Springer

Simple Rape and the Risks of Sex

Author(s): George E. Panichas

Source: *Law and Philosophy*, Nov., 2006, Vol. 25, No. 6 (Nov., 2006), pp. 613-661

Published by: Springer

Stable URL: https://www.jstor.org/stable/27652603

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at https://about.jstor.org/terms

Springer is collaborating with JSTOR to digitize, preserve and extend access to *Law and Philosophy*

JSTOR

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

Law and Philosophy (2006) 25: 613–661
DOI 10.1007/s10982-005-5882-9 © Springer 2006

GEORGE E. PANICHAS

SIMPLE RAPE AND THE RISKS OF SEX

(Accepted 26 December 2005)

I.

Early critics of American rape law recognized that the obstacles to just legal reform were numerous, deeply entrenched, and well fortified. Thus they knew that any successful reform campaign would require simultaneous and persistent attacks on multiple targets including ineffective statutes, unjust rules (both procedural and evidentiary), and the demonstrably sexist attitudes and misogynistic practices of police, prosecutors, judges, and legislators. Absent such multilateral efforts, prevailing legal practices would persist in preventing most complaints of rape from becoming criminal charges and most criminal charges from being vigorously pursued. Equally predictable, the law of rape would continue to be hostile to women and friendly to rapists.[1]

The long and hard fought campaign to reform rape law yielded considerable success. Specially trained police officers now work in concert with both counselors for and advocates of victims. These police take seriously complaints that not long ago would have been "unfounded" at the end of insulting and often humiliating interviews of victims. With the aim of

[1] The path-breaking article here is Susan Griffin's 'Rape: The All-American Crime', *Ramparts* (September, 1971): 26–35. Also important among early papers is Camille E. LeGrand's 'Rape and Rape Laws: Sexism in Society and Law', *California Law Review* 61 (May, 1973): 919–941. The most influential book-length treatment of the period is Susan Brownmiller's *Against Our Will: Men, Women, and Rape* (New York: Simon & Schuster, 1975). The best critical overview of the early reform movement remains Rosemarie Tong's *Women, Sex, and the Law* (Totowa, NJ: Roman and Allenheld, 1984), Chapter 4.

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

increasing the willingness of juries to convict and thus of prosecutors to prosecute alleged rapists aggressively, legislators modified criminal statutes to include different degrees of rape (or its common statutory equivalent, "sexual assault") with attending differences in punishment.[2] But perhaps most striking are the dramatic changes in evidentiary and procedural rules – rules that were without analogues in other areas of the criminal law.

No longer must victims resist an attacker "to the utmost," thereby effectively requiring that rape victims be battered or killed if charges are to be brought and pursued. Prompt reporting requirements have been eliminated along with the requirements of some jurisdictions that victims undergo psychological evaluations designed to determine their mental health – hence credibility – prior to and independent of the effects of the sexual attack. Courts no longer require corroboration of victim testimony of penetration or police testimony of battery.[3] While in some jurisdictions the marital exemption (whereby physically forced sex of a woman by her husband does not count as rape) has been modified, in others it has been eliminated.[4] In criminal court proceedings, victims are shielded from defense inquiries (designed to undermine credibility by impugning their character) into their sexual history, preferences, demeanor, choices, and conduct.[5] And juries no longer receive instructions abiding by the 17th century admonition

---

[2] See Stephen J. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Cambridge, MA: Harvard University Press, 1998), Chapter 2. Especially important here is Schulhofer's discussion of the influence of the Model Penal Code, pp. 20–29.

[3] See Sanford H. Kadish and Stephen J. Schulhofer, *Criminal Law and Its Processes*, 6th ed. (Boston: Little, Brown, 1995), pp. 339, 352, 362, and nts. 7–11, 377, nt. 17.

[4] However, most states retain some form of the marital exemption. See Schulhofer at p. 30.

[5] Evidence indicates that shield laws, though permitting more interrogation than initially anticipated, improve the treatment of victims. See Kadish and Schulhofer at p. 377, nt. 17.

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

that rape charges are far more easily brought than defended against.[6]

The combination of all the above with dramatic changes in attitudes regarding what counts as proper sexual conduct for women – especially unmarried adult women – has resulted in significant differences in the treatment of rape victims. With respect to women who have been subjected to forcible sex – specifically physically forcible sex – American rape law is, by statute and in practice, significantly more just and increasingly more protective of the interests of women than it was a mere two decades ago. So there can be no question but that there have been important victories in the campaign to address the long-standing defects in this important area of the criminal law.

However, as several legal scholars have shown, and when considered in light of appellate court decisions and reporting and conviction rates, success in rape-law reform has been largely confined to aggravated rape.[7] That is to say, improvements in the law of rape have been limited to cases of nonconsensual sex where immediately prior to or during a sexual attack and so as to achieve penetration, the assailant employs or credibly threatens to employ physical force intended or likely to result in bodily injury. When dealing with heterosexual interactions where one party (most always the male) either: (1) employs coercive tactics not involving physical force or the credible threat of it, or (2) rejects or ignores clear expressions of nonconsent to sex, or (3) fails, in circumstances where consent is

[6] In *The History of the Pleas of the Crown* (London: 1678, S. Emlyn (ed.), 1778, pp. 628–629), Matthew Hale stated that rape "is an accusation easily to be made and harder to be proved, and harder to be defended by the party accused, though never so innocent."

[7] It is worth noting, however, that the effects of legal reform on reporting and conviction rates are ambiguous and vary with jurisdictions. See Schulhofer at p. 38, Ronet Bachman and Raymond Paternoster, 'A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?', *Journal of Criminal Law and Criminology* 84 (1993): 554–574, and Cassia C. Spohn and Julia Horney, 'The Impact of Rape Law Reform on the Processing of Simple and Aggravated Rape Cases', *Journal of Criminal Law & Criminology* 86 (1996).

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

unclear, to seek and acquire it, the reformed law of rape does not respond effectively or consistently.[8]

This apparent failure of the law is not limited to jurisdictions in which only aggravated rape is treated as a serious felony. Even in the small number of jurisdictions with criminal statutes that do not take the use or threat of physical force as a necessary condition of felony rape, vigorous prosecution of alleged rapists is largely limited to those perpetrators believed to have employed physical force as the coercive means for achieving sexual penetration.[9] So with respect to reforms that would expand the law of rape so as to proscribe nonconsensual sex resulting from tactics that do not include the use or credible threat of physical force, efforts at systematic reform have largely stalled. With a few exceptions, and these of arguable efficacy, the reformed law of rape is the reformed law of aggravated rape. Non-aggravated or "simple rape" – nonconsensual sex that does not involve the actual use or credible

[8] Historically, appellate courts have been reluctant to sustain convictions in cases of non-aggravated rape, i.e., where there is no use or credible threat of physical force to achieve intercourse. See, for example, *Commonwealth v. Berkowitz* 641 A.2d 1161 (Pa. 1994), where a college student's conviction was overturned even though he allegedly ignored the victim's clear expression of "no" to intercourse. Because he did not use physical force or any credible threat of it to achieve intercourse, the rape statute was found not to apply to his conduct (A discussion of *Berkowitz* follows in section IX, below). The courts reached similar decisions in a line of cases including *Commonwealth v. Mlinarich*, 498 A.2d 395 (Pa. Super. 1985), *People v. Warren*, 446 N.E. 2d 591 (Ill. App. 1983), *State v. Alston*, 312 S.E. 2d 470 (N.C. 1984) (A discussion of *Alston* follows in section IX, below.), and *Goldberg v. State*, Md. Ct. Spec. App. 1979.

[9] Since the decisions in *Mlinarich* and *Berkowitz*, Pennsylvania's rape statute has changed to include, as a felony, a charge of non-aggravated rape. However, there is as yet little evidence that prosecutors use the new statute to bring the charge as the primary offense, though some bring the charge as a lesser-included offense. Other states have changed rape statutes so as to include a broader range of putatively coercive conduct as constituting the "force" or "forcible compulsion" requirement of felony rape. But here again, there is no unambiguous evidence that as a result of these statutory changes there has been an increase in the prosecution of all forms of non-aggravated or simple rape.

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

threat of physical force or violence by a single person – remains largely a moral rather than a legal notion.[10]

II.

This paper addresses the highly controversial question currently confronting the rape-law reform movement: Should, as several philosophers and legal scholars recommend, the reform of rape statutes proceed so that they treat all cases of simple rape as serious crimes? Good arguments have been provided for revising statutes so as to include two classes of simple rape as felonies. The first class is limited to cases where all the following obtain: (1) any preexisting relationships between the relevant parties were not entered into for romantic or sexual purposes (e.g., physician and patient, attorney and client, teacher and student), (2) there exists a significant differential in power between the parties that facilitates the use of coercive threats (either overt or covert) to achieve sex, and (3) the party enjoying the power advantage succeeds in employing a coercive threat to achieve sexual penetration.[11] The second class

[10] The phrase "simple rape" is used by Susan Estrich (*Real Rape*, Cambridge, MA: Harvard University Press, 1987, at p. 4) who borrows it from Harry Kalven and Hans Zeisel, *The American Jury* (Boston: Little, Brown, 1966). Kalven and Zeisel also include among aggravating factors whether the assailant was a stranger to the victim and whether there were multiple assailants. Thus simple rape occurs if, and only if, there occurs nonconsensual sexual intercourse, the assailant and victim (who is fully conscious) are known to each other, the assailant acts alone, and there is neither a credible threat nor use of physical force or violence to achieve penetration. Estrich is less careful in her use of "simple rape," for she counts as simple rape cases where physical force and credible threats of injury are present. See her comments on *Brown v. State* at p. 30 and *Gonzales v. State* at p. 66.

[11] Schulhofer provides the first systematic defense of such statutory reform by appeal to the notion of coercive offers. For a critical review of Schulhofer and suggested revision of his position regarding these cases of simple rape, see George E. Panichas, 'Rape, Autonomy, and Consent,' *Law & Society Review* 35 (2001): 259–268.

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

identifies cases, far fewer in number, where fraud is employed to secure consent to sex.[12] The primary concern of this paper, however, is with a third class of sexual interactions – imprecisely and often misleadingly referred to as acquaintance or date rape. While involving sexual interactions that are less than fully consensual, this class includes neither the complete combination of conditions required by the first class nor fraud.[13]

This paper contends that expanding the law of rape so as to include this third class of sexual interactions – even when sex occurs because one party employs highly manipulative strategies sometimes including intimidation – as serious criminal offenses is likely to result in unjust treatment of the relevant parties. Of central importance in defense of this contention is an argument showing that on the concept of consent best suited to this class of cases there is little justification for treating these cases as serious crimes. This argument has significant implications for reform proposals that would make felons of men who, whether employing manipulative tactics to achieve intercourse or not, fail to secure "meaningful" consent from their sexual partners. Hence this paper also takes aim at rape-law reform

---

[12] See Joan McGregor's discussion of sex by fraud or deception in 'Why When She Says No She Doesn't Mean Maybe and Doesn't Mean Yes: A Critical Reconstruction of Consent, Sex, and the Law', *Legal Theory* 2 (1996): 199–203. See also Schulhofer, pp. 152–159.

[13] The modifying phrase, "less than fully consensual," as used here and throughout denotes a sexual encounter or a specific sexual act with respect to which (1) at least one participant expresses some degree of sincere unwillingness to another participant (in the same encounter or act) by behavior, including verbal behavior, indicating reluctance, resistance, or nonconsent, and (2) that unwillingness is not wholly and non-coercively eliminated prior to the relevant encounter or act. On this definition, a person who has profound but unexpressed reservations (rooted in guilt, for example) about a specific sexual encounter, but participates anyway, does not engage in less than fully consensual sex. Nor does less than fully consensual sex occur when reluctance or nonconsent is expressed only subsequent to a sexual encounter or a specific sexual act. Sincerely registered regret is not nonconsent.

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

that would require affirmatively granted consent for non-felonious sex.[14]

III.

At the outset of the rape reform movement, both the common law and the criminal statutes identified aggravated rape as among the most serious offenses – those commanding the highest penalties. There was then, as there is now, no serious doubt about whether sex achieved by "physical forcible compulsion" inflicts a grave personal harm constituting precisely the sort of wrong that ought to command a proportionate response from the criminal law.[15] But there was also, as feminist scholarship showed, a broad range of widely accepted, self-serving and often self-perpetuating myths that functioned to create doubts about whether and when aggravated rape actually occurs.[16] So the point of laboring to bring about the significant changes in the procedural and evidentiary rules recounted in section I was to eliminate both cultural and legal impediments to the just enforcement of this most serious offense. Given that the law acknowledged aggravated rape as a serious wrong thereby justifying its classification among

[14] Those who have recommended such a reform include: Lois Pineau, 'Date Rape: A Feminist Analysis', *Law and Philosophy* 8 (1989), at p. 223, Lynn Henderson, 'Rape and Responsibility,' *Law and Philosophy* 11 (1992), at pp. 172–173, McGregor, at p. 190, and Schulhofer at p. 282. In his Model Criminal Statute for Sexual Offenses, Schulhofer would find a person guilty of the third degree felony of Sexual Abuse if "he knows that he does not have the consent of the other person," and where consent requires that at the time sex occurs, "there are actual words or conduct indicating affirmative, freely given permission" at p. 283. For an evaluation of this proposal and criticisms of Schulhofer, see David P. Bryden, 'Redefining Rape', *Buffalo Criminal Law Review* 3(2) (2000): 396–411.

[15] But it is important to recognize, here and throughout, that not all harms are or ought to be treated as wrongs or as resulting from wrongdoing. So one person can be harmed by another (or herself) without being wronged, and can be wronged without being harmed. See Joel Feinberg, *The Moral Limits of the Criminal Law, Vol. 1, Harm to Others* (New York: Oxford University Press, 1984), pp. 32–36.

[16] See Pineau, at pp. 225–33 and Tong, pp. 98–104.

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

felonies of the first or second degree, the problem of justice addressed successfully by the first wave of rape-law reformers was that of making the criminal justice system act on this acknowledgement.

But as noted above, the successful reform of the law of aggravated rape did not presage a significant and uniform expansion of the range of conduct to be included among felony rape offenses. Many legislators remain disinclined to rewrite statutes so as to include every simple rape as a felony, and appellate courts have resisted interpretations of existing statutes that would facilitate prosecution of all classes of simple rape as felonies. Why, then, has the criminal justice system largely resisted treating simple rape as of comparable gravity to aggravated rape, and is it justified in doing so?

The influential answer, provided by feminist scholarship and given its first systematic expression by Susan Estrich, asserts that while the patriarchal biases in the pre-reform law of aggravated rape were relatively easy to expose and correct, in simple rape they are more subtle and insidious, and thus far more resistant to elimination. While these biases are evident in the conduct of legislators, lawyers, and police, they are palpable in certain well known an oft-cited appellate court decisions in which a man, known to the victim, employs highly manipulative or intimidating tactics, but not physical coercion, to overcome apparent nonconsent. In the minds of the justices, Estrich and other feminists argued, the legal standard for determining what constitutes the relevant kind of force, resistance, and harm is that of how "real men" would and should understand and respond to the threats and bluster of bullies. So rather as a man is obligated by the norms of manliness to stand-up and test the antics of a barroom bully – with aggressive physical resistance if necessary – a "woman of virtue" should be held to a comparable standard when confronted with the antics of a sexual bully.[17]

[17] In the frequently cited and oft-discussed *State v. Rusk*, 424 A. 2d 720 (Md. 1981), Justice Coe, writing in dissent (holding that the court erred in finding Rusk guilty of rape), wrote the following:

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

Absent the "appropriate" (i.e., male) responses to coercive tactics for sex, the courts do not regard victims of these tactics as genuine victims of criminal wrongdoing. So in overturning felony convictions where the use of physical force was absent or ambiguous, the courts effectively held that the only relevant coercive element in felony rape is physical force evidenced by physical resistance. On this analysis of the case law, the courts established legal indicia of rape that discounted the harm and wrong of non-physically coerced sex and thus wrongfully ignored a woman's point of view regarding when non-physically coerced yet nonconsensual sex ought to be treated as criminal conduct.

Unsurprisingly, then, given the extent and depth of the male biases in rape law, even with statutory reforms that de-emphasize a victim's response to sexually coercive tactics employing physical force (such that, for example, women need not physically resist a sexual attack at all), little changed. In cases where: nonphysical yet putatively coercive tactics are employed, physical harm or injury is largely absent and/or nonconsent is clearly expressed and yet ignored, prosecutions remain uncommon. The law may no longer regard only severely battered women as true victims of rape, but without clear evidence of the intentional and coercive use of physical force to achieve penetration, it remains disinclined to regard even aggressive and highly manipulative sexual tactics as sufficient for a grave legal wrong. Justices may believe that sex by manipulation or intimidation is morally reprehensible, but the bias against regarding such sex as constituting serious wrong-

---

While the courts no longer require a female to resist to the utmost or to resist where resistance would be foolhardy, they do require her acquiescence in the act of intercourse to stem from fear generated by something of substance. She may not simply say, "I was really scared," and thereby transform consent or mere unwillingness into submission by force. These words do not transform a seducer into a rapist. She must follow the natural instinct of every proud female to resist, by more than mere words, the violation of her person by a stranger or an unwelcomed friend. She must make it plain that she regards such sexual acts as abhorrent and repugnant to her natural sense of pride. She must resist unless the defendant has objectively manifested his intent to use physical force to accomplish his purpose (p. 733).

This content downloaded from 70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

doing prevents simple rape from being treated as conduct comparable to aggravated rape. Thus the endurance of the male bias woven throughout the fabric of the law of rape explains why, as a matter of statute or practice in most jurisdictions, simple rape is not taken to be of a kind with aggravated rape. And because the law of rape obscures or denies the nature and extent of harmful wrongdoing resulting from simple rape, it fails to protect adequately the interests and rights of women. On this influential analysis, the law's treatment of simple rape as legally indistinguishable from "sinister seduction" is both morally and legally objectionable.[18]

Analyses of this kind provide the theoretical foundation for legal reforms developed by the second wave of rape-law critics. For in exposing and rejecting the biases whereby only physically coerced, physically resisted, and physically injurious sex count as harmful wrongdoing, the path is cleared for taking all less than fully consensual sex to involve the essential wrong of rape. And by arguing that physical force cum physical resistance ought not be a necessary condition of nonconsent – that is, consent that is not valid – and that other forms of conduct can be sufficient for nonconsent, both aggravated and simple rape can be treated as felonies. So rather as the consent-invalidating element in other areas of the criminal law – consider theft, extortion, and blackmail – is not limited to the actual use or credible threat of physical violence, neither should this be the case with rape.[19] In a way that brings greater overall consistency to the criminal law's treatment of valid consent, then, a more inclusive model of felonious sex – one that expands the range of what counts as nonconsensual sex – provides more adequate means for properly identifying and responding to rape.

[18] See Justice Wieand's opinion for the majority in *Commonwealth v. Mlinarich*, especially where he argues that the legislature "did not intend to equate seduction, whether benign or sinister, with rape and make it a felony of the first degree." p. 402.

[19] In criticizing several decisions (including *Mlinarich*) where rape convictions were overturned because perpetrators did not employ physical force, Estrich points out that other felonies, including certain forms of theft and extortion, do not require the use physical force, at p. 70.

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

Recommendations for rape-law reform based on this more inclusive model insist that whenever a perpetrator engages in conduct that results in sex that is less than fully consensual – even if that conduct falls short of coercion or fraud – a felony is committed. As instances of criminal conduct, then, the difference between simple and aggravated rape is a matter of which illegitimate tactic the rapist chooses to employ. However, it does not follow that felony rape cannot include different offenses – aggravated rape, gross sexual misconduct, e.g. that are pertinently distinguished by degree. Rather as in other areas of the criminal law, considerations such as the nature and extent of harm to victims and the varying degrees of culpability of perpetrators are relevant in determining the appropriate amount of punishment hence degree of the offense.[20] On this model, then, treating both aggravated and simple rape as felonies will not entail unjustly harsh punishment of the latter. Some rapists will go to jail for a long time, others will not. So even while affirming that the core wrong of all rapes is essentially the same and sufficiently grave to count as a felony, the reformed law of rape can still punish simple and aggravated rape differently.

But the acceptability of reform plans based on the inclusive model requires more than apparent consistency with other areas in the criminal law and assurances of justly proportionate punishment. These plans must successfully address a set of fundamental and importantly related questions – questions raised repeatedly by the appellate courts – and they must do so in a way that provides justification for the crucial contention that significant wrongdoing is present whenever morally suspect tactics result in sex that is less than fully consensual. These questions include: (1) how the wrong of rape is best analyzed, (2) how the criminal law ought to identify valid consent to sex, and (3) precisely what rights and responsibilities the criminal law should ascribe to persons engaged in conduct likely to result in sex. As shall now be argued, while the reformed law of *aggravated* rape readily provides compelling answers to these

[20] See McGregor, at pp. 189–191. Schulhofer makes a similar provision in his model statute, at p. 283.

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

questions, there are powerful reasons – reasons accentuating the distinctive nature of aggravated rape – for thinking that these answers are not available to reform plans based on the inclusive model. Specifically, they are not available to plans that would treat all less than fully consensual sex as serious crimes. Thus insofar as proponents of reform based on the inclusive model do not take adequate account of the distinctive nature of aggravated rape, they err in thinking that the criminal law ought to treat all instances of nonconsensual sex as serious crimes. As will eventually be seen, absent new and compelling answers to these questions, it will appear that the second wave of rape-law reform is based on mistakes about how consent and nonconsent are best understood in cases of allegedly nonconsensual sex between acquaintances and about the rights and responsibilities of acquaintances assuming the risks of sexual intimacy.

IV.

To start, consider how the reform law of aggravated rape responds to questions (1)–(3). Because of the undeniable presence of avoidable and willfully inflicted harm, questions concerning the presence of grave wrongdoing seem perfunctory. Even when physical injury is slight, overwhelming evidence shows that the use or threat of physical force to penetrate a person's body sexually so terrorizes, degrades, and humiliates victims that immediate and often long-term psychological injury and moral harm are common. Furthermore, because the facts of harm and injury in these cases are so conspicuous and uncontroversial they render perpetrator-intent and culpability – the presence of the requisite *mens rea* – equally uncontroversial. A man who uses his fist or a weapon to injure and/or instill terror so as to achieve sexual penetration knows or ought to know that he perpetrates a serious criminal offense. In fact, the combination of obvious and undeniable harms – physical, psychological, and moral – with conduct willfully and knowingly inflicting these harms creates so strong and so reasonable a presumption of wrongdoing that even if sexual penetration did not occur, and the case were one of attempted aggravated

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

rape, there would persist a powerful presumption of egregious wrongdoing.

Now just as the facts constituting aggravation suffice to establish a strong and reasonable presumption of wrongdoing, they effectively eliminate any defense, or claims of mitigation or excuse, based on the perpetrator's beliefs in his victim's consent. Indeed, in cases where the perpetrator employs physical force so as to overpower and sexually penetrate his victim and where there is clear evidence of physical injury and sexual penetration, so strong is the presumption of nonconsent that any use of a consent-defense is now taken to be foolhardy.[21] Valid consent is also reasonably presumed absent in cases where a credible threat of physical violence succeeds. Of course, the question of what should count as a credible threat of physical force or injury remains controversial, with case law affording numerous decisions that confirm feminist allegations that in practice only physical force resulting in physical injury is dispositive. Nonetheless, when a threat of physical violence is found credible, forcible compulsion is confirmed and nonconsent is entailed.

Thus question (3) is rendered moot. Any competent man who intentionally employs physical force so as to achieve sexual penetration, inflicting harm in the process, can be reasonably presumed to have the requisite *mens rea*. On even the highest standard of culpability, he knows or ought to know that his acts violate his moral and legal duties. And in aggravated rape, because there is most always no semblance of valid consent, there is no victim-responsibility. Claims of mitigation or excuse based on the perpetrator's beliefs that consent was present are properly regarded as dubious. A considerable achievement of the rape-law reform movement is that the law no longer takes rapists seriously when they deny criminal intent by appealing to self-serving myths that a certain (if not extensive) amount of real or threatened physical injury or psychological harm is somehow compatible with fully consensual sex. The law no longer countenances the idea that victims who "go along with"

[21] See David P. Bryden and Sonja Lengnick, 'Rape in the Criminal Justice System', *Journal of Criminal Law & Criminology* 87 (1997), at p. 1204.

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

physically forced or physically threatening sex are to some extent or degree responsible for or deserve their own rape.

Once the male biases in the pre-reform law of aggravated rape are identified and eliminated, the logic of the offense appears self-evident: the very facts of aggravation constitute unambiguous evidence of criminal wrongdoing. Especially in the paradigm cases of aggravated rape – aggravated stranger-rape – these facts establish links among the intentional and harmful use of force, nonconsent, and criminal responsibility that are so powerful as to be, in effect, legally indefeasible. On the logic of aggravated rape, the perpetrator presumptively knows or ought to know that in using physical force so as to achieve sexual penetration, valid consent is absent and criminal conduct is present. In virtue of an unbiased, clear-headed understanding of the nature of aggravated rape, then, convincing evidence of the proscribed conduct – of the *actus reus* – is properly construed as convincing evidence of both nonconsent and *mens rea*. Properly reformed, the law of aggravated rape establishes a serious felony of little ambiguity, and implements it accordingly.

Notice, then, that because the component elements of aggravated rape are so stark, the need for a general theory of the wrong of rape, valid consent, and the rights and responsibilities of the relevant persons does not arise. No matter how complex the notions of legal consent and wrongdoing, for example, a complete theory of them is assuredly not required to determine whether a woman, battered and sexually penetrated by a stranger, consented to the sexual penetration and was wronged by it. Indeed, if a theory had implications inconsistent with this determination that would count as sufficient reason for thinking the theory, not the determination, is mistaken. However, it is also important to notice that as soon as cases diverge from the paradigm of aggravated stranger-rape, the simple logic of aggravated rape falters, and the need for a more comprehensive theory becomes immediately apparent. And the divergence need not be great, as is evidenced in a highly instructive case of aggravated acquaintance rape in which an appellate court identified the limits of the logic of aggravated stranger-rape and in so doing resurrected questions of how best

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

to understand wrongdoing, consent and responsibility in sexual interactions that are less than fully consensual.

V.

In 1997, Kurt Fischer was charged with several criminal offenses, including involuntary deviate sexual intercourse and aggravated indecent assault. Fischer was an eighteen year-old, first-year college student when he and another first-year student with whom he was acquainted went to his dormitory room. At trial, the young woman testified that during this afternoon encounter she and the defendant kissed and fondled each other, but there was no sexual penetration. The defendant's account differed. He claimed that they had consensual "rough sex," including her holding his arms above his head, biting him on his chest (other students, friends of the defendant, testified to seeing bite marks), and initiating and performing fellatio. They separated, had dinner with friends (at which time Fischer showed the bite marks to others) and then met again, some two hours later, in his room. The victim testified that during the second encounter Fischer locked the door (preventing others from entering, but not someone from leaving), pushed her onto his bed, held her wrists above her head and forced his penis into her mouth. She struggled and resisted throughout, verbally expressing her unwillingness to engage in sex. He ignored her. She testified that Fischer pushed his hand into a hole in her jeans, and penetrated her digitally before inserting his penis into the hole and removing it to ejaculate on her face, hair, and sweater (the prosecution entered into evidence laboratory findings of sperm on the sweater). When she attempted to leave, he stood in her way, but she kneed him in the groin and was able to depart.

Again, Fischer's account differed, this time dramatically. He claimed that upon entry to the room the victim asserted that the sex would have to be quick. They engaged in conduct similar to that which occurred earlier. Fischer admitted to the touching, holding her arms above her head, straddling her, and placing his penis in her mouth. When she responded to his "I know you want my dick in your mouth." with "No." he responded with

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

"No means yes." But when she reasserted her unwillingness with "No, I honestly don't." he stopped, but they continued to kiss and fondle each other. Fisher testified to reinitiating sexual contact by touching her thigh, but stopped when she expressed anger. She left to attend a required lecture but subsequently sought and received medical attention.

Kurt Fischer was convicted of all the serious charges against him, but prior to serving three and one-half years in prison, he appealed his conviction.[22] The appeal was brought on a single issue, whether Fischer received ineffective counsel because his attorney failed to request a jury instruction regarding the defense of mistake of fact. Specifically, the appeal argued, Fischer's attorney should have asked the trial court to instruct jurors that they could acquit if they found that the defendant reasonably, even though mistakenly, believed his victim consented to sex. While the appeal was denied on narrow grounds, the court was plainly sympathetic to the appellant's argument for the availability of a mistake of fact defense in cases of this kind.[23]

Writing for the majority, Justice Beck argued that in cases deviating from the paradigm of aggravated stranger-rape with obvious physical injury, fundamental questions concerning the presence of consent and compulsion quickly become difficult to resolve. And this is not simply because, in the usual absence of a third party witness, the only relevant issue before a jury is that of determining which party is most credible. Rather, the difficulty is a matter of determining precisely what counts as evidence of

---

[22] *Commonwealth v. Fischer*, 721 A.2d 1111 (Pa. Super. 1998).

[23] The court argued that controlling precedent was the 1982 decision in *Commonwealth v. Williams* (294 Pa. Super. 93, 439 A. 2d). In *Williams* the court noted that Pennsylvania law does not allow a mistake of fact defense in aggravated rape, and refused to usurp legislative prerogative by creating such a defense. Even though, in the Subcommittee Notes of the Pennsylvania Criminal Suggested Standard of Jury Instructions, there was a recommendation that a carefully explained mistake of fact defense should be provided to juries in cases of aggravated rape – especially given changes in the rape-law (subsequent to *Williams*) expanding the notion of force – the law had yet to be changed to reflect this recommendation. Thus on grounds of ineffective counsel, Fischer's attorney could not be faulted. After all, an attorney can hardly be expected to act on what might someday be, but was not then, law.

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

nonconsent and *mens rea* once the concept of force has been expanded (as occurred in statutory reform prior to *Fischer*) so as to include "compulsion by physical, intellectual, moral, emotional or psychological force, either express or implied."[24] The court agreed with the assertion made in the appellant's brief that expanding the concept of force in sexual assault to include "intellectual or moral" force, "inextricably links the issues of consent with *mens rea*" in a way that should require jury consideration of the defendant's state of mind at the time of the encounter.[25] Without such a consideration, as assured by the proper jury instruction, the jury would effectively be barred from determining whether a material element of the offense – the requisite *mens rea* – was even present. And as appellant's counsel argued, this is "patently unfair to the accused."[26]Although the current state of the law requires holding this argument inapplicable to the instant case and thus entails denying the appeal on grounds of ineffective counsel, the court agreed that the law should be changed such that if the defense employs a defense of mistake of fact – as it did in *Fischer* – then the jury should receive an instruction concerning this defense.

The recommendation of this court has far-reaching implications for how the law ought now to treat cases of non-aggravated yet less than fully consensual sex between acquaintances. And this is not simply because in most all such cases where there is little if any doubt about either the identity of the accused or (given current technology) whether sexual intercourse occurred, the defense of mistake of fact has become *the* defense of choice. Rather, the critical point here with respect to the law of rape is that by agreeing with the appellant's contention that in these cases questions of consent and *mens rea* are linked "inextricably," this court would jettison the logic of aggravated rape. That is to say, outside clear cases of aggravated stranger-rape, this court would reject inferences whereby convincing evidence of the *actus reus* alone suffices as convincing evidence of both nonconsent and *mens rea*. Once the

[24] See 18 Pa. C.S.A. § 3101.
[25] *Commonwealth v. Fischer*, at 1118.
[26] Id.

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

purportedly coercive element in less than fully consensual sex falls short of or is different than the use or threat of physical force by a stranger, questions of consent and intent – and with them questions of wrongdoing and responsibility – would require precisely the sort of theoretical scrutiny eschewed by the simple logic of aggravated stranger-rape.

But was this court correct to endorse the appellant's contention that when sex is less than fully consensual but does not occur because of the coercive use of physical force, questions of consent and *mens rea* should be taken as inextricably linked? Indeed, what does this contention mean such that its truth requires the availability of, and a clear jury instruction regarding, a mistake-of-fact defense in order to assure fair treatment of the accused? One way to address these questions involves looking at a relatively simple case where questions of consent and *mens rea* are linked inextricably, understanding what this amounts to, and then returning to the question of why a strong linkage between consent and *mens rea* should be affirmed in cases of non-aggravated yet less than fully consensual sex between acquaintances.

Consider the case of a woman who takes an automobile on a month-long trip on the belief that she has permission to borrow it. She believes she has permission because, as occurred in the past, she emailed her request to borrow the car and received the usual email-response – with the owner's return email-address and nickname appearing at the bottom – granting permission. Unbeknownst to the borrower, however, the response was not genuine. Rather, the wife of the car's owner sent the response with the intent of causing considerable anger and inconvenience, and so the borrower has a reasonable but mistaken belief in consent. Now in the unlikely event that charges were brought in this case, a mistake-of-fact defense against a charge of theft certainly ought to be available to the accused just because her reasonable belief that she had permission to borrow the car shows she had no intent to steal it and thus committed no crime. And of course given that this would be her defense and that it would be a true defense, it would be patently unfair to diminish consideration of her reasonable belief in consent when determining whether she is guilty.

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

Indeed, given that a mistake of fact would be exculpatory, a proper jury instruction would and should put the issue of *mens rea* emphatically before the jury.

Worth emphasizing here is that with respect to criminal responsibility; i.e., to whether a crime has been committed, it does not matter that in the ordinary sense of the terms, the owner did not grant permission – the owner did not consent – to loan the car. Nor does it matter that the owner endures a loss because of the borrower's mistake. Because the borrower's reasonable belief in consent shows the absence of *mens rea*, there is no crime. The owner's nonconsent and loss are both irrelevant. So in this kind of case – where reasonable belief in consent defeats *mens rea* – it certainly seems correct to say that questions of consent and *mens rea* are inextricably linked and mean that the reasonable belief of the accused in the presence of consent legally overpowers the owner's claim of nonconsent. And, of course, on this meaning, and given the facts of the case, it would be unfair to hold the borrower criminally responsible for taking and using the car. But consent and *mens rea* are linked in a second way. For now imagine that the "borrower" knew the owner of the car and his spouse were in the midst of a nasty divorce, strongly suspected that the owner's wife had sent the email, and decided to exploit the situation for her own benefit. Here the "borrower's" reasonable belief in the absence of consent indicates (at least some degree of) culpability and it would be unfair to the owner of the car if this fact were ignored when considering prosecution of the "borrower." Thus questions of consent and *mens rea* are also linked inextricably in this way: a reasonable belief in nonconsent indicates the presence of *mens rea* such that it would be unfair not to hold the "borrower" in some degree responsible for taking the car.

Return then to the initial question of whether the court was correct to agree that where something other than coercive physical force is present (especially between acquaintances) consent and *mens rea* should be taken as inextricably linked. Though evasive about how this "linkage thesis" might eventually be applied to tough cases like that of Kurt Fischer, the court was clear about the need for its application in cases where

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

the purportedly coercive element is "intellectual, moral, emotional, or psychological" and does not involve the use or credible threat of physical force. And the court's position here is plainly defensible. For it is far easier to be mistaken about whether one employs "intellectual, moral, emotional, or psychological" coercion to achieve intercourse than about whether one employs physical coercion to the same end. Indeed, and assuming there are such things as, for example, intellectual and moral coercion, given the absence of criteria for determining what counts as coercive conduct, not only are reasonable mistakes likely, but fair warning about what constitutes an offense seems absent. The court correctly recognized that with the considerable broadening of the definition of what counts as coercion, there comes a considerable lowering of the standard of what counts as coercive conduct. Thus the price paid for this lowered standard is a greatly increased likelihood of legally valid excuses based upon reasonably mistaken beliefs about the presence of consent and reasonable ignorance of what sort of conduct is legally prohibited.

Now because these cases are rife with the possibility of precisely the sort of mistake (one that is reasonable and serves to defeat *mens rea*) that serves as a complete defense in the criminal law, it would be patently unfair to deny the mistake-of-fact defense to the accused. And of course making this defense available to the accused for this reason affirms the linkage thesis in its first meaning – that a reasonable belief in consent legally overpowers claims of nonconsent in a way such that it would be unfair to hold the accused criminally responsible for his conduct. So unless one were to deny the need for the mistake-of-fact defense in precisely those cases where fairness requires its availability, the court was correct to encourage that in cases of non-aggravated yet less than fully consensual sex, the linkage thesis should apply.

The court in *Fischer* would refuse to apply the simple logic of aggravated stranger-rape to cases where the allegedly coercive element does not involve the use or credible threat of physical force. In cases of alleged non-aggravated acquaintance rape, then, they would reject inferences that take compelling evidence

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

of the *actus reus* to serve as compelling evidence of both non-consent and *mens rea*. In so doing, the court proffered, albeit in nascent form, a more complicated logic for application to cases of non-aggravated acquaintance rape. This logic takes the question of consent – of legally valid consent to sex – to be linked to the intent of the accused in a way such that compelling evidence of *mens rea* is a necessary condition for establishing the critical legal fact of nonconsent. Said another way: claims of nonconsent are legally vitiated by the absence of *mens rea*. As shall now be argued, once developed and defended more fully, this court's recommendation has far more powerful implications for the law of rape – specifically for how the law should treat non-aggravated yet less than fully consensual sexual interactions – than the court saw fit to acknowledge.

VI.

Recall that on the logic of aggravated stranger-rape there is little need for a comprehensive theory of the wrong of rape, valid consent, and the rights and responsibilities of the relevant parties. The coercive use of physical force tends to settle these issues without a theory. But given the demonstrated inadequacy of this logic for cases that fall outside the paradigm of aggravated stranger-rape, the need for such a theory – or at least certain indispensable component elements of it – becomes far more pressing. For the import of *Fischer* just is that there may well be at least some sexual interactions where even though the accused employs physical force to achieve sexual penetration, even though there is evidence of physical or psychological harm, and even though there is testimonial evidence of nonconsent, there may still be insufficient grounds to establish criminal intent, hence criminal wrongdoing. Now if this is true of at least some cases of *aggravated* acquaintance rape, then it would certainly seem to be true of a far greater number of cases where the coercive use of physical force is absent – that is, in a far greater number of less than fully consensual sexual interactions between acquaintances. But of which cases is it true, and why? The answer to this question requires a more careful consideration of the linchpin of the reasoning in *Fischer* – the linkage thesis – with

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

the aim of showing that when properly developed this thesis should constitute the cornerstone of a legal theory of valid consent in sexual interactions between acquaintances.

In holding that legally valid consent presupposes the absence of the requisite *mens rea*, the linkage thesis entails that one rather ordinary pre-theoretical notion of consent is not suitable for this legal purpose. On this ordinary notion, determining whether someone has consented to sex (or anything else) does not require checking on the beliefs – reasonable or not – and intentions of another who seeks that consent. Rather, consent is taken to be a state of mind, sufficiently subjective that its existence is independent of the epistemic states or conduct of others. Thus the primary and virtually unimpeachable evidence of whether a person consents to sex consists in the beliefs of that person with respect to her consent. But on the linkage thesis as developed here, someone can honestly believe that she has not consented to sex, she may genuinely and after reasonable consideration not want to have sex, and yet still fail to establish nonconsent that is legally effective; i.e., that is either a necessary or a sufficient condition of wrongdoing. While it might seem paradoxical that a person who honestly believes she has not consented to sex has in effect consented to sex, the paradox is resolved when it is recognized that there are two different concepts of consent operative here such that it is possible not to have granted consent (in a pre-theoretical and ordinary) sense while having effectively consented in the other (fully legal) sense.[27]

While this implication of the linkage thesis may seem both counterintuitive and objectionable with respect to sexual interactions – especially when ordinary and legal concepts of consent are improperly conflated – it gains increasing plausibility when considered in comparison to its application in legal relationships

[27] The pre-theoretical or ordinary sense of consent employed here corresponds to what Alan Wertheimer calls a "subjective view" of consent. The fully legal sense of consent is a complicated instantiation of what Wertheimer calls the "performative view" of consent. See Alan Wertheimer, 'What is Consent? And is it Important', *Buffalo Criminal Law Review* 3(2) (2000), at p. 556. Wertheimer provides a more developed analysis is his *Consent to Sexual Relations* (Cambridge, UK: Cambridge University Press, 2003), chapters 6 and 7. What follows is influenced by Wertheimer's accounts.

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

such as that of the first borrowing example given earlier. Here, while the owner of the automobile assuredly believes that he did not consent to loan (i.e., did not grant permission to borrow) the automobile, and in an ordinary sense he did not do so, this nonconsent is not a legally effective fact – not legal nonconsent. For if his claim of ordinary nonconsent were equivalent to or sufficient for a legally effective (rather than ordinary) claim of nonconsent, it could not be wholly vitiated by the absence of *mens rea*. But, as argued in the discussion of the mistake-of-fact defense, his claim is wholly vitiated and, given that *mens rea* is a material element of the crime, ought to be wholly vitiated if the borrower is to be treated fairly – as not having committed a crime. So even if, in an ordinary sense, he has not consented to loan the car, the legal consequence of the absence of *mens rea* is functionally equivalent to his having legally consented to loan the car. By parity of reasoning, then, even if, in the ordinary sense, a person has not consented to sex, it does not follow that she has not, in legal effect, consented to sex.

Of course the linkage thesis should not be read to imply that just any belief in consent suffices to defeat *mens rea*, vitiates all claims of nonconsent and thus eliminates criminal culpability. Just as there are social norms and legal rules that govern what does and does not count as granting legal consent in property transactions such as buying and borrowing, there are analogous but far more ambiguous norms and rules governing consent to sex between acquaintances.[28] In both kinds of cases, permissible conduct presupposes a context of norm- and rule-governed interactions that constitute a set of practices. The existence of these practices affords the requisite grounds for reasonable beliefs that legitimate consent has been granted such that, in a case of borrowing, a legitimate transaction has occurred or, in a sexual encounter, that the sex is consensual and thus there is no legal wrongdoing. Now while these practices often include a broad range of norm- and rule-bound expectations mutually

[28] The important initial paper on the relevance of social conventions to issues of consent and reasonable mistakes in acquaintance sex is Douglas N. Husak and George C. Thomas III, 'Date Rape, Social Convention, and Reasonable Mistakes', *Law and Philosophy* 11 (1992): 95–126.

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

understood (sometimes well, sometimes not) by the persons participating in them, certain behaviors are so flagrantly inconsistent with or disruptive of the fundamental norms, expectations, and purposes of these practices that they indicate knowing and willful violation of them; i.e., they indicate wrongful conduct.

For example, the fundamental norms governing borrowing require that prior to taking or using the property at issue, a meaningful request to borrow has been made and recognizable permission to borrow has been provided. Even though authentic disagreements are possible regarding exactly what counts as a meaningful request and recognizable permission – especially in the context of a long-term borrowing/lending relationship – there are limits. Ordinarily, a person cannot be taken to have a reasonable belief that she borrowed something if she never requested the owner's permission or if nothing remotely resembling permission were ever provided. Nor could a carjacker reasonably hold – she does not have – a reasonable belief that consent has been granted to take and use the car. Because the norms constitutive of the practices governing automobile ownership and permission to use do not and cannot serve as grounds for a reasonable belief that employing physical force so as to commandeer another's vehicle is permissible, the carjacker does not and cannot have the requisite belief in consent that would establish the absence of intent to steal. Here, then, given the rules and expectations constitutive of the practice of borrowing as set against a background of the relevant ownership rights, there are inadequate grounds for a reasonable belief in consent and the denial of *mens rea*; so any mistake-of-fact claim is presumptively false. Nonconsent remains intact.

Finally, and of critical importance for arguments that will be made below, the linkage thesis should be understood to imply that rather as with consent to borrow, consent to sex has a critical bilateral component. That is to say, even though the norms governing consent in both kinds of cases can diverge significantly, both involved persons play an indispensable role in establishing the presence of legally valid consent. When seeking to secure consent to take and/or use property, the borrower's conduct must conform with the norms or rules that

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

govern such requests and, in order for there to be legally valid consent, the loaner must respond to the borrower's normatively correct request with conduct recognizable to the borrower as conforming to the norms or rules governing consent to borrow. On the linkage thesis, the same holds true with respect to legally valid consent to acquaintance sex. However, and worth emphasizing here, when dealing with competent and purposeful persons with developed beliefs about how their behavior affects and is affected by others, saying that their conduct seeking or granting consent recognizably conforms to the relevant norms and rules connotes a good deal about their beliefs, intentions, rights and responsibilities. Most important is the connotation that *both* parties are consciously enmeshed in a network of ongoing interactions that can trigger rights and correlative responsibilities on their own and each other's part. Thus the important bilateral component of valid consent is not a merely formal requirement – not simply a matter of whether a person's conduct happens to conform to the relevant set of norms and rules. The bilateral component of valid consent is normative: it says that persons consciously involved in certain normative interactions have certain mutually created and correlative rights and responsibilities to each other.

Summarily then, the linkage thesis, as developed here, offers a set of significant advantages when serving as the foundation for a legal theory of consent to acquaintance sex. For in a way that is consistent with the concept of consent in other areas in the law, the thesis: (1) captures the fact that an ordinary pre-theoretical notion of consent is inadequate for this legal purpose, (2) provides an alternative account of consent that can accommodate *prima facie* criteria of reasonableness when considering whether *mens rea* is indeed present and thus when claims of nonconsent are viable, and (3) recognizes the normatively bilateral nature of consent in contexts of mutual interaction where certain types of conduct can result in a set of rights and correlative responsibilities for both involved parties.

But there are reasonable concerns about applying the linkage-thesis concept of consent to acquaintance sex, and these concerns emanate from the core question of whether this

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

concept will prove adequate for an acceptable account of the wrong of less than fully consensual sex between acquaintances. But as shall be argued below, and while operating on the critical assumption that its appropriate application is limited to a context systematically different from that typical of aggravated rape, the linkage-thesis concept of consent illuminates rather than obfuscates the terms of an acceptable account of this wrong. As a result, the thesis facilitates an answer to the question of whether that wrong is sufficiently grave to require treating less than fully consensual sex between acquaintances as a serious crime. But before doing this it will prove helpful to consider some objections to the linkage thesis.

VII.

Concerns about the linkage-thesis concept of consent will likely focus on the question of whether it will prove adequate for an acceptable account of the wrong of less than fully consensual acquaintance-sex. And the emphasis here is the rather obvious difference between the kinds of interests and rights at stake in borrowing and acquaintance-sex, respectively. Given the nature and extent of these differences, it will be argued that even if the linkage thesis makes perfectly good sense when determining what ought and ought not count as valid consent in borrowing an automobile, it assuredly does not follow that the thesis makes equally good sense when determining valid consent for sex with an acquaintance. Most conspicuously, the argument might continue, borrowing concerns interests and rights of and with respect to real property and as such are both different from and, in many if not most circumstances, of considerably less importance than an individual's interests and rights with respect to her person and decisions regarding sexual intimacy.[29]

[29] Several writers have argued that the wrong of simple rape can best be analyzed as a violation of property rights, but others have argued convincingly that such analyses are deeply flawed. See Schulhofer, at p. 67 and pp. 116–117. Also important are McGregor's criticisms of Donald Dripps [in his 'Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent', *Columbia Law Review* 92(7) (1992): 1780–1809]. See McGregor, pp. 186–189.

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

So there are good reasons for thinking there to be undeniable and substantial differences between the two kinds of interactions, differences concerning what is at stake – especially with respect to harm and the potential for harm – for women. And the presence of these differences shows why application of the linkage-thesis for determining valid consent to acquaintance sex is largely unjustified. Employing the linkage thesis to cases of both kinds thus underestimates the harm of nonconsensual acquaintance-sex, and does so in a way that inevitably involves misconceiving and understating the wrong in such cases.

But this objection pays inadequate attention to certain critical differences between the normative contexts in which intentional interactions such as borrowing and acquaintance sex occur and, by comparison, the contexts required for theft or, most pertinently here, aggravated rape. In neglecting these differences when attempting to ascertain the nature or degree of wrongdoing, inappropriate emphasis is placed on the differences between and danger to various psychological and physical interests – in effect, to the potential for harm – rather than on what would be required within a specific normative context for the presence of any kind of harm to indicate or be the result of wrongdoing. This objection, then, assumes that simply because in some contexts certain serious losses or harms are the result of rights-violations and as such constitute wrongdoing, it follows that wherever such losses or harms are present there are rights-violations and thus wrongdoing. But this assumption is certainly false. A woman seriously injured in athletic competition, say boxing, is not wronged by her competitor simply because, in some other context, her sustaining the same or similar injuries would constitute a rights-violation and thus wrongdoing.[30] With respect to serious wrongdoing – serious enough to warrant the attention of the criminal law – then, the norms of the context in which harm or injury of various degrees might occur are necessary for determining whether the presence of that harm or injury indicates or constitutes wrongdoing. Thus a determination regarding whether intentional acts of willful participants constitute wrongdoing should be made only

[30] In the law, consent is an affirmative defense in battery.

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

when those acts are considered in the context of a set of norms constitutive of certain practices. The brute fact of one person's causing serious injury to another is a necessary condition of certain kinds of wrongdoing, but it is assuredly not sufficient.

But there is a response to this, a response that revives the concerns of feminist philosophers who, as noted earlier, identified the male-biases woven throughout the law of both aggravated and simple rape, especially with respect to the role this bias plays in the network of norms that determine what counts as legally valid consent to sex. In taking the linkage thesis seriously, one automatically takes seriously the idea that it is not simply what a woman says or believes about whether she consented to sex that makes the final difference as to whether legally valid consent is present, rather it is the male perpetrator's state of mind – his male-reaction as formed by the norms and institutions of patriarchal societies – that is the *sine qua non* of this determination. So on the linkage thesis it would appear that even the combination of what a woman says and honestly believes with her suffering physical or psychological injury is not sufficient to count as a legal wrong unless they occur in the "right" normative context. But what would the norms of this "right" context be, in patriarchal societies, if not those that protect women's interests only if they happen to coincide with those of men? In employing the linkage thesis to determine consent in these cases, it would appear that both the interests and the point of view of women are systemically subordinated and the wrong of nonconsensual acquaintance sex is, yet again, misunderstood and either understated or ignored.

While this criticism is especially effective when directed at the unreformed law of aggravated rape and the two classes of simple rape noted in section II, it does not have the same force in the substantively different context of acquaintance sex. For here there is no strong and reasonable presumption (as there is with aggravated stranger-rape) that valid consent is neither present nor likely to be forthcoming. Nor is there a strong presumption, as in examples such as non-physically coerced sex between physician and patient, that the nature of the relationship

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

between the relevant persons is not sexual (and could be harmfully and wrongfully altered if it were) or that there is a significant and exploitable differential in power of precisely the sort that facilitates illegitimate threats. Lest it be forgotten, in acquaintance sex, women and men have common desires for and interests in sexual satisfaction. Admittedly, some of the norms governing what sort of behavior constitutes or is properly read to constitute consent and nonconsent to sex between acquaintances are complex, ambiguous, male-biased, and more than occasionally silly. But it is not as if all these norms are utterly incomprehensible to women and men; both are or should be reasonably well aware of the norms and conventions governing sexual interactions among acquaintances and of the manipulative strategies sometimes employed by some men and some women when they encounter or present apparent resistance or reluctance to have sex. And it is not as if (as shall be considered in more detail below) given certain highly desirable outcomes for both, either women or men are or should be wholly ignorant of, or wholly unwilling to run the risks incurred when engaging in behavior that can and often does result in sex. These risks include those of physical and psychological frustration or harm resulting from misunderstandings, and of the exploitation that can result from the manipulation of the ambiguity typical of some behavior leading to sex between acquaintances.

Perhaps the failure of these criticisms of the linkage thesis can be attributed to a single mistaken assumption, viz., that the individual interests, rights, and normative context of all sexual encounters are sufficiently similar that the criteria employed to discern consent and nonconsent, permissible behavior and wrongdoing, are or should be essentially the same for all sexual encounters. Now this mistake is understandable, especially given the history of rape-law and rape-law reform. Once the injustice and unfairness of the law of aggravated rape were successfully exposed and the law changed appropriately, it seemed quite natural to extend the reform process so as to make all nonconsensual sex felonious. For on the assumption that the central and serious wrong of rape consists in nonconsent *simpliciter*, the origin, nature, or cause of nonconsent seems to

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

be but an ancillary consideration. With respect to the wrong of rape – though perhaps not to punishment for it – it would thus make no difference if the perpetrator were a knife-wielding stranger leaping from the bushes or a boyfriend on an apartment couch claiming to believe that sometimes "no" means "yes." Pervasive throughout is the strong presumption that the standard milieu of sexual interactions is essentially adversarial, wherein two competitors, with no common desires or interests other than those tied to proprietorship, vie for hotly contested property in a zero-sum game. Small wonder that at least one influential theorist found it so terribly difficult to distinguish rape from sex.[31]

But the interests, rights, and normative context in which acquaintances have sex are critically different from those governing adversarial proceedings designed to determine who "gets" what another "has." In the numerous and varied circumstances that can and do result in acquaintance-sex there is, at least initially: (1) a reasonable presumption that each person is or should be aware that sex between them may well be in the offing, (2) no strong presumption that having sex is contrary to the desires or interests of *both* persons; indeed, the opposite may well be true, and (3) a recognition on the part of each person that some of the norms governing the continuing conduct that culminates in sex are sufficiently ambiguous that certain of their actions and locutions can and will be misunderstood, with unintended and undesirable consequences sometimes resulting. These actions and locutions include: requests for sex, offers for sex, consent to sex, nonconsent to sex, reluctance regarding consent to sex, expressed interest in certain kinds of sex acts but reluctance regarding or nonconsent to others, etc. Now these and other differences entreat a fresh look at the normative terms of sexual interaction between acquaintances. This fresh look will provide further

[31] In *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989), Catherine MacKinnon says "Perhaps the wrong of rape has proved so difficult to define because the unquestionable starting point has been that rape has been defined as distinct from intercourse, while for women it is difficult to distinguish the two under conditions of male dominance." (p. 174).

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

support to the linkage-thesis concept of consent by, among other things, showing how certain implications of that thesis are compatible with a reasonable account of any wrongs that may occur when acquaintances have sex. But in so doing, it will also afford reasons for believing that these wrongs are not of a kind that justifies treating all less than fully consensual sex as a crime.

VIII.

Consider yet again the interactions of acquaintances when they successfully loan and borrow from each other. But on this reconsideration emphasize what these interactions can and often do mean – specifically with respect to the nature and extent of their regard for each other – to the relevant participants, and de-emphasize the fact that the objects of and rights incurred by these interactions pertain to real property. Think, then, with the aim of providing a more effective understanding of the normative context of acquaintance sex, of loaning and borrowing not as a legal phenomenon pertaining to property, but as a social practice comprised of a set of interactions – falling into the general category of highly personal favors – between acquaintances. These interactions imply a perceived mutuality of interests, trust, and good will. Even in situations where persons are newly acquainted, where they "barely know each other," the willingness to loan indicates concern for another and good will towards her; and the willingness to borrow – to accept the loan – indicates a reciprocal gesture of appreciation, not merely for the use of that which is loaned, but for the concern. So when a woman offers to loan her hedge-clippers to a new neighbor, she does significantly more than handover a device that makes work go easier. Her act is one of generosity that, with the appropriate reciprocal response, establishes the basis for the kind of fellow-feeling that can develop into a trusting relationship – some degree of friendship perhaps – wherein each party is increasingly comfortable with both requests to borrow and consents to loan. What can and often does develop, then, is a set of mutual and norm-governed expectations, set against a

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

backdrop of trust and mutual aid between the relevant persons. Over time, these expectations both characterize the relationship and serve to sustain it.

Relationships of this kind, especially (but not only) those that are ongoing, are most often not the result of one person's having made a single definitive decision or "act of consent" at some specific moment in response to some specifiable proposal. It is not as if a light switch is either thrown or not thrown, and that everything that can be correctly said about the legitimate expectations, rights and responsibilities of the relevant persons in these relationships depends on this single illuminating event. While a light-switch model may be appropriate for understanding the wrongs of robbery, extortion and aggravated rape, it seems plainly inappropriate when applied to interactions or relationships in which there is a presumption of trust, mutual aid, and mutual interest between even newly made acquaintances or, and with far more complexity, lovers and spouses. For in these circumstances, there is also a normative presumption that if something goes wrong, if, for example, something is borrowed without adequate permission and a significant inconvenience or loss results, then the borrowing party has made a mistake, careless or insensitive perhaps, but with neither bad nor exploitative intent. The appropriate response should include an explanation and an apology or a gesture of restitution from the borrower and gracious acceptance, perhaps with suggestions to avoid future misunderstandings, from the owner. But throughout, and depending on the terms of the relationship, enduring mutual assent is presumptively present. And so precisely as the linkage thesis would have it, only in the face of compelling reasons for thinking the "borrower" had persistently bad or exploitative intent would the presumption of mutually enduring assent be endangered or defeated. Of course were this to occur, the nature of the relationship between the persons can be radically and perhaps

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

irretrievably altered, and the linkage thesis may no longer apply.[32]

Persons entering into or involved in relationships of trust and mutual aid have or should have common knowledge of the terms of these relationships. They should be aware of the norm-governed expectations – especially those grounding various rights and responsibilities – of each party, and they should understand these expectations as they pertain to themselves and others similarly situated. But they should also have common knowledge that involvement in these relationships typically includes varying degrees of vulnerability that, while attending the high likelihood of substantial benefit, can increase appreciably the risk of loss, harm, or injury. So for example, when acquaintances engage in competitive behavior for mutual benefit, say they play a challenging and mutually-enjoyable game that involves the use and anticipation of various strategies, physical contact, deception in the form of bluffing, and manipulation in the form of fakes and aggressive maneuvers, they recognize and assume the risk of harm or injury in a way that disables certain rights claims. A woman should feel badly if her conduct – permissible within the rules and strategies of the game – results in the injury of a friend; but she violates no rights of the competitor-friend. For here the voluntary and mutual assumption of risk – of knowingly acting in ways that either bring about a predictable likelihood of injury to another

[32] The linkage-thesis concept of consent applies to acquaintance sex only if there exists a perceived mutuality of interests, trust and good will. Thus it certainly makes no sense to employ this concept in alleged cases of aggravated rape, especially aggravated stranger-rape. Since aggravated rape is precisely the sort of conduct that betrays any semblance of concern for the interests and rights of victims, the simple logic that sees nonconsent as implied by the proscribed conduct most always proves adequate. It does not follow, then, that in finding the linkage-thesis of consent appropriate for acquaintance sex the first foot has been placed on a slippery slope that would eventuate in applying this concept to aggravated rape. Recognizing the appropriateness of the linkage thesis to acquaintance sex emphasizes the critical difference between two kinds of normative contexts in which these interactions occur, and in so doing helps to explain why it is a mistake to liken non-aggravated but less than fully consensual sex to conduct such as extortion.

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

or create circumstances where they are predictably likely to be subjected to harmful or injurious conduct – eliminates the moral and legal grounds on which such rights-claims would ordinarily and otherwise be based.

Friendly participants in risky but rule-governed conduct have responsibilities, to which other participants have correlative rights, to act prudently and avoid exceeding the bounds of legitimate contact, especially when harm or injury may result. But in a context of risk, imprudent conduct is not always wrongful conduct. Indeed, because participants can be legitimately expected to recognize and mutually assume the risk that imprudent conduct with harmful consequences can and does occur, they *both* bear certain moral responsibilities – especially to acquaintances – to act in ways that would mitigate any harmful or injurious consequences either to the other participant or to themselves. So if encounters become too exuberant, if participants fear certain conduct is no longer appropriate or exceeds the limits of reasonable risk, they *both* bear some responsibility to change the course of that conduct. If neither participant does so, or if either attempts to do so in a less than perspicuous way (given the norms governing their interactions), then both implicitly assent to the game's even more risky continuation.

Now if a participant believes these responsibilities come at too high a price, then she or he should not assume the risk of participation. But once the participants have exercised their autonomy so as to participate in risky conduct – once they have assumed certain risks – they thereby incur certain special responsibilities to or with respect to which the other participant has rights or, more precisely here, permissions. This means that because of the acquaintances' continued and willful participation in the now more risky game, the intentional use of more dangerous conduct is not presumptively wrongful. Because of the continuing assent of the participants – because of the continuing and mutual assumption of increased risk – those engaging in more dangerous behavior do not necessarily behave wrongfully even if their conduct can and does result in greater injury. That is to say, even if injury greater than that to which

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

participants could be reasonably be expected to consent prior to or outside of the competition were incurred, this would not suffice to establish wrongdoing. Participants in risky conduct have responsibilities to make their assent and dissent known, and as their conduct becomes more risky, known unambiguously to each other. Thus, rather as the linkage thesis (with emphasis on its bilateral component) holds, someone's engaging in increasingly dangerous and potentially injurious behavior does not behave wrongfully simply because in some "ordinary" sense and at some arbitrarily selected moment her conduct has not been consented to by another participant. Rather, given the norms governing the ongoing risky interactions and the responsibilities of her fellow participants in those interactions, she behaves permissibly quite simply because her conduct does not evidence wrongful intent.

This is not to deny that the details of particular cases – recall *Fischer* – can create considerable difficulty when attempting to ascertain whether serious wrongdoing is present. Nor does it undermine determinations of wrongdoing in clear cases. If a participant in a game knowingly employs impermissible and coercive physical violence *so as to* injure another – that is, he acts with full knowledge that his conduct exceeds any risk another participant assumes and with the full intent to ignore the norms in accord with which continuing assumption of risk is provided – he violates the moral rights of other participants. He acts wrongfully given both the terms of the practice and, depending on the nature and extent of the deception or violence employed and the degree of injury to the relevant person, the criminal law. With respect to acquaintance sex, if a man knowingly employs coercive means such as the use of illegitimate threats – overt or covert – so as to achieve sexual penetration, or if he knowingly exploits a position of superior power in a nonromantic or nonsexual relationship, or if he employs fraud to the same end, then the *mens rea* of rape is present and nonconsent is not vitiated by any claims or pretense to the contrary. Furthermore, and worth emphasizing here, because this kind of conduct radically alters or is radically inconsistent with the nature and terms of any friendly relationship of trust

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

and mutual concern between the relevant persons, it also eliminates the responsibility of victims to establish dissent or nonconsent by appeal to various forms of resistance. As will be recalled, conduct of this kind falls within the first two classes of simple rape identified earlier, and as such properly falls within the province of the criminal law.

But once acquaintances voluntarily embark upon a course of conduct they mutually know to entail certain risks, the relevant rights and responsibilities governing assent and dissent, consent and nonconsent, can, as several appellate courts found, be far more difficult to ascertain and ascribe.[33] This point pertains to the general risk that both persons assume when they engage in behavior (dating, "hooking-up" in a bar, visiting a former lover, etc.) that can and often does lead to sexual intercourse. This risk is run with respect to the primary decision (whether well formed and final or not) about whether, in initiating, acceding to or rejecting a sexual encounter, one's choices have been properly expressed, understood, and respected. But it is also true of those subsequent risks assumed with respect to specific sexual acts occurring prior to, during, and after intercourse. Now given the considerable ambiguity – both in the time leading to and during a sexual encounter – surrounding: (1) what sorts of conduct counts as assent to or dissent from sex or specific sexual acts, (2) which acts fall within the range of conduct with respect to which risk can reasonably be taken to have been assumed, and (3) what sort of behavior does and does not indicate (let alone confirm) continuing willingness to assume some or all of the relevant risks, the occasions for reasonable mistakes on the part of *both* participants increase dramatically. The occasions for mistakes multiply not only with respect to the presence of consent to proceed with the sexual encounter, but also with respect to the presence of consent to specific sexual acts.

[33] See especially the decision in *State v. Rusk*. By the time Rusk's conviction was sustained (on the evidentiary issue of whether his "light choking" of the victim could be taken as sufficient physical force to justify conviction), his case had been considered by twenty-three judges, eleven of whom would have acquitted.

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

Now there is no question but that a significant degree of vulnerability attends the ambiguities attending the risks assumed by participants in acquaintance sex, and there is equally no question but that this vulnerability is highly susceptible to exploitation. Men can and sometimes do act unscrupulously by exploiting this vulnerability and in so doing selfishly disregard or violate certain moral rights of women to be treated with dignity and respect. But in a context of mutually assumed risk for mutually beneficial purposes, and in the absence of unambiguous resistance precipitating a dramatic change in relationships presumptively characterized by good will and trust, this exploitation surely does not rise to the level of coercive wrongdoing present in conduct of concern to the criminal law; for example, robbery or extortion. So while the exploitation of ambiguity and vulnerability in a context of mutually assumed risk for mutually beneficial purposes undoubtedly involves the infliction of dignitary wrongs such as insult and betrayal of trust, treating this exploitation as a serious criminal offense seems largely unjustified.

IX.

The above reconsideration of the normative context of acquaintance-sex is intended to afford a better model for understanding the nature of sexual interactions between acquaintances and of any wrong that might occur when acquaintance-sex is less than fully consensual. If this linkage-thesis based model is indeed more faithful to the phenomena than alternatives that mistakenly see all such interactions as akin to a series of contracts or property transactions between isolated parties with no common interests or ties except with respect to control of whatever contested interest or property is at issue, then it should also provide better grounds – both moral and legal – for assessing and evaluating both the statutes and judicial reasoning that pertain to acquaintance sex. In what follows, an effort will be made to generate some support for this proposition.

Consider the case that provoked changes in Pennsylvania's rape statutes – *Commonwealth v. Berkowitz*. At trial, the complainant, a college student, testified to having returned to her room after a class, drinking a martini, and then waiting for her

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

boyfriend in a dormitory lounge. When he failed to arrive, she went to the room of another male friend, knocked, and although hearing no response, entered the unlocked room. Robert A. Berkowitz, the roommate of the complainant's friend, was asleep in his dormitory room and awakened when she entered. Berkowitz asked the woman to stay and requested a back-rub. She declined to provide the back-rub and a request to sit on his bed. She then sat on the floor where he joined her, removed her shirt and bra and fondled her breasts. He then removed his pants and, after failing to insert he penis in her mouth, rose to lock the door (which prevents persons without a key from entering but not from leaving). He returned and continued to undress her. They had vaginal intercourse on his bed. Berkowitz said, "Wow, I guess we just got carried away." The complainant replied, "No, we didn't get carried away, you got carried away." Under cross-examination, the complainant would not affirm that she had taken any physical action to discourage Berkowitz. She denied being threatened, denied that he in anyway restrained her, affirmed both her knowledge that the door could be opened from within and that during the encounter she never attempted to leave the room. However, and of critical importance to reformers, the complainant did testify to repeatedly saying "no" during the encounter.

Berkowitz was convicted of rape, a felony of the first degree, and a second degree-misdemeanor of indecent assault. Berkowitz appealed both convictions and prevailed in the Superior Court which held that (the then) existing Pennsylvania rape-law requires not simply nonconsent, but forcible compulsion resulting from the use or threat of physical force or psychological coercion that would "prevent resistance by a person of reasonable resolution." The state appealed, but the Pennsylvania Supreme Court agreed that even when reviewed as required by law – in a manner most favorable to the prosecution – the facts in *Berkowitz* could not sustain a rape-conviction. Thus the Superior Court's decision to overturn the rape-conviction (but not the misdemeanor charge for which nonconsent alone is required) was sustained. Given the grounds of the appeal, the courts properly focused on the question of

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

whether Berkowitz's conduct constituted the requisite kind of force. While agreeing that the complainant's repeated expressions of "no" were relevant to whether consent was present, the Supreme Court held these locutions to be irrelevant to the central issue of the appeal: force. Because both force and nonconsent were required for rape, and the requisite kind of force was deemed absent, the fact of nonconsent, even if stipulated to by the appellant, was found irrelevant.[34]

In response to public criticism of this and earlier Pennsylvania appellate court decisions that also read the legislative intent of the rape statute to require the use or threat of physical force, statutory reform expanded the concept of force so that conduct like that of Berkowitz would satisfy the force requirement of felony rape. Currently, under Pennsylvania law the use of "intellectual, moral, emotional, or psychological force, either express or implied," can fulfill the forcible compulsion requirement for felony rape.[35] Thus in a concerted effort to avoid a physical force standard of coercion, the legislature was willing to locate "forcible compulsion" in a remarkably broad range of behavior. Indeed, and taken on its face, this change and similar statutory language in other jurisdictions would establish what is, in legal effect, a nonconsent standard of force. On this standard, the forcible compulsion required for felony rape can be deemed present on the basis of a complainant's contention that at the time of a sexual encounter, she possessed a certain mental state – she felt or believed she did not consent. So on this and similar statutes, a woman's nonconsent in the ordinary sense noted earlier, and here amounting to little more than a feeling or belief that she had succumbed to "intellectual, moral, emotional, or psychological force," could be sufficient to establish both the nonconsent and force requirements of felony-rape.[36]

[34] The court did overturn the lower court's judgment to require a retrial on the misdemeanor charge of indecent assault and thus sustained this conviction.

[35] 18 Pa. C.S. § 3121.

[36] In *State in the Interest of M. T. S.*, 609 A.2d 1266 (N.J. 1992), the New Jersey Supreme Court was willing to allow the force involved in intercourse to fulfill the force requirement of rape. See Schulhofer's important discussion of this case, pp. 94–98.

This content downloaded from 70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

This implication of recent statutory reform governing acquaintance sex entails certain serious moral and legal defects that proper application of the linkage thesis successfully avoids. Interestingly enough, and when making reference to *Berkowitz*, the court in *Fischer* clearly recognized one of these defects and, by employing the linkage thesis, proffered a simple legal remedy. In *Fischer*, the court argued that even if the reforms provoked by *Berkowitz* were intended by legislators to have the above implication, the new statute should not be applied to the sort of cases often referred to as "date rape." As noted earlier, this court recognized that broadening the definition of force as required by the new statute so lowers the standard of coercion that mistakes about consent – mistakes that are nonrecklessly held and reasonable – are far more easily made. In fact, in cases of alleged "date rape" where the woman is "non-resisting," it is unreasonable to believe that a man will readily recognize the intimidating or coercive implications of some of his conduct.[37] Given the nature and context of this kind of sexual interaction, then, and absent efforts on the part of the woman that unambiguously establishes reasonable grounds for the ascription of *mens rea*, the *Fischer* court denied that behavior like Berkowitz's should constitute felony rape. So by an application of the linkage thesis that denies the presence of legally valid nonconsent in cases with circumstances like those present in *Berkowitz* – circumstances where reasonable mistakes about consent abound – the *Fischer* court addressed the defective nature of Pennsylvania's statutory reform by simply excluding "date rape" from the scope of its application.

---

[37] The court claimed that with the broadening of the definition of force, a man may reasonably believe that "his words and conduct" do not constitute force or the threat of force.

> An example might be "date rape" resulting from mutual misunderstanding. The boy does not intend or suspect the intimidating potential of his vigorous wooing. The girl, misjudging the boy's character, believes he will become violent if thwarted; she feigns willingness, even some pleasure. In our opinion the defendant in such a case ought not be convicted of rape (pp. 1117–1118).

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

Here again, on grounds both moral and legal, the concern of this court is plainly justified. For the language of the statute is sufficiently vague (What, for example, would count as sex by implied moral or intellectual force, and how would such "force" constitute compulsion or coercion?) that there is little clarity about what sort of conduct would constitute an infraction. Thus given the broadening of the concept of force and the concomitant lowering of the standard of nonconsent, it becomes unclear precisely what is expected of men in circumstances like those present in *Berkowitz*. But furthermore, and as an important point not considered by the *Fischer*-court in its application of the linkage thesis, the special responsibilities of risk-taking women in these situations are not taken into adequate account; indeed, they seem to be straightforwardly ignored. Thus the legislation is defective not only because it provides neither fair warning about what constitutes wrongful conduct nor a standard for determining when (if ever) a man makes a reasonable mistake about consent, but also because it affords no clear provisions in accord with which the autonomous choices of women to assume the risks of acquaintance-sex are taken into serious moral and legal account. So while the intent of the legislative reformers was to hold men behaving as did Berkowitz responsible for a serious criminal offense and to protect the autonomy of women, they failed to recognize the significant difficulties involved in constructing legislation that would do both fairly; i.e., that would take into account the relevant rights and responsibilities of both persons.

The quick response here takes these difficulties to be exaggerated. By returning to *Berkowitz* and similar cases and focusing on the complainant's conduct, specifically as described in testimony that she said "no" throughout the encounter, it certainly does seem clear that certain moral rights of the complainant are violated, and that these rights-violations are of sufficient gravity that they ought to trigger a proportionate response by the criminal law. Because this or similar expressions of nonconsent constitute what should be taken as definitive, then, it is indeed clear what reasonable men in Berkowitz's position are morally and legally required to do:

This content downloaded from 70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

they should take "no" for an answer. And the special responsibilities of women are also clear: they should engage in conduct – and saying "no" is a clear example – that makes decisions about sex or specific sexual acts clearly known. So on this response, the *Fischer* court's recommended exclusion of "date rape" from the scope of the new legislation wrongly neglects the second way in which the linkage thesis should be understood; viz., as holding that a reasonable belief in non-consent indicates the presence of *mens rea* such that it would be unfair to complainants not to hold Berkowitz and those like him criminally responsible for ignoring their expressed non-consent. But the court wisely assumed that given the norms of sexual interaction in cases of this kind, mere expressions of "no" are not sufficient to establish a reasonable belief in nonconsent. Indeed, evidence concerning the use of "no" during sexual encounters does not sustain the slogan that "'No' means no." if that slogan is taken to mean that any assertion of "no" entails unequivocal nonconsent to all sexual behavior.[38] Depending on the subtleties of intonation and context, expressions of "no" prior to or during sex can express anything from a request to slow the pace of the encounter ("'No' means 'slow'.") to the joy of orgasm ("Oh no, oh no, oh no!"). So in terms of ascribing the requisite *mens rea*, absent the presence of a normative context mutually known to ground a reasonable belief that "no" establishes unambiguous blanket nonconsent, the morally correct judgment in cases of this kind is reached by application of the linkage thesis such that the absence of *mens rea* ought to legally overpower the complainant's assertions of nonconsent.

An appropriate rejoinder here focuses on the standard for *mens rea* in these cases, claiming that knowledge of nonconsent

[38] See Schulhofer, pp. 59–67 and 69–74, Bryden, pp. 387–396. Husak and Thomas appeal to empirical research regarding the use of "no" indicating that in the sorts of cases relevant here, "the possibility of mistake is always present" (Husak and Thomas at p. 115). For an important update of this paper that includes reference to additional and more recent empirical studies, see Douglas N. Husak and George C. Thomas III, 'Rapes Without Rapists: Consent and Reasonable Mistake', *Philosophical Issues* 11 (*NOÛS Supplement*) (2001), sections III and IV.

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

is too high a standard and that negligence should constitute the *mens rea* of acquaintance rape. On this argument, men in Berkowitz's circumstances would bear the responsibility to seek affirmatively granted consent whenever something like an expression of "no" raises doubts about the presence of consent. But there are serious problems with this suggestion. For in order for the expression of "no" to raise *reasonable* doubts about consent, the normative context of acquaintance sex must afford reliable grounds for believing that this or roughly equivalent locutions are, in and of themselves, clear indications of nonconsent. But it is precisely because this is not the case that it would be unreasonable and unfair to hold someone negligently responsible for taking "no" to mean something that, in this context at least, it generally cannot be presumed to mean. And even if this problem could in some way be mitigated, comparable problems arise when attempting to determine what would or should count both as reasonable requests for consent and clearly recognizable responses to such requests. Furthermore, given the phenomenology of sexual encounters – the fact that sexual encounters between acquaintances involve a complex and ongoing series of interactions including those that both persons realize or should realize can be read or misread as constituting consent – it would constitute a serious misunderstanding of the practices whereby consent is either granted or denied to regard a mere expression of "no" at some moment or set of moments as having thrown the switch of blanket nonconsent.

This point becomes especially clear when considering more directly the vexing question of what should count as immoral or illegal conduct once a sexual encounter is underway. For it does seem that once a woman voluntarily assumes the risk of a sexual encounter, she also assumes the risk that she will be subjected to conduct that would, in other contexts, be wrongful. And in assuming this latter risk, it also seems reasonable to believe that she has waived certain rights she enjoyed prior to the sexual encounter. So for example, imagine that during a consensual sexual encounter and when desiring fellatio, a man achieves slight oral penetration only then to be successfully

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

rejected. Should his attempt be regarded as seriously immoral – a violation of the woman's rights – and treated as criminal? Or, given the context of an ongoing sexual encounter and current norms of sexual interaction, should he be held blameless because, *ceteris paribus*, he reasonably and correctly believes that in assuming the risks of a sexual encounter the woman effectively waives any antecedent rights she might have against his attempting such an act? Of course it might be claimed that permission should always be sought for any and all sexual penetration, but it is difficult to take such a suggestion seriously without knowing a great deal about the involved persons, including their sexual history and the details of their sexual encounter. And it is assuredly not clear that additional information will automatically provide reasonable grounds for a permission-requirement in every case. Ask, for example, whether it would make a difference to the above if the attempted fellatio followed the woman's willing participation in cunnilingus.

Or consider a non-hypothetical case. If, during consensual vaginal intercourse and while in the superior position, a woman in no apparent physical distress tells her sexual partner to stop intercourse just before he will achieve orgasm, does he rape her if he holds her hips and moves for a few more moments? Does she not, in a context where she presumably has at least some responsibility for the sexual satisfaction of her partner, assume the risk that he will respond in this way and thus waive any right she might antecedently have to halt intercourse?[39] If this question does not seem rhetorical, ask the following: If their roles were reversed, would anyone take seriously the idea that she should be charged with sexual assault for holding onto him and continuing to move for a few moments until she reached orgasm? Given the nature and complexity of practices commonly known to occur once acquaintance sex commences, it is daunting to know what a *mens rea* of negligence would entail, let alone how this would avoid the ascription of unreasonable and unfair responsibilities to men.

[39] See *In re John Z*, 29 Cal. 4th 756 (2003).

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

Perhaps at this juncture another more important issue – one that recalls and emphasizes the bilateral implications of the linkage thesis – should be rehearsed and emphasized. Why, with respect to acquaintance sex, should the responsibility for assuring the presence of full consent fall on men? If the ambiguities in the norms and conduct that ought to alert men to seek assurances of full consent should be known to men such that they have a responsibility to seek full consent, should not these same ambiguities be known to women such that they bear an equal responsibility to assure that questions of consent have been settled unambiguously? Recall the victim in *Fischer*. Assuming the first sexual encounter was rough, and that elements of roughness of precisely the sort that amplify ambiguity regarding consent were present in the second encounter (so that "no" might easily be part of a rough sexual game and thus ought not indicate legally valid nonconsent), did not the victim bear the responsibility to do precisely what she testified to having done: physically resist and leave?[40] And if women voluntarily assuming the risks of acquaintance sex are to be taken seriously as autonomous agents having made this choice, do they not also assume the responsibility to act in ways that make the presence or absence of continuing consent unambiguous? This is not meant to entail that the only conduct that resolves adequately the question of consent in acquaintance sex is aggressive physical resistance or that anything falling short of physical resistance ought not count as establishing nonconsent. The point is different. In acquaintance sex, the beliefs, intentions and reasonable expectations of the participants trigger a bilateral set of moral rights and responsibilities. And given the conduct of the participants – their ongoing interactions as set against previous interactions and, when appropriate, their sexual history – these rights and responsibilities can differ

[40] Also worth asking is whether the circumstances in *Fischer* required such an act of resistance and thus that Fischer should have been acquitted by the very logic of the appeal court. Here, as the *Fischer* court recognized, the norms are sufficiently complex and ambiguous that a reasonable belief in consent cannot be excluded *a priori* simply because physical force is used during sex. That is not to say that this defense should always succeed or would have succeeded had it been available to the defense in *Fischer*.

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 1701 Jan 1976 12:34:56 UTC
All use subject to https://about.jstor.org/terms

substantively and substantially, and with these differences come varying and sometimes increasing degrees of risk that both persons can and should reasonably be expected to have recognized and assumed.[41]

This does not mean that the rights and responsibilities of those assuming the risks of acquaintance sex are always easily determined and thus that it is easy to ascertain when persons have assumed the risks of acquaintance sex and thereby have waived certain rights they would otherwise have. But it is precisely with respect to difficult cases that affirmation and careful application of the linkage thesis can effectively address criticisms of controversial court rulings. One such ruling, widely discussed and criticized, is *State v. Alston*. Here the North Carolina Supreme Court reversed the rape-conviction of Edward Alston, who, according to the testimony of his accuser and former girlfriend, Cottie Brown, confronted her as she approached the technical institute she attended, grabbed her arm so that she would walk with him (but released it at her request and as a condition of her willingness to proceed), and threatened to "fix" her face to show her meddlesome mother (with whom she now lived) that he meant business. While discussing their relationship, they continued for some time to walk throughout the neighborhood surrounding the institute while

[41] It might be responded that for women the risk of harm in acquaintance sex is greater than for men, so much so as to constitute a greater likelihood of enduring injury for female rather than male participants. But even assuming this is to be true, it surely does not follow that the scales of responsibility regarding assurances of consent are thereby tilted towards men. If anything, the opposite seems true. For if both participants are assumed to recognize the possibility that the woman's risk are greater than that of the man, and if the woman neglects to take requisite steps to clarify consent – in *Berkowitz*, for example, to demonstrate nonconsent to intercourse by an act as simple as getting dressed – would this not give the man reason for believing that the question of consent to intercourse was indeed settled? If both parties are held responsible for clarifying and settling questions of consent to sex and if expressions of "no" were not having the effect she desired, does she not have a responsibility to act in a way that would make nonconsent clear? Absent such action, did Berkowitz not have reason to believe that she assumed the risks of a continuing sexual encounter, one that would eventuate in sexual intercourse?

This content downloaded from 70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

passing numerous persons, some of whom were known to both Alston and Brown. During this time and while continuing to walk (sometimes side-by-side, other times with her slightly behind him), he did not threaten her and did not touch her, but eventually said that he had a right to have sex with her again. Brown did not reply, but did walk with him to the home of a friend, a location where they had gone for sex on previous occasions. The owner of the home was present when they arrived and spoke with Alston in the rear of the house during which time Brown remained alone. Brown made no attempt to leave the house, and chatted with the friend and Alston when they returned. The friend left the room (and possibly the house) and Alston asked Brown if she was ready for sex. She recalled saying she didn't want to go to bed with him and testified that she did not consent to sex. After Brown finished a cigarette, Alston initiated a sexual encounter. He lifted her from a chair, removed her clothing, asked her to recline on a bed (which she did without resistance), pushed her legs apart, and penetrated her vaginally while she remained passive and cried.

The court agreed that Brown had a general and perhaps reasonable fear of Alston, based both on their past relationship (a difficult and apparently abusive one) and on the events of the day leading to their arrival at the house where they had sex. But the court focused narrowly on the moments immediately preceding sex and found that this general fear was not sufficient to establish that the sex in question was indeed rape. According to the court, and set against a statute and case law that required the use of physical force or a credible threat of serious injury, the evidence could not sustain the charge that Alston had indeed employed force or credibly threatened injury immediately prior to sex and so as to achieve intercourse. Thus the force condition of the law had not been adequately fulfilled and the conviction was reversed. Critics of the decision responded to the court's preoccupation with force by attacking its apparently paradoxical contention that even though Brown had not consented to sex and even though the sex was against her

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

will, the force requirement of the law had not been met.[42] Surely, then, the concept of force employed by the court was unjustifiably narrow, wrongly emphasized Alston's (and the law's) male point of view, neglected the conduct (passivity and crying) and point of view of Brown, and placed too high a burden on Brown to resist Alston.

But when viewed through the lens of the linkage thesis, paying more careful attention to Brown's conduct both on the day of the encounter and in the context of the couple's sexual history lends little support to the critics' position. Brown testified that their consensual sex occasionally involved physical violence, that she had occasionally remained passive during sex, that, as noted, they had gone to precisely the same apartment for sex before, that she had the opportunity to leave Alston both during their walk and once in the apartment and yet did not do so, and that she had not physically resisted Alston. Given this information, and the absence of the use of physical force or a threat of injury immediately prior to and so as to achieve intercourse, why should Brown's conduct be taken by Alston to indicate nonconsent? Given her knowledge of and participation in their sexual history as well as events of the day, did not Brown's remaining in Alston's company constitute her assuming the risk that she might eventually fail to communicate successfully her unwillingness to have sex? In this case and given these circumstances, then, her failure to communicate her unwillingness defeats *mens rea* and thus, on the linkage thesis, legally valid nonconsent is absent. So the effective response to the decision's critics involves applying the linkage thesis to deny any paradox in the court's decision. Brown's nonconsent was not legally valid nonconsent on that day anymore than it was on an evening *after* the alleged rape when she decided not to resist physically Alton's aggressive sexual advances and cunnilingus because she found she enjoyed it. Initially, and because she was embarrassed, Brown failed to inform police of this encounter and the fact that Alston had then spent the night during which time the couple had intercourse several times.

[42] Estrich, for example, found the approach of the court to involve a "clear contradiction", at p. 62.

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms

Assuming that such encounters were not uncommon throughout the couple's sexual history, Brown had far greater responsibilities regarding resistance than either she or the court's critics acknowledged.[43]

X.

This paper provides reasons for resisting reforms of the law of rape that would treat all less than fully consensual sex between acquaintances as a serious criminal offense. And it does so with full recognition that absent such reforms, some men will employ tactics of manipulation and intimidation that exploit both the normative ambiguities surrounding acquaintance sex and the vulnerabilities of women choosing to run the risks of acquaintance sex. But because certain important interests, rights, and responsibilities of both men and women involved in acquaintance sex cannot be systematically protected or respected by such expansive reforms, some undeniably immoral conduct should not be treated as a serious crime. Of course the reasons presented against reforms of the above mentioned type have no application to aggravated rape, or to other kinds of wrongdoing that violate the fundamental rights of women.

Department of Philosophy
Lafayette College
Easton, PA 18042-1781
USA

[43] As noted, *Alston* is a widely discussed and criticized case, especially among rape-law reformers. Perhaps worth adding is that few, if any, of these discussions pay adequate attention to the details of the case or take into account the sexual encounter Ms. Brown was too embarrassed to discuss.

This content downloaded from
70.15.53.202 on Fri, 24 Feb 2023 17:14:51 UTC
All use subject to https://about.jstor.org/terms