

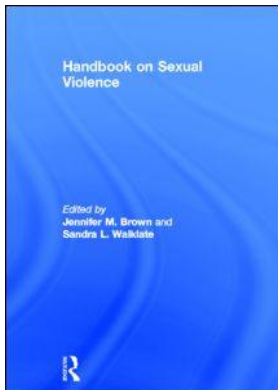
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## **Handbook on Sexual Violence**

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### **The legal heritage of the crime of rape**

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## Chapter 3

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# The legal heritage of the crime of rape

*Joan McGregor*

### Meet Joan McGregor

Joan McGregor is a professor of philosophy and adjunct professor of law at Arizona State University in Tempe, Arizona. Her interest in rape grew out of her earlier work on coercion and exploitation where she argued that given the unequal bargaining positions of individuals, those with more bargaining power (power can come in various forms) can use that power to exploit or coerce the vulnerability of the weaker party. That framework for coercion was not premised on the notion of explicit threats of violence. Most rapes, particularly acquaintance rapes, don't involve explicit threats of violence. In acquaintance rape cases, the nonconsensual sexual interactions are a result of the unequal bargaining positions of men and women. The power that is used is not necessarily physical power but may be economic, social, political, or even exploiting the coercive environment where many women find themselves. McGregor subsequently wrote a book entitled, *Is it Rape?: On Acquaintance Rape and Taking Women's Consent Seriously*, morally criticising the criminal laws of rape, arguing that the criminal justice system is supposed to protect individuals from harm from others but that it is not adequately protecting women's sexual autonomy from harm.

### Introduction

Current rape laws around the world continue in failing to protect women's interests in their sexual autonomy. For instance, last year Afghanistan's government tried to enact legislation that would permit men to force their wives into sex (Abawl 2009). Other countries still exclude rape charges, including India, Malaysia, Tonga, Ethiopia, Lebanon, and Guatemala and Uruguay if the perpetrator marries the victim (Neuwirth 2004). Mali, Sudan and Yemen have laws mandating 'wife obedience' in marital relations (Neuwirth 2004). A Saudi judge recently sentenced the *victim* of a gang rape to

90 lashes (CNN.com 2007). Lest the problem is viewed only as one in non-Western nations, notice the recent findings that judges in England are 'getting around' the new sexual assault law that was supposed to shield the sexual history of victims during trials for rape (Dyer 2008). Shield rules were designed to prevent defence lawyers from routinely cross-examining victims about their sexual history as a method of undermining the victim's credibility and playing into myths about women and sexuality (Kelly *et al.* 2006). Compounding the problem in Britain is the treatment by police of rape. The following story is indicative: 'After Linda Davies reported to police that her 15-year-old daughter had been raped, it took three months – plus two dozen phone calls and a threat of legal action – before police questioned the suspect, a 28-year-old neighbour' (Jordan 2008). In that case, the defendant was later acquitted after the police lost the cellphone records that would have contradicted the defendant's account and the judge told the jury to disregard the victim's age and that the defendant was 'in a way a man of good character' because his earlier criminal convictions did not involve violence. The result was another acquittal for rape in Britain, not unusual given the fact that based on the government's statistics of officially recorded rapes, only 5.7 per cent of rapes end in conviction (Stern Report 2010). In a study conducted by Kelly and colleagues (2005) about rape investigations in London's Metropolitan Police, in about one third of the reported rapes, the accused offenders had histories of other accusations of rape, targeting young women who were intoxicated or high on drugs, many of whom suffered from mental illness, and yet many of those same cases were labelled 'not-crimed', i.e., not treated as crimes by the police (Kelly *et al.* 2005). And finally it is suspected that the rapes that are reported to police in Britain represent only 10 per cent of the rapes that occur annually. Dismal statistics tell a tale of a system that even with thoroughgoing and progressive revisions to its criminal sexual assault laws is failing to protect women from serious harms.

Criminal laws are supposed to protect people from harms perpetrated by others. Why are the criminal laws that address sexual violence around the world not protecting women from the harms to their sexual autonomy and physical integrity? Before answering that question, it is important to remember that the area of sexual violence recognised by criminal laws is only a small subset of the much wider range of sexual violence. Sexual violence falls on a continuum and the range of sexual violence that is recognised and ostensibly protected by the criminal law is narrow. In Liz Kelly's *Surviving Sexual Violence* (Kelly 1988), she defines sexual violence as 'any physical, visual, verbal or sexual act that is experienced by the woman or girl at the time or later as a threat or assault that has the effect of hurting her or degrading her and/or takes away her ability to control intimate contact'. Some of the different behaviours she identifies include abuse, intimidation, coercion, intrusion, threat and force. Her definition picks out a more expansive range of behaviour than is identified by any country's criminal code. Once we acknowledge Kelly's more expansive range of sexual violence, the fact that the criminal laws are doing a dismal job at protecting women from the narrower subset of instances is even more disturbing.

This chapter will consider just the area of sexual violence that the criminal

law addresses. The chapter will give a brief history of the theoretical underpinning of rape law, particularly focusing on laws of the twentieth century and the Anglo-American system, and then examine the reforms that were supposed to solve certain problems and consider how and why many of the reforms failed.

### **The legal heritage of the crime of rape**

How did the system of criminal laws addressing sexual violence get to its current state? The history of rape in the Anglo-American legal system illustrates treatment of women that is shocking and indefensible in its blatant unfairness and this is still true with an increasingly progressive legislation. An increasing chorus of theorists has been raising objections and advocating changes in rape law since the 1970s and 1980s. Some changes have come, but even with the revisions in the 1970s and 1980s, extensive ones in Canada in 1992 (Criminal Code of Sexual Assault) and in Britain again in 2003 (Sexual Offences Act 2003), the statutes and the criminal justice system continue to reflect a legacy of patriarchy and a disappointing lack of respect for women's sexual autonomy and physical integrity (McGregor 2005). The assumptions and standards of rape law and the procedures to enforce them have been biased against women since the beginning. This begs the question of the law's objectivity and fairness. The Anglo-American criminal justice system has a morally significant procedural safeguard of the presumption of innocence of the defendant until proven guilty which, of course, needs to be preserved. Here it is argued that statutes, procedures and assumptions in rape prosecutions go far beyond the interests of this procedural protection.

There are numerous dimensions to the problems with the prosecution of rape:

- First, there is the fact that rape laws and the enforcement of them protect men's interests in sexual access to women and against prosecution.
- Second, the statutes and the criminal justice system, the police, prosecutors and judges employ assumptions and standards about rape, consent, force, reasonable belief, resistance, 'proper behaviour for women' that fail to account for the perspective and interests of women.
- Third, attitudes of the public (who make up juries) about proper and improper behaviour for women and, consequently, who can be a 'victim' of sexual violence – what one theorist called 'good victimhood' – reinforce and entrench sexist attitudes about women and sexuality.

Feminist legal theorists have criticised standard doctrines in rape law, pointing out that 'utmost resistance', i.e. the requirement of strong physical resistance, the corroboration requirement, marital exception, and routine introduction at trial of past sexual histories in rape cases, do not advance the legitimate ends of criminal law and are blatantly unfair to women. The legal rules and the implementation of them are either not designed to protect women's interest in

the physical integrity and security, or the rules are implemented in a fashion that does not secure women's autonomy. Feminist theorists and others have also been critical of the procedures and attitudes of police, prosecutors, judges and the public who have perpetuated the injustices of rape enforcement against the interests of women. For instance, police and prosecutors who persist in believing that many rape allegations are false and don't believe women's account of their victimisation because they were drinking and knew their attackers, judges who are dismissive of women's stories of sexual abuse due to their previous consensual sexual history, and the public's attitude that victims are responsible for their own victimisation when they drink or engage in other 'risky' behaviours are all contributing to the injustices against women (see for example [http://www.equalities.gov.uk/pdf/ConnectionsFinal\\_acc.pdf](http://www.equalities.gov.uk/pdf/ConnectionsFinal_acc.pdf)).

The 2009 British case involving John Worboys is a recent example of women's complaints of rape not initially being taken seriously or being believed. Worboys was arrested but held only briefly, allowing him to go on to rape a number of other women until he was finally arrested again and convicted on a number of other rape charges. The police incredulity was based on among other reasons, the fact that the female victims had been drinking prior to the assault, there was no 'physical injury' to the victims, and the assaults involved the 'trusted black cab' company in London. Even after all the reforms and attention to the issues of sexual violence in Britain, including the 2003 reforms, the problems of addressing rape in the criminal justice system continue (IPCC 2010).

The twentieth-century definition of rape in Anglo-American systems can be directly traced to the eighteenth-century definition of rape in William Blackstone's 1765 *Commentaries on the Laws of England*. Blackstone's definition of rape was 'carnal knowledge [by a man not her husband] of a woman forcibly and against her will'. That definition of rape statutorily exempted husbands and it required a finding of force *and* absence of consent. A wife could not be raped by her husband, even if she were estranged from him and there was extreme force. In 1736 Lord Matthew Hale said of the exclusion of husbands: 'the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract' (Hale 1736). 'Carnal knowledge' meant penetration of a vagina by a penis; other sexual violations were excluded. Amazingly, the eighteenth-century definition would not be changed in the United States, England and Wales, and Canada until the late 1970s and early 1980s when the American Law Institute attempted reform of the entire criminal code. In 1976 England and Wales began rape reform by passing the Sexual Offences (Amendment) Act and Canada's Federal Government made substantive rape reforms in the early 1980s. Acknowledging that husbands can rape their wives would not be statutorily changed in most Anglo-American systems until the 1990s.

### **The requirement of resistance**

Rape historically was viewed as a threat to male interests since it: 'devalued

wives and daughters and jeopardized patrilineal systems of inheritance' (Rhode 1989: 245). Rape laws were designed to protect men's interest in their women, which included their daughters and their wives. On the other hand, policy-makers perceived 'too stringent constraints on male sexuality...equally threatening...' (Rhode 1989: 245). The 'utmost resistance' requirement is a prime example of protecting male interests in their own women and in male interest in sexual access. The requirement was used to determine whether the sexual interaction was 'against her will' and reflected the belief that a woman should protect her chastity with her life. Women's chastity was worth a lot to men interested in marrying off their daughters and ensuring that children conceived during their marriage were biologically their progeny. Without chastity, women lost their value and were often ostracised by family and community. The assumption of these laws was that women too held chastity to be of the highest value and would protect theirs with their own life. Given this assumption, failure to protect one's chastity with 'utmost resistance' was seen as giving consent to the sexual interaction. Rather than protecting women's sexual autonomy or even their physical well-being, these rules were designed to protect the interests of men. Even in contexts where resistance would have been extremely dangerous, women were held to this standard. Moreover, victims were often humiliated when their resistance or lack of it resulted in judgment that they must have really desired the sexual interaction and 'consented' to it. For example, in an American case, *Brown v. State* (1906), the perpetrator tripped his 16-year-old victim to the ground and physically forced himself on her. The Supreme Court of Wisconsin found that *the victim had not adequately demonstrated* her non-consent, even though she tried screaming and he was physically restraining her. 'Not only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person, and this must be shown to persist until the offence is consummated.'

'Utmost resistance', on the other hand, protected men's interest in sexual access, thus making it difficult to obtain a criminal charge and conviction for rape. The result was that to prove 'forcibly' and 'against her will', courts (and some statutes) required victim resistance as 'utmost resistance'. This meant that unless the victim used 'utmost' physical resistance, a physical fight to near death, the sexual interaction was not against her will. Utmost resistance was claimed to be the natural response of a woman of virtue, therefore not an imposition on any woman. In another American case in the 1800s, *People v. Dohring* (1874), where the appeals court reversed the conviction of a man found guilty of raping a servant in his house, the court said:

Can the mind conceive of a woman, in the possession of her faculties and powers, revoltingly unwilling that this deed should be done upon her, who would not resist so hard and so long as she was able? And if a woman, aware that it will be done unless she does resist, does not resist to the extent of her abilities on the occasion, must it not be that she is not entirely reluctant?

Women's resistance was judged, put 'on trial', even with evidence of extreme force or weapons. There have been instances where the victim was beaten to the edge of death and it was determined that she was not raped because she didn't resist with enough vehemence. A Texas court said in *Perez v. State* (1906) that 'although some force be used, yet if she does not put forth all power of resistance which she was capable of exerting under the circumstances, it will not be rape.' This requirement reflected the view that it was better for a woman to die than be 'dishonoured'. And the assumption was that if a woman did not put up such a fight she probably was consenting and just wouldn't admit to it.

In another case from the 1880s, *Whittaker v. State* (1880), where even though the assailant had the woman's hands and feet so tight that she couldn't move, and when she screamed for help, Whittaker threatened her with his revolver, the Supreme Court of Wisconsin reversed his conviction, saying, 'this is not a case where the prosecutrix was overcome by threats of person violence.' Then the court continued that Whittaker's threat to use his gun was merely 'conditional upon her attempting again to cry out... The testimony does not show that the threat of personal violence overpowered her will, or... that she was incapable of voluntary action.'

These historical court decisions illustrate that consent was understood as equivalent to submission, and submission no matter how reluctantly given. With the element of consent present, an essential element of the crime of rape is missing. The 'utmost resistance' requirement, as Stephen Schulhofer argued, 'became impossibly difficult to satisfy and dangerous to any victim who tried' (Schulhofer 1998: 19). These were malicious standards and got support from medical writers who insisted that women have the physical means to stop rape if they so desire, by using hands, limbs and pelvic muscles. They claimed that any woman who wasn't willing to have sex could stop any man regardless of size from penetrating her. The implication was that successful penetration meant that the woman was a willing sexual partner (*Brown v. State* (1909)).

### Suspicion of female victims

Add to the utmost resistance requirement, the criminal justice system and societies' belief that women make up rape complaints. There has been and continues to be an entrenched suspicion and distrust towards female victims (Kelly *et al.* 2005). The persistence of the belief that women 'cry rape' is illustrated by the lengthy discussion in the recent Stern Report of how rape is investigated and prosecuted in England and Wales. The report recommended, because of the prevalence of the belief that many charges of rape are false charges, that the Ministry of Justice carry out research on the frequency of false allegations of rape (Stern Report 2010). The assumption was that unless the victim could prove that she physically resisted, what reason would the investigation and prosecuting authorities have to suppose that she is not lying about the rape? Two other requirements, which reinforced the belief in the unreliability of female victims, were the requirements for *corroboration* of the

woman's testimony and the requirement that the *complaint is promptly filed*. Currently, elaborating on the suspicion of female victims, countries like Pakistan and Sudan have required four male (not female) witnesses to corroborate a claim of rape. If the victim's complaint was not quickly made, it was assumed that she was having second thoughts about her consensual sexual activity.

Distrust of female victims has found its way into jury instructions too. The practice was to instruct the jury that it was unsafe to convict for rape on the uncorroborated evidence of the alleged victim. No other crime requires the victim to have corroboration. The legacy of this suspicion is epitomised by the warning given three centuries ago by the English Lord Chief Justice Matthew Hale, who said that rape is a charge 'easily to be made and hard to be proved, and harder to be defended by the party accused, tho' never so innocent' (Hale 1736: 635). This quote was for many years, and up until very recently, recited to juries before their deliberations. Glanville Williams, a leading twentieth century jurist, supporting the distrust of female victims of rape, said, 'There is a sound reason for it [the instruction to the jury], because these cases are particularly subject to the danger of deliberately false charges, resulting from sexual neurosis, phantasy, jealousy, spite or simply a girl's refusal to admit that she consented to an act of which she is now ashamed' (Williams 1962: 159). Williams worries that those psychological approaches – namely, having a physician question the complainant, to determine whether she is having fantasies, is neurotic, and so forth – may not be able to pick out all falsehoods and suggests that all female complainants take polygraph tests. Furthermore, it was the opinion of John Wigmore, author of the United States's most influential treatise on evidence, that 'No judge should ever let a sex-offence charge go to the jury unless the female complainant's social history and mental make-up have been examined and testified to by a qualified physician' (Wigmore 1970: vol. 3A, sec. 924a).

The nexus between rape as a dishonour, expectations of a woman's behaviour when confronting a rape attempt, and distrust of female victims still presents itself in modern rape prosecutions. In 1998, the Italian Supreme Court overturned a rape conviction in part on the grounds that the victim was wearing jeans. The court's opinion stated that since it is difficult to remove jeans worn by another, the victim must have assisted the defendant with the removal of her jeans, and hence she could not have been raped by the defendant (Van Cleave 2005). The court's argument reflected the idea that any woman of virtue would have fought hard to protect herself from sexual assault.

### **The consent standard**

The consent standard in rape law was like no other standard for consent in law. Consent in rape was inferred from submission, no matter how long it took or whatever it took to get that submission. Even when threatened or assaulted, if the victim submitted, consent has often been inferred. The consent standard in rape is unique since it requires victims of rape, unlike



victims of any other crime, to demonstrate their 'wishes', that is, demonstrate their *non-consent* through physical resistance. Moreover, in some cases, even resistance has not been sufficient to establish non-consent since, as was expressed in Glanville Williams's classic textbook on criminal law, women often welcome a 'masterly advance' and 'present a token of resistance'. An article published in the *Stanford Law Review* in the 1960s argues that although a woman may desire sexual intercourse, it is customary for her to say 'no, no, no' while meaning 'yes, yes, yes'. In a *Yale Law Journal* article it further suggested that women do not know what they want, or mean what they say, and often require *force* to have a 'pleasurable' experience (Note 1952). Rather than requiring an explicit sign of consent and worrying about the circumstances in which the alleged consent was given (for example, were the circumstances threatening? Was the victim intimidated? Were implicit threats made?), the courts have interpreted silence and non-resistance as signs of consent. This approach to consent effectively assumes the default position that women are consenting to sex, that there is a presumption of consent which could only be defeated by the most extreme circumstances. In other areas of law, consent is not assumed but must be affirmatively sought.

Overwhelming force has not been sufficient to have courts put aside their attempts to find some semblance of consent. In *People v. Burnham* (1986) a woman was severely beaten and then forced to engage in intercourse with her husband and a dog and the court held out the possibility of consent or at least that the defendant might reasonably believe that she was consenting. So-called 'submission', no matter how 'reluctantly given', negated the element 'without consent' which was an element of the crime of rape. These interpretations of consent eviscerate the normative force of consent. In other words, the reason for requiring consent in the law in the first place is to ensure the moral autonomy of the person is respected. By assuming that women are consenting in all but the most egregious circumstances, the law is not permitting consent to protect women's sovereignty over their bodies.

### **Race and sexual assault**

Many of these rules and standards that made rape prosecution so difficult have lasted well into the present day. The exception to the difficulty of prosecuting rape was in the case of white women charging black men with rape, particularly in the United States, during the period of slavery and the era of systematic legal discrimination and segregation known as the Jim Crow era. In those cases, the law did not require 'utmost resistance' since it was assumed that a white woman wouldn't consent to sexual intercourse with a black man. White women's testimony was taken as truth and not requiring corroboration. For instance, in Virginia in 1921 a black man was sentenced to the death penalty for a rape of a white, 'simple, good, unsophisticated country girl' (*Hart v. Commonwealth*). The court never looked for her 'utmost resistance' nor scrutinised the case. The horrific history of the use of rape charges against black men, many in southern United States resulting in the death penalty, on very little evidence, illustrates another way in which the law has treated

groups unequally. Black women who were victims of rape did not, however, get similar treatment; in fact their claims of rape, particularly against white men, got very little attention.

### Reforming the law

In the 1950s the American Law Institute proposed reforms to the criminal codes of the states including reforms to rape laws. The writers were worried about the extremely low conviction rate for rape. The Model Penal Code, however, keeps the requirements of corroboration of the woman's testimony, the special cautionary instructions to the jury, the marital exception, and extends the exemption to cases where the man and woman are living together. The Code suggested eliminating the victim's consent altogether and focusing on the man's illegitimate behaviour. Changing the focus from the woman to the man's conduct sounded like a step in the right direction; until then, the woman's conduct was put on trial, judged, and often found wanting. The status of the victim then becomes a factor in the trial; was she a virgin, was she married, was she a 'party girl' or prostitute? Nevertheless, the reasons for not including consent in the Model Penal Code rules rested on sexist notions about women and consent too. The writers assumed that women say 'no' and don't mean it, that women are ambivalent about consent to sex, and that women have conflicting emotions and are unable to directly express their sexual desires. Model Penal Code contributors delineate between forcible rapes, on the one hand, and on the other, reluctant submission. Only the former, forcible rape, was a serious crime. The focus then was on 'forcible compulsion' as a trustworthy guide to when women had not consented. But gaining submission without overwhelming violence, through intimidation, threats, deception is recognised as legitimate sexual conduct.

Force continues to this day to play a major part in the understanding of rape. Without physical force, and even extreme physical force, the assumption is that the sexual activity was consensual. As mentioned earlier, Kelly identified a much wider range of sexual violence than what the criminal law recognises as criminal behaviour. The reforms were meant to bring more of the continuum of sexual violence, including non-consensual behaviour without explicit physical force, under the purview of the criminal law. For example, including non-consensual sex without physical force is to expand what the criminal law addresses, so is recognising that 'rape' can occur in a marriage. Nevertheless the criminal law has not been very successful in its attempts to secure prosecutions of that wider range of sexual violence.

In the United States, individual states reformed their statutes in the 1960s but didn't adopt the Model Penal Code's suggestions wholesale, deciding instead to adopt parts of it, particularly focusing on 'forcible compulsion'. Most states kept the resistance requirement, the marital exception, the special rules about prompt complaint, corroboration, and the cautionary jury instruction. They reduced the utmost resistance requirement to 'earnest resistance' and later 'reasonable resistance', keeping to this day the requirement of the woman's physical resistance (Williams 1963: 162). Current rules and practices

still rely upon a woman's resistance as necessary evidence that it is a rape. When the victim is intoxicated, or afraid, or for other reasons does not resist, the legal system is unlikely to consider it an instance of rape. The laws continued to see rape as only a violent attack and then only if the woman resists. Non-consensual sex outside of that paradigm was not protected.

### Reforms again

In the 1970s feminists such as Susan Brownmiller and Susan Griffin exposed many of the problems with the Anglo-American laws and the criminal justice system's treatment of rape victims (Griffin 1971). The baseline assumption of consent, the corroboration rule, the routine introduction of a victim's sexual history, the force and resistance requirement, and the marital exception continued to support the protection of men's interests in sexual access and not the protection of women's sexual choice (MacKinnon 1989: 179). Feminists argued that the rules themselves, particularly the force and resistance requirements, embody typical male perceptions, attitudes and reactions rather than female ones. Moreover, some feminists argued that far from protecting women, the rape laws, through their expectations of proper female behaviour and their high expectations of impermissible force, actually served to enhance male opportunities for sexual access. What women wore or did, 'she wore a tight sweater', 'she went to the man's apartment', 'she drank alcohol', led police and prosecutors to assume that she consented or had only got what she deserved given her dress and behaviour. Feminists argued that the rape laws actually increase a woman's dependence on a male protector and reinforce social relations of male dominance.

Rape cases that went to trial resulted in the victim being subjected to brutal and humiliating cross-examination of her life, particularly her prior sex life. The object of these cross-examinations was to make her out, no matter how violent or outrageous the alleged rape was, to be a 'bad girl' who either consented to the events or got what she deserved given her 'loose' lifestyle. Susan Griffin's article in *Ramparts* magazine in the 1970s was one of the first to document the rape trial ordeal. She described a rape trial where a man, along with three other men, forced a woman at gunpoint to go to his apartment where the four men sexually assaulted her. At trial, other women testified that this man had sexually assaulted them as well. The defence attorney characterised the events as consensual, suggesting that the victim was a 'loose woman'. The attorney asked her if she had been fired from a job because she'd had sex on the office couch, if she'd had an affair with a married man, and if her 'two children have a sex game in which one got on top of the other and they...'(Griffin 1971: 971). All of these allegations she vehemently denied; however, the attorney had successfully created in the jurors' minds a distrust of the victim and a picture of her as a 'loose woman'. This resulted in the defendant being acquitted. A standard trial tactic was for defence attorneys to 'put the woman' on trial, asking questions about her previous sexual experiences, whether she used birth control, whether she went to bars, what she wore, either suggesting that she consented to the sexual events or that she

'got what she deserved'. Recall the 1990s rape trial of Kennedy-Smith (nephew of the late Senator Edward Kennedy), where it was recounted that among other things, the victim's Victoria's Secret underwear suggested that anyone who wears such underwear is looking for sex. This played into jurors' ideas about 'proper' female behaviour. Even victims who admitted to having consented to sex with their boyfriends were consequently portrayed as likely to consent to the stranger who was on trial for raping them. In the USA, at the preliminary hearing of the Kobe Bryant rape case, Bryant's lawyer asked if the victim's injuries were consistent with her having sexual intercourse with three partners, putting the idea to the media that she had been promiscuous. Bryant, a National Basketball Association superstar, claimed that he had consensual sex with the 19-year-old resort employee. Between Bryant's scorched earth lawyering and the media's hounding, the sites all over the Internet about her, and the death threats to her, she eventually withdrew her rape charge.

In the 1970s and the 1980s, response to feminists' objections resulted in reforms such as dropping the corroboration requirement, the special instruction to juries and eventually presumptive 'rape shield' rules to bar defence attorneys from routinely introducing past sexual experiences as a way of undermining the credibility of the victim. How well, for example, the rape shield rules are used is debatable. For instance, Kobe Bryant's lawyer was able early on to get into play the victim's sexual history (or even her possible sexual history). And the judges in England, as mentioned earlier, are also subverting the objective of the shield rules.

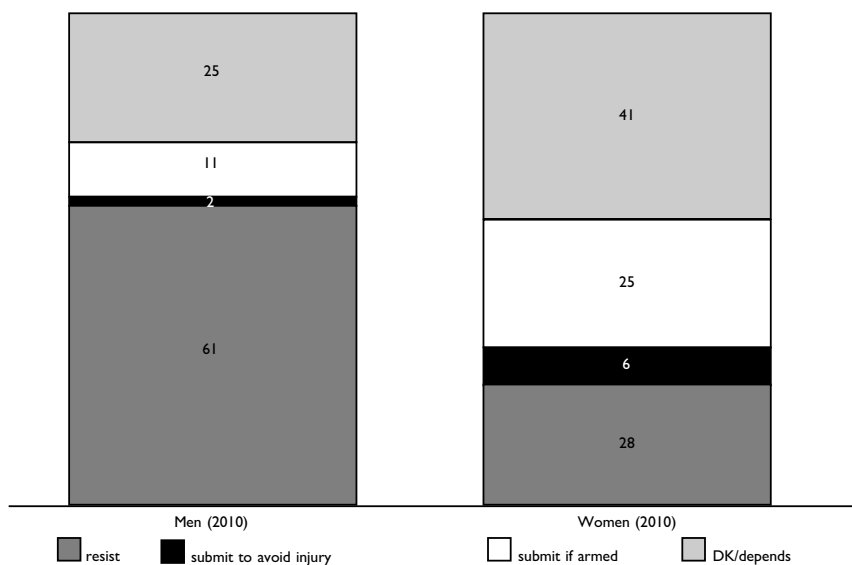
Concern for equality led some feminists to design gender-neutral statutes, replacing traditional statutes which punished the rape of a woman by a man with gender-neutral ones (Estrich 1987: 81 onwards). Support for gender-neutral statutes also arises from the following concern: 'Men who are sexually assaulted should have the same protection as female victims, and women who sexually assault men or other women should be as liable for conviction as conventional rapists.' Gender neutrality is seen as a way 'to eliminate the traditional attitude that the victim is supposed to resist earnestly to protect virginity, her female "virtue" or her marital fidelity' (Bienen, 1980: 74–175). Problems, however, arise from making rape statutes gender neutral. Indeed, gender-neutral statutes may address one set of problems but create others. Because women do not necessarily react in the same way as men do, and if gender-neutral statutes mean retaining male norms and reactions to rape scenarios, then women will continue to be disadvantaged by such statutes. So, for example, physical resistance might be a typical male reaction to attack, but not necessarily a typical female reaction. Men are socialised to fight, to respond physically. Women are not and may respond by crying or just being silent.

Consider the results of the attitude survey to the question: 'What would you do if a man tried to rape you?' (see Figure 3.1).

Subjecting women to the resistance requirement disadvantages them. Further, rape is typically something that is perpetrated on women by men. Rape is not generally a gender-neutral crime; men rape, not women. Women are overwhelmingly the victims of rape. Making rape gender neutral obscures this fact. Gender-neutral statutes are, however, the norm today.

## Handbook on Sexual Violence

If a man attempted to rape you, do you think you would be most likely to... (%)



Source: [http://www.equalities.gov.uk/pdf/ConnectionsFinal\\_acc.pdf](http://www.equalities.gov.uk/pdf/ConnectionsFinal_acc.pdf)

**Figure 3.1** Self-reported behavioural intentions if raped

Another reform was to relabel 'rape' as a form of assault. The purpose of the change was to eradicate from the offence the baggage from the common law, to place it more centrally within the criminal rules of assault that focus attention on the defendant and away from the victim. Relabelling rape 'sexual assault' may, however, assume a position in the debate as to whether rape should be considered a crime of sexual desire or violence. Some theorists argue that rape is motivated by desire to dominate, to have power, and is a crime of violence; not, as was long assumed, by uncontrollable sexual desire. Focusing on the violent aspects of rape makes it clear that the law is not trying to prohibit all sex and that those violent men must be incapacitated as dangerous criminals, not treated as only sexually aberrant. Moreover, to see rape as violence is to recognise that sex should be inconsistent with violence. Reconceptualising rape as assault, however, has prompted some to question the seriousness of rape, particularly non-aggravated rape (Davis 1984: 984). How serious an assault is rape if the victim isn't cut up, bruised and broken? In 1989 the Manhattan Supreme Court of Justice justified a light sentence for a rapist, even though he had an extensive criminal history, because the victim was not being 'tortured or chopped up' (Arce 1989). Assaults are normally graduated in terms of level of bodily injuries. Supporters of the change recognised that equating rape with assaultive conduct may obscure the unique meaning and understanding of the indignity and harm of rape. The harm of rape is different from other assaults. The meaning and significance of sexual touching is different from other kinds of touching (McGregor 2005: 219–48).

Another problem with conceptualising rape as a form of assault or an act of violence is that a man can force sex against a woman's will without physical violence. Having power over the victim will do. The definition of force, still a major component in many statutes or in the prosecution of rape, needs to be clearly articulated and not confused with exclusively physical force. Think of coercive force that can be exerted upon your will – for example, when three bullies in an alley ask for your wallet. We should distinguish two senses of force: first, overwhelming physical force – the perpetrator lying on top of the victim so that she cannot resist, for example; and, second, coercive force, explicit or implicit threats to do harm that put pressure on the victim's will.

Feminists who argue for rape as *sexual* assault want to reinforce its violent character *and* its sexual nature. Some argue that the so-called power rapists' and anger rapists' 'choice of the vagina or anus as the object of aggression is not accidental, but essential...the rapist seeks to spoil, corrupt, or even destroy those aspects of a woman's person that should be a source of pride, joy, and power for her rather than a source of shame, depression, and humiliation' (Tong 1984: 17). On the other hand, rape as sexual assault focuses on women's sexuality as being particularly susceptible to attack and hence in need of special protection. This view may reinforce the myth of rape 'according to which the invasion of sexual integrity is so traumatic that the victim's psychic wounds never heal' (Tong 1984: 65). The sexual assault approach may unwittingly cast women back into the position of victim, a role which many feminists would like to move beyond.

Making prosecutions easier and attempting to address the interests of victims lead to various approaches. One of the ways thought to increase prosecution and convictions was to argue that penalties for rape be reduced, recognising that juries are unlikely to convict for unaggravated rape when the defendant faces a long sentence. Not all rapes are the same (the same can be said about assaults); some rapes involve aggravated assault too, and consequently some rapes are 'worse' than others. So-called 'simple rapes', often they are acquaintance rapes, don't have other assaults along with the rape. Saying that some rapes are worse than others is not to suggest that 'simple rapes' or unaggravated rapes are not serious offences and worthy of some punishment. Moving beyond the adversarial criminal trial to a restorative justice model has been proposed by Mary Koss, Kathleen Daly and J. Stubbs as a method of achieving some of the aims of victims (Koss 2006; Daly and Stubbs 2006). These scholars, who have been researching rape for decades, have recently argued for 'expanded justice alternatives', including a restorative justice model in conjunction with criminal prosecution. Their approach has not been met with unequivocal support. One concern of the restorative justice approach is the possible danger of losing sight of the fact that all rapes are serious crimes, involving serious harms to their victims.

In the United Kingdom there were reforms in the 1980s triggered by a television documentary in 1982 showing the police's sexist attitudes towards women who claimed to be raped and their role in the attrition rate for the crime of rape (Lea *et al.* 2003). Even with those changes in the sexual assault law, the police still tended to pursue cases that fitted the 'stranger violent rapist' profile and designate as 'no crime' the more common acquaintance

rapes (Lea *et al.* 2003). Then, in 2003, the Sexual Offences Act attempted to modernise the consent rule and overhaul the law. With all these attempts at reforms, results are still not as good as was hoped.

### Physical force, resistance and consent

Many contemporary criminal justice systems, even when the changes include explicitly getting rid of the force requirement, still search for victim resistance. The following case in the United States is representative. In *State v. Rusk* the victim gave the defendant a ride home from a bar where they had met through a mutual friend. The defendant invited the victim up to his apartment but she declined. After he took her car keys, she reluctantly accompanied him to his apartment. The defendant started to undress the victim, and before intercourse the victim said to the defendant, 'If I do what you want, will you let me go without killing me?' The victim started to cry and then the defendant, according to the victim, started lightly choking her. The appellant court argued that she had not been raped as she had not been *forced* since she had not resisted.

The standards used in *Rusk* exemplify what feminists label 'the male orientation to the law'. 'Prohibited force' is defined in terms of physical force and the victim's response to the situation. The victim's response must be physical resistance and not merely verbal protests – or crying! If the law were interested in protecting the autonomy rights of women, then it should consider verbal protests as resistance. Beyond that, if the law were interested in protecting the autonomy rights of women, it would drop altogether the resistance requirement and see verbal protests as sufficient for non-consent and beyond that ask for affirmative assent. The 'physical force' and 'physical resistance' requirements in rape law embody what Susan Estrich called 'a male perception of threatening situations' and a male way of responding to a threatening situation (Estrich 1987). Physical force is seen as threatening, and one responds to the threat with physical resistance. Force translates into 'physical force' rather than into the various power relationships to which women might feel vulnerable. Being isolated, without transportation, with someone you hardly know, who is physically more powerful than you are, possibly someone who is in a role of authority, all could contribute to feeling threatened and thereby being 'forced' into sex. The law's standard, however, of the 'reasonable person' is one who fights back, not cries. As Estrich says: 'The reasonable woman, it seems, is not a schoolboy "sissy"; she is a real man' (Estrich 1987: 65). Also worth noticing is that the woman's behaviour, and not the defendant's, is the one that is subject to evaluation. The law is judging what the alleged victim did or didn't do to make an assessment of whether she was truly a victim or not.

When the 'physical' resistance requirement is applied to women, the results have been disastrous because many women do not respond with physical force to a threatening situation. Women, as illustrated in Figure 3.1, don't respond with force but often will respond by crying. One reason for the failure to use force may merely be a result of the normal differentials in strength

between men and women. Other reasons for women's lack of physical and sometimes even lack of verbal response are probably related to social conditioning. Women are socialised not to fight or respond physically; they are also trained to be passive, especially around men, particularly men they know (Warshaw 1994: 52–4). For a rape conviction, a victim may only fail to resist, the courts have argued, when based on a *reasonable* fear that if she (the victim) resists, she will be seriously harmed. In *Rusk*, the victim's fear was based upon being isolated, in an unknown part of town, late at night, without her car keys, with a man she didn't know. The court claimed that her *fear was not reasonable*. 'She may not simply say, "I was really scared", and thereby transform consent or mere unwillingness [sic] into submission by force. These words do not transform a seducer into a rapist.' Again the courts have enshrined a standard of *reasonable fear* that is *not* based upon the experiences of women. To whom is the fear reasonable? For some (many?) women, being isolated with a man, who is larger and who has made some intimidating remarks or gestures, may be a frightening and unpredictable situation. Just as a man might be afraid of three big men in an alley and comply with their wishes without resistance, for many women one man may be enough.

Force is defined in terms of the victim's resistance; if she did not resist, there was no force – therefore, no rape. And, if the reason for not resisting is fear, then the situation must be one which is objectively threatening, i.e. one which men would find threatening. Consider *State v. Alston*, in which Alston and the victim had a 'consensual' relationship over a period of months. During that relationship, Alston had behaved violently towards the victim on many occasions. A month after their relationship had ended, Alston came to the school where the victim was a student and attempted to block her path, demanded to know where she was living, and when she refused to tell him, grabbed her arm and stated that she was coming with him. At one point the defendant told the victim he was going to 'fix her face'. The defendant told her that he had a 'right' to have intercourse with her again. The two went to the house of a friend of the defendant. The defendant asked her if she was 'ready' and the victim told him she did not want to have sexual relations. The defendant pulled her up from the chair, undressed her, pushed her legs apart, and penetrated her. She cried. The court agreed that she had not consented but since there was no 'force' it was not rape. The definition of force is extremely narrow and does not acknowledge the range of power relationships that don't neatly map onto this standard definition of force.

Consider the Wyoming Supreme Court's reversal of a conviction in *Gonzales v. State*. Like *Rusk*, the defendant and victim met in a bar and the defendant requested a ride home. The victim refused, but the defendant got into her car anyway. The victim repeated her refusal to drive him, but after unsuccessfully trying to get him out of her car she started to drive. He asked her to turn down a road and stop so that he could urinate. Before getting out of the car he removed her keys from the ignition. When he returned he told her he was going to rape her; she tried to talk him out of it. 'He told her he was getting mad at her and then put his fist against her face and said, "I'm going to do it. You can have it one way or the other."' The Wyoming Supreme Court argued that the trial court's standard of reasonable fear was in error; it should not



place the determination 'solely in the judgment of the victim and omit the necessary element of a reasonable apprehension and reasonable ground for such fear; and the reasonableness must rest with the fact finder.' Surprisingly the court didn't find that it was a 'harmless error' since a fact finder should (if asking whether the reasonable woman would have been afraid) have found that the fear was reasonable. The court seemed to suggest that a trier of fact might not find the fear in this case reasonable. What is the standard of reasonable?

Again, looking for physical force and physical resistance in *Commonwealth v. Minarich*, where Minarich threatened a 14-year-old girl living in his custody with return to the detention home if she refused sex with him. The court found no forcible compulsion, hence no rape. The court said the legislature 'did not intend to equate seduction, whether benign or sinister, with rape...' Here is an obvious power relationship where no physical force was required, but the courts still look for them. And in 1994 in *Commonwealth v. Berkowitz*, a 19-year-old sophomore at a Pennsylvania college one afternoon went to the dorm where her boyfriend lived. While waiting for him to return she entered the room of an acquaintance, Robert Berkowitz. She sat on the floor and talked with him for a while. He sat next to her and began kissing and fondling her. She protested at his advances and said that she had to go. Berkowitz disregarded her protests, got up and locked the door, came back and pushed her on the bed, lay on top of her, removed her clothes, and penetrated her. Throughout she was saying 'no'. Berkowitz said that he took the 'nos' to be passionate moaning. He was found not guilty of rape since the court could not find force.

England, Wales and Canada have explicitly dropped the force requirement, in the UK requiring consent and, in Canada, going even beyond that in what appears a very progressive reform requiring affirmative consent. The Sexual Offences Act of 2003 in England and Wales says that rape occurs when someone 'intentionally penetrates the vagina, anus or mouth of another person with his penis' and that the other person does not consent to the penetration.' How consent is defined was a major revision in the sexual assault laws of the UK. The act requires 'free agreement' to take place for a sexual relationship to be consensual and there is no requirement for force. Nevertheless, even with what appear to be radical progressive reforms to the law of sexual offences, results such as the ones in *R. v. Dougal* ((2005) Swansea Crown Court) and *R v. Bree* ((2007) EWCA 256) occur where there were no findings of rape because of the intoxication of the victims. The victims were unable to remember all the details of the occurrences (in both of these cases the victims were in and out of consciousness) and the judges held that 'drunken consent is still consent' (Dougal 2005: 176). In the Crown's closing remarks, it argued that the reason the victim hadn't resisted (and thereby shown that she hadn't consented) was due to the effects of alcohol (Bree 2007). As Sharon Cowan argues about these cases:

[H]ow do we know when a woman is too drunk to consent? How do we know whether or not she has consented to sex if she herself does not know, because she cannot remember the event? *R v. Bree* alongside *R v. Dougal* ...seems to suggest that if she cannot remember a refusal, or

indeed if she cannot remember anything at all, providing that she was conscious, then she will be presumed to have consented, or at least, the man's belief in her consent will stand, and it is not rape

(Cowan 2005: 914)

Presumed to have consented because the victim was too incapacitated to remember what happened. In no other area of the law would that type of circumstance result in a finding of consent.

Canada's new legislation, which requires affirmative consent, would appear to circumvent the problem of smuggling in the resistance requirement and having a baseline presumption that the woman is consenting. Positive and affirmative consent has resulted in Canadian courts increasing conviction rates in many cases where the victim is intoxicated or passed out, and therefore incapable of consent. Still, there are many instances, as Lise Gotell argues, where women are viewed as 'risk takers', they are drug addicts, runaways, or homeless, and thereby perceived as not exercising appropriate caution as 'good' women should, their behaviours are scrutinised and criticised and found to come up wanting (Gotell 2008). For example, consider the case of a Saskatchewan 12-year-old aboriginal girl who was running away from home and was picked up outside a bar by three white men. After giving her numerous beers in less than an hour, the men proceeded to have sex with the girl even as she went in and out of consciousness. The judge portrayed her behaviour in running away and willingly getting into the truck with the men and drinking the alcohol as behaviour signalling that she was, in his words, the 'sexual aggressor' and not the victim. The appropriateness of women's behaviour and whether they can thereby be a victim of sexual violence is still being judged by the criminal justice system of Canada.

### **Mens rea for rape: honest or reasonable beliefs**

Guilt for the crime of rape, along with most serious crimes, requires the defendant to have a specific mental state, or *mens rea*. The defendant's mental state refers to what he actually believed or understood at the time of the crime. For rape, the defendant must have believed that his victim was not consenting or believed that she might not be consenting. Defendants may claim 'mistake' about the consent of the victim, that is, claim as a defence for rape that they believed their victims were consenting in the situation, and thus fail to have the mental state necessary for the crime.

The UK House of Lords held in the famous (or infamous) *Morgan* decision that unreasonable but honestly held beliefs should exculpate or excuse from liability for rape. The details of the 1975 case are as follows: Morgan was a senior non-commissioned officer in the RAF and invited his three drinking partners, who were his subordinates, to have sex with his wife, claiming that she liked 'kinky' sex and would feign refusal but in fact welcomed the intercourse. The four men dragged Mrs Morgan from the room where she was sleeping to a room with a double bed. They held her down while each of them took turns having intercourse with her. Throughout, she vigorously physically

and verbally protested, including screaming to her children to call the police. Morgan, because he was her husband, could not be charged with rape, but was charged with aiding and abetting rape. The other three men were charged with rape. Relying upon the story that Morgan had told them, they said that they believed that she was consenting. They argued at trial that they thought she had consented, and consequently, could not be convicted of rape since they did not have the *mens rea* for rape. The trial judge in his instruction to the jury added that the belief about consent to exculpate had to be reasonable, that is, 'such a belief as a reasonable man would entertain if he applied his mind and thought about the matter'. The defendants were subsequently convicted. They appealed, claiming that the judge erred in giving that instruction to the jury. Any belief in consent, they argued, as long as it was honestly held, would be incompatible with the intention to commit rape. The House of Lords accepted the argument that unreasonable but honestly held beliefs would exculpate. In other words, any belief about the woman's consent, no matter how objectively unreasonable, would establish that the defendant was without fault and, hence, could not be convicted of the crime of rape.

Many people saw serious problems with *Morgan*. It permits a defendant to be acquitted of rape if he believes that a woman is consenting, no matter what his reasons are for believing it. In favour of *Morgan* were theorists like Glanville Williams, who argued that not permitting unreasonable mistakes to exculpate is to convict a man for being stupid. 'To convict the stupid man would be to convict him for... honest conduct which may be the best that this man can do but that does not come up to the standard of the so-called reasonable man' (Williams 1975).

The Sexual Offences Act of 2003 explicitly addressed this issue and requires that the belief be reasonable; an unreasonable belief that is honestly held will no longer exculpate the accused. What, however, constitutes a 'reasonable belief' and who defines it are still important questions. As long as men, police, prosecutors, judges and juries continue to believe myths and stereotypes about women – for instance, that 'no' means 'yes', that women require some force, that women desire to live out rape fantasies, and so on – then it may be true in many cases, particularly the so-called acquaintance rape cases, that the defendants will lack the *mens rea* for the crime. In *Dougal*, the defendant claimed that he believed that the victim had consented to sex with him even though she was intoxicated. She claimed that there was no way that she would have consented to sex with the man since he was a complete stranger to her. Was it a reasonable belief for this security guard at the university where the victim was a student to believe that an intoxicated student whom he didn't know would consent to have sex with him? *Rusk*, an American case discussed earlier, illustrates the problem with the 'reasonable belief' standard for consent based on what men in a sexist society would believe reasonable in the circumstances; namely, that since he did not use 'excessive' force and she did not strenuously resist, then she was consenting. Unless the standard of 'reasonable belief' includes what women would consider reasonable in those circumstances, the standard may continue to fail to protect women from sexual assault.

## Conclusions

Criminal rape laws have come some distance from the days of Blackstone's *Commentaries*. At least in some places, husbands can be liable for raping their wives, force and resistance are not explicitly required as independent elements for rape, independent corroboration is not always necessary, shields against regular introduction of sexual history are in place, prompt complaint is not a requirement, and consent is required. Nevertheless, not only are there many places globally where these rules are not in place but even in nations appearing to have progressive legal reforms, such as Britain and Canada, the old standards and myths get smuggled into the process through entrenched attitudes by agents in the system, namely, police, judges and even the public. After considering the problems that arise out of the historical treatment of rape, the question becomes, can laws and policies be changed enough to protect women's sexual autonomy? Educating the public, changing views about women and sexuality, including recognising the continuum of violence that many women experience, may ultimately be needed to address the problems of sexual violence. Nevertheless, the legal system should demand more from men's behaviour in regards to sexual interactions. When seeking a sexual interaction, men should proceed with caution, ensuring consent is obtained, that the person has the prerequisites for consent – namely that they are not incapacitated in various ways – and that the circumstances are not coercive or exploitative, and they should recognise the risks involved for the failure to behave cautiously. The legal system itself should be held to a higher standard to protect women from sexual violence and not perpetuate gender stereotypes which seriously diminish the status of women and undermine women's sexual autonomy.

## Further reading

Starting with Brownmiller's seminal text (Brownmiller, S. (1975) *Against Our Will: Men, Women, and Rape*. New York: Simon and Schuster) the following are a selection of classic works addressing philosophical issues pertaining to rape: Archard, D. (1998) *Sexual Consent*. Boulder: Westview Press; Brison, S. (2002) *Aftermath: Violence and the Remaking of a Self*. Princeton: Princeton University Press; Burgess-Jackson, K. (1996) *Rape: A Philosophical Investigation*. Brookfield, VT: Dartmouth Publishing Company; Burgess-Jackson, K. (ed.) (1999) *A Most Detestable Crime: New Philosophical Essays on Rape*. New York: Oxford University Press; Cahill, A. (2001) *Rethinking Rape*. Ithaca NY: Cornell University Press; Card, C. (1991) 'Rape as a Terrorist Institution', in R. Frey and C. Morris (eds) *Violence, Terrorism, and Justice*. Cambridge: Cambridge University Press, pp. 296–319; Davis, A. (1981) 'Rape, racism, and the myth of the black rapist', in *Women, Race, and Class*. New York: Vintage Books; Estrich, S. (1987) *Real Rape*. Cambridge MA: Harvard University Press; Frye, M. and Shafer, C. (1977) 'Rape and respect', in M. Vetterling-Braggin, F. Elliston and J. English (eds) *Feminism and Philosophy*. Savage, MD: Rowman and Littlefield, pp. 333–46; Husak, D. and Thomas, G. (1992) 'Date rape, social convention, and reasonable mistakes', *Law and Philosophy*, 11: 95–126; MacKinnon, C. (1987) *Feminism Unmodified: Discourses on Life and Law*. Cambridge MA: Harvard University Press; MacKinnon, C. (1989) *Toward a Feminist Theory of the State*. Cambridge MA: Harvard University Press.

Looking more particularly at the issue of consent, the following are helpful reading: McGregor, J. (1996) 'Why when she says no she doesn't mean maybe and doesn't mean yes: A critical reconstruction of consent, sex, and the law', *Legal Theory*, 2: 175–208; McGregor, J. (2005) *Is It Rape?: On Acquaintance Rape and Taking Women's Consent Seriously*. Hampshire: Ashgate Publishing; Pineau, L. (1989) 'Date rape: A feminist analysis', *Law and Philosophy*, 8(2): 217–43; Scheppele, K. (1991) 'The reasonable woman', *The Responsive Community*, 1(4): 36–47; Schulhofer, S. (1998) *Unwanted Sex: The Culture of Intimidation and the Failure of Law*. Cambridge MA: Harvard University Press.

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