

Sexual Consent, Reasonable Mistakes, and the Case of Anna Stubblefield

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I. INTRODUCTION

For the crime of rape, a false belief that the other party was consenting should provide a complete defense¹ only if the belief is reasonable. This is a common view, one I defended years ago² and hold without hesitation. I won't be defending it in this paper.

Just what should count as a reasonable belief is a further question, and the tendency seems to be one of excessive generosity. At least that is my experience: I almost never come across a sexual assault case where I think the mistaken belief that was deemed unreasonable perhaps should have been considered reasonable, and I fairly often read cases where the belief, apparently deemed by jurors or judges to be reasonable,³ strikes me as clearly unreasonable. The case of Anna Stubblefield is of great interest because even if we are convinced that D.J. did not consent, it seems quite plausible that her belief that he did was reasonable. Not that I am certain it was, and my concern is not primarily to argue that it was. Rather, I reflect on it, as well as another case,⁴ in an effort to sort out—and prompt reflection on—what should factor into a judgment that a mistaken belief that the other party was consenting was reasonable.

My discussion will draw heavily on the Stubblefield case but not be an analysis of it. I will leave it to others to discuss the trial court's restrictive rulings and the appellate decision overturning the conviction on the grounds that those rulings prevented Stubblefield from fully presenting her defense.⁵ In order to focus on the mens rea issues, I'll assume for the sake of discussion that D.J. did not consent. (I'll also assume that she believed he consented and that all testimony

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¹ I put it this way because to put it accurately would involve more legalese than is desirable, but technically it doesn't count as a true defense; rather, one element of the offense, the *mens rea*, has not been proven beyond a reasonable doubt. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 203–04 (7th ed. 2015).

² See Marcia W. Baron, "I Thought She Consented," 11 PHIL. ISSUES 1 (2001).

³ Or at least, they judged that there is room for reasonable doubt as to whether it was unreasonable.

⁴ *R v. Tawera* (1996) 14 CRNZ 290 (CA).

⁵ *State v. Stubblefield*, 162 A.3d 1074, 1080 (N.J. Super. Ct. App. Div. 2017).

from her that I report below was sincere.) I emphasize that I do so strictly for the sake of discussion, with the purpose of throwing the mens rea issue into relief.

Because they bear on the rest of my paper, I begin by explaining my starting points on sexual assault law—on what I think the law should be. The first I already noted: a false belief that the complainant was consenting should be a complete defense only if it was reasonable. I also think there should be no force requirement. The actus reus of rape should be understood to be *nonconsensual sex*. Not forced nonconsensual sex; not even forced sex (where non-consent does not have to be proven, only force does).⁶ Finally, sexual consent should be understood as distinct from wanting or desiring sex. This is a less common point than the other two, so some elaboration is in order.

II. CONSENT (OR: WHY NONCONSENSUAL SEX AND UNWANTED SEX ARE NOT IDENTICAL)

Consent—whether to sex or to something else—is best understood as something one does (or in its noun form, something one gives) rather than as something one feels. It is better understood as (roughly) a performative than as a mental state.⁷

It is worth noting that some scholars agree that consent should not be equated with wanting or desiring yet maintain that it is a mental state. I limit myself to arguing against the common conflation of consent with desire rather than examine views equating consent with, e.g., “[t]he mental state . . . of waiving one’s right to object.”⁸

To consent to something, I maintain, is to agree to it (and to agree under conditions where one is reasonably free to decline). A can desire something without agreeing to it, as when A feels a strong desire for sexual intimacy with B but for such reasons as that A is married to C, declines B’s invitation. One can also agree to something without desiring it, as when one agrees to give a housemate a

⁶ This is, however, a more plausible option than requiring both force and consent, and yet more plausible is understanding rape as coerced sex, following Scott A. Anderson, *Conceptualizing Rape as Coerced Sex*, 127 ETHICS 50 (2016).

⁷ A mistake concerning this position needs to be corrected. Larry Alexander presents as a “fatal problem for the performative view” that “for speech acts, there are . . . necessary mental state criteria, the absence of which will defeat the performative’s effectiveness.” Larry Alexander, *The Ontology of Consent*, 55 ANALYTIC PHIL. 102, 103–04 (2014). This could only be thought a problem if one supposed that on the performative view, mental states are *irrelevant*. They aren’t; they factor in via the felicity conditions. See J. L. AUSTIN, HOW TO DO THINGS WITH WORDS (J. O. Urmson & Marina Sbisa eds., 2d ed. 1975). For more on the performative view, see Tom Dougherty, *Yes Means Yes: Consent as Communication*, 43 PHIL. & PUB. AFF. 224 (2015), and H.M. Malm, *The Ontological Status of Consent and Its Implications for the Law on Rape*, in 2 LEGAL THEORY 147 (1996).

⁸ Alexander, *supra* note 7, at 108.

ride to the airport, realizing that her need for the ride is greater than one's own need to continue, without interruption, the translation one is working on.⁹

This is so far just a conceptual point about consent, and one might retort, 'What's in a word? Even if consent and desire are not the same thing, might it not be useful for purposes of the law to understand sexual consent as sexual desire?' Point well taken, but I don't see that it is useful. On pragmatic grounds as well it is better not to equate them. Wishful thinking combined with arrogance can easily support the thought, 'I know she said "no" but I can tell she really wants it and I guess she doesn't really know her own mind, or maybe she just has a hard time saying what she wants.' If sexual consent and sexual desire are equated, the initiator may be well situated to say, 'Yes, she consented! She really did want it, though she denied it.' This is true whether we understand the desire in question to be sexual desire or an all things considered desire to have sex (on this occasion and with this person), though the risk is probably greater if sexual consent is equated with sexual desire.¹⁰ By firmly distinguishing consent from both, we can make it clear that it is unacceptable to override the other person's refusal or lack of consent with one's own judgment of what she (or he) really wants.

If *A* declines *B*'s invitation, that *B* thinks *A* really wants to have sex with *B* is—or should be—neither here nor there. But if desire is treated as equivalent to consent, the option to refuse sex is dangerously undermined. Does *A* have to convince *B* that she doesn't want it, if *B* maintains that she does? One wants to have one's refusal taken seriously, recognized as authoritative.¹¹ *B* might be in a suitable epistemic position to question whether *A* wants what *A* says *A* wants; but that *A* may be wrong about that has no bearing on whether *A* consented. It is something *B* could bring up in an effort to try to persuade *A* to change her mind, but not to show that she *has consented*, or *is consenting*.

It is worth noting that it is not only *A*, the person responding to an overture, who benefits from a distinction between consenting to *X* and desiring *X*. Consider the matter from the perspective of *B*, the person initiating sex.¹² *B* is better off if *B* can be confident that *A* really is consenting when *A* says 'Sure!' As long as the

⁹ One might contest this, claiming that if one agrees to it, then even if one would in some sense rather work on the translation, one must want to provide the ride more than one wants to stay in and work on the translation. Clearly this hangs on just how we understand the terms 'want' and 'desire', an issue I will sidestep. I am less concerned to convince readers of the conceptual point than to bring out the pragmatic reasons in favor of distinguishing consenting from wanting or desiring.

¹⁰ Greater because it may be obvious that the other person is sexually aroused, and inferring sexual desire from arousal is more warranted than is inferring an all things considered desire to have sex. The view that sexual desire constitutes (or at least suffices for) consent is very likely one reason for rape victims' hesitation to report the crime to the police, and it would not be surprising if this were a particularly serious obstacle to male victims reporting an assault.

¹¹ On the matter of authority, see David Archard, *The Mens Rea of Rape: Reasonableness and Culpable Mistakes*, in *A MOST DETESTABLE CRIME: NEW PHILOSOPHICAL ESSAYS ON RAPE* 213, 222–26 (Keith Burgess-Jackson ed., 1999).

¹² Not that it is always the case that one person is the initiator, but these cases are of greater interest for my purposes because they are more likely to give rise to mistakes about consent.

conditions are not such as to raise worries that this was not consent but submission out of fear (or feeling so pressured that *A* feels she is being given no choice), and as long as there was no obvious sign of fear or distaste or something else that suggests that this might well not be consent, *B* should not be called upon—legally required—to check that *A* means what she said and is not merely submitting. There may be unclarity to sort out (‘Sure’ to which sexual activity?), but there should not be a legal requirement to try to figure out what *A* really wants. Moreover, the fear that later *A* will regret it and believe (possibly correctly, possibly not) that *A* never did want it and if sufficiently upset will go to the police, should have less of a foothold if it is made clear that what is crucial, for purposes of the law, is that *A* consented, not that *A* desired to have sex with *B*.

A further point in favor of distinguishing between unwanted sex and nonconsensual sex is that without the distinction, it is hard to do justice to the importance of not having sex with someone too intoxicated to give consent or someone below the age of consent. In each case the person might in fact want to have sex (and with the relevant party). Yet we know better than to think that because a thirteen-year-old or an inebriated person wants to have sex with *B* that he or she is consenting to it.

III. WHEN IS A MISTAKEN BELIEF THAT *A* CONSENTED REASONABLE?

My aim is not, of course, to come up with a formula. Rather, through reflection on both the Stubblefield case and a case where (or so I’ll argue, contra the *Tawera* court) the defendant’s belief should *not* count as reasonable, I’ll propose some guiding considerations and hopefully generate discussion of what we should want from a requirement of reasonableness in the context of criminal law defenses. But first a quick statement of my starting points on reasonableness.

I take it that ‘reasonable’ in ‘reasonable belief’ has to add something. It should not be the case that as long as one really does believe *p*, one counts as having a reasonable belief that *p*. Yet at the same time, the bar should not be high. This reflects the way we usually use the term ‘reasonable’ in ordinary discourse: a belief or action or person counts as reasonable simply by not being unreasonable.¹³ But in the context of criminal law—perhaps especially when what is at stake is whether the mens rea requirement has been met—it is particularly important that the bar for reasonableness not be high.

A more tentative starting point is that reasonableness is not primarily an epistemic concept.¹⁴ This is the case, I have argued, for our use of the notion in ordinary discourse;¹⁵ moreover, it is important for the criminal law that

¹³ I elaborate in Marcia Baron, Reasonableness (last updated Feb. 11, 2018) (unpublished manuscript) (on file with author) and take up the issue of how high the bar should be for reasonableness in Marcia Baron, *The Standard of the Reasonable Person in the Criminal Law*, in *THE STRUCTURES OF THE CRIMINAL LAW* 11 (R.A. Duff et al. eds., 2011).

¹⁴ See ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* (1999).

¹⁵ Baron, Reasonableness, *supra* note 13.

requirements of reasonableness not focus on how well one reasons, but track features more critically important for culpability. More on this later.

I begin with *R v. Tawera*, a 1996 New Zealand case.¹⁶ Tawera (age 48) was convicted of raping¹⁷ his sixteen-year-old cousin, who was living with Tawera and his family.¹⁸ The appellate court overturned the conviction and directed that a verdict of acquittal be entered,¹⁹ explaining that “this is one of those rare cases when the verdicts cannot be supported, and . . . a reasonable assessment of the relevant evidence as a whole must have left a tribunal of fact with a reasonable doubt on this essential element.”²⁰ The essential element was that the appellant *not have believed on reasonable grounds that the complainant was consenting*.

I find this ruling intriguing because all seemed to be going so well: the relevant statute was admirably progressive, the jury rendered what seems clearly to be an appropriate verdict; and then the appellate court, for reasons I cannot fathom, directed that a verdict of acquittal be entered. The statute was admirably progressive for a couple of reasons: first, it required only that sexual connection took place “without the consent of the other person” and “without believing on reasonable grounds that the other person consents to that sexual connection”;²¹ there was no force requirement as there typically is in the U.S. More notably, §128A includes an important stipulation, namely, “that a person does not protest or offer physical resistance to sexual connection does not by itself constitute consent to sexual connection for the purposes of section 128 of this Act.”²²

The evidence (not in dispute) was as follows: after the complainant got into her bed, Tawera got into the bed with her, uninvited.²³ He initiated some intimacy; she showed no interest but also did not resist beyond trying to turn her head away when he attempted to put his tongue into her mouth (resistance which he overcame) and trying to hold her thighs together (again resistance he overcame).²⁴ Apart from the resistance just mentioned, her reaction was one of passivity, including giving no response when he asked, “Honey can I stick it in . . . ?”²⁵

¹⁶ (1996) 14 CRNZ 290 (CA).

¹⁷ *Id.* at 290–91. He was convicted of unlawful sexual connection as well, but as this raises no additional mens rea issues, I’m simplifying by focusing on the conviction for rape. *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 293. Not that he was entirely a free man; he had also been charged with “having sexual intercourse with a girl under his care and protection.” *Id.* at 291. On that charge, no verdict had been taken, and the court ordered a new trial. *Id.* at 293.

²⁰ *Id.*

²¹ BUTTERWORTHS CRIMES ACT 1961, at 66 (Lee Andrew ed., 4th ed. 1997) (referring to Crimes Act 1961, s 128 (N.Z.)). For current and recent legislation, see <http://www.legislation.govt.nz/act/public/1961/0043/latest/versions.aspx?av=True> [<https://perma.cc/TZM4-BN62>].

²² *Id.* (referring to Crimes Act 1961, s 128A (N.Z.)).

²³ *Tawera*, 14 CRNZ at 290–91.

²⁴ *Id.*

²⁵ *Id.* at 291.

Given that New Zealand law specifies that passivity by itself does not constitute consent, it is clear that this was nonconsensual sex. For there was nothing other than a lack of resistance, verbal or physical, to point to as a reason for thinking she consented. In fact, as noted, she did resist; but even if she had been completely passive, that would not, by itself, have constituted consent. The court does not claim that it was consensual (nor that the prosecution failed to prove beyond a reasonable doubt that it was nonconsensual). But it denies that the prosecution proved beyond a reasonable doubt that the mens rea requirement was met. The judges' reasoning emerges when they offer a guess as to how the jurors could have arrived at a guilty verdict:

It may be that the jury became unduly concerned about the direction (correctly given) on s 128A and the fact that a failure to protest or offer physical resistance does not by itself constitute consent. That kind of consideration may of course be highly relevant to whether there was consent, but it does not really bear on the critical issue of belief in consent.²⁶

Not on the issue of belief in consent, but surely it bears on whether the belief was reasonable!

If the law spells out that *x* does not suffice to constitute consent and *D* believes solely because of *x* that *V* consented, this cannot be a reasonable belief. Perhaps it could if we counted ignorance of the law as an excuse, but we don't (except in rare circumstances, not relevant here).²⁷ Treating that as a fixed point,²⁸ it matters that a mistaken belief that because she did not resist, she consented, is a mistake of law.

The elements of the crime for which Tawera was convicted seem clearly to have been proven beyond a reasonable doubt. The court raises no worries concerning the act element, but holds that the mens rea was not proven. However, if 'reasonable' in 'reasonable grounds' is going to play a role in §128, surely this mistaken belief that she was consenting is *not* based on reasonable grounds. It is based only on the fact that she didn't resist (more precisely, didn't resist much).

Now, were there no stipulation in the law that passivity does not by itself constitute consent, there would be some basis for arguing that although Tawera should have stopped his advances in the absence of any indication of consent, still, the bar for reasonableness needs to be set low. Morally, sure (one might argue),

²⁶ *Id.* at 293.

²⁷ For the mistake of law/mistake of fact distinction, see DRESSLER, *supra* note 1, at 155–80 and Kenneth W. Simons, *Ignorance and Mistake of Criminal Law, Noncriminal Law, and Fact*, 9 OHIO ST. J. CRIM. LAW 487, 489 (2012). For a discussion of mistakes of law in connection with sexual consent, see MAYO MORAN, *RETHINKING THE REASONABLE PERSON: AN EGALITARIAN RECONSTRUCTION OF THE OBJECTIVE STANDARD* 295–99 (2003).

²⁸ *But see* DOUGLAS HUSAK, *IGNORANCE OF LAW: A PHILOSOPHICAL INQUIRY* (2016) (arguing that ignorance of law usually *should* be a complete excuse from criminal liability).

but we are talking about legal culpability here. For that the bar for reasonableness needs to be lower, and it would be too harsh to say that he acted unreasonably in thinking that more than an absence of robust resistance was needed (legally) for consent. I am not sure I am on board, but it is not implausible, particularly if we take into account fair warning considerations. But since §128A makes it quite clear that passivity alone does not suffice to constitute consent, there is no absence of fair warning. It cannot be reasonable to substitute his own ideas of what suffices for consent.

Reflection on *Tawera* suggests two points concerning when a mistaken belief that the other person is consenting is reasonable:

First, the belief had better not be at odds with what the law tells us about what does, or does not, constitute consent. The mistake has to be a mistake about a matter of fact (e.g. how old the other party is, or whether (s)he is only slightly tipsy rather than intoxicated, or what (s)he said), not about a matter of law.

Second, in thinking about whether the defendant's belief was unreasonable, we should attend to any steps (s)he took to ascertain whether the other party was consenting. It is in *Tawera*'s favor that he did ask permission; the problem is that when she didn't reply, he proceeded anyway.

That in determining whether the mistaken belief should count as reasonable, one should take into account any such steps is part of U.K. law, and I think it should be part of all sexual assault laws. The 2003 Sexual Offences Act specifies: "Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents."²⁹

IV. THE STUBBLEFIELD CASE

Anna Stubblefield was convicted in 2015 of two counts of first-degree aggravated sexual assault of D.J., a disabled man alleged by the State to be mentally incapacitated.³⁰ I'll assume for the sake of discussion that D.J. was incapable of consenting.

²⁹ Sexual Offences Act 2003, c. 42 (Eng.), <http://www.legislation.gov.uk/ukpga/2003/42/part/1/crossheading/rape/section/1> [<https://perma.cc/D8AZ-4J4T>]. This Act governs England and Wales, and parts of it govern Northern Ireland; *see also* Sexual Offences (Scotland) Act 2009, (ASP 9), (incorporating similar language regarding step-taking).

³⁰ *State v. Stubblefield*, 162 A.3d 1074, 1075 (N.J. Super. Ct. App. Div. 2017). She was sentenced to two concurrent twelve-year prison terms, each with an 85% parole ineligibility period. *Id.* The conviction was reversed in 2017 and remanded for a new trial before a different judge. *Id.* at 1083. As this article goes to press, Stubblefield has accepted a plea deal, pleading guilty to third-degree aggravated criminal sexual contact and admitting that she "should have known" that D.J. was "legally unable to consent." On May 11, 2018, Judge Zunic sentenced Stubblefield to time served. Associated Press, *Professor Accused of Assaulting Disabled Man Pleads Guilty*, N.Y. TIMES (Mar. 19, 2018, 2:39 PM), <https://www.nytimes.com/aponline/2018/03/19/us/ap-us-disabled-man-sexual-consent.html> [<https://perma.cc/MV5X-QERK>]; Alex Napoliello, *No More Prison for ex-Rutgers Professor Who Sexually Assaulted Disabled Student*, NJ.COM (May 11, 2018), http://www.nj.com/essex/index.ssf/2018/05/anna_stubblefield_sentenced_for_second_time.html [<https://perma.cc/R7N2-PZ8G>].

Stubblefield believes that D.J. is not cognitively impaired. There is no question that he cannot speak (and never has), that he wears a diaper, needs assistance in “every area of daily living,”³¹ and has trouble making eye contact and keeping objects fixed in view, nor is there any dispute about the diagnosis of cerebral palsy.³² But was it the case that he had only “the intellectual ability of a young child”³³ and (quoting a psychologist’s assessment in 2004 for the New Jersey Bureau of Guardianship Services) that he lacked “the cognitive capacity to understand and participate in decisions”³⁴?

Stubblefield was convinced that D.J. was a very intelligent man who was merely unable, thanks to physical disabilities, to communicate his thoughts through any of the usual ways (talking, signing, writing, typing on his own).³⁵ Through what both proponents and critics call “facilitated communication” (FC), she sought to enable him to communicate.³⁶ The method she employed involves holding one hand under the person’s elbow, the other over his hand, thereby addressing problems of motor control and coordination;³⁷ the difficulty is that the facilitator may—many would say always does—unwittingly guide the person’s hand.³⁸ He seemed to her a quick learner, with a lot to say and an enthusiasm for reading.³⁹ They met regularly over the course of many months and—as she saw it—they fell in love.⁴⁰ She was so convinced that the words typed were his, including his expression of interest in sex with her, that she had no doubt that everything they were doing, sex included, was mutual.⁴¹

From my description so far, and on the assumption that the psychologist’s assessment was correct and that the words she helped D.J. type were hers rather than his, Stubblefield seems to be acting out a fantasy (without any notion that it is a fantasy). She imagines him to be deep, thoughtful, full of ideas he is eager to share; she rescues him from a life in which his thoughts were trapped inside him; they fall in love, and now she gives him even more: a sexual relationship. Insofar

³¹ *Id.* at 1076.

³² Daniel Engber, *The Strange Case of Anna Stubblefield*, N.Y. TIMES MAG. (Oct. 20, 2015), <http://www.nytimes.com/2015/10/25/magazine/the-strange-case-of-anna-stubblefield.html> [https://perma.cc/324H-VLPW]. An outstanding article to which I’m much indebted.

³³ *Stubblefield*, 162 A.3d at 1076.

³⁴ Engber, *supra* note 32.

³⁵ Her view, as she explains in the letter she wrote to Judge Teare prior to sentencing, is that she and D.J. are “intellectual equals.” Daniel Engber, *What Anna Stubblefield Believed She Was Doing*, N.Y. TIMES MAG., (Feb. 3, 2016), <https://www.nytimes.com/2016/02/03/magazine/what-anna-stubblefield-believed-she-was-doing.html> [https://perma.cc/4F9L-KJ56].

³⁶ Engber, *supra* note 32.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

as we think of her as living out a fantasy, she bears some striking similarities to Benigno, a character in the film “Hable con Ella” (“Talk to Her”), directed by Pedro Almodóvar.⁴²

Benigno, a nurse, is infatuated with Alicia, a young dancer whom he observes from afar (thanks to having a view from his apartment of her dance studio).⁴³ When she is seriously injured in a car accident, Alicia ends up with Benigno as her nurse.⁴⁴ Tending to her in her stable, comatose state goes on for months, even years.⁴⁵ Thanks to another nurse needing some time off, Benigno finds himself alone with Alicia for long stretches, including some nights.⁴⁶ As viewers, we aren’t quite sure what to make of his practice of talking to her as if she can hear and comprehend his detailed reports of (among other things) theatre performances. Nor do we know what to think of the intimate massages he lovingly gives her, because although better for her than being touched only minimally, they are also more gratifying to him than is appropriate. Should we bracket this, we wonder? Treating a comatose person as if she can listen to him, dressing her up and taking her out on a balcony to enjoy the breeze and the sunshine—all this seems better, we initially tell ourselves, than treating her as just a physical body. But we soon realize that this is not a case of treating her “as if . . .” As he sees it, they are a couple. When he tells his friend, Marco, that he plans to marry Alicia—not that he hopes to marry her if she ever emerges from a coma, but that he plans to marry her in her current state—he seems fully unprepared for Marco’s reaction of horror. Soon we see how far Benigno has taken what we, but not he, see as a fantasy: she is pregnant.

One of the fascinating features of “Talk to Her” is that Benigno intensely enjoys his imagined relationship in part because it is his own construction. (Of course, it matters that he doesn’t regard it as such.) He doesn’t have the challenges of a real relationship; he does all the talking and never suffers the hardships that those with real relationships have—feeling put down, being challenged or contradicted when you wanted support, realizing that your partner wasn’t listening to you or was bored by your story. He doesn’t have to contend with grumpiness, nor worry that something he says will offend her. He can idealize her without having to face disappointment. There are no arguments. “Why shouldn’t we get married?” he says to Marco. “We get along better than most married couples.”⁴⁷

Against some striking similarities, there are important dissimilarities, including this one: Benigno talked to a motionless, unresponsive Alicia. By contrast, when Stubblefield declared her feelings for D.J., he typed back “I love

⁴² TALK TO HER (Sony Pictures Classics 2002).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

you, too” and shortly thereafter, “So now what?”⁴⁸ Whereas Benigno had no reply to Marco’s emphatic “It’s just a monologue!”⁴⁹ Stubblefield fully believes that she and D.J. are engaged in dialogue. And she has a partner who says what she wants to hear, yet at the same time is an unfolding personality, full of (what seem to her) surprises.

The jurors reportedly were baffled: how could Stubblefield love him? I think that betrays a failure to appreciate the powers of the imagination and the draw of a fantasized relationship (provided that the person immersed in the fantasized relationship can see it as not a mere fantasy). One can imagine the loved one to be (almost) whatever one wants him to be; one can enjoy being with him without being challenged or contradicted. Yet at the same time, one is not alone, as one is in a purely fantasized relationship. For both Benigno and Stubblefield, there *is* this real person, of flesh and blood, and the person is present (although Alicia is only physically present). Moreover, in both cases the person is one’s project. Stubblefield devoted a significant portion of her free time to enabling D.J. to communicate, to realize his potential, to live a real life. Thanks to her, he has transformed from someone whose pleasures, apart from eating, consisted mainly in playing with plastic coat hangers into a man who reads voraciously such works as those of Maya Angelou and who, with Stubblefield’s help, writes papers that are delivered at conferences. No wonder she loves him!

Enough on the parallels. Here is the difference I want to highlight: whereas any suggestion that Benigno believed on reasonable grounds that the comatose Alicia consented to sex with him would be utterly preposterous, a suggestion that Stubblefield believed on reasonable grounds that D.J. consented to sex with her is not preposterous.

V. SOME GROUNDS FOR DEEMING STUBBLEFIELD’S BELIEF REASONABLE

Stubblefield was not simply creating her own fantasy in thinking that D.J. was mentally far sharper than the psychologists’ assessments indicated and that he was communicating his thoughts through FC. To see this, we need to delve further into the history of Stubblefield and D.J.’s relationship.⁵⁰

⁴⁸ Engber, *supra* note 32.

⁴⁹ TALK TO HER, *supra* note 42.

⁵⁰ In recounting the history, I rely on Engber, *supra* note 32 and *State v. Stubblefield*, 162 A.3d 1074, 1075–76 (N.J. Super. Ct. App. Div. 2017), and use the initials and names that Engber uses to refer to D.J. and D.J.’s mother and brother. I leave out some details that although important to understanding some of the dynamics, are not relevant to the question of whether her belief that D.J. consented should count as reasonable. These include the racial components (D.J. is black; Stubblefield is white; Stubblefield’s then-husband is black; Stubblefield’s research areas included philosophy of race and she was the first and thus far only white scholar to chair the American Philosophical Association’s Committee on the Status of Black Philosophers) and the relationship that developed between Stubblefield and D.J.’s mother and brother (“She was like family,” Wesley said in a deposition). For these details and more, see Engber, *supra* note 32.

They met in 2009 through his brother, Wesley, a student in one of her classes at Rutgers-Newark.⁵¹ (Stubblefield was a professor in, and chair of, the philosophy department.)⁵² After she showed the class part of a documentary⁵³ depicting a nonverbal girl with an I.Q. of 29 who, thanks to FC, managed to go to college, Wesley told Stubblefield about his brother and asked if D.J. might be able to utilize FC.⁵⁴ Soon she was working with D.J. every other Saturday at Rutgers.⁵⁵ Wesley and D.J.'s mother, P., were delighted by his rapid progress, and P. invited Stubblefield to her home for more frequent FC sessions.⁵⁶

Some months later, Stubblefield's mother, Sandra McClennen, suggested that D.J. write a short conference paper for a session she was organizing for the Society for Disability Studies.⁵⁷ Stubblefield and D.J. worked together on the essay, and in June 2010, D.J. traveled with Wesley and their mother to the conference, where Wesley presented the paper.⁵⁸ Subsequently, Stubblefield helped D.J. write another conference paper.⁵⁹ Stubblefield, D.J., and P. traveled together to this conference, where Stubblefield's father presented the paper.⁶⁰ The paper was subsequently published in a peer-reviewed journal, *Disability Studies Quarterly*.⁶¹ In Fall 2010, D.J. sat in on a 400-level course in African-American literature, assisted in his homework by FC provided by Sheronda Jones, an undergraduate recruited by Stubblefield.⁶²

I've recounted this to offer reasons for thinking that Stubblefield's belief that D.J. was communicating his own thoughts via FC should count as reasonable for purposes of criminal law. That those who knew D.J. best—his mother and brother—also saw him to be conveying his own thoughts through FC provided Stubblefield with some confirmation of her belief that he was doing so (though the fact, of which she should have been aware, that naturally this is what relatives want to believe reduces the confirmatory value). By the time Stubblefield and D.J.'s relationship had taken a sexual turn—Spring 2011—Wesley had begun to have doubts about FC, but he did not share this with Stubblefield. By all reports, no one was relaying to Stubblefield any worries about whose thoughts were being typed

⁵¹ Engber, *supra* note 32.

⁵² *Stubblefield*, 162 A.3d at 1075.

⁵³ AUTISM IS A WORLD (Cable News Network 2004).

⁵⁴ Engber, *supra* note 32.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ DMan Johnson, *The Role of Communication in Thought*, 31 DISABILITY STUD. Q. (2011), <http://dsq-sds.org/article/view/1717/1765> [<https://perma.cc/358D-U6XG>]. It was later retracted, though not for reasons concerning authorship.

⁶² Engber, *supra* note 32.

out, hers or D.J.'s. Her confidence in him and in FC was reinforced by more than just a few people: in addition to D.J.'s mother and brother, Stubblefield's parents, Sheronda Jones, those who attended the conference presentations of his papers, and (arguably) the editor(s) of the journal where one of the papers was published under his name.⁶³ Her confidence was also bolstered by the firm endorsement of FC by such people as Professor Douglas Biklen, founder of the Facilitated Communication Institute and, from 2006–2014, Dean of the Syracuse University School of Education, and by the appreciation of others for whom she served as a facilitator.⁶⁴

If her belief that D.J. was communicating his thoughts through FC was reasonable, so was her belief that D.J. was not mentally handicapped and that the psychologist's assessment was thus totally wrong. After all, he could fruitfully sit in on an advanced undergraduate course and even write conference papers! On the assumption that the papers written by FC were authored by D.J. and that the contributions to their FC conversations really were his, the reasons for thinking that he does not have the "mental age" to consent evaporate.

To be sure, many of the people who believed FC worked believed this not on independent grounds, but in part because Stubblefield believed it. Wesley learned about FC from her, as did his mother; Sheronda Jones would have been influenced by the fact that D.J. was auditing the course and by the request that she aid him by using FC. So the 'confirmation' I spoke of was not exactly an independent confirmation.

But there was more ratification than just that. Her parents did not support her merely out of friendly support for a daughter; Stubblefield's mother, Sandra McClennen, had been working with cognitively impaired children since 1963 and began using FC long before Stubblefield did.⁶⁵ As a professor at Eastern Michigan University, McClennen taught her students to "never judge people with disabilities by their outward appearance"; as a licensed psychologist sought out by parents of disabled children when they felt their children were being underestimated by school psychologists, she "worked with the schools to set up more appropriate accommodations" and to find "better methods of communication for students who could not speak" (as Stubblefield explained in a letter she wrote to Judge Teare while awaiting sentencing).⁶⁶ From her invitation to D.J. to contribute to a

⁶³ Johnson, *supra* note 61. It is clear from the content of the paper that the author is an FC-user; moreover, the contact information provided for him is Stubblefield's. That they accepted the paper thus seems to be an endorsement of it as an outcome of facilitated communication.

⁶⁴ Engber, *supra* note 32. The article mentions that one of them, Zach DeMeco, whose mother came to Stubblefield's trial to show their support. *Id.* Zach's mother is quoted as saying, "It changed his life. . . . She was so selfless and devoted . . . She speaks to my son as an equal. . . . She treats him as a human being. If he told me he was in love with her, I would believe him." *Id.*

⁶⁵ *Id.*

⁶⁶ Letter from Anna Stubblefield to Superior Court Judge Siobhan Teare (Dec. 26, 2015) in Bill Wichert, *Professor Sentenced to Prison for Sexual Assault of Disabled Man*, NJ.COM (Jan. 16,

conference, we surmise that she shared her daughter's rejection of the psychologists' assessment. (And she was not merely relying on Stubblefield's reports of D.J.; she met and typed with him).⁶⁷

I mentioned confirmation from the community of FC providers, and we should bear in mind that that community is not on a par with, say, palm-readers. The main institute for FC is housed at Syracuse University (though in 2010 it changed its name from 'Facilitated Communication Institute' to 'Institute on Communication and Inclusion' because of controversy about FC).⁶⁸ Although highly controversial, FC has a fair number of academic supporters. In addition, FC is endorsed by the Autism National Committee in a policy statement.⁶⁹

I stated earlier that the steps taken to ascertain whether the other party is consenting should factor into an assessment of the reasonableness of the belief. So we should note in this connection that Stubblefield, according to her testimony, sought to ensure ongoing communication from D.J. during their sexual encounters. If D.J. wanted to say something, he would bang on the floor, and she would set him up with the keyboard.⁷⁰

VI. SOME GROUNDS FOR THINKING STUBBLEFIELD'S MISTAKEN BELIEF UNREASONABLE

There is ample room for doubt about the reasonableness of her belief that D.J. was consenting. She held (and from all reports, holds) her beliefs about the reliability of FC and its effectiveness with D.J. with a fierce tenacity, refusing to consider the possibility that what D.J. typed were her thoughts, not his. This to my mind is the main reason for thinking that her belief that he was consenting was not reasonable or, to put it in the terms used in the New Jersey statute under which she was charged and convicted, that she "should have known" that he wasn't consenting.⁷¹

Even on the assumption that prior to her announcement that they were in love no one directly challenged her assumption that FC was working for D.J., it is clear

2016), http://www.nj.com/essex/index.ssf/2016/01/in_jailhouse_letter_professor_convicted_of_sex_ass.html [<https://perma.cc/2NRC-82PK>].

⁶⁷ Engber, *supra* note 32.

⁶⁸ *Id.*

⁶⁹ *Autism National Committee Policy and Principles Regarding Facilitated Communication*, AUTISM NAT'L COMM. (2008), <http://www.autcom.org/articles/PPFC.pdf> [<https://perma.cc/HW3G-PBFZ>].

⁷⁰ Engber, *supra* note 32.

⁷¹ More aptly, though less like the language of the New Jersey statute: should have suspected that he might not be consenting. *See* N.J. STAT. § 2C:14-2 (7) (2014). ("The victim is one whom the actor knew or should have known was physically helpless or incapacitated, intellectually or mentally incapacitated, or had a mental disease or defect which rendered the victim temporarily or permanently incapable of understanding the nature of his conduct, including, but not limited to, being incapable of providing consent.")

that Stubblefield was aware that facilitators at least *sometimes* unknowingly guide the typing. One such case, recounted in 1993 on “Frontline” and in 1994 on “20/20,” was that of Betsy Wheaton, an autistic teenager whose parents were charged with child abuse solely on the basis of messages typed using FC.⁷² Many other such cases came to light,⁷³ and as FC was tested, it became clear that the “ideomotor” (or Ouija board) effect was extremely common and that FC (in the form that Stubblefield used)⁷⁴ very rarely (if ever) worked.⁷⁵ The American Psychological Association issued a resolution in 1994 that there was “no scientifically demonstrated support for its efficacy” and several other professional organizations issued similar warnings.⁷⁶ For those serving as FC facilitators, there was no escaping the claims that FC was at best highly unreliable, at worst totally worthless. No escaping—but that doesn’t mean they gave them serious consideration.

The evidence that Stubblefield knew of the controversy about FC comes not only from it being impossible for her not to know, but from her published work. In her “Sound and Fury: When Opposition to Facilitated Communication Functions as Hate Speech,” she dismisses the worries that FC is unreliable, pointing out that

⁷² Wheaton’s facilitator writes poignantly about her discovery, thanks to testing to which she reluctantly submitted, that she, rather than Wheaton, was the author of the messages. See Janyce Boynton, *Facilitated Communication—What Harm It Can Do: Confessions of a Former Facilitator*, 6 EVIDENCE-BASED COMM. ASSESSMENT & INTERVENTION 3 (2012).

⁷³ See, e.g., John Wisely, *Was Autistic Girl Abused? Former Prosecutor Won’t Say*, DETROIT FREE PRESS (Oct. 23, 2014, 6:35 PM), <http://www.freep.com/story/news/local/michigan/-oakland-/2014/10/23/lawsuit-targets-facilitated-communication/17796093/> [<https://perma.cc/ZL7S-QW4L>]. For discussion, see KENNETH A. KAVALE & MARK P. MOSTERT, *THE POSITIVE SIDE OF SPECIAL EDUCATION: MINIMIZING ITS FADS, FANCIES, AND FOLLIES* (2004).

⁷⁴ I say this because ‘FC’ is sometimes used to refer to facilitation that involves far less guidance, e.g. steadying an elbow or holding the keyboard. In addition, it reportedly can sometimes be effectively used as a stepping-stone to enable the user soon to type independently. See David M. Perry, *Sexual Ableism*, L.A. REV. BOOKS (Feb. 25, 2016), <https://www.lareviewofbooks.org/article/sexual-ableism/> [<https://perma.cc/3Z69-EGCM>].

⁷⁵ According to Boynton, “Every facilitator moves their communication partner’s arm and authors the FC messages,” Boynton, *supra* note 72, at 12. See KAVALE & MOSTERT, *supra* note 73 (for a review of studies testing FC); Mark P. Mostert, *Facilitated Communication Since 1995: A Review of Published Studies*, 31 J. AUTISM & DEVELOPMENTAL DISORDERS 287 (2001). See also Mark P. Mostert, *Facilitated Communication and Its Legitimacy—Twenty-First Century Developments*, 18 EXCEPTIONALITY 31 (2010). For discussions by proponents of FC, see CONTESTED WORDS, CONTESTED SCIENCE: UNRAVELING THE FACILITATED COMMUNICATION CONTROVERSY (Douglas Biklen & Donald N. Cardinal eds., 1997).

⁷⁶ *Facilitated Communication: Sifting the Psychological Wheat from the Chaff*, AM. PSYCHOL. ASS’N (Nov. 20, 2003), <http://www.apa.org/research/action/facilitated.aspx> [<https://perma.cc/8NWM-Z8FP>]. Many other organizations have warned against it, as well. For a list, plus the text of several such statements, see *Resolutions and Statements by Scientific, Professional, Medical, Governmental, and Support Organizations Against the Use of Facilitated Communication*, BEHAV. ANALYSIS ASS’N MICHIGAN, <http://www.baam.emich.edu/baamsciencewatch/baamfresolutions.htm> [<https://perma.cc/NSG2-W8UM>].

this is true of other modes of communication, too, so why the focus on FC?⁷⁷ Perhaps part of the answer, she suggests, is the quickness with which many read off profound intellectual impairment from such physical disabilities as the inability to speak and difficulty initiating or controlling the movements of one's arms and hands. "[T]o an observer who assumes that the FC user is profoundly intellectually impaired, it will appear unbelievable that he can be given access to a means of communication that involves literacy and immediately type meaningful words and sentences."⁷⁸ Her main thesis: "[A]nti-FC expression functions as hate speech when it calls into question, without substantiation, the intellectual competence of FC users, thereby undermining their opportunity to exercise their right to freedom of expression."⁷⁹ As for the scientific research, in addition to questioning what it really establishes, Stubblefield endorses the following statement, by another author: "Research is really useless as its own reward. The only good purpose for research is liberation from our limitations. Research designed to make those limitations more real and more legitimate must be stopped."⁸⁰

It is clear from her published work that she was well aware of the FC controversy. It is also evident that she had no interest in considering the possibility that FC might be unreliable, and a great deal of interest in discrediting the objections to it. This lends support to the position that her belief in FC was unreasonable, and likewise her belief that D.J. was consenting to sex with her. But there are other factors to consider.

VII. FURTHER FACTORS

In this section I complicate what I've written above by factoring in some other considerations (some of which were mentioned earlier in my paper). I do so with the aim of getting clearer both on how we should go about assessing, for purposes of deciding whether the mens rea requirement is met, the reasonableness of a belief that the other party is consenting, and on how we should evaluate Stubblefield's belief (supposed for the purposes of discussion to be false) that D.J. consented. I begin with a list of relevant factors.

1. As noted above, the bar for reasonableness for purposes of the criminal law needs to be fairly low.

⁷⁷ Anna Stubblefield, *Sound and Fury: When Opposition to Facilitated Communication Functions as Hate Speech*, 31 *DISABILITY STUD. Q.* (2011).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* (quoting Eugene Marcus, reportedly an FC-user).

2. Also as noted above, a crucial consideration is what steps the defendant took to be sure that the person was consenting.⁸¹
3. For purposes of assessing the reasonableness of a belief that rests on a highly controversial background belief, that the latter is held by a fairly large number of people is relevant. It counts for something.

But other considerations enter in, among them:

4. Are the controversial supporting beliefs held only by a very insular, us-against-them community?
5. Is there a way to test a (crucial) supporting belief, and if there is, at what cost? If the defendant did not opt to have it tested, despite it being low cost or cost-free to do so, why not?
6. When, as in this case, the background beliefs are held tenaciously, what is the underlying motivation?

I want to suggest that it matters whether the motivation for the belief is (e.g.) to improve the lot of others or (e.g.) to provide oneself with a rationalization for exploiting or abusing others. One might contend that this should factor in only at sentencing, not for purposes of assessing reasonableness; but I think that unless reasonableness is understood to be purely epistemic, the agent's motivation for (tenaciously) holding the belief sometimes does bear on the reasonableness of her belief. More on this shortly.

Now, to some extent (2), (4) and the first part of (5) lend further support to the thought that Stubblefield's belief was unreasonable. On (2), the verdict is mixed. On the one hand, one is hard pressed to name another sexual assault case that has gone to trial (let alone resulted in a conviction) where the accused sought as much as she did to ensure both initial consent and ongoing consent and was as concerned that the other party consent not merely to please her, but because this was really something he wanted. But on the other, she refused to take seriously the possibility that the assumptions on which her belief that he was consenting rested were false, namely that FC is reliable and specifically that her use of FC with D.J. is reliable. When something as important as sexual consent is at stake, the assumption that FC was working cannot be taken for granted. She thus failed to

⁸¹ With regard to other crimes, it won't be consent, but a different factor to which the defendant should be attending. The Model Penal Code definition of the culpability level of negligence is useful to bear in mind:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

MODEL PENAL CODE § 2.02(d) (AM. LAW INST. 1962).

take a step she absolutely should have taken: she failed to have her use of FC with him tested.

The test (and I am now addressing the first part of (5)) is simple. It is easy to test the effectiveness of FC for a particular FC pair. The basic idea is that a third party asks the FC-user questions whose answers the FC-user would know but the facilitator would not know, e.g. the names of the FC-user's cousins. The test may also involve showing the facilitator a picture, showing the FC-user a different picture (of some easily identifiable object, such as a shoe or a banana), and then asking the FC-user to label the object.⁸² In sum, the answer to the first part of (5) is straightforward: Yes, and the only cost is that of humiliation and deep distress for the facilitator in the event of failure (obviously not a cost that should be taken into account).

Before considering the second part of (5), we can briefly address (3) and (4). It isn't altogether clear how large a number of people believe that FC (including the form Stubblefield was using) is reliable, but it certainly does seem to be the case that an us-against-them mentality is pervasive among FC-facilitators and other FC-proponents.⁸³

This us-against-them mentality is also relevant to both (1) and the second part of (5). A detailed autobiographical account from former FC facilitator Janyce Boynton brings out how difficult it would be for someone in the FC community to opt to be tested, in part because of the mentality just noted.⁸⁴ Those favoring testing were demonized, as were those who offered and administered such tests; and it was impressed upon facilitators that testing would be stressful for the FC-user and administered in an "adversarial" fashion.⁸⁵ Boynton reports her surprise, when she and Wheaton were tested, at how gentle and non-adversarial the testing was.⁸⁶

The pressures against being tested were enormous. FC was supposed to require trust in both the person one was helping and the process itself.⁸⁷ It would be very difficult to remain a committed facilitator and opt for testing, since part of being a good facilitator is to have faith. That it would have been so difficult does not begin to justify Stubblefield's failure to have her use of FC with D.J. evaluated. But it does suggest that it might be setting the bar for reasonableness (for purposes

⁸² For more detail, see Boynton, *supra* note 72.

⁸³ See *id.*; KAVALE & MOSTERT, *supra* note 73; Engber, *supra* note 32.

⁸⁴ Boynton, *supra* note 72.

⁸⁵ *Id.* at 11. I use the past tense not because I have reason to think this has changed, but because what Boynton reports on is from the 1990s. Engber's report, however, is quite similar, and concerns much more recent events, in particular, the 2014 annual Syracuse conference for typers and facilitators.

⁸⁶ *Id.*

⁸⁷ Also highlighted by Boynton as an obstacle to choosing to be tested was the fear of learning that one is one of the "'bad' facilitators" who do it improperly and give FC a bad name. *Id.* at 9.

of criminal law) a bit on the high side to deem her belief unreasonable, given that it would be a very rare and unusually courageous and “free-thinking” FC-facilitator who would opt to have his or her use of FC tested.⁸⁸

VIII. THE REASONABLENESS OF A BELIEF AND THE MOTIVATION FOR THAT BELIEF

The above paragraph serves as a partial answer to the second part of (5) and to (6). But there is more to be said, particularly about the motivation for believing in FC in the first place. Behind the confidence in FC—and especially in its effectiveness for the particular person one is assisting—is the conviction that *one should err in the direction of overestimating, not underestimating, the capacities of the person thought to be cognitively disabled*. We do best (the ideology has it) to assume that the person’s “mental age” matches his chronological age unless the evidence forces us to revise this; we do best to figure that the impairments are only physical; we do best to figure that he has thoughts, wants to learn, wants to live as an independent adult, and then try to facilitate his doing so. Are we to wait, one might ask, until either a more effective method is found or FC is determined to be pretty reliable after all, when we have people leading extremely limited lives who might be helped by FC to express their thoughts, become more independent, and to gain more control over their lives?

This ideology is certainly not innocuous, as is obvious from both this case and the many cases of parents accused of child abuse on the strength of FC messages. But my point is that the tenacity of Stubblefield’s beliefs and her unwillingness to take criticisms of FC seriously were not due to an ugly motivation such as that of Clifford’s ship-owner, who talked himself out of his doubts about the seaworthiness of his emigrant-ship because he knew that to overhaul it would be very expensive.⁸⁹ Stubblefield’s beliefs seem to be motivated by a genuine concern to enable those with disabilities to lead richer lives. This is not the case of a woman who, feeling powerfully attracted to someone she (vaguely) realizes is too cognitively impaired to be capable of consent, searches for an ideology that allows her to see him as only physically disabled and thus presumably capable of consent.⁹⁰

⁸⁸ A complicating factor, however, is Stubblefield’s education, specifically, that she has a Ph.D. (and from a top department) in philosophy, a field in which we are taught to think critically. One might argue that although it is true that the bar for reasonableness has to be set low enough that it doesn’t require heroism to reach it, it should be raised a notch or two if one has the skills and practice in reasoning that should enable one to rise above the rhetoric about FC and think critically about possible dangers in relying on it.

⁸⁹ W.K. CLIFFORD, *The Ethics of Belief*, in *THE ETHICS OF BELIEF AND OTHER ESSAYS* 70, 70 (1999).

⁹⁰ Judge Teare saw things differently. When sentencing Stubblefield, she pronounced Stubblefield’s actions “the perfect example of a predator preying on their prey.” *State v. Stubblefield*, 162 A. 3d 1074, 1083 (2017).

There is of course room to argue that such considerations should enter in only at sentencing. Why think they bear on reasonableness? I cannot do justice to this question here, but suggest that to answer it we need to reflect on what we want from a requirement that to negate the mens rea, the belief that the other party was consenting must have been reasonable. As I said at the outset, I am taking as given that we do not want the mens rea to be negated simply by a genuine belief that *V* was consenting. So my question is not whether we should require reasonableness, but what we want from it. What should a judgment of unreasonableness track? This much is clear: we want a belief's failure to qualify as reasonable to track culpability, culpability of a sort that we think suffices for criminal law purposes, culpability that plausibly renders someone criminally liable (for this type of offense).⁹¹

Here is what a judgment of unreasonableness usually tracks: culpable indifference.⁹² It need not be complete indifference; Tawera may not have been entirely indifferent. After all, he did ask; but he wasn't concerned enough to stop what he was doing when she did not answer and her actions in no way indicated consent. The contrast to Stubblefield is striking⁹³: there is *no hint of indifference (culpable or otherwise) as to whether D.J. consented*. She discussed with him in advance what they were contemplating doing, and during their encounters she sought to ensure that there was continued consent. To be sure, she did so using FC. But we can grant that she should not have relied on it while also recognizing that her confidence in FC was deep and genuine, informed since childhood by her mother's work. Her belief in FC and the underlying ideology predated her acquaintance with D.J. It was not a belief she cultivated in herself in order to rationalize something that she knew or suspected was wrong.

As I see it, most cases where *D* incorrectly believes *V* was consenting are cases where the belief should count as unreasonable. These cases generally divide (with significant overlap) into two types: (a) those where *D* deceived himself into thinking *V* consented in order to rationalize *D*'s conduct, i.e., in order to be able to proceed without feeling he is acting wrongly; and (b) those where *D* believes *V* consented because (say) of the way *V* was dressed or because *V* invited him to her apartment for a drink, together with a belief that 'No' may not mean 'No' and can therefore be legitimately ignored. Stubblefield certainly can't be placed in the first group. (If she deceived herself, it was not in order to rationalize her conduct.) What about the second? This is where the underlying ideology is relevant.

⁹¹ The same question can be asked with respect to the language used in the NJ statute: what do we want 'should have known' to track? What differentiates *A*, who should have known but didn't, from *B*, who also didn't know, but about whom we do not think we should say 'he should have known,' such that the difference warrants saying that *A*, but not *B*, has the required mens rea?

⁹² I am speaking here of the unreasonableness of a belief that the other party was consenting. Whether it holds more broadly than that is not something I can take up here.

⁹³ And, of course, the contrast between Stubblefield and the rapist who did not believe the victim was consenting, and who either cared not at all or took pleasure in their not consenting, is all the more striking.

Contrast the beliefs just noted with Stubblefield's. In the cases where the belief clearly should count as unreasonable, there is serious disrespect shown towards those in the group in question (towards *V* and others whose behavior *D* would so interpret). By contrast, underlying Stubblefield's belief that D.J. was consenting was respect for those judged to be cognitively disabled, respect that, sadly, took a form that blocked her from considering that he might be so severely impaired as to be incapable of consenting.

IX. A POSSIBLE OBJECTION

One might argue that given what I said about Tawera, I should take the position that Stubblefield's belief that D.J. was consenting was clearly unreasonable. I said that because Tawera's belief that his cousin was consenting to sex with him was based only on her passivity and it is explicitly stated in New Zealand law that passivity alone does not constitute consent, his belief should not count as reasonable. One might claim that for similar reasons, Stubblefield's belief that D.J. was consenting cannot be reasonable because as a matter of law, he could not consent. He was deemed by the State of New Jersey to be mentally below—far below—the age of an adult and therefore was appointed guardians; and Stubblefield knew this. Hence she either knew or should have known that he was as a matter of law incapable of consent.⁹⁴ If she judged otherwise, that was a mistake of law, just as (I claimed) Tawera's view that his cousin was consenting involved a mistake of law.

I don't think this is correct. That consent is defined as *X* is a matter of law; that person *S* is incapable of consent—consent as defined by the law—should not be considered a matter of law. The psychologist's assessment could have been wrong. (Evidently many people thought it was. If you think *S* has the mental age of a toddler, you do not endorse *S*'s sitting in on college courses and writing conference papers.) So I do not think that the fact that the State of New Jersey said D.J. had the mental age of a toddler entails that Stubblefield's belief that he was consenting was unreasonable.

X. CONCLUSION

There is no question but that Stubblefield acted wrongly. Even if it had been the case that D.J. clearly could consent to sex and was consenting, a sexual relationship was morally off limits because of her role as his facilitator. It would have been off limits for roughly the same reason that a sexual relationship between

⁹⁴ This seems to have been the position of the trial court judge. Engber reports that Judge Teare held that Stubblefield "knowingly and wantonly overstepped the bounds of lawful behavior." Engber, *supra* note 32. She "violated the terms of D.J.'s guardianship because she decided, on her own, that the courts were wrong—and that she knew better than the State of New Jersey." *Id.*

a dissertation director and her student is off limits. It would not amount to sexual assault.

She also acted wrongly in not considering the possibility that D.J. might be incapable of consenting to sex. Her policy of erring in the direction of overestimating, rather than in underestimating, a person's capacities (a reflection of the "criterion of the least dangerous assumption")⁹⁵ needed to be carefully bracketed. Whether we should hold that her belief that he was consenting was unreasonable is not entirely clear to me, but I think that we should not. At issue is both how high the standard should be, and what we think the requirement of reasonableness should track. I have suggested that when we focus on the fact that we want an unreasonable belief to track culpability—culpability of a sort that warrants criminal liability—it seems clear that the motivation for the underlying belief or ideology on which her belief that he consented rests is relevant.

A related way to think about it is in terms of culpable indifference. Normally a mistaken belief that the other party is consenting reflects culpable indifference. And normally we—here I have in mind likely readers of this journal—do not deem the mistake reasonable. In those rare cases where we think it may be reasonable, we need not only to be able to understand that the defendant could have made this mistake, but also to understand how it could have happened without culpable indifference. In the case of Stubblefield, we can understand it, thanks to an ideology she subscribed to that, without a trace of ill will or unkindness or lack of respect, she allowed to go too far.⁹⁶

⁹⁵ As put forward in an influential paper, Anne M. Donnellan, *The Criterion of the Least Dangerous Assumption*, 9 BEHAV. DISORDERS 141 (1984). The proposal to err in the direction of overestimating a person's capacities is picked up on by many practitioners. See, e.g., Kate Ahern, *Living the Least Dangerous Assumption*, THINKING PERSON'S GUIDE TO AUTISM (July 22, 2010), <http://www.thinkingautismguide.com/2010/07/living-least-dangerous-assumption.html> [<https://perma.cc/4QBU-93GR>] (where the author asks rhetorically how we go about living the least dangerous assumption, and includes among the answers: "Give the gift of assuming intentionality in communication," explaining that "even if you are wrong in your assumption you will teach intentionality by responding as if the action was intentional").

⁹⁶ Earlier drafts of this paper were presented to the philosophy department of Loyola University of Chicago (2016), a law and philosophy seminar at Georgetown University (2017), at a conference on sexual consent and coercion at the University of Virginia (2016), and as a keynote address at Northwestern Society for the Theory of Ethics and Politics (2017). I am grateful to discussants at each event for their comments, and especially to Elizabeth Barnes, my commentator at the University of Virginia, and Louis-Philippe Hodgson, my commentator at NUSTEP. Thanks too to Luis Chiesa, Joshua Dressler, Judith Lichtenberg, Rik Peels, Ric Simmons, and Kenneth W. Simons for written comments, Nathaniel Baron-Schmitt, Leonard Cassuto and Daniel Engber for helpful email exchanges, Eliana Elizalde and Thomas Rovito for careful editorial assistance, and Frederick F. Schmitt for extensive discussion.