

On Crime, Society, and Responsibility in the Work of Nicola Lacey

Edited by

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Responsibility and Explanations of Rape

*Hanna Pickard*¹

I first met Niki when we were colleagues together at All Souls College, Oxford. I was in my late thirties so not young, but I was, in a sense, young in my career: having taken a diversion from analytic philosophy into clinical practice, I was at that stage working to integrate these very different perspectives, and to develop a voice I could genuinely call my own. I could not believe my luck when Niki suggested we have lunch and then—after what would prove to be the first of many long and intense discussions washed down with a bottle of good white wine—that we co-author a paper together. A decade or so later, we're about to embark on our fifth. Writing with Niki has been one of the most wonderful intellectual experiences of my entire life. No one could ask for more in a co-author: erudite, rigorous, generous, dedicated, and with an intellect so penetrating and an understanding so broad in scope that she is like no one else I know. But for me, Niki did something more, and in truth more important. Philosophy is not known for its femininity. Prior to Niki, none of my significant teachers, mentors, or academic influences, had been a woman, and I had no clear conception how to be, at one and the same time, a woman and an academic. Niki modelled this with such grace and wit that it appeared effortless. It was transformative to work alongside her. She showed me how to be myself, simply by being herself. But I now know that, appearances notwithstanding, this was not in fact effortless on her part. Writing this chapter has given me occasion to read parts of Niki's work I was hitherto ignorant of. I was astonished to learn, from her inaugural lecture for her Chair in Law at Birkbeck College, University of London, published in 1998,² that, much like me, she had not been educated by women, but only by men, and was at that time in her career struggling to find a voice both feminine and professorial. How many more generations of academic women will be forced to experience this crisis of identity? Niki and my co-authored work has not been feminist in orientation, despite the fact that it is written by two women who are committed feminists. This chapter is feminist in orientation and it is about a very painful topic that Niki speaks to in that inaugural

¹ This chapter has been a long time in the making. I would like to thank Iyiola Solanke not only for providing me with the opportunity to write it, but also for her patience while I did; Josh Knobe, Niki Lacey, Iyiola Solanke, and Elanor Taylor for helpful comments and discussion; and Harvey Lederman, Ian Phillips, Jocelyn Pickard, and Zoë Pickard for their support through the writing process.

² Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart 1998) ch. 4.

lecture: the criminal law's grotesque and persistent failure to do justice to women who are victims of rape. I write it out of love, respect, friendship, and gratitude, for Niki as a woman and as an academic. Thank you for what you have given us all.

* * *

In Search of Criminal Responsibility: Ideas, Interests, and Institutions argues that one cannot understand what criminal responsibility *is* without attention to what it is *for*.³ And what it is for—according to Lacey—is the legitimation and coordination of criminal law as an exercise of state power. Lacey therefore situates her analysis of criminal responsibility squarely within a sweeping view of the changing social, political, and economic contexts within which the criminal law has historically operated. This analysis reveals no one core idea of criminal responsibility capable of transcending time and place, but rather a series of distinct if historically overlapping ideas—each contributing, albeit in different ways, to criminal responsibility's crucial role of legitimation and coordination. These ideas of criminal responsibility pertain to character, capacity, outcome, and, in recent years, risk. Each idea is complicated and contentious—both in principle and in its practical manifestation within the criminal process—and each contributes in an equally complicated and contentious way to the legitimation and coordination of the criminal law. But, to crudely simplify the nuance of Lacey's theoretical and historical articulation of each of these ideas, they can be seen as props for the state's power to censure those who commit crimes and thereby to regulate social norms and behaviour in the following ways. Character legitimates censure in so far as the crime is expressive of an inherently vicious or criminal disposition; capacity is legitimating in so far as voluntary and autonomous wrong action reveals, if not always or inevitably a guilty mind, then at least a choice, or, alternatively, a reasonable opportunity to conform one's conduct to the law; actual outcomes of crime matter in so far as some harms are so violating of social or moral norms that regulating any and all conduct producing them is essential for the public good; risk matters in so far as there is a genuine probability of such a social or moral norm-violating outcome in future. For each of these legitimating ideas, establishing whether and to what extent they apply in any particular case coordinates and structures the criminal process, including the presentation of the evidence at trial in order to determine a verdict, as well as the nature of an appropriate sentence and its aftermath. Lacey narrates the development of our ideas and practices of criminal responsibility in the context of the ever-present need for regulatory state power to be legitimated and coordinated: this is the purpose for which they evolved and to which they must answer.

³ Nicola Lacey, *In Search of Criminal Responsibility: Ideas, Interests, and Institutions* (Oxford University Press 2016).

Lacey's discussion is so rich and interdisciplinary that I cannot but gulp before suggesting that it contains an omission. But, in situating her analysis of criminal responsibility predominantly in relation to historically changing social, political, and economic contexts, her gaze is trained outside of the courtroom, as much if not more than within it. And, within the courtroom, criminal responsibility may have a further role that is less socio-political and economic, and more psychological. Or so I shall argue. Very schematically, the aim of this chapter is to begin to critically interrogate the psychological function and consequences of responsibility judgments and practices in the courts—much as our co-authored work has done in relation to judgments and practices of *affective blame*. As this omission characterizes our co-authored work as much as *In Search of Criminal Responsibility*, I start with a very brief account of that work as a backdrop to what follows.

Lacey and I have together argued for the value and viability of importing the clinical model of responsibility without blame that I have elsewhere articulated⁴ into criminal law.⁵ This model deploys an idea of responsibility linked firmly to capacity—as opposed to character, outcome, or risk—emphasizing the cognitive and volitional conditions necessary for determinations of responsibility. But the reason for this emphasis on capacity is not the usual backward-looking concern: to legitimate the imposition of 'hard treatment' for past wrongdoing and ensure offenders get their 'just deserts'. The reason is rather forward-looking: for it is only when an action is voluntary and autonomous—in the broadest sense—that it is possible for an individual to work to directly change their behaviour in future, and for interventions that target and support their agency—whether clinical or correctional—to be practically effective. This is one of the core values of capacity responsibility: agency matters to responsibility in the clinic—and arguably in the courtroom—not because it identifies when punishment is legitimate, but because it identifies when interventions aimed at behavioural change can make a difference.⁶ But, this forward-looking goal can only be achieved if practices of holding

⁴ Hanna Pickard, 'Responsibility without Blame: Empathy and the Effective Treatment of Personality Disorder' (2011) 18 *Philosophy, Psychiatry, Psychology* 209; Hanna Pickard, 'Responsibility without Blame: Philosophical Reflections on Clinical Practice' in KW M Fulford et al. (eds), *The Oxford Handbook of Philosophy and Psychiatry* (Oxford University Press 2013) 1134.

⁵ Nicola Lacey and Hanna Pickard, 'From the Consulting Room to the Court Room? Taking the Clinical Model of Responsibility without Blame into the Legal Realm' (2013) 33 *Oxford Journal of Legal Studies* 1; Nicola Lacey and Hanna Pickard, 'To Blame or to Forgive? Reconciling Punishment and Forgiveness in Criminal Justice' (2015) 35 *Oxford Journal of Legal Studies* 665; Nicola Lacey and Hanna Pickard, 'The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems' (2015) 78 *Modern Law Review* 216; Nicola Lacey and Hanna Pickard, 'A Dual Process Approach to Criminal Law: Victims and the Clinical Model of Responsibility without Blame' (2019) 27 *The Journal of Political Philosophy* 229.

⁶ Pickard, 'Responsibility without Blame: Empathy and the Effective Treatment of Personality Disorder' (n. 4); Pickard, 'Responsibility without Blame: Philosophical Reflections on Clinical Practice' (n. 4). See too Gunnar Björnsson and Karl Persson, 'The Explanatory Component of Moral Responsibility' (2012) 46 *Noûs* 326; Gunnar Björnsson and Karl Persson, 'A Unified Empirical Account of Responsibility Judgments' (2013) 87 *Philosophy and Phenomenological Research* 611.

responsible and to account are fashioned so as to avoid what I have called *affective blame*, understood to include both stigmatizing and essentializing character judgments, and the hostile, negative emotions and associated reactions that all too typically accompany ascriptions of responsibility for wrongdoing. Affective blame, thus understood, undermines the potential of responsibility to effect behavioural change, precisely because of the psychological effect it has on the person who is blamed. Of course, the laws of human psychology are *ceteris paribus*: there will always be exceptions and individual differences. But affective blame typically—if not inevitably—makes people feel that they are worthless, hated, shunned—unfit for relationships and not welcome in our community. In consequence—and especially for those who, like many offenders, come from backgrounds of psychosocial adversity and have limited socio-economic opportunities—it can strip people of reason to hope or motivation to change.⁷ Lacey and I have therefore aimed to articulate an idea of *criminal responsibility without affective blame*, and to sketch a corresponding set of criminal justice policies and practices, fit on the one hand for the purpose of holding to account, and on the other for the more rehabilitative and reparative ends which must stand alongside accountability in any modern conception of the criminal law which claims moral and political legitimacy.⁸ In other words, we have argued for the great value of responsibility to the multiple purposes of criminal law provided it is divorced from the invidiousness of affective blame—the difference between them being rooted in their contrasting psychological functions and consequences.⁹

But responsibility judgments and practices also have psychological functions and consequences that are all too easily invidious in criminal justice contexts—especially when the crime in question is rape. To make this case, the chapter proceeds as follows. Drawing on recent work in the philosophy and science of causal cognition, I suggest in section 1 that responsibility judgments function in part like explanatory judgments. Part of what they are *for* is to provide a sense of understanding—indeed, closure. Responsibility ascriptions, like explanations, are naturally tethered to our interests and perspectives: they focus on all and only those causes that stand out as unusual and abnormal, relative to descriptive and prescriptive norms that work in the background. But this means that what stands out as unusual or abnormal depends on which norms we accept. Shifting the norms therefore not only affects what is likely to count as a *satisfying explanation of why something happened*, but who is singled out as the *bearer of responsibility for what happened*. Section 2 then sketches some of the descriptive and prescriptive norms of rape culture, extracted from in-depth qualitative interviews with convicted

⁷ For further discussion see especially Lacey and Pickard, 'To Blame or to Forgive?' (n. 5).

⁸ *Ibid.*

⁹ For further discussion see especially Lacey and Pickard, 'From the Consulting Room to the Court Room?' (n. 5); Lacey and Pickard, 'A Dual Process Approach to Criminal Law' (n. 5).

rapists, and empirical studies of the attitudes and factors that result in ‘victim-blaming’ within the general population. Section 3 brings the discussion of section 1 and section 2 together. I explore how information about the victim introduced by the defence in rape trials can serve to shift the focus such that rape culture norms come to be at work in the background. This means that a satisfying explanation of why the rape occurred in the minds of members of the court—including both judges and juries—is likely to avert as much to what *she* did as to what *he* did—and that, correspondingly, responsibility ascriptions for rape are prone to involve *her* as much as *him*. In other words, I suggest that the criminal law’s grotesque and persistent failure to find perpetrators of rape responsible is in part a predictable upshot of the explanatory function of responsibility, in combination with the pervasiveness of rape culture norms in our society. I conclude with some brief remarks about how responsibility as capacity is therefore poised to distort justice for women, until women’s sexual autonomy and sexual integrity¹⁰ is valued.

1. Responsibility, Causation, and Explanation

Traditionally in both philosophy and the law, it is not the concept of *explanation* that is linked to responsibility but of *causation*.¹¹ To take a classic example, suppose there is a fire in the house. What caused the fire? The full causal story includes many facts that we typically take for granted when we try to answer the question. For example, there can be no fire in absence of oxygen and combustible material. But, in most contexts, we do not cite these facts as part of what we often call ‘the cause’ of the fire. We rather point to an event that is both more specific and more salient to us. For example, the offender entered the house and set it alight using gasoline and a lighter: this is a case of arson. Assuming the presence of oxygen and the combustibility of the house, the cause of the fire is the offender’s act. Given that the capacity conditions are met—the offender knew what they were doing at the time of the offence and the act was voluntary—the fact that the defendant was the cause of the fire is central to a finding of criminal responsibility.¹²

How do we select ‘the cause’ from all the other facts that are part of the full causal story? Within the philosophical literature, there is relatively clear consensus that, whatever the answer, the upshot is in no sense objective. John Stuart Mill states that we have ‘no right’ to single out one cause from others;¹³ while David Lewis

¹⁰ To use the concept Lacey rightly emphasizes in her inaugural lecture. See Lacey, *Unspeakable Subjects* (n. 2) ch. 4.

¹¹ For a review see Michael Moore, ‘Causation in the Law’ in Edward N Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Winter 2019 Edition) forthcoming at <<https://plato.stanford.edu/archives/win2019/entries/causation-law/>> UPDATE

¹² This general claim of course leaves unspecified the question of how the law in fact understands (and ought to understand) the notion of knowledge of action, voluntariness, and causation.

¹³ John Stuart Mill, *A System of Logic, Volume I, Fourth Edition* (J.W. Parker and Son 1856) 361.

refers to the principles by which we distinguish ‘the cause’ from other causal factors as ‘invidious.’¹⁴ But the fact that our procedures are not objective does not mean that they defy description. Consider Fred Dretske’s telling remark: ‘I have nothing particularly original to say about how one identifies the cause of something from among the many events and conditions on which it depends. It seems fairly clear that this selection is often a response to the purpose and interests of the one doing the describing.’¹⁵ This seems correct so far as it goes; but is there anything general that can be said about our purpose and interests in asking why something happened, and how these shape our causal reasoning?

Christopher Hitchcock and Joshua Knobe have put forward an original and intuitive proposal about how people in fact select the cause from all other causal factors, based on a synthesis and analysis of multiple empirical studies conducted over the past decades.¹⁶ Simplifying somewhat, they argue, first, that our causal reasoning is on the whole guided by the goal of discovering successful interventions: ‘In general, while causal structure identifies all of the factors that *could* be manipulated (either singly or in combination) to effect a change in the outcome, [what we select as] the actual causes are the factors that *should* be manipulated.’¹⁷ In other words, we are often interested in why something happened because of the power this information gives us to shape future events: intervention is the purpose served by the concept of cause. Second, they suggest that the process of causal reasoning commonly proceeds through consideration of counterfactuals: we ask, would the outcome have occurred *if* a particular causal factor had not been present or had been significantly different?¹⁸ Third, they argue that we assess which of the many factors *should* be manipulated—which counterfactuals are relevant to discerning an intervention—by identifying what about the causal story is *unusual or abnormal*.¹⁹ In other words, we focus on the causal factors that stand out as *violations of our expectations* as determined by a combination of both descriptive and prescriptive norms, including norms which are statistical, functional, conventional, practical, moral—and, we might wish to add, legal. For these violations constitute a natural target for intervention, without requiring us to *disrupt any of the background descriptive or prescriptive norms*—which is unlikely to be expedient in practice, and which we may in addition view as problematic in principle.

¹⁴ David K Lewis, ‘Causation’ (1973) 70 *The Journal of Philosophy* 556; cited from his *Philosophical Papers, Volume II* (Oxford University Press 1986) 162.

¹⁵ Fred Dretske, *Explaining Behavior: Reasons in a World of Causes* (MIT Press 1991) 24.

¹⁶ Christopher Hitchcock and Joshua Knobe, ‘Cause and Norm’ (2009) 106 *The Journal of Philosophy* 587. For a contrasting empirical account of our procedure for cause selection in cases of negatively evaluated actions, see Mark D Alicke, David Rose, and Dori Bloom, ‘Causation, Norm Violation, and Culpable Control’ (2011) 108 *The Journal of Philosophy* 670.

¹⁷ Hitchcock and Knobe, ‘Cause and Norm’ (n. 16) 590.

¹⁸ This step in the proposal is similar to the classic *sine qua non* test for ‘cause-in-fact’ in criminal law.

¹⁹ This step in the proposal is similar to Herbert Hart and Tony Honoré’s discussion in *Causation in the Law* (Clarendon Press 1959).

By way of illustration, return to the example of the fire in the house, and consider why in this case we might wish to select ‘the cause’ from all other causal factors. Given that the event in question is a harm, it is no surprise that the answer is intervention: we want to understand why it happened, so we can try to ensure it does not happen again.²⁰ Suppose now that we discover that the fire was not caused by an act of arson, but a random freak of nature: the house was hit by lightning. Does this point to an intervention to stop fires from occurring in future? The presence of oxygen in the atmosphere and the combustibility of the house are statistically normal features of the Earth’s environment and dwellings respectively. If there hadn’t been oxygen in the atmosphere, or if the house hadn’t been combustible, then there wouldn’t have been a fire. But, because these features are normal, they are relegated to the background: in principle, we keep unremarkable factors such as these fixed while conducting our inquiry; in practice, we have no ready means of changing them anyhow. In contrast, lightning, although a natural occurrence, is more out of the ordinary, statistically speaking, and so immediately emerges as a possible cause. Would the fire have occurred, if the house had not been hit by lightning? Like the case with oxygen and combustibility, the answer is no. But, could we have prevented the house from being hit by lightning? Unlike the case of oxygen and combustibility, it is immediately apparent that the answer is yes. We cannot stop lightning, but we can divert it. Had the house been equipped with a lightning rod, there would have been no fire. That is the lesson to be learned in this case from asking about the cause: we discover a way to potentially stop a fire in the house from happening again. The value of Hitchcock and Knobe’s proposal is that it explains *how* we make this selection in relation to *why* we make it at all. We attend to those parts of the causal story that stand out as violations of descriptive or prescriptive norms and identify these as ‘the cause’, precisely because this puts us in the best position possible to effectively intervene to alter the outcome in future.

Suppose now that we revert to the example as originally presented: when we ask what caused the fire, the answer is that it looks like arson. The mere whiff of human agency brings with it an interest not just in determinations of causation but of responsibility. What is the purpose of determining responsibility? We may have backward-looking considerations primarily in mind: we may want to find out who caused the fire in order to know who to punish and blame. Or, we may have forward-looking considerations primarily in mind: we want to find out who caused the fire in order to intervene to ensure that the individual in question does not set a fire again. Notably, this forward-looking consideration is the rationale that Lacey and I employ in our joint work, as the basis for a form of criminal responsibility linked firmly to capacity, but without affective blame: just as our interest in causation may stem from concern with intervention for the sake of a better future,

²⁰ If the event under consideration is a good, we may wonder about the cause in the hope that the answer will allow us to try to intervene for the opposite reason, namely, to ensure it happens again.

so too may our interest in criminal responsibility. Of course, the offender would have been unable to set the fire if the atmosphere had been devoid of oxygen, the house had not been combustible, and it had not been easy to procure gasoline and a lighter. But these are statistically normal features. Their presence is to be expected: we take them for granted and relegate them to the background. Given this background, what explains why the fire occurred is that the offender knowingly and voluntarily set it. Not only *the act* of arson, but this *state of mind* itself, violates norms (e.g. statistical, moral, and legal) and stands out as such. But, in part because of this, and unlike the other causal factors that contributed to the fire, it is also a ready object of intervention. If the offender has a *change of mind* and determines not to set fires in future, then there will be no future fires of their making. We can therefore intervene to target their state of mind—through clinical, correctional, or other means—in order to try to secure this future.

My discussion thus far has been cast—at least predominantly—in the traditional terms of responsibility and causation. But the picture that has emerged is more naturally cast in terms of responsibility and explanation. As noted above, there is broad philosophical consensus that there is no objectivity in our causal selection process. Hitchcock and Knobe's proposal explains why. Causes are selected relative to norms of many varieties, which are held fixed in the background; but, unfix the norms, and you change which cause out of the many possible causal factors will be selected. To illustrate this point, vary the example. Consider a case not of arson, but of gun violence in modern America. Statistically, many Americans own guns.²¹ Morally, plenty believe gun ownership is a right. Holding those stats and that right fixed, the cause of a death by shooting is the person who pulled the trigger: from this perspective, as the slogan goes, it is people who are bad, not guns. But, in contrast to the presence of gasoline and lighters in the country, plenty other Americans refuse to resign themselves to these gun statistics or believe there is any such right to gun ownership. Unfix these norms, and the cause of a death by shooting is as much the availability of guns as the individual who pulled the trigger. If they didn't have a gun—*which they shouldn't, and only do because of political and moral corruption*—then there wouldn't have been a shooting. *That* violation is as important to single out and to intervene on as any individual who pulls a trigger. From an objective perspective, neither of these violations is any more or less the cause of the death than any other of the myriad causal factors that constitute the full causal story in this case. But, depending on whether your interests and perspective embody norms supporting gun rights or gun reform, you are respectively likely or unlikely to be satisfied with an explanation of why the death occurred that fails to mention this further violation: whether an explanation strikes you as good or not depends, among other things, on where you are coming from. Correspondingly, depending

²¹ Precise numbers of owners are difficult to estimate, but see The World Population Review of Gun Ownership by State 2019 at <<http://worldpopulationreview.com/states/gun-ownership-by-state/>>.

on whether your interests and perspective embody norms supporting gun rights or gun reform, you are respectively likely or unlikely to ascribe responsibility entirely to the individual shooter, with no consideration of wider moral and political context as (potentially) mitigating and (certainly) relevant: whether a responsibility ascription strikes you as fair or not depends, also, on where you are coming from. For, if the shooting is not the only violation that has come into focus, then both an explanation of why the death occurred, and an ascription of responsibility for the death, that omits the other salient violation will be missing an important part of the story—in neither case does it yield the understanding and closure you want and expect. Responsibility ascriptions, like explanations, are naturally tethered to our interests and perspectives: they depend not only on what we want to explain and why we want to explain it, but on what norms we assume as background. Shifting the norms therefore not only affects what is likely to count as a *satisfying explanation of why something happened*, but who is singled out as the *bearer of responsibility for what happened*.

In recognition of this parallel between responsibility and explanation, Gunnar Björnsson and Karl Persson have made the striking claim that responsibility judgments *just are* explanatory judgments.²² But one can acknowledge the point without going so far. What seems clear is that responsibility ascriptions can be sensitive to the same kinds of considerations that selections of cause are sensitive to, and so *function like* explanations. This similarity is fundamentally procedural: they both naturally focus on all and only those causes that stand out as unusual and abnormal, in virtue of violating accepted background norms. But it is also psychological: they both provide understanding and closure, marking the end of inquiry. Indeed, in the courts, this closure is marked explicitly by the verdict announcing a finding of guilty or not guilty, which signifies the end of the inquiry and resolution of the trial.

I believe it is important to acknowledge the similarity without endorsing the outright identification because it is possible for us to resist the temptation to allow

²² Björnsson and Persson, 'The Explanatory Component of Moral Responsibility' (n. 6); Björnsson and Persson, 'A Unified Empirical Account of Responsibility Judgments' (n. 6). Simplifying somewhat, they argue for this claim in three ways. First, similar to the clinical model of responsibility without blame, they suggest that our practices of holding people responsible are forward-looking: they aim at preventing behaviour. But they argue that, if so, we should expect responsibility to be ascribed when the person's state of mind is a significant part of the explanation of the behaviour—the salient cause—otherwise our practices would be idle. Second, they point out that many everyday excuses function by showing how, in the particular case under consideration, a person's state of mind is not in fact a reliable or remarkable cause of their behaviour. Rather, they acted as they did because they were forced, coerced, ignorant, or even simply obeying the rules—excuses function to refocus our attention on explanations other than the person's state of mind as the cause of their behaviour. Third, through a detailed discussion, they show how conflicting philosophical intuitions about the nature and existence of moral responsibility can be explained by recognizing how different thought experiments foreground or background different interests and perspectives. Despite quibbling about their core claim, my discussion owes a great deal to Björnsson and Persson's work; indeed, they allude to the possibility of applying their framework to explain victim-blaming in n. 16 of 'The Explanatory Component of Moral Responsibility'.

our responsibility ascriptions to mirror our explanatory judgments. For example, if the judge instructs the jury to ignore their personal view of gun rights or gun reform in deciding whether or not this defendant is responsible for the death, and instead to focus only on whether the defendant knowingly and voluntarily pulled the trigger—honing in on a narrow idea of responsibility as capacity only—I do not rule out that the jurors are able to focus their minds and do just that—including those who believe that the moral and political context is (certainly) relevant and (potentially) mitigating. What I am suggesting is rather that our responsibility ascriptions—especially in so far as they embody forward-looking ends—are as a matter of fact *prone* to be influenced by explanatory considerations that are easy to manipulate—as I have tried to do by the way I developed the examples. As a result, we are all too easily led astray, by mechanisms such as rhetoric, allusion, dramatic framing, and even the simple introduction of a new piece of information, that serve to focus our attention on a new possible norm violation, and correspondingly, a new possible part of the explanation of *why* the event occurred and hence locus of responsibility *for* its occurrence.²³ Indeed, such manipulation is a hallmark of opening and closing statements in court, where prosecution and defence may try to tell the story of the crime so as to foreground or background respectively the defendant's part in explaining it, and, in consequence, his responsibility for it.

I shall now argue that this psychological tendency to tether responsibility ascriptions to what strikes us as a significant part of the explanation for why something happened poses a serious problem for justice for rape.

2. Rape Culture Norms

Let us begin with some statistics. The US National Intimate Partner and Sexual Violence Survey 2010 Summary Report states that one in five women has been the victim of rape or attempted rape;²⁴ the US Department of Justice reports that out of 1000 sexual assaults, 230 are reported to the police, 46 reports lead to arrest, 9 cases are referred to prosecutors, 5 cases result in felony convictions, and 5 convicted offenders are incarcerated.²⁵ Rape statistics are often the subject of controversy; and

²³ In a series of studies on victim-blaming as a general phenomenon, Laura Niemi and Liane Young found that assignments of blame could be manipulated simply by shifting the focus of the vignette from perpetrator to victim—while holding all the facts reported constant. They also found that victim-blaming was associated with what they label 'binding values', which include commitment to loyalty, authority, and purity, as oppose to 'individualizing values', which simply prohibit harm. Laura Niemi and Liane Young, 'When and Why we See Victims as Responsible: The Impact of Ideology on Attitudes towards Victims' (2016) 42 *Personality and Social Psychology Bulletin* 1227.

²⁴ National Intimate Partner and Sexual Violence Survey: 2010 Summary Report at <https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf>.

²⁵ Rape Abuse and Incent National Network at <<https://www.rainn.org/statistics/criminal-justice-system>>. There has been recent outcry concerning the failure of police and prosecution to pursue those sexual assaults that are reported: see Barbara Hagerty, 'An Epidemic of Disbelief' (2009) *The Atlantic* 72.

it is unquestionably true that elements of this overall picture are hard to measure given low reporting rates combined with the failure of reporting to lead to arrest and prosecution. But the general trend is crystal clear: the odds of a woman being raped are high, while the odds of a man being convicted of rape are—to put it mildly—low.

Why do men rape—and why does our society so reliably fail to hold them to account for doing so? Here I consider just one potential part of what must ultimately be a multi-dimensional answer: rape culture norms, understood as cultural norms that function to enable and license rape. To examine these norms, I draw on two sources: the voices of convicted rapists themselves as documented by Diana Scully through in-depth qualitative interviews with 114 men, published in her book *Understanding Sexual Violence: A Study of Convicted Rapists*,²⁶ and empirical studies of the attitudes and factors that result in ‘victim-blaming’ within the general population.²⁷ Strikingly, the pictures that emerge from each of these sources match. Men who rape justify and excuse their actions by appeal to many of the same factors that the general public considers as mitigating of their responsibility; and a specific attitude towards women found in convicted rapists is also associated with victim-blaming among study participants.

Before describing these factors and attitude, it is worth drawing attention to why this alignment is important to recognize. There is a long history within psychiatry and popular culture alike of viewing rape as the expression of a kind of mental disorder—a ‘sickness’ or ‘disease’.²⁸ This pathologization of rape has not in general been admissible as a defence in the criminal courts. But it has nonetheless served as what I should like to call a *cultural defence mechanism* against the recognition that, in our society, rape is *normal*. But normal it is. Recall that one in five women are victims of rape or attempted rape; now add the fact that 41 per cent of these women are assaulted by an acquaintance.²⁹ Put these statistics together: roughly one in ten women experience rape or attempted rape at the hands of an acquaintance, which means that in all likelihood, we all know men who rape. Moreover, there is no clear evidence that rates of mental health problems are any different or higher among

Comparable statistics and a similar problem exist in the United Kingdom. See <<https://www.theguardian.com/society/2019/mar/06/prosecution-rate-in-england-and-wales-falls-to-five-year-low>>.

²⁶ Diana Scully, *Understanding Sexual Violence: A Study of Convicted Rapists* (HarperCollins 1990).

²⁷ For a comprehensive review see Claire R Gravelin, Monica Biernert, and Caroline E Bucher, ‘Blaming the Victim of Acquaintance Rape: Individual, Situational, and Sociocultural Factors’ (2019) 9 *Frontiers in Psychology*, Article 2422. I cite this review whenever the number of studies supporting a claim are too many to sensibly reference given the aims of this paper; many of the individual studies cited below are reported in this review, too. Obviously, other sources in addition to those I use here can also shed light on rape culture, e.g. depictions of rape in the media, literature, music, films, and, perhaps most of all, pornography.

²⁸ For discussion see Scully, *Understanding Sexual Violence* (n. 26).

²⁹ The National Intimate Partner and Sexual Violence Survey 2010 Summary Report at <https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf>.

convicted rapists than other felons: rapists are not distinctively 'sick' or 'diseased'.³⁰ And although, like other violent felons, convicted rapists appear more accepting of violence than non-felons and non-violent felons alike, they do not report poor relationships with mothers, sisters, girlfriends, and spouses, or unusual sexual development or activity in childhood or adolescence, or a lack of sexual activity or sexual frustration prior to imprisonment.³¹ On the whole, they consider themselves to be—and in many ways are—ordinary men. Indeed, research on the prevalence of and attitudes towards rape as *self-reported*³² by male college students supports this outlook. In a sample of 6159 students, 1 out of 4 reported participating in acts of sexual aggression, including sexual contact (10.2 per cent), sexual coercion (7.2 per cent), attempted rape (3.3 per cent), and rape (4.4 per cent);³³ in a sample of 356 students, 28 per cent indicated some likelihood of raping³⁴—a percentage that a separate study with a sample size of 172 students found to increase to 37 per cent if the students were given assurances that they would not be caught.³⁵ As feminist theorists have long insisted, much as we may not wish to acknowledge it, rape culture is *our* culture.³⁶ The striking alignment between the mindset characteristic of convicted rapists and the mindset found in ordinary study participants shines a spotlight on this fact. Men rape—and justify and excuse why they rape—in large part because the ideas about women and rape that they themselves report as motivating and explanatory are prevalent within our society. Rape and its rationale is not abnormal: it is culturally learned.³⁷

Scully's analysis of the in-depth interviews she conducted suggests that rapists fall into two categories, *admitters* and *deniers*.

³⁰ Scully, *Understanding Sexual Violence* (n. 26).

³¹ *Ibid.*

³² Self-report is of course not an accurate measure. Given the assumption that the students are unlikely to report acts of, and willingness to engage in, sexual assault, real rates are likely to be higher. On the other hand, if the students felt that reports of acts and expressions of willingness were somehow *expected* of them, real rates are likely to be lower. Both possibilities support the idea that rape is *normal*, albeit in different ways.

³³ Mart Koss, Christine Gidycz, and Nadine Wisniewski, 'The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Students in Higher Education' (1987) 55 *Journal of Consulting and Clinical Psychology* 162.

³⁴ John Briere and Neil Malamuth, 'Self-reported Likelihood of Sexually Aggressive Behavior: Attitudinal versus Sexual Explanations' (1983) 17 *Journal of Research in Personality* 315.

³⁵ Note that 20 per cent of these men indicated a likelihood greater or equal to midpoint on the rating scale; this was correlated with belief in a selection of rape culture norms (see below). Todd Tieger, 'Self-rated Likelihood of Raping and Social Perception of Rape' (1981) 15 *Journal of Research in Personality* 147.

³⁶ 'Rape is not committed by psychopaths or deviants from social norms—rape is committed by *exemplars* of social norms . . . Rape is not excess, no aberration, no accident, no mistake—it embodies sexuality as the culture defines it' (Andrea Dworkin *Our Blood: Prophecies and Discourses on Sexual Politics* (Perigree Books 1976) 45–6). See too Catherine Mackinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press 1987), and *Toward a Feminist Theory of the State* (Harvard University Press 1989).

³⁷ The claim that it is culturally learned is supported by cross-cultural anthropological studies which, although limited, suggest that rates of rape are widely variable and correlated with measures of gender equality. See Scully, *Understanding Sexual Violence* (n. 26).

Admitters acknowledge that they raped. But they explain what happened in ways that distance themselves from the act and reduce their responsibility, thereby protecting them from an identity as *a rapist*:

It's different from anything else I've ever done. I feel more guilt about this. It's not consistent with me. When I talk about it, it's like being assaulted myself. I don't know why I did it, but once I started, I got into it. Armed robbery was a way of life for me, but not rape. I feel like I wasn't being myself.³⁸

Exculpatory themes that emerge from the interviews and serve this identity-protecting function include:

- (i) Being under the influence of drugs and alcohol which 'made' them do it:

[Alcohol] brought out what was already there but in such intensity it was uncontrollable. Feelings of being dominant, powerful, using someone for my own gratification, all rose to the surface.³⁹

Multiple studies report that ordinary subjects also view intoxication as significantly reducing responsibility in perpetrators; the more intoxicated the perpetrator, the more study participants excuse his behaviour and do not hold him responsible.⁴⁰ On the other hand, in an all too predictable asymmetry, the more intoxicated the victim, the more she is perceived as responsible for the rape (see below).⁴¹

- (ii) Going through a particularly difficult period characterized by emotional distress:

My parents had been married for many years and I had high expectations about marriage. I put my wife on a pedestal. When I walked in on her, I felt like my life had been destroyed, it was such a shock. I was bitter and angry about the fact that I hadn't done anything to my wife for cheating. I didn't want to hurt her [the victim], only to scare and degrade her.⁴²

Note that this quotation expresses a common motivation for rape identified by rapists: revenge for the actions of a particular woman taken out on women as a group. A minority of rapists not only explain their behaviour by appeal to

³⁸ Ibid., 129.

³⁹ Ibid., 124

⁴⁰ Gravelin, Biernet, and Bucher, 'Blaming the Victim of Acquaintance Rape' (n. 27).

⁴¹ Ibid.

⁴² Scully, *Understanding Sexual Violence* (n. 26) 127.

emotional distress at the time of the rape (as this man does), but in addition pathologize their state of mind, inferring that, because they raped, they must be sick. Study participants also show associations between victim blaming, and the belief that rape is due to male pathology and inability to control sexual urges, especially combined with 'female teasing' (see (iv) below).⁴³

- (iii) They are actually a 'nice guy'. As evidence of this, some men report being 'kind' to their victims even though they raped them, for example they tried to be gentle while raping, or they gave their victim money to get home after. Men who were convicted of gang rape may explain how they were led along by others:

I'm against hurting women. She should have resisted. None us of were the type of person that would use force on a woman. I never positioned myself on a woman unless she showed an interest in me. They played to me, not me to them. My weakness is to follow. I never would have stopped [the car], let alone pick her up without the others. I never would have let anyone beat her. I never bothered women who didn't want sex: never had a problem with sex or getting it. I loved her—like all women.⁴⁴

Deniers, in contrast, do not believe they are guilty of rape. Some—not all—acknowledge that what they did was not quite right; but they maintain it was justifiable in the circumstances. The majority of these justifications focus precisely on *features of the woman raped*, supposedly rendering the man's behaviour understandable in the context:

- (iv) A range of so-called 'precipitating' factors figure in virtually all reports offered by deniers as legitimating their actions; in empirical studies, these factors are found to be strongly associated either with increased perception of victim responsibility, or reduced perception of perpetrator responsibility, or both.⁴⁵ These features of women include: dressing in a revealing way, sexual history and reputation, flirtatious or 'teasing' behaviour, going home with someone, being a sex worker or other jobs/factors seen as impugning character, and, as noted above, victim intoxication. The myth that 'nice girls' do not get raped but only women who in some way 'ask for it'—as supposedly evidenced by these factors—appears pervasive.

- (v) Women say no when they mean yes. Although they may 'cry rape' afterwards, in truth they are consenting. This connects to the further belief expressed by many deniers that their victims did not themselves want to bring

⁴³ Barbara Krahe, Jennifer Temkin, and Steffen Bieneck, 'Schema-driven Information Processing in Judgements about Rape' (2007) 21 *Applied Cognitive Psychology* 602.

⁴⁴ Scully, *Understanding Sexual Violence* (n. 26) 129.

⁴⁵ Gravelin, Biernet, and Bucher, 'Blaming the Victim of Acquaintance Rape' (n. 27).

charges, and only did so because they were pressured to by other men, for example boyfriends and spouses:

A man's body is like a Coke bottle, shake it up, put your thumb over the opening and feel the tension. When you take a woman out, woo her, then she says, 'no, I'm a nice girl,' you have to use force. All men do this. She said 'no' but it was a societal 'no,' she wanted to be coaxed. All women say 'no' when they mean 'yes' but it's a societal 'no' so they won't have to feel responsible later.⁴⁶

- (vi) Women like rape: they eventually 'relax and enjoy it'. This justification may be related to the previous one, in that rapists frame rape as sex, which women want but do not admit to wanting. It may also connect to the view expressed by many rapists, including in the quotation in (iii) above, that women *should* resist rape: this duty lies with them—while pushing a woman who says no to have sex is a man's prerogative. Connectedly, empirical studies demonstrate a correlation between depictions of women who forcefully resist rape, and ascriptions of perpetrator responsibility.⁴⁷ In both convicted rapists and study participants, women appear to be perceived as required to forcefully resist rape in order to escape the risk of being perceived either as consenting and/or as in part responsible.
- (vii) Rape is a minor wrong if a wrong at all. Often this justification is linked to economic transactions that are traditionally gendered. In one study that manipulated the kind of date preceding an acquaintance rape, victim responsibility and perceived justifiability of the rape were highest when the date was expensive and the man paid.⁴⁸ This mode of reasoning is explicit in the following convicted rapist's justification of his behaviour:

After I paid for a motel, she would have to have sex but I wouldn't use a weapon.⁴⁹
I would have explained I spent the money and if she still said no, I would have forced her. If it had happened that way, it would have been rape to some people

⁴⁶ Scully, *Understanding Sexual Violence* (n. 26) 104. The belief that 'no means yes' figures in Douglas Husak and George C Thomas's argument that men's mistaken belief in consent can be honest and reasonable and hence constitutive of a permissible defence (see n. 58). Husak and Thomas argue that empirical studies of 'token resistance' indicate there is a convention of women saying no but meaning yes; they see this convention as allowing the possibility of reasonable mistake. Douglas N Husak and George C Thomas, 'Date Rape, Social Convention, and Reasonable Mistakes' (1992) 11 *Law and Philosophy* 95.

⁴⁷ Gravelin, Biernet, and Bucher, 'Blaming the Victim of Acquaintance Rape' (n. 27).

⁴⁸ Susan Basow and Alexandra Minieri, 'You Owe Me': Effects of Date Cost, Who Pays, Participant Gender, and Rape Myth Beliefs on Perceptions of Rape' (2011) 26 *Journal of Interpersonal Violence* 479.

⁴⁹ Scully notes that the towering size and strength of this particular man makes it unlikely he needed a weapon to gain compliance.

but not to my way of thinking. I've done that kind of thing before. I'm guilty of sex and contributing to the delinquency of a minor, but not rape.⁵⁰

Note that neither admitters nor deniers report feeling remorse in the aftermath of raping or concern for the victim; most report feeling good. Deniers, unlike admitters, continue not to feel remorse even with the passage of time; but, of course, this is as expected: they deny there is much to feel remorse about.

Importantly, despite documenting the differences in exculpating belief and styles of reasoning among rapists, Scully nonetheless identifies a single attitude common to all rapists, admitters and deniers, alike: they are strongly committed to what she calls 'pedestal values'. Women are placed 'on a pedestal' but only insofar as they conform to very rigid standards of moral and sexual conduct, for example, they display none of the so-called 'precipitating' factors in (iv). Needless to say, few if any women meet 'pedestal' standards. Correspondingly, rapists identify with traditional stereotypes of male superiority and masculinity: off the pedestal, women are objects for male sexual use. One rapist who murdered his victim expresses this attitude very clearly:

Rape is a man's right. If a woman doesn't want to give it, a man should take it. Women have no right to say no. Women are made to have sex. It's all they're good for. Some women would rather take a beating, but they always give in; it's what they are for.⁵¹

One cannot but hope that the majority of study participants would disagree with this chilling statement. Nonetheless, endorsement of traditional gender roles that maintain unequal status between women and men and place restrictions on women's roles and rights is significantly correlated with a willingness to blame victims and endorse rape culture norms in empirical studies.⁵²

Drawing this discussion together, we can discern the following highly schematic norms that characterize rape culture:

Descriptive norms for women:

- (1) Women engage in deception about wanting and consenting to sex [rape]
- (2) Women enjoy forced or coerced sex [rape]

⁵⁰ Scully, *Understanding Sexual Violence* (n. 26) 111.

⁵¹ *Ibid.*, 166.

⁵² Gravelin, Biernet, and Bucher, 'Blaming the Victim of Acquaintance Rape' (n. 27). Note that endorsement of politically conservative values is similarly correlated: Kathryn Anderson, Harris Cooper, and Linda Okamura, 'Individual Differences and Attitudes toward Rape: A Meta-analytic Review' (1997) 23 *Personality and Social Psychology Bulletin* 295.

Prescriptive norms for women:

- (3) ‘Nice girls’ don’t get raped: to communicate non-consent and/or avoid rape, women are required to conform to certain standards of dress, behaviour, status
- (4) To communicate non-consent and/or avoid rape, women are required to forcefully resist rape
- (5) Women ‘owe’ sex if they engage in traditionally gendered economic transactions

Descriptive norms for men:

- (6) ‘Nice guys’ rape because something else ‘made’ them do it, for example emotional distress, pathology, peer pressure
- (7) Men are unable to control their desire to rape when intoxicated

Prescriptive norms for men:

- (8) Men have a right to sex [rape]
- (9) Men are permitted to use pressure, coercion, and if necessary force to get sex [rape] given the descriptive norms for women (1) and (2) above

How widespread is adherence to these norms? It is not possible to answer this question definitively, but the good and bad in our surrounding culture seeps into us all, men and women, whether we like it or not: these norms may *influence* in absence of *overt adherence*. Certainly the failure of reported rape to be charged and prosecuted, and those rapists who are charged and prosecuted to be convicted, suggests rape culture norms are not confined to a small minority of the general population any more than rape reflects a pathological mindset attributable only to ‘sick’ rapists. Rape culture is part of our society—including, of course, the courts.

3. Failures of Responsibility: Rape Culture and Explanations of Rape in the Courts

In 2018 during a rape trial in Ireland, the defence lawyer for a twenty-seven-year-old man charged with raping a seventeen-year-old girl in an alleyway asked: ‘Does the evidence out-rule the possibility that she was attracted to the defendant and open to meeting someone and being with someone? You have to look at the way

she was dressed. She was wearing a thong with a lace front.⁵³ The defendant was unanimously acquitted by the jury.⁵⁴

The story prompted outcry. Protests erupted—including in the Irish Parliament—and women posted pictures of their underwear under #IBelieveHer and #ThisIsNotConsent. But the story is hardly unique. The history of rape trials is replete with occasions where the defence introduces as evidence information about the victim's dress, sexual history and reputation, flirtatious or 'teasing' behaviour prior to the assault, whether they went home with the defendant, whether they forcefully resisted or 'complied' with rape, status as a sex worker or other kinds of jobs or factors that could be seen as impugning character, and state of victim (and defendant) intoxication. Recent media investigation of the low rates of arrest and prosecution of reported rapes suggests that police and prosecutors—like judges and juries—may be swayed by exactly these factors—and, ironically, by the fact that they expect judges and juries to be swayed by them.⁵⁵ In parallel, defendants may be portrayed by their lawyers as 'nice guys' of good character who have already suffered enough,⁵⁶ and whose life stands to be adversely affected by what in this context comes to be called a 'harsh' sentence but in any other context—on the assumption that rape is a serious crime, not a minor transgression—would be called a reasonable one.⁵⁷

How does the introduction of such evidence function to exonerate defendants in the courts? No doubt, part of the answer is that it can be used to support a mistake of fact defence, in so far as it supposedly renders intelligible how the defendant could have had an honest and reasonable belief in consent. In the background is the belief that the defendant is a 'nice guy'—not the kind of man who would have non-consensual sex. By a purely subjective standard, information about the victim introduced by the defence can explain why he honestly believed she was consenting, *given the nature of that information combined with the fact that he adheres to or is significantly influenced by*

⁵³ *The New York Times*, 15 November 2018 at <<https://www.nytimes.com/2018/11/15/world/europe/ireland-underwear-rape-case-protest.html>>.

⁵⁴ *The Guardian*, 15 November 2018 at <<https://www.theguardian.com/uk-news/2018/nov/15/thong-protest-in-belfast-raises-concerns-over-trials>>.

⁵⁵ Barbara Hagerly, 'An Epidemic of Disbelief' *The Guardian* 6 March 2019 at <<https://www.theguardian.com/society/2019/mar/06/prosecution-rate-in-england-and-wales-falls-to-five-year-low>>.

⁵⁶ And so are treated with 'himpathy', to use the phrase coined by Kate Manne in *Down Girl: The Logic of Misogyny* (Oxford University Press 2018). In this context, it is telling to note how the convicted rapist in the quotation above illustrating the general mindset of *admitters* expressed his suffering, thereby revealing the degree of his self-focus and failure to recognize the suffering of his victim: 'When I talk about it [rape], it's like being assaulted myself.'

⁵⁷ This indeed was a part of the judge's reasoning in the now famous case of Brock Turner, a Stanford University student convicted of three felonies: assault with intent to rape an intoxicated woman; sexually penetrating an intoxicated person with a foreign object; and sexually penetrating an unconscious person with a foreign object. Turner received a sentence of six months in prison (he served three months) and three years on probation; the judge also considered the fact he was intoxicated at the time of the assaults as a mitigating factor in sentencing. See *The Guardian* 14 June 2016 at <<https://www.theguardian.com/us-news/2016/jun/14/stanford-sexual-assault-read-sentence-judge-aaron-persky>>. Brock Turner is of course wealthy and white: rape culture norms intersect with class and race, and are unlikely to exculpate or mitigate in the same way when ethnic minority or otherwise marginalized men are accused of rape.

the relevant rape culture norms (1)–(5) above. Is such an honest belief reasonable? It depends, of course, on what it means for a belief to be reasonable. If a reasonable belief is one which the average person in the defendant's position would have believed—and *the average person in his position adheres to or is significantly influenced by the relevant rape culture norms (1)–(5)*—then information about the victim introduced by the defence and pertinent to those norms may indeed render his belief reasonable.⁵⁸ On the other hand, if a reasonable belief is judged in relation to moral norms that value the sexual autonomy and integrity of all people of all genders equally *and hence conflict with rape culture norms*—moral norms, it should be noted, that sexual offences laws purport to reflect—then the defendant's belief, however honest, is not reasonable.⁵⁹ Without disputing the importance of such evidence to the possibility of mistake of fact defences, I want nonetheless to suggest that it has a significant additional function in the courts, namely, to focus the search to understand *why the rape happened* on her part in the full causal story, not his.

The facts introduced by the defence pertaining to the victim typically reveal her as violating one or more of the women-specific norms characteristic of rape culture. The burden of section 2 of this chapter was to argue that such norms are a genuine part of our society—they are influential, even if we do not know that the majority of people explicitly adhere to them. The burden of section 1 of this chapter was to suggest that, as a matter of fact, we (implicitly or explicitly) treat norm violations as targets for intervention and select them as the cause that explains why something happened, and, correspondingly, where responsibility lies. Putting these together, introducing facts revealing the victim as violating rape culture norms—given the influence of these norms—focuses our attention on these facts as the causes that explain why the rape happened, and where the responsibility lies. The counterfactuals that then guide our reasoning—either implicitly or explicitly—are counterfactuals such as the following. If she hadn't been dressed that way, *then the rape wouldn't have happened*. If she hadn't flirted with him, *then the rape wouldn't have*

⁵⁸ Lacey explores precisely this kind of case as one among many examples of so-called 'cultural defences' in 'Community, Culture, and Criminalization' in Rowan Cruft, Matthew H Kramer, and Mark R Reiff (eds), *Crime, Punishment and Responsibility: The Jurisprudence of Antony Duff* (Oxford University Press 2012) 292. Note that, although my argument in this chapter focuses entirely on rape, its structure may apply more broadly across the criminal law.

⁵⁹ A long history of accepting mistake of fact defences and acquitting defendants charged with sexual assault on this basis suggests the latter interpretation of reasonableness is, to put it mildly, not common in the courts. One solution is to impose the latter interpretation on the courts—an imposition justified, arguably, by the purpose of sexual offences laws. Another solution is to reject mistake of fact defences in sexual assault, instead either requiring consent to be subject to positive and affirmative proof (Lucinda Vandervoort, 'Mistake of Law and Sexual Assault: Consent and *Mens Rea*' (1987–1988) 2 *Canadian Journal of Women & the Law* 233)—or, more radically, by making sexual assault subject to strict liability—responsibility as outcome only, to adopt Lacey's term—thereby removing any element of *mens rea*. An alternative solution—given the principled and pragmatic impediments to all these reforms—is to give up on the criminal courts altogether, and use civil suits as a way for women to get recognition and compensation for the wrong of rape. I have become increasingly convinced of the value and viability of exploring the possibility of reconceiving rape as a strict liability offence, thanks to discussions with Sarah Hirschfeld.

happened. If she hadn't gone home with him, *then the rape wouldn't have happened*. If she hadn't been drunk, *then the rape wouldn't have happened*. If she had forcefully resisted rape, *then the rape wouldn't have happened*. Meanwhile, the defendant may be presented as *conforming* to male-specific norms characteristic of rape culture—for example, he is just a 'nice guy' who would never have done this if he hadn't been drinking with the boys—and so as in no way unusual or abnormal. She is the norm violator, not him. The explanatory focus is thereby shifted away from his motivation and behaviour—factors now relegated to the background of the full causal story—onto her motivation and behavior—factors now in the foreground as targets for intervention *to prevent rape*.⁶⁰ Given our tendency to tether responsibility ascriptions to what strikes us as a significant part of the explanation, the shift in explanatory focus from him onto her creates a shift in focus of responsibility from him onto her.⁶¹ For the story has now been manipulated such that the explanation of why the rape occurred appeals to what she could—and should—have done differently.

Note that—in an all too familiar depressing turn—it may be true that, in some cases, these facts about her are indeed part of the full causal story. Perhaps this rapist only rapes women at home: it is true that she wouldn't have been raped if she hadn't gone to his home. The point is that the response to this counterfactual should not be to pass over to her some or all of the responsibility for the rape, but rather a resounding: *so what?* Even if her decision to go home with him is part of the full causal story of why the rape occurred, it is irrelevant to the question of whether he is criminally responsible for raping her, which ought to be answered by focusing our attention on him: what *he did* and—assuming *mens rea* is to be preserved as relevant to the crime (see footnote 58)—what was in his mind when he did it.

To make this as plain as possible, consider the preposterousness of comparable counterfactuals being judged relevant by the courts with respect to the crime of burglary. Suppose a woman is in her house, intoxicated and lying in her underwear on the sofa. A man sees her through the window and opportunistically views her vulnerability as conducive to burglary. He tries the door of the house and finds she has left it open. He walks in and takes her wallet in front of her eyes and then leaves. While he is robbing her, she says 'That's mine! Don't take it!' But she does not try to forcefully stop him. The following counterfactuals may well be true: If she hadn't

⁶⁰ In this respect, it is noteworthy that rape prevention strategies are inevitably directed at women, both in the public realm and in our collective parenting. I started teaching my daughters how to protect themselves against rape when they were about three. I am hardly unique in this respect. But how many parents of boys drill into them—not just at that age, but at any age—that they must always ensure that all sex is consensual?

⁶¹ Does the fact that we teach women rape prevention strategies from such a young age therefore set them up to feel responsible should they get raped, no matter how much we simultaneously insist that, if anything does happen, it is in no way their responsibility, but entirely his? Given the extraordinary pervasiveness of self-blame among rape victims, I worry the answer is yes. To my daughters: I am sorry.

been lying intoxicated in her underwear, *then the burglary wouldn't have occurred*. If she hadn't left her door open, *then the burglary wouldn't have occurred*. If she had forcefully tried to stop it, *then the burglary wouldn't have occurred*. The point is that none of these counterfactuals strikes us as relevant to the question of the man's criminal responsibility—never mind the ludicrousness of her verbal protest possibly being used to support a defence of mistake of fact to the effect that he honestly and reasonably believed she was making him a gift. They are not relevant because they do not constitute violations of the norms of property and theft and so are not viable targets of intervention. Police *advice* is never to resist but always to hand over your property, and it does not matter if you are intoxicated and in your underwear. He is the norm violator in this case, not her. This is why—even though it may be true that, had she behaved differently, the outcome would have been different—we do not use these counterfactuals to select 'the cause' and explain what happened any more than we use them to allocate responsibility for what happened.

Contrast rape. Given the existence and influence of rape culture norms, introducing a woman's violation of any of them can serve to (implicitly or explicitly) focus our attention on these violations as causally salient and hence explanatory of what happened, and hence on her as the bearer of responsibility for what happened. In this regard, it is important to note that some violations of women-specific rape culture norms will be introduced into the court merely by recounting *the setting* for the crime—as women are not supposed to go to men's houses, or to bars, or to walk the streets alone at night—never mind if the defence deliberately employs so-called 'discrediting' information about the victim to this effect. What explains the rape? *She went to his house when she shouldn't have*. Who is responsible for the rape? *She is, because she went to his house when she shouldn't have*. Of course, the fact that we are prone to see her as responsible when we consider (implicitly or explicitly) these counterfactuals does not mean that we fail to see him as responsible *at all*. The fact she went to his house may be *partly* explanatory and correspondingly she can be *partly* responsible—responsibility can be shared.⁶² But her partial responsibility is likely to be seen as *mitigating* his—on the assumption that sharing a burden reduces the amount that would otherwise be borne by each individual.⁶³ Hence, our tendency to allow ascriptions of responsibility to mirror

⁶² Arguably, this can be understood to follow from the fact that causation can be shared. See Joseph Y Halpern and Christopher Hitchcock, 'Graded Causation and Defaults' (2014) 66(2) *British Journal of Philosophy of Science* 413.

⁶³ Gravelin, Biernet, and Bucher, 'Blaming the Victim of Acquaintance Rape' (n. 27). Somewhat extraordinarily, one study found that exposure to pornography (less than one hour per week over six weeks) led to participants recommending *half* the length of a prison sentence for a rape conviction, as compared to the recommendation of participants who had had no pornography exposure; Dolf Zillman and Jennings Bryant, 'Pornography, Sexual Callousness, and the Trivialization of Rape' (1982) 32 *Journal of Communication* 10. Given that use of pornography appears to increase endorsement of rape culture myths as well as interest in and perpetration of sexual violence (for a review see Lori Watson's part of her book authored alongside Andrew Altman, *Debating Pornography* (Oxford University Press 2019), one explanation of the reduction in recommended sentence is reduction of responsibility ascribed to the rapist, because of increase of responsibility ascribed to the victim; another

what look to us like good explanations can interact with rape culture norms to redistribute responsibility from him onto her. In this light, the grotesque and persistent failure of the courts to convict and appropriately sentence rapists—given the fact that rape culture norms are bound to (implicitly or explicitly) influence at least some judges and jurors—is all too predictable.

Lacey situates her analysis of criminal responsibility squarely within historically changing social, political, and economic contexts. In doing so, she displays a remarkably keen eye for descriptive detail. But deep down her project is, at least in part, aspirational. She hopes the analysis to reveal ways in which our ideas and practices of criminal responsibility could be better. Our co-authored work also embodies this hope: in arguing for *criminal responsibility without affective blame*, we have tried to construct an idea and corresponding set of practices of responsibility fit not only for the purpose of holding to account, but equally for rehabilitation, reparation, and the ideal of equal treatment and respect for all members of our community. To this end, we have focused on responsibility as capacity, precisely because of its potential to identify when practices that hold to account can also promote behavioural change and make a difference, thereby serving these forward-looking ends. As I said above, I believe it is possible to resist the temptation to allow our responsibility ascriptions to mirror our explanatory judgments, by keeping our eyes fixed firmly on the issue of the defendant's capacity, and nothing more. Possible, yes. But probable, perhaps not. The invitation that any idea of responsibility linked to explanation offers—an invitation to widen the scope of inquiry, and attribute responsibility to other agents who strike us as a salient part of the explanation of why the crime occurred—is psychologically real. It may also, alas, be especially tempting in relation to those ideas of responsibility that embody forward-looking interventionist aspirations. But, when the invitation is offered within a culture influenced by norms that enable and license subordination of, and violence towards, the group to which the victim belongs, it augurs a violation of justice.

I do not know what the solution is, apart from starting by acknowledging the problem. In her inaugural lecture, Lacey remarks that 'the most important conditions for sexual equality and integrity lie in cultural attitudes rather than coercive legal rules.'⁶⁴ Are cultural attitudes changing? The #metoo movement suggests yes, while the meteoric rise of ever-more violent and degrading pornography

is reduction in perceived wrongness of rape; these mechanisms may, of course, work in tandem. To my knowledge, this particular study has not been replicated; but, more generally, empirical studies of actual and mock juries suggest that jurors who endorse rape culture norms are more disposed to victim-blame and to acquit—as one would expect, given that jurors, like study participants, are ordinary people. For a review of this evidence, see Meagen M Hildebrand and Cynthia J Najdowski, 'The Potential Impact of Rape Culture on Juror Decision Making: Implications for Wrongful Acquittals in Sexual Assault Trials' (2015) 78 Albany Law Review 1059. Hildebrand and Najdowski suggest endorsement of rape culture affects juror decision-making via a number of psychological mechanisms distinct from the proposal put forward here, including schema theory, confirmation bias, and attribution theory.

⁶⁴ Lacey, *Unspeakable Subjects* (n. 2) 122.

suggests no.⁶⁵ But, until they do, even the most forgiving and forward-looking idea of criminal responsibility carries its own undoing within it. For those of us who have been convinced by Lacey's overall project, perhaps it should come as no surprise that, in legitimating and coordinating state power, our ideas and practices of criminal responsibility have proven to be so useful a tool for legitimating and coordinating male power.

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⁶⁵ See Andrew Altman, *Debating Pornography* (n. 63).

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