Responsibility for Reckless Rape

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ABSTRACT

Sometimes persons are legally responsible for reckless behavior that causes criminal harm. This is the case under the newly drafted provisions of the U.S. Model Penal Code (MPC), which holds persons responsible for "simple" rape (nonconsensual sex without proof of force or threats of force), where the offender recklessly disregards the risk that the victim does not consent. In this paper we offer an explanation and corrective critique of the handling of reckless rape cases, with a focus on the U.S. criminal justice system, although our analysis is applicable more broadly. We argue that a wider group of reckless rapists are criminally responsible than is captured by the MPC and claim criminal punishment of reckless rapists must be justified by looking to both moral desert and instrumental aims achieved by criminal punishment. Part of the law's job is to communicate and enforce society's expectations regarding unacceptable behavior. In punishing reckless rape, we are not just giving people what they deserve, but also reinforcing and shaping norms regarding sexual behavior.

1. Introduction

Rape is a crime that affects most people, even if only indirectly. A recent survey by the U.S. Center for Disease Control (CDC) estimates that 20% of women have been subject to rape or attempted rape, and one third of women have been subject to sexual violence.[1] Victims are not the only ones impacted by rape; family members, friends, and co-workers are affected, too. Given its prevalence, un-

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[1] https://www.cdc.gov/violenceprevention/sexualviolence/fastfact.html

derstanding the contours of rape and accurately identifying and punishing rapists is a pressing and important social problem. However, there is disagreement about the criteria for rape and how severe a crime it is, as evidenced by the variation in rape statutes within and across common law countries. This variation seems related to the way in which rape is understood within cultures. Views of rape have changed significantly over time, and real differences in views currently exist in different segments of the U.S. and the U.K. Although some "rape myths" have been cast aside, such as the notion that women could not be raped by their husbands, our understanding of what constitutes rape is still muddy and variable across gender and social groups.[2]

Much of this disagreement has to do with which sorts of behaviors express consent and non-consent to sex. English-speaking countries like the U.K. and the U.S. now seem more accepting of the idea that saying "no" is a good indicator of non-consent, in part due to the relative success of public education campaigns (the famous "no means no" campaign).[3] Even so, some still believe that indications of non-consent mean stronger pressure is appropriate. There is also little agreement regarding whether non-consent must be verbal, or about what sorts of nonverbal behavior indicate non-consent. For example, some women freeze up and go silent in response to an attack due to their levels of fear. Even so, lying very still and even crying may not be interpreted as a strong enough indication of lack of consent for a rape verdict.

The American Law Institute – charged with writing model legal codes to serve as a guide to the individual U.S. states – recently undertook the work of addressing the large discrepancies in rape law across U.S. jurisdictions by drafting revised sexual assault provisions for the U.S. Model Penal Code (MPC) (ALI, August 18, 2020). Drafters of the provisions noted that in the United States "existing [sexual assault] law defies ready characterization" (ALI, August 18, 2020: 1). This is because there seems to be no unifying theoretical approach to, or understanding of, rape within the U.S. Instead, state sexual assault law exhibits a "patchwork" of penal philosophies and understandings regarding rape

[2] Another way of seeing the variability of views on rape is by observing that in many countries, marital rape is not a crime and there is strong resistance to criminalizing it.

[3] See https://www.pbs.org/newshour/education/means-enough-college-campuses for a discussion of the original campaigns in North America, and the perceived insufficiency of these campaigns in making persons sensitive to cues of consent. Many college campuses are now switching to a "yes means yes" approach.

crimes (p.1). As an example, the drafters discuss the offense of engaging in sexual intercourse with an adult who is unconscious. Ohio punishes the offense with a maximum of five years' incarceration, while Washington state punishes the same offense with life without parole – the most serious criminal penalty one can incur in the states without the death penalty. The crime of rape using aggravated force also has wildly varying penalties depending on jurisdiction. In California the maximum sentence is eight years, whereas in Georgia one might (again) be sentenced to life without parole (ALI, August 18, 2020: 2-4).[4]

The revisions recently made to the MPC sexual assault provisions attempt to provide an updated understanding of the culpable mental states and wrongful action that comprise rape for U.S. states to emulate. These new provisions serve as a jumping off point for our exploration of rape. In this essay, we introduce a philosophical account of criminal responsibility for rape by examining the least serious type of rape for which persons are held criminally responsible under the MPC. These are cases of "simple" rape – nonconsensual sex without proof of force or threats of force. The essence of simple rape is a sexual act with a non-consenting partner, where the offender was culpable regarding that non-consent (e.g., they knew of it, or showed reckless disregard).

We argue that the MPC construes the lowest required level of culpability for "reckless" simple rape too narrowly. The recklessness mental state standard adopted by the MPC requires that the offender be subjectively conscious of the risk on non-consent. We hold that some offenders who are not consciously aware of non-consent ought to meet the recklessness standard. Criminal punishment of this larger class of reckless rapists, we argue, can be justified by looking to both moral desert and instrumental aims achieved by criminal punishment. Like many philosophers, we hold a hybrid view of the justification of punishment. Moral desert is a necessary condition for punishment and provides *pro tanto* or defeasible reasons for directed blame and punishment (McKenna, 2019), but instrumental reasons to blame and punish (or not) should also be

[4] Adding to the legal disarray is the inconsistency in the way in which sex offenses are policed and prosecuted. For example, many cases where a rape victim was unconscious will not be investigated or prosecuted because such victims cannot give an account of the rape and there are very often no third-party witnesses. All types of rape, however, are under-reported and under-prosecuted, and this is not only because rape cases are often "he said, she said" cases with little corroborating evidence available; it is also because many rape complaints are judged incredible or dismissed by law enforcement, although many such cases have been found later to be well-founded. American Law Institute Model Penal Code: Sexual Assault and Related Offenses, Tentative Draft No. 4, (August 18, 2020: 4).

considered. In the case of rape, these instrumental aims are particularly strong due to disagreement regarding what constitutes consent and non-consent to sex. Even so, we argue that appeal to moral desert and instrumental ends only justifies mild criminal punishments for reckless rape – significantly milder than those allocated under the MPC.

Here is how we will proceed: In section 2, we explain the relationship between mental states, moral culpability, and criminal responsibility. Both moral and criminal responsibility look to a person's mental states related to a wrongful act when determining the level of blame (and sometimes punishment) a person deserves. In section 3, we describe the legal requirements for guilt for simple rape - with a focus on the MPC's requirements for reckless simple rape - and argue for a more inclusive understanding of reckless rape. In section 4, we argue that a more inclusive understanding is better suited to meet instrumental aims of punishment, and we conclude in section 5.

2. Mental states, moral culpability, and criminal responsibility

Many legal scholars believe criminal responsibility depends upon moral responsibility; to be criminally responsible for harm one must be morally blameworthy for criminal harm (Duff, 2018; Husak, 2016; Moore, 2020; Morse, 2007; Sifferd, 2021). Moral blameworthiness is frequently defined in terms of moral desert, where desert claims tend to take the following form: Someone (the "deserver") deserves something (the "desert") in virtue of their possession of some feature (the "desert base") (Feldman & Skow, 2020). On many theories of moral responsibility, what is deserved is moral blame or reproach and sometimes punishment; and the feature that makes one deserving is typically some sort of cognitive capacity or process, such as reasons-responsiveness (Fischer & Ravizza, 1998) combined with an action expressing a certain (poor) quality of will (Vargas, 2013). When they are related to harm, certain mental states result in more serious moral condemnation. For example, one might think that moral blame and punishment may be a fitting or deserved response to intentionally harming others (Brink & Nelkin, 2013). One who is only reckless regarding harm they cause may be deserving of directed blame (McKenna, 2012) but the severity of the blame (moral anger versus reproach) would seem to be lower than in cases where the same kind of harm is desired or caused on purpose.

Delivering deserved proportional punishment based on moral desert is the focus of the Model Penal Code's Purposes of Sentencing provisions

(1.02(2)) which notes that states ought to "render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders" (2(a)(i)).[5] The next provision – 2(a)(ii) – states that when "reasonably feasible" a sentence might aim to achieve deterrent and restorative ends; however these goals may only be pursued "within the boundaries of proportionality in subsection (a)(i)". This indicates that according to the MPC, desert is both necessary and sufficient for criminal punishment for a criminal act, as – even within the boundaries of proportionality – courts are not *required* to consider forward-looking aims such as deterrence.[6] However, many responsibility theorists, ourselves included, do not agree with the MPCs sufficiency claim. In moral responsibility theory, the necessity claim is often accepted, but the claim that moral desert or blameworthiness is in and of itself sufficient for harsh treatment is rejected by more consequentialist or hybrid views of punishment, which hold that some further instrumental good such as moral development or social order needs to be met.[7] We endorse such a hybrid view in this paper, which takes desert to be a necessary condition and a *pro tanto* reason for blame and punishment, but instrumental aims such as deterrence should also be considered within the boundaries of proportionality.

For those who think the criminal law relies upon moral blameworthiness, the process of determining whether a person is guilty of a crime involves looking for features that would make moral blame fitting. The *actus reus* or vol-

[5] American Law Institute, Model Penal Code: Sentencing, Proposed Final Draft, (2017).

[6] Revised § 1.02(2) "reorients the foundations of sentencing law" throughout the Model Penal Code. The 1962 Code emphasized utilitarian goals of offender rehabilitation and incapacitation. "The original Code's indeterminate-sentencing system allowed for shortened prison terms for those offenders deemed by the parole board to be rehabilitated during incarceration, but significantly extended terms for offenders perceived by the board to be resistant to rehabilitation." (American Law Institute, Model Penal Code and Commentaries, Part I, §§ 1.01 to 2.13(1985)). Under the new Code's scheme, no utilitarian purpose of sentencing may justify a punishment outside the "range of severity" proportionate to the gravity of the offense, the harm to the crime victim, and the blameworthiness of the offender American Law Institute, Model Penal Code: Sentencing, Proposed Final Draft, (2017: 2).

[7] There are even cases where the necessity condition is called into question. Cheshire Calhoun (1989) has famously argued that we should reproach sexist behavior even where people do not meet blameworthiness criteria as a means to address wide-spread moral ignorance within a society. On her account, moral blame, reproach or punishment can outstrip desert where we are trying to achieve a change of consciousness (Calhoun, 1989). We will return to this type of justificatory model later.

untary act requirement explores the link between the defendant and the wrongdoing or criminal harm for which she is to be blamed (Moore, 2020). Offenders must have voluntarily committed an action causally linked to criminal harm, and criminal harm can be more or less serious (e.g., murder versus theft). The *mens rea* or mental state requirement asks the court to consider the offender's intentions and knowledge regarding the criminal harm caused – in other words, to look for culpable mental states (Moore, 2020). It reflects the criteria for blameworthiness discussed above: An offender is only criminally culpable for a wrongful act if she desired, knew of, or ought to have known of the wrong-making features of the act related to criminal harm. In general, the tighter the relationship between the mental states of the offender – which can be loosely understood as desires and beliefs – and the criminal harm, the higher the level of criminal culpability assigned to the offender. Level of wrongdoing and culpability can be seen as determining a person's level of moral blameworthiness.[8]

The exact reasons why reckless persons are less morally culpable than those who desire to cause harm depends on one's theory of moral responsibility, but in part it is likely to relate to the fact that for the reckless person, knowledge that they may be doing something wrong (and possibly criminal) is fleeting and/or less explicit. Persons who intend to cause harm are generally very likely to know their action is morally wrong. It can also be the case that one is culpable for being in the situation where one is not engaged fully with moral reasons: for example, the reckless driver who is late for work, drinking coffee in their car and thus doesn't see the stop sign in time to stop. But this reckless person is less culpable than the driver who sees the stop sign with time to stop and goes through it anyway. This driver seems to fit the classic case of culpability where one knows an action is wrong but performs the wrongful act anyway. In this case, the responsible actor could have acted differently (Fischer & Ravizza, 1998).

[8] The relationship between culpable mental state, severity of harm, and level of criminal responsibility is complicated. As Shen et al note, "Quite often, a particular crime is defined exclusively as a given act committed with a specific level of mental state. Acts committed with more culpable mental states are punished no more severely, and acts committed with less culpable mental states are not crimes at all ... On the other hand, there are some serious crimes, such as homicide, which are typically defined by differing degrees of culpability. Those differing degrees make a purposeful act more serious than a knowing act, a knowing act more serious than a reckless act, and so on. For such crimes, the MPC further assumes that, holding the act constant, the average person would punish these four categories in the manner corresponding to the MPC hierarchy–that is, punishing purposeful conduct the most severely and negligent conduct the least severely"(Shen, et al., 2011: 1308).

Recklessness can also be less culpable because it is expressive of carelessness rather than of the intent to harm. A driver is exhibiting a poorer quality of will when she intentionally goes through the stop sign, as is an intentional actor that acts with the direct desire to cause harm (such as a rape) than when they are reckless regarding whether they are causing that harm.

Under the MPC, reckless agents are those that act with *conscious disregard* to the fact that criminal harm might result (2.02(2)(c)).[9] The level of moral blame one deserves is even lower when one acts negligently – when one *ought to have known* their behavior involved a "substantial and unjustifiable" risk of harm (2.02(2)(d)). The lower moral culpability of negligent and reckless agents is reflected in the law in terms of the structure of criminal offenses and punishment prescribed. There are specific worries articulated in the criminal law literature about holding persons criminally responsible for negligence: Even a reasons-responsive person cannot respond to reasons they do not know about; thus, it seems they are not culpable for failing to act or not act based upon this moral reason (Husak, 2011). Although negligence can be culpable under the criminal law, recklessness is presumed to be the default minimum fault element – or culpable mental state required – in both U.S. and U.K. law where none is stipulated (Temkin, 2002). Indeed, the drafters of the original MPC "viewed recklessness as the threshold for criminal culpability" in most cases "...because it distinguishes between careless actors on the basis of awareness of the risk" (ALI, August 18, 2020: 20). Where a person's actions involve very serious risks – say, to a person's life – they are more likely to be held criminally responsible even if they aren't aware of such risks via negligence (Greenberg, MS). Thus, many jurisdictions hold negligent persons responsible for involuntary manslaughter (Stark, 2016: 5).[10]

Negligence and recklessness are morally culpable when they express objectionable moral values which simply don't take the other person's consent or well-being as important enough to consider. We normally take people to have certain fact-finding duties that they have to meet in order for ignorance to count

[9] American Law Institute, Model Penal Code and Commentaries (1985).

[10] Doug Husak (2011) notes that although negligence is the lowest form of culpability recognized in the Model Penal Code, "... surprisingly few offenses can be committed by a defendant who is merely negligent. ...The verdict of positive law on the wisdom of punishing negligence is decidedly mixed." Husak, D. (2011). Alexander, Ferzan, and Morse (2009) reject the idea of negligence as an appropriate fault element for criminal guilt altogether.

as an excuse from moral culpability (Rosen, 2008). On some quality of will accounts of moral culpability, indifference toward the well-being of others in itself is culpable (Arpaly, 2002; Robichaud, 2022). And of course, indifference can be related to harmful action. If I am indifferent to your need to be on time for your doctor's appointment, I may take my time getting a coffee instead of making sure to pick you up when promised. Where this harm is sufficiently serious, an indifferently culpable person would seem deserving of moral blame and even punishment, although less so than persons who act for the purpose of causing serious harm.

Legal philosopher Anthony Duff distinguishes between different levels of culpability within the categories of recklessness and negligence. Duff claims that even an agent who fails to know that there is a risk of harm may be more or less culpable depending on *why* the agent is not aware. Duff distinguishes between practical indifference and mere thoughtlessness (Duff, 1990). A person is more culpable where their practical indifference for another's well-being can be read from their conduct – it is manifested in their action – than when they are merely thoughtless. As Duff notes, "What I notice or attend to reflects what I care about; and my failure to notice something can display my utter indifference to it" (Duff, 1990:163). Duff gives an example of practical indifference: a bridegroom who is found in the pub when he ought to be at his wedding (Duff, 1990). Even if the groom-to-be honestly lost track of time, his indifference toward the well-being of his fiancé, manifested in forgetting about and then missing his wedding, is morally culpable. Similarly, if one asks their partner to take them to an important chemotherapy appointment and the partner forgets the appointment, moral blame is appropriate because the level of indifference regarding the partner's well-being manifested in his actions is morally culpable. This is especially the case if the fiancé and partner's indifference led them to ignore, not notice, or not take seriously several cues regarding their obligations.

Thus, Duff argues we are morally responsible for many cases of indifference, even where a person did not know, but ought to have known, their behavior involved a substantial risk of serious harm. Further, he classifies these cases where an offender acts with "practical indifference" as cases of recklessness, not negligence (Duff, 2019). This means he sees such cases as more similar to ones where a person consciously disregards a risk than cases where a person causes harm without indifference but still failed to use ordinary care or did not act as a reasonably prudent person would act (Zipursky, 2015: 2134; Zipursky, 2021). Such negligent persons are often morally culpable.

In sum, persons are morally culpable for a wide range of mental states when those states are causally related to harm caused to others. Indifferent and negligent actors are less culpable than they would be for intentionally or knowingly causing harm; but they can be culpable.[11] This claim is in line with many people's intuitions on the matter. We agree with Duff that persons who exhibit practical indifference to the interests of others and thereby risk harm (say, to bodily autonomy) are more morally culpable than those who are just ignorant of the risks they pose. In the next section we examine in more detail the question of what type of mental states display moral culpability sufficient to trigger criminal responsibility for simple rape.

3. The legal requirements for "simple" rape

As noted above, the new MPC sexual assault provisions are the result of the ALI taking a "fresh look" at the proper scope of liability for sexual offenses, including both the culpability and wrongdoing requirements (ALI, August 18, 2020:10). Section 213.6 describes the least serious version of rape (the type of rape with the least serious penalty) as sexual assault without consent. This is a felony offense with a punishment range of three to five years of imprisonment. A defendant may be found guilty of sexual assault without consent if he causes another person to submit to or perform an act of sexual penetration or oral sex and (a) the other person does not consent to that act; and (b) the actor is aware of, yet recklessly disregards, the risk that the other person does not consent to that act (213.6).[12] Thus, to prove a person is guilty under MPC 213.6 a prosecutor would have to prove he caused another person to submit to nonconsensual sex (which constitutes the act requirement for simple rape) and that he was aware of

[11] We thus disagree with the authors of the new MPC Sexual Assault provisions when they note that recklessness must be the minimum culpability for rape because "A lower standard, such as negligence or strict liability, would be inconsistent with the Model Penal Code's foundational commitment to moral fault as a prerequisite to criminal liability." See American Law Institute, Model Penal Code: Sexual Assault and Related Offenses, Tentative Draft No. 4, 213.6 discussion point 2, (August 18, 2020: 227).

[12] The drafters were clearly committed to excluding negligence as the grounds for criminal liability for rape. They claimed that imposing liability on the basis of recklessness reflects the "basic norm" of the 1962 Code, which treats recklessness as sufficient culpability for most of its major offenses, including aggravated assault, manslaughter, robbery, and the principal sexual offenses. The Model Penal Code: Sexual Assault and Related Offenses, Tentative Draft No. 4 (August 18, 2020: 227).

a substantial risk of non-consent (which constitutes the mental state or culpability requirement for simple rape). Section 2.02(2)(c) specifies that a risk is substantial and unjustifiable when disregarding that risk constitutes "a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation" (p. 228).

As physical violence or intimidation is not required for criminal wrongdoing for simple rape, such rapes can include cases where an offender employs coercive tactics not involving physical force or the credible threat of it; rejects or ignores expressions of non-consent to sex; or fails, in circumstances where consent is unclear, to seek and acquire consent (Panichas, 2006: 615-616). This is a change from many folk views of rape and legal understandings of rape which focus on physical force and resistance in addition to nonconsensual sex (Archard, 2007). On this understanding, rape is primarily wrong because it is a violation of autonomy, although of course physical and mental hurt is also often caused. Under the new draft provisions, force and threats of force are an *additional* form of wrongdoing, ratcheting up the severity of a crime where the core wrongdoing is nonconsensual sex (see MPC 213.1 – Sexual Assault by Aggravated Physical Force or Restraint, and 213.2 – Sexual Assault by Physical Force or Restraint).[13]

Recklessness with regard to simple rape can be read in more or less inclusive ways.[14] In the U.K. in the 1980s and 1990s, the recklessness standard applied by the courts was often equivalent to "could not care less" whether consent was given (Temkin, 2002: 126). Defendants who were indifferent to clear signs of non-consent were found to be reckless (Stark 2016: 86). The Sexual Offenses Act of 2003 attempted to capture indifferent rapists in a different way, by requiring that belief in consent must be reasonable (Stark, 2016: 86). Under this act, "where the defendant failed to form the belief that his partner was not consenting despite obvious signs" the defendant can be found to be reckless on the basis that their belief in consent was unreasonable (p. 86).

[13] The other offenses described are: 213.3 Sexual Assault of a Person Who is Incapacitated, Vulnerable, or Legally Protected; 213.4 Sexual Assault by Extortion; 213.5 Sexual Assault by Prohibited Deception; 213.7 Offensive Sexual Contact; and 213.9 Sex Trafficking. Model Penal Code: Sexual Assault and Related Offenses, Tentative Draft No. 4, (August 18, 2020).

[14] It may be helpful to compare the recklessness mental state with the mental state required for sexual assault by aggravated force or restraint. The former requires knowledge of a risk of non-consent, whereas the latter requires that "[T]he actor knows that the other person submitted...because of the actor's use of or threat to use aggravated physical force" (213.1(b)) Ibid. In this case it is clear to the offender that the victim did not consent.

By contrast, the MPC draft provisions claim the culpability requirement of recklessness, contains an "unambiguous requirement of proof of the actor's subjective awareness and conscious disregard of the substantial risk" (ALI, August 18, 2020:19). In this case the offender must have been *consciously aware* that there was a substantial risk the victim did not consent, where "consent means a person's behavior, including words and conduct– both action and inaction–that communicates the person's willingness to engage in a specific act of sexual penetration or sexual contact" (MPC 213.3(a)).

According to the drafters of the new sexual assault provisions, it is not enough to meet the recklessness standard for a defendant to "have a hunch that this risk might exist, and still less that the actor was not aware of, but should have been aware of, the risk" (ALI, August 18, 2020: 19). Instead, the MPC takes the position that to be criminally blameworthy for rape an offender must hold a conscious culpable mental state with regard to wrong-making features of the act, i.e. non-consent. This reflects their judgment regarding the minimum level of moral culpability necessary to ground criminal liability for rape.[15]

Some legal scholars agree with the line drawn by the MPC, including Panchias (2006) and Husak and Thomas (2001), who claim that although rape of a person by someone who ought to have known that the person didn't consent is morally abhorrent and extremely harmful to the victim, the moral culpability of the offender in many of these cases may be slight or negligible (e.g., it is a "rape without a rapist")(Husak & Thomas, 2001). They argue that negligence is an inappropriate standard for criminal culpability because the court cannot point to the *absence* of a defendant's knowledge as the culpable cause of criminal harm. This is true even in cases where all can agree he *ought* to have known something – in this case, that the person they were having sex with did not consent. However, there are at least two different explanations for the position that negligent rapists lack criminal culpability. It may be that negligent rapists are not at all morally blameworthy, and thus criminal sanctions are inappropriate. On the other hand, it may be that negligent rapists are morally blameworthy, but not to a degree where a criminal conviction – particularly conviction of a felony – is a proportionate response.

[15] For what it is worth, we disagree with the MPC's boundaries regarding conscious disregard of the risk of non-consent. If an offender had a "hunch" or "sneaking suspicion" of non-consent and they continued to pursue sex, we think they meet the recklessness requirement of conscious awareness and disregard of a substantial risk of non-consent.

We embrace the latter explanation. We hold that, in general, people are morally blameworthy for simple rape in a much wider range of cases than are stipulated in the new MPC Sexual Assault provisions. In some cases, inadvertent negligence is blameworthy (Zipursky, 2021). Obviously, a person who consciously disregards the risk that their partner does not consent is morally blameworthy; but so too is the person who, as Duff describes, is practically indifferent to cues of consent. We agree with Duff that the practically indifferent person is relatively more morally blameworthy than the person who doesn't notice cues of non-consent for reasons other than indifference – say, because they are very tired, had too much to drink, or are miseducated regarding cues of non-consent.

Although some cases of negligent rape are morally culpable, they are not culpable enough, we think, to be found guilty of a felony criminal offense. The MPC defines negligence as requiring that the risk the offender failed to be aware of must be of such a nature and degree that the actor's failure to perceive it (...) involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation (MPC 2.02(2)(d))[16]. Such negligent persons are morally culpable, especially when they cause the very serious harm of rape. They are morally culpable because negligent persons perform actions that are reflective of a disregard of the moral and legal norms that should govern behavior – especially where important interests, including bodily integrity via consent to sex, are at stake. Persons are morally culpable for failures to consider whether someone consents to sex. Being diligently attentive to whether another person consents to sex is low cost and requires little effort, especially considering the harm caused to rape victims.

All of this means that, in so far as the MPC indicates that their version of recklessness was chosen because it distinguishes those who are morally culpable for rape from those who are not, the MPC drafters are mistaken.[17] The question is not whether negligent versus reckless offenders are morally culpable when they rape. The question is what level of moral culpability ought to be required for criminal responsibility for rape – and in the context of the MPC provisions for simple rape, conviction of a felony offense. The best place for the law

[16] American Law Institute, Model Penal Code and Commentaries (1985).

[17] The drafters of the new sexual assault provisions claim "A lower standard, such as negligence or strict liability, would be inconsistent with the Model Penal Code's foundational commitment to moral fault as a prerequisite to criminal liability." American Law Institute, Model Penal Code: Sexual Assault and Related Offenses, Tentative Draft No. 4, August 18, 2022 (p. 227).

to draw a line regarding legal culpability for reckless rape is not to require conscious subjective awareness of a risk, but to draw a line between conscious and indifference recklessness, on the one hand, and inadvertent negligence on the other. Cases of recklessness where a person consciously disregards the risk of non-consent and indifference recklessness are relevantly similar regarding level of deserved moral blame when they are related to a rape, and both are somewhat more culpable than many cases of inadvertent negligence. In both cases, recklessness can be clearly traced to offender; either to their subjective awareness, or to indifference manifested in their behavior. One might raise the worry that indifference in an offender is hard to ascertain, but we are in a similar position when attributing disregard of a risk. An offender's awareness of a risk of non-consent must often also be determined by the court by looking to their behavior (as offenders are unlikely to testify that they knew there was risk); similarly, it can be left to the court to determine if the offender's conduct manifests the level of indifference that renders him culpable for reckless indifference to non-consent.[18]

As noted above, some cases of inadvertent rape can consist in a failure to notice cues of non-consent due to factors such as tiredness, stress, anxiety, or miseducation.[19] But where evidence of such practical indifference is lacking, the rapist is still morally blameworthy because he ought to have paid better attention to or better understood cues of non-consent. However, the cases which reflect culpability sufficient for criminal responsibility for a felony are those included in our expanded category of recklessness. As we discuss below, we leave open the possibility that negligent rapists are culpable enough to be found guilty of a misdemeanor related to their rape – something like Negligent Sexual Conduct – based on instrumental aims of punishment.

[18] Stark claims that indifferently reckless persons may believe that there is a risk even if they do not consciously acknowledge or have knowledge of that risk. Stark's notion of belief includes unconscious beliefs that guide behavior, such as a belief that motivates a parent to unconsciously move a dangerous object away from a toddler. See Stark (2016). However, it isn't clear that the indifference a person manifests on Duff's view is related to (even an unconscious) belief of a risk of non-consent. It is certainly related to an attitude that is insufficiently concerned with another's well-being.

[19] Imagine a person who is having sex for the first time but has watched a lot of misogynist porn. This person might well be unaware of many of the nonverbal cues of non-consent and have a skewed understanding of what is normal.

Our view agrees with the MPC's rejection of negligence as sufficient for legal culpability for felony rape. But it departs from the MPC's strict understanding of recklessness as requiring the subjective/conscious consideration of the possibility of non-consent, as indifferently reckless rapists are equally culpable. Instead, it aligns more closely with earlier UK law that deemed that rapists were reckless if their behavior indicated they "couldn't care less" whether their partner consented. One might think this is an uneasy compromise, where we reject negligence as qualifying one for felony rape but still say that things the agent is not fully aware of (and therefore cannot control) determine their culpability. We disagree. Indifference to consent may not be something that the agent is fully aware of, but it's still a culpable attitude we can ascribe to the agent.

In the next section, we will further justify our more inclusive category of recklessness for a felony conviction of rape by appeal to instrumental aims of criminal punishment. These aims may also support holding negligent rapists responsible for a misdemeanor offense.

4. Justifications for criminal punishment of reckless rape

4.1 Criminal guilt and moral blameworthiness

Holding an offender criminally responsible in the form of a criminal verdict and punishment obviously causes serious harm to the offender. Some legal responsibility theorists – and, we think, the MPC – claim this can be justified in a purely backward-looking or retributive way (Moore, 2020). For example, Michael Moore claims that punishing a person with the right abilities – say, someone who is reasons-responsive, or a person who can form culpable mental states – when they act wrongfully delivers an intrinsic good (Moore, 1997: 172-173). Michael McKenna indicates that directed moral blaming might deliver a non-instrumental good for moral creatures like us, in the same way grief, although painful, constitutes a good for us based upon our emotional attachments (McKenna, 2019). One might claim that the world is a better place for us blaming and punishing each other (in fair and proportionate ways); it would be a worse world where we did not do these things. In this case we need not consider any good effects of punishment, because (all things considered) proportionate punishment is justified as a good in itself.

However, even though many accept that criminal guilt is contingent on moral blameworthiness, in contrast to the position the MPC takes, most legal theorists do not believe that criminal punishment can be justified by looking to

retribution alone (Brink & Nelkin, 2013; Duff, 2018; Hart, 1968; Husak, 2016; Sifferd, 2021). Douglas Husak argues that moral desert "provides a moral reason to treat persons as they deserve," but that, regarding criminal punishment, the "weight of this reason...is typically minimal, and has substantial weight only when the most monstrous crimes are perpetrated" (Husak, 2016: 54). If one believes moral blameworthiness provides *pro tanto* reasons to punish, criminal punishment often does not produce a non-instrumental good strong enough to outweigh the harm done to criminal offenders and to the community (consider, for example, incarceration's criminogenic effect, loss of housing and wages, harm to family members, and so on).

Our discussion above indicates that moral blameworthiness is a notion that comes in degrees: intentional wrongdoers may be more blameworthy than reckless ones, and persons who rape are more blameworthy than those who steal, for example. Persons who intentionally murder are the most blameworthy. In cases of simple reckless rape, the wrongdoing or harm caused – nonconsensual sex – is very serious; but the level of culpability is relatively lower than in cases where a person intended the harm or knew they were causing the harm. We have argued that rapists who subjectively disregard a substantial risk of nonconsent, and those whose behavior manifests indifference to consent, are similarly morally blameworthy. This moral blameworthiness, we think, makes criminal punishment permissible beneath an upper limit of what is proportionate to an offender's moral desert. However, desert does not justify the serious impacts of criminal punishment based on a non-instrumental good when these are weighed against the harms caused by punishing reckless rapists. The MPC recommends sentences of three to five years in prison for persons convicted of simple rape. Especially in the U.S., such a sentence is harmful not just because it denies liberties to the offender, but because it can have permanent impacts on persons' relationships, mental health, earning potential, ability to find housing, and even voting rights.

However, important further aims are achieved by criminally punishing reckless rapists. Expressivists about punishment stress that the audience for our expressive acts of moral blame and punishment is not just the offender; instead, criminal punishment sends a message of disapproval regarding the offender's acts to the moral community (Wringe, 2016; Duff, 2018). In this case, the good gained by criminal verdicts is not solely the non-instrumental good of blaming the offender. A classic instrumental aim of punishment is to change people's behaviors and perceptions of what constitutes acceptable conduct; to provide

"clear and stable guidance on what is proscribed as culpability wrongdoing, so that they can reasonably easily avoid criminal punishment" (Stark, 2016: 71). While there are considerable empirical issues with measuring the effect of legislation on people's moral beliefs and the moral beliefs they take others to have, there is some evidence that the law is successful both in communicating and shaping norms, for example in the context of changes in gay marriage law (Aksoy et al., 2020). In this case, imposition of punishment need not have good effects on a particular offender, or group of potential offenders, to be justified by its effects. Instead, we need to look to see what criminal punishment communicates to the moral community about acceptable conduct, and what effect this has. Making persons more sensitive to moral and legal reasons in a way that results in more law-abiding behavior is a further effect criminal punishment aims for.

When we consider the criminal law as communicative, one major worry is that if we do not penalize certain types of rape, we are in effect sanctioning them. Cheshire Calhoun argues that not holding people to account for wrongful behavior when they have an excuse can be perceived as condoning that behavior in her paper 'Responsibility and Reproach' (Calhoun, 1989). She claims that men are not blameworthy for certain kinds of ignorance regarding the harms of sexist behavior because that kind of behavior is seen as normal, even desirable by large portions of society. She is talking about what would now be called microaggressions, for example the way we address women. The case of rape is different in that nobody would, we hope, think of reckless rape as desirable. But in many parts of society, there is still a strong tendency to put the onus on the woman to resist if she does not want a sexual interaction, as opposed to the man having a duty to ascertain consent. Calhoun argues that we should reproach people who behave in sexist ways they may not be blameworthy for, because anything else would sanction and therefore further entrench this kind of behavior. In other words, if we want moral progress within a society, we can't just excuse the careless and the bigots, even if their bigotry is perfectly understandable given their circumstances. Our responsibility practices are concerned with holding people answerable for their behavior when it falls below an acceptable standard, in part to draw attention to and reinforce the importance of the standard.

Similarly, Mason proposes justifying holding "reasonable" but mistaken rapists who fall short of recklessness standards responsible via negligence, and justifies this move based not upon moral culpability, but on instrumental grounds (Mason, 2021: 222). Mason argues that given their sexist beliefs,

which are supported by a sexist environment, some rapists can be merely unlucky rather than reckless when they think a partner who didn't consent consented. Their belief in consent is reasonable given their sexist presuppositions. However, we disagree with both Calhoun and Mason in so far as they wish to sanction or hold men responsible in cases where there is no moral culpability.[20] Persons ought not to be punished on purely instrumental grounds. If the motivation is purely one of general deterrence, such punishment amounts to a form of instrumentalizing or "using" offenders to set an example for society and permits actions such as punishing the undeserving. Further, like the MPC, most common law jurisdictions clearly articulate moral desert as a primary aim, and thus these sorts of instrumental justifications will not work alone to justify punishment in these jurisdictions. Mason disagrees that moral desert is always required to justify criminal punishment, claiming "[t]he legal system should not fetishize culpability. The system is not there to increase the total of just deserts. Rather it is there to regulate a complex and imperfect society" (Mason, 2021: 218).

4.2 Moral desert and instrumentalism

For the reasons outlined above, we side with the U.K. and U.S. legal systems in making moral culpability a necessary precondition for legal punishment. Furthermore, we are interested here in performing what Morse calls an "internal" critique of the criminal law (Morse, 2006). That is, we wish to critically examine criminal practices but operate within certain broad parameters, including the law's commitment to persons' having the necessary freedom to be responsible for their actions, and that offenders deserve blame and punishment.[21]

[20] Most legal theorists reject purely instrumental justifications of criminal punishment. Brink and Nelkin explicitly reject strict liability crimes such as statutory rape on the basis that we should not punish where there is no moral culpability (Brink & Nelkin, 2013). If strict liability crimes such as statutory rape are justified at all, it is precisely for instrumental reasons, they discourage certain crimes. As we have already argued, reckless simple rape significantly does involve culpability on the side of the offender, so the necessary condition for punishment is met, but it is greatly bolstered by instrumental considerations.

[21] In this way we hope our work has clearer real-world impacts. We wonder about the relevance of work that claims persons are never responsible for anything they do, for example, to current practices. Such work seems to demand nothing less than the complete dismantling of criminal law systems, a suggestion that is exceedingly unlikely to have any impact.

Given some level of moral desert, however, we think instrumental considerations provide powerful reasons for criminal blame and punishment, especially for certain crimes. Moral reproach can serve to make persons more aware of society's moral expectations: when I tell a coworker their behavior is sexist, I draw attention to moral norms regarding sexual discrimination, and I make it clear I expect him to adhere to those norms. Similarly, criminal verdicts and punishments serve the important instrumental aim of helping persons be more aware of, or sensitive to, moral and legal norms – not just the offender, but his moral community. Ecological accounts of responsibility highlight the way in which moral agency relies on a shared and public understanding of moral norms (McGeer & Pettit, 2015; Vargas, 2013). On such theories, societal moral feedback is essential to agents' sensitivity to moral reasons: we foster each other's moral agency by holding each other responsible. Culture provides tools, skills, and knowledge to support our capacity to understand, reflect upon, and ultimately follow current norms, and the criminal law is an especially important part of normative culture. The law codifies society's most serious moral demands, and publicly exhibits these demands as applied to specific acts via criminal verdicts. Thus, the criminal law doesn't merely serve as a mechanism for punishing the guilty, but as a way of communicating what is acceptable within a society (Maculan & Gil Gil, 2020). If one aim of the law is to flag certain kinds of behavior as unacceptable, then verdicts and punishments related to reckless rape ought to communicate that there is a duty to attend to consent, and that dismissing worries about consent, or not caring about consent, isn't an excuse regarding responsibility for rape.

Consider the way that societal moral feedback has generated changes in sexual harassment behavior. Until fairly recently sexually explicit jokes and comments on other persons' bodies were common in the workplace. Moral opinions on this behavior began to change, and laws (often civil, not criminal) began to emerge addressing this behavior. Victims of sexual harassment identified and drew attention to specific harmful behaviors, and their stories and testimony have helped explicate this harm to the moral community. More people began to provide moral feedback in keeping with updated views and laws on harassment. While still more common than it should be, sexual harassment in the workplace now occurs less often; and where it does occur, the perpetrator of harassment is more likely to face a hostile response. The law can play an important role in instigating and shaping moral discourse, which means that legal norms can change the moral norms people endorse, not just make existing

norms salient. This is particularly important as societies are not homogenous with respect to the moral norms their members endorse. Legal norms therefore signal what behavior is expected, irrespective of any divergence in a subset of society.

In some cases, these sorts of instrumental considerations do not provide special reasons to apply criminal punishment at the higher end of what would be proportional given moral desert. For example, although moral and legal norms against murder are obviously important, and our commitment to them ought to be affirmed via punishment, people generally know murder is wrong, and most don't need feedback from the moral community regarding which sorts of behaviors constitute murder. This means that laws and verdicts against murder do not have the role of clarifying norms regarding murder. But the case of simple rape is very different from murder. There is often a gap between the commonsense understanding of rape and legal understandings, and in general, unfamiliarity with legal expectations regarding sexual behavior. People may not agree on what constitutes a cue of consent or non-consent to sex or on the level of care required. Indeed, given the variability in rape statutes, people may not understand what constitutes simple rape in their jurisdiction at all. It is these issues that the new MPC provisions are trying to address. In this way, current understandings of simple rape are somewhat similar to our understandings of sexual harassment 20 years ago. Updated uniform rape laws and high-profile verdicts can serve to raise awareness regarding the moral wrong of rape, coalesce our notions of sexual consent, and make persons sensitive to the required due diligence regarding consent.

We thus think the instrumental ends justifying criminal guilt and punishment in the case of simple rape - making moral and legal rules relevant to sexual consent more salient - are weighty. Given both backward-looking retributive aims and forward-looking instrumental aims, criminal punishment of rapists who are aware of a risk of non-consent and those who exhibit indifference recklessness is justified. As noted above, in these cases it seems easier to point to the culpability related to the criminal harm: e.g., the knowledge of a risk of non-consent; or manifest indifference to consent. This group of reckless rapists are thus morally blameworthy and deserving of punishment within a proportionate range. Further, instrumental aims, especially the aims of clarifying the moral and legal norms related to rape, and of making persons more sensitive to these norms, are important in cases of reckless rape because there is disagreement or ignorance about these norms. Importantly, even if different understandings of

behavior indicating consent remain, categorizing reckless rape as a felony can work to impose a duty to gather information in sexual contexts.[22] These two types of aims – retributive and instrumental – work together to justify criminal punishments for our group of reckless rapists.

4.3 Severity of punishment

Our readers may worry that our argument will lead to an overly punitive legal system that punishes the young and ignorant in particular. This would be true if we advocated for particularly harsh penalties or set the bar for recklessness very low. Importantly, we don't want to do either of those things. Instead, we want the law to communicate the following to the moral community: where a person is aware of a risk of non-consent,[23] or where a person's actions, all things considered, manifest indifference regarding consent, this constitutes rape, even where there is no subjective awareness of a risk of non-consent. This can be done, we think, with very light criminal sentences, which seems especially appropriate given the lesser culpability of reckless offenders. The MPC sentencing range of 3-5 years is overly harsh, even though it identifies a narrower range of offenders (which does not track any important moral difference, we have argued). We advocate for lighter sentences, applied to a wider range of reckless behavior. Very short custodial sentences (one year, the shortest sentence typically assigned to a felony conviction), or even sentences of probation and/or

[22] Instrumental aims also have special significance where it is very difficult to prove that an offender had the requisite mental state for guilt. Duff (2009) points to the practical problem of establishing recklessness or intent for crimes such as drug possession, and the danger of many people not being found guilty because intent and recklessness are so hard to prove. This, in turn, means that criminalizing drug possession or simple rape will have less of an effect. "The result of all this (apart from the cost) will be that the law is less effective in deterring the dangerous or harmful conduct at which it is aimed: more people will acquire drugs (...) since they will know that even if they are caught, they have a good chance of avoiding conviction" (Duff 2009: 983). Duff does not think that this justifies strict liability, but he claims that it justifies what he calls 'strict answerability' – the burden on the court is only proving the actus reus, not the *mens rea*. The burden of proving that they did not have the *mens rea* falls on the defendant. We believe that this shift in the burden implies a broader standard than the MPCs recklessness standard. The reason for this is that the same difficulties the prosecution would face in proving awareness of risk of non-consent are faced by the defendant in proving lack of awareness of such a risk, especially when they are in a situation where there were clues a reasonable person would have been aware of.

[23] Contra the MPC, we think having a "sneaking suspicion" or an "inkling" that the person may not consent constitutes subjective conscious awareness of the risk. Thus, we should interpret awareness somewhat more widely than the authors of the new provisions seem inclined to. We feel justified in doing this based on claim that lesser penalties for reckless rape are appropriate.

community service, and other non-custodial sanctions might be appropriate given reckless offenders' level of moral blameworthiness, and are sufficient to achieve the instrumental ends we are interested in. Empirical evidence suggests that severity of punishment does not increase deterrent effect, rather, it is certainty of punishment that deters (Nagin, 2013). The message that reckless sexual behavior violates moral and legal norms and the need to be diligent about consent can be delivered with a six-month sentence of probation or a three-year sentence. In this case, a six-month sentence is more appropriate. The important thing is to communicate unacceptability of behavior.

In general, where moral desert is lower – as it often is in cases of recklessly caused harm – instrumental aims ought to be relatively stronger to justify criminal penalties. This is because, if moral desert provides only *pro tanto* reasons to punish, the harm of criminal punishment may outweigh any non-instrumental good produced. We claim the instrumental goods sought by the law ought to be understood broadly. The law aims not just to deter, incapacitate, or rehabilitate offenders. It provides the moral community with an opportunity to clarify and update moral and legal norms, to focus its attention upon certain pressing moral problems, and to encourage a method of solving moral problems. In some cases, like in the case of reckless rape, these latter aims will be especially important.

Is the moral culpability of negligent rapists sufficient to warrant criminal liability, given the instrumental goods this might secure? Persons who meet the MPC requirements for negligence – persons who grossly deviate from a standard of care that a reasonable person would observe during sex – are morally culpable when they rape: however, we think the level of culpability exhibited by negligent rapists is not sufficient to justify a felony conviction. In theory, we are open to the possibility of negligent rapists being found guilty of a misdemeanor, where this conviction does not entail the possibility of custodial sanctions. Such offenders ought to be punished (in a way further than the label of "misdemeanor offender" entails) only via mandatory rehabilitative programming. While the impact on the norms of sexual conduct in response to criminalizing such negligent rape would be significant, we are aware that the justification provided by the moral desert of negligent rapists and the instrumental effect of changing norms together may be outweighed by the harms of arrest and conviction even in the case of a misdemeanor criminal offense. In other words, the positive instrumental effects and the very low culpability taken together may not outweigh the harm

done to the offender sufficiently to justify punishing negligent rape as a misdemeanor.

If criminalizing reckless rape and having a broader definition of recklessness that encompasses forms of indifference has the effect that the importance of consent becomes more salient across society, we will have an interesting effect. Because norms of consent have become more ingrained, cases that look like negligence because the offender simply did not consider consent will become rarer. It is only because norms around sexual consent are so murky and influenced by sexist stereotypes that people can claim lack of subjective awareness now. This means that as time goes by, culpability for these kinds of actions will become more clear-cut – and more will fall into the recklessness category specified by the MPC – in part because of the partly instrumentally motivated criminalization of a broader class of reckless rape.

An obvious final worry is that we haven't avoided the "use" objection: we are still instrumentalizing current reckless rapists for the sake of societal progress. The easy answer to this question is that we have argued for culpability, even though we have conceded that this is not severe culpability. But it has to be conceded that there is a grain of truth in the accusation. Whenever we use criminal punishment to express moral norms or set an example, we go beyond what the individual deserves in a retributive sense and indeed what may aid their own individual moral progress. This may be troubling, but it is not clear that it's avoidable if we take norm expressive and instrumental aims to be part of what justifies punishment.

5. Conclusion

We have argued that the Model Penal Code is too restrictive in its definition of simple rape because it requires rapists to be reckless in the sense that they are consciously aware of the danger of non-consent. We have instead argued for indifference recklessness as the minimum standard, whereby practical indifference to whether or not the partner consents to sex is sufficient for the *mens rea* requirement for simple rape. Offenders who rape with indifference recklessness are criminally culpable, though less culpable than those who commit intentional rape. We further argued that in addition to desert-based reasons, which are a necessary precondition for punishment and provide *pro tanto* reasons to punish, instrumental and communicative aims justify punishing rapists who exhibit indifference recklessness. Society communicates and enforces expectations about

seeking consent in sexual intercourse by holding indifferently reckless rapists responsible. However, we have argued that this communicative function can and should be fulfilled with less severe punishments than are traditionally meted out for felonies.

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