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RAPE AND THE REASONABLE MAN ⋆

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ABSTRACT. Standards of reasonability play an important role in some of the most difficult cases of rape. In recent years, the notion of the "reasonable *person*" has supplanted the historical concept of the "reasonable *man*" as the test of reasonability. Contemporary feminist critics like Catharine MacKinnon and Kim Lane Scheppele have challenged the notion of the reasonable person on the grounds that reasonability standards are "gendered to the ground" and so, in practice, the reasonable person is just the reasonable man in a gender neutral guise. These critics call for the explicit employment of a "reasonable *woman*" standard for application to the actions of female victims of rape. But the arguments for abandoning a gender-neutral standard are double-edged and the employment of gendered standards of reasonability is likely to have implications that are neither foreseen by, nor acceptable to, advocates of such standards. Reasonable agent standards can be dropped, in favor of appeals to the notion of a "reasonable demand (or expectation)" by the law. However, if reasonable agent standards are to be retained, gendered versions of such standards are not preferable to gender-neutral ones.

The essential difference between rape and ordinary sexual intercourse, we believe, is the presence of consent: the latter is consented to, the former not. This view is not uncontroversial; not all states define 'rape' in terms of non-consensual sexual contact and not all commentators agree that they should.[1] In what follows, we will assume, rather than argue for, the view that rape is to be defined in terms of non-consensual sexual intercourse.[2] For purposes of this paper, then, it is definitionally true that rape requires non-

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[1] For useful discussions of this issue, see Estrich (1987, pp. 29–41), Bessmer (1976, pp. 58–64), and Dripps (1992).

[2] It might plausibly be argued that rape should be understood to include non-consensual sex acts other than intercourse. We are here neutral on this issue and use "sexual intercourse" only for expository convenience. If the best account of

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consensual sexual contact. We also assume that force is *not* a defining element of rape.[3] One can be subjected to non-consensual intercourse without the presence (or even the threat) of force and the same violation of the person characteristic of rape is present.[4] And, one can be involved in extremely forceful, and even violent, sexual contact without this characteristic violation of the person being present.[5]

Given our analysis of the defining elements of rape, a person can be guilty of rape even though there is neither force nor the threat of force present. Imagine the case of a man who, having been out drinking with his friend, returns to the friend's house whereupon the friend promptly passes out in the living room. The man realizes that if he quietly slips into his friend's bed with that man's wife, he may be able to have sexual intercourse with her while she is under the impression that he is her husband. Were he to do so, this would be rape – rape by fraud in the act (Morland 1994). On our account, whatever the woman does to comply with any sexual advances he makes does not constitute consent to sexual intercourse *with him*, if she is under the impression that he is her husband. Indeed, even if it is she who makes the sexual advances in a groggy state, believing him to be her husband, she has not consented to sexual intercourse *with him*. That this is a case of rape is, we think, a welcome implication of our understanding of rape as non-consensual sexual intercourse.

Were force, or the threat of force, a defining element of rape, it would be easy to see the relevance of concerns about what a reasonable person would think or do in the victim's situation: if a

rape includes actions other than sexual intercourse, the exposition may be changed without loss of cogency.

[3] We thus decline Catharine MacKinnon's invitation (1989, p. 172) to interpret the phrase "with force and without consent" as redundant.

[4] We do not mean to suggest by this that there are no morally or legally relevant differences between forcible and nonforcible rape. Rather, we mean only to be declaring our understanding of rape as a crime which, like theft, admits of both forcible and nonforcible species. For a cogent statement of the essential wrong involved in rape, see McGregor (1994).

[5] The force cannot be *coercive* force of course, for, as we shall argue below, coercive force undermines consent. Still, when coercive force is present, what contributes *definitionally* to the act of rape is the element of coercion not that of force.

reasonable person would have believed that she would be seriously harmed by resistance to the sexual advances of the putative assailant, then, one might plausibly argue, the threat of force was present. This may be true even if the putative assailant had no intention of employing force, no intention to create or sustain this belief in the victim, no knowledge that the victim held this belief, etc. On the other hand, were it not the case that a reasonable person in the victim's situation would believe that she would be seriously harmed by not yielding to the putative assailant, then, plausibly, there was no threat of force present, though the actual victim may have mistakenly believed there was. The threat of force is quite plausibly viewed as an "objective" feature of the situation.

But the relevant defining element of rape is lack of consent. And, on one plausible understanding, it appears that consent involves a thoroughly "subjective" element.[6] We do not mean by this to deny that there are might be objective elements as well. Even an essentially subjective approach should insist that a state of mind of the victim is not sufficient in itself – that there must also be some outward signification of this state of mind.[7] Some hold that consent, in the legally significant sense, is *entirely* "objective" – constituted completely by what was said and done in the circumstances. But regardless of how subjectively or objectively one construes consent, it does not appear that the issue of what a *reasonable* person would do, or believe, or consent to in this situation is a material element of the crime of rape; rape is defined in terms of *this* person's *actual* consent. Of course, the situation is not this simple.

[6] 'Subjective' is a slippery word – used in dangerously different ways. We do not mean to suggest by calling consent a subjective matter that there is no fact of the matter. Quite the contrary. There is a fact of the matter and that fact seems to involve a subjective mental state of the victim. It appears to depend on the content of her consciousness, not on what is happening external to her, nor on what a reasonable person would believe is happening external to her. As we will stress later, of course, what is happening "outside her consciousness" and what a reasonable person would believe in her circumstances, may have *evidential* bearing on what we should conclude about her subjective state of mind.

[7] See Joan McGregor's "Why When She Says No She Doesn't Mean Maybe and Doesn't Mean Yes: A Critical Reconstruction of Consent, Sex, and the Law" (unpublished manuscript).

Consent involves both knowledge and freedom. The phrase 'informed, voluntary consent' is a useful reminder of this, but it is, strictly speaking, redundant.[8] There is no consent where the agent does not understand to what she is putatively consenting. A person who signs a consent form for a medical operation in a language he does not understand – believing it to say one thing when, in fact, it says quite a different thing – does not consent to the operation in question. Furthermore, there is no consent where the agent is coerced into giving a conventional sign of consent. Acceptance of a "Don Corleone offer" that one "cannot refuse" is not an instance of consent; a teller who turns over bank funds upon the threat of death does not consent to the transfer.

Coercion undermines the claim of consent.[9] And force can be coercive. Thus, while force is not a defining element of rape, it is relevant to the establishment of a charge of rape because nothing an alleged victim of rape said, or did, or failed to do can count as (being or indicating) consent if it was said, done or omitted under coercion. (And a similar point can be made with respect to ignorance. Nothing a putative victim of rape says, does or fails to do can count as (being or indicating) consent to sexual activity if it is said, done or omitted in ignorance of the situation – for example, in ignorance of the fact that it would be taken as a sign of consent to the sexual activity that occurred.)

Not all use of force is coercive, though. As a professional boxer does, we may consent to force being used against us. Force may be, even if not consented to in advance, welcome and, therefore, not coercive to the subject. Even force and threats of force that are unwelcome and nonconsensual may not be coercive. A bank teller confronted by a would-be robber obviously armed only with a squirt

[8] At least, we believe this is true of consent *in the morally relevant sense*.

[9] In "The Moral Magic of Consent (II)" (1996), Larry Alexander sketches, but does not endorse, an alternative way of looking at situations of coerced "consent": "Threats by the boundary crosser, then, do not vitiate consent; rather, they render the boundary crosser himself morally powerless to take advantage of the consent he has induced.... Provisionally, therefore, we appear to be led to the somewhat counterintuitive conclusion that coerced consent is still consent" (p. 171). If one were to take this view, our claims would have to be recast in terms of consent that confers on the threatener a moral power at cross the consenter's moral boundary, but the argument would remain substantially the same.

gun filled with distilled water can hardly claim coercion if he gives the robber money upon being squirted. And the threat, "Give me all the money in your cash drawer or I'll let the air out of your car's tires," would hardly be counted as a *coercive* threat in ordinary circumstances. Turning over the funds, if done, is done voluntarily in these cases. It is an act consented to despite the use of force or the threat of force.[10]

And here is where reasonability enters once again. For the determination of whether a situation is coercive in a way that undermines consent is plausibly understood "objectively" in terms of how a *reasonable* person could be expected to respond in the situation. A reasonable person can be expected to resist the threat of flat tires, but not the threat of death, when the bank's money is demanded. To illustrate this, consider the Maryland case of *State* v. *Rusk*. In this case, a woman, Pat, met Mr. Rusk at a bar through a mutual friend. She gave Rusk a ride home and he invited her into his apartment for a drink. When she declined, she testified, he took her car keys and, at that point, she agreed to go up to his apartment. Once there, Rusk apparently left Pat alone in the living room for a few minutes. The door was unlocked and there was a phone in the room. Pat remained in the room during Rusk's absence. When he returned, he began to undress her. She alleged that she begged him to let her leave, began to cry, and said to him, "If I do what you want, will you let me go without killing me?" He claimed that Pat came willingly to his apartment and began to cry only after intercourse. Rusk was convicted at trial, but the conviction was overturned by the Court of Special Appeals of Maryland on the grounds that the victim's fears were unreasonable:

> [T]here are no acts or conduct on the part of the defendant to suggest that these fears were created by the defendant or that he made any objective, identifiable threats to her which would give rise to this woman's failure to flee, summon help, scream or make physical resistance … In my judgment the State failed to

[10] Of course, we would dismiss the claim that the teller was "*forced* to turn over the funds" in these cases, as well as the claim that he was coerced to do so. However, this is because, in this context, 'forced' functions as a near synonym for 'coerced'. That the force used or threatened was insufficient to "*force* the agent *to*" perform the action desired by the attacker does not entail that force was not used or threatened, only that it was not coercive.

prove the essential element of force beyond a reasonable doubt and, therefore, the judgement conviction should be reversed . . . (289 Md. 230, 424 A. 2d 720 (1981))

If, as we do, one takes absence of consent (rather than the presence of force) to be the relevant feature of rape, a central issue here concerns whether the situation was such that the victim's "failure to flee, summon help, scream, or make physical resistance" should be taken to constitute or indicate consent. And this issue is commonly understood in terms of whether the force employed was such as to make a reasonable person unable to resist – if so, then the failure to resist cannot be taken as a sign of consent. Thus enters the "reasonable person standard".

The reasonable person standard has been challenged as predicated on a myth – the myth that it is possible to have an ideal of reasonableness that is gender neutral.[11] Those who believe that it is not charge that 'reasonable person' means, in practice, 'reasonable *man*', and the appearance of gender neutrality makes the phrase all the more insidious than the (allegedly) blatantly gendered phrase it replaces. Critics have proposed that these terms are essentially "gendered to the ground" (MacKinnon 1989, p. 183). For expository purposes, we shall here refer to the claim that reasonable agent standards are necessarily gendered as '*the gendered reasonability thesis*'.

Our tasks in this paper include an examination of the implications of the view that reasonable person standards are necessarily gendered. We shall be looking at this issue in the context of current rape law and proposed changes in that law. The implications of the conjunction of the view that the law of rape requires reasonable agent standards with the claim that such standards are essentially gendered are surprising and troubling. While we are optimistic about the possibility of a gender neutral standard of a reasonable agent, we conclude by cautiously suggesting that the correct results achieved by appeal to a reasonable person standard would be better achieved by dispensing with reasonable agent standards all together.

[11] See, for example, Catharine A. MacKinnon (1989) pp. 172–183 and Kim Lane Scheppele (1991).

CONSENT AND THE REASONABLE WOMAN

Some critics of the "reasonable man" standard have charged that such a standard is essentially gendered in a way that cannot be eradicated by such superficial revisions as replacing 'man' with 'person'. Some terminology will help clarify the issue here. Let us understand 'reasonable agent standards' as referring to a genus of standards comprising at least the following three species:[12] reasonable man standards, which we will understand to be gendered (male) standards; reasonable woman standards, which we will understand to be the female counterparts; and reasonable person standards, which we will understand to be a gender neutral species of reasonable agent standards.

According to the gendered reasonability thesis, of course, there is no defensible reasonable person standard since a gender neutral conception of a reasonable agent is vacuous. Those, like Catherine MacKinnon (1989), who accept the gendered reasonability thesis may have no quarrel with reasonable agent standards, but they will deny that there can be any defensible reasonable *person* versions of such standards. All reasonable agent standards must be gendered – they must be either reasonable *woman* standards or reasonable *man* standards. This assertion, which we have called 'the gendered reasonability thesis', seems to us to be a complex claim – partly empirical, partly normative – which isn't well supported by programmatic proclamations. But we will not contest it here, at least not by attacking its assumptions or the arguments offered in its defense. Rather, we accept the gendered reasonability thesis in order to tease out the implications waiting in the wings.

The most obvious implication for rape law is one that advocates of this position have been quick to herald: when we judge the issue of consent – when we seek to determine whether the actions and words of the victim constitute or indicate consent to sexual intercourse – it is the standard of the reasonable *woman* we must employ. We cannot justifiably employ those of the reasonable man nor the bogus standard of the reasonable person.

[12] Some may argue for the importance of recognizing other reasonable agent standards. We do not imply that the three listed species are the only important ones.

When we do this, it is urged, what might have appeared to be consent under the reasonable man standard will appear not to be consent under the reasonable woman standard. Since the latter is the appropriate standard, we will conclude that consent has not been given in some cases in which we would come to the opposite conclusion using a different standard of reasonability.

The Rusk case provides a useful example. If we discuss the case in terms of the reasonable agent language, the Maryland Court of Special Appeals held, in effect, that a reasonable person in the circumstances confronting Pat who did not consent to Rusk's actions would have fled, summoned help, screamed or offered physical resistance. In criticizing the Court's decision, Kim Lane Scheppele points out that while "[t]he reasonable man, who doesn't fear city streets the way the reasonable woman does and who can fight physically with the expectation of success, may have tried to leave or fight" (1991, p. 46), this is not true for the reasonable woman. Substituting a reasonable woman standard for the reasonable man standard, or for the counterfeit (gender neutral) reasonable person standard, would have warranted the opposite conclusion in the Rusk case.

Proponents of the reasonable woman standard believe this will have profound effects in the law of rape. Scheppele, for example, claims that employment of the reasonable woman standard would allow "women's views to have a strong impact on the outcome of rape trials" (1991, p. 45). It would also, she believes, have the effect of "putting men on notice that they must consider how women's perceptions of sexualized situations may be very different from their own" (p. 45) and requiring "men to see the world through women's eyes" (p. 46). These are significant claims concerning the effect of employing a reasonable woman standard in determining consent. They are also unjustifiably optimistic.

THE *MENS REA* OF RAPE

Were it correct that the issue of consent was dependent on a reasonable agent theory in the way proposed and that there can be no gender neutral species of a reasonable agent theory, then, it seems to follow, the law must apply a reasonable *woman* test to determine

whether a woman has consented to sexual contact. Then, we might say, where the situation was such that a reasonable *woman* would have believed resistance to be dangerous to her physical or mental well-being, the failure to resist sexual contact does not signify consent.

This makes the reasonable woman's point of view relevant to a defining element of the crime of rape. If the reasonable woman's view is materially different from that of the reasonable man, then this should have a significant effect within the law of rape. It may well allow "women's views to have a strong impact on the outcome of rape trials" (Scheppele 1991, p. 45). It will not, however automatically have the effect of "putting men on notice that they must consider how women's perceptions of sexualized situations may be very different from their own" (p. 45). And it will not necessarily "[require] men to see the world through women's eyes" (p. 46). This is because, absence of consent to an act of sexual intercourse is only one element of the crime of rape. It forms a part of the *actus reus* of that crime. But liability to punishment for the crime of rape requires *mens rea*, a criminal state of mind, as well.[13,14] And, when this element of the crime of rape is considered, the implications of the belief that notions of reasonable agency are "gendered to the ground" seem quite different from those defenders of the claim anticipate.

[13] This seems to be a source of complaint for some. Scheppele claims that employment of a reasonable woman standard for consent would constitute a "radical departure" for the law of rape which "privileges the perspective of the defendant through the *mens rea* requirement" (1991, p. 44). MacKinnon suggests that the *mens rea* component of rape raises a "problem" because "the injury of rape lies in the meaning of the act to its victim, but the standard for its criminality lies in the meaning of the act to the assailant" (1989, p. 180).

[14] It might be suggested that *mens rea* is a necessary condition for finding a defendant guilty of the crime of rape, but not an element of the crime. This way of talking sounds needlessly paradoxical to us: is there, for example, a rape but no rapist? We prefer to use the language of rape like that of murder; while a homicide may take place without anyone having the *mens rea* required for murder, the absence of such a mental state means not only that no one was a murderer – it also means that no murder took place.

One could, of course, insist that rape is a strict liability crime, denying the existence of any *mens rea* element.[15] While this proposal may result in a higher rate of convictions, it is unacceptable for a number of reasons. First, it carves out an apparently indefensible area of strict liability crime within the criminal law generally. On grounds of consistency, then, we must demand that, absent a cogent argument to the contrary, rape be treated like other serious crimes against a person. Secondly, it has implications that are quite unpalatable. Treating rape as special in this respect will lead to clearly unacceptable, sometimes barely coherent, judgments, as we shall argue shortly.

One might favor treating rape as a strict liability crime on the grounds that much (or even all) of the harm to the victim of nonconsensual intercourse is present whether or not the assailant intended sexual intercourse without the consent of the victim, knew he was having such nonconsensual intercourse or even acted recklessly or negligently with respect to her consent. But to deny a *mens rea* component of rape on these grounds is clearly unacceptable. Much (or even all) of the harm to the victim of homicide is present regardless of whether or not the death of the victim was intended, foreseen or recklessly disregarded or negligently produced. We do not, and obviously should not, on those grounds argue for treating homicide as a strict liability offense. Homicides are appropriately graded and even rendered non-criminal in virtue of the mental state of the person causing death. We would not have it otherwise. Proponents of treating rape as a strict liability crime would have a strong burden to show why rape should be treated differently.

Suppose, owing to some perceived uniqueness in the crime of rape, we *were* to treat it differently, deciding that rape requires only that a person have sexual intercourse with a non-consenting partner. What would the implications be? We think they would be wildly unacceptable. To see why, recall our discussion of rape by fraud. There we said that a person can be guilty of rape without employing

[15] Douglas Husak has pointed out to us that some jurisdictions – Massachusetts, for example – apparently construe rape as strict liability crime. See Commonwealth v. Ascolillo, 541 N.E.2d 570 (1989), and Commonwealth v. Simcock, 575 N.E.2d 1137 (1991). However, it is not clear that this view would be maintained were it tested by actual cases having the facts we describe (hypothetically) below.

force or coercion. In that case, fraud in the act was sufficient for rape. But mere mistake would not have been. Crucial to the charge of rape in the case we gave, is the man's awareness that woman believes him to be her husband.[16]

Imagine now – to get to a case that illustrates the importance of a *mens rea* condition for rape – that two couples, strangers to each other, are vacationing. They currently happen to be staying at the same old Victorian inn – one that has a common bathroom and kitchen separated from the sleeping rooms by a maze of twisty little passages, all alike. In the middle of the night, one wife gets up to go to the bathroom and the other goes to the kitchen for a cup of herbal tea. Each returns to what she sincerely believes to be her own room but, as the reader will have anticipated, is in fact the other's room. Each crawls in bed with the man she mistakenly believes to be her husband. Each husband, still more asleep than awake, believes that it is his own wife who has rejoined him in bed. Each couple begins to have sexual intercourse, only to be most unpleasantly surprised as the activities carry on to such a point that the mistake is recognized.

On the strict liability notion of rape, who has been raped? Who has raped? We have, in this "preposterous case", as we shall unabashedly call it, four individuals who have engaged in sexual intercourse without consenting to do so with the sexual partner. We have, also, four individuals who have engaged in sexual intercourse with a partner who did not consent to sexual intercourse with them. It appears that we have four victims of rape and four rapists. (Presumably, a reciprocal agreement to drop charges would be proposed by someone.)

Another, admittedly concocted (though not impossible), case that is of interest in this connection is the following. Suppose a man – we'll call him Horgan – threatens a woman with severe harm to herself or her children if she doesn't do as he demands. His demand is that she entice a man to have sexual intercourse with her while

[16] We explicitly deny (later) that knowledge of lack of consent is a defining element of rape. Reckless disregard (or even negligence) with regard to consent is, we believe, a sufficient *mens rea* condition for at least some grade of rape or, at least, criminally wrongful non-consensual sexual conduct. Therefore, in a modified case in which the man acted recklessly with respect to the woman's knowledge of who he was, he may still be guilty of rape or some criminally wrongful non-consensual sexual conduct.

Horgan is watching and never let the man suspect that she is not doing it of her own free will. The woman is, we will imagine, an accomplished enough actress to carry this off. We believe that she has not consented to the sexual intercourse because her actions were the result of the wrongful coercion by Horgan.[17] Nevertheless, the man she encourages to have sexual intercourse with her is not guilty of rape if there was no reason to suspect that she was being coerced in this way. Call this case 'the improbable case'.[18]

If "hard cases make bad law" and what sort of law must be produced by preposterous and improbable cases? Were we forced to rely on such cases and to generate problems for the proposal that rape be considered a strict liability crime, we might think rather better of that proposal. However, there are, quite obviously, relatively mundane cases in which the strict liability view would be clearly objectionable. Suppose, for example, that a husband and wife work different shifts so that he regularly comes home while she is asleep. Frequently, he initiates intercourse with her while she is still mostly asleep. She has always encouraged this though never given him "blanket permission" to continue. One night, for whatever reason, she decides that she does not want him to do this. She writes him a note telling him not to disturb her when he comes to bed, but forgets to leave the note where he will see it. When he comes to bed, he initiates intercourse as he often does. This time, she has not consented to have sexual intercourse with him. He is clearly having sexual intercourse with a woman without her consent. He is not guilty of rape, because it would be unreasonable to expect him to know, or even suspect, that she is not, on this night as she has on all other nights, consenting to his actions.[19]

[17] On some objective accounts, it might be true to say that the victim *did* consent to sex with the innocent man. On these accounts, it appears, the victim was not raped at all.

[18] Improbable though it may be, the facts seem no more bizarre than those of the (real) Morgan case (discussed below).

[19] While we take it to be clear that a rape did not occur in this case, some might dispute this. It might be held, for example, that any sexual intercourse without explicit, verbal consent is rape. This strict requirement would, we believe, count most instances of consensual sexual intercourse as double rapes – a result we find problematic.

We conclude from these cases (and a host of others that could be generated) that rape includes, as a defining component, some element of *mens rea*.[20] But what element?

The now infamous case of *Director of Public Prosecutions* v. *Morgan* ([1975] 2 All ER 347 Decision of Court of Appeal, see [1975] I all ER 8) raised a challenge for those who believed that the *mens rea* required for rape was either the intent to have sexual intercourse without the consent of the victim or the knowledge that one was doing so. Morgan convinced three other men that his wife would like to have intercourse with them. He explained that she would feign resistance but that this was all part of a rough sort of sexual "play" she desired. Upon arriving at Morgan's home, the four men dragged her from a room where she was sleeping and took turns having intercourse with her while restraining her. They admitted that she protested and resisted as best she could, but alleged that they sincerely believed that she was consenting. The three colleagues were charged with rape; Morgan, himself, was charged with aiding and abetting a rape.

At trial, the defense argued that the three men lacked the requisite *mens rea* for rape; that is, they did not intend to have sexual intercourse with a non-consenting person. They were convicted by the jury after being instructed that any belief in consent would have to be a reasonable one. On appeal, the defense argued that the jury was misinstructed in law because even an unreasonable and false belief in consent, if honestly held, is inconsistent with the intent to have intercourse without a person's consent. The House of Lords, highest court of criminal appeal in England, agreed with the defense on the point of law, but declined to reverse the convictions on the grounds that the claim to a sincere belief in consent on the part of the three defendants was not credible.

The legacy of *Morgan* is this: an honest, though mistaken, belief in consent, *however unreasonable,* is a defense for rape. That is, if

[20] Again, we see the semantics of 'rape' as paralleling those of 'murder'. An act of rape (murder) requires the existence of a rapist (murderer), and that requires someone with the *mens rea* required by rape (murder). However, as with homicide, this does not entail that a victim has not been harmed just as much as if a rape had occurred.

the accused honestly believed that the victim consented to sexual intercourse, he lacks the *mens rea* necessary for the crime of rape.

We disagree and believe that there is room here, as in other places in the criminal law, for gradations of a crime determined in part by the mental state of the perpetrator. The defendants in the Morgan case acted at best, we believe, with reckless disregard for the existence of consent. E. M. Curley (1976) argues – persuasively, we think – for this conclusion and for the further crucial claim that, given the importance of what was at stake, such recklessness is a sufficient *mens rea* for rape. We agree and prefer to introduce degrees of rape (or sexual assault) to reflect differences between non-consensual sexual intercourse where there are materially different mental states present in the assailant. It is no part of our argument that the crime of rape requires the mens rea of intent or knowledge; the "guilty mind" may consist in nothing more than reckless disregard – indeed, we believe it may be nothing more than criminally negligent disregard – for whether one's partner has consented.[21]

MENS REA AND REASONABLENESS

We are here assuming that the *mens rea* for rape may be intent, knowledge, recklessness or even (perhaps) negligence. In either of the first two cases, the issue of *mens rea* seems to be an entirely subjective matter[22] – defined without reference to a standard of reasonableness. Of course, reasonableness enters into the matter evidentially since we may be reluctant to conclude that an individual defendant held a belief that no reasonable person would have had in the circumstances. This is, in effect, the reasoning of the House of Lords in the Morgan case. Their motivation may have been to preserve, in the face of a difficult case, the Morgan rule, which

[21] There are both moral and strategic reasons for recognizing degrees of rape (or of criminal sexual assault). With respect to the *actus reus* of rape, as with that of homicide, there are real differences in degrees of moral culpability based on the mental state of the perpetrator. More to the practical matter, by allowing juries to return decisions that reflect the moral distinction that they (rightly, we believe) draw, we may increase convictions in those cases where the criminal intent is not one typical of the intentional rapist.

[22] See note 6, above.

holds that sincere belief in consent is inconsistent with the *mens rea* of rape. But there is nothing to bar this kind of reasoning even if we admit the concept of reckless or negligent rape; we are still free to use our standards of reasonability to help us to determine whether the denial of intent or knowledge on the part of the assailant is credible.

While the issue of reasonableness is connected with intent and knowledge only evidentially, it is typically assumed to be more intimately related to the issue of recklessness and negligence. And the relation is complex because these notions are often taken to be at once subjective and objective. Thus, in *Commonwealth* v. *Welansky*, 316 Mass. 383, 55 N.E.2nd 902 (1944) the court instructed the jury that "[k]nowing facts that would cause a reasonable man to know the danger is equivalent to knowing the danger".[23] The court went on to quote favorably the instructions in *Commonwealth* v. *Pierce*, 138 Mass. 165, 52 Am. Rep. 264:

> To constitute wanton or reckless conduct, as distinguished from mere negligence, grave danger to others must have been apparent and the defendant must have chosen to run the risk rather than alter his conduct so as to avoid the act or omission which caused the harm. If the grave danger was in fact realized by the defendant, his subsequent voluntary act or omission which caused the harm amounts to wanton or reckless conduct, no matter whether the ordinary man would have realized the gravity of the danger or not. But even if a particular defendant is so stupid (or) so heedless . . . that in fact he did not realize the grave danger, he cannot escape the imputation of wanton or reckless conduct in his dangerous act or omission, if an ordinary man under the same circumstances would have realized the gravity of the danger. A man may be reckless within the meaning of the law although he himself thought he was careful.

Even the Model Legal Code, while avoiding explicit reference to a reasonable agent standard, appeals to what is, in essence, such a standard in defining recklessness:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material

[23] Since, as Doug Husak has pointed out to us, knowledge of facts that would cause a reasonable person to know something cannot generally be equivalent to knowing that thing, a charitable interpretation of this claim would restrict the equivalency claim to the purpose of assessing criminal liability. One may still disagree with the assertion, of course, but at least under this interpretation it will have some defenders.

element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation. (Proposed Official Draft (1962) §2.02(2)(c).)

Of course, the notion of a "law-abiding person" can't mean one who always obeys the law or the definition would be circular (since its point, after all, is to define an instance of law-breaking). Nor can it be interpreted to mean simply a person who usually obeys the law; the circularity will manifest itself here as well. Instead, the reference to a "law-abiding person" seems merely to impose a reasonable agent standard for recklessness.

We conclude at this point that the crime of rape (or criminal sexual assault) requires a *mens rea* of intent, knowledge, recklessness or negligence. Further, if reasonable agent standards are to be used in the law of rape, a reasonable agent standard will be evidentially relevant to determination of the intent and knowledge of the assailant and both evidentially and definitionally relevant in the determination of recklessness and negligence. If the gendered reasonability thesis is correct and there are no gender neutral reasonable agent standards, then, in the typical case in which the assailant is a man, the standard to be used in coming to a decision about the presence of the requisite *mens rea* of rape is a reasonable *man* standard. The implications of this fact for those who accept the gendered reasonability thesis are momentous.

In discussing them, we note at the outset that rape, as we understand it, is a crime which neither by definition nor in fact can be perpetrated only by a man and only upon a woman. The existence of male-on-male rape is undisputed and, depending on how 'sexual intercourse' or 'sexual assault' is understood, female-on-female and female-on-male rape is possible. Our preference is for an understanding of these terms that allows for the logical possibility of these latter forms of rape. Our reason for this is derived from a conception of the characteristic violation present in rape.[24] The violation of the person that accounts for the wrong of rape is no respecter of gender or genitalia. That said, we shall continue to discuss the cases in which the perpetrator is male and the victim female because

[24] See note 4, above.

these are the cases that motivate the special concern for gendered standards of reasonability in rape law.

If the determination of guilt in rape cases requires the employment of a reasonable man standard to determine the *mens rea* of the assailant, then the fact that a reasonable woman standard is employed to determine the presence of consent will not, by itself, ensure that men are put on notice that "they must consider how women's perceptions of sexualized situations may be very different from their own" (Scheppele 1991, p. 45), or that men will be required "to see the world through women's eyes" (Scheppele 1991, p. 46). Whether these consequences obtain will depend on the *content* of the reasonable man standard.

Suppose that the reasonable woman standard is relevant to the issue of consent. Notwithstanding this, if the reasonable *man* standard does not impose a requirement that a man "consider how women's perceptions of sexualized situations may be very different from his own" or that he look at "the world through women's eyes", then there is nothing in the law of rape that will ensure that these things will happen. The content of the reasonable man standard is crucial – more important to reform of the law of rape, we think, than the standard of reasonableness employed in determining consent.

We do not mean by this to minimize the role that the determination of consent plays and, if the reasonable woman standard is appropriate in addressing this question, the role that standard plays in the law of rape.[25] However, it seems that those rape cases that

[25] In addition, it is the absence of consent that results in most of the harm essential to rape. Consider again MacKinnon's claim that "the injury of rape lies in the meaning of the act to its victim, but the standard for its criminality lies in the meaning of the act to the assailant" (1989, p. 180). Perhaps MacKinnon's point is that it is the absence of consent (which involves, we believe, a subjective state of mind of the victim) that makes the act of nonconsensual sex an injury, but it is this together with the presence of an appropriate *mens rea* that makes such an act the crime of rape. If so, she is right. This means that when a rape case is lost (either because the prosecution fails to *establish* that the woman did not consent or because it fails to establish that the accused had the requisite *mens rea*), we should certainly not conclude (if anyone has) that the victim was not injured at all (MacKinnon 1989, p. 181). Injury turns principally on whether, in fact, she did consent, not on whether this fact is proved or on whether the assailant had the appropriate guilty mind (though the presence of a guilty mind may exacerbate the injury). MacKinnon claims that, "Hermeneutically unpacked, the law assumes

motivate people to propose a reasonable woman standard, turn more on the issue of *mens rea* than on consent.[26] This fact would tend to be masked by the fact that the defendant would testify to his belief concerning the presence of consent and the grounds for that belief. While it is natural, perhaps, to think that what is in dispute is the presence of consent, it seems more plausible (especially if we view consent as involving an essentially subjective element) that the role of this testimony is, in the difficult cases, to establish that the belief in consent was reasonable rather than that consent was present. So, while the standard of consent is an important issue in the law of rape, we think that, as a practical matter, the central issue is usually over the reasonability in the belief in consent.

If we are to ensure that men look at sexualized situations from the point of view of women in these important cases where the claimed differences in perspectives between men and women are crucial, what is needed is an independent argument that the reasonable *man* standard requires men to look at the situation from that standpoint. And, it seems, the very considerations that motivate gendered reasonability thesis undermine the possibility of giving such an argument.

The call for separate reasonable agent tests for men and women is typically, though not necessarily, motivated by the view that there is a fundamental rift between the perspectives of men and women. Many feminist scholars have charged that the perspectives of men and women are "incommensurable", that male and female "versions of the truth" are incomparable, or even that men and women have different, but equally correct, "truths".[27] It is this conception of a fundamentally, and possibly inherently, gendered epistemology

that, because the rapist did not perceive that the woman did not want him, she was not violated." That certainly would be an incorrect assumption; what is unclear is why we should think that the law makes it.

[26] As MacKinnon puts it: "so many rapes involve honest men and violated women" (1989, p. 183).

[27] See, for example, Scheppele (1991, pp. 36ff., emphasis added): "A serious problem for the legitimacy of public institutions occurs when *truths become multiple*, when stories proliferate in *incommensurable* versions, when different people with different *ways of seeing* become empowered to be heard in the public debate." See also MacKinnon (1989, p. 183, emphasis added): "The deeper problem is the rape law's assumption that *a single, objective state of affairs existed*, one that merely needs to be determined by evidence, when so many rapes

(and, on some views, metaphysics) that seems to motivate the gendered reasonability thesis for many of its defenders. (After all, if there is a single reality, knowable in principle by men and women, why should we be forced to deny that there is a single standard of a rational agent?)

But these extreme philosophical claims undermine the assertion that the reasonable man does, and possibly that the reasonable man *could*, understand the very different experiences of women, and *vice versa*. If such views were correct (correct according to which perspective?), then the reasonable man standard cannot require that men see the world from the perspective of women, and there is no objective perspective from which to see it. All they can do, and all they can be required to do, is to see the world from the male perspective.

Furthermore, the attempt to support the gendered reasonability thesis by denying the possibility of objectivity is deeply incoherent. There is no objective reality, no "fact of the matter" about the world, defenders seem to assert; there are only "perspectives" which, paradoxically, are not perspectives *on* anything. The paradox is, of course, very deep because, as many of us are fond of pointing out to our introductory philosophy students, the very denial of an objective reality seems to assert an objective reality. And this paradox manifests itself in the present case quite problematically. If one holds that the reasonable man would view sexualized situations from the woman's point of view, one is committed to there being a fact of the matter about what is the woman's point of view and a fact of the matter about a reasonable man's point of view – about there being an objective reality at least with respect to points of view. This denial of objectivity is self-refuting and, unsurprisingly, undermines those very practical conclusions it is intended to support.

We think that it makes more sense – and is more plausible – to say that male and female perspectives of reality are often very different and typically "partial" rather than to say that they are incommensurable or represent separate-but-equal "truths".[28] Claiming merely

involve honest men and violated women. When *reality is split*, is the woman raped but not by a rapist?"

[28] The *significance* of an act of forced sexual intercourse may well vary rather dramatically along gender lines. Indeed, there may well be a biological basis for such differences in perspective.

difference, rather than incommensurability or separate "truth", preserves the uniqueness of male and female experiences in our society without destroying the possibility of mutual understanding and communication.[29] Given this, it becomes possible for courts to determine what really happened regarding rape cases, rather than being lost in the haze created by the idea of multiple truths. It also becomes possible, and we think defensible, for the law to presume that reasonable men and women look at sexualized situations from each others' perspective because both of these are part of an objective reality which is, in principle epistemically accessible to both men and women.[30]

If we are, then, to accept the gendered reasonability thesis, we should make two further commitments in order to realize the aims of defenders of such standards, one metaphysical and one epistemic: we should commit ourselves to there being a fact of the matter about what the reasonable woman or man would think and do;[31] and we should commit ourselves to the epistemic accessibility of the female perspective to males and the male perspective to females. Without these two further commitments, the, now fragmented, rational agent standards do not do the job their proponents want them to do.

And if we admit that there is an objective matter of fact about what the reasonable man and what the reasonable woman would do,

[29] Scheppele (1991), too, argues for the possibility (albeit, with difficulty) of understanding between the sexes. It is unclear how she squares this with her talk of "multiple truths" and "incommensurable" versions of reality.

[30] Joan McGregor has suggested (correspondence) that employment of the reasonable woman standard in determination of consent can make it more difficult for the accused rapist to establish that he was not acting recklessly with regard to consent when he was in a situation in which a reasonable woman would not have consented. There is a hidden danger in this use of the reasonable woman standard: if the assailant has any reason to believe that the victim does not conform to the reasonable woman standard with respect to her consent to sexual activities, that will become a material element in the case. This will tend to undermine the gains made in some jurisdictions by the introduction of "victim shield laws" for the accused should surely be free to introduce anything he knew or reasonably believed about the victim that would indicate that it was reasonable for him to take her behavior as consent despite the fact that a "reasonable woman" would not have consented.

[31] For a subtle and very helpful discussion of when mistakes about consent are reasonable, see Husak and Thomas (1992).

it is difficult to deny that there is an objective matter of fact about what happened in a rape case. Indeed, we can't defend the appropriateness of applying *any* sort of reasonable agent standard if there is no fact of the matter about what situation the actual agents were in. The reasonable agent standards, after all, ask us to determine how a reasonable agent would act *in the circumstances the agent was in*.[32] We think, then, that it is reasonable to believe that there is an objective fact of the matter about what happened in alleged rape cases and that, while the victim and the purported assailant may well have different perspectives on this reality – perspectives that are shaped by their gender and the way in which gender is influenced by social circumstances – it is nonetheless possible to determine the facts of the matter, including the facts about what the different parties' perspectives of the situation were. Given this, the prospects for what we have called a reasonable *person* standard (a gender neutral reasonable agent standard) are not dim. Of course, what a reasonable person would do may depend in part on that person's strength, experience, social conditioning, and much more. The reasonable person may flee from a threat if physically fit, but not have this as a practical option otherwise. Thus, the practical import of the reasonable person standard will be relativized to various features of the actual agent. Furthermore, physical strength is correlated with gender. Our experience and social conditioning are also so correlated (at least in our society). Therefore, the reasonable person standard will, in some situations, lead to different conclusions for typical men than for typical women. But this is not because the reasonable person standard fails to present a single (gender neutral) standard, but because the standard we are employing is sensitive to features of the agent and the situation that are correlated with gender.

To make this abstract point more concrete, consider what the defender of a (gender neutral) reasonable person standard might say about the Rusk case. While critics of the reasonable person standard rightly decry the conclusion that the victim's "failure to

[32] We might also want to know how a reasonable agent would act in the circumstances that the actual agent reasonably *believed* herself to be in. This only pushes back the objectivity one step. For what situation it is reasonable to believe oneself to be in depends crucially on what evidence one actually has at one's disposal. If there is no objective matter of fact about this, there can be no determinate answer to the question of what situation one *reasonably* believes oneself to be in.

flee, summon help, scream, or make physical resistance" constituted consent, they are quite wrong if they think that this conclusion is mandated by acceptance of a gender neutral standard of reasonability. For it is quite plausible that a reasonable person who had the strength, experience and social conditioning that the victim in this case had would not do any of these things despite having not consented to sexual intercourse. If the Maryland Court of Special Appeals failed to draw this conclusion, we think it is not because it failed to employ a (gendered) reasonable woman standard, but either because it employed a *flawed* reasonable person standard, which was not sensitive to the appropriate features of the situation, or because it employed a reasonable person standard incorrectly.[33]

RESPONSIBILITY WITHOUT REASONABLE AGENTS

So far, we have indicated some of the implications of the gendered reasonability thesis together with the insistence that reasonable agent standards are essential in the law of rape. We have argued for the necessity of a *mens rea* element of rape. In those cases in which the determination of *mens rea* requires appeal to a reasonable agent standard, it will be the standard appropriate to the gender of the perpetrator (assumed here to be male). This, we have argued, has implications for certain advocates of rape law reform who accept the gendered reasonability thesis – implications that have not been adequately acknowledged or defused. In particular, while the proposed use of a reasonable woman test with respect to consent may make it easier to prove one element of the crime of rape, the corresponding employment of a reasonable man standard with respect to the *mens rea* element of the crime may make it harder to establish this element of the crime.

[33] Much of the problem that has led critics to propose the gendered reasonability thesis arises, as Deborah Merritt has suggested to us, from the fact that a mostly male judiciary may well be deficient in determining what a reasonable *person* would do if placed in the situation of the victim in the cases that interest us here. This is indeed a problem, but it is unclear that it is a problem with the *standard* in question, or that it would be corrected by supplanting that standard with a reasonable woman standard.

In closing, we want to suggest dispensing with reasonable agent tests entirely. Such tests ask us to evaluate an actual agent's conduct in comparison with what of a hypothetical "reasonable" agent would have done in similar circumstances. What is to count as part of the agent and what is to count as a part of the circumstances in which the she finds herself is, of course, all important to the outcome of the test. Initially, it might seem that we should treat as part of the circumstances only features of the situation that are, in some intuitive sense, "external" to the person whose behavior is being evaluated. If, for example, we want to know if Smitters took reasonable and prudent actions to minimize the damages caused to him by the wrongful action of some other person, we might be inclined to treat the fact that Smitters was lazy and unfocused in his response to the injury as part of him rather than as part of the circumstances. Thus, we would ask what the reasonable person, who presumably would not be lazy and unfocused in his response, would do in Smitters's position. Based on the fact that such a hypothetical person would have taken actions to prevent some of the harm Smitters suffered, we would conclude that Smitters is responsible for some portion of the harm he suffers. However, this would clearly be the wrong answer if the laziness and lack of focus was a causal consequence of the wrongful action done to him and was unavoidable by Smitters. While the reasonable and prudent person would not have acted as Smitters did, Smitters fails to be reasonable and prudent precisely because of a wrong done him.

This sort of case pushes us to treat features that might ordinarily be thought of as belonging to the agent himself as elements of the circumstances in which we will imagine our hypothetical agent. If we ask, what would a (formerly or otherwise) reasonable agent do in Smitters's circumstances *including the laziness and lack of focus*, we will get a different answer than we would get otherwise.

In light of these sorts of considerations, the reasonable agent test will seem more or less "objective" and more or less sensitive to the particulars of the situation depending on how much we are willing to build into the situation. It is *not* our contention that no principled answer can be given to the question of what is and what is not a part of the circumstances in which we will place our hypothetical agent. We assume it can be.

Even if properly clarified, though, there will remain a question of what bearing the activity of a hypothetical agent has on our judgments of the responsibility of the actual individual. Why is it that Smitters's laziness and lack of focus are not "held against him" while they would be if they were not the result of factors beyond his control? In either case, a truly reasonable agent would have prevented the additional harm. The difference seems to be that it is not reasonable for *us* to require Smitters to take the protective measures that it would be reasonable to take.

This suggests that the reasonable agent test, even if it is clarified satisfactorily, is really a heuristic for something else. And this is good – for, if we are right, it is a heuristic for something that is manifestly of moral significance. It appears to be a heuristic for the question of what it is reasonable for us (or "the law") to require of a person. If this is true, then we can answer quite simply the question of why the actions of a hypothetical reasonable agent are relevant in determining the responsibility of an actual individual. It is because, typically (though not always) it is reasonable for us to require that individuals act as reasonable agents. The reasonable person test assists us in showing that the law's requirements are justifiable on the assumption that it is, typically, justifiable to require people to be reasonable.

Taking the underlying question to be one not of what a reasonable agent *would do* in some circumstance, but what it is reasonable for us (or "the law") to require (expect) this person to do simplifies much of the discussion over reasonable agent standards. Consider once again the Rusk case. On the view being embraced here, the real issue of consent is not determined by what a reasonable agent (man, woman or person) would have done in the victim's, Pat's, circumstances. The question is what is it reasonable to require or expect Pat, in all her individuality, to do in those circumstances. If she were a six-foot, 200 pound, black-belt karate instructor confronted by a five-foot, 140 pound, partially paralyzed assailant, then, *ceteris paribus*, it might be reasonable to treat her failure to scream, call for help, leave or employ physical force to resist the assault as in indication of consent. Alternatively, if she is a five-foot, 90 pound, woman who has been previously raped, confronted by a six-foot, 200 pound, assailant, then, *ceteris paribus*, it seems unreasonable

for the law to demand of her that she engage in these things in order not to be judged to have given consent. Correspondingly, given the actual facts of the Rusk case, it seems quite reasonable for the law to demand that Rusk refrain from any sexual activity in the circumstances. Indeed, it seems reasonable for the law to have demanded that Rusk's behavior be quite different than it was from the outset.[34] On this view, we are not ultimately interested in what a reasonable agent (woman, man or person) would do; we are, at bottom, interested in what it is reasonable for us to require (expect) individuals to do. The gender, if any, of some hypothetical reasonable agent just drops out of the picture.

It would, however, be a mistake to think that *gender* drops out of the picture. The gender of the actual principals is sometimes relevant and sometimes not, depending on whether gender makes a difference to what it is reasonable to require (expect) a person to do in the circumstances. While we are not here arguing for this view, we think it is plausible that gender will frequently be relevant to what it is reasonable to expect of people. This will be especially so in sexualized situations, with respect to which we have good reason to expect that men and women will, as a result of their biological nature and socialized character, tend to view differently.

It is important to the moral justification of the law that it make reasonable demands on people. The question of what a reasonable agent would do is a helpful one in ensuring that the demands of the law are reasonable ones. But, we think, the fundamental issue is the reasonability of the demands of the law, not the behavior of hypothetical reasonable persons.

Before leaving this issue, we should make clear that, just as there is nothing in our present suggestion that entails that issues of gender will drop out, so, unfortunately, there is nothing it in to ensure that they will be given their due. It is quite possible that a mostly male judiciary will be insensitive to issues of gender and how those affect what it is reasonable to expect of women in various situations. It is also quite possible for a mostly male judiciary to be insensitive to what a reasonable person would to if she were a woman in a

[34] We are grateful to Deborah Merritt for pointing out to us that, if the facts of the Rusk case are as we suppose above, then Rusk's behavior throughout the encounter was contrary to what we should reasonably expect.

given situation or what a reasonable woman would do in such a situation. This is a problem of insufficient moral imagination. It will plague the outcome of the sorts of cases that interest us here so long as it persists regardless of the test mandated. Paraphrasing John Stuart Mill we might say: there is no difficulty in proving that any legal standard whatever – even a reasonable woman standard – to work ill, if we suppose universal (or widespread) moral insensitivity conjoined to it.[35]

CONCLUSION

While the above considerations lead us to prefer to dispense with reasonable agent standards altogether – at least at a foundational level of legal theorizing – the thrust of our argument has been elsewhere. We have argued that because rape requires a *mens rea* element, the employment of reasonable agent standards, conjoined with the gendered reasonability thesis, has untoward implications that defenders of the gendered reasonability thesis have not acknowledged or defused. We want to ensure that individuals approach in a sensitive way those sexual situations where misunderstandings over the presence of consent might arise. We do this by requiring that people be sensitive to whatever factors might bear on the presence of consent, and gender may plausibly be one of those. If it is, then we must insist on the reasonability of considering gender, but not on the genderization of reasonability.

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[35] Mill said, "[t]here is no difficulty in proving any ethical standard whatever to work ill, if we suppose universal idiocy to conjoined with it" (1968, p. 265).

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