

A Heinous Act

Don Berkich

Texas A&M University-Corpus Christi

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Abstract

Intuitively, rape is seriously morally wrong in a way simple assault is not. Yet philosophical disputes about the features of rape that make it the heinous act it is invite a general account of the difference between (mere) wrong-making characteristics and heinous-making characteristics. In this paper I propose just such an account and use it to refute some accounts of the wrongness of rape and refine others. Given these analyses, I close by developing and defending an account of a particularly important heinous-making characteristic of rape.

Introduction

It is possible to have a broad consensus *that* an action is morally wrong with little agreement about *why* the action is wrong. All but the pathological agree that killing an innocent person without sufficient reason is morally wrong. Yet as Marquis (1989) correctly points out, many different reasons can and have been given for its moral wrongness, including that

1. It brutalizes the killer, inuring him or her to acts of killing;
2. It causes pain and suffering to the victim in the process of being killed;
3. It is a great loss to those deprived of the victim's existence;
4. It discontinues the victim's valuable experience of enjoying life;
5. It destroys the victim's strong and fundamental desire to continue living;
6. It erases any future expression of will the victim might otherwise have had; and,
7. It is the loss to the victim of a future of great value like ours.

These reasons neatly illustrate four facts of common moral practice. First, a reason for the moral wrongness of an action can be more or less important depending on what I shall call the *wrong-making characteristic* cited by the reason. Since the killer is brutalized *because* the killing is morally wrong, and not vice versa, (1) is but a derivative reason for the killing's moral wrongness inasmuch as the wrong-making characteristic it cites, brutalizing the killer, is at most a troubling consequence of more fundamental wrong-making characteristics.

Second, there may be many reasons for an action's moral wrongness, up to as many reasons as there are wrong-making characteristics. One can imagine an example of killing an innocent person without sufficient reason that has all of the wrong-making characteristics given by (1) - (7) just as easily as one can imagine an example having the same wrong-making characteristics except those in (1), (2), and (3)--viz., the painless killing of a hermit by a sociopath.

Third, the number and kind of wrong-making characteristics an action has determines its *degree of moral wrongness*. That is, common moral practice is to partially order morally wrong actions.¹ A killing by prolonged and severe torture presumably has a greater degree of moral wrongness than a killing by guillotine, although having all the wrong-making characteristics but the one mentioned by (2) in common may make the difference in degrees small relative to the high degree of moral wrongness of either action. This caveat suggests that, fourth and finally, there are some uniquely or specially morally wrong actions insofar as they have wrong-making characteristics that are at once essential to the action qua morally wrong act and especially egregious in their contribution to the action's degree of moral wrongness. Call these *heinous-making characteristics* and the actions having them *heinous actions*.

Examples of heinous actions surely include murder, rape, genocide, and species extinction. Yet identifying an action's heinous-making characteristics is apparently no small chore given the number of competing analyses philosophers propose: With respect to murder, Marquis (1989) contrasts seven such accounts, and I find at least as many accounts in discussions of rape. Perhaps, then, we need a theory of heinous-making characteristics which can be used to winnow out competing analyses.

I begin by articulating and explaining necessary and sufficient conditions on heinous-making characteristics so as to distinguish them from the larger class of wrong-making characteristics. I then apply the theory of heinous acts to disputes over the heinous-making characteristics of rape. That is, using the theory I argue that the accounts of the heinous-making characteristics of rape given so far either quickly fail or head in the right direction without quite reaching the mark. The theory of heinous acts is thus helpful to the extent that it shows that accounts of rape are either non-starters or incomplete in important respects. Drawing on the

incomplete accounts, I close by proposing and defending an account that meets the conditions set by the theory of heinous acts.

To be sure, we should expect that what we finally conclude about the heinous-making characteristics of rape will enable us to say more about what counts as rape in the first place. Yet I take the vexing problem of providing necessary and sufficient conditions on acts of rape to be a follow-on to my project here. For now I am interested in understanding, when we have a clear case of rape, what makes *that* action heinous. This is not to suggest I think less of the problem of defining rape. Quite to the contrary, my hope is that being able to distinguish heinous-making from (merely) wrong-making characteristics will help provide resources for exploring the philosophically, socially, and legally crucial problem of definition.

That said, my goal is also more general than an analysis of the heinous-making characteristics of rape *per se*. In constructing the analysis, I seek to defend a theory of heinous acts by showing how it can be applied to an abiding dispute, thereby illustrating the importance of understanding degrees of moral wrongness while also providing tools for other discussions of heinous-making characteristics. The theory itself is relatively simple.

A Theory of Heinous-making Characteristics

Moral normative theory specifies wrong-making characteristics in the grounds given for moral judgment. Thus for hedonic utilitarianism (Mill 1987 [1863], pp. 276-278), causing greater pain than pleasure is a wrong-making characteristic, while Kantian deontology (1981 [1785], p. 47) offers treating a person as a means only--often interpreted in terms of restricting personal autonomy (xiii-xiv)--as a wrong-making characteristic.²

Heinous-making characteristics are a species of wrong-making characteristic. They

differ, however, in how they contribute to the degree of an action's moral wrongness:

C is a *heinous-making characteristic* of an action X if, and only if,

- i. C is a wrong-making characteristic of X;
- ii. C is *independent* of any of the other wrong-making characteristics X could have (possibly, X has no other wrong-making characteristics than C);
- iii. C is *essential* to X-type actions (necessarily, X-type actions have C)³; and,
- iv. C is *morally significant* (no possible action of type X has less a degree of moral wrongness than *any* action of type X having C as its only wrong-making characteristic).

We need only add the requirement that an action is heinous just in case it has one or more heinous-making characteristics to have the theory of heinous acts. Now, the intuition behind these conditions is that the heinous-making characteristics of heinous acts are respectively fundamental, constitutive, and serious in the sense that they set a strict lower bound on the degree of moral-wrongness of an action taken in isolation from its causes and effects. The conditions thus partly derive from an intrinsic *dis*-value interpretation of G.E. Moore's absolute isolation test for intrinsic value,

'What things have intrinsic [dis-]value, and in what degrees?'... In order to arrive at a correct decision on the first part of this question, it is necessary to consider what things are such that, if they existed *by themselves*, in absolute isolation, we should yet judge their existence to be good [bad]; and, in order to decide upon relative *degrees* of [dis-]value of different things, we must similarly consider what comparative [dis-]value seems to attach to the isolated existence of each. (Moore 1993 [1903], p. 236)

Perhaps predictably, the relationship between intrinsic dis-value and moral wrongness is no less complicated than the relationship between intrinsic value and moral rightness. That is, it might be thought that having a wrong-making characteristic *suffices* to make the action morally wrong. While “wrong-making characteristic” certainly suggests so, I worry about Foot's (1967) trolley problem: You can set the switch to send a runaway trolley to kill one innocent person on a

track or let it kill five on another. In most circumstances killing the one innocent person would be wrong, but killing the one to save the five is not because we now have (under certain versions of utilitarianism and perhaps other moral normative theories) sufficient reason to kill the one. The problem is that whatever heinous-making characteristic (assuming there is only one) we might ultimately identify in killing an innocent person *without* sufficient reason *remains* a characteristic of killing an innocent person *with* sufficient reason.

For example, suppose we agree with Marquis that killing an innocent person without sufficient reason is morally wrong because it has the heinous-making characteristic of depriving the person of a future like ours of great value. Further suppose that it is morally right to set the switch to kill one innocent person and thereby save five innocent people. In doing so we nonetheless deprive the one person of a future like ours of great value. Killing the innocent person has the heinous-making characteristic(s) it has regardless of whether it is right (with sufficient reason) or wrong (without sufficient reason). Perhaps this shows “wrong-making” to be a poor choice of words, yet I think not: There is an important sense in which killing the innocent person with sufficient reason is *still* heinous, and thus deeply lamentable, even if forced. It is simply the least worst of the alternatives, a point of little comfort. Fortunately, forced “least-worst” cases are somewhat rare, if not as rare as we would like them to be. In *most* cases, wrong-making characteristics will, indeed, make wrong.

Applying the conditions is reasonably straightforward. For example, (1) fails to cite a heinous-making characteristic since brutalizing the killer is not fundamental: It cannot occur without some antecedent wrong-making characteristic. Nor will (3) provide that characteristic since, taken in absolute isolation, the killing will deprive no one. Killing destroys a person's strong and fundamental desire to continue living only if they happen to have the desire, hence (5)

does not designate a heinous-making characteristic since the characteristic it cites is inessential or, equivalently, not constitutive of the action. Finally, there is presumably no least amount of pain and suffering except its complete absence, so (2) does not give a heinous-making characteristic since there is no lower bound to the contribution it makes to a killing's degree of moral wrongness.

To be sure, it may seem very odd to speak of heinous-making characteristics setting a *lower* bound on degree of moral wrongness, but think of it in terms of the presence of a heinous-making characteristic conferring a *minimum standard* of degree of moral wrongness below which actions of the same type, regardless of their other characteristics, cannot descend. For example, suppose that vandalism has the wrong-making characteristic of unjustly defacing someone else's property.⁴ Intuitively, unjustly defacing someone else's property is *not* a heinous-making characteristic, since vandalism is not *prima facie* a heinous act. Yet unjustly defacing someone else's property is presumably an independent and essential wrong-making characteristic of vandalism, so it remains to determine whether it is also morally significant in the sense given in condition (iv).

Locally known as “taggers”, the vandals in question are notorious for spray-painting messages using large, stylized lettering on buildings and fences. The degree of moral wrongness of tagging depends, though, on the extent of the tagging. Contrast an ordinary tagger with a 'micro-tagger' whose designs are on a micro-meter scale: It seems the degree of moral wrongness of tagging becomes vanishingly small as the scale of defacement becomes vanishingly small. Thus unjustly defacing someone else's property fails to meet the fourth condition and so fails to be a heinous-making characteristic. One cannot, on the other hand, be a little bit murdered or slightly raped. The puzzle in the case of rape is not *whether* rape is

heinous, but *how*.

Accounts of Rape's Heinous-making Characteristics

Philosophers have sought to identify the heinous-making characteristics of rape, yet even if they succeed in identifying a wrong-making characteristic, the characteristic often falls short of a heinous-making characteristic.⁵ Examples include locating rape's heinous-making characteristics in what the act symbolizes:

Rape is a cultural practice, then, of extreme cruelty that violates a woman in the most shameful ways, forcing on her an unchosen silence and reminding her of her status as the recipient of what the male chooses to give. Rape can symbolize, simultaneously, as we have said, the destruction of the woman as an individual and the destruction of her culture. For a woman, it might be said that there is a genuine sense in which rape is the ultimate crime. (Duran 2000, p. 195)

Even if true, *symbolizing* the destruction of person and culture is at most a derivative and inessential wrong-making characteristic. Similarly,

[I]t is the expressive content of the action--in both its commission and its results--representing the rapist as master and the victim as inferior object, and not the causal story we tell to explain why it was performed, that accounts for its being wrongful. (Hampton 2001, p. 135)

Seen as an expressive act, the wrongness of the expression of rape depends crucially on the wrongness of rape itself. As with symbolizing, expression *per se* is far from fundamental or even essential inasmuch as rapes committed in isolation from a broader social context are presumably no less heinous than rapes committed in the context. Social implications are likewise suspect:

One of the most important aspects of rape as it occurs in our society is the way in which it is a moral injury to all women, not merely to the woman who experiences it, insofar as it is part of a pattern of response of many men toward many women that aims to

establish their mastery *qua male* over a woman *qua female*.
(Hampton 2001, p. 135)

Rape may or may not generalize in this way, but if it does, we have at most a wrong-making characteristic since such generalizations are again neither fundamental nor essential.⁶ Likewise, public shame can only increase the degree of rape's moral wrongness:

[T]he public morality about rape suggests that unless one is somehow mutilated, broken, or killed in addition to being raped, one is suspected of having provoked, initiated, complied in, consented to, or even enjoyed the act. It is this public response, the fear of such a response and the belief (often) in the rationality of such a response (even from those who do unequivocally view you as a person) that scorns to make rape especially horrible. (Foa 1998, p. 586)

The trauma consequent to a rape, including public reaction and the fear thereof, surely *adds* to the moral wrongness of the rape, yet it does so without thereby setting a lower bound to its moral wrongness depending on the extent of the subsequent reaction and fears. One can even imagine, if not hope for, an enlightened public in which this kind of trauma is wholly absent.

A similar point suffices for Cowling's (2001) argument that "rape is a violation of autonomy that should be condemned because of the extreme unhappiness caused to the victim." No lower bound is set by unhappiness, extreme or otherwise, since it may be altogether missing in the case of an anesthetized victim raped by her attending physician. That is, the act is nonetheless heinous despite the victim's lack of awareness, so to the extent that happiness assumes awareness, Cowling's account fails to explain just why *this* rape is at least as morally wrong as any other rape.

Burgess-Jackson argues that "[t]he feature of rape that makes it unique, and that creates a theoretical problem, is that it is overwhelmingly a crime of men against women." (2000, p. 287) Singling out a group for maltreatment, like brutalizing the killer, is surely a wrong-making

characteristic of rape, but it is not fundamental since it presupposes a maltreatment. The fact that rape is ordinarily a crime of men against women may *increase* rape's degree of moral wrongness, but that fact crucially depends on antecedent heinous-making characteristics. Indeed, Burgess-Jackson's account arguably fails the second, third, and fourth criteria for heinous-making characteristics. It is an accidental rather than essential feature of rape that it is overwhelmingly a crime of men against women. Worse, being singled out for maltreatment fails to set a lower bound on rape's degree of moral wrongness since it depends on the extent of the maltreatment, and the maltreatment in question may or may not be a heinous-making characteristic.

To summarize the discussion so far, all of the preceding accounts identify wrong-making characteristics; none of them succeed in identifying a wrong-making characteristic which is at once fundamental, essential, and morally serious. That is, *given* that rape is a heinous act, its degree of moral wrongness is certainly all the greater for

- Singling out one group by another for maltreatment,
- Symbolizing the destruction of a person and culture,
- Representing a master-slave relationship,
- Victimizing everyone in a group,
- Causing public shame, and
- Causing extreme unhappiness by violating autonomy,

but all of these accounts are non-starters insofar as they fail to identify by our criteria *heinous*-making characteristics. To be sure, they do identify *wrong*-making characteristics which presumably add to the degree of a rape's moral wrongness when they obtain. That they may not obtain when rape is considered in isolation and yet rape still be decisively heinous merely underscores the basic point that these accounts have not identified what constitutes the

heinousness of rape.

Other accounts, however, are much more promising. Burgess-Jackson developed his account of the moral wrongness of rape as a response to Calhoun's (1997) account, which turns out to have been much nearer the mark:

[R]ape is not a crime against women. Rape is a crime against human beings. The fact that rape involves sex is irrelevant to its wrongness. Rape is a crime of invasion in which an aggressor appropriates another human being as his personal possession and acts completely without regard to the fact that she is an intelligent, sentient human being with rights to self-determination and to live in peace and serenity. (Calhoun 1997, p. 109)

For Calhoun, rape is more than a mere violation of autonomy: It is, to use her phrase, an *appropriation* of one person by another for his personal use. Presumably the difference is between *constraining* a person's action in some way or other and *capturing* the person entirely. Contrast manipulation by deceit with enslavement to appreciate the gravity of her account. As an account of a heinous-making characteristic of rape, Calhoun's account fares better than any of the preceding accounts.

The appropriation of a person for personal use is plausibly a heinous-making characteristic of slavery. It is fundamental since it is possible for an enslavement to have no other wrong-making characteristic but the appropriation of the person. It is also essential to slavery that there be an appropriation, and no doubt the appropriation of one person by another for personal use and without regard for the appropriated person's interests sets a very high lower bound on the degree of the actions moral wrongness.

Yet is the appropriation of one person by another as Calhoun describes it *also* a heinous-making characteristic of rape? Put another way, are rape and slavery essentially analogous insofar as they share an important heinous-make characteristic? These questions serve to

illustrate two important features of my account of heinous-making characteristics. First, a heinous-making characteristic is essential according to (iii), yet although it is necessarily had by all actions having the heinous-making characteristic, different heinous actions may share the heinous-making characteristic. Heinous-making characteristics do not partition the class of heinous actions, since essentialness does not imply *uniqueness*. Heinous-making characteristics are not definitive.

Second, a given heinous-making characteristic may vary in the degree of wrongness it contributes to the different kinds of heinous actions sharing it. To see how, suppose I appropriate another person for my personal use, but only for an afternoon and only to wash my car. The heinous-making characteristic of the appropriation of one person by another for personal use presumably contributes a great deal to the degree of moral wrongness of slavery but much less to the degree of moral wrongness of being forced to spend a few hours washing my car. Rape is surely much closer in degree of moral wrongness to slavery than forced car-washing, nevertheless the point suffices to show that (iv) does not require the lower bound on the degree of moral wrongness be the same for every *kind* of heinous action having the wrong-making characteristic. Only heinous actions of the same type have the same lower bound under (iv). This is why Calhoun's account is a good start but can't be the whole story: It does not explain why the resulting degree of moral wrongness of rape is much closer to slavery than forced car-washing on the scale of degrees of moral wrongness.

Further, Calhoun explicitly rejects the obvious point that rape is the appropriation of one person by another for *sexual* use by asserting that the “fact that rape involves sex is irrelevant to its wrongness”, which is odd. After all, rape is a uniquely *sexual* and deeply *personal* crime--points conspicuously and curiously absent from all of the preceding accounts. Distinguishing the

essential kind of appropriation in question by reference to human sexuality seems a good first step.

Persons and Values

Consider the case of Abner Louima.⁷ As reported in the New York Times (Kocieniewski 1997), Mr. Louima had been arrested in 1997 after a fight outside a nightclub, whereupon “the officers had beaten him and shoved the wooden handle of a toilet plunger into his rectum and then into his mouth.” The police officers could have physically injured Mr. Louima just as seriously without sodomizing him, which raises a crucial question: What does the perpetrator achieve by *sexual* assault he could not achieve by *mere*, albeit vicious, assault?

Recall that Hampton (2001) locates what she calls the 'moral injury' of rape in the expressive content of the act, yet the expressive content alone cannot determine the seriousness of moral injury. As Archard (2007, p. 389) points out, “[t]he would-be but unsuccessful rapist still expresses in his attempted rape the indifference to the other that is constitutive of moral injury or dignitary harm... However, we might reasonably think that the actual carrying out of the rape involves a greater moral injury than its mere contemplation or an unsuccessful attempt.” Thus it is the expressing behavior itself, and not what is expressed by the behavior *per se*, which grounds the seriousness of the moral injury. Anticipating this point, Hampton concludes that sexual assault achieves something mere assault does not because “[o]ur sexuality is deeply important to each of us and in certain ways central to our sense of self.” (p. 151) The importance of sexuality emerges from the fact that “one's humanity is perhaps never more engaged than in the sexual act. But it is not only present in the experience; more important, it is “at stake,” in the sense that each partner puts him/herself in a position where the behavior of the other can either confirm it or threaten it, celebrate it or abuse it.” (p. 147)

Drawing on Hampton's understanding of the seriousness of the moral injury of rape, Archard argues that,

In as much as sexual integrity is important to the person, the rapist commits great moral injury. In effect, he can be taken to say to his victim 'You do not count, or count for very little, even in respect of that which matters very much to you.'

...the moral injury of a wrongful action tracks the damage done to a person's interests by the action. It does so... in as much as those interests assaulted by the action are more or less central to the person. The more central interests are to personhood, the greater the harm, and hence moral injury, done to someone in overriding her consent in relation to the interests. So if sex is central to personhood, [non-consensual-sex] assaults the very 'core' of the self and causes great moral injury.

Thinking in this way helps to make sense of Lynne Henderson's assertion that rape is 'a form of soul murder'. [(Henderson 1988, p. 225)] ...our interests in our sexual bodily integrity and in our sexual self-determination are at the heart of our being. Sex and sexuality are central to who we are. ...To put things all too bluntly and simply, ...rape is very wrongful for violating what we are." (Archard 2007, pp. 389-390)

The police officers' sexual assault of Louima with the wooden handle constitutes, on Archard's view, a far greater appropriation of Louima *himself* than mere assault with the wooden handle would have insofar as sexuality is central to personhood itself. Having taken the argument this far though, Archard stops short of giving an account of the connection between sexuality and personhood so as to explain the force of this kind of appropriation and thereby explain the heinousness of rape: "...a full defence of this manner of thinking of [non-consensual-sex] as seriously wrongful is beyond the scope of this article." (Archard 2007, p. 390)

To find an answer I draw on some theoretical machinery Harry Frankfurt first developed to tackle the problem of freedom of the will in his seminal paper, "Freedom of the Will and the Concept of a Person" (1971) and later brought to bear on the concept of love in his "The Reasons of Love" (2004).⁸ Frankfurt argues that a person's will has complexity a non-person's will lacks.

“It is my view that one essential difference between persons and other creatures is to be found in the structure of a person's will. Human beings are not alone in having desires and motives, or in making choices. They share these things with the members of certain other species, some of whom even appear to engage in deliberation and to make decisions based upon prior thought. It seems to be peculiarly characteristic of humans, however, that they are able to form what I shall call 'second-order desires' or 'desires of the second order'.” (1971, p. 6)

Contrast me with my cat, Salem. Salem is an *unreflective bundle of desires*. He does not evaluate, veto, or endorse his desire to pounce on, bite, and scratch my feet at night. He pounces, bites, and scratches without once wondering whether this is something he should want to do. Salem has a fierce will, but he has no care one way or the other for what his will happens to be. Having no *second-order* desires, he is a perfect *wanton*.

I, on the other hand, am a person insofar as I am a *reflective bundle of desires*. I care deeply about my will, which is just to say that I have second-order desires that in turn determine which of my desires end up bearing on my actions. That is, my will at any given time is the totality of my *first-order effective desires*, as Frankfurt dubs them (1971, p. 7). And unlike Salem, I sometimes worry about whether I should have the first-order effective desires I have. Indeed, I don't want to have some of the first-order desires I do have, and some desires I *don't* have I wish I did. Sometimes I veto my first-order desires; other times I endorse them. I thereby actively shape my will. Frankfurt's point is that the reflective desires which guide the desires I have that move me to act constitute my personhood and distinguish me as a person from Salem the wanton.

Frankfurt's account of persons and wills, together with the use he makes of it in “The Reasons of Love”, can help us make sense of how rape is heinous. In “The Reasons of Love”,

Frankfurt sets out to explain what love is and why love is so important to us.

Love is, most centrally, a *disinterested* concern for the existence of what is loved, and for what is good for it. The lover desires that his beloved flourish and not be harmed; and he does not desire this just for the sake of promoting some other goal. ...For the lover, the condition of his beloved is important in itself, apart from any bearing that it may have on other matters. (2004, p. 42)

Thus love is a kind of caring, where caring of this sort is understood in terms of our second-order desires.

Loving something has less to do with what a person believes, or with how he feels, than with a configuration of the will that consists in a practical concern for what is good for the beloved. This volitional configuration shapes the dispositions and conduct of the lover with respect to what he loves, by guiding him in the design and ordering of his relevant purposes and priorities. (2004, pp. 42-43)

Notice that the expression of the lover's care for his beloved is especially vivid where the lover's desire is to want the satisfaction of his beloved's desires quite apart from the satisfaction of his own desires. Human sexual activity is thus not merely the result of a strong and abiding will constituted by sexual desires: Sex between lovers reflects the rich and complicated reflective or second-order desires we have regarding the affections we have towards ourselves and others.⁹

The full range of second order sexual desires is at least as vast as our complicated relationship to sex would suggest. We care both about ourselves and our lovers, and so want that they should want us as much as we want that we should want them. We might indeed set our own desires aside wanting to satisfy theirs, thereby shaping our wills in caring for the lover. We find these second-order desires in the delight the lover takes in wanting his beloved's delight and to be, reciprocally, the object of her delight and hers alone. Yet we also find them when we consider how troubled someone with homophobic tendencies can be upon discovering an attraction to the same sex—he desires *not* to have the very desire he has, and may be driven to

suicide by the depths of what he views as his body's betrayal.

Since these second-order sexual desires partly and centrally constitute the person who has them in Frankfurt's sense of "person", sexual assault achieves something mere assault cannot-- the direct violation of those important second-order desires (and thus, the person herself) which guide the person's sexual desires. In effect, sexual assault reaches *through the will* to dominate *the person herself* in a way mere assault does not.¹⁰ Thus it is not that she does not happen to desire the rapist but wouldn't have minded if she did; she wholly wants to not want the rapist. It is this profoundly more important--'important' in the sense of being central to her personhood-- second-order desire the rapist violates.

Frankfurt's distinction between first-order desires as they bear on action and second-order desires as they constitute personhood helps explain why date-rape is nonetheless rape and why it can be so confusing for the woman raped. The woman may in such a case have sexual desires for her date, but absolutely not therefore want to want him or want to desire sex with him. The rape in this case is as much a violation of her personhood as it would have been had she never wanted sex in the first place.¹¹ Frankfurt's distinction also helps explain why claiming that the rape of a prostitute is merely theft of services only further violates a person whose second-order desires are as constitutive of her personhood as they are anyone else's.

I submit that rape is heinous because it involves the sexual appropriation of a person, where rape sexually appropriates a person in Frankfurt's sense by contravening an important class of the second-order desires which constitute the person. Put another way, it is both essential and fundamental to rape that it always violates the person as constituted by their contravened second-order sexual desires regardless of their first-order desires. The rapist's assault is not merely against the person's body or even the person's will: The rapist strikes

directly at the person herself by violating the important second-order desires she has which bear on her sexuality and partly constitute her personhood. In doing so, the rapist exercises an extraordinary level of control over his victim, one which reaches beyond the victim's will to violate the very grounds by which she guides her own will, her personhood. This *meta-control* the rapist imposes sets a substantial lower bound on the degree of rape's moral-wrongness. Thus the sexual appropriation of a person so defined satisfies my criteria for being a heinous-making characteristic of rape. Contrary to Calhoun, rape is an ineluctably sexual and thereby deeply personal appropriation of one person by another. Consistent with Archard, we can see just how rape is a violation of the person herself in Frankfurt's account of persons and their interests.

Conclusion

Surprisingly, the sexual appropriation of persons in the sense of violating second-order sexual desires is a kind of wrong-making characteristic not obviously countenanced by any of the prevailing moral normative theories. Neither utilitarian nor deontological theories easily explain, for example, why indiscoverable, non-impacting, yet total surveillance is morally wrong. There is neither harm nor violation of autonomy in this surveillance, yet it is clearly a violation of the person in virtue of her second-order desires to the contrary. I see almost no hope for utilitarianism on this, but perhaps Kant's dictum (1981 [1785], p. 47) to treat persons as ends and never as means only can be suitably extended beyond simple violations of will to include persons in Frankfurt's sense. I leave it as a challenge for those developing moral normative theory to account for the different kinds of heinous-making characteristics.

Finally, I do not claim that mine is the last word on analyses of the heinous-making characteristics of rape. In seeking to understand the heinousness of rape, it seemed it would be useful to begin by setting out a theory of heinous-making characteristics. I submit this strategy

has proven itself in the resulting discussion. Yet the sexual appropriation of a person is surely but one of a number of heinous-making characteristics which jointly constitute the heinous act of rape.

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- 1 Partial orderings allow for ties, whereas linear or *total* orderings do not.
- 2 Of course, one moral normative theory can account for the wrong-making characteristics of another, as Mill's argument in defense of autonomy (1978 [1859]) demonstrates.
- 3 This is not to say that heinous-making characteristics partition the class of heinous acts insofar as differing kinds of heinous acts may share heinous-making characteristics. The question of whether there exist *unique* heinous-making characteristics which could be used to discriminate heinous acts is interesting but beyond the scope of this essay.
- 4 I'm grateful to Ward Jones for suggesting this example to help explain the point.
- 5 At least, I assume these authors intended to discover heinous-making characteristics. I have no quarrel if all they sought were wrong-making characteristics.
- 6 I shall revisit Hampton's position later, however, because the seriousness of the moral injury of rape (as she calls it) is determined not by what the behavior expresses, which can be and is expressed in all sorts of ways, but by the expressing behavior itself, a position much closer to the one I develop.
- 7 It does not matter for my argument whether or not we take Mr. Louima to have been raped--what matters is the distinction between *mere* assault and *sexual* assault his case illustrates.
- 8 Although I am unconvinced that his machinery allows him to make as much headway on the freedom of will problem he thinks it does, I find Frankfurt's distinction between first and second-order desires and his notion of personhood both defensible and applicable.
- 9 Promiscuous sex, or mere 'hooking-up', notwithstanding.
- 10 Of course, the fact that the rapist can use sexual assault in this way depends on the kind of social animal human beings are and the centrality of sex to our social lives. I am grateful to my student Jeffrey Rodriguez for pointing out that were humans differently constituted so sex had not the bearing it has on our personhood, the rapist would have to find some other means to so profoundly appropriate another person.
- 11 I am grateful to my student Alaesa Hearn for pointing out that while all cases of rape are presumably fully contrary to the victim's first-order desires, matters are complicated because the victim's will may be conflicted by first-order desires for sex. Desiring sex, though, is *never* to desire rape, as the heinous-making characteristic of rape I've offered makes clear.