesis," In Sanford Goldberg (ed.), *Externalism, Self-Knowledge and Skepticism: New Essays* (Cambridge University Press, 2015); and Daniel Greco, "Could KK Be OK?" *Journal of Philosophy* 111 (4):169–197. (2014). It is outside the scope of this chapter to engage this question fully. What I say here can be interpreted conditionally: if it is possible to know that *p* without also knowing that one knows that *p*, then an agent might be blameworthy for acting as if she knows that *p*, even when she does in fact know that *p*.

that there is a difference between knowing that p , and knowing that one knows that p , or even believing that one knows that p . (This may depend, of course, on the extent to which one opts for an internalist or externalist conception of knowledge—among other things.) In certain morally significant stakes cases in which we lack this kind of introspective awareness of the fact of our knowledge, we should not act (at least if we know that refraining from acting is morally permissible, and we know that we know this), even if we in fact do know the proposition in question. If we act in such a case, even if we in fact do know the proposition in question, we act in a way that is morally blameworthy, although we do nothing that is objectively impermissible. We destroy the house, and no one is harmed, because the house was empty. But we took a risk, from our subjective vantage point. And we were aware that we might be taking a risk, given that we did not believe that we knew the house to be empty. And it was not a risk that we were compelled by other morally significant factors to take. And all of that remains true, even if we in fact knew that the house was empty.

In summary, then, we might accept View One: Moral Encroachment, and then we should endorse (4a). Or we might reject Moral Encroachment, but endorse View Two: Scope of Use Tied to Epistemic Justification, and then we should endorse (4b). If we accept both View One and View Two, then we should accept both (4a) and (4b). If we accept View One, then Jack knows, and Jill doesn't. If we accept View Two, then perhaps Jack and Jill both know, or neither of them do, but either way, neither can take morally significant actions based on their beliefs, given their level of justification (whether sufficient to constitute knowledge or not). I hope to have made the case that we should accept either View One or View Two (or both), and so should accept either (4a) or (4b) or both. Where does that leave us regarding the epistemology of consent?

B. Moral Stakes and the Epistemology of Consent

The foregoing discussion suggests that moral stakes matter, either by directly affecting whether a person holds a justified belief or knows some proposition, or by affecting whether a person can permissibly act *as if* they justifiably believe or know some proposition, whether they can act *based* on a justified belief or knowledge. Connecting these conclusions to the general argument, we get the next several premises:

5. Some cases in which consent is important are, as a result, cases with high moral stakes, and so B must possess more/stronger evidence (the result of perhaps correspondingly more investigation) in order for B (a) to justifiably believe that A consents or (b) to non-culpably act as if A consents.
6. In particular, cases for which sexual or medical consent are important are cases in which there are high moral stakes.
7. In cases in which B is contemplating an action which is permissible only if A consents to states of affairs involving sexual activity or medical intervention, B must possess more/stronger evidence (perhaps requiring greater investigation) (a) to justifiably believe that A consents, or (b) to non-culpably act as if A consents.

Premise (5) should be uncontroversial, if we have taken on board either (4a) or (4b) or both. (Whether both disjuncts hold depends on whether (4a) and (4b) are both true.) And (6) is uncontroversial, even when left relatively vague as to what “importance” involves. Here is one way of understanding importance: sexual and medical consent are important in that engaging in sexual activity with or medical interventions on someone who does not consent to those states of affairs constitutes a serious moral wrong. There might be other cases in which not getting someone’s consent is also wrong, but not seriously so. Perhaps, for example, I should not borrow your coffee mug without your consent. Or perhaps I should not take your picture without your consent. These are less important, morally.

If we accept the argument so far, then, we are left with (7), which requires more, epistemically, of those who are taking certain actions that require the consent of another person.²⁸ Exactly what “more” a person must do, or what better/stronger evidence they must have, will be hard to state in a general way. The suggestion I want to make here is that it is plausible that this is what makes “affirmative consent” a more normatively appropriate standard with respect to sexual consent: an epistemic account about when we can justifiably believe that other have consented to engaging in sexual activity, or about when we can permissibly act on such a belief, *not* a metaphysical claim about when there is consent. In this sense, proponents of affirmative consent may be advocating for something importantly new in the norms regarding sex and consent. But what they are advocating for is a higher bar for what counts as enough evidence to justifiably believe that others have consented to engage in sexual activity, or when it is permissible to act on such a belief, not a new metaphysical view about consent.²⁹

Consider the difficulties identified earlier about coming to know the mental states of others. On the picture of the metaphysics of consent defended above, a person consents to a state of affairs, SA, only if the person has a particular mental state: namely, an attitude of affirmative endorsement to SA. The precise details of the attitude of endorsement itself can be different in its nature and connection to other mental states and attitudes, depending on the state of affairs toward which it is directed. The attitude of endorsement will have a particular object, a particular state of affairs, but the precise boundary of that object can be unsettled and/or difficult to discern. And the attitude of endorsement can change over time, be implicit as well as explicit, and plausibly comes in degrees. This makes it genuinely hard to know whether we have another person’s consent—knowing whether a person consents to some state of affairs, the robustness of that consent, whether the person continues to consent to that state of affairs over time, and what precisely it is to which the person consents.

It suggests practices that involve regular efforts made to ‘check in’ and communicate thoughtfully and carefully with others about what is happening, what they would like to happen, whether it falls within the scope of what they endorse, whether they still possess the relevant attitude of endorsement, and so on.³⁰

²⁸ Although I do not follow Tom Dougherty in settling on the performative, communication-requiring view of consent or seeing it as perhaps motivated by concerns of the sort mentioned here, Dougherty agrees with the broad idea that as the stakes matter more, one’s evidence has to be better (clearer, stronger, less ambiguous, etc.). Dougherty, “Yes Means Yes,” p. 248.

²⁹ Thanks to Olivia Odoffin for pressing this point.

³⁰ For an excellent recent discussion of issues relating to the pragmatics and ethics of such communication, see Rebecca Kukla, “That’s What She Said: The Language of Sexual Negotiation,” *Ethics* 129, no. 1 (October 2018): 70-97.

These will vary depending on the context, of course. In the medical context, efforts have been made to get “informed consent” which focuses on making sure that the person actually has an attitude of endorsement toward the states of affairs that will or might obtain during and after the proposed medical intervention, or toward the states of affairs in which certain actions are taken, understanding the attendant risks.

With respect to “affirmative consent” standards in the domain of consent to sexual activity, these should not be understood as requiring an explicit question and an explicit affirmative verbal “yes” to that question, although they have been caricatured that way in the popular media.³¹ Instead, “affirmative” here is captured by the idea offered earlier, in which consent is a robust, affirmative pro-attitude toward some state of affairs. Some have offered the idea of “enthusiastic” consent as capturing the relevant idea.

The issue then becomes an epistemological one: how can we know when someone has this attitude of robust endorsement toward some state of affairs, such as having sex? What kind of evidence do we need? Given the foregoing discussion, what constitutes adequately strong evidence? We can understand the arguments in favor of affirmative consent are an attempt to shift how people think about what constitutes evidence of consent, if we accept the idea that consent is this kind of enthusiastic, robust attitude of endorsement, rather than either just an explicit verbal “yes” or the absence of a verbal “no.” Consider, for example, what the popular writer Tara Culp-Ressler says about affirmative consent standards:

The current societal script on sex assumes that passivity and silence—essentially, the “lack of a no”—means it’s okay to proceed. That’s on top of the fact that male sexuality has been socially defined as aggressive, something that can result in men feeling entitled to sex, while women have been taught that sex is something that simply happens to them rather than something they’re an active participant in. It’s not hard to imagine how

³¹ See, for example, the discussion in Amanda Hess’s clarificatory piece about California bill SB-967 Student Safety: Sexual Assault, which as of 2015 is now the law of California. She writes:

The California legislature is weighing a bill that would require college students to secure “affirmative consent” from their partners at every stage of sexual activity... You may have heard of this bill as the one that would require students to draft up a written sex contract before bed or constantly proclaim “yes, yes, yes!” at every slight readjustment, thereby practically redefining most sex as rape. The Fresno Bee editorial board interpreted the bill to mean that “‘yes’ only means ‘yes’ if it is said aloud.” The Daily Californian, the independent student newspaper of UC–Berkeley, also claimed that affirmative consent is necessarily verbal. RH Reality Check advanced the game to approvingly say that affirmative consent requires “a verbal or written yes.” If consensual sex entailed that level of consent, millions of couples would be unsuspectingly raping one another every night of the week. But the bill doesn’t actually require those things. It calls for “an affirmative, unambiguous, and conscious decision by each participant to engage in mutually agreed-upon sexual activity.”

““No Means No” Isn’t Enough. We Need Affirmative Consent Laws to Curb Sexual Assault,” [Slate](http://www.slate.com/blogs/xx_factor/2014/06/16/affirmative_consent_california_weighs_a_bill_that_would_move_the_sexual.html) June 16, 2014, available at http://www.slate.com/blogs/xx_factor/2014/06/16/affirmative_consent_california_weighs_a_bill_that_would_move_the_sexual.html. Hess helpfully points out that all kinds of non-verbal cues can, in principle, constitute sufficient evidence that a person affirmatively consents.

couples end up in ambiguous situations where one partner is not exactly comfortable with going forward, but also not exactly comfortable saying no. Under an affirmative consent standard, on the other hand, both partners are required to pay more attention to whether they're feeling enthusiastic about the sexual experience they're having. There aren't any assumptions about where the sexual encounter is going or whether both people are already on the same page. At its very basic level, this is the opposite of killing the mood—it's about making sure the person with whom you're about to have sex is excited about having sex with you.³²

It is worth pausing to note the epistemic notes being sounded here. Passivity and silence do not constitute evidence of consent, because consent is not about the absence of an explicit “no.” Instead, both partners should be attentive both to their own attitudes toward what is occurring, and to whether one's partner has an attitude of affirmative endorsement and excitement toward what is happening. This might require explicit verbal communication, but it need not.

Importantly, in discerning whether another person consents to some state of affairs, one is required to use one's total evidence regarding that question. It is epistemically inappropriate to fixate, for example, on a single speech act while ignoring extensive and clear non-verbal cues, body language, relevant personal history, and so on.³³ This is just as true in the medical context. It would be inappropriate for a doctor to see a signature on a consent form as sufficient evidence of consent if the patient is exhibiting clear anxiety, confusion, and lack of comprehension regarding the details of what was being consented to, or if the patient has adamantly refused to consent to this very procedure for months, and there is no explanation of the apparent change of heart, etc. In both kinds of situations, it is incumbent on the person seeking consent to probe further, to investigate what is going on with the other person, to attempt to resolve or explain apparent contradictions in the evidence the person has, and so on. And this is so because of the kind of action that is being contemplated. The bar is higher for the evidence needed to justifiably believe that a person consents, or to non-culpably act as if the person consents.

This is one place where I part ways with, for example, Douglas Husak and George Nelson, who argue that “empirical generalizations about the means by which consent to sex is typically given or withheld should be used to assess the reasonableness of a mistake about consent.”³⁴ My thought here is that broad empirical generalizations, although fine for forming some kinds of beliefs, will not be enough in these cases. As Husak and Nelson note, these kinds of discussions are often mired with potential for miscommunication as both men and women attempt to navigate interpersonal cues, sexist and patriarchal background social pressures and expectations to behave and perform in certain ways, and much else. All of this affects communication. They suggest that because of this, some mistaken beliefs regarding consent will be reasonable because of the way in which men (in particular) might have been socialized to

³² Tara Culp-Ressler, “What ‘Affirmative Consent’ Really Means,” *Think Progress*, June 25, 2014 available at <https://thinkprogress.org/what-affirmative-consent-actually-means-ea665b32b388/>

³³ For a similar point, see Lackey, this volume. See also Douglas Husak and George Thomas, “Rapes Without Rapists: Consent and Reasonable Mistake,” *Philosophical Issues*, 11 (2001), p. 102, in which they defend a “totality of circumstances” approach to assessing whether a belief about consent (even a mistaken belief) is reasonable or not.

³⁴ Husak and Thomas (2001), p. 88.

read and understand verbal and non-verbal behavior. Their view is that generalizations about how consent is viewed by men and women should inform judgments about reasonableness or justifiability of mistake. They don't commit to specific claims about which generalizations will be used to show reasonableness, but they do say things of this sort:

It seems likely that many men who use minor force to overcome resistance at the initial stage believe that consent to penetration will be forthcoming (even if the consent is to unwanted sex). It is difficult to imagine how minor force can accomplish the rape of a woman who resists. . . . Perhaps some women become passive and signal their non-consent only weakly, if at all, once their initial resistance is ignored. In these cases, the man who used minor force at an earlier point could believe that, despite her lack of cooperation, the woman now wants to proceed—or is at least willing to proceed. Whether this belief is reasonable, of course, is a different question.³⁵

Although they don't answer that question, they do suggest that the way to answer it will be to look at what is typically or generally true of men and women in these situations. That is troubling if many men have been conditioned in various sexist and patriarchal ways; it is also troubling if whatever is typical for the majority in terms of communication comes to govern, regardless of the specifics present in a particular case.

My view is that it is imperative on people to gather much more in the way of evidence in the face of any kind of doubt or even uncertainty about the presence of consent. Many of the cases they suggest might end up as reasonable mistakes are ones in which it is implausible that the individuals involved actually investigated the question of consent enough to count as justified, or to act on their belief, given what I have argued above. And that remains so even if such mistakes are currently statistically common, due to sexist practices, sexual miseducation, and other social norms. (It is worth stressing that morally blameworthy wrongdoing can be statistically common, and has been—at least in some domains—for all of human history.)

Husak and Nelson are worried that a test is needed for when a mistaken belief is reasonable, and their test—whether a reasonable person (in some cases, really a reasonable man) in those circumstances might believe that consent was present, where that is to be assessed regarding what is statistically common or normal—is the only one on offer. A better test might be: would a reasonable person (or, perhaps better, a reasonable woman) believe that *enthusiastic* consent was being given under these factual circumstances. And that can be shown, perhaps, based on a totality of the evidence test, including evidence about what are normal ways of registering enthusiastic consent.

This might seem to change what is needed, metaphysically, before certain actions are morally permissible: shifting from *consent* to *enthusiastic consent*. But to reiterate the central theme of the chapter, the better way of understanding this is as a needed epistemic corrective, given the warped social dynamics that exist in sexual communication and interpersonal interactions, particularly between men and women. If people investigate only for evidence of consent—or really, something that might better be

³⁵ Husak and Thomas (2001), p. 100.

described as “consent” (in scare quotes)—many will come to have unjustified, mistaken beliefs about whether real, valid, normatively transformative consent is present. When they act on those beliefs, they cause harm, they act in ways for which they are morally blameworthy, and they engage in unexcused consent violations. If people look instead for enthusiastic consent, this makes it more likely that their beliefs about consent will be justified, and correct.

C. Morality, Law, and Mens Rea

On this picture, then, there are many things that one can do that are morally blameworthy. In this section, I will set out the different types of actions that can be morally blameworthy, and the way in which an individual’s beliefs or mental states are relevant. After discussing the moral case, I then briefly consider the way in which these moral distinctions might be—and perhaps ought to be—reflected in law.

These first two kinds of morally blameworthy action are familiar, and it is uncontroversial that agents are typically morally blameworthy in both cases (assuming that there were no other compelling moral reasons that required X to ϕ , despite the lack of consent).

Knowing consent violation:

- (1) X performed an action, ϕ
- (2) X’s ϕ -ing is only morally permissible with W’s consent
- (3) W did not consent to X’s ϕ -ing
- (4) X knew that W did not consent to X’s ϕ -ing

Reckless indifference to consent violation:

- (1) X performed an action, ϕ
- (2) X’s ϕ -ing is only morally permissible with W’s consent
- (3) W did not consent to X’s ϕ -ing
- (4) X was recklessly indifferent to whether W consented to X’s ϕ -ing

In these cases, W did not consent, and X either knew this fact or was recklessly indifferent to this question. One way of understanding “reckless” indifference here is indifference that is itself morally culpable. There might be some cases in which indifference is not morally culpable; those are not the cases covered by (4). And the (2) condition explicitly states that, for actions of this sort, a necessary condition of moral permissibility (although by no means a sufficient condition!) is that the person in question consents to the action.

What I have argued above, however, suggests that there are other ways in which one can act that would also be morally blameworthy. Consider:

Unexcused consent violation:

- (1) X performed an action, ϕ
- (2) X’s ϕ -ing is only morally permissible with W’s consent
- (3) W did not consent to X’s ϕ -ing
- (4) (a) X mistakenly believed that W consented to X’s ϕ -ing, but

(b) X's belief about W's consent was not justified

Here, X did believe that W consented, but this belief was not justified, and so X's action constitutes an unexcused consent violation.³⁶ It is an "unexcused" consent violation because *if* X's belief was justified—even given the heightened requirements defended earlier—then X might be excused for ϕ -ing. X might not be morally blameworthy. But there is no such excuse if the belief is unjustified.

In these cases, it might be that this belief was grossly negligent—falling below some basic standard of justification for any kind of belief. But the suggestion in this chapter is that, because of the moral significance of the action being contemplated, the bar for what is required for justified belief about consent is higher, so that what might sometimes be enough to believe something non-negligently or reasonably would not be enough in these cases.

It seems clear that what is done in cases like this will often be morally blameworthy and morally objectionable. This is clearest in those cases in which (a) X is morally or epistemically blameworthy for having an unjustified belief about W's consent, or in which (b) X is aware that X's belief about W's consent is based on somewhat shaky evidence and in which not acting is clearly a permissible option for X. Consider a case in which X believes that W consents, but knows that he doesn't know that W consents, and intentionally doesn't take any of several easy steps to try to get more and better evidence about whether W consents. Imagine further that X's evidence that W consents is very weak—clearly not enough to justify the belief. If X decides to go ahead and have sex with W anyway under these circumstances, and if W in fact does not consent, it seems that X is morally blameworthy for going ahead and acting anyway.

More controversially, there are still more ways in which people can act in ways for which they are morally blameworthy.

Objectionable moral risk (reckless indifference):

- (1) X performed an action, ϕ
- (2) X's ϕ -ing is only morally permissible with W's consent
- (3) W did consent to X's ϕ -ing
- (4) X believed that W did not consent, or X was indifferent regarding W's consent

³⁶ An alternative explanation is to focus on so-called "secondary" duties of investigation. In a recent paper, Tom Dougherty argues that affirmative consent standards might be understood by reference to a duty of due diligence, which includes a duty to "adequately investigate" whether consent is present (if needed). He doesn't say much specifically about what this might require, but briefly suggests that what is adequate might well vary with context and stakes. The wrong in some of these cases then might be, on his terminology, the failure to live up to this duty of due diligence, which would, on his view, explain the permissibility of holding people culpable in cases in which the advocates of affirmative consent policies think there is culpability. That seems to mischaracterize the wrong, suggesting that what was morally objectionable was failing to live up to this "secondary" investigative duty, rather than violating a primary duty not to act in this way given the lack of consent, or a primary duty not to act in this way given one's poor epistemic position regarding the question of consent. But a full discussion of this route is outside the scope of this chapter. See "Affirmative Consent and Due Diligence," *Philosophy and Public Affairs*, Vol. 46: 1 (2018), pp. 90-112.

(not having considered the question)

Objectionable moral risk (unjustified belief):

- (1) X performed an action, ϕ
- (2) X's ϕ -ing is only morally permissible with W's consent
- (3) W did consent to X's ϕ -ing
- (4) (a) X correctly believed that W consented to X's ϕ -ing, but
(b) X's belief about W's consent was not justified

These cases are different than those above because they are cases in which W did in fact consent. The objectionable conduct here stems not from there being an instance, of, say, nonconsensual sex, but because of X's taking an objectionable moral risk with respect to whether W consented or not, given X's epistemic standing with respect to the question of whether W consented. Many think that cases of this sort, where one takes an objectionable moral risk, but the risked outcome does not in fact materialize, are less morally objectionable—even if whether the bad outcome materialized or not is not under the control of the agent. I don't want to wade into the controversy regarding the existence of moral luck in terms of outcomes, but I do want to stress that these cases may involve morally blameworthy conduct, even if may not be as morally bad as the previous kinds of cases.

One reason that this conduct is morally blameworthy is that it often involves taking a significant and unnecessary moral risk, given one's epistemic situation.³⁷ For example, it is plausible that if X knows that *not* ϕ -ing is morally permissible, and if ϕ -ing is only morally permissible if W consents to state of affairs SA, then X ought not to ϕ unless X knows or at least justifiably believes that W consents to SA.³⁸ If X fails to even consider the question of consent, or considers it only inadequately, and goes ahead and acts anyway, this is a way of disrespecting that person, acting without sufficient regard for that person's standing as a moral agent—it is just a different way of doing this than acting without that person's consent.

There is more that might be said to ground the claim that all five of these categories of action constitute what is often or typically morally blameworthy conduct—conduct that is blameworthy because of the pairing of a certain kind of action with a certain kind of epistemic situation regarding the consent of another.

Some actions covered by these descriptions are already illegal. In some states, for an act to constitute rape still requires the use of force, not just the fact of non-consent, even if known. But in many states, there has been a shift to including as rape those actions in which one person has sex with another while *knowing* that the person does not consent. But many of these actions—including the unexcused consent

³⁷ I discuss this kind of case at length in Guerrero (2007).

³⁸ One significant difference between sexual consent cases and medical consent cases is that, in the former cases, it is almost always completely morally fine to refrain from acting—there is nothing or very little at stake, morally speaking, in refraining from engaging in sexual activity on a particular occasion. That is not always true in the medical context. There may often be quite a bit at stake in the decision to refrain from offering some medical intervention. That changes the calculus, since it means that both acting and not acting are high stakes, morally speaking.

violations and both kinds of objectionable moral risk actions—are not currently defined as illegal. It is too large a project to argue that these all should be criminalized, nor to argue for some specific level of punishment in response to them. I do want to suggest, however, that at least one argument against making them illegal is unsound: the argument that suggests they ought not to be illegal because the conduct included is not morally blameworthy, and moral blameworthiness is a necessary condition for permissible criminalization.

Kimberly Ferzan, for example, is worried about affirmative consent policies on the grounds that they might expand criminal law to cover cases in which there is no moral blameworthiness. She writes:

If...potential defendants are punished in order to cause social change or to protect women by creating prophylactic rules, then we are punishing individuals who are nonculpable as to what we really care about (nonconsensual sex) in order to accomplish our goal (better and more accurate communication about consent). We are punishing the morally innocent. We should pause before punishing the innocent for the collective good.³⁹

But if what I've argued so far is correct, then although it would be true that we might punish some individuals who are nonculpable as to non-consensual sex if we made illegal the conduct described in the "objectionable moral risk" cases, we would not be punishing the "morally innocent." Those individuals would be engaging in morally blameworthy conduct, much like the criminally reckless or intoxicated driver who doesn't hit anyone, or (in the reckless indifference versions) like those who attempt but do not succeed in perpetrating crimes such as homicide and rape.⁴⁰

The foregoing has focused on moral claims, not legal ones. But the analysis might be extended to the law of rape and sexual assault as well—and, indeed, many who focus on affirmative consent doctrines think that they should be doctrines about the law and policy of rape and sexual assault.

Current law regarding rape and sexual assault is very far from aligning with what many believe to be the moral facts concerning these matters. For a long time, rape was defined in the criminal law as requiring the use of force, so that the *actus reus* of rape included the use of force. Reform efforts in the 1980s resulted in many jurisdictions including an alternative *actus reus* of sex without consent, or "rape by non-consent," but in most of these jurisdictions this alternative is limited to circumstances in which one of the parties, by legal definition, cannot consent due to their age, employment relationship, or state of intoxication.⁴¹ Even for those proportionally few cases in which the *actus reus* can be this kind of legally

³⁹ Ferzan (2016), p. 421.

⁴⁰ In almost all jurisdictions, if attempted rape is criminalized, it is not a felony offense, and it usually is only even a possible offense if it involves sexual interaction with people who are not legally capable of consent: minors, currently incarcerated people, etc.

⁴¹ For discussion and review of this area of law, see Lois Pineau, "Date Rape: A Feminist Analysis," Law and Philosophy 8 (1989): 217–43; David Archard, "The Mens Rea of Rape: Reasonableness and Culpable Mistakes," in A Most Detestable Crime: New Philosophical Essays on Rape, ed. K. Burgess-Jackson. (Oxford: Oxford University Press, 1999), pp. 213–29; Marcia Baron, "I Thought She Consented," Philosophical Issues 11 Social, Political and Legal Philosophy (2001): 1–32; Helen Power, "Towards a Redefinition of the Mens Rea of Rape," Oxford Journal of Legal Studies 23 (2003): 379–404; Kari Hong,

defined nonconsensual sex, the *mens rea* of rape is still such that it limits rape to cases in which the defendant (a) *intends* or *knows* that he is engaging in non-consensual sex or (b) is recklessly indifferent as to the victim's lack of consent. If the defendant mistakenly believes that the victim consents, then the element is not satisfied, and acquittal is required—even if the mistaken belief is not reasonable or justified.⁴²

Thus, under current law in Anglo-American jurisdictions, even *unexcused* consent violations (in the above terminology) are not criminalized. Nor, of course, are either of the two kinds of objectionable moral risk cases. It is outside the scope of this chapter to make the case for correcting this, but here let me just join Marcia Baron, Helen Power, and Kari Hong, among others, in suggesting substantial reform in this area might well be appropriate. Power, in particular, argues for including what I've called “unexcused consent violations” under the law of rape, as instances of third degree “negligent” rape—cases in which a person is procedurally or substantively negligent in forming a belief that the person with whom they are having sex consents to doing so.⁴³ Neither Power nor Hong go as far as I might, in that both still require that the *actus reus* in question actually include that one engages in an act of non-consensual sex with another person.

I hope to have both suggested that there is a substantial case for moral blameworthiness in these cases—such that might undergird legal criminalization and punishment—as well as suggesting that we should perhaps see the bar for non-negligent, justified belief formation about consent as being higher than is commonly thought. Of course, much more would need to be said in full defense of further extending the criminal law, and in the details of that possible extension.

Conclusion

In this chapter, I have argued for a certain view about one necessary component of consent: the presence of a mental state of robust, affirmative endorsement toward a state of affairs. I have argued that, given this component, we all face hard epistemological questions about when others consent. Additionally, these questions are morally very significant—they arise in high stakes moral contexts. These two features give rise to a number of important epistemological issues. I have argued that we should accept either moral encroachment or the view that the scope of use of our beliefs and even knowledge may be sensitive to our level of justification for those beliefs. In either case, it will mean that agents must do more,

“A New Mens Rea for Rape: More Convictions and Less Punishment,” *American Criminal Law Review*, Vol. 55 (2018), pp. 259-332.

⁴² For extended discussion of the law in the United States, see Hong (2018), pp. 270-89. For similar discussion of the law in the U.K., see Power (2003), pp. 379-87. Some have suggested that having an unjustified or unreasonable belief regarding consent can itself constitute recklessness, or that it should constitute recklessness. Power, discussing Antony Duff's *Intention, Agency, and Criminal Liability* (1990), suggests that his view is that “the individual who *unreasonably* believes that the victim consents is reckless, in the sense that the belief itself demonstrates practical indifference.” Power, p. 391. But this is not the law in either the U.S. or the U.K.

⁴³ Power (2003), p. 381. Hong defends a “malice” standard for the *mens rea* of rape, in which any of knowledge of non-consent, intent to have sex with someone who doesn't consent, or reckless indifference to consent could satisfy the mental element for rape. She explicitly states that negligence in forming a belief about the other's consent would not suffice on her standard. Hong (2018), p. 303.

epistemically speaking, before they can justifiably believe that another person consents, or non-culpably act as if another person consents. We may, for example, need to look beyond the words that people say, to pay attention to non-verbal cues and personal history, and to inquire and investigate further when we encounter ambiguity or contradictory signals. On this picture, “affirmative consent” standards can be understood as responding to and even articulating these epistemological concerns, rather than as offering a new metaphysics of what constitutes consent.⁴⁴ If we accept this picture, this has implications both for how we ought to view the morality of various actions, given the agent’s mental states, as well as for what we ought to think about the law governing violations of consent.

⁴⁴ Thanks to Yuval Abrams, Hrafn Asgeirsson, Kristen Bell, Ryan Doerfler, Jennifer Lackey, Hallie Liberto, Olivia Odoffin, Cosim Sayid, Daniel Viehoff, Gerardo Vildostegui, and audiences at the Workshop on the Public Discourse of Contested Sexual Consent at the University of Connecticut in September 2016 and the 2018 Rutgers-Columbia Undergraduate Philosophy Conference for helpful comments on earlier versions of this chapter. Thanks, too, to Tom Dougherty who provided very helpful comments on this chapter in October 2017 as a referee for this volume.