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While the defendant's attitude toward consent may be considered either an issue of *mens rea* or a mistake of fact, the key question remains the same. In *mens rea* terms, the question is whether negligence suffices, that is, whether the defendant should be convicted who claims that he thought the woman was consenting, or didn't think about it, in situations where a 'reasonable man' would have known that there was not consent. In mistake-of-fact terms, the question is whether a mistake as to consent must be reasonable in order to exculpate the defendant.

In defining the crime of rape, most American courts have omitted *mens rea* altogether. In Maine, for example, the Supreme Judicial Court has held that there is no *mens rea* requirement at all for rape.[81] In Pennsylvania, the superior court held in 1982 that even a reasonable belief as to the victim's consent would not exculpate a defendant charged with rape.[82] In 1982 the Supreme Judicial Court of Massachusetts left open the question whether it would recognise a defence of reasonable mistake of fact as to consent, but it rejected the defendant's suggestion that any mistake, reasonable or unreasonable, would be sufficient to negate the required intent to rape; such a claim was treated by the court as bordering on the ridiculous.[83] The following year the court went on to hold that a specific intent that intercourse be without consent was not an element of the crime of rape,[84] that decision has since been construed to mean that there is no intent requirements at all as to consent in rape cases.[85]

To treat what the defendant intended or knew or even should have known about the victim's consent as irrelevant to his liability sounds like a result favourable to both prosecution and women as victims. But experiences makes all too clear that it is not. To refuse to inquire into *mens rea* leaves two possibilities: turning rape into a strict liability offence where, in the absence of consent, the man is guilty of rape regardless of whether he (or anyone) would have recognised non-consent in the circumstances; or defining the crime of rape in a fashion that is so limited that it would be virtually impossible for any man to be convicted where he was truly unaware or mistaken as to non-consent. In fact, it is the latter approach which has characterised all of the older, and many of the newer, American cases. In practice, abandoning *mens rea* produces the worst of all possible worlds: the trial emerges not as in inquiry into the guilt of the defendant (Is he a rapist?) but of the victim (Was she really raped? Did she consent?). The perspective that governs is therefore not that of the woman, nor even of the particular man, but of a judicial system intent upon protecting against unjust conviction, regardless of the dangers of injustice to the woman in the particular case.

The requirement that sexual intercourse be accompanied by force or threat of force to constitute rape provides a man with some protection against mistakes as to consent. A man who uses a gun or knife against his victim is not likely to be in serious doubt as to her lack of consent, and the more narrowly force is defined, the more implausible the claim that he was unaware of non-consent.

But the law's protection of men is not limited to a requirement of force. Rather than inquire whether the man believed (reasonably or unreasonably) that his victim was consenting, the courts have demanded that the victim demonstrate

81 *State v Reed*, 479 A.2d 1291, 1296 (me. 1984).

82 *Commonwealth v Williams* 294 a Super 93, 99–1000, 439 A 2d 765, 769 (1982).

83 *Commonwealth v Sherry* 437 NE 2d 224, 386 Mass 682 (1982).

84 *Commonwealth v Grant* 391 Mass 645, 464 NE 2d 33 (1984).

85 *Commonwealth v Lefkowitz* 20 Mass App Ct 513, 481 NE 2d 227, 230, review denied. 396 Mass 1103, 485 NE 2d 224 (1985).

her non-consent by engaging in resistance that will leave no doubt as to non-consent. The definition of non-consent as resistant – in the older cases, as utmost resistance,[86] while in some more recent ones, as 'reasonable' physical resistance[87] – functions as a substitute for *mens rea* to ensure that the man has notice of the woman's non-consent.

The choice between focusing on the man's intent or focusing on the woman's is not simply a doctrinal flip of the coin.

First, the inquiry into the victim's non-consent puts the woman, not the man, on trial. Her intent, not his, is disputed, and because her state of mind is key, her sexual history may be considered relevant (even though utterly unknown to the man).[88] Considering consent from *his* perspective, by contrast, substantially undermines the relevance of the woman's sexual history where it was unknown to the man.

Second, the issue for determination shifts from whether the man is a rapist to whether the woman was raped. A verdict of acquittal thus does more than signal that the prosecution has failed to prove the defendant guilty beyond a reasonable doubt; it signals that the prosecution has failed to prove the woman's sexual violation – her innocence – beyond reasonable doubt. Thus, as one dissenter put it in disagreeing with the affirmance of a conviction of rape: 'the majority today … declares the innocence of an at best distraught young woman'.[89] Presumably, the dissenter thought the young woman guilty.

Third, the resistance requirement is not only ill conceived as a definition of non-consent but is an overbroad substitute for *mens rea* in any event. Both the resistance requirement and the *mens rea* requirement can be used to enforce a male perspective on the crime, but while *mens rea* might be justified as protecting the individual defendant who has not made a blameworthy choice, the resistance standard requires women to risk injury to themselves in cases where there may be no doubt as to the man's intent or blameworthiness. The application of the resistance requirement has not been limited to cases in which there was uncertainty as to what the man thought, knew or intended; it has been fully applied in cases where there can be no question that the man knew that intercourse was without consent.[90] Indeed, most of the cases that have dismissed claims that *mens rea* ought to be required have been cases where both force and resistance were present and where there was danger of any unfairness.

Finally, by ignoring *mens rea*, American courts and legislators have imposed limits on the fair expansion of our understanding of rape. As long as the law holds that *mens rea* is not required and that no instructions on intent need to be given, pressure will exist to retain some form of resistance requirement and to insist on force as conventionally defined in order to protect men against

86 See *King v State* 210 Tenn 150, 158, 357 SW 2d 42, 45 (1962); *Moss v State* 208 Miss 531, 536, 45 So 2d 125, 126 (1950) *Brown v State*, 127 Wis 193, 199, 106 NW 536, 538 (1906); *People v Dohring* 59 NY 374, 386 (1874).

87 See eg *Satterwhite v Commonwealth* 210 Va 478, 482, 111 SE 2d 820, 823 (1960); *Goldberg v State* 41 Md App 58, 68, 395 A 2d 1213, 1218–19 (1979); *State v Lima* 64 Hawaii 470, 476–77, 643 P.2d 536, 540 (1982).

88 See eg *Government of the Virgin Islands v John* 447 F 2d 69 (3d Cir 1971) (holding victim's reputation for chastity relevant to consent); *Packineau v United States* 202 F 2d 681, 687.

89 *State v Rusk* 289 Md 230, 256, 424 A 2d 720, 733 (1981) (Cole J, dissenting).

90 See eg *Goldberg v State* 41 Md App 58, 68, 395 A 2d 1213 (1979). See also *State v Lima* 64 Hawaii 470, 643 P 2d 536 (1982).

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conviction for 'sex'. Using resistance as a substitute for *mens rea* unnecessarily and unfairly immunises those men whose victims are afraid enough, or intimidated enough, or, frankly, smart enough, not to take the risk of resisting physically. In doing so, the resistance test may declare the blameworthy man innocent and the raped woman guilty.

While American courts have unwisely ignored the entire issue of *mens rea* or mistake of fact, the British courts may have gone too far in the other direction. To their credit, they have squarely confronted the issue, but their resolution suggests a highly restrictive understanding of criminal intent in cases of sexual assault. The focal point of the debate in Great Britain and the Commonwealth countries was the House of Lords' decision in *Director of Public Prosecutions v Morgan*,[91] in which the certified question was: 'whether in rape the defendant can properly be convicted, notwithstanding that he in fact believed that the woman consented, if such belief was not based on reasonable grounds'.[92] The majority of the House of Lords answered the question in the negative.

The Heilbron Committee was created to review the controversial *Morgan* decision. The committee's recommendation ultimately enacted in 1976, retained the *Morgan* approach in requiring that at the time of intercourse the man knew or at least was aware of the risk of non-consent but provided that the reasonableness of the man's belief could be considered by the jury in determining what he in fact knew.[93] In situations where a 'reasonable man' would have known that the woman was not consenting, most defendants will face great difficulty in arguing that they were honestly mistaken or inadvertent as to consent. Thus, in *Morgan* itself, the House of Lords, although holding that negligence was not sufficient to establish liability for rape, upheld the convictions on the ground that no properly instructed jury, in the circumstances of that case, could have concluded that the defendants honestly believed that their victim was consenting. Still, in an English case decided shortly after *Morgan*, on facts substantially similar (a husband procuring a buddy to engage in sex with his crying wife), an English jury concluded that the defendant had been negligent in believing, honestly but unreasonably, in the wife's consent. On the authority of *Morgan*, the court held that the defendant therefore deserved acquittal.[94]

My view is that such a 'negligent rapist' should be punished, albeit – as in murder – less severely than the man who acts with purpose or knowledge, or even knowledge of the risk. First, he is sufficiently blameworthy for it to be just to punish him. Second, the injury he inflicts is sufficiently grave to deserve the law's prohibition.

The traditional argument against negligence liability is that punishment should be limited to cases of choice, because to punish a man for his stupidity is unjust and, in deterrence terms, ineffective. Under this view, a man should only be held responsible for what he does knowingly or purposely, or at least while aware of the risks involved. As one of *Morgan*'s most respected defenders put it:

91 [1976] AC 182; [1976] 2 All ER 347; [1975] 2 WLR 913.

92 *Ibid* at 205; [1975] 2 All ER at 354.

93 The Sexual Offences (Amendment) Act, s 1. See generally Smith, *The Heilbron Report* 1976 Criminal Law Review 97, 98–105.

94 The most striking difference between that case, *R v Cogan* [1975] 3 WLR 316 (CA) and *Morgan* is the number of 'buddies' involved. In the law of rape, numbers often assume major significance in a court's approach to the facts.

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> To convict the stupid man would be to convict him for what lawyers call inadvertent negligence – 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. People ought not to be punished for negligence except in some minor offences established by statute. Rape carries a possible sentence of imprisonment for life, and it would be wrong to have a law of negligent rape.[95]

If inaccuracy or indifference to consent is 'the best that this man can do' because he lacks capacity to act reasonably, then it might well be unjust and ineffective to punish him for it. But such men will be rare, and there was no evidence that the men in *Morgan* were among them, at least as long as voluntary drunkenness is not equated with inherent lack of capacity. More common is the case of the man who could have done better but didn't; could have paid attention, but didn't; heard her say no, or saw her tears, but decided to ignore them. Neither justice nor deterrence argues against punishing this man.

Certainly, if the 'reasonable' attitude to which a male defendant is held is defined according a 'no means yes' philosophy that celebrates male aggressiveness and female passivity, there is little potential for unfairness in holding men who fall below that standard criminally liable. Under such a low standard of reasonableness, only a very drunk man could honestly be mistaken as to a woman's consent, and a man who voluntarily sheds his capacity to act and perceive reasonably should not be heard to complain here – any more than with respect to other crimes – that he is being punished in the absence of choice.

But even if reasonableness is defined – as I argue it should be – according to a rule that 'no means no', it is not unfair to hold those men who violate the rule criminally responsible, provided that there is fair warning of the rule. I understand that some men in our society have honestly believed in a different reality of sexual relations and that because men and women may perceive these situations differently and because the injury to women stemming from the different male perception may be grave that it is necessary and appropriate for the law to impose a duty upon men to act with reason and to punish them when they violate that duty.

In holding a man to such a standard of reasonableness, the law signifies that it considers a woman's consent to sex to be significant enough to merit a man's reasoned attention. In effect the law imposes a duty on men to open their eyes and use their heads before engaging in sex – not to read a woman's mind but to give her credit for knowing her own mind when she speaks it. The man who has the inherent capacity to act reasonably but fails to do so has made the blameworthy choice to violate this duty. While the injury caused by purposeful conduct may be greater than that caused by negligent acts, being negligently sexually penetrated without one's consent remains a grave harm, and being treated like an object whose words or actions are not even worthy of consideration adds insult to injury. This dehumanisation exacerbates the denial of dignity and autonomy which is so much a part of the injury of rape, and it is equally present in both the purposeful and negligent rape.

By holding out the prospect of punishment for negligence, the law provides an additional motive for men to 'take care before acting, to use their faculties and draw on their experience in gauging the potentialities of the contemplated

95 Professor Glanville Williams in a letter to *The Times* (London) 8 May 1975, p 15, col 6.

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> conduct'.[96] We may not yet have reached the point where men are required to ask verbally. But if silence does not negate consent, at least the word no should, and those who ignore such an explicit sign of non-consent should be subject to criminal liability.[97]

Professor Estrich then analyses the use of force in relation to rape and further examines the question of consent or non-consent as revealed in American caselaw. Her conclusions as to the appropriate approach to rape is set out below.

RAPE

Susan Estrich

Conclusion

The conduct that one might think of as 'rape' ranges from the armed stranger who breaks into a woman's home to the date she invites in who takes silence for assent. In between are literally hundreds of variations: the man may be a stranger, but he may not be armed; he may be armed, but he may not be a stranger; he may be an almost, rather than a perfect, stranger – a man who gave her a ride or introduced himself through a ruse; she may say yes, but only because he threatens to expose her to the police or the welfare authorities; she may say no, but he may ignore her words.

In 1985, the woman raped at gunpoint by the intruding stranger should find most of the legal obstacles to her complaint removed. That was not always so: as recently as ten years ago, she might well have faced a corroboration requirement, a cautionary instruction, a fresh complaint rule, and a searing cross-examination about her sexual past to determine whether she had nonetheless consented to sex. In practice, she may still encounter some of these obstacles, but to the extent that the law communicates any clear message, it is likely to be that she was raped.

But most rapes do not as purely fit in the traditional model, and most victims do not fare as well. Cases involving men met in bars (*Rusk*) or at work (*Goldberg*) or in airports (*Evans*), let alone cases involving ex-boyfriends (*Alston*) still lead some appellate courts to enforce the most traditional view of women in the context of the less traditional rape. And in the system, considerations of prior relationship and the circumstances of the initial encounter, as well as force and resistance and corroboration, seem to reflect a similarly grounded if not so clearly stated view of the limits of rape law.

In thinking about rape, it is not as difficult to decide which rapes are more serious or which rapists deserving of more punishment: weapons, injury, and intent – the traditional grading criteria of the criminal law – are all justifiable answers to these questions. Most jurisdictions that have reformed their rape laws in the last ten years have focused on creating degrees of rape – aggravated and unaggravated – based on some combination of the presence of weapons and injury. While *mens rea* or mistake needs to be addressed more clearly in some

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96 Model Penal Code, s 2.02 comment at 126–127 (Tent. draft No 4, 1955). The Model Penal Code commentators thus recognised the deterrence rationale of negligence liability in justifying its inclusion as a potential basis for criminal liability (albeit for a limited number of crimes, not including rape).

97 *Rape*, pp 162–67.

rape laws, and bodily injury more carefully defined in others, these are essentially problems of draftsmanship which are hardly insurmountable.

The more difficult problem comes in understanding and defining the threshold for liability – where we draw the line between criminal sex and seduction. Every statute still uses some combination of 'force', 'threats', and 'consent' to define the crime. But in giving meaning to those terms at the threshold of liability, the law of rape must confront the powerful norms of male aggressiveness and female passivity which continue to be adhered to by many men and women in our society.

The law did not invent the 'no means yes' philosophy. Women as well as men have viewed male aggressiveness as desirable and forced sex as an expression of love, women as well as men have been taught and have come to believe that when a women 'encourages' a man, he is entitled to sexual satisfaction. From the sociological surveys to prime time television, one can find ample support in society and culture for even the most oppressive views of women and the most expansive notions of seduction enforced by the more traditional judges.

But the evidence is not entirely one sided. For every prime time series celebrating forced sex, there seems to be another true confession story in a popular magazine detailing the facts of a date rape and calling it 'rape'. College men and women may think that the typical male is forward and primarily interested in sex, but they no longer conclude that he is the desirable man. The old sex manuals may have lauded male sexual responses as automatic and uncontrollable, but some of the new ones no longer see men as machines and even advocate sensitivity as seductive.

We live, in short, in a time of changing sexual mores – and we are likely to for some time to come. In such times, the law can cling to the past, or help move us into the future. We can continue to enforce the most traditional views of male aggressiveness and female passivity, continue to adhere to the 'no means yes' philosophy and to the broadest understanding of seduction, until and unless change overwhelms us. That is not a neutral course, however; in taking it, the law (judges, legislators, or prosecutors) not only reflects (a part of) society but legitimates and reinforces those views.

Or we can use the law to move forward. It may be impossible – and even unwise – to try to use the criminal law to change the way people think, to push progress to the ideal. But recognition of the limits of the criminal sanction need not be taken as a justification for the status quo. Faced with a choice between reinforcing the old and fuelling the new in a world of changing norms, it is not necessarily more legitimate or neutral to choose the old. There are lines to be drawn short of the ideal: the challenge we face in thinking about rape is to use the power and legitimacy of law to reinforce what is best, not what is worst, in our changing sexual mores.

In the late eighteenth and early nineteenth centuries, the judges of England waged a successful campaign against duelling. While 'the attitude of the law' was clear that killing in a dual was murder, the problem, was that for some, accepting a challenge remained a matter of 'honour', and juries would therefore not convict. 'Some change in the public attitude toward duelling, coupled with the energy of judges in directing juries in strong terms, eventually brought about convictions, and it was not necessary to hang many gentlemen of quality before the understanding became general that duelling was not required by the code of honour'.[98]

98 Williams, 'Consent and Public Policy' [1962] 9 *Criminal Law Review*, 74, 154 (pts I and II); at 77.

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There has been 'some change in the public attitude' about the demands of manhood in heterosexual relations, as in duelling. If the 'attitude of the law' is made clearer – and that is, in essence, what this chapter is about – then it may not be necessary to prosecute too many 'gentlemen of quality' before the understanding becomes general that manly honour need not be inconsistent with female autonomy.

In a better world, I believe that men and women would not presume either consent or non-consent. They would ask, and be certain. There is nothing unromantic about showing the kind of respect for another person that demands that you know for sure before engaging in intimate contact. In a better world, women who said yes would be saying so from a position of equality, or at least sufficient power to say no. In a better world, fewer women would bargain with sex because they had nothing else to bargain with; they would be in at least as good a position to reject demands for sexual access as men are to reject demands for money.

If we are not at the point where it is appropriate for the law to presume non-consent from silence, and the reactions I have received to this chapter suggest that we are not, then at least we should be at the point where it is legitimate to punish the man who ignores a woman's explicit words of protestations. I am quite certain that many women who say yes – whether on dates or on the job – would say no if they could; I have no doubt that women's silence is sometimes the product not of passion and desire but of pressure and pain. But at the very least the criminal law ought to say clearly that women who actually say no must be respected as meaning it; that non-consent means saying no; that men who proceed nonetheless, claiming that they thought no meant yes, have acted unreasonably and unlawfully.

So, too, for threats of harm short of physical injury and for deception and false pretences as methods of seduction. The powerlessness of women and the value of bodily integrity are great enough to argue that women deserve more comprehensive protection for their bodies than the laws of extortion or fraud provide for money. But if going so far seems too complicated and fraught with difficulty, as it does to many, then we need not. For the present, it would be a significant improvement if the law of rape in any state prohibited exactly the same threats as that state's law of extortion and exactly the same deceptions as that state's law of false pretences or fraud.

In short, I am arguing that 'consent' should be defined so that 'no means no'. And the 'force' or 'coercion' that negates consent ought [to] be defined to include extortionate threats and deceptions of material fact. As for *mens rea*, unreasonableness as to consent, understood to mean ignoring a woman's words, should be sufficient for liability: reasonable men should be held to know that no means no, and unreasonable mistakes, no matter how honestly claimed, should not exculpate. Thus, the threshold of liability – whether phrased in terms of 'consent, force', or 'coercion', or some combination of the three, should be understood to include at least those nontraditional rapes where the woman says no or submits only in response to lies or threats which would be prohibited were money sought instead. The crime I have described would be a lesser offence than the aggravated rape in which life is threatened or bodily injury inflicted, but it is, in my judgment, 'rape'. One could, I suppose, claim that as we move from such violent rapes to 'just' coerced or nonconsensual sex, we are moving away from a crime of violence toward something else. But what makes the violent rape different – and more serious – than an aggravated assault is the injury to personal integrity involved in forced sex. That same injury is the reason that

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forced sex should be a crime even when there is no weapon or no beating. In a very real sense, what does make rape different from other crimes, at every level of the offence, is that rape is about sex and sexual violation. Were the essence of the crime the use of the gun or the knife or the threat, we wouldn't need – and wouldn't have – a separate crime.

Crime is labelled as criminal 'to announce to society that these actions are not to be done and to secure that fewer of them are done'.[99] As a matter of principle, we should be ready to announce to society our condemnation of coerced and nonconsensual sex and to secure that we have less of it. The message of the substantive law to men, and to women, should be made clear.

That does not mean that this crime will, or should, be easy to prove. The constitutional requirement of proof beyond a reasonable doubt may well be difficult to meet in cases where guilt turns on whose account is credited as to what was said. If the jury is in doubt, it should acquit. If the judge is uncertain, he should dismiss.

The message of the substantive law must be distinguished from the constitutional standards of proof. In this as in every criminal case, a jury must be told to acquit if it is in doubt. The requirement of proof beyond reasonable doubt rests on the premise that it is better than ten guilty should go free than that one innocent man should be punished. But if we should acquit ten, let us be clear that we are acquitting them not because they have an entitlement to ignore a woman's words, not because what they allegedly did was right or macho or manly, but because we live in a system that errs on the side of freeing the guilty.[100]

AGAINST OUR WILL: MEN, WOMEN, AND RAPE[101]

Susan Brownmiller

Evan Connell, a novelist of some repute, wrote a *tour de force* some years ago entitled *The Diary of a Rapist*. Connell's protagonist, Early Summerfield, was a timid, white, middle-class civil-service clerk, age twenty-seven, who had an inferiority complex, delusions of intellectual brilliance, a wretched, deprived sex life, and an older, nagging, ambitious, 'castrating' wife. Connell's book made gripping reading, but the portrait of Earl Summerfield was far from an accurate picture of an average real-life rapist. In fact, Connell's *Diary* contains almost every myth and misconception about rape and rapists that is held in the popular mind. From the no-nonsense FBI statistics and some intensive sociological studies that are beginning to appear, we can see that the typical American rapist is no weirdo, psycho schizophrenic beset by timidity, sexual deprivation, and a domineering wife or mother. Although the psycho rapist, whatever his family background, certainly does exist, just as the psycho murderer certainly does exist, he is the exception and not the rule. The typical American perpetrator of forcible rape is little more than an aggressive, hostile youth who chooses to do violence to women.

99 HLA Hart *Punishment and Responsibility* (Oxford University Press, 1968), p 6.

100 *Rape*, pp 179–82.

101 New York: Simon & Schuster 1975; Reprint Fawcett 1993, Chapter 6.

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We may thank the legacy of Freudian psychology for fostering a totally inaccurate popular conception of rape. Freud himself, remarkable as this may seem, said nothing about rapists. His confederates were slightly more loquacious, but not much. [Carl] Jung mentioned rape only in a few of his mythological interpretations. Alfred Adler, a man who understood the power thrust of the male and who was a firm believer in equal rights for women, never mentioned rape in any of his writings. [Helene] Deutsch and [Karen] Horney, two brilliant women, looked at rape only from the psychology of the victim.

In the nineteen fifties a school of criminology arose that was decidedly pro-Freudian in its orientation and it quickly dominated a neglected field. but even among the Freudian criminologists there was a curious reluctance to tackle rape head on. The finest library of Freudian and Freudian-related literature, the AA Brill Collection, housed at the New York Psychoanalytic Institute, contains an impressive number of weighty tomes devoted to the study of exhibitionism (public exposure of the penis) yet no Freudian or psychoanalytic authority has ever written a major volume on rape. Articles on rape in psychology journals have been sparse to the point of nonexistence.

Why Freudians could never come to terms with rape is a puzzling question. It would not be too glib to suggest that the male bias of the discipline, with its insistence on the primacy of the penis, rendered it incapable of seeing the forest for the trees. And then, the use of the intuitive approach based largely on analysis of idiosyncratic case studies allowed for no objective sampling. But perhaps most critically, the serious failure of the Freudians stemmed from their rigid unwillingness to make a moral judgment. The major psychoanalytic thrust was always to 'understand' what they preferred to call 'deviant sexual behaviour' but never to condemn.

'Philosophically', write Dr Manfred Guttmacher in 1951, 'a sex offence is an act which offends the sex mores of the society in which the individual lives. And it offends chiefly because it generates anxiety among the members of that society. Moreover, prohibited acts generate the greatest anxiety in those individuals who themselves have strong unconscious desires to commit similar or related acts and who have suppressed or repressed them. These actions of others threaten our ego defences'.

This classic paragraph, I believe, explains most clearly the Freudian dilemma.

When the Freudian-orientated criminologists did attempt to grapple with rape they lumped the crime together with exhibitionism (their hands-down favourite!), homosexuality, prostitution, pyromania, and even oral intercourse, in huge, indigestible volumes that sometimes bore a warning notice on the flyleaf that the material contained herein might advisably be restricted to adults. Guttmacher's *Sex Offences* and Benjamin Karpman's *The Sexual Offender and His Offences* were two such products of the 'fifties. Reading through these and other volumes it is possible to stumble on a nugget of fact or a valuable insight, and we ought to keep in mind, I guess, how brave they must have seemed at the time. After all, they were dealing not only with s-e-x, but with aberrant s-e-x, and in their misguided way they were attempting to forge a new understanding. 'Moral opprobrium has no place in medical work', wrote Karpman. A fine sentiment, indeed, yet for one hundred pages earlier this same Karpman in this same book defined perversity as 'a sexual act that defies the biological goal of procreation'.

By and large the Freudian criminologists, who loved to quibble with one another, defined the rapist as a victim of an 'uncontrollable urge' that was 'infantile' in nature, the result of a thwarted 'natural' impulse to have intercourse with his mother. His act of rape was 'a neurotic overreaction' that stemmed from his

'feelings of inadequacy'. To sum up in the Freudian's favourite phrase, he was a 'sexual psychopath'. Rapists, wrote Karpman, were 'victims of a disease from which many of them suffer more than their victims'.

This, I should amend, was a picture of the Freudian's favourite rapist, the one they felt they might be able to treat. Dr Guttmacher, for one, was aware that other types of rapists existed but they frankly bored him. Some, he said, were 'sadistic', imbued with an exaggerated concept of masculine sexual activity, and some seemed 'like the soldier of a conquering army'. 'Apparently', he wrote, 'sexually well-adjusted youths have in one night committed a series of burglaries and, in the course of one of them, committed rape – apparently just as another act of plunder'.

Guttmacher was chief medical officer for the Baltimore criminal courts. His chilling passing observation that rapists might be sexually well-adjusted youths was a reflection of his Freudian belief in the supreme rightness of male dominance and aggression, a common theme that runs through Freudian-orientated criminological literature. But quickly putting the 'sexually well-adjusted youths' aside, Guttmacher dove into clinical studies of two rapists put at his disposal who were more to his liking. Both were mail-biters and both had 'nagging mothers'. One had an undescended testicle. In his dreary record of how frequently they masturbated and wet their beds, he never bothered to write down what they thought of women.

Perhaps the quintessential Freudian approach to rape was a 1954 Rorschach study conducted on the *wives* of eight, count 'em eight, convicted rapists, which brought forth this sweeping indictment from one of the authors, the eminent psychoanalyst and criminologist Dr David Abrahamsen:

> The conclusions reached were that the wives of the sex offenders on the surface behaved towards men in a submissive and masochistic way but latently denied their femininity and showed an aggressive masculine orientation; they unconsciously invited sexual aggression, only to respond to it with coolness and rejection. They stimulated their husbands into attempts to prove themselves, attempts which necessarily ended in frustration and increased their husband's own doubts about their masculinity. In doing so, the wives unknowingly continued the type of relationship the offender had with his mother. There can be no doubt that the sexual frustration which the wives caused is one of the factors motivating rape, which might be tentatively described as a displaced attempt to force a seductive but rejecting mother into submission.

In the nineteen-sixties, leadership in the field of criminology passed to the sociologists, and a good thing it was. Concerned with measuring the behaviour of groups and their social values, instead of relying on extrapolation from individual case studies, the sociologists gave us charts, tables, diagrams, theories of social relevance, and, above all, hard, cold statistical facts about crime. (Let us give credit where credit is due. The rise of computer technology greatly facilitated this kind of research.)

In 1971 Menachem Amir, an Israeli sociologist and a student of Marvin E Wolfgang, America's leading criminologist, published a study of rape in the city of Philadelphia, begun ten years before. *Patterns of Forcible Rape*, a difficult book for those who choke on methodological jargon, was annoyingly obtuse about the culturally conditioned behaviour of women in situations involving the threat of force, but despite its shortcomings the Philadelphia study was an eye-opener. It was the first pragmatic, in-depth statistical study of the nature of rape and

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rapists. Going far beyond the limited vision of the police and the [FBI's] *Uniform Crime Reports*, or the idiosyncratic concerns of the Freudians, Amir fed his computer such variables as *modus operandi*, gang rape versus individual rape, economic class, prior relationships between victim and offender, and both racial and interracial factors. For the first time in history the sharp-edged profile of the typical rapist was allowed to emerge. It turned out that he was, for the most part, an unextraordinary, violence-prone fellow.

Marvin Wolfgang, Amir's mentor at the University of Pennsylvania's school of criminology, deserves credit for the theory of the 'sub-culture of violence', which he developed at length in his own work. An understanding of the subculture of violence is critical to an understanding of the forcible rapist. 'Social class', wrote Wolfgang, 'looms large in all studies of violent crime'. Wolfgang's theory, and I must oversimplify, is that within the dominant value system of our culture there exists a subculture formed of those from the lower classes, the poor, the disenfranchised, the black, whose values often run counter to those of the dominant culture, the people in charge. The dominant culture can operate within the laws of civility because it has little need to resort to violence to get what it wants. The subculture, thwarted, inarticulate and angry, is quick to resort to violence; indeed, violence and physical aggression become a common way of life. Particularly for young males.

Wolfgang's theory of crime, and unlike other theories his is soundly based on statistical analysis, may not appear to contain all the answers, particularly the kind of answers desired by liberals who want to excuse crimes of violence strictly on the basis of social inequities in the system, but Wolfgang would be the first to say that social injustice is one of the root causes of the subculture of violence. His theory also would not satisfy radical thinkers who prefer to interpret all violence as the product of the governmental hierarchy and its superstructure of repression.

But there is no getting around the fact that most of those who engage in antisocial, criminal violence (murder, assault, rape and robbery) come from the lower socio-economic classes; and that because of their historic oppression the majority of black people are contained within the lower socio-economic classes and contribute to crimes of violence in numbers disproportionate to their population ratio in the census figures *but not disproportionate* to their position on the economic ladder.

We are not talking about Jean Valjean, who stole a loaf of bread in *Les Miserables*, but about physical aggression as 'a demonstration of masculinity and toughness' – this phrase is Wolfgang's – the prime tenet of the subculture of violence. Or, to use a current phrase, the *machismo* factor. Allegiance or conformity to machismo, particularly in a group or gang, is the *sine qua non* of status, reputation and identity for lower-class male young. Sexual aggression, of course, is a major part of *machismo*.

The single most important contribution of Amir's Philadelphia study was to place the rapist squarely within the subculture of violence. The rapist, it was revealed, had no separate identifiable pathology aside from the individual quirks and personality disturbances that might characterise any single offender who commits any sort of crime.

The patterns of rape that Amir was able to trace were drawn from the central files of the Philadelphia police department for 1958 and 1960, a total of 646 cases

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