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## THE ESSENCE OF RAPE

‘If we can’t say what rape “is”, how can we struggle against it?’<sup>1</sup>

What is rape? How do we recognize it? Upon what does a designation of rape depend? Can we identify some minimal properties characterizing rape in its many, distinct manifestations? Certainly, pronouncements about what is and is not rape, what ought and ought not to count as rape, are common enough for us to suppose that, boundary disagreements notwithstanding, there is some shared understanding, some essential core, which grounds the concept. The basic idea we instantly comprehend: rape is a heinous act inflicting unique, irreparable harm. Yet, beneath this surface of shallow consensus lurks deep, unresolved contestation, played out repeatedly in the media and popular culture, and manifest too in a vast repository of rape scholarship.<sup>2</sup> There is wide-ranging debate, for example, about how to characterize rape. Is it fundamentally about sex or violence? Is it a natural (if regrettable) expression of ‘normal’ male sexuality or extreme, aberrational conduct? Why is rape regarded as so morally repugnant? What exactly is wrong with rape and what sort of harm does it occasion? Are there gradations of rape or does rape entail an ‘all-or nothing’ designation? How does rape figure in a society in which gendered norms and disparities remain deeply embedded?

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<sup>1</sup> AJ Cahill, *Rethinking Rape* (Cornell UP 2001) 9.

<sup>2</sup> The literature on rape is voluminous; key texts on which this analysis draws include S Brownmiller, *Against our Will: Men, Women and Rape* (Penguin 1975); S Tomaselli and R Porter (eds), *Rape: a Historical and Social Enquiry*, (Blackwell 1986); K Burgess-Jackson (ed), *A Most Detestable Crime: New Philosophical Essays on Rape* (OUP 1999); L du Toit, *A Philosophical Engagement with Rape: The Making and Unmaking of the Feminine Self* (Routledge 2009); S Brison, *Aftermath* (Princeton UP 2003); Cahill (n 1); SJ Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Harvard UP 1998); N Gavey, *Just Sex? The Cultural Scaffolding of Rape* (Routledge 2005).

The contentiousness of these questions evidences the striking lack of consensus infusing rape discourse.<sup>3</sup> Once probed, the idea of rape proves surprisingly elusive. Yet, public debate routinely bypasses the discursive fragility of rape, presupposing a stable, uncontested core of meaning unaffected by disagreement at the penumbra. This is culturally reproduced in appeals to ‘real’,<sup>4</sup> ‘legitimate’,<sup>5</sup> or ‘classic’ rape,<sup>6</sup> positing a prototypical ideal to assess the ‘rape-ness’ of specific encounters.<sup>7</sup> The assumption that rape is a self-evidently meaningful term - that ‘rape is rape’<sup>8</sup> - constantly jars with the practical and political irresolution characterizing the discourse. Put simply, if perceptions of rape vary so extensively, how can it properly signify a shared understanding around which public debate may be conducted?

The academic solution is to devise a theory with sufficient explanatory and/or normative potency; to construct an account offering ‘the best understanding of the constellation of acts we conceptualize as rape’.<sup>9</sup> The result is a plethora of theoretical engagements, spanning disciplines and diverging markedly in form, focus, and standpoint. While, such multi-disciplinary engagement reflects the importance of rape as a focus of intellectual enquiry, it is less conducive to harmonious theoretical alignment. Because most rape theories emanate from within a disciplinary frame, the choice of frame inevitably influences the analysis which results, generating a series of parallel, often discordant, narratives and a discursive environment in which

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<sup>3</sup> ‘Rape discourse’ denotes the myriad significations / representations of rape in ordinary language, law, public debate, philosophy, art etc, encompassing conceptual structures, ideological frameworks, institutional practices, and other linguistic and non-linguistic processes of knowledge creation, configuration, and authentication.

<sup>4</sup> J Temkin and B Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart 2008) 31-33.

<sup>5</sup> See comments of US Senate candidate, Todd Akin, on the unlikelihood of pregnancy in cases of ‘legitimate rape’ (‘Todd Akin defiant as support withdrawn over “legitimate rape” claims’, *The Guardian* 20 August 2012).

<sup>6</sup> See remarks of British politician, Kenneth Clarke, describing ‘classic rape’ as ‘where someone jumps out from behind a bush’ (‘Ken Clarke is wrong on rape – but many seem to agree with him’, Duncan Robertson, *The New Statesman*, 18 May 2011).

<sup>7</sup> Prefacing descriptors before ‘rape’ may also signal departures from or qualifications to a prototypical ideal, eg ‘date rape’ / ‘marital rape’.

<sup>8</sup> Barack Obama, reported in *The Huffington Post*, 20 August 2012 ([http://www.huffingtonpost.com/2012/08/20/obama-todd-akin-rape\\_n\\_1812140.html](http://www.huffingtonpost.com/2012/08/20/obama-todd-akin-rape_n_1812140.html)).

<sup>9</sup> JH Bogart, ‘Reconsidering Rape: Rethinking the Conceptual Foundations of Rape Law’ (1995) 8 *Can J L & Jurisprudence* 159, 160.

understandings of rape are ‘splintered, broken up, diffracted’ amidst a proliferation of authoritative voices.<sup>10</sup>

Is it possible to reduce the discord marking the field? Can we identify some core principles, isolate key properties, agree some basic normative stakes upon which a coherent articulation of rape might rest? Is there an *essence* of rape to be distilled, pure and unadulterated, from the bewildering medley of views populating the discursive frame? We could turn to law and posit that rape is, and only is, what the law decrees: a designation of rape is the product not of philosophical speculation or anthropological enquiry but doctrinal precision. This approach has some merit: After all, rape, strictly speaking, is a legal concept; and although law cannot capture exhaustively what might be regarded as sexual wrongdoing, it is surely conclusive on the question of whether and what conduct amounts to rape.

The problem is that while law can settle the question of what rape currently *is*, it can do little to resolve the question of what rape *ought* to be. And unless the ‘ought’ question is addressed, appealing to law defers rather than determines most of the concerns animating rape debate. Moreover, as HLA Hart, amongst others, pointed out, legal concepts are rarely as determinate as we imagine. Because language is open-textured, even the clearest of rules requires interpretation.<sup>11</sup> Nor is language a neutral vehicle for expressing ideas: language is socially and culturally encoded, embedded in institutional settings, and actively implicated in representational and meaning-making processes.<sup>12</sup> For example, the traditional common law articulation of rape – to have ‘carnal knowledge with any woman... against her will’<sup>13</sup> - has

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<sup>10</sup> N Bryson, ‘Two Narratives of Rape in the Visual Arts: Lucretia and the Sabine Women’ in Tomaselli and Porter (n 2) 152, 153.

<sup>11</sup> HLA Hart, *The Concept of Law* (Clarendon Press 1961) especially Ch VII.

<sup>12</sup> S Ehrlich, *Representing Rape: Language and Sexual Consent* (Routledge 2001).

<sup>13</sup> M Hale, *Historia Placitorum Coronae [History of the Pleas of the Crown]* 2 vols (London Professional Books Limited 1971) vol 1, 628 (originally published 1736).

long served as a linguistic proxy for the assumptions and beliefs of a succession of male juristic communities about sexual matters. While reforms in recent decades have produced contemporary definitions in which allusions to ‘carnal knowledge’ have yielded to more explicit articulation of acts and body parts,<sup>14</sup> there remains considerable scope for injecting social and cultural ideas about sexuality into the legal framework. Temkin and Krahé speculate that no other criminal offence ‘is as intimately related to broader social attitudes’ as rape.<sup>15</sup> Such attitudes seep into the fabric of legal discourse, shaping legal and moral deliberation. Juries too are influenced by ideas about rape going well beyond the formal doctrinal categories,<sup>16</sup> all of which troubles an understanding of rape as purely and inviolably legal.

Recent law reform initiatives have further destabilized rape as a meaningful category. As feminist concerns infiltrate policy discourse, a transformative impetus has swept the globe,<sup>17</sup> producing a discursive platform in which traditionally held views have been challenged and formal definitions radically revised. In England and Wales, the common law definition was statutorily superseded in 1976 by a more detailed elaboration of rape as ‘unlawful sexual intercourse with a woman who at the time of intercourse does not consent, the man knowing she does not consent or being reckless as to whether she does’.<sup>18</sup> Further revision followed in 1994 when ‘sexual intercourse’ was expanded to include anal as well as vaginal penetration,

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<sup>14</sup> Sexual Offences Act 2003, s 1(1) (considered further below).

<sup>15</sup> Temkin and Krahé (n 4) 33.

<sup>16</sup> L Ellison and V Munro, ‘Of “Normal Sex” and “Real Rape: Exploring the Use of Socio-sexual Scripts in (Mock) Jury Deliberation’ (2009) 18/3 *Social & Legal Studies* 1; ead, ‘Better the devil you know: “real rape” stereotypes and the relevance of a previous relationship in (mock) juror deliberations’ (2013) 14 *International Journal of Evidence and Proof* 299.

<sup>17</sup> Useful cross-jurisdictional analyses include C McGlynn and V Munro (eds), *Rethinking Rape Law: International and Comparative Perspectives* (Routledge 2010); N Westmarland and G Gangoli (eds) *International Approaches to Rape Law* (Polity Press 2011).

<sup>18</sup> Sexual Offences (Amendment) Act 1976, amending the Sexual Offences Act 1956 which, while recognizing rape as a statutory offence (s 1), offered no definition so that the common law understanding continued to govern. Some aspects of rape law were statutorily enshrined before 1976, eg sex with a minor (‘statutory rape’). See generally K Burgess-Jackson, ‘A History of Rape Law’ in Burgess-Jackson (n 2) 15.

thus encompassing male rape.<sup>19</sup> In 2003, following a comprehensive Home Office Review,<sup>20</sup> significant additional changes were enacted, the Sexual Offences Act 2003 offering the most explicit statutory account of rape in England and Wales to date:

‘1 (1) A person (A) commits an offence if—

(a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,

(b) B does not consent to the penetration, and

(c) A does not reasonably believe that B consents.’

This new articulation replaced the concept of recklessness in the 1976 Act with a standard of reasonable belief in consent,<sup>21</sup> introducing a general definition of consent<sup>22</sup> supported by evidentiary presumptions in prescribed circumstances.<sup>23</sup> The term ‘sexual intercourse’ was dropped in favour of an anatomical formulation so that for the first time English legislation was explicit about requiring a penis to commit rape.<sup>24</sup> More broadly, the Act radically re-structured sexual offences to comprise four core categories: rape (s 1), assault by penetration (s 2), sexual assault (s 3) and causing a person to engage in sexual activity without their consent (s 4). This conveyed a legislative *logos* in which rape was distinguished from other forms of sexual violation and located at the top of the sexual offences hierarchy.<sup>25</sup>

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<sup>19</sup> Criminal Justice and Public Order Act 1994, s 142, amending SOA 1956, s 1.

<sup>20</sup> *Setting the Boundaries: Reforming the Law of Sexual Offences, Vol 1* (HO 2000).

<sup>21</sup> Ending the controversial reign of *DPP v Morgan* [1976] AC 182.

<sup>22</sup> SOA 2003 s 74: ‘A person consents if he agrees by choice and has the freedom and capacity to make that choice’.

<sup>23</sup> SOA 2003 ss 75 and 76.

<sup>24</sup> See also SOA 2003 s 78, defining ‘sexual’ and s 79 defining ‘penetration’. Previous statutory elaborations incorporated the penis requirement implicitly by using gender-specific language (‘man’, ‘woman’ etc).

<sup>25</sup> A hierarchical conception of sexual offences is reflected in the prescribed penalties as well as in legislative debate. See eg House of Commons Home Affairs Committee, *Sexual Offences Bill, Fifth Report of Session 2002-2003*, HC 639, paras 11-12; *Sexual Offences Bill: Government Reply to Fifth Report from the Home Affairs Select Committee 2002-2003 HC 639* (Cm 5986, October 2003) para 1.

Debate in England and Wales about what kinds of conduct should fall within the contours of rape is emblematic of wider, multi-jurisdictional interrogation of the traditional parameters of the crime,<sup>26</sup> further propelled by international law developments in which the association of rape with group-based forms of coercion has come more clearly to the fore.<sup>27</sup> It is increasingly acknowledged that perceptions of rape are changing (some argue, quite dramatically<sup>28</sup>). Certainly, the marked increase in the number of rapes reported<sup>29</sup> suggests either that the incidence of rape has risen exponentially or that views as to its scope are undergoing significant change. Some commentators maintain that the ambit of rape is now too wide: ‘rape’ is being dangerously ‘diluted’<sup>30</sup> and/or unduly extended ‘into the realms of sexual etiquette’.<sup>31</sup> Others think the global shift away from conceiving rape as sex by force towards conceiving it as nonconsensual sex better reflects contemporary moral and cultural values in which rape is increasingly aligned with the protection of sexual autonomy, understood as the right to self-governance in matters of sexuality.<sup>32</sup>

Tension between competing conceptions of rape is also visible in debate about rape conviction rates. For some, the fact that the number of rape convictions has remained relatively static despite the steep rise in rapes being reported, is indicative of a ‘justice gap’ when it

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<sup>26</sup> Scottish rape law has changed along similar lines. See Sexual Offences (Scotland) Act 2009 and S Cowan, ‘All Change or Business as Usual? Reforming the Rape Law of Scotland’ (McGlynn and Munro (n 17) 154).

<sup>27</sup> See especially the decision of the International Criminal Tribunal for Rwanda (ICTR) in *Akayesu* (ICTR-96-4-T, Judgment 2 September 1998), considered further below.

<sup>28</sup> Gavey (n 2).

<sup>29</sup> Domestic figures reveal an unprecedented rise in the number of rapes reported over the last few decades (Temkin and Krahe (n 4) 14). For a statistical breakdown by force and year, see [www.justiceinspectorates.gov.uk/hmicfrs/publications/rape-monitoring-group-digests-and-data-2015-16](http://www.justiceinspectorates.gov.uk/hmicfrs/publications/rape-monitoring-group-digests-and-data-2015-16).

<sup>30</sup> K Roiphe, *The Morning After: Sex, Fear and Feminism on Campus* (Little, Brown and Co 1993) 81.

<sup>31</sup> L Gittos, *Why Rape Culture is a Dangerous Myth* (Imprint Academic 2015) ch 4.

<sup>32</sup> See eg Schulhofer (n 2). For an argument against sexual autonomy as the underlying principle of rape law, see J Rubinfeld, ‘The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy’ (2013) 122 Yale LJ 1372, 1380.

comes to rape victims.<sup>33</sup> For others, the statistics are evidence that the system is working well, that only ‘real’ rapes are making the legal cut.<sup>34</sup> Disagreement about what can be inferred from rape conviction statistics is complicated by limitations in the range and compatibility of available data.<sup>35</sup> Nevertheless, it is plain that disagreement about the scope of rape is now deeply entangled in public policy debate on criminal justice matters.

Rape is a maelstrom of conceptual and normative contestation, a ‘category in crisis’.<sup>36</sup> The term is apparently so devoid of shared social and cultural meaning as to question its fitness for purpose. Has the time come to eschew rape as a term, to look afresh at questions of sexual wrongdoing unencumbered by the ideological baggage it imports? This approach is not without precedent. The 1970s and 1980s witnessed a trend away from rape as a formal legal category towards more generic formulations premised upon violence and/or sexual misconduct.<sup>37</sup> Changes in nomenclature however did not necessarily produce improvements on the ground.<sup>38</sup> Whether framed in terms of rape or sexual assault/battery/misconduct, legal approaches to sexual violence continue to be widely criticized for failing victims. Moreover, even in jurisdictions where ‘rape’ has been formally abolished, the term still retains cultural

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<sup>33</sup> See, eg Temkin and Krahe (n 4); V Munro and L Kelly, ‘A Vicious Cycle: Attrition and Conviction Patterns in Contemporary Rape Cases in England and Wales’ in M Horvath and J Brown (eds) *Rape: Challenging Contemporary Thinking* (Willan 2009) 281.

<sup>34</sup> Gittos (n 31) ch 1.

<sup>35</sup> *Stern Review: A Report by Baroness Vivien Stern CBE of an Independent Review into how Rape Complaints are handled by Public Authorities in England and Wales* (Home Office and Government Equalities Office 2010) 42-46.

<sup>36</sup> P Rush, ‘Jurisdictions of Sexual Assault: Reforming the Texts and Testimony of Rape in Australia’ (2011) 19 *Feminist Legal Studies* 47, 48.

<sup>37</sup> See eg the Michigan reforms introduced in the 1970s to regulate ‘criminal sexual misconduct’ (considered in Burgess-Jackson (n 18) 21-24) as well as the ‘sexual assault’ framework introduced in Canada in 1983 (J Roberts and R Mohr (eds) *Confronting Sexual Assault: A Decade of Legal Change* (University of Toronto Press 1994)). On Australian reforms, see Rush (n 36).

<sup>38</sup> Schulhofer (n 2) ch 2.



and political purchase, expressing a need to signal the *distinctiveness* of rape, the special and unique status it holds as a focus of moral, political, and social concern.<sup>39</sup>

At which point we return to the nub of the question: what *is* this distinctiveness, this special status, this uniqueness? What makes rape rape and not otherwise? This looks like a question of essence. Essence is closely associated with efforts to identify and differentiate things, and distinguishing rape from non-rape is surely a central preoccupation of rape discourse. It would be surprising, therefore, not to find essence implicated in some way and one does not have to look far to detect the operation of an essential or paradigmatic rape (however elusive) serving as a conceptual theoretical, or ideological lynchpin. This is not to assert that there *is* an essence of rape to be extracted from the morass of contestation but rather to recognize that rape discourse frequently operates *as if* there is. Assuming this hypothesis is correct, close investigation of how essence is discursively deployed may well aid our understanding of, and enhance our ability to respond to, the complex array of practical and political difficulties which rape, and rape law, currently pose. In the analysis which follows, I pursue this line of thought to mount a comprehensive critique of the role of essence in rape discourse. I argue that reliance on essence promotes an understanding of rape as static and universal, insensitive to historical, cultural, and spatial specificities; a continuity of meaning and commonality of understanding is projected which is more misleading than enlightening. I encourage instead an apprehension of rape as politically contested and contextually bound, shifting the focus away from abstract speculation about what rape is, towards honest, creative, and constructive engagement with the role of law in regulating sexual misconduct.

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<sup>39</sup> The policy literature is peppered with references to the ‘uniqueness’ of rape. See eg L Kelly, J Lovett and L Regan, *A Gap or a Chasm? Attrition in Reported Rape Cases* (Home Office Research Study 293 2005); Stern Review (n 35); Dame Elish Angiolini, *Report of the Independent Review into the Investigation and Prosecution of Rape in London* (CPS 2015).

## ESSENCE TALK

It is not uncommon to frame accounts of rape in terms of essence. PJ Fitzgerald asserts that ‘the essence of rape and similar offences is that the accused takes sexual liberties with a woman against her will’.<sup>40</sup> According to *Setting the Boundaries*, ‘the essence of rape’ is ‘the sexual penetration of a person ... without consent’.<sup>41</sup> For Nicola Lacey, ‘its essence lies in the violation of sexual autonomy.’<sup>42</sup> John Bogart invokes ‘the essential harm’ of rape,<sup>43</sup> while Louise du Toit refers to the ‘damage’<sup>44</sup> and George Panichas to the ‘wrong’<sup>45</sup> of rape in expressly essentialist terms. Judges too often talk about rape – indeed about legal categories in general - in terms of essence: In *DPP v Morgan*, Lord Hailsham identifies intent as an ‘essential ingredient’ of rape<sup>46</sup> while, in *R v Miller*, Lynskey J describes consent in similar terms.<sup>47</sup> Even when not explicitly invoked, essence may function implicitly to underpin discursive engagement, particularly where the concern is to analyse conceptual boundaries or interrogate core meanings. For Aristotle, most closely associated with essence philosophically, the idea of essence was intimately connected with substance or being. He used the Greek phrase ‘*to ti en einai*’ (‘what it is to be that thing’) and it is from his early metaphysics that essence emerged as a philosophical category, specifically as a conceptual vehicle for articulating what things *are*, including intangibles such as ‘law’ or ‘justice’.<sup>48</sup> Because essence is deeply bound

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<sup>40</sup> PJ Fitzgerald, *Criminal Law and Punishment* (OUP 1962) 74.

<sup>41</sup> (n 20) para 2.8.2.

<sup>42</sup> N Lacey, ‘Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law’ (1998) 11 *Can J L & Jurisprudence* 47, 59.

<sup>43</sup> Bogart (n 9) 170.

<sup>44</sup> Du Toit (n 2) 6.

<sup>45</sup> G Panichas, ‘Simple Rape and the Risks of Sex’ (2006) 25 *Law and Philosophy* 613, 622.

<sup>46</sup> (n 21) at 215.

<sup>47</sup> *R v Miller* [1954] QBD 282 per Lynskey J at 285. Other examples include Lord Nimmo-Smith in *Lord-Advocate’s Reference (No 1 of 2001)* [2002] SCCR 435 at 461, considering whether force is ‘an essential element in the crime of rape’ and overruling *HM Advocate v Sweeney (Charles)* (1858) 3 Irv 109 in which Lord Cowan states: ‘it is the essence of the crime of rape that carnal knowledge of the woman's person should be had, forcibly, and without her consent’ (at 143).

<sup>48</sup> Aristotle, *Metaphysics* (*Penguin Classics*) (1998) Z4.

up with questions of meaning and definition, almost any exploration of ideas or concepts will veer in its path. Essence diverts attention away from particular manifestations of a thing towards features which persist across time and endure through processes of change. It offers a way to bypass temporal and spatial specificities, to get beyond the debilitating details of normative and conceptual contestation, promising an articulation capable of transcending all others.

In philosophical discourse, essence is a highly technical concept featuring prominently in the fields of logic, metaphysics, and linguistic philosophy. Outside these contexts, essence is understood less strictly and more diversely so that correspondence between philosophical articulations and popular usages is loose at best; indeed, some of the ways in which essence is culturally apprehended are likely to be viewed, philosophically speaking, as distortions of the idea of essence properly understood. This is not always appreciated by those who wield essence as a discursive tool. Recognizing this, the analysis here sacrifices philosophical purity and adopts an ‘ordinary language’ approach<sup>49</sup> to probe the myriad ways in which essence figures, explicitly and implicitly, in rape discourse. Four common understandings of essence are posited: ‘necessary’, ‘positional’, ‘pure’, and ‘real’ essence. Each exemplifies a distinct, albeit related, linguistic use of the term, although in practical contexts the categories are not always easily distinguishable: Multiple understandings of essence may be deployed simultaneously, synonymously, and/or interdependently. The proffered typology thus functions heuristically as an explanatory tool to be approached with due caution regarding the methodological risks which accompany the construction and application of ‘ideal types’, in particular, the risk

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<sup>49</sup> On ordinary language philosophy, see F Lynd, ‘Oxford and the “Epidemic” of Ordinary Language Philosophy’ (2001) 84 *Monist* 325. Hart’s *Concept of Law* is a prime example of the application of ordinary language philosophy to law.

of reifying - rendering 'real' - abstract theoretical contrivances devised for analytical purposes.

## NECESSARY ESSENCE

Perhaps the most common understanding of essence in popular usage attributes essential *properties* to something. Described by Forbes as an 'intuitive' understanding in which 'the essence of the thing is the collection of features which determine its identity and make it the specific thing it is rather than something else',<sup>50</sup> the conceptual separation of entities from their properties provides a means of identifying and distinguishing things. Essential properties are *necessary* properties which cannot be relinquished without loss of the thing itself. They are distinguishable from *accidental* properties, properties which something happens to have, might commonly possess, but are not necessary to its *being*. Swans for example, while commonly white, can sometimes be black. Whiteness therefore is an accidental not essential property of a swan.<sup>51</sup>

The accidental/essential distinction, while intuitively easy to grasp, is difficult to pin down philosophically and views diverge widely on how the distinction should be drawn.<sup>52</sup> It is easy to fall into the 'dangerous trap'<sup>53</sup> of mistaking accidental for essential properties. It is equally mistaken to assume that universal properties are always also essential: A sexual division of labour may well be a universal feature of human societies but this does not make it essential in the sense that no human society could do without it. Although closely associated, essence

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<sup>50</sup> G Forbes, 'Essentialism' in B Hale and C Wright (eds) *A Companion to the Philosophy of Language* (Blackwell Publishing 1999) 515, 516.

<sup>51</sup> *ibid* 515.

<sup>52</sup> *ibid*; see also S Roca-Royes, 'Essential Properties and Individual Essences' (2011) 6/1 *Philosophy Compass* 65.

<sup>53</sup> J Roland Martin, 'Methodological Essentialism, False Differences and Other Dangerous Traps' (1993) 19/3 *Signs* 630, 632.

and universality are not synonymous: while essential features are necessarily universal to the category they belong, universal features are not necessarily essential. A similar point applies to generalization. We can generalize - extrapolate from experience or draw upon a representative sample - without necessarily making an essence claim. Of course, the generalization may turn out to be false or unsustainable but to expose a false generalization is not necessarily to challenge the concept of essence *per se*.<sup>54</sup>

Necessary essence is frequently encountered in law. The jurisprudential quest to delineate a domain of law invites the articulation of essential properties which capture what law is and ground it as a meaningful category.<sup>55</sup> Essence also functions as a doctrinal tool: The reduction of legal concepts to bundles of necessary properties is a common legal technique. In many ways, the traditional methodology of legal scholarship, entailing the abstraction of core elements from the clutter and chaos of practical legal disagreement, is essence talk writ large. Essence here is closely linked to processes of categorization. Identifying common attributes allows distinct entities to be grouped in terms of *kind*.<sup>56</sup> For example, the four core offences comprising the sexual offences framework in England and Wales may be classified as a single kind of offence premised on nonconsensual sexual acts.<sup>57</sup> Essence here works to signal sameness across difference, conferring unity upon otherwise fragmented phenomena.

What then are the necessary properties of rape? What makes rape ‘the specific thing it is and not something else’<sup>58</sup>? Doctrinally speaking, rape, like any legal category, is easily reducible

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<sup>54</sup> According to Martin, the feminist critique of gender essentialism has largely been concerned with attacking false generalizations which have become confused with claims about essence (ibid, 644-645).

<sup>55</sup> See eg J Raz, ‘Can There be a Theory of Law’ in M Golding & W Edmundson (eds) *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell 2004) 324.

<sup>56</sup> In *The Metaphysics of Gender* (OUP 2011), Charlotte Witt distinguishes ‘kind essentialism’ from ‘individual essentialism’, the former relating to those features which identify a thing as belonging to a particular kind, the latter being concerned with features which confer individual identity or unity. Both understandings rely on a notion of necessary properties.

<sup>57</sup> *Setting the Boundaries* (n 20) para. 2.1.1.

<sup>58</sup> Forbes (n 50).

to a bundle of necessary ingredients. The contents of the bundle will vary jurisdictionally: rape does not always require a penis, include anal or oral penetration, require proof of physical force and so on. Inevitably, disagreements will arise about what the bundle *ought* to comprise at which point attention shifts towards identifying some minimally recurring, multi-jurisdictional feature(s) capable of uniting rape as a generic category.

Could *lack of consent* serve such a unifying purpose? In a lengthy, multi-jurisdictional overview of rape law reform, the European Court of Human Rights in *MC v Bulgaria*<sup>59</sup> highlights lack of consent as the key point of convergence in modern rape law. Rape becomes recast, simply and essentially, as nonconsensual sex.<sup>60</sup> Others, however, question whether consent provides the glue holding rape law together. Historically, and to some extent contemporaneously, consent is not always legally determinative.<sup>61</sup> Moreover, it is generally the perpetrator's perception of whether it has been given, rather than the fact of consent, which delineates the scope of the offence. Consent may be withheld, but if the perpetrator believes, honestly and/or reasonably (depending on whether an objective or subjective legal test governs) that it has been given, rape is not deemed to have occurred. Strictly speaking then, rape is not non-consensual sex but sex where the defendant knows or ought to know (again, depending on the

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<sup>59</sup> (39278/98) [2003] ECHR 646 (4 December 2003).

<sup>60</sup> See *ibid*, in particular at [127] where the Court refers to rape as an offence against women's autonomy, the 'essential element' of which is lack of consent.

<sup>61</sup> Statutory rape provides one example here, the marital rape exemption, another. While in both contexts, consent is woven into the conceptual structure - the underage child is deemed by law to be incapable of giving her consent and the married woman is deemed by law to be incapable of withdrawing it - the notion of consent is formal and legally constituted rather than derived from the victim's state of mind. At the very least, this is a different kind of consent from that endorsed in *MC v Bulgaria* and indeed most consent theories.

test applied) that consent is lacking. Add to this the well-documented practical problems associated with *proving* lack of consent and there emerges a significant category of nonconsensual sexual encounters likely to fall outside the parameters of legal proscription.<sup>62</sup>

If consent does not necessarily correspond with rape conceptually or practically, nor does it normatively. Catharine MacKinnon maintains that consent misdiagnoses the problem of rape as ‘unwanted, rather than unequal sex’.<sup>63</sup> MacKinnon, among other commentators,<sup>64</sup> questions the practicability of consent to sex in a society in which power disparities remain so visibly gendered, ‘Lack of consent’ she argues ‘is redundant and should not be a separate element of [rape]’.<sup>65</sup> Rape should be defined as ‘sex by compulsion’,<sup>66</sup> placing coercion not consent at the heart of the conceptual framework. To exemplify this approach, MacKinnon invokes the judgment in *Akayesu* where rape is defined as ‘as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive’.<sup>67</sup> In *Akayesu*, the (external) conditions of coercion rather than the (internal) presence or absence of consent are the primary evidentiary and doctrinal foci. Although devised in an international criminal law context, MacKinnon advocates the broader application of *Akayesu*,<sup>68</sup> adapting it to craft a ‘transnational’ redefinition of rape<sup>69</sup> which dispenses with consent entirely.

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<sup>62</sup> In *MC v Bulgaria* (n 59), the gist of the complaint was that notwithstanding a legal definition of rape appearing to encompass all nonconsensual sex, the practice of Bulgarian prosecutors was to proceed only where evidence existed that the victim had physically resisted. Resistance thus functioned as a practical element of the offence, restricting the categorical scope to a sub-set of nonconsensual encounters.

<sup>63</sup> CA MacKinnon, ‘Rape Redefined’ (2016) *Harvard Law & Policy Rev* 433, 436.

<sup>64</sup> J Gauthier, ‘Consent, Coercion, and Sexual Autonomy’ in Burgess-Jackson (n 2) 71. BM Baker, ‘Understanding Consent in Sexual Assault’ in Burgess-Jackson (n 2) 49.

<sup>65</sup> CA MacKinnon, ‘Defining Rape Internationally: A Comment on *Akayesu*’ in *Are Women Human? And Other Dialogues* (Harvard UP 2006) 237, 245.

<sup>66</sup> *ibid.*

<sup>67</sup> *Akayesu* (n 26) at [688].

<sup>68</sup> (n 65) 244-246.

<sup>69</sup> ‘[Rape is] a physical invasion of a sexual nature under circumstances of threat or use of force, fraud, coercion, abduction, or of the abuse of power, trust, or a position of dependency or vulnerability’ (n 63) 474. Interestingly, MacKinnon includes fraud within her expanded definition of coercion. By contrast, Rubinfeld argues that fraud properly features as a factor in consent and that legal reluctance to recognize rape-by-deception proves that

Which model - consent or coercion - confers upon rape the clearest conceptual boundaries?

Which has the widest scope? Much depends here on how coercion and consent are understood. Conceived narrowly and traditionally in terms of physical force, coercion yields an understanding of rape which excludes many nonconsensual sexual encounters. In this context, a consent-based model is obviously more expansive than a force- or coercion-based one.<sup>70</sup>

However, a broader understanding of force/coercion yields a correspondingly broader offence. Burgess-Jackson, for example, advocates an idea of coercion going beyond physical force (or the threat thereof) to include situations in which perpetrators create conditions which render victims vulnerable, enabling the exploitation of that vulnerable state (what Burgess-Jackson describes as cases of ‘manipulated-vulnerability’).<sup>71</sup> His approach recognizes that, even under threat, people make choices, but because such choices are *constrained* by conditions imposed by the threat-maker, they should not be permitted to legitimate sexual encounters. Like MacKinnon, Burgess-Jackson supports a model of rape in which coercion is central and choice/consent play no formal or direct role. However, MacKinnon’s conception of coercion is wider still; for MacKinnon one cannot easily separate rape from the broader context of gender inequality generating an element of coercion in virtually all heterosexual

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force not consent is the normative lynchpin of US rape law. Such diverging apprehensions of how fraud/deception ‘fits’ within the fabric of rape law further evidences the inability either of consent or coercion satisfactorily to resolve boundary problems in rape.

<sup>70</sup> Note that confining rape to violence also allows for the inclusion of *consensual* sexual encounters in which violence features. Thus Patricia Smith (‘Social Revolution and the Persistence of Rape’ in Burgess-Jackson (n 2) 32), argues that ‘rough’ consensual sex should fall within the scope of rape and non-violent, non-consensual sex should remain without (at 39).

<sup>71</sup> K Burgess-Jackson, ‘A Theory of Rape’ in Burgess-Jackson (n 2) 92, 99-103. In delineating the contours of coercion, Burgess-Jackson distinguishes between vulnerability created by the exploiter (within the conceptual scope) and vulnerability which arises independently (outside the conceptual scope).



encounters.<sup>72</sup> The difficulty then becomes that coercion, so broadly conceived, struggles to devise a clear boundary between rape and ‘ordinary sexual intercourse’.<sup>73</sup>

The risk of dissolving the rape/sex boundary in an all-encompassing concept of coercion has prompted calls to retain and reinvigorate consent.<sup>74</sup> Many also view consent as a more agent-centered model which too broad a concept of coercion tends to deny.<sup>75</sup> However, instead of a negative conception of consent framed in terms of its absence, a more positive conception is advocated in which the parties mutually *agree*.<sup>76</sup> There are undeniable practical difficulties with requiring formal affirmation in sexual encounters<sup>77</sup> (although this has been possible in other legal contexts).<sup>78</sup> Stressing the need positively to affirm one’s agreement to sex also has the theoretical merit of highlighting an unarticulated presumption underpinning most rape laws, namely that sexual intercourse is presumed to be consensual unless proven otherwise.<sup>79</sup> If one were to start from the premise that sexual intercourse is not consensual unless and until positive evidence of consent is adduced,<sup>80</sup> our conception of rape would look very different.

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<sup>72</sup> MacKinnon (n 63) especially 469-471. MacKinnon here is not necessarily reducing all (hetero)sex to rape, a position which is often, but wrongly attributed to her; however, she is directly confronting the operation of gender and other inequalities in sexual encounters. As Ann Cahill observes, MacKinnon’s analysis ‘justif[ies], at the very least, a hermeneutics of suspicion with regard to the ethic of heterosexual interactions’ (‘Unjust Sex vs Rape’ (2016) *Hypatia* 1, 4).

<sup>73</sup> See contra R. Posner: ‘All that distinguishes [rape] from ordinary sexual intercourse is lack of consent’ (*Sex and Reason* Harvard UP 1992 388). Feminist analyses increasingly acknowledge ‘a sphere of ambivalence’ in sexual encounters not easily classifiable as either sex and rape. See eg Gavey (n 2); Cahill (n 72) and, most recently, LM Alcoff, *Rape and Resistance* (Polity Press 2018).

<sup>74</sup> V Munro, ‘From Consent to Coercion: Evaluating International and Domestic Frameworks for the Criminalization of Rape’ in McGlynn and Munro (n 17) 17.

<sup>75</sup> Although it has equally been pointed out that current legal configurations of consent produce a rather narrow range of agency reducible to the giving or withholding of permission to be penetrated: L du Toit, ‘the Conditions of Consent’ in R Hunter and S Cowan (eds) *Choice and Consent: Feminist Engagements with Law and Subjectivity* (Routledge 2009) 58; J Gardner, ‘The Opposite of Rape’ (2018) 38/1 *OJLS* 48.

<sup>76</sup> L Pineau, ‘Date Rape: A Feminist Analysis’ (1989) 8 *Law & Philosophy* 75; Gardner advocates a shift away from ‘refurbished consent’ towards a notion of ‘ongoing consensus’: ‘sex is to be conducted only in the moment, its trajectory determined by ongoing likemindedness’ (n 75) 65.

<sup>77</sup> Baker (n 64).

<sup>78</sup> eg medical law has moved towards a more communicative model to protect patient autonomy (ibid 61).

<sup>79</sup> MacKinnon (n 63) 452.

<sup>80</sup> The introduction of evidentiary presumptions against consent in the SOA 2003 might be understood as a strategy to dislodge the comprehensive grip of the cultural and legal presumption that sex is consensual.

What this reverse imaginary reveals is precisely the *situatedness* of rape law within a broader cultural context of heterosexual norms and liberal values which together sustain a conception of sexual intercourse as a positive, natural encounter engendering minimal interpersonal obligations.<sup>81</sup> This default cultural presumption is rarely challenged;<sup>82</sup> yet the benign nature of coitus is far from self-evident, particularly when viewed from a female risk perspective.<sup>83</sup>

More importantly, the cultural embeddedness of rape and its normative investment in a particular conception of sexual relations is difficult to reconcile with any formal articulation of essential properties abstracted from the context and conditions in which they apply. A formalistic approach is thus likely to yield an impoverished account of the operational parameters of the concept. The business of reducing rape to a bundle of necessary properties starts to look more complicated than first thought, certainly when the focus moves beyond the articulation of doctrinal requirements towards a more generic, normatively grounded understanding. Even lack of consent, surely the intuitive front-runner, does not easily or unequivocally qualify as a necessary or indispensable feature. Lack of consent may be a sufficiently common element of rape conceptualizations to encourage a tendency to generalize about rape in such terms but such generalizations lack the ontological power of essence claims and do not pull such normative weight.

One is tempted to conclude that rape has no essence, that rape is simply whatever the label 'rape' happens to be attached. Before settling on this conclusion however, it is worth considering whether a different idea of essence is in play.

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<sup>81</sup> J Hampton, 'Defining Wrong and Defining Rape' in Burgess-Jackson (n 2) 118, 138.

<sup>82</sup> Although see Kant's *Lectures on Ethics*, expressing concern that outside marriage, each party to the sexual act is treating the other as an object of their gratification (see Hampton (n 81)).

<sup>83</sup> J Herring and M Madden Dempsey ('Rethinking the Criminal Law's Response to Sexual Penetration' in McGlynn and Munro (n 17) 30) argue that because of the risk of harm to women, sexual penetration should be regarded as a *prima facie* moral wrong, requiring legal justification. A similar position is taken by Jesse Wall ('Sexual Offences and General Reasons not to have Sex' (2015) 35 OJLS 777) although for different reasons.

## POSITIONAL ESSENCE

An associated understanding of essence operates in ordinary language. It calls upon essence to ascribe value or normative weight, often drawing on spatial metaphors to position essence, for example, at the centre (core, heart) or base (foundation, bottom) of something. The use of *positional* essence signifies importance by instituting a rank order of identifying features. To say that the essence of law is justice, or the essence of love forgiveness, is to make a claim about the preeminence of one feature of a thing (justice /forgiveness) over others. While necessity is generally implied here it is not directly the concern. Rather the focus is on constructing (or revealing) a hierarchy among features inhering in a thing.<sup>84</sup>

As with necessary essence, positional essence engages with questions of identity. It does this by accentuating that feature of identity perceived most closely - or essentially - to capture what something is. When Dicey declares that unlimited parliamentary authority is ‘the very essence of the English Constitution’,<sup>85</sup> he is foregrounding what he regards to be a fundamental feature of English constitutionalism. Similarly, when Dror Wahrman, remarks upon an emerging cultural tendency in eighteenth century England to view maternity as ‘the essence of femininity’,<sup>86</sup> he is deploying essence to privilege one feature of femininity (maternity) with greater consequence than others. Essence here assumes an aspirational quality, enabling it to operate as a regulatory norm. Indeed, it is this understanding of essence which is at the

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<sup>84</sup> There is resonance here with John Finnis’s application of the idea of a ‘central case’ to support attributions of significance or importance in analytical philosophy. However, while positional essence is merely a discursive technique which may be variously grounded in politics, prejudice or ideology, Finnis seeks to anchor his central case methodology objectively in the application of practical reasonableness (J. Finnis, *Natural Law and Natural Rights*, 2<sup>nd</sup> ed (OUP 2011) especially ch 1).

<sup>85</sup> AV Dicey, *Introduction to the Law of the Constitution* (1915 edition).

<sup>86</sup> D Wahrman, *The Making of the Modern Self: Identity and Culture in Eighteenth Century England* (Yale UP 2004) 67.

heart of the feminist critique of gender essentialism. To assert, for example, that women apply an ‘ethic of care’ to moral deliberations<sup>87</sup> is to promote a normative ideal of nurturing womanhood. Sometimes too a teleological element comes into play, as when women’s reproductive capacities become aligned with essential womanhood: Because reproduction is what women are *for*, it is deemed to be quintessentially expressive of what they *are*.<sup>88</sup>

Positional essence often surfaces in discursive contestation. It provides a way of ‘controlling, regulating, and policing’<sup>89</sup> debate through a process of normative weighting in which certain features, values, or concerns emerge as dispositive. Appeals to essence taking this form do not always do so explicitly. Essentialist assumptions are often mobilized unconsciously and/or unreflectively so that their architectural role in discursive exchange goes unnoticed and unchallenged. This is one way of apprehending the operation of the ‘real rape’ stereotype. A stereotype, understood as ‘a widely held but fixed and oversimplified image or idea of a particular type of person or thing’ (OED), is not synonymous with an essence but the two concepts are closely connected; stereotypes often rely on essentialist assumptions and beliefs, for example, ascribing certain natural and immutable properties to socially constructed categories/groups.<sup>90</sup> The ‘real rape’ stereotype invokes an understanding of rape in which certain features – the presence of violence, the absence of a prior relationship between victim and perpetrator, the public nature of the location (park, alleyway) - are thought to be especially

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<sup>87</sup> C Gilligan, *In a Different Voice* (Harvard UP 1982). See C Heyes, ‘Anti-Essentialism in Practice: Carol Gilligan and Feminist Philosophy’ (1997) 12/3 *Hypatia* 142 for a partial exoneration of Gilligan from charges of essentialism. For Gilligan’s own recent reflections on the essentialism controversy her work ignited, see *Joining the Resistance* (John Wiley Scott 2013)).

<sup>88</sup> This kind of reasoning has been used by rapists to justify rape: ‘rape is a man’s right...women are made to have sex. It’s all they’re good for’ (comment of a convicted rapist, quoted in J Bridgeman and S Millns, *Feminist Perspectives on Law* (Sweet & Maxwell 1998) 399-400).

<sup>89</sup> A Phillips, ‘What’s Wrong with Essentialism?’ (2010) 11/1 *Distinktion: Scandinavian Journal of Social Theory* 47.

<sup>90</sup> Prejudicial social stereotyping has been characterized by social psychologists as a form of ‘psychological essentialism’. See N Haslam et al, ‘Psychological Essentialism, Implicit Theories and Intergroup Relations’ (2006) 9 *Group Processes & Intergroup Relations* 63; N Haslam et al, ‘Are essentialist beliefs associated with prejudice?’ (2002) 41 *British J Social Psychology* 81.

indicative of the offence. Many rape commentators contend that the stereotype operates prescriptively to shape police investigations and rape trials.<sup>91</sup> The identification of a ‘typical’ rape scenario means that the conceptual parameters of rape become constrained by a paradigmatic norm against which other instantiations are weighted and assessed. Cultural invocations of ‘real rape’ thus rely on essentialist constructions of rape in much the same way as cultural appeals to femininity rely on essentialist constructions of gender. Importantly, however, the notion of essence in play is positional, *not* necessary. As Helen Reece observes, the ‘real rape’ stereotype is rarely invoked definitionally,<sup>92</sup> that is, to prescribe necessary properties or set minimum conditions of identification; but it does function discursively, providing a normative paradigm which structures rape debate. Nor is the influence of the real rape stereotype dependent upon its explicit endorsement: stereotypes too often influence *unconsciously* to instill implicit biases which inform evaluative judgments.<sup>93</sup> One cannot therefore dismiss the continued purchase of the real rape stereotype, simply on the grounds that fewer people consciously subscribe to it.<sup>94</sup>

The long-running debate over whether to conceptualize rape in terms of sex or violence presents another useful context for exploring how positional essence works. In the 1970s, Susan Brownmiller led feminist calls for a construction of rape as ‘a hostile and degrading act of violence’.<sup>95</sup> This perspective found favour with feminist law reform advocates<sup>96</sup> who hoped that by recasting rape as a crime of violence, it would be taken more seriously as a harm. The

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<sup>91</sup> Temkin and Krahé (n 4) ch 1; J Jordan, *The Word of a Woman: Police, Rape, and Belief* (Palgrave MacMillan 2004) 139-143.

<sup>92</sup> H Reece, ‘Rape: Is elite opinion right and popular opinion wrong?’ (2013) 33 OJLS 445, 455.

<sup>93</sup> AG Greenwald and MR Banaji, ‘Implicit social cognition: attitudes, self-esteem and stereotypes’ (1995) 102 *Psychological Review* 4.

<sup>94</sup> As Reece does (n 92) 456.

<sup>95</sup> Brownmiller (n 2) 376.

<sup>96</sup> See eg L Clark and D Lewis, *Rape: The Price of Coercive Sexuality* (Toronto Women’s Press 1977), providing the theoretical basis for reforms to Canadian rape law in 1983.

judiciary too welcomed the rape-as-violence paradigm, happy to endorse the notion that ‘rape has nothing to do with sex and everything to do with anger and power’.<sup>97</sup> The focus on violence encouraged gender-neutral legal articulations in which violent sexual intercourse became subsumed within the broader contours of criminal assault.<sup>98</sup> This trend towards de-sexualizing rape is captured in a controversial utterance of Michel Foucault: ‘When one punishes rape, one should be punishing physical violence and nothing but... there is no difference in principle between sticking one’s fist into someone’s face or one’s penis into their sex’.<sup>99</sup>

By contrast, MacKinnon argues against taking the sex out of rape.<sup>100</sup> One of the difficulties with the rape-as-violence frame is that it promotes discursive representations of rape in which its social and cultural significance as an institutionalized expression of male violence is lost.<sup>101</sup> Disavowing the sexual dimension of rape also makes it difficult to acknowledge the harm of ‘simple rape’ in which physical violence is not present.<sup>102</sup> The rape-as-sex paradigm, by contrast, emphasizes the intrinsically *sexual* nature of rape, where ‘sexual’ may variously connote: the character of the act (a corporeal encounter involving genitalia or a socially and culturally coded expression of sexual desire); the gender-specificity of the legal requirements (requiring a departure from the general practice of framing legal wrongs in gender-neutral terms); and/or the wider context of gender-asymmetrical power relations of which rape

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<sup>97</sup> *Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1998) 160 DLR (4<sup>th</sup>) 289 per MacFarlane J. See also the remarks of L Cowan in *Sweenie* (n 47).

<sup>98</sup> PLN Donat and J D’Emilio, ‘A Feminist Redefinition of Rape as Sexual Assault: Historical Foundations and Change’ (1992) 48 *Journal of Social Issues* 9.

<sup>99</sup> Interview reproduced in M Foucault, *Politics, Philosophy, Culture: Interviews and Other Writings 1977-1984*, ed LD Kritzman, trans A Sheridan et al (Routledge 1988).

<sup>100</sup> C A MacKinnon, *Towards a Feminist Theory of State* (Harvard UP 1989) 171-183.

<sup>101</sup> Rape-as-violence doesn’t necessarily produce neglect of the gendered institutional aspects of rape: Brown-miller (n 2) placed violence at the heart of the men’s exercise of political power over women. Nevertheless, the legal translation of the violence paradigm undoubtedly encourages more gender-neutral conceptualizations of rape.

<sup>102</sup> The term ‘simple rape’ was coined by Susan Estrich, *Real Rape* (Harvard UP 1987). For extended discussion, see du Toit (n 2) esp 43-48; Panichas (n 45).

emerges as an important expression. And while the rape-as-violence trope renders rape virtually indistinguishable from other acts of violence, rape-as-sex inevitably foregrounds the difficulty of distinguishing rape from ‘just sex’.<sup>103</sup> Indeed, MacKinnon contends that the popular appeal of rape-as-violence is precisely that it puts rape and sex at a convenient distance from one another.<sup>104</sup> What rape-as-violence does *not* do is offer an account of why rape deserves our special attention, why it should be regarded as distinctly wrongful. By supplying the specificity which violence denies, sex facilitates the elevation of rape above other violent crimes; it better *positions* rape as a unique and/or particularly heinous wrong.

Neither Brownmiller nor MacKinnon, the two key protagonists in the sex-versus-violence debate, explicitly invoke essence to bolster their positions (although both are frequently accused of taking an essentialist approach to understandings of sex/gender).<sup>105</sup> However, there are numerous examples where essence is directly invoked to privilege one feature of rape over others. In the nineteenth century, Lord Emslie asserted that ‘rape has always been essentially a crime of violence’.<sup>106</sup> In the twenty-first century, Michal Buchhandler-Raphael concludes that ‘most scholars today agree that the essential characteristic of rape is nonconsensual sex rather than an act of physical violence’.<sup>107</sup> This debate over whether sex or violence has the greatest explanatory potency exhibits many features of essence talk. What is centrally at issue is the *nature* of rape, what makes it the thing it is and not something else. Moreover, the discourse is generally conducted in universalizing terms: the sex-versus-violence debate rarely

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<sup>103</sup> Gavey (n 2).

<sup>104</sup> MacKinnon (n 100) 174.

<sup>105</sup> Although see Elizabeth Rapaport, challenging the view that MacKinnon’s work is essentialist (‘Generalizing Gender: Reason and Essence in the Legal Thought of Catharine MacKinnon’ in LM Antony and CE Witt (eds) *A Mind of One’s Own: Feminist Essays on Reason and Objectivity* (Westview Press 2002) 254).

<sup>106</sup> *Stallard v HM Advocate* [1989] SCCR 248 per L Emslie at 253.

<sup>107</sup> M Buchhandler-Raphael, ‘The Failure of Consent: Reconceptualizing Rape as Sexual Abuse of Power’ (2011) 18 *Michigan J of Gender and Law* 147, 150. Essence plays a central rhetorical role throughout this article, the author eventually concluding that ‘the law should reconceptualize the offense of rape by suggesting that the essence of rape is sexual abuse of power’ (199).

acknowledges cultural or historical specificity, positing a relation between rape and the privileged feature (sex or violence) which is internal and essential rather than external and contingent. Sometimes the debate presents as an ‘either/or’ dilemma: *either* rape must be conceived in terms of sex *or* it is a crime of violence. In other contexts, the dual identity of rape as simultaneously sexual and violent (captured in the term, ‘sexual violence’) is recognized though, even here, one feature generally trumps the other. MacKinnon provides a good example of the conceptual accommodation of sex and violence by subsuming the latter into the former, locating the violence of rape within a frame in which it is already recast as (hetero)sex understood as the eroticization of dominance and submission.<sup>108</sup> The violence thus emerges as an expression of male sexual desire, a desire fueled by women’s social and sexual subordination. Echoing Foucault’s analogy, MacKinnon observes: ‘Assault by a man’s fist is not so different from assault by a man’s penis, not because both are violent but because both are sexual.’<sup>109</sup> For MacKinnon, sex is what rape *is*: its most essential feature and the key to understanding rape’s significance and effects. Sex is *positioned* as the premise upon which the edifice of rape and rape law rests.

Is it possible to conceive rape in terms in which sex does not feature prominently? Interestingly, the etymological origins of rape derive from the Latin *rapere* meaning ‘to seize or carry off’. In most historical accounts, until at least the early middle-ages rape was not specifically equated with forced sex but with the abduction of live things (including women).<sup>110</sup> Early meanings of rape were thus more aligned with violence and theft than sex. Once rape began to assume a narrower, predominantly sexual meaning, the broader cultural frame through which rape discourse was mediated assumed an increasingly moral character. As late

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<sup>108</sup> MacKinnon (n 100) 171.

<sup>109</sup> *ibid*, 178.

<sup>110</sup> Burgess-Jackson (n 18) 16; L Farmer, *Making the Modern Criminal Law* (OUP 2016) 267.



as the 1960s, criminal law scholar, P J Fitzgerald, for whom, as we recall, the essence of rape lies in ‘taking sexual liberties’,<sup>111</sup> subordinated the violent and sexual dimensions of rape to a broader classification of the offence as a ‘crime against morality’.<sup>112</sup> As with Foucault, the sexual dimension here is almost incidental: what is central about rape is that it violates the moral order. Fitzgerald’s classification of rape as essentially moral in character further underlines the cultural specificity of perceptions of rape;<sup>113</sup> his approach provides a powerful illustration of the way in which essentialist discourse encourages the hegemonic privileging of culturally-specific understandings of rape as universally determining, closing off other modes of apprehension and presenting rape as a phenomenon which is fixed, ahistorical, and naturally occurring.

## PURE ESSENCE

Essence is sometimes understood as an extract, concentrate, or flavour. This understanding of essence emerges with Enlightenment scientificism, etymological investigation placing the earliest reference to essence as ‘a substance in concentrated form’ in Robert Boyle’s *New Experiments*, published in 1660.<sup>114</sup> A concentrated substance is undiluted by solvents, usually the product of distillation, a process entailing the evaporation and condensation of a liquid substance in which extraneous or contaminated elements are removed, leaving a pure, undiluted residue. Academic discourse routinely invokes a metaphor of distillation to signify

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<sup>111</sup> Fitzgerald (n 40) 74.

<sup>112</sup> Ibid.

<sup>113</sup> Farmer (n 110) argues that the idea of a body of criminal law concerned with ‘sexual offences’ (as opposed to religious, moral or public order-based crimes) only emerged in the second half of the 20<sup>th</sup> century, reflecting growing recognition of a public interest in protecting sexual autonomy (280-294); his analysis further evidences the cultural specificity of current apprehensions of sexual wrongs.

<sup>114</sup> *Chambers’ Dictionary of Etymology* ed, R K Barnhart (2001) 344.

the reductive re-ordering of data, ideas, and arguments into more concentrated form. The distilled, purified product of intellectual reflection is often characterized as an essence, as when Genevieve Lloyd remarks that ‘deductive ratiocination [is] the essence of [Descartes’] method’.<sup>115</sup> Sometimes, the distillation metaphor is explicit. For example, Brownmiller proclaims pornography as ‘the *undiluted* essence of anti-female propaganda’.<sup>116</sup> Roiphe’s concern that rape has been ‘diluted’<sup>117</sup> is similarly reliant on the distillation metaphor, presupposing a ‘pure’ unadulterated conception of rape threatened by feminist contamination. Pure essence then, like positional essence, functions rhetorically to accord greater authority on a point of view by conferring upon it a natural and/ or scientific gloss.

Related to pure essence is *quintessence*. This notion also has scientific associations although its heritage is far more ancient, deriving from pre-atomic conceptions of the elements in which the *quinta essentia* (*pempte ousia* in Greek) was the elusive fifth element (after air, fire, earth and water) which accounted for the heavenly bodies and permeated all things.<sup>118</sup> From this has emerged the modern linguistic understanding of quintessence as the purest, most refined aspect of a thing. Human beings, Margaret Archer observes, ‘are quintessentially evaluative’.<sup>119</sup> More pertinent perhaps is Bogart’s assertion that rape is ‘quintessentially... an experience of unwanted sex’.<sup>120</sup> The etymological association of quintessence with immateriality and heavenly bodies imports into essence an ‘other-worldly’ quality, reminiscent of Plato’s theory of forms. Unlike Aristotle, who argued that essences inhered in things themselves, Plato maintained that essences existed in a perfect realm of forms of

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<sup>115</sup> G Lloyd, *The Man of Reason: ‘Male’ and ‘Female’ in Western Philosophy*, 2<sup>nd</sup> ed (Routledge 1993) 49.

<sup>116</sup> Brownmiller (n 2) 394 (my emphasis).

<sup>117</sup> Roiphe (n 30).

<sup>118</sup> Barnhart (n 114) 877.

<sup>119</sup> M Archer, *Being Human: the Problem of Agency* (CUP 2000) 318.

<sup>120</sup> Bogart (n 9) 168.

which real things were mere replicas.<sup>121</sup> Such an understanding of essence as an ‘ideal prototype’<sup>122</sup> reinforces its potency as a regulatory norm.

One of the advantages of pure essence as a discursive tool is that it can work not simply to privilege a particular element of a thing but to isolate it from its surroundings. Just as distillation separates a substance-in-concentrate from its solvent state, pure essence facilitates the dissection of conceptual or normative structures and the detachment of particular elements therefrom. The ICTR decision in *Musema* provides an example: drawing on the previous conceptualization of rape in *Akayesu*, the Tribunal asserts that ‘the essence of rape is not the particular details of body parts and objects involved but rather the aggression that is expressed in a sexual manner under conditions of coercion’.<sup>123</sup> Essence here serves both to *privilege* an understanding of rape as sexual coercion and to *distance* that understanding from the practical technicalities of the sexual act so that the precise factual details (more than usually difficult to prove in cases of mass rape carried out in conflict) become less critical to establishing whether or not rape (and, thereby, a crime against humanity) has occurred. Essence allows the Court to bypass the potential legal obstacle which these evidentiary difficulties pose by excluding them from what is essential to the crime. A similar move is evident in the ECtHR judgment in *SW v UK*<sup>124</sup> in which the Court was required to confront the aftermath of judicial abolition of the common law immunity protecting husbands from prosecution for raping their wives.<sup>125</sup> Two applicants, convicted of rapes perpetrated before the House of Lords had re-

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<sup>121</sup> R Kraut, *How to Read Plato* (Granta Books 2008).

<sup>122</sup> G Lakoff and M Johnson, *Philosophy in the Flesh: The Embodied Mind and its Challenge to Western Thought* (Basic Books 1999) 368.

<sup>123</sup> *Pros v Musema*, Case No. ICTR-96-13-A, para 226.

<sup>124</sup> (1996) 21 EHRR 363.

<sup>125</sup> *R v R* [1992] 1 AC 599.

jected the marital immunity, alleged that their convictions violated Art 7(1), the provision regarding retrospective laws.<sup>126</sup> In determining the convictions did not violate Art 7(1), the ECtHR repeatedly appealed to essence to circumvent the problem of retrospectivity. The law, the Court asserted, was in a process of ‘evident evolution ... consistent with the very essence of the offence...’<sup>127</sup> It followed that the applicants could reasonably foresee that the immunity might not apply at the time of their actions. Judicial eschewal of the marital immunity, the Court declared, was ‘in conformity ... with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom’.<sup>128</sup> The clear intimation was that the applicants could not rely upon the marital immunity because to do so would violate the essence of the Convention. Thus, a radical change in law, judicially enacted and retrospectively applied, was re/presented as so consistent with the essence of the offence and the substantive values upon which the jurisdiction of the Court was premised as to be a reasonably foreseeable, logically consistent legal extension of existing principle, so minor and inexorable as to raise no concern about retrospective application.

*SW* shows how pure essence can advance legal change, the distillation metaphor facilitating not just the extraction of an essential element from its immediate surroundings but its transposition from one context to another. Such an approach is particularly useful when reworking concepts and, unsurprisingly, features prominently in law reform where the gist of discarded doctrines are often allowed to resurface in attenuated form so that some degree of doctrinal purity is retained. It is arguable for example that the old legal notions of ‘carnal knowledge’, and later ‘sexual intercourse’, have been legislatively distilled into a concentrated form in

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<sup>126</sup> Art 7(1) ECHR: ‘No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed...’

<sup>127</sup> *SW* (n 124) at [43/41].

<sup>128</sup> *ibid* at [44/42].

which penile penetration emerges as the very essence of rape. This emphasis on penile penetration serves to distinguish rape from other forms of sexual assault but does not preclude an expanded reformulation of the offence encompassing penetration of other bodily orifices and, *inter alia*, widening the category of potential victims to include men. If we grant that to reconceive rape as a crime which can be perpetrated on women *and* men is to reconceive it fairly fundamentally, a radical reform is achieved with some continuity of meaning retained by transposing a core feature of the old doctrinal framework.

Is penile penetration the elusive essence we have been seeking? An obvious difficulty here is that penile penetration, in and of itself, is not generally regarded as harmful or reprehensible.<sup>129</sup> It cannot therefore account for the wrongfulness of rape. In addition, the jurisdictional trend is to move away from penile penetration as an essential feature of rape, in large part to facilitate the recasting of the offence in gender-neutral terms. Granted, this is not the approach in England and Wales. The question of whether rape ought to be redefined to include penetration by other instruments (for example, a bottle or fist) was considered by the Home Office Review prior to the 2003 reforms; it determined that, notwithstanding gender-neutrality as a key reform principle, rape should continue to be confined to penile penetration. In taking this position, the Review emphasized the centrality of penile penetration to public understandings of rape, observing: ‘We were uneasy about extending the definition of rape to include all forms of sexual penetration. We felt rape was *clearly understood by the public* as an offence that was committed by men on women and on men’ (my italics).<sup>130</sup> The subsequent legislation, while expanding the scope of rape to include penile penetration of the

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<sup>129</sup> Although see (n 83).

<sup>130</sup> *Setting the Boundaries* (n 20) para 2.8.4. The Review continues: ‘the offence of penile penetration [i]s of a particularly personal kind, it carries risks of pregnancy and disease transmission and should properly be treated separately from other penetrative assaults’ (ibid).

mouth, explicitly excluded penetration other than by the penis, creating instead a separate offence of ‘assault by penetration’ to include penetration of the vagina or the anus by ‘a part of the body or anything else’.<sup>131</sup> In the minds of British legislators then, rape is exclusively aligned with penile penetration. This is what sets it apart from other sexual offences.<sup>132</sup>

Other jurisdictions take a more expansive approach. The South African Criminal Law (Sexual Offences and Related Matters) Act 2007 adopts an extended definition of rape encompassing a number of penetrative acts beyond penile penetration of the vagina, rendering the offence fully gender-neutral.<sup>133</sup> Ireland takes an odd middle path, combining a traditional statutory definition of rape as sexual intercourse between a man and a woman<sup>134</sup> with an additional definition introduced in 1990 (known as ‘rape under s 4’)<sup>135</sup> to include penetration of the anus or mouth by the penis or penetration of the vagina by any object held or manipulated by another person. In jurisdictions which have forsworn the rape nomenclature, the significance of penetration has been weakened further. Indeed, Canada’s law of sexual assault makes no formal categorical distinction between sexual touching and full-blown intercourse.<sup>136</sup> By contrast, penetration (though not necessarily penile) continues to occupy a privileged position in Australia, even in those states which have adopted gender-neutral sobriquets such as ‘sexual assault’ (New South Wales) or ‘sexual intercourse without consent’

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<sup>131</sup> SOA 2003, s 2.

<sup>132</sup> The Law Reform Commission of Hong Kong reached similar conclusions, recommending that the offence of rape should continue to be confined to penile penetration but extended to include penetration of the anus and mouth: Law Reform Commission of Hong Kong, Review of Sexual Offences Sub-Committee, *Rape and Other Non-Consensual Sexual Offences*, especially paras 55-58 (September 2012). Scotland too continues to require a penis (Sexual Offences (Scotland) Act 2009, s 1(1)).

<sup>133</sup> SW Mills, ‘Reforming the Law of Rape in South Africa’ in McGlynn and Munro (n 17) 251.

<sup>134</sup> Criminal Law Act (Rape) 1981, s 2 (mirroring the wording of the SOA 1976).

<sup>135</sup> Criminal Law (Rape) (Amendment) Act 1990.

<sup>136</sup> See Criminal Code of Canada s 265 (defining assault to include sexual assault) and s 271 (prescribing penalties for sexual assault).

(Australian Capital Territory and Northern Territory).<sup>137</sup> In Western Australia the designated term is ‘sexual penetration without consent’.<sup>138</sup> The notion of penetration is quite expansive, encompassing a range of bodily orifices and penetrating instruments.

The question which inevitably arises is why retain the anchor of penetration at all? Certainly, the more rape is removed from the heterosexual archetype of penile-vaginal penetration, the more difficult it is to comprehend the continued centrality of penetration in the conceptual framework. The widespread endorsement of sexual autonomy as the normative keystone for criminalization<sup>139</sup> puts further distance between rape and penetration as autonomy places greater emphasis on the violation of the victim’s will or her denial of choice than the physical details of the encounter.<sup>140</sup> The retreat from penetration is also reflective of changing cultural as well as legal understandings of rape. In England and Wales, ‘male rape’ was not formally recognized until the closing decade of the last century.<sup>141</sup> Recognizing male rape not only effects a formal break between rape and heterosexuality but excises reproductive considerations from the discursive frame. This perhaps is the most radical move of all because it disrupts centuries of association between rape and the regulation of female generativity. It is widely recognized that in its earliest historical manifestations, rape was conceived as a means of protecting men’s property in women’s bodies and the fruits thereof.<sup>142</sup> The wrong of rape lay not in the violation of a woman’s will but in the unlawful appropriation of a woman’s chastity,

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<sup>137</sup>B Fileborn, ‘Sexual Assault Laws in Australia’ Australian Institute of Family Studies 2011, especially Appendix A, ‘Elements of the laws surrounding sexual assault by jurisdiction’ (<https://aifs.gov.au/publications/sexual-assault-laws-australia>, last accessed 5<sup>th</sup> July 2018).

<sup>138</sup> *ibid.* Four states retain the term ‘rape’.

<sup>139</sup> Sexual autonomy is a key theme running through *Setting the Boundaries* (n 20). For analysis and discussion of the emergence of autonomy as the preferred normative underpinning for rape law in England and Wales, see Farmer (n 110) especially 287-292.

<sup>140</sup> Leading some feminists to critique sexual autonomy as insufficiently attentive to the embodied aspects of rape (see eg Lacey (n 42) Cahill (n 72)).

<sup>141</sup> See generally P Rumney and N Hanley, ‘The Mythology of Male Rape: Social Attitudes and Law Enforcement’ in McGlynn and Munro (n 17) 294.

<sup>142</sup> R Porter, ‘Rape – Does it Have a Historical Meaning?’ in Tomaselli & Porter (n 2) 216, 217; Burgess-Jackson (n 18) 16-18; Du Toit (n 2) 35-36.

viewed as a ‘dimension of property or inheritance’.<sup>143</sup> We have seen how, in early Roman law, *raptus* was not regarded as a distinctly sexual wrong but as a form of theft or abduction.<sup>144</sup> Women’s value lay in their marriageability and reproductive promise, and rape functioned as a deeply embedded aspect of a legal framework which protected (male) property rights.

This brief appeal to history highlights once again the cultural contingency of rape, the way in which it takes its form and substance from the broader network of values and relations, attitudes and institutions, which shape social life. It enables us to understand both the historical centrality of heterosexuality in rape law and its increasing marginalization in an era in which rape is thought to be less about gender and more about sex. It is in this context that we can best apprehend the retention of penetration, albeit in expanded, gender-neutral form, in most modern rape laws. Penetration works here to pin down the *sexual* dimension of rape; it is positioned as quintessentially expressive of what sex is. At the same time, and in the context of an ongoing transformation in cultural perceptions of sexual identity, expression, and relations, this conflation of sex with penetration, and indeed the construction of sex as something that one person *does* to another, assumes an increasingly arbitrary and tendentious character. Because penetration has long exercised a historical grip on our apprehension of what sex is, it seems difficult to envisage an understanding of rape without it. Yet, once the link between rape and heterosexuality is formally severed, once a concern with the consequences of female generativity falls out of focus, we can envisage an understanding of rape or sexual misconduct in which penetration is no longer a central feature.

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<sup>143</sup> Farmer (n 110) 267.

<sup>144</sup> Burgess-Jackson (n 18) 16.



## REAL ESSENCE

A final common understanding of essence is linked to notions of what is real. To get to the essence of something is to get to what it *really* is. In philosophical discourse, 'real essence' is primarily associated with Locke's distinction between 'real' and 'nominal' essence. The real essence of a thing, Locke argued, is its actual internal constitution and the cause or explanation of its observable qualities.<sup>145</sup> By contrast, nominal essence is our abstract idea of something, based on our sensory perceptions and comprising the features or characteristics we select to signify it. Locke maintained that real essence is largely unknowable, our sensory limitations allowing us to apprehend it only in limited contexts such as mathematics. Our definitions, our accounts of what things are, may well call upon essence but it is nominal rather than real essence which is being invoked.

Real essence emerges again in classical social theory, this time in the idea of a real but elusive essence which lurks beneath or behind the appearance of things. Marx, in particular, distinguished between the essential or 'real relations' underpinning capitalist production and the appearance or 'phenomenal forms' of capitalist social relations.<sup>146</sup> This conception of essence/appearance has also been deployed in feminist standpoint theory.<sup>147</sup> Nancy Hartsock's argument, that women by virtue of their structural position under patriarchy have access to a particular, epistemologically privileged vantage point which better apprehends the reality of patriarchal social relations, is predicated on the idea of an essential reality which patriarchal

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<sup>145</sup> J Locke, *An Essay on Human Understanding* Book 3.iii. 15.

<sup>146</sup> Essence and appearance here are causally linked so that appearance is not so much a denial of essence as a distorted expression thereof. For discussion of Marx's use of the essence/appearance distinction, see Derek Sayer, *Marx's Method: Ideology, Science and Critique in Capital* (Humanities Press 1979).

<sup>147</sup> See generally S Harding (ed) *The Feminist Standpoint Theory Reader* (Routledge 2004).

ideology conceals.<sup>148</sup> MacKinnon's work can also be read in this way. Her core assertion that 'the social relation between the sexes is organized so that men may dominate and women must submit and this relation is sexual – is in fact sex'<sup>149</sup> is premised on the idea that what appears as natural (hetero)sexual desire is but a phenomenal expression of the male appropriation of female sexuality.<sup>150</sup> MacKinnon repeatedly asserts that the notion of sexuality she invokes is not essentialist. Discussing her use of sex categories, she observes: 'Male is a social and political concept not a biological attribute, having nothing whatever to do with inherency, pre-existence, nature, essence, inevitability...'<sup>151</sup> However, what this comment reveals is that the conception of essence MacKinnon has in mind has more in common with Aristotle than Marx. Marx would not deny that capitalism is socially constructed; indeed, at the heart of Marx's historical materialism is precisely an emphasis upon the historical contingency of arrangements which *appear* natural and inevitable. What is essential within a Marxian frame is the lived *reality* of everyday lives, essential in the sense of being real within the fabric of capitalist social relations though not naturally determining or inherent in all social and economic arrangements.

What is real here is closely aligned with what is true. Essence is understood to be expressive of an actual, usually hidden, truth, whether about capitalism, patriarchy, or human nature. Is there an inner truth or reality of rape to be discovered? Consider Brownmiller's famous assertion that rape is "nothing more or less than a conscious process of intimidation by which *all*

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<sup>148</sup> N Hartsock, 'The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism' in Harding (n 147) 35-54: 'The concept of a standpoint structures epistemology in a particular way... it posits a duality of levels of reality, *of which the deeper level or essence both includes and explains the "surface" and appearance*' (ibid, 37, my italics).

<sup>149</sup> CA MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard UP 1987) 3.

<sup>150</sup> 'Sexuality is to feminism what work is to Marxism, that which is most one's own, yet most taken away' (CA MacKinnon, 'Feminism, Marxism, Method and State: Towards an Agenda for Theory' (1982) *Signs* 515, 515).

<sup>151</sup> MacKinnon (n 100) 114.

men keep *all* women in a state of fear'.<sup>152</sup> Here Brownmiller invites us to 'accept as basic truth that rape is not a crime of irrational, impulsive, uncontrollable lust but ... a deliberate hostile violent act of degradation and possession ... designed to intimidate and inspire fear...'.<sup>153</sup> Brownmiller effectively reconfigures rape from an individual, aberrant act to a political weapon which sustains male dominance. What appears as capricious and one-off is in fact calculated and systemic; what seems to be the primary driver – sexual desire – is merely the tool, the method – collectively deployed to quite different ends. Brownmiller is attributing a systemic logic to rape which, while not readily apparent, nevertheless reflects the underlying reality of rape as a social institution. Real essence is a way of getting at this systematicity, the group-based and/or structural features of rape, facilitating a discourse in which rape can be apprehended other than as 'an accident of private history'.<sup>154</sup> Real essence also provides an account of rape's origins and purposes. According to Brownmiller, the simple anatomy of copulation created an opportunity for force which men could not resist: 'When men discovered they could rape, they proceeded to do it' so that, over time 'rape became not only a male prerogative, but man's basic weapon of force over woman'.<sup>155</sup> Here we have a story of origins in which a fact of biology becomes ideologically overlain. It serves both as an explanation of rape – what rape is – and an account of how and why rape emerged, its causal origins or foundations. This is why Brownmiller's analysis is widely regarded as essentialist.

Louise du Toit also invokes an essential reality underpinning the appearance of rape. She argues that the 'true nature'<sup>156</sup> of rape is occluded by a patriarchal symbolic framework which

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<sup>152</sup> Brownmiller (n 2) 15.

<sup>153</sup> *ibid*, 391.

<sup>154</sup> Brison (n 2) x.

<sup>155</sup> Brownmiller (n 2) 14.

<sup>156</sup> Du Toit (n 2) 33.

simultaneously denies the possibility of rape as it is actually experienced. Highlighting a fissure between a predominant conception of rape as a violation of ownership rights over the body<sup>157</sup> and phenomenological accounts in which rape emerges as the utter devastation of selfhood, du Toit maintains that it is precisely the fragile and ambiguous status of female subjectivity within the Western symbolic order which renders the ‘essential damage of rape’<sup>158</sup> so difficult to apprehend. She offers the example of ‘simple rape’, rape with no accompanying physical trauma. Within a property model, du Toit explains, the harm of simple rape seems relatively trivial, no more than unauthorized usage. In the absence of physical injury, the property (body) has been ill-used but not *damaged*.<sup>159</sup> By contrast, and drawing on the accounts of rape victims themselves, du Toit reveals the ‘true nature’ of rape – including simple rape – as ‘the violent erasure of a woman victim’s sexual subjectivity’,<sup>160</sup> a violence and destruction which is no less real because it is concealed.

Again, it is important to stress that du Toit’s analysis is not essentialist in the sense of ascribing certain necessary, universally shared attributes to the rape experience (necessary essence); nor is she privileging some aspects of that experience over others in terms of importance (positional essence) or degree of concentration (pure essence). Rather, by excavating the ‘essential damage’ of rape, she is seeking to articulate the truth or reality of rape as experienced by women *within the framework* of a symbolic order in which that truth or reality is denied. Far from fixing the meaning of rape in an eternal truth, du Toit’s object is to disrupt the symbolic order which denies women full sexual subjectivity and renders rape such a devastating experience. She seeks to imagine a world in which ‘rape becomes ridiculous’<sup>161</sup>

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<sup>157</sup> *ibid*, 35-43.

<sup>158</sup> *ibid*, 6.

<sup>159</sup> *ibid*, 43-45.

<sup>160</sup> *ibid*, 33.

<sup>161</sup> *ibid*, 211.

because it can no longer function as an attack on women's selfhood; its cause for being, for becoming, is thus extinguished.<sup>162</sup>

Note here how essence relates to cause. The essential harm of rape – understood as the erasure of women's subjectivity – is also its cause or explanation; rape occurs precisely because 'it serves to affirm the rapist's sense of masculine self and his sense of having a place in the world through a sharp and violent demarcation of his identity from the feminine'<sup>163</sup>; this is rape's meaning or 'logic'.<sup>164</sup> Just as the expropriation of labour/sex is both the reality and root cause (explanation) of capitalism/patriarchy, so is the denial/destruction of female selfhood the reality and root cause of rape within a patriarchal symbolic order.<sup>165</sup> Revealing that essential reality becomes a critical step towards resisting its effects.

One can relate such notions of essence as cause and/or origins to Witt's conception of 'individual essentialism'.<sup>166</sup> Witt distinguishes two kinds of individual essentialism: uniessentialism, in which essence is understood in terms of the unity and organization of material parts to make a functional whole (essence as functional properties), and identity essentialism which Witt associates with Saul Kripke's work locating (an idea of) essence in the material origins of things.<sup>167</sup> While the mapping is far from exact, one does see – in Brownmiller's analysis in particular – an account of rape as intimidation which is both an account of causal being in terms of function (why rape is) and causal becoming (how rape is engendered). Applying Witt's understanding of essence as causal being (what she calls 'uniessence'),<sup>168</sup> it is that rape-functional property – rape enables intimidation - which is essential to rape, which makes

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<sup>162</sup> On essence as 'causal being or becoming', see Witt (n 56), especially ch 1.

<sup>163</sup> Du Toit (n 2) 88.

<sup>164</sup> *ibid.*

<sup>165</sup> This notion of essence as cause or explanation is also a feature of Locke's 'real essence' (n 145).

<sup>166</sup> Witt (n 56).

<sup>167</sup> S Kripke, *Naming, Necessity and Natural Kinds*, ed Stephen Schwartz (Cornell University Press 1977).

<sup>168</sup> Witt (n 56) 6.

it what it is and explains why it is (as opposed to a random encounter of body parts). Interestingly too, such a functional properties approach avoids the kind of essentialism – usually associated with necessary essence – in which a thing must be understood in terms of necessary properties which endure through time and change. As Witt explains, functional properties are relational not intrinsic: ‘the functional properties of artifacts are always enmeshed in a broad social context of use’.<sup>169</sup> They also have a ‘normative dimension: ‘the function specifies what the object ought to do, not simply what it does’.<sup>170</sup> Returning to du Toit, her analysis locates rape – its function, operations, and objectives – within a particular socio-symbolic context in which the true nature or essence of rape can be revealed; but it is a contingent truth which both accommodates the social construction of rape while affirming its reality as a felt experience.

Similarly, accounts of rape which focus on its historic origins resonate, however crudely, with Kripke’s identity essentialism, with the notion that the essence of rape somehow derives from where and what it has originated.<sup>171</sup> What makes rape *really* rape is the thin but unbreakable thread connecting its past iterations with present apprehensions. Thus, Brownmiller’s account of rape’s origins in an anatomical accident exploited by men, locates the essence of rape in penile penetration - ‘the locking together of two separate parts, penis into vagina’<sup>172</sup> – but, crucially understood as an act men *perform* upon women, creating the opportunity for force. By contrast, du Toit points out that this very understanding of sex as men’s use (whether consensually or otherwise) of women’s bodies is itself a construction of

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<sup>169</sup> *ibid*, 17.

<sup>170</sup> *ibid*, 17.

<sup>171</sup> The application of Kripke here is acknowledged to be stretched: Kripke situates his exploration of identity essentialism within the context of individuals, not abstract concepts. However, his focus on origins does allow us to get at the way in which rape’s past is constantly called upon to determine its presence.

<sup>172</sup> Brownmiller (n 2) 14.

the patriarchal symbolic order.<sup>173</sup> To put it another way, it is only within a cultural frame in which women's sexual subjectivity is already rendered fragile and/or limited, in which, aptly expressed by MacKinnon 'man fucks woman; subject-verb-object',<sup>174</sup> that such a one-sided conception of sexual intercourse is intelligible.

To sum up, both du Toit and Brownmiller draw, explicitly in Du Toit's case, implicitly in Brownmiller's, on notions of essence to offer an account of the reality of rape, a reality which is not self-evident but needs to be revealed. Du Toit's account is in my view more successful in demonstrating that rape has a systemic logic producing a necessary harm while simultaneously acknowledging its socio-symbolic construction. Du Toit thus avoids (Brownmiller arguably less so) an invocation of rape as natural and fixed; she is open to an understanding of essence which accommodates the social and variable nature of rape over time and space.

There is in Du Toit's analysis a real essence to rape – a unity to the assemblage of its parts which is phenomenologically revealed in its function and effects - but only within the social context of its use, only in relation to the symbolic world in which (hetero)sex is currently configured.

## CONCLUSION

This article has critically explored the idea that rape has an essence. What it reveals is that it has not. While multiple notions of essence structure and infuse rape discourse, it is difficult to identify or defend an 'essence' of rape. Invoking an ordinary language approach to conceptual interrogation, I posited four inter-related understandings of essence – necessary, positional, pure, and real - each of which captures a way in which essence is discursively utilized.

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<sup>173</sup> Du Toit (n 2) 41.

<sup>174</sup> MacKinnon (n 100) 124.

Engaging these different understandings of essence to probe central questions regarding the nature, scope and content of rape has been illuminating. Looking at rape in terms of essential properties has shown how difficult it is satisfactorily to pinpoint any necessary features of rape, neither consent nor coercion, surely the most plausible candidates in this regard, proving sufficiently stable or determinate to qualify as features with which rape law cannot dispense. Exploring how essence hierarchically *positions* certain features of a thing illuminates the operation of the ‘real rape’ stereotype not as definitional, but as discursively privileging. Positional essence also throws fresh light on the sex-versus-violence debate in rape theory by exposing how, as particular understandings of rape compete for primacy, their cultural and situational specificity becomes submerged. Appeals to purity in rape discourse are shown to be closely associated with ideas of essence, and explain, inter alia, the continued reliance on (penile) penetration to anchor rape law long after the historical link between rape and the regulation of female generativity has been formally severed. Finally, this analysis has mapped a discursive alignment between essence and appeals to the truth or reality of rape. Essence works in two main ways here, either to tie rape to an account of its origins/cause, or to navigate (and explain) the tension between formal articulations of rape and experience-based, phenomenological accounts. In both contexts, the ‘reality’ of rape, its material, corporeal, and sex(ually)-specific aspects, are the main focus of essence-driven analyses, although, as the discussion of du Toit’s work, in particular, reveals, such engagements do not require a commitment to a conception of rape which transcends the historical and cultural conditions rendering it intelligible.

Far from revealing an essential core, rape is seen to be a remarkably fluid concept, evolving and adapting culturally and historically. We should not, then, be surprised – or concerned – to learn that contemporary ideas of rape are changing or that multiple notions of rape co-exist



simultaneously in public discourse. Drawing on WB Gallie's seminal article,<sup>175</sup> Eric Reitan argues that rape is an 'essentially contested concept', that is, a concept which, because of its evaluative, indeed emotive, qualities, is inherently contestable.<sup>176</sup> Essentially contested concepts are generally utilized appraisively (consider, for example, concepts like art or democracy) so that disagreements about definition are more than usually contentious: what presents as an analytical dispute is in fact a normative conflict over the appropriate designation of a morally loaded term. Reitan's argument goes some way to explain why public discourse around rape is so frustratingly unproductive. The essential contestedness of rape generates endless disputes which take the form of concern about its proper definition and scope but actually express deeply conflicting views about the moral/political character of particular forms of sexual interaction and expression.

For example, reflecting on *R v Bree*,<sup>177</sup> a Court of Appeal case which considered the issue of a drunken victim's capacity to consent to sexual intercourse, Gittos laments 'the criminal adjudication of a drunken regrettable incident between two young people...*unfortunately the sort of encounter which must happen regularly at campuses up and down the country*'.<sup>178</sup> It is the sheer normality of such encounters which, for Gittos, takes them outside the scope of rape, a term he reserves for extreme acts of sexual aberration, gauged from a culturally masculine perspective of what looks like 'normal' sex. Because he views rape as exceptional, out-of-the-ordinary sexual behavior, Gittos wants to contain the term, as far as possible, within traditional parameters. However, it is the parameters themselves, not the gender relations they express, which Gittos invokes, thereby deflecting attention away from the prob-

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<sup>175</sup> WB Gallie, 'Essentially Contested Concepts' (1956) 56 *Proceedings of the Aristotelian Society* 167.

<sup>176</sup> E Reitan, 'Rape as an Essentially Contested Concept' (2001) 16/2 *Hypatia* 43.

<sup>177</sup> [2007] EWCA 256.

<sup>178</sup> Gittos (n 31) x.

lematic assumptions about male and female sexuality which underpin such traditional articulations. Drawing again on Reitan's analysis, Gittos is 'seeking to silence some moral perspectives [feminist ones] "by definition"'.<sup>179</sup>

An important feature of essentially contested concepts is that it is their nature to host contestation. Therefore, there is nothing wrong with seeking to extend their parameters. As Reitan puts it, 'extending the boundaries of [an essentially contestable] concept is *part of the proper use of the term*'.<sup>180</sup> Because essentially contested concepts function primarily as a vehicle for making evaluative judgments, multiple, competing concepts come into play in any discursive encounter. In this context, the pull exerted by ideologically privileged conceptions is always strong. However, if we recognize the essential contestability of rape, we should resist the ideological impetus to contain the concept and accept that questions of definition and delineation are properly open to challenge.

This does not open the concept of rape to a free-for-all. An additional feature of essentially contested concepts is that, while different definitions may compete, it is generally possible to identify some exemplars or paradigms which everyone agrees fall within the scope of the concept, however defined. Reitan cites here the example of 'a stranger using physical force to overpower and vaginally penetrate a resisting woman',<sup>181</sup> easily recognizable as the 'real rape' stereotype. Is this essence reasserting itself? Reitan insists not. This 'standard paradigm' he argues (correlating historically with the ancient notion of rape as the carrying off of livestock) does not prescribe the minimum necessary features of rape (necessary essence) although it may well, by virtue of the agreement it inspires, contain some feature(s) which most

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<sup>179</sup> Reitan (n 176) 43.

<sup>180</sup> *ibid*, 45.

<sup>181</sup> *ibid*, 49.

people regard as essential.<sup>182</sup> What remains contentious is *which* feature of the standard paradigm is essential in this sense: some might point to force, others to vaginal penetration, and, still others to the objectification and/or dehumanization of the victim which the crime occasions.<sup>183</sup> This latter aspect, of course, is not a recognized feature of rape historically. For too long rape and rape law functioned to protect men's rights of sexual access to women, not to protect or empower women themselves. It is feminist re-definitions of rape, as Reitan points out, which have challenged such patriarchal conceptions by drawing directly upon women's perspectives and experiences. It follows that new feminist insights on rape do not so much trouble the standard paradigm as view it through a different lens, bringing into focus elements, such as the erasure of female subjectivity, which have hitherto been obscured.

The 'real rape' stereotype, then, is not an essence, at least not in the necessary sense. However, because it contains at least one element which virtually all agree is rape-indicative (albeit in the context of significant *disagreement* about which element this might be) it continues to figure prominently in discursive engagement. In other words, the persistence of the real rape stereotype is not purely historical; it is nevertheless pernicious, at least in its operation, because it continues to facilitate the ideological foregrounding of a rape imaginary derived from and too often supportive of male privilege. Acknowledging the 'essential contest-ness' of rape helps to counter such pernicious effects by exposing and legitimating normative conflict.

For the analytical philosopher, this becomes a problem of conflict resolution, fueling enquiries into which norms, values or interests are, or ought to be, at the heart of rape law. Such engagements are of more than just philosophical significance. Grounding rape in an agreed normative framework can aid the resolution of pressing boundary disputes: for example, should

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<sup>182</sup> *ibid*, 56.

<sup>183</sup> *ibid*, 49.

sex induced by fraud fall within or without the legal contours of the offence? Autonomy-based arguments generally pull rape in the direction of inclusion here.<sup>184</sup> However, the prospect of extending rape to encompass rape-by-deception may also offer a reason for rejecting sexual autonomy as the normative lynchpin of rape law because it casts the conceptual net more widely than some might like.<sup>185</sup> This of course highlights the obvious difficulty of how to secure normative agreement, how to ground a coherent, principle-based account of rape capable of resisting repeated challenge. Can the sound application of techniques of moral reasoning yield a satisfactory answer to the problems we have been canvassing?

I would argue against the representation of rape discourse purely as a site of moral conflict. Stressing cultural and historical specificity has exposed rape as inessential, taking different forms and meanings over time and space, and highlighting a need *to apprehend it in context*, to recognize rape as a socially constructed, culturally produced set of judgments about sexual wrongdoing, embedded in networks of values, attitudes and relations which are, inter alia, gendered. Abstract reasoning around competing moral values too often leads to the excision of concepts from their context, and although this does not necessarily follow – it is possible, for example, to advocate a conception of rape law premised on sexual autonomy while fully recognizing this as expressive of distinctly modern ideas about sex and sexual behavior - the accompanying inclination to view legal developments teleologically ‘as the gradual working out of an underlying principle’,<sup>186</sup> does tend to foster universalized accounts in which principles inexorably (re)assert themselves. A further difficulty with the neglect of context is that it diverts attention away from the conditions which give rise to a particular perception of the issue; as Farmer observes, the question of how and why an issue comes to be framed in the

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<sup>184</sup> O. Madhloom, ‘Deception, Mistake and Non-disclosure: Challenging the Current Approach to Protecting Sexual Autonomy’ (2018) *Northern Ireland Legal Quarterly* (forthcoming).

<sup>185</sup> See Rubinfeld (n 32).

<sup>186</sup> Farmer (n 111) above.

terms that it does.<sup>187</sup> For Farmer this requires an approach which historicizes normative theorizing but also, I would argue, *politicizes* it. I invoke here not an idea of politics in the conventional sense but rather the philosophical notion of ‘the political’ which locates power at the heart of knowledge production and meaning-making.<sup>188</sup> Once we accept that knowledge is at least in part mediated by power relations, we cannot avoid viewing rape and the discourse surrounding it as politically imbued. The sensibilities and rationalities which shape and animate rape debate are situated within ‘a hegemonic field of contestable interpretations and values’,<sup>189</sup> in which our very apprehension of the ‘problem of rape’ is the focus of profound *political* disagreement over the role and scope of law in regulating sexual encounters. For some, for example, Gittos, the political vision underpinning his critique of modern rape law is staunchly libertarian, grounded in an individualist conception of society blind to social relations of power (including gender) and adamantly resistant to further state encroachment on the sphere of sexual intimacy.<sup>190</sup> For others, for example, MacKinnon and indeed most feminists, rape is a key site of gender inequality, a critical focus of resistance to patriarchal power/male dominance. This is also a politics which actively engages the state in combatting gendered power asymmetries, including in the sphere of sexuality.

The politics of rape are inevitably more intense at a time when notions of sex and sexuality are being radically remade. Rape discourse has become a channel for debating what kinds of socio-sexual relations we are trying to promote or discourage, and the role law should play in this regard. Approaching rape through an agonistic rather than consensus-seeking paradigm

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<sup>187</sup> *ibid*, 1.

<sup>188</sup> On the distinction between ‘politics’ and ‘the political’, see further J. Oksala, *Foucault, Politics and Violence* (Northwestern University Press 2012) ch 1.

<sup>189</sup> *ibid*, 5.

<sup>190</sup> Gittos (n 31).

gets at this critical dimension of contemporary rape politics while encouraging an apprehension of rape through its discursive articulations, which are in turn entangled in a complex, historically entrenched network of social relations, practices, and beliefs.

Understanding, interrogating and reconceiving rape is part of a political process of collectively recalibrating sexual norms in the context of significant change in women's social, economic and political status, empowering and impelling calls upon law to proscribe acts of sexual misconduct which, in earlier times, would not have been widely viewed as within the proper reach of criminal law. It is for this reason that what Gavey describes as the 'cultural scaffolding of rape'<sup>191</sup>, understood as the 'discourses of sex and gender that produce forms of heterosex that set up the pre-conditions for rape – women's passive acquiescing (a)sexuality and men's forthright, urgent, pursuit of sexual "release"<sup>192</sup> is, on the one hand, under unprecedented threat, and on the other, relentlessly reasserting itself. The agonistic politics of rape discourse occupies tricky and hazardous territory - difficult to navigate and with a great deal at stake. My purpose here has been to show that thinking about rape in terms of essence does not help effective navigation and, more often than not, impedes rather than advances a richer understanding of what everyone acknowledges are complex and pressing concerns. A first step to crafting just solutions to the problem of rape in contemporary society is surely to recognize its political nature; to apprehend its contentiousness in the context of the wholesale disruption of patterns of power and privilege, legally enshrined for centuries. Viewed in this way, rape law emerges not, as Rubinfeld asserts, as 'a body of law in search of a principle'<sup>193</sup> but as a field of struggle in which principle yields to politics and law to power.

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<sup>191</sup> Gavey (n 2).

<sup>192</sup> *ibid* 3.

<sup>193</sup> Rubinfeld (n 32) 1387.