CONSENT TO MARITAL RAPE: COMMON LAW OXYMORON?

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> No slave is a slave to the same lengths, and in so full a sense of the word, as a wife is . . . however brutal a tyrant she may unfortunately be chained to - though she may know he hates her, . . . he can claim from her and enforce the lowest degradation of a human being, that of being made the instrument of an animal function contrary to her inclination.[1]

INTRODUCTION

Marital rape has been, for many women, a symbol of law's complicity in male domination. Exempting husbands who raped their wives from criminal prosecution was viewed as an obvious sign of acquiescence to male power. Inevitably, a message was being sent to women about sexuality, about their inability to refuse consent, and about the legal constitution of marriage, despite denials by lawyers. Therefore, the abolition of the male marital right has been welcomed throughout the common law world.[2] English and Australian final appeal courts recently followed the lead of many other jurisdictions.[3] The purpose of this Article is to examine the different paths that led to the abolition of the male marital right in the English and Australian jurisdictions. The object is to draw les-

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1 JOHN STUART MILL, THE SUBJECTION OF WOMEN 248 (Everyman's Library ed., 1929) (Cambridge Univ. Press 1869).

2 *See, e.g.*, JENNIFER TEMKIN, RAPE AND THE LEGAL PROCESS 43-60 (1987); Michael D.A. Freeman, *But If You Can't Rape Your Wife, Whom Can You Rape?: The Marital Exemption Re-examined*, 15 FAM. L.Q. 1 (1981); DIANA RUSSELL, RAPE IN MARRIAGE (1982).

3 R. v. R., 4 All E.R. 481 (H. L. 1991); The Queen v. L., 66 A.L.R. 36 (Austl. 1991), *citing* S. v. H.M. Advocate, 1989 S.L.T. 469 (H.C.J.).

sons about different legal cultures that apply common law and about the meanings of such cultures for women.

England's export of the common law was at its height in the seventeenth and eighteenth centuries. Wherever imperial domination was established, for however short a time, England's common law was imported. For example, the writings of Blackstone were inordinately powerful in the establishment of the common law in the United States.[4] In adopting the common law, legal symbols and messages were attached; some were represented while others were ignored.[5] Ideas about women contained in the law were shaped by medieval and early modern English societies, but a woman's status was legally represented. Whether discussing American, Australian, Canadian or Irish law, husbands were exempt from criminal prosecution for the rape of their wives. Furthermore, wives were unable to consent or refuse consent. It is true that over time, exceptions to absolute exemption were elaborated within various jurisdictions, but the continued message, nevertheless, was that women within a marriage were to be dominated and available for sexual intercourse with their husbands on command.

With the arrival of second wave feminism,[6] the message of male marital right did not go unremarked. As common law jurisdictions were criticised by women activists, the judiciaries and legislatures distanced themselves from this manifestation of the law. The challenge, and subsequent abolition, took a variety of forms in accordance to the jurisdiction in question. Some commentators denied that this aspect of the common law had been "received" in their country,[7] while others accepted that reception had taken place, but abolished the exemption by legislation.[8] In England and Wales, home of original common law, the judiciary anticipated legislation and declared the male marital right to be a fiction due to "changed social circumstances."[9]

This Article first examines first the significance in feminist legal theory of the male marital right, focusing particularly on consent and the capacity to refuse consent, as being central to one's

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[4] *See* Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979).

[5] I have argued that the omission of women, and silence about legal subjects, is as significant as the inclusion of women. Whether one is presented or omitted, this is a form of representation. *See* KATHERINE O'DONOVAN, SEXUAL DIVISIONS IN LAW (1985).

[6] This period dates from the 1960's.

[7] *See* TASLIM OLAWALE ELIAS, BRITISH COLONIAL LAW (1962) (providing the theory of the reception of common law in British colonies).

[8] *See, e.g.*, Crimes (Sexual Assault) Amendment Act, (1981) (N.S.W. Austl.); Criminal Code, § 246.8 (1992) (Can.); Crimes Amendment Act, No. 3 (1985) (N.Z.).

[9] R. v. R., 4 All E.R. at 484.

autonomy. Part II questions from whence the common law derived the ideas contained in the exemption. Part III contains a detailed study of the Australian and English decisions to abolish the male marital right, reflecting upon comparative legal cultures. Part IV contemplates ethical intimate relations.

PART I: "FOR SHE HAS NO RIGHT OR POWER TO REFUSE HER CONSENT"[10]

Consent is a badge of adulthood. The subject's autonomy is marked since the law requires the consent of a legal subject prior to some form of bodily invasion. In recognizing a lack of capacity, the law denies to infants and mentally impaired persons the ability to consent, or to refuse consent. Although the capacity to consent and the capacity to refuse consent are often not distinguished in legal discussion, there are circumstances in which this distinction is important. However, in judicial rulings on marital rape, this distinction has not even been introduced. The common law categorization of married women, along with infants and the insane, has often been noted and explained by such concepts as paternalism or patriarchy. But we should not pass by the significance of consent too quickly. For political philosophers, consent is the lodestone of citizenship. The married woman's inability to consent, and therefore to refuse consent, has affected her autonomy. But it has also affected how women are viewed by the law, and may help to account for why "no" is sometimes taken to mean "yes," particularly in rape cases.[11] Part I focuses on the importance of consent in the justification of political authority, in the ways the public regards politics, and in the connection consent has with marital rape.

A major account of the significance of consent in political philosophy can be found in Carole Pateman's *The Sexual Contract.*[12] This account argues that, because of problems over women's lack of consent, women have not been fully accepted as individuals in liberal society. The argument is related to the story of the social contract as being the narrative of modern political society. Pateman's view is that social contract theorists overlooked the question of women's status when they explained the demise of patri-

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[10] R. v. Clarence, 22 Q.B.D. 23, 64 (1888) (Pollock, B). *See also* Charlotte L. Mitra, *"For She Has No Right or Power to Refuse Her Consent"*, 1979 CRIM. L. REV. 558; KATHERINE O'DONOVAN, FAMILY LAW MATTERS 1-9 (1993).

[11] In 1993, Judge Bland in Morwell County Court, Victoria, Australia said, "[I]t does happen, in the common experience of those who have been in the law as long as I have anyway, that 'No' often subsequently means 'Yes.' " SYDNEY MORNING HERALD, May 7, 1993.

[12] CAROLE PATEMAN, THE SEXUAL CONTRACT (1988).

archy.[13] As the sons killed off the father symbolically in order to create the contractual state, women were forgotten. Consent, so essential to contract, was required of men who agreed to the formation of the state, but the woman's consent was not required, and hence patriarchy continued. According to Pateman, women are not liberal individuals in the fullest sense of the word, for the ability to consent is the badge of the liberal individual.

According to Pateman, the husband's sexual rights over his wife's body symbolises the wife's lack of autonomy.[14] The wife cannot be incorporated into political society since her consent is required for the social contract. Her ability to consent is lacking because it is not required for the sexual contract. She is not regarded fully as an adult, and therefore does not have full autonomy. The centrality of consent to modern democratic society is undeniable, whether or not the reader rejects this argument on account of the very recent abolition of the male marital right. It is on this consent that the legitimacy of government depends. Consent through the vote is the justification for state action in the distribution of the burdens and benefits of citizenship. As stated by Pateman, "[i]t is no accident that women were so long excluded from those who consent; it may indeed prove intrinsic to liberal democracy that it cannot acknowledge women as citizens in the fullest sense of the word."[15]

It might be objected that Pateman's argument, partly based on the marital rape exemption, no longer holds in the circumstances of abolition. But the idea that one can just "add women and stir" (in the sense of adding women to social and political institutions), has long been shown by feminist theorists to be false. Incorporating women into the body politic means entry into institutions designed by men, for men. Incorporation means accepting the existing rules of the institution, whether it be of people of colour, or of people previously incapacitated.

Consent, and refusal of consent, play a particular role in marriage. In order for a marriage to be valid, the consent of both parties was required. However, once married, a woman lost her autonomy and her capacity to refuse consent. Her consent was not required if her husband wanted to have sexual intercourse with her. It is such a presumption of her consent, essentially a theory of

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[13] The term "patriarchy", as used by Pateman derives from Sir J. Filmer's book, PATRIARCHA, published in the seventeenth century. *See* GORDON J. SCHOCHET, PATRIARCHALISM IN POLITICAL THOUGHT (1975).

[14] PATEMAN, *supra* note 12, at 7, 123.

[15] *Id.* at 31.

implied consent, that is later labelled as being a legal fiction by the English House of Lords.[16]

Modern theories of democracy are grounded in consent, for as Anne Phillips points out, "it was the idea that government is an artifice, legitimated only by the agreement of subjects who are 'naturally' free, that revived the democratic tradition."[17] The reference is to seventeenth century Europe and to the United States Constitution. For liberals, one of the major problems with the theory of government is the justification of political authority. In the writings of Hobbes and Locke, the private individual took precedence to the state and it was the consent of such individuals that justified governmental rule.[18] The necessity of consent was instated despite differences amongst theorists as to what constitutes consent. Children, lunatics, servants and women, however, did not count as individuals.[19]

It is apparent that the modern version of consent is the extension of the ballot to all adults. However, since the arrival of political parties, the role of the consent element in government is slight. Consent in liberal theory now takes the form of setting boundaries to government action - the distinction so criticised by feminists between public and private realms. Carole Pateman argues that liberal theory provides us with a "double separation."[20] It is not just a separation between state and civil society, but one that is within civil society. In social contract theory, civil society is the creation of consenting *men*, and the relationship between the consenting male society and the government is what preoccupied political thought. The individual was disembodied, made into an abstract being. But within the civil sphere, there is a private sphere wherein women are found to be embodied persons, and not abstract beings. The civil individual and the public realm appear universal only in relation to and in opposition to the private sphere, the natural foundation of civil life.[21]

The individual is not gender-neutral, but male. To be a full individual one must be an appropriator, defined by what one owns,

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16 R. v. R., 4 All E.R. at 486 (examining whether a presumption of consent can exist in law for two hundred and fifty years, and subsequently be termed a legal fiction, and whether other legal concepts are susceptible to similar treatment).

17 ANNE PHILLIPS, ENGENDERING DEMOCRACY 23 (1991). *See also* ANNE PHILLIPS, DEMOCRACY AND DIFFERENCE (1993).

18 JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed.)(2d ed. 1967); THOMAS HOBBES, LEVIATHAN (1651).

19 PHILLIPS, *supra* note 17.

20 PATEMAN, *supra* note 12, at 11.

21 *Id.* at 113-14.

including oneself as a possession, not depending on others, free. This is the difference between the free man and the slave. The wage worker may enter into a contract for the use of his labour, but he owns his person and his capacities; he is proprietor of himself. As C.B. Macpherson phrases in his discussion of possessive individualism, "The individual in market society *is* human as proprietor of his own person. However much he may wish it to be otherwise, his humanity does depend on his freedom from any but self-interested contractual relations with others."[22]

The centrality of choice in the writings of male political theorists can be further used to highlight the problem of women and consent. For if "she has no right or power to refuse her consent," then she has no choice. Yet the ability to make choices is considered to be one of the most fundamental human capacities. It is this that makes humans command the respect of other humans. It is specifically human capacities that are thought to justify human rights, and deny them to animals, plants, and rivers. But as Phillips observes, "[w]hatever candidates we might offer for specifically human identity - rationality, autonomy, ability to make choices - they all turn out to have a sexual history."[23]

The problem is one of the incorporation of women into the liberal regime of consent, choice, individuals and rights. Women do not become abstract individuals merely because courts have granted them the "right" to refuse sexual intercourse to their husbands. The nature and extent of this "right" remains in doubt. In any case, the liberal individual retains a masculine shape.

Consent has been described by Pateman as being a male category.[24] The political status of women was tied to the sexual contract which, in confining women to the private part of the civil sphere, gave men access to the bodies of women. Whereas the individual is abstract, women are embodied. The contract between husband and wife served for two and a half centuries as the basis for denying women the status of individuals. What is necessary is the recognition of the embodiment of the woman, and of the man as gendered.

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22 CRAWFORD B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE 275 (1962).

23 PHILLIPS, *supra* note 17, at 33.

24 PATEMAN, *supra* note 12.

PART II: THE COMMON LAW MESSAGE

The story of the male marital exemption from criminal prosecution for rape starts with Sir Matthew Hale, whose compilation of law entitled *Pleas of the Crown* and published in 1736 is drawn from his court experiences. Due to the precendent nature of the system, it is not surprising that there was reliance on such texts which were based on court cases. However, there is reason to believe that Hale went beyond precedent and included his own views on marriage. Hale declared that "[t]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract."[25] It is notable that Hale believed in the possibility of one human submitting oneself physically to another in perpetuity.

With judicial divorce only becoming available in England and Wales in 1857, it is no wonder that some writers liken this contract to slavery.[26] But aside from Hale's introduction of his own views, which may have been congruent with the misogyny of the times,[27] there is reason to believe that Hale misinterpreted the only authority he cites, a case from one hundred years earlier, *Lord Audley's Case*.[28] *Lord Audley's Case* concerned the Earl of Castlehaven who was criminally convicted for holding down his wife in order to enable one of his minions to rape her. Hale could have interpreted this case as precedent for the possible criminal conviction of husbands, but instead chose to interpret it as a case concerning rape by a stranger, with the husband as a principal convicted of rape in the second degree.

A reading of *Lord Audley's Case*, juxtaposed with Hale's *Pleas of the Crown*,[29] shows a clever sleight of pen. In the former, there was no discussion of a wife's eternal consent to sexual intercourse in marriage, as that question was not raised. The status of a married woman, and whether she could bear witness against her husband, did however attract legal argument, and the court allowed the wife's testimony as "the party grieved and on whom the crime is committed."[30] In other words, status as wife did not absolutely pre-

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25 SIR MATTHEW HALE, PLEAS OF THE CROWN 629 (1736). Original publication in 1736 was forty years after Hale's death.

26 PATEMAN, *supra* note 12, ch. 5.

27 Gilbert Geis, *Rape in Marriage Reform*, 6 ADEL. L. REV. 284 (1978); David Lanham, *Hale, Misogyny and Rape*, 7 CRIM. L.J. 148 (1983); Gilbert Geis, *Lord Hale, Witches and Rape*, 6 BRIT. J. L. & SOC'Y 26 (1978).

28 Lord Audley's Case, 7 State Trials 401 (1631).

29 *See supra*, notes 25 and 28.

30 Lord Audley's Case, 7 State Trials at 414.

clude the presentation of evidence against a husband. But notwithstanding the wife's ability to testify, and the conviction of the husband for aiding the rape of his wife, and of the "minion" for the rape itself, Hale declared positively that the "husband cannot be guilty of a rape committed by himself upon his lawful wife." Hale asserted that status as a wife absolutely precluded such a charge, yet there was no direct authority for such a proposition.

The story might have ended with Hale had it not been for the reverence accorded to his views by subsequent judges, in both England and elsewhere. The fiction of a wife's permanent consent to marital sexual intercourse was based on the myth created by Hale, and that myth became legal doctrine because Hale's text was treated as unquestionable and sacred. But as mentioned, when the English House of Lords decided to abolish the male marital right, the wife's perpetual consent to sexual intercourse has been termed as being a "legal fiction."[31] Because the House of Lords was concerned with upholding Hale's authority and reputation, it was said that whilst Hale's statement of law was correct, the common law is capable of evolution in the light of changing social, economic and cultural developments. As "marriage is in modern times regarded as a partnership of equals,"[32] the law can now change.

There is reason to believe that abolition of the rule that a wife's consent to sexual intercourse with her husband is irrevocable was judicially necessary. The English courts had elaborated a list of exceptions to irrevocable consent which could not be logically supported. For example, physical separation and a petition for divorce were insufficient[33] whereas a court undertaking by the husband was sufficient.[34] What emerges from a series of cases in which no thread of logic can be discerned[35] is that women, since they could not do so themselves, need a court to revoke their consent for them. What the series of cases reveal is that choosing the appropriate action and court was a form of roulette. As Lord Keith concluded in the House of Lords, "[t]hose cases illustrate the contortions to which judges have found it necessary to resort because of the fiction of implied consent to sexual intercourse."[36]

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31 R. v. R., 4 All E.R. at 486 (examining whether a presumption of consent can exist in law for two hundred and fifty years, and subsequently be termed a legal fiction, and whether other legal concepts are susceptible to similar treatment).

32 *Id.* at 484.

33 R. v. Miller, 2 Q.B. 282 (1954).

34 R. v. Steele, 65 Crim. App. 22 (1977).

35 Richard Brooks, *Marital Consent in Rape*, 1989 CRIM. L. REV. 877.

36 R. v. R., 4 All E.R. at 487.

What is lacking in the judgments of the English judiciary is a recognition of bodily autonomy as a general principle for women and men.[37] To recognise such autonomy would have required denying the legitimacy of Hale's views. The upholding of Hale ensures the preservation of the legitimacy of the statements of previous generations of judges, but what is lost in the justification of tradition is a clear statement of principle concerning the right to bodily integrity as being a fundamental human right.

Prior to the judicial decision to recognise the fiction of a wife's eternal consent to sexual intercourse in marriage, the Law Commission, an official body charged with law reform, had published a discussion paper soliciting the views of the public.[38] It referred to previous discussions which had concluded that recognising marital rape would undermine the institution of marriage. Severing these family ties would cause a woman with children to cope with her emotional, social and financial problems as best she could, at the same time wondering if her children would resent what she had done to their father.[39]

As can be deduced from the foregoing, the doctrine of irrevocable consent denying a woman autonomy, turning the ethical relations of marriage into a form of slavery for one partner, is entirely omitted from such discussions. As late as 1991, English courts continued to proclaim Hale's proposition without apology. It might be argued that because criminal law concerns the liberty of the subject, the doctrine of irrevocable consent should be changed only by legislation, and only prospectively.[40] Even if a court should take that stance, it is still possible to openly and publicly condemn Hale's views about marriage and women.

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37 The legal culture, which the judiciary plays an important role in transmitting, has been analysed by NGAIRE NAFFINE, LAW AND THE SEXES: EXPLORATIONS IN FEMINIST JURISPRUDENCE (1990).

38 LAW COMMISSION, WORKING PAPER NO. 116, RAPE WITHIN MARRIAGE (1990); LAW COMMISSION, WORKING PAPER NO. 205, RAPE WITHIN MARRIAGE (Final Report) (1992).

39 CRIMINAL LAW REVISION COMMITTEE, WORKING PAPER ON SEXUAL OFFENCES (1980) para. 33. *See also* SEXUAL OFFENCES, 15TH REPORT, CMND. 9213 (1984). This objection to the undermining of marriage by allowing husbands to be charged with rape was later described in the following terms: "it is hard to believe that any but the emotionally crippled could entertain" such a view. THE INDEPENDENT, October 24, 1991. *See also* Michael D.A. Freeman, *Doing His Best to Sustain the Sanctity of Marriage, in* MARITAL VIOLENCE 124 (Norman Johnson ed., 1985).

40 Marianne Giles, *Judicial Law-Making in the Criminal Courts: The Case of Marital Rape*, 1992 CRIM. L. REV. 407. There is a problem: has the House of Lords shredded a rule that remained unchallenged in principle for over 250 years? Or has the House of Lords merely restated the common law's view of rape in marriage? If so, for how long has this position existed? The view that the defendant can complain of his conviction to the European Commission on Human Rights has been expressed orally by his legal advisors.

Hale's statement about marital rape must be placed in the context of his views about rape in general. Rape continues to pose various problems in the English legal process, as well as elsewhere. The difficulties relevant to this article, of proof and of corroboration, have to be placed in the general legal culture. In response to the Law Commission's proposals for reform, Professor Glanville Williams, an eminent authority on criminal law, insisted that the distinction between the rape of wives and the rape of other women must be preserved because of the nature of the crime and the ease of accusation. Professor Williams's views seem to be derived partially from Hale. In *Pleas of the Crown*, Hale writes that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused tho never so innocent."[41] Both Hale and Williams are concerned about the men who have been accused of rape, and they protect him by placing the married man in a special category.

In *Textbook of Criminal Law*, Professor Williams expresses concern about the reliability of the rape complainant.[42] According to Williams, women are not sure what they want and this confusion extends to men. To help us understand, Professor Williams quotes Lord Byron:

> A little still she strove, and much repented,
> And whispering "I will ne'er consent" - consented.[43]

It does not seem to occur to Professor Williams that legally denying married women the ability to refuse might infect the law of rape generally. The infection is a legal representation of women as lacking clarity in their sexual desires. Thus, Professor Williams argues that "some women enjoy fantasies of being raped" and "they may, to some extent, welcome a masterful advance while putting up a token resistance."[44] He is also concerned about what he perceives as women's propensity to lie. As a result, men need special protection in rape cases.[45]

Feminist theorists have effectively refuted these myths about rape,[46] just as the House of Lords has finally refuted the fiction of a wife's irrevocable consent. But where does this leave ethical rela-

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41 HALE, *supra* note 25, at 634.

42 GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW (2d ed. 1983).

43 *Id.* at 238 (quoting LORD BYRON, DON JUAN, Canto 1, Stanza CXVII).

44 *Id. See also* Ngaire Naffine, *Windows on the Legal Mind: The Evocation of Rape in Legal Writings*, 18 MELB. U. L. REV. 741, 747-49 (1992).

45 *See* TEMKIN, *supra* note 1, at 133-49.

46 ZZUZSANNA ADLER, RAPE ON TRIAL (1987); LORENNE M.G. CLARK & DEBRA J. LEWIS, RAPE: THE PRICE OF COERCIVE SEXUALITY (1977).

tions in marriage and the question of women's citizenship? So long as women are seen as objects to be possessed by men, whereas men possess themselves, "freedom and consent for women will be different than for men."[47] So long as consent is different for women than for men, and the masculine is the standard for the abstract individual, there shall be uncertainty and ambiguity over the status of women.

PART III: ENGLAND AND AUSTRALIA INVOKE CONSENT

In *R. v. Henry*,[48] an English judge restated Hale's view of the irrevocable nature of a wife's consent to sexual intercourse in marriage, arguing "[t]hat consent continues to be applied until it is revoked or put aside by certain legal acts which intrude on or interfere with the married state. These include a decree nisi of divorce. . . ." This legal proposition in 1990 illustrates that a married woman could not revoke consent without permission from a court. Furthermore, indecent assault in overpowering physical resistance was covered by the legal notion of implied consent.[49]

When the House of Lords declared consent to be revocable, it did not assert principles of bodily integrity and autonomy, but turned to a precedent from Scotland. The High Court of Justiciary in Scotland had doubted whether Hale's proposition on irrevocable consent, incorporated by Hume in the text, *Criminal Law of Scotland*,[50] had ever accurately expressed the law of Scotland. Although the House of Lords expressed no skepticism about the accuracy of Hale's opinions, it was nevertheless convenient to use the Scottish judgment as an alternative authority.

A two-pronged approach characterises the decision by the Australian High Court on consent to marital rape: (a) it expresses doubt about Hale; and (b) emphasises mutual respect in marriage. The rule of a husband's exemption was rejected "as now (forming) part of the common law of Australia,"[51] and skepticism was ex-

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47 PHILLIPS, *supra* note 17, at 361.

48 R. v. Henry, unreported March 14, 1990. *See* LAW COMMISSION, *supra* note 35.

49 "It is unrealistic to sort out the sexual intercourse from the other acts involved in the assault and to allow the wife to complain of the minor acts but not of the major and most unpleasant one". R. v. R., 4 All E.R. at 486 (Lord Keith). Acts which would ordinarily be indecent "but which are preliminary to an act of normal sexual intercourse are deemed to be covered by the wife's implied consent to the latter." *Id.* at 487.

50 S. v. H.M. Advocate, 1989 J.C. 469 (Scot. 1989). DAVID HUME, COMMENTARIES ON THE LAW OF SCOTLAND RESPECTING THE DESCRIPTION AND PUNISHMENT OF CRIMES was first published in 1797.

51 The Queen v. L., 66 A.L.R. 36 (Austl. 1991).

pressed as to whether Hale's proposition was ever part of common law:

> [T]here is support for the proposition in some non-binding judicial statement and in some learned writings tracing back to Hale. . . if it was ever the common law that by marriage a wife gave irrevocable consent to sexual intercourse with her husband, it is no longer the common law.[52]

The court placed emphasis on the mutual respect that spouses owe one another, which was derived from ecclesiastical law, to deny that marriage law relegates "a wife to the position of sexual chattel."[53] On the contrary, the court expressed that a wife has a right "to live with her husband, to have him listen and talk to her, to be cherished, to be entertained at bed and board and treated with respect."[54]

The contrast between the English and Australian ways of dealing with the embarrassment of Hale's opinions is notable. For the highest court in England, the maintenance of tradition, precedent, continuity and authority is the first priority. However, the Australian judges felt free to deny legitimacy to Hale, as well as to proclaim an ethical relationship in marital law. It is, of course, easier for erstwhile members of empire to disassociate themselves from unpleasant aspects of the common law, than for the paternal jurisdiction. Of even greater interest is the proposal of marriage laws as containing an ethical relationship of mutuality.

The evidence for marriage law (as inherited by common law from the ecclesiastical courts) contains an ethical vision that is difficult to sustain.[55] For example, the argument that the "courts have never made orders for the mandatory performance of a connubial obligation. . . to compel sexual intercourse,"[56] does not necessarily demonstrate the ethical nature of marriage law. Rather, it might demonstrate that the courts left enforcement to husbands. Such a reflection of non-enforcement shows ignorance of the feminist scholarship on the public/private dichotomy; the confinement of women to the private sphere as embodied persons.[57] Further-

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52 *Id.* at 39 (Mason, C.J., Deane & Toohey, J.J.).

53 *Id.* at 42 (Brennan, J.).

54 *Id.*

55 *See* the critiques of feminist legal scholars: LENORE J. WEITZMAN, THE MARRIAGE CONTRACT (1981); REGINA GRAYCAR & JENNY MORGAN, THE HIDDEN GENDER OF LAW 118-45 (1990); J. SCOTT & D. GRAHAM, FOR RICHER FOR POORER (1984); CAROL SMART, THE TIES THAT BIND: LAW, MARRIAGE, AND THE REPRODUCTION OF PATRIARCHAL RELATIONS (1984).

56 The Queen v. L., 66 A.L.R. at 41 (Brennan, J.).

57 Frances E. Olsen, *The Family and the Market*, 96 HARV. L. REV. 1497 (1983); KATHERINE O'DONOVAN, SEXUAL DIVISION IN LAW (1985).

more, while the emphasis is again on law, and not on consent, it does not mean that such a legal projection of ethical relations is otiose. Feminist legal theorists are attempting appropriations from past traditions and writings in order to propose an ethical content to intimate relations, that has consent as being central to such appropriations.[58]

The invocation of consent by the English and the Australian court is on contrasting terms. For the English court consent remains implied (as it does in Scotland), but is revocable. It is not clear whether implied consent can be revoked at will, but this is unlikely.[59] The insistence upon court permission for revocation may no longer continue, but some significant indication to the husband may be required. Professor Williams has expressed the view that rape is an inappropriate charge against the cohabiting husband:

> The reasons should be too obvious to need spelling it out. We are speaking of a biological activity, strongly baited by nature, which is regularly and pleasurably performed on a consensus basis by mankind... Occasionally some husband continues to exercise what he regards as his right when his wife refused him... What is wrong with his demand is not so much the act requested but its timing, or the manner of the demand. The fearsome stigma of rape is too great a punishment for husbands who use their strength in these circumstances.[60]

Australian law is more openly committed to principles of equality and autonomy in sexual relations than in English law. Current rape law has been amended to take account of persons, rather than of irreducible categories of male and female.[61] As Ngaire Naffine summarises:

> The sexed body of the rapist and the body of the victim have been reinterpreted in ways beyond the imaginings of Hale and Blackstone... The crime which was once, in essence, about the unlawful possession of a woman by a man is now a crime without gender. It seems that the liberal ideal of treating all citizens identically... has been realised in the crime which was once utterly about the sexes and their sexuality. In Australian law, the

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58 Margaret Davies, *Feminist Appropriations: Law, Property and Personality*, 3 SOC. & LEGAL STUD. 365 (1994). I owe an intellectual debt to this paper which made me think about the ethical nature of intimate relations.

59 Vanessa Laird, *Reflections on* R. v. R., 55 MOD. L. REV. 386 (1992).

60 Glanville Williams, *The Problem of Domestic Rape*, 14 NEW L. J. 205, 206 (1991).

61 Crimes Act, § 61 H (1) (N.S.W.); Criminal Law Consolidation Act, § 5 (1935) (S. Austl.); Criminal Code, § 324F (W. Austl.); Crimes Act, § 62(2) (1958) (Vict.). GRAYCAR & MORGAN, *supra* note 55, at 342-47.

> rapist and the victim are now abstract individuals, atomised, desexualised, even though the crime is still all about sex.[62]

Naffine's conclusion is that Australian reforms have been imposed upon a legal culture which continues the tradition of Hale. Given this, as well as the sex/gender culture of men possessing women, Naffine's view is that the gender neutrality of Australian laws tend to obscure the reality that the crime of rape is by men against women.[63]

Corroboration of the victim's evidence as a requirement in rape trials provides another distinction between English and Australian law. Hale's statement that rape "is an accusation easily to be made,"[64] means that the English judge is obliged to warn the jury of the danger of convicting solely on the basis of the complainant's evidence. When this warning is not given, the conviction will be quashed in the absence of corroboration.[65] In Australia, this requirement no longer applies in practice, but most states have retained judicial discretion on the giving of a warning.[66]

The Australian gender-neutral law of rape has little relation to marital rape as marriage remains an institution imbued with gender; indeed it might even be considered a foundation of the sex/gender system.[67] Problems of corroboration will continue so long as women are not credited with truth. What emerges from this analysis of legal representations of rape is that consent, so primary in political philosophy for citizenship, is also an ethical requirement for intimate sexual relations. Yet consent, in the sex/gender culture, is imbued with ideas of masterful men possessing yielding women. And our legal cultures mirror this.[68]

PART IV: REINVENTIONS OR RECLAMATIONS? ETHICAL INTIMATE RELATIONS

Reconstructing intimate relations is not necessarily about women and men or about marriage. Ethical intimate relations are consensual, regardless of whether expressed in a long term partnership. Violence, the imposition of one's will on the other, can

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62 Ngaire Naffine, *Possession: Erotic Love in the Law of Rape*, 57 MOD. L. REV. 10, 23 (1994).

63 *Id.* at 24.

64 HALE, *supra* note 25, at 634.

65 TEMKIN, *supra* note 1, at 133-40.

66 GRAYCAR & MORGAN, *supra* note 55, at 341-42.

67 O'DONOVAN, *supra* note 5, at 60-89.

68 "Women who say no do not always mean no... If she doesn't want it she only has to keep her legs shut and she would not get it without force." Judge David Wild at Cambridge Crown Court 1982, *cited in* POLLY PATTULLO, JUDGING WOMEN 21 (1983).

have no part to play in such relations placed against this ethical ideal; marriage is a major paradigm of intimacy. The court utterances analysed earlier in this paper emphasise marital law rather than ethics, and marital law is shown as a cultural representation of property rights and possession laid over understandings of passive women and dominant men, as confirmed by such language as possession, surrender,[69] and persuasion.[70]

The possessing relationship whereby the autonomous man took unto himself a woman who lost herself in him, informed the marital rape exemption. Such a woman did not fully possess herself, and therefore her consent or refusal was suspect. Despite reforms to the legal version of intimate heterosexual relationships, the traditional ways of presentation and viewing have not disappeared. A 1992 marital rape case is a recent Australian example in which the judicial statement to the jury explained that a husband could seek to persuade his wife to sexual intercourse "in an acceptable way" which might involve "rougher than usual handling."[71]

It is a curious aspect of human history that a primary relationship, such as marriage, is rarely discussed in the language of ethics. Instead, asserting our "rights" is provided in the law, deconstructing the cultural content. Feminist scholarship has successfully accomplished the latter task, but on the whole, little reconstruction has been achieved, perhaps as a result of the institutional history of marriage. Yet marriage remains a paradigm of intimate relations for same-sex partners and heterosexual couples. These relations may also be affected by ideas of property and possession, so reinventions may be germane to us all. Wherever we start and whatever we imagine, consent will surely be central. Unfortunately, consent also carries a baggage of sexual history.

Free consent, as a concept, contains the idea of an individual who is autonomous and able to make decisions about her life. In a liberal vision of society we are all free and consenting individuals with power over ourselves. Our relationships with others are conducted as equals, and where this is not so, legal weight supports the weaker party in order to balance the scales.[72] An example of the

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69 DAVID HUME, COMMENTARIES ON THE LAW OF SCOTLAND RESPECTING THE DESCRIPTION AND PUNISHMENT OF CRIMES 306 (1844) (stating "he cannot himself commit a rape on his own wife, who has *surrendered* her person to him") (emphasis added).

70 In G. v. G., 1924 App. Cas. 349, 357 (Lord Dunedin expressed the "wish that some gentle violence had been employed" on a wife who refused to consummate a marriage).

71 *See* Barbara A. Hocking, *The Presumption Not In Keeping With ANY Times*, 1 AUSTL. FEMINIS. LEGAL STUD. 152 (1993) (noting an unreported a Supreme Court of South Australia case, adjudicated by Bollen J, 26 August 1992).

72 Unfair Contract Terms Act, ch. 50 (1977) (Eng., Wales, and N. Ir.).

standard of consent in rape cases as enacted by the Australian state of Victoria, is that consent is defined as "free agreement."[73] In relevant cases "the fact that a person did not say or do anything to indicate free agreement to a sexual act is normally enough to show that the act took place without that person's free agreement."[74] Silence no longer means consent.

Legal changes, such as that enacted by Victoria, are welcome and may show the way to other common law jurisdictions. But we should not overlook the social context to which this is a legal solution, namely the inequality of relations between the sexes and the male eroticization of dominance.

CONCLUSION

This article set out to link presumed consent in marital rape[75] with issues of women's consent in liberal political philosophy. Its goal was to illustrate the ambiguity over women's consent within the law. Many general issues of women's citizenship are affected by this ambiguity. Imaginings are difficult for feminist theorists who seek new visions. On the one hand, liberal language has offered ready expression of dissatisfaction with inequality, lack of autonomy, and presumed consent. On the other hand, these terms carry their own assumptions and sexual history. One may use them to journey out of silence, inequality, lack of consent and domination, but will they serve us in our imaginings? Can one reclaim them from one's past?

This article has focused on consent because it was written into legal marital relations as an irrevocable presumption, without women's assent. This paradox makes one suspicious of consent in political philosophy, so central to liberal democracy. Everlasting and eternal consent surely lacks the qualities we associate with the giving of agreement voluntarily. This is especially so where consent is an irrebutable presumption. It is true that legal definitions of consent in rape remain open to change, and yet for Carole Pateman, "the identification of enforced submission with consent in rape is a stark example of the wider failure in liberal democratic theory and practice to distinguish free commitment and agreement by equals from domination, subordination and inequality."[76]

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[73] Crimes Act, § 36 (1958)(Vict.).

[74] *Id.* at § 37. *See* NAFFINE, *supra* note 44, at 766-67.

[75] The title to this paper, with its use of the word "oxymoron" is intended to suggest an inherent contradiction between the words "consent" and "rape."

[76] Carole Pateman, *Women and Consent*, 8 POLITICAL THEORY 162 (1980), *reprinted in* CAROLE PATEMAN, THE DISORDER OF WOMEN (1989).

The legacy of history is that the language which enables women to make claims for recognition and hearing is tainted with cultural connotations from the sex/gender system. If "consent has been understood in a way that deprives it of meaning,"[77] then this poses problems for feminist appropriations. Consent must be given a new meaning.

[77] PHILLIPS, *supra* note 17, at 36.