

# Rethinking the Wrong of Rape<sup>1</sup>

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## 1 Introduction

In the roughly four decades since rape has become a proper subject for mainstream philosophical inquiry, scholarship in this area, propelled mainly but not exclusively by feminist philosophers, has enriched our understanding of sexual violence against women.<sup>2</sup> Evolving alongside early influential accounts coming out of feminist theory and practice,<sup>3</sup> and often drawing from this work, philosophers have illuminated the role of rape in war,<sup>4</sup> in oppressive patriarchal norms and institutions,<sup>5</sup> and its dual role in racial oppression.<sup>6</sup> We have seen nuanced analyses that explore the lived experience of rape survivors,<sup>7</sup> from the complexity of sexual subjectivity to questions of personal identity, sexual agency, and autonomy.<sup>8</sup> There has also been some important conceptual work on how best to define rape, and, in a related vein, on what, fundamentally, is the wrong of rape.<sup>9</sup>

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<sup>1</sup> I owe a great debt of gratitude to the feminist thinkers and activists – too many to mention by name, though some are cited in what follows – whose work has nourished me and inspired me and helped shape my understanding of sexual violence against women. I am also grateful to Amalia Amaya and Eduardo Martinez for their insightful comments on an earlier draft of this paper, which were immensely useful in helping me to improve it.

<sup>2</sup> In what follows, my main emphasis is on rape against women. My focus is on women because of the historical facts of patriarchy and the endemic nature of sexual violence against women (tagged globally, perennially, at 1 out of 3; WHO, 2021), and the fact that the philosophical scholarship on rape, both legal and feminist, is, correspondingly, focused primarily on women. That said, I want to make a number of qualifications here. First, the analysis of the wrongness of rape developed here is not gender specific, applying equally to people all along the gender spectrum. Second, while my focus is on rape, the analysis here is inclusive of non-penetrative ‘sexual violence,’ a term I use to cover a broad range of sexual assaults. Third, while my focus is on women, the threat of sexual violence is not distributed evenly across all populations of women, not historically and not now. Examples of this abound, but here are a few: Black women in the United States experience higher than average rates of sexual violence owing to the legacy of slavery, with its legally and morally condoned sexual violence against African American women and girls (Tillman et al., 2010; Bryant-Davis et al., 2010) (in a recent *NYT* article, the poet Caroline Randall Williams (2020) exposes one dimension of this legacy with the opening line, “I have rape-colored skin”). In Canada, due to colonization, we see similarly high rates of sexual violence among Indigenous women (three times higher than non-Indigenous women (Boyce, 2016)). And, generally, women whose bodies are in some respect nonconforming are overrepresented when it comes to sexual violence – for instance, both disabled women and trans women are twice as likely to experience sexual violence than non-disabled women or cis women (Cotter, 2018; James et al., 2016).

<sup>3</sup> The list here is long, but classics include Brownmiller (1975), the Combahee River Collective (CRC) (1977), Dworkin (1976), Estrich (1987), and MacKinnon (1989). See Whisnant’s (2017) *SEP* entry for an extensive list of references. Chapter One of Cahill (2001) offers a nice analysis of the ‘power vs. sex’ question that was characteristic of these early feminist debates (see also Cahill, 2014, for further reflections on this issue in light of Gavey, 2005).

<sup>4</sup> As Claudia Card (1996) has shown us, “there is more than one way to commit genocide” (p. 8). See also Card (1991), Bergoffen (2003, 2013), MacKinnon (1994), Miller (2009), and Schott (2009, 2011).

<sup>5</sup> E.g. MacKinnon (1987, 1989), Pineau (1989), and West (1996).

<sup>6</sup> E.g. Bar-On (1999), Collins (2000; 2005), Davis (1981), Hooks (1981), and Roberts (1997).

<sup>7</sup> In what follows, I use both ‘victim’ and ‘survivor’ when referring to people who have suffered sexual violence, based on which is more apposite in a given context. For an account of some of the problems with both of these terms, with a particular emphasis on what’s wrong with the notion of ‘survivorship’ from a disability studies perspective, see Larson (2018).

<sup>8</sup> E.g. Alcoff & Gray (1993), Alcoff (2018), Brison (2002), Cahill (2001, 2016), du Toit (2009), Frye & Shafer (1977), and Hänel (2018a).

<sup>9</sup> A number of the essays in the Burgess-Jackson collection (1999) focus on conceptual issues, including Baker (1999), Gauthier (1999), Burgess-Jackson (1999), Archard (1999), and Hampton (1999); see also fn.11, below.

Some of this conceptual work has been driven by philosophers of law, and no wonder. From a legal perspective, we want to know not just what makes rape wrong, but what makes it a serious, criminal wrong. While this scholarship has generated important insights into various aspects of rape and criminal law, it has also produced a thread of debate that perpetuates a fundamentally flawed conception of the trauma of rape. I am referring to an idea developed in the well-known essay, *The Wrongness of Rape* (2000), by legal philosophers John Gardner and Stephen Shute.<sup>10</sup> In this paper, Gardner and Shute argue that to discover what is really wrong with rape, we need to separate the wrong of rape from its harms. They propose a ‘pure case of rape’ (*pure case* hereafter). In this case, which I describe in detail below, a woman is raped while unconscious, and the rape, for a variety of stipulated reasons, “never comes to light” (p. 7), a scenario they describe as “possible, but unusual” (p. 6). On their account, this makes the *pure case* a harmless case of rape, which means that if rape is a serious and criminal wrong, as they insist it is, then its wrongfulness must lie outside its harmfulness. This clears the path for their argument that rape is wrong because it is the sheer use of a person.

Over the years, there have been a number of objections to Gardner and Shute’s *pure case*, but none of them get at what is really problematic with their notion of a harmless rape, and so the idea lingers, re-emerging in subsequent work by Gardner (2012, 2016) and others.<sup>11</sup> This is unfortunate. As I argue below, the contention that the *pure case* is a harmless rape gains traction by relying on a notion of trauma as an evaluation-dependent reaction, in this case, by a victim to her rape. This is an outdated conception of trauma (certainly now, arguably so in 2000). The science of trauma reveals that it goes wrong by conflating evaluative responses – our self-reflective appraisals – with non-deliberative somatic ones which arise from the automatic response of a central nervous system to a threatening event. This is significant not just because it exposes that the thinking behind the *pure case* is misguided, though it is, but, more broadly, because it reflects the way that current philosophical legal scholarship on rape is out of step with contemporary neuroscientific research on trauma. This is a missed opportunity. An updated conception of trauma can prompt us to rethink the wrong of rape, and usher in a much-needed trauma-informed model, putting pressure on the consent and coercion models prevalent in both criminal law and feminist discourse.

The bulk of this paper is devoted to showing what is wrong with the notion of a harmless rape. In §2, I describe the *pure case*, turning to neurobiological models of trauma in order to elaborate my main objection to it. This gives me an opportunity to develop a robust conception of trauma, and elaborate the different ways that rape harms its victims, including the central way, what I call ‘threat-circuitry harm.’ This discussion of trauma invites us to rethink the wrong of rape, and opens the door for my argument, in §3, that the wrong of rape consists in its central

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<sup>10</sup> “The Wrongness of Rape” was originally published in Horder (ed.), (2000), and reprinted in Gardner (2007). All references here are to the (2000) version of the article.

<sup>11</sup> Husak (2009) expresses sympathy for Werheimer’s (2003) ‘experiential’ view but accepts the idea of a harmless rape as a statistically unusual case. In a parallel consideration of domestic abuse, Tadros (2005) accepts the idea of a harmless rape, but objects to Gardner and Shute’s methodology: “the fact that there may be cases of this sort should not incline us to think that psychological trauma is not central to what is wrong with domestic abuse” (p. 1008). Statman (2012) makes a similar claim, arguing that the *pure case* is not the paradigm, but the exception. Archard (2007), following Feinberg (1984), adds a third category, ‘hurtfulness,’ in addition to harmfulness and wrongfulness, but accepts Gardner and Shute’s basic characterization of the *pure case* as (in his terms) a hurtless case. Watt (2014) is particularly troubled by the *pure case*, arguing that it fails to account for the harm to the reader, whose empathetic response to rape (“it freezes our hearts” (p. 50)) is at the root of the wrong of rape. In Gardner’s (2016) response to Watt, he reaffirms his commitment to the *pure case* as a harmless rape: “[Watt] has helped to confirm our hunch...that an undetected rape, hence a rape giving rise to no trauma, is still very seriously wrong” (p. 5).

harm. This view of the wrong of rape captures the embodied experience of rape and can be used to help progressively reform aspects of the criminal justice system, thereby offering some hope of securing a modicum of justice for rape survivors, something that, globally, it has almost completely failed to do.<sup>12</sup>

## **2 The Harm of Rape**

### **2.1 The *pure case***

Rape, by all accounts, is a serious wrong. But what makes it so? A common answer is that rape is a serious wrong *because* it causes grave harms to victims of rape. In their paper, Gardner and Shute (2000) consider but reject this possibility. Of course, they say, rape has the potential to result in terrible harms, sometimes unspeakable ones. These harms include not just physical injuries, but also what they refer to as devastating “feelings of violation” (p. 5). On their account, feelings of violation constitute the trauma of rape, and consist in evaluative judgments made by rape survivors in the aftermath, and include a sense of insecurity, loss of trust in men, a reduction of self-esteem, and feelings of humiliation. These are harms, they argue, because they change someone’s life for the worse.<sup>13</sup> And while Gardner and Shute do not reject the harm principle as a basis for the criminalization of rape, they reject that the trauma of rape can provide a basis for it, since it is comprised of a set of harms that hinge on the victim’s own evaluation of her experience, or so they argue.

This is the set up for the *pure case*. For what about those cases, they wonder, wherein the victim has no awareness of her experience? What if, for instance, a woman was drugged and rendered unconscious, and was thus unaware that she was being raped, and yet was sufficiently lubricated – perhaps, they suggest, this was a date-rape – such that there were no physical injuries as evidence of the crime. If these conditions are met, which they describe as possible but unusual, then “a victim may be forever oblivious to the fact that she was raped” (p. 6). As such, they argue, her life cannot go any worse for her. Furthermore, if we imagine that her rapist, who wore a condom (thus preventing STDs or pregnancy), dies immediately after the attack, then the rape would also make no difference to his prospects, nor could he harm his victim in the days or months following the attack, say, by boasting about it. Thus, they conclude, the *pure case* is a harmless case of rape.

And yet, they insist, even though the rape victim was unharmed, she was nevertheless wronged. This means that the wrong of rape must be distinct from its harms. And so, what is it that makes rape wrong? Their answer, referred to above, is that rape is objectifying; it is the

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<sup>12</sup> Equality Now’s (2017) report, which surveys 82 jurisdictions (within 73 UN member states), documents the range of these global legal failures, including some of the more egregious ones (for instance, where perpetrators of rape can legally escape punishment by marrying their victims, or by reaching a ‘settlement’ with the victim’s family), but the failures go beyond anachronistic laws. Even in a country like Canada, which undertook a major reform of its rape laws in 1983, over 90% of sexual assaults go unreported (Craig, 2018; Johnson, 2012), on par with most jurisdictions and due, in large part, to a well-founded distrust and fear of the criminal justice process, for reasons to be discussed in what follows.

<sup>13</sup> In an often-cited paragraph from *On Liberty*, John Stuart Mill (1859) says, “That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others” (Ch. 1 paragraph 9). Gardner and Shute (2000, fn. 6) put themselves in the camp of those who endorse Raz’s (1988) interpretation of the harm principle.

sheer use of a person.<sup>14</sup> Drawing on Nussbaum's (1995) work on objectification, they argue that the sheer or mere use of a person is abuse. It is a kind of instrumentalization, which is dehumanizing, and rape is the central case of this: "That a rapist objectifies his victim by treating her as a mere repository of use-value is, in our view, what is basically wrong with rape" (p. 20).<sup>15</sup> This allows the harm principle in through the back door, as it were, for if even a harmless rape were not criminalized, then *that*, they argue, would be harmful, since the absence of a legal deterrent would result in an increased incidence of rape, which would increase the number of violations of women's sexual autonomy, and increase women's justifiable fears of being treated as sex objects. These sorts of indirect harms, on their account, require that all cases of rape be criminalized, even if not all cases result in direct harm to those who are raped.

I will not evaluate the merits of this argument here.<sup>16</sup> My interest lies only with the *pure case*, and, in particular, with Gardner and Shute's contention that it is a harmless case of rape. To see why they are wrong about this, remember that, on their account, someone is harmed if their life is changed for the worse. In their view, rape typically results in harm of this diminishing sort, but not so in the *pure case*. The reason for this is because, on their account, there are two kinds of ways that a rape survivor's life can be changed for the worse, and the *pure case* rules out both.

The first way is through physical injuries. Although they are not explicit about this, it is clear that what they mean by 'physical' is clinically detectable injuries, like genital tearing, abrasions, and bruising, the sorts of physical wounds which can play a significant evidentiary role in criminal proceedings.<sup>17</sup> Gardner and Shute refer to the physical harms of rape as being overemphasized historically, alluding to a fraught history of an outdated concept of rape in which forensic evidence of physical trauma is necessary as proof of rape, and lack thereof as evidence of consent (the law still requires medical evidence of this sort in at least half a dozen countries (Equality Now, 2017)).<sup>18</sup>

The notion that all acts of rape result in overt physical injuries is a pernicious falsehood that feeds into one particular class of rape myths (that 'real rape' is violent; that if there is no

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<sup>14</sup> In (2016) Gardner continues to maintain that the wrong of rape lies in its objectification of a person but pulls back from his and Shute's earlier emphasis on *sheer* use.

<sup>15</sup> Stanton-Ife (2010) puts pressure on Gardner and Shute's claim that objectification *alone*, without considerations of consent, constitutes the wrong of rape, noting that they tolerate objectification in the case of prostitution and pornography, i.e. in cases where it is consensual (or licensed). Plaxton (2014) uses Gardner and Shute's analysis as a starting point to engage more thoroughly with Nussbaum's view of objectification, and the mitigating role of mutuality embedded in the norms of particular types of relationships. On this point, see also Marino (2008).

<sup>16</sup> Although I do wonder, along with Husak (2009), how to interpret these indirect harms. Are Gardner and Shute's claims about rising incidence rates in the absence of criminalization empirical predictions, for instance? More to the point, how could a rape that *never* comes to light impact anything, let alone incidence rates? On this point, and a way around the problem it raises for the harm principle, see Spina (2010).

<sup>17</sup> The evidential significance of genital injuries in rape cases is a complicated issue, for a variety of reasons, not least of which is the unreliability of forensic evidence of rape. In his discussion on this issue, forensic physician Graeme Walker (2015) states that "research in this area has been plagued with multiple uncontrollable variables which make reliable conclusions virtually impossible" (p. 173). He goes on to show that we can conclude virtually nothing about the nature of sexual contact in most cases of genital injury (barring extreme ones), since both consenting and non-consenting sexual contact may or may not result in genital injury. And indeed, studies show the incidence of genital injuries from rape range wildly, anywhere from 5% to 87%, a variability that can be attributed to any number of factors, including differential definitions on what counts as a 'genital injury,' timing of examination vis-à-vis timing of rape, and participant inclusion criteria (Orellano-Campos, 2020).

<sup>18</sup> See Dowds (2020) for an overview of the regressive narratives of force and resistance in interpretations of rape as a crime of extreme violence.

genital trauma, there was no rape; that if a woman doesn't fight back, there was no rape;<sup>19</sup> and that consenting women 'open up' to sexual contact by naturally lubricating, such that if she didn't want it, her body would have said 'no'<sup>20</sup>), which, like all rape myths, perpetuate victim-blaming norms and serve to undermine the credibility of rape survivors.<sup>21</sup> The fact that one could survive a rape and appear physically intact is what prompts Gardner and Shute's reference to date-rape, which is meant to assure us that it is possible to be raped while sexually aroused – drunk, drugged, or otherwise – such that someone could be raped while unconscious and not show any physical signs of genital trauma. If this is right, and it seems clear that it is, then one important way a rape survivor's life could be changed for the worse is ruled out.<sup>22</sup>

The second way that a rape survivor could be harmed, on their account, is through the feelings of violation that often plague rape survivors in the aftermath – the shame, grief, horror, and rage, as well as a sense of insecurity or loss of trust. Again, on their account, these are evaluative judgments by a victim about her rape, which comprise her subjective experience in the aftermath, and constitute the trauma of rape. As they say: "Some of it may be physical injury, but apart from that kind of injury any harm to the victim depends on the victim's evaluations of what has been done to her" (p. 9). But in the *pure case*, remember, the victim has no awareness of her rape, and hence has no ability to evaluate it in the aftermath:

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<sup>19</sup> "Why couldn't you just keep your knees together?" was what Alberta Judge Robin Camp asked a rape survivor in his courtroom, in 2015, stating in his judgement that the woman had failed to explain "why she allowed the sex to happen if she didn't want it"; <https://www.theglobeandmail.com/opinion/myths-and-stereotypes-some-judges-still-dont-get-it/article27164326/>.

<sup>20</sup> This line of thinking is what was behind former US Republican Representative Todd Akin's comment, in 2012, that "if it's a legitimate rape, the female body has ways to try to shut that whole thing down"; <https://www.nytimes.com/2012/08/20/us/politics/todd-akin-provokes-ire-with-legitimate-rape-comment.html>.

<sup>21</sup> The deleterious impact of rape myths undermine the credibility of rape victims at every point of contact with the criminal justice system, impacting which rapes get treated by police as crimes, which ones get taken up by prosecutors, and which ones result in convictions by judges and juries (Craig, 2018; Doolittle, 2017; Johnson, 2012), and is one contributing factor to the underreporting of rape, presenting a case in point of what Kristie Dotson (2011) calls 'testimonial smothering,' wherein someone suffers a testimonial injustice as a result of a kind of coerced self-silencing. This routine undermining of rape victims' credibility epitomizes Fricker's (2007) central case of identity-prejudicial credibility deficit. These victims end up suffering not just the distinctive primary harm of testimonial injustice, but considerable secondary harms as well (see Freedman, 2020, on this point). And note, credibility is not something that is evenly apportioned among women. The credibility of Black women, for instance, is further undermined by intersecting myths about their sexuality: Black women are 'jezebels'; they have insatiable sexual desires; they aren't 'rapeable'; they are strong and can 'take it'; etc. (Capers, 2013; West & Johnson, 2013), which is one factor in the lower-than-average rates of reporting among this population (Tillman et al., 2010). See Peterson and Muehlenhard (2004) on the impact of rape myths on women's ability to make sense of their own experiences of rape, and Jenkins (2017) for an argument that this is a kind of hermeneutical injustice.

<sup>22</sup> The demand on women to demonstrate physical evidence of rape has almost never worked in their favour, certainly not historically, but even now, and not only because it amplifies damaging misconceptions about what constitutes rape, but also because it invites further and protracted poking and prodding of women's bodies in alleged safe spaces (i.e. hospital rooms), the prospect of which can be terrifying and retraumatizing for someone who has just been raped, and in particular, for racialized, gender non-conforming, and trans women, whose bodies are perpetually under threat due to structural racism, transphobia, and transmisogyny. I say 'almost never' because the promise of a medical examination, for a rape victim, is the conviction of her rapist, via DNA and other evidence collected in a rape kit, offered as incontrovertible proof of rape at trial. Unfortunately, this promise has not materialized as once was hoped, and not just because most rape cases never make it to trial, but also because rape kits are expensive to test, they accumulate faster than police departments can process them, and they are often not prioritized within the system, and as such they wind up in warehouses, collecting dust (Kennedy, 2020). In the US, for instance, in 2015, the total backlog of untested rape kits was in the vicinity of 400,000 (Hagerty, 2019).

So our case of the utterly harmless rape – perpetrated on a sexually aroused but somatic victim and leaving no trace on her memory or her body (or indeed any other trace) – is the pure case because it strips out the epiphenomena. It strips out not only the physical injuries but also the victim’s evaluation-dependent reactions to the rape. It is rape pure and simple (p. 9).

Since, on their account, rape victims can be harmed in only two ways, and the *pure case* rules out both, it is, they conclude, a harmless rape. But what Gardner and Shute fail to recognize is that not all physical harms which result from rape are clinically detectable, and not all feelings experienced in the aftermath are evaluation dependent. These errors rest on their misconception of the trauma of rape.

## 2.2 The trauma of rape

The history of the concept of trauma is a fascinating one, evolving around the mid- to late-1800s from its early meaning, referring to strictly physical injuries, still seen in medical contexts (e.g. trauma wards, trauma surgeons), to the psychologized notion of trauma in common use today, understood roughly as a psychic wound resulting from exposure to a terrifying event.<sup>23</sup> This paradigm shift opened up a new way of conceptualizing harm, one which was decidedly unsettled for much of the twentieth century, mutating in important respects over time.<sup>24</sup> Interest in the idea of trauma waxed and waned throughout this period, gaining cultural currency in the context of catastrophic events like the First World War, the Holocaust, and the Vietnam War, in light of the prevalence of post-war forms of suffering. It was following the Vietnam War, as a result of the activism of psychiatrists, social workers, and others on behalf of returning Vietnam vets, that psychological trauma became an official psychiatric category in American Psychiatric Association’s (APA) third edition of its *Diagnostic and Statistical Manual of Mental Disorders (DSM-III)*, in 1980, with the nomenclature of ‘posttraumatic stress disorder’ (PTSD).<sup>25</sup> By then, the concept of trauma had settled into the zeitgeist, and it was not long before feminists, therapists, and medical professionals noticed that survivors of rape and childhood abuse exhibited symptoms similar to those of combat veterans.<sup>26</sup>

While the diagnostic criteria for PTSD have undergone significant revisions over subsequent editions of the DSM, exposing the social dimensions of diagnosis and bringing fresh controversy with each set of changes,<sup>27</sup> the science of trauma has been advancing apace, with dramatic innovations in imaging techniques driving neurobiological models of trauma, which now dominate the field.<sup>28</sup> Our understanding of trauma continues to evolve, and what counts as a

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<sup>23</sup> The superb collection of essays in Micale and Lerner (2001) tell the story of the early history (1870-1930) of the psychologization of trauma in Europe and America, from railway spine to shell shock, through Charcot, Freud, Janet, and others.

<sup>24</sup> From hysteria and traumatic neuroses through to shell shock, gross stress reaction, and posttraumatic stress disorder (PTSD), each new label reflecting shifting conceptions of trauma. See Leys (2000) for an intellectual and cultural history of trauma through the twentieth century.

<sup>25</sup> See Scott (1990) for the story of the political struggle to have PTSD recognized as an official psychiatric disorder in *DSM-III*.

<sup>26</sup> Judith Herman’s *Trauma and Recovery* (1992) is the landmark work in this field.

<sup>27</sup> See Young (1996) on the ‘invention’ of PTSD; see also Leys (2000), Scott (1990), and Summerfield (2001).

<sup>28</sup> van der Kolk (2014) refers to this period, which he marks as the early 1990s, as the ‘Neuroscience Revolution.’

traumatic stressor continues to engender debate,<sup>29</sup> but we now have a pretty good idea of what happens to brains and bodies under conditions of extreme threat.

Trauma theorists and trauma therapists have long understood that traumatic events, standardly defined as ones that threaten life or bodily integrity, such as war and rape, overwhelm the ordinary systems of functioning in the human brain. Working with survivors of traumatic events, they have long observed a relatively consistent set of behaviours, or, to use a medicalized term, symptoms, in the aftermath of these events, despite the variability in the experience of rape and its aftermath.<sup>30</sup> Although not everyone who suffers a traumatic event develops the full range of these symptoms, and not always to the same degree, they are typical of rape survivors.<sup>31</sup>

We can use the conceptual framework of PTSD from the *DSM-5* (2013) to describe these symptoms.<sup>32</sup> Some of them are best characterized as somatic, including intrusion symptoms (e.g. flashbacks, recurrent intrusive thoughts, and distressing dreams), hyperarousal and reactivity symptoms (e.g. sleep disturbance, difficulty concentrating, irritability, exaggerated startle response, and hypervigilance), and numbing symptoms (e.g. hypoarousal, emotional detachment, and derealization). Other symptoms are best characterized as reflective, lining up (more or less) with Gardner and Shute's feelings of violation, including negative alterations in mood and cognitions (e.g. persistent and exaggerated negative beliefs about oneself, others, or the world, persistent distorted cognitions, and persistent negative emotional states), as well as avoidance behaviors (e.g. avoidance of activities, people, places, and things that are reminders of or associated with the event) (pp. 271-272).

First-person accounts of rape chronicle the full range of these symptoms, although often in less clinical terms, illustrating that the subjective experience of rape survivors encompasses both the evaluative appraisals and somatic sensations that are characteristic of PTSD.<sup>33</sup> So, for

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<sup>29</sup> The stressor criterion of PTSD is unique among psychiatric diagnoses, and the description of it is something that each edition of the DSM, in one way or another, has failed to get right. In *DSM-III* (1980), a traumatic event was defined as 'outside the range of usual human experience,' which inadvertently precluded rape. In *DSM-IV* (1994), one of the categories of exposure of traumatic events included 'witnessing of traumatic events to others,' which raised the so-called bracket creep concern (McNally, 2009; Spitzer et al., 2007), allowing that viewing traumatic experiences on TV could count as genuinely traumatic, which, as Summerfield (2001) argues, pathologizes and creates a medical condition out of normal human distress. Some of these concerns have dissipated with the publication of *DSM-5* (2013), and the move from 'witnessing of traumatic events to others' to 'witnessing *in person*...', but other concerns have emerged about the inclusion of a new exposure category that applies to workers who encounter the consequences of traumatic events because of their jobs (for example, does this include trauma therapists?); see Pai et al. (2017).

<sup>30</sup> This variability hinges on a range of factors, including one's gender identity, personal history, social and political framework, and cultural and religious commitments.

<sup>31</sup> Research suggests that the development of full-blown PTSD following a traumatic event has to do with a variety of factors, including the extremity of the attack, predisposition to stress resulting from genetic heritability, and developmental stress resulting from early histories of complex trauma (that is, occurring chronically) (Fenster et al., 2018; Ogden et al., 2006). We also know that early therapeutic treatment can be critical to avoiding long-term symptoms, and therefore health inequities – who has access to mental health care, for instance – are a factor here, with the result that poor health outcomes track class and racial dimensions (Bryant-Davis et al., 2010; Ansell, 2017).

<sup>32</sup> The conceptual framework of PTSD from the DSM remains the industry standard, despite the controversies that arise with each new edition. For an overview of the some of the problems with PTSD in the most recent *DSM-5* (2013), see Pai et al. (2017) and Wakefield (2013). Hoge et al. (2016) offer a scathing critique, which concludes with this comment: "The purpose of revising a psychiatric definition is to enhance diagnostic accuracy, clinical utility, and communication. The *DSM-5* definition of PTSD provides no improvement in these areas" (p. 751).

<sup>33</sup> Despite the formidable pressures on women to keep silent about their experiences of sexual violence (Freedman, 2020), first-person accounts abound in the media, popular culture, and rape memoirs (currently, there are 675 of

example, a rape survivor might describe herself as feeling empty, listless, and stuck, or alternatively as jumpy, unable to let down her guard around others, or feel at ease in sexual encounters, even with a loving partner. She might describe the flashes of unwanted images, which she cannot get out of her head, not even while asleep, and the unexpected panic, which never fails to take her by surprise, even though she's always waiting for it, and how that makes her feel helpless and anxious. And she might, upon reflection, feel that all of this has wreaked havoc on her ability to sustain intimate relationships and taken a serious toll on her well-being, her feelings of self-worth, and her view of the world.

First-person accounts of PTSD offer a fairly reliable picture of what rape and its aftermath can feel like, from the inside. But this just raises the question of *why* rape results in these feelings and symptomatic behaviors. That is, why is rape traumatic? What happens to the brain under conditions of extreme threat like rape, such that survivors feel and behave as they do? We can find answers to these questions by turning to neurobiological models of trauma.

Our brain is evolutionarily wired to scan for danger. When it senses threat, the amygdala, the central hub of the defense or threat circuitry in the brain (what used to be called the 'fear center'<sup>34</sup>), is activated and triggers a fight-or-flight or (the less well-known) freeze response.<sup>35</sup> These are reflexive, adaptive biological reactions to help us avoid or cope with danger. Once the threat circuitry is engaged, it releases stress chemicals, like adrenaline and cortisol, which increase heart rate, respiration, and blood pressure, and can significantly impair attention. In cases of momentary threat, the secretion of stress hormones tapers off. But not so in acute cases, when the threat is inescapable:

If for some reason the normal response is blocked – for example, when people are held down, trapped, or otherwise prevented from taking effective action, be it in a war zone, a car accident, domestic violence, or a rape – the brain keeps secreting stress chemicals, and the brain's electrical circuits continue to fire in vain (van der Kolk, 2014, p. 54).

This experience of extreme stress alters brain circuits. According to Bremner (2006), "stress results in acute and chronic changes in neurochemical systems and specific brain regions, which

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these available on amazon.com). We also learn of these stories as they are retold (anonymously) by trauma therapists (e.g. Frewen & Lanius, 2015; van der Kolk, 2014).

<sup>34</sup> This move away from talk of 'fear center' and 'fear behaviors' to 'defense/threat circuitry' and 'defensive behaviors' has been driven by the work of Joseph LeDoux (and collaborators) (LeDoux, 2015a, 2015b, 2020; LeDoux and Pine, 2016; LeDoux and Brown, 2017; Brown, et al., 2019), and marks a reversal of sorts from LeDoux's previous position (LeDoux, 1996). It is more than just a shift in terminology, but reflects a conceptual reframing of fear as part of a higher-order theory of consciousness (LeDoux & Brown, 2017; Brown et al., 2019), in which subjective feelings (e.g. fear) are distinct from non-conscious amygdala-driven threat responses in the brain; hence, the move away from using mental state terms (i.e. fear) to describe what are essentially functions of brain circuits. On this view, fear is the awareness that you are in danger or are being threatened. For some of the implications of LeDoux's conceptual shift for the philosophy of emotion, see Majeed (2020).

<sup>35</sup> This is referred to as the *defense cascade* (Kozłowska et al., 2015), envisioned as proceeding along a continuum, depending on the level and proximity of threat, and moving from arousal to fight-flight-freeze, and then to the more extreme tonic immobility (where the person can't move or speak), collapsed immobility (a variant of tonic, when active defenses have failed) and quiescent immobility (playing dead), depending on which defensive behavior is best geared to survival.



result in long-term changes in brain ‘circuits,’ involved in the stress response” (p. 446).<sup>36</sup> Studies suggest that these brain changes can depend on which defense reaction is taken,<sup>37</sup> but generally, extreme stress impairs the medial prefrontal cortex (PFC) (the rational part of our brain that regulates cognitive function),<sup>38</sup> increases activity in the amygdala (the so-called ‘threat center’ of the brain), and results in a reduced hippocampal volume (which is implicated in storage and memory retrieval).<sup>39</sup>

Importantly, research shows that the defense circuitry of threat detection in the brain operates subcortically, that is, below a level of conscious awareness, and thus before we even feel afraid (for LeDoux, fear is the awareness that you are in danger or are being threatened; see fn. 34, above).<sup>40</sup> This is thought to be an evolutionary adaptation, since in the face of extreme threat reflective deliberation can slow us down. And indeed, studies show that visual threats which are presented subliminally activate the amygdala, even when participants deny seeing the stimulus. According to LeDoux and Brown (2017), “under such conditions, participants do not report feeling fear, even when explicitly instructed to be introspective about what they are experiencing” (p. 2).<sup>41 42</sup>

### 2.3 Threat-circuitry harm

This basic description of what happens to the brain in cases of threat to life or bodily integrity is explanatory on a number of fronts. A traumatized brain is structurally different from a non-traumatized brain. The science of trauma has brought back the idea of trauma as a physical injury, although now, one that is undetectable to the naked eye. The psychological jolts to the nervous system are the result of structural changes in the brain. This manifests in the typical symptoms of PTSD and can help to explain some otherwise curious behaviors of rape victims –

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<sup>36</sup> While the impact of extreme stress on an adult brain can be transformative, the detrimental effects are even more pronounced in children. Studies show that traumatic events in the lives of children, especially in cases of complex trauma (chronically occurring), are profoundly damaging to neurodevelopment, resulting in a broad range of physical and physiological ailments (e.g. impaired neural functioning, compromised immune systems, dysregulation of affect, and metabolic changes, to name a few); the greater the number of traumatic events (as scored by adverse childhood experiences (ACEs)), the more damaging the impact on a child’s ability to learn and regulate affect (National Scientific Council on the Developing Child, 2005/2014).

<sup>37</sup> Terpou et al. (2019) note that freezing or immobility-type defense responses are correlated with the dissociative subtype of PTSD. Dissociation can be indicative of prolonged, repeated, or chronic trauma, in which any active attempt of physical escape has been abandoned, hence the default to passive responses of psychological escape, namely dissociation, as an adaptive coping mechanism to an overwhelming threat. They find that dissociation is reflected in brain changes, reporting that the “neural alternations at the level of the periaqueductal gray that is unique to the dissociative subtype” (p. 1123). See also Kozłowska et al. (2015) and Lanius et al. (2003).

<sup>38</sup> For an explanation of how neurochemical changes brought about by extreme stress impair PFC function, see Arnsten (2009) and Sherin et al. (2011).

<sup>39</sup> Fenster et al. (2018) note that the evidence on *why* there is reduced hippocampal volume, which is a main indicator of a traumatic event, is underdetermined: “whether trauma leads to hippocampal atrophy in individuals who develop PTSD or whether having small hippocampi predisposes an individual to PTSD remains controversial” (p. 543). See also Sherin et al. (2011).

<sup>40</sup> As Kozłowska et al. (2015) say, “In evolutionary terms the responses that make up the defense cascade are primitive emotional states – coordinated patterns of motor-autonomic-sensory response – that are available to be automatically activated in the context of danger” (p. 264). See also Pichon et al. (2012), LeDoux & Brown (2017), LeDoux & Pine (2016), and Vida & Behrmann (2017).

<sup>41</sup> See Pichon et al. (2012) and LeDoux & Brown (2017). These empirical studies provide support for LeDoux and Brown’s higher-order theory of consciousness.

<sup>42</sup> Stephen Porges (2004, 2009) coined the term ‘neuroception’ to refer to the subcortical process of threat detection which occurs outside of conscious awareness.

for instance, why they might not fight back when under attack, why their memories can be disjointed and fragmented, why regulating states of arousal can be challenging, and why they can be particularly reactive to certain environmental stimuli – why an unexpected touch on the arm, for instance, can trigger a disproportionate physiological response. As van der Kolk (2006) observes, trauma survivors “blow up in response to minor provocations, freeze when frustrated, and become helpless in the face of trivial challenges” (p. xx). It is as if the brain gets jammed in a threat circuit, primed for danger, and is unable to stop scanning. Whereas this can be a life-saving adaptive response in conditions of extreme threat, it becomes maladaptive once the threat is gone: “for traumatized individuals, the debilitating, repetitive cycle of interaction between mind and body keeps past trauma ‘alive,’ disrupting the sense of self and maintaining trauma-related disorders” (Ogden et al., 2006, p. 3). The traumatized body, it has been said, keeps the score. Its dysregulated affect exhibits the signs of a body stuck in a state of alertness, awaiting the return of the predator, and rooted in the expectation of catastrophe, thereby interfering with basic human systems of biological functioning – eating, sleeping, breathing, and connecting with others.<sup>43 44</sup>

I will call these structural changes to the brain ‘threat-circuitry harm,’ according to the notion of harm as that which changes someone’s life for the worse. Threat-circuitry harm is a distinctive harm; it arises in our neural circuits and plays out in our brains and bodies. In some cases, people’s brains rebound relatively quickly, but depending on the level of danger, combined with genetic and environmental factors, the harm can develop into full-blown PTSD. The science here continues to evolve, and there is a good deal of theoretical debate over the relationship between complex neural networks, evaluations, and somatic responses,<sup>45</sup> but some of these connections seem clear enough.

Amygdala-driven threat responses in the brain cause structural changes, i.e. threat-circuitry harm, which result in the hallmark somatic symptoms of PTSD – intrusion, fluctuating arousal, reactivity, and numbness. These are the profound embodied effects of trauma. It is less obvious that structural brain changes directly cause evaluative symptoms of PTSD. Certainly, a traumatic experience is not a necessary condition for evaluative symptoms, which appear across a range of mood disorders (and, indeed, absent any such ‘disorder’). What’s more, in the case of PTSD, somatic symptoms can occur prior to evaluative appraisals, and can appear independently of them.<sup>46</sup> This is unsurprising, given the way trauma takes root in the body, and given that

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<sup>43</sup> Wakefield (1992, 2007) calls this a ‘harmful dysfunction,’ where ‘dysfunction’ is the objectively measurable interference with the biological functions of bodies, and ‘harmful’ is the negative value prescribed to this dysfunction.

<sup>44</sup> The neurobiological model of trauma, with its emphasis on trauma as rooted in the brain and body, has motivated the ‘somatic turn’ in therapeutic treatment of trauma, with an emphasis on sensorimotor, or body-based therapies, either on their own or in combination with traditional psychotherapeutic (i.e. talk) therapies. Bessel van der Kolk and Ruth Lanius stand out among the leading figures here, in terms of integrating neuroscience and trauma therapy. Prominent somatic therapies include somatic experiencing (Levine, 2010), Eye Movement Desensitization and Reprocessing (EMDR) (Shapiro, 2017), the polyvagal theory (Porges, 2011, 2017; Dana, 2018), neurofeedback (Fisher, 2014), and the sensorimotor approach (Ogden et al. 2006).

<sup>45</sup> LeDoux and Pine (2016) argue for a ‘two-systems’ view, “with one set of circuits for generating conscious feelings and a second set for controlling behavioral and physiological responses typical of such experiences” (p. 1083). See also LeDoux & Brown (2017).

<sup>46</sup> There is an argument to be made that, in the case of PTSD, self-appraisals are interpretive narratives of the somatic experiences that precede them. As Porges (2017) describes it: “There are people who pass out during public speaking, and it is not really that they get anxious, they just go *whoosh* and they faint. Fainting, known clinically as vasovagal syncope, is due to a rapid and massive drop in blood pressure, which results in insufficient oxygenated

chronic physiological arousal can impede a rape survivor's ability to assimilate or resolve (what, in the vernacular, we call 'process') her traumatic experience, thus hindering self-reflection.<sup>47</sup> When this occurs, there can be a mismatch between a survivor's self-reflections and her body's response to trauma.<sup>48</sup> This can result in cognitive dissonance for the survivor, who might believe that she has survived her rape unscathed, only to find herself unable to make sense of her disruptive embodied experience ("I am just fine, so I don't know why I am having trouble sleeping").<sup>49</sup> This can also manifest as recalcitrant emotions – feeling afraid, for instance, in the acknowledged absence of danger.<sup>50</sup>

This mismatch between self-reflection and somatic experience in the aftermath of a traumatic experience is not inevitable. Sometimes a survivor's self-evaluations line up with her somatic experience – her unruly body leaves her feeling unfairly damaged, for instance. But the split sense of self which arises in misaligned cases can be disconcerting, as anyone who has experienced this knows, particularly because somatic responses are immune to rational persuasion. Try as she might, the rape survivor cannot reason herself out of her body's automatic response to a threat that has long since passed.<sup>51</sup>

## 2.4 The *pure case* revisited

We are now in a position to see what is wrong with Gardner and Shute's contention that the *pure case* is a harmless case of rape. It rests on a misunderstanding of the trauma of rape. This leads them to suppose that rape victims can suffer only two sorts of harms, such that absent clinically detectable physical injuries and evaluative feelings of violation, there can be no harm. Although Gardner and Shute lament that there has not been enough attention paid to women's experiences of rape, "the way that a victim's life is changed *for her* by the fact of having been raped" (p.5; italics in original), they, too, fall short on this front. For as we have just seen, paying close attention to the experience of rape illustrates that there is a third way that rape harms its victims,

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blood flow to the brain. This reaction is often due to the nervous system detecting cues of life threat. Once this neurophysiological response occurs, the conscious brain tries to make sense of the sequence and builds a plausible personal narrative. Often the personal narrative focuses on self-esteem, but the cause of the reaction may not be related to self-esteem; it may be triggered by another feature in the environment, such as confinement or isolation" (p.178; italics in original), where being confined 'on stage,' so to speak, can prompt a bodily memory of being trapped in a dangerous scenario.

<sup>47</sup> Duff's (2001) discussion of Feinberg's harm principle in the case of burglary is illustrative here. As Duff describes it, the victim of a burglary might experience evaluative feelings of distress about the burglary (e.g. concern or fear of future invasions, inability to enjoy the property which was vandalized, etc.), and these effects might be significant enough to constitute setbacks to interest and, thus, harms, but they need not be. Duff's burglary victim is analogous to the survivor who does not experience evaluative harms of rape, for one reason or another, even while threat-circuitry harm plays out in her body: "For those feelings reflect the victim's *recognition* of the harm that he has suffered in being burglarized. If he did not realize that he had been burglarized, this would not mean that he did not suffer a harm of this distinctive kind; it would mean that he did not realize that he had been thus harmed. Here, as elsewhere, even if what you don't know can't hurt you, it can harm you" (p. 23; italics in original).

<sup>48</sup> In earlier work (2007, 2014), I referred to the impact of traumatic events on our brains and bodies as the 'shattered self,' which, I argued, is distinct from our cognitions, i.e. our beliefs about the world, which I called the 'shattered worldview,' where both are vulnerable to change in the aftermath of rape. I continue to maintain this distinction, but I now see that there is overlap between the two sides, which are bridged by (cognitively contentful) self-reflective appraisals.

<sup>49</sup> This is one reason why therapists gather information about trauma survivors from a number of methods of observation, where self-reports are just one contributing factor (Ogden et al., 2006).

<sup>50</sup> Porges (2017) calls this 'faulty neuroception': "when the nervous system detects risk when there is no risk or when the nervous system detects safety when there is a risk" (p. 178).

<sup>51</sup> I elaborate this idea in Freedman (2017).

and that is the harm that arises from a nervous system under extreme threat, which does not depend on self-reflection, and while physical, does not show up in a routine medical exam.

The question is, does threat-circuitry harm arise in all cases of rape, even those in which the victim is unconscious? As we saw earlier, the threat circuitry is activated when it senses danger, and if the threat is persistent then neural circuits misfire, resulting in typical somatic symptoms of trauma (which may or may not develop into full-blown PTSD). Contrary to myths that trivialize rape and mock the genuine threat to life or bodily integrity suffered by rape victims,<sup>52</sup> rape is one such case. But this raises the further question, can a body which has been drugged to the point of unconsciousness sense danger?

Being raped while unconscious is not a new phenomenon or an unusual one.<sup>53</sup> It is referred to in the literature as drug-facilitated sexual assault (DFSA),<sup>54</sup> and it ranges in terms of method (i.e. kind of drug) and degree of incapacitation, from semiconscious to unconscious.<sup>55</sup> In the *pure case*, the victim is described as being drugged or drunk to the point of unconsciousness. Can the threat circuitry be activated, nevertheless? For obvious reasons, we do not have neuroimaging studies of unconscious humans facing extreme threat. Without imaging, the best evidence we have comes by way of symptoms of PTSD, and specifically, somatic symptoms, for although threat-circuitry harm is not sufficient for the development of persistent or long-term somatic symptoms (for that, as we have seen, various genetic and environmental conditions must be met), it is a necessary condition of them. Thus, if someone who is raped while unconscious develops somatic symptoms of PTSD, we can reasonably conclude that there has been harm to their threat circuitry.

There are not a lot of studies on DFSA and PTSD, but what data there are support this. Russell and Curran (2002) ran a study on 29 survivors of DFSA (they call it ‘drug-rape’) who all reported “extensive, persistent anterograde amnesia for rape.” They found that despite impairment of explicit memory, “the prevalence and severity of PTSD was not significantly associated with loss of consciousness during the rape, or perceived extent of amnesia” (p. 115). They conclude that drug-facilitated rape impairs emotional and cognitive processing, and that this impairment further harmed, rather than helped, survivors of drug-facilitated rape: “Rather than being protective, amnesia for rape may lead to chronic emotional processing and more enduring PTSD symptoms” (p. 115). And Padmanabhanunni and Edwards (2013) report that partial or full amnesia is prevalent among survivors of DFSA, and that even in cases where the memory loss is complete, or full, “such amnesia does not protect against PTSD, which also regularly occurs in patients with post-traumatic amnesia following traumatic brain injury” (p. 374).

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<sup>52</sup> E.g. he’s her husband, so what’s the big deal; it just happened once, why isn’t she over it; she continued to stay married to him, so it couldn’t have been that bad; she went out with him on another date, so she must have liked it; he wasn’t going to hurt her, despite threatening to do so; etc.

<sup>53</sup> Reliable data here can be challenging as drug-facilitated rape is mired in victim-blaming norms (if you were out drinking, then you were asking for it; if you use drugs regularly, then you brought this on yourself; if you didn’t want it, then you should not have gone back to his house, or invited him to yours; etc.), which, according to Kilpatrick et al. (2007), combined with partial or full amnesia (and correspondingly, yet more rape myths: if you can’t remember it, then it probably didn’t happen; she probably enjoyed it, but is pretending that she was unconscious to cover her shame; etc.), lead to even lower than usual rates of reporting. See also Sheehy (2012).

<sup>54</sup> “[DFSA] has been defined as offences in which victims are subjected to non-consensual sexual acts, while they are incapacitated or unconscious due to the effects of alcohol and/or drugs and are therefore prevented from resisting or are unable to consent” (Hall & Moore, 2008, p. 291).

<sup>55</sup> See Fitzgerald & Riley (2000) and Hall & Moore (2008).

Crucially, for our purposes, among the symptoms observed in survivors of DFSA are the somatic sensations of a body subjected to extreme threat. As Gauntlett-Gilbert et al. (2004) report, survivors of DFSA can experience “surges of emotion in response to certain cues (e.g. a smell) that are not accompanied by a specific memory” (p. 218). These somatic feelings can be written in the body, as they go on to say: “One survivor experienced intrusions of the feeling of hair on her face, and overwhelming distress associated with a specific smell. She had no other conscious memories of the assault” (p. 218).<sup>56</sup> Even if learning that you had been raped while unconscious, say, by discovering photo evidence online, or torn clothing at the scene of the crime, could lead to evaluative symptoms of PTSD, the presence of somatic sensations in survivors of DFSA is decisive for threat-circuitry harm. Thus, women who are drugged unconscious are not quite ‘dead to the world.’<sup>57</sup>

Animal studies provide some insight as to how unconscious rape victims might detect threat. Recall, threat circuit activation does not depend on conscious awareness, but is instead triggered subcortically. Even if we grant that our unconscious victim has no ability to pick up on visual cues (subliminal or otherwise), it is possible that her other senses could be triggered by tactile, auditory, or olfactory signs of impending danger. As Pereira and Moita (2016) report, these other arousal pathways are seen across vertebrates. Studies of rodents, reptiles, and amphibians, for instance, show that threat detection via chemical cues bypasses visual stimuli, and olfactory and auditory senses are activated. In the case of rodents, for instance: “a single sensory modality such as predator odor, a moving shadow from above, or ultrasound calls are independently sufficient to drive acute defense responses” (Silva et al., 2016, p. 545). These studies provide support for the idea that the evolutionarily wired threat detection circuitry of an unconscious rape victim can be triggered by whatever arousal pathways are available to her, employed to protect against pending predatory attacks by somatically encoding the smells and sounds of danger.

It is worth pausing to consider one possible counter example to this view, and that is the rape of someone in a persistent vegetative coma, or brain-dead state. In this case, it seems unlikely that the threat circuitry could be activated. One might wonder, then, if this would count as a harmless rape, even if the *pure case* does not. I can think of two considerations that count against this thought. The first has to do with physical harm. Recall, in the *pure case*, the unconscious victim is purported to be sexually aroused, eliminating the possibility of physical harm through genital injury. But I cannot think of any reason why we should suppose that a comatose victim would be well lubricated. And if she were not, then this kind of case could well result in genital tearing, bruising, and abrasions.

This consideration alone might be sufficient to rule out the coma case as a harmless rape, but one might argue further, although I will not do so here, that sexual penetration of someone in a persistent comatose or brain-dead state should not be classified as rape, in the first place, even if it is treated as such under current law.<sup>58</sup> It is at least arguable that the central offence in this case has less in common with rape than it does with indecent interference with an (effectively)

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<sup>56</sup> They report further that while alcohol can cause full amnesia for explicit memories, “there is evidence that implicit memories can still be encoded,” and this also seems to hold true for some benzodiazepines (p. 216).

<sup>57</sup> This is the title of Heyes’s (2020) recent phenomenological account of the distinctive harms of being raped while unconscious (which also gives a brief history of the phenomenon of DFSA, spotlighting some high profile cases).

<sup>58</sup> As it has been in the United States, famously in 1996, <https://www.democratandchronicle.com/story/news/2019/01/11/comatose-woman-gave-birth-rochester-23-years-before-phoenix-case/2540086002/>, and again recently <https://www.nytimes.com/2019/01/23/us/nathan-sutherland-vegetative-arizona.html>.

dead human body. Again, more discussion is needed here, but if this is right, then even if the ‘rape’ of a comatose victim did not result in physical injuries, it would be a case of a harmless wronging, rather than a harmless rape.

Because she suffers no obvious physical injuries, Gardner and Shute’s unconscious rape victim would not know, in the immediate aftermath, that she had been raped, but that does not mean that “the victim’s life goes on exactly as before” (p. 5). Someone who has been rendered unconscious and subjected to extreme danger will eventually show the telltale signs of threat-circuitry harm. We might even expect that, puzzled by persistent and inexplicable behavioral ticks, along with fragmented gaps in her memory and intrusive somatic feelings, this rape victim might undertake some form of inquiry – what’s going on with me? Why am I behaving this way? Did something happen to me? – only to learn that her symptoms are typical of rape survivors. And, at that point, with a sinking realization, come to experience evaluative feelings of violation.<sup>59</sup>

### **3 The Wrong of Rape**

#### **3.1 The central harm of rape**

This account of the trauma of rape tells us that the *pure case* is not a harmless rape. The science of trauma reveals that a body which has been subjected to extreme threat will manifest the somatic symptoms that arise from structural changes to the brain’s threat circuitry. These somatic symptoms represent one kind of harm suffered by rape survivors, along with self-reflective or evaluative feelings and overt physical injuries. Each of these harms can change a rape survivor’s life for the worse, often dramatically. Which one is most deeply felt will vary from survivor to survivor, but given the inevitability of threat-circuitry harm and its principal role in shaping the embodied experience of rape, it is, I contend, the central harm of rape.

Might it also be the wrong of rape? The fact that the *pure case* is not a harmless rape does not, on its own, establish what is wrong with rape, but it certainly eliminates a key incentive for separating the harm of rape from its wrong. Still, it could be that objectification is what makes rape wrong, as Gardner and Shute argue, or it could be that the wrong of rape has to do with the absence of consent or use of force, which are (in varying degrees) central to legal definitions of rape,<sup>60</sup> or some combination of the two – for example, Archard’s (2007) ‘conjunctive definition’

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<sup>59</sup> We see this in survivors of childhood abuse who do not have any conscious memories of their abuse, either because they were too young to remember, or because they dissociated as a protective response to overwhelming stress (what’s called Dissociative Amnesia (DA), a subtype of PTSD; Frewen & Lanius, 2015, and Lanius et al., 2014), but whose bodies hold the truth. Although there was some fanfare in the 1990s over whether recovered memories were ‘false memories’ (the issue goes back at least as far as Pierre Janet; Leys, 2000) the science has come down overwhelmingly in support of the delayed recall of traumatic events (“The posttraumatic basis of dissociation/DD has been demonstrated in the vast majority of studies in clinical and non-clinical populations” Lowenstein, 2018, p.239). For a first-person perspective, see trauma therapist Mary Armstrong’s (2010) memoir. Armstrong, a survivor of childhood sexual abuse who did not remember her abuse until she was in her forties, describes a life full of inexplicable behavior – her body’s “hair-trigger pistol,” and “the fear that upset my gut and tightened my neck and shoulders into spasms of pain,” and “the deadening, heavy weight in my stomach... what was I afraid of? I didn’t know” (p. 41; italics in original).

<sup>60</sup> The history of rape law, written by white men to protect their unfettered access to women, and its overt discrimination against women (e.g. women as property, failure to recognize the rape of Black women as a crime, marital rape exceptions, ‘proof of chastity’ requirement, ‘utmost resistance’ condition, etc.) is well documented. See, in particular, Capers (2013), McGregor (2005), Roberts (1997), and West (2020). For an account of how rape law

as non-consensual and forced, or Anderson's (2016) 'coerced sex.' But I doubt it. Certainly, there is *some* kind of serious wrong with the sheer use of a person and with the failure to respect the will and autonomy of others. And it is true that, under patriarchy, these wrongs have been overwhelmingly perpetrated against women. And while there are many non-criminal ways in which a person can be objectified and have her autonomy compromised,<sup>61</sup> rape is one of the crimes that epitomizes these moral wrongs. And yet, it seems to me that we cannot understand the full extent of *how* a rape survivor's life is changed for the worse by looking at these wrongs.

The focus on consent when considering the wrong of rape, in particular, can lead us astray. Despite the central role of consent in legal definitions of rape,<sup>62</sup> and its importance in negotiating sexual encounters,<sup>63</sup> this emphasis gives the impression that what is fundamentally wrong with rape is the absence of consent, which is like saying that what is wrong with burglary is that the homeowner did not consent.<sup>64</sup> Furthermore, while consent might have the normative power to make permissible a sexual encounter, the presence of consent not only fails to signal *good* sexual encounters (as opposed to merely permissible ones), but the emphasis on consent reinforces the problematic notion that rape is at one end of a continuum, with good sex at the other. Across the continuum from good sex is bad sex: sex that is abysmal, sex that is not pleasurable, sex we would rather forget, less than enthusiastic sex, sex we feel obliged to have but do not enjoy, sex that suffers from poor communication and compromised decision-making, even demeaning sex, and sex that can be violating in some way.<sup>65</sup> Bad sex can be bad for all parties, but in heterosexual encounters, in light of structural gender inequalities and the privileging of male entitlement, bad sex is endemic among women.<sup>66</sup> Bad sex is not benign. But bad sex is not rape, and rape is not bad sex, nor is it the 'opposite of sex' (Gardner, 2018). It is not across the continuum from good sex, just minus consent. Rape is not sex at all, but rather is a form of sexualized violence which interferes with the proper biological functioning of brains and bodies.

### 3.2 The wrong of rape

Threat-circuitry harm has an explanatory edge over competing accounts of the wrong of rape because it tells us how a rape survivor's life is changed for the worse. As we have seen, the way trauma lives in the body can be relentless. The acute and chronic changes in brain circuits that result from the experience of overwhelming stress hinder a survivor's well-being by interfering

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has discriminated against Black men, and how it has been shaped by racial prejudice and designed to maintain power hierarchies of white supremacy, see Capers (2010, 2013).

<sup>61</sup> Kukla's (2021) non-ideal theory of sexual consent explores the complexities of various autonomy-compromising scenarios under patriarchy, i.e. real-world sexual encounters.

<sup>62</sup> Greasley (2021) has an interesting discussion about where consent should figure in rape law (i.e. offence vs. defence) in light of considerations (which she rejects) about the pro tanto moral wrongness of sexual penetration.

<sup>63</sup> Hence, the recent trend to 'affirmative consent,' evidenced in sexual conduct policies on university and college campuses across North America and Europe. For recent philosophical accounts of affirmative consent, see Dougherty (2018) and Guerrero (2021). For a different perspective, see Kukla's (2018) communicative model of sexual negotiation, which looks at sexual invitations and gift giving as alternatives to consent. For a broad-ranging examination of some of the problems with affirmative consent, and in particular, with locating consent at the center of sexual ethics, see Fischel's aptly titled *Screw Consent* (2019).

<sup>64</sup> Or, to put the point slightly differently, it is like describing theft as "coerced gift-giving" (Brison, 2002, p.6).

<sup>65</sup> A number of recent feminist accounts take up this important issue. For variations on a theme, see Conly's (2004) 'sexual wrongs,' Cahill's (2014, 2016) 'unjust sex,' Gavey's (2005) 'just sex,' West's (2010, 2020) 'unwanted sex,' and Woodard's (forthcoming) 'Bad Sex.'

<sup>66</sup> See Hänel (2018b) on this point.

with her basic systems of biological functioning – eating, sleeping, breathing, and connecting with others. This is what makes rape fundamentally wrong. The central harm of rape is, therefore, the wrong of rape. This lines up with Feinberg’s (1984) notion of a wrongful harm: “A harm in the appropriate sense then will be produced by morally indefensible conduct that not only sets back the victim’s interest, but also violates his right” (p. 106). We can say, furthermore, that if a rapist acts with an intent to cause harm, then he rapes for the reasons that make rape wrong, but even if a rapist acts for his own pleasure, with reckless indifference to causing harm, the harm is still caused by the conduct that wrongs.<sup>67</sup>

Threat-circuitry harm is not distinctive to rape. It is, rather, the predictable consequence of all manner of threatening events. This is why PTSD is common in cases of physical assault, in addition to grievous bodily harm, as seen in survivors of war combat, childhood physical abuse, and domestic violence. Indeed, threat-circuitry harm can occur without any accompanying wrong, such as in the case of a natural disaster, like an earthquake. The intrinsic nature of the harm is the same, but in the case of rape, the harm is caused by the conduct that wrongs.

Although threat-circuitry harm is not distinctive to rape, the way it lives in the body presents a singular challenge for the rape survivor. Because rape targets sex organs, the survivor’s body may be triggered to its past trauma in the most intimate of all settings: sexual relationships. Sexual relationships are typically viewed as central to human well-being, a marker of a good life, and something everyone should enjoy. Not all rape survivors struggle to feel safe in sexual encounters, but for some, the body holds the memory of the helplessness of being trapped in a threatening situation, and as such, it can be a landmine of intrusive feelings, waiting to be set off with each sexual touch. For these survivors, the normativity of sexuality can be a trial, turning one of life’s purported joys into an unwelcome reminder of an event they would rather forget.

Rape is further distinguished from other traumatic events because of its social meaning, which has an ineliminable impact on the evaluative harms of rape, which can intensify the way a life goes worse for someone. These evaluative harms can weigh heavily on people all along the gender spectrum, but in a world permeated with misogynistic and sexist values, they can be acute for women,<sup>68</sup> and especially for women who are disabled, queer, or trans, and whose bodies do not conform to heteronormative standards.<sup>69</sup>

As feminists have long argued,<sup>70</sup> patriarchal norms place a high premium on women’s sexuality, indeed on their virginity and so-called purity, and on their central value as wives and providers of sex to men – historically, under legal contract of marriage, and still in some cases now.<sup>71</sup> This ideology has a trickle-down effect in terms of the wholesale commodification and objectification of women’s bodies, and in particular, of a poisonous ideal of those bodies, which

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<sup>67</sup> As Feinberg (1984) says: “The term “harm” as it is used in the harm principle refers to those states of set-back interest that are the consequence of wrongful acts or omissions by others” (p. 106).

<sup>68</sup> That said, we should not underestimate the stigmatizing effects on men who are raped, given society’s injurious standards of masculinity, as evidenced in a number of recent memoirs (Douglas, 2016; Metatawabin, 2015).

<sup>69</sup> In describing her experiences of sexual violence, trans writer Kai Cheng Thom (2019) says: “A body cannot be violated if it does not exist. This is the predicament that trans women survivors find ourselves in, perceived as we are by most of the world as men in women’s clothing, mentally ill, predatory wolves hidden among the pure fleece of cisgender femininity” (p. 83).

<sup>70</sup> Most recently, Manne (2017).

<sup>71</sup> Marital rape exemptions (rape of women or girl by husband) still exist in at least 10 criminal codes, including in India, Lesotho, Nigeria, Sri Lanka, and Singapore (Equality Now, 2017).



gets amplified in social, cultural, and religious contexts, feeding into taboos around rape and perpetuating victim-blaming norms. The meaning of rape is inextricably wound up in this ideological juggernaut, and the harsh judgment it implies about what it means to be raped – not least of all, the self-judgment – can be formidable. Threat-circuitry harm may be the central harm and wrong of rape, but the evaluative harms of rape add insult to injury.

### 3.3 Getting right the wrong of rape

Over the last three decades, developments in neuroscience have brought about a rapid growth in our understanding of the trauma of rape, and of the structural brain changes that result from threats to life or bodily integrity. Combined with a growing awareness of the plasticity of the brain, which offers tremendous possibilities for retraining misfiring neural circuits, this has motivated a turn to somatic-based therapeutic treatment, along with other forms of physical movement like yoga, dance, and martial arts, that center the body in order to heal from trauma. This conception of trauma is becoming increasingly recognized outside of scientific and therapeutic contexts, but misunderstandings persist.

Shifting our conception of the wrong of rape to its central harm is important not only because it brings us in lockstep with the science of trauma, but because despite the variation in the way that rape is perpetrated, all rape is threatening.<sup>72</sup> In taking seriously that threat and locating the wrong of rape in its central harm, this account *sees* the rape survivor on her own terms, acknowledging and validating the embodied experience of rape. Surely, an account of the wrong of rape should do at least that much.

My main goal in this paper has been to show what is wrong with the notion of a harmless rape, and to use the opportunity to develop a robust picture of the trauma of rape in order to illuminate threat-circuitry harm. I have done so without committing to a precise definition of rape, in general or for the purposes of law. That is a project for another time, but it seems to me that an account of the wrong of rape which centers the trauma of rape can provide some guidance here. Rape is one among a class of traumatic experiences, defined as ones that threaten life or bodily integrity, wherein the threat is executed through sexual violence. It is not obvious to me what more is gained, conceptually at least, by saying, further, that the threat occurred under coercion or force, or that the threat occurred absent consent<sup>73</sup> – although laying out the different

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<sup>72</sup> Shifting our focus away from consent to the trauma of rape might also help solve some conceptual puzzles about rape. Take, for instance, Rubinfeld's (2013) riddle of rape-by-deception. The issue here is typically framed in terms of the sorts of factors that can vitiate consent. For example, if two people consent to sexual relations, but one person later learns that she did so under deceptive conditions, does this nullify the consent, and hence count as rape? If, instead of consent, we use trauma as a way of defining rape, then instead of asking what factors corrupt consent, we ask: was the situation threatening? If the answer to this is no, then even if deception vitiates consent, as Dougherty (2013) argues, and is thus a moral wrong, it does not count as rape. This solution to the problem of deception addresses some of the worries raised by Fischel (2019) and Brodsky (2017), who argue that rape by deception often gets used as a cloak of bigotry – like in the case of the “Jewish Israeli woman’s horror to learn she had slept with an Arab man or a partner’s horror to learn a man with whom she had been sexually intimate is transgender” (Brodsky, pp. 194-195). These cases may involve genuine evaluative harms, albeit bigoted ones, but they do not cause threat-circuitry harm, and so are not rape.

<sup>73</sup> I have discussed some of the problems with the requirement of force as proof of rape, but the way that consent functions in the criminal justice system equally underserves rape victims, turning rape trials into a ‘he-said-she-said’ that gets exploited by defence lawyers employing the “honest mistake” defence (Sheehy (2012): I thought she consented, she invited me over; she had consented previously; etc.) or the more pernicious “she asked for it” defence (Pineau (1989): look at how she was dressed; look at how much she had to drink; etc.). See Craig (2018) for an exhaustive account of the failures of the legal profession in trying sexual assault cases.

ways that rape is perpetrated may be a promising option for the law of rape, as Tadros (2006) has argued.<sup>74</sup> This topic deserves further consideration, but it is clear that current legal definitions of rape underserve rape victims, so perhaps a radical rethinking is in order.<sup>75</sup>

It is also clear that a better understanding of the trauma of rape can help to address some of the systematic failures within the criminal justice system, of which there are many when it comes to rape. It is well known that rape is underreported, more than any other crime. One of the reasons for this, as Craig (2018) argues, is the way that rape victims are treated within the criminal justice system – by the police, defence attorneys, even prosecutors, judges and juries, and by the law. Some of this poor treatment is a reflection of the sexism (and classism, ableism, and racism) that is built into the system, and some of it is good old-fashioned sexism, but some of it can be directly linked to a failure of understanding of trauma. Rape victims deserve better than the routine shaming, belittling, and ridiculing they receive in light of the poorly understood yet entirely characteristic behaviors they manifest as survivors of traumatic events. And this problem, at least, has a solution, one which we are seeing signs of already,<sup>76</sup> and that is mandating trauma education for individuals who work within the system, from top to bottom. We need trauma-informed medical care, trauma-informed interview techniques, trauma-informed policing, and trauma-informed courtrooms populated with trauma-informed judges, juries, and lawyers.

And while we are considering progressive reforms, in addition to mandating trauma education for individuals who work within the criminal justice system, we should also be considering alternatives to traditional criminal trials for resolving rape cases, where appropriate, such as mediation and restorative justice approaches. Many rape victims describe their experiences in a court of law as triggering and retraumatizing, and even a trauma-informed courtroom will retain its adversarial nature. There are other ways to mete out justice.

There is more to be said on this point, but I want to conclude by indicating one further advantage to moving rape cases outside the courtroom, which is that it helps to affirm the notion that the problem of rape cannot be solved by locking up men, many of whom have suffered violence in their own lives and are also living with trauma. Indeed, imprisoning men, effectively barring them from civil society and rendering them vulnerable to further traumatic experiences within the criminal justice system,<sup>77</sup> while adding to an already overincarcerated penal system teeming with the overrepresentation of Indigenous, Black, and brown men, is about as far away

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<sup>74</sup> Tadros (2006) offers a compelling argument in favour of a differentiated offence of rape. His argument is nuanced, but the basic idea is that we have one differentiated offence of rape, with each of the different substantive parts of the offence aligned with the different ways that rape is perpetrated. This would be analogous to the differentiated offence of manslaughter, which can be perpetrated by either “grossly negligent killing, killing as a consequence of an assault, and intentional killing with a partial defence (either provocation or diminished responsibility)” (p. 518).

<sup>75</sup> Despite the fact, as Husak (2006) rightly says, apropos the (then) current state of scholarship on rape, that “Sweeping reforms, of course, are bound to be ignored and ridiculed” (p. 271).

<sup>76</sup> For example, End Violence Against Women International recently published a 100-page report on the neurobiology of trauma. The first half of the report, by Hopper (2020), reviews the science behind victim responses during sexual assault. The second half, by Lonsway & (Sergeant) Archambault (2020), reviews how law enforcement should respond in these cases. Justice Canada recently published a similar report, by Haskell & Randall (2019), also on the neurobiology of trauma and its impact on rape victims (Parts 1 & 2), and how trauma impacts memory (Part 3), and finally, on “Why We Need a Trauma-Informed Criminal Justice System” (Part 4).

<sup>77</sup> As Forman Jr. (2012) argues, “Given that most offenders *already* come from backgrounds of tremendous disadvantage, we heap additional disabilities upon existing disadvantage” (p. 11; italics in original).

from a solution to the problem of rape as we could get.<sup>78</sup> Instead, we should be looking at how to address the structural inequalities and material conditions that create the circumstances which lead to violent behavior in the first place, as we consider how best to provide opportunities for justice, and for healing.

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<sup>78</sup> Public defender Aya Gruber (2020) teases out some of the layers of tension between feminist ideals and anti-incarceration work, presenting a complicated story of gender equality and social justice, and of the incongruence between the Black Lives Matter and abolition movements and the rise of #MeToo and renewed attention to issues like campus rape, which she refers to as “feminism’s tragedy” (p. 278).

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