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The Moral Wrong of Rape and the Issue of Consent: A Philosophical Analysis*

El problema del mal moral y del consentimiento en la violación sexual: un análisis filosófico

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Abstract: This article addresses the problem of the moral wrong present in rape. To do so, it undertakes an analysis of John Gardner's proposal on the subject. Then, identifying what Gardner calls a pure case of rape, it explores the nature and characteristics of consent as a normative transformer. To this end, it addresses the discussion, within the philosophy of action, on what is the ontology of consent. Finally, and as a consequence of holding that consent is a mental state, some problems related to the knowledge of other people's mental states, traditionally addressed as the problem of other minds in the philosophy of mind, are raised. Some consequences for the evidentiary analysis in cases of rape crimes are drawn from this analysis.

Key words: moral wrong, consent, rape, proof of mental states, philosophy of law

Resumen: El presente artículo aborda el problema de la incorrección o mal moral presente en la violación sexual. Para ello, emprende un análisis de la propuesta de John Gardner sobre el asunto. A continuación, identificando lo que Gardner llama un «caso puro de violación», explora la naturaleza y las características del consentimiento como transformador normativo. Con ese objeto, se aborda la discusión, en el seno de la filosofía de la acción, sobre cuál es la ontología del consentimiento. Finalmente, y como consecuencia de sostener que el consentimiento es un estado mental, se plantean algunos problemas relacionados al conocimiento de estados mentales de otras personas, tradicionalmente abordado como el problema de las otras mentes en la filosofía de la mente. De dicho análisis se extraen algunas consecuencias para el análisis probatorio en casos de delitos de violación.

Palabras clave: Mal moral, consentimiento, violación sexual, probanza de estados mentales, filosofía del derecho

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CONTENTS: I. INTRODUCTION.- II. THE MORAL WRONG OF RAPE.- III. THE ONTOLOGY OF CONSENT.- IV. EVIDENTIARY IMPLICATIONS.- V. CONCLUSIONS.

I. INTRODUCTION

Consent to sexual intercourse has been conceptualized in certain areas of the philosophical literature as a "normative transformer," that is, as a permission which justifies a significant degree of instrumentalization of the body of another (Wertheimer, 1996; 2003, pp. 119 *et seq.*; De Lora, 2019; Raja, 2020). However, as Germaine Greer (2019) argued in an eloquent recent essay, consent is to a certain extent an "unsolvable puzzle", since in legal terms it seems to require not only the existence of a mental state which grants another person permission to cross certain boundaries implicit in a moral or legal right (the right to not have these boundaries crossed), it also requires that the consent seeker have the knowledge that consent has been given (Greer, 2019, p. 27). Should both these requirements be components of the ontology of consent? This is one of the issues I will address in this paper.

In an influential work on the philosophy of criminal law, John Gardner (2012, pp. 23-53) proposed a thought experiment related to a case of "rape pure and simple", that is, an act which is not accompanied by any of what the author called "epiphenomena": violence, physical harm, and psychological trauma, among others. The exercise is interesting from a philosophical point of view: it aims to get to the heart of the specific moral wrong of rape, to isolate it from other effects with which it is usually associated empirically. Gardner concludes that consent negates the instrumental use of a human being, a reformulation of the Kantian imperative of non-instrumentalization. Comparable reasoning, albeit less refined philosophically, can be found in parts of the legal doctrine related to "crimes against sexual freedom" (Salinas Siccha, 2013, pp. 678 *et seq.*).

The paper is not only concerned with determining the moral wrong of rape; as Tadros (2021, pp. 293-318) and others have argued in a special issue of the journal *Ethics*, in the real world consent operates in many different ways. If we accept the idea that the world is permeated by asymmetrical power relations, consent cannot be conceptualized in a vacuum—that is, absent of any degree of coercion—as simply a willingness to engage in sexual relations. With regard to this idea, authors such as Catharine MacKinnon[1] and, more famously, Andrea Dworkin (2006) have argued that the ubiquity of rape is a constitutive feature of patriarchal societies. Tom Dougherty (2021, pp. 319-344) reaches a different conclusion, more in line with that of Tadros, arguing

1 See, for example, MacKinnon (1997, p. 50).

that between the extremes of fully valid consent—which eliminates the moral wrong of rape—and the complete absence of consent—which constitutes an absolute moral wrong—there exists a complex range of examples of partially valid consent, which have a mitigating effect on judgements concerning the instrumentalization of another person. Of course, Dougherty's proposal lands us squarely in the realm of moral vagueness; a more refined analysis incorporating ideas from the philosophy of action would be necessary to develop his argument.

Against this background, this paper seeks firstly to offer an answer to the question of what the specific moral wrong of rape consists of, by way of a discussion of Gardner's thesis. Secondly, using Gardner's case of "rape pure and simple" as a starting point, I explore the issue of the ontology of consent, including a discussion of Larry Alexander's influential work on this subject.

The final section addresses the complex problem of proving consent, or a lack thereof, to sexual intercourse, beginning from the premise that consent is a vague concept. At this point I will discuss a classic work by Herbert Hart (2019, pp. 65-84) on criminal liability and excuses.

Before continuing I would like to clarify some of the limitations of this paper. Firstly, although I make reference to a number of sub-branches of philosophy—mainly existential phenomenology—I have not covered these in depth. A comparison, from different philosophical perspectives, of the ideas proposed in this paper regarding ordeals such as rape may be an interesting topic for a more comprehensive study in the future. An in-depth discussion of recent developments in the legal literature on the subject, both in Peru and internationally, is also beyond the scope of this paper. An analysis of the philosophical assumptions underpinning important case law precedents may also be an interesting topic for future research and a potentially productive means of integrating legal philosophy into more applied branches of the law.

II. THE MORAL WRONG OF RAPE

Thought experiments are a tool often employed by philosophers to explore the explanatory power of certain concepts, and I will also make use of them to illustrate my arguments in this paper. Let us begin, then, by imagining a scenario in which a boy called Daniel goes to a party with his friend Gonzalo and drinks too much. Daniel drunkenly agrees to have sex with Gonzalo at Gonzalo's apartment, close to where the party is taking place. However, when they arrive at the apartment and Gonzalo tries to kiss Daniel, Daniel resists. In response, Gonzalo hits Daniel, who then stops resisting and the pair have sex.

Some readers might be tempted to argue that the moral wrong in this hypothetical rape lies in the fact that when Gonzalo initially obtained consent Daniel was intoxicated. But this brings us back to the problem of factual vagueness, as the validity of the consent depends on Daniel's level of consciousness as the consenting agent. As Kukla (2021) argues persuasively on this issue:

> it is frequently treated as obvious that drunk or high people cannot consent. Someone who is incoherently black-out drunk almost certainly doesn't have enough awareness or self-control to have consensual sex, but in fact a huge swath of perfectly normal, fun sex happens after a few drinks or tokes. While such situations raise ethical and social challenges and risks, it is unrealistic to count all such sex as nonconsensual, and hence in effect rape (p. 275).

For the moment, however, I am interested in exploring a second hypothesis in greater detail. A second group of readers might argue that the moral wrong of the rape lies in the physical harm Gonzalo inflicts on Daniel; however, this position runs into a number of problems, two of which seem particularly relevant.

First, it seems clear that many sexual encounters which are not considered rape can involve physical harm; in fact, many relatively normalized sexual practices involve varying degrees of physical harm (slapping and hitting, among others). In an interesting review of the literature on this topic, Song and Fernandes (2017) found that the proportion of victims of sexual assault who sustain genital injuries is similar to that of people who engage in consensual sex (between 6 % and 87 % and between 6 % and 73 % respectively, with the variation being dependent on the type of analysis and diagnostic techniques employed by the specialists involved). However, it is important to clarify that these statistics do not include cases involving serious injuries.

Furthermore, if the consequences to Daniel's physical integrity are the only reprehensible aspect of the above scenario, this means that there is nothing particularly significant in his agreeing to and subsequently resisting sexual intercourse. This seems unreasonable, and as such a natural conclusion to draw from this analysis of the case of Daniel and Gonzalo is that physical aggression involves a different wrong from that of rape.

Now imagine a second scenario: that Daniel agrees to have sex with Gonzalo, albeit somewhat ambiguously. However, once they arrive at Gonzalo's house, he puts up some resistance to Gonzalo's advances —resistance which could potentially be interpreted, in line with our culturally accepted sexual practices, as a kind of "sexual game"—before falling fast asleep. The next morning, he feels no pain and does not

remember anything of what happened the night before. In this scenario no physical harm has been done to Daniel, nor does he have to deal with any feelings of humiliation, guilt or shame, since he does not remember anything of what happened. If we adopt what I will call a *molecular perspective,* this second scenario cannot be classed as a morally reprehensible rape, while the first clearly can. I will now examine both cases conceptually in further detail.

Those who would argue that the first scenario I described above qualifies as rape view the case from what I call a *molecular perspective*. From this perspective, a rape is morally reprehensible when what John Gardner calls "epiphenomena" (2012, p. 29), such as physical or psychological harm, humiliation, etc., occur in addition to the absence of agreement or consent. Of course, many real-world rape cases—probably the vast majority—also involve violence in the form of physical and psychological harm; it is for this reason that advocates of the molecular perspective might argue that a more refined theory of the moral wrong of rape is a worthless philosophical distraction. However, to say that only people who are uninterested in the philosophical nuances advocate for a *molecular perspective* is an oversimplification for two reasons.

The first is that some such people may only *appear* to advocate for this perspective. A certain type of intellectual contrarian may argue that agreement or consent is a relevant factor, while in reality believing that it is not. They may hold this view for a variety of reasons, such as a conviction that living in an inherently violent patriarchal society means that all consent is simply a reflection of the invisible structures of social power[2]. According to this theory, what is relevant is not so much the absence of consent as the harm which results from the sexual intercourse. If social reality is permeated by discourse which legitimizes sexual violence, an advocate of the molecular perspective may claim, then the notion of consent is simply an ideological means of perpetuating the availability of bodies for the satisfaction of sexual desires. At the risk of exaggerating certain aspects of her views, the esteemed feminist theorist Rita Segato seems to adopt this perspective in places in her work. For example, in one interview, the anthropologist and theorist argued that "we transform the rapist into a scapegoat, while in reality he is but the agent, the protagonist of an act carried out by all of society" (Sietecase, 2017). She makes a similar claim in an essay from 2016, in which she argues that rapes are acts which must be contextualized within the structure of society in terms of the interpenetration involved and how they are understood socially (pp. 38 *et seq*.). My choice of two men in the above hypothetical scenarios is intended to show that it is

2 Some of the arguments of feminist legal theorists, as outlined by Olsen, reflect this view; see Olsen (1990).

the role of the person within the framework of social relations, rather than their sexuality, which is key to perspectives such as Segato's. With regard to this idea, the author points out that:

> the development of masculinity and the development of femininity entail different processes. Evidence [...] indicates that the status of masculinity must be attained—and reaffirmed on a regular basis throughout life—through a process of approval and conquest and that it is conditional above all upon the extraction of favors from another who, because of their naturalized position in the social order, is perceived as the provider of the repertoire of acts which sustain virility. [...] Under the 'normal' sociopolitical conditions of the social order, we, women, pay [sexual] tribute to men, the receivers and beneficiaries (2016, p. 40).

Such a radical position views consent as a secondary or even irrelevant consideration, claiming that what is important is the underlying social fabric—the "web of power", as Foucault termed it (1999, pp. 235-254)—of sexual interactions[3]. Thus, the moral wrong of sexual relations is ubiquitous and represents a form of social injustice. De Lora (2019), expanding on the ideas of MacKinnon, argues that for Segato, "female sexual desire is [...] a social construct, a perverse weapon used by men to exercise dominance" (p. 45). According to this view what distinguishes rape from consensual sex, what makes it deserving of punishment, are the physical or psychological consequences. As all consent is but an ideological construct used to veil a structure of social domination, the distinguishing factor is the violent manifestation of this domination.

This position strikes me as problematic for two main reasons. The first is that to argue that autonomous decisions are made in a vacuum seems overly naive. We accept jobs because we need money, but also for other reasons, such as personal fulfillment or to meet new people; we accept invitations out of commitment, but also for other reasons, such as to please people we care about; everything seems to support the belief that people do consent to sexual relations, even though multiple levels of discourse and ideologies shape our conceptual universe. As Tadros (2021) argues, "the decision to have sex is often made in, and shaped by, unjust circumstances. For example, a person's self-conception, including her sexual self-conception, may result from powerful sexist social norms that influence her decision to have sex" (p. 293). It is important for social philosophy, as well as for scholars of ideology, to identify these levels of discourse and the kinds of social pressures which crystallize and are converted into power relations, but to use this insight to deny the agency of those who agree to have sex is an unjustified leap of logic. Moreover, recent analyses of political power, such as that of Rainer Forst

3 A clear illustration of this idea can be found in Angulo (2019, pp. 88 *et seq*.).

(2015), have shown that it is possible to recognize that power relations do not wholly negate agency without denying that these relations are part of structural realities which affect, to a certain extent, the environment within which the agent reasons.

The second reason why the position under discussion is problematic is because in denying the importance of consent in sexual relations, physical or psychological violence—or indicators of this such as physical harm or disproportionate use of force between the actors involved—becomes the decisive factor. The problem with this is that, as mentioned above, many common and accepted sexual practices in our societies involve significant degrees of physical and psychological violence, as well as disproportionate use of force between the agents involved. The argument that violence is the decisive factor may help explain the furious reaction of political activists in Spain to the 'La Manada' *(The Wolf Pack)* case. One of the key considerations in this case was whether a young woman is capable of consenting to sexual relations with five unknown men in an intimidating environment. According to De Lora's (2019) review of this case, two of the three judges considered the offense to be one of predatory sexual assault, as regulated in Spain's Criminal Code, since

> the defendants manufactured a situation of total dominance: the woman did not have the option of resisting the advances of the members of 'La Manada' due to their number, their physical superiority, the difference in age and sexual maturity (the convicted men were between 24 and 27 years old and she was 18) and the location—a narrow alley from which it was difficult to escape—where the events took place (p. 46).

However, intimidating circumstances with disproportionate power dynamics do not in and of themselves mean consent has not been given, meaning that those who hold this view must look elsewhere to identify the moral wrong of rape in such cases, again unrelated to the absence of consent. If the locus of the wrong is the physical and/or psychological consequences of the act, it is no longer an attack against sexual autonomy or freedom, but a form of aggression or an assault on the bodily integrity of the victim. Such a conclusion has practical consequences; accepting it should lead to changes in the legal doctrine concerning rape, as well as a rethinking of exactly what legally protected right is violated. There is another consequence to this view which is that it imposes a sort of moral perfectionism on human sexuality, i.e., it implies that only sexual relations which comply with certain requirements of non-violence should be acceptable. Assuming that contemporary constitutional states are built on premises related to political liberalism, the philosophy of which has been outlined by authors such as John Rawls, this would imply

the intrusion of a comprehensive doctrine—that is, one motivated by reasons other than the public interest—into the political space governed by criminal law (Rawls, 2019, pp. 255 *et seq*.).

I will now move on from those who only *appear* to be advocates of the molecular perspective to a discussion of the ideas of bona fide advocates of this approach. This group consider that rape is composed of two elements: a) the absence of consent to sexual intercourse; and b) the epiphenomena surrounding the sexual act, such as physical or psychological harm, feelings of worthlessness or humiliation, fear, etc. It is first important to fully consider the consequences of this perspective, which holds that two individually necessary and jointly sufficient conditions must be satisfied for an act to qualify as rape. Certain cases may not meet these requirements, such as the case of a "rape pure and simple", in which the sole harm lies in the crossing of a boundary related to a moral or legal right without the consent of the holder of said right. Those who believe that consent is irrelevant given that ideologically it is inseparable from the web of power and instead emphasize the epiphenomena will also argue that both requirements are not met. Nevertheless, the molecular perspective does avoid certain problems faced by the purely epiphenomenal perspective in that it holds that consent is important, and not only the consequences or the circumstances surrounding the sexual act. Despite this, these requirements are too demanding in yet another sense: both those who emphasize consent and those who emphasize the epiphenomena will tend to highlight the importance of one or other of the requirements in blocking the normative transformer which turns potential rape into consensual sexual intercourse, but their arguments will be lacking since, as mentioned, both conditions must be met. It may thus be necessary to propose an intermediate category between rape as an absolute moral wrong and morally dubious sexual relations, which would include those cases in which one of the requirements is met, but not the other. In addition, if we accept that real-world cases meet both of these requirements to varying degrees—i.e., establishing consent ranges from straightforward to complicated and different degrees of physical or psychological harm are involved—the result is complex and plagued by moral vagueness. Kukla (2021) discusses the complexities involved in establishing consent, making mention of scenarios involving people under the influence of drugs or alcohol or in subordinate relationships, among others. Moreover, accepting this philosophical perspective would have consequences for criminal law, which should view rape as a multifarious crime (there has been discussion of these various facets in

the criminal law literature, mainly as they relate to different categories of aggravated rape)[4].

Due to the problems with the proposals analyzed so far, I believe that the best approach to identifying the moral wrong of rape is that proposed by John Gardner (2012), who contends that this requires an examination of rape in isolation, separated from epiphenomenal factors. This involves another thought experiment, this one involving a case of "rape pure and simple"; one which leaves no traces in the victim's memory or body and which nobody but the perpetrator knows about (pp. 28 *et seq.*). This second component of the definition precludes the possibility of the victim suffering any kind of social harm.

If we strip rape of all epiphenomena, what remains? Fundamentally, what remains is the commission of an act not consented to by a person who has the right not to be raped. However, identifying the justification for this right is a very complex issue which Gardner (2012) discusses in some detail, and which I run the risk of oversimplifying here. The most obvious and basic reading is that rape consists of the non-consensual transfer of the victim's right to bodily autonomy, but the reason why the victim holds this right to bodily autonomy is not as obvious as it may seem[5]. As Gardner correctly points out, an influential Cartesian philosophical tradition holds that the distinctive characteristics of personal identity reside in the thinking mind or substance (Descartes, 2013, Second Meditation). If this is the case, an autonomous subject —that is, the Kantian subject who can make free decisions and behave morally—is a *noumenal* subject. Adopting the position that a person has a right to bodily autonomy presupposes an acceptance that the body is, at least, an extension of the subject, with such characteristics that the subject consequently holds property rights over it, and by extension the right to consent (or not) to the crossing of certain boundaries in relation to this body which is their property. Gardner rejects the Cartesian perspective (2012), pointing out the following:

> There is a long-standing tradition in Western philosophy which diminishes the centrality of the body. The body becomes something like an arbitrary receptacle in which the real business of human life —that special inner thing called 'the self'—just happens to live. This is a barely intelligible view. People are, in part, their bodies and their relationship with their bodies cannot—barring strange pathological cases (schizophrenia?) or conceptually testing science fiction (brains in vats?)—be that of artificial self-extension. The embodied self is not

4 See Fernández Cruz (2007) for an example.

5 The non-consensual transfer of the right to control one's body in the case of rape is distinguished from other forms of non-consensual transfer of the right to control one's body by its sexual purpose. I would like to thank the anonymous reviewers for asking me to clarify this issue.

> the extended self; in the distinction between self and world, the body already belongs to the 'self' side without any need for, or possibility of, self-extension into it (pp. 34-35).

I will not discuss Gardner's ideas further because, for the purposes of this paper, we have already identified where the moral wrong of rape lies: it is the non-consensual crossing of a boundary protected by the moral right (which can be made a legal right) to bodily autonomy, not only as an extension of the self, but as a constituent part of it. Sexual freedom consists, then, of a complex bundle of rights related to making one's body—as a component of the self—available for behaviors of a sexual nature[6].

One of De Vignemont's (2020) "fundamental bodily states" is that of awareness of bodily ownership (pp. 85 *et seq*.). The fundamental idea is that the sense of ownership over the body cannot be reduced to the idea of familiarity with one's body nor to the notion of identity (understood as bodily identity). While I agree that the notion of bodily ownership cannot be reduced to that of familiarity, the author's explanation as to what differentiates it from the concept of identity seems to me circular and ultimately unsatisfactory.

The author argues that awareness of bodily ownership cannot be reduced to the idea of familiarity because this idea is too tenuous: we are also familiar with other bodies which have personal significance for us. This observation is sound and concerns the vagueness of the concept of familiarity itself. In simple terms, there is no (non-arbitrary) boundary which marks the precise dividing line between the familiar and the unfamiliar. Therefore, unless we can define the term specifically, the concept is flawed.

De Vignemont (2020) goes on to argue that the notion of bodily ownership is not analogous to the notion of identity because, although our sense of identity and our sense of bodily ownership usually go hand in hand, they play different epistemic roles and may be viewed as separate

6 Debra Bergoffen (2009), taking a philosophical approach inspired by existential phenomenology but focusing on the bodily dimension of the human experience, analyzed the relationship between the body, personal identity and vulnerability in the case of rape. She argues that rape (of the specific category she focuses on in her investigation, rape as a weapon of war) is a form of exploitation of human bodily vulnerability. However, this bodily dimension is intertwined with personal identity and dignity: "we cannot reduce any of these human rights offenses [the crimes of slavery, torture and rape as a weapon of war] to matters of the material body alone. We must take account of the ways in which the human body is always the embodiment of a meaning-making subject." The author goes on to point out that approaches which focus exclusively on the body fail to account for the fact that human beings' construction of meaning is related to the bodily dimension. This has important consequences, such as the reduction of rape to the notion of forced intercourse: "If we identify the human rights violation of rape as a weapon of war with the crime of forced intercourse (accounting [...] only for the way it abuses the material body) and forget the ways in which it destroys the body's desire for intimacy and the communal effects of destroying our trust in this desire (by forgetting that the lived body is always a lived desiring body) we will not be able to understand the effectiveness of rape as a weapon of war" (p. 313).

in certain situations. The author offers the example of a face transplant, after which the patient must deal with both the problem of accepting the new face as their own and the problem of recognizing themself in the mirror (De Vignemont, 2020, p. 88). The first problem is related to bodily ownership, while the second is related to the notion of identity. Of course, the fact that two concepts may play different epistemic roles in certain situations does not mean that they cannot be defined in relation to one another. De Vignemont's example demonstrates that identity judgments allow us to make statements such as "I am raising my hand," while ownership judgments allow us to make statements such as "the hand which is being raised is *mine*." The former suggests that one of the facets of identity is awareness of a physical object which channels mental intentionality; the latter demonstrates that this identity has a bodily dimension. In contrast to De Vignemont, defining bodily ownership in terms of personal identity does not seem unreasonable to me. In any case, the author subsequently presents a more nuanced version of her argument, suggesting that the sense of bodily ownership is composed of two elements: the sensory phenomenology of our bodily organs and the affective phenomenology of our bodies, which links our perceptions with an individuality tied to the notion of identity (p. 98).

However, in certain cases identity and the sense of bodily ownership can become disconnected. De Vignemont (2020) correctly identifies two examples of this: that of the rubber hand illusion, where some people report feeling as though a rubber hand were their own; and cases of depersonalization, when individuals feel that certain of their bodily organs are no longer "theirs" (pp. 88, 95 *et seq.*). What these cases demonstrate is that bodily ownership, although necessarily related to the physical extension of the self which is part of our personal identity, can sometimes be either more limited or broader than this physical extension, in that it excludes or incorporates elements outside our bodies. Given this observation, it must be accepted that it is theoretically possible for someone to feel that they do not need to give their consent because they do not perceive a part of their body to be their own, or for someone to feel that they have been violated as they did not give their consent for another to use an object which they perceive to be part of their body. With regard to the former, authors such as Coy (2009) have analyzed the disembodiment experienced by prostitutes using a phenomenological approach. The results, based on first-hand testimonies, do not lead to the conclusion that the experience of disembodiment means we no longer allow for the possibility of rape; rather it is an expression of the harmful alienation from their bodies which many people who work in prostitution begin to feel, an alienation which is often accompanied by feelings of powerlessness in the face of a potential use of force by a client in an attack (pp. 68-69). As such, a perception of bodily ownership

appears to be a natural requirement for a healthy personal identity which includes the physical boundaries which make human agency possible[7]. In any event, given the exceptional nature of the two examples given by De Vignemont (2020), I will not examine this matter in further detail.

There is a natural consequence to the discussion so far which may seem repugnant in the face of some of our deeply held beliefs; if we accept that the moral wrong of rape lies in the absence of consent to cross the boundary of a person's right to bodily autonomy, we must then analyze the nature of such a right. This right is a moral right which derives from the idea that a subject's moral autonomy applies not only to the *noumenal* subject, but to the embodied subject which entails both mind and body. We have also discussed the case of "rape pure and simple," considered in isolation and separate from any epiphenomena surrounding the absence of consent; that is, the victim does not remember nor were they conscious of the act, and their body holds no trace of it. If we accept this characterization, the question arises as to whether the moral right not to be raped should be made a legal right in any and all cases, enshrined in a law which criminalizes rape in all circumstances, including both rape with associated epiphenomenal harm and cases of rape pure and simple. This question goes to the heart of the debate regarding the relationship between law and morality: those who consider that every moral right is also a legal right will argue that every rape is a criminal offense; while those who argue for the separation of law from morality will recognize that some rapes may not qualify as crimes. Moreover, this question prompts another: whether every violation of a moral right qualifies as harm and therefore violates the liberal harm principle. Consider again the case of a rape of an unconscious person, which does not result in any subsequent physical or psychological pain or suffering, and which nobody but the perpetrator knows took place: does this violation of a moral right in itself constitute harm according to the liberal foundations of criminal law?

I do not have the answers to these questions, which seem to me quite complex. However, I will conclude this section with two pertinent observations: firstly, that legal positivism, which holds that there is no inherent connection between moral and legal rights (the contingent relationship between law and morality of Hartian positivism) leads to the conclusion that the moral wrong of rape, which manifests itself as the absence of consent, is sufficient reason for the enactment of a law which recognizes this assertion, although the moral right cannot

7 Regarding this point, Coy (2009) adds the following: "Dissociation from the body—leaving it emotionally when it is impossible to leave physically—is a well-documented reaction to trauma, particularly sexual abuse with the violations of both body and self, and it is understood as a psychological defence strategy (Scott, 2001). Significantly, the necessity of dissociation, the separation of self from body and the need to distance the thinking, feeling self from the physical body, was discussed at length by the women as a coping mechanism during commercial sex exchanges" (p. 68).

be expected to map precisely onto the legal right. And secondly, the fact that the moral right not to be raped has not been made a legal right may be connected to the balancing of rights and freedoms within the law. Such anomalies are possible due to the fact that many moral and legal rights coexist within the same space, where interaction and occasional opposition is inevitable. These are all issues which require further analysis.

III. THE ONTOLOGY OF CONSENT

Van Inwagen (2015) notes that in philosophy the term "ontology" is used in at least two senses. The meaning I refer to here is that which relates to the types of things the world contains and their attributes (p. 304). As such, social ontology is concerned with the nature and properties of the social world and the entities which arise from social interactions (Epstein, 2018). One component of the social world are the relations between agents, which encompasses consent. As such, it is worth examining the nature of consent and why we consider that it can be a normative or moral transformer.

According to Wertheimer (2003), there are three approaches to understanding the nature and properties of consent: a) the subjective approach, according to which consent is a psychological concept analogous to a mental state; b) the performative approach, which holds that for there to be consent it must be effectively expressed by some behavior; and c) the hybrid approach, according to which both the mental state and the expression of this state are necessary in order for consent to be a normative transformer (p. 144).

Using this categorization as a basis, Wertheimer (2003) examined the theses of various authors who had tackled this topic, arriving at the conclusion that the best approach depends on the purpose of the debate; discussions related to the issue of consent from a purely metaphysical perspective are very different to discussions on consenting sexual relations. This pragmatism led Wertheimer to opt for a qualified version of the performative approach (p. 146). However, I will set Wertheimer's conclusion aside and attempt to frame the issue using a different methodology. In order to do so I will trace the analysis of Larry Alexander (1996, 2014), who opposed Wertheimer's views on the ontology of consent.

Alexander (2014) considers performative theories of consent, such as that of Wertheimer, to be flawed for two main reasons: a) there is no explicit means of defining the words and/or actions which count as consent; and b) such theories do not require an implicit mental state as a precondition for the verbalizing of consent (pp. 103-104).

The first objection is weak and the author himself seems to be aware of it. The interpretive vagueness of the act of verbalizing consent is analogous to that which is inherent to other verbal acts such as promising, greeting, and threatening. Just as there is no universal and fixed form of expressing consent, there is no universal and fixed expression of a promise. However, expressions such as "I swear to God" or "on my mother's grave" are clearly understood as promises, and interpreting whether said promise is made in earnest or in jest represents the same kind of vagueness problem that we face in interpreting acts of consent.

However, although Alexander's (2014) first objection to performative theories is weak, the second is much more substantial. Indeed, the verbal act of promising—to continue with the analogy—involves the use of certain linguistic forms to communicate a prior decision to commit to doing or to refrain from doing something; specifically, the object of the promise. An empty promise—that is, one made without a corresponding mental state—is meaningless. The verbal act of consenting is analogous; in order to be capable of consent, the agent must first make a decision: to consent to someone doing something under certain circumstances. While this observation does not mean we can disregard the performative component of the act of promising—that is, it does not mean we can dismiss what Wertheimer called hybrid approaches—it does suffice to dismiss an entirely performative theory of consent.

Others who oppose Wertheimer's characterization consider that consent consists of a) a mental state, accompanied by b) an intentional communication on the part of the consenting person (Alexander, 2014, p. 104). Alexander disagrees with this perspective in that he considers that consent is the mental state exclusively, and that communication is not a required constitutive element. To demonstrate why this is the case Alexander gives the example of a situation in which someone grants consent, but the consent seeker fails to understand the message and interprets that consent has not been given. Nevertheless, the consent seeker proceeds with the act. In this case, the person is guilty of acting in the belief that they have not obtained consent, but objectively they have not committed an offense, since they did receive consent (p. 105). From this perspective, the error relates to the interpretation of the communication of consent, which presupposes that consent exists independently prior to its communication.

Something similar can be discerned in the opposite case, i.e., where the person seeking consent interprets the words or gestures of the other to mean they have granted consent, even though this has not in fact occurred. In this case the intercourse is an offense, but not a culpable one. Such a situation may occur because the meaning of the words or gestures was ambiguous or vague, or due to failures in the channels of

communication (e.g., when a messenger distorts the message, or it was transmitted in less than ideal conditions).

These examples show that intentional communication is evidence of consent, but that consent in itself is something different: a mental state.

Alexander's (2014) supports his position by making a distinction between culpability and wrongdoing, which is not analogous to that used by lawyers to differentiate between malice and negligence in criminal law. According to Alexander, culpability refers to the *belief* that a boundary has been crossed without consent, while wrongdoing occurs when an agent actually crosses a legal or moral boundary without the consent of the right holder, regardless of whether or not they believed consent was given. Thus, it is possible to commit wrongdoing without being culpable—when the agent incorrectly believes that they have obtained consent—and it is also possible to be culpable without committing wrongdoing—when the agent believed that consent was not given, whereas in fact it was, or when they believe they crossed a boundary, but in fact did not.

So, what does the mental state of consent consist of? Regarding this question, Alexander (2014) discusses three alternatives: that proposed by Heidi Hurd (1996), that of Peter Westen (2004), and his own. For Hurd, the mental state of consent exists when the person giving consent "intends" or expects the consent seeker to carry out the requested conduct (Alexander, 2014, p. 107). For his part, Westen (2004) argues that the mental state of consent exists when the person giving consent "accepts" the requested conduct. After considering these alternatives, Alexander (2014) then presents his own thesis: that the mental state of consent exists when the person giving consent "waives the right" for the requested conduct not to be performed. Going into further detail, the author argues that this mental state refers to a willingness to not object to the conduct of the consent seeker on the basis of the pre-existing right, which has been waived (p. 107):

> The mental state that I believe constitutes consent is that of waiving one's right to object—or, if that sounds too much like a non-mental action, that of mentally accepting without objection another's crossing one's moral or legal boundary (the boundary that defines one's rights) (2014, p. 108).

Of course, this presupposes that the right in question is an alienable right.

In applying this view to the issue of consent to sexual intercourse, we must consider scenarios such as the following:

> Nor can Edith believe she has been raped if she mentally accepted sex with Ed, tried to convey that acceptance to him, and he then had

> sex with her. When she later discovers that Ed never heard her consent and instead thought she had refused consent, she can surely resent and be indignant at Ed's lack of concern about her consent. *But she cannot believe she was raped* (Alexander, 2014, pp. 108-109).

In this case, a person consents to sexual intercourse with a consent seeker, but for some irrelevant reason this consent is not effectively communicated or is not interpreted as such by the consent seeker. Only after the sexual act has concluded does the person who consented discover that their message was not received. This does not mean the act was carried out without consent, but it does mean the consent seeker is culpable for having performed an act for which they believed they had not obtained permission.

Why does Alexander (2014) believe his approach is qualitatively superior to those of Hurd (1996) and Westen (2004)? Firstly, Alexander believes that there are two problems with Hurd's view:

1. One cannot *intend* the act of another person; one can accept it or be indifferent to it, but one cannot *intend* it.
2. An additional, and in my view more important, issue with Hurd's approach is that it presupposes a positive attitude towards the consent seeker's actions, an "intent" that they engage in the conduct. Alexander (2014) correctly considers that no such degree of enthusiasm is required; on the contrary, one can consent to act X without desiring it and even while hoping that it will ultimately not be performed (p. 108).

Given these issues—primarily the latter—Alexander's proposed definition of consent is broader than that of Hurd, since it requires only the waiving of the right to object to the crossing of a boundary which demarcates a right, even if this is accompanied by a desire that the act will ultimately not be performed.

Secondly, Alexander (2014) considers Westen's (2004) criterion of acceptance to be too broad, since a person can accept something without having consented to it. For example, we may accept being jostled from a line by a bully, but this does not mean we have consented to losing our place in the line. Alexander's critique thus makes reference to legitimate and illegitimate reasons: for example, when I accept having lost my place in line to a stronger person, my acceptance may be due to prudence rather than principle: in order to avoid being pushed harder, for example, or even punched. In considering a person as a subject capable of giving and offering reasons while also considering this merely instrumental use, a link can be drawn between Alexander's critique of Westen's position and Arendt's conceptualization of violence as the

instrumental use of (in this case physical) force (Arendt, 2018, pp. 61 *et seq.*).

In addition to the mental state of willingness to waive the right to object to the crossing of a moral or legal boundary, Alexander (2014) considers that in order to be transformative, consent requires that the consent giver understand to some degree the nature and potential consequences of the act to which they are going to consent (p. 109). What degree of knowledge is required? In order to establish this, it is necessary to make a distinction between how much the consent giver should know and the issue of the culpability of the person requesting consent. For example, the person seeking consent may be culpable of using deception when making a request, without this invalidating the consent: A consents to sexual relations with B because B tells A that he loves and wants to marry her. This consent is valid even if B is not sincere. This is because A has sufficient information about the sexual act, which is the immediately forthcoming action for which consent is sought. In summary, according to Alexander, what is required is sufficient knowledge of what is being consented to (in this case, sexual intercourse). In any case, the question of how much information is required, and how pertinent the information should be, is complex and beyond the scope of this paper.

In conclusion, if the moral wrong of rape lies in the crossing of a moral (and sometimes also legal) boundary which defines a person's right to bodily autonomy as a component of their personal identity, this boundary-crossing may be interpreted as a non-consensual act. Consent can thus be conceptualized as a mental state which consists of waiving the right to object to the crossing of a boundary which defines a moral or legal right, and which requires relevant information regarding what is at stake in the request being made by the person seeking consent.

IV. EVIDENTIARY IMPLICATIONS

If, as I have argued, the moral wrong of rape lies in the violation of the duty to obtain consent, understood as permission to cross the boundary of a person's moral right to bodily autonomy, then obtaining evidence of this necessarily involves establishing proof of mental states, as consent is a mental state. If obtaining this proof is unfeasible in certain cases, it seems reasonable to accept that not all theoretically possible cases of rape are punishable under the law, only those which can be identified as such by the trier of fact. That is to say, while all rape involves non-consensual use of a human body, not all rape can be proven; proof is only possible in that subset of cases in which the the mental state of non-consent can be determined, either because it has been communicated in some way or through the use of complex brain imaging techniques, about which much is still unknown (Rodriguez, 2003).

Herbert Hart (2019) argues that one of the reasons why the conditions for ruling out criminal liability are of limited applicability is the difficulty of establishing proof (p. 68). This difficulty can be confronted by recourse to idealized standards such as that of the "reasonable person", which involves attributing mental states to persons based on the circumstances in which an action takes place. However, this strategy has significant shortcomings, the most important of which has been pointed out by proponents of feminist legal theory. Scholars in this field consider that the "reasonable person" standard for attributing mental states in cases such as sexual harassment (and it seems possible to extend the argument to cases of rape) does not consider the particular vulnerabilities of women and the oppression they face in their social interactions (Dimock, 2008). This argument led some courts in the United States, primarily in the early 1990s, to apply a different measure known as the 'reasonable woman' standard (Ashraf, 1992, p. 483; Kenealy, 1992). However, this standard was not applied in the field of criminal law (Ashraf, 1992, p. 495), and it too seems unsound theoretically; as Ashraf concludes, its structure contains too many subjective components. By acknowledging differentiated circumstances and points of view, by acknowledging that people's actions and choices are affected by their social position, we are faced with the problem of how precise a characterization we need. For example, why should we use the "reasonable woman" standard and not a "reasonable woman of African descent" standard? Why a "reasonable woman" and not a "reasonable woman between the ages of 15 and 22"? Why a "reasonable woman" and not a "reasonable rural woman" or a "reasonable urban woman"? Those who argue for a particular standard must decide how far they wish to go in their efforts to refine the distinctions; this is not to say that such an approach cannot be useful.

Finally, the idea of applying a differentiated "reasonable woman" standard runs up against the problem of the *ultima ratio* principle of criminal law, whose purpose is to guarantee individuals' fundamental freedoms. Convicting a defendant based on a "reasonable person" or "reasonable woman" standard is similar to convicting them based on a presumption about a mental state, which arguably runs contrary to the fundamental principles of criminal law[8].

A second method of confronting the difficulty of establishing proof, similar to the use of standards, is to use principles derived from experience, the application of which do not require sound underpinnings. However, this method runs into the same problems as that of employing standards; the

8 Ramírez Ortiz (2020, p. 203) employs similar reasoning in reference to the functions and limits of criminal law.

rule is used in order to create a link between the available evidence and the conclusion being sought.

What remains, then, is the option of seeking proof of the mental state itself. Two mental states are relevant when it comes to establishing proof in cases of rape: the mental state of (non-)consent on the part of the victim; and the mental state of knowledge, or lack thereof, of this (non-)consent on the part of the aggressor. If, as Hart (2009) argues, criminal responsibility derives from moral responsibility (p. 70), we must accept that if it can be proved that the aggressor had a true and well-founded belief that the victim consented (i.e., a belief that permission had been obtained to cross the moral boundary of the right to bodily autonomy) even though consent had not been given, we must accept that this rape would not be punishable under law. Of course, as already pointed out, the difficulties surrounding knowledge of mental states means a punishment of some type cannot be ruled out.

Avramides (2020) correctly points out that the epistemological problem of other minds refers to knowledge of other people's mental attributes, including mental states such as those we are concerned with here. The problem has Cartesian origins in that it stems from doubts about our perceptual knowledge of the external world. Although some versions of this doubt are radical ("in reality, everything might be some kind of delusion, and there is no such thing as other minds that think and feel"), others are more moderate and seem more reasonable. In these our doubt is restricted to knowledge of specific mental states, rather than a generalized doubt regarding the existence of other minds.

According to these more moderate versions, one way of verifying our perceptions of other people's mental states is by asking them to describe them in linguistic statements. In this way, a mental state can be externalized and communicated to other people, allowing them to corroborate their perceptual impression or to discard it if it does not coincide with the linguistic formulation. This entails a potential conflict between the information reported to us by our senses and that which is communicated to us by another person through their statements. For example, Maria might berate Alberto, saying that as she did not consent to sex with him what happened was rape, while Alberto might respond by claiming that certain things Maria said before and during the act for him constituted consent. If Alberto is not inventing an excuse to justify his action, then he is experiencing a conflict between the evidence of his perception of the world and the evidence being communicated to him *ex post* by the relevant source. This is the same discrepancy which is behind Alexander's (2014) distinction between wrongdoing and culpability which we discussed earlier.

However, just as the aggressor can be mistaken about the other's mental state, the latter can also modify her statement after the act: regretting what happened, Maria contends that Alberto did not obtain consent when, in fact, he did. In this case there was no rape, but according to Maria's *ex post* statements there was.

In addition, it is possible that the act took place under a cloud of perceptual, informational and moral vagueness. In this scenario Alberto may have interpreted ambiguous signals from Maria as consent and Maria's attitude may have shifted from receptive to resistant over the course of the interaction. In this case we must accept that, just as the participants themselves have doubts about aspects of what occurred, the uncertainty of the information will be reflected in the legal response.

Finally, it is important to note that the preferred evidence for proving mental states in rape cases is the testimony of those involved. This is problematic because, as Ramírez Ortiz (2020) points out, in relation to the weighting of legal evidence, evidentiary law followed the principle that "one witness is no witness" for many centuries. Even Enlightenment thinkers such as Benthan and Beccaria cautioned against overvaluing the testimony of a solitary witness (pp. 204-206). Beccaria's argument that "more than one witness is always necessary, because as long as one affirms and another denies nothing is certain, and the right of each to be presumed innocent prevails" (Beccaria, cited in Rodríguez Ortiz, 2020, p. 206) seems relevant with regard to accusations of rape. In rape cases, the alleged victim may claim that they did not give consent and that they communicated this beforehand to the consent seeker, while the alleged aggressor may claim that they did obtain consent or that they interpreted certain words or gestures as confirmation of consent.

A related point with regard to cases in which only the two relevant parties (victim and aggressor) were present when an alleged rape took place is that any evidence other than the testimony of the parties will, as discussed previously, likely be more related to what Gardner calls the "epiphenomena surrounding the act" than to the act itself.

We are thus faced with a dilemma: evidence related to epiphenomena does not directly prove that rape—as in non-consensual sex—took place, while witness testimony by itself may not be enough to prove to a sufficient degree whether consent was given or not. If we accept the argument that only epiphenomenal evidence can effectively establish the facts then we must accept that the law can only punish rape when it is accompanied by epiphenomena (or when epiphenomena demonstrate that consent was not given), whereas if we accept the argument that testimonial evidence should be given due weight we must accept that evaluating the veracity of this evidence in cases with an element of doubt will necessarily be less factually precise compared with other types

of legal evidence. The testimony of one party may seem more credible that that of the other, but any decision in this regard cannot be justified epistemically, rather based solely on evidentiary policy. As such, while evaluating conflicting testimonies is a useful means of confronting the problem under discussion, this does not change the fact that it is very difficult to legally prove rape occurred.

V. CONCLUSIONS

In this paper I have proposed three core theses: the first is that the moral wrong of rape lies in the non-consensual crossing of the boundary which demarcates a moral right to bodily autonomy. This moral right may correspond to a legal right, but the two do not usually map precisely onto one another.

Secondly, expanding on the ideas of Larry Alexander, I have argued that the mental state of consent this mental state refers to a willingness to not object to the conduct of the consent seeker on the basis of the pre-existing right, which has been waived. This right is the right to bodily autonomy, as mentioned above.

Finally, I have argued that, if consent as a "normative transformer" is a mental state, what must be legally proved in cases of rape is the existence—or lack thereof—of consent on the part of the victim, and the belief that consent was or was not obtained on the part of the aggressor. This represents a significant challenge with regard to the weighing of evidence, since witness testimony is the preferred means of proving mental states (which are communicated *ex post*) in rape cases and there may be conflict between the perception of one party and the mental state of the other. All of this leads to the conclusion that not all cases of rape are punishable by law, nor can they be.

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