withdraw is no reason to deny the law's protection to those who continue to want it or to the much greater number whose husbands may be deterred by the knowledge that raping their wives would be a crime.

The real reason for opposing a change in the law is the difficulty which many seem to find in believing that it is indeed so dreadful for a husband to rape his wife that he should be called a criminal for doing it.[47] After all, she did once wish to have intercourse with him and may do so again. If they are still living together and sharing a bed, can he not be allowed to use a little persuasion upon her for the sake of their marriage? In the nullity case of *G v G*,[48] Lord Dunedin permitted himself to wish that the husband had used some 'gentle violence' instead of acquiescing in his wife's refusals. In *Baxter v Baxter*[49] the Court of Appeal actually refused a decree because the husband had not insisted, although the House of Lords disagreed.[50]

This argument appears to have caused the CLRC to change its mind between working paper and report. In 1980 a majority thought that wives should no longer be so subject to their husbands or in a position less favourable than that of unmarried cohabitants. Nevertheless, they believed that the consent of the Director of Public Prosecutions (DPP) should be required as check upon prosecutions which were 'not desirable in the public interest'.[51] What they meant by this was not explained. By 1984 all were agreed that the husband's exemption should go once the couple were no longer living together; but as they could not find an acceptable definition of this, they were divided as to whether the law should stay as it is or whether the exemption should be abandoned altogether. A narrow majority favoured leaving it as it is, and even most of those who wished it to go would have required the consent of the DPP to prosecution.

The majority view is clearly based on the perceived need to preserve the unique character of the 'true rape'. Although the Committee will happily contemplate an offence of indecent assault ranging from a small stroke to violent oral intercourse, it finds it hard to contemplate an offence of rape which includes intercourse between husband and wife. Yet if, as the Committee elsewhere asserts, the unique gravity of rape lies in the risk of pregnancy and childbirth, the most serious objection to the marital rape exemption ought to have been apparent. Before the advent of reliable contraception, it could effectively force a wife to bear her husband's children. Even today, unless she is a suitable candidate for oral contraceptives or an intra-uterine device, it allows him to proceed without waiting for her to take the precautions which are safest for women but which he may dislike. This objection may carry little weight with people who see a woman's prime vocation as bearing children, and particularly her husband's children. From the women's point of view, she may indeed have the same ambitions, but she might prefer it if the law left to her the decision as to whether and when. As with the decision to prosecute, however, the law remains curiously reluctant to allow women to take responsibility for their own lives.[52]

47 See Criminal Law Revision Committee, *Sexual Offences* (1980), para 42.

48 [1924] AC 349.

49 [1948] AC 274.

50 See also N Morris and AL Turner, 'Two Problems in the Law of Rape', *University of Queensland Law Journal*, vol 1, 1952–55, pp 247–63, quoted with apparent approval in JC Smith and B Hogan *Criminal Law* (Butterworths, 1978, 4th edn), pp 40–43.

51 *Sexual Offences* (1980), para 42.

52 *Women and the Law*, pp 71–73.

In *R v R* the wife had left the family home and informed the husband that she intended to seek a divorce. While the wife was staying with her parents, the husband forced his way into the house and had nonconsensual sexual intercourse with the wife. The wife alleged rape. The Court of Appeal (Criminal Division) upheld the conviction for rape; a decision which was affirmed by the House of Lords. Lord Keith of Kinkel, having referred to Sir Matthew Hale's opinion, stated:

> For over 150 years after the publication of Hale's work there appears to have been no reported case in which judicial consideration was given to his proposition. The first such case was *R v Clarence* (1888) 22 QBD 23, to which I shall refer later. It may be taken that the proposition was generally regarded as an accurate statement of the common law of England. The common law is, however, capable of evolving in the light of changing social, economic and cultural developments. 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.

Following *R v R* the Law Commission reviewed the state of the law.[53] Having considered Hale's opinion, and the exceptions to the exemption from prosecution for rape, the Commission recommended that the immunity should be formally abolished. The Commission reasoned in the following manner:

> We think that the principal matter to be considered in deciding whether the present marital immunity is supportable on grounds of policy and principle, as opposed to history, is whether non-consensual intercourse by a husband with his wife is sufficiently different from non-consensual intercourse by a man with a women to whom he is not married, or with his wife when a non-molestation or personal protection order is in existence, as to justify giving the husband immunity from the law of rape. That in its turn involves consideration of the nature of, and justification for the existence of, the crime of rape.
>
> The reasons for the existence of a separate crime of rape, and for that crime being regarded as of a particularly serious nature, are in our view best expressed by the Criminal Law Revision Committee's Policy Advisory Committee, in a passage specifically approved by the CLRC itself –
>
> > Rape involves a severe degree of emotional and psychological trauma; it may be described as a violation which in effect obliterates the personality of the victim. Its physical consequences equally are severe: the actual physical harm occasioned by the act of intercourse; associated violence or force and in some cases degradation; after the event, quite apart from the woman's continuing

53 *Rape Within Marriage*, Working Paper No 116 (HMSO, 1990).

> insecurity, the fear of venereal disease of pregnancy. We do not believe this latter fear should be underestimated because abortion would usually be available. That is not a choice open to all women and it is not a welcome consequence of any. Rape is also particularly unpleasant because it involves such intimate proximity between the offender and the victim. We also attach importance to the point that the crime of rape involves abuse of an act which can be a fundamental means of expressing love for another; and to which as a society we attach considerable value.[54]

The (narrow) majority of the CLRC did not, however, agree that those considerations operate where the non-consensual intercourse is by a husband with his wife –

> The majority of us, who would not extend the offence of rape to married couples cohabiting at the time of the act of sexual intercourse, believe that rape cannot be considered in the abstract as merely 'sexual intercourse without consent'. The circumstances of rape may be peculiarly grave. This feature is not present in the case of a husband and wife cohabiting with each other when an act of sexual intercourse occurs without the wife's consent. They may well have had sexual intercourse regularly before the act in question and, because a sexual relationship may involve a degree of compromise, she may sometimes have agreed only with some reluctance to such intercourse. Should he go any further and force her to have sexual intercourse without her consent, this may evidence a failure of the marital relationship. But it is far from being the 'unique' and 'grave' offence described earlier. Where the husband goes so far as to cause injury, there are available a number of offences against the person with which he may be charged, but the gravamen of the husband's conduct is the injury he has caused not the sexual intercourse he has forced.

Like the minority of the CLRC, we find that view hard to accept. The minority were, in our view, right to say that 'a woman, like a man, is entitled on any particular occasion to decide whether or not to have sexual intercourse, outside or inside marriage'. The question is, therefore, whether, as the minority thought, she is entitled to be protected in both situations, inside and outside marriage, by the law of rape. We have quoted … above the grounds advanced by the majority of the CLRC for distinguishing the two cases. We see the following difficulties in the distinction that they made.

First, and most fundamentally, if the rights of the married and the non-married woman are in this respect the same, those rights should be protected in the same way, unless there are cogent reasons of policy for taking a different course.

Second, it is by no means necessarily the case that non-consensual intercourse between spouses has less serious consequences for the woman, or is physically less damaging or disturbing for her, than in the case of non-consensual intercourse with a stranger. Depending on the circumstances the wife whose husband thrusts intercourse upon her may suffer pain from the act of intercourse itself; or the fear or the actuality of venereal or other disease; or the fear or the actuality of an unwanted pregnancy if because of the suddenness of the attack she has taken no contraceptive precautions or such precautions are unacceptable or impossible for medical reasons; and in the event of actual pregnancy a termination may be unavailable or morally offensive to her. All of these hazards may apply equally in the case of marital as of non-marital rape.

54 Fifteenth Report, at para 2.2.

> Third, we think that there is a danger that the CLRC underestimated the emotional and psychological harm that a wife may suffer by being subjected by her husband to intercourse against her will, even though on previous occasions she has willingly participated in the same act with the same partner. In *Kowalski*[55] the Court of Appeal approved the trial judge's ruling, in respect of an act of fellatio that the husband compelled the wife to perform on him, that she was entitled to say –
>
> > I agree I have done that with you before. I agree I did not find it indecent when we did it as an act of love, but I now find it indecent; I find it repellent; I find it abhorrent.
>
> It is well recognised that unwanted sexual intercourse can be a particularly repellent and abhorrent experience for a woman: that is one main justification for the existence of the offence of rape. We see no reason why a wife cannot say that she feels that abhorrence for such intercourse with her husband, whether or not she has willingly participated on previous occasions.
>
> Fourth, for a man to oblige his wife to have intercourse without her consent may be equally, or even more, 'grave' or serious as when that conduct takes place between non-spouses. We quoted above the CLRC's own view, that it was important that 'the crime of rape involves abuse of an act which can be a fundamental means of expressing love for another; and to which as a society we attach considerable value'. In the case of the husband, however, he abuses not merely an act to which, as a matter of abstract principle, society attaches value, but the act that has been or should have been his means of expressing his love for his wife. There seems every reason to think that that abuse can be quite as serious on the part of the husband, and quite as traumatic for the wife, as is rape by a stranger of casual acquaintance.
>
> Fifth, in many cases where the husband forces intercourse on his wife they will be living in the same household, or at least she will be in some sort of dependent relationship with him. It is likely to be harder, rather than easier, for such a woman to avoid her husband's insistence on intercourse, since to do so she may for instance have to leave the matrimonial home. That is a further respect in which non-consensual intercourse by a husband may be a particular abuse.
>
> Our view, as at present advised, is therefore, that there are no good grounds of principle for distinguishing between marital and other types of rape.[56]

The Law Commission's Report[57] endorsed the conclusions reached in the Working Paper, and the law of rape was statutorily reformed in the Criminal Justice and Public Order Act 1994, which provides that:

> s142 For section 1 of the Sexual Offences Act 1956 (rape of a woman) there shall be substituted the following section–
>
> 1.–(1) It is an offence for a man to rape a woman or another man.
>
> (2) A man commits rape if –
>
> (a) he has sexual intercourse with a person (whether vaginal or anal) who at the time of the intercourse does not consent to it; and
>
> (b) at the time he knows that the person does not consent to the intercourse or is reckless as to whether that person consents to it.

55 (1987) 86 Cr App R 339.

56 Paras 4.16–4.25.

57 *Criminal Law: Rape Within Marriage*, No 205 (HMSO, 1992).

(3) A man also commits rape if he induces a married woman to have sexual intercourse with him by impersonating her husband.

Ngaire Naffine analysed the now reformed common law of immunity for marital rape in the following manner:

POSSESSION: EROTIC LOVE IN THE LAW OF RAPE[58]

Ngaire Naffine

English common law prescribed a certain form of female sexuality in which women were positively required to assume a particular part – that of the possessed. And there was a certain part prescribed for the man: to possess her. In the sex prescribed and proscribed by law, the sexual natures of men and women were made to correspond with nature. Within marriage, the common law spelled out the obligation of the wife to renounce her subjectivity to her husband. In his *Commentaries on the Laws of England*, William Blackstone (now famously) explained the legal status of the married woman. 'By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated into that the husband: under whose wing, protection, and cover, she performs every thing'.[59]

In marriage, the law specifically countenanced the use of a reasonable measure of force by a husband in order to keep the unaccommodating wife in line: she who was not true to her own nature could be bent to his will with a rod no bigger than his thumb. In his exposition of the legal relations between husband and wife, Blackstone asserted the husband's right of 'domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children'.[60] Marriage law also deprived a woman of the sort of economic independence needed to mount an effective challenge to male authority. Upon marriage, her property effectively passed into the hands of her husband. She was also deprived of her ability to function as an independent political and economic citizen in the public realm. The married woman was coerced by her husband in more than one way. More than one violence was done to her: one was physical, another was economic, a third was explicitly sexual.

All three forms of violence could be seen to operate implicitly within the law of primogeniture – the law which ensured the passage of property to the eldest son of the marriage upon the death of the husband and father. The concern of primogeniture was with 'posterity and the family lineage, but it also enabled the accumulation of wealth'.[61] For this law to work, for a husband to secure his future through his son and his son's son, it was vital that the law recognise the male right of control over (the fertility of) his wife. The husband had to have access to her reproductive body as well as the right to exclude all others from her body (for he had to know that his sons were his).

The law of primogeniture presupposed the right of the husband to obtain sex from his wife. The legal fiction employed to guarantee this right was to treat a woman's consent to marriage as much the same thing as consent to intercourse (with her husband). That is to say, consent to marriage also meant ongoing consent to sex – for the life of that marriage. Once married, the wife was

58 [1994] 57 *Modern Law Review*, p 10.

59 Blackstone, *Commentaries on the Laws of Englan*d (New York: Garland, 1978) vol 1, p 442.

60 *Ibid*, p 444. On more modern expressions of this 'right' see further below.

61 Katherine O'Donovan *Sexual Divisions in Law* (Weidenfeld and Nicolson, 1985), p 22.

therefore presumed to have consented to every act of intercourse with her husband: a married woman had no right to refuse the proposal to be possessed. Sir Matthew Hale, English Chief Justice in the seventeenth century, still provides an authoritative word on the legal attitude to rape in marriage. To Hale, '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'.[62] Thus Hale expounded unambiguously the traditional possessive form of sex reflected in the law of rape. The wife was required by law to give herself up to her husband: the husband had the lawful right to take her.[63]

In certain circumstances, the husband's proprietorial right of the sex of his wife was one he could also claim and exercise against other men. Indeed, a line of men held right in her body. As Hale explains:

> If the woman consented not at the time of the rape committed, but consented after, she shall not have an appeal of rape … but yet the king shall have the suit by indictment, and … if she have a husband, he shall have an appeal, and if she have none, then her father or other next of blood shall have an appeal of such rape.[64]

Outside marriage, the possessory rights of the man were more limited (though intercourse was cast in the same form). The unmarried woman (of good reputation) had the legal right not to be possessed (in that she could complain of rape). She had the right to save her chastity for a husband who could then possess her with a legal right. Indeed, a woman already sexually possessed was of little value to the man who might possess her as a husband. No longer could she be exclusively possessed and so he was dispossessed. Again, Hale tells us of the sort of woman whom the law protected. She was a woman 'of good fame', who revealed the injury immediately: otherwise 'the strong presumption [was] that her testimony [was] false or feigned'.[65]

The sexual paradigm of law, the naturalised sex of law, invariably cast the man (never the woman) in the role of initiator (never the negotiator) of a sexual act (a singular, never a plural, thing which never took the form of an engagement) which always entailed the thrusting of the penis into the vagina (never the lips of a woman on the lips of another, to think of just one of the many other forms that 'the act' might have taken). Other female orifices (where his seed would not flourish) were outlawed as unnatural whether or not the act took place with the consent of the woman. If we return to Hale this all becomes plain. 'Rape' in the view of Hale was 'the carnal knowledge of any woman above the age of ten years against her will'. He was, in Hale's words, the 'ravished', she was 'ravished'. So obvious to Hale was the male subjectivity of the sexual act(or) that he was not concerned to spell it out. He does not tell us that 'carnal knowledge' is always the man's knowledge because the subjective role of the man is axiomatic: literally, it goes without saying. The sex of law involves the man's 'knowledge' of the woman, never the woman's knowledge of the man, never the woman's knowledge of another woman, never the woman's knowledge of herself – all unthinkable relations. She is necessarily the object of his knowledge,

62 Hale, *The History of the Pleas of the Crown* (London: Professional Books, 1971), p 629.

63 Though, of course, when a husband had intercourse with his wife by force, it was not rape as the law defined it.

64 Hale, *op cit*, p 631.

65 Hale, *op cit*, p 633.

he the knowing subject. The woman, then, was always the respondent to the man's proposal and it was a proposal leading to her ultimate pleasure. He was expected to persuade, using reasonable force if necessary; but eventually she was to capitulate (ultimately with pleasure as she realised her sexual fulfilment in her possession by him). As we saw, Hale explicitly recognised that consent could come after rape, in effect, that a rape could produce a woman's consent, making her the assenting 'ravished'.

The Death of Hale?

Hale's *Pleas* should now have the ring of antiquity, as should the writings of Blackstone. We know that law and society have undergone dramatic change in their understandings of the sexes and so we are surely now at a great remove from the lives and crimes so eloquently depicted by these two 'great men' of law. Surely it is an odd thing to do, to exhume these Englishmen of centuries past and yet we find this is not so. The possessive ideal of sexuality described by our legal forbears persists, both in English and Australian law and society, though it has assumed new and mystifying forms.

While the general movement of English law in this century has been towards formal sex equality (usually interpreted as treating the sexes the same, as gender-neutrality), this shift has been uneven. English men and women may now be (formally) equal subjects before the law, but rape is still 'the most gender specific of all crimes', as Temkin reminds us.[66] '[O]nly a man …. can be the actual perpetrator, only a woman the victim'.[67] The possessive idea of male sexuality also remains within the modern crimes of incest. In the relevant provisions of the Sexual Offences Act 1956, we see explicitly repeated the idea that it is the man who has the woman and the woman who is had. Thus, it is an offence 'for a man to have sexual intercourse with a woman whom he knows to be his granddaughter' and 'for a woman … to permit a man whom she knows to be her grandfather [etc] … to have sexual intercourse with her by consent. As Lacey, Wells and Meure observe, 'the "natural" mode is subtly portrayed as vaginal sexual intercourse with the woman as the passive partner'.[68]

Debates leading up to, and surrounding, the abolition of the husband's common law immunity from prosecution for rape of his wife also suggest that many jurists still favour the possessive ideal of heterosexuality. In the landmark decision of *R v R*, the House of Lords condemned as anachronistic the common law view of rape in marriage and declared that now the 'husband and wife are for all practical purposes equal partners to a marriage'.[69] In the opinion of the Court, the reference to rape as '*unlawful* intercourse' in the Sexual Offences (Amendment) Act 1976 posed no obstacle to this interpretation of the law. The

66 Jennifer Temkin *Rape and the Legal Process* (Sweet & Maxwell, 1987), p 7.

67 Section 1 of the Sexual Offences Act 1956 states that 'It is a felony for a man to rape a woman'. 'Rape' us ten defined by the Sexual Offences (Amendment) Act 1976:
A man commits rape if –
(a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it;
(b) and at the time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it.

68 *Reconstructing Criminal Law: Critical Perspectives on Crime and the Criminal Process* (Weidenfeld and Nicolson, 1990), p 355.

69 [1991] 3 WLR 767, at 771.

word 'unlawful' was mere 'surplusage' and was not intended to confine the crime of rape to incidents occurring outside marriage.

In her commentary on *R v R*, Vanessa Laird questions this reading of the Act. She maintains that the retention of the term 'unlawful intercourse' in the Act was really an expression of Parliamentary ambivalence about 'the politically troublesome issue of marital rape'.[70] In 1976, Parliament lacked the resolve to remove the husband's immunity, preferring to leave the matter to the forthcoming Criminal Law Revision Committee. When in 1984 that Committee produced its final report on the law of rape in marriage, however, it affirmed the right of an Englishman to have intercourse with his wife. The majority of the Committee said that when a man forced his wife to have intercourse with him, and it did not result in overt injury, this was merely 'evidence of the failure of the marital relationship', not of rape.[71] It might be a problem for social workers, but it was not the province of the criminal law.[72] The Committee stressed that the 'gravamen of the husband's conduct is the injury he has caused not the sexual intercourse he has forced'.[73]

By 1990 legal opinion had changed dramatically. In its Working Paper on Rape within Marriage, the Law Commission recommended, provisionally that the husband's immunity be lifted.[74] It said that there were 'no valid reasons for distinguishing between non-consensual sexual intercourse within marriage' and without it.[75] In 1991 the House of Lords abolished the immunity at common law and in 1992 the Final Report of the Law Commission recommended that 'the law should continue to be that there is no immunity in the crime of rape'.[76] The legal community, however, remains divided on the issue, with Professor Glanville Williams perhaps the most vocal critic of the new approach. In his response to the provisional recommendations of the Working Paper, Professor Williams did not mince words. He asked:

> Why is rape an inappropriate charge against the cohabiting husband? The reasons should be too obvious to need spelling it out. We are speaking of a biological activity, strongly baited by nature, which is regularly and pleasurably performed on a consensual basis by mankind … Occasionally some husband continues to exercise what he regards as his right when his wife refused him … What is wrong with his demand is not so much the act requested but its timing, or the manner of the demand. The fearsome stigma of rape is too great a punishment for husbands who use their strength in these circumstances.[77]

However, there is reason to believe that Williams should not be too concerned about the ill-fated possessing husband. As Vanessa Laird explains, *R v R* generates the false impression that 'inequalities between husband and wife have been resolved', thus obscuring 'the social conditions that shape women's consent'. That is, many women still do not feel they have the right or the capacity

70 'Reflections on *R v R*' (1991) 55 *Modern Law Review*, 386, 391.

71 *Sexual Offences* (HMSO, 1984) Cmnd 9213.

72 *Ibid*, para 2.64.

73 *Ibid*.

74 Working Paper No 116, *op cit*.

75 *Ibid*, p 83.

76 The Law Commission (Law Com No 205) *Criminal Law: Rape Within Marriage* (1992), p 18, *supra*.

77 Williams 'The Problem of Domestic Rape', 15 February 1991, *New Law Journal* 205, 206.

to say 'no' to a husband. The simple assertion of the equal sexual rights of wives by the House of Lords does not make it so.[78]

RAPE

In the passage which follows Professor Susan Estrich examines the differing approaches of American and English courts to the issue of rape. Neither approach, in the author's view, satisfies the requirements of justice and the protection of women. The law and legal process, Professor Estrich argues, in effect places women on trial – not the male rapist.

RAPE[79]

Susan Estrich[80]

The Definition of Rape: The Common Law Tradition

The traditional way of defining a crime is by describing the prohibited act (*actus reus*) committed by the defendant and the prohibited mental state (*mens rea*) with which he must have done it. We ask: What did the defendant do? What did he know or intend when he did it?

The definition of rape stands in striking contrast to this tradition, because courts, in defining the crime, have focused almost incidentally on the defendant – and almost entirely on the victim. It has often been noted that traditionally at least, the rules associated with the proof of a rape charge – the corroboration requirement, the requirement of cautionary instructions, and the fresh complaint rule – as well as the evidentiary rules relating to prior sexual conduct by the victim, placed the victim as much on trial as the defendant. Such a reversal also occurs in the course of defining the elements of the crime. *Mens rea*, where it might matter, is all but eliminated; prohibited force tends to be defined according to the response of the victim; and non-consent – the *sine qua non* of the offence – turns entirely on the victim's response.

But while the focus is on the female victim, the judgment of her actions is entirely male. If the issue were what the defendant knew, thought, or intended as to key elements of the offence, this perspective might be understandable; yet the issue has instead been the appropriateness of the woman's behaviour, according to male standards of appropriate female behaviour.

To some extent, this evaluation is but a modern response to the long-standing suspicion of rape victims. As Matthew Hale put it three centuries ago: 'Rape is … an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent'.

But the problem is more fundamental than that. Apart from the women's conduct, the law provides no clear, working definition of rape. This rather conspicuous gap in the law of rape presents substantial questions of fair warning for men, which the law not so handily resolves by imposing the burden of warning them on women.

At its simplest, the dilemma lies in this: If non-consent is essential to rape (and no amount of force or physical struggle is inherently inconsistent with lawful

78 *Possession: Erotic Love in the Law of Rape*, pp 18–23.

79 95 *Yale Law Journal* 1087.

80 Robert Kingsley Professor of Law and Political Science, University of Southern California.

sex), and if no sometimes means yes, and if men are supposed to be aggressive in any event, how is a man to know when he has crossed the line? And how are we to avoid unjust convictions?

This dilemma is hardly inevitable. Partly it is a product of the way society (or at least a powerful part of it) views sex. Partly it is a product of the lengths to which the law has gone to enforce and legitimise those views. We could prohibit the use of force and threats and coercion in sex, regardless of 'consent'. We could define consent in a way that respected the autonomy of women. Having chosen neither course, however, we have created a problem, of fair warning, and force and consent have been defined in an effort to resolve this problem.

Usually, any discussion of rape begins (and ends) with consent. I begin instead with *mens rea*, because if unjust punishment of the blameless man is our fear (as it was Hale's), then *mens rea* would seem an appropriate place to start addressing it. At least a requirement of *mens rea* would avoid unjust convictions without adjudicating the 'guilt' of the victim. It could also be the first step in expanding liability beyond the most traditional rape.

Without *mens rea*, the fair warning problem turns solely on the understanding of force and consent. To the extent that force is defined apart from a women's reaction, it has been defined narrowly, in the most schoolboyish terms. But most of the time, force has been defined according to the woman's will to resist, judged as if she could and should fight like a man. Thus defined, force serves to limit our understanding of rape even in cases where a court might be willing to say that this woman did not consent.

Rape is not a unique crime in requiring non-consent. But it is unique in the definition given to non-consent. As it has been understood, the consent standard denies female autonomy; indeed, it even denies that women are capable of making decisions about sex, let alone articulating them. Yet consent, properly understood, has the potential to give women greater power in sexual relations and to expand our understanding of the crime of rape,. That is, perhaps, why so many efforts have been made to cabin the concept.

A. Mens Rea

It is difficult to imagine any man engaging in intercourse accidentally or mistakenly. It is just as difficult to imagine an accidental or mistaken use of force, at least as force is conventionally defined. But it is not at all difficult to imagine cases in which a man might claim that he did not realise that the woman was not consenting to sex. He may have been mistaken in assuming that no meant yes. He may not have bothered to inquire. He may have ignored signs that would have told him that the woman did not welcome his forceful penetration.

In doctrinal terms, such a man could argue that his mistake of fact should exculpate him because he lacked the requisite intent or *mens rea* as to the woman's required non-consent. American courts have altogether eschewed the *mens rea* or mistake inquiry as to consent, opting instead for a definition of the crime of rape that is so limited that it leave little room for men to be mistaken, reasonably or unreasonably, as to consent. The House of Lords, by contrast, has confronted the question explicitly and, in its leading case has formally restricted the crime of rape to men who act recklessly, a state of mind defined to allow even the unreasonably mistaken man to avoid conviction.

This section argues that the American courts' refusal to confront the *mens rea* problem works to the detriment of the victim. In order to protect men from unfair convictions, American courts end up defining rape with undue restrictiveness. The English approach, while doctrinally clearer, also tends toward an unduly restricted definition of the crime of rape.

While the defendant's attitude toward consent may be considered either an issue of *mens rea* or a mistake of fact, the key question remains the same. In *mens rea* terms, the question is whether negligence suffices, that is, whether the defendant should be convicted who claims that he thought the woman was consenting, or didn't think about it, in situations where a 'reasonable man' would have known that there was not consent. In mistake-of-fact terms, the question is whether a mistake as to consent must be reasonable in order to exculpate the defendant.

In defining the crime of rape, most American courts have omitted *mens rea* altogether. In Maine, for example, the Supreme Judicial Court has held that there is no *mens rea* requirement at all for rape.[81] In Pennsylvania, the superior court held in 1982 that even a reasonable belief as to the victim's consent would not exculpate a defendant charged with rape.[82] In 1982 the Supreme Judicial Court of Massachusetts left open the question whether it would recognise a defence of reasonable mistake of fact as to consent, but it rejected the defendant's suggestion that any mistake, reasonable or unreasonable, would be sufficient to negate the required intent to rape; such a claim was treated by the court as bordering on the ridiculous.[83] The following year the court went on to hold that a specific intent that intercourse be without consent was not an element of the crime of rape,[84] that decision has since been construed to mean that there is no intent requirements at all as to consent in rape cases.[85]

To treat what the defendant intended or knew or even should have known about the victim's consent as irrelevant to his liability sounds like a result favourable to both prosecution and women as victims. But experiences makes all too clear that it is not. To refuse to inquire into *mens rea* leaves two possibilities: turning rape into a strict liability offence where, in the absence of consent, the man is guilty of rape regardless of whether he (or anyone) would have recognised non-consent in the circumstances; or defining the crime of rape in a fashion that is so limited that it would be virtually impossible for any man to be convicted where he was truly unaware or mistaken as to non-consent. In fact, it is the latter approach which has characterised all of the older, and many of the newer, American cases. In practice, abandoning *mens rea* produces the worst of all possible worlds: the trial emerges not as in inquiry into the guilt of the defendant (Is he a rapist?) but of the victim (Was she really raped? Did she consent?). The perspective that governs is therefore not that of the woman, nor even of the particular man, but of a judicial system intent upon protecting against unjust conviction, regardless of the dangers of injustice to the woman in the particular case.

The requirement that sexual intercourse be accompanied by force or threat of force to constitute rape provides a man with some protection against mistakes as to consent. A man who uses a gun or knife against his victim is not likely to be in serious doubt as to her lack of consent, and the more narrowly force is defined, the more implausible the claim that he was unaware of non-consent.

But the law's protection of men is not limited to a requirement of force. Rather than inquire whether the man believed (reasonably or unreasonably) that his victim was consenting, the courts have demanded that the victim demonstrate

81 *State v Reed*, 479 A.2d 1291, 1296 (me. 1984).

82 *Commonwealth v Williams* 294 a Super 93, 99–1000, 439 A 2d 765, 769 (1982).

83 *Commonwealth v Sherry* 437 NE 2d 224, 386 Mass 682 (1982).

84 *Commonwealth v Grant* 391 Mass 645, 464 NE 2d 33 (1984).

85 *Commonwealth v Lefkowitz* 20 Mass App Ct 513, 481 NE 2d 227, 230, review denied. 396 Mass 1103, 485 NE 2d 224 (1985).