

DOES THE CRIMINAL COURT OFFER A REFUGE FROM PATRIARCHY OR IS IT A SITE OF ITS REPRODUCTION?

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ABSTRACT

Traditional interpretations of legal doctrine have seen *mens rea* as a key element in the determination of rape. Here it is argued that this view is problematic. Bringing into dialogue Hilary Putnam's concept of 'semantic externalism' (1973) and Miranda Fricker's concept of 'hermeneutical injustice' (2007), it is suggested that, because the intelligibility of a woman's claim is structured by a specific legal framework that restricts the boundaries of what can be comprehended, the legal paradigm of rape constitutes a patriarchal failure. By placing significance on the perpetrator's understanding of the act, the criminality of rape becomes tied to the perpetrator's perception of the victim's desires, not the harm caused to the victim. The problem is that when a man accused of rape wrongly but sincerely believes that a woman consented to sex, he may have a defence of mistaken belief and therefore fail to meet the *mens rea* of rape. This disconnect creates a hermeneutical gap between the victim's experience and the law's interpretation of it, rendering the victim's testimony conceptually incoherent: a woman may be subject to rape but not by an individual legally recognised as her rapist.

INTRODUCTION

'Women who charge rape say they were raped twice, the second time in court', observes Catherine Mackinnon (1989) about the experience of women turning to the carceral state for justice.¹ Mackinnon's suggestion here is that, within the context of the rape allegation, the criminal trial is infected by a patriarchal illusion: that it is men's place to subordinate women. This distortion is reflected in the fact that the crime of rape is defined by the *mens rea* standard – the intention or knowledge of wrongdoing that constitutes a crime – which reflects men's experience that women have meaningfully consented to sex with them. The problem is that when a man accused of rape wrongly but sincerely believes that a woman consented to sex, he may have a defence of mistaken belief and therefore fail to meet the *mens rea* of rape. What follows is a paradoxical situation in which a woman may be subject to rape by an individual not legally recognised as her rapist. This raises an important question: whether the criminal court offers a refuge from patriarchy or if it is a site of its reproduction.

Part of the present task is to address this question critically. In this regard, having introduced the problematic historiography of rape in a legal context, this article brings into dialogue Hilary Putnam's concept of 'semantic externalism' (1973) and Miranda Fricker's concept of 'hermeneutical injustice' (2007) to provide a genealogical inquiry of 'rape' within that legal context. Whereas 'semantic externalism' may be defined broadly as the idea that our words and thoughts depend on our contingent external environment; Fricker defines 'hermeneutical injustice' as a gap in a person's interpretative resources that occurs when they have some significant area of their social experience obscured from collective understanding. Taking these ideas together, this article aims to demonstrate that the legal paradigm of rape reinforces and reproduces women's second-class standing. This is because the intelligibility of a woman's claim is structured by a specific legal framework that restricts the boundaries of what can be comprehended. This obscures her experience and interpretation of the event, creating a hermeneutical gap between the victim's perspective and the law's understanding of it. In practical terms, this article calls into question the ability of legal doctrine to produce real

improvements at the level of practice and, by extension, the role and relevance of the law as a mechanism for securing change in the context of rape.

GENEALOGY OF RAPE

The general understanding of genealogy is as a story of the origins of a particular person or a particular family. However, in philosophy, genealogy takes on a broader scope, examining the origins of entire systems of beliefs. As an historical method, genealogy is most associated with Friedrich Nietzsche's *On the Genealogy of Morality* (1887) and Michel Foucault's histories of madness and sexuality. In *On the Genealogy of Morality*, Nietzsche argues that our modern system of morality has its roots not in human goodness but in acts of violence, resentment, and revenge. Some readers interpret Nietzsche's *Genealogy* as a challenge to the reliability of our moral beliefs and their correspondence to moral reality. Raymond Geuss, for instance, suggests that *Genealogy* is Nietzsche's attempt to show that commonly held beliefs about the origins of Christian values are false (Geuss, 1994). However, Amia Srinivasan (2019) suggests that Nietzsche is more concerned with how these beliefs operate in practice. According to Srinivasan, the important question for Nietzsche is not about the origins of our representations but, rather, how our representations serve the function of allowing powerful agents to maintain political control.

It is within this strand of genealogical thinking that I offer a genealogy of the legal concept 'rape'. However, in the interests of space, I will limit my focus to how the modern crime of rape was defined and deployed from the nineteenth century onwards, turning latterly to show how engaging Putnam's and Fricker's philosophy may help us to consider the question of experience.

At its core, 'rape' is a legal term that reflects a culturally determined perception of an act. Throughout its visible development, it has been intimately tied to the concepts of consent and citizenship. Indeed, the modern concept of 'rape' may be traced back to the crime of *raptus* in early Roman law, referring to the forcible abduction of a woman from her legal domicile (Simpson, 1968). Despite this depiction, the crime was perceived not as an offence against the woman herself but

¹ In this article, I focus specifically on our legal understanding of rape as applied to people who are *perceived* as women. While I acknowledge

that these issues affect people of all gender identities, this requires separate treatment that falls outwith the scope of the present discussion.

against her father or husband (Brundage, 1987). The legal construction of women as property situated them outside any discourse of consent or sexual agency and, therefore, the offence was defined from a man's perspective: as an offence to his property and to his rights of ownership.

Moving into the nineteenth century, the legacies of these patriarchal scripts adapted well to post-Enlightenment culture. Even when veiled in the premise of Enlightenment principles, such as autonomy and personhood, the language with which sexual violence was legally and morally understood remained embedded in patriarchal instrumentalization. Indeed, in *Rape and Resistance* (2018), Linda Martín Alcoff highlights that, during this period, consent was understood through the lens of the Lockean social contract, which considered consent a necessary condition for autonomous personhood. Yet, from its inception, the social contract was intentionally limited to white men (Freedman, 2013). Conversely, there existed a sexual contract, granting husbands ownership over their wives, and denying women the legal right to refuse sexual consent within marriage. Within this context, female bodies were construed as property, with their value contingent upon virginity (Alcoff, 2018).

This historical context illuminates how patriarchal ideology is embedded within the legal discourse of rape. Indeed, when examining the connections between legal capacity, political consent, and citizenship, the implications of the sexual contract are further clarified. For example, coverture – a law permitting male heads of households to represent women and children – exempted husbands from the category of potential rapists, as married women were unable to revoke their matrimonial consent (Freedman, 2013). If a woman were raped by someone other than her husband, owing to the principle of coverture, the offence was not legally recognised as committed against her, but against her husband or father. This is because the crime constituted an illegitimate possession of someone else's property – to which redress, her husband or father could legally take violent action against the perpetrator. Moreover, women's legal incapacity to refuse sexual consent within marriage contributed to their political incapacitation as citizens. In 1832, the passage of the Reform Act in England extended voting rights to those with legal capacity. Under the principle of coverture, however, wives remained dependent on their husbands, thereby deprived of the right to political consent and political participation, except for their role in instilling virtue within their families (Freedman, 2013). Under coverture, wives existed legally in the shadow of their husbands, rendering them substantially invisible to the law.

While white women struggled to prove violation of consent under coverture, women of colour were unable to get a foot in the courtroom (Freedman, 2013). In *Black Bodies, White Bodies* (1985), Sander Gilman argues that the colonial construction of black womanhood in the image of the 'jezebel' – a figure characterised as sexually excessive and animalistic – meant that sexual violence committed against them was not legally recognised. This lack of legal recognition extended to the justification of the lack of legal and social support available to black women who suffered from sexual violence. Other marginalised women were subjected to similarly prejudiced constructions. Gilman (1985) highlights how the portrayal of sex workers in nineteenth-century England was grounded in the belief that their involvement in such work was biologically predetermined. This perspective linked their involvement to particular physiological traits that were believed to validate their innate hypersexuality and inclination toward sex work. Consequently, the existence of sex workers was perceived as a public health concern, likened to pollution on the city streets.

What binds these highly embodied categories of women, the 'jezebel' and the 'prostitute', is their deliberate construction in

opposition to the ideal – that is, believable – rape victim: a chaste white woman of a particular class who was assaulted by a stranger of a certain class, with injuries severe enough to indicate resistance (Gilman, 1985). This construction of the ideal rape victim may be partly attributed to the fact that rape was a capital crime in nineteenth-century England. Indeed, English jurist Sir Matthew Hale's (1609-1676) claim that rape accusations are easy to make and difficult to prove fostered scepticism toward such allegations. Under this view, rape demanded serious consideration, not because of the harm caused to women, but due to its potential to lead to a man's death. This perspective stemmed from the belief that women were inherently untrustworthy and likely to fabricate claims of sexual violence. Incentives for fabricating rape allegations included the desire for notoriety, financial compensation, and the allure of victimhood status (Bourke, 2008).

Despite the elimination of the marital rape exemption in England in 1991, the law still tends to infer consent in cases involving pre-existing relationships between the accused and the victim. *R v Cogan and Leak* (1976) offers a compelling case study of marital rape exemption prior to the 1991 law, highlighting the pre-existing paradox. In this case, a British man, John Cogan, was acquitted of raping the wife of his friend, Michael Leak. The events unfolded as follows: while the two men were at a pub, Cogan expressed his desire to have sex with Leak's wife. Both then went to Leak's house, where Leak informed his wife that Cogan intended to have sex with her and told her not to resist him. Leak proceeded to undress her and lay her on the bed. Cogan watched as Leak had sex with his wife and then proceeded to have sex with her himself. After Cogan was finished, Leak had sex with his wife once more. The men then returned to the pub.

In the Crown Court trial, presiding judge Lord Justice Lawton ruled that Cogan did not meet the *mens rea* requirement for rape since he genuinely believed that Leak's wife had consented to sex. Lawton therefore found Cogan not guilty. Nonetheless, it is clear that this case reveals a great deal about the legal mind: the presumption of a singular objective reality that can be determined through evidence. However, the reliance on the defendant's understanding of the claimant's consent creates a paradoxical situation in which a woman may be subjected to rape without necessarily being violated by an individual recognised legally as her rapist. Implementing the *mens rea* standard without critically examining whose belief is considered reasonable perpetuates this patriarchal failure.

FINDING A SEMANTIC EXTERNALISM OF RAPE

Hilary Putnam's theory of semantic externalism offers a useful framework when evaluating this legal paradox. As outlined in 'Meaning and Reference' (1973), Putnam's preoccupation is how one thing comes to represent something else. While we intuitively think that words and images resemble the things they represent, Putnam argues that mere resemblance is neither necessary nor sufficient for representation. One possible response to this is to suggest that representation must be a matter of intention. To illustrate this point, consider a scenario in which aliens who have never encountered trees see a picture resembling a tree made by spilled paint. While humans would form a mental image representing trees based on their prior familiarity, the alien's mental image of the same picture lacks that causal connection and therefore does not represent trees. Similarly, Putnam argues, no word or thought, in and of itself, inherently represents anything. This is because reference is not an intrinsic quality of any mental representation, as there must first be a causal relationship between that representation and the object to which it refers. A word refers to an object *if and only if* there exists an appropriate causal connection between the term and the object. Put simply, as a human familiar with trees,

my mental image of a tree represents trees because it was caused by prior visual perceptions of trees. Conversely, the alien's mental image cannot represent trees since it lacks that prior familiarity. A mental representation, considered in isolation, cannot represent anything else without a causal link.

Just as Putnam contends that representation requires a causal link between the representation and the object being referred to, the law's reliance on the objectively provable aspects of a crime may neglect the subjective experiences and motivations of those involved. As Putnam's semantic externalism asserts, reference and meaning are not intrinsic qualities of mental representations; they require a causal connection between the representation and the object being referred to. Similarly, the law's presumption of a singular objective reality that can be determined through evidence may not fully account for the complex and diverse experiences of sexual violence. In many rape cases, the law may conclude that no rape occurred if the *mens rea* does not align with the victim's experience of the event.

RAPE AS A HERMENEUTICAL INJUSTICE

Putnam's ideas on language serve as a valuable starting point for understanding Fricker's concept of hermeneutical injustice (2007). Specifically, Putnam's idea that our understanding of language is shaped by our individual conceptual frameworks helps illuminate the social nature of hermeneutical injustice as proposed by Fricker. While both Putnam and Fricker make similar arguments about the conditions necessary for effective communication and the attainment of knowledge, their discussions diverge in focus. Whereas Putnam emphasises the processes involved in establishing the validity of our knowledge claims, Fricker's analysis focuses on understanding how violations of certain conditions in communication may lead to injustice against those who possess knowledge. To clarify this distinction requires further interrogation of Fricker's understanding of hermeneutical injustice.

In *Epistemic Injustice: The Power and Ethics of Knowing* (2007), Fricker defines hermeneutical injustice as a gap in a person's collective interpretative resources leading to the obscurity of an individual's social experiences from collective understanding. This obscurity may arise from deliberate or unintentional exclusion or marginalisation of individuals or groups affected by limited epistemic resource development. These resources include language, concepts, terminologies, modes of expression, frameworks, and knowledge standards, all of which are pivotal in making specific experiences and knowledge comprehensible.

While the presence or absence of these resources directly impacts how individuals engage with certain experiences and knowledge, it is important to highlight that the concept of hermeneutical injustice is not merely a breakdown in communication. Rather, it functions as an assault on our identities as knowers. Indeed, hermeneutical injustice stems from unequal attributions of credibility; misrecognition; disregard for knowledge; marginalisation; and/or exclusion of knowers from processes aimed at developing epistemic resources. The legal paradigm of rape serves as a pertinent example of this form of injustice. Despite its profound significance, the experience of rape is often inadequately acknowledged and recognised within the legal system because the intelligibility of a victim's claim is structured by a severely circumscribed legal framework that restricts the boundaries of what can be comprehended. For this reason, women are caught in a bind: their experiences are often too intricate to be captured by this specific framework, leading to a hermeneutical gap between their experiences and the legal system's understanding of it, as in the case of *R v Cogan and Leak*. The lack of conceptual resources available to make their experience intelligible constitutes a patriarchal failure: it feeds on, and reinforces, women's second-class standing in the courtroom.

CONCLUSION

Bringing into dialogue Fricker's ideas of hermeneutical injustice with Putnam's semantic externalism furthers the understanding of the foundation that genealogy provides for comprehending the legal paradigm of 'rape.' Specifically, this interplay of theoretical concepts reveals how the criminal justice system functions to perpetuate certain forms of political dominance while purporting to serve justice. Drawing upon Putnam's perspective, I concur with the notion that the legal paradigm of rape may impact our sense of self-understanding as knowers detrimentally, eroding our trust in ourselves. As such, Fricker's theory of hermeneutical injustice offers a valuable framework for comprehending this deficit and pursuing future change. Though far from exhaustive, this article demonstrates the beneficial interplay between theories of epistemic injustice and language, better considering our legal understanding of sexual violence. There is also a need to critique the generation and dissemination of knowledge surrounding sexual violence. This is essential if the pervasive issue of gender oppression is to be halted in the courtroom.

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