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SMITH AND HOGAN AT VILLANOVA:
REFLECTIONS ON ANGLO-AMERICAN CRIMINAL LAW, THE
DEFINITION OF RAPE, AND WHAT AMERICA STILL
NEEDS TO LEARN FROM ENGLAND

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THE following Essay was presented at the Norman J. Shachoy Symposium in September 2015, commemorating the sixtieth anniversary of the *Villanova Law Review*. Primarily, it is a comment on two articles published in the *Villanova Law Review*: John C. Smith, *Subjective or Objective? Ups and Downs of the Test of Criminal Liability in England*¹ and T. Brian Hogan, *Crime, Punishment and Responsibility*.² The essays, authored by two of England's most influential criminal law theorists, take up the broad issue of criminal responsibility. Moreover, in Smith's contribution, he offered insights regarding how to think about the specific issue of mens rea in rape. In addition to engaging and honoring the works of Smith and Hogan as they appeared in the *Villanova Law Review*, this Essay will defend two claims concerning comparative Anglo-American criminal law. First, English criminal law has long had a more salutary approach than many American jurisdictions when it comes to asking the right kind of questions regarding the mens rea of rape. Second, when it comes to substantive answers regarding what the mens rea of rape should be, American jurisdictions still have much to learn from England's example.³

I. SMITH AND HOGAN AT VILLANOVA

It is difficult to overstate the impact Sir John Cyril Smith (1922–2003) and T. Brian Hogan (1932–1996) had on the development of English criminal law and, in particular, on English thinking regarding criminal responsibility. Their jointly authored textbook, first published in 1965 and now in its fourteenth edition (edited by David Ormerod and Karl Laird) has served as a must-read text for generations of English law students.⁴ Indeed, the book “quickly outstripped its origins as a work for

* My thanks to Kristen Ashe, Editor-in-Chief of *Villanova Law Review*, and her fellow editors, for allowing the Villanova Law faculty to hijack the 2015 annual Norman J. Shachoy Symposium to offer a collection of essays honoring the sixtieth anniversary of the *Villanova Law Review*. It is a great honor to work with such a dedicated group of students.

1. John C. Smith, *Subjective or Objective? Ups and Downs of the Test of Criminal Liability in England*, 27 VILL. L. REV. 1179 (1982).

2. T. Brian Hogan, *Crime, Punishment and Responsibility*, 24 VILL. L. REV. 690 (1979).

3. By *rape*, I mean to refer to both “rape” and “sexual assault.”

4. See generally SMITH & HOGAN'S CRIMINAL LAW (David Ormerod & Karl Laird, eds., 14th ed. 2015).

students to become an authoritative treatise on criminal law, widely relied on throughout the common law world.”⁵ Just slightly overstating the matter, perhaps, the Oxford University Press website heralds the book as “the bible” of English criminal law.⁶

If Smith and Hogan’s *Criminal Law* is the bible, their subjectivist account of criminal responsibility is the gospel. With characteristic clarity, Smith offers the following explanation in his opening remarks at his Villanova lecture:

The definition of a crime usually, though not invariably, requires proof of 1) an act by the defendant; 2) certain results caused by that act; and 3) certain circumstances. A simple illustration may be found in the offense of causing criminal damage to property belonging to another. The act is the physical movement made by the defendant. The result is the destruction of, or damage to, the property. The circumstance is that the property belongs to another. The defendant may not be convicted unless each of these elements is proved. It must also appear that the defendant intended to make the physical movement, but there is rarely any difficulty in proving this intent. In those crimes known as offenses of “absolute” or “strict” liability, the duty of the prosecution may end at this point. But in most crimes, particularly serious crimes, they must go on to prove a degree of fault with respect to each element of the offense, whether a result or a circumstance. If the defendant is to be held responsible for causing the result in the circumstances in which it is a criminal offense, it ought to be shown that he was at fault with respect to each of these elements. The question with which I am concerned today is the nature of this fault.

Smith continues, explaining the two competing approaches to defining mens rea that have so thoroughly influenced English criminal law: the subjective and objective.

By a subjective test I mean that, where the definition of the crime requires a result, the defendant may not be held liable unless it is proved that at the time of his act he knew or foresaw that the result would or might be caused by his act. Where the definition includes a circumstance, under the subjective test the defendant may not be held liable unless it is proved that he knew at the time of his act that the circumstance would or might exist.

5. See Ian Dennis, *Sir John Smith*, GUARDIAN (Mar. 25, 2003, 9:31 PM), <http://www.theguardian.com/news/2003/mar/26/guardianobituaries> [https://perma.cc/38RF-TB5H].

6. See *Description: Smith and Hogan’s Criminal Law*, OXFORD U. PRESS, <http://global.oup.com/ukhe/product/smith-and-hogans-criminal-law-9780198702313?cc=gb&lang=en> [https://perma.cc/7LJQ-6EVH] (last visited Mar. 20, 2016).

By an objective test I mean that the defendant may be held liable where it is proved that he *ought* to have known or foreseen that the result would or might be caused, and that he *ought* to have known that the circumstance existed or might exist. Under this test, it does not matter if the particular defendant, in fact, did not know these things; it is sufficient that a reasonable and prudent man would have known them.⁷

There are two aspects of the subjectivist approach to defining mens rea that are worth emphasizing. First, subjectivism is opposed to strict liability, especially when it comes to defining serious offenses. Rather, subjectivists endorse the “principle of correspondence”—the requirement that each and every element of the actus reus have a corresponding culpable mental state (mens rea).⁸ Criminal offenses that violate the principle of correspondence include all full strict liability offenses (that is, crimes that require no proof of mens rea whatsoever), as well as partial strict liability offenses. Partial strict liability offenses require proof of mens rea corresponding to one or more, but not to all, elements of the actus reus. As Hogan observed in his lecture at Villanova, “It is often overlooked that elements of strict liability are imported into many serious crimes”⁹

Two clear examples of partial strict liability offenses are felony murder and statutory rape (as it is defined in many jurisdictions). The actus reus elements of felony murder include (1) causing the death of a human being, (2) during the commission of a felony—yet the only mens rea requirement is that the defendant possess the mens rea to commit the felony.¹⁰ As such, liability as to causing the death is strict—there is no mens rea requirement corresponding to that element of the actus reus. Similarly, in many jurisdictions, statutory rape is partially strict. The actus reus elements of statutory rape include (1) engaging in sexual intercourse, (2) with someone under the age of consent—yet, in many jurisdictions, the only mens rea requirement is that the defendant intend to engage in sexual intercourse. In these jurisdictions, there is no requirement of mens rea corresponding to the actus reus element regarding the victim’s age. According to Hogan, doctrines such as felony murder and strict statutory rape “have no place in a rational scene of things which, in matters of *crimi-*

7. Smith, *supra* note 1, at 1179–80 (emphasis added).

8. See ANDREW ASHWORTH & JEREMY HORDER, *PRINCIPLES OF CRIMINAL LAW* (7th ed. 2013).

9. Hogan, *supra* note 2, at 693.

10. See, e.g., 18 PA. CONS. STAT. ANN. § 2502(b) (West 2016). A variety of complicated doctrines have developed to restrain the scope of felony murder. For further discussion, see Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. REV. 403 (2011).

nal responsibility, must look to the accused's intentions and not impose liability on objective principles of causation."¹¹

The principle of correspondence is a tremendously clarifying conceptual tool for asking the right kinds of questions in defining and debating criminal responsibility. While Andrew Ashworth is to be credited with coining the term, surely the influence of Smith and Hogan's subjectivist account of criminal responsibility created the intellectual and legal environment in which the idea has flourished.¹²

It is possible, however, to honor the principle of correspondence without endorsing Smith and Hogan's strong version of subjectivism. One might require a *mens rea* element in correspondence to each and every element of the *actus reus*, but acknowledge that *negligence* may sometimes be sufficiently culpable to establish the corresponding *mens rea*. If this thought is plausible, then it pays to consider whether negligence can ever be sufficiently culpable to establish criminal fault. According to a widely accepted definition, criminal negligence consists in failing to recognize a "substantial and unjustifiable risk," where the risk is "of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation."¹³ As I characterize it for my students, being criminally negligent consists in being clueless to the risks of harm one poses to others. Yet, as I emphasize, not just any cluelessness will satisfy the standard of criminal negligence. Rather, the defendant's cluelessness must rise to the level of criminal culpability—that is, he must be *criminally culpably clueless*.

In some cases, where the harms we seek to prevent are sufficiently serious (e.g., death), criminal negligence has been widely regarded as a sufficient *mens rea*. Indeed, even otherwise committed subjectivists, such as the Law Commission of England and Wales, have endorsed criminal (gross) negligence as an appropriate *mens rea* for the offense of man-

11. Hogan, *supra* note 2, at 693. I suspect Hogan said, "rational scheme of things," rather than "rational scene of things" in the quote above, since the former is a familiar British phrasing.

12. See ASHWORTH & HORDER, *supra* note 8, at 129–30.

13. MODEL PENAL CODE § 2.02(2)(d) (1962). It is, admittedly, somewhat awkward to characterize negligence as a *mens rea*, if one conceptualizes *mens rea* as referring to a state of mind. Since negligence consists in failing to recognize a risk, it is at best a blank state of mind. As Chris Clarkson puts it, "it is semantic nonsense to describe a blank state of mind as a state of mind." CHRISTOPHER M.V. CLARKSON, UNDERSTANDING CRIMINAL LAW 73 (4th ed. 2005). Following Clarkson and others, I take the view that *mens rea* is best understood according to a "normative theory of criminal culpability under which judgments as to blameworthiness are made." *Id.*; see also *infra* note 45. Under this approach, "[o]ne must ascertain the 'mens' (for example, that the defendant failed to consider the risk) and then judge whether that *mens* is 'rea' (blameworthy)" under the circumstances. CLARKSON, *supra*, at 73.

slaughter.¹⁴ Yet, to be clear, endorsing negligence as an acceptable mens rea is, in principle, inconsistent with the strong version of subjectivism endorsed by Smith and Hogan.

This brings us to the second aspect of a subjectivist approach that is worthy of emphasis. Subjectivism rejects negligence as an adequate mens rea and instead requires that each actus reus element correspond to a mens rea of, at least, recklessness.¹⁵ Recklessness consists in being aware of “a substantial and unjustifiable risk,” and “consciously disregard[ing]” the risk in circumstances where such disregard “involves a gross deviation from the standard of conduct that a [reasonable] person would observe in the actor’s situation.”¹⁶ The key difference between the negligent actor and one who is reckless (or who possesses one of the “higher” *mentes rea*e of knowledge and intention/purpose) has to do with *choice*. The reckless actor is subjectively aware of the risk his conduct poses and yet *chooses* to go ahead and take the risk nonetheless—whereas the negligent actor is not even aware of the risk his conduct poses, and so never *chooses* to impose this risk on others.

Other things being equal, both subjectivists and objectivists can agree that the reckless actor is typically more culpable than the negligent actor. As such, most all can endorse Hogan’s claim that “fairness demands that a sharp distinction be drawn between the deliberate and the thoughtless.”¹⁷ Smith echoed the point forcefully in his remarks:

[I]n the case of serious crime . . . an objective standard is inappropriate. Murder, rape and theft are not offenses for which mere negligence should justify conviction. A person who deliberately chooses to bring about a particular harmful event, or who chooses to take an unjustifiable risk of bringing about that event, may properly be held responsible for the event when it occurs. The person who is merely negligent does not choose to bring it about or choose to take a risk of bringing it about. That is a moral difference which justifies drawing the line at this point.¹⁸

The question remains, however, whether the line we draw between the deliberate and the thoughtless must map directly onto the outer limits of the criminal law, leaving negligent actors beyond its reach. For, another way to mark a sharp distinction between the deliberate and the (cul-

14. See JEREMY HORDER, *The Changing Face of the Law of Homicide*, in HOMICIDE LAW IN COMPARATIVE PERSPECTIVE 19, 19–38 (Jeremy Horder ed., 2007); LAW COMMISSION, MURDER, MANSLAUGHTER AND INFANTICIDE: PROJECT 6 OF THE NINTH PROGRAMME OF LAW REFORM: HOMICIDE 51 (Law Com. No. 304, 2006), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228782/0030.pdf [<https://perma.cc/7LJY-2N3Z>].

15. See MODEL PENAL CODE § 2.02(3) for an example of the Model Penal Code drafters adopting a presumption in favor of subjectivism.

16. MODEL PENAL CODE § 2.02(2)(c).

17. See Hogan, *supra* note 2, at 695.

18. Smith, *supra* note 1, at 1204.

pably) thoughtless is to criminalize both, but punish the (culpably) thoughtless person to a lesser extent. For Smith and Hogan, however, such an approach is unacceptable. As Hogan rhetorically asked, “[O]n what basis is punishment assigned for the accused’s failure to foresee or appreciate a risk which the most of us would have recognized?”¹⁹ His answer, of course, is that such punishment cannot be justified, since (he supposes) negligent conduct cannot be deterred through the threat of criminal punishment:

The punishment [for negligence] can hardly deter [those who] would have foreseen or appreciated the risk and thus have had the chance of . . . avoiding it. Nor can it deter [those] who share the accused’s lack of perspicacity because, *ex facie*, they would not have foreseen or appreciated the risk either.²⁰

Yet, *pace* Smith and Hogan, criminal punishment for culpable negligence (that is, negligence that rises to the level of criminally culpable cluelessness) may be justifiable in some circumstances. First, given that, *ex hypothesi*, the actor is culpable (blameworthy) for being so clueless, retributive considerations weigh in favor of punishment. For, criminal punishment is, *inter alia*, an effective means of communicating blame and censure. Where the communication of blame and censure are apt (that is, where one is *worthy of blame*), then there is at least something to be said in favor of punishment.²¹ On a related note, there is something to be said in favor of punishment of the criminally culpably clueless insofar as it may “serve both to assist the process of repentance and reform, by focusing [the culpably clueless person’s] attention on his crime and its implications, and as a way of making the apologetic reparation that he owes.”²²

Consequentialist considerations may weigh in favor of punishing the criminally culpably clueless as well. For example, both the incapacitation of those who culpably fail to recognize the risks of harm they pose to others, as well as the possibility of educating individuals to be more attentive to such risks, ground considerations weighing in favor of punishment. Moreover, the threat of punishment may motivate actors in the community at large to be more attentive to the risks they pose to others. Thus, while Hogan may have been right to think that those who “share the accused’s lack of perspicacity” cannot be deterred because they simply will not foresee or appreciate risks, he may have too quickly discounted the

19. Hogan, *supra* note 2, at 694.

20. *Id.*

21. See ANDREW VON HIRSCH, CENSURE AND SANCTIONS (1993).

22. See Antony Duff, *Legal Punishment*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2013), available at <http://seop.illc.uva.nl/entries/legal-punishment/> [<https://perma.cc/8DJ9-Z5LW>] (citations omitted). This account of punishment as communicating blame and censure owes much to Antony Duff’s work. See generally R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY (2001).

role of the criminal law in creating a more perspicacious community in general.²³

II. THE ENGLISH APPROACH TO DEFINING RAPE

To summarize and segue, Smith and Hogan defended a subjectivist approach to criminal responsibility, one which demands both that each element of the actus reus have a corresponding mens rea element, and that the mens rea include a subjective awareness of risk taking. This way of thinking about criminal responsibility has been tremendously impactful in shaping the way the mens rea of rape has been conceptualized in England. In the context of sexual offenses, Smith and Hogan's general framework has influenced English courts to frame, with admirable clarity, the precise issues that should be addressed when deciding whether to hold a defendant criminally responsible for rape. While it is submitted that the answers provided by the House of Lords and Parliament have not always been correct, at least they have been asking the right kind of questions. Meanwhile, many American courts have been largely incapable of asking the right kind of questions regarding the mens rea of rape, because they continue to be influenced by an outdated common law approach to defining the actus reus elements and a resulting failure to appreciate the need to define mens rea elements.

This Section will briefly outline the English approach to mens rea in rape, illustrating the influence of Smith and Hogan's subjectivist account of criminal responsibility and observing the more objectivist approach that currently prevails in England. It will then compare approaches to defining the mens rea of rape that remain prevalent in many American jurisdictions and suggest three ways in which Americans should learn from the English approach.

English criminal law has long recognized that each element of the actus reus of rape should have a corresponding mens rea element. Which is to say, the English have long recognized the principle of correspondence.²⁴ Over time, however, both the elements of the actus reus of rape and the level of mens rea that should be required in correspondence to the actus reus of the victim's non-consent has changed considerably in English law.

At common law, the actus reus elements of rape consisted of "the carnal knowledge of a woman forcibly and against her will"—with the latter phrase "against her will" taken to incorporate elements of both non-consent and physical resistance by the victim.²⁵ While the common law

23. For a brief overview of key arguments in the debate regarding criminal negligence, see *CRIMINAL LAW CONVERSATIONS* 273–91 (Paul H. Robinson, Stephen Garvey & Kimberly Kessler Ferzan eds., 2009).

24. The principle of correspondence was first coined by Andrew Ashworth in his first edition of treatise, *PRINCIPLES OF CRIMINAL LAW* 129–30 (1991).

25. See 4 *WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND*, ch. 15 (Univ. of Chi. 1979) (1769).

definition did not specify the mens rea required for the offense, the House of Lords had the opportunity to clarify that matter in the infamous case of *DPP v. Morgan*.²⁶ In his remarks at Villanova, Smith explained the basic facts of the case with characteristic brevity:

[T]he defendant invited three friends to have sexual intercourse with his wife, telling them that she would like them to do so and ignore any show of resistance because this was merely to add to her pleasure. The three men had intercourse with Mrs. Morgan who did not in fact consent. They were charged with rape²⁷

The key issue in *Morgan* concerned the mens rea element that must be proven in correspondence to the element of the victim's non-consent.²⁸ Specifically, if the defendants held an honest belief that the victim was consenting, would such belief negate the mens rea of rape, even if that belief was wholly unreasonable?²⁹ In rejecting the Crown's plea that only a reasonable mistake should lead to acquittal, the House of Lords, in effect, ruled that rape is not a crime that can be committed by mere negligence as to the victim's consent.

The *Morgan* rule, coined the "rapists' charter," was widely criticized in England and abroad.³⁰ Not only did the ruling exonerate defendants who reasonably should have known that they were engaging in sexual intercourse without their victims' consent, *Morgan* endorsed a definition of the actus reus of rape that required four elements: (1) unlawful (meaning, here, outside of marriage); (2) sexual intercourse with a woman; (3) without her consent; (4) by force, fear, or fraud.³¹

Parliament acted quickly to ameliorate some of *Morgan*'s impact, in the Sexual Offenses (Amendment) Act of 1976, which clarified that the actus reus elements of rape do not require proof of force, fear, or fraud. Instead, Parliament established that rape consists simply of sexual inter-

26. [1976] A.C. 182 (H.L.), (1975) 2 W.L.R. 913 (H.L.).

27. Smith, *supra* note 1, at 1187.

28. The actus reus elements of force and whether the conduct was in fact "against [the victim's] will" were not at issue on appeal.

29. The trial court had instructed the jury that the defendant's belief in consent must be reasonable. Despite what the Law Lords viewed as an erroneous jury instruction, the House of Lords upheld the rape convictions on grounds that the evidence established beyond any doubt that the defendants in fact knew that the victim was not consenting.

30. See, e.g., JENNIFER TEMKIN, RAPE AND THE LEGAL PROCESS 119 (Oxford Univ. Press, 2d ed. 2002) (1987); E.M. Curley, *Excusing Rape*, 5 PHIL. & PUB. AFF. 325, 325 (1976).

31. See *Morgan*, [1976] A.C. 182 (H.L.) (Lord Hailsham of St. Marylebone) ("Rape consists in having unlawful sexual intercourse with a woman without her consent by force, fear or fraud." (quoting ARCHBOLD: CRIMINAL PLEADING, EVIDENCE AND PRACTICE (38th ed. 1973)) (internal quotation marks omitted)). The marital rape exemption was eventually eliminated in *R v. R*, [1992] 1 A.C. 599, (1991) 3 W.L.R. 767.

course without consent.³² Moreover, the Sexual Offenses (Amendment) Act of 1976 established that the mens rea of rape does not require proof of an intention to engage in sexual intercourse without the victim's consent. Rather, Parliament provided that either knowledge or recklessness would suffice to establish mens rea in correspondence to the victim's consent.

After decades of debate and activism, the subjectivist rule regarding the mens rea of rape was eventually superseded by Parliament in the Sexual Offenses Act 2003. According to this definition, which remains the current legal definition of rape in England, the offense consists of the following elements:

Rape

- (1) A person (A) commits [rape] if—
 - (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
 - (b) B does not consent to the penetration, and
 - (c) A does not reasonably believe that B consents.
- (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.³³

Under the Sexual Offences Act 2003, the actus reus of the offense consists of two elements: (1) penetration of the victim by the defendant (the conduct element) and (2) the victim's non-consent (a circumstance element). The correspondence principle is clearly on display in the requirement that mens rea be proven in correspondence to each element of the actus reus.

While the mens rea of intention remains in place in correspondence to the penetration element of the actus reus, the key transformation brought about by the Sexual Offenses Act 2003 was to reject the *Morgan* rule's subjectivist approach to mens rea regarding consent, and thus make rape a crime of negligence as to the victim's non-consent. As Chris Clarkson explains, "previously the requisite *mens rea* involved proof of either knowledge of lack of consent or subjective recklessness as to the lack of consent; under the Act all that has to be established is that the defendant did not *reasonably* believe there was consent."³⁴

In sum, there are three aspects of the English approach to defining rape worthy of particular note. First, at least since the *Morgan* ruling in 1975, English criminal law has adhered to the principle of correspondence in defining rape, which is to say, each element of the actus reus has required proof of a corresponding mens rea. Second, at least since the

32. To be clear, the requirements that the victim be a woman, not the wife of the defendant, and that the sexual intercourse consist of penile-vaginal penetration all remained in place.

33. Sexual Offences Act, 2003, c. 42, § 1 (U.K.).

34. CLARKSON, *supra* note 13, at 74 (second emphasis added).

Sexual Offenses (Amendment) Act 1976, English criminal law has defined rape such that the key difference between lawful sexual intercourse and rape turns on whether the victim consented.³⁵ Third, since 2003, English criminal law has recognized that negligence with respect to the victim's non-consent is a sufficient mens rea to establish the offense of rape.

III. WHAT AMERICA STILL NEEDS TO LEARN FROM ENGLAND

American jurisdictions would do well to follow England's example when it comes to defining rape. First, American courts should adhere to the correspondence principle, so that they can begin to ask the right kinds of questions regarding how to define rape. Second, American legislatures should follow Parliament's example from forty years ago, when it recognized that the key to distinguishing sexual intercourse from the actus reus of rape consists in the victim's non-consent, without any further proof of force or resistance. Finally, American jurisdictions (whether through legislative enactments or judicial opinions) should embrace negligence regarding the victim's non-consent as a sufficient mens rea of rape. This Section will unpack each of these issues and briefly consider the lessons Americans still need to learn from England.

First, due to a failure to adhere to the correspondence principle, several American jurisdictions have failed to formulate the right kind of questions regarding the definition of rape. Indeed, due to one such failure, the United States Court of Appeals for the Second Circuit recently found itself unable to determine what level of mens rea applied to lack of consent under Connecticut law.³⁶ In what is appropriately characterized as the "[m]orass of mens rea in American rape law," Robin Charlow summarizes the state of affairs as follows:

[S]ome state statutes define rape . . . with no specification of culpable mental state in the statute. In these jurisdictions, case law may or may not clearly supply the missing required mens rea for the nonconsent element.

Other [states'] rape statutes specify a culpable mental state in conjunction with the act of intercourse, but do not include any mental state specifically with regard to [the] element [of the vic-

35. Issues noted in *supra* note 29 aside, the acceptance of rape as "sex without consent" was underscored in *R v. Olugboja*, [1982] QB 320, (1981) 3 All ER 443: "In relation to a charge of rape, contrary to section 1 of the Sexual Offences Act 1956 as amended by section 1 of the Sexual Offences (Amendment) Act 1976, the only question concerning the *actus reus* is 'At the time of the sexual intercourse did the woman consent to it?'"

36. See *Efstathiadis v. Holder*, 752 F.3d 591 (2d Cir. 2014) *certified question answered* by 119 A.3d 522 (Conn. 2015). *Efstathiadis* is a promising example of American courts beginning to formulate the right kind of questions to define rape. However, it is to be regretted that Connecticut had not yet framed the issue in this way nor provided a clear answer until 2014, when the issue was presented as a certified question from the United States circuit court.

tim's non-consent] Case law may or may not clarify the matter.

In yet other jurisdictions, rape is so defined that [the victim's non-]consent does not appear to be an element. Even under these statutes, however, it is possible that consent becomes relevant nonetheless, and therefore that the mens rea with respect to consent is still in issue. This could occur if the act element is interpreted essentially to require proof of nonconsent. For example, a statute that defined rape as intercourse by forcible compulsion could be read to require evidence of nonconsent in order to establish the necessary force or compulsion.

Finally, some jurisdictions delineate a mens rea with regard to [the victim's] nonconsent . . . but then have a separate rule allowing [that] a reasonable mistake of fact may qualify as a defense

. . . .

After wading through the morass, it appears that the various American jurisdictions require different mens rea to prove rape In one state, it seems that the defendant must have a purpose to have nonconsensual sex in order to commit rape. In other states, recklessness about nonconsent would seem to suffice In other American jurisdictions, negligence with regard to consent appears to be the current standard. *And, in a number of states, courts seem to treat the nonconsent element as one of strict liability, requiring no mens rea for conviction.*³⁷

While varying approaches to criminal offense definitions are to be expected in a federal system with fifty-two distinct criminal jurisdictions, it should never be the case that a serious criminal offense such as rape would be treated as a strict liability offense. Recall the words of Sir John Smith, from his Villanova address:

[I]n most crimes, particularly serious crimes, [the prosecution] must . . . prove a degree of fault with respect to each element of the offense If the defendant is to be held responsible for causing the result in the circumstances in which it is a criminal offense, it ought to be shown that he was at fault with respect to each of these elements.³⁸

Yet, in many American jurisdictions, the prosecution is not required to prove any mens rea corresponding to the victim's non-consent.³⁹ If American jurisdictions recognized the importance of clearly defining not

37. Robin Charlow, *Bad Acts in Search of a Mens Rea: Anatomy of a Rape*, 71 *FORDHAM L. REV.* 263, 272–81 (2002) (emphasis added) (footnotes omitted).

38. Smith, *supra* note 1, at 1179.

39. See Charlow, *supra* note 37, at 281 n.68; see also MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES (Discussion Draft No. 5 2015).

only the actus reus elements of criminal offenses, but also clearly defining the mens rea elements that correspond to each of the actus reus elements, it would be unthinkable that a serious offense such as rape would be regarded as a crime of strict liability in so many American jurisdictions.

Second, American legislatures would do well to follow the example of English criminal law in terms of how to define the actus reus elements of rape. In defining the actus reus elements of what separates non-criminal conduct (sexual intercourse) from criminal conduct (rape), the goal should be to identify all—and only—those elements that make the conduct a public wrong that calls for both condemnation and punishment by the State.⁴⁰ If the actus reus fails to include such elements, the offense definition will be overly broad, with attendant risks of impermissibly prohibiting conduct that is either not wrongful all-things-considered, is merely a private wrong, or is a public wrong, but one that does not call for State condemnation and punishment. Conversely, if the actus reus includes additional elements above and beyond that which makes the conduct a public wrong that calls for State condemnation and punishment, it will result in an overly narrow definition of the offense, with attendant risks that the State will fail in its duty to exercise due diligence in protecting people from violence.⁴¹

England marks the distinction between sexual intercourse and rape according to whether the intercourse was non-consensual, with no additional requirement that the offense be committed through the use of physical force, or that the victim physically resist.⁴² In so doing, England joined the “universal trend towards regarding lack of consent as the essential element of rape.”⁴³ This approach should be emulated in American jurisdictions for three reasons.

First, marking non-consent as the key element distinguishing sexual intercourse from rape reflects a correct understanding of the wrongness of rape as consisting, primarily, in a violation of the victim’s sexual auton-

40. By the phrase “a public wrong that calls for State condemnation and punishment,” I mean that the State would be justified in condemning and punishing the wrongdoing. In my view, there is no overarching principle to identify when these conditions are satisfied. See Michelle Madden Dempsey, *Public Wrongs and the ‘Criminal Law’s Business’: When Victims Won’t Share*, in *CRIME, PUNISHMENT, AND RESPONSIBILITY: THE JURISPRUDENCE OF ANTONY DUFF* 254, 254–72 (Rowan Cruft, Matthew H. Kramer & Mark R. Reiff eds., 2011).

41. On the principle of due diligence, see Yakin Ertürk, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on the Due Diligence Standard as a Tool for the Elimination of Violence against Women*, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006).

42. See Sexual Offenses Act, 2003, c. 42, § 1 (U.K.).

43. *M.C. v. Bulgaria*, Eur. Ct. H.R. 39272/98, para. 161 (2003); see also Samuel W. Buell, *Culpability and Modern Crime*, 103 *GEO. L.J.* 547, 570 (2015) (“When the concepts of force and resistance controlled the law of rape, consent lingered off-stage, rarely a significant player because of rape law’s hugely underinclusive scope, both de jure and de facto. Force and resistance requirements were so demanding they eclipsed inquiry into consent.”) (footnotes omitted).

omy.⁴⁴ Second, given the absurdly low rates of rape prosecution throughout America, it is unwise to require proof of actus reus elements that go above and beyond what is required to make the conduct into a public wrong that calls for State condemnation and punishment. Retaining superfluous elements of force and resistance in defining the actus reus elements of rape simply makes it all the more difficult to prosecute this offense, resulting in the failure of American jurisdictions to fulfill their due diligence obligations.⁴⁵ Third, for strictly pragmatic reasons, it would be wise for American jurisdictions to make non-consent the key to distinguishing sexual intercourse from rape, in order to track the substantive offense definition for rape that is used by the FBI's Uniform Crime Reporting system.⁴⁶

Finally, American jurisdictions should follow England's lead in adopting a negligence standard for defining the mens rea corresponding to the victim's non-consent. Which is to say, if someone *A* sexually penetrates a non-consenting person *B*, and *A* *should* have recognized a substantial and unjustifiable risk that *B* was not consenting, but culpably failed to do so, then *A* should be guilty of rape.⁴⁷ Recall, the standard here is not simply civil negligence. In order to be properly held criminally responsible, the defendant's failure to recognize the risk that the victim is not consenting must be a *culpable* negligence—so culpable as to merit criminal condemnation and punishment. Not every instance of negligence will amount to culpable negligence—and so, not every instance of negligence should satisfy the criminal mens rea of rape. Excusable ignorance would not inculpate, but callously self-motivated blindness to the victim's non-consent may do so. Not only would a negligence standard allow for conviction in cases such as *Morgan*, it would create a vehicle for communities to discern and articulate sharper social norms regarding what constitutes a reasonable belief that sexual consent has been communicated. As Samuel Buell correctly observes, the very fact that social norms regarding consent to sex are contested and in flux speaks in favor of adopting a negligence standard:

44. See John Gardner & Stephen Shute, *The Wrongness of Rape*, in OXFORD ESSAYS IN JURISPRUDENCE 193 (Series No. 4, Jeremy Horder ed., 2000). I add the qualifier “primarily” to signal my view that an important part of the wrongness of rape consists in its tendency to sustain and perpetuate patriarchy.

45. See Cory Rayburn Yung, *How to Lie with Rape Statistics: America's Hidden Rape Crisis*, 99 IOWA L. REV. 1197 (2014). For a discussion of due diligence, see *supra* note 41.

46. See *UCR Program Changes Definition of Rape*, FBI (Mar. 2012), <https://www.fbi.gov/about-us/cjis/cjis-link/march-2012/ucr-program-changes-definition-of-rape> [<https://perma.cc/4JAD-P56Q>].

47. To be clear, the definition of negligence I have in mind here would further require the prosecution to prove that the risk of *B*'s non-consent was “of such a nature and degree that the actor's [*A*'s] failure to perceive it, considering the nature and purpose of his [*A*'s] conduct and the circumstances known to him, involve[d] a gross deviation from the standard of care that a reasonable person would observe in [*A*'s] situation.” MODEL PENAL CODE § 2.02(2)(d) (1962).

The mens rea problem [in defining rape] is this: if consent to sex is normative and [mens rea requires that] the defendant must be culpable with respect to consent, then arguably the defendant has to be culpable with respect to norms. When the law says, “He knew he did not have consent,” it means, “He knew this was not a situation that society recognizes as consensual sex.” When norms about sexual behavior are evolving, and the law is dealing with a crime that presents difficult evidentiary problems in general, the culpability analysis can be challenging in at least some cases.

One way to reduce the difficulty is to reduce culpability requirements. . . .

If rape is a crime of negligence as to the victim’s lack of consent, the law still has to draw lines about what counts as legal consent. And the law still has to determine whether the line was clear enough in any particular case that a reasonable person would know the geography. *But it does not need to concern itself with any account the defendant wishes to put forward about his own understanding of norms.*⁴⁸

By adopting a negligence standard for defining the mens rea of rape in correspondence to the victim’s non-consent, we both honor the subjectivist principle of correspondence and avoid deferring to the defendant’s own peculiar understanding of what counts as consent to sex. Defendants such as the gang rapists in *Morgan* will not win acquittal by arguing that, according to their subjective view of things, a woman screaming “no” while being restrained and penetrated was consenting—and defendants motivated into self-deception will not be entitled to “read[] screams as squeaks of pleasure, or resistance as play”⁴⁹

Smith and Hogan, no doubt, would agree with some, but not all, of my recommendations regarding what America still needs to learn from England. They would surely agree with my endorsement of the correspondence principle and resulting critique of strict liability as the mens rea of rape in some American jurisdictions. With respect to my second recommendation, I have no reason to suppose that Smith or Hogan would object to defining the actus reus of rape in terms that make the victim’s non-consent the key feature distinguishing sexual intercourse from rape.⁵⁰ No doubt, however, Smith and Hogan would be less than enthusiastic regarding my endorsement of an objectivist approach to defining the mens rea

48. Buell, *supra* note 43, at 579–80 (emphasis added) (footnotes omitted).

49. See Sara Hinchliffe, *Rape Law Reform in Britain*, 37 *Soc’y* 57, 59 (2000) (citing NATASHA WALTER, *THE NEW FEMINISM* (1999)).

50. The non-consent based definition was not terrifically controversial. See, however, Victor Tadros’s intriguing argument in favor of a differentiated offense of rape, which “would allow the law to express that violence is central to the offence of rape where violence is present, but it would also allow convictions of rape where there is no violence.” Victor Tadros, *Rape Without Consent*, 26 *OXFORD J.L. STUD.* 515, 515 (2006).

of rape. For, according to their subjectivist account of criminal responsibility, cases like *Morgan* were correctly decided. On their view, rapists who believe they are obtaining consent, no matter how absurdly unreasonable those beliefs might be, are not subjectively reckless and thus should not be held criminally responsible for their conduct. On my view, however, there may be some cases of negligence that do rise to the level of culpable cluelessness, such that the criminal law would be justified in condemning and punishing the culpably negligent rapists. On that issue, I must, with deep respect, disagree with Smith and Hogan.