1 The Setup

Suppose it’s raining and Bea has forgotten her umbrella. Abe’s umbrella is by the door; before he before leaving for the weekend, Bea had asked whether she could borrow it while he was away, and he said “sure”—but she isn’t certain he really meant it. If Bea borrows the umbrella now, she risks taking Abe’s property without his assent. On the other hand, it is raining and she needs an umbrella. What should she do?

You may feel that there is no problem here: if Abe told Bea it was fine to borrow the umbrella, then Bea need no longer guess at his intentions, but can instead permissibly rely on his verbally given consent. But many take the conventions we use to communicate things like consent, promises, offers, etc., to be purely evidential: providing some reason to think that an underlying moral change has occurred, but not themselves sufficient for the change. On this view, even having heard Abe say “sure”, Bea should think there’s some chance he hasn’t really given her permission to borrow his umbrella. On these views, Bea is facing normative opacity: uncertainty with respect to whether a normative power has been exercised to alter her permissions.

If Abe did not intend to permit her to use his umbrella, but thinking he did, Bea borrows it, she make a mistake: she causes an injurious outcome which it would be rights-violating to bring about, were she fully informed. Given her evidence she isn’t blameworthy, but she has a duty not take Abe’s property without his consent, and unless we maintain that duties are violated only when culpably breached, the mistakes for which the duty-bound is culpable won’t exhaust the mistakes against which the injured party has a legitimate complaint.\footnote{We might think this latter category outstrips even the mistakes for which duty-bound can be justly held responsible. If so, we should accept that for a subset of reasonable mistakes the rights-holder has a claim to compensation, but not (following Gardner, 2012) a right to reparation, the “special kind of compensation which has the added feature that it is paid by or on behalf of someone who bears causal responsibility for the injury or loss that is being compensated.” No-fault insurance schemes provide this sort of compensation, allowing the community as a whole to offset the harm to the injured party without imposing a significant burden on the faultless mistake-maker. In the absence of a robust system of social compensation for harms of this sort, however, we must be quite careful that the features are properly identified.}

Holding fixed the fact that our social practices treat a mistake’s being reasonable as defeating the
rights-holder’s claim to compensation from the duty-bound, or standing to complain that they have been mistreated, it follows that establishing that Bea is not blameworthy does not establish that her mistake is reasonable.

Defining what constitutes a reasonable mistake is a matter of social policy: it sets how we, as the political community, will respond to mistakes, and who we will hold responsible to bear their costs. But it is a policy partially about underlying moral rights, and articulates a standard of conduct for agents. So constructing a standard for reasonableness in a way that safeguards members’ moral rights involves grappling with three core questions:

- **Moral Question:** what does respecting each other’s objective moral rights demand from people who are subject to normative opacity, such that if Bea fails to do it, she wrongs Abe?
- **Guidance Question:** what guidance should we give to agents aiming to act in ways that adequately respect the moral rights of those around them, such that if Bea follows it she is not culpable?
- **Distributive Question:** which social practices distribute the costs of mistakes, as well as the burdens of mistake-minimization efforts, fairly?

Those who think we should answer the **Moral Question** first approach normative opacity as a problem for a single decision-maker, analogous to other moral ignorance problems, e.g. how agents ought to act when they are uncertain about which moral theory is the true one, or what they should do when they know what outcome they morally ought to achieve but do not know which of their available actions will bring it about. I’ll refer to this as the **Individualist Approach**. Theories within this approach focus on issues about which action would be best for the duty-bound to perform, what they would be blameworthy for doing, and what outcomes rights-holders have interests in—and hold fixed the things that are outside of the control of the duty-bound agent, including the communicative practices, conventions, and social norms of the community. They may take agents’ available evidence and expectations to affect their obligations, but do not treat ‘change the social conventions’ as a possible answer to the moral question; after all, that is not something any individual agent can do on their own. The individualist approach implicit in most discussions of reasonableness in moral and legal theory treats it as an evaluation of the rationality of the mistake, holding fixed the background context and asking only whether the person who made the mistake did their individual best (or near enough) in their circumstances.

I urge that we instead start by asking what sorts of mistakes would be exonerated under an adequately coordinating social practice. Just like instituting rules of the road, the articulation of a suitable standard for reasonableness does not just help individuals manage the risks of ignorance more effectively; it materially changes what constitutes doing their best. And just as it is appropriate to hold drivers responsible for running red lights even when they don’t harm pedestrians, it is appropriate to hold agents responsible for their failures to do their part as defined by the convention, even if sans-conventionally it wouldn’t have been blameworthy we take to make a mistake reasonable are plausibly features that make it not wrong the rights-holder, or at least not ground a claim to reparation. Otherwise, releasing the duty-bound from responsibility is simply declining to enforce the injured party’s claim rights and leaving them to absorb whatever harms the mistake imposed on them, in violation of the State’s fundamental duties. My thanks to Chuck Beitz and Larry Alexander for urging that I consider this issue more carefully.

2Failing to follow appropriate moral guidance is a necessary condition for culpability, but not a sufficient one. One might fail to follow the guidance but be subject to other (at least partially) excusing factors, such as coercion, duress, or delusion.
to act as they did. To set a standard for reasonable mistakes, then, we should be asking ‘what set of practices best balances the moral interests of the parties, minimizing and fairly distributing the risks and costs of mistakes?’

This is a more productive question than evaluating the rationality of individual mistakes. Even more urgently, however, I suggest that while our theoretical discussions of reasonable mistakes assume an individualist framing, our actual social and legal determinations of reasonableness are already implicitly shaped by a coordinating practice. We already do count ‘normal’ mistakes to be reasonable even when they were not rational—when the mistaken agent knew (or should have known given their evidence) that they were making a mistake. Failing to recognize that we are in fact invoking social norms and conventions to set the standard for reasonableness leaves us poorly positioned to ensure that the resulting standard is adequately just; we are apt instead to compound existing injustice. So we desperately need an explicit account of the conditions necessary to render a conventionally defined reasonableness standard adequately just.

The task of this chapter is to argue that determinations of whether to hold someone responsible for a mistake about consent must take a social approach: we must proceed not by asking whether they acted rationally, but rather whether they conformed to a social practice that minimizes and fairly distributes the costs of the mistakes that expectably occur given our actual conditions. We should at the outset distinguish this issue about social policy from the closely related, but distinct, moral question: what morally constitutes consent? These questions may be answered separately; one might think (and many have, though I do not) that the moral facts about whether someone truly consents are not what determine whether we socially ought to treat them as consenting. But I will argue that we cannot justifiably shape our social practices to match the prescriptions of the individualist approach: under our actual conditions, doing so expectably results in failing to enforce the rights of vulnerable minorities.

2 The Core of Consent

2.1 Essential features of permissive consent

The issue of consent central to our inquiry is when to treat agents as having given permissive consent: having issued a genuine moral or legal permission. Permission-granting interactions vary widely in their duration, formality, the interests served, and how bad a mistake would be for each party. Some indications of consent double as requests for the consented-to behavior (as Abe’s consent to surgery from Bea); in other cases (particularly in proximity to contracts) consent can begin to blur into promising, not merely granting permissions the recipient previously lacked but creating obligations for the giver.

The simplest cases of purely permissive consent are like the umbrella-borrowing: Abe explicitly issues a one-off permission, neither asking Bea to take his umbrella nor obligating himself to give her similar permissions in the future, and the whole interaction is pretty low-stakes. It is for these reasons one of the easiest cases for a normative conventions account to accommodate. The hard cases are the ones that are high-stakes, but do not involve a discrete moment of permission-granting. Sexual consent is a paradigmatic hard case: though undoubtedly communicative, moral interactions around sex more closely resemble an ongoing negotiation than a one-off signaling event. Sexual consent is also both prolific and of incredible significance to us: we have weighty autonomy interests in being able to decide when to consent to sex, and in having

institutions that protect and enforce our authority over these decisions. Consequently, a great deal of the public conversation about reasonable mistakes involving consent concerns sexual consent. I will therefore take it as the central case for this chapter, though the account is meant to generalize to permissive consent more broadly. As a consequence of this focus, this chapter contains some discussion of sexual assault. I will keep the discussion abstract where possible; specific descriptions and cases are marked with "*Content Warning*" in the margin.

I will not attempt to address all of the vexing questions about consent. Rather, I will focus on the ways that normative opacity affects the social practice of consenting, setting aside puzzles concerning when an agent has the appropriate standing to give morally valid consent (including what specific capacities, alternatives, information, etc. a consenter must have). Let’s start with a very basic question: what is the point of the normative power to consent? Once we can sketch what value the ability to give or withhold consent has for agents, we will be in a position to use its functional role as a way to evaluate candidate answers to the moral, guidance, and distributive questions for interactions involving permissive consent.

### 2.2 The Value of Consent

Discussions of the moral value of consent uniformly represent it as tightly bound up with agents enjoying autonomy or control over their lives. The power to consent “enables people to shape their interactions with others by exercising discretion over what they are permitted to do” (Pallikkathayil, 2020, 108); it gives an agent control over how others treat her body and possessions. Consent “plays a critical role in social relations: [if people are conceived of as individual right-holders, consent is the basic means for interaction among them. [. . . ] consent carries the weight it does in liberal society because it is the practical means for exercising autonomy in one’s relations with others” (Sherwin, 1996, 211). The narrowest interpretation of the way the power to consent contributes to an agent’s autonomy is that it gives her control over the normative status of actions affecting them. As Hurd (1996, 124) construes it, “autonomy resides in the ability to will the alteration of moral rights and duties” and consent’s contribution consists in enabling a person to make such alterations without requiring the cooperation of any external elements.

Framing the value of consent this way leads us to think of consent as occurring entirely within an agent’s person and in no way dependent on the world for efficacy. It is with this conception of autonomy in mind that Ferzan (2016, 405) writes “autonomy is best respected by recognizing that the consenter has it within his or her power to allow the boundary crossing simply by so choosing. No expression is needed.” On this conception, the value of consent for an agent is that it furnishes her with

*Authorization* authority: control to decide whether to waive her complaint against an otherwise rights-trespassing interaction.

This ability to decide whether an action wrongs her is certainly important. But there are other forms of control connected with the power of consent that seem equally—or at least also centrally—important.

Healey (2022, 39) emphasizes that “the power of consent provides a form of positive control over our interactions with others that might be viewed as the necessary flip side to the negative control established by our autonomy rights.” Along similar lines, Miller and Wertheimer (2010, 82) stress that “consent transactions serve both to protect the consenter’s negative autonomy or control over herself and, quite crucially, to serve

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her positive autonomy by facilitating mutually beneficial and altruistic interactions with others.” A more thorough accounting of the contribution consent makes to an agent’s autonomy, then, is that it furnishes her with a deeply interpersonal and interactive form of control:

_Uptake_ authority: control to selectively engage in otherwise rights-trespassing interactions with others.

This value is realized just when others “recognize and are practically guided by our normative power of consent” (Healey, 2022, 42). Since not everyone takes the absence of consent as a decisive reason to refrain from interfering with others’ belongings or persons, there is also a third sort of value that travels awfully closely with _uptake_, and gives it teeth, namely

_Enforcement_ authority: ability to secure and authoritatively direct third parties’ assistance in enforcing her rights.

Whether or not _enforcement_ is part of the constitutive value of the normative power of consent (or just instrumentally valuable), it is essential to ensuring that agents are secure in their enjoyment of the _uptake_ value. And insofar as an agent’s interest in _authorization_ authority extends beyond the moral ledger—that is, insofar as she has an interest in controlling what is done to her, and not merely whether it wrongs her—the social practices for managing consent must treat _enforcement_ as a central good. The interpersonal and social value of consent for her consist in securing actions from others that are sensitive to whether she has consented. In these roles, consent directly changes what it is allowable for B to do, and indirectly also changes the obligations of third parties. If Bea takes Abe’s umbrella without his consent, other members of the community have some obligation to assist Abe in recovering his property, or securing apology or compensation from Bea. But if Abe consented, we lack this reason to interfere. Our responsiveness to these reasons depends in part on how well we track the facts about whether he is consenting.

If securing the full value of consent requires securing all three features of an agent’s control interest, it matters not only how a social practice characterizes _consenting_, but also what directions it gives concerning when to treat someone as consenting. Even when non-culpable, unauthorized trespasses threaten A’s control over how others treat her. And when others are non-responsive to whether she consents—even if they treat her as always having withheld her consent, rather than always as having given it—she is unable to select when or how to engage in intimate relationships with others (losing _uptake_). Similarly, whether their insensitivity arises from hostility or ignorance, if third parties fail to track whether A has consented to a treatment by B, she will be unable to enjoy the goods of _enforcement_—she cannot safely rely on being able to secure their help in protecting from (or seeking compensation for) a non-consensual trespass. The core account (of the ‘ontology’) of consent _together with_ its policy for determining whether a mistake is reasonable—when to treat A as having no complaint against B’s action, as not entitled to compensation for it, etc.,—jointly shape whether the resultant social practice of consent in fact secures the moral value of consenting for agents.

Nevertheless, much of the debate concerning consent focuses on how to characterize the underlying moral phenomena, so allow me to briefly survey the main accounts on offer before comparing the social practices prescribed by the individualist approach and social approach (respectively).

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5 My thanks to Heidi Hurd and Chelsea Rosenthal for helpful discussion on this point.
2.3 Three Theories of Moral Consent

Accounts of the ontology of consent can be sorted into three basic families of view: attitudinal, hybrid, and communicative. Attitudinal views (also called 'subjective' or 'mental state' views) take whether A genuinely consents to depend entirely on A's internal attitudes:

**Attitudinal Consent:** A consents to B's \( \phi \)ing if and only if A forms a particular mental attitude \( m \) concerning B's \( \phi \)ing. \(^6\)

Advocates of attitudinal views analogize consent to the abandonment of property, a normative power which an agent can exercise to change the ways that her rights bind others without requiring any communication with or uptake from them. \(^7\) They hold that though one typically uses a behavior or speech act to communicate that one has consented, the communication itself has no effect on consent-based permissions and obligations: it is just defeasible evidence of consent.

Other theorists see consent as more closely analogous to promising, because unlike abandonment, consenting alters not only other agents’ permissions, but their reasons for action. So plausibly if promising requires communication or even uptake, consent must as well. \(^8\) As Wertheimer (2003, 146) puts it: 'If we ask what could change A’s reasons for action, the answer must be that B performs some [explicit behavioural] token of consent. It is hard to see how B’s mental state—by itself—can do the job.' Theorists who take consent to parallel promising model it as ‘an act rather than a state of mind’, \(^9\) with a hybrid requirement that A both have some specific internal attitude (intending to consent, desiring that B \( \phi \), etc.,) and do something aimed at communicating this fact to B. Accordingly, these views are known as ‘hybrid’, ‘behavioral’, or ‘performative’ accounts:

**Hybrid Consent:** A consents to B’s \( \phi \)ing if and only if A forms a particular mental attitude \( m \) concerning B’s \( \phi \)ing, and communicates this to B. \(^10\)

\(^6\)Candidates for the particular attitude vary, but include: an intention that B \( \phi \) (Hurd, 1996); a desire that B \( \phi \) (Westen, 2004, 32); a judgment by A that he has no moral complaint, or waives his right against B’s \( \phi \)ing (Alexander, 1996, 2014); or a will or disposition to acquiesce to B’s \( \phi \)ing (Ferzan, 2016; Hickman & Muehlenhard, 1999). On these views, A’s having the relevant internal attitude is necessary and sufficient for A’s in fact consenting. Husak (2006) also advocates an attitudinal view, but is noncommittal about the relevant attitude.

\(^7\)Alexander (2014, 107), Ferzan (2016, 404). While acknowledging that a legal framework for consent or abandonment might require a communicative act as *evidence* of the relevant exercise, Ferzan argues that as far as the normative power itself is concerned, “if one thinks that one can abandon without communication, there is no reason one cannot likewise consent in a similar way.”

\(^8\)See especially Dougherty (2015).

\(^9\)Archard (1998, *Sexual Consent* p.4)

\(^10\)Proposals for the specific mechanics vary, including having the intention to consent and (at least) attempting to communicate to B (den Hartogh, 2011; Healey, 2015; Kleinig, 2010; Owens, 2011; Tadros, 2016): having the attitude and successfully communicating this to B (Archard, 1997; Dougherty, 2015; Gruber, 2016); or performing a specific act with the intent that B recognize, by this performance, that A has given B a consent-based permission (Cowart, 2004; Manson, 2016; Sherwin, 1996).

Theorists offering performative views differ with respect to how explicit the communicative behavior must be, whether it must be conventional, and whether uptake is also a necessary condition for valid consent. Some authors categorize performative views as purely communicative, rather than hybrid. I resist this because (as Alexander, 2014, and others note), these authors characterize the relevant communicative behavior as necessarily including the *intention* to issue a consent-based permission. But assuming that *intending to communicate* that one is issuing a consent-based permission counts as an internal attitude, these performative views are best understood as a subtype of hybrid account.
On hybrid views, whether A consents is a fact about A’s internal attitudes and what he’s done to communicate them to B. If A has the internal attitude $m$ but fails to communicate that to B, or if he communicates consent to B but in fact lacks $m$, A’s rights remain unchanged and B would wrong him were she to $\phi$.

Advocates of communicative views emphasize the interpersonal and social importance of consent. Their accounts drop the internal attitude requirement, taking communication to be sufficient for consent:

**Communicative Consent:** A consents to B’s $\phi$ing if A communicates to B that he consents to B’s $\phi$ing.\(^{11}\)

Importantly, communicative views do not maintain that there is a magic sequence of moves or sounds such that one consents merely by producing them no matter the background circumstances; each details important restrictions on what constitutes the communication of consent, and specifies conditions that cancel, undermine, or invalidate such communication. But they do hold that A’s having a particular internal attitude is not strictly necessary for the exercise of the normative power.

All of three of these views address themselves to the moral question for consent: they concern what circumstances genuinely change whether it is allowable for B to $\phi$. All of the proposed accounts give a fact-relative answer. By contrast, an evidence-relative answer would hold that when it is rational for B (on her best available evidence) to believe that A consents, A’s normative power has genuinely been exercised. Though there is logical space for an evidence-relative answer to the moral question for consent, no one (to my knowledge) defends one. This is for a very good reason: to meaningfully protect or extend A’s autonomy, the power to consent must be subject to his agential control. But if whether A consents is set by what it is rational for B to believe, then the contours of A’s moral rights will fluctuate with changes in B’s epistemic state in a way that need not be connected at all to A’s agency. Even if we could talk ourselves into accepting this result for other normative powers, a small variation on the infamous case of *Director of Public Prosecutions vs. Morgan* will vividly illustrate how deeply perverse it would be as an analysis of consent.

In 1973, Lt. Morgan and three colleagues overcame Mrs. Daphne Morgan’s resistance and each forcibly had sex with her, choking her to silence her screams for someone to call the police. She filed a police report immediately after the incident, and the men were tried for rape. The defense argued that she had consented, and if she hadn’t then the men at least mistakenly believed she was consenting, because Lt. Morgan had proposed the plan and told them “they must not be surprised if his wife struggled a bit, since she was ‘kinky’”\(^{12}\) and had a rape fantasy. The trial judge instructed the jury that the defendants should be acquitted if they honestly and reasonably believed she was consenting.

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\(^{11}\) Again, the specific proposals vary, but versions of a communicative view have been floated by Wertheimer (2000), Baron (2001), Simmons (2010), Bolinger (2019), Pallikkathayil (2020), and Healey (2022).

\(^{12}\) Lord Hailsham, *Director of Public Prosecutions v. Morgan* [1975] UKHL 3 (30 April 1975). Morgan himself was only charged with being an accomplice to rape, since at the time the law followed the seventeenth-century doctrine articulated by British Chief Justice Lord Hale, that “by their matrimonial consent and contract, the wife hath given up herself in this kind unto her husband, which she cannot retract.” (Matthew Hale, *The History of the Pleas of the Crown* 629 (S. Emlyn ed., 1778), as cited in Schulhofer (1998, 18).) This ‘marital rape exemption’ applied to unmarried partners who lived together, as well as persons who were separated but not yet legally divorced, and persisted in U.K. law until 1992. In the United States, Oregon was the first to abolish the unqualified exemption in 1977, and though most states now recognize violent, forceful assault of a partner as a criminal offense, many still exempt spouses from prosecution for non-violent non-consensual sex (e.g. accomplished through drugging or incapacitation.) See for discussion Schulhofer (1998, *Unwanted Sex*), Bennice and Resick (2003).
In the actual case, the jury weren't convinced that the men were sincere, and voted to convict. But even if we imagine that the defendants’ epistemic states were as they represented them to be—if we stipulate that on their evidence it was rational for each man to believe that Daphne Morgan consented to their interaction—that stipulation does nothing to safeguard Daphne’s rights to bodily autonomy or give her control over how others treat her. An account according to which A genuinely consents whenever it is rational from B’s epistemic position to believe that she does sacrifices the right-holder’s control over authorization without securing for her any additional control over uptake or enforcement. So an evidence-relative answer to the moral question for consent is a non-starter.

3 Comparing the Approaches

But whether a given social practice of consent secures the justifying moral goods is not solely determined by the way its underlying account of consent answers the moral question; we must also look at what guidance it issues concerning when to treat an agent as having consented.

3.1 The Individualist Approach to Navigating Consent

The standard approach to navigating normative opacity involving consent is individualist, answering the moral question exclusively in terms of outcomes to which A is entitled, and the guidance question in terms of B’s epistemic position. Most theorists endorse Attitudinal or Hybrid views, both of which include intending to consent as at least a necessary condition on genuinely exercising the normative power. This means they answer the moral question by demanding accuracy: it is allowable for B to treat A as consenting only when the outcome is one in which A has intentionally done whatever the theory identifies as constituting consent. Since A's intentions are opaque to B, this guarantees unresolved normative opacity: it is often opaque from B's position whether it is now allowable for her to ϕ.

And while no one advocates an evidence-relative answer to the moral question, theorists working in the individualist paradigm have converged a single evidence-relative answer to the guidance question. A common defense for this split is that whereas the former asks when A has been wronged, the latter is relevant.

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13 The men appealed, and while the House of Lords upheld the conviction, they agreed that the trial judge erred in instructing the jury that the defendant’s needed to believe reasonably. This opinion was grounded in the argument that to be guilty of the crime of rape—for which the required mens rea was "an intention to have intercourse without the woman’s consent"—it is not sufficient to have only "an intention to have intercourse with a woman who is not in fact consenting to it", but the defendant must have "an intention to have non-consensual intercourse [...] in the sense that he was either aware that she was not consenting or did not care whether or not she consented.” (Admissions counsel for the appellant, Morgan; quoting Stephen J. in R. v. Tolson 23 Q.B.D. 168 at 185) Since merely sincerely believing that A consents precludes being aware that she does not, and is some defense against indifference to the fact, the court reasoned that even an unreasonably held belief demonstrates that the defendant did not have the relevant intention for the crime. This doctrine held in the UK until the passage of the Sexual Offenses Act of 2003, which requires that the belief at least be reasonable.

14 As an incomplete but representative sample: Alexander, Hurd, and Westen (2016) maintain that the intention to consent is both necessary and sufficient for consent; similarly Husak and Thomas (2001, 91) “Regardless of how he might behave, we contend that no person can consent to sex without having an intention to consent.” Pallikkathayil (2020, 109) holds that "In order for consent to adequately reflect one’s authority to determine others’ permissions, it must be intentionally given’; Archard (1997) that "the giving of consent is accomplished in and by an intentional act.” Tadros (2016, 208) asserts that "Y consents only if she intends to communicate to X that he has the option to v.” In the course of defending her performative view, Sherwin (1996) writes "the essential condition for consent to sex is the intent that one’s words will confer a privilege on the hearer, to proceed with sex.” Similarly, while advocating a hybrid view Dougherty (2015, p. 229) argues that “since consent must be intentional, everyone should agree that an intention is necessary for morally valid consent.” And even though Liberto (2017) departs from Dougherty (2013) that one need not intend every significant aspect of the thing to which one consents, she is happy to grant that consent must be intentional.
when determining whether B is culpable for mistakes. And just as it is unsatisfactory to allow B's evidential circumstances to settle whether the harm A suffered wronged him, it is unfair to hold B responsible for failing to match her actions to facts that are opaque to her. The only alternative within the individualist paradigm is to articulate the answer to guidance wholly in evidence-relative terms. From this vantage, only when we ask the guidance question do we need to concern ourselves with B's epistemic circumstances—and then we give them decisive weight.

Both attitudinal and hybrid theorists make this move, holding that B is culpable for a mistake only if she did not reasonably believe A was consenting, and though third parties may intervene to stop a mistake, they should only hold B responsible for the costs if she is culpable. The next question, as Husak and Thomas (2001, p. 101) anticipate, is “How might I defend the reasonableness of my belief that you have consented to something?” to which they answer: “Whether consent is wholly or partly a mental state, the answer can only be that I have made an inference about your mental state from your behavior, linguistic and otherwise.” The remaining controversy is how high to set the standard: should we demand less—merely sincere belief—or more, requiring the reasonable belief to also be non-negligently held?

An unfortunate byproduct of exonerating B from responsibility for all nonculpable mistakes is that it yields a social practice of treating A as having consented—having no claim against B's action, and no rights to compensation—when B (sincerely or reasonably) believes he has, even if B is mistaken, and even if the reasons for B's mistake do not trace back to communication from A. Many of the most eloquent advocates of this move approach the issue from the perspective of criminal law, and so their discussions are animated by concern for whether B ought to be punished for her mistakes—not merely whether she should be held in some way responsible. This is understandable, but it would be better to keep the questions carefully separate: while it is plausible that we should criminally punish B for an action only if she is culpable for it, there is no obvious reason that A's claim to enforce his rights or demand compensation should be limited to only culpable transgressions.

3.2 The Social Approach to Navigating Consent

The Social Approach answers the moral question differently: what B owes to A is to cooperate with A in good faith to avoid a mistake. A is entitled not to a mistake-free outcome, but to B's doing her part in a social coordination practice justified by its ability to minimize and fairly distribute the costs of normative opacity. This structure fits most naturally with a communicative view; my proposed way to fill in the relevant coordination practice is with the following normative signaling convention.

**Conventional Consenting Norm**

A consents to B's φ-ing iff either (i) A satisfies the core analysis of consenting, or (ii) A communicates through a conventional signal β that they consent to B's φ-ing, this is not cancelled, and is not undermined by B's best available evidence.

This practice ties whether A consents to their agency without demanding that B divine A's intentions. In most ordinary cases, both clauses will be satisfied: A communicates consent to B because he intentionally consents

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16Baron (2001) advocates requiring the belief to be reasonable and non-negligent, as does Archard (1997, 277).

17However, like the conventional promising norm given in Chapter 4), this norm is neutral about the core analysis in clause (i); it can allow that an internal attitude is sufficient for the exercise of the power. It denies however that such an attitude is strictly necessary, since clause (ii) commits to communication being sufficient for permissive consent.
in the way specified by the core account. However, in the event that A communicates that he consents through a conventional signal $\beta$ (and this is neither cancelled nor undercut by B's available evidence), B no longer faces a moral gamble.

For an instance of this consenting convention to be justified by its ability to minimize and fairly distribute the costs of opacity, the signaling convention invoked will have to meet a moral baseline. That is, it must satisfy both of the constraints outlined in the previous chapter:

- *due diligence* – B may rely on a signal only when it is the strongest reasonably available evidence.
- *avoidability* – the signal behaviors be public knowledge and avoidable without undue cost.\(^\text{18}\)

These restrictions are well-motivated. The justification for treating conventionally communicating consent as a way of consenting is that this is the best way to manage the hazards of normative opacity while enhancing agents’ autonomy. So any typical costs of avoidance for A must be outweighed by the long-run value for A of having that signaling convention, and the signals must be sufficiently public that B can reasonably expect any arbitrary member of the relevant community (and in particular A) to know them. If a convention fails *either* of these tests, it is not sufficiently fair to do the moral work and so does not constitute a way to consent on the social approach.

The Social Approach gives the same answer to the guidance question that it gives to the moral question: B should treat A as consenting only when doing so is allowed by the justified coordinating practice; when A communicates that he consents. Whether A has communicated consent is not set by A's intentions or B's interpretation; it is (as detailed in Chapter 4) a fact-relative question settled only by a signaling convention that itself meets the moral baseline. When A performs a behavior $\beta$, which is typically easy for him to avoid and publicly known to signal consenting to $\phi$, A has conventionally communicated consent and it is allowable for B to $\phi$ (provided B has done due diligence, nothing in the context blocks B's inference, and B lacks decisive reason to think that doing so will result in a mistake). In short, B is instructed to actually do what she objectively owes A.\(^\text{19}\) And because the norm divides responsibility for normative opacity between the two parties A and B, it is not unfairly demanding. B can comply by either refraining from $\phi$ing, or waiting for A to signal, trusting A and responding accordingly.

It is possible on occasion for B's circumstances to make it difficult or impossible for her to accomplish even this. She might vividly hallucinate A $\beta$ing, or falsely believe that $\beta$ is a signal that satisfies *avoidability*, or a villain might threaten B with serious harm unless she treats A as consenting even in the absence of a signal. Each of these are possible excusing circumstances: they affect how culpable or blameworthy B is for failing to act as she owes it to A to act. But it is not appropriate to incorporate them into the guidance given to B—we should not instruct her to merely avoid blame (for reasons given in Chapter 3). Nor are these facts relevant to whether A is wronged by a mistake, or is owed compensation or apology.

\(^{18}\)It's worth noticing that these immediately rule out conventions on which merely dressing attractively, drinking, attending a party, or not actively resisting signify consent to sexual contact: none would satisfy the *avoidability* constraint.

\(^{19}\)Depending on the core account, it may be possible in some cases to accomplish this in two ways: either by doing her part in responding to his signaling behavior, or by merely avoiding a mistake (even in the absence of or in contradiction to a signal from A). I remain neutral on whether this latter option is a real possibility for consent—one might think not, because it is conceptually impossible to respect a control interest through an action that contradicts explicit communication from the rights-holder. Either way, the guidance given by the social approach is do what you owe. My thanks to Annie Stilz and Daniel Viehoff for discussion on this point.
The social approach adamantly distinguishes whether B should be held *responsible* for a mistake from whether (and if so to what degree) she is to be blamed or punished for it. It demands that we recognize two kinds of mistake: *misfires*, in which though A doesn't intentionally consent, he does precipitate the mistake by performing a consent-communicating behavior \( \beta \), and *errors*, in which B's reasons for thinking that A consented are independent of A's performing any specific consent-communicating \( \beta \). A is partially responsible for a misfire, and that fact is relevant to whether A was wronged. By contrast, when B makes an error there is nothing we could fairly demand that A do differently; whether B made her error culpably or not, she cannot fairly demand that A absorb the costs of her mistake. And intuitively there *is* a real difference between the cases; *reasonable mistakes* and *rational mistakes* are not coextensive. Just consider:

**Mix-up**: A nurse hands Bea a vaccination consent form with Abe's signature on it, and says Abe signed the form. In fact there has been some sort of mix-up: Abe did not sign and does not assent to the vaccination.

**Inattentive**: Abe signs a vaccination consent form and hands it to Bea. Though he appeared to read the form carefully before signing, in fact his mind wandered and he did not attend to it, and did not intend to consent to the vaccination.

In both cases, Bea has excellent reason to believe that Abe has consented. But while she might be blameless in administering the vaccination in *Mix-up*, doing so wrongs Abe by trespassing his rights; he has a valid complaint, and may be owed compensation for the wrong. By contrast in *Inattentive*, Abe's carelessness is itself the source of the mistake: Bea has attended carefully to his communicative behavior, and conscientiously done her part in an adequately just social practice designed to enable agents to coordinate in exchanges like these. This mistake is Abe's responsibility, and Bea does not wrong him if she trusts his attestation and administers the vaccination.  

### 4 Guidance and Mistakes

With the different approaches now on the table, we can turn to evaluating the expectable consequences of using them to guide our social practices for navigating consent. They have significant prescriptive overlap: all hold that what B should do is treat A as consenting when his language, behavior, etc. communicates that A consents, and B has been appropriately attentive to undermining evidence. Provided B has done this, all agree that even if A did not intentionally consent, B's mistake is *reasonable*: B should not be held responsible.

The difference is that on the social approach whether a mistake is reasonable is *settled* by the fact-relative question of whether A has communicated consent, while for individualist views this is just one of many inputs to what they take to be the real question: whether it is rational for B to believe (on her total evidence) that A consents. There are consequently two points where the theories will come apart in practice. First, on the social approach the range of reasonable mistakes is much narrower, because the normative signaling account issues more constraining guidance concerning which sorts of reasons make it permissible to treat A as consenting. Second, there will be some cases—misfires, where A signals consent but lacks the mental state \( m \)—in which individualists count A as *having been wronged* and the social approach does not.

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20 A quite similar circumstance arose in *O'Brien v. Canard* (SS Co 28 NE 1891:266). O'Brien joined a line waiting for vaccination, put her arm out for a surgeon to administer a smallpox vaccination, and later brought a tort action against the surgeon for battery and negligence, on the grounds that she was vaccinated against her will. The court opinion (issued by Judge Knowlton) held that "If the plaintiff's behavior was such as to indicate consent on her part, he was justified in his act, whatever her unexpressed feelings may have been. In determining whether she consented, he could be guided only by her overt acts and the manifestations of her feelings."
Given what we know about the agents to whom we are giving guidance, which of these approaches can we expect to yield the most just distribution of the costs of the mistakes that do happen? Since we aren't organizing ideal agents, we shouldn't idealize here. Whether a social rule yields a fair distribution of moral goods depends on what people as they actually are will do if they try to follow it, not on how their counterfactual better selves might manage to act. So to compare the approaches we need to take a realistic look at extant background conditions: the pre-existing social norms about what expectations to have, when to assume consent by default, what behaviors to read as indicating consent, and how much evidence to seek before acting on the assumption that one has received consent. We'll of course focus on the trickiest case: sexual consent.

4.1 The People As We Are: Heuristics and Biases

Unlike legal contracts or medical consent forms, it is common to not to use direct, explicit linguistic communication navigate sexual consent. While there is some variation across countries and generations, people rely overwhelmingly on non-verbal cues to infer the presence or absence of sexual interest, and in turn often use interest as a proxy for consent to escalate contact. How risky this is depends on how accurate we are. While some experimental designs are more sparse and artificial than others, the main findings of studies investigating this (ranging from 1982 to present day) are remarkably consistent: when relying on implicit cues, on average men substantially over-estimate, and women slightly under-estimate, a person's sexual interest relative to that person's self-report. In one set of experiments, subjects were shown full-body pictures and asked to classify a pictured woman as friendly, sexually interested, sad, or rejecting. Men were less accurate than women in all categories, and “were much more likely than women to misidentify friendly targets as indicating sexual interest (12.1% vs. 8.7%).”\(^{21}\) They were particularly prone to over-ascribe sexual interest to women whom they rated as attractive or whom they considered to be dressed 'provocatively'. A second study design had subjects engage in a round of speed dates (interacting for three minutes), and then complete debrief surveys in which they rated the other party's attractiveness, reported their own level of interest, and indicated how interested they took the other party to be in them. While women erred on the side of caution, “men significantly overperceived the sexual interest of their conversational partners”, and the “magnitude of men's overperception of women's sexual interest was predicted by the [men's ratings of the] women's physical attractiveness.”\(^{22}\) Another set of studies asked subjects to rate the sexual intent of characters in written or video vignettes.\(^{23}\)

Across all the studies, the error rates were most pronounced when the circumstances were ambiguous or explicitly non-sexual, for example meeting for coffee, asking for or granting a paper extension, or training a new employee.\(^{24}\) And while a number of factors stably predicted the extent to which a man mistakenly believed a woman was sexually interested—including his alcohol consumption,\(^{25}\) his beliefs about whether

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\(^{21}\) Farris, Treat, Viken, and McFall (2008). Treat, Viken, and Kruschke (2001) found that men who paid relatively more attention to sexual attractiveness rather than a person's affect performed particularly badly on this classification task.

\(^{22}\) Perilloux, Easton, and Buss (2012), 'The misperception of sexual interest'

\(^{23}\) Botswick and Delucia (1992); DeSouza, Pierce, Zanelli, and Hutz (1992); Koukounas and Letch (2001); Muehlenhard and Hollabaugh (1988). See also Lenton and Bryan (2005); Shotland and Craig (1988)

\(^{24}\) These results were also found in Fisher and Walters (2003); Kowalski (1993); Saal, Johnson, and Weber (1989).

\(^{25}\) Abbey, Zawacki, and Buck (2005): “Men who consume a moderate alcohol dose in a laboratory setting perceive a female confederate as behaving in a more sexualized manner and recall relatively more of her positive cues than her negative cues, as compared to men
women commonly engage in token resistance, his hostility toward women, rating of her physical attractiveness, or estimation of whether her clothes are "provocative"—her actual communicative behavior (as rated by women observing the same interaction) was not among them.

Two explanations are compatible with these patterns. It might be that men are comparatively bad at distinguishing between signals of sexual interest and simply friendly behavior, and so make discrimination errors. Or they could be employing too low of a decision threshold for what to count as sufficient evidence to conclude that a woman is sexually interested in them. It is hard to pull these explanations apart in the lab, in part because the task in the lab is artificially difficult. In real life, it is possible to avoid discrimination errors by getting more data: having a longer interaction, or asking increasingly direct or disambiguating questions. But this won't resolve the issue if the real problem is that the men are working with too low a threshold, or if they are not adequately motivated to avoid mistakenly treating a woman as consenting when she isn't.

4.2 Should Common Mistakes be Reasonable?

The Individualist and Social Approaches diverge sharply on the question of how this information should inform our practices for navigating consent. Husak and Thomas (2001) argue that these "considerations provide the key to a theory of reasonable belief about consent," by showing how a wide range of mistakes might be rational. When you have reason to think that a particular source of evidence is often unreliable, it is rational to give it relatively less evidential weight. So, they argue, given a strong enough belief in token resistance—a high enough credence that women who say 'no' do not mean to thereby refuse their consent—a man might rationally disregard a woman's explicit communication or at least give comparatively more weight to his interpretation of implicit and situational cues. But these cues are more ambiguous, and if he is prone to making false-positive perceptual errors when interpreting them, then even when she explicitly refuses it

who consume a placebo dose or a known nonalcoholic beverage."

26 Osman (2003, 689): "Men in the high TR [high degree of belief that women engage in Token Resistance] group had weaker perceptions of rape when the woman said 'no' to sex than did those in the low TR group. Therefore, the results suggest that "no" did not mean refusal to the men in the high TR group. It is also noteworthy that for these men, perceptions of rape did not significantly differ when there was no response from a woman and when there was an explicit verbal consent." The study had 131 participants, all male undergraduates under 21, majority (76%) white.


28 Abbey et al. (2005); Farris et al. (2006); Treat et al. (2001); Willan and Pollard (2003). For a detailed summary of these and other study findings, see Farris et al. (2008). Fisher and Walters (2003, 162) noted that the observed "gender difference was primarily due to the subgroup of men who expressed callous sexual attitudes and who had more traditional attitudes toward women", strongly suggesting that rather than tracing to a deep gender-based inability to model or understand women's communication, the asymmetric error rates are due to the extreme inattentiveness of a subset of men.

29 In fact the studies Husak and Thomas (1992, 2001) cite as providing the basis for rational belief in token resistance (principally Hickman & Muehlenhard, 1999; Muehlenhard & Hollabaugh, 1988) do not quite support it. In these studies, 37-39% of women surveyed (and slightly more—38-47%—of the men) reported having given a "scripted refusal" (saying 'no' when they were willing and intended to proceed with a sexual interaction) at least once; of them, just 15% reported having done so on four or more occasions. These studies are widely cited to indicate that "women engage in token resistance", but it is worth emphasizing a few additional findings of these studies. First, an equal proportion (39%) reported always communicating their desire for sex explicitly and never having engaged in scripted refusal. Second, the majority of respondents (60%) in the study indicated never using 'no' without intending refusal. Third, even for those in the 39% who gave a scripted refusal at least once, the vast majority (85%) reported doing so on no more than three occasions—this cannot be fairly represented as their standard practice. Finally, refusing at one point in an interaction while intending to consent later is quite a different thing from using 'no' to communicate present consent (Wertheimer, 2000, also makes some of these points about the studies, but they bear repeating.).
might be rational for him to believe—on his total evidence—that she does internally assent to the interaction. Husak and Thomas conclude that when conventional wisdom among men holds that women’s refusals are often insincere, such a man is blameless—and so cannot fairly be held responsible—for his error.

I think it has a different lesson. When a significant number of men believe that women’s explicit refusals are often unreliable, the guidance *treat A as consenting if you rationally believe that they are* will predictably yield a gendered skew in the distribution of costly false-positive mistakes, even if everyone were well-intentioned. When not deferring to explicit communication, men and women tend to make errors in opposite directions, women under-estimating, and men over-estimating, the sexual interest of the opposite sex. So in a predominantly heterosexual society, we should expect that false-positive mistakes about consent will be disproportionately made by men and suffered by women, while the reverse holds for false-negatives mistakes. But while suffering a false-negative—being read as friendly when you were trying to communicate sexual interest or consent—may be frustrating, its disvalue pales in comparison to being treated as consenting despite your explicit refusal. When declining to hold a man responsible means treating the woman as having no complaint and leaving her to absorb any costs of his mistake, the resulting distribution of moral costs is neither equitable, nor random, nor justifiable by appeal to choices made by the people—women—who are left disproportionately burdened.

Whatever else we can say about such a policy, it is a manifestly unfair distribution of the costs. Not only does it allow *actual* high-cost errors to concentrate on women, it threatens women’s sexual autonomy by undermining their control over the uptake-dependent goods of the social practice of consent. If B aims to treat A as consenting just when on his evidence it is rational to believe that A consents, and he does not treat A’s explicit communication as decisive, she has little to no ability to correct his perceptual errors. Instead, whether she is treated as consenting rests to a large degree on the operation of factors inside his head, and outside her agential control. This is precisely the fault for which we rightly abandoned evidence-relative answers to the moral question.

The advocates of the individualist accounts aim to secure the consenter’s autonomy by making the question of whether she is *wronged* fully independent of what reasons the other party had for making their mistake. There is a theoretical elegance to this. Making *whether A has been wronged* wholly a question about A’s own internal states maximizes her *authorization* authority, while leaving *whether B is blameworthy* wholly dependent on B’s epistemic circumstances seems to hold him to a maximally fair standard of conduct. But the guidance given is what sets the circumstances in which partners and third parties will treat her as consenting, and so it is what shapes her access to and control over the *uptake* and *enforcement* goods of consent. If the guidance issued is evidence-relative, an outcome-relative answer to the moral question contributes nothing to these aspects of women’s control interests. It neither reduces her probability of suffering a rights-trespass, nor augments her ability to secure help from others in enforcing against them. The goods of security, uptake, and enforcement are all functions of how well others *track* whether she is consenting. The larger the distance between an account’s answer to the moral question and to the guidance question, the greater the range of moral value that is A’s *in theory only*. If it doesn’t put her in a position to ward off future trespasses, secure an apology or compensation, or even issue reproach, the fact that *theoretically* B’s action wrongs A is cold comfort.

A social practice that releases B from responsibility so long as his mistake was rational given the background conventions—no matter how perverse—rather than demanding that he defer to his partner’s explicit
communication, or be more cautious about presuming consent, leaves the rights-holder who suffered the mistake to absorb the costs without even a claim to compensation or apology. Unfortunately, the individualist prescription for social practices—pairing an outcome-relative answer to the moral question with evidence-relative guidance—has disastrous distributive consequences against a background of bad social norms, conventions, or heuristics. The end effect of this combination is to treat extant perverse social conventions as self-justifying, entrenching and implicitly endorsing them.

4.3 The Value of Guidance with a Moral Baseline

When we take the question of reasonableness to ask only whether B's belief was rational holding the conventions fixed, we focus on whether someone could rationally infer sexual interest (or receptivity) from the behavior. If the Social Approach did that, it would be just as distributively bad as the individualist approaches. But it precisely does not presume that social conventions must be held fixed when we ask whether a mistake is reasonable. Rather than asking whether B's belief was rational, its first question is whether the convention underwriting B's inferences meets the moral baseline. Reasonableness on this approach is not a question of whether B reached a high enough credence, given the total evidence available to him and his ability to interpret it, that A was consenting. We instead use the normative signaling account to provide explicit constraints on which conventions and signals can make a mistake reasonable, and require deference to As explicit communication. To shift responsibility for a mistake from B to A, we'll need to establish that (a) B could not easily get better evidence, and (b) the signaling convention being invoked is sufficiently avoidable. Widespread acceptance of a convention that fails these tests may speak to B's culpability, but does not mitigate the rights-holder's complaint or claim to compensation, and so does not affect the strength of her claim to social cooperation in enforcing her rights.

5 The Promise and Perils of the Social Approach to Consent

The Social Approach at least asks the right questions. But can it deal with just how bad the extant social conventions concerning consent really are? Realistically, we can hardly do worse than we presently do. We already make, and exonerate others for, false-positive errors in line with conventions so perverse that they count silence or failure to actively resist as communicating consent.

Several studies run on mock jury proceedings in the US, the UK, and Australia found that "men who have internalized norms that members of their own communities share are unlikely to be judged differently from what they had reason to expect." Jurors work to see things from the defendant's perspective, and tend to over-read consent roughly the same way that the men on trial did. When jurors in simulated trials were asked to evaluate whether the defendant's belief was sufficiently reasonable to acquit, they "tapped into highly dubious, but widely supported, social conventions which indicate that women who drink or flirt with men, or who take steps to initiate some intimacy, cannot complain when men take this behaviour to imply a willingness to engage in intercourse thereafter." Even when asked specifically to evaluate whether the de-

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30 These limitations nicely mirror the observations in Archard (1997), Miller and Wertheimer (2010), and Dougherty (2015) about the appropriate limits of convention. "If a convention is not generally accepted, or if there is disagreement concerning its existence, and if acting in reliance upon it may result in great harm to someone, and if it is nevertheless possible directly to confirm the belief inferred from acceptance of the convention, then someone who acts in the light of a belief inferred solely from the convention may be judged to behave unreasonably and culpably." (Archard, 1997, 278)


32 Finch and Munro (2006, 318)
fendant took appropriate steps to confirm that he had received consent, juries in the UK applied egregiously lenient standards:

“As one juror put it: ‘you might think yeah, that is very unreasonable but from his point of view you might think it’s not as unreasonable and the fact that she is at a party, she does look and appear to be drunk, she hasn’t told him no, and from the other person’s point of view it might look like he’s not being unreasonable’”

It is tempting to think that this problem can be controlled by tinkering with the guidance offered to juries. But in practice juries do not confine their deliberations carefully either to the statement of the rule they’ve been tasked to apply or the instruction given. Instead, they leverage “common sense”, leaning on social norms to interpret and contextualize not only ambiguous evidence about the facts of the case, but also the law—even when doing so conflicts with the explicit legal tests, definitions, or instructions they were given.

5.1 Evaluating the Social Approach for Consent-Givers

But while the persistence of perverse social norms distorts the application of legal standards when articulated in individualist terms, there is a real chance that adopting a social approach would nudge our practices in the right direction. This is because rather than asking us to evaluate whether a mistake is rational according to whatever conventions are common, it asks, directly, whether the common convention meets the moral baseline. It acknowledges the powerful good that conventions could do—if they are suitably constrained—and so points the way toward an optimistic future. Coordinating consent through a normative signaling convention that does meet the moral baseline would go a long way toward securing for A maximal control by balancing her interests in authorization, uptake, and enforcement. Such a convention provides an agent with a set of signals that she can avoid sending when she does not wish to consent, but can send when she does, and which others—whose uptake or cooperation she needs in order to change how she is treated, or whether her rights are enforced—know to treat as dispositive of her consent. Holding others responsible for costs in the absence of her signal constrains them to track her communication, and insulates her from others’ epistemic foibles, securing for her the greatest portion of the moral value of consent. This approach maximizes moral value for consent-givers and receivers alike. So the best-case scenario is better for all parties on the Social Approach than the best-case scenario for individualist approaches.

But while the social approach highlights the value of having adequately just communicative conventions, it does not ignore the wrongs done by extant unjust conventions. The injustice of the present conventions includes, but doesn’t reduce to, the particular wrongs suffered by individual victims of trespass. Nor do it reduce to any individual woman’s inability to make herself understood by any particular man as refusing consent. There is a properly structural complaint, had collectively by women, qua members of a group disproportionately harmed by the present signaling conventions: they are unfairly deprived of sexual autonomy. As things stand, it is incredibly easy for a woman to be read as issuing permissive consent to sexual contact. She can signal conformity to social expectations concerning how she should make herself available (especially to men) in myriad ways, and many people use extremely low evidential thresholds for

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33 Finch and Munro (2006, 318). This juror had been instructed that he should evaluate “whether [the defendant’s] belief was reasonable in all the circumstances and, in assessing this, should consider any steps that he took to ascertain whether the complainant was consenting.” This is the instruction that accords with s1(2) of the 2003 Sexual Offenses Act.

34 This was one of the main findings of a meta-analysis of 45 years of jury and mock-jury study results (Devine, Clayton, Dunford, Seying, & Pryce, 2001, ‘Jury decision making: 45 years of empirical research on deliberating groups’).
concluding that she has. But it is disproportionately difficult to exercise her sexual autonomy by withholding consent—leaving her rights against contact intact. So many behaviors for women are conventionally coded as signaling consent that it is quite difficult, at times quite costly, at times dangerous, to avoid them. Even if women suffered fewer actual mistakes, a social practice that thus renders them comparatively less able to control their interactions—because less able to use explicit communication to secure others’ uptake or help enforcing their rights—leaves them less secure in the moral goods of consent than men.

Insofar as women have the same agential interests in consent as men, and equal claim to having the social solutions to normative opacity protect and secure their rights and moral powers, they have a distinctive complaint against continued use of these skewed signaling conventions. We established earlier (in Chapter 2) that when a group is choosing a coordination norm for a long run of interactions, parties have a complaint of justice against norms that put them disproportionately at risk of injury. The implication for normative conventions is that members of a social subgroup have legitimate complaints against the selection and use of conventions that (without special justification) make it disproportionately difficult for them to retain their rights or exercise their normative powers. So when the operative conventions effectively ‘silence’ or disproportionately expose members of a subpopulation to moral injury, they have a legitimate demand that it be reformed or abandoned. Plausibly the other members of the population have a duty to answer this demand, accepting some costs if necessary, in order to reform their social practices to in fact respect the rights of the subgroup.

Regardless what account of consent we take to answer the moral question, the connection between our social practices regulating consent—that is, the guidance issued and reasonableness standard applied—and the informal norms and signaling conventions we use to navigate consent is not one-way. Signaling conventions are responsive to reinforcement pressures—and are learned socially. Strategies that sometimes are rewarded, and even when mistaken are rarely costly for the agent using them do not get extinguished. When signals are in use that fail to fairly distribute the risks and routinely lead to moral injury for rights-holders—e.g. taking drinking, politeness, dress, or silence as indicating sexual consent—a social practice of insulating agents who rely on them from social sanction is unjust to the rights-holders. It effectively treats rights that are habitually infringed as unenforceable. Once such signals have emerged, some form of negative feedback is necessary to destabilize them, even if it is not appropriate to criminally punish the offending agents.

The social approach puts us in a position to view bad social norms and conventions not as fixed points that make violations of consent tragically unavoidable, but as practices we can, and indeed are morally obligated to, cooperate to reform. But to do so we must grapple with another mess of difficult questions: whom to we hold responsible, when, and what does that look like? Are the accountability practices needed for social reform fair to those on whom the costs fall?

5.2 Evaluating the Social Approach for Consent-Seekers

Social conventions and norms shift slowly over time, responsive to public discourse and norm-enforcing behavior (including but not limited to legal sanctions). Social norms concerning sexual consent in the US and the UK have come a long way in the last half-century, in part due to efforts to reform legal standards for rape. When Morgan was decided in 1975, legal doctrine held that marital rape was conceptually impossible, because consenting to marriage entailed open-ended consent to sex with one’s spouse. It was also
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commonplace to presume consent in the absence of physical resistance "to the utmost." I hardly need to point out that neither of these is a practice that satisfies the avoidability constraint. ‘No means No’ is an improvement insofar as it demands deference to explicit refusals when given. But even this is far below the moral baseline: it licenses B to assume that A does consent unless she issues a refusal. Rather than treating the normative power of consent as a way for A to exercise autonomy in authorizing what would otherwise be a rights-violation, this sets B up as entitled to cross the normative boundary unless A can make herself understood as actively refusing such permission. Anderson (2005) appropriately condemns this norm for implying that someone who is non-responsive (whether because suffering frozen-fright or unconscious) counts as consenting. This too clearly fails the avoidability constraint.

Affirmative Consent reforms championed with the slogan '(only) yes means yes' are an improvement. These at least require a positive signaling act from the rights-holder before allowing B to engage in presumptively rights-violating contact. But as Ferzan (2016) rightly points out, if we do not constrain their decision, affirmative consent standards invite juries to invent communicative conventions on the fly (and as we saw, the results are unlikely to meet the moral baseline). So insofar as we have reason to prefer affirmative consent standards—because they do more to secure the rights-holder’s control interests—we also have reason to issue clear, constrained guidance concerning which conventions can permissibly be invoked to interpret behavior, and to start applying pressure to improve the social norms.

Both slogans are still too simplistic, implying that consenting to sex is more like a contract than an ongoing exchange in which each party has the responsibility to monitor the other for signs of discomfort and disengage if they appear uncomfortable. Social norms and scripts are capable of significantly more nuance than establishing that "no means no" and "yes means yes." They are often dynamic and temporally extended, prescribing patterns of expected behavior for the duration of a wide range of ways an interaction might unfold. Consider the social norms of politeness: they include some default expectations (e.g. against showing up at someone's house uninvited, calling at particular hours, or saying rude remarks); scripts that structure a polite exchange (e.g. if asked how you are doing, answer and then inquire about how they are doing); as well as norms to ensure the others’ comfort (be alert for signs that they are uncomfortable, provide socially graceful 'outs' and ways to decline invitations, etc.). It is difficult to articulate all the norms governing polite interactions, but that does not mean that they are difficult for neurotypical community members to learn or

35 On the marital rape exemption, see also discussion in footnote 12 above. Louisiana still defines aggravated rape as “when the victim resists the act to the utmost, but whose resistance is overcome by force.” (La. Rev. Stat. Ann. §14.42A(1) (2011), as quoted in Kadish, Schulhofer, Barkow, and Steiker (2012, Chapter 4 §C). The eighteenth century Blackstone definition of rape as "carnal knowledge of a woman forcibly and against her will" formed the core of American definitions of rape until a wave of reforms in the 1970s. These ‘bad old days’ are not safely in the past: most jurisdictions still include the use or threat of force as an element of rape, and in practice require victim resistance to prove that the defendant used force, even if they do not require resistance to demonstrate non-consent. For a survey, see Schulhofer (1998, Chapter 2); Kadish et al. (2012, Chapter 4); Anderson (2005). Nor are these (or even worse) views yet entirely absent from the bench. In 1992, Justice Derek Bollen (Supreme Court of South Australia) infamously presented physical coercion as benign persuasion in the course of summarizing a case in which a man was charged with five counts of marital rape of his estranged wife (who had come out as a lesbian and was already living separately at the time of the assaults): “There is, of course, nothing wrong with a husband, faced with his wife’s initial refusal to engage in intercourse, in attempting, in an acceptable way, to persuade her to change her mind, and that may involve a measure of rougher than usual handling.” (Transcript of Proceedings, R v Johns, Supreme Court of South Australia, Bollen, 26 August 1992.)

36 Antioch College was one of the earliest to adopt an affirmative consent requirement, in 1991. Canada encoded it as a legal standard in 1992, but the first U.S. state to legally require affirmative consent was California (in 2014). (See: Kimmel and Steinem, “Yes’ is Better than ‘No”, New York Times Sept 5 2014.)
recognize. Nor does this nuance erode our willingness to hold each other accountable to prescriptive social scripts: failures to perform one’s role as prescribed by these norms are met with social sanction of various forms, ranging from reproach to reputational damage. Even unintentional rudeness necessitates an apology.

Proposals to strengthen rape laws in ways that would not require culpably disregarding consent have been met with concerns about whether they are fair to defendants. I am not here advocating a specific change in liability to criminal punishment; the issue of how appropriate social norms should be incorporated into the apparatus of criminal law is a delicate one, to which we will return in later chapters. Criminal law takes a punitive focus, whereas the core question driving our present inquiry is about when, as a matter of social practice, we should collectively take A to have been wronged by, and have a claim against, B’s action, for which we should hold B responsible. In the most egregious cases we pursue this question through criminal proceedings, but the vast majority of our accountability practices are less formal, borne out in how we structure our interpersonal relationships, talk to (and about) one another, and offer, demand, or accept apologies.

Some worry that even holding mistaken agents socially accountable for acting according to perverse but widespread social norms is unfair to them; that applying social sanctions to men in this position ‘destroys men who don’t deserve it’, because it holds them to a higher standard of care than they anticipated. In its most compelling form, this concern worries that accountability changes the rules on hapless men who have innocently internalized bad but normal behavioral patterns, suddenly demanding that they use new, unfamiliar communicative practices. It is true that shifting the social norm to require that the convention meet the moral baseline would hold agents accountable to better practices than we presently do, but it isn’t quite accurate to think of the shift as requiring them to learn communicative practices they do not already

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37 Famously, unspoken rules of etiquette and informal social norms can be challenging for people with particular neuroatypicalities to navigate. However, framing an interaction as a signaling problem makes it possible to fall back on explicit communication— unlike instructing someone to ‘simply’ divine someone’s unexpressed, internal attitudes or intentions.

38 For instance, Ferzan (2016) worries that legally requiring consent to be communicated will lead to criminal convictions of men whose partners were internally consenting but did not communicate this: “If these 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.” Husak and Thomas (1992, 112) went further, maintaining that these proposals can be justified only if one believes “that it is more important to encourage the social convention to change or to vindicate a particular view of women’s autonomy than to do justice in an individual case. But if the law should deal justly with each individual defendant, it is objectionable to punish someone to promote an ideology or to effect a change in societal views.” I confess even here I do not see grounds for a weighty concern that men whose partners in fact consented and simply failed to explicitly say so will end up with criminal assault convictions. When the victim takes herself to have consented, it is unlikely that she will seek or find a willing prosecutor, and already the vast majority of rape cases that turn only on the issue of consent are declined or dismissed.

39 Holding B responsible can itself take many forms: interfering with B φing to avert the mistake; reproaching B him for relying on an unacceptable signal; publicly recognizing A as wronged by B’s action; requiring that B apologize to A for the mistake; shifting or dividing costs between A and B by requiring some compensation; or even punishing B for his action. Which forms of responsibility are called for will depend on the nature of the harm suffered by the rights-holder, what is necessary for moral repair, and what sort of social feedback is required for us all to make good on the fair enforcement that we owe to each rights-holder.

40 I borrow this phrase from an article by Caitlin Flanagan (“The Humiliation of Aziz Ansari: Allegations against the comedian are proof that women are angry, temporarily powerful—and very, very dangerous”) which appeared in the the Atlantic on Jan 14 2018.

41 My thanks to Alec Walen for urging that I address this issue directly.
understand. And though taking a social approach would hold consent-seekers to a higher standard than the alternative views, I do not think it is plausible that it does so unfairly.

While perverse conventions have plenty of social currency, we should be careful not to pessimistically oversimplify: there are far better conventions existing alongside them. There are already incredibly nuanced norms and scripts for negotiating and checking for ongoing sexual consent, and we can make an intentional choice about which to support with our social norms.

In a study of Australian men (18-34 years old), O’Byrne, Hansen, and Rapley (2008) found that when asked how they would refuse consent to sex, “young men can and do display a clear awareness of the fine-tuned nuances of the normative interactional management of sexual refusal—here, via clichè, indirection or the offering of palliatives and excuses.” They also volunteer these and subtler signals (including being conversationally ‘short’ or affectively ‘cold’) as the most common ways that women indicate non-consent. In fact, it was only after the topic of rape was introduced that participants adopted a skeptical stance about the possibility of really knowing that an activity was not welcomed by their partner or even what she might mean by ‘no’. In a similar study of UK undergraduates, Gray (2015) found that when discussing consensual sex “the young men [. . .] were able to understand subtle verbal and non-verbal signals of sexual refusal, but” when rape was made salient “they drew on ideas from the miscommunication model, to deny men’s accountability for rape, claiming not to understand the signs of refusal.” These findings suggest there is less innocent confusion than motivated ignorance to deflect accountability for ignoring non-consent. The young men in these studies do not sincerely believe that an unresponsive or extremely hesitant partner is genuinely consenting. They are just reluctant to accept that someone who disregards her nonconsent is responsible for seriously wronging her.

With all of this in mind, let’s revisit the Bad Date case from the first Chapter:

Alex took Grace on a fancy dinner date. Alex felt they had chemistry, and was excited. Grace accepted his invitation to go back to his apartment, and once there, he kissed her. She kissed back, so he escalated. *Content Warning* He playfully asked where in the apartment she’d like to have sex, but she hesitated and said “maybe next time”, and that she didn’t want to “feel forced.” He thought maybe she was worried about being too easy, and suggested just chilling on the couch. When she joined him, he suggested she give him oral sex. She hesitated but complied, they made out again; he tried several more times to get her interested in penetrative sex, putting her hands on his body, exploring hers, and briefly role-playing sexual aggression, in case she was into that—but she pulled away and eventually left. Then she texted him: “I just want to take this moment to make you aware of your behavior and how uneasy it made me. You ignored clear nonverbal cues; you kept going with advances. You had to have noticed I was uncomfortable.” Reading it, Alex felt

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42For discussion of some of these, see Kukla (2018). Some communities — e.g. queer and BDSM communities— have developed particularly rich sets of practices for continuously communicating enthusiastic consent for the duration of the interaction. These are in many ways exemplary, and provide a proof of concept for the model I am advocating. Of course, the fact that some subcommunities have good practices does not establish that everyone in the broader community can be reasonably expected to know and act according to these conventions. Cultural norms do not evolve or change at a uniform pace throughout a community as large and diverse as a country. Rather, much like linguistic patterns, shifts originate in relatively small (and often comparatively young) subpopulations, and propagate outward. There is an important question concerning how to handle the missteps of the people who are slow to adopt the new improved conventions, to which we will return in Chapter 8.

43This parallels Estrich (1986)’s point that when there are multiple conventions, there’s no reason to buttress the worse one with the reinforcement pressures of law simply because it’s the older one.
sinkingly that he had made a serious error. He had not meant to pressure her, and did not want a sexual
encounter that wasn’t fully consensual.

There are a host of questions to ask about this case, but for our purposes let’s focus on whether Alex’s mistakes
would be considered reasonable on the normative signaling account.44 Did Grace communicate consent to
all the various forms of contact? If we interpret Grace’s behavior according to one of the many available
signaling conventions that meet the moral baseline, not only did she not communicate consent, she clearly
communicated a refusal to his escalations: at several points suggesting an alternative activity, indicating her
discomfort, and explicitly stating a preference to stop. Given the study data just above, there is reason to
think that someone like Alex does understand these signals.

But imagine that he truly doesn’t, and instead embraces one of the conventions sometimes espoused by
men in college fraternities: that Grace’s merely “going along with” his proposals constitutes or communicates
consenting to them.45 Before this convention can do the moral work of rendering Alex’s mistakes reasonable,
it must meet the moral baseline. Focus on the avoidability constraint. Could Grace avoid complying with
his increasingly insistent proposals without undue cost? It is at best unclear. The fact that they are at his
apartment makes it costly for her to confrontationally resist, and his persistence despite her redirection and
soft refusals left her with no non-confrontational alternatives.46 In fact it is doubtful that an agent could non-
culpably rely on a convention like this one: when you are in a position to know that it is quite burdensome for
A to avoid behavior B, relying on it rather than a clearer (that is, sufficiently avoidable) signal for something
with the stakes of sexual consent is reckless at best. Given the apparent costs of avoidance, the comparative
costs of error, and ease of getting a better signal, then, Grace’s behavior did not communicate consent by the
lights of the Normative Signaling Account.

I’ve framed the case in the light most favorable to Alex, imagining that he genuinely didn’t pick up on
Grace’s discomfort. If he did, his continued pressure is culpable. But even if he didn’t, her repeated hesitation
when he suggested sex should have given him pause. He does not know her well, and insofar as he aims to
have a mutually respectful, satisfying encounter, he should aim to dispel rather than apply pressure on her
to have sex with him. No matter which conventions we imagine as the ones relevant to their encounter, she

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44 Because the view can be paired with an Attitudinal account as the core analysis of consent, it is possible to stipulate that Grace had the
mental attitude m that constitutes uncommunicated consent, and so Alex’s actions were not a mistake at all, even if he was reckless
with respect to whether she was consenting. I think it is implausible given her follow-up text, so I will continue to treat his actions as
mistakes.

45 The behavior of college men in fraternities issue frequent if not yearly reminders that an incredible disrespect for women’s sexual
autonomy and consent persists at least in social banter and bonding activities. To pick just two cases that received significant media
attention: in 2002, Glasgow University Union produced leaflets for freshers’ week with a section entitled “No means Yes and Yes means
Harder” (Guardian). In 2011, Yale University’s Delta Kappa Epsilon (DKE) fraternity was suspended for marching through campus
chanting a very similar phrase: “No means Yes and yes means Anal”.

46 It is controversial what level of coercion invalidates consent, but we shouldn’t too quickly dismiss the coercive effects a context (being
alone in a man’s apartment at night) can have. See Ferzan (2019, at p. 45) for a nuanced discussion distinguishing coercive pressure
sufficient to render a treatment wrongful and sufficient to undermine the coercee’s moral agency. Ferzan suggests that in the Ansari
case (on which Bad Date is based) the badgering rises to the level of wrongful coercion, and it ought to be up to the consentees whether
‘consent’ thus obtained is morally valid. We are also prone to under-estimate the psychological and situational difficulties of issuing
a confrontational refusal. A pair of studies by Sommers and Bohns (2019) found that while most subjects predicted that they would
refuse to unlock their phone if requested, and believed a reasonable person would refuse, 100 out of 103 people actually asked promptly
complied, and “only two made a remark expressing unease, skepticism, or objection”.
clearly did not issue a clear signal of consent. That is what would be needed, on the view I am defending, for Alex’s actions to count as misfires rather than errors. Alex at best negligently violated Grace’s rights to bodily integrity, a serious wronging which renders her rebuke fully appropriate and entitles her to at least an apology. Whether Alex should be criminally prosecutable for rape or indecent assault is a further question; the standard for not wronging a sexual partner is and ought to be higher than merely ‘don’t commit a provable felony against them.’ One must treat them with respect for their person and bodily autonomy, which means proactively safeguarding their sexual autonomy.

There is reason to be cautious of the residual feeling that it is in some way unfair to Alex to hold him to higher standards than he absorbed from those around him. Moody-Adams (1994, 298) rightly cautions—against the “commonplace of everyday moral reflection that it is ‘only fair’ to judge people by ‘the standards of their own day’”—that it “dangerously ignores the common, and culpable, tendency simply to affect ignorance of the possibility that some cultural practice might be morally flawed”, persisting precisely because of “our failings as human beings who perpetuate cultures.” It could be unfair to demand that a group of agents absorb the costs associated with shifting from an acceptable but non-optimal social practice to an optimizing one, but that is not the demand. Rather, the social approach simply requires that agents shift off of an unacceptably unjust norm, even if they have internalized it haplessly rather than villainously. Even if Alex is not personally blameworthy for having learned to follow a perverse convention, he surely does not have a moral claim against bearing proportionate costs necessary to secure the rights of those threatened or injured by his actions. Costs of these kinds are less like ‘punishing the innocent’ and more like the liability that even innocent threats incur to suffer the harms necessary to protect their victims.

5.3 Abuse and Disregard

Given the data about jury deliberation in §5, the risk that a strict social standard will result in criminal convictions for morally innocent men is minimal in the absence of a shift in underlying social norms—at which point those men would either not be disposed to make such mistakes, or would not be morally innocent. But there is a real risk that an overly lenient standard will deprive women of the goods of enforcement. I have to this point constrained my discussion under the idealizing assumption that everyone is sincerely doing their best to follow their evidence and avoid making mistakes. But most sexual assaults are not the result of innocent miscommunication; in Susan Estrich (1986)’s words, “More common is the case of the man who could have done better but did not; could have paid attention, but did not; heard her refusal or saw her tears, but decided to ignore them.” Especially in light of this, there is good reason not to err on the overly-permissive side when crafting a standard for reasonable mistakes concerning consent. As Schulhofer (1998, 90) warns, “in rape law, flexibility almost inevitably means non compliance and under-enforcement.”

This is not to say that partners must always work out an explicit agreement in order to ensure that their contact is consensual, though other theorists (notably Anderson, 2005) do advocate this. People in a stable longterm partnership who coordinate with each other often develop highly specific private communicative conventions over time. The social approach counts them as having a range of possibly highly idiosyncratic signals available with which they can communicate genuine ongoing moral consent to each other. But people who do not have a shared history can only rely on the conventions that are public to the community, which they can reasonably expect the other to know. So particularly on first encounters, there is reason for partners to be extremely careful to avoid misunderstandings, just as we are cautiously polite and careful to dispel social pressure when interacting with new acquaintances. And when the legal community is called on to adjudicate a conflict or enforce a claim, they can only invoke the communicative norms intelligible within the broader community. If the partners haven’t established a clear understanding in the shared language (much the way that BDSM ‘contracts’ function), then the courts should presume non-consent. This means that legal determinations of wrongdoing may come apart from the moral.
Claims that a non-consensual sexual encounter was in fact a reasonable mistake are routinely offered in circumstances that do not appear to even be sincere mistakes, as for instance in defense of Brock Turner (California, United States: California v. Brock Allen Turner [2015]) and Luke Lazarus (New South Wales, Australia: Regina v. Lazarus [2015]). Both men were charged with rape, after having forcefully penetrated women in alleys behind a party venue. In both cases, the woman was at the time too intoxicated to stand, and suffered serious physical injuries including abrasions and tearing during the encounter. Neither man claimed to have asked for consent at any point in the interaction, but both claimed they reasonably believed the victim mentally assented to their actions, and sought to frame the events as an innocent miscommunication. Turner was ultimately found guilty of three counts of felony sexual assault, sentenced to six months’ imprisonment, and served three. Lazarus was initially convicted of sexual assault and sentenced to three years, but on appeal was acquitted on the grounds that he reasonably believed she was consenting (Regina v. Lazarus [2017] NSWCCA 279). Cases like these demonstrate the importance of defining reasonable mistakes especially carefully: whatever account we give, we can expect that brazen and reckless agents will attempt to invoke it as a shield against accountability for their actions.

Particularly given the ways that jury deliberations are shaped by social norms, an individualist account of consent—and especially an evidence-relative standard for reasonableness—cannot hope to adequately protect women’s sexual autonomy under the actual social conditions. Worse, they will routinely be leveraged to help culpable violators escape responsibility. This is manifestly unjust; if we can do better, we are obligated to. Given the conventions and heuristics, we can expect better distributive results from explicitly focusing on whether the conventions relied on are above the moral baseline than we can expect from an individualist standard. This makes it imperative to adopt as a social practice.

6 Wrapping up

Individualist approaches to navigating consent start with the moral question (to determine when A is wronged by B), and then address the guidance question (to determine when B is blameworthy). This all but ignores the distributive question. When we treat each instance of opaque consent individually, there is no distribution to ask about, and no way for the predictable distributive results of a standard to affect whether it is a plausible characterization of what rights require. By contrast, the Social Approach starts with the distributive question, and uses it to constrain what answers are plausible for the other two questions: what we owe each other is good faith cooperation—doing our part in a social practice justified by its ability to minimize and fairly distribute the costs of normative opacity.

But even if we take an extremely narrow individualist view of the ontology of consent—characterizing whether someone in fact consents as purely a question about their mental states—the full moral value of consenting can only be secured for agents by a social practice that articulates when it is allowable to treat agents as having consented in terms that we can follow fairly and well. A functioning social practice will need to specify when to treat people as having consented: to take them as lacking a complaint and not entitled to compensation. This is what our standard for reasonable mistakes does.

There is a real question about how the existence of bad social conventions should inform our efforts to craft policy concerning mistakes. We can take them to have exonerating force, or not. We can choose our policy with an eye toward controlling for the worst distortions, or not. We can lament their existence, but they will not change if we do nothing to change them. And we cannot genuinely insulate consent from them.
Background social conventions shape what errors we will tend to make, who is likely to suffer them, what we will see as a rational mistake—and so determine who can securely enjoy the moral value of consent. When there are widespread practices of treating women as consenting under conditions that do not satisfy the moral baseline, it morally is urgent that our choice of reasonableness standard at least not reinforce disproportionate error rates.

The social policy prescribed by the individualist approach—exonerating agents for blameless or subjectively rational mistakes—has exactly the wrong shape. It allows the prevalence of a perverse social convention to insulate the agents who act according to it, thus reinforcing it. When furthermore the deliberations of police officers, prosecutors, judges, and juries are shaped by the same perverse social norms, not only does giving evidence-relative guidance fail to evenly distribute the risks of suffering a mistake, it declines to enforce victims’ rights because it classifies all but the most egregious errors as reasonable. Even in theory it fails to provide A with adequate moral control, and in practice it provides far too much cover for the brazen to violate rights with impunity.

As a realistic standard, a coordination norm does better to secure the moral goods of sexual consent fairly than individualist accounts can. More importantly, it shifts our focus away from treating reasonableness determinations as evaluating an individual’s culpability for a mistake, to the essential role of our social practice of managing normative opacity. What we owe to each other is to adopt adequately just social norms, using signals that meet the moral baseline, and to enforce the norms evenly enough to secure the relevant moral goods for all participants.

References


A Social Approach to Navigating Consent


