CONSENT IN RAPE: THE PROBLEM OF THE MARRIAGE CONTRACT

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A proposition finding general acceptance is that no man may be guilty as principal[1] for the rape of his wife. In the current controversy surrounding rape laws and the strongly put view that reform is a necessity long overdue, the foundation for that proposition has not been questioned, although the "rule" has been recognized by some advocates to have no place in twentieth-century law.[2]

With much fanfare in 1976 the South Australian Parliament passed legislation purportedly overcoming the alleged common law problem and providing protection for a married woman from non-consensual acts of sexual intercourse where the perpetrator happened to be her husband.[3] Unfortunately, however, the new law serves only to confuse the issue,[4] in addition to depriving a wife of a protection which would seem to have existed without dispute at common law: that is, unqualified protection from acts of indecent assault carried out upon her by her husband.[5]

The question now for debate is whether legislative intervention is in fact necessary, or whether on the contrary the belief in a husband's immunity at common law demands a re-evaluation. It seems that a study of the grounds upon which the immunity proposition is based raises doubts as to its legal foundation, and also brings into disrepute the justification of such a ruling as public policy. Several aspects bear consideration:

i. Hale stated that a man may not be guilty of the rape of his wife, because "by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract".[6] Further support has been found in *R.* v. *Clarence*,[7] however

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1 At common law he will be responsible as a secondary party where assisting another to rape his wife: *Audley* (1631) 3 State Tr. 402.

2 See, for example: V. Nordby, "New Sexual Conduct Law" (1975) 19/4 Law Quad Notes 3; P. English, "The Husband Who Rapes His Wife" (1976) New Law Jrn. 1223; F.-C. Schroeder, *Das neues Sexualstrafrecht* (Karlsruhe: C. F. Müller Juristischer Verlag, 1975) p. 23.

3 S. 73(5) *Criminal Law Consolidation Act* 1935-1976 (s. 12(5) *Criminal Law Consolidation (Amendment) Act* 1976).

4 See discussion at VII. *The South Australian Legislation* infra.

5 *Ibid.*

6 *Hale's Pleas of the Crown*, Vol. I, 629.

7 (1888) 22 Q.B.D. 23.

a perusal of the supposed support contained therein tends to the view that the conventional reading may well be misguided.

ii. It has been held that a man may be charged with the assault of his wife, and where the assault is the direct means of obtaining sexual connection that assault may be the subject of a criminal charge.[8] It is therefore difficult to maintain that the sexual act arising from the assault[9] cannot itself be the subject of the criminal charge which would attach where there was no marriage. Can the end validly be divorced from the means?

iii. In matrimonial law the proposition which is used in the criminal law to preclude a charge of rape against a husband—namely, that the wife's consent to intercourse, given upon marriage, remains constant during the course of the marriage—does not exist as an iron-clad notion. There are occasions in matrimonial law when a woman is entitled to renounce or withhold consent to intercourse, and in certain circumstances the law has required her to withhold consent.[10] Further, matrimonial law recognizes that in fact a woman does in some situations withdraw consent and makes provision to deal with such instances. This is not reconcilable with a notion of complete, non-revocable consent to intercourse on marriage.

iv. With public policy, it would be paradoxical if support were given to the idea that a woman's property was not to be ravished by her husband; that upon marriage control of her property did not pass to the husband[11]—yet the law were to uphold the ravishing of the woman's body, and pass complete control over sexual activity to the husband. Further, the criminal law is made directly relevant to theft of property between spouses, there being no "policy reason" for ousting criminal responsibility where a husband has stolen from his wife—where he has taken *property* from her without her consent.[12]

v. Further to the public policy issue, in justifying the resort to physically aggressive demands and the indulgence by a husband in sexual acts with an unwilling wife by not making him liable to be charged with rape it seems that the law is supporting a tyrannous rather than a happily married relationship. Why should a married woman expect less consideration in sexual matters than an unmarried woman? Why should she be protected less by the criminal law?

8 *R.* v. *Miller* [1954] 2 Q.B. 282.
9 Which in practical terms would seem to be definable only as a sexual assault (that is, the intention of the actor is to obtain a sexual result, and the result of the assault is in fact sexual) of the type which in law is termed "rape".
10 E.g. where the husband committed adultery and the wife chose not to condone but to use the adultery as a grounding for a divorce action.
11 As provided in the *Married Woman's Property Acts.*
12 *Theft Act* 1968 (U.K.) and see infra.

I. CASE LAW BACKGROUND

All statements in *R.* v. *Clarence*[13] relating to the culpability of a man for the rape of his wife are *obiter*. The defendant was charged with "unlawfully and maliciously inflicting grievous bodily harm upon his wife", and with an assault upon her occasioning actual bodily harm. He had intercourse with his wife, with her express consent to the act, when at the time he was suffering (to his knowledge, though concealed from his wife) from venereal disease. The prosecution argued that had the wife known of the disease she would not have consented, and that therefore the husband was guilty of rape or at least of assault occasioning actual bodily harm. In the first instance the accused was convicted of both grievous bodily harm and assault. On appeal the conviction was reversed, nine of the judges favouring quashing as opposed to four favouring upholding the conviction. Despite the overwhelming decision that in the particular instance no crime had been committed at common-law, the judgments were by no means similarly in support of the idea that a wife could never withdraw consent to intercourse. Of the thirteen judges, seven declined to comment on the rape proposition.[14] Of the remaining six, the majority cast doubts on the non-rape idea; only one judgment stated unequivocally that a wife's consent given to intercourse upon marriage can never be revoked. Pollock B. contended:

> "The husband's connection with his wife is not only lawful, but it is in accordance with the ordinary conditions of married life. It is done in pursuance of the marital contract and of the status which was created by marriage, and the wife as to the connection itself is in a different position from any other woman, for she has no right or power to refuse her consent. . . . [Such a] connection may be accompanied by conduct which amounts to cruelty, as where the condition of the wife is such that she will or may suffer from such connection, or, as here, when the condition of the husband is such that the wife will suffer."[15]

Clearly Pollock B. considered that there is an irrevocable consent given upon marriage by a wife—a consent which apparently includes consent to otherwise unlawful acts, viz. assault.

> Wills J. cast doubt upon the idea that a man can never rape his wife: "If intercourse under the circumstances now in question constitute an assault on the part of the man, it must constitute rape, *unless indeed, as between married persons rape is impossible, a proposition to which I certainly am not prepared to assent, and for which there seems to me to be no sufficient authority.* . . . I cannot understand why, as a general rule, if intercourse be an assault, it should not be rape."[16]

[13] (1888) 22 Q.B.D. 23.
[14] Charles and Day JJ. (dissenting); Coleridge C.J., Huddleston B., Grantham, Manisty, Mathew JJ.
[15] *Clarence* (1888) 22 Q.B.D. 23, 63-4 (quashing conviction).
[16] Ibid. p. 33 (quashing conviction) (italics added).

And later:

> " for had he disclosed to the woman that there *might* be [a possibility of infection] . . ., she would, in most cases . . . have refused her consent, and it is, I should hope, equally true that a married woman, no less than an unmarried woman, would be justified in such a refusal."[17]

Stephen J. admitted that in the first edition of his *Digest of the Criminal Law* he had surmised that under certain circumstances a husband might be indicted for rape of his wife, but pointed out that in a later edition that statement was withdrawn.[18] Nevertheless in considering the question of fraud vitiating consent he stated: "If we apply [the fraud vitiates consent idea] to the present case, it is difficult to say that the prisoner was not guilty of rape, for the definition of rape is having connection with a woman without her consent. . . ."[19] The statement is completely inconsistent with the idea that upon marriage a woman gives an irrevocable consent to all acts of intercourse with her husband. In *Clarence* the parties were married. If fraud had been held to vitiate consent, then Stephen J. clearly saw that there would have been a consent on the part of the wife which would have been vitiated. The marriage contract still extant, the only consent that he could have contemplated as being capable of vitiation would have been a consent to the act in question: for if "consent to marry" and "consent to intercourse at all times" are the same thing, which must be the basis of the "irrevocable consent" argument, because a marriage ceremony certainly does not contain specific reference to intercourse and specific agreement by the parties to intercourse *at all times*, then the inescapable conclusion is that Stephen J. saw a consent capable of vitiation which was separate from the consent to marry. Stephen J. could not have been saying that if the fraud vitiated, the consent vitiated would have been that given upon marriage—the agreement to wed being inextricably bound up with an agreement to sexual intercourse at all times—and therefore that the marriage contract itself would have been ended![20]

Smith J. agreed with Stephen J. However he made special reference to the rape of a wife, and on this reads equivocally. He contended that upon marriage a wife consents to her husband's exercising marital rights, and this consent is not confined to times when his body is sound:

[17] Ibid. p. 34.

[18] *Stephen's Digest of the Criminal Law* 1877 Ed., 172; comments in *Clarence* (1888) 22 Q.B.D. 23, 24.

[19] *Clarence* (1888) 22 Q.B.D. 23, 43 (quashing conviction).

[20] Certainly Stephen J. also stated in *Clarence* at p. 43, that he considered the law in relation to fraud vitiating consent in rape to be indisputable only in cases of fraud as to the nature of the act done; with fraud as to identity of the person by whom it is done, "the law is not quite clear"; such types of fraud are not likely to arise between husband and wife. Nonetheless Stephen J.'s judgment implies that intercourse without consent can take place within a marriage, as he assumes that were fraud of a type capable of being classed "vitiating" to arise between married parties, the law would be capable of holding that the wife possessed an ability to consent, that consent being vitiated by the fraud.

> "for I suppose no one would assert that a husband was guilty of an offence because he exercised such a right when afflicted with some complaint of which he was then ignorant. Until the consent given at marriage be revoked, how can it be said that the husband in exercising his marital right has assaulted his wife?"[21]

He continued, however:

> "The utmost the Crown can say is that the wife would have withdrawn her consent if she had known what her husband knew, or, in other words, that the husband is guilty of a crime, viz. an assault, because he did not inform his wife of what he then knew. In my judgment in this case, the consent given at marriage still existing and unrevoked, the prisoner has not assaulted his wife."[22]

Thus, although he initially declared wifely consent to intercourse to exist on the basis of marriage, he apparently considered that that consent might be revoked: "*the consent given at marriage* still existing and unrevoked". Had he been inclined to the view that never within the marriage can consent be revoked, he should have said: "*the marriage* still existing . . ."; no necessity would arise for considering consent beyond the actual fact of marriage.

Field J. cited the passage from Hale[23] but went on to point out that unqualified acceptance would be wrong.[24] He then put the case of a wife who for reasons of health refused to consent to intercourse, the husband then inducing a third person to assist him while he forcibly perpetrated the act. He commented: "Would anyone say that the matrimonial consent would render this no crime?"[25, 26]

21 *Clarence* (1888) 22 Q.B.D. 23, 37.
22 Ibid. p. 37 (quashing conviction).
23 *Hale's Pleas of the Crown*, Vol. I, p. 629 (supra at 255).
24 *Clarence* (1888) 22 Q.B.D. 23, 57-8; "The authority of Hale C.J. on the matter is undoubtedly as high as any can be, *but no other authority is cited by him for this proposition, and I should hesitate before I adopted it.* There may, I think, be many cases in which a wife may lawfully refuse intercourse, and in which, if the husband imposed it by violence, he might be guilty of a crime." (Italics added.)
25 *Clarence* (1888) 22 Q.B.D. 23, 57-8 (dissenting and contending that conviction ought to be affirmed). At common law a husband can be convicted as secondary offender *where he assists another to rape his wife*: *Audley* (1631) 3 State Tr. 402 (or as a principal per *R.* v. *Cogan* and *R.* v. *Leak* [1976] Q.B. 217); however here the suggestion is that the assisted husband should be guilty of a crime—which surely must be rape. The question of "assistance" in such an act does not seem to be relevant to criminal liability of the husband, where the act is perpetrated by force: a forcible act of intercourse should be rape, whether or not assistance is sought. Further, it seems wrong that in law a husband assisting another party to rape his wife is liable for the rape penalty, but where a husband did the act whilst assisted both parties could not be guilty of rape (unless Field J.'s view is accepted) —yet surely the acts and the harm and danger are like? If Field J.'s view is accepted, also, there is no justifiable reason for distinguishing the crime or the punishment where a husband acts unassisted.
26 On the issue of assistance, it is also interesting to note the more recent case of *R.* v. *Cogan* and *R.* v. *Leak* [1976] Q.B. 217; [1975] 3 W.L.R. 316. There, although the principal offender, a friend of the husband, was on appeal held to be not guilty of rape, on grounds of an honest belief in the consent of the wife (per *R.* v. *Morgan* [1976] A.C. 182; [1975] 2 W.L.R. 913; [1975] 1 All E.R. 8; [1975] 2 All E.R. 347, C.A. and H.L. (E.)), the husband was nevertheless considered to be

Hawkins J.'s judgment contains conflicting views, first asserting that a husband can never rape his wife, then affirming that the wife's consent to intercourse given upon marriage is not absolute—or that it is a very special one, so that those acts not coming within the ambit of consent may be refused by the wife:

> "By the marriage contract a wife no doubt confers upon her husband an irrevocable privilege to have sexual intercourse with her *during such time as the ordinary relations created by such contract subsist between them.* For this reason it is that a husband cannot be convicted of rape committed by him upon the person of his wife. *But this marital privilege does not justify a husband in endangering his wife's health and causing her grievous bodily harm*, by exercising his marital privilege when he is suffering from venereal disorder of such a character that the natural consequence of such communion will be to communicate the disease to her. . . . So to endanger her health and causing her to suffer from loathsome disease contracted through his own infidelity cannot, by the most liberal construction of his matrimonial privilege, be said to fall within it; and although I can cite no direct authority upon the subject, *I cannot conceive it possible seriously to doubt that a wife would be justified in resisting by all means in her power, nay, even to the death, if necessary, the sexual embraces of a husband suffering from such contagious disorder.*"[27, 28]

Finally, Hawkins J. said:

> "I ought perhaps to state that *even if to hold a husband liable for an assault under such circumstances would be to subject him also to a charge of rape, the opinion I have expressed would not be changed.* No jury would be found to convict a husband of rape of his wife except under very exceptional circumstances, any more than they would convict of larceny a servant who stealthily appropriated to her own use a pin from her mistress's pin-cushion. *I can, however, readily imagine a state of circumstances under which a husband might*

guilty of aiding and abetting the rape of his wife. The Court considered that although "there was a presumption" that a husband cannot rape his wife, basing this statement on Hale, no such presumption exists where a man procures a drunken friend to perpetrate the act; here, the defendant husband could be indicted as a principal: "Had [the husband] been indicted as a principal offender, the case against him would have been clear beyond argument . . ." (At 320.) This case again illustrates the confused state of the law, in that a husband thinking he is assisting a companion to rape his wife may be indicted for rape, despite lack of intention to rape on the part of the party undertaking the act of intercourse, whilst a husband intending to have intercourse with his own wife in contravention of her wishes in the matter is considered not to be capable of being indicted for rape.

[27] *Clarence* (1888) 22 Q.B.D. 23, 33 (dissenting and upholding conviction) (italics added).

[28] Further authority was added by reference to *Popkin* v. *Popkin* (cited *Durant* v. *Durant* (1794) 1 Hagg. Eccl. Rep. 765) where Lord Stowell said: "[T]he husband has a right to his wife's person, but not if her health is endangered."

> *deservedly be punished with the penalty attached to rape*, and a person committing a theft even of a pin to the penalty attached to larceny."[29]

The view was also put that particular acts of intercourse—for example, intercourse where the husband is diseased, would not come within the ambit of a consent given upon marriage.[30]

The authority of *Clarence* is, then, not the bulwark of the irrevocable consent argument which it may have been considered.[31] Nevertheless support might be found in later cases. In *R.* v. *Clarke* the husband had forcible intercourse with his wife despite a justices' order containing a non-cohabitation clause. Byrne J. considered the only way in which the implied consent of marriage could be resurrected was by voluntary resumption of cohabitation by the wife. At the material time the wife had not resumed cohabitation:

> "The position, therefore, was that the wife, by process of law, namely marriage, had given consent to the husband to exercise the marital right during such time as the ordinary relations created by the marriage contract subsisted between them, but by a further process of law, namely, the justices' order, her consent to marital intercourse was revoked. Thus in my opinion, the husband was not entitled to have intercourse with her without her consent."[32]

The support given for the "existing proposition" that whilst a marriage was in train (without process of law revoking "the ordinary relations" so created) a husband could not be guilty of rape of his wife was that of Hale and *Clarence*; however the strong doubts expressed in *Clarence* as to the authority were not dealt with. It cannot be said, then, that this case adds authority to the argument for "perpetual consent" within marriage.

In *R.* v. *Miller*[33] the principle in *Clarke's* case was studied. During the interim between the filing of a petition for divorce and the hearing of the action, the husband forced himself upon his wife and had intercourse with her without her consent. When charged with rape and assault occasioning actual bodily harm, he was held to be guilty of assault only: although the implied consent of the wife to intercourse upon contracting the marriage might be revoked by order of a court (or, semble, by a separation agreement) it had not in fact been revoked—as no court order or agreement had been made at the time of the act. However the husband was not entitled to use force or violence for putting into practice the

[29] *Clarence* (1888) 22 Q.B.D. 23, 52. (Italics added.)
[30] Ibid. pp. 51-2.
[31] As in *R.* v. *Miller* [1954] 2 Q.B. 282 (and comments infra); P. Brett and P. L. Waller, *Criminal Law—Cases and Text* (3rd Ed., Sydney: Butterworth & Co. Ltd. 1971) p. 176; C. Howard, *Australian Criminal Law* (2nd Ed., Melbourne: Law Book Co. Ltd. 1970) pp. 170-2. The more recent case *R.* v. *Cogan* and *R.* v. *Leak* [1975] 3 W.L.R. 316 also accepted without question that a man cannot rape his wife, accepting the Hale statement. (At 320.)
[32] *R.* v. *Clarke* [1949] 2 All E.R. 448-9.
[33] [1954] 2 Q.B. 282.

(alleged) marital right; if he did so he would be guilty of assault. Lynskey J. stated:

> "Can I say that because the wife has left her husband and has brought a petition for divorce that one must infer revocation of the wife's implied consent? . . . I cannot see that, because a petition for divorce has been presented, that has any effect in law upon the existing marriage. It is not until a decree nisi, or possibly a decree absolute, has been pronounced that the marriage and its obligations can be said to be terminated. . . . The petition might be rejected and in that event the marriage would still be subsisting and consent to marital intercourse as given in that marriage contract still be unrevoked. The result is that I must apply the law as it stands, there being no evidence which enables me to say that here the wife's implied consent to marital intercourse has been revoked by an act of the parties or by an act of the courts. The result is that, as the law implies consent to what took place in so far as intercourse is concerned . . . the accused cannot be guilty of the crime of rape."[34]

Superficially the judgment gives weight to the Hale statement. However the judgment is disturbing in that although *Clarence* is referred to, and indeed heavily relied upon, the full extent of the conflicting views in that case is not recognized. In discussing *Clarence* Lynskey J. took the view that the statement of the law in Hale was still accepted by the judges, yet he quoted from the judgments of Wills J.—who said that he was not prepared to assent to the idea that a man could never rape his wife; from Smith J.—whom Lynskey J. admitted took the view opposed to that of Hale; from Field J.—who would "hesitate" before adopting Hale's position; and referred to Hawkins J. who, as Lynskey J. saw it, "took a strong view that a husband could not be convicted of a rape on his wife", yet nevertheless attempted to distinguish instances where the so-called marital consent would not extend, and also envisaged that a jury *might* convict a husband of rape; Pollock B. was the only judge referred to (and the only judge in *Clarence*) who took an unequivocal view that a man cannot rape his wife. On the basis of these judgments Lynskey J. stated:

> "There are no other authorities I can find prior to 1949 when this matter was considered in *Clarke*, and the view which I take of the *dicta* of the judges in *Clarence* is that the statement of the law in Hale was still accepted by them because their observations are only *obiter dicta*, . . ."[35]

To state that it must be assumed that the judges accepted Hale's view "because their statements were *obiter dicta*" is confusing. Of course the statements criticising the Hale stance were *obiter*—there was in the case no question of whether the woman had or had not consented to the

[34] *R.* v. *Miller* [1954] 2 Q.B. 282, 290.
[35] Ibid. p. 288.

particular instance of intercourse the subject of the charge. The statements could be nothing *but obiter*; nevertheless there could not be said to be "an acceptance" of Hale's rule. Both upon the showing of those judges referred to in *Miller* and upon a totality of the judgments in *Clarence* it is extremely difficult to understand Lynskey J.'s decision to ignore the strong questioning of Hale, obviously pointing the way to a complete review of the whole issue of marital consent and liability for rape. Although *obiter*, the remarks were of such a nature as to suggest that the case of *Miller* is the very instance in which a reappraisal of the "rule" should have been made. The majority of judges quoted in *Miller* would seem to advocate this review.

R. v. *Clarke* and *R.* v. *Miller* could be described as mapping a retrograde path. To suppose that the reservations contained in *Clarence* might refer only to cases of termination of the marital contract would be to empty the judgments of any substance. Once a court order has put a marriage to an end or suspended cohabitation between parties, it is obvious that any consent which might be said to be created under the marriage contract will similarly be at an end. Here there is no problem. Can the judges in *Clarence* have directed their queries at what is in effect a truism?[36] Such a view also ignores the period of legal history in which the judgment was made, in that at the time, development of family law being at the stage it was, it could not feasibly be thought that the judges were basing their ideas on the separation order/divorce standard of *R.* v. *Miller* and *R.* v. *Clarke*.

Similarly *R.* v. *O'Brien*[37] errs by way of limitation. Here, the wife petitioned for divorce and was granted a decree nisi. Two days after the decree nisi was issued the husband, it was alleged, raped his wife. The accused contended that the indictment should be quashed, no offence having been committed as the prosecutrix remained his wife until the decree absolute was pronounced. The court rejected this argument. It was held to be unnecessary to require that forcible intercourse be carried

[36] Further, Lynskey J. could be said to be confused about the nature of the withdrawal of consent, or the type of action required. Referring to *Clarke's* case, he considered that withdrawal of consent could be evidenced by "an act of the parties or by an act of the courts" (at 286). He earlier said that had there been "an agreement to separate, particularly if it had contained a non-molestation clause, I should have come to the conclusion that that, also, revoked the wife's consent" (at pp. 285-6). Presumably the latter would be "an act of the parties" as to revoke consent. However it is difficult to understand how the act of the woman in issuing a petition for divorce could not similarly be considered to be a revocation of any presumed or implied consent evolving with the marriage contract. Is it necessary for the revocation of implied consent to be made only with the agreement of the husband, unless the court has intervened in making an order or divorce decree to support the wife's revocation? Is it indeed to be an act of the *parties* which is required, so that both husband and wife together agree that the wife will retract the supposed consent given upon marriage? Can a wife retract consent, where a court order is not made, only upon consent of her husband? For this is the conclusion to which one is drawn upon reading *R.* v. *Miller*.

[37] [1974] 3 All E.R. 663.

out after decree absolute rather than decree nisi in order that the offender-husband could validly be indicted for rape. Referring to *Miller's* case, Park J. concluded:

> "In my judgment, decree nisi effectively brings the marriage to an end. Between the pronouncing of a decree nisi and a decree absolute a marriage subsists as a mere technicality. There can be no question that by a decree nisi a wife's implied consent to marital intercourse is revoked. Accordingly the husband commits the offence of rape if he has sexual intercourse with her thereafter without her consent."[38, 39]

It appears that the "bringing of the marriage to an end" is the relevant issue; rather the question should be "did the wife withdraw consent to intercourse". The decree absolute may for some reason not be issued. This would mean that the marriage was not at an end. Yet would this similarly mean that the husband would then have a right to enjoy forcible intercourse with his wife without being indicted for rape, and appeal against the original conviction? The objection to *Miller's* case is valid here: that is, the petitioning for divorce by the wife should be sufficient to indicate revocation of consent to sexual intercourse with the husband. If the marriage is "at an end" there is no necessity for legal pronouncement to confirm that a wife's consent on marriage to intercourse within that marriage is also at an end. Quite clearly once the marriage is at an end because it has legally ended, all rights and obligations created under the original contract are at an end.

The authority on which *Clarke, Miller* and *O'Brien* seek to found the idea that the contract of marriage must be at an end or a separation order issued or separation agreement made so that a wife might be said not to consent to intercourse with her husband, thus laying him open to an indictment for rape in the case of forcible intercourse is tenuous. If the judgments in *Clarence* are to be at all meaningful, the *Miller* reading of them cannot be accepted; nor can the *O'Brien* finding that the marriage must be "at an end" be accepted otherwise than as compounding the failure to take into account *Clarence*,[40] which provides authority for the reopening of the question of wifely consent, so that the Victorian attitude of "submission at all times" should have no place in present day law.

II. RAPE VERSUS ASSAULT

It may be contended that *Clarence* raises the issue of assault where a man has forcible intercourse with his wife, rather than the issue of rape.

38 Ibid. p. 664.

39 That marriage is a "mere technicality" after decree nisi may be subject to questioning! (See: L. E. Mosesson, "Case Notes—U.K." (1974) 9, 34). The Criminologist 30, 34 (Rape—consent of wife pending decree absolute).

40 And *Popkin* v. *Popkin* (see fn. 28 supra)—though both cases concentrated on the health aspect as justifying a woman in making a legal refusal to intercourse, this was an example of a possible instance of refusal rather than an exclusive ground. (See judgments of Wills, Hawkins, Field and Smith JJ.)

This problem was dealt with by Wills J., who considered that if the husband were to be found guilty of an assault, then he should be guilty of rape where forcible intercourse was in question:

> "To separate the act into two portions . . . and to say that there was consent to do so much of it [as amounted to penetration], seems to me to be a subtlety of an extreme kind. There is, under the circumstances, just as much and just as little consent to one part of the transaction as to the rest of it . . . because the consent was not to the act done, the thing done is an assault. If an assault—a rape also, as it appears to me. . . . [T]o me it seems a strange misapplication of language to call such a deed as that under consideration either a rape or an assault . . . an assault which includes penetration does not seem to me to be anything but rape."[41]

That the acts leading up to, and the actual act of, penetration are part of a single transaction with one design—the obtaining of sexual gratification—and that the acts leading up to penetration may be the subject of a criminal charge—assault—leads to the logically inevitable conclusion that the total transaction should be the subject of a criminal charge. If, as Field J. stated, there may be "many cases in which a wife may lawfully refuse intercourse, and which, if the husband imposed it by violence, he might be held guilty of a crime . . ."[42] the inevitable conclusion is that the "crime"—an assault leading to penetration against the will of the woman, is "rape".[43] Even more strongly supporting this conclusion is that Field J. went on to add that were a husband to gain assistance in committing the act, "would anyone say that the matrimonial consent would render this no crime?"[44] The man's liability should be like, whether he seeks assistance or alone subdues his wife for the purposes of intercourse.[45]

Hawkins J. could "readily imagine a state of circumstances under which a husband might deservedly be punished with the penalty attached to rape".[46] If the man is so punished, then he is being punished for rape, not simply for assault.

In *Miller's* case Lynskey J. did not address himself to the difficulty of resolving the paradoxical nature of a ruling which would render a man

41 *Clarence* (1888) 22 Q.B.D. 23.
42 Ibid. pp. 57-8.
43 Note that it has contrarily been suggested that if it is correct in law that consent given on marriage to sexual intercourse by the wife is irrevocable, then events leading up to intercourse, whether or not between unmarried persons they would constitute assault, could neither be subject to criminal law as assault, just as the actual act of penetration could not be rape: C. Howard, op. cit. p. 172. Hunt, *South African Criminal Law and Procedure* (Vol. II, Common Law Crimes, Cape Town, 1970). Hawkins J. did not advocate this, preferring that the husband be liable, even if that liability should be for rape. (Note also Pollock J.'s judgment in *Clarence*: he recognized that where consent to intercourse was absolute on the part of a wife, this would also mean that a husband would not be guilty of assault. This would seem to be the more consistent view if the consent premise is accepted.)
44 *Clarence* (1888) 22 Q.B.D. 23, 57-8.
45 See: fns 25, 26 supra.
46 *Clarence* (1888) 22 Q.B.D. 23, 52; see also fn. 29 supra and accompanying text.

having forcible intercourse with his wife as being guilty of assault for the preliminaries, but not of rape for the penetration effected thereby: "If [the husband] uses force or violence . . . he may make himself liable to the criminal law, not for the offence of rape, but for whatever other offence the facts of the particular case warrant."[47] This conclusion was based on *R.* v. *Jackson*[48] where the husband, having obtained an order for restitution of conjugal rights which his wife refused to obey, took possession of his wife's person, placing her in strict custody in his own home. It was held that although the husband had a right to the society of his wife, and although he had obtained a decree for restitution of conjugal rights, he was not entitled to use force for the purpose of attaining his rights.[49] *Miller's* case extended the prohibition to the use of force or violence in sexual relations with the wife.[50] Such an extension may, however, be so limited as to be misplaced. Rather than providing a means whereby assault in effecting penetration can be separated from the penetration so that the man can be held guilty of assault but not of rape, *Jackson's* case supports the view that if the man is guilty of assault, then he is guilty of rape also.

Upon agreement under the marital contract the wife consents to conjugal rights on the part of the husband, as he with her.[51] However never has the law had power to enforce such rights by placing the wife in the custody of the husband; the greatest power asserted was that of imprisonment of a party refusing to obey a decree for restitution of conjugal rights which had been issued by the Matrimonial Causes Court.[52] By the *Matrimonial Causes Act* 1884 the Court was deprived of this power of enforcement; instead refusal to restore conjugal rights was to be deemed desertion. The conjugal rights set up by the marital contract are dependent upon continuing agreement of the parties; if the consent is unilaterally withdrawn, the marriage is not in law at an end, but the law is powerless to restore the rights. Other remedies—such as the right to

[47] *R.* v. *Miller* [1954] 2 Q.B. 282, 286.

[48] [1891] 2 Q.B. 671.

[49] In delivering judgment, Lord Halsbury L.C. referred to the "bold contention" in the past that slavery existed in England, stating that in 1891 it would be "regarded as ridiculous": "In the same way, such quaint and absurd dicta as are to be found in the books as to the right of a husband over his wife in respect of personal chastisement are not, I think, now capable of being cited as authorities in a court of justice in this or in any civilised country."

[50] *R.* v. *Miller* [1954] 2 Q.B. 282, 286.

[51] See generally: P. M. Bromley, *Family Law* (2nd ed., London: Butterworths, 1971) p. 92 ff.

[52] In *R.* v. *Leggat* 18 Q.B. 781 where a husband applied for a writ of habeaus corpus for restoral of his wife against her will it was said: "If a writ of habeaus corpus were to issue, and the wife were to be brought before us, we could not compel her to return to her husband; she would be at liberty to go where she chose. If she has no good cause for remaining away from her husband, he may obtain a decree of the Ecclesiastical Court ordering her to return to him." (Per Lord Campbell, cited *Jackson.*) Note that restoration of conjugal rights is now an obsolete procedure.

apply to the court for maintenance, separation or divorce—come into play. What the law cannot do cannot be done by private enforcement: the husband does not have a right to remove the wife into his own custody; if he does so, it will be a false imprisonment, and there is no suggestion that the marital contract could oust an action against the husband for false imprisonment or kidnapping of his wife:[53]

> "It is impossible to imagine that the husband has any right of imprisonment in a case in which he is at once a party, the judge, and the executioner, or that he can enforce such restitution by himself imprisoning the wife. . . ."[54]

It is significant that the *imprisonment* of the wife was ruled illegal. There was no severance of the imprisonment (the regaining of the wife's company) from the means by which that imprisonment was undertaken. The court considered the whole transaction to be illegal. The severance idea put forward in *Miller's* case would legally be in concert with *R.* v. *Jackson* only if in the latter it had been held that the method of securing the wife's return to the matrimonial home was illegal—e.g. assault—and the actual fact of her being in the home was rendered lawful by the consent given upon marriage to conjugal rights. On a parallel with *Jackson's* case, where sexual intercourse is in question it would be that the marital contract is a recognition of an agreement by husband and wife to take part in intercourse, but that if the wife chooses not to consent to the particular act, the husband has no power to enforce this by direct action.[55] If he decides to take direct action, forcing intercourse despite refusal of the wife, then in concert with *Jackson* he will be laying himself open to charges of assault and rape. Just as the marital contract does not provide that the company of a wife may be secured against her will,

[53] Per Halsbury L.C. at 680. "[This case] seems to me to be based on the broad proposition that it is the right of the husband when his wife has wilfully absented herself from him, to seize the person of his wife by force and detain her in his house until she shall be willing to restore to him his conjugal rights. I am not prepared to assent to such a proposition. The legislature has deprived the Matrimonial Causes Court of the power to imprison for refusal to obey a decree for the restitution of conjugal rights. The husband's contention is that, whereas the Court never had the power to seize and hand over the wife to the husband, but only the power to imprison her as for a contempt for disobedience of the decree . . . and even that power has now been taken away, the husband may himself of his own motion, if she withdraws from the conjugal consortium, seize and imprison her person until she consents to restore conjugal rights. I am of opinion that no such right exists or ever did exist." And per Lord Esher at 684: "I think that the passing of the Act . . . is the strongest possible evidence to shew that the legislature had no idea that a power would remain in the husband to imprison the wife for himself; and this tends to shew that it is not and never was the law of England that the husband has such a right of seizing and imprisoning the wife as has been contended."

[54] Per Fry L.J. in *R.* v. *Jackson* [1891] 1 Q.B. 671, 686.

[55] The action available to him would be to accept the decision of the wife not to partake of the particular act of intercourse, or if refusal was intolerable to him, to seek remedies through the courts—by way of an action for divorce on grounds of breakdown of the marriage, or simply to come to an agreement with the wife to part, or to leave her.

nor does it provide that sexual intercourse with her may be secured against her will.[56]

III. MATRIMONIAL LAW

In law the contract of marriage creates a special relationship between the parties. Certain "rights" and "obligations" devolve upon the spouses: husband and wife partake of "bundles of rights some hardly capable of precise definition".[57] Perhaps the basic duty is that of living together. In concert with this duty, however, there is a right to consent (or refuse to consent) to live in a particular place. The law does not operate on the basis that consent given on marriage is absolute, however. If a disagreement arises as to the place of the home, although it was considered that the husband had the right to determine where that home might be,[58] the law did not deny that the wife could refuse to consent to live in the chosen place. If choice of home was detrimental to wife's health or general welfare, she was entitled to refuse consent to live there.[59] Similarly if the choice of home qualified as "unreasonable" the law accepted refusal of consent on the part of a wife to join the husband.[60] Even where refusal of a wife is deemed "unreasonable" by the courts, the law recognizes withholding of consent by making special provision for it: where a wife so refuses, the husband may be justified in seeking a separation order or a divorce. This is a legal recognition of a capacity to refuse. If the husband transports his wife to the place despite her express desire not to go, the transportation will be against her will and the husband guilty of false imprisonment.[61] The concept of consent or non-consent to the question of cohabitation should logically extend to the question of consent or non-consent to sexual intercourse.

That a clear recognition of a capacity in the wife to refuse intercourse is given by the law is evident from *Foster* v. *Foster*[62] where the husband,

[56] Note that in *Jackson's* case the court regarded the "insult" of capture and confinement as well as the actual fact of withdrawal of liberty. Presumably also on a parallel with that case, the act of intercourse with an unwilling wife would just as well be heinous where it was simply a forced submission as where it was accompanied by actual blows.

[57] Lord Reid in *Best* v. *Samuel Fox and Co. Ltd.* [1952] 2 All E.R. 394, 401.

[58] *Mansey* v. *Mansey* [1940] P. 139; [1940] 2 All E.R. 424. Today the choice would be made together: *Dunn* v. *Dunn* [1948] P. 98; [1948] 2 All E.R. 822 (see comments on this latter case infra).

[59] *Walter* v. *Walter* (1949) 65 L.T.R. 680; *Munro* v. *Munro* [1950] 1 All E.R. 832.

[60] In *Munro* v. *Munro* [1950] 1 All E.R. 832 it was held that the husband had no right to demand, simply by virtue of matrimonial consent, that his wife join him in living accommodation shared by his mother, with whom the wife had no desire to live. Bucknill L.J. stated: "[T]he question is whether the offer of a home by the husband to the wife was a reasonable offer. If it was not a reasonable offer, *the wife was entitled to reject it.*" (At p. 833.) (Italics added.)

[61] Or kidnapping. See: *R.* v. *Jackson* (1891) 2 Q.B. 671; *R.* v. *Reid* (1973) 1 Q.B. 299, and see discussion in ii. *Rape versus Assault* supra. (In *R.* v. *Reid* it was specifically held that it is not necessary that a husband be living apart from his wife, nor that there should be a non-cohabitation order, for the charge of kidnapping to lie.)

[62] [1921] P. 438.

infected with venereal disease, had connection with his wife despite her protests. The husband was described as "taking advantage of his wife and having intercourse with her *against her will*".[63] Similarly, if the demands of one spouse are inordinate or unreasonable, or are likely to result in a breakdown in health, the other spouse may deny consent.[64] It is difficult, then, to maintain that a wife can have a capacity to consent or deny consent to intercourse in marital law yet not have such a capacity to consent or deny consent in criminal law. A person can either consent to a particular act or not consent to it; whether or not proceedings are brought, or in what jurisdiction proceedings are brought, cannot alter the capacity to give or withhold consent, or the material facts of the event.

Further with condonation: at common law the adultery of one partner, if condoned by the other, cannot be the subject of proceedings for divorce or separation;[65] acts of sexual intercourse can be sufficient to sustain an allegation of condonation; "condonation" implies capacity to give or withhold consent.[66] If the wife is capable of giving consent or withholding it for the purpose of condonation,[67] she ought equally to be capable of giving or withholding for purposes of criminal law. If she was considered to have given irrevocable consent to all acts of sexual intercourse upon marriage "condonation" would be a nonsensical term if applied to her acts. Either no act of intercourse could ever constitute condonation—she would have no choice in the matter; or every act of intercourse would be capable of constituting condonation where she knew of the adultery. If consent to marriage is equal to absolute consent, an act following adultery will be consensual and the wife cannot be said *not* to condone, unless unaware of the adultery.[68] The capacity of refusal which was recognized thus in the law of matrimony should render a husband capable of prosecution for the rape of his wife.

IV. PROPERTY LAW

In mediaeval law the powers, rights and duties of married persons differed from those sustained under modern law. As common law developed so too did rules relating to property of married women, so as to give the

[63] *Foster* v. *Foster* [1921] P. 438, 443 (italics added).
[64] Bromley, op. cit. p. 96. Relevant may be the state of the spouse's health or the manner in which intercourse is insisted upon—e.g. coitus interruptus.
[65] *Wills* v. *Wills* [1954] 2 All E.R. 491.
[66] See: *Baguley* v. *Baguley* (1957) reported [1962] P. 59; [1961] 2 All E.R. 635; *Morely* v. *Morely* [1961] 1 All E.R. 428; *W.* v. *W.* (No. 2) [1962] P. 49; [1961] 2 All E.R. 626. Note also: Bromley, op. cit. p. 194.
[67] See: *Matrimonial Causes Act* 1965 (U.K.) s. 42(1); now *Matrimonial Causes Act* 1973.
[68] Although today in Australia under the *Family Law Act* 1975 the idea of condonation as barring a divorce is obsolete, and it is resumption of cohabitation which may operate to dispute the idea of irretrievable breakdown, this does not detract from the absurdity of the common law position: that at a time when some would declare that an irrevocable consent to intercourse was given upon marriage, in marital law the fact and the right of retraction of consent was recognized.

husband considerable control. With freehold land the woman retained ownership; during the marriage, however, the husband was entitled to all rents and profits therefrom to do with as he chose; the wife was not entitled to dispose of the land, although she could do so in concert with her husband. A husband had absolute power to dispose of any leaseholds belonging to the wife. All those choses in possession belonging to a wife upon her marriage, or accruing during marriage, belonged absolutely to the husband.[69] By the close of the 16th century, however, rules had developed protecting the married woman's property interests to a degree.

The husband's concurrence was not necessary in order that a married woman might exercise powers of appointment. By way of a separate use a married woman was able to retain, under equity, rights of holding and disposing of the estate identical with those of a single woman.[70] A second rule which developed, that of "restraint upon anticipation" prevented the wife from disposing of benefits accruing from the property before they actually became due; thus it was hoped to prevent dissipation by a profligate husband.[71] In the nineteenth century various Acts were passed, culminating in the *Married Woman's Property Act* 1882 (U.K.) by which it was provided that a married woman should be entitled to retain property which she owned at the time of her marriage. Later Acts further improved the situation so that today a married woman stands in relation to property owned by herself in a like position to the single woman.[72]

It can thus be seen that from an early date the law followed a policy recognizing that a husband might abuse control over his wife's property. Today a man does not have a licence by way of marriage to do with his wife's property what he will. Public policy seeking to uphold the marital relationship does not see as detrimental to that relationship the recognition of rights in married women over their property. The feasibility of a contention that there should be a rule giving a husband a licence to do with his wife's person as he pleases is thus brought into question.

Further, there is the issue of criminal proceedings between husband and wife in terms of property offences. Originally the doctrine decreeing husband and wife were one precluded any possibility of criminal charges on grounds of theft, though one party might dispose of personalty of the other without consent. With recognition of the separate property concept by the 1882 Act, however, the rule was altered so that a charge of theft could legally be maintained against one spouse by the other where

[69] See generally: J. Eekelaar, *Family Security and Family Breakdown* (London: Penguin 1971) p. 98 ff for an account of this development.

[70] Originally this was effected through the use of trustees, however it finally came about that a husband would hold such an estate on trust, with no greater powers than those that would have been created in independent trustees.

[71] For a general coverage of development of laws protecting married women's property interests, see: Bromley, op. cit. p. 347 ff; R. E. Megarry and H. W. R. Wade, *Law of Real Property* (London: Stevens and Sons, 1966) p. 986 ff.

[72] See, e.g. *Law Reform (Married Women and Tortfeasors) Act* 1935 (U.K.).

the parties were living separately at the time of the alleged theft, or the theft took place as the accused party was departing from the matrimonial home in order to renounce consortium.[73] Under the *Theft Act* 1968 either party can now be charged and convicted of theft of the spouse's property, in the same way as strangers.[74]

Thus, if the "rule" that a man cannot be charged with the rape of his wife is based on grounds of public policy, a paradoxical issue is raised: that it should be considered "against public policy" for a husband to be charged with rape, yet not considered "against public policy" for a man to be charged with theft of property of his wife.[75]

Certainly some development of protection of the wife's person from abuses of a husband can be seen. Ancient dicta proclaimed a husband had power to chastise and beat his wife;[76] yet even Hale contended that a husband's power, if it existed, extended only to chastisement by way of admonition.[77] *R.* v. *Jackson*[78] held that a man has no power to imprison his wife;[79] *R.* v. *Miller*[80] held that a man will be guilty of assault if he does to her that which if done to a stranger would amount to assault.[81] It is nevertheless contended that public policy should give sanction to all acts of sexual intercourse between husband and wife which are carried out by means of force. Thus, although public policy allows a man to be charged with simple assault committed upon his spouse so that crimes committed against the person within marriage are not totally without redress, it remains difficult to comprehend a public policy which would allow prosecution within a marriage for theft and for assault, but not for an act of penetration arising from the very assault which can be the subject of criminal prosecution.

If the ground upon which prosecution for rape is ousted when the assailant is the husband is that of wishing to support the marriage relationship, a public policy which does not come into play where charges relate to real or personal property, it seems that the policy places a higher premium on protection of property than upon protection of the person. This in effect places protection of property above the support of the

[73] *Married Woman's Property Act* 1882 (U.K.), ss. 12, 16; also: *R.* v. *Creamer* [1919] 1 K.B. 664; G. Williams, *Criminal Law* (Vol. I, The General Part) (London: Stevens & Sons, 1961) p. 800.

[74] S. 30(1); each can also be charged and convicted of obtaining the property by deception, etc. one from the other; also theft by one partner of property owned jointly. (See generally: Bromley, op. cit. p. 129.)

[75] One objection raised to the prosecution of a man with rape of his wife is that difficulties of proof in such an intimate relationship are insurmountable. Why not in at least some property offences, however?

[76] *R.* v. *Jackson* [1891] 2 Q.B. 671, per Lord Halsbury, p. 679 ff.

[77] See also: *Lord Leigh's Case* 3 Keb. 433; *Manby* v. *Scott* 1 Sid. 109.

[78] [1891] 2 Q.B. 671.

[79] See discussion supra, p. 268 ff.

[80] [1954] 2 Q.B. 282.

[81] See discussion supra, p. 265 ff.

marriage relationship, and support of the relationship above protection of the person. Such a policy could only be described as lacking credibility.

V. LAW AND PUBLIC POLICY

The public policy issue may nevertheless continue to find favour. It may be said that the sexual relationship being such an intrinsically important part of the total marriage relationship, it is essential for the maintenance of good married relations that no man should ever fear being charged in respect of his sexual activities with his wife.[82]

The contention rests upon a fallacy. The ground upon which it could be asserted that a marriage wherein the husband forces his sexual attentions upon an undesiring wife is one that the law should be determined to maintain, whatever the physical or psychological abuse the wife might be forced to suffer, eludes discovery. No court can justify, on grounds of upholding the "sacred state of matrimony", inconsideration on the part of one of the parties in relation to what is a most affective part of that relationship.

In *Dunn* v. *Dunn*[83] Denning L.J. in discussing rights arising under the marital contract concluded that where decisions were such as to affect the parties and their children a duty was cast upon both:

> "It is their duty to decide [such issues] . . . by agreement, by give and take, and not by the imposition of the will of one over the other. Each is entitled to an equal voice in the ordering of the affairs which are their common concern. Neither has the casting vote. . . ."[84]

The decision as to sexual activity is clearly a decision affecting both parties; therefore it must be the duty (if not the desire!) of the parties to decide by agreement whether in the particular instance they will partake of sexual intercourse. While public policy might support all gentle persuasion on the part of either spouse in carrying out any of the terms of the marriage contract, it surely ought not to support what in effect are criminal acts committed against the person, which can hardly be calculated to inspire, maintain, or preserve a happily married relationship. To imply that lack of provision for protection of married women against rape where the perpetrator is the husband supports the marital relationship is to state that the aim of the law is to preserve relationships *not* where there is "equal agreement" by the parties, but where there is domination by one, subjugation on the part of the other, and where one partner's sexual appetite is assuaged without regard to sexual appetite, good health and well-being of the other.

[82] This view apparently attaches no importance to the fear of a wife of her husband's sexual assaults.
[83] [1949] P. 98; [1948] 2 All E.R. 822.
[84] *Dunn* v. *Dunn* [1948] 2 All E.R. 822, 823-4.

In regarding sexual relations within marriage, however, the view has been adopted that:

> "Intercourse . . . is a privilege at least and perhaps a right and duty inherent in the matrimonial state, accepted as such by husband and wife. In the vast majority of cases the enjoyment of this privilege will simply represent the fulfillment of the natural desires of the parties and in these cases there will be no problem of refusal. There will however be some cases where, the adjustment of the parties not being so happy, the wife may consistently repel her husband's advances. If the wife is adamant in her refusal the husband must choose between letting his 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 for rape."[85]

Such a view shows some lack of understanding of sexual relations. It is questionable whether the husband's "letting his wife's will prevail" would any more tend to the "destruction of the marriage" than would the aggression of the husband in having his will prevail. Significantly the marriage is spoken of as "his" marriage. Apparently it is better for the law to tolerate aggression within the married relationship, supporting the type of marriage where the man's sexual desires are assuaged without regard for the desires of the wife, than for a husband to have to seek separation or divorce due to his wife's lack of sexual desire, or for the law to uphold a policy in which aggression or imposition of the will is not considered tolerable in marital relations, so that the husband is required to temper his desires with consideration for his wife, and thus wait until she is a willing partner. The wife's type of marriage, where parties assuage sexual desires only when both parties are desirous or agreed upon doing so, is seemingly of no moment. Acting without wifely consent will result in one evil and perhaps two. It may result in both the commission by the husband of what is clearly, in law, if the man were not the husband, a criminal act—an assault which is rape; and the subsequent breakdown of the marriage.[86]

Nevertheless in support of such a policy the case of *G.* v. *G.*[87] has been cited.[88] A decree of nullity on grounds of impotence was sought by the husband against the wife, where the wife's refusal was due to an invincible repugnance to the act of consummation, resulting in a paralysis of the will and failure to consummate. Lord Dunedin, referring to attempts made by the husband to secure connection with the wife, stated:

[85] N. Morris and G. Turner, "Two Problems in the Law of Rape" (1956) 2 Univ. of Qld L.R. 247, 259.

[86] Acts of a sexually aggressive nature are recognized in matrimonial law as an appropriate basis for divorce, and thus as justifying breakdown of a marriage—in both fact and in law, yet it is alleged that the recognition of such as criminal would lead to marriage breakdown.

[87] [1924] P. 349.

[88] See: Morris and Turner, op. cit. p. 259.

> "[T]he learned judges in the Court below threw a doubt on whether these attempts were characterised by what they term a sufficient virility. It is indeed permissable to wish that some gentle violence had been employed; if there had been it would either have resulted in success or would have precipitated a crisis so decided as to have made our task a comparatively easy one. . . ."[89]

It is difficult to believe that a judge should advocate a criminal course of action simply to make the task of the court "a comparatively easy one"—for it is clear from the evidence contained within the report that a great deal of gentle persuasion had been used by the husband to no avail—and the only recourse would have been to overcoming the woman's will by force . . . which in view of the evidence it is clear that only a misdescription could call such activity "gentle violence".[90]

Lord Dunedin's judgment contains eight or nine pages describing the husband's attempts to persuade the wife to have intercourse with him. These attempts were not "lacking virility"; what they were lacking was the direction of a will so bent on seeking fulfillment in the sexual act as to ignore completely the wife's desires—or lack thereof. When judges in the court below questioned the husband as to his "virility" the reply was that he was "very anxious to awaken the sexual instinct"; that he found his wife "on many occasions hysterical and tearful", and that he felt any attempt "with even mild and gentle force would only hinder and not help the end he desired".[91] Commenting upon this, Lord Dunedin continued: "Such a course of conduct may well have been mistaken. . . ."[92]

It can only be submitted that Lord Dunedin's view is contrary to the whole concept of marriage which it could be hoped the law would support. The husband's advances were designed with consideration for the wife's aversion to the sexual act. He felt that such aversion would hardly be overcome by forcing her to submit. Lord Dunedin, however, suggested that the husband in such a situation should ignore hysteria, disregard tears, not bother to seek to "arouse the sexual instinct" in the woman, but force the sexual act upon her without regard to the thought that this might hinder and not help the eventual coming together of the couple in sexual relations. If there is in the wife what can be termed "a repulsion" or "aversion" to the act of intercourse,[93] it is hardly likely that force resulting in the imposition of that act upon her will increase her liking for it. Rather, it may well concretise such dislike beyond altering it by way of persuasion.

[89] *G.* v. *G.* [1924] P. 349, 357.
[90] The term "gentle violence" is itself a nonsense. Logically violence cannot be used together with gentleness in this way. Violence is the antithesis of gentleness; gentleness cannot encompass violence. An act of violence could hardly be classed "gentle".
[91] *G.* v. *G.* [1924] P. 349, 358 ff.
[92] Ibid.
[93] Or simply a wish at that particular time not to be a partner in an act of sexual intercourse with the husband.

Lord Dunedin goes so far as to suggest that the husband should "take a chance" on force; that he should employ force in the hope that the woman will discover an appetite, so solving the problem, or if he (or she?) is not so fortunate, at least the problem will be solved in that he can seek annullment or divorce, with no problems of decision-making for the court. One can only recall the words of Denning L.J. in *Dunn* v. *Dunn*[94] that it is the duty of married persons " to decide by agreement, by give and take, and not by the imposition of the will of one over the other. . . . Each is entitled to an equal voice. . . . Neither has the casting vote. . . ."[95] Lord Dunedin's and Lord Denning's views are incompatible. Denning L.J.'s are clearly to be preferred, for Lord Dunedin would not only incite the husband to commit criminal acts,[96] but also to act in such a way as very possibly to precipitate a crisis which would lead to the inevitable breakdown of the marriage. Sound public policy could not advocate such measures.

VI. LEGISLATIVE REVIEW

A survey of the legal position on the matter of rape between husband and wife shows that there is not the support for the stance that a man can never rape his wife which has in most circles been presumed. It is clear that recent attempts in the United Kingdom[97] and the abortive attempt in South Australia,[98] as well as the final South Australian result,[99] to pass legislation providing for the possibility of rape charges being brought against a man in the case of his wife may in fact be unnecessary were the courts to revise the position as was urged in *Clarence*.[100] Nevertheless it may be argued that despite the call for revision in *Clarence*, the failure of the move in the United Kingdom to make a legislative declaration that a husband cannot be excluded from charges of rape simply because he was at the time married to the victim, and the difficulties in passing the law through the South Australian Parliament show that the public, through the legislature, is not in favour of husbands being liable for the rape of their wives. The arguments put forward are, however, less than compelling.

94 [1949] P. 98; [1948] 2 All E.R. 822.

95 Ibid. pp. 823-4. (See also: fn. 84 and accompanying text supra.)

96 Even where it is contended that the actual penetration should not be classed criminal, under the *R.* v. *Miller* view of the provision for assault charges being laid against an aggressive husband where sexual intercourse has been had with the wife without her assent, the husband in *G.* v. *G.* would, had he acted within Lord Dunedin's advice, have laid himself open to charges of assault upon his wife.

97 S. 1(3) *Sexual Offences (Amendment) Bill* 1976 (U.K.) provided: "In any prosecution on a charge of rape a woman shall not be presumed to have consented to intercourse with a man only on the ground that she is his wife." (Section deleted by amendment.)

98 The original provision was contained in s. 12, Bill No. 55, South Australian Parliament (1976). The provision stated that "no person shall, by reason only of the fact that he is married to some other person, be presumed to have consented to sexual intercourse with that other person".

99 See: s. 12(5) *Criminal Law Consolidation (Amendment) Act* 1976; s. 73(5). *Criminal Law Consolidation Act* 1935-1976.

100 (1888) 22 Q.B.D. 23.

Although it is understandable that difficulties in proof are acknowledged in the case of rape between partners of a marriage, it is difficult to understand that such should be seen as greater than problems of proof arising where parties are acquainted with each other, or where they have been social partners, or have been living together for some time.[101] In recommending that no prosecution for rape by a husband on his wife should be legislated for, the South Australian *Criminal Law and Penal Methods Revision Committee* purported to bolster their argument in stating that ". . . it is only in exceptional circumstances that the criminal law should invade the bedroom. . . ."[102] Yet as has been shown,[103] there appears to be no impediment to the criminal law "invading the bedroom" where the act in question is simple assault[104] or a matter of false imprisonment[105] or kidnapping.[106] As a proportionately minor act such as assault can justify intrusion of the criminal law into the bedroom, it seems wrong that a potentially far more damaging act should be ignored.

That a wife could bring charges of assault against her husband was referred to in the United Kingdom debate as providing sufficient protection and ousting any need for rape prosecution provision.[107] However the obvious objection here is that where an assault culminates in sexual penetration which is not assented to, it is rape; the law does not simplify matters by justifying the penetration but outlawing acts which enable that penetration to take place. In fact, to take the assault-but-not-rape stance is simply to reveal the ludicrous state of the law. As most rapes would be preceded by an assault[108] this would mean that the criminal law is permitted to "invade the bedroom" for the purpose of the assault prosecution, but must turn tail at the point of penetration.

A further argument in the United Kingdom debate was that wives "in many cases . . . instructed lawyers to institute proceedings for divorce, but later changed their minds and went back to their husbands".[109] However a change of mind after an act constituting rape hardly can be seen as altering the fact of a rape having been committed, nor as sufficient to

101 For further discussion on this issue, see: VIII. *The Issue of Enforcement* infra.

102 Criminal Law and Penal Methods Reform Committee of South Australia, *Special Report—Rape and Other Sexual Offences* (Department of the Attorney-General, 1976) p. 14.

103 See: II. *Rape Versus Assault* supra.

104 *R.* v. *Miller* [1954] 2 Q.B. 282.

105 *R.* v. *Jackson* [1891] 1 Q.B. 671.

106 *R.* v. *Reid* [1973] 1 Q.B. 299.

107 Reported: *The Times* 22.5.76, p. 6 Parliamentary Report: "Labour MP faces protest over delay to bill".

108 In fact it would seem almost impossible to commit the act of rape without preceding this by an assault, in that in order to effect penetration hands must be laid upon the victim; any laying on of hands without consent—and knowing there is no consent—is both assault and battery.

109 *The Times* 22.5.76, p. 6.

oust from all women protection where the aggressor is married to them.[110] It was also said during the debate that were the law framed so that "there could be rape during cohabitation, there might be many cases going to the Crown Court where a husband would be open to the most serious of penalties".[111] Briefly, there again seems to be no good reason for exempting a man from a serious charge simply on grounds that the victim is his wife.[112] A further comment that "there were some women . . . so unscrupulous that if encouraged by legal backing . . . might be prepared to commit perjury and do everything necessary to convict their husbands of rape with the objective of breaking up a marriage and getting rid of an unwelcome and unloved partner"[113] smacks of Victorianism: it is hardly to be expected that many—or any—women would go to such lengths, in view of the difficulties surrounding rape charges and the extreme scepticism which currently exists,[114] when a petition for divorce may easily be utilised. Additionally, it could be said that the law as presently framed supports "unscrupulous husbands" in making their wishes for sexual intercourse override the wishes of their wives; lack of the possibility of being subjected to a rape prosecution surely is "legal backing" for rape within marriage.

VII. THE SOUTH AUSTRALIAN LEGISLATION

The similarity of such views with those expressed in the matter of the original framing of the South Australian legislation was notable. There, even the Committee set up to enquire into the law considered that "to allow a prosecution for rape by a husband upon his wife if he is living with her might put a dangerous weapon in the hands of a vindictive wife and an additional strain on the matrimonial relationship".[115] The strain upon a marriage of the existence of a "rule" that a man may make use of his wife for sexual purposes at any time, despite her own feelings in the matter, was not alluded to.

The objections in South Australia to the original provision that "no person shall, by reason only of the fact that he is married to some other

110 In the case of charges of assault brought by wives against husbands, "change of mind" may also occur, yet this is not seen as justifying ouster of assault protection. Similarly with other types of crime, a change of the victim's mind may occur when it comes to prosecution, yet there is no call for revision of laws on the basis of such possibility.

111 *The Times* 22.5.76, p. 6.

112 Interestingly enough, one implication from this comment is that there are numerous husbands committing sexually aggressive acts upon their wives!

113 *The Times* 22.5.76, p. 6.

114 See, for example: A. Blumberg and C. Bohmer, "The Rape Victim and Due Process" (1975) 80 Case and Comment 3; N. Connell and C. Wilson, *Rape: The First Source Book* (New York: New American Library, 1974).

115 Criminal Law and Penal Methods Reform Committee of South Australia, op. cit., p. 14; see also: *Canberra Times*, 9.6.76: "Controversy over sex-offences report"; *Canberra Times*, 5.10.76: "Rape within marriage—South Australia foreshadows new legislation".

person" be presumed to have consented to sexual intercourse with, or to an indecent assault by, that other person[116] led to the inclusion of an amendment that no person should be convicted of rape or indecent assault upon his spouse, or an attempt to commit the same, "unless the alleged offence consisted of, was preceded or accompanied by, or was associated with—

(a) assault occasioning actual bodily harm, or threat of such an assault, upon the spouse;
(b) an act of gross indecency, or threat of such an act, against the spouse;
(c) an act calculated seriously and substantially to humiliate the spouse; or
(d) threat of the commission of a criminal act against the person."[117]

Thus are the courts faced with untangling the import of such qualifications.

If the provisions in fact mean anything, and are intended to place the married defendant in a different position from the unmarried defendant, then by including "indecent assault" within the qualifications the legislature has succeeded in removing a protection which the married woman would seem to have enjoyed at common law. It has been argued that:

> "It should not be unlawful for [a man] to make a gesture towards his wife or embrace her in a manner which the law would regard as indecent. Such occurrences are as much within the concept of physical love envisaged by marriage as is the intercourse in which they frequently culminate."[118]

However the question is what does the "concept of physical love" as seen by the courts to reside within the marital union involve in terms of physical acts. Clearly an acceptance of a rule that a man cannot rape his wife does not carry within it an acceptance of any rule that a man can undertake to commit buggary upon his wife, regardless of any consent to marriage or consent to the act in question.[119] Further, other "unnatural acts" might be ousted from the idea of marital consent to intercourse.[120] Certainly it has been settled that flagellation is unlawful, with or without consent:

[116] S. 12(5) Bill No. 55, South Australian Parliament (1976). For an account of the political background to the Amendment, see: P. Sallman, "Rape in Marriage" (1977) 2 Legal Service Bulletin 202.
[117] S. 73 (5) *Criminal Law Consolidation Act* 1935-1976.
[118] Howard, op. cit. p. 176.
[119] *R.* v. *Jellyman* (1938) 8 C. & P. 604; *Statham* v. *Statham* [1929] P. 131, C.A.; *R.* v. *Wiseman* (1718) Fortes. Rep. 91.
[120] Of course the problem is what is meant by "unnatural acts". As Howard, op. cit. points out (at p. 177, fn. 61): "Offences such as buggery, 'other deviant sexual practices between humans' and 'sexual contact with animals' are usually placed in a section of the statute headed 'Unnatural Offences', even though, whatever else they may be, they are manifestly natural in a biological sense." *Perkins on Criminal Law* (2nd Ed., New York: The Foundation Press, 1969) pp. 389-90 points out the considerable confusion in common law as to what particular acts are prohibited under the term "Unnatural Offences". Blackstone, too, had difficulties in giving a clear account: 4 *Bl. Comm.* 215.

> "If an act is unlawful in the sense of being in itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment it is done consents to it. No person can licence another to commit a crime."[121]

The repressive attitude of the common law in relation to sexual activity is clearly documented, so that it would appear reasonable to suppose that the "consent to intercourse" envisaged within the marital union probably meant "consent to intercourse in the missionary position". Thus were a man to attempt buggery, he could be held guilty of indecent assault for any acts leading up to that act where they were discernable as having that end in view. Similarly if he flagellated his wife the act should be indecent assault. The problem is that "indecency" is relative, so it could well be that the common law would consider some acts between husband and wife "acts against good behaviour",[122] "offensive to common propriety; . . . grossly vulgar; obscene; lewd; unseemly",[123] despite any alleged consent upon marriage to sexual intercourse.[124] The new South Australian legislation may therefore limit protection for married women.

However it may be that the provisions are so confusing as to be meaningless. Take, for example, the requirement that the offence leading to conviction should consist of an act "calculated seriously and substantially to humiliate". The condition would be fulfilled by the very act of non-consensual intercourse:

> "Considering the nature of the crime, that it is a brutal and violent attack upon the honour and chastity of the weaker sex, it seems . . . natural and consonant to those sentiments of laudable indignation which induced our ancient lawgivers to rank this offence among felonies, [that no further enquiry is necessary] after satisfactory proof of the violence having been perpetrated by actual penetration of the unhappy sufferer's body. The quick sense of honour, the pride of virtue which nature hath implanted in the female heart, is already violated past redemption and the injurious consequences to society are in every respect complete."[125]

This view of the crime, put by *East's Pleas of the Crown* in 1803, has been reconstituted in modern terms in *R.* v. *Fraser*:[126]

> "[Today there is] a greater appreciation of, and increased sensitivity to, the terrible affront to human dignity, and the cruel invasion of human privacy, which is involved in the rape of a woman. The recognition of a woman's right to sexual freedom and sexual equality, which largely

121 *R.* v. *Donovan* [1934] 2 K.B. 498, 507.
122 *Timmins* v. *U.S.*, C.C.A. Ohio, 85 S. 205, 30 C.C.A. 74; *Black's Law Dictionary* (4th Revised Ed., St. Paul's, Minn.: West, 1968).
123 *Hutcheson* v. *State* 24 Ga. App. 54, 99 S.E. 715; *Wood* v. *State* 45 Ga. App. 783, 165 S.E. 809; *Black's Law Dictionary*.
124 Thus clearly these acts must be "sexual assault" where the wife has not consented to them in fact.
125 *East's Pleas of the Crown* (1803), Vol. I.
126 [1975] 2 N.S.W.L.R. 521.

> underlay the dropping of repressive attitudes to sex, has brought even stronger revulsion against *the humiliating denial of that freedom and equality which is involved in rape.*"[127]

That is, the act of intercourse without consent is one of serious and substantial humiliation; this is the philosophy of rape law protection.[128] It would not seem to make the humiliation any less simply because the victim is married to the offender. The view may well be put that the humiliation should be worse if a spouse, having agreed "to love and honour", wilfully refuses to listen to his wife's point of view on the subject of sexual relations in the particular instance, simply forcing himself upon her without regard for her desire or lack thereof, or her willingness to participate even lacking desire.

What of the "gross indecency" provision? A clear legal definition of "gross indecency" is hard to come by; both court reports and text books are coy in describing just what acts will constitute the offence.[129] In *R.* v. *Hornby and Peaple*[130] where the charge was one of gross indecency the court even went so far as to state:

> "In this class of case it is understandable that the judge or chairman, having regard, possibly, to the feelings of the jury and other people in court, is apt to pass over the full details of the evidence. . . ."[131]

One of the essentials of legislating for criminal offences would seem to be that prospective defendants should be made aware of what conduct will bring them into conflict with criminal law. In designing the South Australian provision, therefore, failure to outline the exact nature of the activity on which a charge may be based should be the object of criticism; conviction rests upon the view that a particular judge or jury (when the jury is informed!) takes of the acts done, and what particular moral standards are seen as acceptable—a subject upon which considerable variation of opinion may be found.

Nonetheless, it could be contended that the legislature thought to cover "unnatural acts"—such as penetration per anus.[132] However again the confusing nature of the Amendment is obvious. As "rape" is redefined to

[127] *R.* v. *Fraser* [1975] 2 N.S.W.L.R. 521, 524-5. (Italics added.)

[128] See: Howard, op. cit. (at p. 172): "The law of rape is designed to protect a woman's freedom of choice in her choice of sexual connections." This accounts for the recognition during the 19th century that the act must be without consent, rather than "against the will" in the sense of requiring resistance by the woman. (For comment on the application of the philosophy through the cases, however, see: J. A. Scutt, "The Standard of Consent in Rape" (1976) 20 N.Z.L.R. 262.)

[129] American text books, dictionaries and cases seem to be more relaxed in being explicit about what acts will be classed "grossly indecent". The traditional "British reticence" seems to preclude, in many instances, any outlining of the particular acts prohibited. Apparently members of the community are expected automatically to know.

[130] [1946] 2 All E.R. 487.

[131] Ibid.

[132] Or penetration per os? Or cunnilingus?

include acts of anal penetration,[133] the result is that the section is rendered tautologous. Further, it might be said that any act of sexual intercourse where there is no consent must logically come within any meaningful definition of "an act of gross indecency". Thus it might be claimed that, as marriage does not presume consent, if the woman does not in fact consent to intercourse and the husband knows it or is reckless thereto,[134] he will be guilty of an act of gross indecency which happens to be an act of vaginal penetration.

Another criticism lies in that it has been held[135] that an act may constitute "gross indecency" notwithstanding lack of bodily contact. Thus exposure of an erect penis has been considered to be "grossly indecent". It could therefore be considered that where a man exposes himself for the purpose of undertaking an act of sexual intercourse where his wife has clearly signified her lack of consent, despite the fact that she is his wife he may be guilty of gross indecency. This would bring him within the terms of the provision, for once consent is not presumed, by marriage, to sexual intercourse, then it would seem to follow that it must not be presumed to other acts of a similar nature. If exposure of genitals may qualify as "grossly indecent" between unmarried parties, then where there is no consent between married partners it does not seem reasonable to apply a conflicting construction.

Again, the provision that the offence must consist of "a threat to do a criminal act" does not add anything to the conventional definition of rape. Rape consists in the act of sexual intercourse without consent. Lack of consent can be shown by the fact that there was a threat such as to overcome the will of the victim, thus rendering the act non-consensual.[136] Although the Parliament has seen fit to include the provision in the section relating to rape between spouses, nothing is added to the law relating to rape between unmarried parties.

Further, it would seem virtually impossible knowingly to have non-consensual sexual intercourse without "threatening" to do so. A threat may be defined as "a menace . . . of such a nature and extent as to unsettle the mind of the person on whom it operates, and to take away from his acts that free and voluntary action which alone constitutes consent".[137] A threat may be found in "veiled or ambiguous language or

[133] S. 5 *Criminal Law Consolidation Act* 1935-1976. Penetration per os is also included in the term "rape".

[134] This is the accepted standard of intent at common law and under the South Australian statute. See: s. 48(1) *Criminal Law Consolidation Act* 1935-1976; *R.* v. *Morgan* [1974] 2 W.L.R. 913.

[135] *R.* v. *Hornby and Peaple* [1946] 2 All E.R. 487; *R.* v. *Hunt and Another* [1950] 2 All E.R. 291.

[136] For a discussion of the standard, see: J. A. Scutt, "Consent versus Submission: Threats and the Element of Fear in Rape" (1977) U.W.A.L.R. (in press).

[137] *Black's Law Dictionary* ("threat").

gestures";[138] it is the "declaration or show of a disposition or determination to inflict evil or injury upon another".[139] In *R.* v. *Wyatt*[140] "threatens" was said to be equivalent to "expresses an intention to" or "says that he will". Apart from those cases where the wife is drugged or asleep or intoxicated so that she is unable to bring her mind to bear on the matter, it is impossible to conceive of any instance of rape taking place without some threat to assault the victim, in that the laying on of hands in order to effect the intercourse would qualify as a criminal act in that consent was lacking. Thus in the moment that the husband gestures towards his wife in order to secure her person to undertake the act, aware that she does not consent, this would qualify as "a threat to do a criminal act". Of course the husband may not intend to have intercourse without consent, or may not be reckless thereto. However once intent is shown and the woman's lack of consent is shown, what must be taking place is "a threat to do a criminal act".[141]

The one provision of the legislation which cannot be given an interpretation to render it nonsensical in drafting terms is that requiring the act to consist of, be preceded or accompanied by, or associated with assault occasioning actual bodily harm, or the threat of such an assault. However for reasons of public policy the provision should not stand.[142] Such a qualification ignores the rationale of the crime of rape: that is, that to impose sexual intercourse upon any person without consent to the act involves a denial of the right to choose a sexual partner; it involves a loss of dignity and serious humiliation.[143] Thus the common law definition of rape is that it is carnal knowledge without consent. In conjunction with the act there may be other factors to be taken into account in sentencing —such as bodily injury, the commission of indecent acts and so on. However all that need be proved for commission of the offence is intent on the part of the accused, and lack of consent on the part of the victim.

138 *R.* v. *Collister* (1955) 39 Cr. App. R. 100 and see: Howard, op. cit. p. 241.
139 *Black's Law Dictionary* ("menace").
140 91 L.J.K.B. 402.
141 Whether events leading up to the act of penetration can be considered as capable of interpretation as a separate crime is a matter of some conflict. See: *R.* v. *Pople* [1924] S.A.S.R. 448 and *R.* v. *Salmon* [1969] Law Society Judgment Scheme (South Australia) 102. The South Australian Court of Criminal Appeal has considered itself bound by *Pople* that although no violence or indecency occurs which is clearly separable from the act of intercourse, it is possible to separate out the penetration and the acts leading up to it or immediately following it, to form the basis of a conviction for indecent assault. Thus the proof of the act of intercourse may be sufficient to bring the crime within the provision (d). (For discussion on this issue, see: Howard, op. cit. pp. 174-5.)
142 Fundamentally the provision is unsound (see comments infra) and the danger arises that as the other three provisions are capable of a tautologous construction, perhaps (a) is the only provision which will be of any import in the eyes of the judges. It may come about that the courts interpret the Amendment as requiring all acts of rape within marriage to involve an assault of actual bodily harm or threats thereof.
143 See: fns. 125-7 and accompanying text supra.

By inserting into the legislation the "actual bodily harm" requirement, the philosophy seems to be that the married woman must defend herself against the husband desiring intercourse. If she simply submits without resistance the act will not be rape, and her non-consent rendered meaningless. Generally, however, the criminal law frowns upon self-help: the defence of self-defence is not easily made. Thus is the married woman placed in a dilemma. In order to qualify under (a) she is required to resist her husband's attentions until he assaults her, occasioning actual bodily harm, or until she is so put in fear by the possibility of such assault that she submits. Although what literature there is dealing with the sociological aspects of rape shows quite plainly that resistance to a party desiring intercourse will serve only to inflame, resulting in more severe damage to the victim than where non-resisting submission is practiced,[144] the wife is not permitted to take the less damaging path of submission, or if she does, the husband may not be guilty of a criminal act. So is the married man supported by the legislature in his belief that "a woman doesn't mean 'no' when she says 'no'; she means 'yes' unless she has to be beaten into submission".

The provision could also lead to difficulties in that should the wife, in obeying the admonition of the legislature to add resistance to her stated lack of consent, overstep the mark in her degree of resistance and injure the husband, she lays herself open to prosecution, where she will bear the burden of pleading self-defence. The requirement of resistance to the party intending rape is thus out of step with criminal law philosophy—and, it is to be hoped, with public policy.

So the law erroneously claimed to be the "first in the world to provide for prosecution of rape between spouses"[145] brings confusion to an issue which need not have arisen at common law, and includes a requirement which is hardly in accordance with present-day policy. Perhaps the legislature would have left better alone, or followed the simple path taken by the Swedish legislature in 1975[146] in providing that where rape is in issue,

144 See, for example: M. Amir, *Patterns in Forcible Rape* (Chi.: Univ. Chi. Press, 1971); D. E. Russell, *The Politics of Rape* (New York: Stein & Day, 1975); D. E. Russell, *Politics of Rape: The Victim's Perspective* (New York: Stein & Day, 1975); B. Toner, *The Facts of Rape* (London: Hutchinson, 1977); K. Weis and S. Borges, "Victimology and Rape: The Case of the Legitimate Victim" (1973) 8 Issues in Crim. 71.

145 This claim has repeatedly been made (e.g. *Adelaide Advertiser* 2.12.1976 "First to make rape within marriage a criminal offence"), yet in 1974 the Michigan legislature provided for rape between spouses: sec. 520J(3) *Michigan Penal Code* (see discussion infra), and in 1975 an amendment to the *Swedish Criminal Code* provided simply that marriage would not affect prosecution for rape.

146 See: s. 1, Chapter 6 *Swedish Criminal Code*. It is to be hoped that forecasted changes in rape laws in New South Wales and Victoria, where announcements have been made as to legislation in the area of husband-wife rape, are directed at a simple statement such as the Swedish, rather than the convolutions of the South Australian legislation.

married and single women and married and single men stand on equal footing with the law.

VIII. THE ISSUE OF ENFORCEMENT

In most United States' jurisdictions, Hale's "rule" has passed into statue law.[147] Thus when in 1974 the Michigan legislature addressed the question of reform of rape law, the problem of rape between spouses was clearly one of concern. After much debate, a section was included in the Act to provide:

> "A person does not commit sexual assault[148] under this Act if the victim is his or her[149] legal spouse, unless the couple are living apart and one of them has filed for separate maintenance or divorce."[150]

Apart from the issue of rape occurring between parties who were not living apart, a criticism levelled at the provision was that a spouse would be unprotected between the time of leaving the matrimonial home and the actual filing for maintenance or divorce. That the filing was slow would not necessarily be the fault of the spouse: such procedures are not marked with speed on the part of attorneys and clerks. Yet this would be a time when the wife might well be at greatest risk.

A similar criticism may be directed at the position as stated in *R.* v. *Clarke*,[151] *R.* v. *Miller*[152] and *R.* v. *O'Brien*:[153] action for divorce is not speedy in present times; the Family Court is currently notorious for its tardiness due to an overabundance of work.[154] Thus during the interim, and at a time when emotions may well be running at a peak, the wife is without appropriate protection.[155]

147 See: Comment, "Rape and Battery Between Husband and Wife" (1954) 6 Stan. L. Rev. 719; Note, "Rape Reform Legislation: Is it the Solution?" (1975) 24 Cleve. State L. Rev. 463.

148 Rape and other sexual offences have been renamed "sexual assault".

149 The "sex-based" character of "rape" has been done away with, so that all acts of penetration, by way of penis, hand or instrument, carried out by male or female protagonist, are "sexual assault".

150 Sec. 520J(3) *Michigan Penal Code.*

151 [1949] 2 All E.R. 448.

152 [1954] 2 Q.B. 282.

153 [1974] 3 All E.R. 663.

154 See, for example: *Sunday Sun* 10.10.1976, "A Divorce Epidemic!"; *West Australian* 11.10.1976, "60,000 file for divorce"; *Adelaide Advertiser* 11.10.1976, "60,000 divorces tipped this year".

155 It seems to be a generally accepted view that "once the parties have reached the stage of a petition, there is little chance of reconciliation". (See: C. Butler, "A Sole Ground for Divorce—An examination of recent reform in England in anticipation of reform in Australia" (1971) 45 A.L.J. 168, pp. 178-9, citing the example of the Scottish and English Commissions into Divorce Law, Cmnd. 3123, para. 29; Cmnd. 3256.) Thus it is even more disturbing that in the time of decision to put a petition, and whilst the petition is being put into effect, up until the decree becomes absolute (or perhaps nisi, per *O'Brien* [1974] 3 All E.R. 663) the wife allegedly remains subject to the sexual requirements of the husband.

Some factions[156] have therefore argued that any criminal liability for rape where the aggressor is the husband should attach when the parties are living apart, not withstanding the lack of any formal declaration of divorce proceedings, but that "living apart" should be a minimum requirement. The basis for this stance appears to rest in the belief that enforcement of rape law between spouses sharing a household would be too difficult or inappropriate. Such a stand begs for analysis.

When Hale laid down his rule he stated that although a wife could not be victim to a rape by her husband, this was not so with mistresses: a "concubine" would be protected against rape by her lover.[157] Thus some factor other than "living together" or "enforcement problems arising from familiarity" operated for Hale. More recently, in the *Report of the Working Party on Territorial Criminal Law*[158] discussion arose as to whether, as immunity was seen to extend to husbands to exclude them from rape charges, that immunity should legislatively be extended to exclude de facto husbands. Such an approach has not received much—if any—acclaim.

Thus it would seem that "difficulty of investigation" is a red herring, and that as for Hale, some other factor is operating to support the husband exclusion. Perhaps this "other factor" may be the idea of some proprietorial interest in the body of a spouse or a "right to control" arising from the marital contract. That a contractural right to control over human beings was foreign to public policy was stated forcefully by Lord Halsbury L.C. in *R.* v. *Jackson*:[159]

> "More than a century ago it was boldly contended that slavery existed in England; but if anyone were to set up such a contention now it would be regarded as ridiculous. . . . With regard to the proposition that the mere relation of husband and wife gives the husband complete dominion over the wife's person, apart from any circumstances of misconduct or any acts amounting to approximate approach to misconduct on her part, which would give the husband a right to restrain her, none of the authorities cited appear to me to establish that proposition."[160]

If this was a statement of public policy in 1891, it seems not unreasonable to assert that in 1977 the idea that the criminal law should retreat from

[156] See: Criminal Law and Penal Methods Reform Committee of South Australia, op. cit. and comments by the South Australian Attorney-General, *House of Assembly Debates* 19.10.1976 p. 1611.

[157] *Hale's Pleas of the Crown*, Vol. I, p. 629.

[158] Canberra, A.C.T. 1975.

[159] [1891] 1 Q.B. 671.

[160] *R.* v. *Jackson* [1891] 1 Q.B. 671, 679. The "misconduct" or "approximate approach to misconduct" to which Lord Halsbury L.C. referred as justifying restraint involved the case where "the wife were on the staircase about to . . . elope". Even then he very guardedly said: "I could understand that there *might be to some extent* a right to restrain the wife." (At p. 679-80, italics added.)

governing criminal acts committed within a marriage on grounds that a husband has a dominion over his wife is out of step. Indeed, in discussing this issue the court in *R.* v. *Reid*[161] stated:

> "[We do not] see any reason why a wife who is not separated from her husband, even a wife who is still to be regarded as cohabiting with her husband, should lack . . . protection of the criminal law. The notion that a husband can, without incurring punishment, treat his wife, whether she be a separated wife or otherwise, with any kind of hostile force is obsolete. . . ."[162]

Nonetheless the "lack of enforceability" contention may still be adhered to. If this argument is to be applied to rape law, however, it should not be advanced only in relation to acts between married parties. It has been shown that many rapes take place in bedrooms,[163] that rapes very often occur where the parties are not strangers,[164] that problems of enforcement arise where parties are unmarried,[165] and that proof that the crime of rape has been committed may be generally difficult except in the obvious case: the paradigm situation of the stranger leaping from the bushes.[166] Thus if the lack of enforceability argument is carried to its logical conclusion, it would result in revision of rape law so that the crime consisted only of the paradigm; non-consensual intercourse between acquaintances, acts carried out in "intimate" situations and so on should no longer be the subject of criminal law. Yet that these situations involve difficulties of proof has not led to any general cry for revision of the law in such manner.[167]

There is no doubt that laws which are unenforceable should not remain on the statute books. However with laws relating to the offence of rape

[161] [1972] 2 All E.R. 1350.

[162] *R.* v. *Reid* [1972] 2 All E.R. 1350, 1353.

[163] See, for example: Amir, op. cit.; H. Kalven and H. Zeisel, *The American Jury* (N.Y.: Little, 1966); Toner, op. cit.

[164] See, for example: Amir, op. cit.; Toner, op. cit.; *The Times* 6.12.1976, p. 2: "Report of the Rape Crisis Centre, London—Most rapes not by strangers".

[165] Problems of enforcement of rape laws are well documented. See, for example: Amir, op. cit.; Kalven and Zeisel, op. cit.; United Kingdom, *Report of the Advisory Group on the Law of Rape* (1975, H.M.S.O.) ("Heilbron Report"); Tasmanian Law Reform Commission, *Report and Recommendations for Reducing Harassment and Embarrassment of Complainants in Rape Cases* (Tas. Gov. Printer, 1976); K. Weis and S. Weis, "Victimology and the Justification of Rape" in Drapkin and Viano, Eds. *Victimology* (Lexington, Mass.: Lexington Bks, 1974).

[166] In their study into the operation of the jury, Kalven and Zeisel, op. cit. found that in "simple rape" cases—those where there were no aggravating circumstances —juries tended to be critical of the victim and seemed to infer an assumption of risk. (At p. 254.)

[167] Quite the contrary: currently there seems to be a very strong move to do away with the defects in rape law which have led to unenforceability, so as to balance more justly the position of accused and victim, in addition to having regard to justice for society in general. See, for example: Tasmanian Law Reform Commission, *Report and Recommendations* op. cit.; United Kingdom, *Report of the Advisory Group* op. cit.; Victorian Law Reform Commission, *Rape Prosecutions (Court Procedures and Rules of Evidence)* (Vic. Gov. Printer, 1976).

clearly the question to be asked is why problems of enforcement arise, not only between husband and wife, but in all other situations where difficulties are found. One of the major problems would seem to be the classification of all non-consensual acts of intercourse as "rape", and the existence of one maximum punishment which is capable of application to that offence.[168] The word "rape" and the term "rapist" tend to conjure up in the minds of public, judges and juries alike the picture of the sex-crazed fiend, and the severely battered, weeping, distraught female victim "ruined for life".[169]

That this instance of the crime may occur is not doubted. However where the offence consists of simple non-consensual intercourse, where the woman is not beaten or otherwise physically damaged, where the offender is a normal, everyday individual (just as offenders in other sorts of crime are "normal, everyday individuals"), obviously a jury may be reluctant to award the offender with the label of his crime. Thus the solution would seem to be to adjust the law to the realities of rape, by recognizing within the legislation that with some acts of intercourse without consent, this will be the essence of the offence. In other cases there will be aggravated circumstances—such as additional physical damage, threats of serious harm, weapons may be used in conjunction with the offence and so on. Penalties must be adjusted accordingly.[170] It is only when the law of rape is reformed to meet the reality of present mores that "lack of enforceability" will disappear as a criticism applicable not only to acts between married parties, but to many acts of non-consensual intercourse between those who are unwed.

IX. CONCLUSION

There is no legal justification for a rule that a husband cannot be prosecuted for the rape of his wife. The law cannot be taken as rendering

168 Rape was originally a common law felony punishable by death. Life imprisonment is now the penalty in many jurisdictions—e.g. under the Queensland *Criminal Code* "any person who commits the crime of rape is liable to imprisonment with hard labour for life": s. 348; where the imprisonment is for a term of years, it is usually relatively high—e.g. the penalty in Victoria is "imprisonment for a term of not more than twenty years": s. 44(1) *Crimes Act* 1958. In the United States, too, harsh penalties are the rule—presently at least thirty States provide a life sentence as maximum penalty, many other jurisdictions imposing possible sentences of thirty, forty or fifty years: Note, "Rape Reform Legislation . . ." op. cit. p. 489.

169 See: Kalven and Zeisel, op. cit. p. 254.

170 The Michigan revision of the law of rape sets out degrees of harm, taking into account penetration accompanied by aggravating factors and "simple sexual assault", with lesser penalties for the latter. See: Michigan *Penal Code* ss. 520A-K.; Nordby, op. cit. and J. A. Scutt, "Reforming Rape Laws: The Michigan Example" (1976) 50 A.L.J. 615. The *Model Penal Code* also includes an attempt to grade rape offences, however its gradation can be severely criticised: s. 213.1 *Rape and Related Offences* (1955 Draft). See: Note, "Recent Statutory Developments in the Definition of Forceable Rape" (1975) 61 Va. Law Rev. 1500, pp. 1520-1.

a husband immune from a serious criminal charge, simply by way of the marital contract. This would result in the ironic situation whereby a married woman would not be protected from aggressive (or non-consensual) sexual activity merely because she was married to the aggressor, whereas if she were unmarried, the criminal law would protect her.

Neither is it feasible to assert that a husband might be rendered immune from such a charge on grounds of public policy. Public policy surely requires protection of citizens, married or unmarried, from aggressive sexual acts; it also requires that potential defendants be treated alike, whether the chosen victim is a spouse or a single person. Again, public policy in upholding the marital relationship must be directed toward upholding those relationships wherein criminal acts are not committed by one spouse upon the other. Further, public policy cannot go so far as to advocate criminal acts on the part of a party to a marriage.

As for difficulties in investigation and enforcement—certainly investigation into all personal relationships is difficult, and not to be undertaken lightly; nevertheless the criminal law should not on such grounds absolve itself from requiring certain standards of physical conduct in society—within, as without, marriage.