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Epistemic Responsibility in Sexual Coercion and Self-Defense Law

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Consider Al and Betty. Al meets Betty at a bar, summons her to the back alley behind the bar, and suggests that she have sex with him. She does so—not because she wants to have sex with him, but because he has a gun in his holster the entire time, and she fears that he might use it if angered by a sexual refusal. In fact, she believes the gun to be an implicit threat—one that Al wants her to understand by displaying the gun so prominently. Both in United States law and in philosophical literature there is disagreement about whether Betty has consented to have sex with Al, given her motivating reason. Was it reasonable for Betty to believe that she was being threatened with violence? Was it reasonable for her to believe that she could not escape unharmed without having sex with Al? Even if the court deemed this sex act non-consensual, that is not enough to determine whether Al has criminally raped Betty. This hinges on whether he believed, or believed reasonably, that Betty was choosing to have sex with him under threat.[1] If Betty's belief was deemed reasonable then the *actus reus* would be satisfied: she suffered non-consensual sex with Al. However, rape convictions in the United States also require a *mens rea* condition be met—criminal intent.

Consider next Yvette and Zachery. Yvette shouts some racial slurs at Zachary at a bar, visibly angering Zachery. They later meet in a back alley. Zachery approaches Yvette with an angry face. Yvette sees that Zachery has his hands in his pockets. Based on his race, his clothing, and his demeanor, Yvette believes that Zachery is the kind of man who carries a gun (though she does not see one) and who uses it when sufficiently mad—and he looks mad now. In fear for her life, Yvette takes out her own gun and shoots Zachery to death. In many US states, Yvette can appeal to her fear as an affirmative defense if she is charged with murder or unlawful killing; she need only convince the jury that a reasonable person might have felt afraid for her life. In some states, Yvette is actually immune from

[1] Note that this was only true in United States Law as of the Sexual Offense act of 2003. Before 2003, defendants only needed to convince a jury that they had a sincere belief, however unreasonable (Wortley 2013).

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prosecution if she can convince a jury in a pre-trial hearing that she held a reasonable belief that Zachery might kill or gravely injure her.

Was Al responsible for double-checking with Betty, to make sure that she did not feel coerced into sex due to the presence of the gun? Was Yvette responsible for waiting until she had more information before shooting Al to death? Or were their initial beliefs sufficiently reasonable to justify their actions? Due to questions like these, the criminal laws pertaining to sexual coercion and killing in self-defense are concerned with epistemic responsibility.

In what follows, I make a case for how we should assign and handle the adjudication of epistemic responsibility in these two areas of criminal law. I will explain why it is problematic to try to assess whether those accused of sexual coercion and unjustified killing had reasonable beliefs, or whether they acted like reasonable people. I will present an alternative suggestion by Hubin and Healey with regard to cases of sexual coercion that I will label the "reasonable expectation from state" (REfS) standard. I will argue that adopting a REfS standard for adjudicating both self-defense and sexual coercion cases is better than the "reasonable person" standard currently used. However, contra Hubin and Healey, I argue that expectations from the state toward victims of these criminal cases—expectations that ascribe epistemic responsibility to the victims—are misdirected. This is true both in cases of sexual coercion and killing in self-defense.

My project focuses on a very specific form of *moral* responsibility that is epistemic in nature: the moral responsibility to gather information so as to be better justified in one's beliefs before proceeding to act. I take this to be a form of epistemic responsibility. This is the type of responsibility that I will be referring to when I say "epistemic responsibility" in this chapter.

Before I begin my argument, I want to identify some questions related to sexual coercion and killing in self-defense that I will *not* handle in this short chapter. I am not going to attempt to answer any question about what is consent. Consent might be a purely internal event—occurring inside a person's head—an internal choice made that grants permission to another person.[2] Alternately, it might involve an external, communicative component—like a verbal "yes," or a set of actions that manifest willingness.[3] My arguments about epistemic responsibility will not hinge on the answer to this question—though how my conclusions could be applied to particular laws will vary depending on what communicative acts might be required for consent.

In the United States, criminal trials dealing with both sexual coercion and killing in self-defense try to ascertain the weight of threats—just how bad it would be for a victim if a threat was carried out. For instance, we might ask in a sexual coercion case: was the threat made by a man weighty enough to limit the woman's

[2] For examples of the internal account of consent, see Alexander (1996). Also see Hurd (1996).
[3] For an example of the internal plus communicative account of consent, see Dougherty (2015).

options such that her sexual compliance did not constitute consent? If he threatened to shoot her, then courts would say: the woman's sexual compliance was not consent. If he threatened to sing a show tune, then courts would say: the woman's sexual compliance did count as consent.

In a case of self-defense, we might also ask about the weight of the threat posed by the attacker; did the attacker pose a significant enough threat to justify killing him in self-defense? For instance, if the attacker meant to dismember you, then you would be justified in killing him. If the attacker was merely trying to forcibly pierce your ears, then it would not be justified in killing him.[4] Of course, there are many hard cases—threats that are not so serious as death and dismemberment, nor so trivial as singing and ear piercing. However, I am not going to explore the seriousness of threats in this chapter.

Finally, in what follows, I will usually refer to person A as male, and person B as female, when I cannot refer to them simply as A and B. I do this in order to acknowledge that the vast majority of sexual assaults in the United States, and indeed the world, are male-on-female. Much of what makes threats in the sexual arena *credible* threats is the consistent evidence we gather from real-life experiences and current events that remind us that men who threaten women are willing to carry through with their threats.[5]

Let us return to the cases that motivate the questions of this chapter. Here they are, simplified:

Perceived sexual coercion: Person A perceives person B as making a threat to hurt A if A does not have sex with B. A's belief in B's threat motivates A to have sex with B.

Perceived killing in self-defense: Person Y perceives person Z as making a threat. Y's belief motivates Y to shoot and kill Z.

We can ask questions about each person's beliefs. Each may be morally relevant. Let us start with persons A and Y, since they are the ones whose beliefs motivate behavior that jeopardizes another person, and who stand to be defendants in criminal cases dealing with killings and sexual assault.

Person A might not know that person B believes that she is under threat and that A is motivated to have sex with A only because of the perceived threat. Before the Sexual Offenses Act of 2003, person A's false belief would have been, by itself,

[4] This is assuming a proportionality criterion for using force in self-defense. For a description of this account, and its various nuances, see Feinberg (2001).

[5] Scott Anderson has recently made a powerful argument that it is our cultural narratives—derived from real events—that makes man's threat against women credible. It is this credibility that makes sexual coercion possible. He thinks that women cannot rely on men assuming that they are under threat during sexual solicitation, making sexual coercion harder and more unlikely for women to perpetrate, as it would have to be explicit (Anderson 2016).

exonerating. If he sincerely held the belief that B consented, then courts could not charge him with rape, no matter how unreasonable his belief.[6] However, today person A could not be exonerated on the grounds of a completely unreasonable false belief that person B consented. Legal theorists and philosophers argued that the *mens rea* condition could be met by recklessness or negligence, not just intent—and that it is reckless to have sex with someone and to reject the possibility that she did *not* consent on insufficient information.[7]

In court, whether person A's belief was reasonable is decided by the jury, provided that, "in determining whether a belief was reasonable, the jury must give regard to 'all the circumstances'."[8] When it comes to cases of sexual coercion (as opposed to sexual offense cases that hinge upon incapacitation, alcohol, or age), the relevant question for the jury is this: was it reasonable for the man to believe that the woman knew that she was able to safely refuse sex?

Here are some considerations that we might hope that the jury takes into account when attempting to answer this question: Did person A have a weapon that he knew to be visible to person B? (For instance, was A carrying a gun?) Was person A aware of any barriers to person B's safe ability to leave person A's company? (For instance, were the couple in a remote location? Was person B relying on A to drive her home from the remote location?) Did person A have any occupational or legal authority over person B that A could have reasonably recognized as a weighty barrier to B safely refusing sex with A? (For instance, was person A the prison guard, military superior, or boss of B?) We might hope that the jury takes these considerations into account *if* we think that person A is epistemically responsible for his false belief regarding B's consent in light of these circumstances.

Let us now consider person Y. Person Y might falsely believe that person Z is trying to kill or gravely injure her and, because of this false belief, kill person Z. If her belief is reasonable, then she cannot be convicted of murder. In many states, she cannot even be tried for murder if her belief is deemed reasonable in a pre-trial

[6] See fn. 7 for examples of court cases in which sincere but unreasonable beliefs were all that was required for rape trial acquittals.

[7] The cases that prompted legal theorists and philosophers to discuss the reasonableness of belief were not ones of sexual coercion, but ones of forcible rape. In *Regina vs Cogan* (1975) and *Regina vs Morgan* (1976) (both cases handled in British courts), husbands arranged for their own wives to be raped by engaging other men to forcibly have sex with them. In both cases, the husbands had told the men committing the forcible sex that their wives consented. During the forced sex, the women resisted, screamed and, in one case, screamed to her children to call the police. In both cases, the men committing the forcible sex were exonerated on the grounds that they believed that the women had consented. For accounts of these cases, see Hubin and Haely (1999). See also McGregor (2005, ch. 2).

[8] This provision has been criticized for failing to clarify whether internal features of the mind of the accused—such as a mental illness—count as part of 'all the circumstances.' (Wortly 2013, 187–8).

hearing.[9] Whether in trial or in a pre-trial hearing, the reasonability of the belief is determined by the jury.

Was person Y's belief that person Z was attempting to kill or gravely injure her a reasonable belief? Here are some considerations that we might hope that the jury takes into account when attempting to answer this question. Was person Z brandishing a weapon in the direction of person Y? Was person Z physically attacking person Y with lethal or potentially lethal force? Did person Z tell person Y that he was going to kill or gravely injure person Y, and was this verbal threat credible from the perspective of person Y? If the answer to all of these questions is "No," then we might think that person Y was not justified in killing Z, even if Y did believe herself to be in mortal danger.

Both in cases of sexual offense and in cases of killing in self-defense, a court might consider whether particular beliefs held by the victims were reasonable. For instance, in certain sexual coercion cases, judges have ruled that women could not have reasonably believed themselves to be unable to safely leave the company of the man, or unable to safely refuse sex. For this reason, they might rule that the act of sex was consensual—even if the woman sincerely believed herself to be trapped or under threat of violence. Similarly, a court might consider whether a person killed in self-defense could have reasonably known that he was being perceived as a threat to person Y, and if he could have done anything to change this perception. If so, then a jury might deem person Z to have forfeited his right to life—to have, essentially, brought about his own death.

I am going to present two famous cases in order to illustrate the sort of considerations presented to juries when they are asked to evaluate the reasonableness of a person's beliefs. One case is of alleged sexual coercion and one deals with killing in self-defense.

State vs Rusk (1981)

A woman, Pat, met Mr Rusk at a bar through a mutual friend. Pat agreed to give Rusk a ride home. Pat alleged that when she stopped to let him out, Rusk invited her inside and she twice refused. Rusk reached over and turned off the ignition and took the keys from her. He told her to come upstairs. His apartment door remained unlocked and there was a phone on the table that Pat claimed that she did not see. Rusk exited the room for a few minutes, came back, undressed Pat, and had sex with her. According to Pat's testimony: She cried; he choked her

[9] In these pre-trial immunity hearings, the burden of proof is on the defendant to show that her belief was reasonable—unlike in a criminal trial, wherein the prosecution must prove beyond a reasonable doubt that the defendant did not hold a reasonable fear. For a thorough explanation of how this works in Florida, see Alvarez (2017).

lightly, and she asked, "If I have sex with you, will you let me leave without killing me?" After the sex act, Pat asked for her keys back. Rusk walked her to her car and gave back her keys, and asked if he could see her again. She drove away.

Rusk claims that Pat voluntarily came up to his apartment, denies that he took her keys, and denies that she asked, "If I have sex with you, will you let me leave without killing me?" He says that she only started crying after they had had sex.

Though Rusk was initially convicted of second-degree rape (coerced sex), on appeal, the decision was overturned. The court ruled that *even if* Pat's claims were all true, Rusk did not use force or make threats sufficient to justify a reasonable belief in Pat that he would hurt her. Further, even if he had taken her keys, the court thought it was unreasonable that Pat would not have thought that she could scream or run to a neighboring apartment for help.[10]

State vs Zimmerman (2013)

Zimmerman, an armed man participating in an informal "community watch," followed an unarmed, black teenager, Trayvon Martin through his housing community. Zimmerman was in his car initially, Martin on foot. Zimmerman reports that he found Martin suspicious because he was walking slowing in the rain and looked like he might be on drugs. Zimmerman called the police's non-emergency hotline to report Martin. The police first asked some questions that suggest that Zimmerman should continue to watch Martin (i.e. "What is his race?), but ultimately told him not to continue pursuing Martin. However, Zimmerman continued to pursue him and got out of his car. Zimmerman testified that, while he was outside his car, Martin jumped out from behind a bush and attacked Zimmerman. According to Zimmerman, Martin got on top of him, punched him in the nose, slammed his head against the pavement, and was beginning to reach down his leg for Zimemrman's gun. At that point, Zimmerman screamed for help and shot Martin.

Because Martin is dead, he could not provide testimony. However, his family members who listened to the recording from a neighbor's 911 call reported that the voice screaming "Help" was Martin's, not Zimmerman's. Also, Martin's friend, Rachel Jeantel, who was on the phone with Martin up until the confrontation between Martin and Zimmerman began, reported that Zimmerman approached Martin. Martin knew that he was being followed and was trying to get away, fearing that Zimmerman was a "pervert." Jeantel encouraged Martin to get away, suggesting to Martin that the adult pursuing him might be a rapist.[11]

[10] *State of Maryland vs Edward Salvatore Rusk*, No. 142. September Term, 1979. Court of Appeals, Maryland. 289 Md 230; 424. A.2d 720; 1981 Md LEXIS 165, 8.

[11] Alvarez and Buckley (2013). See also Jonsson (2013).

Testimony from neighbors watching from their windows differed in who was believed to have been on top of the other in the physical fight leading to the gun shot. Some reported that it was Martin, some that it was Zimmerman. The forensic expert testified that Martin was probably on top when he was shot. However, expert testimony was also given suggesting that the wounds that Zimmerman received (a bloody nose and bumped head) were minor, and not consistent with lethal force.[12]

In his closing remarks, Zimmerman's attorney asked the courtroom to be silent for four minutes. He then told the jury to consider that this was the amount of time that Martin had available to him to go home, and he chose not to do so. He ended by saying, "Trayvon Martin caused his own death." The jury acquitted Zimmerman of all charges.[13]

* * *

In both of these cases, the victims' reasonability was called into question. Why is this relevant? In *State vs Rusk*, the jury was asked to determine whether Pat had a reasonable fear that she could not safely leave Rusk's company. They determined that she did have a reasonable fear, and the state overturned their ruling—saying that she did not. Since her fear was unreasonable, it did not vitiate her sexual consent.

In *State vs Zimmerman*, the defense lawyer asked the jury to take into account the opportunity that Martin had to run away home—an opportunity he did not take. Even though the jury was meant to deliberate upon the reasonability of Zimmerman's fear for his own life, the lawyer prompted the jury to also consider whether Martin had the opportunity to flee. There are many interpretations of why this might have been relevant to Zimmerman's innocence or guilt—though the lawyer himself did not stipulate his reasons.

Here is the first line of reasoning that might be interpreted from the defense lawyer's closing remarks: If Martin had known that Zimmerman had perceived him as a lethal threat, and Martin was *not* a lethal threat, he would have acted in a way to try to change Zimmerman's perception. Over the course of four minutes, Martin reasonably could have known (or: it would have been unreasonable for Martin to believe anything but the fact) that Zimmerman perceived him as a lethal threat. Hence, the fact that he did not attempt to change Zimmerman's perception is evidence that he *was* a lethal threat. This evidence renders Zimmerman's own belief reasonable, and the killing justifiable.

Here is the second line of reasoning that might be interpreted from the defense lawyer's closing remarks: Over the course of four minutes, Martin reasonably could have known (or: it would have been unreasonable for Martin to believe

[12] Alvarez and Buckley (2013). [13] Ibid.

anything but the fact) that Zimmerman perceived him as a lethal threat. By failing to walk away, Martin chose to remain and menace Zimmerman. This choice constituted the forfeit of Martin's right to life, and justified Zimmerman in killing him. Either of these lines of reasoning can explain the lawyer's final pronouncement, "Trayvon Martin caused his own death."

There might be alternate interpretations of the lawyer's closing remarks. However, I think that these are the two explanations that could possibly be relevant to the decision that the jury was asked to make about the innocence or guilt of Zimmerman. I am not asking the reader to believe that the lawyer had one or both of these lines of reasoning in mind during his remarks. I only ask them to recognize that these *are* explanatory interpretations of his remarks, in that they show how the lawyer's exercise could be relevant to the jury's task. Both lines of reasoning require the jury to consider whether Martin could have reasonably believed, or reasonably failed to hold the belief, that he was perceived as a lethal threat to Zimmerman, and whether he should have acted differently on this basis.

When it comes to sexual offence cases, feminists have long since pointed out the problems that arise when juries are asked to gauge the reasonableness of fear, or of a belief in another person's consent. Courts are prone to use "reasonable man" standards. For instance, in *State vs Rusk*, it might be convincing to a court that Pat could have run away, in consideration of what a reasonable man would have done in her place. However, a male judge or a jury full of men might fail to understand how a woman might be differently situated when stranded without her car keys in an unknown neighborhood, late at night. Feminist philosophers suggest that courts appeal to a "reasonable woman" standard in determining the *actus reus* of criminal cases in sexual assault and coercion. If a reasonable woman would submit to sex rather than face running through an unknown neighborhood at night, then her sexual compliance cannot constitute consent. Further, a reasonable woman, unlike a man, might not assume that she should outrun her assailant. Joan McGregor points out that resisting with force is a very masculine instinct. Women are raised to submit and endure because their resistance against a man will be futile and cause them more harm. In light of this difference, a lack of physical resistance is not a form of consent.[14]

Hubin and Healey agree with the feminists' concerns, but do not think that substituting a "reasonable woman" standard will help in the prosecution of rape cases. Even if this alternative standard would help establish the *actus reus* of sexual offenses, it would not help establish the *mens rea.* Even if Pat was found by the appeal court to have been the victim of non-consensual sex, this would not mean that Rusk could be convicted of rape. As long as he held a reasonable belief that Pat *did* consent, then he must be acquitted. While a "reasonable woman" standard could be appropriately applied to Pat, a "reasonable man" standard must be

[14] McGregor (2005, 41). See also Estrich (1987, 65).

applied to Rusk—and, courts deem reasonable men to believe that women are consenting to sex with them if they do not provide a show of physical resistance.[15]

Hubin and Healey suggest that instead of adopting a "reasonable person" standard of any type, we instead adopt a legal standard based on: What is it reasonable for the state to expect of a person? Is it reasonable for the state to expect someone in Rusk's position to halt his sexual advances and ask if Pat wants to go home untouched? Remember that Pat claims to have asked Rusk, "If I have sex with you, will you let me leave without killing me?" Is it reasonable for the state to expect Rusk to respond by saying, "I'm not going to kill you whether or not you have sex with me."[16] Is it reasonable for the state to expect Pat to ask more directly, "If I don't have sex with you, will you kill me?" Is it reasonable for the state to expect Pat to attempt to make an emergency phone call, when the man she believes to be her assailant might return at any moment?

Hubin and Healey think this proposal is virtuous because it does not require members of a court of law to differentiate between features of a person's mind and features of their circumstances (e.g. could someone's prior experience of being raped count as a feature of their circumstance)? They also think that it avoids making any particular generalizations about what a man versus a woman would reasonably do or reasonably believe. They point out that a "reasonable woman" standard assumes that one standard should apply to all women. However, in assessing *State vs Rusk*, they point out:

> If she [Pat] were a six-foot, 200 pound, black-belt karate instructor confronted by a five-foot, 140 pound, partially paralyzed assailant, then, *ceteris paribus*, it might be reasonable to treat her failure to scream, call for help, leave or employ physical force to resist the assault as in indication of consent. Alternatively, if she is a five-foot, 90 pound, woman who has been previously raped, confronted by a six-foot, 200 pound, assailant, then, *ceteris paribus*, it seems unreasonable for the law to demand of her that she engage in these things in order not to be judged to have given consent . . . On this view, we are not ultimately interested in what a reasonable agent (woman, man or person) would do; we are, at bottom, interested in what it is reasonable for us to require (expect) individuals to do. The gender, if any, of some hypothetical reasonable agent just drops out of the picture.
>
> (Hubin and Healey 1999, 136–7)

I think that the main virtue of Hubin and Healey's proposal is that it does not leave open the following strategy for defense teams. With reasonable person standards, a defense team need only conjure up a single, possible explanation of

[15] Hubin and Healey (1999, 136).

[16] Note that *State vs Rusk* was heard before the Sexual Offense Act of 2003, and so the reasonability of Rusk's belief was not called into question at the time.

how a reasonable man might have come to think that a woman was consenting to sex. Think how quickly a student can come up with a possible counterexample to a generally true proposition, how easily any of us could tell a made-up story of how a genuinely innocent, adult man was duped into believing that a 15-year-old girl was really 18 (an excellent, fake passport—designed just to entrap unsuspecting men into sex with a minor). Since the burden of proof is on the shoulders of the prosecution, all that a defense needs to accomplish is to convince a jury that there is *some* way that a reasonable man could have held a belief that the woman was consenting to sex.

Curley suggests that if a man is going to claim that he had a reasonable belief in a woman's consent, "then we must assume that he considered the possibility that she was not consenting, and rejected it."[17] Carole Pateman points out that if a man really considered this possibility, that the woman was not consenting, he certainly couldn't reasonably reject this possibility if she were verbally refusing sex or physically resisting sex in any way.[18]

A virtue of Hubin and Healey's proposal is that we might be able to say, uniformly, that the state can reasonably expect that person A consider the possibility that person B is not consenting, and only reject it if he can find no evidence for that possibility being the case. If person B is saying, "No," then he cannot reject the possibility, and should not have sex with B. If there is a weapon present, then he cannot reject the possibility. If she expresses to him a fear that he might kill her, then he cannot reject the possibility. If he has taken away her most obvious means of safe retreat (e.g. her car keys), then he cannot reject the possibility. If someone in this situation defends himself by saying, "I didn't think of these things," that cannot matter. It was reasonable for the state to expect him to consider these things.

Hubin and Healey are mistaken to think that the state can reasonably expect that victims of sexual coercion can reasonably be expected to fight back or flee, depending on their size and strength. Even if Pat was a 200-pound black belt in karate, the state should not demand that she physically resist sex rather than comply with Rusk's demands, and that her compliance amounts to consent. After all, even a very strong person can still expect to be somewhat injured by a fight. Further, Pat might be unwilling to do the physical harm to Rusk that might be required to incapacitate him, such that she could flee. Pat's unwillingness to use her considerable strength in self-defense should not be interpreted as her consent to sex. That she voiced her refusal, that she communicated her fear of being killed—the state can demand no more than this of Pat (in fact, I think it cannot

[17] Curley (1976, 348).

[18] See Pateman (1980). She says, "The circumstances in which a man might so deliberate, and come to an honest, but mistaken, belief about consent, are unlikely to be straightforward or simple-and surely would preclude explicit, prolonged manifestations of refusal by the woman and threatened or actual physical violence by the man" (160).

demand this much, since oftentimes fear paralyzes rape victims, and they are unable to say anything). Rusk must consider and reject the possibility that Pat is consenting, and her silence is not grounds for rejecting the possibility. It is reasonable for the state to demand that person A does not reject the possibility that B is not consenting on the basis of B's silence.

Part of the reason why I take person B to be without much responsibility—certainly not much epistemic responsibility—is because she does not choose to act in a way that has high stakes for another person. If she complies and has sex with person A, even though her belief that person A is coercing her is completely unreasonable, person A does not suffer for it. However, if the belief is completely unreasonable, then person B might have a duty to refrain from holding person A accountable for the non-consensual sex that person B endured—at least, short of new information that better justifies her belief or fear, learned subsequently.

Now, Hubin and Healey's proposal for handling reasonability in sexual offense law can also be helpfully applied to self-defense law. After all, asking judges and juries to consider what a reasonable person would do in Zimmerman's situation is subject to bias—perhaps not gendered bias, as is the case with sexual coercion. Instead, the reasonable person standard is subject to racial and ethnic bias when it comes to self-defense cases.

John K. Roman, from the Urban Institute, analyzed FBI data and found that the race of a shooter and the race of the person being shot both make a big difference in the prosecution of defendants who use self-defense strategies in their trials. Roman was comparing states that have "stand-your-ground" laws with states that do not have such laws (note that Zimmerman's defense team did not formally make use of this particular defense law).[19] He found that there is a remarkable discrepancy in the success of convincing a jury (or judge) that a killing is justified, depending on the races of the persons involved. In states with "stand-your-ground" laws, white people shooting black people is found to be justifiable, for reasons of self-defense, 17 per cent of the time (versus 9 per cent of the time in states without "stand-your-ground" laws), whereas, in all states, black people shooting white people is found to be justifiable, for reasons of self-defense, only 1 per cent of the time.[20]

[19] "Stand-your-ground" laws allow people to kill an aggressor instead of requiring someone who comes under attack to retreat to a safe place. These laws are controversial extensions of the age-old "Castle laws" (laws that allow you to shoot someone intruding into your home). "Stand-your-ground" laws say that not only your home, but any public place in which you have a right to be is a place from which you have no duty to retreat. The controversy surrounding these laws became part of the cultural debate during Zimmerman's trial, even though Zimmerman's defense team did not choose to make a case using Florida's "stand-your-ground" law. See Alvarez and Buckley (2013) and also Jonsson (2013) for discussion of these laws during the time of Zimmerman's trial.

[20] See Roman (2013).

Juries are more likely to think that a killer is justified when his target is a black person—especially a black man or boy. This is because they are more likely to agree that his belief that the other person is going to kill or gravely injure him/her is reasonable. If we were to apply a REfS standard, instead of a reasonable person or reasonable belief standard to self-defense killings, this could help us eliminate the racial component of a jury's deliberations. We should not ask juries to consider: Did Zimmerman have a reasonable belief that Martin was going to kill him? Could a reasonable man have believed such a thing? If we only considered Martin's youth and relatively small size, compared to Zimmerman, it would be surprising that a jury thought this belief to be reasonable. After all, Martin was not in a physical brawl with Zimmerman that involved even remotely serious injuries. It is only in consideration of Martin's race, and American stereotypes of black men and boys, that the jury's decision is not surprising.

Recall that the defense attorney suggested that Martin had four minutes to go home, and did not, before being shot, and that his refusal to do so meant that he caused his own death. Earlier, I suggested that there were only two ways that the lawyer's suggestion could possibly bear upon the jury's decision to deem Zimmerman's belief reasonable: (i) We presume that Martin, if reasonable, would have known that he was perceived as a lethal threat, and if he wasn't a threat, then he would have done whatever he could to change Zimmerman's perception. So, if he does not act to change this perception, in the course of four minutes, than Zimmerman's belief is rendered reasonable. Alternately, (ii) we might say that Martin—knowing he is perceived as a threat—forfeits his right to life by choosing to remain and menace Zimmerman.

Note that these accounts are both flawed. It is not clear that Martin has a responsibility to change the perception of Zimmerman. Even as a teenager, Martin has a right to walk around the neighborhood, make purchases, and linger in the rain while talking on the phone. If he is engaging in no violent or illegal behavior, then it is not his responsibility to prove to others that he is not a threat. Zimmerman's stalking behavior was the behavior that necessitated some sort of signal, from Zimmerman to Martin, that Zimmerman was not a threat to Martin. This is true, regardless of what happened in the subsequent, four confrontational minutes. If anyone behaved in a way, at the outset, that justified the other person's initial, violent confrontation, it is Zimmerman. Even if Martin did attack Zimmerman (using mild force—based up the forensic testimony), this attack needs to be viewed in the context of Zimmerman following Martin and instilling in Martin a reasonable fear of Zimmerman. It could well be that Zimmerman forfeited his right against being punched in the nose.

If the court thinks that "going home" is the way for Martin to signal that he is not a threat to Zimmerman, then Martin is being held to a standard that is different than Zimmerman. Zimmerman had four minutes to go home—in fact, he had many more minutes after being told by the police hotline to stop pursuing

Martin. It is this very double standard that made the case noteworthy to academics and political commentators during Zimmerman's trial. Though Zimmerman did not formally appeal to Florida's "stand-your-ground" laws in his defense, those laws were informally used by the defense team and by Judge Nelson, overseeing the trial. The jury was instructed to keep in mind that Zimmerman had no responsibility to retreat to a safe spot instead of shooting Martin, that he could stay and "meet force with force,"[21] whereas, the defense lawyer ended his closing statements with the suggestion that Martin should have gone home and that, by failing to do so, he caused his own death.

For these reasons, both of the explanations of why Martin's failure to go home justified Zimmerman killing him are steeped in double standards—perhaps racial, perhaps age-related. The jury agreed with the defense, however. Applying the REfS standard to cases of killing in self-defense leaves less room for juries and judges to implement racial double standards.

What is it reasonable for the state to demand of someone in Zimmerman's situation? This is a question that can be asked and answered without specifying the race of the people involved. Legal codes should be established that specify what type of information gathering, warning, or endurance of minor injuries can be expected or demanded by the state. For instance, maybe it is reasonable to demand that Zimmerman (or anyone in his situation) endure a bloodied nose or a bump to the head without shooting, especially if he was the one who initially pursued and confronted his assailant. Maybe it is reasonable for the state to expect and demand that Zimmerman (or anyone in his situation) tell his assailant that he has a weapon and will use it. Maybe it is reasonable for the state to demand that I never shoot someone who is not making physical contact with me, and is not brandishing a weapon at me. If legal policy was written in this way, the juries would not have to determine the reasonability of a defendant's beliefs, a project that might involve racial biases. Juries would simply need to determine whether someone met the demands of the state before killing in self-defense.

Can the state reasonably expect or demand anything from someone in Martin's situation? Of course: The state can reasonably expect that Martin will not attack or threaten Zimmerman, unprovoked. Of course, there needs to be policy that helps us adjudicate what it means for Martin to be provoked by Zimmerman (e.g. is stalking a provocation that justifies a punch to the nose?). However, even if someone in Martin's position falls short of meeting the state's reasonable expectation, it does not follow that he has signaled a lethal threat to Zimmerman, nor that he has forfeited his right to life. For this reason, it is not clear that the answer to the question, as it pertains to Martin, will have much bearing on the answer to the question as it pertains to Zimmerman.

[21] See Jonsson (2013).

I want to point out that the REfS standard helps resolve racism in sexual coercion cases as well as self-defense cases. In the United States, black men are perceived as more violent, and are more likely to be viewed as threatening. For this reason, American juries have a history of being more willing to convict a black man in a rape trial, including trials in which men are accused of sexual coercion.[22] There is a longstanding cultural narrative about black men as rapists—one that motivated countless lynchings of black men in the hundred years after the American Civil War.[23] When there are existing cultural narratives about a particular type of person posing a threat, it is easier to view actual or imagined threats as credible.[24] If both black and white men accused of rape are subject to a REfS standard for determining whether their sexual partners are consenting, then juries will only be asked to determine whether the man met those standards. For instance, perhaps the state can reasonably expect that person A will not have sex or solicit sex with a new partner while armed, lest she believe that she is under threat. If so, then this can standard can be applied equally to white and black men. The jury need only consider whether person A was armed at the time of the sex act or in the time proceeding the sexual act when he made the sexual request.

The REfS standard also does some work to prevent racism against black, female victims of rape from rearing its head in rape trials. Reasonable man and reasonable belief standards in sexual offense cases have failed black women. There is a persisting American attitude towards black women that they are "un-rapable" because they are in a constant state of desiring and wanting sex.[25] This attitude is especially dehumanizing, not because of the way that it sexualized black women (it is not clear that sexualizing a person is a way of dehumanizing them), but because it assumes that the woman's rights against sexual interference are continuously waived. This assumption produces the result that the woman lives, *de facto*, without sexual rights. So, when a jury is asked whether a reasonable man would have believed that a black woman consented to sex, the jury is likely to say yes—no matter what means the black woman used to resist or refuse the sexual encounter. I should note that this phenomenon bears out whether the male defendant is black or white.[26] It seems that American attitudes that black women are "un-rapable" because they are continuously waiving their sexual rights is even stronger than our presumption that black men are racists. The REfS standard would do some work to remove the opportunity for racist judgments in jury deliberations. Instead of being asked what a reasonable man would believe about the woman's consent, the jury would be asked whether the man had met the reasonable expectations of the state to be sure of the woman's consent—expectations that would be the same whether the victim was black or white.

[22] See Bar On (1999). See also Roberts (1997) and Davis (1981).

[23] See Biss (2009 [2011]).

[24] See footnote 5 above. Scott Anderson does not apply his theory to racial narratives that serve to make the threat perceived by white people by black people more credible.

[25] Bar On (1999, 206). See also Collins (2000 and 2005, 223).

[26] See Donovan and Williams (2002). See also: Foley et al. (1995) and George and Martinez (2002).

Note that in order for the REfS standard to have the advantages that I suggest, allowing for less opportunity for racism in jury deliberations, the expectations of the state need to be outlined ahead of time, and be made known to the public. This is true both in sexual coercion cases and in self-defense cases. Hubin and Healey think that it is important that a jury consider what the state can reasonably expect of individuals, given all of the particulars of the individuals in question (e.g. the 200-pound, black belt in karate who is the victim of sexual coercion). I have already explained that I think this is problematic. Further, prescribed expectations—ones that can be applied to all people regardless of race, and be made well known to the public—can still be nuanced. For instance, perhaps if sexual partners have a long history of non-coercive sex with each other, then the state should require less pre-sexual investigation into the other's consent. What I mean is: Consider a man whose wife has refused sex from him many times, without coming to any harm. This man can reasonably believe that her sexual agreement counts as consent, without asking her ahead of time if she knows that she can safely say "No." Consider our traffic laws. In general, a red light means stop. Everyone knows this. However, in the United States, if everything is calm, and you can see in all directions, and there is no special sign prohibiting it, you may turn right on red. This nuance to the law is well known—and causes little trouble.

In this short chapter, I have argued that reasonable person or reasonable belief standards do a poor job of handling both sexual coercion cases and killing in self-defense cases—and for similar reasons. Our attitudes about what a reasonable man or woman would have believed in a particular situation are subject to racist and sexist constructions. American juries seem incapable of thinking that a reasonable man would do *much* to ascertain whether his partner is truly consenting to sex. American juries seem prone to think that reasonable men and women, when confronted with a black man or boy, will believe themselves to be in mortal peril. Applying the REfS standard to both cases better avoids these discriminatory applications. I have argued that, contra Hubin and Healey, it does not make sense to apply this standard to victims of self-defense killings and sexual coercion as a way of deliberating about the accused.

References

Alexander, Larry (1996). "The Moral Magic of Consent (II)." *Legal Theory* 2: 165–74.

Alvarez, Lizette (2017). "Florida Posed to Strengthen 'Stand Your Ground' Defense." *New York Times* (March 15, 2017).

Alvarez, Lizette and Cara Buckley (2013). "Zimmerman Is Acquitted in Trayvon Martin Killing." *New York Times* (July 13, 2013).

Anderson, Scott (2016). "Conceptualizing Rape as Coerced Sex." Ethics 127 (October 2016): 50–87.

Bar On, Bat-Ami (1999). "'The Scottsboro Case' on Responsibility, Rape, Race, Gender, and Class," in Keith Burgess-Jackson (ed.), *A Most Detestable Crime*. New York: Oxford University Press, 200–210.

Biss, Eula (2009). *Notes from No Man's Land: American Essays*, original edn, 2009. Minneapolis, MN: Graywolf Press.

Collins, Patricia Hill. (2000). *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment*, 2nd edn. New York: Routledge.

Collins, Patricia Hill. (2005). *Black Sexual Politics: African Americans, Gender, and the New Racism*. New York: Routledge.

Curley, Edwin M. (1976). "Excusing Rape." *Philosophy and Public Affairs* 5: 325–60.

Davis, Angela (1981). "Rape, Racism, and the Myth of the Black Rapist," in *Women, Race, and Class*. New York: Vintage Books.

Donovan, Roxanne and Michelle Williams (2002). "Living at the Intersection: The Effects of Racism and Sexism on Black Rape Survivors." *Women and Therapy* 25(3/4): 95–105.

Dougherty, Tom (2015). "Yes Means Yes: Consent as Communication." *Philosophy and Public Affairs* 43(3): 224–53.

Estrich, Susan (1987). *Real Rape*. Cambridge, MA: Harvard University Press.

Feinberg, Joel (2001). "Abortion and the Conflict of Claims,' in George Sher (ed.), *Moral Philosophy: Selected Readings*, 2nd edn. Belmont, CA: Wadsworth/Thomson Learning, 735–47.

Foley, Linda A. et al. (1995). "Date Rape: Effects of race of Assailant and Victim and Gender of Subjects on Perceptions." *Journal of Black Psychology* 21(1): 6–18.

George, William Henry and Lorraine J. Martinez (2002). "Victim Blaming in Rape: Effects of Victim and Perpetrator Race, Type of Rape, and Participant Racism." *Psychology of Women Quarterly* 26: 110–19.

Hubin, Donald C. and Karen Haley (1999). "Rape and the Reasonable Man." *Law and Philosophy* 18(2): 113–39.

Hurd, Heidi (1996). "The Magic of Consent." *Legal Theory* 2: 121–46.

Jonsson, Patrik (2013). "Racial Bias and 'Stand-Your-Ground' Laws What the Data Show." *Christian Science Monitor* (August 6, 2013).

McGregor, Joan (2005). *Is It Rape? On Acquaintance Rape and Taking Women's Consent Seriously*. Farnham, Surrey: Ashgate Publishing Ltd.

Pateman, Carole (1980). "Women and Consent." *Political Theory* 8(2): 149–68.

Roberts, Dorothy. (1997). *Killing the Black Body: Race, Reproduction and the Meaning of Liberty*. New York: Vintage Books.

Roman, John K. (2013). "Race, Justifiable Homicide, and Stand Your Ground Laws: Analysis of FBI Supplementary Homicide Report." *Urban Institute*, https://www.urban.org/sites/default/files/publication/23856/412873-Race-Justifiable-Homicide-and-Stand-Your-Ground-Laws.PDF.pdf.

Wortley, Natalie (2013). "Reasonable Relief in Consent under the Sexual Offences Act 2003." *Journal of Criminal Law* 3: 184–8.