

# MORAL PHILOSOPHY AND THE GLEN RIDGE RAPE CASE

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I first noticed that Chief Justice Rehnquist starts his decisions in criminal cases by reciting the facts of the crime while teaching my evidence classes about a fine point of evidence law. The opinions usually start something like this:<sup>1</sup>

Billy Ray Smith and Sammy Ray Smith entered a convenience store on the night of May 1, 1992, each of them carrying a sawed-off shot gun. While attempting to rob the store, Billy Ray shot the clerk, a straight-A student who was supporting his aged mother, and blew off his head.

As I tell my students, if you represent the defendant and an opinion starts out this way, you know you are in big trouble.

Taking a leaf from Chief Justice Rehnquist's book, I will open my article the same way. On March 1, 1989, a retarded young woman followed a high school football star to the basement of a Glen Ridge house on the promise of a "date." There, thirteen high school athletes gathered: six left, seven others stayed. The seventeen-year-old girl, who has an IQ of 64 and has been described as operating at the mental age of eight, laid down on a couch. The young men told her to disrobe. They then penetrated her with a broomstick and a baseball bat.

You recognize, no doubt, the facts of the Glen Ridge, New Jersey rape trial of four former high school athletes.<sup>2</sup> In his charge to the jury, trial judge R. Benjamin Cohen gave his opinion on the application of non-legal theories to judicial decision-making. He said: "This is a criminal trial. It is not a morality play. You are not asked to decide whether what any of the defendants may have done is right or wrong in a moral sense."<sup>3</sup>

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1. See, e.g., *Payne v. Tennessee*, 111 S. Ct. 2597 (1991); *Blyston v. Pennsylvania*, 110 S. Ct. 1078 (1990); *Duckworth v. Eagan*, 492 U.S. 195 (1989); *Barclay v. Florida*, 463 U.S. 939 (1983).

2. For a more detailed description of the facts behind this case, see Robert Hanley, *Sex-Assault Trial Focuses on Mental Defectiveness*, N.Y. TIMES, Feb. 20, 1993, at A25.

3. For a discussion of this portion of the charge, see Catherine S. Manegold, *Bracing Message From Glen Ridge Jury*, N.Y. TIMES, Mar. 7, 1993, at A42.

Unlike Judge Cohen, I find morality and its worldly expression in moral philosophy, specifically western moral philosophy, to be very helpful in understanding the Glen Ridge rape trial. I hope by exploring this specific case to illuminate the larger question of the role of philosophy in law.

First, I draw from Enlightenment epistemology in understanding Judge Cohen. It was Descartes who first conceived that a person might be no more than a mind in a vat, the plaything of an evil philosopher.<sup>4</sup> Only a mind in a vat, divorced entirely from the knowledge, experience, and history of our species, could conceivably have thought that the issues in the Glen Ridge rape trial were not issues of right and wrong.

What could Judge Cohen have been thinking? Was he saying that the law against rape could be stripped of the core moral meaning that has infused its every word since the time of ancient Greece? Did he believe that the rape law was the product of an evil legislature that arbitrarily selected a subset of human behavior to prohibit in order to inculcate habits of obedience in the populace? Was the legislature simply an infinity of monkeys sitting at endless legislative typewriters? Moral philosophy and history are essential for an understanding of the legal issues before the judge and jury in the Glen Ridge rape trial.

A study of the history of rape would have told the jury that rape law has a long and complex past. It changes even without amendment as a society's moral attitudes toward women change. In ancient Athens, the seduction of a married woman was regarded as worse than rape because seduction engaged the victim's emotional life, or "soul," as the Greeks would have called it.<sup>5</sup> This is an interesting insight.

In medieval Christianity, where much western criminal and common law was formed, the wrongness of rape was rooted in the idea that girls are the property of their fathers and married women are the property of their families and their husbands.<sup>6</sup> Of course, I am not advocating a return to the treatment of women

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4. Rene Descartes, *First Meditation: Concerning Things that Can Be Doubted*, reprinted in RENE DESCARTES, *PHILOSOPHICAL ESSAYS* 75, 80 (Laurance J. Lafleur trans., 1964).

5. JAMES A. BRUNDAGE, *LAW, SEX AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE* 14 (1987). Although relatively enlightened, Greek law was, of course, far from gender neutral. The offense was not harm to the woman's emotional life but, rather, turning her affections away from her father or husband. *Id.*

6. *Id.* at 129, 209-10, 249.

as property. Yet there is a deep moral foundation to the law against despoiling someone else's property.

In modern society, the feminists' attempt to change the moral content of rape is arguably the most radical manifestation of women's claim to citizenship. This is because the ability to protect one's self from rape is a uniquely female claim to security of the person, and an intact physical self qualifies a person to become a player in the social contract game that is the foundation of modern social and political theory. If one cannot enforce such security, one has nothing to gain or bargain; one cannot be a player, so one cannot be a citizen.<sup>7</sup>

The claim to such security is constitutive of all the other claims of feminism, which deeply challenge the existing moral and political order. It is not surprising, therefore, that contemporary feminists' efforts to stake out a strong position of sexual control for women have met with responses that include disbelief and derision.<sup>8</sup> If women cannot effectively own their bodies, their claim to citizenship, along with the threat to existing social structures it poses, will be greatly weakened.

The current cutting-edge issue on this subject is the meaning of silence. Having fought for a generation to undo the once widespread male belief that a woman's "no" means "yes," women now are trying to establish that *silence* is not "yes" either. Writing recently in the *New York Times*, graduate student Katie Roiphe asserted that feminists seeking to mark off such an area of security for themselves by moving the line of consent have returned the sexual exchange to the familial paradigm.<sup>9</sup> According to Roiphe, if a woman's body does not rightly belong to anyone who gives her a drink,<sup>10</sup> it apparently belongs to her ancestral family.

7. THOMAS HOBBS, *LEVIATHAN* (Michael Oakeshott ed., 1966) (1651). The social contract tradition, stretching from Thomas Hobbes to John Rawls, has recognized this condition of contingent citizenship and traditionally has assigned the role of political bargainer to the patriarchal head of household, who also controlled sexual access to female family members. See JOHN RAWLS, *A THEORY OF JUSTICE* 208-9 (1971); see also SUSAN M. OKIN, *JUSTICE, GENDER & THE FAMILY*, ch. 5 (1989).

8. KATIE ROIPHE, *THE MORNING AFTER* (1993); Wendy Kaminer, *What is This Thing Called Rape?*, *N.Y. TIMES*, Sept. 19, 1993, at G1 (book review).

9. Katie Roiphe, *Date Rape's Other Victim*, *N.Y. TIMES* (magazine), June 12, 1993, at 26 ("Rape crisis feminists express nostalgia for the days of social control, when the university acted in loco parentis. . . . We shouldn't need to be reminded that the rigidly conformist 50's were not the heyday of women's power."). This article is part of Roiphe's book, *THE MORNING AFTER*, *supra* note 8.

10. *Id.* ("People have asked me if I have ever been date-raped. And thinking back on complicated nights, on too many glasses of wine, on strange and familiar beds, I would

Yet surely there is some middle ground between (sexual) feudalism and (sexual) communism.

In any case, because the claim to protect one's physical integrity lies so close to the core meaning of modern personhood, rape involves the most important concerns of modern moral philosophy—as it once did in ancient and medieval philosophy. The modern moral philosophy on which the New Jersey rape law is predicated involves concepts that philosophers call ontology, or metaphysics. New Jersey's statute asks: Did the girl in the Glen Ridge rape case consent to the acts she engaged in? Or was she "mentally defective," defined as "an inability to exercise the legal right to refuse to engage in sexual conduct"?<sup>11</sup>

What is it about the human being that provides the ability to exercise the right to refuse? Philosophy long ago abandoned the notion that there is simply a little homunculus sitting in the pineal gland that exercises its will. The ability to refuse does not stand alone, as the Glen Ridge jury might have been told, just as philosophers now know that personhood is not a solitary little man in your brain. Yet the ability to refuse seems to be a part of what it means not only to be *human*, as a species, but also what it means to be a *person*, which Descartes did his best to describe. The question of what constitutes a "person" is hotly contested, even in the law. This is true to the point that what appears to be an easy question—whether or not an incorporated association is a person—recently gave rise to a 5-4 decision in the Supreme Court of the United States.<sup>12</sup>

What constitutes a person is thus enormously complex, as philosophers have long known. Is the person what philosopher Harry Frankfurt calls the "wanton," the being who wants a cigarette, or is it the second order self who wants the wanton not to want a cigarette?<sup>13</sup> The concept of personhood grows even more complex when confronted, in the Glen Ridge case, with the prospect of a somewhat retarded girl being asked to consent to pene-

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have to say yes. With such a sweeping definition of rape, I wonder how many people there are, male or female, who haven't been date raped at one point or another."

11. N.J. REV. STAT. § 2C:14-1h (1992) ("'Mentally defective' means that condition in which a person suffers from a mental disease or defect which renders that person temporarily or permanently incapable of understanding the nature of his conduct, including, but not limited to, being incapable of providing consent.")

12. Metropolitan Life Ins. Co. v. Ward, 470 U.S. 869 (1985) (holding that for equal protection and due process purposes, a corporation is a "person").

13. Harry G. Frankfurt, *Identification and Wholeheartedness*, in *THE IMPORTANCE OF WHAT WE CARE ABOUT* 159 (1988).

tration with a baseball bat by six teenage boys in a basement. These were boys she had known for years. They completely dominated the only society she had ever known.<sup>14</sup> At the time of her alleged "consent," they were offering her membership in that society.

There is good work in the philosophy of personal identity that captures the intuition that something illegitimate is involved in the above bargain. Thinkers like Alasdair MacIntyre and Charles Taylor have developed a theory that people are formed like narratives: "People" are born with a background social history and situate themselves within that history as they tell the story of their personhood through the course of their lives.<sup>15</sup> It is the authorship of this story (that is, control of one's life) that attaches a "person" to the physical self who changes over time and forgets or misremembers what the prior self experienced.<sup>16</sup> Taylor and MacIntyre have seen that, in the course of the story that is one's life, a person defines herself by working in a dialogue with other people. So, a person who thinks he is Napoleon does not get to be Napoleon if everyone else in the world thinks he is Joe Blow. Conversely, for instance, universal opinion did not end the question of who Alfred Dreyfuss was, even though society had confined him to Devil's Island. A person's identity is a dialogue. The roles of the person as narrator, and other people as reader-revisionists of her life, will ebb and flow depending on the context. The context of the Glen Ridge case presents a devilish problem for law and moral philosophy, because the victim's internal narrator was definitely in a weakened state. Nonetheless, since the law was unwilling to decide the consent question as a matter of strict liability (for example, prohibiting sex with anyone whose I.Q. is under 100), the system had to look at the dialogue between the victim and the defendants to see whether a person with the capacity to say "no" emerged.

Here, the insights of moral philosophy dictate that the defendants justly lost. This is so for the same reason that even sexual liberationists balk at incest. As in the invitation of a parent or a sibling, the rapists' sexual offer was incoherent. It offered one of the fundamental elements of personhood, membership in a soci-

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14. See Manegold, *supra* note 3; Hanley, *supra* note 2.

15. See ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981); CHARLES TAYLOR, *SOURCES OF THE SELF* (1989);

16. The cutting-edge work that deconstructs personhood into narrative continuity probably began with DEREK PARFIT, *REASONS AND PERSONS* (1984).

ety, while simultaneously withholding as a condition of such social personhood the capacity to say no to sex with other members of that society. The victim was thus faced with a dilemma: Either choice she could have made would have rendered her a non-person. By rendering this young woman a non-person, the defendants committed a crime—an act that was morally *wrong*.

In a sense, the protagonists in the Glen Ridge rape case acted out the theory Katie Roiphe suggested in her analysis of date rape.<sup>17</sup> The only person the defendants were willing to recognize was a woman who did not control her sexuality. It belonged either to her family or to the world.

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17. See Roiphe, *supra* note 9.