

## GARDNER ON THE WRONGNESS OF RAPE

*Daniel Statman\**

Everybody agrees that rape is wrong, but what exactly constitutes this wrongness is less obvious than one might think. Gardner opens his intriguing paper by pointing to a prevalent view about rape which he finds objectionable and then turns to develop his own proposal. According to the commonly accepted view, rape is wrong because of the serious harm it causes its victims. At times it is physical harm, but more often, it is severe psychological harm. In almost all cases, rape brings about a decline in the victim's prospects; it initiates a change for the worse in her life. In accordance with this view, we are therefore terrified of being raped because we are terrified of this harm, and we regard rape as wrong – indeed as a *paradigm* of wrongness – because of the harm it produces.

Though prevalent, Gardner believes that this understanding of the wrongness of rape is misguided. To clarify his point, he invites us to think of a possible case of *harmless rape*. In this case, a woman is raped without being aware of the fact, either at the time of its occurrence or afterwards. For example, “she was drugged or drunk to the point of unconsciousness when the rape was committed, and the rapist wore a condom”.<sup>1</sup> Suppose further that the rape is never known to anybody; “the incident never comes to light at all.” Surely, says Gardner, such rape is just as wrong and despicable as any other one, but since it involves no harm, it serves as a counter-example to the view that the wrongness of rape lies in the harm that it causes to the victim. Once we realize that rape can be wrong without being harmful, we can appreciate the fact that harm, though typical, is really only “epiphenomenal to rape,” as Gardner puts it. The case of the harmless rape is, therefore, “the *pure case*” of rape, “entirely stripped of distracting epiphenomena”.<sup>2</sup> If we want to grasp what is wrong with rape in and of itself, without distractions, this is where we should look.

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<sup>1</sup> JOHN GARDNER, *OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF CRIMINAL LAW* 5 (Oxford Univ. Press, 2008) [hereinafter GARDNER].

<sup>2</sup> *Id.* at 6.

But why think that this imaginary case of harmless rape is the paradigm – the pure – case of rape, rather than take it as an exception to a general rule, according to which the wrongness of rape does lie in the harm it causes? Why not say that in almost all cases its wrongness is based on this grave harm, while in those very rare, mostly imaginary cases, in which no harm is involved, there is either a different source for the wrongness of rape, or, possibly, no serious wrongness at all?

Gardner's main reason for rejecting this proposal is based on a general philosophical view concerning the normative status of emotional reactions. According to this view, emotional pain cannot by itself ground normative claims unless it is based on a good reason, in which case it is this reason that does the justificatory work, not the emotional pain. If no good reason can be provided, then the emotional pain is irrational, and irrational emotions cannot serve as bases for arguments to impose moral or legal constraints on others. Thus, Gardner suggests, "if nothing was wrong with being raped apart from the fact that one reacted badly afterwards, then one had no reason to react badly afterwards".<sup>3</sup> And he concludes, "so such reactions, to be rational, must be epiphenomenal, in the sense that they cannot constitute, but must shadow, the basic, or essential, wrongness of rape".<sup>4</sup>

Note that this argument does not apply to all kinds of harm. If I am punched on the nose or if my leg is broken, I don't need to provide a reason for feeling badly afterwards. The physical injury and the physical pain suffice to do the required normative work. The difference between such cases and those of emotional reactions is that the latter depend on the victim's evaluation of the relevant event, an evaluation that is subject to rational assessment. While there could be nothing irrational in feeling pain as a result of having one's leg broken, there could be something irrational in feeling humiliated by a comment deeply misunderstood. Since in many cases of rape no real physical harm is involved, the harm argument for the wrongness of rape would have to depend on emotional pain. But, if the former argument is sound, the victim's pain and psychological harm count only if they can be shown to be rational, that is to say, only if her negative evaluation of the rape is justified, namely, only if "the basic, or essential" wrongness of rape can be established. We can now better appreciate the importance of the harmless rape case to the normative theory of rape. Only if one can establish the wrongness of rape in this pure and imaginary case, can one confirm its wrongness in the impure cases, which constitute almost all real cases of rape.

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<sup>3</sup> *Id.* at 6-7.

<sup>4</sup> *Id.* at 7.

This is a powerful and attractive argument against basing the wrongness of rape on its harm, though, in the end, I am not sure that it works. As I read it, it is a version of the old stoic line against the rationality of emotions in general, and of humiliation, in particular. Why feel badly because of what some idiot said to me or about me? Why feel a threat to my self-esteem or my self-respect because some villain touched my body or penetrated it? If there is physical or other *harm*, it should be dealt with, but letting myself be emotionally unsettled by such actions is a sign of irrationality. This line is taken very seriously by Avishai Margalit in the first part of his book *The Decent Society*, in which he assumes that if the stoic challenge cannot be met, then humiliation is irrational, and the idea of a decent society as he defines it – a society whose institutions do not humiliate its citizens – loses its appeal. However, Margalit does not offer a philosophical solution to this problem, some proof that humiliation is rational, but instead, after a long discussion, offers the following insight:

The attempt to find a general justification for this fact is ludicrous. That's the way it is, that's life... To ask why the Jews in the Viennese square considered themselves degraded when their Nazi tormentors forced them to scrub the pavement is absurd. If that is not humiliation, then what is?<sup>5</sup>

In a similar manner, I would say that if rape is not humiliation, then what is? In rape, just as with the degradation of the Viennese Jews, no further argument is needed in order to establish the rationality of the painful emotions of the victims. "That's the way it is," as Margalit puts it, "that's life." Of course, this does not mean that emotions can never be rationally criticized in a way that is relevant to their normative status. To take a simple example, if the other feels insulted by me because he completely misinterprets what I did, then his painful emotions indeed carry no normative force against me. Similarly, if I made a completely innocent mistake about my partner's wish to have sex, then her sense of humiliation would be irrational; it would be based on a distorted view of reality. But in normal circumstances, when no such mistakes are involved, there is nothing irrational in humiliation, at least not in the sense relevant to moral and legal judgment. Hence, contra Gardner, the psychological harm caused to rape victims is an independent basis for its wrongness, not one that depends on some other argument. In terms of its immediacy and long-term damage, the psychological trauma of rape is not so different from that caused by physical harm, and the same is

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<sup>5</sup> AVISHAI MARGALIT, *THE DECENT SOCIETY* 127 (Harvard Univ. Press, 1996).

true for the passivity and helplessness of the victims in both cases vis-à-vis the harm that befalls them.

One might object to my comparison between rape and the Viennese Jews episode on the grounds that in the latter the humiliation was intentional, hence a proper ground for harm, while in rape the humiliation is typically unintentional and therefore not a proper ground for harm. I find this objection unconvincing. Margalit's observation that some behaviors bring about a sense of humiliation applies not only to cases in which the perpetrators act with conscious intent to humiliate their victims - to cases in which they do what they do to them *in order* to humiliate them. Human beings, with their pathetically fragile self-respect, inescapably feel humiliated even when the humiliation is not intended in such a conscious and explicit manner.<sup>6</sup> We are humiliated when we are ignored, when we are taken advantage of, when we are sexually exploited: "That's the way life is."

So far for Gardner's argument against the harm understanding of the wrongness of rape. At any rate, since, in his view, such harm is merely epiphenomenal, some other account is needed to establish the wrongness of rape, one that would apply to all cases, especially to the pure ones. The account Gardner proposes is one based on the Kantian distinction between treating people as ends and treating them merely as means. Though the feature of treating people as means characterizes many moral wrongs, "none of these wrongs instantiates the central moral importance of the Kantian argument so clearly and unequivocally as rape. Rape, in the pure case, *is the sheer use of a person*".<sup>7</sup>

I am not convinced, however, that this abstract Kantian notion is enough to answer Gardner's question regarding the wrongness – the *grave* wrongness – of rape. In Kant's view, *any* immoral behavior treats humanity as a mere means. Such an attitude is expressed when an individual decides to commit suicide, to give a promise she does not intend to fulfill, to refrain from helping other human beings in need and so on. It is therefore unclear how the notion of treating human beings as means can account for the special wrongness of *rape*, for the fact that it is "never excusable" and "never justifiable".<sup>8</sup>

Let me try to be more concrete. In the pure case, let us assume, a woman is lying unconscious in a hospital room and is raped by a medical student who sneaks into her room at night. Now suppose that the same student sneaks into her room not in order to have sex with her, but in order to use her body to help him prepare for his forthcoming test on the anatomy of the face. He brings a ruler and measures her nose and her ears, he

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<sup>6</sup> I would reckon that cases in which perpetrators explicitly intend to humiliate their victims are a rather small sub-category within the category of humiliating acts.

<sup>7</sup> GARDNER, at 16 (italics added).

<sup>8</sup> GARDNER, at 1.

feels her facial bones and so on. She is just a *body* for him, nothing but a tool to enable him to do well in the test. Now while his behavior is definitely wrong, it is wrong in a different way than rape is, though in both cases a person is used merely as a means. (Would it make a difference if our anatomy student undressed the woman to prepare for his final test in anatomy, but still with no sexual intent or desire whatsoever?)

It is interesting to see how Gardner himself uses this kind of argument against a different account for the wrongness of rape, but fails to apply it to his own. What I have in mind is his response to the proposal to see rape as one of many wrongs which fall within the rubric of ‘doing to another that to which they do not consent.’ That is not very helpful, says Gardner, because it fails to tell us “what is wrong with rape *in particular*.”<sup>9</sup> Fair enough. But the same critical thought applies to Gardner’s own proposal. Saying that rape belongs in the same category as many other wrongs that treat people as mere means is a promising start, but only a start. We need to know what is wrong with rape in particular; in what sense rape is different, and probably much worse, from other instances of treating people as means. Perhaps Gardner wanted to solve this problem by insisting that unlike other wrongs, rape is the *sheer* use of a person. But I can’t see why this description wouldn’t apply to the anatomy student case too, or to numerous other cases, in which very clearly one person treats another as mere means.<sup>10</sup>

It seems that the elephant in the room that is missing in Gardner’s account for the wrongness of rape, and probably in other accounts as well, is the meaning of our body for us, or, more precisely, the meaning for us of being sexual objects. Rape is not just using a person as a means, but using her as a means for sexual satisfaction. Moreover, the sexual intent or satisfaction must involve actual contact with the victim’s body. Deriving such satisfaction from merely looking at a woman would not suffice. What a theory of rape must explain, then, is why sex makes such a normative difference, why is it that using a person becomes so much worse, when the use is associated with sex. When Gardner’s account is supplemented by this missing part of his argument, we might finally have a complete theory of the wrongness of rape.

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<sup>9</sup> *Id.* at 3.

<sup>10</sup> My brief comments here raise a general worry about the amount of normative work that can be done by the Kantian principle never to treat people merely as means. See, e.g., Don E. Marietta Jr., *On Using People*, 82 *ETHICS* 232, 238 (1972) (“we cannot solve the problems of interpersonal relationships by saying that people should not be used. We must judge each use of a person, relying finally on the ethical principles and the values which underlie our general moral position”) and Michael Otsuka, *Self-Ownership and Equality: A Lockean Reconciliation*, 27 *PHIL. & PUB. AFF.* 65, 69 n.15 (1998) (“The notion of ‘using as a means,’ though intuitive, has proven resistant to philosophical analysis”). For a survey of some contemporary debates about Kant’s formula of the end, see Lara Denis, *Kant’s Formula of the End in Itself: Some Recent Debates*, 2(2) *PHIL. COMPASS* 244 (2007).