SUMMARY: Husak, Douglas; ‘Rapes Without Rapists: Consent and Reasonable Mistake’


Thesis: Husak aims to provide a theory explaining the necessary criteria for a mistake regarding consent to sex to be considered reasonable. He defends and qualifies a position put forward in the 1992 article, ‘Date Rape, Social Convention, and Reasonable Mistakes’, co-authored with George C. Thomas III.

Introduction

Husak begins by differentiating the act of rape from the crime of rape:

“Suppose that the crime of rape is defined as non-consensual sex. A person who performs an act of sex without the consent of the victim has thereby committed an act of rape. The victim of this act has been raped. But the fact that a victim has been raped and a defendant has committed an act of rape does not resolve the question of whether this person has committed the crime of rape. The crime of rape requires not only that a person commit the actus reus of rape, but also that he do so with mens rea.” [233]

A rapist may be defined either as someone who has committed the act of rape, or someone who has committed the crime of rape. If committing the act of rape is not sufficient to call someone a rapist, then we find it possible to say that a victim has been raped, but not by a rapist. However, Husak notes that this is a common feature of many crimes. [233]

Generally, we accept that mens rea is necessary in order to hold someone criminally liable and, in some cases, punishable. In the case of rape, this means that someone who makes a reasonable mistake of fact about consent should not be held criminally liable, or that a reasonable mistake of fact about consent should function as a defence if such a person is accused. [234]

A claim of reasonable mistake, if used by as a defence, contains two elements: (i) that the defendant had a false belief about the presence of consent, and (ii) that his false belief was reasonable. [235]

Husak’s aim is to focus on the criteria by which one should judge a mistaken belief about consent to be reasonable or unreasonable. He makes two claims: (a) that consent is generally given or withheld non-verbally, and (b) that empirical claims about how consent to sex is generally given or withheld should be used to assess the reasonableness of a mistake regarding consent. [235]

The Ontology of Consent

What kind of thing is consent? According to mentalistic conceptions, consent is wholly a state of mind. Conversely, behaviouristic conceptions believe consent to be wholly composed of behaviour. [236-7]
According to mentalistic conceptions, the behaviour that conveys consent can be distinguished from consent itself. This is not true of the behaviouristic conception, where the behaviour that expresses consent is consent. [237]

Any attempt to defend the mentalistic conception of consent will be required to explain what kind of mental state consent is. One view is that consent is composed of beliefs and desires, but it is not clear what these might be. Behaviouristic accounts face similar problems. It seems possible that any given behaviour could be exhibited without actual consent from the individual. [237-8]

Husak concludes that consent must be, at least, partly mental, such that “no person can consent to sex without having an intention to consent”. [238] The most likely truth is that consent consists in a combination of mental state and behaviour. However, a specific account is beyond the scope of the current discussion. [238-9]

**How Consent is Expressed**

Husak’s view is that, if consent is expressed through behaviour, then it is better to judge empirically how this occurs, rather than provide a priori conditions as to how it should occur. [239]

A non-empirical account of how consent is expressed will create circumstances under which an individual may have intended and, at their own insistence, expressed consent; yet will not have done so as a matter of law. [239]

Husak provides two important generalizations, based on empirical survey data: (i) consent to sex is typically non-verbal, and (ii) even rejection is typically non-verbal. [240-1] It is, therefore, possible that non-verbal signals may be, at times, misinterpreted and that mistakes may be made about the presence of consent.

**Mistakes**

Husak points to empirical data that suggests that men are likely to interpret the behaviour of women as sexually motivated, even when it is not. [242] He lists three cultural factors, which add to this fact, along with the indirect ways in which consent is given or withheld, which make mistakes about consent possible:

1. Women often reject an initiated sexual activity, but allow another to continue.
2. Culture teaches men that ‘good girls say no’, whether they mean it or not. Men may, therefore, believe that insistence is warranted if the woman really does want to have sex.
3. Some women (though rarely) do offer ‘token’ resistance to sex. This can reinforce men’s belief that women want sex more often than they admit. [243]

More than this, there is evidence that men are just as likely to engage in token resistance as women, meaning that they are doubly aware that ‘no’ does,
occasionally, mean ‘yes’. This helps to show how a man can mistake real resistance for token resistance. [244]

It is also a fact that both men and women engage in sexual activity when they do not want to. Husak argues that this cannot be seen as coercive, as many perform activities that they do not want to (work, visiting relatives), yet are entirely consensual. Unwanted, or compliant, sex may not be ideal, but the minimum threshold to avoid criminal liability is rarely, if ever, the ideal model. [245]

Empirical data may also suggest that some men (and a smaller number of women) believe that force can be justified in obtaining consensual sex. While it is difficult to believe that a man could continue to be mistaken about consent if significant force were required, minor force may be construed by men as simply coercing women to things which they want to do, but who feel culturally restrained. [246-7]

“We have painted a picture, using empirical data, of how a man might make a mistake about whether a woman is consenting to have sex even though she has indicated her lack of consent and even though he may have used minor force to overcome her resistance. We have assumed that the man has misperceived the woman's behaviour as more sexual than it was, and that the man acts in a forceful manner to get what he believes they both want, or to persuade her to engage in compliant sex. What remains to be examined, however, is the critical question: can any of these mistakes ever be reasonable?”

Re�sonable Mistakes

To begin, Husak notes that his theory is to provide only an account of reasonable belief about consent, rather than a general account of reasonableness, or reasonable belief. [247-8]

Moving on, he asks: “How might I defend the reasonableness of my belief that you have consented to something?” Presumably, the answer will involve an inference from your behaviour. If you have behaved in a manner consistent with others who are expressing consent, then this would seem to be a reasonable belief. Additionally, if I know you well, then my inferences regarding your behaviour are likely to be more accurate than if we are relative strangers. [248]

Empirical generalizations about how others typically behave in a particular context give rise to social conventions. In relying on generalizations, we employ a totality of the circumstances approach. That is, we do not privilege or exclude any material evidence of consent. [249]

Husak draws comparisons with people who are in love, showing that linguistic expressions, which contradict empirical generalizations, can produce reasonable and unreasonable beliefs, regardless of their truth, about a person’s mental state. [249]
“A person who behaves in the way that persons generally behave when they consent to sex does not entail that they have in fact consented. Some such persons have not consented. Their behaviour, however, makes reasonable someone else’s belief that they have consented. Since that belief is reasonable, actors who hold it lack mens rea; they might commit a rape, but they are not rapists.” [250]

**Is Our Theory Unfair to Women?**

Many feminist philosophers have claimed that the generalizations, given above, offer inadequate protection to women and, therefore, should be changed. They insist that, in order to prevent mistakes and, therefore, rapes from occurring, instigators of sexual activity should not be permitted to rely on empirical data. These philosophers believe that a change in law is necessary in order to force a change in social conventions. [250]

One claim made in support of this feminist position, is that the empirical data looks as it does due to “pernicious sexual stereotypes and gender inequality.” If these issues were address, the argument goes, then women would not behave so ambiguously when expressing or withholding consent, and so mistakes would not occur. [251]

Husak provides some responses to the allegations that his theory is unfair to women:

1. The current theory should not be abandoned unless another, the superiority of which is evident, can replace it. Husak thinks that his critics fail to provide a sufficient alternative, noting that, even if the ways in which we express consent change, we will still require an account of reasonable mistake. [251-2]
   a. It is worth noting, also, that the theory provides an account of when mistakes are unreasonable, meaning that it will show that some sincere false beliefs do not constitute a defence of rape.
2. It is not clear that changing the law will change the social conventions regarding sexual consent. It is unlikely that a change in the law would change the ways in which people actually behave. At least in the short term, it is likely to criminalize many who are acting in accordance with prior conventions. [253]
3. Husak agrees with Schulhofer’s analysis that ‘no’ does not always mean ‘no’ and, therefore, that mistakes will be made, some of them reasonable. However, he rejects Schulhofer’s proposal that all men who proceed with sex after an explicit ‘no’ should be convicted of a sex crime (for the reason that we must assign some meaning to the word ‘no’). Essentially, the argument states that, in order to protect women, reasonable mistake should not function as a defence in rape cases. Husak thinks this position is unfair to men. [254]
4. Finally, some commentators argue that rape law should protect the autonomy of women. Husak responds, however, asking: if this is the
case, how can the law preclude women from expressing consent in
the way they see fit? [255]

Conclusion

To sum up, there are two claims made about consent to sex:

1. Empirical data suggests that consent is expressed or withheld, generally,
   by non-verbal behaviours.
2. That the reasonableness of a mistake about consent should be assessed
   with reference to generalizations from empirical data. [256]

This means that, in order for a mistake about consent to be considered
reasonable, it should be the case that the behaviour exhibited by the victim
conformed significantly to the behaviours typically used to express or convey
consent. Mistakes about consent in which the victim acted in ways which are
atypical of how consent is generally expressed, should, in turn, be considered
unreasonable.

References

Husak, Douglas; ‘Rapes Without Rapists: Consent and Reasonable Mistake’ The

See also:

Husak, Douglas N. and George C. Thomas III; "Date Rape, Social Convention, And
Reasonable Mistakes", Law and Philosophy, 11 (1992) p. 95