

THE WRONG OF RAPE

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If rape is evaluated as a serious wrong, can it also be defined as non-consensual sex (NCS)? Many do not see all instances of NCS as seriously wrongful. I argue that rape is both properly defined as NCS and properly evaluated as a serious wrong. First, I distinguish the hurtfulness of rape from its wrongfulness; secondly, I classify its harms and characterize its essential wrongfulness; thirdly, I criticize a view of rape as merely 'sex minus consent'; fourthly, I criticize mistaken attempts to discount the wrongfulness of rape for those who do not value sex; fifthly, I contrast two models for weighing interests, according to one of which rape is not seriously wrongful; finally, I sketch a defence of the view that our sexual integrity ought to be a central interest of ours.

There is a problem about combining a definition of rape as non-consensual sex with evaluating it as a serious wrong. Rape is conventionally defined as sex without the consent of its victim. I endorse this definition without here offering any further defence of it beyond what is necessary to resolve the tension between the definition and the evaluation. Rape as *non-consensual sex* (hereafter NCS) is normally contrasted with definitions of rape as *coerced sex* or as *forced sex* ('carnal knowledge [by a man] of a woman forcibly and against her will'¹). Joan McGregor, for example, writes 'At the baseline what differentiates rape from other crimes is *sexual intercourse or contact without consent* – non-consensual sex is rape'.²

What I shall call the 'conjunctive definition' of rape views it as sex that is non-consensual *and* forced. Joan McGregor notes the requirement of most current American criminal codes that 'for the offence of rape, the assault be both forceful *and* without the consent of the victim'.³ The conjunctive definition is distinct from one citing NCS alone. The former sees as rape only what is at least forced, whereas the latter allows that non-consensual but

¹ William Blackstone, *Commentaries on the Laws of England* (1765–9) (New York and London: Garland, 1978), Vol. IV, p. 210.

² J. McGregor, 'Force, Consent, and the Reasonable Woman', in J. Coleman and A. Buchanan (eds), *In Harm's Way: Essays in Honor of Joel Feinberg* (Cambridge UP, 1994), pp. 231–54, at p. 233.

³ J. McGregor, 'Why When She Says No She Doesn't Mean Maybe and Doesn't Mean Yes', *Legal Theory*, 2 (1996), pp. 174–208, at p. 181.

unforced sex – for instance, sex secured through the credible threat of superior force – is rape. Under the umbrella of NCS the use of force is one but not the only circumstance in which consent to sex is vitiated. NCS is also broader than coerced sex. A woman does not consent to sex following the unwitting administration of a drug such as Rohypnol – indeed, she may well be unaware at the time of the sex – but she is not coerced into having sex.

In law, of course, NCS suffices only to capture the *actus reus* of the crime of rape, which also requires *mens rea*, normally that the defendant knew that the woman did not consent or was reckless in the face of her likely non-consent.⁴ Thus according to section 1 of the United Kingdom (2003) Sexual Offences Act a person *A* commits the offence of rape if ‘(a) he intentionally penetrates the vagina, anus or mouth of another person (*B*) with his penis, (b) *B* does not consent to the penetration, and (c) *A* does not reasonably believe that *B* consents’.⁵

So much for the definition of rape. In evaluative terms, rape is regarded as a very serious wrong and as a grave crime. Within most jurisdictions, rape is an offence meriting the most severe of punishments – in the United Kingdom, for instance, up to life imprisonment. In people’s estimation of the seriousness of various crimes, forcible rape comes immediately below murder and above a serious assault or armed robbery.⁶ However, the definition of rape as NCS and its evaluation as a serious wrong are in tension with each other. Some instances of NCS are not seen as seriously wrongful. Indeed, the victims of NCS do not always view what has happened to them as rape. For instance, some women who have suffered sex when too intoxicated to give their consent do not describe their ordeal as rape, even though it would conform to the legal definition of the offence.⁷

Why is this a problem? The principle of fair labelling prescribes that differences between kinds of wrongdoing should be respected and captured by appropriate distinctions in the law.⁸ The definition of some offence should capture ‘the moral essence of the wrong in question, by reference to the best moral conception of that essence in society as it is today’.⁹ John

⁴ I follow most people here in assuming that the victim of a rape is a woman and the rapist a man. Male rape of men and female rape of men both occur. But my usage, like that of others, reflects the fact that the overwhelming number of rapes are of women by men.

⁵ <http://www.legislation.hms.gov.uk/acts/acts2003/30042-b.htm#1>

⁶ See T. Sellin and M. Wolfgang, *The Measurement of Delinquency* (New York: John Wiley, 1964), quoted in McGregor, ‘Force, Consent’, pp. 235–6.

⁷ A.S. Kahn, ‘What College Women Do and Do Not Experience as Rape’, *Psychology of Women Quarterly*, 28 (2004), pp. 9–15.

⁸ A. Ashworth, *Principles of the Criminal Law*, 3rd edn (Oxford: Clarendon Press, 1999), pp. 90–3.

⁹ J. Horder, ‘Rethinking Non-Fatal Offences against the Person’, *Oxford Journal of Legal Studies*, 14 (1994), pp. 335–51, at p. 335.

Gardner thinks that the law displays ‘moral clarity’ when it replicates in its distinctions those that apply outside the law in the broader society.¹⁰ Fair labelling might thus require that there would be distinguishable offences of NCS of which rape proper would only be one; or, indeed, that some instances of NCS would not be offences.

More generally, that the definition of rape as NCS and its evaluation as a serious wrong do not mesh suggests that the social kind ‘rape’ is not well constructed. What people understand as seriously wrongful is not what the orthodox definition holds to be rape, namely, every instance of NCS. Two very different responses can be made to the problem which I have outlined. The first is to concede that rape is indeed poorly defined as NCS if it is still to be evaluated as a serious wrong and as a grave crime. We might instead reserve the term for a limited class of instances of NCS, and speak otherwise, in law and generally, of, for example, sexual assaults. The second is to insist that rape is both properly defined as NCS and properly evaluated as a serious wrong. A process of education is necessary to correct the misperception of NCS as a class of actions not all instances of which are seriously wrongful. Here I shall adopt the second strategy. I shall do so by first dispelling several misunderstandings which get in the way of seeing every instance of NCS as seriously wrongful, and then offering a general account of why all NCS is seriously wrongful.

I do not here provide a full defence of this general account of why NCS is seriously wrongful. However, I shall indicate both why it is a plausible account and what more would need to be said in order to supply a full defence of it. My purpose is to resolve the problem outlined at the outset by showing how it is reasonable both to define rape as NCS and to continue to regard it as seriously wrongful. I do this in the following manner. First, I distinguish the hurtfulness of rape from its wrongfulness; secondly, I offer a typology of the harms of rape and, thus armed, provide a characterization of its essential wrongfulness; thirdly, I criticize a misleading view of rape as merely ‘sex minus consent’; fourthly, I criticize the views of some philosophers who mistakenly discount the wrongfulness of rape for those who do not value sex; fifthly, I contrast two models for understanding the importance of interests, according to one of which rape is not seriously wrongful; finally, I sketch a defence of the view that our sexual integrity ought to be a central interest of ours.

¹⁰ J. Gardner, ‘Rationality and the Rule of Law in Offences Against the Person’, *Cambridge Law Journal*, 53 (1994), pp. 502–23, at p. 513.

I

One reason for thinking that not every instance of NCS is seriously wrongful is the fact that not every woman who suffers NCS experiences it as severely traumatic. Indeed, some women report no hurt at all. Women who are raped can endure serious and enduring psychological trauma.¹¹ Nevertheless, the trauma experienced by women does vary, and there is evidence as to which variables correlate with the degree of deleterious impact, such as the disposition of the victim to blame herself for the attack and the severity of the assault.¹²

Concentrating on instances of NCS in which there is no trauma or perceived hurt, we can conceive of two kinds of case. In the first the woman has sex in circumstances such that it is only later that she becomes aware that she did not consent. This, classically, occurs when sex is obtained by deception either as to the nature of the act or as to the person with whom she has sex, or else in respect of the inducements to have sex.¹³ It would also be the situation if the woman were unconscious during the sex. At the time of the sex in this kind of case the woman may suffer no hurt. Her belated awareness that she did have sex from which her consent was absent may occasion distress; but again, it need not. The second kind of case is one in which the woman undergoes NCS and knows this to be the case, but sincerely reports that she experiences no hurt either at the time or later.

Should we say then that the wrongfulness of NCS varies in proportion to its perceived hurtfulness? More particularly, should we say that only instances of NCS which occasion serious distress or trauma can properly be regarded as seriously wrongful? There are reasons not to. In the first place, it is obviously mistaken to argue that since one instance of some kind of offence is more wrongful than some other instance of the same offence, the latter is not seriously wrongful. There can be more or less serious instances of a class of seriously wrongful actions. The deliberate and malicious killing

¹¹ See, *inter alia*, M.P. Koss and M.R. Harvey, *The Rape Victim: Clinical and Community Interventions*, 2nd edition (London: Sage Publications, 1991); M.A. Mazur, *Understanding the Rape Victim: a Synthesis of Research Findings* (New York: John Wiley, 1979); A.W. Burgess and L.L. Holmstrom, 'Rape Trauma Syndrome', *American Journal of Psychiatry*, 131 (1974), pp. 981–6.

¹² J. Norris and S. Feldman-Summers, 'Factors Related to the Psychological Impact of Rape on the Victim', *Journal of Abnormal Psychology*, 90 (1981), pp. 562–7.

¹³ These are referred to in law as fraud in the *factum* and fraud in the inducement. Under Section 76(2) of the United Kingdom Sexual Offences Act 2003, circumstances under which consent may be presumed absent include those in which 'the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act' and in which 'the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant'.

of an innocent person is a serious wrong and is so even if accomplished painlessly and when not preceded by extended torture. In the second place, it is important, as I shall show in more detail later, to distinguish between the essential wrong of rape as NCS from the wrongfulness of the further features of a particular rape, such as a vicious physical assault.

Thirdly, and most importantly, we need to distinguish between the wrongfulness and the hurtfulness of an action. In fact, we need to distinguish between wrong, harm and hurt. By ‘hurt’ I mean experienced pain, displeasure, discomfort; by ‘harm’ I mean, following Joel Feinberg, a setback to another’s interests; and by ‘wrong’ I mean an indefensible setback to another’s interests.¹⁴ A wronging of another is indefensible in two respects. The person committing the wrong has no warrant for causing the harm, such as might be the case if it was excusable or justifiable; and the person to whom the harm is done has a justified claim that this harm ought not to be done to him.

This typology is by no means uncontroversial, but I shall not defend it here. What it allows us to say is the following. *A* can cause *B* hurt but not wrong him. *B*, a bank robber, is discomfited by *A*’s thwarting of his crime, but *B* has no legitimate interest in robbing the bank, and *A* does not act wrongly in thwarting his attempt to do so. *A* may not wrong *B* if he harms him but does so justifiably. Thus *A* might kill *B* in self-defence. Or *A* might not wrong *B* if *B* consents to *A*’s harming of *B*. The principle *volenti non fit injuria* holds that no wrong is done to him who consents. This principle may admit of exceptions where the harm is very serious and irreversible. In the English case of *Brown* (R. v Brown [1993] 2 All ER 75) the House of Lords held that a group of men who practised extreme but consensual sado-masochism were nevertheless rightly prosecuted for assault; some of the judges in that case appealed to the idea of a threshold of harm beyond which the consent of the ‘victim’ no longer suffices to exculpate. *A* might wrong *B* but not harm him. Arguably, *A* harmlessly wrongs *B* if he breaks a promise to *B* in circumstances which nevertheless rebound to *B*’s very great benefit. Or *A* might steal from *B* a bottle of poison that *B* mistakenly believed contained a refreshing drink.

Someone may be wronged and be harmed even though they are not hurt. A person may suffer an unjustified setback to his legitimate interests without knowing that he has been wronged. If my writings are maliciously mistranslated into a language with whose speakers I have no contact, and hence I know nothing about the mistranslation or its consequences, then my reputation among these readers suffers without my knowledge. It seems clear

¹⁴ J. Feinberg, *Harm to Others*, Vol. 1 of *The Moral Limits of the Criminal Law* (Oxford UP, 1984), ch. 1.

that my interest in seeing my ideas accurately represented has been set back, even though I am unaware of the fact.¹⁵ In analogous terms, a woman's interest in her sexual integrity is set back when she undergoes sex to which she does not consent, even if she does not know this at the time or even subsequently. Gardner and Shute envisage a 'harmless rape', one in which the victim is 'forever oblivious to the fact that she was raped', and insist that the wrongfulness of such a rape cannot lie in its harmfulness.¹⁶ On my typology, the rape is not harmless, since it sets back her legitimate interest in her sexual integrity; but it is nevertheless a hurtless rape. We can thus agree on the essential point that the wrongfulness of Gardner's and Shute's envisaged 'harmless rape' cannot lie in its hurtfulness.

This view contrasts most obviously with an 'experiential' account such as the one Alan Wertheimer defends: 'rape and non-consensual relations are special harms, and they are special harms largely because they are experienced as special harms'.¹⁷ Wertheimer acknowledges that the principal problem for his account is what to say about the woman who is raped when unconscious or as the result of a deception of which she is unaware. Of course, she may learn *later* that she has been raped and at that time experience distress. But she need not. Suppose a man has sex with a woman who is in a permanent comatose state. Wertheimer thinks (p. 111) that the man acts wrongfully even though she does not and will never experience any hurt. He acts wrongly because his action is of a kind that *typically* causes a harmful experience or is *likely* to do so.

This does not, I think, capture what is wrongful in this case, namely, that it is a violation of the woman's sexual integrity. This is a wrong independent of any distress she could experience, just as the translator wrongs me even though I might never be distressed or embarrassed by any knowledge that I had been mistranslated. Moreover, it does not capture matters to say that the translator does wrong because his actions would typically or probably cause distress in those whose work he mistranslates. Rather, he traduces and assaults the integrity of those he mistranslates; he does so whether or not they do or would experience any distress at learning of the mistranslation.

Some rapes defined as instances of NCS may be experienced by their victims as rapes but also as non-traumatic. Whether or not she experiences it as hurtful, a woman who is raped is wronged. The vast majority of rape victims *do* suffer psychological distress of varying degrees of magnitude. That fact –

¹⁵ For a stimulating defence of the view that even the dead can be harmed see G. Pitcher, 'The Misfortunes of the Dead', *American Philosophical Quarterly*, 15 (1984), pp. 27–36.

¹⁶ J. Gardner and S. Shute, 'The Wrongness of Rape', in J. Horder (ed.), *Oxford Essays in Jurisprudence*, Fourth Series (Oxford UP, 2000), pp. 193–217, at pp. 196–7.

¹⁷ A. Wertheimer, *Consent to Sexual Relations* (Cambridge UP, 2003), p. 103.

and it is a fact – gives support to the view that rape is a serious wrong. But whilst its hurtfulness is evidence of, it is not constitutive of, its essential wrongfulness.

II

I shall expand upon and offer a defence of this claim by being clearer about how to specify the essential harm of rape. I speak of harm in this section rather than wrong, because I want to allow for the possibility that someone could have their legitimate interest in sexual integrity set back but not be wronged. Envisaging such cases may, I concede, be very hard. Perhaps cases in which someone consents now to non-consensual sex later, or in which someone rapes another in self-defence, provide analogues to instances of justified or excused killing. I shall not comment on these cases further. However, allowing for their possibility preserves the important distinction between harming and wronging.

I can specify the essential harm of rape by providing a typology of harms that is constituted by two distinctions. First, we may distinguish between the *core* and the *aggravating* harms of an act of rape. By the ‘core’ harms I mean those which are done to a victim by *any* act of rape. By the ‘aggravating’ harms I mean those which are not occasioned by every act of rape but which are additional and due to particular features of the individual rape, to the circumstances in which it was committed, or to other features of the victim or her society. Most centrally, not all acts of rape are accomplished with acts of non-sexual physical violence, such as a beating. Such violence and its effects will count as aggravating harms. The aggravating harm of a violent act of rape compounds the core harm of the act of the rape in the sense that it adds to the harm of the rape itself the further harm of the accompanying violence.

NCS can be secured without the use of overwhelming and physically injurious force. Yet it is undoubtedly true that the use of such force can seriously compound the trauma of rape. Susan Brison has written, movingly and eloquently, about the philosophical significance of the deep trauma she endured as the result of an extremely violent sexual assault in which she was strangled to unconsciousness and left for dead. The trauma she suffered was in large part that of having faced the most extreme loss of control over one’s body and person that one could face, namely, the prospect of one’s own death at the hands of another. She is surely justified in succinctly and accurately describing her ordeal as ‘attempted sexual murder’.¹⁸ It is proper,

¹⁸ S.J. Brison, *Aftermath, Violence and the Remaking of a Self* (Princeton UP, 2002).

then, to acknowledge the special, and extreme, trauma occasioned by her violent rape, but also to recognize that not every rape is or need be so extraordinarily violent.

Some aggravating harms may be attributed to the particular perceptions or understanding of rape held by an individual. These in turn may be due to psychological characteristics of the victim or to more general social meanings and values. If, for instance, a rape victim has certain sensibilities which make non-consensual sex, or some particular sexual act, especially horrifying or abhorrent to her, then she suffers a contingent harm which others without those sensibilities do not suffer. Or again, if the society to which a rape victim belongs attaches a certain significance to a woman's loss of honour, then she may suffer contingent harms, such as social ostracism and exclusion, which women outside that society would not. Here the aggravating harms compound the core harm of the rape by making the very act of rape itself worse for its victim.

Aggravating harms thus comprise those which are due to the circumstances or character of the particular rape – that it was, for instance, achieved with physical violence – and those which are explained by the beliefs, values and sensibilities of the victim or her society. It is of course possible that beliefs held by some women in some societies cause them to view certain kinds of rape as non-traumatic. A woman might, for instance, report that she is not violated if her rapist promises to marry her. But, to repeat my earlier point, the hurtfulness of a rape is evidence of, but not constitutive of, the essential wrongfulness of a rape.

The second distinction is between *direct* and *indirect* harms. By the former I mean those which are done to the victim alone, and by the latter harms done to others. Thus it has been argued that the prevalence of rape may have social effects. All women, not just those who are raped, suffer from an increased anxiety and fearfulness in any context in which rape is a possibility. All women may suffer the indirect harms of rape. Some have argued, with merit, that it is unfair that women should suffer significantly greater fear in their lives than men.¹⁹ A further and much more contentious claim is that since the object of women's fear is some men, it is all men who bear responsibility for rape.²⁰ If all women are indeed more fearful in consequence of its occurrence, then this indirect harm should be viewed as a core harm. Yet it is the prevalence of rape that occasions the fear, and not rape as such. In a society in which rapes were rare, or occurred in very particular kinds of circumstance, then the indirect harms of rape might not befall all women.

¹⁹ K. Burgess-Jackson, *Rape: a Philosophical Investigation* (Aldershot: Dartmouth, 1996), ch. 10.

²⁰ See, e.g., L. May and R. Strikwerda, 'Men in Groups: Collective Responsibility for Rape', *Hypatia*, 9 (1994), pp. 134–51.

The preceding concerns the indirect social effects of rapes which are committed, one must presume, in an uncoordinated fashion. Rapes perpetrated by different unrelated men unaware of others' actions nevertheless have, in aggregate, a considerable social impact. There are, by contrast, circumstances in which rapes *are* co-ordinated and do have a direct social effect. The most obvious example is the use of rape in war as a means of terrorizing, humiliating and cowing a well defined group. Rapes in these circumstances may well be characterized as war crimes.²¹

Armed with this typology of harms, I maintain that the essential wrong of any instance of rape is the set of indefensible core direct harms it causes. This claim assists the strategy I am defending – that rape is both properly defined as NCS and properly evaluated as seriously wrongful – in the following ways. First, it allows us to acknowledge the full range of harms any particular rape may cause, without commitment to the view that each and every rape must cause all of these harms. Secondly, it brings into clearer view what needs to be shown, namely, that the essential wrong of rape, defined as NCS, is indeed a very serious one. I shall respond to this latter challenge in the final sections of this paper. Before that, I shall criticize a misleading characterization of NCS which gets in the way of seeing it as seriously wrongful, and leads some to argue that for those who do not value sex NCS cannot be seriously harmful.

III

If rape is defined as NCS, then the wrongfulness of rape must be explicable in terms of this combination of 'sex' and 'non-consensuality'. I shall now provide a contrast between two ways of understanding this combination: 'sex minus consent', and 'sex-without-consent'. I shall argue that the first amounts to a serious misunderstanding of NCS. In summary, the distinction between the two is as follows. Sex minus consent is sex from which consent is missing, but it is sex nevertheless. It thus retains the positive characteristics that sex has in other, consensual, contexts. It merely has the additional but negative element of non-consensuality. By contrast, sex-without-consent is a combinatory whole whose elements cannot be separately evaluated. The hyphens indicate the indissolubility of the whole. Sex-without-consent is qualitatively distinct from consensual sex, and the 'sex' in both cannot be thought of as having the same invariant value across both combinations.

²¹ See, e.g., K.D. Askin, 'Prosecuting Wartime Rapes and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles', *Berkeley Journal of International Law*, 21 (2003), pp. 288–349.

There is more to say about the mistaken idea of NCS as ‘sex minus consent’. I shall italicize the expression of a view which I shall subsequently criticize.

The overbearing of a person's consent is the violation of that person's autonomy, a disregarding or disrespecting of her choices about that over which she rightfully exercises the power of consent. Such overbearing is seriously wrongful, and, qua overbearing, is an invariant wrong. What makes it wrong as a violation of autonomy is not measured by the content of what it is that she autonomously chooses. In all cases of an overbearing of autonomy there is a constant measure of wrongfulness in denying someone her power of choice, whatever it is that she might otherwise have chosen. A does ϕ to B (suffers B to undergo ϕ) and B does not consent to A doing ϕ to her (to having A suffer her to undergo ϕ). For any value of ϕ , A does a wrong to B and the wrong is that of overbearing B's consent.

If we are thus to measure the differential wrongfulness of different instances of an overbearing of another's consent, we can do so only in terms of what it is that is not consented to. What makes A's doing ϕ to B without B's consent more or less wrongful is given by the value of ϕ to B. The greater the value to Smith of ϕ , the greater the wrong that is done to Smith by doing ϕ (or suffering Smith to undergo ϕ) without Smith's consent. If I use her car without her consent, this is worse than using her lawnmower without her consent if, and to the degree that, using Smith's car has a greater value for Smith than using Smith's lawnmower has for Smith. One way to measure the wrongfulness in question is indeed quite simple: the positive value to Smith of ϕ is converted directly into a corresponding negative value when consent to ϕ is withdrawn.

In the case of rape, ‘sex’ is what ϕ stands for in the general formal characterization of a non-consensual activity. Thus rape is more or less seriously wrongful depending on the extent to which the person who does not consent to sex values it. Raping someone is graver than tickling them without their consent just because sex is more important to a person than merely being tickled. So we have a way of capturing the wrongfulness of rape by combining the elements of the definition – ‘sex’ and ‘non-consensual’. Any non-consensual activity is wrong, and wrong to the same degree, in as much as it is non-consensual. Rape is more or less wrong than any other non-consensual activity to the degree that sex is more or less valuable or important to the person who engages in or undergoes it than the other activities.

This ends the summary of a view I now proceed to criticize. It is a mistake to think of the significance or importance of sex as invariant between non-consensual and consensual instances of it. Non-consensual sex is of an entirely different order from consensual sex. What is wrongful is sex-without-consent. The wrong is not measured as sex from which consent has been subtracted; the wrong of rape is the indivisible wrong of non-consensual sex. Susan Brison points out (pp. 6–7) that thinking of other offences as action-types without consent exposes the oddity of doing so in the case of rape. Try, she suggests, thinking of theft as ‘coerced gift-giving’ or murder as ‘assisted suicide minus consent’. She adds that ‘In the cases of

both theft and murder, the notion of violation seems built into our conceptions of the physical act constituting the crime, so it is inconceivable that one could consent to the act in question'. It is easier to think of rape as a violation if one does not simply think of it as sex – and the very same kind of sex as we have as consenting parties – but with the consent subtracted. An alleged victim of rape, when questioned by defence counsel about her last sexual relationship, rightly protested 'Having sex with your boyfriend is different from someone raping you'.²²

The tendency to misunderstand NCS as sex minus consent is nevertheless encouraged by a certain *façon de parler* about the difference between rape and normal sexual intercourse. This takes the form of the oversimplified and thus potentially misleading claim that 'The crucial difference between ordinary sexual intercourse and simple rape is that ordinary sexual intercourse is more or less (freely) consented to while rape is not'.²³ Ross Harrison says that 'What principally distinguishes rape from normal sexual activity is the consent of the raped woman', Richard Posner, more bluntly, that 'All that distinguishes [rape] from ordinary sexual intercourse is lack of consent'.²⁴ This manner of description suggests that normal sex is sex plus consent, whereas rape is sex minus consent. To repeat, the proper contrast is between rape as sex-without-consent and normal sexual intercourse as consented-to-sex. Expressing the distinction in this way avoids the dangers of viewing sex as a constant factor in both rape and normal sexual intercourse.

These dangers are manifest in certain prejudicial characterizations of rape and the victim of rape. At worst, there is a view that not only sex but also sexual pleasure is a constant factor in rape and normal sexual intercourse. This view is on display in the mythical injunction to the victim 'If you cannot prevent it happening at least enjoy it'. Or in the rapist's rationalizing myth that deep down a woman really wants it. Such myths are served by the falsehood that if the lack of consent can be discounted there is nevertheless the constant underlying fact of sexual pleasure. These myths do not even construe non-consensual sex as a harm that negatively mirrors the positive good of consensual sex. They view sex as constantly pleasurable whatever the circumstances, and rape as unpleasant merely because the negative value of the absence of consent somehow outweighs that constant positive value of sexual pleasure.

²² S. Lees, *Carnal Knowledge: Rape on Trial* (London: Hamish Hamilton, 1996), p. 134.

²³ M. Davis, 'Setting the Penalties: What Does Rape Deserve?', *Law and Philosophy*, 3 (1984), pp. 61–110, at p. 89.

²⁴ R. Harrison, 'Rape – a Case Study in Political Philosophy', in S. Tomaselli and R. Porter (eds), *Rape: an Historical and Cultural Inquiry* (Oxford: Blackwell, 1986), pp. 41–56, at p. 52; R. Posner, *Sex and Reason* (Harvard UP, 1992), p. 388.

IV

One kind of case discussed by philosophers is that used to argue that NCS cannot be seriously wrongful when its victim does not value sex. The case is that of a prostitute, somebody who sells sex. Joel Feinberg comments ‘The fact that a woman is willing to have sex for money implies that the sexual episode in itself is not a clear harm to her when she is not paid’.²⁵ Jeffrie Murphy, in his discussion of the rape of a prostitute, insists that whilst he wants to regard it as being as serious as the rape of any other woman, he also thinks that this may be implausible, in virtue of the way the prostitute ‘conceives of her sexuality’. He adds ‘The prostitute might seem to regard her sexuality, not as a sacred and mysterious aspect of her self-identity, but rather as a commodity to be traded on the market’.²⁶

The case discussed by Feinberg and Murphy is one in which the prostitute is not, as promised, paid for her services. It is described as NCS, and hence as rape. However, in the English case of *Linekar* ([1995] QB 250, [1995] 3 All ER 230), where a young man reneged on his pledge to pay a prostitute for sex, at issue was whether she had indeed been raped. Central to the dispute was the distinction between ‘fraud in the *factum*’ – deception as to the nature of the act – and ‘fraud in the inducement’ – deception as to ‘collateral matters’ such as rewards for or consequences of the act. Anglo-American law has been willing on the whole to regard as rape sex obtained by fraud in the *factum*, but not so sex obtained through ‘fraud in the inducement’. Notwithstanding the difficulties of showing why consent is vitiated in the one case of fraud but not the other, the whole distinction between the two types of fraud is very unclear.²⁷

One might then say that a prostitute who is merely deceived in respect of the inducements to sex is not raped, since such deceit does not vitiate consent. Hence she does not suffer the harms of NCS. I set this possible complication to one side, since the question under present consideration is whether, if she *is* raped, the unconsented sex is as harmful to her as it would be to another woman who is not a prostitute.

²⁵ Feinberg, *Harm to Self*, Vol. III of *The Moral Limits of the Criminal Law* (Oxford UP, 1986), p. 295.

²⁶ J. Murphy, ‘Some Ruminations on Women, Violence, and the Criminal Law’, in J. Coleman and A. Buchanan (eds) *In Harm's Way: Essays in Honour of Joel Feinberg* (Cambridge UP, 1994), pp. 209–30, at p. 216.

²⁷ Murphy, pp. 204–9; P. Westen, *The Logic of Consent: the Diversity and Deceptiveness of Consent as a Defence to Criminal Conduct* (Aldershot: Ashgate, 2004), pp. 197–8; J. McGregor, *Is It Rape? On Acquaintance Rape and Taking Women's Consent Seriously* (Aldershot: Ashgate, 2005), pp. 181–90.

Feinberg and Murphy both think that the prostitute, in virtue of her trade and thus in virtue of what sex means for her, is less evidently harmed by non-consensual sex than someone who does not sell sex. They do not think that this is the case because her life as a prostitute has been such that she is now insensitive to the harms that might be done her. Rather, they think, it follows merely from the fact that she is presently prepared to exchange sex for money that non-consensual sex is not as harmful to her as it would be to someone not so prepared to sell sex. However, the inference is solely warranted by the disputed assumption that the harmfulness of non-consensual sex is a function of the value of consensual sex. Since the prostitute does not value the latter – indeed, she only attaches a price to it – she cannot greatly be harmed by non-consensual sex. More precisely, the prostitute cannot be as seriously harmed by suffering non-consensual sex as someone who does not sell sex. The ‘sexual episode’ is not, says Feinberg, a ‘clear harm’ to her; and Murphy thinks it implausible to view the harm to the prostitute as being as great as it would be to any other who does not sell sex.

Murphy believes that the harmfulness of non-consensual sex can be read off from the value of sex. This, he suggests, is confirmed by an analogue he invokes and discusses. He asks us to imagine a person who gets hold of people, forces sushi into their mouths, and makes them swallow. Murphy thinks it evident that such a person, although guilty of the offence of assault, would not and should not be punished as severely as the rapist. As to why this might be so, he asks (p. 214), rhetorically, ‘what is the difference except that forced sex is sex and forced sushi is not?’. The question displays two interrelated errors. First, it is far from clear that as implied if not stated, forced sushi is sushi nevertheless. Voluntary eating, with its pleasures of gustation and digestion, is of a completely different order from the oral assault that Murphy envisages. Indeed, it would be irrelevant what food was forced down one’s throat, since what would be predominant for the victim would be the involuntary filling and emptying of the throat. I assume here that excluded are foodstuffs which would be refused as disgusting or abhorrent to the person if he had a choice of eating them or not. Secondly, and as a correlate, forced sex is not sex. It is an assault upon the genitals. To seek for an understanding of what is harmful about rape in what is ‘special about sex’ (*ibid.*) is simply to misunderstand the asymmetric relation between sex-without-consent and consented-to-sex.

Imagine, by way of a contrast with the case of the prostitute, a celibate.²⁸ She is someone who has had a number of sexual experiences, all of them

²⁸ Strictly speaking, a celibate is someone who values the state of living unmarried. It is used here and henceforth in the sense, wrongly extended but widely used, of someone who does not value having sex.

consensual, none of them especially unpleasant, but who has come to the conclusion that she does not enjoy, or more accurately, does not value sex. She is not to be thought of as repressed or as suffering from some pathological inability to enjoy sex. She has a rich and varied life, the absence from which of sex is not compensated for by other pleasures; rather, she does not feel the loss of sex as a loss. She simply does not value sex. Does it follow that if she is raped, that is, if she suffers non-consensual sex, then she is not as harmed as she would be if she were not a celibate? Is she, like the prostitute, someone whom rape does not especially harm because she does not think of sex as ‘special’? If the answer seems quite evidently to be ‘No’, then why is it not equally so in the case of the prostitute? The prostitute is as wronged by being raped as is the celibate.

V

In the final two sections of this paper I shall offer an account which renders it plausible to think of all instances of NCS as seriously wrongful. I shall be trying to provide a context within which we can and must think about the essential wrong of rape. I do so by contrasting two models for understanding the relative importance of interests. These I shall term the ‘network’ and the ‘spatial’. On the network model the importance of an interest is gauged by the relations it stands in to other interests. On the spatial model, interests, to invoke a helpful metaphor, occupy a space which helps to define the self or personhood, and the most important interests are those that are closest to, are at the core of, a person or the self. I favour the spatial model, and I believe that it more accurately captures what is essentially wrong with rape. I shall proceed to explain each model in more detail.

Joel Feinberg defends a network model of interests. More particularly, he views interests as forming a network with some interests being the necessary condition of others, and some being efficacious means to the realization of others. Central amongst our interests are our ‘welfare interests’ – in life, health, resources and liberty – whose value is that they are an ‘indispensable necessary’, albeit not sufficient, condition for the achievement of our goals and our ultimate well-being. To use his own example (*Harm to Others*, ch. 1 §6), one cannot hope to live well on bread alone, but without bread one cannot hope to live at all. H.E. Baber applies this network model of Feinberg’s to the case of rape.²⁹ ‘The most serious harms’, she argues, ‘are those

²⁹ H.E. Baber, ‘How Bad is Rape?’, *Hyppatia*, 2 (1987), pp. 125–38, repr. in A. Soble (ed.), *The Philosophy of Sex: Contemporary Readings*, 4th edn (Boulder: Rowman and Littlefield, 2002), pp. 303–16, at p. 311.

which interfere with the greatest number of interests for the longest time, those which are most likely to prevent us from ever achieving our goals'. The seriousness of a harm is thus measured in two dimensions: the number of interests it damages, and the extent of time over which it does so. On her analysis, enforced work is more harmful than rape for two reasons, each of which corresponds to one of these two dimensions. First, rape is episodic, whereas work is chronic. Secondly, work denies those who must endure it the freedom to pursue those of their important goals that conduce to their ultimate well-being. Rape does not do this, or at least it does not do so essentially.

On the spatial model, by contrast, interests should be thought of as occupying a defined but metaphorical space constitutive of the person or self. Interests are more or less important to the identity of the person, to our sense and understanding of ourselves. The more important the interests are, the closer they are to the centre or core of the space that, metaphorically, defines the self. If our sexuality is an interest which defines who and what each of us is, then it is at the very heart of our self-identity. In consequence, rape attacks and damages something crucial to our being and personhood.

For instance, Shafer and Frye define a person's domain as 'the physical, emotional, psychological and intellectual space [the person] lives in'. That space also defines 'the rightful scope of the person's power of consent'. To fail to recognize this power of consent is to attack or invade that person-defining domain. Further, the closer some property of the person is 'to the centre of the domain of the person ... the more violent is the attack upon that creature's personhood itself'. Rape, on this account, is to disrespect what is at the very centre of the domain, namely the sexually embodied self.³⁰

Here are some more expressions of essentially the same thesis. Joan McGregor ('Force, Consent', p. 191) insists that the wrong of non-consensual sex, unaccompanied by violence, 'rests with the matter that the victim's consent is overridden in an area that is central to one's identity and personhood'. Andrew Ashworth asserts (*Principles of the Criminal Law*, p. 349) that 'sexuality is an intrinsic part of one's personality' such that the harm of unconsented sex is that it 'invades a deeply personal zone'. A psychological study of the rape victim characterizes rape as 'the ultimate violation of the self ... the invasion of one's inner and most private space'.³¹ Finally, the victim in a much publicized English rape case writes that 'rape is totally and

³⁰ C.M. Shafer and M. Frye, 'Rape and Respect', in M. Vetterling-Bruggin, F.A. Alliston and J. English (eds), *Feminism and Philosophy* (Totowa: Littlefield, Adams, 1977), pp. 337–40.

³¹ E. Hilberman, *The Rape Victim* (Washington: American Psychiatric Association, 1976), quoted in Burgess and Holmstrom, p. 49.

utterly destructive, striking right at the roots of a person's sense of self and worth.³²

The contrast between the 'network' and the 'spatial' model needs supplementing with Jean Hampton's account of a moral injury. A moral injury is distinct from a wrongful harm or loss. Hampton defines a moral injury as 'damage to the realization of the victim's value, or damage to the acknowledgement of the victim's value, accomplished through behaviour whose meaning is such that the victim is diminished in value'.³³ By 'value' Hampton means the worth each of us has as a Kantian end in itself. She believes that this worth cannot be destroyed, but that it can be represented in and by an action as absent or lesser. This is what it is to diminish another. Rape, for Hampton, is morally injurious because in the rape the rapist represents the woman as an object to be used to serve the man's needs.

Acts, including rape, are morally injurious if the person experiences them as 'demeaning, damaging to [one's] understanding of [one's] worth as a human being' (Hampton, p. 151). Acts need not be morally injurious *only* if we *feel* that we are represented as inferior. Moral injury could be 'objective' and 'not dependent on the victim feeling a particular way or believing that she has received dishonouring treatment' (McGregor, *Is It Rape?*, p. 231).

Peter Westen (p. 149) refers not to moral injury but to 'dignitary harms', which are 'the indignities that an actor *A* inflicts upon *S* by manifesting that he has so little regard for *S* that he is ready to abridge *S*'s legitimate interests in order to aggrandize himself'. As Westen points out, the representation to another as being of little worth, the manifestation or expression of indifference to the other as an end or source of required consent, does not need the successful completion of the intended action. The would-be but unsuccessful rapist still expresses in his attempted rape the indifference to the other that is constitutive of moral injury or dignitary harm. Indeed, such injury can be occasioned even if there is *no* rape. Imagine that *S* does consent to sex with *A*. Nevertheless *A* is a potential rapist who would have had sex with *S* even if she had not consented. In such a case *A* manifests a disregard for *S*'s worth, an indifference to her consent and its significance, which is, once again, the hallmark of moral injury.

However, we might reasonably think that the actual carrying out of the rape involves a greater moral injury than its mere contemplation or an unsuccessful attempt. Equally, and significantly for the present discussion, moral injury varies according to the importance of whatever it is in regard to which the other's consent is overlooked. In as much as sexual integrity is

³² J. Saward, *Rape: My Story* (London: Pan Books, 1991), p. 153.

³³ J. Hampton, 'Defining Wrong and Defining Rape', in K. Burgess-Jackson (ed.), *A Most Detestable Crime: New Philosophical Essays on Rape* (Oxford UP, 1999), pp. 118–56, at p. 132.

important to the person, the rapist commits great moral injury. In effect, he can be taken to say to his victim 'You do not count, or count for very little, even in respect of that which matters very much to you'. Hampton agrees that all wrongful actions are injurious in that they are disrespectful of the victim's value, and asks what makes a rape especially injurious. After all, if I steal from you, break a promise to you, lie to you, falsely denigrate your abilities to others, I morally injure you. What makes wrongful sex more injurious than other wrongful actions? Hampton's answer (p. 147) lies in the place of sex in our understanding of ourselves: 'our humanity is deeply engaged in the sexual experience. Sexuality and humanity are deeply entangled'. Again (p. 151), 'Our sexuality is deeply important to each of us and in certain ways central to our sense of self'.

On this view, the moral injury of a wrongful action tracks the damage done to a person's interests by the action. It does so, on the 'spatial' model, in as much as those interests assaulted by the action are more or less central to the person. The more central interests are to personhood, the greater the harm, and hence moral injury, done to someone in overriding her consent in relation to the interests. So if sex is central to personhood, NCS assaults the very 'core' of the self and causes great moral injury.

Thinking in this way helps to make sense of Lynne Henderson's assertion that rape is 'a form of soul murder'.³⁴ On the spatial model, our interests in our sexual bodily integrity and in our sexual self-determination are at the heart of our being. Sex and sexuality are central to who we are. On Baber's network model, by contrast, these interests are non-central, since their protection is not a precondition for the possibility of our achieving our goals. To put things all too bluntly and simply, on the spatial model, rape is very wrongful for violating what we are. On the network model, rape is not wrongful to *that* extent, since it does not really vitiate what we can do.

So we do now have a way to think of rape, defined as NCS, as seriously wrongful, in as much as rape is an indefensible harming of a legitimate interest in safeguarding what is central to our personhood. If we are to think in this way, we need to defend both the 'spatial' model and the centrality of sex within this model. A full defence of this manner of thinking of NCS as seriously wrongful is beyond the scope of this article. Such a defence would need to say both why the 'spatial' model of interests is preferable to the 'network' model, and why sex should be placed at the centre of the space which allegedly defines our personhood. However, in the concluding section I sketch some ways in which such a full defence ought to be and might indeed be constructed.

³⁴ L.N. Henderson, 'What Makes Rape a Crime?' (review of S. Estrich, *Real Rape*), *Berkeley Women's Law Journal*, 3 (1988), pp. 193–229, at p. 225.

VI

I turn first, then, to the idea that within a ‘spatial’ model of interests, sex is a ‘central’ interest. An immediate objection is that our sexuality may not be or need not be deeply important to us. Rape injures us gravely, on this model, only if sex *is* central to our sense of self. If this is not the case – and the instances of the prostitute and the celibate cited earlier appear to illustrate this possibility – then making such an assumption falsely generalizes for all persons. Moreover, we must surely allow that there is variation across cultures, historical periods and social groups as to the ranking of interests as more or less ‘central’.

To this point one kind of response, made by Joan McGregor (*Is It Rape?* p. 223), is as follows. Assignments of position within the ‘space’ of ‘personhood’ will ‘depend on what people care about and how they define their personhood’. Nevertheless there is a significant degree of cultural uniformity in the importance attached to our sexuality. Moreover, in as much as our own culture does attach a high importance to sexuality, a criminal code for our jurisdiction that makes rape a very serious crime is fully warranted. A different response, one I favour, would proceed as follows. The claim is in the first instance only that humans are *sexed* beings. That claim is consistent with its being the case that some human beings choose not to have sex, or do not value sex, or do not derive any pleasure from sex, or do not desire to have sex. Thus although the prostitute and the celibate may not value sex, it certainly does not follow that sexuality is not central to their sense of themselves. Indeed, it is plausible to think that the prostitute and the celibate greatly value their integrity as sexual beings, even whilst they do not value the exercise of their sexuality.

Each of us is a sexed being such that our sexuality, our sexual nature, is central to our identity, to who each of us is. That does not mean that each of us is sexually active, or thinks often about sex, or is deeply interested in sex, or is continually moved by sexual desire. I want to distinguish carefully my claim by this qualification from any broader and more substantive thesis. It is, in general, all too easy to think that the importance of sex to our being derives from, or indeed is equivalent to, the importance of sexual motivation in our lives.

However, the claim that we are sexed beings does not imply that we need think of ourselves sexually, nor that we should be, or feel ourselves to be, moved by sexual desire. Nor does the claim imply, or require, any particular theory of sex and sexuality. The claim is only that sex is central to our

identity as human beings, and is thus more modest than the claim that all humans are much interested in and always desire sex.

But even this modest claim is in tension with the possibility that humans might or do not think of themselves as sexed beings. Humans who do not *think* of themselves as sexed beings might not care as much whether their sexual interests are thwarted or abridged as those humans who do think of themselves as sexed beings. To such individuals, NCS would matter in as much as it would be a violation of their autonomy. But it would not matter, or would not matter as much, as a violation of their sexual integrity. According to an objectivist view of human interests, human beings are sexed beings whatever they might or do actually think about themselves. Those who think that harms are wrongful setbacks to *legitimate* or *rightful* interests also believe that there are some human interests that ought to be protected, whatever individuals themselves do take an interest in.

We can thus construct the following outline argument. Human beings are fundamentally sexed beings. This is true whatever the interest humans variously happen to have in sex and however they variously think of themselves. In so far as this is the case, humans have a central interest in their sexual integrity's not being violated. The claim that rape defined as NCS is seriously wrongful ultimately derives support from an objectivist view that humans are sexed beings. This objectivist view needs a proper defence. In the absence of this, I offer the following line of thought. There is a range of putatively fundamental human interests – sexual integrity, health, happiness, knowledge, friendship, self-fulfilment, and so on. Now conceive of societies whose members who do not think of these various interests as fundamental to their sense of themselves, and who in consequence do not view the thwarting or abridgement of these interests as harmful. In the case of each putative fundamental interest we can certainly conceive of such a society. But, again in each society, we shall surely conclude that there has been a serious loss of humanity and that something has caused the destruction or an erosion of the necessary conditions of human flourishing.

What then of the choice between the spatial and network models? The spatial model conceives of interests as more or less important the closer they are to or the further they are from the centre of a metaphorical space viewed as constituting the self. The most important interests are at the person's 'core'. Of course, the network model could map onto the spatial model in the following way. Those interests at the centre of the imagined space are the preconditions for the possibility of those interests that are next nearest but still further away from the centre. These latter interests are, in turn, the preconditions for the possibility of those interests further still from the centre.

This is possible. However, the interest which I claim there is in our sexual bodily integrity, and which we have on account of our nature as sexed beings, is what is set back by rape. On the spatial model, this interest is at or very close to the centre of the space that constitutes the person's self. On the network model, this interest is not a central one, since it is not an interest which can be viewed as a necessary condition of others. Thus the different place of our interest in sexual integrity in each model displays the lack of congruence between the two models. They do not map onto each other in the way they situate the importance of an interest in sexual integrity.

The following, finally, tells in favour of the spatial model. The network model favours thinking of persons in terms of agency. It conceives of the person as an agent in pursuit of goals to whose realization his interests are a means. But the ideal of a human being as a source of value, as worthy of respect, is prior to that of the person as an agent. For to think of people as entitled to pursue their ends and goals requires one first to think of them as possessed of value, as having a moral status, as being selves owed respect. Agency – the choosing and willing of ends and the means to those ends – is to be valued because the agent is a self and already a source of value. We respect people's choosing of ends and their pursuit of them because we respect the self who makes the choices and acts. The valuation of the self who acts is prior to the valuation of the exercise of agency.

Rape, on the network account, is wrong because it stops a person from doing what she chooses. On the spatial account, rape is wrong because it denies that she is, in regard to what is central to her personhood, worthy of respect. It is wrong to deny somebody her choices. But that is because, first of all, it is fundamentally wrong not to think of somebody as a person and hence as a source of value. Rape does not stop a person from doing everything she wants to. It is not, in this regard, comparable to enforced labour or to imprisonment. However, rape subverts agency in a much more radical fashion. For in devaluing the self it devalues the actions of the self. The rape victim need not be prevented from acting. Yet rape subverts the person for whom agency matters and has value. If rape defined as NCS is seriously wrongful, this is not because it is a fettering of the achievement of our goals, but rather because it is, in the sense indicated, 'dehumanizing' and 'soul murder'.

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