

HISTORICAL DEVELOPMENT OF THE OFFENCE OF RAPE

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Introduction

Sexual assault is not like any other crime. Almost all perpetrators are male. Unlike other violent crimes, most incidents go unreported despite evidence suggesting that the rate of sexual assault is on the increase. While many forms of sexual activity are not in themselves illegal, the circumstances prevailing at the time -- such as an absence of consent or the youthfulness of a participant -- can make the activity illegal and expose one of the participants to a lengthy term of imprisonment. And despite the physical nature of the act constituting the crime, much of the harm is psychological or emotional in nature, not bodily.

The prosecution of sexual assault is unlike the prosecution of any other criminal offence. There is an intense focus on the character and motivation of the complainant. Traditionally, this focus has translated into a preoccupation with aspects of the complainant's behaviour which are not immediately related to the circumstances of the offence. One example is whether the complainant provided a "recent complaint" after the assault.¹ This focus also results in an extraordinary interest in the demonstration of proof of resistance by the complainant and the corresponding application of force by the perpetrator, though neither is an element of the crime.

A proper appreciation of the law in this area requires an understanding of the legal evolution of the most serious form of sexual assault -- namely, rape.² It also requires some understanding of the broader social, cultural and political forces that have helped shape the law.

In this article I will trace the historic underpinnings of the offence of rape, as well as the policy

¹ In Canada, this requirement was removed by S.C. 1980-81-82-83, c. 125, s. 19.

² The term "rape" was eliminated in amendments to the *Criminal Code* enacted in 1983, *ibid.* However, as the offence historically has been labelled "rape" that term will be used throughout this article.

behind the law, starting first with a brief examination of the ancient laws in Europe and the Middle East. I will move quickly to medieval times, and then to seventeenth and eighteenth century England, where most of our modern laws and principles were crystallized. I will then look at the tension that developed between legislators and the judiciary, as the courts sought to protect male defendants against false claims of rape, while the Parliament at Westminster endeavoured through legislation to protect women against unwanted sexual advances. The transposition of the law from England to Canada will then be examined, followed by a description of how Canadian law has subsequently been developed by the Parliament of Canada.

Ancient Law

Under ancient Hebrew law, if a man raped a virgin within the walls of a city, and she was betrothed to another man, both she and the rapist shared the same fate of death by stoning. The elders of the day reasoned that if the girl had screamed, she would have been heard and rescued. Her failure to scream justified imposition of the ultimate penalty. For the man's part, death was appropriate because he had "humbled his neighbour's wife".³

However, if the same girl was assaulted outside the city or while she was labouring in the fields, where no one could hear her screaming, only the rapist was put to death. His culpability was clear; but no one had been around to save the girl and her involvement, it was concluded, did not justify being given the ultimate penalty.⁴

The rape of an *unattached* virgin was, however, placed into an entirely different category. In this situation no one was put to death. The rapist was required to pay 50 shekels of silver to the girl's father, and the pair were commanded to marry one another. Despite a general power of divorce that

³ Deuteronomy, Chapter 22, verses 23-29: *Commentaries of the Laws of England*, by Sir William Blackstone, Book IV (London: 1769), at p. 210; and generally see *Against Our Will*, by Susan Brownmiller (New York: Simon and Schuster, 1975), at pp. 21 *et seq.*

⁴ Deuteronomy, *supra*; Brownmiller, *supra*.

existed under mosaic of his life "because he had humbled her".⁵ During these early days, the crime of rape was not considered so much an assault against the person of the woman as it was an attack on the property of the dominant male in her life father or husband, as the case may be. Recent writers have observed:⁶

If a woman was raped, a sum was paid to either her husband or father, depending on who still exercised rights of ownership over her, and the exact amount of compensation depended on the woman's economic position and her desirability as an object of an exclusive sexual relationship. The sum was not paid to the woman herself; it was paid to her father or husband because he was the person who was regarded as having been wronged by the act.

Rape is simply theft of sexual property under the ownership of someone other than the rapist. When women are forms of private property, owned by fathers or husbands, with a value determined by their sexual and reproductive capacities, rape is an act of theft and trespass against the legal owner of the sexual property (that is, the woman) in question. In having intercourse with a woman who does not belong to him, a man is guilty of trespassing on the property of whoever does own her, and of stealing access to female sexuality to which he has no legal right. From the beginning, rape was perceived as an offence against property, not as an offence against the person on whom the act was perpetrated, and it has not lost the shrouds of these historical origins.

The situation in ancient Israel was described in particularly blunt terms by Susan Brownmiller in her seminal work on rape, published in 1975:⁷

In the Hebrew social order, which differed only in its exquisite precision from the simpler Babylonian codes, virgin maidens were bought and sold in marriage for fifty pieces of silver. To use plain language, what a father sold to a prospective bridegroom or his family was title to his daughter's unruptured hymen, a piece of

⁵ Deuteronomy, *supra*; Brownmiller, *supra*; Blackstone, *supra*.

⁶ *Rape: The Price of Coercive Sexuality*, by Lorenne Clark and Debra Lewis (Toronto: The Women's Press, 1977), at pp. 115-6.

⁷ Brownmiller, *supra*, at pp. 19-20; see also Clark and Lewis, *supra*, at pp. 118 *et seq.*

property he wholly owned and controlled. With a clearly marked price tag attached to her hymen, a daughter of Israel was kept under watch to make sure she remained in a pristine state, for a piece of damaged goods could hardly command an advantageous match and might have to be sold as a concubine.

This period saw the development of some of the myths and stereotypes that would plague the Anglo-Saxon system of criminal justice during the next 2,000 years. The famous story of Potiphar's wife was an important morality lesson in Hebrew, Christian and Moslem folklore.⁸ It tells us what can happen to a fine, virtuous man if a vengeful woman cries foully that she has been raped by him.

Joseph the Israelite was a highly regarded slave in the household of Potiphar, an Egyptian. Potiphar's wife was attracted to Joseph, and regularly cast a lecherous eye on the Hebrew slave. She became unrelenting in her invitations to "lie with me", but the virtuous Joseph always reminded her of the important role of their master in common. One day, Joseph and Potiphar's wife found themselves alone in the house. Seizing on the opportunity, Potiphar's wife caught Joseph "by his garment", and commanded: "Lie with me." Joseph fled, leaving some of his torn garment behind

When Potiphar came home his wife showed him Joseph's torn garment, and claimed that she had been raped by him. Potiphar's wrath was ignited, and he placed Joseph in prison. Joseph was a good man, however, and his devoted service to the Pharaoh ultimately led to his release from jail and later appointment as ruler of Egypt.⁹

The spectre of false accusations from a vengeful and spurned lover contributed greatly to a common law that viewed alleged victims of sexual assault with suspicion and distrust. As we suspicion, in turn, laid the foundation in early England for the development of a series of rules which had the

⁸ Genesis, Chapter 39; Brownmiller, *supra*, at pp. 22-3; and, generally, see *R. v. Seaboyer*; *R. v. Gayme* (1991), 66 C.C.C. (3d) 321 (S.C.C.), especially the judgement of L'Heureux-Dubé, J.

⁹ Genesis, *supra*.

effect of shifting the usual focus of a criminal trial from an inquiry into the conduct of the accused to that of the moral worth of the complainant.

Medieval Saxon Laws

Before the Norman Conquest of 1066 the penalty for rape was death and dismemberment.¹⁰ Henri de Bracton has provided us with the most authoritative description of these ancient Saxon laws in his classic study entitled *De Legibus et consuetudinibus Angliae Libri quinque*, written sometime between 1250 and 1260.¹¹ He says that during the tenth century if a man were to throw a woman "upon the ground against her will, he forfeits the King's grace; if he shamelessly disrobes her and places himself upon her, he incurs the loss of all his possessions; and if he lies with her, he incurs the loss of his life and members".¹² However, it did not stop there. The law then proceeded against the man's animals. "By the law of the Romans, the Franks and the English, even his horse shall to his ignominy be put to shame upon its scrotum and its tail, which shall be cut off as close as possible to the buttocks. If he has a dog with him, a greyhound or some other, it shall be put to shame in the same way; if a hawk, let it lose its beak, its claws and its tail."¹³

¹⁰ *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill* ("Glanvill"), written between A.D. 1187 and 1189, edited in an English edition by G.D.G. Hall (1965), and reprinted in 1983 by Wm. W. Gaunt and Sons, Inc. in association with the Selden Society, at p. 171; *De Legibus et consuetudinibus Angliae Libri quinque* ("Bracton on the Laws and Customs of England"), edited by George E. Woodbine from 1915 to 1942, translated, with revisions and notes, by Samuel E. Thorne (Cambridge: Harvard University Press, 1968), Vol. II, at p. 418; *The History of English Law before the Time of Edward I* by Sir Frederick Pollock and Frederic William Maitland (Cambridge: The University Press, 1895), Vol. II, at p. 489; Blackstone, *supra*, at p. 211; *A Treatise on Crimes and Indictable Misdemeanors*, by William Oldnall Russell (London: Butterworth and Son, 1826), Vol. I, at p. 80.

¹¹ First published (in Latin) in 1959, and then in English in 1878-83: *A Legal Bibliography of the British Commonwealth of Nations*, compiled by W. Harold Maxwell and Leslie F. Maxwell (London: Sweet and Maxwell, 1955), Vol. I, at p. 51.

¹² Bracton, *supra*, at p. 418.

¹³ *Ibid.*

In a land overrun by foreign soldiers, William the Conqueror felt that death was too severe a penalty. He substituted castration and loss of eyes -- a penalty that continued through Bracton's day and into the reign of Henry III.¹⁴ Bracton explained the rationale for the law in these terms:¹⁵

If he is convicted of this crime [this] punishment follows: the loss of members, that there be member for member, for when a virgin is defiled she loses her member and therefore let her defiler be punished in the parts in which he offended. Let him thus lose his eyes which gave him sight of the maiden's beauty for which he coveted her. And let him lose as well the testicles which excited his hot lust.

The method of trial under William also switched to trial by combat. It is unclear, however, how many violated virgins were actually championed by their chivalrous kin. On this issue, modern historians have been moved to observe: "In one respect a woman's capacity of suing was curtailed by the inability to fight".¹⁶

A significant reform of the law occurred during the twelfth century. If a raped virgin filed an action or "appeal" and an indictment was obtained, the resulting trial was by jury in the King's Court and not by combat. Under the heading "An Appeal Concerning the Rape of Virgins", Bracton detailed the steps that must be taken by the victim to pursue this form of action:¹⁷

She must go at once and while the deed is newly done, with the hue and cry, to the neighbouring townships and there show the injury done her to men of good repute,

¹⁴ Bracton, *supra*, at pp. 414-5; Pollock and Maitland, *supra*, at p. 489; Blackstone, *supra*, at p. 211; Russell, *supra*, at p. 556. It should be noted, however, that the death penalty was abolished for *all* crimes, not just rape. Whether this change should be considered a reduction in penalty is debatable, and is discussed, *infra*. Plucknett, *supra*, at p. 79 says that the mutilation imposed under William was "generally fatal" in any event. Generally, see *History of the Criminal Law of England*, by Sir James Fitzjames Stephen (London: MacMillan and Company, 1883), Vol. I, at p. 458.

¹⁵ Bracton, *supra*, at pp. 414-5.

¹⁶ Pollock and Maitland, *supra*.

¹⁷ Bracton, *supra*, at p. 415; and to the same effect, see Glanvill, *supra*, at pp. 175-6; Blackstone, *supra*, at p. 211.

the blood and her clothing stained with blood, and her torn garments. And in the same way she ought to go to the reeve of the hundred, the king's serjeant, the coroners and the sheriff. And let her make her appeal at the first county court, unless she can at once make her complaint directly to the lord king or his justices, where she will be told to sue at the county court. Let her appeal be enrolled in the coroners' rolls, every word of the appeal, exactly as she makes it, and the year and day on which she makes it. A day will be given [her] at the coming of the justices, on which let her again put forward her appeal before them, in the same words as she made it in the county court, from which she is not permitted to depart lest the appeal fall because of the variance, as is true in other appeals.

Blackstone, a leading eighteenth century scholar, contended that these steps were necessary “to prevent malicious accusations”, and he noted that other countries, including Scotland, required that a complaint of rape had to be made shortly after the assault took place.¹⁸ An important evidentiary seed was thus planted: fully 500 years before the common law started to develop formal rules of evidence, the victim in a rape case was required to give a "recent complaint" to authorities. The focus was starting to shift away from the accused for, as Blackstone observed, "The jury (would) rarely give credit to a stale complaint".¹⁹

The burden on the complainant did not, however, stop there. If the man accused of the crime maintained his innocence, the complainant was obliged to have her body examined "by four law-abiding women sworn to tell the truth as to whether she is a virgin or defiled".²⁰ If she proved to be defiled, the trial was allowed to continue to determine who was responsible. If she was still a virgin, the charges were dismissed and the false accuser was herself placed into custody.²¹

There is no doubt that at this stage the law was directed primarily towards the protection of the unmarried virgin. The most severe penalty was reserved exclusively for their defilement. Others,

¹⁸ Blackstone, *supra*, at p. 211.

¹⁹ Blackstone, *supra*, at p, 211.

²⁰ Bracton, *supra*, at p. 416.

²¹ *Ibid.*

however, received a degree of protection from the law. The main difference lay in the punishment of the offender. Bracton explained that while the rape of all women" was prohibited, the penalty would vary according to the circumstances of the case, including the "type" of woman involved. He outlined the law in these terms:²²

Punishment of this kind [mutilation] does not follow in the case of every woman, though she is forcibly ravished, but some other severe punishment does follow, according as she is married or a widow living a respectable life, a nun or a matron, a recognized concubine or a prostitute plying her trade without discrimination of person, all of whom the king must protect for the preservation of his peace, though a like punishment will not be imposed for each.

The level of protection, as controlled by the ultimate punishment imposed by the court, was, of course, entirely in the discretion of the court. And as we shall soon see, judges well into the twentieth century have continued to see little merit in punishing those responsible for the sexual assault of prostitutes.

Bracton also described the defences or "exceptions" that could be raised by the an accused of rape. Most have a clear twentieth century ring about them.²³

.... He may (contend) that he had her as his concubine and *amica* before the day and year mentioned in the appeal and put himself on the country with respect thereto, [or] that he had her and defiled her with her consent and not against her will, and that if she now appeals him it is in hatred of another woman whom he has as his concubine, or whom he has married, and at the instigation of one of her kinsmen. He may also except that on the year and day the deed was supposed to be done he was elsewhere, outside the realm, or if in the county in so remote a part of it that it would be quite unlikely that he could have done what is alleged against him. He may also except on the ground of an omission made in the appeal, because she says no more than that he lay with her, no mention made of her maidenhood. Many other matters may constitute exceptions though I do not now call them to mind.

²² Bracton, *supra*, at p. 415.

²³ Bracton, *supra*, at pp. 416-7.

It should be observed that at this point in the evolution of the law the offence of rape was more closely linked to property concerns than the security of the woman's person. Commenting on the nature of the crime, Bracton said: "When a virgin is defiled she *loses* her member."²⁴ That, of course, justified the man losing his. Additionally, amongst other things, a charge of rape had to include the following elements: "... [the defendant] lay with her and *took from her* her maidenhood (or "virginity")..."²⁵ Likewise, in the case of a multiple rape, only the first to defile was liable to the maximum punishment of mutilation. Those that followed the lead rapist were criminally liable as lesser penalty on the theory that virginity could only be taken away once.²⁶ Bracton explained that proposition as follows:²⁷

Several may be accessories, but only one shall be held for the defilement, though the several may be liable for lying with her, for to defile a virgin and to lie with one defiled [are different deeds]. And since the deeds are different it is evident that the same punishment ought not to follow in both cases. That the same punishment does not follow upon both is true, that is, unless the accessory's act is so closely linked to the first act of ravishment [that they cannot be separated].

In the event of a conviction, the woman could save the rapist from gruesome mutilation by marrying him. It was her option, however, though the decision to spare him had to be sanctioned by both the judge and her parents. Technically, the man also had to agree, but if he valued his sight and testicles it is a reasonably safe bet that most offenders opted for marriage rather than face certain execution of the courts sentence.²⁸

²⁴ Bracton, *supra*, at p. 414.

²⁵ Bracton, *supra*, at p. 416.

²⁶ Bracton, *supra*, at p. 417.

²⁷ *Ibid.*

²⁸ Bracton, *supra*, at p. 417; Glanvill, *supra*, at p. 176 [Glanvill says both families had to consent. The rationale for this is hard to understand.] Blackstone, *supra*, at p. 211; Pollock and Maitland, *supra*, at p. 489.

Thirteenth Century Legislation: The Statutes of Westminster

The two Statutes of Westminster enacted by Edward I at the close of the thirteenth century marked important milestones in the development of the rape laws. The first was enacted in 1275; the second, one decade later, in 1285.²⁹

Edward I was a great King, who ruled during an important era in England's legal history.³⁰ He identified the problems facing his country and, though not the first to do so, used legislation to deal with them in a simple yet effective way.

The policy behind his legislation was generally novel. It had few antecedents in the laws of his predecessors, and the principles expressed in the legislation were generally believed to have been the product of the combined thinking of Edward and his lay advisors.³¹

The first Statute of Westminster was intended to be a "law and order" package. The preamble said, in part, that the King "had great Zeal and Desire to redress the State of the Realm" including the belief by the people that the "Peace (was) less kept, and the Laws less used, and the offenders less punished than they ought to be". To achieve this objective, the Statute outlined several provisions intended to suppress corruption amongst public officials. It also required citizens to pursue fleeing felons, failing which they themselves could be imprisoned.

I set these matters out in some detail because it is against this backdrop that the provisions respecting rape should, I think, be measured. Substantively and procedurally, the 1275 legislation

²⁹ Statutes at Large, 3 Edw 1, c. 13; 13 Edw 1, c. 34.

³⁰ *Edward I and Criminal Law*, by T.F.T. Plucknett, Professor of Legal History in the University of London (Cambridge: The University Press, 1960), especially at pp. 1-3; 77 *et seq.*

³¹ *Ibid.*, at pp. 84 and 88-9.

concerning rape was, by all accounts, an improvement over the old Saxon laws. Some authorities, however, have contended that the penalty was drastically reduced to two years imprisonment under this *Act*. For the reasons that follow, I disagree.

The legislation consisted of one section. It read:³²

And the King prohibiteth that none do ravish, nor take away for Force, any Maiden within Age (neither by her own Consent, nor without) nor any Wife or Maiden of full Age, nor any other Woman against her Will; (2) and if any do, at his Suit that will sue within fourty Days, the King shall do common right; (3) and if none commence his Suit within fourty days, the King shall sue; (4) and such as be found culpable, shall have two Years Imprisonment, and after shall fine at the King's Pleasure; (5) and if they have not whereof, they shall be punished by longer Imprisonment, according as the Trespass requireth.

The Statute no longer drew distinctions based on virginity.³³ It simply provided that it was an offence to rape *any woman* against her will, and any underage girl with or without her consent. There was no difference in punishment to offending males, and the provisions respecting underage rape -- where the issue of consent was irrelevant -- provided the basis for our modern principle of "statutory" rape. Further, the woman no longer had to commence proceedings "at once and while the deed is newly done", as under the Bractonian law: she had 40 days in which to start the action. And if she failed to do so, the King "shall" sue. No longer was a rape merely a family misfortune and a threat to land and property: it was an issue of public interest and concern, worthy of criminal

³² This version is the official translation from the original Latin, and was prepared during the eighteenth century. Hale and other early writers did not have the benefit of this translation and, on the basis of the original Latin text), they translated this provision as follows: "That none ravish or take with force a damsel within age with her consent nor against her consent, nor no dame, damsel of age, nor any other woman against her will; and if any do it, the party may sue within 40 days, and common right shall be done; and if none sue within 40 days, the King shall have the suit, and the party convict shall suffer two years imprisonment, and be ransomed at the Kings' pleasure." *History of the Pleas of the Crown*, by Sir Matthew Hale (London: 1736), Vol. I, at p. 627. Hale wrote his famous treatise during the latter part of the seventeenth century, sometime before his death in 1676.

³³ Britton, shortly after A.D. 1290, said: "Rape is a felony committed by a man by violence on the body of a woman, whether she be a virgin or not." Britton, edited by Francis Morgan Nichols (reprint published by Wm. W. Gaunt and Sons, Inc., 1983), Vol. I, at p. 55.

action by the state.

This is where the penalty of two years imprisonment comes into play. Under the law previously in existence, two types of proceedings could be commenced. The first was an appeal brought by the complainant. It was punished by mutilation. The second involved a suit by the Crown where the complainant did not wish to proceed.³⁴ Generically, these were considered "trespasses". Before 1275, the offence if prosecuted in this manner was punished by a fine and imprisonment only. The distinction between these two proceedings was not unlike the difference between prosecuting a felony and prosecuting a misdemeanour. Edward's Statute simply gave the complainant a longer time in which to commence her "appeal" ("the felony"). Failure to do so triggered the lesser procedure ("trespass") at the instance of the King, but on conviction the court was required to impose a two year minimum term of imprisonment. Thus, the first procedure which led to mutilation remained intact but benefited from an extended limitation period, while the penalty for the lesser procedure was actually *enhanced* to a mandatory term of imprisonment. As mentioned earlier, this legislative package was intended to be one which enhanced law and order; against that backdrop, it is simply inconceivable that Edward I reduced the penalty for rape from the most severe under the law to a paltry two years imprisonment. Rather, he left both forms of proceedings intact, enhancing both in different ways.³⁵

³⁴ Generally, see *An Introduction to English Legal History*, by J.H. Baker, Professor of English Legal History and Fellow of St. Catherines College, Cambridge (London: Butterworths, 1990), at pp. 572-8.

³⁵ The writers have divided on this issue over the years. Sir William Staundforde, who wrote the first great treatise on the criminal law, *Les Plees del Coron*, (1557) may well be the culprit. He said: "Edward I ... seems through the law made at Westminster I to have relaxed this penalty. And then, in view of the outrages which followed the said law, at his next Parliament held at Westminster ... the offence of rape ceased to be a felony." (The full text of Staundforde's commentary on the law of rape is set out in Appendix "A" to this article.) William Hawkins, in *Pleas of the Crown*, (London: 1716), c. 41 (p. 109 of Book I), said that the first statute of Westminster reduced the offence to a trespass, subjecting the offender to two years imprisonment and a fine at the King's will. He continued that "the smallness of the punishment prov(ed) a great encouragement to the offence." Blackstone, *supra*, at pp. 211-2 followed suit several decades later as did Edward Hyde East in the final study of the "Pleas of the Crown", published in 1803 (Vol. 1, pp. 434-5). Russell, *supra*, propelled this erroneous impression into the nineteenth century with the added speculation at p. 556 (Vol. I) that "this leniety, however, is said to have been productive of terrible consequences". None of these authors, however, outlined the "terrible consequences" that ensued, and none pointed to an authority for the proposition

Ten years later, in 1285, the death penalty was restored for all forms of rape, regardless of who brought the action.³⁶ This penalty was confirmed by another statute 300 years later,³⁷ and remained in effect in England until 1841, when the death penalty was abolished for all but a few offences.³⁸

The Interlude

The latter part of the middle ages until the early modern period (AD. 1300 to the 1600s) is sometimes referred to as the "dark age" of the criminal law. Few writers of significance emerged

that a reduction in the penalty generated any terrible consequences. On the other hand, Sir Matthew Hale in his History of the *Pleas of the Crown*, *supra*, struck the right note when in Vol. I, at p. 627 he said the following: "This statute gives a punishment by imprisonment and ransom only, if attaint at the King's suit, and takes away castration and putting out of eyes; but it seems as to the suit of the party, if commenced within 40 days it alters not the punishment before, *Le Roy lui ferra common droiture*." Pollack and Maitland, *supra*, at p. 490 agreed with this conclusion.

³⁶ 13 Edw 1, c. 34 provided as follows: It is provided, That if a Man from henceforth do ravish a Woman married, Maid, or other, where she did not consent, neither before nor after, he shall have Judgement of Life and of Member. (2) And likewise where a Man ravisheth a Woman married, Lady, Damosel, or other, with Force, although she consent after, he shall have such Judgement as before is said, if he be attainted at the King's Suit, and there the King shall have the Suit. (3) And of Women carried away with the Goods of their Husbands, the King shall have the Suit for the Goods so taken away. (4) And if a Wife willingly leave her Husband, and go away, and continue with her Advouterer, she shall be barred for ever

(...continued)

³⁶(...continued)

of Action to demand her Dower, that she ought to have of her Husband's Lands, if she be convict thereupon, except that her Husband willingly, and without Coertion of the Church, reconcile her, and suffer her to dwell with him; in which Case she shall be restored to her Action. (5) He that carrieth a Nun from her House, although she consent, shall be punished by three Years Imprisonment, and shall make convenient Satisfaction to the House from whence she was taken, and nevertheless shall make Fine at the King's Will; and see Britton, *supra*, at p. 55.

³⁷ 18 Eliz. 1, c. 7 (1576), on this occasion abolishing the "benefit of clergy".

³⁸ By 4 and 5 Vict., c. 56. In Blackstone's era, no less than 160 offences carried the death penalty (Commentaries, Vol. IV, p. 18). Starting in 1823, the death penalty was removed from a number of offences and by the 1880s the only offences for which the death penalty could be imposed were murder, piracy with violence, dock yard arson and treason (*History of the Criminal Law of England*, by Sir James Fitzjames Stephen (London: MacMillan and Co., 1883), Vol. 1, pp. 472-5). In the case of rape, the debates in the House of Commons which preceded abolition make it very clear that, at least in the eyes of the government, the death penalty had to be replaced with a less severe punishment because English juries were most reluctant to take away a man's life on the evidence of a woman whose motives were, in the majority of cases, quite, suspect: *Hansard's Parliamentary Debates*, 3rd Series, 4 Viet. 1841, Vol. LVII, col . 47-57.

during this period, and there was little advancement in the development of fundamental principles of criminal law.³⁹ For the most part, lawyers and judges seemed preoccupied with matters of practice and the intricacies of the legal process. The limited progress that was made was based on the detailed development of the law that occurred during the reign of Edward I. To many, the principles previously developed had been fixed "for all time".⁴⁰

The sixteenth century writings of Sir William Staundforde provide a good example of this. In 1557, Staundforde published England's first treatise on the criminal law. The chapter on rape, some six pages in length, consists of little more than a verbatim reproduction of the thirteenth century writings of Bracton along with the Statutes of Westminster. I have appended a translation of that chapter in its entirety as Appendix "A" to this article.

Before moving into the modern era, it may be useful to summarize the state of the law thus far. By the seventeenth century, the crime of rape consisted of having sexual intercourse⁴¹ with a woman, "by force, and against her will".⁴² The slightest penetration was sufficient, though emission of semen did not have to be proven.⁴³ The consent had to be real: it could not be forced by fear of

³⁹ Stephen, in his *History of the Criminal Law of England*, *supra*, Vol. II, at p. 202 said: "From the days of Bracton to those of Coke (1644), an interval of at least 350 years there was an extraordinary dearth of writers on English law". The most notable work was Staundforde's *Lees Ples del Coron* (Pleas of the Crown) (1577), generally regarded as the earliest treatise on the criminal law. (See Appendix "A", *infra*).

⁴⁰ Generally see Baker, *An Introduction to English Legal History*, *supra*, at pp. 570 and 594-5; Pollock and Maitland, *supra*, at p. 489; *Criminal Law and Society in Late Medieval and Tudor England* by John G. Bellamy (New York: St. Martin's Press, 1984), at pp. 1-6.

⁴¹ Usually referred to in the authorities as "unlawful and carnal knowledge of any woman" (Coke, *Third Institutes*, at p. 60) or the "violation" of a woman (Glanvill, *supra*, at p. 175).

⁴² Bracton, *supra*, at p. 414; Britton, *supra*, at p. 55; Coke, *supra*, at p. 60; Hale, *supra*, at p. 628; and Blackstone, *supra*, at p. 210.

⁴³ Coke, *supra*, at p. 60 (penetration is the key); Hale, *supra*, at p. 628 (emission not required); Hawkins, *supra*, Vol. I, at p. 108 (emission must be proven, and it is *prima facie* evidence of penetration); East, *supra*, Vol. 1, at pp. 436 *et seq* (emission is not required); *Pleading and Evidence in Criminal Cases*, by John Frederick Archbold (London: 1822), at p. 260 (emission required at common law).

death or

duress.⁴⁴ Where the complainant was younger than ten years of age, consent was immaterial.⁴⁵

The complainant's evidence was viewed with suspicion and distrust. The spectre of the vengeful, lying "prosecutrix" -- that *bête noire* of the present-day rape prosecution -- haunted the common law with the result that trials were refocused from an inquiry into the conduct of the accused into an examination of the background of the complainant.⁴⁶ Her moral worth as well as her credibility were very much in issue during a rape trial.⁴⁷ And she was expected to have provided a "recent complaint", failing which there was a "strong" presumption that her allegation was "malicious and feigned".⁴⁸

An accused could no longer be rescued from punishment if, after the trial, the complainant agreed to marry him. However, a husband, once lawfully married, could not be prosecuted for raping his wife,⁴⁹ although he could be indicted for assisting another in such a rape.⁵⁰ All forms of the offence

⁴⁴ Hawkins, *supra*, Vol. I, at p. 108; Archbold, *supra*, at p. 259; *The Justice of the Peace*, by Richard Burn (London: 1755), Vol. II, at p. 314.

⁴⁵ The authoritative writers divided on the appropriate age. Coke, Hawkins, East, Burns and Archbold, *supra*, all say the age was ten. Hale said that they were wrong, and maintained that the appropriate age was twelve: *History of the Pleas of the Crown*, by Sir Matthew Hale, *supra*, Vol. 1, at pp. 628 and 730-1 [sic], actually pp. 630-1.

⁴⁶ See the discussion of this issue, *infra*.

⁴⁷ Hale, *supra*, Vol. I, at pp. 633 and 635; Burn, *supra*, Vol. II, at p. 315; and see the discussion of this issue, *infra*.

⁴⁸ Hale, *supra*, Vol. I, at pp. 632-4; Blackstone, *supra*, at p. 211; Hawkins, *supra*, Vol. 1, at p. 108; East, *supra*, Vol. I at p. 446; Glanvill, *supra*, said at p. 175 that the complainant "must go" to report the incident.

⁴⁹ Hale, *supra*, Vol. I, at pp. 629 *et seq*; Hawkins, *supra*, Vol. I, at p. 108; Archbold, *supra*, at p. 259. This doctrine was only recently overturned in *R. v. R.*, [1991] 4 All E.R. 481 (H.L.); see the discussion of this issue, *infra*.

⁵⁰ *R. v. Lord Audley* (1631), 3 St. Tr. 401.

were a felony, punishable by death.⁵¹ Charges could be pursued by the complainant herself, as well as her nearest male relative or the Crown.⁵²

Rape Prosecutions in Eighteenth and Nineteenth Century England

By the year 1700, the basic legal framework for the offence of rape had been developed through a curious interaction of the courts and Parliament. However, many of the elements of the modern law of rape were established or shaped during the eighteenth and nineteenth centuries. I will deal with five of them:

- (a) The element of force;
- (b) The pregnant complainant;
- (c) The marital rape exemption;
- (d) Proof of emission of semen;

⁵¹ Britton, *supra*, at p. 55; Coke, *supra*, at p. 60; Hale, *supra*, Vol. I, at p. 627; Hawkins, *supra*, at p. 109; Pollock and Maitland, *supra*, at p. 490.

⁵² Britton, *supra*, at p. 55; Hale, *supra*, Vol. I, at p. 731 [sic]: actually, p. 631.

(e) The moral character of the complainant.

(a) *The Element of Force*

An important element in the proof of rape during the eighteenth and nineteenth centuries concerned a demonstration that the assault had been accomplished *by force*. The leading authorities of that era were virtually unanimous on the point:⁵³

East -- "Rape is the unlawful carnal knowledge of a woman *by force* and against her will".⁵⁴

Coke -- in the *Second Institute*, gives the following, from the *Mirror*: "Rape is when a man hath carnal knowledge of a woman *by force* and against her will".⁵⁵

Hale -- "Rape is the carnal knowledge of any woman above the age of ten years 'against her will', and of a woman child under the age of ten years with or against her will".⁵⁶

Hawkins -- "It seems that rape is an offence in having unlawful and carnal knowledge of a woman *by force* and against her will".⁵⁷

⁵³ The fact that Hale did not seem to require the element of force did not escape the attention of the thirteen judges that heard the case of *The Queen v. Camplin* (1845), 1 Cox C.C. 220 (Footnote B), a pivotal decision which is discussed, *infra*. East, *supra*, Vol. I, at p. 435 had the following to say on this issue: "This distinction between a rape and rape *by force* appears to be founded on a difference which once prevailed between what (in the old French law) was called the rapt and the viol. The first of these was only the seduction of a ward with intent to marry her, which was a misdemeanor. The viol was what is now understood by a rape, and was always a capital offence. *Barrington on the Statutes*, c. 34, p. 139".

⁵⁴ East, *supra*, Vol. I, at p. 43-4.

⁵⁵ Coke, *supra*, 2 *Institutes*, p. 180.

⁵⁶ Hale, *supra*, Vol. I, at pp. 628.

⁵⁷ Hawkins, *supra*, Vol. I, at p. 108.

Blackstone -- Rape is "the carnal knowledge of a woman *forcibly* and against her will".⁵⁸

Russell -- "Rape has been defined to be the having unlawful and carnal knowledge of a woman, *by force*, and against her will".⁵⁹

These definitions, and many of the judicial constructions placed on the word "forcibly" and "against her will" led to a widely-held belief that, to constitute a rape, the man must have used overpowering force, and there must have been desperate resistance on the part of the woman.⁶⁰ Bishop described the rationale for this belief, as well as on it, in the following way.⁶¹

In just principle, it is believed that the extent and form of the resistance should in each case be shown to the jury, who, weighing this evidence with the rest, will find as of fact whether or not the woman consented. But the question seems commonly to be treated by the courts as a question of law, and they often lay it down that the

resistance must be to the extent of the woman's ability. Some of the cases, both old and modern, are quite too favourable to the ravishers of female virtue. Thus, where a man locked his servant girl of fourteen in a barn and had connexion with her, a verdict for rape was set aside because the judge at the trial refused to direct the jury that to convict they must be satisfied she "resisted the defendant to the extent of her ability", though he did tell them that "the act must have been done by force and against her will and resistance". Said the learned judge in the Court of Appeals: "*The resistance must be up to the point of being overpowered by actual force, or of inability, from loss of strength, longer to resist, or, from the number of persons*

⁵⁸ Blackstone, *supra*, at p. 210.

⁵⁹ Russell, *supra*, Vol. I, at p. 556

⁶⁰ For instance, see *The Queen v. Rudland*, (1865), 4 F. and F. 495, per Crompton, J.; and in an earlier Canadian decision, see *R. v. Fick*, (1866), U.C.C.P. 379, per A. Wilson, J. (Richards, C.J. and J. Wilson, J. concurring).

⁶¹ Quoted in the *Criminal Code of Canada*, by James Crankshaw (Montreal: 1902), at pp. 275-6.

attacking, resistance must be dangerous or absolutely useless, or there must be *dread or fear of death*." Various other cases state that the woman's will must oppose the act, and that any inclination favouring it is fatal to the prosecution. The latter terms are not under the ordinary facts repugnant to good doctrine. And the stronger ones just quoted might not be very objectionable in a barbarous age; but, in our age, to compel a frail woman, or girl of fourteen, to abandon her reason, and measure all her strength with a robust man, knowing the effect will be to make her present deplorable condition the more wretched, yet not to preserve her virtue, -- on pain of being otherwise deemed a prostitute instead of the victim of an outrage -- is asking too much of virtue and giving too much to vice. *The text of the law*, we have seen, and, it is believed, the better judicial doctrine, requires only that the case shall be one in which the woman did not consent. Her resistance must not be a mere pretense, but in good faith. [Emphasis in original].

Force was interpreted quite literally. It could include the threat of force, although claims of this were rarely persuasive. Evidence of resistance had to be clear, as shown by marks of injury, disordered clothing or, of course, eyewitness testimony. A threat of force was the equivalent of force in the law,⁶² but it was not enough for a victim to claim that she had simply been cowed into submission. In the case of one woman who explained that she failed to resist because she was paralyzed with fear, ("I had no power"), the court ruled that the circumstance of force, or threat of force, had not been proven.⁶³ Similarly, the court refused to accept the heartrending explanation for lack of resistance given by a twelve year old workhouse inmate raped by her father in the course of one of his visits to her: "I said I would tell my mistress; he said if I did he would never come and see me any more."⁶⁴

Medical evidence of penetration, injury caused by the use of force or violence, or venereal infection became critical to the success of any rape prosecution brought during the eighteenth and nineteenth centuries. This evidence, however, had a double edge to it. While it was certainly capable of

⁶² Hawkins, *supra*, c. 41, s. 2, p. 108.

⁶³ *R. v. Adkins*, Old Bailey Proceedings, sessions ending September 18, 1751 (No. 532).

⁶⁴ *R. v. Sherwin*, Old Bailey Proceedings sessions, beginning January 13, 1779; London Evening-Post December 12-15, 1778.

confirming or corroborating the testimony of complainant, recent studies have raised substantial questions about the expertise of some of the doctors called to testify for the Crown.⁶⁵ Further, much of the medical literature at the time supported the belief that, absent extraordinary force and violence, it was impossible to commit a rape upon a grown woman who had full possession of her faculties. Consider, for example, statements of Dr. Tait, an eminent nineteenth century gynaecologist and medical officer employed to assist police in their criminal investigations:⁶⁶

I am perfectly satisfied that no man can effect a felonious purpose on a woman in possession of her senses without her consent.

An authoritative medical text entitled *The Elements of Medical Jurisprudence* (1815) supported the age-old and quite distasteful myth that "you cannot thread a moving needle".⁶⁷

Where a rape has been committed not only will the *parts* of the woman have suffered violence, but there should be marks of bruises on different parts of her body, in consequence of her struggles and endeavours to preserve her chastity.

A subtle yet important change occurred in the courts during the middle of the nineteenth century. The emphasis shifted from whether force had been used to whether the act of intercourse took place without the consent of the woman. No longer was it necessary for the Crown to prove a positive dissent by the complainant; it was sufficient to show that she did not assent. The cases of *Camplin* (1845)⁶⁸ and *Fletcher* (1859)⁶⁹ provided the vehicle for this change in the legal policy of the courts. In *Camplin*, the conviction of the accused was upheld where he had intercourse with a thirteen year

⁶⁵ At the prosecution of James Larwill, a doctor testified that: "The hymen ... lies at the very entrance of the vagina, not within the vagina; it is not called the vagina till you pass the hymen." Old Bailey Proceedings, sessions beginning September 16, 1778

⁶⁶ (1889), quoted in *Female Sexuality and the Law*, by Susan S.M. Edwards (Oxford: Martin Robertson, 1981), at p. 126.

⁶⁷ *Ibid.*, at p. 122.

⁶⁸ (1845) 1 Cox C.C. 220.

⁶⁹ (1859) 8 Cox C.C. 131.

old girl whom he had rendered insensible by giving her liquor "in order to excite her". In *Fletcher*, the accused was convicted of raping a thirteen year old retarded girl who had not resisted his advances. Rejecting the contention, based on earlier authorities, that force was an essential element of the offence, Lord Campbell, C.J. said at page 134:

I am of opinion that the conviction must be affirmed. The case has been very well argued. The definition of rape may now be considered *res adjudicata*. The question is, what is the proper definition of the crime of rape? Is it carnal knowledge of a woman against her will, or is it sufficient, if it be without the consent of the prosecutrix? If it must be against her will, then the crime was not proved in this case; but if the offence is complete where it was by force and without her consent, then the offence proved that was charged in the indictment, and the prisoner was properly convicted. ... The law, therefore, must now be taken to be settled, and ought not to be disturbed. It would be monstrous to say that these poor females are to be subjected to such violence, without the parties inflicting it being liable to be indicted. If so, every drunken woman returning from market, and happening to fall down on the road side, may be ravished at the will of the passers by.

This trend continued during the latter half of the nineteenth century. In 1872, and again in 1878, it was held that a conviction for rape may be entered, though no evidence was tendered to show violence or resistance, where the accused had intercourse with a woman while she was asleep.⁷⁰ Likewise, a consent induced by impersonating the woman's husband,⁷¹ or fraudulent representations concerning the nature of the act,⁷² were held to be sufficient to found a conviction for rape.

⁷⁰ *R. v. Mayers* (1872), 12 Cox C.C. 311; *R. v. Young* (187), 14 Cox C.C. 114. Whether this case law finally disposed of this issue is a matter for some conjecture. One hundred years later, in 1975, the authors of a Home Office report on rape law had this to say: "It is, therefore, wrong to assume that the woman must show signs of injury or that she must always physically resist before there can be a conviction for rape. We have found this erroneous assumption held by some and therefore hope that our recommendations will go some way to dispel it". (*Report of the Advisory Group on the Law of Rape*, presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty, December 1975), at p. 3.

⁷¹ *R. v. Case* (1850), 1 Den. 580; *R. v. Dee* (1884), 15 Cox C.C. 579; and see 48-49 Vict., c. 69, s. 4 (G.B.).

⁷² *R. v. Case*, *supra*; *R. v. Flattery* (1877), 2 Q.B.D. 410; and, more recently: *R. v. Williams*, [1923] 1 K.B. 340; *R. v. Harms* (1943), 81 C.C.C. 4 (Sask. CA.).

However, the line seems to have been drawn there. Misleading representations by a man about his wealth, or freedom to marry, or nondisclosure of a diseased condition were found not to render intercourse thereby obtained rape.⁷³

Not everyone jumped on this law reform bandwagon. Several eminent jurists, scholars and practitioners were highly critical of the new wave of decisions that emerged in the post-*Camplin* era. Many felt that legitimate seduction was being converted into the crime of rape.

Resistance was anchored on several fronts. First and most importantly, it was said that judicial activism completely ignored the accumulated wisdom and experience of several centuries demonstrating that most accusations of rape are false. Second, it was contended that the common law definition of rape was settled and had been "fixed" many decades earlier. It was open to the courts, the argument continued, to change the law simply because of sympathetic facts in a few "tough" cases.

Few were as vocal as Charles S. Greaves, Q.C., a practitioner and scholar who wrote extensively and greatly influenced the development of the criminal law during the nineteenth century. In his earlier years, he had edited the third and fourth edition of Russell's classic work *On Crimes and Misdemeanors* (published in 1843 and 1865, respectively).⁷⁴ By the 1850s Greaves was the legal draftsman whom the Chancellor of the day, Lord St. Leonards, instructed to proceed with codification of the criminal law in England.⁷⁵ Opposition from the judiciary caused the government to move from codification to consolidation of the existing statutes, and the resulting legislation,

⁷³ *R. v. Clarence* (1888), 22 Q.B.D. 23 (discussed, *infra*).

⁷⁴ *A Legal Bibliography of the British Commonwealth of Nations*, (London: Sweet and Maxwell, 1957), Vol. II, at p. 312.

⁷⁵ *The Genesis of the Canadian Criminal Code of 1892*, by Desmond H. Brown (Toronto: The Osgoode Society, 1989), at p. 21; *A History of English Law*, by Sir William Holdsworth (London: Sweet and Maxwell), Vol. XV, at pp. 147-153.

passed in 1861, became known as Greaves Consolidation Acts.⁷⁶ Greaves wrote several texts on the criminal law, the last one being an annotation of the statutes he had framed, entitled *Criminal Law Consolidation and Amendment Acts*.⁷⁷

Several years before his death in 1881, it was said that Greaves had become "the most eminent living writer on the subject of criminal law".⁷⁸

In 1878, Greaves prepared a detailed and compelling essay on the law of rape in England. It is an important document for a number of reasons. First, it provides an excellent description of the law's evolution to that time. It also contains an impassioned plea for judicial restraint in the reform of the law -- from someone who twenty years earlier had been very much a part of the development of England's *statutory* criminal law. Most importantly, however, the essay provides an important glimpse into how Victorian lawyers viewed the evidence of a complainant in a rape trial. Greaves also pulled no punches in his stinging attack on contemporary reformist judges, contrasting them in not very favourable terms with the judicial giants of earlier times.

Greaves' essay on rape law was prepared at the request of Mr. Justice Taschereau, one of the judges of the Supreme Court of Canada. At the time, Taschereau was in the process of preparing an annotation of Canada's criminal law statutes which, for the most part, had been borrowed English counterparts. Taschereau's text finally came out ten years later, in 1888. It contained the Greaves essay as an appendix. Unfortunately, Taschereau's book has been out of print for over one hundred years,⁷⁹ and it has not been reprinted by any publisher. Original copies of this book are difficult to

⁷⁶ 24-25 Vict., c. 95-100 (1861). These Statutes ultimately provided the basis for a similar consolidation in Canada: 32-33 Vict., c. 18-36 (Can.).

⁷⁷ Sweet and Maxwell, *supra*, Vol. II, at p. 145. Greaves' first edition came out in 1861 and a second edition emerged the following year.

⁷⁸ *The Criminal Statute Law of the Dominion of Canada*, by Henri Elzéar Taschereau, one of the judges of the Supreme Court of Canada (Toronto: The Carswell Company, 1888), at p. vi.

⁷⁹ It was superseded by a new edition of Taschereau's text in 1893, after Canada's first *Criminal*

find, even in large academic libraries, so for all practical purposes Greaves' essay has now been lost to history. Because of its importance, I will review Greaves' analysis in considerably more than would normally be appropriate for an article of this nature.

At the commencement of his essay, Greaves maintained that rape necessarily involved an act of violence against the will of a woman. He likened it to the offence of robbery:⁸⁰

Indictments for rape have always alleged the offence to be committed by violence *and* against the will, and nothing could more clearly show that proof of both is necessary. The indictment runs "the said A *violently and against her will* feloniously did ravish". Robbery is exactly similar; there the indictment runs "from the person and *against the will* of the said A *feloniously and violently* did steal". It seems impossible to draw any distinction between these forms; and the definition of robbery is stealing from the person and "against the will by violence and putting in fear," etc. Now both these offences require the act to be done with violence and against the will; and it is quite clear that in robbery there must be some violence to the person beyond the force that may be used in taking the articles; for no mere taking from the person, even against the will, can suffice in robbery. It is quite clear that merely taking an article from a man asleep or drunk would not suffice. And for the same reason it would seem that having connection with a woman in a state of insensibility can not constitute a rape, because there is no violence ultra the mere connection. In robbery the violence is the principle [sic] ingredient, and in rape it seems at least to be one necessary ingredient. Violence to the person has always been an offence; so that robbery is in truth compounded of two offences, larceny and assault. And it is difficult to understand how a case can amount to rape where there is no violence ultra the act itself.

Greaves added that the violence must be such that it overcame the resistance of the woman. There must, he argued, have been "a struggle".⁸¹

Codewas enacted in 1892.

⁸⁰ "Appendix: Mss. note by C.S. Greaves, Esquire, Q.C., on rape", at pp. 1081-99 of the *Criminal Statute Law of Dominion of Canada*, by Henri Elzéar Taschereau, one of the judges of the Supreme Court of Canada (Toronto: Carswell and Company, 2nd edition, 1888), at p. 1085.

⁸¹ *Ibid.*, p. 1086.

Nothing could more clearly show that violence to the person is essential to the crime of rape than the statute of William the Conqueror, and it is clear from it that the violence must be such as to overcome the resistance of the woman; even in the case of an attempt there must be a struggle, *luctamen*. It need hardly be added that a mere attraction that is sufficient to constitute an assault in point of law is insufficient, unless indeed there were an overpowering terror otherwise created.

Speaking of an appeal of rape at common law Bracton says: "*Cum virgo corrupta fuerit et oppressa, statim cum factum recens fuerit cum clamore et hutesio debet accurrere ad villas vicinas, et ibi injuriam sibi illatam probis hominibus ostendere, sanguinem et vestes suas sanguine tinctas et vestium scissuras*". Lib III, chapter 28, f. 147. Lord Hale cites this passage (1 Hale, 632); and evidently fully approves of it. (*Ibid.* 633, 4). Nothing could more clearly prove that from the time of Bracton till Lord Hale wrote the act must have been done both violently and against the will in order to constitute the crime. And Lord Hale fully justifies my views as to the dangers to which innocent men may be subjected by false charges of rape.

Concerning the decision in *Camplin*, Greaves noted that the judges had relied on the fact that in the second Statute of Westminster the offence of rape was described as ravishing a woman when she *did not consent*, rather than "against her will". Greaves disagreed. He said:⁸²

It is very difficult to conceive a more erroneous statement. We have shown that the Statute did not define the crime at all. The words are not merely "where she did not consent," but "where she did not consent, neither before nor after;" and, therefore, do not apply to the act itself, and the 3 Edw 1, chapter 13, which does apply to the act, and *must* be construed together with this act, has the words "against her will". If the Statute had been referred to in the argument, the explanation we have given might have been offered, and it would have been seen that the Statutes when properly considered have a totally different meaning.

Greaves drew on his own experience to assess the practical implications of the decision in *Camplin*.⁸³

A very long experience in criminal courts satisfies me that the majority of charges of rape are false, and that innocent persons are put in great peril by them; and for the

⁸² *Ibid.*, pp. 1088-9.

⁸³ *Ibid.*, pp. 1092-3.

most part no one except the man and woman are alleged to be present, and consequently it is open to the woman to fabricate any story she likes without fear of contradiction by anyone except the prisoner; and the stories that have turned out to be fabrications may be said to have culminated in a case, in which the prosecutrix, a nice looking girl of under age, told as a clear a story as ever was heard in examination in chief; but Gurley, B., who had taken down her examination in shorthand, desired her to repeat her story; which she did word for word as it was on his notes, on which that great criminal lawyer at once directed an acquittal. It is in consequence no doubt, of the prevalence of false charges that it has always been expected that marks on the person of the woman should have been seen; and this expectation was, no doubt, founded upon the belief that if the woman was true to herself, and resisted as she ought, her tender flesh would bear clear proof that violence had been offered to her in order to overcome her resistance. Of course there may be cases where the absence of marks may be explained; as by present fear of death or the intimidation of numbers. But the holding that fraud is equivalent to force opens the way to charges where no marks are to be expected. How very easy would it be to utilize *Camplin's case*, in support of a false charge.

Suppose a man and woman are drinking together in a room, and she consents to connection, and during it someone walks unexpectedly into the room, and finds them in the act, what would be more easy -- nay what would be more probable than that she would charge the man with a rape?

It may well be asked, also, if fraud is equivalent to force and want of consent, how far is it to be extended? A married or single man induces a woman to yield to his wishes by a promise to marry her. No one can doubt that this is a gross fraud; but is it rape? A man administers drugs to a woman and thereby so excites her passions as to yield to his desires; no doubt it is a gross fraud, but is it a rape? Is it not turning cases of seduction into rape?

Greaves also took aim at the decision in *Fletcher*, arguing that sexual intercourse with a retarded woman who exhibited normal "animal passions" could not possibly amount to rape:⁸⁴

A woman may be quite incapable of exercising reasoning power, and yet be perfectly capable of exerting her natural appetites; and consequently the want of the former in no way negatives the existence of the latter. The verdict, therefore, in *R. v. Fletcher*, Bell, C.C., 63, was clearly wrong

Nor can there be any doubt that in many cases of unsound mind the animal passions

⁸⁴ *Ibid.*, at p. 1097. Formerly, it was an offence in Canada to have sexual intercourse with a feeble-minded woman: *The Criminal Code*, 1892, 55-6 Vict., c. 29, s. 189.

are extremely strong; and in the absence of reason to control them, the reasonable inference is that they will be gratified whenever an opportunity occurs, and when there is no evidence to the contrary, it would seem that the fair presumption is that that is the case. This point, though one of fact, deserves more consideration than it has received.

Greaves levelled his sights on the judges who decided *Fletcher*, in a manner that is virtually unparalleled in English legal literature.⁸⁵

Equally remarkable is it that the court never noticed that Lord Coke, Lord Hale, and others all wrote upon the Statutes, and all hold that in order to constitute a rape the act must be done against the will of the woman. On no subject is there a greater concurrence of opinion; and on no point is there an opinion entitled to greater weight. It cannot be pretended that any judge of the present day is abler than Lord Coke or Lord Hale, and both were very much more conversant with our old Statutes than any judge in our time; and Lord Hale was an infinitely better criminal lawyer than any judge of recent times; but stranger still is it that Lord Campbell cites the 2 Inst. 433 for the clause in the Statute, and never notices Lord Coke's note on it, which shows how erroneous his judgment was.

Lord Campbell, C.J., also added: "It would be monstrous to say that if a drunken woman returning from the market lay down and fell asleep by the roadside, and a man, by force, had connexion with her whilst she was in a state of insensibility and incapable of giving consent, he would not be guilty of rape." I totally dissent from this *obiter dictum*. Substitute for "had connexion with her" the words "took a purse from her," and the fallacy will at once appear. No one ever dreamt of such a case being a robbery, and yet it is a bad offence. The Greeks considered it so infamous to steal from a dead body that they had a proverb to denote the disgraceful nature of the act, viz., "he would even plunder a dead man." But disgraceful acts ought not to be included in we known crimes [sic], however bad they may be, unless they clearly fall within them; and it is to be feared that these cases are but two strong examples of the proverb that "bad cases make bad law".

Finally, Greaves somewhat prophetically alluded to situations where, despite some resistance, the accused had a *bona fide* belief that the girl was consenting⁸⁶ -- a scenario which, one hundred years

⁸⁵ *Ibid.*, at pp. 1091-2.

⁸⁶ *Ibid.*, at p. 1098.

later, would vex appellate courts in England, Canada and Australia.⁸⁷

An important question arises occasionally in these cases in addition to the question whether the woman submitted, but did not consent. It is "did the man *bona fide* believe that she was consenting?" In *R. v. Flattery*, Denman, J. said "There is one case where a woman does not consent to the act of connexion, and yet the man may not be guilty of rape, that is where the resistance is so slight and her behaviour such that the man may *bona fide* believe that she is consenting." And, *a fortiori*, that may be the case where the woman submits, and makes no resistance at all. In *R. v. Barratt*, where the girl was blind and out of her mind, and here was no evidence whatever of resistance, the surgeon proved that there were no external marks of violence, but that in his opinion there had been recent connexion, and he thought she had been *in the habit of having connexion*, there would seem to have been cogent evidence that the animal passions of the girl had led to the connexion, and the case ought to have ended in an acquittal.

(b) *The Pregnant Complainant*

Folklore and common beliefs in seventeenth and eighteenth century England crept into the criminal justice system and found expression in many different ways. Some of these beliefs affected the charging process; others shaped the nature and quality of evidence led at trial; and many influenced the way that jurors viewed the case.⁸⁸

Few were as bizarre as the widespread belief that conception is only possible when sexual intercourse is accompanied by desire. On its surface, this myth seems innocuous enough, until one

⁸⁷ *Morgan v. D.P.P.*, [1976] A.C. 182; *Sansregret v. The Queen* (1985), 18 C.C.C. (3d) 223 (S.C.C.); *Laybourn v. The Queen* (1987), 33 C.C.C. (3d) 385 (S.C.C.); *R. v. Brown* (1975), 10 S.A.S.R. 139; *R. v. Wozniak* (1977), 16 S.A.S.R. 67.

⁸⁸ Generally, see *R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321 (S.C.C.), especially the decision of L'Heureux-Dubé, J.; Antony E. Simpson, "The Blackmail Myth and the Prosecution of Rape and Its Attempt in Eighteenth Century London: The Creation of a Legal Tradition", (1986) 77 J. Cr. L. and Crim. 101; Susan S.M. Edwards, "Female Sexuality and the Law", *supra*, at pp. 121 *et seq.*

considers the legal corollary: the testimony of a pregnant complainant should be regarded with great suspicion. She is likely lying.

The origins of this belief are forever lost to history. Legal and medical literature of the time, however, described its parameters, and tracked its progress until it fell into oblivion at the end of the nineteenth century. One could easily dismiss this myth as a medieval curiosity, of no interest to us now; there are, however, signs that it is re-emerging in one form or another in at least some medical circles as we move towards the twenty-first century.

Sir William Staundforde, an eminent legal scholar who wrote in 1557, said: "Britton, on p. 45, states that if at the time of the rape the woman conceives a child of the rapist, it is not rape, because no woman can conceive if she does not consent."⁸⁹

During the latter part of the seventeenth century, Sir Matthew Hale, in his classic study of the criminal law entitled *The History of the Pleas of the Crown*, also said that the principle that "it can be no rape if the woman conceive with child" was based on the writings of Britton, a thirteenth century author. Hale summarily dismissed the rule, however, observing that "(It) seems to be no law ..."⁹⁰

Several decades later, in 1716, William Hawkins likewise discounted this belief on grounds of logic and legal policy:⁹¹

Also it hath been said by some to be no Rape to force a Woman who conceives at the time; for it is said, That if she had not consented, she could not have conceived: but this Opinion seems very questionable, not only because the previous Violence is no

⁸⁹ *Les Plees del Coron*, by Sir William Staundforde, *supra* (a translation of Staundforde's writings on the crime of rape is reproduced as Appendix "A" to this article).

⁹⁰ Hale, *History of the Pleas of the Crown*, *supra*, Vol. I, p. 731 [sic], actually p. 631.

⁹¹ Hawkins, *Treatise of the Pleas of the Crown*, *supra*, Book I at p. 108.

way extenuated by such a subsequent Consent, but also because if it were necessary to shew that the Woman did not conceive, this Offender could not be tried till such Time as it might appear whether she did or not, and likewise because the Philosophy of this Notion may very well be doubted of.

All legal writers followed suit.⁹² Indeed, by 1826, Russell in the second edition of his study *On Crimes and Misdemeanors* said the "notion that if the woman conceived it could not be a rape, because she must, in such case, have consented, *appears to be quite exploded*" (emp. added).⁹³

The myth may have exploded, but it did not die. Several medical writers persisted. In 1815, Dr. Farr, in his leading text entitled *The Elements of Medical Jurisprudence*, said:⁹⁴

It may be necessary to enquire how far lust was excited, or if she experienced any enjoyment. For without the enjoyment of pleasure in the venereal act no conception can probably take place.

By the turn of the century, however, it was generally agreed on all legal and medical fronts that the nineteenth century belief in the relationship between impregnation and consent was erroneous, and it was discontinued as a defence tactic in court.

The tide shifted somewhat in the 1960s and 1970s, when eminent medical authorities and sociologists, such as Masters and Johnson, pointed to new evidence suggesting a positive correlation between consent and conception and, in particular, between female orgasm and conception.⁹⁵ There may indeed be a proper physiological basis for reaching this conclusion. But that is a far cry from saying that a woman cannot become pregnant if she was forced to have intercourse against her will. Clearly she can, and many have.

⁹² Burn, *supra*, Vol. II, at p. 315; East, *supra*, Vol. I, at p. 445; Russell, *supra*, Vol. I at p. 557.

⁹³ Russell, *ibid.*; generally, see Simpson, "The Blackmail Myth", *supra*, at pp. 104-5.

⁹⁴ Quoted in Susan S.M. Edwards, *Female Sexuality and the Law*, *supra*, at p. 123.

⁹⁵ Susan S.M. Edwards, *supra*, at p. 125.

The saga of the "responsive womb" leads us to three points. First, it is clear that a myth which had little or no basis in fact, law or medicine drove one aspect of the English criminal justice system for over 600 years. That does not say much for the common law development of our criminal policy. Second, the full impact of this bizarre belief will never be known. In 600 years, how many charges were declined on the basis that the complainant became pregnant as a result of the assault? How many cases were dropped when, after the laying of charges, it became obvious that the complainant was pregnant? And, if the case made it through these hoops, how many juries disbelieved complainants who stood before them, "great with child"? Finally, the story of the "responsive womb" demonstrates how a popular belief -- and it was nothing more than that -- can impact at each stage of the prosecution process -- from the decision whether to prosecute, through to the evidence led and the verdict delivered by the jury. The thought is chilling.

(c) The Marital Rape Exemption

"Rape shield" laws are not new. They have existed for over 250 years. But the first ones were not directed towards the protection of complainants while testifying: rather, they shielded abusive husbands against prosecution for raping their own wives.

Over the next few pages I will recount this sorry chapter in the history of our criminal laws. It begins in England around 1670, spreads through much of the Commonwealth and ends where it should, in England, when the House of Lords unceremoniously tossed the rule out of the books in 1991.

Sir Matthew Hale is one of the most interesting and colourful characters in our legal history. Born in 1609, Hale was raised in a puritan environment and as a young man he had nothing but contempt for lawyers. A friend was, however, able to persuade him to enter law school in 1628 and by

studying 16 hours a day Hale became a star pupil.⁹⁶ After his call to the Bar in 1637 he was retained in a number of important state trials, including the trial of King Charles 1. He was appointed to the Bench in 1653, became Lord Chief Baron of the Exchequer Court in 1660, ultimately rising to become Chief Justice of the King's Bench in 1671, a position he held until 10 months before his death in 1676.⁹⁷

Hale's character and abilities as a judge and his writings as a jurist have attracted considerable praise throughout the common law world. Lord Northington pronounced him one of the ablest and most learned justices that ever adorned the profession. Mr. Justice Grosse declared that he was one of the most able lawyers that ever sat in Westminster Hall. Others have spoken eloquently of his moral character, uncorrupt integrity, and deep compassion.⁹⁸

There are, however, two blots on Hale's copybook that will forever stain his otherwise flawless judicial record. The first is that he believed in the existence of witches. In 1665, he tried two widows for bewitching several children, and sentenced both to death.⁹⁹ The second is that he believed no wife has the right to refuse to have sexual intercourse with her husband.¹⁰⁰

⁹⁶ *A History of English Law*, by Sir William S. Holdsworth, Vol. VI, (London: Methane and Co. Ltd., 3rd edition, 1924), at p. 574.

⁹⁷ *The Life and Death of Sir Matthew Hale, Kt.*, by Gilbert Burnett, D.D. (London: 1682), at pp. 22, 25, 32, 55 and 57.

⁹⁸ *Sources and Literature of English Law*, by W.S. Holdsworth (London: Oxford University Press, 1925), at p. 151; Burnett, *supra*.

⁹⁹ "A Trial of Witches" [*R. v. Cullender and Dunny*] (1665), 6 St. Tr. 687. Hale's own account of this trial can be found in *Tryall of Witches at Bury St. Edmunds* (1682); Silas Alward, "Sir Matthew Hale. The "Great Judge", 37 Can. Law Times 355 (1917); for a stinging critique of Matthew Hale, see G. Geis, "Lord Hale, Witches and Rape", (1978), 5 British Journal of Law and Society 26. Geis' commentary has, in turn, been condemned by a number of academics, most recently by Professor David Lanham, "Hale, Misogyny and Rap" (1983), 7 Crim. L.J. 148.

¹⁰⁰ This has led to the suggestion that Hale was a misogynist, a claim that has sent several scholars scrambling to defend his integrity: G. Geis, "Lord Hale, Witches and Rape," *supra*; rebutted by David Lanham, "Hale: Misogyny and Rape, *supra*".

Viewed with twentieth century eyes, both of these beliefs are, at best, bizarre; most people would say that they are patently absurd, and potentially very dangerous. At the time, however, both had a broad base of support within the community.

In *History of the Pleas of the Crown*, Hale made the following classic statement:¹⁰¹

But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.

As a direct result of this passage, no prosecutions for marital rape were brought in England for the next 200 years. Status as a husband provided absolute immunity from criminal proceedings that would otherwise result in the death penalty or life imprisonment. Whether and to what extent a prosecution for rape would have been available even before Hale's statement is certainly debatable. Some have argued that Hale simply outlined the law at the time, and in fact erred in favour of being somewhat restrictive in favour of the wife.¹⁰²

¹⁰¹ Hale, *History of the Pleas of the Crown*, *supra*, at p. 629. Hale's classic study was written around 1670, but was not published until 1736.

¹⁰² See David Lanham, "*Hale, Misogyny and Rape*" *supra*, at pp. 153-6; and see *R. v. Lord Audley* (1631), 3 St. Tr. 401, where the accused was convicted for assisting another in the rape of his own

Before going further, I think it is important to place Hale's comments into some sort of context. First, his work was left unfinished when he died in 1676. While Hale had made extensive revisions to his original draft, there is no reason to believe that he regarded even those chapters that he had

wife.

revised as fit for the printer.¹⁰³ Indeed, a large portion of the book was never revised at all.¹⁰⁴ This has not always been remembered by those who have later relied upon it.¹⁰⁵

Second, under the terms of Hale's will, none of his manuscripts were to be published after his death unless he had given express authority to do so during his lifetime.¹⁰⁶ During this period, unauthorized editions often preempted the official publication of a major treatise, and Hale feared that the true meaning of his work could be obscured by unscrupulous editors. It is clear that he did not wish any book to appear under his name until it had received his final revision and approval. "Such works", he said of unauthorized books, "rarely come out to the due advantage of the author".¹⁰⁷ The treatise on the *History of the Pleas of the Crown* had not been authorized for publication by Hale, and it took a special resolution of the House of Commons to arrange for its publication after his death.¹⁰⁸

Third, Hale cited no authority in support for his claim that a husband could not be convicted of raping his wife. Indeed, courts and scholars since then have not been able to find any earlier authority directly supporting his view.¹⁰⁹

¹⁰³ *History of the Pleas of the Crown, supra*; according to the Preface, the last of Hale's revisions occurred in Chapter 27 (out of 123 chapters). P.R. Glazebrook, in a Contemporary Introduction to the reprint of Hale's *Treatise*, says that the last of Hale's corrections actually extended to Chapter 34.

¹⁰⁴ Hale's original manuscript, and the resulting transcript, both survive. The single volume manuscript is now in the John Rylands Library at Manchester, England. The seven volume transcript is located in the British Museum: *History of the Pleas of the Crown, supra*, Contemporary Introduction by Glazebrook.

¹⁰⁵ *History of the Pleas of the Crown, supra*, Contemporary Introduction by Glazebrook; see also Holdsworth, *supra*, at p. 584.

¹⁰⁶ *History of the Pleas of the Crown, supra*, Preface, at p. xv; Holdsworth, *supra*, at p. 583.

¹⁰⁷ Holdsworth, *supra*, at p. 583.

¹⁰⁸ *Journal of the House of Commons*, Vol. IX (1867-85), p. 667 (November 29, 1680); reprinted on the reverse of the title page of Vol. I of the *History of the Pleas of the Crown, supra*.

¹⁰⁹ *R. v. Clarence* (1888), 22 Q.B.D. 23, per Field, J. at p. 57; *R. v. Miller*, [1954] 2 Q.B. 282; *R. v. R.*,

Nonetheless, the impact of Hale's *History* upon seventeenth and eighteenth century legal thought was astounding. Together with the writings of Sir Edward Coke, Hale's *History* was "recognized by the courts as possessing an authority scarcely inferior to that of the legislature".¹¹⁰

Hale's proposition was first considered by the 13 judges who sat in *R. v. Clarence* (1888), 22 Q.B.D. 23. There, the accused's husband was charged with assaulting his wife (ie., not rape) on the basis that he had concealed his venereal infection from her when they had had sexual intercourse. A conviction entered at trial was quashed by a nine to four division. The majority found it unnecessary to deal squarely with the marital rape issue, although Stephen, J., whose judgment formed the decision of the court,¹¹¹ suggested at page 46 that it was wrong to say that a husband could be indicted for the rape of his wife. Most of the other judges seemed to accept that correctness of Hale's proposition, although Hawkins, J. (Day, J. concurring) and Field, J. (Charles, J. concurring) felt that a husband could, through forced sexual intercourse, be exposed to prosecution for some

[1991] 4 All E.R. 481 (H.L.), at p. 483; Professor David Lanham, in "*Hale, Misogyny and Rape*", *supra*, argues that Hale's position was supported by authority. It is difficult to accept this argument, given Lanham's conclusion at p. 156 that Hale seized on the one theory which recognized the "dignity of women". The earliest reported case touching on the issue in a general sense may be *R. v. Lord Audley* (1631), 3 St. Tr. 401, where the accused was convicted of assisting another man in the rape of Audley's wife. Coke (1644) makes no reference to marital immunity, nor does Staundforde (1557), although the latter cites Bracton (1250-1260) in support for the proposition that "it is a good defence in a rape case to say that before the time of the alleged rape, (the accused) had the (complainant) and used her as his concubine: see Appendix "A" to this article.

¹¹⁰ *First Report from His Majesty's Commissioners on Criminal Law*, dated June 24, 1834, ordered, by the House of Commons, to be printed July 30, 1834, at p. 15; *British Authors Before 1800*, edited by S.J Kunitz and Howard Haycraft (New York: The H.W. Wilson Company, 1952), at p. 113; Holdsworth, *supra*, at pp. 146-7.

¹¹¹ Susan S.M. Edwards, in her book entitled *Female Sexuality and the Law*, *supra*, suggests at p. 34 that Mr. Justice Hawkins delivered the decision of the court. I disagree. The decision of Stephen, J. Was expressly concurred in by seven judges, and implicitly concurred in by another. That formed a majority of nine judges, with Stephen, J. giving the lead decision. On the other side of the ledger, four judges dissented on the overall disposition of the case. The minority was, however, split. Both Hawkins, J. And Field, J. delivered dissenting judgments, and one other member of the court concurred with each of them. In the result, Hawkins, J. only spoke for himself and for Day, J.

other offence, such as assault.¹¹² One judge, Wills, J. went further than that. He said that a married woman could refuse to have intercourse with her husband, and that in appropriate circumstances a charge of rape could lie against an unrelenting husband.¹¹³

The obiter of the judges leads to a curious result. Logically, if a wife was not entitled to refuse intercourse, her husband should be able to use reasonable force to overcome any resistance she may offer.¹¹⁴ Otherwise, the husband's "right" to intercourse would be quite illusory. Yet, the judges in *Clarence* felt that the use of force was unlawful, and could lead to prosecution against the husband. Thus, the *means* to achieve sexual intercourse was criminal, though the actual *achievement* of it was not.¹¹⁵

Although the judges were valiantly attempting to limit the impact of Hale's proposition, the absurdity of the fictions developed to avoid its application ultimately confined the wife's capacity to complain to the minor element of the transaction, not the major one.

Subsequent decisions restricted Hale's proposition to situations where husband and wife enjoyed "ordinary relations" between them, thus exposing abusive husbands to prosecution for rape where they were judicially separated¹¹⁶ or where the wife had initiated divorce proceedings and had been

¹¹² *R. v. Clarence, supra*, at pp. 51-2 (Hawkins, J.) And p. 57 (Field, J.).

¹¹³ *Ibid.*, at pp. 33-5.

¹¹⁴ This reasoning may have laid the foundation for Lord Dunedin's incredible suggestion in *G. v. G.*, [1924] A.C. 349 (H.L.), within the context of an action by a husband against his wife for a decree of nullity on the ground of impotency, that a husband may be entitled to use "some gentle violence against his wife in order to encourage intercourse. Lord Dunedin was not alone in this view. In *R. v. Clarence, supra*, Pollock, B. suggested at p. 64 that a husband may be entitled to take action which amounts to cruelty in law in an effort to ensure that he has intercourse with his wife.

¹¹⁵ See *R. v. R.*, [1991] 4 All E.R. 481 (H.L.), at p. 486.

¹¹⁶ *R. v. Clarke*, [1949] 2 All E.R. 448.

granted a *decree nisi*.¹¹⁷ Short of judicial intervention into the marriage, however, the courts were reluctant to infer a revocation of the wife's implied consent.¹¹⁸

In the twentieth century, some Commonwealth countries moved away from the harshness of this common law rule through legislative reform. Souther Australia made the first move in 1935 by permitting the conviction of a spouse where the assault involved bodily harm, gross indecency, humiliation of the spouse or the threat of a criminal act against the spouse.¹¹⁹ Other Australian states followed that lead, either by abolishing the rule completely, or by confining immunity to situations where the husband and wife were living together.¹²⁰ In 1961, New Zealand confirmed the existence of the marital exemption, but permitted the conviction of an offending husband the time of the incident, a *decree nisi* or judicially authorized separation existed.¹²¹ In 1983, Canada eliminated the rule completely.¹²²

The High Court of Justiciary in Scotland took a bold step in 1989, holding that the marital exemption, if it had ever been a part of the law of Scotland, was no longer so.¹²³ The House of Lords followed suit two years later in *R. v. R.*, [1991] 4 All E.R. 481. On behalf of the law lords, Lord Keith held that the common law was "capable of evolving in the light of changing social, economic and cultural developments".¹²⁴ He continued:¹²⁵

¹¹⁷ *R. v. O'Brien*, [1974] 3 All E.R. 663.

¹¹⁸ See, for instance, *R. v. Miller* [1954] 2 All E.R. 529; although, see the line of trial decisions alluded to by the House of Lords in *R. v. R.*, *supra*.

¹¹⁹ *Criminal Law Consolidation Act* (1935, amended 1976), s. 73(5).

¹²⁰ New South Wales abolished the immunity rule, as did the Australian Capital Territory. The State of Victoria modified the rule to permit prosecution if the parties lived separate and apart. See generally: *Criminal Law*, by Peter Gillies (Sydney: The Law Book Company Limited, 1990), at pp. 540-61.

¹²¹ *Crimes Act*, 1961, s. 128(3).

¹²² S.C. 1980-81-82-83, c. 125, s. 19.

¹²³ *S. v. H. M. Advocate* 1989 S.L.T. 469, H.C. of Just.

¹²⁴ *R. v. R.*, *supra*, at p. 483. Whether and to what extent the courts should reform the law in an area such

Hale's proposition reflected the state of affairs in these respects at the time it was enunciated. Since then the status of women, and particularly of married women, has changed out of all recognition in various ways which are very familiar and upon which it is unnecessary to go into detail. Apart from property matters and the availability of matrimonial remedies, one of the most important changes is that marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband. Hale's proposition involves that by marriage a wife gives her irrevocable consent to sexual intercourse with her husband under all circumstances and irrespective of the state of her health or how she happens to be feeling at the time. In modern times any reasonable person must regard that conception as quite unacceptable.

The court concluded that the question of consent is one of fact that must be considered on a case by case basis: the fundamental question, the Lords said, is "whether or not consent has been withheld".¹²⁶

320 years after its birth, the so-called marital rape exemption died a natural death. No longer does a wife "give herself up" to her husband when they marry. Nor does the law any longer imply a permanent consent to intercourse, irrespective of circumstances. Put bluntly, no longer does a husband have the "right to rape" his own wife.

The recent appellate decisions from England and Scotland are laudable, but tragically overdue. A community is not well served by laws that permit the abuse of one spouse by the other. How for

as this, or leave it to Parliament, was discussed by Marianne Giles, in "*Judicial Law-Making the Criminal Courts: The Case of Marital Rape*", [1992] Crim. L.R. 407. During parliamentary debate Britain in 1975 on the *Sexual Offences (Amendment) Act*, a major attempt was undertaken to remove this anachronism from British law. The attempt was deflected, largely because of Hale's strong reputation in the development of English common law: *House of Commons Parliamentary Debates*, Standing Committee Report (March 24 -April 7, 1976), pp. 21-42.

¹²⁵ *R. v. R.*, *supra*, at pp. 483-4

¹²⁶ *Ibid.*, at p. 485. Whether there is a distinction between this test and one which simply inquires whether the wife consented on each occasion will have to be considered in future cases. At first blush, however, it would seem that the court has continued to presume consent during normal relations to evidence demonstrating that consent was withheld by the wife on a particular occasion.

three centuries that could have been sanctioned by common law courts on the basis of a paragraph in a textbook is almost beyond comprehension.

(d) Proof of Emission of Semen

Common law courts in the eighteenth and nineteenth centuries struggled in confusion over the sufficiency of evidence required to show the actual commission of the offence of rape. All courts agreed that penetration was an essential element.¹²⁷ Some said that the hymen had to be ruptured;¹²⁸ most, however, disagreed with that view.¹²⁹ Some said that the evidence must show the emission of semen;¹³⁰ but a significant body of authority disagreed with that view as well.¹³¹ Some said that penetration was *prima facie* evidence of emission;¹³² others reversed it, saying that emission was *prima facie* evidence of penetration.¹³³ And everyone was confused on what to do if penetration

¹²⁷ *R. v. Page*, 1 Russ. 558; *R. v. Russen* (1777), 1 East P.C. 438; Hale, *supra*, Vol. I, at p. 628; Coke, *Third Institutes*, *supra*, at pp. 59-60; Hawkins, *supra*, Vol. I, c. 41, p. 108; East, *supra*, Vol. I, c. 10, s. 3, p. 437.

¹²⁸ *R. v. Gammon* (1832), 5 C.&P. 321; 172 E.R. 994; *The Law of Evidence in Criminal Cases*, by Henry Roscoe (Philadelphia: T. and J.W. Johnson, 4th American from the 3rd London edition, 1852), at pp. 861-2.

¹²⁹ *R. v. M' Rue* (1838), 8 C.&P. 641, 173 E.R. 653; *R. v. Hughes* (1841), 2 Mood. 190, 169 E.R. 75; *R. v. Russen*, *supra*; Roscoe, *supra*, at p. 862; Archbold, *supra*, at p. 260; East, *supra*, Vol. I, at p. 438.

¹³⁰ See the discussion of this issue, *infra*. The leading case was *R. v. Hill* (1781), 1 East P.C. 439.

¹³¹ See the discussion of this issue, *infra*. The leading case was *R. v Russen*, *supra*.

¹³² Russell, *supra*, Vol. I, at p. 560; this principle was adopted at an early stage in Canada: see *Provincial Justice*, by W.C. Keele (Toronto: U.C. Gazette Office, 1st ed., 1835), at p. 375.

¹³³ Hale, *supra*, Vol. I, at p. 628; Hawkins, *supra*, Vol. I, c. 41, p. 108; Coke, *supra*, *Third Institutes*, at p. 59; Russell, *supra*, Vol. I, at p. 561; East, *supra*, Vol. I, at p. 437. *Contra: R. v. Hinton*, [1961] Qd. R. 17 (Ct. of Cr. App.) (the discovery of sperm deep in the vagina is not complete proof of penetration).

could be proven, but emission occurred *outside* the complainant's body.¹³⁴ If that wasn't enough, when the British Parliament stepped in to clarify the law, at least one court refused to follow the new legislation!¹³⁵

The greatest controversy centred on whether the evidence had to demonstrate both penetration and the emission of semen. I propose in this part to focus exclusively on that issue. Before going further, however, I would like to make two points. One is policy-driven. The second is practical in nature.

On the policy level, it is amazing that the issue became a live one in the first place. The wrong sought to be prohibited by the law was unwanted sexual penetration of a woman by a man. Once penetration was accomplished, the evil sought to be avoided had occurred. Unquestionably, some facts may *aggravate* the offence: penetration may have been accomplished through violence; injuries may have resulted; or the woman may have become pregnant as a result of the assault. The latter two are, however, consequential issues, not matters inextricably bound up with the conduct sought to be prohibited in the first place. Fundamentally, the crime concerned penetration without consent, not whether the man achieved a sexual climax.

¹³⁴ Twelve judges split evenly on issue in *R. v. Duffin* (1721), 1 East P.C. 437-8. Six judges concluded that both penetration and emission had to be established by the evidence. The six other judges expressed the opinion that emission inside the body was not necessary.

¹³⁵ *R. v. Russell* (1831), 1 M. and Rob. 122; 174 E.R. 42, discussed *infra*.

The point was made well by Edward East in his *Treatise of the Pleas of the Crown*, although some may wish to strip away some of his eighteenth century prose and paternalistic sentiments:¹³⁶

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 more natural and consonant to those sentiments of laudable indignation which induced our ancient lawgivers to rank this offence among felonies, if all further enquiry were unnecessary 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, to render the sex amiable, hath implanted in the female heart, as Mr. Justice Foster has expressed himself, is already violated past redemption, and the injurious consequences to society are in every respect complete. Upon what principle and for what rational purpose any further investigation came to be supposed necessary, the books which record the dicta to that effect do not furnish a trace.

The second point concerns the practicality of requiring proof of emission. In some cases, this proof will unquestionably exist. A sample of semen may have been taken shortly after the incident. Or the man may have said something tending to confirm the fact. In the majority of cases, however, the evidence will be quite circumstantial -- sometimes amounting to nothing more than an assumption on the part of the complainant. Proof becomes even more difficult where the complainant is inexperienced, as with very young children.

The analysis of this issue should start with the three leading eighteenth century cases: *R. v. Duffin* (1721);¹³⁷ *R. v. Sheridan*, (1768);¹³⁸ and *R. v. Russen* (1777).¹³⁹ In the first, the jury found

¹³⁶ Edward Hyde East, *A Treatise of the Pleas of the Crown*, *supra*, at pp. 436-7. This passage is adopted from a statement prepared by Sir Michael Foster in his renowned treatise entitled *Crown Law* (1762). In the original work, Foster was actually dealing with the right to repel force through the use of force. He said: "A woman in defence of her chastity may lawfully kill a person attempting to commit a rape upon her. The injury intended can never be repaired or forgotten; and nature, to render the sex amiable, hath implanted in the female heart a quick sense of honour, the pride of virtue, which kindleth and inflameth at every such instance of brutal lust. Here the law of self defence plainly coincideth with the dictates of nature." (p. 274).

¹³⁷ 1 East P.C. 437

¹³⁸ 1 East P.C. 438 (more precisely, the case was decided "at the sessions before Easter term 8 Geo.

penetration, but emission took place outside of the complainant's body. The court divided six to six on whether emission had to be proven. The verdict was vacated, and the accused re-indicted on a misdemeanor instead. In *Sheridan*, the complainant could not establish emission at all. The trial judge nevertheless left the case with the jury, saying that emission was not required. The accused was convicted.

The last case, *R. v. Russen*, is the most important because the trial judge conferred on the issue with the other 12 members of the court in a recognized procedure known as "Crown cases reserved".¹⁴⁰ The accused was a schoolmaster charged with having raped a young student in his care. Medical evidence established that her vagina was so narrow that a finger could not be introduced, and that the hymen was perfectly whole and unbroken. The girl claimed both penetration and emission, and her testimony at trial was confirmed by other evidence. The trial judge left the issue of penetration to the jury, saying that if there was any, however small, the rape was complete in law. The jury found him guilty, and the judge referred the case to the rest of the court to assess whether his direction was correct. It was unanimously concluded that the charge was perfectly correct. The least degree of penetration was sufficient to establish the offence. The accused was sentenced to death, and was executed.

At this stage, therefore, the weight of authority favoured the proposition that proof of emission was not necessary. However, that state of affairs started to unravel just four years later.

In 1781, Samuel Hill was tried for the rape of one Mary Portas.¹⁴¹ The complainant established penetration, but not emission. The trial judge told the jury that penetration was sufficient, but he

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¹³⁹ 1 East P.C. 438.

¹⁴⁰ For a brief description of this process, see Bruce A. MacFarlane, "The Right to Counsel at Trial and on Appeal", (1989-90), 32 Cr. L. Q. 440, at pp. 443-4.

¹⁴¹ (1781) 1 East P.C. 439.

adjourned the case to get the views of the other judges. On this occasion, by a majority of seven to three, the judges advised that both facts had to be established. A similar conclusion was reached in 1812 in a case where emission took place outside the complainant's body. The judges concluded that the law had shifted in recent years, now requiring *injectio seminis*.¹⁴²

These developments prompted the leading writers of the era, Russell and Archbold, to conclude that evidence of emission was required in all cases.¹⁴³ The law at that stage was best summarized by Archbold in the first edition of his celebrated work *On Criminal Evidence and Pleadings*, published in 1822.¹⁴⁴

To constitute the offence of rape, there must be penetration and emission: *R. v. Hill*, 1 East, P.C. 439.

Any the slightest penetration will be sufficient; where a penetration was proved, but not of such a depth as to injure the hymen, still it was holden to be sufficient to constitute the crime of rape: *R. v. Russen*, 1 East, P.C. 438, 439.

Emission is either proved positively, by the evidence of the woman, that she felt it: or it may be presumed from circumstances, as, for instance, that the defendant after having connexion with the prosecutrix arose from her voluntarily, without being interrupted in the act; *R. v. Harmwood*, 1 East 440. *R. v. Sheridan*, 1 East, 438; but if he were interrupted in the act, and arose from her on that account, then, in the absence of positive evidence, the presumption is that there was no emission, and the defendant must be acquitted.

Development of the law concerning rape had historically been the joint responsibility of the courts and Parliament. Generally, the courts had shaped the fundamental principles concerning criminal liability and the nature of the offence; Parliament decided on the penalty for its commission.

¹⁴² *R. v. Parker*, 1 Russell 560.

¹⁴³ Russell, *On Crimes and Misdemeanors*, *supra*, at p. 560; *Pleading and Evidence in Criminal Cases*, by John Frederick Archbold (London: 1822), at p. 260.

¹⁴⁴ *Ibid.*

The common law had now taken a turn that made many sexual assaults difficult if not impossible to prove, and the courts were not signalling an intention to retreat from this position. To preserve the effective enforcement of the criminal laws, the British Parliament concluded that it must intrude into an area which had historically been reserved for the courts.

In 1828, Parliament passed an Act dealing with a number of offences against the person. The preamble to section 18 made very clear the difficulties that had been encountered during the preceding several decades:

And whereas, upon trials for the crimes of buggery and of rape, and of carnally abusing girls under the respective ages hereinbefore mentioned, offenders frequently escape by reason of the difficulty of the proof which has been required of the completion of those several crimes

The section continued that, to remedy this, it was no longer necessary to prove the actual emission of seed in order to constitute carnal knowledge (including rape), and that "the carnal knowledge shall be deemed complete upon proof of penetration only".¹⁴⁵

That should have ended the controversy. The issue was clear, and the legislation was unambiguous: all that was required was penetration. Emission need not be proven.

Deeply rooted traditions die hard, however, and shortly after the passage of the legislation a court ruled that, notwithstanding the amendment, it was still necessary for the jury to be satisfied that emission had taken place.¹⁴⁶ However, in two cases reserved, both decided in 1832, the judges in

¹⁴⁵ 9 Geo. IV, c. 31, s. 18 (U.K.).

¹⁴⁶ The reasons given by the trial judge seem difficult to accept: "It is not necessary specifically to prove it, but the circumstances must be such as infer that that fact, and everything else essential to carnal knowledge, took place. The Statute did not intend to make less necessary to complete the offence than before, but merely to prevent the necessity of the indecent exposure resulting from the minute inquiries which usually took place. The jury, therefore, must be satisfied that the emission occurred, can

England finally held that proof of penetration was sufficient, even where emission was negated.¹⁴⁷

convict": *R. v. Russell* (1831), see *Roscoe on Evidence, supra*, at p. 861.

¹⁴⁷ *R. v. Reekpear* (1832), 1 Mood. 341; 168 E.R. 1296; *R. v. Cox* (1832), 5 Car. & P. 297; 172 E.R. 985; concerning the rationale underlying this legislation, see Chief Justice Tindal's decision in *R. v. Allen* (1839), 9 Car. & P. 31; 173 E.R. 727; generally, see *Roscoe on Evidence, supra*, at p. 861.

That brought the saga to an end. The English legislative model was soon adopted in Canada,¹⁴⁸ and through a combination of legislative action and judicial deference to the English approach it also

¹⁴⁸ First, in New Brunswick: (1829), Stats. N.B. 9 & 10 Geo. IV, c. 21, s. 12 (adopted verbatim); in Nova Scotia, it was also adopted: see Stats. N.S. 1841, c. 6 (“*An Act for Amending the Law Relative to Offences Against the Person*”), s. 17 (“Emission of seed need not be proven; only proof of penetration is required”); in the newly united Province of Canada (1841), the provision was also adopted verbatim: 4 and 5 Vict., c. 27, s. 18 (“*An Act for Consolidating and Amending the Statutes in this Province Relative to Offences Against the Person*”). However, it should be noted that the first criminal law text in Canada did not mention the Statute in any of the five editions published between 1835 and 1864: *Provincial Justice*, by W. Keele (Toronto, 1st ed. 1835); and the first French language text noted that the issue was very much in dispute: *Les Lois Criminelles Anglaises*, by Jacques Cremazie (Quebec: Frechette & Cie 1842), at p. 83. This early Canadian legislation was propelled into the *Procedure Act*, R.S., c. 174, s. 226, and ultimately found expression in Canada’s first *Criminal Code* in 1892: 55-56 Vict., c. 29, s. 266(3).

became accepted in Australia¹⁴⁹ and New Zealand¹⁵⁰ that emission was not an essential ingredient of rape.

The point of law raised in this controversy was an important one. Something else, however, was even more important. It was evident that a tension was starting to develop between the courts and the legislature. That tension continued well into the twentieth century and, as I will show, continues even today.

(e) *The Moral Character of the Complainant*

Substantive law concerning rape which has been passed by Parliament during the last 700 years has almost universally been anchored on the perceived vulnerability of women and young girls to sexual assault. The legislation came in two main stages. The thirteenth century Statutes of Westminster extended the protection of the law to all women, created the notion of "statutory rape", and made the death penalty mandatory for all forms of the offence.¹⁵¹ Nineteenth century legislation removed evidentiary and procedural impediments to conviction that had accumulated during the preceding century, and gave added protection to young and mentally handicapped girls.¹⁵²

¹⁴⁹ *R. v. Salmon*, [1969] S.A.S.R. 76, at pp. 81-2; *Papadimitropoulos v. R.* (1957), 98 C.L.R. 249 (H.C.); in South Australia, it is sufficient to prove penetration (s. 73(1) *Criminal Law Consolidation Act 1935*, amended 1976); in New South Wales sexual intercourse is defined to mean penetration of the vagina (s. (...continued)

¹⁴⁹ (...continued)
61(a)(1) *Crimes Act 1900*, amended by *Crimes (Sexual Assault) Amendment Act 1981*); and in the State of Victoria, the need to prove emission is expressly negated: s. 4 *Crimes (Sexual Offences) Act 1980*.

¹⁵⁰ *The Crimes Act 1908*, s. 211(2) provided that the offence of rape is "complete upon penetration". That principle was carried forward into the new *Crimes Act 1961*, s. 127, in the definition of sexual intercourse. This has been interpreted to mean that penetration is the "minimum conduct necessary to constitute rape: *R. v. Kaitamaki*, [1980] 1 N.Z.L.R. 59 (CA.), affd. [1984] 1 N.Z.L.R. 385 (P.C.).

¹⁵¹ The circumstances surrounding the passing of this legislation have already been discussed, *supra*.

¹⁵² "An Act for Consolidating and amending the Statutes in England Relative to Offences Against the Person", 9 Geo. IV, c. 31 (1828); "An Act to Make Further Provision for the Protection Girls, the Suppression of Brothels, and Other Purposes", *Criminal Law Amendment Act*, 1885, 48-49 Vict., c.

At the same time that Parliament was passing laws to protect women, the courts were concentrating on the development of evidentiary and procedural rules with an entirely different focus: ensuring that male defendants were protected against false accusations of rape. That led, especially since 1800, to a judicial preoccupation with the reliability of the complainant's testimony, and a refocusing of the trial from an inquiry into the conduct of the accused into an examination of the background of the complainant. Edwards made the point well in *Female Sexuality and the Law* (1981):¹⁵³

The model of female sexuality that informs procedural rules and judicial precedent stands in sharp contrast to the model of female sexual passivity that has consistently informed legislation. In the development of case law is enshrined a belief in female precipitation. The chaste/unchaste, good/bad, virgin/whore and madonna/magdalene distinction is well understood in nineteenth- and twentieth-century accounts of femininity. In talking about female sexuality, however, the dualism is somewhat different and more specific. In law as it relates to sexual offences, and as it relates to rape more especially, the passive/precipitating distinction is particularly appropriate. In a rape trial, it is invariably the case that a model of female sexuality as *agent provocateur*, temptress or seductress is set in motion. From Hale to Hailsham this view is apparent from observing judicial utterances in court.

The reasons for this contrast in legal policy are quite elusive. It may be of some relevance, however, that legislative enactments are usually the product of extended study by Parliamentarians, with input from different interest groups, while judicial decisions are made in individual cases on the basis of a specific fact situation. It is also no doubt relevant that Parliamentary action sets out broad guidelines to be applied in a wide variety of circumstances, while judicial decisions are made with reference to a particular defendant whose life or liberty is very much at stake in the proceedings.

This interaction between the executive and judicial branches produced a confusing legal framework in England: statutorily, women as a class were deserving of special protective measures designed to

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¹⁵³ Edwards, *supra*, at pp. 49-50.

combat sexual assault. However, when allegations of sexual assault were made, the accusing women were viewed by the law with suspicion and distrust, often treated in court as temptresses who in some manner must have caused or contributed to the crime charged by them.¹⁵⁴

In this part, I will examine the principles underlying the judicial approach to the testimony of a complainant in eighteenth and nineteenth century England. This will in turn lead into a discussion of the rules that permitted the defendant to conduct a broad inquiry into the sexual history and moral character of the woman making the complaint.

(i) Birth of a Myth

Ancient and medieval laws and beliefs may have planted the seeds for any of the myths and stereotypes surrounding the complainant in a rape trial, but the writings of Sir Matthew Hale facilitated their birth and cemented them into the common law for the next 250 years.

In *The History of the Pleas of the Crown*, Hale underscored the ease with which a false allegation of the crime can be made. His statement was subsequently adopted as the controlling principle in virtually all of the leading textbooks and digests, and was widely used until well into the twentieth

¹⁵⁴ Respecting which, see *R. v. Seaboyer, supra*, at pp. 336-41. It should be noted, however, that some *legislation* also reflected a distrust of complainants' evidence. More often than not, it was expressed indirectly, and was not apparent on the face of the statute. For instance, when the death penalty was abolished for rape in 1841, Lord Russell, who introduced the Bill in the House of Commons, noted that the question whether the death penalty should be abolished for rape had posed the greatest problem for the government. He continued by observing that when the offence appeared in an aggravated form, with violence, it deserved the most severe penalty. However, he continued: "But when they (the government) considered the offence as it was brought before courts of justice in this country, very grave doubt and difficulty arose. Those who were charged with it were generally charged on the evidence of one person only, and that one not -- as in the case of robbery or attempts to murder -- a person against whom no suspicion could be entertained, but, on the contrary, persons who were in a certain degree subject to the doubt and suspicion that they were endeavouring to clear their own character by bringing serious charges against another. These were matters that much affected the minds of the juries." Lord Russell also noted that during the preceding seven years, 419 men had been charged with rape, but only 69 were convicted by the jury (Hansards Parliamentary Debates, 3rd series, 4 Vict. 1941, Vol. LVII, Col. 47-57).

century as the basis for instructing juries on the assessment of a complainant's credibility:¹⁵⁵

It is true rape is most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent.

Hale did not, however, stop with these general observations. He proceeded to discuss the credibility of a complainant in terms that suggested the need for caution and concern in all cases, rather than the appropriateness of examining the facts of each case individually. In one fell swoop, the following statement laid the common law foundation for the propriety of enquiring into the moral character of the witness, as well as the need for corroboration and a "recent complaint" in cases of this nature. This statement, too, has attained classical dimensions in the two-and-a-half centuries since it was published:¹⁵⁶

The party ravished may give evidence upon oath, and is in law a competent witness, but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury, and is more or less credible according the circumstances of fact, that concur in that testimony.

For instance, if the witness be of good fame, if she presently discovered the offence

¹⁵⁵ Hale, *History of the Pleas of the Crown*, *supra*, Vol. I, at p. 635 [While Hale's *History* was written around 1670, it was not published until 1736]; Blackstone, *supra*, at pp. 214-5; Russell, *supra*; Vol. I, at p. 563; East, *supra*, Vol. I, at p. 445; Burn, *supra*, Vol. II, at p. 316; Roscoe, *supra*, at p. 863; Keele (1st ed.), *supra*, at pp. 75-6. Early Canadian cases citing this principle include: *McCreary v. Grundy* (1876), 39 U.C.Q.B. 316, at p. 318 (C.A.); *Hopkinson v. Perdue* (1904), 8 O.L.R. 228 (Per Meredith, C.J.C.P., Street and Anglin, J.J.), at pp. 230-1 ["Hale's advice has been repeated in the books for 200 years"]; *R. v. Francis* (1865), 13 U.C.Q.B. 116 (Draper, J.) ["An accusation of rape is easily made, but harder to defend"]. The same point has been made in Australia: *R. v. Hinton*, [1961] Qd. R. 17 (C.A.). ["Judges have been saying for centuries that rape is the easiest charge for a woman to make, and the most difficult for a man to disprove."]

¹⁵⁶ Hale, *History of the Pleas of the Crown*, *supra*, Vol. I, at p. 633; Blackstone, *supra*, at p. 213; Russell *supra*, Vol. I, at pp. 562-3; East, *supra*, Vol. I, at pp. 445-6; Keele, *supra*, at pp. 375-6; Archbold, *supra*, at p. 260; Burn, *supra*, Vol. II, at pp. 315-6; Roscoe, *supra*, at pp. 862-3; *Crankshaw's Criminal Code of Canada*, by John E. Crankshaw, (Toronto: The Carswell Co., 5th ed., 924), at pp. 355-6; *R. v. Lillyman*, [1896] 2 Q.B. 167, at p. 171.

and made pursuit after the offender, shewd circumstances and signs of the injury, whereof many are of that nature, that only women are the most proper examiners and inspectors, if the place, wherein the fact was done, was remote from people, inhabitants or passengers, if the offender fled for it; these and the like are concurring evidences to give greater probability to her testimony, when proved by others as well as herself.

But on the other side, if she concealed the injury for any considerable time after she had opportunity to complain, if the place, where the fact was supposed to have committed, were near to inhabitants or common recourse or passage of passengers, and she made no outcry when the fact was supposed to be done, when and where it is probable she might be heard by others; these and the like circumstances carry a strong presumption, that her testimony is false or feigned.

I will now turn to a consideration of how these principles were applied in England and throughout the Commonwealth during the eighteenth and nineteenth century.

(ii) The Legal Context

During the eighteenth and nineteenth centuries, the prior sexual history of the complainant was admissible on two issues, one material and one collateral. "Unchasteness", in one form or another, was believed to be relevant to the material issue of consent and the collateral issue of credibility. Precisely how a lack of chastity was probative of either of these issues was rarely if ever discussed by the courts. It was simply assumed, as if it were beyond any doubt, that women who had consensual sex outside of marriage would be more inclined, firstly, to be untruthful, and, secondly, to consent to sexual relations in a wide variety of circumstances.¹⁵⁷

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Some writers have argued, credibly I think, that there was no need for any extended discussion of these issues: contemporary mythologies about the rape complainant had converted these beliefs into incontrovertible facts: *R. v. Seaboyer, supra*, at pp. 336-48; Susan S.M. Edwards, *supra*, at pp. 58 *et seq.*; Antony Simpson, *supra*, at pp. 129 *et seq.* During debate in the House of Commons in 1841 when the death penalty was being abolished for the offence of rape, Lord Russell, who introduced the Abolition Bill on behalf of the government, noted that the main reason for proposing the legislation was that juries were reluctant to return a verdict of guilty, knowing that the ultimate penalty would be imposed, where the case for the Crown was based upon the evidence of a woman who may have had ulterior motives for bringing the charge: see Footnote 154, *supra*: *Hansards Parliamentary Debates*, Third Series, 4 Vict. 1841, Vol. LVII (March 8 - May 6, 1841), Column 47-57. These assumptions started to be questioned in the twentieth century: *R. v. Konkin* (1981), 63 C.C.C. (2d) 193, at p. 199;

The decided cases can be grouped into three broad categories, each anchored on the sexual experiences attributed to the complainant:

- (a) Where the complainant had previous sexual relations with the accused;
- (b) Where the complainant had sexual relations with other men;
- (c) Where the complainant is a prostitute.

(a) Where the Complainant Had Previous Sexual

Relations With the Accused

Under the early common law, the complainant could be asked in cross-examination if she had willingly engaged in sexual relations with the accused prior to the incident in question.¹⁵⁸ The evidence was not simply received on the issue of credibility; rather, it was considered relevant to the question of consent on the basis that a previous relationship between the two made it improbable that the incident complained of took place against her will.¹⁵⁹ If she denied the relationship, evidence

affd. 3 C.C.C. (3d) 289 (S.C.C.).

¹⁵⁸ *R. v. Martin* (1834), 6 Car. and P. 562 [172 E.R. 1364]; *R. v. Cockcroft* (1870) 11 Cox C.C. 410; *R. v. Riley* (1887) 18 Q.B.D. 481; *R. v. Finnessey* (1906), 10 C.C.C. 347 (Ont. CA.); and see *Laliberté v. The Queen* (1877), 1 S.C.R. 117. In a later Australian case, it was held that evidence of relations six months after the offence was admissible, as consent to the later acts of intercourse went directly to issue of the probability of consent: *R. v. Aloisio*, [1969] 2 N.S.W.R. 338 (CA.).

¹⁵⁹ *R. v. Finnessey*, *supra*, at p. 351; *R. v. Moulton* (1979), 51 C.C.C. (2d) 154 (Alta. CA.); *Report of the Advisory Group on the Law of Rape*, Report of the Home Office, *supra*, said that the theory was that "the development of the relationship between the parties might well throw some light on the matters and events before the jury". *Cross on Evidence*, (4th ed., Butterworths, 1974), at p. 233 put a somewhat finer point on the issue: "... Acts of voluntary intercourse between the same two people are liable to be repeated".

could be called to prove it.¹⁶⁰

Two points should be made concerning the admission of this evidence. First, it is significant that the evidence of a past relationship was only relevant to the consent of the woman -- not, as one would logically expect, to the motives or intent of the man as well. Second, evidence concerning a previously existing relationship tended to refocus the issue from “what happened on the day in question” to an assumption of consent based on past conduct. That is somewhat reminiscent of the recently discarded marital rape rule,¹⁶¹ prompting one contemporary commentator to say:¹⁶²

The law thus leaves a woman unprotected against the unwanted harassment of previous lovers. The view of sexuality that has informed the legal process since 1800 is founded on a belief that a woman who once consents to a man's advances will do so again, and by the same token it is believed that it is a man's right to sexual consortium *ad infinitum* with a woman he has 'won'. In addition, her credibility is immediately affected and it becomes difficult to 'organize the text' in any other way except to believe that she consented.

(b) Where The Complainant Had Sexual Relations

With Other Men

This category covers quite a wide range of evidence, described variously in the cases as a “general want of decency”, a woman with “loose morals” or of a “bad character”, including evidence suggesting sexual relations with one or several men, on a single occasion or over a period of time. Often, counsel’s proposed cross-examination amounted to nothing short of a full review of the complainant’s own sexual history. In general, this line of questioning was permitted, but the

¹⁶⁰ *R. v. Cockcroft* (1870), 11 Cox C.C. 410; *R. v. Riley* (1887), 16 Cox C.C. 191; *Forsythe v. The Queen* (1980), 53 C.C.C. (2d) 225 (S.C.C.), at p. 230 (per Laskin, C.J.C. for the unanimous court). Also see *R. v. Moulton* (1979), 51 C.C.C. (2d) 154 (Alta. CA.), at pp. 160-1.

¹⁶¹ Discussed, *supra*.

¹⁶² Susan S.M. Edwards, *supra*, at p. 66.

evidence was received, at least in theory, on a much more limited basis than evidence which linked the accused and the complainant in a previous relationship.

Evidence of sexual relations with other men was not received on the main issue of consent. Its use was confined to impeachment of the complainant's credibility.¹⁶³ Further, the complainant was not obliged to answer the questions merely because they had been asked; she could decline to respond if she wished, although the trial judge had a discretion to require an answer if he thought it appropriate to do so.¹⁶⁴ As the evidence concerned a collateral issue, her answers, if given, could not be contradicted through evidence led by the accused.¹⁶⁵

Fundamentally, the evidence was admitted on the basis that the complainant's denial of consent on the witness stand could be given little weight by the jury once they learned that she previously had had sexual relations with other men. That inference may be appropriate in some situations, but not in many.¹⁶⁶ The theory underlying the admission of this evidence reflects a Victorian view that a woman is either chaste and reputable, or promiscuous and wanton. The inescapable flaw in this theory is that it ignores the reality that a woman may be *selective* in giving her consent. It's one thing for a woman to express a desire to have intercourse with three men one at a time, and later claim that she was raped by one of them. The simple proximity of events could well assist the jury in assessing whether consent did, or did not, exist.¹⁶⁷ It's quite a different matter where there exists no nexus whatsoever between the intercourse in question and the sexual activity sought to be put to

¹⁶³ *R. v. Holmes* (1871), 12 Cox C.C. 137; see also *R. v. Hodgson* (1812), 168 E.R. 765; *R. v. Cockcroft, supra*, *Laliberté v. The Queen, supra*, at pp. 125 and 130; *R. v. Finnessey, supra*; *McCreary v. Grundy, supra*.

¹⁶⁴ *R. v. Hodgson, supra*; *R. v. Finnessey, supra*; *R. v. Cockcroft, supra*; *R. v. Holmes, supra*; *Laliberté v. The Queen, supra*; *Contra -- McCreary v. Grundy, supra*.

¹⁶⁵ *R. v. Holmes, supra*; *R. v. Hodgson, supra*; *R. v. Cockcroft, supra*; *Forsythe v. The Queen, supra*; *R. v. Finnessey, supra*; *McCreary v. Grundy, supra*.

¹⁶⁶ See the recent analysis of this issue provided by the High Court of Australia in *Gregory v. The Queen* (1983), 151 C.L.R. 566.

¹⁶⁷ *Ibid.*

the complainant in cross-examination. For example, evidence that the complainant had an intimate relationship with a former boyfriend cannot on any rational basis, help the jury decide whether she consented to intercourse with someone else on a later occasion. An appellate court judge in Australia made the point well in *The Queen v. Gun, ex parte Stephenson*:¹⁶⁸

... admitted prior unchastity by the girl was frequently treated by juries as having a bearing on her veracity ... the problem was a real one notwithstanding the unreasonableness of the assumption. Similarly it appeared to be accepted, sometimes at least, by juries that because the girl had had intercourse with one male, usually her boy friend, she could be treated as fair game by every lout who by force or fear or both compelled her to submit to his will.

That, then, provides the legal framework for this issue. But how did it play out in practice? And what were some of the factors that led to the need for rape shield legislation throughout the Anglo/American sphere of influence?

The starting point is *R. v. Hodgson*, decided in 1812.¹⁶⁹ There, counsel for the accused sought to ask the complainant if she had previously had intercourse a) with other men, and b) with a person named. Counsel offered to call evidence to show that the girl “had been caught in bed a year before (the) charge with a young man”, and further offered the young man to prove he had had intercourse with her. The trial judge ruled that the complainant was not bound to answer the questions because they “tended to criminate and disgrace” her. He excluded the evidence, but referred the issue to the rest of the judges (12 in number) who confirmed the correctness of his decision.

In *R. v. Dean*, decided 40 years later,¹⁷⁰ the complainant, a servant, was cross-examined with respect to a charge of stealing money that had previously been made against her by her employer.

¹⁶⁸ (1977), 17 S.A.S.R. 165, at p. 174, per Zelling, J.

¹⁶⁹ (1812), 168 E.R. 765.

¹⁷⁰ (1852) 6 Cox C.C. 23.

On the stand, she said she had told police that the money came from a man who had insulted her by asking to have intercourse with her. She denied, however, that intercourse had taken place. The accused sought to call the police officer to contradict the complainant on what she had said to him. The court held that the officer could not be called to contradict the statement of the complainant, but evidence could be led respecting her general character. The accused was acquitted.

The decision in *R. v. Cockcroft* (1870)¹⁷¹ emphasized the distinction between evidence of sexual relations with the accused and with other men. There, counsel asked the complainant if she had ever had question. Counsel then proposed to call witnesses to prove particular acts of intercourse with other men. Rejecting this evidence, Willes, J. said:¹⁷²

You may cross-examine the prosecutrix with respect to particular acts of connection with other men, but if she denies them you are bound by her answer. You may not call those men to contradict her; you may, however, examine her with respect to particular acts of connection with the prisoner, and if she denies them you may call witnesses to contradict her.

The controlling decision in nineteenth century England was delivered by the Court of Criminal Appeal in 1871.¹⁷³ There, the complainant was 16 years of age. She had gone to a tavern to look for her mother. Enroute, she said, she was assaulted by the accused and another male. After, she went home, crying and distraught, and immediately complained about the assault to several people. She

¹⁷¹ 11 Cox C.C. 410.

¹⁷² *ibid.*, at p. 411.

¹⁷³ *R. v. Holmes, supra.*

testified that she was a virgin at the time of the incident. Counsel for the accused called Robert Sharp, a former boyfriend of the complainant. He asked Sharp if he had ever had intercourse with the girl. Prosecuting counsel objected. For the accused, it was argued that the evidence was admissible and relevant to whether she likely consented to the act with the accused. The court held the evidence inadmissible, describing, for the first time, a rationale justifying its exclusion:¹⁷⁴

The question in this case is of very great importance, and if we had entertained a substantial doubt upon it, we should have desired the case to be re-argued before all the Judges: but, looking to the principle of evidence and the authorities upon it, it seems impossible to entertain a serious doubt that the evidence tendered to contradict the prosecutrix was inadmissible. On the trial of an indictment for a rape, or an attempt to commit a rape, or for an indecent assault, which in effect may amount to an attempt to commit a rape, if the prosecutrix is asked whether she has not had connection with some other man named, and she denies it, we are clearly of opinion that that man cannot be called to contradict her. The general principle is, that when a witness is cross-examined as to a collateral fact, the answer must be taken for better or worse, and the witness cannot be contradicted as to that by a third person. If the proposed evidence were receivable, the prosecutrix might be cross-examined as to the whole history of her life, and one, ten, or even fifty persons might be called to contradict her on various points of the evidence, and she be totally unprepared to meet the evidence of contradiction of any one of them. On principle, therefore, I am of opinion that the party cross-examining on such collateral facts must be bound by the answers, otherwise it would lead to a multiplication of collateral issues, and would be attended with great inconvenience and injustice to the prosecutrix.

¹⁷⁴ *Ibid.*, at p. 143.

Six years later the Supreme Court of Canada, in one of its first decisions,¹⁷⁵ accepted the conclusions reached by the Court of Criminal Appeal, but not without some hesitation. The Chief Justice of Canada said:¹⁷⁶

When the prisoner admits the improper connection, but contends that it was with the consent of the prosecutrix, the fact that she had had connection with other men at no distant time would, to the unprofessional mind, seem a fact proper to go to the jury, and relevant to the question, whether the connection complained of was against her will or not.

Were it not [sic] for the last decision on the subject, so recent as 1871, in the *Queen v. Holmes*, I should have thought the question more relevant to the issue than as merely affecting the credit of the witness, but that case is expressly on the point that such is the nature of the question, and I think we ought not to depart from that decision.

The judgment of the Supreme Court uncovered one very serious practical consequence of this practice. Defence counsel was entitled to pose the question concerning relations with other men. The complainant could answer if she wished, or decline to do so unless the judge directed her to respond. Yet, as Strong, J. noted, “the end of the cross-examination is obtained by putting the question and the refusal of the witness to answer”.¹⁷⁷ A complainant who had previously enjoyed a sexual relationship with a boyfriend was therefore caught in a no-win situation: if she answered the question, and confirmed her previous relationship, her credibility was effectively challenged as she looked promiscuous. If she declined to answer, the jury would draw the “irresistible inference”¹⁷⁸ that intercourse had taken place; she would then look both promiscuous *and* evasive.

¹⁷⁵ Section 101 of the *Constitution Act*, 1867 authorized the creation of a “general court of appeal for Canada”. The Macdonald government never got around to passing the necessary legislation, and the court was not established until MacKenzie’s Liberals took power: S.C. 1875, c. 11. Generally, see F. MacKinnon, “*The Establishment of the Supreme Court of Canada*”, (1946), 27 *Can. Hist. Rev.* 258.

¹⁷⁶ *Laliberté v. The Queen*, *supra*, at p. 130.

¹⁷⁷ *Ibid.*, at p. 141.

¹⁷⁸ Language borrowed from *R v. Finnessey*, *supra*, at p. 353.

Other practical consequences point to the unfairness of the rule permitting cross-examination on previous sexual experience. First, it allowed questions to be posed on the flimsiest of information. A witness' *understanding* of the complainant's *reputation* or "want of decency" would suffice.¹⁷⁹ Nor did the understanding of bad character have to be gained at the time of the offence. In one celebrated case, a constable was allowed to tell the jury that, twenty years earlier, he had seen the complainant on the streets "as a reputed prostitute". At the time, however, he was not investigating crime, nor was he even a peace officer. He had not spoken to the complainant, although, quite irrelevantly, he understood that she was then living with a plasterer.¹⁸⁰

Perhaps the most troubling feature of this entire saga is that for almost two centuries the courts did not consider, much less articulate, the appropriate basis upon which this evidence could be admitted in the first place. Put simply, the evidence was allowed on the basis of the "surely" principle. Surely, the courts said, evidence showing the sexual experience of the complainant will assist the jury in assessing her credibility, and, perhaps, in determining whether consent existed at the time. Indeed, the leading judicial decisions are replete with conclusory statements to this effect until the *Holmes* decision was delivered in 1871.

Under the guise of a principled application of the legal concept of relevance, the common law allowed the accused to delve at great length into the moral character of the complainant by adducing "relevant" sexual history. The prejudicial impact of such an inquiry is readily apparent. The true nature and purpose of the inquiry into sexual history is revealed by the resulting prejudice and by the fact that these concepts were only applicable in respect of sexual offences and, in addition, were not considered relevant to the credibility of the male accused.

It was not until late in the twentieth century that any attempt was made to assess whether this type of

¹⁷⁹ *R. v. Clarke* (1817) 2 Stark 241; 171 E.R. 633; *R. v. Tissington* (1843), 1 Cox C.C. 48; *R. v. Clay* (1851), 5 Cox C.C. 146.

¹⁸⁰ *R. v. Clay, supra.*

evidence had any real probative value. Fortunately, since then, legislatures have attempted to strike an appropriate balance between the plight of those who have been sexually abused, and those who are alleged to be responsible for the abuse. The need to respect the legitimate rights of both was well stated by an Australian appellate judge in 1977:¹⁸¹

[In the development of rape shield legislation] Parliament is saying: "You the Courts have been so engrossed in seeing that justice was being done to the accused rapist that you have entirely overlooked the fact that the girl who has been raped is also entitled to justice at your are going to redress the balance. The girl who has been physically and emotionally injured ought to have at least as much claim on your justice as her assailant."

(c) Where the Complainant is a Prostitute

The law has long recognized the need to protect prostitutes from sexual assault. Just how that legal policy has played out in practice, however, is quite a different matter.

As early as the thirteenth century, Bracton noted that all women, including prostitutes, came within the protective umbrella of the laws against rape. He added, however, that the punishment was less severe for the ravishment of a woman "who plied her trade without discrimination of person".¹⁸² Five hundred years later, in the middle of the eighteenth century, Blackstone echoed these sentiments, but confined the law's protection to situations where the woman had "forsaken" her evil ways.¹⁸³

¹⁸¹ *The Queen v. Gun; ex parte Stephenson, supra*, at p. 173.

¹⁸² Bracton, *supra*, at p. 415, discussed *supra*, "Medieval Saxon Laws".

¹⁸³ Blackstone, *supra*, at pp. 212-3. It is significant to note that at p. 213 Blackstone purports to quote Hale's classic commentary on the assessment of a complainant's credibility, but he adds as one of the considerations the *character* of the complainant. This was not in Hale's original statement.

The civil law seems to suppose a prostitute or common harlot incapable of any injuries of this kind: not allowing any punishment for violating the chastity of her, who hath indeed no chastity at all, or at least hath no regard to it. But the law of England does not judge so hardly of offenders, as to cut off all opportunity of retreat even from common strumpets, and to treat them as never capable of amendment. It therefore holds it to be felony to force even a concubine or harlot; because the woman may have forsaken that unlawful course of life.

At the beginning of the nineteenth century, Archbold went a step further, linking the complainant's occupation as a prostitute with the issue of her credibility on the witness stand.¹⁸⁴

Even that the woman was a common strumpet, or the concubine of the ravisher, is no excuse, 1 Hale 629, although such circumstances should certainly operate with the jury as to the credibility of the fact, that connection was had with the woman against her consent.

Nineteenth century English courts followed suit, holding that the accused was entitled to show that the complainant was a prostitute, or had the reputation for being one, or that, more generally, she was a woman of "notoriously bad character".¹⁸⁵

This evidence was considered relevant to the question of consent, and not just credibility, on the basis that such a woman would be more likely to have agreed to the act with which the accused was charged.¹⁸⁶ Because consent is a material issue, the complainant had to answer the questions, and if

Blackstone's version, however, is the one that was adopted by virtually all subsequent writers. And see Antony Simpson, *supra*, at pp. 129-30.

¹⁸⁴ Archbold, *supra*, at pp. 259-60.

¹⁸⁵ *R. v. Clarke* (1817) 2 Stark 241, 171 E.R. 633; *R. v. Barker* (1829), 3 Car. & P. 588, 172 E.R. 558; *R. v. Hallett* (1841), 9 Car. & P. 748, 173 E.R. 1036; *R. v. Tissington* (1843), 1 Cox C.C. 48; *R. v. Clay* (1851), 5 Cox C.C. 146; *R. v. Dean* (1852), 6 Cox C.C. 23; *R. v. Holmes* (1871), 12 Cox C.C. 137; *R. v. Riley* (1887), 18 Q.B.D. 481, at p. 485; and, in Canada, *R. v. Finnessey* (1906), 10 C.C.C. 347 (Ont. CA.)

¹⁸⁶ *R. v. Hallett*, *supra*; *Laliberté v. The Queen*, *supra*, at pp. 126-7; *Report of the Advisory Group on the Law of Rape*, Report to the Home Office, *supra*, at p. 17, paragraph 97.

she denied the allegation the accused was entitled to lead evidence to contradict her.¹⁸⁷

A review of the decisions concerning the rape of a prostitute starts with *R. v. Clarke* (1817).¹⁸⁸ There, Holroyd, J. held that general evidence could be called to show that the woman was a prostitute (“a woman of abandoned character”) because, he said, it tended to establish that intercourse took place with consent. He also held, however, that the accused could not go into specific facts of her activities as a prostitute. Twelve years later, in *R. v. Barker* (1829)¹⁸⁹ Park, J. allowed the following well-celebrated questions intended to contradict the complainant: "Were you not, on Friday last, walking the high street of Oxford, to look out for men?" and "Were you not, on Friday last, walking in the high street with a woman reputed to be a common prostitute?". Both questions were answered in the negative by the complainant, and a witness sought by the accused to contradict the complainant did not appear in court. The accused was convicted of rape, and sentenced to die. In a footnote to the report of the case, it was observed that despite the sentence of death, the accused was later pardoned "as it was discovered that the imputations made on the character of the prosecutrix were founded in truth".

The principles developed by the courts to this point were put to the test in *R. v. Hallett* (1841).¹⁹⁰ The facts of the rape in this case were serious; applying traditional criteria, however, the background of the complainant was not terribly sympathetic.

The Crown's evidence established that the complainant, Mary Maiden, was drinking at a pub where the eight defendants were likewise drinking. The group of eight followed her to her residence, which was a brothel. They then held her against the door, and raped her one after the other. On the

¹⁸⁷ *R. v. Barker, supra; R. v. Tissington, supra; R. v. Clay, supra; R. v. Finnessey, supra, at p. 337; R. v. Moulton, supra, at pp. 166-7.*

¹⁸⁸ 2 Stark 241; 171 E.R. 633.

¹⁸⁹ 3 Car. & P. 588; 172 E.R. 558.

¹⁹⁰ 9 Car. & P. 748; 173 E.R. 1036.

stand, Miss Maiden said that she had been "on the town" (a prostitute) since the offence, but not before. She conceded, however, that she had not been inexperienced in sexual matters before the assault on her.

A witness called by the Crown to support the evidence of Miss Maiden testified that she (the witness) had lived in the brothel and, on hearing the noise outside, got up and overheard the complainant say: "It's too bad for so many to be attacking one poor girl; but if you will go away, and come, one at a time, I will do what I can to satisfy you".

In his instruction to the jury, Coleridge, J. said that the type of person Miss Maiden was, and the nature of her residence, were relevant to whether she had consented to sexual intercourse with one or more of the defendants. Predictably, the following instruction led to an acquittal on the main count and a finding of guilt on the included offence of assault *simpliciter*.¹⁹¹

However, it is well worthy of your consideration whether, although she at first objected, she might not afterwards (on finding that the prisoners were determined) have yielded to them, and in some degree consented; and this question is the more deserving of your attention when you come to consider what sort of person she was, what sort of house she lodged in, and that she herself told them that she should make no objection if they came one at a time. If there was non resistance on her part, but that non-resistance proceeded merely from being overpowered by actual force, or from her not being able from want of strength to resist any longer, or that from the number of the prisoners she considered resistance dangerous and absolutely useless, the full charge is made out, and you ought to convict the prisoners of the capital offence: but if you think under all the circumstances that the prosecutrix, although at first objecting, at all consented to that which was done afterwards, you ought to convict the prisoners of the assault only.

During the eighteenth and nineteenth centuries, the legal treatment of the prostitute as complainant reflected the belief that, given her background, she could not be trusted, she had received her just desserts in the sexual assault and that, in the result, no moral harm was done in any event.

¹⁹¹ *R. v. Hallett, supra*, p. 1038 (E.R.),

These beliefs persisted until the last quarter of the twentieth century, when they started to be challenged in the strongest of terms by senior appellate courts.¹⁹² In Australia, Chief Justice Bray said this in 1977:¹⁹³

I find it hard to believe that any reasonable person at the present time could assent to any of the following absurd propositions:

1. That a willingness to have sexual intercourse outside marriage with someone is equivalent to a willingness to have sexual intercourse outside marriage with anyone.
2. That the unchaste are also liable to be the untruthful.
3. That a woman who has had sexual intercourse outside marriage is a fallen woman and deserves any sexual fate that comes her way.

Yet it is all too likely that a covert appeal, if not to the affirmative of those propositions, at least to the attitude that underlies them, has been made in the past by means of cross examination as to credit, and I think that that was what Parliament intended to stop and all that it intended to stop by s. 34i.

In Canada, L'Heureux-Dubé, J. of the Supreme Court of Canada made the following remarks in 1991 concerning rape shield legislation then under attack by two defendants charged with sexual assault:¹⁹⁴

Evidence of prior acts of prostitution or allegations of prostitution are properly excluded by the provision. In my opinion, this evidence is never relevant and, besides its irrelevance, is hugely prejudicial. I vehemently disagree with the assertion of the appellant Seaboyer that "a prostitute is generally more willing to consent to sexual intercourse and is less credible as a witness because of that mode of

¹⁹² And others in non-legal circles. See the various studies referred to in the article concerning the effect of rape on prostitutes by Graeme Coss, "*Contemporary Comment - Hakopian's Case -- Oh, Chastity! What Crimes are Committed in Thy Name*", 16 Crim. L.J. 160 (1992).

¹⁹³ *R. v. Gun; ex parte Stephenson*, *supra*, at pp. 168-9 (South Australian Supreme Court (In Banco)); in New Zealand, similar sentiments were expressed in *R. v. Clay*, [1987] 1 N.Z.L.R. 380 (CA.).

¹⁹⁴ *R. v. Seaboyer*, *supra*, at pp. 363-4. Gonthier, J. concurred in the judgment. Although L'Heureux-Dubé, J. dissented on the overall disposition of the appeal, the majority did not deal with this point.

life" (at p. 21 of his factum, quoting the Federal/Provincial Task Force, *ibid.*). Nor do I particularly understand the phenomenon whereby many complainants in sexual assault cases are asked if they are prostitutes: see for example, Z. Adler, "The Relevance of Sexual History Evidence in Rape: Problems of Subjective Interpretation", [1985] Crim. L.R. 769 at p. 778.

Development of the Law in Canada

English criminal law rooted quickly in the early Canadian colonies. Common law principles were, for the most part, adopted by Colonial legislatures during the latter part of the eighteenth century and during the following century the Parliament at Westminster provided a steady stream of prototypes for the Canadian Statute book.¹⁹⁵

As a result, English legal institutions and English precedent became a convenient if not an obligatory starting point for early Canadian courts. Textbooks and reported cases from this era amply demonstrate this.

The first two textbooks on the criminal law emerged in rapid succession during the 1830s - the first at Toronto and the second at Halifax.¹⁹⁶ Both were intended to assist the magistracy in the discharge of their many duties, and were modelled after Burn's highly successful work on the *Justice of the*

¹⁹⁵ *The British Tradition in Canadian Law*, by the Honourable Bora Laskin (London: Stevens and Sons, 1969), at pp. 1-10 and 49-51; J. L.I. J. Edwards, "The Advent of English (Not French) Criminal Law and Procedure into Canada -- A Close Call in 1774", (1983-84), 26 *Cr. L. Q.* 464; J. E. Côté, "The Introduction of English Law into Alberta", (1964) 3 *Alta. L.R.* 262; *Substantial Justice*, by Dale and Lee Gibson (Winnipeg: Peguis Publishers, 1972), at pp. 41-2; 56; 71-2; 119; 159-60.

¹⁹⁶ The first Canadian book on the criminal law was *The Provincial Justice*, by W.C. Keele (Toronto: The Upper Canada Gazette Office, 1835). That was followed shortly afterward by *The Justice of the Peace*, by John George Marshall, Chief Justice of the Courts of Commons Pleas (Halifax: Gossip and Coade, 1837). In turn, those were followed by the first Canadian book on the criminal law in the French language: *Les Lois Criminelles Anglaises*, by Jacques Cremazie (Quebec: Frechette and Cie, 1842).

Peace, first published in England in 1755.¹⁹⁷

The first of these works, entitled the *Provincial Justice*, was published in 1835 by William Conway Keele. Born in England in 1798, Keele emigrated to Canada and settled near Toronto. He practiced law in southern Ontario and published several books on various aspects of the law, although he is best known for his study of the criminal law.

Because it was the first, Keele's text assumes a special importance in understanding the transition of the law from England to Canada. His analysis expressly reflected the writings of Coke, Blackstone, Hawkins, East and, especially, Sir Matthew Hale. On the elements of the offence of rape, he said:¹⁹⁸

Rape signifies the carnal knowledge of a woman, forcibly and against her will, and above the age of ten years, and was felony at common law. 2 Inst. 180. ... The offence of rape is no way mitigated by shewing that the woman at least yielded to the violence, if such her consent was forced, by fear of death or of duress. 1 Haw. 108. Nor is it any excuse that the woman is a common prostitute; for she is still under the protection of the law, and may not be enforced [sic] 1 Haw. 108; nor that she consent after the fact. *Ibid.* It is said by Mr. Dalton, that if a woman, at the time of the supposed rape, do conceive with child by the ravisher, this is no rape; for (he says) a woman cannot conceive, except she doth consent; but Hawkins observes, that this opinion seems very questionable; not only because the previous violence in no way extenuated by such a subsequent consent, but also, because if it were necessary to shew that the woman did not conceive, the offender could not be tried till such time as it might appear whether she did or not; and likewise, because the philosophy of the notion may be very well doubted of. 1 Haw. 108: and L. Hale says, this opinion in Dalton seems to be no law. 1 H.H. 731.

Concerning the nature of the evidence required to support a charge, he observed:¹⁹⁹

¹⁹⁷ *The Justice of the Peace and Parish Officer*, by Richard Burn, proceeded through 30 London editions from 1755 to 1869: *A Legal Bibliography of the British Commonwealth of Nations*, by W. Harold Maxwell and Leslie F. Maxwell (London: Sweet and Maxwell Limited, 1955, Vol. I, at pp. 225-6).

¹⁹⁸ Keele, *supra*, at p. 374.

¹⁹⁹ *Ibid.*

Lord Coke, defining carnal knowledge, says, there must be *penetratio*, that is, *rem in re*; but the least penetration maketh it carnal knowledge. 3 Inst. 59, 60. East P.C. 437. There must also be an *emissio seminis*; therefore in Hill's case, where the jury found the prisoner guilty, but said they did not find the emission [for, from interruption, it appeared probable that that was not effected,] a great majority of the judges held that both penetration and emission were necessary, but thought that the fact should be left to the jury. Hill's case, East P.C. 439. From Hill's case, it appears that the fact of penetration is *prima facie* evidence of emission: so, where the prisoner remained on the body of the woman as long as he pleased, without interruption, this was held sufficient evidence to be left to a jury, of an actual rape. Harmswood's case, E.P.C. 440.

Keele adopted, verbatim, Hale's classic statement that while rape "is a most detestable crime ... it must be remembered that it is an accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, though never so innocent".²⁰⁰ Keele then emphasized the point by repeating Hale's classic admonition about the testimony of a rape complainant:²⁰¹

... The credibility of her testimony, and how far forth she is to be believed, must be left to the jury, and is more or less credible, according to the circumstances of fact that occur in the testimony. 1 H.H. 632. For instance, if the witness be of good fame; if she *presently* discovered the offence and made pursuit after the offender; shewed circumstances and signs of the injury; if the place where the offence was committed, was *remote* from habitation; if the offender *fled* for it; these, and the like, are concurring evidences to give greater probability to her testimony, when proved by others as well as herself 1 H.H. 633. On the other hand, if she concealed the injury for any length of time, after she had the opportunity to complain; if the place where the offence was alleged to have been committed were *near* to inhabitation, or a thoroughfare for passengers, and she made no outcry when the offence was perpetrated, so that she might have been heard by others; or if a man prove himself to be in another place; or in other company at the time she charges with the fact; or if she is wrong in the description of the place, or swears to the fact to have been done in a place where it was impossible the man could have access to her at that time, as if the room was locked up, and the key in the custody of another person; these, and the like circumstances, carry a strong presumption, that the testimony is false or feigned.

²⁰⁰ *Ibid.*, at p. 375.

²⁰¹ *Ibid.*

1 H.H. 633. [Emphasis in original]

Early Canadian courts followed suit. The first reported case involving a charge of sexual assault was *R. v. Francis*, decided by the Court of Queen's Bench for Upper Canada in 1856.²⁰² The accused had attempted to have sexual intercourse while the complainant was sleeping -- pretending, it seems, to be the complainant's husband. She awoke, and he fled. Draper, J. reviewed the leading case in England (*R. v. Jackson*) and acquitted despite clear evidence of criminality.²⁰³

It is possible that -- reflecting on the often-stated proposition that the accusation of rape is one easily made, and even if in some respects hard to be proved yet still harder to be defended and rebutted by the party accused, however innocent he may be -- the court may have felt there was danger in implying force from fraud, and an absence of consent, when consent was in fact given, though obtained by deception; and that cases might arise, however extreme, when a detected adulteress, might, to save herself, accuse her paramour of a capital felony.

In addition to viewing the complainant's evidence with great suspicion, early Canadian courts imposed high standards of proof reminiscent of those imposed in rape prosecutions during eighteenth century England. In *R. v. Fick* (1866),²⁰⁴ an appellate court consisting of three judges concluded that, to convict, a jury must be satisfied not merely that the act was against the will of the complainant, but that she was by physical violence or terror overcome by the accused and resisted as much as she could. That was not all, however: the evidence must also show, the court said, that the complainant resisted "so as to make the prisoner see and know that she really was resisting to the utmost".²⁰⁵

One year later, in 1867, another appellate court reversed a conviction where the accused had taken

²⁰² (1856), 13 U.C.Q.B. 116.

²⁰³ *Ibid.*, p. 117.

²⁰⁴ 16 U.C.C.P. 379 (per A. Wilson, J., Richards, C.J. and J. Wilson, J. concurring).

²⁰⁵ *Ibid.*, p. 383.

advantage of a willing but mentally defective woman.²⁰⁶ In its reasons for judgment, the court remarked that no evidence had been led concerning “the woman’s general character for decency or chastity, or anything to raise a presumption that she would not consent to the alleged outrage upon her.”²⁰⁷ Consent, the court said, that sprang from “animal instinct” provided a full defence to a charge of rape.

The same tension that had developed between Parliament and the courts in England arose, as well, in Canada: the judiciary were bending over backwards to acquit in all but the most egregious situations,²⁰⁸ while legislators were enacting legislation intended to protect women and young girls against unwanted sexual advances.

The first legislative action in the Canadian colonies occurred in 1829, when New Brunswick followed the English lead by making it unnecessary to establish the emission of semen.²⁰⁹ In 1841, legislators followed suit in Nova Scotia²¹⁰ and in the newly united Province of Canada.²¹¹

The uniform observance of the criminal law in British North America was carried into the confederation scheme in 1867 when, unlike the position in the United States and in Australia, exclusive jurisdiction was conferred on the central Parliament in relation to criminal law and criminal procedure.²¹² The Parliament of Canada immediately passed legislation prohibiting rape,

²⁰⁶ *R. v. Connolly* (1867), 26 U.C.Q.B. 317 (C.A.).

²⁰⁷ *Ibid.*, at pp. 324-5.

²⁰⁸ For example, see, as well, *McCreary v. Grundy* (1876), 39 U.C.Q.B. 316 (CA.); *Laliberté v. The Queen* (1877), 1 S.C.R. 117.

²⁰⁹ S.N.B., 1829, c. 21, s. 12.

²¹⁰ S.N.S. 1841, c. 6, s. 17.

²¹¹ 4 and 5 Vict., c. 27, s. 18 (1841).

²¹² *Constitution Act* 1867, s. 91, Head 27.

but followed the English tradition of leaving the offence undefined.²¹³

This tradition was abandoned when Canada enacted the first criminal code in the British Commonwealth. Section 266 of the *1892 Criminal Code* defined rape in the following manner:²¹⁴

Rape is the act of a man having carnal knowledge of a woman who is not his wife without her consent, or with consent which has been extorted by threats or fear of bodily harm, or obtained by personating the woman's husband, or by false and fraudulent representation as to the nature and quality of the act.

The elements of this offence remained largely intact until 1983,²¹⁵ when Parliament enacted legislation reclassifying the offence from rape to a sexual assault.

This legislation was based on the proposition that sexual assault is fundamentally an act of violence, not one of passion. To this end, penetration no longer had to be proven. Indeed, it was unnecessary to show contact with any specific area of the human anatomy. It was sufficient that an assault was committed by the accused in circumstances of a sexual nature.²¹⁶ The minister responsible for introducing the legislation in the House of Commons explained its underlying rationale in this way.²¹⁷

²¹³ In the *Offences Against the Person Act*, R.S.C., c. 174, s. 37, it was provided that "everyone who commits the crime of rape is guilty of felony, and liable to suffer death as a felon, or to imprisonment for life, or for any term not less than seven years".

²¹⁴ *The Criminal Code*, 1892, 55-56 Vict., c. 29.

²¹⁵ Although by S.C. 1953-4, c. 51, s. 135 the section was re-organized, and the term carnal knowledge was replaced by "sexual intercourse".

²¹⁶ *R. v. Chase* (1987), 37 C.C.C. (3d) 97 (S.C.C.).

²¹⁷ Debates, House of Commons, Vol. X, 1981, July 7, 1981, p. 11300. Bill C-53 was introduced on January 12, 1981. The Parliamentary process led to an alternate version of the original Bill, renumbered C-127. It received third reading on August 4, 1982 and was proclaimed into force January 4, 1983.

In the area of sexual offences, a number of changes are necessary. Above all, the law must recognize the element of violence. At present rape and indecent assault are listed in the Criminal Code under the part entitled "Sexual Offences, Public Morals and Disorderly Conduct". Bill C-53 would place the new crimes replacing rape and indecent assault in the part of the Code dealing with offences against person and reputation. This change would separate violent sexual attacks from the concept of sexual morality. Furthermore -- and we have received many submissions on this particular point -- the bill would eliminate the stigma attached to terms such as "indecent assault" and "rape". There would be two new offences. The first would be sexual assault and the second would be aggravated sexual assault. Using a weapon or causing serious bodily harm would become aggravated sexual assault.

It would no longer be necessary to prove penetration. That requirement in section 143 of the Criminal Code has caused much anguish and embarrassment to complainants. It has done little, if anything, to protect these victims. Moreover, it has unduly complicated and prolonged trials. Also it has created an anomaly in the law. Some brutal and injurious sexual attacks not involving penetration have been charged, out of necessity, as the lesser offence of indecent assault. The Law Reform Commission of Canada pointed out in its report on sexual offences tabled in Parliament in November 1978:

To retain penetration as a distinct element of one of the offences would be to emphasize the sexual character of the proscribed behaviour rather than to stress the aspect of violence or threatened violence.

The tension between Parliament and the judiciary that started in the nineteenth century became most pronounced in the attempt by the Parliament of Canada to legislate significant changes in the process by which an accused is tried for non-consensual sexual offences. It started in 1976,²¹⁸ when amendments to the *Criminal Code* were passed which eliminated the requirement that a trial judge caution the jury about the dangers of acting on the uncorroborated evidence of a complainant. The amendments also curtailed the right of cross-examination of the complainant with respect to her previous sexual conduct with a person other than the accused. Notice of an intention to cross-examine on this issue became necessary, and, in an *in camera* hearing, the judge had to be

²¹⁸ S.C. 1974-75-76, c. 93, s. 8.

satisfied that questioning on this point was necessary for "a just determination of an issue of fact in the proceedings, including the credibility of the complainant".

However, subsequent judicial interpretation of this legislative initiative thwarted any benefit that may have accrued to the complainant. In fact, the provision, as interpreted by the courts, provided less protection to the complainant than that offered at common law. The Supreme Court of Canada said that the complainant was compellable at the instance of the accused during the *in camera* hearing, and, contrary to the position at common law, credibility was elevated to the status of a material issue. On this basis, the court held, the complainant could no longer refuse to answer questions about her relationship with other men, and the accused could lead evidence to contradict her testimony.²¹⁹

This result was unfortunate, if not bizarre, given the checkered history of protections offered the witness at common law, and the clear objectives of Parliament. The principle that drove the courts was the need to "balance" the rights of the accused with the new "protections" afforded the complainant. This "tit-for-tat" approach to judicial lawmaking²²⁰ had the effect of emasculating the entire legislative effort: instead of minimizing the embarrassment to complainants, the courts increased it.

Parliament decided to try again. In 1983, the *Criminal Code* was amended to bring the law in line with twentieth century thinking.²²¹ Spousal immunity against charges of rape was eliminated. The rules respecting corroboration were further relaxed. Most importantly, however, further restrictions

²¹⁹ *R. v. Forsythe* (1980), 53 C.C.C. (2d) 225 (S.C.C.); this interpretation has been roundly criticized in: *R. v. Konkin* (1983), 3 C.C.C. (3d) 289 (S.C.C.), per Wilson, J. dissenting; *R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321 (S.C.C.), per L'Heureux-Dubé, J. dissenting; Report of the Federal/Provincial Task Force on Uniform Rules of Evidence, prepared for the Uniform Law Conference of Canada (Toronto: The Carswell Company Limited, 1982), at p. 72; *Christine Boyle*, "Section 142 of the *Criminal Code*: A Trojan Horse?", 23 C.L.Q. 253 (1981), at pp. 258-9.

²²⁰ To use the phrase advanced by Christine Boyle, *ibid.*, at pp. 258-9.

²²¹ S.C. 1980-81-82-83, c. 125, s. 19.

were placed on the ability of the accused to adduce invasive prejudicial evidence of sexual history and sexual reputation, except in circumstances where the evidence was sufficiently proximate to the legal issues raised. The latter provision came under intense judicial scrutiny during the next decade.²²² In 1991, it was ruled unconstitutional on the basis that it overshot the mark, and impermissibly restricted the right of an accused to make full answer and defence.²²³ In place of the legislative scheme developed by Parliament, the Supreme Court of Canada substituted a set of guidelines, developed by Harriett R. Galvin, an assistant professor of law teaching at Ohio State University, who in 1986 had written an article on the rape shield legislation enacted in the United States.²²⁴

In September, 1991 the Minister of Justice announced her intention to proceed quickly to introduce legislation to restore legislative protections for sexual assault victims. A Bill was introduced the following December, and it received second reading on April 8, 1992. After proceeding through Legislative Committee, Bill C-49 was passed by the House of Commons on June 15, 1992, received Royal Assent on June 23, 1992, and came into force on August 15, 1992.

The amendment includes a preamble which emphasizes Parliament's concern about sexual violence and the prevalence of sexual assault against women and children. It also records Parliament's recognition of the unique character of sexual assault and how the fear of sexual assault affects the people of Canada. Finally, it recognizes that evidence of the complainant's sexual history is rarely relevant to the issues properly to be determined. The focus should be on the event which is the subject matter of the charge and not on conduct or events which are not relevant to the truth finding process.

²²² *R. v. Bird* (1984), 12 C.C.C. (3d) 523 (Man. CA.); *R. v. LeGallant* (1986), 29 C.C.C. (3d) 291 (B.C.C.A.); *R. v. Seaboyer* (1987), 37 C.C.C. (3d) 53 (Ont. CA.); *R. v. Wald* (1989), 47 C.C.C. (3d) 315 (Alta. CA.).

²²³ *R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321 (S.C.C.).

²²⁴ *Ibid.*, at p. 387.

In brief, the amendment provides that evidence that the complainant engaged in past sexual activity, with any person, is not admissible to support an inference that the complainant is more likely to have consented to the sexual activity at issue or is less worthy of belief. It also provides that evidence of past sexual activity of the complainant, with any person, is not admissible in the first place unless it possesses probative value which is not substantially outweighed by the danger of unfair prejudice to the trial process. The amendment also sets out a list of factors which the trial judge must consider in determining whether the evidence is admissible, and provides strict procedures governing the determination of admissibility before the trier of fact.

There can be little doubt that the provisions respecting admissibility in this legislation will attract considerable judicial attention over the years to come.²²⁵ Preambles to legislation, common in earlier times, have re-emerged on occasion during the *Charter* era. The preamble enacted in this particular instance will, I expect, be pivotal in the court's assessment of the constitutional validity of this legislation.

Concluding Observations

Throughout history and certainly during the past 1,000 years, the courts have developed most of the policy underlying the offence of rape. It is far from clear, however, that the fundamental principles developed by the courts have consistently served the interests of the public well. It is also far from clear that the common law judges who developed the law until well into the twentieth century understood the need to strike an appropriate balance between those victimized by the offence, and those accused of its commission.

²²⁵ See, for instance, the sentiments expressed by Allan Mewett in his editorial entitled "Prejudicing an Accused", 34 Cr. L. Q. 385 (1992); and see Peggy Kobly, "Rape Shield Legislation: Relevance, Prejudice and Judicial Discretion", 30 *Alta. L.R.* 988 (1992).

Development of the law concerning the offence of rape did not get off to a very good start. In earlier times, the offence was linked more with notions of property and theft than with principles concerning the security of the person. Myths, stereotypes and fictions became institutionalized at an early stage, and it has taken almost a millennium to dislodge some of them. A few, regrettably, are still in play today.

Consider, for instance, the comments of a judge of the Cambridge Crown Court in 1982:²²⁶

Women who say no do not always mean no. It is not just a question of saying no, it is a question of how she says it, how she shows and makes it clear. If she doesn't want it she only has to keep her legs shut and she would not get it without force and there would be marks of force being used.

And in Canada, a judge of the Provincial Court of Manitoba said this in 1984:²²⁷

Unless you have no worldly experience at all, you'll agree that women occasionally resist at first but later give in to either persuasion or their own instincts.

Arguably the most outrageous example in the modern era occurred in Australia in 1981, repeated again by the same court in 1991.

In both cases, the accused was convicted of raping a prostitute. In the first, *R. v. Harris* (1981)²²⁸ Starke, J. held that rape would not cause the same "reaction of revulsion" in a prostitute as in a chaste woman: "The crime when committed against prostitutes ... is not as heinous as when committed, say, on a happily married woman living in a flat in the absence of her husband when the miscreant breaks in and commits rape upon her".²²⁹ A second judge in the case agreed: Prostitutes

²²⁶ Quoted by L'Heureux-Dubé, J. in *R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321 (S.C.C.) at pp. 341-2.

²²⁷ *Ibid.*

²²⁸ *Attorney General v. Harris* (Unreported, Victoria Court of Criminal Appeal, August 11, 1981).

who are raped, he said, suffer "little or no sense of shame or defilement" as a result of the assault.²³⁰

The second case, *R. v. Hakopian* (1991)²³¹ followed a similar path, and provoked considerable controversy in Australia and, indeed, throughout much of the common law world.²³² Hakopian had been convicted of rape with aggravating circumstances, indecent assault with aggravating circumstances and kidnapping, and was sentenced to a total effective sentence of three years and four months with a minimum term of 16 months. He had solicited the services of Miss P., a prostitute. He negotiated a fee for oral and vaginal sex and drove her to a suburb. After 15 to 20 minutes of oral sex, he had not ejaculated, and the complainant discontinued the act. Hakopian became angry, produced a knife, threatened Miss P. with it and forced her to continue. He subsequently accused her of stealing his credit card, indecently assaulted her and drove at a high speed while holding her head to the console of his van, before eventually releasing her. Initially, Hakopian appealed against conviction and sentence; eventually, however, he challenged the conviction only on the basis that the complainant's evidence was unsafe and unsatisfactory.

The trial judge, in reasons not challenged by the court on appeal, said the following:²³³

As a prostitute, Miss P would have been involved in sexual activities on many occasions with men she had not met before, in a wide range of situations. She had, for money, agreed to have oral and vaginal intercourse with you, and had very shortly before these offences occurred, had oral intercourse with you on a

²²⁹ *Ibid.*

²³⁰ *Ibid.*, at p. 12.

²³¹ Unreported, December 11, 1991, Victoria Court of Criminal Appeal.

²³² The case resulted in considerable media commentary throughout North America. In addition, the Attorney General of Australia referred the issue to the Law Reform Commission for consideration, The President of the Australian Law Reform Commission, Justice Elizabeth Evatt, as also indicated that the case will be referred to the United Nations Committee on Discrimination Against Women.

²³³ Whether and to what extent the Court of Criminal Appeal accepted the principles outlined in the earlier decision in *Harris* is quite unclear. See the discussion of this in: Case Comment, (1992) 16 *Crim. L. J.* 200; and see Graeme Coss, "Contemporary Comment: Hakopian's Case -- Oh Chastity! What Crimes are Committed in Thy Name, (1992), 16 *Crim. L. J.* 160.

consensual basis.

On my assessment, the likely psychological effect on the victim of the forced oral intercourse and indecent assault, is much less a factor in this case and lessens the gravity of the offences.

There is a serious fallacy in this reasoning. Consensual sex cannot be equated with an act of violence. Indeed, no amount of consensual sex can lessen the fear, humiliation and degradation associated with the type of sexual assault that occurred in *Hakopian*. Nor can the complainant's vulnerability to emotional or psychological harm be assessed by reference to her previous experience with activity of a consensual nature. To suggest otherwise leads to the absurd result that any woman with an active sex life, married or not, in a relationship or not, working as a prostitute or not, is necessarily less traumatized by rape.

A commentator writing in the wake of the decision in *Hakopian* made the point in this way:²³⁴

[S]exual assault is much more an issue of power, domination, control, invasion, humiliation It's about women losing control of their safety, losing autonomy over their bodies, and often fearing for their lives while being subjected to an attack Most women, including sex workers, negotiate issues around their sexuality and sexual practices as part of their everyday lives. The level of sexual experience of any victim is likely to have little impact on how that woman reacts to a sexual attack And it is the experience of that fear [of death] that creates the significant physical and emotional disturbances in victims (both short term and long term), identified as rape trauma syndrome.

The sentiments expressed in these decisions, and those from Canada and England, are reminiscent of those that emerged in England during the seventeenth, eighteenth and nineteenth centuries. They are anchored on distinctions between "chaste" and "unchaste" women. They also ignore the reality that a sexual assault is fundamentally an act of violence. The values and beliefs underlying these decisions bear little relationship to the realities of life in the twentieth century. Despite this, values

²³⁴ Marian Brown, quoted in the article by Graeme Coss, *ibid.*, at pp. 161-2.

such as these continue to linger under the surface of the criminal justice system -- emerging, from time to time, in an overt way, but most commonly remaining just under the surface. These medieval remnants of our law should be given a final burial now, before we embarrass the twenty-first century with them.