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Rape, and Other Sexual Assaults: Towards a Philosophical Analysis

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Rape, and Other Sexual Assaults: Towards a Philosophical Analysis

Abstract

Philosophers have identified the harm involved in stranger rape in various ways. This article reviews these with a view to making sense of surveys on date and acquaintance rape and minor sexual assaults: how much should these be bracketed with stranger rape as a major and traumatic violation? Or are some of these incidents closer to bad manners? It concludes that rape is a violation of autonomy that should be condemned because of the extreme unhappiness caused to the victim. It is argued that this criterion can be used to make sense of lesser sexual assaults whereas some of the other criteria philosophers have used to condemn rape tend to bifurcate sexual experiences into acceptable on the one hand and seriously traumatic on the other, with little space in between.

I. Rape: the need for a philosophical analysis

Rape has not been extensively discussed by philosophers. The general assumption has been that rape is plainly morally abhorrent, so that there is little scope for debate. The two main issues considered have been exactly how rape should be defined, and how the evil involved in rape should be categorized.¹ I fully accept that rape is morally abhorrent, but argue in what follows that there are good reasons for reconsidering both these issues. In recent years, particularly in the United States and Canada, but also in the UK to some extent, it has been argued on the basis of survey evidence that rape is vastly more extensive than would be thought from official statistics. Thus in England and Wales there are currently some 400-450 convictions for rape each year, arguably a scandalously low figure given that some 6,000 plus women go to police stations, complain of rape, and are believed by the police to have suffered a sexual assault. Using British and American survey evidence, projections of the number of cases of rape and attempted rape in England and Wales vary from 115,000 to 270,000 each year.² The enormous gap between either of the official figures and the projections raises acutely the question of whether the surveys are actually looking at the same phenomenon: are they in some way taking lesser events such as changes of mind or episodes of 'bad sex' and transforming them into rape? Instead of looking at a highly traumatic experience suffered by a tiny minority of women, the surveys suggest that perhaps one woman in four has been the victim of rape or attempted rape. The issue becomes more acute when we consider two other survey findings. One is that lesser sexual assaults are also very common. Thus in summarizing her survey of 6159 US undergraduates Mary Koss concludes that if we include her category of 'unwanted sexual touching' '[o]nly 45.6% of the young women polled by the study had *never* experienced sexual victimization'.³ The other is that men, too, are the victims of forced heterosexual sex. Legal definitions of rape normally assume a male perpetrator, but if we accept for the minute that heterosexual sex forced on a man (using the same criteria of 'force', broadly, as those Mary Koss uses for women) is rape, then 8% of the men in one survey had been victims of

rape on a date, which compares with 8.5% of the women Mary Koss studied.⁴

By this stage the reader is liable to feel that things are getting out of hand. From legitimate feminist outrage that so many of the British perpetrators of the 6,000 or so rapes reported to police stations get off we are moving to a situation where at least half the female population have suffered sexual assaults,⁵ and men perhaps do not lag far behind them. One obvious response is methodological rather than philosophical: it is to ask whether the way the people in the surveys of sexual assault are chosen or the questions they are asked, or the way their answers are interpreted, are producing inflated figures.⁶ The other, which starts with the definition of rape and tries to work out how the phenomena uncovered by the surveys relate to it, is the one to be taken here.

The starting point of most discussions of rape is naturally the legal definition of it. In England and Wales rape is an offence which carries a maximum sentence of life imprisonment (Section 1 (1), Sexual Offences Act 1956, plus s. 37, Schedule 2). The Sexual Offences (Amendment) Act, 1976, as amended by the Criminal Justice and Public Order Act, 1994, s. 142, states that a man commits rape if:

- a. He has sexual intercourse with a person (whether vaginal or anal) who at the time of the intercourse does not consent to it; and
- b. at the time he knows the person does not consent to the intercourse or is reckless as to whether that person consents to it.

Thus under current English law rape is perpetrated by definition by a man, and the victim can be male or female. The test for whether or not intercourse is rape is consent, and the law does not lay down how consent or non-consent is to be established. Obviously almost all features of this definition can and have been challenged: the English and Welsh definition of rape was extended to include anal sex with men or women in 1994; some past legal definitions in the USA laid down criteria for resistance, e.g., 'to the utmost' to establish non-consent; clause b. enshrines the notorious *Morgan* judgement, etc.⁷

II. Rape as a Moral Category

The focus of this article is, however, on rape as a moral rather than a legal category. This is not because the issue of rape generates moral issues similar to those raised by abortion or euthanasia, where there is substantial debate as to whether the law is seriously out of line with morality. I have not run across any philosophical claims that rape is acceptable in some circumstances. However, there are three important reasons for treating rape as a moral issue.

First, it allows us to discuss the seriousness of particular acts without trying to put matters into legal terminology, or to consider the - perhaps unintended - effects of legislative proposals. If, for example, it seems desirable on moral grounds to see rape less as an absolute 'either it is rape or it isn't' type of offence and more as a series of gradations from a very serious interference with another person through to bad manners, that could be reflected in English law either by rewriting the law on rape on the lines first carried out in Michigan, and having a graded series of sexual assaults in which the word 'rape' is never mentioned, or by tacking this idea on to the existing English law of rape together with the English law on procurement. Either of these approaches could

produce much the same effects, but each would have its own legal advantages and drawbacks to do with the way it fitted into the rest of English law.⁸ Alternatively, consider the view that the worst cases of rape are as bad as murder. This was evidently held in some southern states of the USA, which therefore imposed the death penalty for rape up to the 1960s. Even if the moral basis of this view is acceptable, the practical effect in court was that juries were very reluctant to convict rapists, who therefore tended to be put on probation for minor offences rather than executed, the main exception being black men accused of raping white women. There would thus be a good case for someone who held that rapists morally deserve to die actually advocating a lesser penalty in order to secure convictions. It makes sense in an initial approach to get away from these complications and focus on a moral account.

Second, as a practical matter, the use of imprisonment to punish rape and attempted rape on the scale which would be required if the survey evidence is taken at face value would cause enormous social disruption, tripling the British prison population, criminalising a good proportion of (mainly young) men and requiring a British Gulag.⁹ Thus the obvious role for legal change would be as an encouragement to moral change, and there is thus much scope for moral discussion and education.

Third, rape is so plainly morally abhorrent that philosophers and others have tended to use something of a scattergun approach in listing reasons why it is wrong, and a consistent and carefully-thought-out account is a good basis for considering how extensive should be the range of acts covered by our abhorrence of rape.

In what follows I want to focus initially, then, on the wrong done by a stranger rapist. There are two main issues that need to be considered. The first is the definition of the wrongful act, the second is the nature of the harm inflicted.

On the first question I am happy to accept the arguments of J.H. Bogart, who argues that rape is nonconsensual sex. He reaches this conclusion by considering defining rape as forcible, coerced, nonvoluntary and nonconsensual sex. He argues that only the last of these covers the five main categories which should be included in the 'core domain of rape', these being: sex obtained by force or threat of force against the victim; sex obtained by threats against a third party; sex while the victim is incapacitated; sex obtained by fraud, and sex involving a child. The last of these is covered in Britain by legislation on under-age sex, where the penalties for more extreme cases are similar to those for rape. English law thus fits well with Bogart's basic argument, which is that children are incapable of consent to sex, even though they may appear to be voluntarily participating without force or coercion. At the other end of the list, sex obtained by force is nonconsensual as well as forcible, coerced and non-voluntary. Bogart seems to me to have captured the sense behind English law and the better US laws that the minimum definition of rape is that it is sex without the consent of the victim.¹⁰ This is a simple definition which requires less supplementation than alternatives and effectively captures the central idea of what rape comprises. The main problem that it does not solve is what exactly counts as consent or non-consent, but this seems to me to be an inevitably problematic issue that this definition appropriately highlights.¹¹

Some feminists take the view that rape should be seen as against the victim's will rather than without her consent, because consent is a very passive concept.¹² We should, they argue, be advocating sex where the active will of the woman involved is seen as central. I am happy to agree

with this view as an account of the sort of sex that should be encouraged. However, a woman who genuinely consents to entirely passive sex, if such a thing is possible, does not seem to be consenting to rape. Further, children who are able to do things voluntarily, but who are too young to fully understand the meaning of sexual consent are not clearly protected if the concept of will is made central.¹³ There is also the problem of a woman who is unconscious. Unless she has previously stated that she does not want sex while unconscious, a man who has sex with her is not violating her will, which she is incapable of expressing, but he has emphatically not obtained her consent. Thus at minimum a definition based on will requires two forms of supplementation which are not needed by a definition centered on consent.

III. The Harm of Rape

Moving on to the second question, what is the harm inflicted by having sex without consent? There are several possible answers here. They plainly overlap, and there is, of course, nothing to stop several answers being simultaneously right. Here are some suggestions.

Rape violates the *autonomy* of the victim. She is denied the right to determine an important area of her life. Alternatively, she is treated as merely a means for the rapist.¹⁴

Rape violates a person's *sexual self-determination*. Sexuality is an important area in the formation of an individual's personality.

An individual has a right to *control* his or her own body (or a right to bodily integrity). Rape violates that right.

Rape *alienates* an important aspect of a person, reducing her to a fragment of her being.¹⁵

Rape violates an important part of a person's *domain*.¹⁶

Rape causes *unhappiness* to the victim and others for no justifiable reason.¹⁷

Before proceeding I want to consider the case of the Mineral Water Fanatic (MWF). This example appears frivolous in such a serious context, but is intended to prove a serious point. The MWF is a hypothetical figure who is convinced everyone should try noncarbonated mineral water. He forces his victims to swallow a mouthful of mineral water. He has also been known to hold his victims down for brief periods, and to hide behind them.¹⁸ He thus violates their bodily integrity and autonomy, and uses another as a thing to conceal himself, alienating aspects of the person's personality. There is no doubt that the actions of the MWF are morally blameworthy, but despite the apparent verbal similarity between what he does and some of the above moral descriptions of rape, few would regard him as guilty of acts approaching murder in their seriousness. We thus seem to be pointed away from autonomy and bodily integrity as reasons for finding rape morally abhorrent, and pointed towards the denial of sexual self-determination and the causing of unhappiness.

Bearing the MWF in mind, let us review the list of reasons why rape is wrong more carefully. Starting with *autonomy*, there is no question that rape denies a person's autonomy. So, however,

does forcing someone to swallow a mouthful of water, holding someone down briefly, or making them stand still so someone else can hide behind them. So also, as Bogart points out, does a labor contract: it involves someone sacrificing some of her autonomy in exchange for money.¹⁹ There are two problems with autonomy on its own. First, some violations of a person's autonomy are justifiable. Some restrictions on libelous utterances, for example, are seen as a legitimate violation of free speech because the unwarranted harm done to the libel victim outweighs the right to autonomy enshrined in the defense of free speech. By itself this problem is not serious, because the violation of autonomy in instances of rape is grave, whilst the justification for it is slight. This leads us on to the second problem. Why is rape seen as a grave violation of autonomy? The main explanations are that sexuality is central to the personality, and that this particular violation causes great distress. Autonomy does not appear to be a good reason independently of these other two.

We shall return to *sexual self-determination*. What about the right to *control* one's own *body*? The same problems apply to this idea as to that of autonomy. I am not sure that we have an absolute right to control our own bodies. If I am holding on to a friend to stop him from falling from a great height it is debatable whether I have a right to let go of him in order to scratch my nose. Again the heart of the problem is that of the sexual parts of one's body, their central role in the claimed right of control, and of the distress caused by sexual violation.

The idea of *alienation* involves a claim that in some sense I own my person and personality, and that some state or states of this person are acceptable or natural or ideal, whilst other states are alienated. We thus add to the problems involved in the idea of autonomy the difficulty of showing that a certain state *is* ideal or natural or proper. Human beings are very heavily involved in various cultures and it is difficult to decide what is natural or proper. One possibility, of course, is to say that the individual decides what is natural or proper for her, but this then makes the idea of alienation redundant and replaces it with autonomy.

Shafer and Frye's idea that rape violates a person's *domain* involves the assertion that a domain is a person (a behaving body) and the space it occupies. The activities, tools and materials the person needs to carry out her goals are included, as are the 'resources of its work, play, recreation, exercise, solace and amusement'. Bending someone's will, dulling her intelligence or affecting her sense of identity 'comes very near the center of her domain'. The idea of a domain is thus another way of stating that individuals have right to autonomy. As Shafer and Frye then acknowledge, people's rights to autonomy may conflict, in which case 'it seems only reasonable to concede the power of consent in a conflict over a given item to the person to whose domain it is more central - that is, to the one more profoundly affected by it'.²⁰ As with the claim about autonomy, this claim about persons' domains says something important about rape *if* it is accepted that sexual self-determination is very close to the center of someone's domain.²¹ Perhaps one could hold that it is just obvious that this is the case, but a better move is to say that sexual self-determination is very central because violating it causes great distress, whereas the bodily violations carried out by the MWF are much less significant. Although my argument is now moving towards looking at the evil consequences of particular denials of sexual self-determination, it needs to be stressed that the denial of autonomy does remain in the background. People can decide to put themselves through dangerous and painful experiences (e.g. donating a kidney to someone else), and our willingness to do this on occasion where necessary is part of what makes us moral agents. What follows should thus be seen as placing heavy stress on the consequences of one sort of denial of autonomy.

Our more detailed discussion of the list of evils involved in rape thus points in the same direction as our discussion of the MWF: the other evils seem to be premised on assertions about sexual self-determination backed up by the evidence about the distress caused by the violation of sexual self-determination. This latter point seems to me to be crucial: if violating sexual self-determination *never* did anyone any obvious harm, then rape would surely not be seen as any more harmful than the minor interference involved in, say, pressing a leaflet advocating a particular point of view into someone's hand, or causing someone to slow down a very little when driving. We thus have a basically a rule utilitarian view of rape: it is evil because any benefit to the rapist is vastly outweighed by the typical consequences of rape.²²

Bogart discusses and rejects the idea that an experiential element is intrinsic to the harm of rape. The experience of victims varies, he says: there is no common experience.²³ I am sure that the experience varies, but moral condemnation should be concerned with typical or frequent experiences. If some women are unaffected and others suicidal following rape, whilst substantial disturbance is typical, then rape is about as blameworthy as other acts which cause substantial disturbance on average.

A consequence of my approach here is that rape has a cultural and material element to it: it is more wrong for some women in some cultures than for others. In our mainstream British or US culture, for example, a raped woman is not seen as inherently unmarriageable, although her sexual relationships will very likely be disrupted. To that extent, then, rape is less serious for us than for people who have that belief. Rape victims in modern western countries are typically offered abortions if necessary. It is obviously traumatic to put a woman in the situation of having to make decisions about abortion, but arguably somewhat less traumatic than leaving her with no choice and an unwanted child. Going in the other direction, rape victims today have some fear of AIDS, which was absent some years ago and may perhaps become less of a fear in the future.²⁴

The evil consequences of stranger rape in modern western societies have been well charted by anti-rape activists and experts. Many victims suffer a version of post-traumatic stress disorder involving anger, depression, sleeplessness and flashbacks. Victims frequently break up with existing partners, leave their jobs, move house, move to another location. Their sexual functioning is often disrupted. Obviously the disruptions I have listed involve economic as well as psychological costs; for American victims the economic costs may include medical expenses. There is some uncertainty in the literature about how long the effects last, but they can clearly last a very long time, making it hard to claim that a particular woman has fully recovered or become a 'survivor' rather than a victim.²⁵ We are clearly dealing with a very serious violation.

The above list covers the main consequences for the individual victim, but the evils caused by stranger rape are more extensive. Rape is very widely feared by women. One survey suggests that violent stranger rape is the crime most feared by American women.²⁶ Women are generally more afraid of crime than men, and it seems that much of the reason for this is that they are afraid of sexual assault as an aspect of their fear of other crimes. One of the evils of rape is thus the generation of fear in women who are afraid they might become victims.²⁷

A closely-related evil is the restrictions which fear of rape places on women's movements and

activities. There are a whole series of issues to do with control of the streets after dark, public transport, the design of urban spaces, which are generated by (mainly women's) fear of crime. If this fear means that women to some extent lose work and educational opportunities, leisure activities and the chance of participating in political activities, then rapists are restricting the benefits available to half the population as well as generating fear.²⁸

IV. 'Rapettes', Gropes and Male Victims

If my arguments above are accepted we now have a principle with which to attempt to make sense of the results of the surveys discussed in the first section of this article. The more nonconsenting sexual acts resemble rape in the sense that they typically produce similar consequences, the more they should be assimilated to the category of rape.

How does this criterion match up with the survey evidence? To start with, it is necessary to say something about consent. More recent surveys have identified a form of unwilling sex that is familiar to most people, namely 'altruistic' sex undertaken in order to keep a partner happy. Most people's experience of this seems to be positive. There is obviously a problem in identifying this form of sex, because it needs to be distinguished from sex that is undertaken because of implied threats of violence. It is difficult to identify an implied threat because it is a matter of judgment exactly what someone would have done had the woman in question refused. However, many couples seem to be able to identify clear episodes of sex which is intended to maintain the relationship and which it would be stretching the language to describe as rape. There is that least a possibility that the responses to some survey questions that were asked about unwanted sex misinterpreted unwanted but consenting sex into rape.

Some indication of how such a misinterpretation could arise is offered by a survey conducted by Hannon et. al., which found that 63.6% of the women they surveyed had experienced unwanted sex on a date. However, when asked what behaviors they had engaged in on dates where this had occurred, 62% of women *willingly* kissed with tongue contact, 23% had their breasts touched directly by the man, 10% touched the man's genitals, 5% willingly had sex (i.e., presumably they did not want to have sex a second or third time). In other words, although some of what Hannon et. al. discovered was sexual coercion, many of the women surveyed were keeping an aroused partner happy. They were not so much alienating an important aspect of their person as missing something good on television whilst having a fairly pleasurable experience.²⁹

A related question concerns the way in which women who were identified by investigators such as Mary Koss as victims of rape did not identify themselves as victims. This is a fraught issue. On the one hand, it is possible for women who have a pretty clearly been victims of rape not to identify their experience in that way. For example, where spousal rape has only recently been accepted by the law, women may perhaps identify the experience as seriously traumatic, but not to be willing to call it rape. On the other hand, there is a strong tradition in the feminist research which objects to the substitution of the views of experts for the experiences of women. About a quarter of the women who Koss identified as raped on the basis of her *Ms* survey of 6,159 students said in the questionnaire that they did not feel victimized, and some three-quarters did not recognize their experience as rape.³⁰ In a series of articles and responses Gilbert accuses Koss of describing women who were not victimized as victims, whilst Koss provides various explanations of the apparent

discrepancy.³¹ Much of the discussion concerns interpretations of the use of alcohol, and raises methodological rather than philosophical issues, but Koss's vigorous assertion that the students who she considers have been raped are the victims of real rapes and not some less serious 'rapettes' raises a further issue.

A woman who reports a stranger rape to a police station and who subsequently endures a rape trial plainly recognizes that she has been raped, and, as we have seen, there is ample evidence that the event is profoundly traumatic. There is also good evidence that acquaintance rape produces effects similar to stranger rape: the sheer terror of the event tends to be less but the effect on the woman's ability to trust other people is worse.³² The acquaintance rapes which are used in evidence of this are ones reported to rape crisis centers – again, the woman involved plainly recognizes she has undergone a traumatic experience. Many of the women discussed in surveys such as Koss's do not tell anyone, a quarter of them do not feel victimized, and only about a quarter describe their experience as 'rape'. Hence Mary Koss's need to repudiate the allegation that she is largely describing 'rapettes'. However, the evidence of the extent to which the women concerned are traumatized is largely lacking: there is one small survey of women who are deemed, using questions similar to Koss's, to have undergone rape, which suggests that they experience greater depression, but it is on such a small scale that it would be unwise to draw wider conclusions from it.³³ Using the criteria drawn from the above philosophical analysis, then, there has to be an open verdict on some of what Koss uncovered: consenting but unwilling sex, rapettes or rapes. There would, however, be a clear criterion for further investigations.

The same conclusion applies with even greater force to Koss's 'unwanted sexual touching': there seems to be virtually no evidence as to whether the experience of unwanted kisses, fondling etc. is traumatic in any sense. This is particularly worrying, as the predominant model of a move towards greater sexual intimacy seems to be that the man puts his arm round the woman's shoulder, holds her hand, kisses her etc., and she either fends him off or goes along with it.³⁴ Provided that men once fended off remain fended off this seems to be a harmless way to proceed, but it is bound to result in most women experiencing unwanted sexual contact of various sorts. To the extent that female initiation of sexual intimacy has become more common there will be increasingly large numbers of men who also experience unwanted sexual contact.³⁵

This problem relates to Koss's finding of a high rate of attempted rape. One question she used for this purpose was: 'Have you had a man attempt sexual intercourse (get on top of you, insert his penis) when you didn't want to by giving you alcohol or drugs, but intercourse did not occur?'³⁶ This question would certainly get a 'yes' from women given spiked punch at a fraternity party, followed by an interrupted attempt at gang rape, but would also perhaps evince a positive reply from a woman whose boyfriend (with whom she was already sleeping) made gentle attempts to have sex with her at the end of an evening where he bought most of the drinks, but desisted when asked. Remember, the woman is answering a questionnaire, not giving evidence at a police station.

There is some very limited evidence of men being victims of stranger rape by women, as defined above. It would appear that the idea that men cannot maintain erection when threatened is false. The victims of stranger rape by women apparently experience the same symptoms as female victims.³⁷ They also face the ideological problem that it is assumed they have undergone an enjoyable experience, that in most jurisdictions there is no legal category for their experience, and that they

are not believed. Mary Koss argues that women cannot rape men because rape involves forced penetration; the nearest offence she can think of is a group of women holding down a man and penetrating him anally with carrots. This is not a frequent occurrence. More realistically she imagines unethical conduct in which a woman induces a man to have sex with her by threatening to spread rumors that he is impotent. Koss says that this would not be rape because the man is not penetrated and is not threatened with force.³⁸ By invoking ridicule and definition by fiat she thus contributes to a version of the myths of rape, which she would rightly decry if applied to women.³⁹ Koss's myths would be, roughly: i. women cannot force men to have sex because men faced with force do not sustain erections; ii. men are not penetrated by women, therefore sex forced on a man by a woman is not traumatic like rape. According to the above analysis in terms of denial of autonomy and the creation of unhappiness, male victims of stranger rape by women suffer a serious assault and probably deserve the same legal protection as female rape victims. The issue should be seen as one of sexual assault, the seriousness of which is measured by establishing how unhappy a typical male victim becomes. I would not regard a threat to spread rumors of impotence as very coercive; other rumors, such as rumors of marital infidelity or of corruption at work could have serious results and are at least as coercive as many of the examples of force (e.g. a slap) used by Koss. Whether coerced sex of this sort should actually be called 'rape' or placed in some lesser category of sexual assault should depend on how traumatic men typically find this form of coerced sex.

More common is a male experience of unwanted heterosexual sex on a date or with a known woman. Besides altruistic sex, where we can simply say that there is a category mistake because the sex is consenting, male victims (or 'victims') have sex when they are too drunk to consent, and are subjected to some degree of physical force or restraint, hence the conclusion above that 8% of men in the survey quoted had been victims of rape on a date compared with 8.5% of the women in Koss's survey. The conclusions above on 'rapettes' apply even more forcefully here: the suggestion in the survey is that men are less traumatized than women by heterosexual sex without consent, but the evidence is extremely thin and there needs to be further investigation before conclusions are drawn.

Conclusion

The scattergun approach of philosophers to stranger rape probably does not matter very much: there is a widespread consensus, which I do not wish to challenge, that stranger rape is seriously abhorrent. On the other hand, when we start to look at less serious incidents which are bracketed with rape it becomes an important issue. Unless we are going to believe that most of the population is seriously traumatized by various sexual assaults, some way is needed of distinguishing between bad sex, minor assaults and major assaults. Alienation, violation of a right to control one's own body and violation of a domain are all too sweeping: a very serious sexual offence is either triggered off by a particular action or it is not. This way of thinking seems to be tied up with implausible distinctions which say that physically pushing someone in order to obtain sex is raping her whilst threatening her with economic ruin is merely applying pressure. What I am suggesting as a way forward is that there must be some violation of autonomy for something to count as a sexual offence at all. This is to allow for the point that people may do all sorts of things for altruistic motives. Given that there is a violation of autonomy, the other issue that decides between serious, moderate and trivial offences is the degree of distress caused to the victim, to her or his intimates,

and more widely to women in general or the society. Sexual offences are typically multi-dimensional: there is a perceived level of threat, but the perception may be skewed; people's personal attitudes to both the sexual act desired and the threatened consequences of not going along with it vary, as do the attitudes of different societies and different groups within them; the participants may well be incapacitated by drink or drugs, but to what degree? It is thus unlikely that a consensus could ever be reached about an exact hierarchy of the seriousness of offences, but my approach does offer a rational handle on a very fraught area. From a philosophical, if not necessarily a legal, perspective it points towards some sort of lesser crime of rape to cover instances with a lower degree of coercion, or a rewriting of the law in terms of degrees of sexual assault.

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Notes

1. Two further issues, the exact identification of communications of consent and the question of whether all heterosexual intercourse amounts to rape, are not considered here but are discussed in Chapters 4 and 5 of my *Date Rape and Consent*, Ashgate, Aldershot, 1998.
2. See Mark Cowling, *Date Rape and Consent*, Ashgate, Aldershot, 1998, Ch. 3 esp. pp. 77-80.
3. Robin Warshaw, *I Never Called it Rape: The Ms report on Recognizing, Fighting and Surviving Date and Acquaintance Rape*, Harper and Row, New York, 1988, p. 48. It is important to pay careful attention to the language of survey reports. In this case very limited unwanted sexual touching is dubbed 'sexual victimization'. A more spectacular example is Gloria J. Fischer's survey of college males' lies or false promises used to have sex, typically exaggerating their degree of commitment. This is undesirable behavior, and more extreme cases might be deemed rape by deception (although Fischer speculates that the women concerned may have been happy to accept the lie in order to justify their own participation in casual sex), but Fischer uses the term 'verbal coercion' to describe the males' behavior, thus assimilating it to threats of violence - see Gloria J. Fischer, 'Deceptive, Verbally Coercive College Males: Attitudinal Predictors and Lies Told', *Archives of Sexual Behavior*, Vol. 25, No. 5, 1996, pp. 527-33.
4. Cindy Struckman-Johnson, "Forced Sex on Dates: It Happens to Men, Too", *Journal of Sex Research*, Vol. 24, 1988, pp. 234-41. For broadly similar findings see: Charlene L. Muehlenhard and Stephen W. Cook, 'Men's Self-Reports of Unwanted Sexual Activity', *The Journal of Sex Research*, Vol. 24, 1988, pp. 58-72. Because their subjects were asked about types of pressure used to secure unwanted sex but not about numbers of incidents, this survey cannot be used to make exact claims about percentages of men or women suffering sexual assault.
5. Or, in a Canadian survey on the lines of that performed by Mary Koss, conducted by DeKeseredy and Kelly, 81% of the female students surveyed were found to have suffered 'woman abuse' - Information in John Fekete, *Moral Panic: Biopolitics Rising*, Robert Davies Publishing, Montreal, 1994, p. 50.
6. For examples of this approach see Fekete, *Moral Panic: Biopolitics Rising*; N. Gilbert, 'The Phantom Epidemic of Sexual Assault', *The Public Interest*, Vol. 103, 1991, pp. 54-65; 'Realities

and Mythologies of Rape', *Society*, May-June 1992, pp. 5-10; 'Examining the Facts: Advocacy Research Overstates the Incidence of Date and Acquaintance Rape', in Richard J. Gelles and Donileen R. Loseke, eds, *Current Controversies on Family Violence*, Sage, Newbury Park, California 1993, pp. 120-32; 'Miscounting Social Ills', *Society*, Vol. 31, 1994, pp. 18-26; Katie Roiphe, *The Morning After*, Hamish Hamilton, London, 1993; Cowling, *Date Rape and Consent*, Ch. 3.

7. The English law on rape and sexual assault is currently under review. See Home Office, *Setting the Boundaries*, at www.homeoffice.gov.uk (2000).

8. Similar comments, obviously, would apply to moves to reform rape laws elsewhere.

9. A rough figure if rape as found in the surveys were effectively prosecuted might be the conviction annually of 160,000 men for offences warranting a year in prison, which would require some 400 prison ships on the lines of HMP Weare, bought second hand from New York. The United States has already experimented with a massively expanded prison population thanks to the war on drugs, and might have doubts about further expansion.

10. J.H. Bogart, 'On the Nature of Rape', *Public Affairs Quarterly*, Vol. 5, 2, April 1991, pp. 117-136, references to pp. 118-20.

11. An attempt is being made at this in the current review of the law of rape in England. A significant proposal is for consent to be defined in statute as 'free agreement', together with some examples of what does not constitute free agreement. See Home Office, *Setting the Boundaries*, at www.homeoffice.gov.uk (2000), Vol. 1, Ch. 2.

12. Scottish law defines rape in this way.

13. Cf. Bogart, 'On the Nature of Rape', p. 119.

14. This latter formulation involves an appeal to the Kantian principle that it is morally wrong to use someone as merely a means. To use someone as a means with their informed voluntary consent is frequent, normal and moral - it happens almost every time someone buys something from a shop, for example: the vendor is used as a means for the purchaser to get a commodity, but the vendor knows this is happening and is happy about it. This approach is taken by Thomas A. Mappes, 'Sexual Morality and the Concept of Using Another Person', in his *Social Ethics: Morality and Social Policy*, McGraw-Hill, New York, 1987, pp. 248-62. Cf. the analysis of treating women as sex objects in Linda LeMoncheck, *Dehumanizing Women*, Rowman and Allanheld, New Jersey, 1985, pp. 12-13. The Kantian basis of this approach is best explained in Onora O'Neill, 'Between Consenting Adults', *Philosophy and Public Affairs*, Vol. 14, No. 3, 1985, pp. 252-77. She emphasizes that in intimate contexts we must respect other persons not just as persons in general but to some extent at least as 'the persons they are' (p. 260). For a further discussion of the application of Kantian principles to sex, but less specifically to rape, see Raymond A. Belliotti, *Good Sex*, Kansas University Press, Kansas, 1993, pp. 98-108.

15. For these first four reasons see *ibid.*, pp. 121 et. seq.

16. See Carolyn M. Shafer and Marilyn Frye, 'Rape and Respect', in Marilyn Pearsall, ed., *Women and Values: Readings in Recent Feminist Philosophy*, Wadsworth Publishing, Belmont, California, 1986, pp. 188-96, cf. Joan McGregor, 'Force, Consent and the Reasonable Woman', in Jules L. Coleman and Allen Buchanan, eds, *In Harm's Way*, Cambridge University Press, Cambridge, 1994, pp. 231-54.

17. This reason is dismissed by Bogart, 'On the Nature of Rape', but is obviously important in a substantial literature on the effects of rape, to be discussed shortly.

18. This character is adapted from Murphy's sushi stuffer - see Jeffrie G. Murphy, 'Some Ruminations on Women, Violence and the Criminal Law', in Coleman and Buchanan, *In Harm's Way*, pp. 209-230, p. 214. I have changed sushi into mineral water on the grounds that the former is more dangerous to force into people's mouths.

19. Bogart, 'On the Nature of Rape', p. 129.

20. Shafer and Frye, 'Rape and Respect', p. 191.

21. The same idea is expressed by Carole Pateman in the context of prostitution: 'the services of the prostitute are related in a more intimate manner to her body than those of other professionals. Sexual services, that is to say, sex and sexuality, are constitutive of the body in a way in which the counseling skills of the social worker are not...Sexuality and the body are, further, integrally connected to conceptions of femininity and masculinity, and all these are constitutive of our individuality, our sense of self-identity'. Carole Pateman, 'Defending Prostitution: Charges Against Ericsson', *Ethics*, Vol. 93, April, 1983, pp. 561-5, quotation from p. 562. Rape would obviously also violate something constitutive of our individuality and sense of self-identity. Cf. Keith Burgess-Jackson, *Rape: A Philosophical Investigation*, Dartmouth, Brookfield, Vermont, 1996, on the radical feminist theory of rape as something that essentially degrades the woman (p. 53). Estrich captures the same point by insisting that rape is not *simply* an assault but has its own 'unique indignity' - See Susan Estrich, *Real Rape*, Harvard University Press, Cambridge, MA, 1987, p. 81.

22. For a fundamentally similar conclusion based on an analysis of rape as a form of sadism, see Russell Vannoy, *Sex Without Love: A Philosophical Exploration*, Prometheus Books, Buffalo, 1980, p. 59.

23. Bogart, 'On the Nature of Rape', p. 122.

24. Linda LeMoncheck writes of the idea in our culture of sex as a defilement of women (the madonna/whore dichotomy). This idea could sensibly be linked to the analysis at this point - see LeMoncheck, *Dehumanizing Women*, pp. 48-9, 53. The idea of cultural relativity is pursued by Linda Grant in an article which suggests that thanks to a less inhibited approach to sex at that time, a date rape experience of the early 1970s might be less traumatic than a similar incident happening to a student today. See Linda Grant, 'Bad Sex', *Guardian Weekend*, 24 September 1994.

25. There is a very substantial literature in this area. For a sample of it, which includes many references to further articles, see Julie A. Allison and Lawrence S. Wrightsman, *Rape: the Misunderstood Crime*, Sage, Newbury Park, CA., 1993, pp. 160-1, Patricia A. Resick, 'The

Psychological Impact of Rape', *Journal of Interpersonal Violence*, Vol. 8, No. 2, June 1993, pp. 223-55, Ann W. Burgess and Lynda L. Holstrom, 'Rape Trauma Syndrome', *American Journal of Psychiatry*, Vol. 131, 1974, pp. 981-86, Ann W. Burgess and Lynda L. Holstrom, 'Adaptive Strategies and Recovery from Rape', *American Journal of Psychiatry*, Vol. 10, October 1979, pp. 1278-82, Martha R. Burt and Bonnie L. Katz, 'Rape, Robbery and Burglary: Responses to Actual and Feared Criminal Victimization, with Special Focus on Women and the Elderly', *Victimology*, Vol. 10, 1985, pp. 325-58, Ruth E. Hall, *Ask Any Woman*, Falling Wall Press, Bristol, 1985, Ch. 11.

26. Mark Warr, 'Fear of Rape among Urban Women', *Social Problems*, no. 32, 1985, pp. 238-50. Cf. British figures quoted in Adam Sampson, *Sex Offenders and the Criminal Justice System*, Routledge, London, 1994, p. 126, f. 1, cf. *Anxieties About Crime: Findings from the 1994 British Crime Survey*, Home Office, 1994.

27. Burgess-Jackson, *Rape: A Philosophical Investigation*, Ch. 10, makes a convincing and original argument that there is a major issue of distributive justice here that is largely overlooked by philosophers who discuss the distribution of social benefits when they should also look at the distribution of fear.

28. There is quite a large literature in this area. For a few examples see: Jalna Hanmer and Sheila Saunders, *Women, Violence and Crime Prevention: A West Yorkshire Study*, Avebury, Aldershot, 1993, Hall, *Ask Any Woman*, Elizabeth Stanko, *Everyday Violence: How Men and Women Experience Sexual and Physical Danger*, Pandora Press, London, 1990. Cf. Stephanie Riger and Margaret Gordon 'The Impact of Crime on Urban Women', in A.W. Burgess, ed., *Rape and Sexual Assault*, Vol. 2, Garland, London and N.Y., 1988.

29. Roseann Hannon et. al., 'Dating Characteristics Leading to Unwanted vs. Wanted Sexual Behavior', *Sex Roles*, Vol. 33, Nos. 11/12, 1995, pp. 767-83. Obviously, none of the behaviors listed amount as such to consent to sex on this occasion. A rather similar picture, interpreted differently, emerges in Sarah K. Murnen, Annette Perot and Donn Byrne, 'Coping with Unwanted Sexual Activity: Normative Responses, Situational Determinants and Individual Differences', *The Journal of Sex Research*, Vol. 26, No. 1, 1989, pp. 85-106. The authors slide very readily from talking of 'unwanted sexual attempts', carried out by means as limited as 'persuasion' to 'attacks'. The women students they quote seem generally to be fairly unconcerned about such a high rate of 'attack', and fairly confident that they can handle male attempts. For a further discussion of a survey which elides widely different forms of 'forced sex', and makes comments on roughly the same lines as Hannon et. al., see Kate Fillion, *Lip Service*, Pandora/Harper Collins, London, 1997, pp. 194-7. In a different context Fillion also makes some interesting comments about how subjects interpret questionnaires - see pp. 214-7. For more on altruistic sex see: Charlene L. Muehlenhard and Stephen W. Cook, 'Men's Self-Reports of Unwanted Sexual Activity', *The Journal of Sex Research*, Vol. 24, 1988, pp. 58-72; R. Lance Shotland and Lynne Goodstein, 'Sexual Precedence Reduces the Perceived Legitimacy of Sexual Refusal: An Examination of Attributions Concerning Date Rape and Consensual Sex', *Personality and Social Psychology Bulletin*, Vol. 18, No. 6, Dec. 1992, pp. 756-64.

30. Warshaw, *I Never Called It Rape*, p. 28.

31. See Mary P. Koss and Sarah L. Cook in 'Facing the Facts: Date and Acquaintance Rape are Significant Problems for Women', in Gelles and Loseke, *Current Controversies on Family Violence*, pp. 104-119. Gilbert's critique of various statements from Koss is on pp. 123-4 of Neil Gilbert: 'Examining the Facts: Advocacy Research Overstates the Incidence of Date and Acquaintance Rape', in Gelles and Loseke, *Current Controversies on Family Violence*, pp. 120-32. He follows this up in: Neil Gilbert, 'Miscounting Social Ills', *Society*, Vol. 31, 1994, pp. 18-26.
32. B.L. Katz, 'The psychological impact of stranger versus nonstranger rape on victims' recovery', in A. Parrott and L. Bechhofer, eds, *Acquaintance Rape: The Hidden Crime*, New York, John Wiley, 1991, pp. 251-69.
33. B.L. Shapiro and J.C. Schwarz, 'Date Rape: Its Relationship to Trauma Symptoms and Sexual Self-Esteem', *Journal of Interpersonal Violence*, Vol. 12, No. 3, pp. 407-19; see also claims in Mary P. Koss and Sarah L. Cook in 'Facing the Facts'.
34. Timothy Perper and David Weis, 'Proceptive and Rejective Strategies of US and Canadian College Women', *Journal of Sex Research*, Vol. 23, 1987, pp. 455-80, cf. Naomi B. McCormick, 'Come-ons and Put-offs: Unmarried Students' Strategies for Having and Avoiding Sexual Intercourse', *Psychology of Women Quarterly*, Vol. 4, No. 2, 1979, pp. 194-211.
35. On female initiation of dates see Fillion, *Lip Service*, Chs. 4,5; P.A. Mongeau et. al., 'Who's wooing whom? An investigation of female-initiated dating', in P.J. Kalbfleisch, ed., *Interpersonal communication: Evolving interpersonal relationships*, Erlbaum, Hillsdale, N. J., 1993, pp. 51-68.
36. Mary P. Koss, "The Underdetection of Rape: Methodological Choices Influence Incidence Estimates", *Journal of Social Issues*, Vol. 48, 1, 1992, pp. 61-75, p. 68.
37. On this see P.M. Sarrel and W.H. Masters, 'Sexual molestation of men by women', *Archives of Sexual Behavior*, 11, 1982, pp. 117-31, L. Murray, 'When Men are Raped by Women', *Sexual Medicine Today*, Vol. 20, 1982, pp. 14-16. These articles are based on a very small number of cases, and are interesting because they show the existence of a phenomenon widely thought impossible.
38. In Warshaw, *I Never Called it Rape*, pp. 191-2. Andrea Dworkin seems to have much the same view of the impossibility of rape carried out by women - see *Intercourse*, Secker and Warburg, London, 1987, p. 136. The reference to spreading rumors raises issues about the distinction between rape, rapettes and bad sex: consider a threat to spread a plausible rumor that stood a decent chance of getting a man sacked from a well-paid and secure job. For Koss this is not physical force, so even if the question of penetration could be got over the man in question would not be a rape victim. Yet I imagine most people of both sexes would prefer to be slapped than fired from a good job. For Koss a woman threatened with a slap is raped because she faces physical force. A woman faced with possibly being fired is presumably not raped, and a man threatened with either is not raped. At minimum we seem to have a failure to consider the relative seriousness of possible threats.
39. For a standard account of the myths of rape see Martha R. Burt, 'Cultural Myths and Supports for Rape', *Journal of Personality and Social Psychology*, Vol. 38, No. 2, 1980, pp. 217-30.

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