



The Wrongness of Rape (2000)

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The Wrongness of Rape

JOHN GARDNER AND STEPHEN SHUTE*

1. *Philosophising rape*

That rape is wrong, and seriously wrong at that, can scarcely be doubted. Arguably, rape is among those wrongs which are never excusable. Probably, it is among those wrongs which are never justifiable. Certainly, it is among those wrongs which ought to be forbidden and punished by the criminal law. Joel Feinberg is right to place it on his short list of wrongs which are crimes ‘everywhere in the civilised world’ and the decriminalisation of which ‘no reasonable person could advocate.’¹

In view of all this, one might expect it to be obvious to every reasonable person *what* is wrong with rape. Many writers and commentators, including Feinberg, seem to imagine that this is indeed obvious, and do not give the question detailed attention. Some writers, for example, just take rape as a settled paradigm of wrongdoing in need of no explanation, and work towards the conclusion that certain other actions are wrong simply by pointing out their resemblance to rape. But unless we know what exactly is wrong with rape, how do we know whether such a resemblance is resemblance in a relevant respect – that is to say, in a respect which makes the rape-resembling action wrong too?

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¹ Feinberg, *Harm to Others* (1984) 10.

Other writers concentrate on difficult test cases which seem to lie at or near the borderline of rape. Of a fascinating and burgeoning recent philosophical literature on rape, a very large proportion has been concerned with tricky issues about the precise demarcations of consent in rape, or the difficulties of relying on the concept of consent to settle particular classes of case (eg those involving false promises or emotional blackmail on the part of the alleged rapist).² Even if it were plausible to think that good philosophy could remove borderline cases of rape (or borderline cases of anything else) from their borderline – and we doubt that very much – it seems odd that anyone would try to settle such cases by studying the moral logic of consent without giving detailed thought to the prior questions of whether and why consent matters to rape in the first place. And that depends, of course, on what exactly is wrong with rape.

One can understand, of course, why there might be some reluctance to tackle this last question as a purely philosophical puzzle. Might a philosopher, starting from the professional presumption that nothing is quite as obvious as it appears, seem to be doubting that rape is wrong at all, or at any rate casting doubt on its seriousness? Might a philosopher, for whom no aspect of a subject can ultimately be left unspoken if the subject is chosen for study, be guilty of serious insensitivity in taking up the study of unspeakable experiences? Let us not forget that some victims of rape have had unspeakable experiences.³ Some, like

² For example, David Archard, *Sexual Consent* (1998) 130ff. Likewise most of the contributions to the two special issues on 'Sex and Consent' in (1996) 2 *Legal Theory*. Another recent substantial philosophical contribution – Keith Burgess-Jackson's *Rape: A Philosophical Investigation* (1996) – tries to proceed with various definitional or borderline questions while deliberately equivocating about what is wrong with rape (see his remarks at 58).

³ The word 'unspeakable' has been put to all sorts of uses by philosophers recently. All we mean by it is what it commonly means, namely the property which something might have of being so appalling that at least some rational agents might not be able to bring themselves to speak of it. On the very

Lucretia, may even come to regard their lives after rape as not worth living. It may be said that the proper way to make such experiences morally vivid, and to bring out their moral significance, is not through intellectual dissection, in which the horror is reduced to the clinical banality of its component parts. Shouldn't it instead be done through drama, poetry, sculpture, and other more purely expressive, as well as more effectively therapeutic, media? Or at least through study of a less abstract kind, led perhaps by the attempts of those who have experienced being raped to bring their experiences to life? This anti-philosophical line of thought is compounded, for male writers like us, by the fact that the experiences in question are often held to be paradigmatically, and are certainly preponderantly, the experiences of women rather than those of men. The resulting sense that the experiences in question are not even ours to dissect may make the subject seem philosophically uncomfortable, not to say unsafe.

But even in the confession of these anxieties one finds questionable philosophical assumptions. The most obvious is the assumed centrality of the *experience* of rape to an understanding of what makes rape wrong.⁴ Consider, for example, Catharine MacKinnon's definition: 'Politically, I call it rape whenever a woman has sex and feels violated.'⁵ Politically, maybe, but philosophically? Does the *feeling* of sexual violation capture what's wrong with rape? Or is it, rather, the violation itself? And if so what counts as 'violation' in the relevant sense? We can see at once that a focus on consent alone doesn't tell us the answer. It

closely connected concept of 'unthinkability' see Harry Frankfurt, 'Rationality and the Unthinkable' in Frankfurt, *The Importance of What We Care About* (1988).

⁴ But cf John H Bogart, 'Reconsidering Rape: Rethinking the Conceptual Foundations of Rape Law', (1995) 8 *Canadian Journal of Law and Jurisprudence* 159, 168–170.

⁵ MacKinnon, *Feminism Unmodified* (1987) 82.

doesn't tell us what is wrong with rape *in particular*. Many other acts which would be wrong in the absence of consent are perfectly innocent in the presence of consent – handshaking, for example, or stripping someone's wallpaper while they are out at work. Why should rape be regarded as a different wrong from, say, non-consensual handshaking? Why should it be a *separate* entry on Feinberg's short list of crimes which nobody should decriminalise? Consent doesn't give the answer, since many other wrongs prohibited by the criminal law, such as vandalism, theft, and assault, might equally be defined in terms of absence of consent. Why aren't these all handily collapsed into one crime of 'doing to another that to which they do not consent'? Why aren't they all just one and the same wrong? You may still think that the answer is obvious. Rape is a worse violation than mere vandalism, theft, and assault. We do not doubt that for a moment. But in what respect, in what dimension, is rape worse? Wherein does its 'worseness' lie? What exactly, in other words, is wrong with rape?

2. Harmless rape as pure rape

The view that associates rape with feelings of violation is one of a larger family of views which make the wrongfulness of rape a function of the harmfulness of rape. Such views are represented daily in the media through accounts of the trauma of rape and the sense of insecurity or loss of trust which the experience of it generates. These are harms because they change someone's life for the worse. Some unpleasant episodes in our lives are, by contrast, harmless. There is the pain and discomfort of being under the (competent) dentist's drill, or the fleeting but intense irritation of reading an objectionable letter from some foolish bigmouth in my local newspaper. We are not suggesting by these examples of harmless pain and offence that every pain or offence is necessarily harmless. The torturer uses pain to do a great deal of harm, often scarring his victims physically and psychologically,

often breaking down his victims' sense of their own humanity, often forcing them into betrayals which undermine their lives. The buffoon who wields his smutty sense of humour around the office can be inflicting harm on the colleagues he offends by lessening their confidence, their self-esteem, or their sense of ease with their work and their working environment. In these examples the essential added feature on top of the pain, or offence as the case may be, is the diminution of someone's prospects, the change for the worse in his or her life, which the pain or offence brings with it.⁶ That prospective dimension is the dimension of harm, and the first place people normally look for the wrongfulness of rape is in this dimension.

In focusing on the harmfulness of rape, liberal-minded lawyers have tended to make common cause with many of their radical feminist critics. In the case of the former, the focus on harm is a natural consequence of the application of the liberal 'harm principle', which forbids the attaching of legal sanctions to wrongdoing except to the extent that this is necessary to prevent harm and proportionate to the harm thereby prevented. Meanwhile, many of their radical feminist critics, politicians to the end, have tended to urge not that the harm principle is mistaken but that the list of harms to which the law and its liberal-minded defenders are typically sensitive, in thinking of rape and other offences mainly perpetrated against women, is a myopic, not to say facile, one.⁷ The focus is too narrowly on physical harms, or on harms with a medical diagnosis, and not enough on women's own experiences of rape – the way that a victim's life is changed *for her* by the fact of having been raped, or the way that women's lives are changed *for them* by the risk of

⁶ The main source of our view of the nature of harm is Joseph Raz, 'Autonomy, Toleration and the Harm Principle' in Ruth Gavison (ed), *Issues in Contemporary Legal Philosophy* (1987).

⁷ See eg MacKinnon, *Feminism Unmodified* (n5 above) 166; Burgess-Jackson, *Rape: A Philosophical Investigation* (n2 above) 56–57.

being raped. No doubt these challenges to the narrow legalistic approach to harm have a great deal of merit. But they share with the views that they challenge a mistaken starting-point. The harm principle sets certain constraints on the legal proscription of wrongs, but it does not prevent the law from showing sensitivity to other features of those wrongs in defining or classifying them for legal purposes. It does not say that the only wrongfulness legal systems may attend to lies in harmfulness.⁸ The law may proscribe breach of contract (whether by making it actionable in the civil courts or punishable in the criminal courts) and when it does so it complies, we think, with the harm principle. Breaches of contract tend to do harm even when they do not specifically harm the plaintiff by losing her the advantage (if any) of the contract, because even under those circumstances they tend to erode the practice of maintaining reliable voluntary obligations, thereby harming everyone who has reason, or might come to have reason, to enter into such obligations. But breach of contract is wrongful because it is the breach of a voluntary obligation, not because of these various harms which accompany the breach (including the damage to the practice). Focusing on the harms tends to occlude the wrongfulness of the act itself.

The same holds, in our view, for rape. It is possible, although unusual, for a rapist to do no harm. A victim may be forever oblivious to the fact that she was raped, if, say, she was drugged or drunk to the point of unconsciousness when the rape was committed, and the rapist wore a condom. To those who object that this is physiologically impossible – that the rape must involve damaging or painful force, which will inevitably bring it to light later – the answer is that this objection neglects the important fact that, as those who have drawn attention to the phenomenon of ‘date-rape’ have highlighted, one may be raped while sexually

⁸ See further Stephen Shute and Jeremy Horder, ‘Thieving and Deceiving: What is the Difference?’ (1993) 56 *Modern Law Review* 548.

aroused, even while sexually aroused by the attentions of the rapist, and one may be sexually aroused, of course, while drunk or drugged. Then we have a victim of rape whose life is not changed for the worse, or at all, by the rape. She does not, in MacKinnon's phrase, 'feel violated'. She has no feelings about the incident, since she knows nothing of it. Indeed the story has no prospective dimension for the victim, except possibly a hangover in the morning; otherwise the victim's life goes on exactly as before. Not even, for that matter, a prospective dimension for others, who might be put in fear of midnight rape by tales of soporific victims taken unawares. Remember: in our example the incident never comes to light at all. (Let's add, for complete insulation, that the rapist, who told no-one of what he did, is run over by a bus as he leaves the house, and that this would have been no less likely to happen to him even if he had not perpetrated the rape, since that didn't either delay or precipitate his leaving. So the rape doesn't even make a difference to *his* prospects.)

It is no objection that the question of the wrongfulness of this rape will never arise in any practical deliberation, such as the deliberation of a court, since *ex hypothesi* the rape will never come to light. We assume, what we hope will be ecumenically acceptable, that acts which never come to light are not rendered innocent by that fact alone. So we are left with the question of what is wrong with this particular rape. Its wrongfulness cannot lie in its harmfulness. For it does no harm. *Ex hypothesi* nobody's prospects are diminished, or indeed affected at all, by the rape. Yet this atypical, but absolutely unequivocal, feature does not in our view make any difference to the rape's being wrongful.

There are various ways to sideline the example, to regard its atypicality as making it philosophically hazardous to rely upon it. After all, we ourselves were the ones who raised doubts about the difference that philosophical argument can make at the borderline. Isn't this just another borderline case? We don't think so. On the contrary, the case is, in the sense which matters here,

the central case of rape. For it is the *pure* case, entirely stripped of distracting epiphenomena. In more typical cases, rape is of course harmful. Much of the harm is typically harm to the victim, and sometimes, as we already said, unspeakable harm. Some of it may be physical injury, but apart from that kind of injury any harm to the victim depends on the victim's evaluations of what has been done to her.⁹ She may be traumatised, lose her trust in men, be deprived of her sense of her own security, suffer from a reduction in her self-esteem, feel humiliated and/or dirty, etc. All these reactions depend on the victim's own evaluation of her ordeal. Are we to regard all these evaluation-dependent harms as reflecting the victim's irrationality, her superstition, her oversensitivity, etc.? Are we to think of them as mere manifestations of her weakness?¹⁰ Barring exceptional pathological cases, we think not. To avoid the consequence that these are irrational reactions on the victim's part one must explain what it is about the act of rape that gave the victim a reason to react this way. If nothing was wrong with being raped apart from the fact that one reacted badly afterwards, then one had no reason to react badly afterwards. So such reactions, to be rational, must be epiphenomenal, in the sense that they cannot

⁹ Psychiatric injury may be a borderline case. Arguably it is harm *to* the victim's evaluative powers rather than harm depending on her evaluations. This is not the place to explore this point.

¹⁰ One reaction to this question may be to ask why irrationality is assumed to be a weakness. One strand in academic feminism, sympathetically critiqued in Genevieve Lloyd's *The Man of Reason* (1984), regards rationality itself – not just the following of particular reasons but the very idea of following reasons – as a 'male norm', and therefore questions whether the expectation that women should meet it isn't itself an element of patriarchal oppression. We make no bones about rejecting this strand of feminism. In our view, the claim that women's reactions should not be judged by the simplest canon of rationality (ie should not be judged according to whether women have sufficient valid reasons for reacting as they do) plays straight into the hands of misogynists, and indeed rapists. See n36 below for further explanation.

constitute, but must shadow, the basic, or essential, wrongness of rape. This is not to deny that these reactions may count as grossly aggravating factors. We have no doubt that a rape is made worse, perhaps immeasurably worse, by the humiliation of its victim, by the fact that she blames herself, etc. We also agree that the rapist is more of a moral monster if he sets out to humiliate, or callously adds to his victim's suffering by playing on her worst fears, etc. All we say is that what these (actual or intended) harms aggravate is the wrongfulness of rape, a wrongfulness which remains even in the absence of these harms. The alternative view, that these harms are what make rape wrong, turns the victim of rape, in a way, into a victim twice over: for she is now, in her reactions to the rape, additionally a victim of irrationality, a pathological case. She has no reason to react the way she does since, absent that reaction, she was not wronged by the rapist. Here we see the basic philosophical objection to MacKinnon's (admittedly 'political') proposal that rape occurs 'whenever a woman has sex and feels violated.' *Pace* MacKinnon, the victim's feeling of violation must be epiphenomenal to rape, or else there is nothing in rape to give her cause to feel violated. Presumably what there is in rape to give her cause to feel violated is the fact that, in some special way, she was violated by the rapist. And the crucial problem is to identify wherein exactly that violation lies, and hence to explain the (evaluation-dependent) harmful consequences of rape by first explaining what, exactly, is wrong with rape.

So our case of the utterly harmless rape – perpetrated on a sexually aroused but somatic victim and leaving no trace on her memory or her body (or indeed any other trace) – is the pure case because it strips out the epiphenomena. It strips out not only the physical injuries but also the victim's evaluation-dependent reactions to the rape. It is rape pure and simple. Those who accept the purity of the case, and hence the need to rehabilitate it into the centre of the moral terrain of rape even as it languishes at the statistical periphery, may feel moved to try adjusting their

account of harm to include it. They may feel moved to devise a way in which the victim of our supposedly harmless rape is harmed after all, perhaps in the mere fact of her violation.¹¹ As a violated woman, some might say, she is somehow now a less than perfect specimen. The harm is that she has been defiled. We think that this conclusion, and indeed the urge to move towards it, has sinister affinity with older, and we hope long since discredited, views of female sexuality. The talk here – it is not? – is of fallen women. But beyond that moral question-mark which hangs over the search for a harm in the pure case, there lies the question of what would be the *gain* in adjusting our account of harm to transform this into a harmful rape. Why would one want this pure and simple rape to be accredited as harmful? Some might say that only in this way can the pure case pass through the filter of the liberal harm principle. We do not believe that the liberal harm principle excludes legal prohibition of rape in the pure case, and we will return to this point towards the end of this essay. But in any case, the question of whether a certain wrong can properly be prohibited by law is a secondary question. We do not balk at the possibility that there could be wrongs which are in general open to legal prohibition, but some morally significant instances of which cannot legitimately be prohibited by law. In such cases the moral considerations which bear on the wrongness of the action apart from the law do support legal prohibition, but additional moral considerations of an institutional character – including the harm principle – preclude prohibition as a legitimate means of eradicating the wrong. Perhaps, then, the case of rape that we described as the pure case is bound to be legally marginal. In fact, that is what one might expect, given that (*ex hypothesi*) the rape in this case is never detected and never prosecuted. For the law to focus on it might

¹¹ Bogart speaks of this violation as a ‘formal’ or ‘abstract’ harm. We find this completely obscure. See Bogart, ‘Reconsidering Rape’ (n4 above) 170 and 173. Similarly HE Baber, ‘How Bad is Rape?’ (1987) 2 *Hypatia* 125.

well be regarded as fatuous. But be it ever so legally marginal, the pure case we sketched remains morally central, for the reasons we have given. The alternative is to dismiss the outraged victims of more typical rapes as suffering pathological reactions. We regard this suggestion as literally adding insult to injury. In our view the wrongfulness of rape cannot, therefore, lie in the harmfulness of rape.

3. Infringing the proprietor's rights

One can say, of course, that the wrongfulness of rape lies in the violation of its victim's rights. But which rights? Let's say, for a start, her right not to be raped. Since the victim has a right not to be raped if and only if raping her wrongs her, this introduction of the category of a right doesn't take us much further. It does have the virtue of introducing the thought that rape is not only a wrong but a wrong *against the person raped*, which means that it is based on her interest. That seems correct. But we are still left with the question of which interest of hers it is based on. And that question, it could be said, still represents little advance over the question with which we started, namely the question of what is wrong with rape. Phrasing the question in terms of rights and interests does, however, prompt a certain kind of more helpful, although we think nevertheless mistaken, reply to our original question. The wrongness of rape, according to this reply, comes of the fact that the victim of rape has a proprietary interest in, and derived from that a proprietary right over, her own body. It is her body, she owns it, nobody else may use it without her say-so. Rape is none other than the non-consensual 'borrowing of sexual organs'.¹² So the right not to be raped is, at base, a property right or an aspect of a property right.

¹² GA Cohen, *Self-Ownership, Freedom and Equality* (1995) 244. Cohen comments that one may believe in ownership of the body while conceding

What is our interest in property? Only some brief remarks are possible here. Those who focus on productivity are, fundamentally, on the right track – so long as ‘productivity’ is construed widely enough to include the provision of shelter, security, comfort, amusement, and other benefits to the property-holder. The importance of property lies basically in the valuable things we can do with that property that we can’t so easily do without it. This we will call its *use-value*.¹³ Aspects of property rights other than the right to use property are basically derivative of the use-value of property. The value of being able to acquire and transfer property, for example, is basically the value of property’s ending up where it can best be used. In conditions of global and indiscriminate abundance property rights may lose their basic moral purchase, because in these conditions everyone has more than they can use. The question of whether something could best be used by a person other than the person who holds it is less prone to arise, for there is always plenty left to go round. But in times of scarcity or of merely local or discriminate abundance (ie abundance from which some are excluded, leaving them in conditions of scarcity) the question is always live: Could this thing be better used by someone else?

that property rights might not provide the *whole* explanation of rape’s wrongness. Nevertheless, his definition of rape as a ‘borrowing’ is as purely proprietary a definition as one could conceive. For less equivocal renderings of the proprietary approach, see Guido Calabresi and A Douglas Melamed, ‘Property Rules, Liability Rules, and Inalienability: One View of the Cathedral’ (1972) 85 *Harvard Law Review* 1089, 1124–1127; or else Donald A Dripps, ‘Beyond Rape: An Essay on the Difference between the Presence of Force and the Absence of Consent’, (1992) 92 *Columbia Law Review* 1780.

¹³ The mistake in many productivity accounts of the value of property-holding is to focus too narrowly on *further* productivity (ie the use of things with use-value for the production of *other* things with use-value). This mistake lies at the heart, we think, of both Marx’s and Locke’s so-called ‘labour theories’ of property value, on the comparison of which see Cohen, *Self-Ownership, Freedom and Equality* (n12 above) 165–194.

The idea of a property right to such things is that, up to a point, the question of where something is better used can least wastefully be settled by leaving the question to the person who already holds the thing. This means that, again up to a point, people are left free to hold property that they do not use. It is still theirs and cannot be taken without their say-so.¹⁴ If others were to take it away from them this might yield a better use for it, but the suboptimal use of a particular thing is justified, up to a point, by the general gains in use-value that are made from a co-ordinating system based on consensual transactions.

We say 'up to a point', but the question on everybody's lips is: Up to which point? In the long history of property rights the point has been located in different places by different civilisations and regimes. Some things have been regarded at some times and in some places as incapable of being subject to property rights, or incapable of being subject to certain kinds of strong property rights such as ownership. The tendency to wastefulness by property-holders, their refusal to let things be put to their best use, has often been regarded (no doubt sometimes rightly) as too high a price to pay for the avoidance of the costs associated with alternative methods of distribution and allocation. Some things, the value of which is basically their use-value, have therefore on occasions been taken out of a fully-fledged property regime. Thus, at some times and in some places, housing has been publicly provided for tenancy but not for ownership, TV stations

¹⁴ Actually, the 'say-so' or consent condition does not strike us as a universally necessary element of respect for property rights. One can imagine a system in which things stay with the current holder unless complex bureaucratic measures are followed to secure a transfer. Even if these bureaucratic measures do not require the consent of the current holder, it is not misleading, in our view, to regard this holding as a kind of property right. However, for simplicity, we stick here to the familiar protective measure of requiring consent to transfers, which is common to most modern systems where the consideration mentioned in the next-but-one paragraph looms large.

or take-off slots at airports have not been capable of being owned, etc. Meanwhile, some things have been owned but with special regulation inhibiting their use and disposal, such as rent control legislation, restrictions on inheritance, rules against predatory pricing or monopolisation, and official scrutiny of hostile takeovers. Since the basic value of property is instrumental, different policies and practices may serve that value more or less effectively at different times and places, depending on other prevailing conditions – for instance, the extent of the public tendency towards decadence, the sluggishness of competition, the degree of scarcity, or the extent of globalisation.

However, one observation that may be made regarding large parts of the inhabited world today is that property rights are tending to campaign, in a sense, for their own augmentation and deregulation. The rise of public faith in property-holding as a pat solution to the co-ordination problems associated with the use of things under conditions of scarcity, combined with people's increasing alienation from other human beings, leads people to attach great and ever-growing symbolic importance to the acquisition and holding of property. Increasingly, they come to identify with at least some things they hold as extensions of themselves, tokens of their own personality. The idea of 'sentimental value' has always highlighted this aspect of property holding. But it extends nowadays to much else besides the inherited keepsakes of the past or the gifts of friends and family. In fact, it is increasingly associated more with self-chosen than with other-chosen things. Insofar as people regard themselves as autonomous beings, their own choice of property – which house to buy, which ties to wear, which CDs to collect – has an ever more important place in their self-expression. The result is the cultural condition which has come to be known as 'consumerism'. No doubt it has got wildly out of hand. But up to a point – and again the point cannot be settled out of local context – consumerism does effect the moral change which its participants seem to presuppose. They regard property as

meaning more, as carrying more significance, than just the significance imported by its use-value. Their regarding it as carrying that significance actually endows it with that significance by changing its social meaning. People are increasingly *identifying* with what they have. So on top of its basic use-value, much more of what people hold now has what we might call *identification-value*. When property is taken away without the proper consensual process, it is not merely (or even) that the system of optimal use-value is disrupted. It is that people are metaphorically violated by the removal of a part of their extended selves.

Some think that identification-value, and particularly the value which comes of investing autonomous choice in property, suffices on its own to explain why property rights continue to reside in those who make suboptimal use of their property. But property rights can persist even when use-value and identification-value are *both* missing. Consider what might be regarded as the pure case of burglary. Suppose an estate agent who has keys to my house lets himself in while I am on holiday and takes a pile of my old clothes from the attic, passing them on to a charity shop. I had long since forgotten that the clothes were there, and I had no further use, anyway, for loon pants and kipper ties. The burglary goes forever undiscovered. (The estate agent, who told nobody of what he was doing, falls under a bus as he leaves the charity shop, as he would have done anyway even if my clothes had not been among those he delivered.) Yet my property right is violated. Why is this? After all, I have no interest in these old long-forgotten clothes that comes of *either* my use of them *or* my identification with them. But on top of that, as we already indicated, there is the co-ordinating value of property rights in securing use-value and identification-value *at large* (ie for people in general). My having this property right over my old clothes, which is violated by the intruding estate agent, does not come of any use-value or identification-value *to me* but of the contribution which my having such a property

right makes to the perpetuation of a *system* of optimal use-value coupled, so far as possible, with optimal identification-value. So I have an interest in this property which is basically derivative of the public interest in my having such an interest. We call this the pure case for the same reason that we called the pure case of rape the pure case. It is the case of the wrong and nothing but the wrong.

The analogues between rape and burglary here are startling, and may seem to support the idea that rape is wrong because we own our own bodies. But in fact our remarks tend to undermine this view. Neither the use-value nor the identification-value which support our proprietary relations with things can apply straightforwardly to our relationship with our own bodies. We will come to the use-value in the next section. But the main point can be seen through the lens of the identification-value. The identification-value of property holding is the symbolic value of artificially extending oneself out into the world. But regarding our bodies there is no question of such an artificial self-extension. There is a longstanding tradition in western philosophy which diminishes the centrality of the body. The body becomes something like an arbitrary receptacle in which the real business of human life – that special inner thing called ‘the self’ – just happens to live.¹⁵ This strikes us as an unintelligible view. People are, in part, their bodies and their relationship with their bodies cannot, barring strange pathological cases (schizophrenia?) or conceptually testing science-fiction (brains in vats?), be that of artificial self-extension.

¹⁵ We are thinking, of course, of the Cartesian tradition. But notice that one could follow Descartes’ famous ‘dualist’ views about the *relations* between mind and body without adding that the body is the inferior partner. For two self-styled ‘Cartesian friends of the body’ taking this line, see the exchange between Sydney Shoemaker and Galen Strawson under the title ‘Self and Body’ in (1999) 73 *Proceedings of the Aristotelian Society Supplementary Volume* 287.

The embodied self is not the extended self; in the distinction between self and world the body already belongs to the 'self' side without any need for, or possibility of, self-extension into it. It is true that one may play with the boundaries of the body, deliberately blurring the line between the self and its extension into the world. Some kinds of body-piercing and tattooing fit this profile. They are ways of expressing a kind of continuity between self and world which can, under certain cultural conditions, be a symbol of rank or alternatively a symbol of individuality and even rebellion. But these boundary-blurring practices, and others, presuppose that the body is already part of the self and cannot, again barring pathological conditions or sci-fi fantasies, be alienated from it. It is not merely that the self cannot survive outside it, like a patient who cannot live without an artificial lung. It is that without the body there is no complete self to survive.

Some people nowadays say that the experience of being burgled was like that of being raped. Others may well resent this suggestion: Have the people in question ever actually been raped? If not, how do they know that the experience of burglary was like the experience of rape? The answer lies in the way in which property rights, particularly under modern conditions, and particularly in the immediate living environment, operate as self-extensions. Even someone who has not been raped but whose house has been burgled may experience a kind of violation of the self, because they understood their home as a projection of their identity, a kind of larger, more artificial body. The mistake comes in when one tries to reverse the analogy, when one tries to think of one's body as a kind of smaller, more natural house.¹⁶ Anyone who had been raped and said it was like being burgled would be committing a serious travesty. It would show

¹⁶ The mistake is made, we think, by Michael Davis in 'Setting Penalties: What Does Rape Deserve?' (1984) 3 *Law and Philosophy* 61, 78.

extraordinary moral insensitivity. This is not, or at any rate not merely, because they would be diminishing or trivialising their rape. It is primarily because property rights are necessarily the derivative or shadow case. One can analogise what happens to what one owns to what happens to oneself, because what one owns can be an extension of oneself. But one cannot in the same way analogise what happens to oneself to what happens to what one owns, because oneself cannot be an addition to what one owns. This is the first and major flaw in all self-ownership doctrines, including but not restricted to those that focus on ownership of one's own body. They render one's relationship to oneself contingent in such a way that there is no longer any self to do any owning, of itself or of anything else.

4. Use and abuse

One consequence of the modern philosopher's alienation of the body from the self is to sever the value of the body from the value of the self. The body, like other tools and receptacles and artefacts, is basically use-valuable, its use-value augmented, in some cases, by the expressive value of the inhabiting self's contingent identification with it. Once the intelligibility of this latter expressive value is called in question, a question mark also appears above the idea that the body's value is mainly its use-value. Use-value for whom? Who is the user? The possibilities are self or others. If the body is part of the self then the idea that it is *used* by the self becomes harder to understand.¹⁷ At any rate

¹⁷ This consideration is also at the basis of the account of rape's wrongness offered by Carolyn M Shafer and Marilyn Frye, in their classic paper 'Rape and Respect' in Mary Vetterlin-Braggin, Frederick Elliston, and Jane English (eds), *Feminism and Philosophy* (1977) 333, 337. Our position mirrors that of Shafer and Frye in many respects, but not in all. For the most important divergence see below n22 and accompanying text.

that cannot be its most basic value. In very rough terms, the explanation goes something like this. Use-value is value for people. Why should what is valuable for people be valuable *tout court*? The ultimate answer, although it may take a number of precise forms, cannot but include the premiss that people are valuable. To avoid vicious circularity this further value cannot be use-value. So people may have their use-value, perhaps, but that cannot be the only, nor the most ultimate, value they have. To use people without at the same time respecting this further non-use value involves treating them as something other than people. It means treating them as things. In principle this applies as much to the use of the self as to the use of others. And because the (living) body is part of the self, part of the person, it applies equally to the use of (living) bodies.¹⁸

The most famous articulation of this argument is Kant's. In simple terms it shows that there is no value in objects unless there is some more ultimate value in subjects. It shows, therefore, that those who would tie the wrongness of rape to ownership of one's own body not only miss but positively invert the basic element of rape's wrongness. The value of the body becomes, in this view, basically its use-value. So what is the rapist doing wrong, in our pure case of rape, when he uses someone else's body for sexual pleasure? The answer may be that it is not his to use. But this answer, in a way, plays into the rapist's hands. It makes it intelligible for him to respond with the objection that he can make better use of this unconscious body than can the person whose body it is. After all, he is only harmlessly borrowing this body, or some of its components, while its regular user is not using it, or not using those components. Relative to that alternative non-use, this use optimises use-value. On the proprietary model one can resist this as a final answer

¹⁸ We put 'living' in parentheses so as not to prejudge the interesting question of whether it can ever be demeaning, on the same grounds, to use someone's body after his or her death.

by observing that owners still get to decide even when they decide against optimal use. Remember the clothes in the attic. But this resistance concedes to the rapist too much of the moral high ground. It concedes to him that in principle the body of a person is there to be used. This is a kind of use of a person, a kind of *objectification* of a subject. That a rapist objectifies his victim by treating her as a mere repository of use-value is, in our view, what is basically wrong with rape. In making arguments which ultimately rest on the sheer use-value of people and their bodies, the proprietarian approach not only fails to make sense of the wrongness of rape; it actually gives succour to rapists.

The claim that certain practices objectify women lies, as is well known, at the heart of Catharine MacKinnon's and Andrea Dworkin's joint critique of pornography. The critique has been subjected to searching philosophical study by Martha Nussbaum.¹⁹ As Nussbaum shows, 'objectification' is a term which, in the work of MacKinnon and Dworkin, tends to equivocate between a cluster of related ideas: 1. the conversion of subjects into instruments or tools; 2. the denial of subjects' autonomy; 3. treating subjects as inert or inactive; 4. treating subjects as fungible (ie interchangeable with other subjects or objects); 5. breaking into subjects or breaking down the boundaries between subjects; 6. asserting ownership over subjects; and 7. refusing to regard subjects as beings with their own feelings and experiences (ie as subjective). While Nussbaum agrees that categories 2 to 7 can have their moral moment in the debate about sexual representation, she stresses category 1 (instrumentalisation) as the crucial entry on the list, the one that best captures what objectification must be if it is to be generally objectionable.²⁰ We agree. We have added merely that category 1 is closely bound up with category 6 (ownership), and that those

¹⁹ Nussbaum, 'Objectification' (1995) 24 *Philosophy and Public Affairs* 249.

²⁰ *ibid* 265.

who base arguments against objectification on ownership or other property relations, including those who assert inalienable self-ownership, only encourage instrumentalisation thereby.

The extension of this 'objectification' argument from pornography to rape helps to bring out what some feminists are getting at when they claim that pornography is bound up with rape irrespective of whether the consumption of pornography makes any causal contribution to the incidence of rape.²¹ For our purposes, however, the main importance of the 'objectification' argument lies in the way that it begins to differentiate rape, or at any rate the pure case of rape, from other paradigms of criminal wrong, including paradigms of non-sexual criminal violence. There are interesting and no less problematic questions about what is wrong with murder, or with common assault, or with kidnapping, or with torture, or with threatening to kill, or with blackmail, etc. All are wrong in different ways, by virtue of different lines of argument. Arguably the wrongness of at least some of these wrongs is fully explicable only by invoking the Kantian argument somewhere along the line. But none of these wrongs instantiates the central moral importance of the Kantian argument so clearly and unequivocally as rape. Rape, in the pure case, is the sheer use of a person. In less pure, but statistically more typical, cases this use is accompanied by violence, terror, humiliation, etc. Our only point is that when someone feels humiliated by rape itself this feeling is justified. Rape is humiliating even when unaccompanied by further affronts, because the sheer use of a person, and in that sense the

²¹ This is one sympathetic way to interpret Andrea Dworkin's remark in *Pornography: Men Possessing Women* (1979) 137, that 'a rape [is] repeated each time the viewer consumes the [pornographic] photographs.' For more study of the point, see Deborah Cameron and Elizabeth Fraser, 'On the Question of Pornography and Sexual Violence: Moving Beyond Cause and Effect' in Catherine Itzin, *Pornography: Women, Violence and Civil Liberties* (1992).

objectification of a person, is a denial of their personhood. It is literally dehumanising.

5. *Delimiting rape*

So all sheer use of human beings, all treatment of them merely as means, is *abuse*; and rape is the central case of such abuse. In our view, this is the line of thought that generates the basic distinction between rape and (most) non-sexual offences against the person (as well as some sexual offences). But does it fix, even approximately, the boundaries of rape? Does it help to explain the modern focus on *lack of consent* as the touchstone of rape? Does it help us to establish the focus on *penetrative* sexual abuse (or certain forms of penetrative sexual abuse) which is still typical of the law of rape in most jurisdictions which have retained the offence separately? And does our line of thought help us to settle how *mistakes* as to consent should be dealt with by the law of rape? Let's look at each of these familiar problems in turn.

(i) *Lack of consent.* At the deepest level, the Kantian argument we echoed does not distinguish between use by self and use by others. It resists the objectification of subjects either by those subjects or by other subjects. In other words, the evil in question is *agent-neutral*: it consists in the use of people as a mere means, irrespective of which people are doing the using. So at the deepest level the Kantian argument makes no exception for self-abuse. *A fortiori* it makes no exception for self-licensed abuse by others. How, then, can consent make all the difference between the paradigmatic use of a person (rape) and the paradigmatic treating of a person as a person which is the opposite of that use (sexual intercourse)? One suggestion is that only a subject can consent, and so, by being astute to another's consent, someone who has sexual intercourse with that other is not treating that

other any more *merely* as a means, and hence is not objectifying her.²² She may be treating herself as a mere means, but then again she is not the one accused of rape. This suggestion makes *astuteness to consent* of the essence. But in most familiar legal systems the first question about consent in a rape trial is not: Was the accused astute to the complainant's consent? The first question is: Did she actually consent? Only if the answer is 'no' does the further question arise (depending on the mens rea requirements for rape in that legal system) of how astute the accused was to whether the complainant consented. One may say that this is an institutional oddity, that the explanation lies in some technical consideration about the criminal process or the structure of criminal offences. But we suspect that it goes deeper.

If the argument from astuteness worked to show how consent comes to be pivotal in rape, it would do so only at the price of eliminating the accusation of objectification against consent-astute users of consenting subjects, including many clients of prostitutes and many consumers of pornography. To put the point crudely, it would deflect blame from clients to prostitutes, and from consumers of pornography to those appearing in it. Consenting prostitutes and pornographic performers would be objectifying themselves (objectionable), while their clients and consumers, assuming the latter were astute to the presence of consent, would be treating them as subjects (unobjectionable). In our view this conclusion lets clients of prostitutes and users of pornography slip too easily off the moral hook.

Two obvious ways of avoiding the conclusion have often been favoured by those who want to keep that moral hook in place, both of which have been adduced from time to time by MacKinnon and Dworkin. One way to keep the moral hook in

²² This is roughly the line taken by Shafer and Frye in 'Rape and Respect' (n17 above) and here we have the main point at which our position diverges from theirs.

place is to deny that the consent of workers in the sex industry is genuine. In denying that this kind of consent is genuine one may point to some other objectifier in the background – a pimp or a pornographer, say, or an insidious sex industry system, or indeed an insidious *sex* system – to mitigate the accusation of self-objectification against the prostitute or model. She was coerced or manipulated or exploited into submission by that other objectifier, and the client or consumer is complicitous because astute only to that submission, and not to any genuine consent.²³ This line of argument carries serious risks, not least the risk that one ultimately ends up accusing those prostitutes or models who *claim* to be genuinely consenting as suffering from a false consciousness, and hence as less than fully functional moral agents who can speak for themselves, and hence as not fully human. In other words, one risks objectifying sex industry workers oneself in order to make it seem to be the case that they are objectified by their consumers and clients and other participants in their industry. To avoid such risks one may alternatively regard the consent of women who participate in the sex industry as genuine, and hence as capable of forestalling the accusation that these women were *personally* objectified by their clients and consumers, while holding that women *in general* were objectified by being represented in that way.²⁴ This introduces Nussbaum's category 4 (fungibility) into the story, and requires us to show that the sex industry puts everywoman, and not only the women who work in it, under prurient, instrumentalising gaze. This may well be so, but in our view the objectification element in the use of pornography or the resort to prostitutes does not depend on it. Nor do we need to show that women in the sex industry are not

²³ Robin West, 'A Comment on Sex, Consent and Rape' (1996) 2 *Legal Theory* 232, 242; MacKinnon, *Feminism Unmodified* (n5 above) 179–183; Dworkin, *Pornography: Men Possessing Women* (n21 above) 207.

²⁴ MacKinnon, *Feminism Unmodified* (n5 above) 170–174; Dworkin, *Pornography: Men Possessing Women* (n21 above) 224.

genuinely consenting in order to keep their clients and consumers on the moral hook. For the fact that women working in the sex industry may give their genuine and effective consent, and even the astuteness of their clients and consumers to that consent, does not make it the case that they are not personally objectified in the relevant sense by their clients and consumers.

In our view, such sex industry workers typically are being objectified by their clients and consumers, and this is indeed an attack on their humanity. They are being used purely for sexual gratification. But the sex workers' right to sexual autonomy, where their consent is genuine, serves to license the abuse.²⁵ The argument for drawing the line at consent is roughly the same regarding the right to sexual autonomy as it is regarding property rights. With property rights the argument was that even if, regarding a particular piece of property, use-value was in suboptimal combination with identification-value, the value of having a system in which people control by consent the uses of their own property optimally co-ordinates, within limits, the pursuit of use-value and identification-value. With the right to sexual autonomy the argument is that even if, in a particular sexual encounter, the ultimate value of a person was denied (ie that person was used merely as a means), the value of having a system of sexual relations in which people control by consent the treatment of their own bodies secures optimally respect for the

²⁵ Thanks to some familiar practices of pimps and pornographers it is likely that in many cases the consent is not freely given, in which case the considerations which follow do not apply. Nor of course do they apply to children. Our argument assumes only that sometimes consent is real enough and that on those occasions it matters. One reason, among many, why pimps and pornographers get away with practices that remove the reality of consent is that they inhabit a shady world of questionable legality in which employment protection etc cannot be guaranteed. This creates an extra instrumental argument against the criminalisation of aspects of the sex industry. But this argument is distinct from, and supplementary to, the one we pursue here.

ultimate value of people. An obvious objection to this argument is that it depends on a contingency, namely the contingency of whether people generally grant their consent wisely (ie in ways that do not constitute self-abuse). The proliferation and permeation of sex-industry values in, for example, mainstream advertising, may seem to show that this assumption cannot be upheld today. But it must be remembered that in constructing and honouring people's rights, those people must be given a certain kind of moral credit. By much the same argument which condemns rapists, those of us who are discussing, legislating, implementing, and enforcing people's rights must also regard them as people, as beings with value other than use-value. In particular we must regard them as moral agents capable of understanding their own value and making up their own minds about their relationships with others. We must work on the assumption that they respect themselves or else we do not ourselves respect them. It follows that even when people betray that assumption they enjoy some latitude to do so. They have some moral space to go wrong and to permit others to go wrong with them.

This consideration is reinforced, in modern conditions, by the general value of personal autonomy which applies to all kinds of options, including but not restricted to sexual options, and pushes for avenues of experimentation to be opened up. But the value we have been describing is not the value of personal autonomy. It is the distinct value of allowing particular kinds of options to be pursued, including various sexual options, which may at first sight appear dehumanising. The truth is that these options often *are* dehumanising, and therefore to be avoided by the person who is confronted with them. But allowing people nevertheless to pursue them is, up to a point, rehumanising, because it credits them with moral agency, without which credit their dehumanisation is only compounded. This rehumanising value combines with the general value of personal autonomy to yield a right to sexual autonomy. Rape, understood in the

modern way as non-consensual sexual intercourse, is a wrong against the person raped because it is a violation of this right.²⁶ The resort to prostitutes and the use of pornography is also wrong, because it objectifies the prostitute or model even when her consent is genuine. But when her consent is genuine such resort or use is not a violation of the prostitute's or model's right to sexual autonomy, and so not a wrong *against* the prostitute or model. Or at any rate it is not a wrong against the prostitute or model *under the same heading* as that under which rape is a wrong against its victim. For a person's consent is capable of licensing, in the name of sexual autonomy itself, some suboptimal sexual relationships, which in this case means depressingly dehumanising relationships, relationships of objectification.²⁷

²⁶ This right is structurally different from a property right in that, regarding this right, the consent condition cannot be replaced with a condition licensing non-consensual access by bureaucratic procedures, of the type which we suggested may be consistent with property rights in n14 above. The marital rape exemption purported to do this – to by-pass the woman's say-so with a bureaucratic method for allocating sex – but it would be seriously misleading to present this as a protection of a married woman's rights, let alone her right to sexual autonomy. It was clearly a protection of a married man's rights against the sexual autonomy of his wife.

²⁷ You can see here why we favour the right to sexual autonomy over the alternative 'right to sexual *integrity*' advanced by Nicola Lacey in 'Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law' (1989) 47 *Canadian Journal of Law and Jurisprudence* 47. The depressingly dehumanising relationships we mentioned do not involve anything recognisable as integrity. They are self-betraying, and usually on both sides. Nevertheless, so long as there is mutual consent, those who engage in them have a right to do so under the heading of sexual autonomy. In spite of this disagreement, however, Lacey's paper is one which has influenced our own thinking greatly. We suspect that with the removal of unhappy Cartesian and Lockean overtones from the relevant idea of autonomy, the distance between us is considerably reduced.

(ii) *Penetration*. In many jurisdictions, including ours, what counts as sexual intercourse for the purposes of the crime of rape is limited to (one or another kind of) penetrative violation. Why is penetration so special? Does it count as a special way of using another person? The natural answer, of course, is that it counts as an especially humiliating way of using them. But again the special humiliation seems epiphenomenal. There was no special humiliation in the pure case because there was no humiliation at all in the pure case: the rape was never discovered. If, in more everyday cases, penetrative violations *are* particularly humiliating (or terrifying, confidence-sapping, etc.) in the eyes of those who experience them, then as usual we want to know the reason why. Why do violations of *this* kind have such special import for those who suffer them? One might say, of course, that the law itself contributes something to the special significance of penetration by historically reserving the name of ‘rape’ for that class of violations. Certainly there is something in that: The historic legal names of some criminal offences have gathered moral import with age, and often do contribute to structuring people’s moral thinking. The thinking here goes: Rape is (particularly) terrible; rape is non-consensual penetration; so non-consensual penetration is (particularly) terrible. But this cannot serve *by itself* to justify the law’s maintaining its insistence on penetration. Perhaps the old focus on penetration was superstitious or corrupt and the modern law should now be doing its utmost to change the confused moral thinking which that old focus left in its wake. Some aspects of the law of rape or the practice of rape prosecution, such as the marital rape exemption and the institutional blindness to date-rape, as well as the accompanying interest in evidence of the victim’s sexual history, are now widely acknowledged to have left a false trail, and hence a false understanding of rape, in public consciousness. Isn’t the penetration condition, with its crude phallocentrism, in the same camp? Doesn’t it hang over from an era of obsession with female virginity and overbearing preoccupation with the sin

of bearing illegitimate children, an era in which women were *officially* regarded as objects (chattels of their fathers and husbands) rather than subjects? So shouldn't we dump this condition now? We don't think that the answer is quite so simple.

What is true is that the justification of the penetration condition in the modern law of rape does involve some attention to social meaning. Some associate the Kantian argument we adopted above with a view of morality as a body of eternal verities which one abandons on pain of self-contradiction. In places this was how Kant himself presented the applications of the argument. But in fact the applications of the argument depend on many contingencies, including the social meaning of many actions. Which actions count as paradigms of sheer-use-and-abuse of human beings varies, even though the Kantian argument against the sheer-use-and-abuse of human beings has enduring force. Often the special symbolism of a particular act or class of acts is tied to the particular symbolism of acts which are regarded as their moral opposites. The special symbolism of penetrative violation is closely associated, in our culture, with the special symbolism of penetrative sexual activity. That latter symbolism may be over-romanticised. It may come of an aspiration to an impossible perfect union of two selves through two bodies, by making the two bodies, in a sense, just one (recall Shakespeare's 'beast with two backs'). Be that as it may, the fact that penetrative sex is regarded as having that significance actually endows it with that significance by changing its social meaning. The social meaning of the subversion of penetrative sex – its subversion in rape – tends to mirror the social meaning of penetrative sex. If the latter is thought of as a perfection of subject-subject relations – through the most complete and literal intertwining of selves – then the former may well come to represent a paradigm of subject-object relations. This is relevant to explaining and justifying the reactions even of those who do not share the aspiration to intertwine selves in this literal way (eg those who eschew or avoid penetrative sexual relationships, or

those who see them as purely functional). The use of penetration can be a special weapon even against these people, perhaps *especially* against these people. It can become a peculiarly dramatic way of objectifying them, of turning them into mere things to be used, mere means to another's ends. That being so, there is reason for all those who suffer such violations to feel humiliated, whether or not they see particular value, or any value, in consensual penetrative sexual activity. The social meaning of consensual sexual penetration is not necessarily the meaning it has for them, and it is the social meaning of consensual sexual penetration which the rapist exploits by subverting it.

This is not a case against expanding the legal definition of rape to include some kinds of non-penetrative violations, or for discriminating among various kinds of penetration. In fact, it is not an argument for any particular legal definition of rape. It merely points out that the reactions of those who attach particular significance to penetrative violations, or to certain penetrative violations, need not be irrational. They may be supported by symbolic values. Much is left to law-makers and law-interpreters in deciding how best to embody and reflect such symbolic values in a given legal system. Social meanings are often ambiguous, and always have grey areas. Rarely do they set definite boundaries to moral wrongdoing without additional instrumental arguments, and instrumental argument also introduces many contingencies which can affect legal classifications. We showed this already in discussing the 'lack of consent' requirement. The instrumental question of what system of sexual relations would lead to the least use-and-abuse of human beings was an element of the argument. No doubt similar instrumental issues arise in the case of the penetration condition. The point is that although the mere use of people is a timeless evil, the elevation of penetrative non-consensual sexual violation to the status of special paradigm is a longstanding, but culturally conditioned application.

These remarks on the importance of social meaning merit the attention of those who are uneasy about the tendency to associate rape with sex, and in particular the tendency to think of it as a 'sexual offence'. Many campaigners and social researchers tell us that rape typically has nothing to do with sexual desire, and everything to do with a male desire for power over women. Surely it should be regarded as a crime of misogynist aggression, a hate-crime, rather than a sexual offence? We are uneasy about the essentialist view of sexual desire which this critique seems to harbour: Why, we wonder, can't a misogynist desire to subordinate women be a sexual desire? (Is it because sex is wonderful and misogyny is vile?) But even if we grant the integrity of the assumed contrast between sexual desire and other kinds of desire, the main objection to this line of thought is that it assumes that 'sexual offences' are those offences which are differentiated by the offender's motivations. In our view, the real reason for thinking of rape as a sexual offence has nothing to do with the offender's motivations. It is that rape is a weapon against its victim which trades on the social meaning of sexual penetration. It is a way of taking a paradigm subject-subject relationship – a possibly over-romanticised conception of sexual intimacy – and turning it against someone to make a mere object of her.²⁸ This is perfectly compatible with, and indeed may well suggest, that the perpetrator hates the victim, or what she represents. It is not necessary to deny the connection between

²⁸ Contrast the approach taken by Lois Pineau in her 'Date Rape: a Feminist Analysis', (1989) 8 *Law and Philosophy* 217. Pineau argues that sex should be understood, paradigmatically, as 'ongoing communication' and sex outside this paradigm should be understood as presumptively rape. Here Pineau endorses a particular idealised view of sex, and hence becomes what we just labelled an 'essentialist'. Our view, by contrast, is not essentialist about sex. It only trades on the mere fact that an idealised view of sex – which we did not endorse and which indeed may not be endorsed very widely nowadays – nevertheless still colours the social meaning of various actions, including, most notably, actions which appropriate and subvert that ideal.

rape and sex in order to make this clear. On the contrary, if the connection with sex is dropped and rape is simply labelled as, say, ‘aggravated assault’, then it seems to us that (for better or worse) we have decided no longer to recognise in law what is *particularly* wrong with rape. True, a rape can *accurately* be labelled as a kind of assault (as the police often label it when conducting their investigations) since the unifying theme of assault crimes is invasion by one of another’s personal space, and the rapist clearly does invade his victim’s personal space. But this is a wrong incidental to, and usually rather trivial when placed alongside, the most fundamental element of wrongdoing in rape. So the description of rape as an assault, though accurate, is reductive and unrevealing.²⁹ That most fundamental element of wrongdoing in rape, which differentiates rape from (most) assaults and gives rape a separate theme from the family of assault crimes, is the *sheer use* of the person raped, whether that is how the rapist saw what he was doing or otherwise. To understand how rape counts as sheer

²⁹ Contrast Michael Davis, ‘Setting Penalties: What Does Rape Deserve?’ (n16 above) 79. Davis’s reduction of rape to assault relies not only on the fact that rape must (incidentally) involve assault but also on the claim that all assault involves objectification. We don’t see this. Someone who threateningly presses his face up to mine, or grabs me by the arm to get my attention (both paradigm assaults), doesn’t, by these moves alone, treat me as an object. An object, after all, doesn’t respond to intimidation or to attention-grabbing. The wrongness of assault is only very indirectly related to the Kantian considerations we adduced, which lie at the heart of the wrongness of rape. (Davis also errs in thinking that an objectification argument like ours must rely on the rapist *seeing* his victim as an object. It does not. It is about his *treating* her as an object, however he may see her. He may see women as vulnerable child-like creatures in need of a masterly knight in shining armour to protect them. This isn’t seeing women as objects, but it is compatible with – and may well indeed be conducive to – treating them as such. That is one important lesson of the feminist critique of patriarchy: patriarchy is a *delusional* mode of oppression in which dehumanising behaviour is often misconceived by its perpetrators as humanising behaviour.)

use, the social meaning of sexual penetration has to be kept in focus.

Whatever the offender means by it, and indeed whatever it means to its victim, rape is a crime of sexual violation according to its social meaning; and that social meaning is the meaning which is at the heart of rape's wrongness. One may still insist that 'violence' would be a better word here than 'violation'. Wouldn't it at least have more political bite? We doubt whether even this is true. Assimilation of rape to the category of 'violent crime' in the media and in public discussion of crime has, in our view, done more than almost anything else to maintain the public myth that rapists are strangers waiting in dark alleys who subdue their victims by force.³⁰ But rapists work by many more insidious methods than this and they still wrong their victims by non-consensual objectification of them. As our pure case of rape serves to remind us, and many more common kinds of case amply illustrate, the violation that is rape need not be associated with any kind of violence.³¹ Nor are the worst rapes necessarily

³⁰ In 'Coercion and Rape: The State as a Male Protection Racket' in *Feminism and Philosophy* (n17 above) 360, 364, Susan Rae Peterson draws attention to a countervailing pragmatic consideration: Classifying rape as a sexual offence may contribute to the shocking but still prevalent tendency to see a complainant's sexual history as relevant to the issue of consent, and indeed (even more outrageously) to the issue of her veracity on the issue of consent, in a rape trial. We think that this problem of 'the second rape in the courtroom' – in our view a rather apt metaphor, since such lines of questioning themselves make objectifying assumptions about female sexuality – should be addressed head-on, by making evidence of a complainant's sexual history inadmissible and by reforming and improving accessibility to the law of libel for those women who are represented in the press as 'asking for it'. Distorting the wrongness of rape to avoid the problem seems to us to mean throwing out the baby with the bathwater.

³¹ Matters are made worse here by the confused assumption in much of the literature that assault is a crime of violence – so that, if rape is a kind of assault, then rape is by that token a crime of violence. See eg Susan Brownmiller, *Against Our Will* (1975) 377 or Robin West, 'A Comment on Sex, Consent

the most violent rapes. Rapes in breach of trust using subtle threats or surreptitiously administered drugs to forestall any resistance can, in some cases, represent an even more egregious abuse of the person raped and can therefore be worse *qua* rapes (and this still remains true, on our analysis, whether or not these are the rapes that involve the worst experiences for the person raped³²).

(iii) *Mistakes as to consent.* Academic criminal lawyers often worry about the correct response, in the law of rape, to misunderstandings regarding consent. Should the defendant in a rape trial be given the benefit of his genuine mistakes as to consent? Or are there other conditions which need to be satisfied before mistakes as to consent will exonerate? We have already hinted at what we regard as the basic answer. The key, in our view, is the astuteness of the defendant to consent.³³ For the reasons we gave, being astute to consent is not a sufficient condition for avoiding the accusation of objectification. But it is nevertheless a necessary condition. Being astute to consent means not only paying attention to, but also taking seriously, the responses of another person to what one is doing to them. If one fails to pay attention to these responses or to take them seriously, it doesn't matter, so far as we can see, whether one's failure comes of malice, callousness, selfishness, misogyny, insensitivity, or sheer stupidity. We never cease to marvel at the extent to which criminal lawyers, in rape trials and elsewhere, are prepared to regard stupidity as exculpating rather than inculpating.

and Rape' (n23 above), 242. On the differences between assaults and crimes of violence, see John Gardner, 'Rationality and the Rule of Law in Offences Against the Person' (1994) 53 *Cambridge Law Journal* 502.

³² cf Alan Wertheimer, 'Consent and Sexual Relations', (1996) 2 *Legal Theory* 101, wherein the seriousness of a rape is regarded as a function of its harmfulness.

³³ See page 000 above.

Stupidity is a vice, not an excuse. Where risks are complex, some degrees of obliviousness to them may, of course, be excusable. It all depends on how much sophistication can reasonably be expected of human beings in general, without special expertise. But the risk that one is using another human being by sexual violation of them without their consent is not complex, does not call for special expertise, and attention to it can reasonably be expected of all adult human beings unless they are seriously mentally ill. That is why, as we said at the outset, rape is arguably inexcusable.³⁴ Barring serious mental illness, if one is not paying attention to the consensuality of some sexual activity one is embarking on then it is not hyperbolic to regard one as morally beyond the pale – an animal, as the tabloids might put it. Likewise if one is paying attention but, as in the famous *Morgan* case, one concludes or assumes that the protestations of one's victim are not to be taken seriously.³⁵ The *Morgan* defendants were animals *par excellence*. For, however they saw it themselves, they treated their sexual 'conquest' as something less than a subject, as something less than a self-respecting human being fit to decide and speak for herself when it came to her own sexuality.³⁶ She was just a sex-aid for their gratification. That is

³⁴ Serious mental illness is not an excuse. It eliminates the mentally ill person's responsibility for (some or all of) her actions and this means that there can be no requirement, and no possibility, for those actions to be justified or excused.

³⁵ *DPP v Morgan* [1976] AC 182. Interestingly, the defendants' claim that this was the conclusion they drew was, according to the House of Lords, regarded as a 'pack of lies' by the jury.

³⁶ Here is where the consideration of women's rationality stressed in n10 above has its most important bite. Since women are rational agents, a woman who rejects sexual advances must be taken to have her reasons for doing so, and these reasons (thanks to the right to sexual autonomy) must be regarded by the person making the advances as sufficient reasons against persisting. It is not morally open to him to regard the word 'no' as rationally arbitrary (eg as a pathological reaction owed to sex-role conditioning) and therefore as presenting no rational obstacle to persistence.

the clearest imaginable objectification of her. And since she did not in fact consent to the objectifying sexual penetration it was the clearest imaginable way of violating her right to sexual autonomy, and the clearest imaginable case of rape.

These remarks, particularly those about stupidity, will likely be regarded by many criminal lawyers as supporting a rather radical form of ‘objectivism’ about mens rea. But in the face of this suggestion, three important caveats need to be entered right away.

First, as they stand our remarks bear only on the mens rea for the crime of rape. We are among those who believe that the question of what should be the mens rea for a particular crime is a question which calls, at least in the first instance, for a local answer specific to that crime. For it depends, as our foregoing remarks were meant to illustrate, on what exactly is wrong, or is supposed to be wrong, with perpetrating that particular crime. That what we called ‘astuteness to consent’ is a necessary condition of not being a rapist where there is non-consensual sexual intercourse comes of the fact that rape is, fundamentally, a crime of objectification, a crime of using a person as a thing. We do not claim or suggest that similar mens rea requirements would necessarily be suitable for other crimes which are wrong in other ways – that is to say, thanks to other arguments or other clusters of arguments.

Secondly, our remarks about mistakes as to consent are ‘objectivist’ only in the sense that they hold the defendant’s mentality, as well as his conduct, up to the appropriate moral standard. Since morality governs reasons for action it governs not only what we do but also why we do it. Some criminal lawyers may wonder whether the criminal law has a role in requiring us to reason acceptably. The simple answer is that it does if and when we proceed to *act* on the unacceptable reasons. Any mens rea standard in criminal law is, at base, a standard which bears on the reasoning by which certain actions may acceptably be performed. The one we suggested above is no exception. Thus

ours is not an 'objectivist' proposal in the rather different sense, familiar from some corners of private law, of making nothing turn on the defendant's state of mind at the time of the offence. The defendant's attitude, the way he looks upon others, is at the heart of our approach to his mistakes.³⁷

Finally, our remarks on astuteness to consent do not strictly speaking end the matter of what should be the mens rea for rape in law. There are some more general institutional considerations which need to be brought to bear before the task of specifying a suitable mens rea standard for rape can be completed. There may be many such considerations, and they are prone to vary from time to time and from jurisdiction to jurisdiction. They may include considerations relating to ease of explanation to and application by lay people who may be involved in certain kinds of trials, as well as considerations of statutory drafting, proof, precedent, procedure, etc. These considerations are such that different legal systems which include crimes of rape may go their different ways on this and other aspects of the definition of rape, especially at or near the borderlines. And some legal systems may be such that they have more than one acceptable way to go, especially at or near the borderlines. All we would add on this score is that there is one important institutional consideration which often bears on the specification of mens rea elements for crimes, but which has very little purchase in the law of rape. Quite apart from their independent moral salience, it is a further part of the job of mens rea requirements in the criminal law to help put potential defendants on notice that they are about to enter the realms of possible criminality. If it is a condition of criminal liability that one actually noticed what one was doing

³⁷ For a similar approach to the mens rea of rape, see RA Duff, 'Recklessness and Rape' (1981) 3 *Liverpool Law Review* 49. In our view, Duff erred in generalising his analysis of recklessness as to consent in rape to many other crimes without separate analysis of their moral structure: see his *Intention, Agency and Criminal Liability* (1990) 139ff.

then, assuming one can be taken to know the law, one also knows whenever one is dicing with criminal liability. This supports a kind of 'subjectivist' twist in the mens rea for many crimes.³⁸ Not, however, in the case of rape. Barring bizarre conditions calling for the use of an insanity or automatism defence, it is hard to see how sexual penetration could be unwitting.³⁹ That being so, the institutional 'notice' requirement is fully satisfied in the requirement of sexual penetration, and there is no need for a further element of notice in shaping the law's attitude to mistakes regarding consent. Anyone who knows the law knows that when they embark on sexual penetration, lack of consent could carry them across the boundary into rape. And one can scarcely make a plausible defence of mistake of law in such a case, since (as we have shown) rape is *malum in se* rather than *malum prohibitum*. Morality itself – that is to say, the moral doctrine defended in this essay – puts one on notice.⁴⁰ Even if lack of consent did not turn sexual penetration into a crime in law, any tolerably morally sensitive adult realises that lack of consent makes sexual penetration of another's body wrongful, because it amounts to the most straightforward breach of that other's right to sexual autonomy. It is morally unlicensed objectification.

³⁸ For fuller discussion see John Gardner, 'On the General Part of the Criminal Law' in RA Duff (ed), *Philosophy and the Criminal Law: Principle and Critique* (1998) 242–244.

³⁹ For a discussion of this issue and English law's approach to it, see Stephen White, 'Three Points on Pigg' [1989] *Criminal Law Review* 539.

⁴⁰ We have discussed this way of delimiting the scope for a 'mistake of law' defence to criminal charges in our introduction (with Jeremy Horder) to the volume the three of us jointly edited, *Action and Value in Criminal Law* (1994), 10–12.

6. *The role of the law*

You may say that it is enough, to justify the criminalisation of rape, that it violates people's right to sexual autonomy, and enough to justify the criminalisation of rape *as such* that it violates that right in a special symbolically significant way. Perhaps so. It is commonly thought, however, that justifying criminalisation means, among other things, passing the test of the harm principle. Yet in no jurisdictions known to us is it true that rape is a crime only when harmful. Even the pure case is classified as rape, and criminally so. One could sideline it by saying that the harm principle is a rule of thumb, and tolerates some departures from its standard. One could also sideline the pure case by observing that the harm principle's standard is met if the class of criminalised acts is a class of acts which *tend* to cause harm, and that is true of rape in spite of the possibility of the pure case. But, although we are not averse to these two qualifications, suitably refined, we think that the argument of this paper teaches a different lesson about the harm principle.

It is no objection under the harm principle that a harmless action was criminalised, nor even that an action with no tendency to cause harm was criminalised. It is enough to meet the demands of the harm principle that, if the action were not criminalised, *that* would be harmful. This test is passed by the pure case of rape with flying colours. If the act in this case were not criminalised then, assuming at least partial efficacy on the part of the law, people's rights to sexual autonomy would more often be violated. This would be a harm, not only to those people (if they were conscious and became aware of the rape), but also to a broader constituency of people (in our culture mainly women) whose lives would then be even more blighted than at present by violations of their right to sexual autonomy and, more pervasively still, by their justifiable *fear* of violations of their right

to sexual autonomy.⁴¹ These blights are harms which the legal prohibition on rape, if it is functioning properly, helps to reduce. For the purposes of the harm principle that is all that is needed. There is no need to show, in addition, that a given rape caused, or was likely to cause, harm.

These remarks yield two general conclusions about the moral scope and functions of the criminal law. Some have wanted to broaden the traditional interpretation of the harm principle to remove its instrumental cast. They have wanted to shift the focus of the principle away from the diminution of people's prospects, the change for the worse in their lives. They have thought this necessary to bring 'Kantian', non-instrumental wrongs, into the fold of the criminal law.⁴² We believe, on the contrary, that the traditional instrumental reading of the harm principle is correct. But we also believe that non-instrumental wrongs, such as pure rapes and pure burglaries, can be brought under the umbrella of the harm principle. They are brought under that umbrella because the harm principle does not say that only harmful wrongs may be criminalised. It says that the criminalisation of wrongs is justified only in order to prevent harm. Non-instrumental wrongs, even when they are perfectly harmless in themselves, can pass this test if their criminalisation diminishes the occurrence of them, and the wider occurrence of them

⁴¹ Thus Susan Rae Peterson is right, in our view, to emphasise the way that rape 'restrict[s] the freedom of bodily movement for women': 'Coercion and Rape' (n30 above) 360. But Peterson is wrong to regard this as what is primarily *wrong* with rape. It is because rape is anyway wrong that women justifiably fear it, and therefore become especially restricted in their use of some kinds of public transport, their access to certain neighbourhoods, and many other valuable options. This restriction is one of the key kinds of harm which makes it alright, according to the harm principle, to use the law to control the wrong of rape. But the wrongness of rape is independent of, and prior to, this harm.

⁴² See eg RA Duff, *Intention, Agency and Criminal Liability* (n37 above) 111–112.

would detract from people's prospects – for example, by diminishing some public good, such as people's sense of ease with their living environment, the prospects for them to enjoy loving and trusting sexual relationships, their ability to go out and enjoy themselves at night or in strange places, or the degree of mutual respect which prevails in public culture at large.

This brings us to the second conclusion. Some writers have thought that the criminal law could be characterised as a system of fundamentally public wrongs, in which the key interest is the interest of the public at large represented by the state, as opposed to private law in which the wrongs committed are fundamentally wrongs against individuals, who are therefore given the right to control enforcement and remedy.⁴³ Indirectly, we have attacked this view. If there is any fundamental difference between crimes and torts except for the procedures and remedies associated with them, then it is not the difference between a fundamentally public interest and a fundamentally private interest. Crimes and torts alike may protect or reflect similar mixtures of public and private interests. The wrong of rape is a wrong against the person raped, even when she is unaware of it and suffers no harm as a result. The criminal law protects her rights as an individual. Nevertheless, the criminal law may be, and often is, concerned with public goods. These include, for example, the public goods of property-holding and sexual autonomy, as well as those of tolerant co-existence, a clean and aesthetically acceptable environment, a decent social security system, etc. In some parts of the criminal law the harm to these public goods which is done by violations of the rights of an individual is the harm which justifies criminalisation of those violations so far as the harm principle is concerned, even though the wrong done is a wrong against a particular individual right-holder. The same holds in the

⁴³ See eg Lawrence C Becker, 'Criminal Attempt and the Theory of the Law of Crimes' (1974) 3 *Philosophy and Public Affairs* 262.

law of tort, which is equally subject to the requirements of the harm principle and may equally involve wrongs against particular people which are publicly harmful rather than harmful to those people. The law of trespass and the law of libel, as well as the law relating to breach of contract, take this form. The wrong in each case is against an individual but the wrong is actionable even when the individual wronged was not harmed by the wrong (in which case damages are nominal). In such cases the harm which justifies making the wrong actionable in law is the public harm of loss of respect for property, reputation, or voluntary undertaking, as the case may be. There may be differences between trespass, libel and breach of contract on the one hand, and rape and burglary on the other, such that the former are nowadays normally actionable only in private law, and only the latter are crimes. But the difference does not lie in the difference between public and private interests in the subject-matter of the legal proceedings. In fact, these examples show that the contrast between public and private wrongs is, fundamentally, a misleading one. Many familiar individual rights, including those supported by these legal categories, are in large measure justified by the public good which is nurtured in their existence and recognition.⁴⁴ As we have endeavoured to show, the right to sexual autonomy, the right at the centre of the modern law of rape, is no exception.

⁴⁴ On this broader point about rights see Joseph Raz, 'Rights and Individual Well-Being' in his *Ethics in the Public Domain* (1994).