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MARRIED WOMEN — BEYOND THE PALE OF THE LAW OF RAPE¹

Christine Boyle*

The author discusses the law relating to marital rape and contributes to the debate about law reform in this area, with some reference to proposed amendments to The Criminal Code. At the time of writing these were embodied in Bill C-53 which had received its First reading in Parliament on January 12, 1981. The main argument is that law reform in this area should display sensitivity to the special coercive potential of the marital relationship and that any pressure, including the conscious exploitation of external factors, to engage in sexual activity comes within the appropriate sphere of the criminal law.

Les femmes mariées — au-delà des limites de la loi du vio

L'auteur discute la loi sur le viol conjugal et contribue au débat sur la réforme dans ce domaine, avec renvoi aux amendements proposés du Code pénal. Au moment de rédaction, ces derniers faisaient partie de l'Article C-53, passé en première lecture au Parlement le 2 janvier, 1981. La thèse principale est que la réforme de la loi dans ce domaine doit être sensible à une possibilité de contrainte particulière dans la relation conjugale et que tout exercice de pression, y compris l'exploitation consciente de facteurs extérieurs, pour forcer un rapport sexuel entre dans le domaine approprié du droit pénal.

* * *

There has been a flurry of interest in the subject of marital rape in recent years, so that the arguments relating to the abolition of the husband's immunity from the criminal sanction for rape have been extensively aired.² Indeed there has also been a degree of political interest in the subject culminating in January, 1981 in Bill C-53, which contains, *inter*

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¹ According to the *Oxford English Dictionary*, "pale" means, *inter alia*, a district of territory within determined bounds or subject to a particular jurisdiction, e.g. the pale of English law. The word is used to indicate that part of Ireland, varying in extent, but centred on Dublin, over which English jurisdiction was established. "Beyond the pale", the protection of English law could not be guaranteed.

² See e.g., Peter English, "The Husband Who Rapes His Wife" (1976), 126 *New L.J.* 1223; Jocelyne A. Scutt, "Consent in Rape: The Problem of the Marriage Contract" (1977), 3 *Monash U.L.R.* 225; Note (1977), 52 *N.Y.U.L.Rev.* 306; "Comment" (1978), 82 *Dick. L.R.* 608; Gilbert Geis,

alia, a provision abolishing the husband's immunity.³ The purpose of this essay is to utilize discussion of this form of domestic violence as an area in which to offer some thoughts on such matters as the development of the law in relation to women, the severe limits on the effective and appropriate use of the criminal sanction, and law reform. The main thesis is that reform which does not display sensitivity to the special coercive potential of marriage is unsatisfactory and that abolition of the immunity, without more, may have little real impact.

It is important to stress at the outset the limits on this essay: it is not intended to be a comprehensive discussion of the whole of the law appertaining to domestic sexual assault. Although there is a great deal which can be said about domestic violence, my topic concerns the question of access of a married woman to the criminal courts with a complaint of rape by her husband.⁴ Such access could be prevented in any legal system by a number of factors:

- (1) The attitude of the woman's herself — she may not categorize a specific act of intercourse as rape;
- (2) The screening activities of law enforcement officials; and
- (3) The substantive law — the criminal law may not adequately or at all categorize some acts of coercive sexual intercourse as rape.

These factors are all relevant to a discussion of the Canadian position. Law reformers have tended so far to concentrate, in the context of rape laws generally, on enforcement difficulties and in this specific context, on the removal of the husband's immunity.⁶

The above point is made in order to stress that in this writer's view, access issues are not procedural only. In a journal of this

"Rape in Marriage: Law and Law Reform in England, the United States and Sweden" (1978), 6 *Ad. L.R.* 284; Charlotte L. Mitra, ". . . For She Has No Right or Power To Refuse Her Consent", [1979] *Crim L.R.* 558; Sandra L. Schultz, "The Marital Exception to Rape: Past, Present and Future", [1978] *Det. Col. of L.R.* 261; Arthur F. Schiff, "*State of Oregon v. Rideout* — Can Husband Rape Wife?" (1979), 26 *Med. Tr. T.Q.* 49; George Jonas, "Rape and Marriage Are Not Like Horse and Carriage" (1979), 3 *Can. Lawyer* 10 (April). For a useful judicial comment, see *State v. Smith*, 148 N.J. Super. 219, 372 A. 2d 386 (1977).

³ Bill C-53, First Sess., 32nd Parl.(Can.), 29 Eliz. II, 1980-81 also contains provisions replacing rape with sexual assault and aggravated sexual assault offences and relating to the exploitation of children.

⁴ See *The Criminal Code* R.S.C. 1970, c. C-34, s.143.

⁵ The words "woman" and "wife" etc. are throughout used generically unless the context otherwise indicates.

⁶ See the Canada Law Reform Commission's Working Paper 22 *Criminal Law: Sexual Offences* (Ottawa: The Commission, 1978) and the *Report on Sexual Offences* (Ottawa: Min. of Supply & Services, 1978). The latter recommended the total abolition of the immunity, at 16-17.

nature it is legitimate to include discussion of substantive law which unjustifiably excludes one group from the scope of any particular rule.⁷ It also seems necessary to stress that the limitations imposed on this paper are not based on any notion that domestic rape is essentially a *criminal law* matter. There would probably be general agreement that there has been a trend away from the use of the criminal sanction⁸ caused by a number of factors such as the pragmatism and humanitarianism which support diversion from the criminal justice system as well as the provision of support services and social programmes rather than punishment. It would be simplistic in the extreme simply to urge expansion of the criminal law as if that were the only possible response to marital rape. That is not to say that discussion of the use of the criminal sanction is without merit, simply that it must be understood as one aspect of a much wider subject. At a *practical* level it is true to say that what abused wives (whatever form the abuse takes) need is rapid practical and emotional help as opposed to the mere chance of the ponderous punishment of their spouses who are very likely to need help themselves, although the two are naturally not mutually exclusive.

Discussion of the criminal sanction in this context may be useful for a number of reasons, apart from highlighting certain commonplaces about the difficulties of enforcement in the domestic sphere. It illustrates some very significant reasons for

⁷ I would therefore categorize, for example, votes for women as an access issue, but recognize the lack of agreement on precise scope of the concept of access to justice. However, I am not suggesting *simply* that if I had my way, the law of rape would be different, but that the substantive law has the same effect and can be discussed in the same context as the refusal of a Crown attorney to proceed with a rape complaint.

⁸ As, for example, in the context of homosexual conduct, abortion and the increasing use of diversion programmes. Rape seems to be an exception as far as this trend is concerned, reformers tending to express concern about the under-, rather than the over-utilization of the criminal law of rape. Thomas J. Lewis suggests that until "the latter part of the 1960's the primary concern with the law of rape was its adequacy for protecting men from unfounded and malicious charges" in "Recent Proposals in the Criminal Law of Rape: Significant Reform or Semantic Change?" (1979), 17 *Osg. Hall L.J.* 445. Evidence that this is still a significant concern can be found in *Forsythe v. R.* (1980), 15 C.R. (3d) 280 (S.C.C.). However, rape is only an apparent exception if the general theory is accepted that criminal law should be reduced, or expanded, to its essential minimum and then vigorously enforced. See the Report of the Canada Law Reform Commission's Working Paper No. 10, *The Limits of Criminal Law: Obscenity, a Test Case* (Ottawa: Information Canada, 1975). This is important for those feminists who are radicalized liberals, and find it goes against the grain to advocate increased use of the criminal sanction. The same liberal trap lies in wait for those concerned about pornography. For discussions, see Colloquium, "Violent Pornography: Degradation of Women Versus Right of Free Speech" (1978-79), 8 *N.Y.U. Rev. of Law and Social Change* 181.

denial of access such as the manipulation of the law for political purposes by relatively powerful groups and the sheer complexity of the concepts required to draw rational boundaries to the criminal law. This paper concentrates on the concepts of consent, submission and criminal responsibility.

It is necessary to outline the present law simply as background to my more general discussion. On a theoretical level in Canada, the law tells us that non-consensual intercourse is so wrong as to warrant the use of the criminal sanction.⁹ Rape is a crime carrying a maximum punishment of imprisonment for life,¹⁰ a reflection of the seriousness of the crime.

However, still at the level of theory — there is no need to rehearse the divergence between the theory and the law in practice here — *The Criminal Code* states that a husband cannot be guilty of the rape of his wife:¹¹ in other words, he has an immunity, in Hohfeldian terms. He can have sexual intercourse without her consent and not be guilty of rape (though he may be charged with assault causing bodily harm, at least if he hurts her).¹² The legal position in other Commonwealth countries varies slightly in the width of the immunity.¹³

The marital exception flows from the husband's status as such and proposed changes in the law come very late in the movement from status to contract. It has its roots, in Canada and common law countries generally, in English law, since Sir Matthew Hale, in his *Pleas of the Crown*¹⁴, made a bare assertion that a wife gives a general consent to intercourse on

⁹ I am not asserting on any empirical level that there is a general commitment to the wrongness of rape, but I am assuming that there is some level of consensus that at least violent rape ought to be a serious crime. It is fascinating to speculate as to why rape is a crime, but it is enough for the purposes of this paper that it is criminal, with the marital exception.

¹⁰ *The Criminal Code*, R.S.C. 1970, c. C-34, s.144. Bill C-54, First Sess., 32nd Parl (Can.), 29 Eliz. II, 1980-81. Clause 18, retains this maximum punishment for aggravated sexual assault which entails the use of a weapon, or the infliction of serious bodily harm.

¹¹ *Id.*, s.143.

¹² Which would apparently undermine any argument about the inappropriateness of the use of the criminal law in the home, except for those who would argue its inappropriateness for any domestic crime. For discussion and authorities on assault, see Christine Boyle, "Violence Against Wives — The Criminal Law in Retreat?" (1980), 31 *N.I.L.Q.* 35, 41-43.

¹³ For the U.K. position, see Boyle, *id.* 37-44. For a comparative discussion see Gilbert Geis, *supra* note 2. For the American application of the English common law rule, statutory modifications of that rule, and analysis in terms of the purposes of the criminal law, see Sandra Schultz, *supra* note 2.

¹⁴ Sir Matthew Hale, *The History of the Pleas of the Crown*, Vol. 1, (London: Professional Books Ltd., 1971), 629.

marriage, a consent which she is legally incapable of retracting.¹⁵

This dubious authority for the husband's immunity has been cited *ad nauseam* by Commonwealth and American judges¹⁶ and never seems to have been seriously challenged judicially,¹⁷ although some slight inroads have since been made in England to the effect that rape is possible after a decree nisi of divorce or after judicial separation.¹⁸ The issue has not come before a Canadian judge probably because the *Code* is clear that a husband cannot rape his "wife", so that there is here no scope for judicial tinkering with the limits of the immunity. It would seem that the only possible argument (and it is at best labelled tenuous) is that a separated wife is not a "wife" within the meaning of section 143 of the *Code*. The inevitable response would be the tradition of strict interpretation of penal statutes.¹⁹

The issue on a political level is as follows: will it perform any legitimate public function to recognize, via the criminal law, a wife's right to sexual self-determination?²⁰ In order to proceed,

¹⁵ Sir Matthew Hale is an interesting historical figure. He was also responsible for that other well-known comment that an allegation of rape is easy to make, but difficult to prove and difficult to refute, *id.*, 635. The idea that false allegations of rape constitute a real danger has caused enormous problems of enforcement in countries where the English common law has been influential. Hale also presided, in the course of his judicial career, over a number of witch trials. The idea that an allegation of witchcraft might be easy to make and difficult to refute apparently did not occur to him. See Gilbert Geis, "Lord Hale, Witches and Rape" (1978), 5 *Brit. J. of L. and Soc.* 26, and Hugh V. McLachlan and J. K. Swales, "Lord Hale, Witches and Rape; a Comment" (1978), 5 *Brit. J. of L. and Soc.* 251.

¹⁶ See e.g. *State v. Smith*, 148 N. J. Super 219, 372 A 2d. 386 (1977) and *R. v. Miller*, [1954] 2 All E.R. 529 (Winchester Assizes).

¹⁷ Some doubts were expressed *obiter* in *Clarence* (1888), 22 Q.B.D. 23. Wells, J. stated, at 33, that if intercourse with one's wife while suffering from venereal disease were an assault "it must constitute rape, unless indeed, as between married persons rape is impossible, a proposition to which I am certainly not prepared to assent, and for which there seems to me to be no sufficient authority."

¹⁸ That is, after a judge has withdrawn the wife's notional consent. See, *R. v. Clarke*, [1949] 2 All E.R. 448 (Leeds Assizes); *R. v. Miller*, [1954] 2 All E.R. 529 (Winchester Assizes); *R. v. O'Brien*, [1974] 3 All E.R. 663 (Crown Ct.); *R. v. Steele* (1976), 65 Cr. App. R. 22 (C.A.). These cases are discussed elsewhere. See, e.g. Boyle, *supra* note 12, at 40-41.

¹⁹ See generally Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974), 153-54. He quotes Rose C. J. in *Kelly v. O'Brien*, [1942] O.R. 691, 694. "The defendant is entitled to judgment if the Act is ambiguous and if one reasonable meaning will let him out." It would appear to be a difficult task even to establish the ambiguity of the word "wife" except possibly in the context of an argument that it includes common law wife.

²⁰ It is of course a political question, as with all issues relating to the defensible scope of the criminal law, whether a husband should have a right

I shall simply state the political assumption on which this paper is based. I assume that since it is accepted that non-consensual intercourse can legitimately be defined as criminal, the distinction between wives and other rape victims is invidious and a denial of the full humanity of a wife in a sexual context. Such a distinction is based on the view of a wife as the property of her husband, a view that I hope no one would now openly defend, on the equally untenable view that a sexual relationship in the past has some probative value in relation to the sexual activity in question,²¹ on the continuing doubt as to the veracity of the rape victim, and on a misguided emphasis on the value of marriage *per se*.

The view is apparently shared by all political parties in Canada; abolition seems inevitable.²² This is good in that it will

to his wife's sexual services, irrespective of her wishes, and the arguments have already been aired. Norval Morris and A. L. Turner, "Two Problems in the Law of Rape" (1952-55), 2 *Univ. Queensland L.J.* 247, attempt the most comprehensive defence of the husband's immunity. John Cyril Smith and Brian Hogan, in their celebrated text on *Criminal Law* 4th ed., (London: Butterworths, 1978) quote their views with approval, at 403. "If the wife is adamant in her refusal the husband must choose between letting the wife's will prevail, *thus wrecking the marriage* and acting without her consent. It would be intolerable if he were to be conditioned in his course of action by the threat of criminal proceedings" (emphasis added). The defence seems to concentrate on such assumptions as — wives suffer less than other rape victims; "laymen" don't label marital rape as rape; possible prosecutions would jeopardize the institution of marriage. Most writers, cited in note 2, attack the immunity.

This writer would like to offer one contribution to the debate about whether the husband's immunity is justified. A point which may highlight how curious the law is rendered by a distinction between rapists and husband rapists. It has been generally held that a husband can aid and abet the rape of his wife, (see, e.g. *D.P.P. v. Morgan*, [1975] 2 All E.R. 347 (H.L.)) yet even in cases where the husband had intercourse as well he is not guilty of rape *per se*. One American case provides what may be an extreme example. In *State v. Drope*, 462 S.W. 2d.677 (Mo.1971), the husband, in co-operation with four other men, tied his wife to a bed and held a gun to her head while each of the others had intercourse with her. He then had intercourse with her himself, but this did not legally constitute rape. This type of fact situation helps to shake stereotypical images of marital "rape", and makes a mockery of the argument that to categorize non-consensual marital intercourse as rape would jeopardize marriages. As with rape in general we are dealing with a spectrum of widely-varying fact situations, from the more-or-less "accidental" rape to the extremely violent. One cannot categorize marital rape as falling automatically at any point on that spectrum and then use an *a priori* classification to justify refusal to utilize the criminal sanction.

²¹ For a discussion and references to some of the writing on this subject see Christine Boyle, "Section 142 of *The Criminal Code* — A Trojan Horse?" (1981), 23 *Cr.L.Q.* 253.

²² It had already been abolished in Sweden in 1975 when the *Criminal Code* was amended to state simply that a man may be liable for the rape of his wife notwithstanding the marriage contract. Total abolition is not the only

certainly do away with one of the more primitive rules of our criminal law and the negative message that wives are in a position of sexual subordination to their husbands. But what I have said so far is merely background to my main concern which relates to the nature of the 'justice' to which wives will have gained access. This neglected issue raises questions relating to feminist aspirations and the criminal law which I hope at least to begin to explore. In other words, I believe it is not sufficient to say, "the marital exception is outrageous and outmoded and should be done away with". Some thought has to be given to the law that fills the gap. Otherwise abolition is in danger of being a superficial sop to feminist concern, the thought always being possible that a husband could rarely be convicted of rape anyway. The danger of a formal change without substance is all too real in any event, but at least change will be made on a more sophisticated level. The very exercise of thinking about the nature of rape in the marital context may be more helpful than the mere formal abolition of the immunity, although that would at least constitute a clear theoretical statement that sexual assault on one's wife is appropriately labelled as criminal. Change in the law after all is only a *minimum* requirement of real social change in those areas where it has any impact at all. Concern about the impact of the law is particularly acute in this context since there is an apparent tension between the "public" nature of criminal law and the supposedly "private" nature of the family. This is too well-known to justify any great degree of discussion here.²³ Nevertheless, the following are some observations on the subject.

Firstly and most obviously, although that is not to diminish the importance of this point, the criminal law cannot function efficiently by itself; it needs to be administered by people. There naturally has to be a commitment on the part of the human agencies responsible for the enforcement of the criminal justice system before the law, even in its own limited sense, can

possible reform. It may well be that difficulties of proof would preclude conviction where the spouses are not separated, but the main argument against such a compromise is one of principle, that the law should not symbolically condone non-consensual intercourse in any context, nor indicate that wives are in a position of sexual subordination to their husbands.

²³ A useful article about the impact of the law on domestic violence is Susan Maidment, "The Law's Response to Marital Violence in England and the U.S.A." (1977), 26 *I.C.L.Q.* 403. There are a number of interdisciplinary collections of essays. See, e.g. Marie Borland, ed., *Violence in the Family* (Manchester: Manchester U. Press, 1976), J. P. Martin, ed., *Violence and the Family* (Chichester, N.Y.: Wiley, 1978), Suzanne Steinmetz and Murray A. Straus, eds., *Violence in the Family* (New York: Dodd, Mead & Co., 1975), John M. Eekelaar and Sanford N. Katz, *Family Violence: An International and Interdisciplinary Study* (Toronto: Butterworths, 1978).

be said to be giving wives protection against sexual assault by their husbands. There is considerable evidence of antagonism towards rape victims from law enforcement officials,²⁴ particularly where victims have had a previous sexual or even a social relationship with their attackers. Accordingly, one does not need to be a pessimist to predict that the law, as reformed, will not effect significant change in a practical sense. The attitude of law enforcers may in fact reflect a significant body of public opinion to the effect that a husband does have a right to sex. Consequently, the question we are considering here is whether the criminal law can ever really work without some consensus in its favour. This poses a problem for a feminist analysis of the criminal law since there may be a significant body of public opinion out of sympathy with rules which reflect feminist aspirations: that is rules which are counter-productive as far as the dominant male group is concerned. This is a complicated subject which cannot be pursued here. I merely question whether the criminal law can be looked to for the furtherance of feminist aspirations if the consensus which would render the law superfluous will be fatal to its enforcement.²⁵

Secondly, there are genuine practical difficulties in prosecuting husbands for rape, perhaps slightly more than those which have been well-documented in the context of domestic assault generally: the lack of credence given the rape victim; reluctance to report; the lack of support for the wife in the community (although this has changed significantly in the past few years); and the ambivalence of the victim towards the husband because of love and shared experiences, including children. Convictions have been extremely rare so that law reformers have had to deal with the objection that unenforceable laws should not be on the statute books.

²⁴ See Lorene M. G. Clark and Debra J. Lewis, *Rape: The Price of Coercive Sexuality* (Toronto: Women's Press, 1977), c. 10, entitled "Victimology: The Art of Victim Blaming".

²⁵ Even if there were some sign of a positive public attitude to a change in the law, subtle mechanisms exist for undermining this. Shortly after the proposal to abolish the husband's immunity was announced, a cartoon appeared in the *Globe and Mail*. It depicted a bemused-looking man in bed while his wife denounced him to the police as the man who tried to rape her. She was very fat and in curlers, so the message was clear. It is ludicrous to think that such a woman could be the object of desire, thus indicating a belief that rape is sexually motivated. It is also ludicrous to portray the husband in the role of rapist as we all know that a rapist is a man who jumps out of the bushes, not a friend, or a lover, or a husband, and finally the whole idea is essentially trivial. I am not saying that anything is sacred and should not be the subject of humour, but humour is revealing, and there are still in evidence serious misconceptions about the nature of rape, and a reluctance to accept that sexual assault can be just another form of violence within marriage, and yet another very cruel way of conveying the message that wives are not in control of their own lives.

However, unenforceability is a problem which has to be tackled in the context of sexual assault generally and does not justify arbitrary exemptions. Such an argument, taken to its logical conclusion, would justify repeal of rape laws across the board since they are notoriously difficult to enforce.²⁶

A further limiting factor on the effectiveness of the criminal sanction as well as other forms of legal intervention is the *expressed* commitment to the preservation of the family, often suspect in that it may be used as a convenient shield for a policy really directed at the oppression of women. In other words, the policy is actually aimed at denying freedom of choice to women and preserving the traditional family structure no matter what the cost to individual women.

Even if there were no ulterior political motive to the expression of such a policy, one has to doubt whether it is legitimate for the law to try to preserve marriages where violence has taken place. In any event, it has not been shown that failing to punish a husband for raping his wife will help to preserve the marriage. It is submitted that at the very least the law should adopt a neutral stance towards such marriages. In the meantime, however, this reluctance to cross the domestic threshold exacerbates real difficulties of enforcement of the law inside the home.

In summary, then, the law of Canada at present does not recognize the crime of marital rape. There is a commitment towards changing the law and removing the husband's immunity. This is a positive step though one has to express doubts as to what practical significance it will have. I believe however, that it suffers from a graver weakness: namely, that the law will be changed without any analysis of sex within marriage and the extent to which the criminal law should be used to deter and punish coercive sex within such an existing relationship. I propose therefore, to offer some reflections on how the law might be changed if a genuine attempt were to be made to promote access by wives to whatever justice is on offer by the criminal law of rape. If such an attempt is to be made then we must recognize the special position and vulnerability of wives and other women to coercion in relationships to which they have committed themselves.

Since sexual intercourse is of course an ambiguous activity, lack of consent has traditionally been seized upon as the essence of the crime of rape. One must immediately add a further and very severe limit on the scope of the criminal law: its relative lack of *ability* to distinguish between such very complex concepts as consensual and non-consensual sex. This does not mean that the difference does not have to be thought through, simply that the results of that thought must take the form of a

²⁶ See Clark and Lewis, *supra* note 24, 55-57.

fairly simple and easily applied legal distinction. The framers of the present law of rape seem to have learnt that lesson all too readily. It may be useful here to set out the relevant provision *in toto*:

S.143. A male person commits rape when he has sexual intercourse with a female person who is not his wife.

- (a) without her consent, or
- (b) with her consent if the consent
 - (i) is extorted by threats or fear of bodily harm,
 - (ii) is obtained by personating her husband, or
 - (iii) is obtained by false and fraudulent representations as to the nature and quality of the act.

This section is fairly typical of rape laws in that it does not leave consent as a factual issue to be determined by the trier of fact. Rather, it adds certain situations in which apparent consent is legally vitiated, thereby at a single stroke utterly confusing consent and submission. Thus, the question is not 'was her will overborne?'²⁷ but rather 'was her 'consent' achieved by methods disapproved of by the law?' In other words, the law maintains tight control over what factors vitiate 'consent' to intercourse in this context.

In order to take this discussion further, it is necessary to present at least a working idea of what I mean by consent to intercourse, recognizing that consent is a chameleon-like concept. I realize that the following definition is not perfect, but let me at least suggest that consent to sex is agreement based entirely on certain factors relating to the two individuals involved, factors such as pleasure, affection and the desire to make the other person happy. It can only exist in situations where the individual has a choice unfettered by external factors. It hardly needs stating that such truly free consensual intercourse must be very rare indeed.²⁸ Yet anything else must simply be the appearance of consent or, in other words, submission since I do not think that any layperson would say naturally that a woman with a gun to her head has consented to intercourse, as our *Criminal Code* does, nor that a woman who has had intercourse out of economic need has done anything else than merely submit. However, our present law, having

²⁷ For a discussion of this issue in the context of U.S. confession law, which may provide a useful analogy, see Joseph D. Grano, "Voluntariness, Free Will and the Law of Confessions" (1979), 65 *Va. L.R.* 859.

²⁸ In writing this paper I gradually came to the realization that the only time truly consensual intercourse may occur, is where the participants have nothing to gain from one another, they enjoy material and legal equality and have been raised in a totally non-sexist environment; that is, never. It seems however, to be an ideal worth striving for, though having little to do with the criminal law. My realization may however, have some impact at the other end of the spectrum and make some small contribution to creating an environment in which this ideal might be realized.

labelled submission as consent, then limits the situations severely in which such consent will be vitiated: basically to force and fraud.

Perhaps only the unconscious or insane woman or the woman who fights off her attacker throughout no matter what the risk to herself can *not* be said to have consented when consent is used to mean submission. There are probably a number of reasons why rape laws have traditionally been framed in such a way that submission is confused with consent and then judgments are made that some things vitiate consent and others do not. There are tremendous practical difficulties in distinguishing between submission and consent on any given set of facts so that there is an obvious attraction in confining the law to submission — inducing factors which are readily identifiable in a factual sense; hence, force and fraud. But equally clearly, criminal law can be more sophisticated so that this limiting of acceptable reasons for submitting to intercourse must reflect some value judgment as, for example, that it is all right to submit in order to avoid *sufficiently serious* personal injury (and an objective test is used rather than the victim's perception of the action) but that it is not all right to submit in order to save one's job and that it is positively virtuous to submit to your husband.

It does not seem too far-fetched to speculate that the explanation may lie in the development of the law of rape as a protection of a man's interest in his *women*: his wife, sister, daughter, mother. What he feared most was the exercise of physical force or that, gullible creatures that they were, women might be tricked into intercourse. The women belonging to the male framers of laws were not supposed to be working outside the home in any event so should not need protection against economic coercion. Certainly they did not need protection against their husbands who could exercise more subtle forms of power. Submission for reasons other than force or fraud also involved behaviour on the part of the woman that was unacceptable. Even today there is a significant risk that a woman will simply not be believed in the absence of actual injury.²⁹

²⁹ Clark and Lewis, *supra* note 24, conclude at 68, on the basis of their empirical research, that the "greater the degree of violence the more likely a jury is to believe that the victim did not consent to intercourse, and that the commission of the crime placed her at serious risk."

These are all of course political judgments and one underlying theme of this essay is the essentially political nature of rules which deny access. (Denial of access here involves the refusal of law-makers to recognise certain types of coercive sexual intercourse as criminal). As William Conklin has stated in his "Clear Cases", *Univ. of Tor. L.J.* (forthcoming, 1981).

It is clear that this confusion of consent and submission must be addressed in any effort to improve the present law since, at a minimum, the law must exclude true consensual intercourse from its ambit. That is not a significant problem if one accepts the view that such true consensual intercourse may rarely take place in the sense of being uninfluenced by external factors such as economic need or the conditioning of the sexes. No doubt in a perfect world in which the sexes valued each other and themselves equally such sexual activity would be much more common but, at the moment, all acts of intercourse take place in a wider context of economic inequality in which it is true to say that men belong to a group that is dominant at various levels. The main issue therefore does not relate to consent or the absence of it, but rather to the types of submission which ought to attract the attention of the criminal law. It is submitted by this writer that *the dividing line is not necessarily drawn in the same place* with marital rape as with other forms of rape since there is the added factor of the marital relationship. In other words, rules which define coercive sexual intercourse between strangers *may* not be useful where there exists a close relationship between victim and rapist. Here it may be necessary for the law to recognize the effect of special pressures arising out of the relationship. It is possible that a husband might be appropriately labelled as a rapist where a stranger would not.

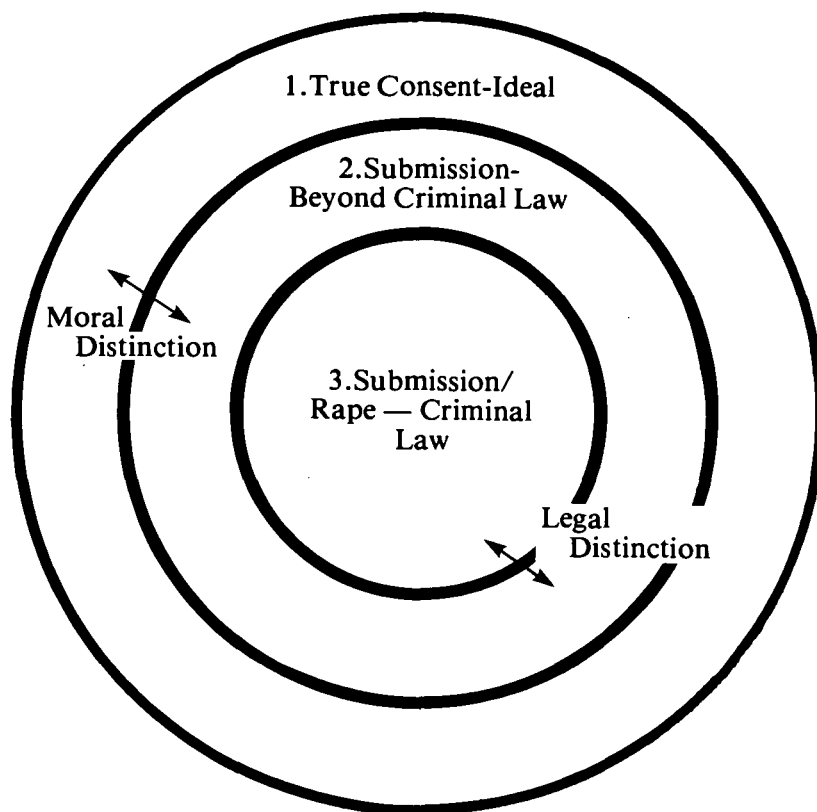
The sense in which rules of law can be characterized as political in clear cases is that there are justificatory ideas and conceptions which are rooted in the rules. And, those ideas and conceptions are political because they make statements about the distribution of power within society. The distribution of power can be analyzed in terms of ideas about the relationship or role between one decision-making structure and another. Or, the rules of law can talk about the distribution of power by assigning rights and duties, powers and immunities and the like to certain categories of persons. Or, the rules affect the distribution of power by specifying certain social practices or forms of conduct as permissible whereas others are identified as proscribed.

There does not seem to be any significant change contained in Bill C-53, First Sess., 32nd Parl.(Can.), 29 Eliz. II, 1980-81, s. 18. Although the new s.244 (4) (a) states that it is a question of fact whether the complainant consented or not, the effect of this may be vitiated by the new s.244(3) which states as follows:

For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

- (a) the application of force;
- (b) threats or fear of the application of force;
- (c) fraud; or
- (d) the exercise of authority.

At this point a diagram may be useful as a crude expository device:



The necessary distinction has to be made between 3 and 2, and the relevant inquiry is where the line should be drawn when the rapist is the victim's husband.

In discussing this dividing line between submission to criminal pressure and any other type of submission I am not advocating any change in the law of *mens rea* but rather in the *actus reus* of marital rape, although it is tempting to suggest a move towards a type of strict liability.³⁰ To the extent that there is a collective male responsibility for the inferior and relatively powerless position of women in our society, I incline to the view that when a man has intercourse with a woman he is taking an enormous risk that she is not consenting or perhaps, more accurately, that she would not consent if she were an autonomous human being enjoying a certain degree of self-esteem and respect and, therefore, with no psychological or

³⁰ Surprisingly enough, there is some judicial authority for this outside the realm of intercourse with minors. See the dissenting judgment in *Bresse v. R.* (1978), 7 C.R. (3d) 50 (Que. C.A.).

economic need for male approval. As a *group*, men cannot 'have their cake and eat it too' — it is ludicrous to look for true consent when our whole society is 'instinct with coercion'.³¹ However, at this point, I am not prepared to advocate a radical enlargement of the traditional scope of the criminal law. At one level at least, criminal law deals with personal guilt — it does not normally operate to punish people on the basis of a category to which they belong. At the moment there is no collective male guilt for rape in the eyes of the criminal law. The latter has no way, because it is not designed to, of reacting to institutionalized coercion and thus redressing an imbalance of power as far as any group is concerned.

I say "normally" because our criminal law does contain *some* precedent for imposing a degree of liability on a group basis. We do punish some people for exploiting their position in a sexual context. An obscure example is the offence of seduction of a female passenger by a ship's captain.³² A better analogy is provided by the sexual offences involving people below a certain age. While the argument is seriously put forward that sexual activity between two young people should not constitute a criminal offence, I think it is safe to say that there is no pressure to change the law relating to sexual intercourse between a girl and an older man.³³ Because of the relative weakness of the young *as a group*, in terms of their physical strength, economic position, and psychological development, adults *as a group* engage in sexual activity with them at their peril. It matters not where the child is under fourteen years of age whether in any particular case she was in

³¹ There may be an analogy here to the concern about confessions obtained in the coercive setting of a police station, even though there is no active coercion other than the setting itself.

³² *The Criminal Code*, R.S.C. 1970, c.C-34, s.154. Note that the question is a factual one of whether the passenger was seduced. Presumably the difference between this offence and rape is that the ship's captain is in a position of power. An example which is more topical is the offence contained in s.153(b) of intercourse with a female employee under the age of twenty-one.

³³ See generally Hogan, "On Modernising the Law of Sexual Offences" in P.R. Glazebrook, ed., *Reshaping the Criminal Law: Essays in Honour of Glanville Williams* (London: Stevens, 1978), 180: "Generally speaking and quite rightly, the law protects the young against exploitation". The relevant sections of *The Criminal Code* are 146 and 151. The Canada Law Reform Commission, *supra* note 6, has recommended, at 19, the retention of the prohibition as to age and also that there be a new offence of sexual interference due to dependency, at 22.

Every one who, for a sexual purpose, directly or indirectly touches a person fourteen years of age or older but under eighteen years of age, whose consent was obtained by the exercise of authority or the exploitation of dependency is guilty of an indictable offence and liable to imprisonment for five years.

Sed quaere the limitation to young persons? See also Bill C-53.

fact the stronger, more aggressive party.³⁴ Sex may be an even more significant difference than age. The relative weakness of women in our society is easily documented.³⁵ Age as a rational way of identifying a group in need of special protection only has the patina of age itself to commend it.

I am not suggesting in using this analogy that women are like children.³⁶ I am merely suggesting that many choices made by women today might not be made in a different type of society. However, the analogy has the virtue, I hope, of being thought-provoking and of underscoring the view that intercourse between a member of a relatively powerful group with a member of a relatively powerless group is essentially questionable. The basic thesis of this essay is that, given the position of inequality of Canadian (and other) women, one should start with the assumption that such intercourse is non-consensual and look for evidence of consent, rather than the reverse.

A further and similar analogy can be found in the law of incest. Professor Hogan presents the following argument in favour of retaining the crime:³⁷

The problem arises where the father exploits his authority as father without overtly intimidating the daughter so that proof of some other offence would be difficult to make out. Such cases, no doubt, occur where the daughter's consent is no more than submission.

This helps to focus more directly on the issue explored in this paper: the access of married women to the full scope of the criminal justice system. A great deal of what I have said so far relates generally to sexual relations between men and women. The marital relationship, rather than negating the possibility of coercive sex, presents opportunities for types of pressure other than those asserted by rapists other than husbands.

³⁴ See s.146(1), *cf.* s.146(2) and (3) which relate to children between the ages of 14 and 16.

³⁵ See, *e.g.* the *Report by the National Council of Welfare, Women and Poverty* (Ottawa: The Council, 1979). The stark conclusion is reached at 51, that "[m]ost Canadian women become poor at some point in their lives. Their poverty is rarely the result of controllable circumstances, and it is seldom the outcome of extraordinary misfortune. In most cases, women are poor because poverty is a natural consequence of the role they are still expected to play in our society."

³⁶ No doubt it may be said that I am suggesting that women have no minds of their own, and that drawing an analogy between women and children has been a common device used against women. I wish to make it clear that I believe that, in most cases, the decision to submit to unwanted sexual intercourse is precisely that, a decision, and the issue relates to the appropriate role of the criminal law in protecting women from pressure.

³⁷ In *Reshaping the Criminal Law*, *supra* note 33, 189. Bill C-53, First Sess., 32nd Parl. (Can.), 29 Eliz II, 1980-81, retains incest as a crime.

All of this merely reiterates that we cannot assume that intercourse, especially marital intercourse, is *normally* consensual and that the criminal law must only deal with the rare aberration. It seems more realistic to assume that people engage in sexual activity because of diverse kinds of pressures: internal and external, conscious and unconscious. The issue here is ‘when should these pressures justify intervention by the criminal law, bearing in mind that criminal law tends, on the whole, to focus on *personal* rather than group guilt?’ Therefore, gaining access to the criminal law may be actively dysfunctional for any feminist concern such as sexual abuse by husbands in that it tends to depoliticize the issue and to reduce it to an interpersonal problem. The criminal law does not help with an analysis which would lead us to doubt our institutions and the present structure of society³⁸ (Nor indeed, does writing about access to justice generally do so.)

In thinking about what should go into circle 3, the proper domain of the criminal law, it may be helpful to utilize a traditional analysis of criminal offences. It is submitted that rape can be broken down into two elements:

- (1) intercourse submitted to by the victim *because of* pressure brought to bear or exploited by the rapist;
- (2) *mens rea*.

Initially it must be stressed with respect to the first element that no judgment of the victim can be justified so that whatever concept we use should not permit such a judgment, as does our present law which treats a rape victim rather like a prisoner-of-war who gives information under torture. We make a moral judgment as to whether the pain or threat of it justified the disclosure. There is no apparent reason why the statement that the victim of rape submitted to pressure should include any moral judgment. Another way of describing what happens is to say that the victim is coerced into sexual activity and that the descriptive use of the word coercion does not necessarily entail a normative judgment of either party involved. (For the alleged rapist the normative judgment is made at the second, *mens rea* stage, so that there is no need for concern about casting the net of submission rather widely.) It is entirely plausible to say that a police officer coerced someone without making any judgment of the police officer or of the person coerced. Thus it is with rape: the initial factual question is whether the victim submitted to pressure.

Gerald Dworkin, in his article “Compulsion and Moral Concepts”³⁹ argues that the existence of coercion is a purely factual issue — after that comes the question of moral

³⁸ Indeed, to further that aim, it may well be better to leave the marital immunity in place.

³⁹ (1968), 78 *Ethics* 227.

responsibility which, with the rape victim, would never arise and, with the rapist, would revolve around *mens rea* issues. Dworkin says that "coercion remains a descriptive and explanatory category with no logical ties to responsibility or the absence of it."⁴⁰ Thus the *act of rape* should be a fact like any other to be decided on the basis of whether the victim was deprived of freedom to make a choice based simply on the experience of sex itself and the attraction of the male.⁴¹ I do not mean that she is deprived of free will — that would be a red herring and would, in any event, lead the criminal law into issues with which it is not capable of dealing. An example may be helpful. An employer indicates to an employee that if she does not have intercourse with him he will fire her. She decides to have intercourse with him because she is afraid of losing her job. It makes sense to say that she was coerced into having sexual intercourse, but certainly not that she was deprived of her free will. She exercised it to submit to what was, in her view, the least of two evils.⁴² This avoids the difficulty pointed out by Atiyah in his recent book, *The Rise and Fall of Freedom of Contract*.⁴³ He states, in discussing duress, that

the tendency to treat coercion as something affecting the free will, was unfortunate. The idea that a man's will is 'overborne' by certain types of pressure and not by others is, both in logic indefensible, and in practice impossible of application. The reality is that some forms of pressure are in conformity with the . . . moral ideas of the community, and others are not.⁴⁴

It is the main thrust of this essay that it is time that the 'moral ideas' of our community, as reflected in the criminal law, reflect the idea that *any* pressure to engage in sexual intercourse is unacceptable. Once the presence of the coercive factor in a fact situation is established, then this would provide the basis only for an inquiry into the personal guilt of the male. By itself it would hardly be sufficient because a woman can be subjected to pressure (whether to submit to that pressure would depend on the individual woman) from external factors such as the economic situation of herself and/or her children, the psychological need for male approval which is constantly reinforced by the media, the perception that children need a father, or the perception of the need to maintain the male ego

⁴⁰ *Id.*, 232.

⁴¹ This is not a new idea. See the very useful article on consent as a factual issue by Jocelyne A. Scutt, "The Standard of Consent in Rape", [1976] N.Z.L.J. 462.

⁴² And indeed the male in this case would already be committing an offence under s.153(1) (b) of *The Criminal Code*, if the woman were under twenty-one. Presumably all other women are under a duty to be made of sterner stuff.

⁴³ (1979).

⁴⁴ *Id.*, 436.

so that he remains a good provider, father and agreeable companion. The male cannot, according to traditional theories of criminal responsibility, be punished for such pressure unless he consciously exploits it.⁴⁵

In considering submission to pressure to engage in sexual activity, it is necessary to cut away inappropriate analogies which cloud the issue because of common consent terminology and because judgment of the victim is inappropriate. At the moment a rape victim is treated rather like a person who commits a crime under duress, in that a judgment is reached as to her reason for submission. We might think that the *contractual* concept of duress is more appropriate and so, indeed, it is because we are dealing with an agreement to have sex, and not a commission of some wrong by the victim. Yet it is dangerous to use contract law as a model. The difference is fundamental in that with contracts there is a bargain which can be judged objectively. Although similar questions have to be asked about contracts between parties of unequal bargaining power (for example, 'did the weaker party consent?') we can afford to have a very narrow concept of lack of consent as it is still possible to judge the bargain. Thus we can enter into contracts with monopolies because it is *possible* to say that power was used fairly and for a socially-desirable economic purpose.

At one and the same time we can respect the judgment of the weaker party since, no matter how weak an individual is, it is assumed that he or she can still weigh alternatives in at least some theoretical sense. But we can refuse to enforce the contract because of the abuse of power as evidenced by the terms of the bargain itself.⁴⁶ There is no such bargain element to be judged in sexual relations. We cannot say, to give the most simplistic example, that on the one hand the wife has to have sexual intercourse when she does not want to but, on the other, her husband keeps a roof over her head and is otherwise kind to her. This is reducing marital sex to prostitution.

For the same reason there is no analogy to international treaties, although the possibility was appealing initially since in many ways the United States and Canada, for example, are like husband and wife. We are physically close, there are obvious differences in size and power including economic

⁴⁵ This is a conservative position. At some point, it must become legitimate to expect a degree of consciousness from men. It may indeed be already the time to utilize the concept of wilful blindness in this context. For a highly persuasive argument that rape can be analyzed as a crime of negligence, which certainly jolted me out of my "subjective orthodoxy" see Toni Packard, "Culpable Mistakes and Rape: Relating Mens Rea To the Crime" (1980), 30 *U. of T. L. J.* 75.

⁴⁶ The courts are becoming increasingly willing to judge bargains, using the concept of unconscionability. See S.M. Waddams, *The Law of Contracts* (Agincourt: Canada Law Books, 1977), 266-340.

power, and there is a certain identity of interest — perhaps too close for the taste of Canadians. An agreement, for example, relating to the extraction of Canadian mineral resources might be subject to the same concern as sexual intercourse between husband and wife: the total situation of inequality and economic dependence prevents a completely free choice. But nevertheless, such an agreement can be scrutinized and judged objectively while a sexual relationship cannot. Whatever infant theory of unequal agreements is developing in international law,⁴⁷ it is not of much use to us here conceptually although the same concern is evident that weakness should not be exploited and the same point can be made that the law is simplistic in the extreme. A treaty might be invalid because it was forced upon a Czech Ambassador by Hitler, but no serious attempt has been made to analyze treaties in terms of the respective power of the parties although in practice an unfair treaty will tend to be discarded as soon as it is feasible.

Another analogy which might seem helpful at first relates to the issues surrounding consent to drug programmes as, for example, in the prison setting. It can be plausibly argued that the very fact of institutionalization casts doubt on such 'consent'.⁴⁸ It seems that here there is something useful which helps to explain at least partly why consent by a wife should be subject to scrutiny, particularly a woman who undertakes the traditional role of wife and mother. It is worth considering whether she is in a 'total institution' in a sense, economically and possibly psychologically dependent on her husband, a dependence which is reinforced by society as a whole. But even here there is the crucial difference that we can develop standards to judge the morality of the bargain especially in view of the fact that we do not want to deny the prisoner the right to bargain for his or her freedom.

A better analogy may well be found in the jurisprudence relating to consent to medical treatment. Here the case-law on informed consent has demonstrated an attempt to impose a duty upon the physician to facilitate self-determination by the patient.⁴⁹ However, the imposition of a duty on a husband to ensure free choice by the wife seems to go too far for the criminal law even if it were possible in our present society. Hence the suggested utilization of the traditional concept of *mens rea* to help isolate cases of pressure on a wife for which a husband is *personally* responsible.

⁴⁹ See T. David Marshall, *The Physician and Canadian Law* (2nd ed., Toronto: Carswell, 1979), 33 ff.

⁴⁷ See Wolfgang Friedmann, Oliver J. Lissitzyn & Richard C. Pugh, *Cases and Materials on International Law* (St. Paul, Minn.: West Pub. Co., 1969), 334 ff.

⁴⁸ There is some authority for this in Michigan for example. See Jeffrie Murphy, "Total Institutions and the Possibility of Consent to Organic Therapies" (1975), 5 *Human Rights* 25.

Before going on to that second element, however, it seems necessary to utilize a further traditional concept: that of causation. There would have to be a link between the pressure brought to bear by the husband and the submission. This is where any proposal such as this comes closest to the danger of facilitating perpetuation of the present system since naturally a judgment will have to be made as to this causative link.⁵⁰

Consequently, in realistic terms, what is likely to be recognized as effective pressure by people charged with making such determinations? There are obvious factors such as force, although here we need to develop a sensitivity to the fact that a situation can be instinct with the threat of force although no threat is actually uttered. That depends on the marital history. American courts have shown some willingness to accept this type of argument. For example, in *People v. Flores*⁵¹ it was stated that:

If one were met in a lonely place by four big men and told to hold up his hands or do anything else, he would be doing the reasonable thing if he obeyed, even if they did not say what they would do to him if he refused. Their action and manner might well indicate their purpose and intention and it would be a mere play on words to say that these actions and circumstances did not constitute and were not the expression of a threat. In fact it would be a very compelling one.

The same degree of willingness to accept the 'four big men' argument has not been shown in the context of rape, and one would naturally not be sanguine about marital rape. In general a threat must be expressed and the victim must risk it being carried out before she will be believed. (In one older English case which provides an ironic contrast to *Flores*, *R. v. Hallett*,⁵² the victim was attacked by eight men but did not resist after the initial attack so that they were convicted of assault only.)

Force is an obvious type of pressure. The other possibilities are infinite and examples only should be given legislatively, threats to children, threats relating to money, food, precious and loved objects and even social activities. Limiting the possibilities would simply provide a vehicle for the judgment of the victim. The trier of fact must be satisfied beyond a reasonable doubt, which makes the current limitations on the law seem somewhat superfluous. Thus, to take an extreme case, it would simply not be credible that a woman would submit to unwanted intercourse because her husband threatened not to take her out to dinner. But would it not be

⁵⁰ I am not at all rejecting the argument that *simply bringing pressure to bear on a woman* should be a criminal offence, whether or not the woman submits. There is scope for both crimes of rape and sexual harassment.

⁵¹ 62 Cal. App. 2d. 700, 145 P. 2d. 318, 320 (1944).

⁵² (1841), 9 Car. & P. 748, 173 E. R. 1036.

credible if he threatened to burn the only copy of her Ph.D. Thesis or, more difficult from past experience, if she knew that family life would be intolerable until he had his own way?

Once a finding of coercion is made, then the inquiry as to the second element would be whether the husband deliberately or recklessly introduced the pressure into the fact situation. That is based simply on the application of the normal principles of *mens rea*. In addition, however, mental guilt could be based on the conscious exploitation of external factors. We cannot in some cases judge personal guilt without looking at such factors.

A useful analogy can be found in Frankfurts' discussion of the difference between an offer and a threat in his essay on "Coercion and Moral Responsibility".⁵³ He gives the example of the butcher who raises the price of meat. We might not feel that that is coercive in a normative sense since it is a simple change in his or her offer to sell us meat. But we need to look at the external circumstances. If we suppose that the customer will starve otherwise and the price is outrageously high, then the butcher can be judged accordingly. Indeed there are criminal law precedents for so doing. Three conditions are necessary:

1. Customer is dependent on butcher for meat.
2. Customer needs meat.
3. Butcher exploits customer's dependency and need.

Therefore it is possible for the relationship between the butcher and the customer to provide the foundation for a coercive situation, even though the customer's need is caused by factors for which the butcher is not personally responsible.

Traces can be found in case law of the idea that the coercive element can come from a position of power. For example, in *Commonwealth v. Carpenter*,⁵⁴ a case of indecent assault, a policeman picked up a girl under sixteen for violation of curfew and assaulted her sexually. It was argued for the defence that she consented and the policeman testified that she did not protest. It was held that the jury could conclude a lack of consent. She submitted because the circumstances meant that there was no need for force. The defendant's position, together with the threat (unstated) of detention for violation of the curfew, interfered with the freedom of choice of the girl. Two factors were therefore significant: first, the defendant's position of power which he exploited and, secondly, the fact of submission although there was no actual threat of force.

In my view it *should* not matter whether the victim took the decision to submit or whether it simply did not occur to her that she had any choice in the circumstances. But I do recognize that my proposal above suffers from the grave weakness that it

⁵³ In Ted Honderich (ed.), *Essays on Freedom of Action*, (London: Routledge and Kegan Paul, 1973).

⁵⁴ 172 Pa. Super. 271, 94 A 2d. 74 (1953).

offers nothing for the wives who have been socialized into the belief that they are the sexual property of their husbands. A domestic relationship may be such that a woman's will is effectively paralyzed in the sense that she either is not able to act on her wishes or is not able to choose what she wants.⁵⁵ However, one can only hope that the abolition of the marital exception and discussion of what should take its place may have some small impact on this problem.

I am sure that what I have offered here is an imperfect contribution to that debate. My aim, however, is to urge that it is not sufficient to recognize simply that the legal immunity of husbands is unacceptable and hence to bring the law of marital rape into line with the rest of the law without some discussion of the special coercive potential of the marital context. It is submitted that any change in the law should reflect the view that *any* pressure to engage in sexual activity is unacceptable so that we can move away from the ingrained notion of the victim's responsibility. It is also submitted that the nature of sexual activity in the context of an established relationship between a member of a relatively powerless group with a member of a relatively powerful group should be subjected to special scrutiny. We should also consider the possibility of adapting the conventional concept of *mens rea* to focus on conscious exploitation of collective power. I hope that I have at least stimulated some reflection on the difficulties of free sexual interaction between men and women, especially in the context of an established relationship.

⁵⁵ I have taken the concept of control over one's wants from Harry G. Frankfurt, "Freedom of the Will and the Concept of a Person" (1971), 68 *Journal of Philosophy* 5. One of the basic thrusts of active feminism is that women can help each other stop wanting certain things such as male approval simply because it is male, or male companionship rather than female companionship. It hardly seems necessary to state, except for the fact that feminist writing is sometimes criticized for not exhaustively cataloging men's woes, that men too can be trapped in an unhappy marriage, and can indeed perceive themselves to be relatively powerless vis-a-vis their wives.