Draft 8/3/2021: Do not quote or cite without permission

Forthcoming in Experimental Advances in Philosophy of Action, Murray, S. and Henne, P., eds.

Do Rape Cases Sit in a Moral Blindspot?

The dual process theory of moral judgment and rape

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Empirical research has distinguished moral judgments that focus on an act and the actor's intention or mental states, and those that focus on results of an action and then seek a causal actor. Studies indicate these two types of judgments may result from a "dual-process system" of moral judgment (Cushman 2008, Kneer and Machery 2019). Results-oriented judgements may be subject to the problem of resultant moral luck because different results can arise from the same action and intention. While some argue luck should not bear on persons' culpability, Victor Kumar has argued that the tendency to hold unlucky agents responsible for harm is justified by consequentialist aims of punishment (Kumar 2019). In contrast, judgments that focus on acts and intentions may be primarily retributive. Kumar claims that judgments focused on results track external, public harm because this increases the reliability of punishment and better achieves instrumental aims, including deterrent effect. In this chapter I examine rape cases using Kumar's theory of punishment. Rape involves outcomes that are not publicly available. If judgments of punishment depend on outcomes, then we would expect such judgments to be less stable for those instances of wrongdoing that lack public outcomes such as rape, because such judgments would rely instead on often biased and unreliable inferential processes to establish the presence of mental states, which are essentially private. In this way Kumar's theory actually predicts the way in which we see criminal justice institutions fail with regard to arrest, prosecution, and punishment related to rape; and we might expect similar failures for other crimes that lack publicly available results. In sum, a fundamental problem with institutionalized punishment centered upon results may be that some crimes sit within a moral blindspot.

[1] The author would like to thank the two editors of this volume, Sam Murray and Paul Henne, and Anneli Jefferson for extensive and insightful comments on an earlier draft that resulted in this much improved chapter. Remaining confusions are not their fault.

Commonsense seems to indicate that people are only responsible for things that are under their control. This is called the "control principle" by philosophers, and it seems to be a feature of our folk psychology: As Oliver Wendell Holmes noted, even a dog knows the difference between being kicked and being stumbled over. However, there are also cases where we seem to violate the control principle when making moral judgments. Imagine that Jorge has the desire to kill Lucinda. He buys a gun for this purpose and lies in wait behind a tree to shoot Lucinda as she leaves her office building. When Lucinda appears, Jorge pulls the trigger, but at that moment a very fat Canadian goose flies right in the path of the bullet and is killed instead. Jorge will be charged with attempted murder due to the lucky (or unlucky, depending on perspective) circumstance of the goose dying instead of Lucinda. It is likely that a judge or jury will apply somewhat lesser penalties to Jorge for attempt than would be applied if he had committed a first-degree murder. This is the case even though Jorge clearly pulled the trigger with the aim of Lucinda's death.[2]

This criminal case is a slightly altered version of the classic moral luck thought experiment in philosophy, which highlights what some philosophers call the "difference intuition," a principle that runs counter to the control principle (Nagel 1993). The difference intuition holds that there is a moral difference between two duplicate cases where the same mental states and related actions yield different consequences, and that this difference justifies a difference in punishment (Kneer & Machery 2019). Legal practice reflects this intuition by stipulating a difference between attempted murder and successful murder. While treating these two types of cases differently seems correct, there does not seem to be any morally relevant behavioral or psychological differences between agents on which such an intuition might rest: two cases can be identical regarding their action and intentions but produce very different results. Even so, it seems our folk psychology – the process of attributing mental states to others in order to understand and predict their behavior (Sifferd 2006) – is not always committed to the control principle or to only holding persons responsible for what is attributable to persons as agents.

This is the puzzle of moral luck. In the above case, resultant luck – luck based on the results produced by an action – seems to impact moral assessment of action. Data from experimental philosophy indicate that results matter specifically to how much punishment is deemed to be

[2] Although both attempted murder and murder are considered very serious felonies (both are Class X felonies in jurisdictions such as Illinois), *in practice* attempted murder tends to carry a lower punishment than murder. For example, Jorge might earn a sentence at the lower end of the Class X range, 20 years, for attempted murder, and a sentence at the higher end, 60 years, for murder.

appropriate, although it may not affect assessments of wrongdoing or permissibility (Cushman 2008, 2015, 2016; Kneer and Machery 2019). In this chapter I will discuss one proposed solution to the problem of moral luck, which offers a normative justification for treating cases differently based upon results (Kumar 2019). This solution focuses on consequentialist aims that may be served when moral judgments track publicly available results. However, crimes that do not involve publicly available results, including rape, pose a problem for this solution. In such cases, moral judgments and attributions of punishment may rely instead upon biased inferential processes to establish a private outcome (often, the mental states of a victim), and consequentialist aims may not be met. Before delving into the specific case of rape, however, I will provide a quick, general account of the dual process theory of moral judgment and the way in which it gives rise to the claim that punishment judgments track outcomes of action. I will then review attempts to further characterize and solve the moral luck puzzle generated by dual-process theory, focusing on Victor Kumar's 2019 paper.

1. The dual process theory of moral judgment and the puzzle of moral luck

In a series of landmark papers, Fiery Cushman asked subjects to engage in a variety of moral judgments.[3] Cushman's studies found that moral judgment is not a unitary process, but instead, is accomplished by parallel, dissociable processes (Cushman 2008). Cushman concluded that there are two processes of moral judgment; one which begins with harmful consequences and then seeks a causally responsible agent to produce a judgment related to punishment, and another that begins with an action and analyzes the mental states responsible for that action to produce a judgment related to wrongdoing.

Cushman hypothesizes that the problem of moral luck may arise when judgments generated by the two processes conflict (Cushman 2008). Responsibility attributions where an agent committed a failed attempt, but the harm still occurred by some independent means, seem to provide evidence for this hypothesis. An example would be if Jorge had fired at Lucinda and hit the goose, but Lucinda had been killed anyway because a tree fell on her. In such cases, causal responsibility is

[3] The following papers are just a few coming from Cushman's lab at Harvard on moral judgment: Cushman, F. (2008). "Crime and punishment: distinguishing the roles of causal and intentional analyses in moral judgment." Cognition **108**(2): 353-380, Martin, J. and F. Cushman (2015). "To punish or to leave: Distinct cognitive processes underlie partner control and partner choice behaviors." PLoS ONE **10**(4): 1-14, Martin, J. and F. Cushman (2016). The adaptive logic of moral luck. Blackwell Companion to Experimental Philosophy. J. Sytsma and W. Buckwalter, Wiley: 190-202.

assigned to the other causal factor (the tree, in my example), and assessment of the culpable mental state of the agent seems to be competitively blocked, leading to a decreased assessment of responsibility (Cushman 2008)(376). So, tracking the harm to the tree that fell on Lucinda ends up blocking an assessment of Jorge's mental states, even though Jorge intended to shoot (and tried to shoot) Lucinda. However, in cases of attempt where no harm at all occurs – where Lucinda emerges unscathed – causal responsibility is not assigned, and then assessment of mental culpability dominates. That is, in this case persons look to Jorge's mental states with regard to his attempt, which leads to judgments of punishment and blame based upon these mental states (Cushman 2008)(376). Cushman's studies found subjects could be made to rely more heavily on one process or the other, and the processes appeared to operate in parallel and to generate cognitive conflict (Cushman 2008)(378).[4]

Recent work has focused on the way in which Cushman's dual-process theory generates the problem of moral luck. In a 2019 paper, Kneer and Machery claimed the problem may affect a narrower set of cases than previously thought. They found that in cases that prompt "reflective deliberation", participants in a within-subjects design tended to judge lucky and unlucky agents as equally blameworthy and their actions as equally wrong and permissible. However, Kneer and Machery replicated Cushman's findings that punishment judgments were significantly more outcome-dependent than wrongness, blame, and permissibility judgments. They found that a sizable portion of subjects judged morally lucky and unlucky agents should be punished differently in both comparative contexts and when reporting their abstract principles (Kneer and Machery 2019)(16).

Kneer and Machery explained the sensitivity of subjects to resultant luck by appealing to the mediating role of negligence (failure to take reasonable care). They noted that subjects seemed to infer from the fact that harm did occur that it had a higher probability of occurring, and thus they were more likely to assume the actor was negligent in acting (Kneer and Machery 2019). In a recent paper, Machery calls this "hindsight bias" (Machery and Scoczen, in progress). So, for example, if Tonya fails to take her car to the mechanic when a check engine light goes on, in the case where the

[4] Interestingly, Cushman's experiments indicated that judgments of wrongfulness and permissibility are more heavily determined by belief than desire Cushman, F. (2008). "Crime and punishment: distinguishing the roles of causal and intentional analyses in moral judgment." Cognition **108**(2): 353-380.(376). So, where mental states mattered, belief that one will cause harm mattered more than the desire to cause harm. This is interesting from a legal perspective because the Model Penal Code separates the mental states of "purposely" and "knowingly," and crimes committed purposely are considered more serious.

car breaks down she may be deemed more negligent than when the car continues to run, even though her mental states and action (of failing to take the car to the shop) are exactly the same in both cases. However, Kneer and Machery found the influence of outcomes on punishment judgments was only partly due to varying ascriptions of negligence (Kneer and Machery 2019)(16). Even once the mediator of negligence was removed, outcome seemed to have a direct effect on a substantial number of punishment judgments. Kneer and Machery conclude that the "puzzle of moral luck exists after all," though its scope is restricted (Kneer and Machery 2019). They note, however, that the tendency to punish unlucky agents more harshly may not be all that philosophically puzzling if there are good normative reasons to make punishment partly dependent on the consequences of actions. In a more recent paper, however, Machery and Szcocen claim that if factors unrelated to moral assessment, but relevant to punishment, account for the effect of outcome on punishment judgments, the problem of moral luck doesn't exist (Machery and Szcocsen in progress, at 24-25).

Kumar (2019) offers a normative justification of the sort that might indeed solve – or dissolve – the problem of moral luck. He argues that the folk's tendency to apply greater punishments to unlucky versus lucky outcomes may be justified by instrumental aims (Kumar 2019). Like Kneer and Machery, Kumar embraces a dual process model of moral judgment, and claims the total amount of blame and punishment assigned depends on the contribution of both processes. This means resultant luck can impact punishment in most cases (Kumar 2019 at 991).

Kumar argues that the folk's focus on results serves the instrumental ends of increasing certainty and uniformity in punishment (Kumar 2019). Punishments are outcome sensitive because outcomes are more reliable and publicly available than intentions (Kumar 2019). Kumar notes that studies show subjects reliably hold people responsible based upon outcomes, even where intentions are fixed (Kumar 2019 at 997). Again, this is because publicly available outcomes drive judgments regarding appropriate levels of punishment.

To summarize: Experimental philosophy supports a dual-process of moral judgment, and indicates this model gives rise to the puzzle of moral luck, although the puzzle may apply to a fairly narrow set of cases. One way to resolve the problem of moral luck is to offer a normative justification for treating cases differently based upon results. Kumar provides such a justification by claiming that consequentialist aims may be met when we punish based on publicly-available results. As we will see

in the next section, Kumar specifically argues that his analysis can justify the criminal law's focus on results by pointing to instrumental effects.

2. The dual-process model and criminal responsibility and punishment

The rest of this chapter will explore how the dual process theory of moral judgment, and Kumar's response to the problem of moral luck, may be related to arrests, prosecutions, and punishments in the criminal law for crimes that may lack publicly available results. Specifically, I will argue that the crime of rape poses special challenges for Kumar's solution to moral luck because it is a crime that often lacks publicly available outcomes. Either the results-oriented process of moral judgment is not tracking public results in such rape cases, or it is not used. In this case one might assume moral judgments about rape rest upon the process focused on actions and intentions. However, because attributing mental states or intentions to determine responsibility in rape cases is often difficult and subject to biases related to gender and credibility, sex, and trauma, such judgments are problematic.

In the criminal law, verdicts and punishments are largely dependent on both a defendant's mental states (*mens rea*) and the type and degree of harm caused (a death, a fire, a stolen car). Criminal guilt also requires that the criminal harm be related to a voluntary act by the defendant (*actus reus*). Voluntary acts are typically defined by exclusion: they are not bodily movements that are best understood as a seizure or a fall, for example. Together, these factors – mental states, voluntariness, and level of harm – determine the type of crime one may be charged with and found guilty of, where the level of charge carries with it a certain level of criminal punishment, usually stipulated in a range by statute.[5]

Resultant luck can affect either the crime with which one is charged – like in the drunk driving case – or the punishment assigned within a given statutory range. Jorge's voluntary act was pulling the trigger of a gun aimed at Lucinda. The mental states relevant to Jorge's criminal culpability are that he committed this act for the purpose of killing Lucinda.[6] This mental state qualifies Jorge for first degree murder in a case where his act caused Lucinda's death and for attempted first degree murder where the goose dies instead.[7] Even in jurisdictions where both charges carry the same range of

[5] Whether a defendant has an excuse for his action, or a justification for his action, will also affect whether and to what extent he can be criminally charged for that action and its related harm.
[6] According to the U.S. Model Penal Code, Jorge killed "purposely" Model Penal Code section 2.02.
[7] Note that a certain level of mental capacity is also necessary for Jorge to be legally culpable. If he is deemed incapable of forming the requisite *mens rea* due to a serious mental illness or juvenile status (that is, if Jorge

possible punishments, the judge or jury may be more likely to apply punishment at the severe end in the former case and apply a lesser punishment in the latter case. This highlights the fact that criminal court procedures can reflect the dual-process model of moral judgment and, accordingly, are subject to the same problem of moral luck arising from it.

a. Levels of justification for the criminal law

Kumar notes that legal scholar HLA Hart argued for a two-level theory of justification of the criminal law, where different justifications might apply to the different levels (Kumar 2019)(1000). Institutions and norms associated with the criminal law must be justified on what I will call the *institutional* level. At this level the very existence of institutions and public policies that operate to infringe on persons' liberty by forbidding certain behaviors and imposing censure or hardships in the form of punishment needs justification. On another level, which I term the *agential* level, applications of moral and legal norms as a response to particular acts by particular persons must be justified. The state must be able to justify finding any one person guilty of a crime, as well as justifying punishment that follows. An unjustifiable criminal justice *system* – say, one that criminalized race or religion – may still apply a just punishment to a particular *individual* (e.g., for murder), and a just system of criminal law and punishment can still impose punishment in an unjust way (e.g., punish black offenders more harshly than white offenders who commit the same crime).[8]

The U.S. Model code endorses a mixed theory of the justification of punishment that appeals to both retributive and instrumental aims (Model Penal Code Sentencing Provisions, 2017). The dual process model of responsibility, argues Kumar, describes the psychology of holding persons responsible in a way that supports this sort of mixed justification of criminal law and punishment with different justifications at each level (Kumar 2019). At the agential level, intentions and outcomes determine what a person deserves or merits in a retributive sense. But at the institutional level, these norms of desert or merit have a consequentialist rationale (Kumar 2019)(1000). That is, at the agential level we attribute culpable mental states to justify a particular criminal verdict that this person is a wrongdoer who deserves punishment for a particular act, but at the institutional level we

were deemed legally insane or if he were 11 years old), then he would not qualify for punishment despite his mental states and voluntary act.

[8] Thank you to Sam Murray for noting that this distinction is reminiscent of Rawls' (1955) two-tiered view of utilitarianism, and for making this point clear via an analogy: In chess, particular moves are justified in virtue of the aims of the players as constrained by the rules of the game. But, when we ask about why the rules are justified, we can appeal to prospective or broadly consequentialist considerations.

may offer forward-looking aims like deterrence to justify criminalization and particular categories or levels of punishment in response to certain harmful results. Kumar tells an evolutionary story to support this latter consequentialist rationale, indicating that our practices of blame and punishment became sensitive to outcomes *because* this sensitivity yields positive consequences (Kumar 2019)(1001). Punishment encourages people to be pro-social by introducing disincentives for harmful behavior that we can track and respond to, says Kumar (Kumar 2019)(1002).

Sensitivity to outcomes supports pro-social behavior because outcomes are "typically much easier to identify than intentions. It is usually obvious whether or not harm occurred" (Kumar 2019)(998). Blaming and punishing people "strictly for their intentions would be unreliable," whereas punishing based on publicly available outcomes is more reliable. Again, Kumar indicates that linking punishments to publicly available results has reliable forward-looking effects because it sends a clear message to the public regarding what sort of outcomes must be avoided. This allows persons to regulate behavior more effectively, resulting in lower levels of crime (Kumar 2019)(998). Thus, only rigid, outcome-based punishment provides a learning environment that truly favors pro-sociality (Kumar 2019)(1003).

b. Different justifications *within* levels

While I agree that a mental state-driven process of moral judgment may ground assessment of guilt at the agential level in the criminal law, I think results-driven moral judgments are also involved at the agential level – not just the institutional one – in the generation of criminal verdicts and sentences.[9] I have watched prosecuting attorneys attempt to trigger strong feelings of blame and punishment by highlighting harmful results. For the prosecution, often the most riveting and convincing way to provoke moral judgment in a homicide is to ask the factfinder to imagine the lifeless body of a victim in detail (or even more effective, to look at pictures or a video). After establishing the presence of serious harm, the prosecutor will then ask the court to trace backward in time from the body to the defendant's actions that purportedly caused the death, which may have been performed purposely, recklessly, or negligently.

Other criminal results are also easily identified to trigger blame and punishment judgments in court. In battery cases the prosecution can display evidence of bruising and broken bones; and in the case

[9] This makes sense given Cushman's claim that the two processes often work in parallel and to some extent competitively to produce moral judgments.

of arson the burnt rubble of a former home. Even where the result is a thing gone missing a prosecutor can tell a story depicting publicly available harm: for example, they may ask the court to consider what it was like for the victim to hurry outside to go to work only to discover an empty driveway where his car should have been. We might imagine that in some cases the defense will counter with an attempt to trigger a responsibility judgment focused primarily on the defendant's mental states and their relationship to his action – to see the crime from the defendant's perspective as an actor. This could serve the defendant's purposes if they were seriously mentally ill, very emotional, or suffered from a cognitive impairment.

Moving back to the institutional level, the results-oriented process of moral judgment may be reflected in the codification of certain harmful results as criminal. Statues also stipulate ranges of punishment for different harms.[10] Remember, Kumar claims outcome-based punishment provides a learning environment that favors pro-social behavior. This means statutes ought to make clear the outcomes that are forbidden by criminalizing results or outcomes that the public can easily identify. Statutes that refer to publicly available outcomes will serve the forward-looking justification of enhancing moral agency by making forbidden harms salient, thereby reducing crime and increasing social order.

It certainly seems right that it would be less effective and successful for the law to criminalize thoughts or intentions rather than publicly available acts, at least as measured by the forward-looking aims just described. First, it seems way beyond the power of the State to expect people to manage or censor their thoughts or be subject to criminal prosecution. Second, trying to forbid harmful thoughts via criminal liability may be futile for several reasons, including: (1) the occurrence of such thoughts are not subject to the same level of control as actions – we very often cannot control what we think; and (2) thoughts are private such that proof of them in a legal setting (often months or years after an arrest) is extremely difficult. It seems easier, although still difficult, to criminalize results and move backward to a causal agent and an assessment of a particular set of mental states regarding that result. In general, when assessing criminal guilt the court is not looking to describe the specific mental states held by the defendant at the time of the crime. Instead, the court seeks to classify those mental states within a categorical level of intention required under the law; for

[10] There are also retributive, or legal moralist, reasons why certain harmful results are criminalized. So, to my mind we might see both retributive and consequentialist justifications of the criminal law at the institutional and the agential level. (What the "best" mixed justification for the criminal law looks like is another matter.)

example, the categories given in the Model Penal Code (MPC). Under the MPC, a crime can be committed purposely, knowingly, recklessly, or negligently.

Even if one agrees with Kumar's claim that results-oriented punishment leads to pro-sociality and provides stronger deterrence than a process that focuses on mental states, there is a question of how to determine what counts as a result. This matters because for some crimes, like trespass, there is no obvious result separate from the criminal act. Can the act of trespass itself count as a result? Under the dual-process theory of moral judgment, it would seem not, because this would collapse the main difference between the two processes where one is triggered by results and moves to a causal actor, and the other focuses on an act and simultaneous mental states. However, in the next section I will explore this issue further by examining the crime of rape. Like trespass, in the paradigm case of rape, the act itself, and not harm caused by the act, is forbidden by the criminal law.

3. Moral judgments and sexual assault

In this section I will focus primarily on "simple" rape, with the idea of narrowing a more complicated larger category of sexual assault that includes, amongst other crimes, sexual assault by extortion (MPC 213.4) and deception (MPC 213.5) and sex trafficking (MPC 213.9). In the U.S. and elsewhere, the present legal definition of rape is sexual intercourse without consent (Temkin 2002)(90), and I will focus on the baseline crime of sexual assault in the absence of consent (MPC 213.6) with the idea that this essential crime can be made more serious where other elements are present, including aggravated physical force or restraint (MPC 213.1). The newly redesigned MPC offense of sexual assault in the absence of consent, which I will also call rape, requires proof beyond a reasonable doubt of: (1) an act of sexual penetration or oral sex, (2) the absence of the complainant's consent, and (3) the defendant's recklessness as to each of these elements (Tentative Draft No. 4, pg. 226, lines 20-23).[11]

As already noted, rape is an interesting test case for Kumar's theory of criminal punishments because it is difficult to posit a publicly available harmful result – the forbidden criminal harm is a particular act performed in the context of the defendant and victim's mental states, and not any result that might flow from that act. Although "rape kits" can collect evidence that sex occurred, and in some cases that sex caused physical harm or damage, there are cases where the only difference between legal sex and rape is lack of consent. Physical harm is not required by the MPC rape statute,

[11] Rape is not a term used in the MPC. Recklessness is sufficient to be found guilty under MPC 213.6.

and for good reason: non-consensual sex is rape even if it does not cause physical damage, and consensual sex that does cause physical damage is not rape. Obviously, consent is a private state-of-affairs as it concerns the victim's state of mind, although there must have been enough of an outward expression of non-consent that the offender can be deemed reckless regarding the victim's state of mind. However, the disjunctive ways in which non-consent can be expressed are too numerous and varied to be the target of statutory language; hence, sex without consent is itself criminalized.

I do not think that the act of non-consensual sex itself can be conceived of as the harmful result of rape. In addition to the worry that this collapses the two processes of moral judgment, another worry is that the victim's mental state of non-consent is crucial to a rape charge, so analysis of the defendant's mental states and act alone is not sufficient to make a moral judgment about a rape. From the perspective of the difference principle, in a rape case both lucky and unlucky actors have sex, but in one case it's rape due to non-consent and in the other it's consensual sex. The difference between these cases is not a public result, but the presence or absence of a particular state of mind on the part of victim. Further, the defendant's private mental states are necessarily relevant to moral judgments about such cases, as what he knew about the victim's non-consent is crucial to his culpability. So, trying to understand the results of rape takes us directly back to an act and the mental states associated with it, where these mental states include those that can be attributed to both the defendant and the victim. Because of this, the assessment of culpability and punishment in cases of rape would seem to be driven not by the results-based process of judgment, but by the mental-states based process.

We may be further convinced that the act/intention process of moral judgment is likely to be used in rape cases when we consider how a prosecutor might attempt to trigger the results-oriented process of moral judgment about a rape in court. What result could a prosecutor gesture toward (in physical images or in the courts' mind's eye) in cases of rape, especially those cases where the victim did not suffer serious physical harm? I have seen prosecutors attempt to describe the victim's traumatized behavior after the attack as an outcome of the crime; however, normal emotional reactions to rape can be withdrawal and numbness, which can then fail to signal the trauma a survivor experienced.[12] Although it is often assumed that in the immediate aftermath of a rape "the

[12] Common responses to rape and other trauma are the "shut down" and dissociation often associated with PTSD. "When a parasympathetically dominated "shut-down" was the prominent peri-traumatic response

victim will be hysterical and tearful," one study found that many victims "have a controlled response in which they mask their feelings and appear calm and composed" (Temkin 2002). Very often, there are no pictures of serious physical injuries to introduce, no pictures of intimate physical violence the victim wants the court to see or imagine, and no stories of a sobbing, inconsolable victim in a public setting. There may be no public result to for the prosecutor to linger upon, and any proof of a public harm is offered primarily to influence the court's mental state attributions.

All of this indicates that while Kumar may be right that result-oriented moral judgments can justify criminalization of acts at the institutional level, the nature of rape is such that the results-driven process may either not be triggered such that the act/intention process must be activated, or may be tuned to things that are not, in fact, publicly-available results. If Kumar is correct that punishing based on public outcomes is more effective and reliable than punishment focused on mental states, then this could have important consequences for criminal law. I posit that if the results-oriented process of moral judgment is unavailable or ineffective in rape cases we might expect three things: First, the lack of public results may mean that laws that criminalize and punish rape are generated by intuitions about wrongdoing by the act/intention system which track mental states. Attribution of mental states in rape cases, however, is often based upon biased and unreliable inferential processes which are not reliably linked to judgments about deserved punishment. As a result, at the institutional level, we might expect less agreement and a wider variety in statutes criminalizing rape, and a wider range of applicable punishments. Second, because the process of discerning mental states in rape cases is difficult and subject to gendered expectations and bias which tends to discount victims' testimony; and because the act/intention process of moral judgment will often depend upon testimony from defendants and victims regarding their mental states ("he said, she said"), we might expect to see fewer investigations and prosecutions for rape crimes given the number of rapes that seem to occur. Third, due to the lack of publicly available result in rape cases and thus the lessened deterrent effect of rape statutes and norms, we might see higher levels of recidivism amongst sexual assault offenders.

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during the traumatic incident, comparable dissociative responses may dominate responding to subsequently experienced threat and may also reappear when the traumatic memory is reactivated." Shauer, M. and Elbert, T. (2015) "Dissociation Following Traumatic Stress," Zeitschrift für Psychologie / Journal of Psychology, 218: 109-127.

In the next three sections, I will argue that all three of these things are the case, taking the U.S. as an example.

a. Rape law

A recent American Law Institute commission has been tasked with updating the Model Penal Code's sexual assault provisions. They said the following regarding existing sexual assault statutes in the U.S.:

> "[E]xisting law defies ready characterization. As a general matter, state laws exhibit a patchwork of penal philosophies. With specific regard to sexual offenses, there is no clear consensus about the amount of punishment that should apply to particular offenses, and a breadth of punishments are authorized for similar conduct across the states. Consider an offense such as engaging in sexual intercourse with an adult who is unconscious. One jurisdiction punishes the offense with a maximum of five years' incarceration; another with life without parole." (Institute August 18, 2020)(1-2).

As this quote makes clear, U.S. sexual assault statutes vary wildly, and the sentences offenders serve are haphazard. Jurisdictions cannot even agree whether sexual assault in the absence of consent (without other aggravating factors) is rape and should be criminalized: only 68% of U.S. jurisdictions punish sexual penetration solely on the basis of absence of consent (Institute August 18, 2020)(239). (The proposed changes to the MPC lament this, and, as already noted, claim non-consensual sex should be a crime where the defendant shows recklessness regarding consent.) The exact same sexual offense may generate a fairly short or extremely long sentence of incarceration. For example, the jurisdictions that do criminalize non-consensual sex vary wildly in their gradation and punishment of the offense. For example, among the 12 jurisdictions that treat absence of consent as sufficient but do not define consent, three authorize a maximum penalty of 20 years, one authorizes up to five years, one up to two years, and seven impose misdemeanor penalties of up to a year. For the 24 jurisdictions that define consent as either affirmative consent or to be determined given the context of the circumstances, some impose felony sanctions with maximum sentences of 20 to life, some with a maximum of 10 to 15 years, some with a maximum of five to seven years, and two with

a maximum of 18 months and two years (American Law Institute 2020)(247-248). Truly, the sentencing of offenders who commit rape is variable to the point of being chaotic and unjust.[13]

The variations between jurisdictions regarding both the basic elements of rape and the gradations or seriousness of sexual offenses may be seen as supporting Kumar's claims that punishing based on results is more effective in accomplishing forward-looking aims and reliable than punishment based upon private mental states. Moral judgments related to punishment in rape cases based upon attributions of these mental states – on dual-process theory, generated primarily using the act/intention or mental state process – seem to be less stable and more variable, and rape statutes reflect this process. The private nature of the harm in many rape cases, and the difficulty and bias inherent in attributing mental states in such cases, discussed in detail below, may be one reason legislatures and courts have handled such cases — through statute and case law — in a highly inconsistent (and often ineffective) way.

b. Lower levels of report, investigation, arrest, and conviction for rape

We might also expect the lack of publicly available results in many rape cases to lead to lower levels of report, investigation, arrest, and conviction of such cases when compared to other violent crimes, especially if I am right that the results-oriented process often supports criminal verdicts at the agential level. If the act/intention process of moral judgment is heavily relied upon in rape cases, we ought not to think this would *necessarily* lead to weaker moral judgments, possibly even about punishment: the system focused on permissibility and wrongdoing might generate strongly consistent judgments of wrongdoing and blameworthiness, which could then result in related retributive judgments regarding proportional punishments. For example, if a person commits an act that is clearly impermissible (e.g. hitting someone) and the mental states associated with the act are fairly easy to surmise (e.g. the hitter yells "You'll be sorry!" whilst throwing the punch), then moral judgments regarding the act should be somewhat consistent. There is still a question regarding

[13] Depending on attendant circumstances, especially where serious physical force was used or where there is a certain relationship between the offender and the victim (e.g. teacher and student), long terms of incarceration for rape are not uncommon. Only murderers serve longer sentences overall. Temkin, J. (2002). Rape and the Legal Process, Oxford University Press. But there are also examples of high-profile rape cases where the sentences seem too lenient to be proportional. For example, Kate Manne discusses the case of Stanford University student and swimmer Brock Turner at length in her book *Down Girl*. Mr. Turner only served three months after being found guilty of sexually penetrating an intoxicated person Manne, K. (2017). Down Girl: The logic of misogyny, Oxford University Press. The judge in the case lamented the possibility of giving Turner a harsh sentence, indicating that Turner did not deserve to have his life ruined over one mistake. This mistake was having sex with an unconscious victim.

whether judgments about proportional punishment will also be consistent – punishment judgments show anchoring effects, for example (Enough and Mussweiler 2006). But we can imagine that it is at least possible that a criminal verdict and sentence or a criminal statute resting primarily on the act/intentions system of moral judgment could be fair and justifiable, even if such a judgment had poorer forward-looking effects than judgments based upon results.

However, as already indicated, in many rape cases the defendant's mental states may be difficult to discern, and a judgment in such cases is also dependent on an assessment of the victim's mental states, which is equally difficult. Proof of both typically rest on testimonial evidence. Understanding the nature of a victim's non-consent and how it interacted with her behavior is very often complicated - for example, both saying "no" and freezing up, and saying nothing can be related to the mental state of non-consent. To make matters worse, law enforcement and factfinders' attempts to use their folk psychology to attribute mental states in rape cases is subject to social norms and biases regarding male and female sexual behavior and testimonial credibility, as well as gendered expectations related to violence and trauma. As legal theorist Kimberly Ferzan puts it: "Rape law has typically conceptualized rape as a 'she said/he said.' …And, because the existence of semen is fully consistent with consent in cases of acquaintances, trials can easily come down to credibility contests" (Ferzan 2021)(28).

Generally, when we ascribe mental states to others, we utilize cues we take to indicate a person's prior behavior, character, appearance, demeanor, and the larger circumstances within which they are acting (Sifferd 2006). In the recent past these types of facts were often crucial to proving – or not proving – a rape case. And for women, reliance on such facts proved to be a disaster because they were interpreted against the backdrop of gendered and biased norms of sexual behavior. For example, courts assumed that if a person had had sex with a partner before they must have consented this time; that if a female victim dressed a certain way or was drunk at the time of the rape, these factors indicated consent; or that it was reasonable the defendant thought they consented (Temkin, 2002). But these factors are not relevant to whether a rape occurred. One might consent to sex in one circumstance and not consent to sex with the same person in another circumstance; one might flirt or leave a party with someone never planning to consent to sex; and a person who drinks too much should not be seen as consenting to sex just due to their alcohol intake. Just the existence

of a public awareness campaign that "no means no" indicates that there was massive societal misunderstanding regarding the nature of sexual consent.[14]

Today, rape shield laws have removed the court's ability to infer a lack of credibility and consent from a victim's sexual history (Temkin 2002)(30). But rape cases still very often rest on credibility, and patriarchal and even misogynist views and values can influence our folk psychology when we are making moral judgments regarding rape (Manne 2017). These views can specifically taint person's assessment of a victim's credibility and responsibility. Of course, some subsets of the population may be more biased against victims than others. In a study by Niemi and Young, subjects who more strongly held the values of loyalty, obedience to authority, and purity – these are the of Moral Foundations Theory (Graham et al., 2013) – were more likely to rate of victims of sexual and nonsexual crimes as contaminated; they were also more likely to blame victims and hold them responsible (Niemi and Young 2016). Women subjects overall, however, considered sexual crime victims less contaminated and more injured; but of course, police officers, prosecutors, and judges are very often men. Subjects who held binding values were also more likely to have increased perceptions of victims' (versus perpetrators') behaviors as contributing to the outcome or harm, and decreased focus on perpetrators (Niemi and Young 2016). Interestingly, these patterns persisted even when the authors controlled for subject's political views.

Because mental state attributions in rape cases are likely to be made in ways that depend crucially on testimony, attributing mental states in rape cases is also impacted by all the ways in which men's testimony may be privileged over women's testimony (Fricker 2007, Manne 2017). Legal scholar Deborah Turkheimer has noted that juries in rape cases seem to default to distrust regarding accounts from women that they were raped (Turkheimer 2017). Kimberly Ferzan notes that a major obstacle to justice in rape cases is law enforcement's search for a "righteous victim," and prosecutors' unwillingness to pursue cases where they don't think the victim will be seen as likeable and sympathetic (Ferzan 2021). Victim testimony alone is very often not enough for a rape conviction: In 2009, the Chicago Alliance against Sexual Exploitation wrote to the Cook County State's Attorney alleging that there was strong evidence the office did not bring rape cases unless there was bodily injury, a third-party witness, or an offender confession (Turkheimer 2017)(34).

[14] For a review of the "no means no" campaign against rape, and its insufficiency, see this Atlantic article: https://www.theatlantic.com/entertainment/archive/2018/08/the-dangerous-insufficiency-of-no-means-no/566465/

If the results-driven process of moral judgment is not available, and the act/intention or mental state process is severely compromised due to bias, especially from the perspective of victims, we ought not to be surprised that rape is under-reported, under-investigated, and under-prosecuted. While large-scale victimization studies indicate that between 15 and 20 percent of adult American women are raped at some time in their lives, the vast majority of these are not reported or investigated (Tjaden and Thoennes 2000).[15] Overall, it is likely fewer than 1-3% of rapes result in an arrest and conviction.[16] Even when reported, arrest and conviction rates are shockingly low. One study found that for every 100 rapes reported to police – and again, one must assume many rapes are not reported – only 18 led to arrest, and even fewer result in a conviction (Morabito et al 2019). Overall, fewer than seven percent of the rapes reported ended up in conviction (Morabito et al 2019). In Chicago, one of the largest criminal justice jurisdictions in the U.S., 80 to 90% of sexual harm reports to the Chicago Police Department over the past 10 years did not result in an arrest.[17] In sum, rape, when compared to other violent crimes, has lower rates of reporting, investigation, arrest, and conviction (Kyckelhahn, and Cohen, 2004).[18]

There is an additional confounding possibility related to the low arrest and conviction rate in rape cases. Above, I indicated that it is unlikely that the results-driven process of moral judgment is engaged with regard to rape due to the lack of publicly available result. As I noted, another possibility is that the rape itself is seen as a result, and moral judgments focus on this result attempt to trace from the rape to a causal actor. One might assume this causal actor identified in a rape would be the defendant, but instead, it might be that both the defendant and the victim – or even, just the victim – are seen as the actor causally related to the rape. Ferzan reports findings that "most observers agree that decisions in acquaintance rape cases are strongly affected by the purported victim's *contributory negligence*, and by her perceived immorality" (Ferzan 2021)(31, quoting (Bryden

[15] The number reported by the Office of Justice Programs in 2000 was 17.9%. See Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women: https://www.ojp.gov/pdffiles1/nij/183781.pdf.

[16] https://www.washingtonpost.com/business/2018/10/06/less-than-percent-rapes-lead-felony-convictions-least-percent-victims-face-emotional-physical-consequences/

[17] https://www.caase.org/cpd-response-sex-crimes/

[18] Studies have found that defendants are charged with rape at roughly the same rate as they are charged with murder, which is striking given the vast difference in estimated numbers of rapes versus murders. For example, an estimated 57,497 felony cases were filed in the U.S. state courts in the 75 largest counties during May 2004. About a quarter of defendants were charged with a violent offense, usually robbery or assault (figure 2). Less than 1% of defendants were charged with murder (0.6%) or rape (0.9%). https://bjs.ojp.gov/content/pub/pdf/fdluc04.pdf.

and Lengnick 1997) at 1232). Relatedly, subjects in Neimi and Young's study that held binding values were also more likely to have increased perceptions of victims' (versus perpetrators') behaviors as contributing to the outcome or harm, and decreased focus on perpetrators (Niemi and Young 2016).

Remember that hindsight bias and attribution of contributory negligence are the factors identified by Kneer and Machery (2019) and Kneer and Scoczen (in progress) as explaining and mediating responsibility assessments that were results-oriented. They note that subjects seemed to infer from the fact that harm did occur that it had a higher probability of occurring, thus the actor was negligent in acting. In rape cases, where the only results to be identified is the act of rape, this may work against victims if they are seen as the relevant causal actor: that the rape occurred seems to make it more likely that the victim is seen as negligent in creating circumstances where the rape happens, instead of making it seem more likely the defendant was negligent in not garnering consent.[19] The two processes of moral judgment operate in competition with one another. If the results-oriented process is triggered, and a moral judgment about rape traces back to the victim as a negligent causal actor, then a responsibility judgment focused on the defendant may be effectively blocked, especially where it is not easy to attribute to him an intent to rape or recklessness regarding consent.

All told, our processes of moral judgment seem to be ill-equipped to handle rape cases, especially in cases where physical violence and serious bodily harm is difficult to discern. If dual process theory is correct, it seems that cases of rape may sit within a moral blind spot, as neither process is well-suited to generate reliable judgments of wrong-doing or appropriate punishment.[20] If this is true, we ought not to be surprised that the enforcement and application of the criminal law regarding rape cases would be similarly compromised.

[19] In a new paper, Machery and Scoczen performed studies focused on ways to counter the hindsight bias. They found that, "Although the hindsight bias is robust, pervasive and its consequences can be daunting…there are measures that can be taken. Whereas the practical import of probability anchoring is small…both probability stabilizing and prompting people to entertain alternative outcomes hold a lot of promise. They block the hindsight bias, the distorted ascription of risk-related types of mens rea (negligence and recklessness) and decrease the outcome bias on blame substantially or cancel it out." This may mean there are ways to counter biased attributions of negligence to rape victims. Machery and Scoczen (in progress), "Outcome Effects, Moral Luck and the Hindsight Bias." Available from: https://www.researchgate.net/publication/350287057_Outcome_Effects_Moral_Luck_and_the_Hindsight_Bias [accessed Jul 15 2021].

[20] I'd like to thank Tyler Fagan for this turn of phrase.

c. Higher levels of recidivism for sexual assault

Above I have shown that categories and gradations of sexual assault crimes and their related punishments are highly inconsistent across jurisdictions, and that rape reports, arrests, and convictions are low in comparison to other crimes. If Kumar's theory regarding the instrumental justification of results-oriented moral judgments is correct, we might also expect that rape law would have a lessened deterrent effect on the general population and on offenders.

Criminal law and punishment is thought to have a general deterrent effect on the population such that fewer people commit crimes than would have if criminal law did not exist. Of course, we cannot compare current rates of rape with those that might occur if the harm in rape cases and norms related to rape were more consistent, reliable, and salient, and we cannot compare current rates with what rates would be if rape were not criminalized at all.

However, it is worth noting that rates of recidivism amongst sexual offenders are higher than for other type of offenders, even violent offenders – but only with regard to sex crimes.[21] That is, sex offenders are *less likely* than other offenders to commit another crime, but four times *more likely* to commit another sex crime. There is evidence that over 40% of heterosexual adult sexual offenders commit another sexual offense (Przybylski 2015). In one study, sex offenders had a lower overall rearrest rate than non-sex offenders (43 percent compared to 68 percent), but their sex crime rearrest rate was four times higher than the rate for non-sex offenders (Langan and Levin 2002). Similar patterns are consistently found in other studies that compare sex offender and non-sex offender recidivism (see, e.g., Sample & Bray, 2003; Hanson, Scott & Steffy, 1995). In another study, sex offenders in Illinois did not appear to commit future offenses, in general, at a higher rate than do other offenders. However, they had higher levels of recidivism regarding the sex crime category for which they were arrested (Przybylski 2015). Like sex offenders overall, rapists had a lower overall recidivism rate than non-sex offenders in the study (46 percent compared to 68 percent), but a higher sexual recidivism rate (5 percent compared to 1.3 percent) (Przybylski 2015). About half of the rapists with more than one prior arrest were rearrested within three years of their release, a rearrest rate nearly double (49.6 percent compared to 28.3 percent) that of rapists with just one prior arrest (Przybylski 2015).

[21] Unfortunately, here I must shift to discussing sex offenders more generally, instead of rapists. This is because this is the way much of the data about recidivism is coded.

It is important to remember that these studies indicated a high rate of re-offense is amongst defendants who are convicted of a sexual offense, not persons who have committed a sexual offense but who have not been convicted. However, when the Cleveland Police Department embarked upon a massive rape kit testing initiative, they identified 207 suspected serial rapists responsible for almost 600 attacks across the greater Cleveland area. Many of these men had never been arrested for a sex crime, and several were linked to over five instances of rape each.[22] Researchers have noted that "the historic under-prosecution of sexual assault means that recidivism studies likely underestimate the scope of serial sexual perpetration" (Campbell et al 2019).

Overall, there seems to be evidence that rape law may have a weaker effect at encouraging prosocial behavior and discouraging offending than laws about other violent offenses. This is something we might expect if Kumar is correct that we may be more sensitive and responsive to moral and criminal norms that identify publicly available results, as these public results are lacking in the crime of "simple" rape.

4. Conclusions

Work in experimental philosophy indicates that humans use at least two separate cognitive processes to make moral judgments: one that focuses on an act and intentions or mental states and one that focuses on outcomes or results and then looks for a causal actor. Conflict between these two processes can give rise to puzzle of moral luck, which arises when persons who commit the same acts with the same associated mental states are punished differently when these acts have different results. Kumar (2019) has argued that one resolution to the puzzle of moral luck as it arises in the criminal law is to claim instrumental aims like deterrence and social order are achieved by the law treating cases differently based on results.

However, rape is a crime that, by definition, may be lacking a publicly available outcome. This means moral judgments about rape may not engage the results-oriented system; or may engage it less often and less effectively. Criminal statutes, police investigations, arrests, prosecutions, verdicts, and punishment for rape are more likely to be related to moral judgments that assess acts and intentions. I have argued that the act/intention process of moral judgment is also poorly equipped with regard to rape cases. In the end, the variability in statutes criminalizing and punishing rape; the low number of reports, arrests, and convictions for rape; and the higher rates of recidivism for rapists all support

[22] https://www.cleveland.com/rape-kits/2015/03/authorities_believe_serial_rap.html

the claim that instances of rape may not produce high-quality judgments from either the results-orientated or the act/mental state systems of moral judgment. If this is true, rape – and other crimes that lack a publicly available result – may sit in a moral judgment blind spot.

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