Fictions and Myths in *PGA v the Queen*

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With the common law method, rules are constructed amidst fictions and myths. These legal inventions are not simply falsehoods, and indeed it is misleading to think of them in this way. Rather, the fictions and myths of the common law are legal stories known to be false, but deemed to be true, in order to achieve certain legal purposes. They are fairly and appropriately deployed only when their inventive nature is recognised and their purposes acknowledged. Our aim is to demonstrate the proper and improper uses of myths and fictions in common law reasoning by means of a close analysis of a single case, *PGA v The Queen,*[1] which made extensive use of both. *PGA* is an important case in its own right. It arose from the first common law jurisdiction in the world in which marital rape was recognised as a crime, and the High Court in *PGA* declared this crime to have existed for many more decades than was ever thought to be the case. Here, a majority of the High Court asserted that marital rape was a crime known to the common law of Australia as far back as the early twentieth century. This startling judgment fundamentally challenged the established legal view, held for most of the twentieth century, that husbands were immune from prosecution for the rape of their wives. So secure was this understanding of rape law right across the Anglo-Australian legal world that there was hardly any prosecution of marital rape and precious little case law. In *PGA*, the High Court relied on both myths and fictions to achieve this common law reconstruction.

This paper operates on two levels: descriptive and normative. It makes a descriptive claim that common law rules are constructed amidst fictions and myths. It also mounts a normative argument: given that common law rules are constructed amidst fictions and myths, judges need to be candid about their creative work. Fictions and myths play a critical and valuable role in the common law, but they need to be employed in a highly conscious and deliberate, even artful, manner. If judges are not mindful of the operations of fictions and myths, the unfortunate result can be obscurantism and duplicity. Hence, the contribution of our legal-theoretical scholarship is to render the processes of legal reasoning more transparent by identifying the subtle effects of fictions and myths on the legal imagination.

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1 (2012) 245 CLR 355 ('*PGA*').

With Blackstone, we argue that fictions and myths can be useful devices;[2] but we also agree with Bentham that they can be pestilential.[3] They can be pestilential if the creative work that they are doing is denied. The awareness of creativity is pivotal because, with the awareness of creativity, comes the acceptance of responsibility for the rules whose construction relies on fictions and myths. It is only after we have recognised the role of fictions and myths in a particular area of law that we can evaluate them for what they do, for good or for ill. This article shows the critical role played by fictions and myths in *PGA* as well as the unfortunate lack of candour about that role.

I. Common law creativity

Lon Fuller draws an analogy between the reciting of a rule and the retelling of a story. To Fuller, the retelling of a story will always be 'the product of two forces: (1) the story as I heard it, the story *as it is* at the time of its first telling; (2) my conception of the point of the story, in other words, my notion of the story *as it ought to be.*'[4] Hence, a story 'is not something that is, but something that becomes; it is not a hard chunk of reality, but a fluid process, which is as much directed by [our] creative impulses, by [our] conception of the story as it ought to be, as it is by the original event.'[5] Like the retelling of a story, the articulation of a common law rule in any given case is always the product of two forces: (1) the rule as told by the precedent judge (the rule 'as it is'); and (2) the conception of the rule by the present judge (the rule 'as it ought to be'). The Fullerian view of legal interpretation bears important similarities to the Dworkinian notion of law as integrity. Dworkin's interpretive ideal of law as integrity has two dimensions: (1) fit and (2) justification. First, the legal interpretation has to fit the available legal materials: 'convictions about fit will provide a rough threshold requirement that an interpretation of some part of the law must meet if it is to be eligible at all.'[6] Second, after satisfying the requirement of fit, the judge 'must choose between eligible interpretations by asking which shows the community's structure of institutions and decisions — its public standards as a whole — in a better light from the standpoint of political morality.'[7] There is a parallel between Fuller's two forces and Dworkin's two dimensions. On both the Fullerian and the Dworkinian models, common law rules come into being through a chain of successive cases. Like the chain novel, the common law is not a hard chunk of reality, but a fluid process. The evolution of a common law rule is always directed by the 'creative impulses' of judges and jurists. And the judicial exercise is to close the gap between the 'is' of the common law and the 'ought'.

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2 William Blackstone, quoted in Lon Fuller, 'Legal Fictions' (1930) 25 *Illinois Law Review* 363, 364.

3 Jeremy Bentham, quoted in Fuller, above n 2.

4 Lon Fuller, *Law in Quest of Itself* (Boston: Beacon, 1940) 8.

5 Ibid 9.

6 Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) 255.

7 Ibid 256.

Fictions and myths are important elements of these 'creative impulses'. Fictions and myths form the background to our rules and fill the gaps within them. Common law rules take shape and make sense in and through fictions and myths which give us a sense of what we think the rules ought to be. They provide us with a narrative framework to produce coherence out of a set of disparate rules. This proposition may be true of legal reasoning generally, but our more limited claim is that common law reasoning is especially reliant on myths and fictions. However, this reliance often goes unremarked. In *PGA*, myths and fictions play critical roles which are poorly acknowledged.

The facts of the case are relatively straightforward: a man was charged with having intercourse with his wife without her consent between 22 and 25 March 1963 and on or about 14 April 1963. The charges were laid under s 48 of the *Criminal Law Consolidation Act 1935* (SA) (the *CLC Act*). As it stood in 1963, the section stated that 'any person convicted of rape shall be guilty of felony, and liable to be imprisoned for life, and may be whipped'. The section merely classified the crime and specified the punishment. The identification of the elements of the crime of rape was left to the common law, which is where the confusion begins.

Counsel for the appellant submitted that the common law position in 1963 was that, upon marriage, a wife was deemed to have consented to sexual intercourse, and that consent was irrevocable. As the presumption of consent was irrebuttable, a husband could never be charged with the rape of his wife. This common law rule was traceable to the writing of Sir Matthew Hale. The High Court was called upon to decide on a chain of questions regarding the operation of this supposed common law rule. First, what kind of rule was that? Second, did the rule ever exist? Third, if it did, was it still in existence in 1963? Finally, if it had ceased to exist by 1963, when did it cease to exist?

Five judges, French CJ, Gummow, Hayne, Crennan and Kiefel JJ, issued a majority judgment which is hardly a model of clarity. In response to the first question, they never properly characterised what kind of rule the presumption was supposed to be. Sometimes, they referred to the common law presumption of irrevocable consent as a marital exemption to the offence of rape. Sometimes, they referred to it as a husband's immunity from prosecution for the rape of his wife. At other times, they described its operation as a defence to a charge of rape. This common law rule was thus variously characterised as an exemption, an immunity and a defence.

In reply to the second, third and fourth questions, the majority responded in a single master stroke: 'if the "marital exemption" ever was part of the common law of Australia, it had ceased to be so by the time of the enactment in 1935 of s 48 of the *CLC Act* and thus before the date of the commission of the alleged offences'.[8] Later, the majority judges added that: '[b]y the time of the enactment in 1935 of the *CLC Act*, if not earlier (a matter which it is unnecessary to decide here), in Australia local statute

[8] *PGA* (2012) 245 CLR 355, 369.

law had removed any basis for continued acceptance of Hale's proposition as part of the English common law received in the Australian colonies'.[9] Did the rule ever exist? Maybe. Was it still in existence in 1963? No. When did it cease to exist? We don't know.

In effect, the High Court ruled that the common law rule, variously characterised (as an exemption, immunity and defence) had just vanished into thin air at an unspecified point in time before 1963, if it ever existed to begin with. The *ratio* of the majority judgment poses two distinct puzzles: one for legal historians and the other for legal theorists. The puzzle for legal historians is, to put it simply, what happened between the time when Hale issued his now infamous statement about the common law of rape, and 1963 when the alleged offences occurred. Historical facts are not dependent on judicial fiat; judges may get historical facts wrong. The puzzle for legal theorists is slightly, but crucially, different. The concern here is not with history itself, or the unearthing of the right historical facts. Instead, the concern is with the judicial portrayal of history: with the creative legal means by which historical propositions are employed and manipulated to arrive at desired legal propositions.

So the legal-philosophical question then becomes: how are historical propositions manipulated in order to produce desired legal propositions, and what legal machination is available to achieve this manipulation? Or to recast the question in Fullerian terms: if the retelling of a story (or history) is always the product of a dynamic interaction between the story as it is and the story as it ought to be, and if the articulation of a common law rule is likewise the product of a dynamic interaction between the rule as told by the precedent judge (the rule 'as it is') and the conception of the rule by the present judge (the rule 'as it ought to be'), what then are the 'creative impulses' that are at work to reconcile the 'is' and the 'ought'? We suggest that the majority judges in *PGA* accomplish this creative feat through the manipulation of fictions and myths. Hence, the common law process of rule-construction is inseparable from the creative process of fiction-writing and myth-making.

II. Fictions and falsehoods

The marital immunity is characterised in two main ways by the South Australian Supreme Court and by the High Court in *PGA*, though confusingly the term 'fiction' is employed for both characterisations. First, there is Hale's pronouncement that a husband could not, in law, rape his wife, as she had by the legal act of marriage given herself up to him. This, we say, is the immunity understood as a legal fiction, one which deemed any separate will of the wife (to proceed with intercourse or not) to be legally irrelevant. The immunity is also described as a fiction in the ordinary language sense of this word, that is, as a falsehood — something which is not true, that is bad or disavowed law — this is its second meaning.

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9 Ibid 384.

Though the judges in *PGA* refer to the immunity as a 'fiction', they do not explicitly distinguish 'legal fiction' (which entails a deeming) from 'ordinary language fiction' (which simply means falsehood) and indeed frequently they slip between the two meanings. This not only makes their judgments difficult to pin down but, more importantly, it tends to obscure the operation of the legal fiction. As a consequence, the majority judges never really explore the moral implications of the immunity understood as legal fiction. (It could be said that Bell J in her dissenting judgment does examine the immunity as a true legal fiction and thus her account is both more bracing and more obviously disturbing.) Here we examine these two understandings of the immunity.

A. THE IMMUNITY AS LEGAL FICTION

When Hale expounded the immunity,[10] we suggest that he was stating a bold legal fiction, one which proved to have remarkable durability. 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.[11]

For Hale (and then for his legal successors over the centuries — the great expositors of the common law) it was axiomatic that upon becoming a wife, a woman's right to refuse sexual intercourse was legally extinguished in relation to her husband. If anything, she acquired a wifely duty to perform sexual relations and the husband acquired a correlative right to demand intercourse. There remains some doubt about the actual connotation of the legal term 'conjugal right': whether it meant only the right to demand cohabitation with a spouse or went further to convey the right to demand sexual services.[12]

Expressed another way, when a woman became a wife she ceased to be the right kind of *legal* being to give or retract consent to intercourse in relation to her husband. Women underwent a change of status, even identity, upon marriage. For she 'hath given up herself' to become one with him. A few decades after Hale's declaration of the immunity was published, William Blackstone made this crystal clear. He explained that upon marriage the personality of the wife was absorbed into that of the husband.[13]

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10 He wrote of the immunity in 1676; his account of the immunity was published in 1736.

11 Sir Matthew Hale *History of the Pleas of the Crown* (1736) vol 1, 629.

12 Gray J in the court below, while tracing the legal history of the immunity, seems to subscribe to the stronger meaning; he refers to 'a husband's marital right to sexual intercourse with his wife' and 'the obligation of irrevocable consent' which flowed from Hale. This right/duty relation, he seems to say, was the necessary correlative of marriage, as Hale saw it. See *R v P, GA* (2010) 109 SASR 1 [117].

13 This was in his famous statement on coverture. See William Blackstone, *Commentaries on the Laws of England* (1765-1769) Book 1, ch 15.

This was a self-evident truth: it need not be explained, demonstrated, defended or justified.[14] It was a given that upon marriage the wife, in many ways, ceased to be a separate moral and legal being and merged into the being of the husband.[15] After marriage, the wife's *actual* sexual preferences ceased to have legal force. She would be legally deemed to have no separate will, particularly in the marital bed.

This could be said to be the very meaning of the wife at the time of Hale's *Pleas.*[16] The wife became, at law, a property of her husband (part of him) and indeed, in some respects, a species of his property (that which he owned). As the House of Lords put it starkly in *R v R*, perhaps overstating the case, the wife became 'the subservient chattel of the husband'.[17] The husband could therefore be said to be immune from rape prosecution in the sense that this was not a law directed at him. It was impossible for him to commit it. He 'could not, by his own physical act, rape his wife during cohabitation'.[18] This was not what rape was; the husband who compelled the wife to have intercourse simply did not commit the wrong of rape.[19] A legal deeming, an irrevocable presumption, of consent ensured that the wife's intentions would no longer be of legal interest for the purpose of the law of rape. The fact of her actual refusal to have sex was not a legal concern — pretty well for the duration of the marriage.

This seems to be the most enduring understanding of the immunity, and the one that is probably sustained right up to the end of the twentieth century, notwithstanding the views of the majority.[20] This also conforms to ordinary social understandings of the respective sexual rights and duties of husbands and wives. The landmark study of sexual relations between English husbands and wives before the sexual revolution of the twentieth century, conducted by British social historians Szreter and Fisher,

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14 As Alfred North Whitehead maintained, the most fundamental beliefs of a society are those for which there is no felt need to mount a defence or offer explanation. See Alfred North Whitehead, *Science and the Modern World* (Cambridge University Press, 1926) ch 3.

15 Indeed in law she ceased to be a person for a formidable range of legal purposes, but not all. For example, she remained protected by the laws of homicide and ordinary assault.

16 There was almost a religious sense in which the wife was thought to undergo a change of status/being in marriage, and indeed it was a transformation endorsed and given meaning and sanctified by the Church. It could be likened to a form of transubstantiation (which turns the bread and wine into the body and blood of Christ); upon marriage the woman became one with the being of the husband.

17 *R v R* [1992] 1 AC 599, 616 (Lord Keith of Kinkel).

18 Gray J describing the rule as enunciated by the English Court of Appeal in the 1970s: *R v P, GA* (2010) 109 SASR 1 [127].

19 In the 1990s, Glanville Williams said something very similar when he asserted that the crime of rape was too harsh to impose on a husband. See Glanville Williams, 'The Problem of Domestic Rape' (1991) 141 *New Law Journal* 205.

20 Gray J in dissent in the court below certainly presents it thus: see *R v P, GA* (2010) 109 SASR 1, 19.

confirms that married women themselves understood that they were under a positive duty to be available for sexual intercourse with their husbands and that any refusal on their part would not find the support of law.[21] (Bell J in her dissenting judgment, takes this even further: not only was intercourse one of the normal incidents of marriage, it was acceptable for a husband to employ some 'gentle violence' to secure his marital rights.[22])

B. THE LEGAL FICTION EXAMINED

To appreciate the full moral and legal significance of the spousal immunity understood as legal fiction, one must know a little more about this legal artifice. The legal fiction is a positive device of law, which entails a deeming of something to be true which is *known* not to be true. *Conscious* falsehood is the essence of a true legal fiction. The point of the deeming — to treat x *as if* it were y — is to achieve a desired legal purpose. Blackstone enjoyed this legal ruse and thought of fictions as 'highly beneficial and useful.'[23] Bentham by contrast detested 'the pestilential breath of fiction' and was perhaps right to do so. He thought of the fiction as a type of 'syphilis' and as 'the most pernicious and basest sort of lying.'[24]

The most authoritative account of legal fictions is still that supplied by Fuller in 1930.[25] Fuller called legal fictions 'conceits of the legal imagination' which can 'effect their entrance into the law under the cover of such grammatical disguises as, "the law presumes," "it must be implied," "the plaintiff must be deemed," etc.'[26] As Fuller makes plain, the legal fiction 'is distinguished from a lie by the fact that it is not intended to deceive.'[27]

To wit, the legal fiction of the personality of the corporation is a critical piece of legal artifice to achieve the ends of commerce: it is a necessary legal device which critically depends on a legal sense of as-ifness. There is legal awareness of the fact that the corporation is not really a person (that is, a human being). But the device of personality relies on the idea that the corporation will be treated as if it were a person; and the person which it is treated as being is also a construction, for human beings, as legal persons, are equally constructions of law.[28]

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21 Simon Szreter and Kate Fisher, *Sex Before the Sexual Revolution: Intimate Life in England 1918-1963* (Cambridge University Press, 2010).

22 See Bell J's discussion of the House of Lords decision of *G v G* [1924] AC 349 and its endorsement of the idea of 'gentle violence' by the husband in the marital bed: *PGA* (2012) 245 CLR 355 [228].

23 William Blackstone, quoted in Fuller, above n 2.

24 Jeremy Bentham, quoted in Fuller, above n 2.

25 Fuller, above n 2.

26 Ibid.

27 Ibid 367.

28 The philosophical and legal concept of 'as-ifness' is propounded at length by Hans Vaihinger, *The Philosophy of As-If* (C K Ogden trans, Kegan Paul, 1924).

Acknowledgement of falsehood is at the heart of a legal fiction[29] and this ability to deem something into legal truth, for legal purposes, is the basis of its utility. The governing idea is that in a certain legal context, for legal reasons, something will be said to be true. Law will treat x as y, in this legal circumstance, in this relation, for this reason, and we, as lawyers, are positively aware of and responsible for this fabrication, this acknowledged fiction, which we employ for our acknowledged ends — conscious of and responsible for what we are doing. As Lon Fuller pointed out, when a true legal fiction loses its sense of falsehood, it dies as a fiction, and so loses its legal sense and function as a fiction.

This use of the term 'legal fiction' therefore calls attention to the manufactured nature of this legal concept: that lawyers are responsible for this invention (even though the majority in *PGA* do not want to be seen as inventive). And it calls attention to the fact that there is a deliberate falsehood — a treatment of something as *legally* true though empirically it may not be true. Its empirical falsehood is noted and then deemed legally irrelevant: for legal purposes, it will be true. It also calls attention to the fact that the falsehood is necessarily for a legal purpose — it must do legal work. It invites us to reflect on these legal ends, the work being done by the fiction.

C. THE MARITAL IMMUNITY EXPLICITLY CONSIDERED AS LEGAL FICTION

The marital immunity is rightly interpreted as a legal fiction, we suggest, because it relied on an *acknowledged* falsehood to give it legal life. There was an *acknowledged* falsehood because something critical to the relevant legal norm was treated as if it were the case, though it was known not to be so. The legal fiction demanded the recognition of a falsehood (which for legal purposes was deemed to be true) and here the acknowledged falsehood concerned the sexual decision-making of the wife. The acknowledged falsehood was that wives always consented to sex with a husband, when it was known that in truth their consent was sometimes absent, and yet sex was still forced. The immunity was a true legal fiction as it positively relied on the falsehood that wives always consented to sex with their husbands. The fiction was needed to get around the inconvenient truth that the will of the husband was not always the same as the will of the wife.

We are then prompted to consider the work that the fiction was doing if it operated as such, as the purpose of a legal fiction is to do legal work. And it seems that the work it must have been doing was to keep the criminal law of rape out of marriage. The wife would be presumed to consent to sex and so rape law would have no purchase once marriage was achieved.

The great expositors of the common law were unashamed when pronouncing on the legal fiction that was the immunity and its essential legal purpose. From Hale to

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29 The corporation is neither a human being nor a 'person', though it is called one in law: it is deemed to have a legal existence as a legal person.

Blackstone, from Glanville Williams to Colin Howard, it was stated without apology that the criminal law of rape had no place in the marital bed. Such disagreements should not be settled by the criminal law. From the early eighteenth century to the late twentieth century the true legal fiction was not only declared and redeclared but found to be good. If the wife wanted to resort to the law of rape, she must get herself out of the marriage.

In 1976, when SA became the first jurisdiction in the common law world to repeal the immunity partially, it used the language of the legal fiction: 'No person shall, by reason only of the fact that he is married to some other person, be presumed to have consented to sexual intercourse with that other person.'[30] It recognised that a presumption had been operating to keep rape law out of marriage and it permitted the criminal law back in by eliminating the presumption — by disestablishing the deeming (but only for aggravated rapes).

The High Court was, in effect, invited to regard the immunity as this true legal fiction by Mr Bennett (counsel for Mr P) when he asked the court to contrast the operation of rape law and assault law within a marriage. Mr Bennett explained to the Court that for both offences an essential legal element was non-consent to the use of force but that when the parties were married this element of non-consent could only have legal purchase within the crime of assault, because of the operation of a legal fiction (a deeming) in relation to the crime of rape. That is to say, for the purpose of assault law, the actual non-consent of the victim must be proven. The prosecution had to produce evidence of non-consent and should it prove persuasive, the defence would need to reply to it. For the purpose of rape law, however, when the parties were betrothed, there was no basis upon which the prosecution could proceed. A legal fiction would be employed to deem / presume consent to be present and so the marital rape case could not even get off the ground.[31]

D. LEGAL FICTION AS DISTINCT FROM FALSEHOOD

Though the term 'legal fiction' is employed both by the South Australian Supreme Court and the High Court, both tend (but not invariably) to use it to mean a falsehood. When they say 'fiction', they do not mean the true legal fiction. Instead they say that law which lacks its underlying legal foundation, as the marital immunity is said to lack, has become nothing more than a 'legal fiction' and so must be rejected as false. The immunity, they say, is something that has lost its meaning, its purpose, its truth and as a consequence is to be dispensed with. Thus they seek to distinguish real law from fictitious or false law and they use the term 'legal fiction' to convey legal falsehood. And a legal falsehood, which is how they characterise the immunity, must be rejected because it is no longer good law. But this is a surprisingly unlawyerly use of the term

30 *Criminal Law Consolidation Act Amendment Act 1976* (SA) s 73.

31 As the Court made clear in the landmark case of Morgan, this is why Mr Morgan was not charged with the rape of his wife as a principal offender. See *R v Morgan* [1976] AC 182.

'legal fiction', for a legal fiction is of course real in the world of law and it is real law. Here the courts are not employing the technical legal definition of legal fiction which is an acknowledged falsehood, treated as true, for a legal purpose.

E. MORE ON THE SINISTER WORK DONE BY THE LEGAL FICTION, PROPERLY UNDERSTOOD

Though the majority of the High Court refers to 'the fiction' of the immunity, it fails to consider the practical operation of the marital immunity as a legal fiction in its true sense.[32] Thus treated, as a true legal fiction, it is chilling in its implications for the integrity of criminal law and for women and the majority is unwilling to examine and concede them. (They are manifestly repulsed by Bennett's efforts to have them see it this way.) To reiterate: the marital immunity as a true legal fiction entails a positive deeming that the wife has consented to intercourse, for the purposes of the law of rape, when it is known that she has not (or might not have: for the purpose of the fiction it doesn't matter either way). With the immunity as true legal fiction, criminal law does not even allow her to rebut this presumption. Demonstration of the falsehood of that consent (non-consent) is not a reply to it because falsehood is the essence of the fiction. It does not destroy the fiction: it is its very basis. Necessary to the logic of the presumption (this deemed consent) is its admitted falsehood.

As a legal fiction, the wife's consent is deemed to exist, achieving the legal purpose of removing her from the protections of rape law. The presumption is needed to overcome the practical fact that the wife succumbs to sex because of the use of force; this would otherwise amount to the very serious crime of rape. The intended legal effect must be to render the potential accused immune from prosecution for the crime of rape, even though he has achieved intercourse without consent. That is, he has forced sex.

A bracing examination of the immunity as a legal fiction thus demands an honest look at the unsavoury legal work being done by such a conscious falsehood. And to repeat, the intended legal effect of the immunity as a legal fiction can only be to exclude the husband, as offender, and the wife, as victim, from the reach of rape law. As a legal fiction, this must precisely be its purpose. Criminal law becomes absolutely complicit in the rape of the wife — and this is what Bennett tells the Court. He insists that this true legal fiction and its sinister function be acknowledged; that the Court recognise 'the Dark Ages' of the Australian common law of rape.

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32 By contrast Bell J in her dissenting judgment does allude to such a fiction albeit briefly. She suggests that by 1963, the date of the alleged rape, the law may have abandoned 'the fiction of the wife's irrevocable consent' and come to rely instead on 'the notion that the criminal law ought not to intrude into the marital bedroom': *PGA* (2012) 245 CLR 355 [173]. In the latter case, one supposes, the rape is implicitly acknowledged but still criminal law is regarded as an inappropriate response. Either way, the immunity existed, in her view.

The concession made to the wife, as Bennett also invites the court to see, is the recognition that any force beyond that required to achieve the rape *will* attract the law of assault. The criminal legal purpose is to give the wife some protection from the offences against the person, but not all. The husband retains 'the marital right' of sexual access to his wife with or without her consent: the law thus condones the use of force to this extent. And it is not just that the criminal law of rape is neutralised. It would seem that the criminal law of assault is also neutralised, to the extent that that assault is required to assert the right of intercourse, and that criminal law even sanctions the force employed to achieve intercourse.

For a now startling demonstration of this way of legal thinking, one can turn to the standard authoritative Australian textbook of criminal law by the distinguished scholar Colin Howard who is invoked, respectfully, by the High Court. Howard coolly pursues the logic of the criminal law of rape and assault when the (potential) accused is married to the victim.

> If a husband cannot be guilty of rape upon his wife, it follows that he is entitled to overcome her resistance to intercourse. Logically, since rape is an aggravated assault by the fact of intercourse, it follows that if V cannot withhold her consent to intercourse she cannot withhold her consent to an assault made for the purpose of achieving intercourse; so that the law of assault cannot reach a husband who attacks his wife unless the attack is not for the purpose of overcoming her resistance to sexual relations.[33]

In the case of the husband, he says, the law of assault is reserved for 'the brutal attack' and 'unjustifiable brutality' which exceeds the needs of the legitimate purpose of subduing the wife for sexual purposes. Here is a clear statement from Australia's leading criminal law scholar of the time that criminal law includes an idea of justified force against the wife who is unwilling to engage in intercourse.[34]

The High Court was sensitive to this unsavoury operation of the two laws, of rape and assault, and spent some time trying to make sense of it. This is the most explicitly chilling part of the judgment, as the court, with evident reluctance, tries to imagine the point at which the force needed to achieve sex, which was covered by the immunity, becomes force for the purposes of the law of assault, which was not so covered. Howard was less squeamish: he maintained, without flinching, that the husband rightly employed force to achieve sex with the law's sanction. His force was legally justified.

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33 Colin Howard, *Criminal Law* (Law Book Co, 3rd ed, 1977) 62–3. It is surprising that this statement is even made after the passage of the SA law which partially criminalised wife rape. It is also to be found in the 1965 edition and is essentially replicated twelve years later.

34 Ibid. Significantly the term 'justified' is used in criminal law to convey the notion of moral right (as opposed to a mere excuse).

Ultimately the majority does not concede the role of law in condoning the husband's use of force to obtain sex via the true legal fiction. Instead it denies the operation of the true legal fiction and treats the immunity as bad or false law. Denial is the essence of its judgment.

III. Myths

Like a legal fiction, a legal myth is not simply a falsehood. Denouncing a myth as a falsehood for its failure to correspond to empirical facts altogether misses the point of a myth. A myth does not refer to facts that objectively exist *in* the world; instead, it refers to ideas about the world that allow us subjectively to make sense *of* the world. It recreates the world in the mind's eye. It is a conscious choice in the interpretation of history and reality.[35]

Like fictions, myths are capable of deeming something into being. Both fictions and myths rely on what Vaihinger termed 'the philosophy of as-if': they spring from 'the will to illusion'.[36] Historically, an event may not have happened, but the law will treat it as if it had happened. Factually, we know that an assertion is not empirically true, but the law will deem it to be true for legal purposes. Fictions and myths therefore have a common character, but they operate at different levels: fictions operate at the level of substantive law, while myths operate at the level of broad justificatory theory, to give meaning and legitimacy to law proper.

Our focus in this paper is on the common law. However, before delving into the common law myth, it is useful to consider briefly a prominent legislative myth to illustrate the general point about legal myths. A prominent legislative myth is that statutes passed by a democratically elected legislature are legitimate because they represent the popular will of the people. This is the legislative myth of popular legitimacy. Treated as a factual matter, it is highly questionable, if not completely false. Various empirical studies have demonstrated that, in the passing of statutes, legislatures respond primarily to the lobbying of interest groups and they are often motivated by factors other than the popular will.[37] Denouncing this myth as a falsehood for its failure to correspond to empirical facts misses its point. The legislative myth functions as an imaginative framework within which citizens view their relationship with the legislature, and the relationship between the legislature and the judiciary. The legal discourse proceeds *as if* parliament speaks in the voice of the

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35 See Mary Midgley, *The Myths We Live By* (Routledge, 2003); Mark Schorer, 'The Necessity of Myth' (1959) 88 *Daedalus* 359; Robert Tsai, 'Fire, Metaphor and Constitutional Myth-Making' (2004) 93 *Georgetown Law Journal* 181; Igor Grazin, 'Law is Myth' (2005) 18 *International Journal for the Semiotics of Law* 23.

36 Vaihinger uses the phrase 'will to illusion' to describe Nietzsche's philosophy: Vaihinger, above n 28, 341.

37 K Scott Hamilton, 'Prolegomenon to Myth and Fiction in Legal Reasoning, Common Law Adjudication and Critical Legal Studies' (1989) 35 *Wayne Law Review* 1449, 1476.

people, and our institutional practices are structured around that myth. This myth then gives rise to a rule and a fiction in statutory interpretation. The rule is that, in statutory interpretation, judges should abide by the will of parliament. The fiction is that the parliament, speaking as it were in the voice of the people, has a single unitary will. Judges know, as a matter of fact, that parliament is dominated by ideological divide and partisan bickering, but they proceed *as if* parliament has a unitary will, *deeming* it to represent the will of the people.

The common law method is similarly reliant on an even older common law myth: the declaratory theory of the common law. This myth plays an important role in *PGA*. Counsel for the appellant in *PGA*, Mr Bennett, helpfully described the theory thus:

> According to the declaratory theory, when judges declare the common law, they are not making law but are really only 'revealing' what it is and has always been ... It follows that, when the law is declared, it will apply to all cases regardless of how long ago the incidents giving rise to them may have occurred.[38]

The declaratory theory of the common law has been the object of sustained criticism. In a famous and oft-quoted speech, Lord Reid maintained:

> There was a time when it was thought almost indecent to suggest that judges make law — they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him [or her] knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the password and the wrong door opens.[39]

Legal realists have condemned the theory as blatantly and patently false; there is no eternal law waiting to be found and revealed by judges; 'the common law is not a brooding omnipresence in the sky'.[40] As a matter of fact, they say, judges make law. Judges obviously do make law, but perhaps this critique misses the point. The common law myth of the declaratory theory is not about what judges do. Rather, it is about how judges imaginatively reconstruct what they do. The common law myth functions as an overarching imaginative framework within which judges subjectively see and interpret their role in the legal order. The myth leads judges to contextualise and conceptualise their judicial function in a particular way. We see that process of myth-making in action in *PGA*. The myth of the declaratory theory may not be the complete explanation for the legal reasoning in *PGA*, but it is at least part of the explanation. As

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38 *PGA* (2012) 245 CLR 355, 357.

39 Lord Reid, 'The Judge as Lawmaker' (1972) 12 *Journal of the Society of Public Teachers of Law* 22, 22.

40 *Southern P Co v Jensen*, 244 US 205, 222 (1917) (Holmes J).

Allan Beever seeks to show in a recent article, 'despite contemporary condemnation of the declaratory theory, the modern law remains committed to it.'[41]

In *PGA*, the majority of the High Court began its judgment with a definition of the common law. They adopted AWB Simpson's five-pronged definition of the common law. The common law is: (i) a body of non-statutory law, (ii) a body of law administered historically by the three royal courts of justice in England, (iii) a body of law that is differentiated from the principles of equity administered in the Court of Chancery, (iv) a body of case law, and (v) a body of judge-made law.[42] With British colonisation, this body of law was transplanted to various colonies, resulting in the creation of what the High Court called 'a common law world'.[43] The High Court's use of the word 'world' here is instructive. It provides the first hint in the judgment that the corpus of the common law is not reducible to a set of rules.

James Boyd White, in his seminal work on *The Legal Imagination*, argues that 'the law makes a world': 'I think that law is not merely a system of rules or reducible to policy choices or class interests but that it is rather what I call a language, by which I do not mean just a set of terms and locutions, but habits of mind and expectations — what might also be called a culture.'[44] The majority in *PGA* recognised this imaginative aspect of law when they stated that, in addition to the substantive rules of the common law, 'what was received included the method of the common law'.[45] The legislature or the judiciary may change the substantive rules of the common law from time to time, but habits of mind persist. The common law world, with its culture, language and habit of mind, is sustained by a common law myth. The mythic structure of the common law provides the imaginative framework within which the common law rules develop.

The majority in *PGA* advanced two interrelated propositions. First, the Court concluded that 'if the "marital exemption" ever was part of the common law of Australia, it had ceased to be so by the time of the enactment in 1935 of s 48 of the *Criminal Law Consolidation Act* and thus before the date of the commission of the alleged offences'.[46] Second, the Court asserted that this conclusion did 'not involve any retrospective variation or modification by this Court of a settled rule of the common law [because] at the time of the commission of the alleged offence the common law rule for which the appellant contends did not exist'.[47] The legal effect of these two propositions was that the accused could not be shielded from the criminal charge of rape on the basis of the marital exemption.

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41 Allan Beever, 'The Declaratory Theory of Law' (2013) *Oxford Journal of Legal Studies*, advance access, available at: http://dx.doi.org/10.1093/ojls/gqt007.

42 *PGA* (2012) 245 CLR 355, 370.

43 Ibid 371.

44 James White, *The Legal Imagination* (University of Chicago Press, 1973).

45 *PGA* (2012) 245 CLR 355, 371.

46 Ibid 369.

47 Ibid.

The High Court adopted a circuitous route to get to the result they wanted through the common law myth of the declaratory theory. The marital rape immunity, they asserted, had vanished by the time the accused committed the alleged offence. The majority went out of their way to reassure us that they were not making any changes to the law; they were merely declaring the state of the law as it was at the time of the offence. The passive voice is crucial in understanding the judicial reasoning that is at work here: the law, we are told, *had* changed. The judges were not the agents of change, but the discerning observers of change. Their role was limited to finding and recognising those changes, and declaring them as such. The court did not abolish the marital rape exemption; it merely declared its non-existence. There is no problem of retrospectivity because at the time of the commission of the alleged offence, the marital rape exemption simply did not exist, or had ceased to exist.[48]

This (re)statement of the law is a striking example of judicial creativity. It allowed the court to achieve two different goals. First, it allowed the court to permit the trial of the accused to proceed, without having to uphold the morally despicable exemption for marital rape. To do otherwise could have exposed both the court and the common law to public censure. Second, it allowed the court to circumvent the prickly issue of retrospectivity. In (re)constructing the rule regarding rape within marriage in this way, the Court made the classic Fullerian move of blending the 'is' and the 'ought': the law ought to prosecute rape within marriage, and the common law, constructed and understood in a certain way, already allows for that, at least since 1935 if not earlier. This master stroke of judicial creativity in rule-construction was presented as a piece of judicial passivity, which was, in turn, made possible by the common law myth of the declaratory theory.

To arrive at the audacious conclusion that the marital rape exemption simply vanished sometime before 1935, the majority had to make several intellectual

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48 One could contrast the circuitous route taken by the High Court with a more direct route that could have been adopted by considering the line of reasoning recommended by Hart in the Hart–Fuller debate. In the Hart–Fuller debate, Hart raised the case of a woman who denounced her husband to the Nazi authorities for insulting remarks he made about Hitler while home on leave from the German army. After the war, the wife was prosecuted for unlawfully depriving her husband of his freedom. The wife pleaded that her husband's imprisonment was pursuant to the Nazi statutes and hence, she had committed no crime. Hart's proposed solution was that, 'if the woman were to be punished, it must be pursuant to the introduction of a frankly retrospective law and with a full consciousness of what was sacrificed in securing her punishment in this way': H L A Hart, 'Positivism and the Separation of Law and Morals' (1957) 71 *Harvard Law Review* 593, 619. The High Court in *PGA* could have proceeded along this line of reasoning. The majority could have said that marital rape is an odious and hideous act, no matter when it was committed; the evil of leaving the perpetrator unpunished would be far greater than the evil of retrospectivity, and therefore, the court would retrospectively abolish the marital exemption in order to bring the perpetrator to justice. But the High Court did not do that.

manoeuvres which drew heavily on the common law myth of the declaratory theory. One was to invoke the radical temporality of the common law. According to the majority judges, 'the term "common law" might be understood not only as a body of law created and defined by the courts in the past, but also as a body of law the content of which, having been declared by the courts at a particular time, might be developed thereafter and be declared to be different'.[49] Quoting John Salmond, the majority judges asked us, the readers, to imagine the tooth of time eating away an ancient precedent and gradually depriving it of all authority.[50] The radical temporality of the common law is a corollary of the traditional notion that the common law is founded on the custom of the realm. As the common law is founded on custom, its force should then lie in its continued and consistent use.

Insofar as custom has existed since time immemorial, the common law has claimed to have existed since time immemorial. However, the immemoriality of the common law itself does not entail the immortality of individual common law rules. The force of precedents may be extinguished by desuetude. A precedent case may be distinguished to the point where its scope of application is so narrow that it becomes irrelevant and eventually extinct. The common law is thus capable of self-transformation. According to the common law myth of the declaratory theory, when that point is reached, the role of the judge is to declare that the common law rule that is associated with the anomalous case has ceased to exist. Hence, the majority judges did not have to abolish the marital exemption: they merely had to declare its non-existence as a *fait accompli*.

One way a common law rule could cease to exist was through the automatic operation of the common law maxim: *cessante ratione cessat lex*. As elaborated by the majority judges in *PGA*, it means that 'where the reason or "foundation" of a rule of the common law depends upon another rule which, by reason of statutory intervention or a shift in the case law, is no longer maintained, the first rule ... is not to be maintained'.[51] The two instances of statutory intervention cited by the majority were the legislation granting women greater access to divorce[52] and the legislation granting women the right to vote.[53] Prima facie, these two laws say nothing about the marital exemption for rape. A stretch of legal imagination is required to draw the connection between these two pieces of legislation and the marital exemption for rape; an even greater stretch of legal imagination is required to characterise the former as removing the foundation for the latter.

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49 *PGA* (2012) 245 CLR 355, 371.

50 Ibid, quoting John Salmond, 'The Theory of Judicial Precedents' (1900) 16 *Law Quarterly Review* 376, 383.

51 *PGA* (2012) 245 CLR 355, 373.

52 See, eg, the *Divorce Amendment and Extension Act 1892* (NSW) and the *Divorce Act 1889* (Vic).

53 *Commonwealth Franchise Act 1902* (Cth).

To make the connection between the divorce legislation and the marital rape exemption, the majority cited a ruling by the Supreme Court of New Jersey in 1981: 'In the years since Hale's formulation of the [marital exemption] rule, attitudes towards the permanency of marriage have changed and divorce has become far easier to obtain[;] the rule, formulated under vastly different conditions, need not prevail when those conditions have changed.'[54] To draw the connection between the franchise legislation and the marital rape exemption, the majority cited the following statement by Isaacs J in *Wright v Cedzich* to show that, by 1930, 'women [were] admitted to the capacity of commercial and professional life in most of its branches, [and were] received on equal terms with men as voters and legislators.'[55] However, the legal connections between these two sets of legislative enactments and the marital rape exemption are tenuous. Other contemporary laws could have been selected showing the very opposite, to wit that women were not yet liberated, and this is precisely what the dissenting judges did and concluded.

A more commonsensical line of reasoning might have been to say that societal views about the status of women had changed between the time when Hale declared the marital exemption and the time when the alleged offences were committed. That change in the *zeitgeist* was reflected, inter alia, in the extension of the grounds for divorce and the extension of voting rights to women. Women were gradually being emancipated. The accused, insofar as he was living as a member of the community in 1963, ought to have known that it was not acceptable to treat his wife in the way he did. Due to changes in the societal perception of the status of women, the law too had changed.

Instead the court engaged in a narrower legal task, as they conceived it: that of declaring the common law as it spontaneously underwent change under the influence of selected statutes which they took to be critical to the evolution of the law. The majority judges chose to draw a tenuous connection between the divorce legislation, the franchise legislation and the marital exemption for rape. Not only did the majority refuse to concede the direct correlation between legal change and social change, they went a step further to disavow any influence of societal values on their judgment. As a final, parting message, the majority declared that:

> To reach that conclusion it is unnecessary to rely in general terms upon judicial perceptions today of changes in social circumstances and attitudes which had occurred in this country by 1935, even if it were an appropriate exercise of legal technique to do so. The conclusion follows from the changes made by the statute law, as then interpreted by the courts, including this Court, before the enactment of the *CLC Act*.[56]

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54 *State v Smith*, 426 A 2d 38, 42 (NJ, 1981).

55 *Wright v Cedzich* (1930) 43 CLR 493, 505 (Isaacs J).

56 *PGA* (2012) 245 CLR 355, 384.

To reframe the point in terms of the common law myth of the declaratory theory, the custom of the realm, upon which the common law is based, is legal custom, not social custom. When the judge declares that the common law has been changed, the judge is declaring a change in legal custom. Legal custom encompasses both the common law and statutory law. Hence, a change in statutory law is a change in legal custom. The judges in *PGA* thus construct law in general, and the common law in particular, as an autonomous field. The role of the common law judge is then to declare the law, i.e. the legal custom of the realm, uncorrupted by individual perceptions of 'changes in social circumstances and attitudes'.[57] Judicial reasoning, held captive by the common law myth of the declaratory theory, deems the law to be an autonomous sphere, and proceeds as if judges are the oracles of the true common law.

Under this mythic framework, if a judge wants to change the common law in line with changing social views of what the law ought to be, the judge is obliged to show that the law as it is already reflects the law as it ought to be. If the judge cannot be seen to be actively changing the law, the only solution is to blend the 'is' and the 'ought', and change the law beneath the cloak of judicial passivity. Therein lies the source of judicial creativity within the common law mythic framework. The majority judges in *PGA* wanted to get rid of the marital exemption, but in a manner which kept faith with the myth of the common law. And thus the judges did not 'abolish' the immunity; rather, it conveniently disappeared 'by the time of the enactment in 1935 of the *CLC Act*, if not earlier'.[58] Just when legal theorists acquire confidence that the common law myth of the declaratory theory is dead and gone, the case of *PGA* reveals otherwise. We are reminded just how much judges and jurists are still in the grip of that ancient common law myth.

Our primary object has not been to criticise the myth of the declaratory theory per se, nor to advocate its repudiation or abandonment. Indeed, this paper has highlighted the imaginative and creative dimensions of the myth. The common law myth has often been construed as giving rise to a deterministic, mechanistic and formalistic mode of legal reasoning. Lord Reid's satirical equation of the common law myth with the Aladdin cave metaphor is an example of that stereotypical view. As the myth postulates that judges merely find, reveal and declare the law, the role of the judge can seem mechanistic. The problem with this account of the common law myth is that it fails to acknowledge the creativity inherent in the myth and the moral work thus achieved.

Within the common law myth, legal discourse proceeds *as if* judges do not make law, *deeming* their judicial statements to be mere declarations of the state of the law as it is. This judicial illusion of passivity — the deeming and the as-if — is itself a judicial creation. The common law myth may be traditionalist, insofar as it requires judges to be seen to renounce any personal creativity, reformist tendency or radical change in their judgments. However, that public renunciation does not mean that there

57 Ibid.
58 Ibid.

is no such creativity. A judge who employs the declaratory theory occupies, either explicitly or implicitly, the same position as Fuller's story-teller or Dworkin's Hercules. In Dworkin's theory of legal interpretation, Hercules is the mythical judge who 'decides hard cases by trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of their community.'[59] In so doing, the judge engages directly his or her own moral and political convictions to reconcile the 'is' and the 'ought'.[60] The judge finds the law, but in a way that gives the law its best interpretation. The act of creatively finding the law is what the common law myth of the declaratory theory allows, and indeed exhorts, judges to do. That creativity encompasses the reliance on myths and the deployment of fictions.

There is nothing inherently progressive or conservative about this judicial technique of manipulation. Within the narrative framework of the common law myth, a diverse range of rules could be constructed and fictions formulated. The triangulation of myth-making, fiction-writing and rule-construction could be used, and has been used, for both progressive and conservative ends. The declaratory theory is a means to an end; its 'goodness' is measured in relation to the ends it serves. But to evaluate the uses of the myth of the declaratory theory in a particular area of law, we need to be open and honest about the work that it does. The myth of the declaratory theory is ill-used when the myth is explicitly denied, but implicitly (and perhaps even duplicitously) followed. As we have sought to show in our analysis of *PGA*, when the power of the myth is denied, as myth, the judgment runs the risk of appearing naïve, formalist and obscurantist.

This paper is therefore not a critique of the myth of the declaratory theory as such; rather, it is a critique of the High Court's use of the myth. The majority judges denied that they were engaging in any creative judicial act of producing the best possible account of the law from a rather impoverished set of legal materials. Had the majority judges been candid about their efforts to produce a law of integrity from such slim legal pickings, they would at least have aligned themselves with the great mythical judges of the common law tradition, such as Fuller's story-teller and Dworkin's Hercules.[61] Instead, the majority of the High Court insisted that the common law was an autonomous field; that it underwent independent and spontaneous changes over time, sometimes under the influence of contemporary legislation and thus

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59 Dworkin, above n 6, 255.

60 Ibid 256; Fuller, *Law in Quest of Itself*, above n 4, 8.

61 From the available legal materials, the majority judges found a 'positive' version of the common law, which enabled the trial of marital rape to proceed. They could have told a different, and far less positive, story about the common law by reading the legal materials differently, as the dissenting judges did. Although the focus of this paper has been on the majority judgment, one could venture to posit that both the majority judges and the dissenting judges (Bell and Heydon JJ) worked within the same common law myth of the declaratory theory, but they read the available legal materials differently to arrive at divergent results.

it could remake itself; and that the court's 'humble' task was simply to divine this autonomous process of change. A better, more honest and convincing approach would have been to acknowledge the constructed nature of the common law: that it is treated *as if* it were autonomous, but that this is necessarily a legal invention.

The Court could have approached the issue with greater candour by acknowledging that its ruling was retrospective in a certain sense, but that is how the common law works according to the common law myth of the declaratory theory. The common law *deems* it to be non-retrospective. This result may or may not be just. However, it is only by calling it what it is, rather than wishing it away, that we are able to evaluate its justness. Unfortunately, the Court in *PGA* was in denial. Indeed, denial was the essence of its judgment.

IV. Conclusion

Common law rules are constructed amidst fictions and myths. Indeed the common law process of rule-construction is inseparable from the process of myth-making and fiction-writing. Notwithstanding the majority's vehement denial in *PGA*, they were actively engaging in rule-construction, and reconstruction, through the subtle manipulation of fictions and myths. The majority judgment in *PGA* is incomprehensible without an appreciation of the fictions and myths that underlie the judgment. The common law has a mythic framework which structures its method of reasoning. There is nothing inherently wrong with myths as long as we recognise them for what they are, and become conscious of what they do and the functions they serve.

The same could be said of fictions. The majority in *PGA* refused to recognise the true legal fiction: the immunity, the legal awareness of the falsehood of invariable wife consent, which meant that it must be deemed into existence, and the work that was done by that deeming. With their denial, they absolved the common law from responsibility for its positive deeming of the wife's consent into being, whether or not it was actually present. Failure to recognise this fiction was a failure to recognise the fact of wife rape and the role of law in giving it full licence.

The problem then is not with myths and legal fictions per se, but with the type and content of legal fictions that law constructs and the attention that is paid to the fact of their construction. As Fuller explained, the fiction does its best work, and is most useful, when its invention is acknowledged and there is an appreciation of the legal work done by this deeming into being. In *PGA*, the High Court missed an important opportunity to expose the true (and unsavoury) work of a common law fiction and to embrace an open creative approach to the reinvention of the common law.