Reconsidering Rape: Rethinking the Conceptual Foundations of Rape Law

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A woman awakens surrounded by four men who remove her from her bed and take her to another room. Despite protests and physical resistance, the men engage in a series of sexual acts with her. She files a complaint and the men are charged, tried, and convicted. They appeal, claiming they believed she was agreeable to their actions. They had been told by her husband that she had unusual tastes in sexual matters, and liked simulated gang rape. Because they had thought she was willing, they had not intended to rape her and therefore should not have been convicted.

A young woman of limited cognitive capacities and an intense desire for acceptance seeks the approval and friendship of her male peers. The teenage boys induce her to join them in a basement where they asked her to perform sexual acts with them. No threats were made or implied. The teenage boys claim she was a happy participant.

If the defendants had been believed, would they have been guilty of rape? Would the women in these cases have been raped?

Argument about changes in the law of rape are logically dependent upon a prior definitional account. For any legal definition of an act, one can sensibly ask if that definition is right. To know whether the law is sound, one must first understand of what it is that the definition is a definition. For many parts of the criminal law,

I have benefitted from discussions with Carola Mone, Jennifer Bell and Karen Snell, and from comments audiences at Chicago-Kent College of Law and Stanford Law School, and an anonymous reader for this journal.

1. The story is based on Director of Public Prosecuting v. Morgan (1975), 2 All E.R. 347 (H.L.). In the event, the jury was thought not to have believed the tale, and all four men served time. For a similarly bizarre tale that did in fact exculpate (at the direction of the court), see R. v. Cogan, R. v. Leaks (1975), 2 All E.R. 1059.

2. In the actual case, Mr. Morgan was convicted of aiding and abetting, but not rape, because England had not abandoned spousal immunity to rape.

3. 2 All E.R. 347 at 355.

4. Ibid. at 353.


7. Unless the aim of the reform is general in a difference sense, i.e., to secure more convictions.

and the law of rape is one, the definitions on which the law moves are concepts perfectly accessible outside and apart from the law.

I have two aims for this article. The first is to argue for a particular conception of rape as the best understanding of the constellation of acts we conceptualize as rape. The second, less direct, is to show that traditional methods of conceptual analysis can contribute to legal and social scholarship and reform.

Argument of this kind is subject to some suspicion. What underlies that suspicion is a worry that general theories may displace the people whose lives and injuries command our concern in the first place. More immediately, it may raise the specter of the “reasonable man,” a well-dressed relatively wealthy white heterosexual male intent upon a world of his own making and reflection. Such work may be thought redolent of obscurantism and mystification, idle schemes whose only value lies in the aesthetics of formalism. Nevertheless, we live in a world ‘constructed’ by cognitive processes. Our actions and the events we experience have conceptual structure. In grasping those structures we come to better understandings because we are better able to see the relations among properties and events. Cognitive structure does not provide everything, but what it does provide is essential. At the same time, of course, it is important not to underestimate the import of other investigative techniques.

An event such as rape is, in many respects, socially constructed. But such construction cannot occur as a bare set of instances assembled higgledy-piggledy. Social events have structures which underlie our understanding and guide our experience of events. For example, emotions have cognitive content. Desire is not merely

a push or pull, but includes an account of belief.\textsuperscript{16} Because belief is essential to emotion, emotions have a cognitive or logical structure. So too the rest of our experiences.\textsuperscript{17}

In conceptual analysis we seek the standard advantages of theory: elegance, systemic power, normative coherence and power, and analytic clarity.\textsuperscript{18} The ideas embodied in these terms can be described briefly. Theoretical simplicity and aesthetic elegance may be seen as developments of a preference for parsimony. Other things being equal, it is a good thing that a theory be simple rather than more complex.\textsuperscript{19}

Fruitfulness of theory is frequently expressed in terms of either predictive power or theoretical fecundity\textsuperscript{20} of a difference sort: the power of a theory to connect in interesting ways with other related theories, to forge new links among theories, to generate profitable lines of research and thought. Thus, explanatory and justificatory power are closely connected to fruitfulness. What is at stake is the power of the theory to provide convincing explanations of a wide range of phenomena.

It might be doubted that these are advantages worth having, at least when the topic is criminal law, especially rape law. But the construction of an adequate theory permits us to connect apparently disparate events or phenomena in more illuminating ways. Thus the import of rape on an individual and experiential level can be connected to larger scale phenomena, located within a web of explanation and analysis of related but nevertheless distinct social phenomena.\textsuperscript{21}

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\textsuperscript{16} Patricia S. Greenspan, \textit{Emotions and Reasons} (New York: Routledge Kegan Paul, 1988); Nussbaum, supra note 15; de Sosa, supra note 12. The idea dates at least to classical Greek philosophy.


\textsuperscript{19} Simplicity can easily excuse a failure to attend to circumstances or context. See, e.g., Martha Minow & Elizabeth Spelman, "In Context" (1990) 63 So. Cal. L. Rev. 1597. It can be a technique by which to suppress the complexity of relevant factors or phenomena. See, e.g., Margaret Jane Radin, "Lacking a Transformative Social Theory: A Response" (1993) 45 Stan. L. Rev. 409; "Pragmatism and Poststructuralist Critical Legal Practice" (1991) 139 U. Penn. L. Rev. 1019; "Market Inalienability" (1987) 100 Harv. L. Rev. 1849; Kimberly Crenshaw, "Demarginalizing the Intersection of Race and Sex" (1989) U. Chi. L. Forum 139; John Roemer, "Should Marxists Care About Exploitations" (1985) 14 Phil. & Publ. Aff. 30. For all that, simpler theories which are of equal success as more complex theories, are better. This preference holds for social phenomena, social practices, just as it does for physical explanations. Alan Nelson, "Explanation and Justification" (1987) 97 Ethics 154.

\textsuperscript{20} Lakatos, supra note 18.

\textsuperscript{21} MacKinnon, supra note 10; Susan Brownmiller, \textit{Against Our Will: Men, Women and Rape} (New York: Simon and Schuster, 1975); Monique Wittig, "One is Not Born a Woman" (1981) 1 Fem.
I.

What must happen for someone to be raped? What is the nature of the acts necessary for a rape to occur? What are the elements of the wrong of rape? To answer these questions requires that we provide a definitional account of rape. What they direct us toward is an explanation of action and event.

A. Alternative Accounts of Rape

There seem to me to be two major alternatives conceptions of rape: nonvoluntary sex, and nonconsensual sex. I intend these alternatives as nested accounts. Thus, the second on the list includes the other as proper subset. In each case, the account has two main elements, only one of which is the subject of investigation here: an account of the physical contact necessary (the sexual contact) and an account of the status or nature of that contact. Categorization along the second element yields the alternatives developed below.

I. Nonvoluntary Sex

Nonvoluntary sex includes, of course, action under compulsion, acting under the threats of coercion, violence or where physical control is significantly impaired. But nonvoluntary action has a wider scope. We should also understand nonvoluntary action to include cases where circumstances or events compel conduct, or where the individual acts under a psychological compulsion.

Nonvoluntary does not, however, mean unchosen. A course of conduct may be chosen by the agent and nevertheless be nonvoluntary. There will usually be at least a formal possibility of choice, as, indeed, there is for coerced conduct. (Sex or death is a kind of choice.) Instead of lack of choice, we are concerned with the nature of the choice. In nonvoluntary action cases, the choices are such that there are overpowering factors favoring one course over others. So a choice is made, but against the grain so to speak.

Issues 47. In the context of property, Margaret Jane Radin has explored some aspects of differing experiential relations to legal property regimes. See Margaret Jane Radin, “Property and Personhood” (1982) 34 Stan. L. Rev. 957, and supra note 19. One basic approach of CLS is a close analysis of the conceptual commitments of legal doctrines. This is a powerful ground in the attacks on law and economics. Mark Kelman, A Guide to Critical Legal Studies (Cambridge, MA: Harvard University Press, 1987).

22. A third candidate for this list is sex against the will of the victim. I discuss later why a will account should not be considered separately. In this opinion, I reject it as parasitic on the accounts listed, and on its own confused. Two other accounts can also be generated which have significant historical import, forcible sex and coerced sex. Neither of the two accounts, however, can sustain more than surface plausibility.

23. I assume for present purposes that the first element is uncontroversial.

24. The classic formulation is from Aristotle, Nicomachean Ethics, Ross, trans. (1925). In Aristotle’s well-known example, the captain of an overladen ship in a storm acts nonvoluntarily when he jettisons cargo. Circumstances are such that an otherwise undesirable course of conduct is overwhelmingly favored, as the least bad outcome for example.

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Nonvoluntary sex occurs under constraints which may originate in third parties, or circumstances, or states of the victim, and not only in the perpetrating actor, as would be true for coercion. It may be that the external events constrain choices. Or the constraint may originate in the conduct of a third party, whose untoward reaction to one course (the victim’s preferred course, normally) compels the victim along another line. Or it may be that the condition of the victim which renders the conduct nonvoluntary. The unconscious engage in no voluntary action at all and hence do not voluntarily have sex. Similarly, some psychological dysfunctions will obviate voluntariness of action, within some or all spheres, as would temporary incapacities. (E.g., the severely intoxicated may be so impaired or disassociated as to be incapable of voluntary action.)

An action may be nonvoluntary because of internal factors, i.e., voluntariness of action also depends on the capacities of the person in question. Where that person lacks certain capacities, or possesses them in diminished form, it may be that the person is in certain respects unable to engage in voluntary action. For example, an individual who is dependent on another for food, because they lack the physical capacity to feed themselves, is subject to different sorts of pressures than are those with that capacity. A similar story applies to psychological capacities. An individual, to engage in voluntary action, must possess certain minimal mental endowments. They must be able to understand at least basic features of the conduct for it to be voluntary action. Voluntariness is thus relative to the agent, and not to an independent information base. So, when one is deceived and acts on the lie, one still acts voluntarily.

2. Nonconsensual Sex

The other candidate is nonconsensual sex. The idea here is that whenever sexual intercourse is not consented to, it is rape. The difficulty comes in explicating the sense of “consent”. We can begin with a simple standard: consent requires fully voluntary and informed agreement by an agent of appropriate actual present capacities. In more ordinary language, the sex must be willingly and knowingly engaged in, the result of mutual desire. It must not be the result of unwelcome exchanges or pressures, unacceptable narrowing of alternatives, and so on.

The notion of consent used here does not have a special sexual content. It is just a general account of consent, already prevalent and available to us in other areas of life, applied to sex.

Consensual sex are relations in which the participants have indicated consent based on their own evaluations of their alternatives, interests, desires, etc. The choices were not unduly constrained by extraneous factors, and were based on an

26. See, e.g., Lois Pineau, “Date Rape: A Feminist Analysis” (1989) 8 Law & Phil. 217 and Martha Chamallas, “Consent, Equality and the Legal Control of Sexual Conduct” (1988) 61 So. Cal. L. Rev. 777 for theories which consider rape as a form of bad sex. As the discussion below makes clear, I do not share these views. An increasing number of statutes are at least on the face of it consent based. But phrasing is not always decisive, as Estrich has argued. See Susan Estrich, Real Rape (Cambridge, MA: Harvard University Press, 1987). A number of older statutes use the language of consent but turned out to rely on something like a force account.
acceptably complete understanding of the circumstances. So, at a minimum, the parties must know that what they are doing is sexual; they must desire to so act; they must understand the risks associated with the conduct they engage in. The decision must reflect appropriate information which they in fact are capable of understanding at the time. When any of these factors are violated, there is a failure of consent. For there to be valid consent, the agent must have a reasonably full understanding of the proposed course of conduct, both as to the nature of the acts and their import. Further, the agents reasoning abilities must be relatively unimpaired. The contrast to nonvoluntary sex as an account of rape is marked by degree, not bright lines.

B. Choosing Between the Accounts: The Argument for Nonconsent

I believe there is a principled argument in favor of the nonconsensual account: it provides better coverage of the scope or domain of rape cases and yields a better explanation of the harms of rape.27

1. The Standard of Scope

There are typical kinds or categories of cases into which many instances of rape may be placed. In considering questions of scope, we look to a set of core cases. The aim is not to provide an exhaustive taxonomy of rape cases, nor even to identify all important aspects of the core cases. Instead, we generate a relatively short list or what seem to be intuitively obvious cases. The competing accounts of rape are then examined for their relative success at explaining the paradigm cases. My list consists of five cases:

1. Sexual relations obtained by means of force or threat of force against the victim.
2. Sexual relations obtained by means of threats against a third party.
3. Sexual relations obtained during a period in which the victim is incapacitated.
4. Sexual relations obtained by means of fraud or deception.
5. Sexual relations involving a young child.

The divergences between the nonvoluntary and nonconsensual accounts come in handling instances under the third, fourth, and fifth types of cases. Type three cases involve incapacity. An ordinary temporary form of incapacity is intoxication, which is also notable for the important role it plays in social life. The nonconsent and nonvoluntary accounts treat instances of this sort in interestingly different ways, drawing the lines of illicit contact in different places. Consider the following sort of story. A woman becomes quite intoxicated, sufficiently intoxicated that we can say she no longer controls, or really understands, her actions. She is dimly cognizant of her surroundings. Nevertheless, there is an inclination to describe her further conduct as voluntary, even if we could not think her fully responsible for her

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27. It also provides a better fit with certain background political theories. But there are difficulties with historical theories.
conduct. So she may voluntarily enter a car, or fall into bed with someone. Certainly she is not forced to do these things.

In contrast, under a nonconsent model, this course of conduct may very well result in rape. A person in a state of intoxication cannot give consent despite appearances. It is surely possible for her to say the appropriate words, to act appropriately for consent. But that is not what is necessary for consent. What more is necessary is that she be competent and informed, for example. Here, just as intoxication would negate an apparent consent to surgery, or sale of a house, it negates valid consent to sex.

Among the cases which fall under type four are those where sexual access is gained by pretence. Where a person accedes to sexual requests under the belief that what is agreed to is a medical treatment, there is rape. Similarly, if the person does not understand that what they have agreed to is sex, or where they are mistaken as to the identity of their partner, there is rape. Under the nonconsent approach, the treatment of these cases is straightforward. Because appropriate, relevant information was not provided, the person could not give valid consent.

What makes these interesting cases is that the victim does act voluntarily. That is a prerequisite for fraud. In these sorts of cases the victim has, in various ways, been hoodwinked, fooled, tricked. They have done voluntarily what they would not have done had they known the truth. Thus, for the nonvoluntary account of rape, these cases would fall outside the core domain. In other words, they would be considered rape merely by extension. In turn, "by extension" means that these sorts of cases would be covered only out of a kind of courtesy to the victims. Thus, there would have to be several distinct accounts of rape, or perhaps there would be several distinct sorts of events which only as an historical accident are discussed under the term 'rape'. This seems to be a trend among some commentators.

This multidimensional approach to the nature of rape comes to the fore again in considering instances under cases of type five, sexual relations with children. Here, however, there is at least an historical practice of separate discussion and reference. The important cases are those in which the victim would seem to act voluntarily, that is the child is not coerced or threatened into acquiescence. The nonvoluntary account must treat instances of this sort as either (1) not instances of rape, or (2) rape only derivatively, i.e., by extension. So an eight year old girl induced without threats to cooperate in sexual relations with her father is not raped under the nonvoluntary account. The reason is that her conduct does not reflect the right sort of external compulsions.

28. For cases and discussion, see 70 A.L.R. 2d 824 and 65 A.L.R. 4 1064 (medical contexts); 90 A.L.R. 2d 591 (rape by fraud); People v. Minkowski, 204 Cal. App. 832; Commonwealth v. Morgan, 1948) 162 Penn. Super. 105, 56 A.2d 275, rev’d on other grounds 358 Penn.607, 58 A.2d 30.

29. State v. Ely (1921) 114 Wash. 185, 194 P. 988; Regina v. Flattery (1877) L.R. 2 Q.B. iv 410, 13 Cox C.C. 388. For further material, see 65 A.L.R. 4 1065.


The child may be victimized by her trust in the perpetrator, her desire to please her father, for example. In such cases there does seem to be voluntary action. But those cases too should be seen as rape, and that is possible only on the nonconsent model. The reason is that the victim lacked the capacity to give consent, and hence voluntariness of conduct does not matter.

2. The Harm of Rape

In analyzing the harm of rape, we explore a second basis on which to prefer one of the accounts. That account which better provides for and integrates the harms intrinsic to rape is to be preferred. Thus, the kinds of interests protected, and the degree of protection offered by the competing accounts contributes to the overall argument in favor of or against each of the accounts.

The case which characterize the ordinary image of rape involves ordinary adults and the use of force. Consider Case 1: A is accosted by B who demands that she accede to sexual intercourse with B under a threat (or use) of force. A acquiesces. How has A been harmed?

One feature of Case 1 that marks it as paradigmatic is that the rape occurs in the midst of, as part of and by means of, a physical attack. The aggressor uses force (or the threat of force) to compel the victim’s submission. There may be a beating (or threat of one) to effect the rape, and the rapist may engage in other conduct which is degrading or humiliating, additional to the rape. But these are distinguishable elements of the overall event. One can say that A was raped, beaten, and so on. Thus, as a physical attack, the rape is indistinguishable from a mugging.

Physical attack is not peculiar to rape. By the same reasoning, rape is not a physical attack directed at sex organs. The key is in the commonplace, that rape involves sex. What this means is that rape is an attack on a person as a sexual being. For that reason, in order for there to be a rape it is necessary for there to be contact with the victim and for that contact to implicate the victim’s body as sexualized.

These considerations lead me to think that the harm intrinsic to rape is best characterized in a relatively abstract form. With respect to the rape itself, A has suffered four kinds of harm:
1. a violation of an interest in sexual self-determination;
2. a violation of bodily integrity;
3. a violation of autonomy; and
4. alienation.

This list may strike some readers as very odd, omitting what they take to be the central element: experience. Before explaining why I have not included an experiential element I should say a little more about what is included on the list.

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The notions of sexual self-determination and bodily integrity are, I think, relatively transparent. Every person has an important interest in control over certain substantive relations in and aspects of their lives. Sexual expression and experiences are certainly among them. Choice of partners (if any), the nature of one’s sexual practices, are matters for each person to decide for themselves. Sexual self-determination is just that control. The importance of sexuality to individual personality is sufficiently well-established to need no defense here. It is plain that however rape is defined, this interest in one’s life is diminished by such occurrences.

Bodily integrity is similarly transparent. It is equally well established that each is to determine for herself what happens to her body, insofar as that is practically possible. This is an extensively protected and important interest, and one uncontroversially compromised by rape.

Autonomy, under a variety of guises and in varying conceptions, is a central, social value. Autonomy is certainly important in contemporary domestic debates on gender, public policy, and ethics. It is a value which has—as democracy and equality—an increasing part in debates on a transnational basis.

Autonomy is not simply a more formal term for self-control or bodily integrity. An autonomous agent is self-determining, but not merely. Autonomy requires the agent’s choices to be consonant with and expressive of a rational and reasonable personality. An autonomous agent, for example, is not merely subject to her desires and preferences, but is able to shape those desires and preferences. Autonomy requires an active second order set of preferences.

A set of second order preferences is a set of preferences about one’s preferences. If we understand ‘preferences’ in this context in an expansive fashion, as including desires, inclinations, dispositions, then when we have preferences about our preferences, we have second order preferences. So an autonomous agent not only desires, but cares about what their desires are. Insofar as she is capable of shaping—even if over the long term—her preferences, an agent is autonomous. Very roughly then, autonomy is a capacity to shape oneself, to choose one’s life. Affronts to autonomy are not, as they might seem, obscure and overly intellectual failures of nicety. These are affronts to dignity or worth. What marks out autonomy is the effect of action (or circumstances) on one’s self, on one’s power to think of oneself as having a life of one’s own.

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34. The conception applicable will not be uniform across cultures, however, anymore than equality must have the same meaning and embodiment everywhere. Of course, this does not imply that all views of persons are counted. It should be emphasized that autonomy does not mean individualism, least of all libertarianism. Communitarians also care about autonomy. See, e.g., Michael Taylor, Community, Anarchy and Liberty (Cambridge: Cambridge University Press, 1987); Will Kymlicka, Liberalism, Community and Culture (Oxford: Clarendon Press, 1990); Leon Trotsky, Literature and Revolution (New York: International Publications, 1925); Charles Taylor, Ethics of Authenticity (Cambridge, MA: Harvard University Press, 1993) and Sources of the Self (Cambridge, MA: Harvard University Press, 1989).


36. Dworkin, supra note 35; Christman, supra note 35.

37. It is instructive to consider the affront of racist remarks from this perspective. Sexual slavery is not incompatible with self-determination, as it is with autonomy.
Alienation is the final sort of harm to be considered. In the present context, alienation takes the form of objectification, the reduction of an individual to what is only a fragment of their being. The starkest form of alienation involved in a case of rape is the treatment of the victim as a sexual body at the disposal of the aggressor. In this sort of case the victim is appropriated as a body (for a period of time), and hence reduced to a mere piece of available property, a thing. There is, of course, a great deal more to be said about alienation, as there is about autonomy and sexual self-determination. But it is not necessary at this point to provide any elaborate discussion of these concepts.

It is the presence of these harms which constitute the generalizable core of an act such that it is rape. They do not directly determine the experiences of victims of this act, however. What they do provide is a structure to those experience, carried across events, giving them common identity.

It is not obvious that rape is properly characterized abstractly. Talk of set-backs to interests and loss of autonomy does seem to miss something rather important: the experiences of victims. Is it a mistake to leave out an explicitly experiential element? It does seem to many observers that what characterizes rape, quintessentially, is an experience of unwanted sex.

There are two kinds of reasons for excluding experience from the harm of rape. The first kind arises from a requirement that if there were an experiential element in the harm, it would have to be an experience common across the core cases.

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There are two basic forms, one involves obtaining sexual access by use or threat of force (1798), and the other focuses on engaging in sexual acts with another knowing they have refused (1804). The theoretical core is a claim that we can understand rape best if we look on sexuality as a commodity and attend to the demarcation of legitimate and illegitimate constraints on exchange of that commodity.

This alternative is, I think, seriously flawed. First, the analysis entails consideration of consent. Exchanges are primarily legitimated by consent. Commodification is one version of a consent theory, but cannot displace it. Second, the account is inadequate by its own standard. Dripps advances a case of unconscious sex as a central problem case, and discusses misrepresentation as a form of prohibitive conduct. Neither can be accommodated by his account of “sexual expropriation” because neither involves refusal. Both involve failure of consent.

Finally, part of Dripps argument is an argument against a consent theory. But that effort misfires. First, his argument (1790) is really directed at a different theory which identifies rape with bad sex. Second, he fails to attend to the evidence he musters (1793: if no force, then consent, and if consent then no force; cf. 1800 “present law does not punish pressure to engage in sex at all unless the pressure takes the form of force” with note 63). Third, Dripps believes both that consent is at least partly based in positive valuation of sexual autonomy (true) and that sexual autonomy is relative in a way that undermines its value to understanding rape (false). The problem here, as in many cases, is the too easy jump from the relation of a value to context to the thought that such relativity vitiates normative import. It doesn’t. What matters is the range of factors which condition the value; in this case, as in many cases, there are very general conditions of human life. (It is helpful to attempt concrete specification of conditions under which the value is seriously impaired. They are extreme conditions. By way of analogy, consider the conditions permitting the raising of human beings as a food source.)

The most likely candidate for this common experience is that of unwanted sex. One difficulty, however, is that it is impossible to locate any experience co-occurrent with the relevant physical events. After all, it is not necessary that one even be conscious to be raped. Thus, for such cases the experience would be displaced from the physical events to which it presumably attaches. We should be hesitant to displace an event's essential elements in a ragged fashion across time, and that seems the only solution which could preserve the possibility of an experiential element.

One response, of course, is recourse to counterfactual analysis. Were the victim conscious, she would not want the sex, and, hence, by analogy there has been a rape. That approach is mistaken in several ways. First, such counterfactual analysis makes no sense absent a structure for analysis. The events must have some pre-existent logic which permits the inference. But, once we have made it that far, there is no need to rely on the counterfactual experience (which is after all an experience not had) because the underlying logical structure is able to do all the necessary work. Second, the inference is itself unstable. Consider a case where the victim is unconscious during the sex. It would not matter, in the end, whether the sex would have been wanted had she been conscious, for that would not suffice to render it acceptable. It is still a case of rape. Later ratification will not do the trick.

An additional impediment to an experiential element is a spatio-temporal problem of a different order. It is not clear that the experience of rape, as a psychological state, remains stable across historical and social distance. It is clear that even within a locality, rape is experienced differently by victims. That fact alone should lead us to be wary of making experience an intrinsic harm of rape.

Pursuing this line would also require an account of the basis on which sex not wanted amounted to unwanted sex, that is, rape. People may come, for a wide range of reasons, to want their lives to have gone differently than they in fact went. A could have sex with B today, apparently both willing partners, and yet afterwards come to think that it was all a very bad idea. A would then think the sex unwanted. Which are the reasons that will count to make it rape? If we restrict the reasons to those contemporaneous with the sex, then the difficulties of time and events noted above are etched more sharply. If we permit counterfactual reasons, then surely retrospective reasons should be let in. Thence we must have a means of sorting out the reasons. Once we begin to perform that task, we will find the reliance on experience does us no good, as it does no work. The work is all performed by the logic of the experience: the logic of consent.

The second sort of reason to reject experience as a necessary element arises from consideration of the further aims of the project: the legal implications. It is one of the reforms of recent years to limit or eliminate trial inquiries into the victim's psychological states. If an essential feature of rape is that it feel a certain way, it is natural to think it appropriate to inquire into related experiences by the victim. That seems to me an invitation to inquire into a victim's sexual practices, among other matters.

41. This argument is elaborated below.
42. I think it possible to provide such a sorting, but that is not the point. I have begun such an effort in connection with the nonconsent account of rape in my unpublished paper "Sex and Consent".
An additional danger in taking experience as essential to the harm of rape lies in the link between the harm as characterized by an experiential view and the extent of punitive response. Suppose that experience constitutes an essential element of the harm. When there is a rape, the victim has (in addition to the other harms) endured a further negative experience. The presence of that experience is an appropriate intrinsic measure of the seriousness of the rape. Because, unlike the other harms, the experiential harm itself varies among cases, the extent of overall harm must also vary, and vary directly with the experiential variance. Some rather disturbing consequences follow. For example, a victim of unusual resilience and strength with an unusually supportive network, will give rise to lesser sentence. Notice that what is happening is that the rape itself is a lesser event than otherwise.

Assume, arguendo, that a lesser punitive response is in order. The reasoning to that conclusion turns on mitigation of the rape. The rape does not alter, but the effects of the event are different. The causal sequence is altered, not the nature of the event itself.

That the victim does not suffer does not deny that there was a rape. The harm accrues whether or not it is recognized by the victim, or by others. In that sense, it is like a violation of political rights. The seriousness of the violation does not turn solely on how the violation is perceived. There may be an extremely serious violation despite a general failure of recognition or concern.

These remarks should not be interpreted to discount the importance of experience, nor to deny the seriously destructive effect rape frequently has. That rape has a pervasive diremptive effect on the personal and social lives of a significant portion of the population is obvious, even ineluctable. But there are effects and there are effects. These are handled under a different heading, under discussion of the moral and social import of rape, not its definition.

What rape is is distinct from how we assess it, either as an individual event or as a class. That differentiation allows us to claim at once that rape has a unitary content and at the same time suppose that there are different degrees of seriousness involved in various instances or kinds of rape.

My view is that the essential harm of rape has a markedly formal nature. It is best accounted for under the nonconsent model, for it is violations of conditions of consent that most directly lead to an explanation of the identified harms. Consider the contrast in protected interests between nonvoluntary and nonconsent accounts of rape. From that perspective, the four identified interests are plainly relevant.

We might ask what interests are protected by the nonvoluntariness account that are not better protected by the nonconsent account. The nonvoluntariness account does not better protect the interests in autonomy, etc. Hence, its advantage must lie in the protection afforded to some other interests. In looking at the divergences between the two, those interests seem to be interests in practicing deception to gain sexual access to others, or an interest in exploiting others for sexual gain. The nonvoluntariness account does better by an interest in mystification of sexual relations, and furthers a rather more complex and less honest set of social relations. These do not seem to be interests victims would normally have, and indeed seem to be of a fairly dubious sort altogether.
I have spoken thus far largely in terms of harm and not wrong. The wrong in rape lies partly in the harm, but not wholly. The wrong varies along dimensions that the harm does not. The wrong is tied to particular facts about particular instances, the way in which the harms occur, and the consequent effects on the victim, among other things.

C. Rape, Harm, and Morality

One unusual feature of the account of rape I have advanced is that there is not a straightforward identification of rape necessarily as an egregious evil. Nevertheless we cannot understand rape without attending to the relation between rape and morality, the relation between the harm in rape and a moral assessment. However, there are conceptually important reasons for identifying the nature of rape in a way which allows for separation.

There are four aspects to the determination of the evil of rape. The first concerns the assignment of culpability or answerability. The second is the nature of the related violations or immoralities. Third is the felt or experienced harms. What is the psychological and physical effect of the rape on the victim? Fourth is the nature of the systemic effects of the presence and pervasiveness of rape, and the ideological commitments which make sexual assault of particular significance.

1. Answerability

Briefly, answerability can be thought of as a measure of the degree to which the wrong involved was intended by the agent involved. It is not that it is only wrong if the agent intended the act (under the description). The act is wrong, on this measure, to the degree to which the act was undertaken intentionally or deliberately. So deliberate rape shows a higher degree of moral corruption than does an accidental case. The wrong is greater because the agent displays a greater disregard for the victim and the demands of morality.

Responsibility is not simply a function of intent, however. An agent may also be responsible for proceeding with risky conduct, or failing to attend to context in appropriate ways. What I wish to emphasize here is just that consideration of the different ways in which we assign responsibility reflects differences in the degree of immorality. The agent may be more or less evil even when the harm caused is invariant.

The influence of established social norms is an important example here. It is clear that an act of rape may not violate behavioral norms. Indeed, it may be that

43. Model Penal Code §2.02(2)(a). See Fletcher, supra note 25, at §§4.3, 6.6.6, and 8.3; Feinberg, supra note 25 (Harm to Self) Ch.5 (§5.3) and Ch. 6 (§6.3); Alan White, Grounds of Liability (Oxford: Clarendon Press, 1985) at 94-99, 105-111, ch. 7.

some social norms encourage rape, and such norms will have an effect on the assessment of particular acts. Where it is not the case that women are (normally) accorded control over access to their bodies, we should have a different view of the responsibility of individual men for the rapes they commit than in social contexts in which women are accorded control over their bodies.\(^{45}\) No individual is, after all, free of the milieu in which they live. How people understand their behavior is conditioned (not determined) by the social context of their lives. We think differently about applying corporal punishment today than when we consider applications in tenth century Poland. Thus, in considering individual answerability for rape, it will matter that the actor lives in a society in which women are treated and socialized as reproductive capital and not as persons. However important condemnation of that social system may be, the individuals living within cannot reasonably be held to standards disassociated from that context. Thus, similar conduct, including intentional states, will yield differing assessment due to differences in social context. Seen in this light, social norms may work to mitigate individual responsibility and exacerbate problems of individual security, heightening political condemnation.

2. Collateral Obligations

The second element relevant here is the nature and degree of related obligations violated in the course of the rape. These are of various and quite distinct sorts. In some instances, what is involved is the conduct by means of which the rape is effected. Obligations to refrain from physical attacks on others are commonly violated in the course of committing rape. These sorts of duties are stringent, and the evil of the rape is commensurate.

Among the physical harms inflicted are not only such things as beatings, bruises, broken bones, etc., but equally serious harms of infection with or exposure to disease, and possible imposition of pregnancy. There are duties to refrain from creation of such risks. Indeed, once we accept duties with respect to risk, the amplitude of the immorality becomes larger and clearer.

In addition to the wrongs involved in physical attacks on others, we should also include here constraints on infliction of psychological distress. Beyond the clear obligations not to psychologically torture, or to inflict serious trauma, obligations which map easily the physical harm duties, there are others as well. Thus, duties not to exploit psychological dependencies (of certain kinds), nor to engage in abusive or callous social conduct, can come into play. Sex obtained by means of fraud bears thinking about here.

There are other quite important sorts of wrongs which may occur that are not likely to be captured under the constraints on inflicting pain or physical or psychological harms. Ignorance may be culpable, after all.\(^{46}\) We may do wrong when

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45. This does not entail claiming that rape is less important for prevalence of occurrence, but that we should assess differently the actions of particular individuals in light of prevailing social norms.
we act without appropriate inquiries regarding information or risk, or when we are insufficiently attentive to information available to us. These wrongs are independent. They often play a role in the creation of serious risks or serious harms. They certainly play a complicating role in the assignment of responsibility for actions and outcomes. Here, they implicate a duty to inquire as to consent of sexual partners, or a duty to make reasonable efforts to assess claims of information.

I am not suggesting that this is a complete list of related duties. The point is rather that the importance and stringency of related duties has an effect on the assessment of the seriousness of a rape. The degree of evil is affected by the nature of wrongs committed in the course of its commission. As more stringent duties are violated, the rape rises in seriousness. In part this is because these sorts of issues are indicia of the degree of moral corruption of the agent.

3. Experienced or Felt Harms

The third factor in assessing the evil of rape is what I have termed the felt harms. This is a somewhat misleading rubric, for there are two distinguishable elements to be considered here. The first is the psychological harms of the experience of rape. These effects are constituted by the way in which the rape is experienced by the victim. Fragmentation of personality, the creation of lasting fear, anxiety, etc., are one set of measures of the seriousness of the consequences of the rape. As the causal nexus from which these debilitating effects flow, the rape may be judged by the effects.

Here I would emphasize several points. One is that, despite the brevity of my description, these are essential to an adequate understanding of the evil in rape. Second, the psychological effects are as important as the physical effects. Both have the potential—frequently realized—for being devastating. A third point is that we are concerned with a range of effects. Obviously, rapes vary in their actual effects. At least some of the psychological effects will display social conditioning. Because people understand their lives differently in different milieux, it is likely that there are differing ranges of experiences for those milieux.

The second part of this factor concerns the harms to autonomy. One source of resistance is that we usually think of harms in a more concrete form. They are first thought of as physical injuries, etc. But a violation of autonomy is not intrinsically concrete. It may be, of course, as when one is bashed in the head with a brick. There, the issue of autonomy is not first in our minds. It is fairly abstract as a claim, more structural and formal than most we talk about. But like physical injury, it covers a wide range.

4. Systemic Effects

The final element to be discussed is that of the systemic effects of rape. Patterns of conduct are important as well as the individual acts which constitute the patterns.

47. This is one way to understand liability for negligence and, in some circumstances, recklessness. See Smith, supra note 44; Pickard supra note 44; Wooley, supra note 46.
They play an informative and valuable role in analysis of systems of social domination, especially as related to systems of gender or sex domination. Part of the evil of rape is its political content or role. The question is not just how particular acts, considered in isolation, are responded to, but also the nature and extent of protection or respect accorded to individual sexual autonomy. It is a different social world when there are isolated cases of rape from the world where rape is prevalent.

Rape, like most forms of interactions, has social content beyond the individuals involved in particular instances, and the overall pattern generates effects autonomous of the individual acts of the pattern. Women and men may be conditioned to respond to only certain sorts of cases as legitimate cases of rape, and to consider other cases of rape as acceptable forms of sexual interaction. Such patterns matter in two ways. They affect assessments of individual participants (already discussed) and guide the assessment of social systems as a whole. The two levels are distinct.

Attention to patterns of conduct in addition to particular instances, allows us to talk sensibly about such matters as institutional racism or sexism. The systemic effects play another important part. The account of rape I have urged focuses on consent. In turn, if consent is to be an effective analytic and normative standard, we must be concerned with the conditions under which it is given. That means we must give serious consideration to actual arrangements if we are to judge validity in individual cases and if we are to make reforms which are effective. One thing that happens, e.g., when rape is ubiquitous, is that individuals are much less effective in exercising control over their lives more generally.

Thus the assessment of the evil of rape proceeds on two levels. On the one hand, we have various factors to be considered in speaking of particular cases. On the other hand, we must also attend to the social context of the occurrence, the systemic role and effects of practices which control or encourage rape. It is both personal and political corruption that is involved in rape, and our knowledge of the evil is similarly doubled.

II.

The account of rape advanced here has a number of implications which are likely to cause resistance. The nonconsent account of rape clearly entails some disturbing descriptions of many ordinary sexual relationships. Intoxication, for example, plays a large and widely accepted part in seduction and courtship. Under the present account, where there is intoxication, the capacity to give valid consent is compromised, and consequently we may easily pass over from seduction to rape. Indeed, on this account, it is entirely proper, if a bit odd, to speak of mutual rape where

48. Hence it requires education to have date rape or marital rape recognized.
49. See Richard Wasserstrom, “Racism and Sexism” and “Preferential Treatment” in Philosophy and Social Issues (South Bend, IN: University of Notre Dame Press, 1980).
50. This depends on the circumstances. Where the intoxicants are used as performance enhancers, it is likely still seduction. Where the use replaces judgment we move towards rape.
(at least) two individuals engage in sexual relations while intoxicated.⁵¹ I can see no way to avoid such an outcome, but neither does it seem to me particularly bothersome. In the first place, the claim is not, in such cases, that there must have been some terrible evil done.⁵² These are cases of rape, but ones of much diminished significance. Indeed, it is such cases as these that illustrate the value of separating the nature of rape from the moral assessment.

In this case, the participants are willing, but the choice of engaging in sexual activities with one another was made after both were intoxicated. It may turn out well, neither regretting the conduct. In that case, there seems little reason to worry. But one, or both, may regret the interchange. Then there are some grounds for worry. But it is a confusion to suppose that after the fact psychological states, which are both contingent and notably difficult to discern in advance, appropriately determine the status of the sexual activities. Rape is neither bad nor nonvirtuous sex. In the hypothetical case, the intoxicated state makes valid consent unavailable. Categorization occurs at that point, moral evaluation awaits the outcome.

It is important to see that there is a natural path that links rape to other sexual activities.⁵³ There is no doubt that adoption of a nonconsent view of rape opens very serious debates about acceptable conduct, excusable conduct, and the like. But is identification of risky conduct as risky conduct really objectionable? A failure to see the continuum here complicates the task of identifying the socially systemic workings of sexual differentiations and domination. It makes seeing the connections between kinds of rape and other forms of sexual interactions far more difficult.⁵⁴

On first look, it would appear that in widening the scope of rape, we would be condemning a proportionately large segment of the population for committing what is usually a fairly serious wrong. The complaint is that too many wrongdoers are created. This is a misunderstanding. Because the scope of instances of rape is expanded, it does not follow that the range of those to be punished by law, must also expand.

The complaint assumes that every rape must, by that fact, be a crime. But the account I have offered has no such implication, indeed a contrary one follows. Differentiation between penal responses and categorization is in fact common. Is every theft to be prosecuted? Act descriptions do not entail culpability descriptions. While simplicity is desirable, oversimplification is still a sin.

⁵¹ Of course, such a case need not be as simple as here described. I assume for the moment, somewhat counterfactually, that there is no further reason to consider it a case of rape. Although rape requires at least two parties, sex, pace Dripps, does not.
⁵² An account of rape is not an account of bad sex. Cf. Fineau, supra note 26 and Chamallas, supra note 26. I also do not think that it is psychological states of participants that determine whether or not there has been a rape. There is nothing wrong, after all, in speaking of a person as not knowing that they were raped although conscious at the relevant times.
The objection might be raised in other terms. If the scope of responsibility is unchanged, then there is such a deep split between action and responsibility that there is no account of action at all.

The received view regarding responsibility for action ties the scope of responsibility to an account of intention.58 The idea is that responsibility attaches most directly to those aspects of action which are intended. Lesser degrees of responsibility attach to foreseen aspects of action, and responsibility is not extended to aspects of action which are never considered by the agent. Responsibility is normally treated as following advertisement.

Assuming something like the preceding account of responsibility, and the non-consent account of rape, then it would seem to follow that responsibility would be limited to those agents who act with an intent to have nonconsensual intercourse or a disregard for consent.59 Indeed, a part of the account of responsibility assumed here is that there is no genuine action outside the confines of responsibility. Action is defined by the intent of the agent. What an agent does is described in terms of the agent’s intentional state, not in terms of causal progeny of physical states. Responsibility and action are coextensive.

Attractive as it is, the received view is contrary to both practice and, in the end, reason. Our deeply embedded social practices extend responsibility (and action) well beyond the intentionalism advocated.57 It is peculiarly narrow conception of action. If adopted in any consistent fashion, it would require vast reconceptualizations of action and of social description.58 The core intuition is that intention is a central factor in attribution of responsibility, a claim I happily concede. But it is not the sole or decisive factor.

The boundaries of responsibility are quite plastic. For present purposes, this means we can split responsibility from action in a number of ways. We may provide a fundamental account of action as determined from an external perspective, established by a community of observers.59 Rape occurs whenever the conditions of valid


56. The holding in D.P.P. v. Morgan (1975) 2 W.L.R. 923 (H.L.) and People v. Mayberry 15 Cal. 3d 143, 542 P.2d 1337, 125 Cal. Rptr. 745 (1975). The intent to have nonconsensual intercourse is distinct from an intent to have intercourse whether or not consenting. Whatever the moral assessment of the two intents, both provide grounds for responsibility under traditional theories. One line is drawn where the intent is for intercourse under an unreasonable belief in consent. For many purposes, there is no reason to distinguish between an intent that the intercourse be nonconsensual and disregard for whether it is consensual, i.e., a similar callousness is displayed.

57. E.g., we hold parents blameworthy for neglecting their children. Even outside such special relationships there is often moral blame. For example, negligent or intoxicated operators of machinery (including vehicles) are held to answer in both criminal and civil law, and suffer social disapprobation. Analogous treatment is found on a widespread basis.

58. I.e., we would have to abandon many regulatory schemes. More fundamentally it would require abandoning common accident description, i.e., extensive revisions of ordinary language classifications.

Reconsidering Rape

consent are breached and there is sexual intercourse. The nature of the action is composite in the sense that some of the necessary elements are defined relative to one party and other elements are defined relative to other parties. In this case, one element depends on an agent (knowingly) engaging in sexual intercourse, another element depends in the objective determination of the possibility of consent, and a third depends on whether the victim was in fact consenting under conditions in which her consent could be valid.\(^{60}\) There is nothing sui generis about such a composite understanding of action. Something of the sort is found in medical contexts, in reputational questions, a variety of property crimes, etc.

It might be objected that the case I have made is not for a nonconsent account of rape as much as it is a case for multiple concepts of rape. That objection might be put in the following way. Grant that the only account of rape that covers all five categories of cases is the nonconsent account. Nevertheless, the nonconsent account itself has some surprising and troublesome implications. The reason for this is that the net is cast too widely.\(^{61}\) We can do better by admitting that there are several concepts of rape. By splitting the categories of cases we may more fully and accurately account for both our present intuitions and social practices regarding rape without including problematic implications of the nonconsent account.

The distinctiveness, according to the objector, of rape turns on its experience by victims. The experiences are most clearly captured in thinking of rape as sex occurring against the will of the victim.\(^{62}\) This “against the will” conception of rape is the fundamental conception underlying the law.\(^{63}\) There are acceptable

60. See Pickard, supra note 44. As MacKinnon points out (supra note 53 at 354), much depends on whose beliefs are to be treated as reasonable. The position I am urging is that reasonable belief is a function of certain external observers. There is a danger that this will simply provide cover for perpetrator beliefs. However, that danger can be avoided if we take seriously the requirements of reasonableness of belief, i.e., consider the observers as able to provide adequate explanatory accounts of evidentiary beliefs and necessary patterns of reasoning for assessing the social context of a given act. See MacKinnon, ibid. at 353-54.

61. Some parts of Schulhofer’s work reflect such an attitude. Schulhofer, supra note 31. Schulhofer offers an analytic approach that can be fairly characterized as about a distinct problem, albeit closely related. His concern is with problems of effective implementation of reform. His analytic efforts (especially at 68 et seq.) are, I think, consonant with the views advanced here. In the main what Schulhofer finds at the conceptual core of rape is violation of sexual autonomy. Although there are significant differences, this inevitably means that the analytic core is a consent theory of rape.

One notable difference is that Schulhofer divides the cases, so to speak, into two classes. One consists of forcible rapes, and the other includes the other cases, e.g., involving the incompetent or unconscious. 65. I have not made that demarcation. But the motivation for Schulhofer to make the distinction is practical, not conceptual. His concern is with statutory reform and consequent enforcement. The range of considerations, obviously, must vary from those relevant to determining what defines the class of conduct that makes legal control appropriate. I hope to develop the comparison with Schulhofer in more detail at another time.

62. This is part of the traditional common law definition, and has been an element in code definitions throughout United States history. Even where deception or duress were allowed for, they are clearly alternatives to force. The connection between “against the will” and experience is direct. In order for an act to override the will of another, that other person will have to have a will on the issue and, except in extraordinary circumstances, be consciously present. Will is usually understood as a kind of desire or preference with quasi-experiential elements. For it to be overborne, there will be resistance, i.e., an experience of losing out, of being forced to undesired conduct.

63. This approach treats rape as fundamentally a violent rather than a sexual act. See Mackinnon, supra note 10 at 323.
counterfactual extensions available sufficient to provide coverage of cases of incapacity. The cases left out are handled by the development of an independent status conception. Prohibitions on sexual activities involving children (and certain others) manifest a distinct set of concerns—partly paternalistic, partly prohibitions on seriously exploitative conduct. But that, if rape, is rape of a different kind.

I have already argued against placing experience in this role. I will not rehash those arguments. Placing the experiential element at the center of the concept of rape has pernicious consequences. Furthermore, maintaining such an experiential elements requires treating rape in an anomalous fashion. There is no similar experiential element to homicide or theft or even battery. The experiential claim is grounded in a parochial understanding of the nature and problems of rape. It presumes a set of deeply ahistorical reactions and psychology. It reifies present social relations and their effects.

Rape understood as sex against the will of the victim is itself a conception subject to a number of serious objections. It is a notion ambiguous in several ways. First, acts against the will fall across distinct categories of coercive, nonvoluntary, and nonconsensual acts. What seems to be invoked is the idea of (at least internal) resistance. Indeed, the idea of the 'against the will' account leads to standards of resistance as relevant to the question of the occurrence (existence) of rape. It should not be necessary to detail the reasons why that is a defect. Secondly, the will account must be understood so as to provide for counterfactual cases if it is to be at all plausible. The thought is that just as there is a sense in which surgery on an unconscious or intoxicated person may be (counterfactually) against the will of the person, so too may sex. Thus, many cases of rape relying on incapacity can be accommodated by the will account.

However, this effort to extend the will account fails because it demonstrate a confusion at the heart of the account. The difficulty is that the counterfactual analogies are properly formed with respect to consent, not will. The medical cases involve questions of consent, not questions of will. The terms of analysis of medical cases make this point quite clear. First, of course, patients give consent. Second, in assessing permissibility of conduct, we look to indicia of consent. Did the patient sign the form, did they express their wishes, etc.? That clearly asks for a determination of consent. Third, issues of proxy consent (that inconvenient word again) proceed through consideration of choices made by reasonable persons, or by projecting expected courses of conduct. The terms all go to consent, and not the will, of the patient. The development of proxy and implied consent doctrines in medicine are

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64. See, e.g., People v. Bergsneider, 211 Cal. App. 3d 144, where the requirement is met by an apparently effortless movement of the victim's hand. In such cases, it is the clear lack of consent rather than anything about the victim's will that constitutes the action of rape.


66. The point is clearly and amply made in Estrich, supra note 26.

67. Moreover, it is very hard to square 'will' accounts with counterfactual analysis. Such analysis proceeds necessarily on the basis of abstract constructed persons and assessments of what such
not disguised theories of proxy will or of implied will. The counterfactual analysis simply adopts that of consent renaming it along the way. In those cases which rely on a counterfactual analysis, the nonconsent account of rape is to be preferred on grounds of simplicity and clarity.

Insofar as rape involves compromise of interests in sexual self-determination, it is logically independent of the victim’s will. Consider the case where the victim lacks independence. On the will account, this person cannot be raped, because they do not exercise will at all. It is not like intoxication cases where we may sensibly speak of what the person would have desired had she not been intoxicated. In the present example, it is susceptible to counterfactual analysis only by substituting for the victim. But then, what is the sense of adhering to the language of will? What we are concerned with is the victim’s consent, a matter which is relatively free of experiential requirements. In fact, attending to the way in which the counterfactual cases must be handled under the will account displays the degree to which it is parasitic on a nonconsent theory. The conclusion we should draw is that the language of will hinders understanding rape. It is best thought of as a stand-in for an analysis of rape as nonconsensual sex.\footnote{The later exchange between Dripps and Robin West illustrates the respective limits of Dripps’s theory and the experiential view advanced by West. See Robin West “Legitimizing the Illegitimate: A Comment On Beyond Rape” (1993) 93 Colum. L. Rev. 1442 and Donald A. Dripps, “More On Distinguishing Sex, Sexual Expropriation, And Sexual Assault: A Reply to Professor West” (1993) 93 Colum. L. Rev. 1460.}

III.

Given the general account of rape advanced above, the codification of rape in the criminal law should properly focus on nonconsent as the central requirement reasoning agents would do, how they would decide. They do not have a will in any interesting way distinct from the cognitive capacities exercised in consent. The language of will is unnecessary here and obfuscatory. In important respects, it is a defect of voluntariness as well. See also Posner, supra note 8; Hume, supra note 12.

\footnote{West criticizes Dripps on three grounds. First, his theory fails to make experience the essence of rape. (1448-49) Second, he has an overly expansive view of commodification and an impoverished view of self. (1451) Third, Dripps is unduly sanguine about ordinary sexual relations. (1452-53). However, as Dripps properly notes, the experiential claims is deeply problematic. (1461) It fails to explain clear instances of rape which do not involve an experience, as I have discussed supra. Dripps is similarly skeptical of West’s account of violence which is so overbroad as to be meaningless. (1462-63). Finally, he concedes that he was too sanguine about “ordinary” relationships in light of background conditions.

Both think there is progress in abandoning consent, yet neither notices that the very basis of their analyses necessarily involve a substantive account of consent. For example, both discuss cases where a person accedes to sex after violence, terming it “consent.” But this is wrong. There is no consent in such a context, whether the exchange is sexual or monetary. More directly, the very notion of legitimate methods of exchange entails consideration of consent. To the same end, as I have already argued, the experiential content of rape is also dependent on its nonconsensual nature.

A final point is worth making in this context. Both West and Dripps assert that background injustice renders consent untenable as a basis for evaluating interactions. (The background injustice, obviously, is differential access to resources.) This is not the place to give a detailed discussion of this claim. Suffice it to say that it proves entirely too much.
for the crime of rape. The requirement of consent should not be treated, as it commonly has been, as camouflage for a force or resistance standard. The crucial point of the nonconsent theory of rape is that what distinguishes rape is the absence, or presence, of consensual participation in sex. Taking that fact seriously would alter statutes and enforcement of rape laws in important ways. However, it does not follow from my argument above that it is advisable to criminalize all instances of rape as there defined.

The notion of consent relied on is philosophical, not legal. The conditions it imposes for effective exercise are stringent. It was that aspect of the concept of rape which generated some apparently odd outcomes. For various reasons, some of which will be discussed below, not all of the elements and conditions of the philosophical analysis of socially important concepts and categories can or ought to be carried over into the institutional and practical instantiations of those concepts or categories.

Although the pressures of social and institutional life require relaxing standards for autonomy and consent in a number of significant ways, it is (almost) always desirable to seek a closer approximation to realizing the standards implied by the philosophical concepts. As used in the ordinary social and legal world, consent and related notions are treated largely as defeasible, and affected by, context dependent presumptions. The presumptions regarding consent sex are an important area for reform.

The contrast between legal or institutional embodiments and the underlying philosophical conceptions is by now ordinary. It has its place in work as varied as that of Charles Fried and Catherine MacKinnon. Indeed, certain strands of feminist analysis proceed on exactly this basis, and on just this topic. Thus, one way to understand the critique of sex offered by Robin West or Catherine MacKinnon is that they focus attention on the gap between social reality and ideal conditions.

Consent in law has a different practical content than does consent in a philosophical analysis. Not every case which would, by philosophical analysis, be classed as rape should be so classed under the law. The conditions of valid consent under the law would, of course, need to be made rational. This means two things. First, that insofar as practicable, the same conditions of consent should apply throughout the law. If threats negate consent in one area, so should they in another.

69. See Leigh Beinen, “Rape III - National Developments in Rape Reform Legislation” (1980) 6 Women’s Rights Rep. 170; Beinen & Field Judges and Rape (Lexington, MA: Lexington Books, 1980), for a survey of statutory definitions. The suggestion is not that statutes merely use the language of consent. As the Michigan reform experiences shows, terminological changes are not enough. Education of prosecutors and police along with the public, is required.

70. Estrich, supra note 26.


73. MacKinnon, supra note 10.


75. MacKinnon, supra note 10.

76. See also Wittig, supra note 14.
area. If it is impermissible to extort money payments, it should be impermissible to extort sexual services.” What will nullify consent in one case should, other things being equal, nullify consent in the other.

This may yield an enlargement of the scope of the law of rape. But it cannot plausibly be argued that this enlargement would impose any undue burdens. The bounds of acceptable conduct are not being changed arbitrarily. Rather, principles already deeply embedded in law, and to which patterns of social conduct have already successfully accommodated, are extended.

The threshold for criminalizing rape is marked by several factors. The kind of case, considered as a type, must be thought to produce, or embody a significant level of harm. Rapes effected by means of violence can be considered as a kind or type, one that is very harmful because such cases typically are very harmful. The point is that we can separate out what might be called the social classes of actions or events, and rely on that class or event without going on to suppose that every instance which in fact falls under the description actually has the claimed effects. The point here is just that there is reason to confine (legal) rape, to a domain of significant harm.

Treatments of classes of actions, in place of attending to individual acts, is common. The limitations on excuse and justification in the criminal law are constructed in this way. Or, to consider a current controversy, battered women’s reliance on self-defense claims are such an example.79

Another factor determining the threshold for (legal) rape, is the relation between the events so classed and the institutional constraints of the criminal law. The demarcation should be consonant with the burdens of evidence and proof of the available decision procedures. While these factors are not precise, they are sufficient to provide a natural explanation for why a range of cases under (the concept of) rape will not fall under the narrower legal definition of rape. For example, cases of mutual rape or cases in which the victim’s conduct stands in a kind of aphasia to her intentions and desires, where conduct expresses assent and the victim’s psychology is refusal, may be excluded.80

In placing consent at the center of rape law, we move toward integrating it into the body of the criminal law. There are advantages in so doing, including making

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78. Of course, consent is sensitive to context and the relative importance of the object affects the stringency of conditions.


80. A bizarre case, introduced only for illustrative purposes. But it is noteworthy that extremes are necessary to illustrate the point.
available very deeply entrenched doctrines about relevance and the interpretation of consent. It supports the effort to lessen the ‘specialness’ of rape, and that should help destigmatize victims. At least, it helps change the stigma to that felt by victims of crime generally. The victims of financial fraud may feel, in addition to anger, etc., chagrined by what is in retrospect a foolish decision. But that is, or should be, no more than sheepishness. A woman raped through fraud should feel no greater stigma. The underlying idea is that over the long run it is to the better if sexuality and sexual crimes take on different and less charged social and psychological meanings.

The account of rape I have urged, is not compatible with a univocal punitive response. I understand the proposal as implying support for legislative reforms of several kinds. The penal statutes on rape should provide for a number of distinct levels of seriousness. Rape should be punished by crimes of degree. The statutes should take account of the means used, the intentions of the perpetrator and appropriate contextual features (age, relationships, etc.). In sentencing, there should be room within each degree of crime to consider further individual factors, e.g., the effects on the victim, the number of victims or number of offenses, etc.

As well, I think the account supports the movement for victim shield laws. For, on this account, the laws serve to keep the trial focused in the issue of consent to the activities alleged. Prior consensual acts matter only as they resemble the particular case tried. The mere fact of prior sexual involvements, even with the defendant, does not much matter. There must be some pattern which could lead to belief in consent on the instant occasion.

**IV. CONCLUSION**

Let me return to the two cases which opened this article. A was raped because she in fact did not consent to what was done to her, no matter what the men believed. Had their story been believed, it is possible that they may have a claim to reduced sentence. But even had their belief been honest, it was one of extraordinary riskiness, so it is at least as likely that no particular mercy need be shown such actors. In the second case, there was also an appropriate conviction, for the young woman was also the victim of rape. She may indeed have said yes. But her words were not sufficient for consent because she was not able, she lacked the capacities, to give valid consent. The young men were in a position to know that, and they exploited her limitations for their own ends.

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81. In the actual case, the sentence ranged from four to 10 years.
The Canadian Journal of Law & Jurisprudence
An International Journal of Legal Thought

**TOPIC:** LAW AND SEXUALITY

*Guest Editor:* Leslie Green

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January 1995