ACTING LIKE A MAN: SEDUCTION AND RAPE IN THE LAW

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In the *Forsyte Saga*, the character of Soames asserts his rights and acts like a man. That is, he rapes his wife Irene. Soames' doubts about his behaviour are quickly put aside as he reflects that

> The incident was really not of great moment; women made a fuss about it in books; but in the cool judgment of right-thinking men, of men of the world, of such as he recollected often received praise in the Divorce Court, he had but done his best to sustain the sanctity of marriage, to prevent her from abandoning her duty.[1]

When Galsworthy was writing, as this often-quoted passage illustrates, a husband was not merely protected by the law when he entered the bedroom. The husband entered the bedroom in the name and majesty of the law. The husband's need *was* law. The wife's desire was acknowledged by the law as a permanent consent to its satisfaction.

It is only in the last ten years or so that a husband's immunity to a charge of rape upon his wife has come to an end. The most recent case in Australia concerning the principle of the husband's access to the body of his wife, decided by the High Court in 1991, confirmed that a husband no longer has such immunity.[2] The immunity was set aside in Scotland in 1989,[3] and in England in 1991.[4]

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1 Galsworthy, J, *The Forsyte Saga*, Book I (*The Man of Property*), London, William Heinemann, 1922, 315.

2 *Reg* v *L* (1991) 174 CLR 379.

3 *S* v *HM Advocate* (1989) SLT 469.

4 *R* v *R* [1991] 3 WLR 767.

The legal majesty of the husband's sexual need now looks somewhat diminished. Or so it might have seemed — until the remarks of Justice Derek Bollen in South Australia in a marital rape case in August 1992. In directing the jury, Justice Bollen said

> It seems to me that a wife always had the right to say no although, if she persisted in doing that unreasonably, it might be, in the old family law, thought to be something unreasonable.[5]

Apart from earning a place in the annals of tautology, such a comment seems to mark a return to older conceptions of what it is to act like a husband.

In reviewing Justice Bollen's direction, the South Australian Court of Criminal Appeal held that Justice Bollen erred in law.[6] The issue arising from Justice Bollen's remarks, however, is not merely whether he allowed his personal beliefs to intrude into the judicial process to an inappropriate extent. Nor does the issue merely concern what violence husbands are entitled to inflict on their wives. At issue is the very character of sexual relations between men and women in society: what will count in justice as seduction and what as rape, and what is a 'reasonable' level of force in normal, that is legally acceptable, sexual relations.

In dealing with sexual relations, the common law once worked with a distinctive rule for relations between husbands and wives. The courts took as axiomatic the dictum of Sir Matthew Hale that

> 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 herself in this kind unto the husband which she cannot retract.[7]

A husband's sexual access to his wife was part of the marriage agreement, and marital rape was not recognised at law.

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5 Transcript of Justice Bollen's decision, September 9 1992, p 14. See also Stenberg, M, 'Calls mount to sack judge in rape case', *Sydney Morning Herald*, January 13 1992.

6 See Stenberg, M and J Stapleton, 'Rape case judge erred in law — appeal court', *Sydney Morning Herald*, April 12 1993.

7 Hale, M, *Pleas of the Crown* (1678), London, Professional Books, 1972, vol. 1, at 629.

It was the husband's exemption from prosecution for the rape of his wife that John Stuart Mill had in view when he characterised the position of women in nineteenth-century England as one of slavery, centred around the tyranny of marriage. In *The Subjection of Women*, Mill noted that

> The vilest malefactor has some wretched woman tied to him, against whom he can commit any atrocity except killing her, and, if tolerably cautious, can do that without much danger of the legal penalty.[8]

In fact, claimed Mill, a married woman was in a worse position than a slave because she had no legal right

> to refuse to her master the last familiarity ... he can claim from her and enforce the lowest degradation of a human being, that of being made the instrument of an animal function contrary to her inclinations.[9]

That a man was married to the woman he raped was seen by the courts not just as one piece of evidence concerning her consent, but as a complete defence — although not to *all* sexual aggression on the part of the husband. A wife has *not* always had the right to say no to vaginal intercourse. However, sodomy apparently did not fall within the scope of Hale's dictum. In a case reported in 1839, Judge Patteson argued that it was a wife's 'duty' to resist sodomy 'to the utmost'.[10] (While the term sodomy at the time encompassed other 'unnatural' acts, the case at issue concerned anal intercourse.) And in 1988, the Court of Appeal in England affirmed that a wife's marital consent is not consent to fellatio, even if fellatio were a preliminary act to intercourse in the ordinary way. The court ruled that fellatio, while not unlawful, required *actual* consent on the occasion concerned if it were not to constitute an assault — and that such consent did not relate back to the marriage vow, contract or status.[11]

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8 Mill, J S, *The Subjection of Women*, in Robson, J M (ed), *Collected Works*, Vol 21, Toronto, University of Toronto Press, 1984 at 287.

9 *Ibid* at 285.

10 *Reg* v *Jellyman* (1839) 8 Car & P 604 [173 ER 637]. See also *R* v *Hornby*, noted [1978] Crim L R 298, and the discussion in the divorce case *Statham* v *Statham* [1929] P 131. But cf the ruling of a judge of the County Court in Victoria in *Re C* (1985), cited in Scutt, J A, 'Judgments of Right Thinking Men: Marriage Rape and Law "Reform"', (1986) *Scarlet Woman*, no. 21 at 23.

11 *Reg* v *Kowalski* [1988] 1 FLR 447.

Apart from such caveats, the courts left the desire of a wife without protection against the assertion of her husband's need. The immunity of a husband to a charge of rape was first discussed at length in 1888, as a crown case reserved before thirteen judges.[12] The case concerned Charles Clarence, who, in the knowledge that he had gonorrhoea, had sex with his wife, who did not know and who contracted the disease. On appeal, Clarence's conviction for inflicting grievous bodily harm and assault was quashed on the grounds that fraud did not vitiate consent in relation to assault. While the case did not directly concern the question of whether a husband could be guilty of rape upon his wife, that question was canvassed in the judgments handed down.

Some of the judges in *Clarence's Case* argued that the wife's consent did not reach to those actions of her husband that endangered her health or caused her bodily harm. However, the majority argued that a wife has no right or power to refuse her consent. And Baron Pollock added

> Such a connection may be accompanied with conduct which amounts to cruelty, as where the condition of the wife is such that she will or may suffer from such connection, or, as here, when the condition of the husband is such that the wife will suffer.[13]

For more than fifty years, such remarks served to deter the bringing of charges of rape against a husband. What charges did come to the attention of the courts largely concerned the effect of various separation orders and decrees on a wife's consent.[14]

However, many judges did flinch from Baron Pollock's proposition that the right of access of a husband to his wife's body meant that he could use any level of force and violence, or inflict any degree of injury upon her, in the exercise of that right. In 1891, for example, the Court of Appeal ruled that a husband had no right to confine his wife by force in order to realise a decree for restitution of conjugal rights.[15]

From 1954 the courts developed more explicitly the position that, although it was not possible to convict a man for rape of his wife, he could be convicted for assault if force or violence were used in the

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12 *Reg* v *Clarence* (1888) 22 QBD 23.

13 *Ibid* per Pollock B at 64.

14 See for example *R* v *Clarke* [1949] 2 All ER 448 and *Reg* v *Miller* [1954] 2 QB 282.

15 *R* v *Jackson* [1891] 1 QB 671. Also see *Reg* v *Reid* [1972] 2 All ER 1350.

exercise of his right. In 1954, Peter Miller was charged with raping his wife while divorce proceedings between them were at a preliminary stage. Judge Lynskey, otherwise upholding Hale's dictum, held that Miller could be charged with assault and inflicting bodily harm for the force he used to get his wife to have sex. (The judge also held that 'injury to her state of mind for the time being', such as a hysterical and nervous condition, fell within the definition of actual bodily harm.)[16]

It is difficult to overstate the absurdity of the position to which Judge Lynskey came in *Miller's Case*. That is, a man could be convicted for assault upon his wife but not for the aggravated assault which it aimed to secure. In 1991, Lord Keith of Kinkel noted the 'strange result' of the case, namely that 'although the use of force to achieve sexual intercourse was criminal the actual achievement of it was not'.[17] Yet this strange absurdity offered at least some protection, not nothing, to the wife's desire.

It might be thought that, through the extension of such protection, the courts were developing a certain decency or discretion in relation to the violence of men's relations with their wives. But it is possible to see judicial recoil from the crude language of Baron Pollock in a rather different light. Less, that is, as increased delicacy towards women, and more as a refinement in methods of marriage counselling.

Apart from meting out punishments, judges also serve as counsellors or educators, even in the simple act of telling us when we will be punished and when we will not be. In cases involving relations between men and women, the judgments of courts inform us about what the character of sexual desire is, and when it can be rightly resisted or when it should be submitted to as 'reasonable' behaviour. Those judgments set out and convey, often very explicitly, a model of 'normal' sexual relations.

For example, we might see the courts as giving advice to men about the ways in which it is acceptable to make their wives engage in sexual relations — and advice to women about the character of male sexuality to which they must yield. Baron Pollock's construction of male sexuality pictures an imperious force. This picture of male sexuality has changed very little. After Baron Pollock, however, judges increasingly counselled men on how they might act like a man without recourse to gross cruelty. Judges did not so much flinch at the use of force, as advise how force

16 *Reg* v *Miller*, *supra n 14* per Lynskey J at 292.
17 *R* v *R*, *supra n 4*, per Lord Keith of Kinkel at 773.

short of 'cruelty' might be used to gain an actual consent, an actual consent which would qualify as 'success'.

A case in 1924, for example, concerned a husband's action for divorce on the basis of 'the unreasoning refusal of the wife to permit sexual intercourse'. The woman had told her husband that she wanted a spiritual union before the physical side of their relationship developed, and the husband seems to have acted with a degree of patience towards his wife for some time. At first hearing, the judges chided the husband for insufficient virility in his attempts to have sex with his wife. In the House of Lords, Lord Dunedin chimed in,

> It is indeed permissible to wish that some gentle violence had been employed; if there had been it would either have resulted in success or would have precipitated a crisis so decided as to have made our task a comparatively easy one.[18]

Lord Dunedin's approval of 'gentle violence' to procure 'success' both reflects and constructs a standard of normal sexual relations. If the consent of a woman can be gained, an otherwise criminal level of force becomes seduction. To act like a man, with sufficient virility, is to use the persuasion of gentle violence. A violent sex can be maintained as separate from rape, if force is seen as the 'gentle violence' of persuasion rather than as Baron Pollock's 'cruelty'.

And here we may rejoin Justice Bollen. By Justice Bollen's standards, the husband of the woman concerned could not be guilty of rape. *Not* because she was his wife, however. Rather, because she had agreed to the act, saying, 'I suppose you won't stop until you have it, so get it over with.' Justice Bollen summed up: 'That would be a consent, a reluctant consent.'[19] And as to how that consent can be obtained, Justice Bollen gives us lessons in persuasion:

> There is, of course, nothing wrong with a husband, faced with his wife's initial refusal to engage in intercourse, in attempting, in an acceptable way, to persuade her to change her mind and that may involve a measure of rougher than usual handling. It may be, in the end, that handling and persuasion will persuade the wife to agree. Sometimes it is a

18 *G* v *G* [1924] AC 349, per Lord Dunedin at 357.
19 Transcript, *supra n 5* at 26.

> fine line between not agreeing, then changing of the mind, and consenting.[20]

In explaining these remarks to the Court of Criminal Appeal, Justice Bollen noted,

> I was giving a direction of or making a comment on law. I was not offering a personal opinion. I was not 'condoning' any violence between husband and wife. Consistently with all right thinking people I do not think that a husband should lift a finger in anger against his wife.[21]

Justice Bollen continued his explanation of his direction:

> I did not have 'violence' as properly understood in mind. I had in mind persuasions by acts — acts of an acceptable type performed 'in an acceptable way'. I am confident that this jury would have understood 'acceptable' to have meant (as I intended it to mean) acceptable to the wife. I had in mind vigorous hugging or squeezing and pinching. I was directing the jury that if such acts acceptable to, and done in a way acceptable to the wife, did produce a changing of mind then there was consent. I was not discussing the desirability of such persuasion. If that persuasion was done by physical acts, done in an acceptable way and if it produced consent, then the second element of rape had not been proved.[22]

If this were indeed what Justice Bollen had in mind in talking of persuasion, it raises the further question of how certain behaviour comes to seem 'acceptable' to a woman, such that her consent to it makes it sex rather than rape. At the Court of Criminal Appeal, Justice Kevin Duggan noted that most difficulties with Justice Bollen's remarks as a statement of law would have 'evaporated' if Justice Bollen had added the words 'acceptable to the wife' in his direction. On the contrary, a whole new set of difficulties arises. For example, it becomes a question as to whether the pattern of physical abuse to which the woman concerned in this case was subjected by her husband can be understood as on a continuum with their sexual relations, that is, as a way of making sex 'acceptable to the wife'.

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20 *Ibid* at 13.

21 Report of Justice Bollen to SA Court of Criminal Appeal. Also see 'SA judge had hugging in mind', *Sydney Morning Herald*, March 16 1993.

22 Report, *supra n 21* at 4.

Implicit in Justice Bollen's counsel at the trial is the *idea* that it is acceptable and reasonable to use 'gentle violence' in sexual relations, especially when a woman suffers from a regrettable lack of sexual openness to her husband's need. As Justice Bollen noted:

> On any view of the matter, it does seem, speaking colloquially, that Mrs [J] had hang-ups which made engaging in sexual intercourse less easy for her than for many people.[23]

Apparently she didn't want it.

The cool judgment of men of the world is this: if women are not immediately available, they can be made so by a degree of gentle violence, and an acquiescence in fear and trembling can be counted as consent. Gentle violence becomes foreplay. As Senator Gareth Evans, speaking in Parliament, once reminded us, 'if rape is inevitable one might as well, if not enjoy it, at least succumb with such grace as one can muster in the circumstances'.[24]

In directing the jury, Justice Bollen noted very clearly that submission is not consent. However, when a mustered yielding to force can count as consent, rather than as submission, it appears as no puzzle that women fail to recognise forcible sexual relations as criminal sexual assault, as rape. Many women, as well as men, seem to have great difficulty in distinguishing between rape and sex, particularly intercourse in the home, in the kitchen and the bedroom where most assaults against women take place.[25] The majority of women assaulted are attacked not by a lunatic stranger on the street but by someone to whom they had entrusted their tenderness and care, whom they had at one time loved and perhaps continued to love. These women were assaulted by someone from whom they could *justly* expect reciprocity of tenderness and care.

When John Stuart Mill introduced the women's suffrage amendment to the 1867 Reform Bill, he argued that women could not rely on men for

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23 Transcript, *supra n 5* at 18.

24 *Hansard* (Senate), 24 February 1987, p 514. Senator Evans offered a personal explanation for his 'throw away line' to the Senate some days after: *Hansard* (Senate) 26 February 1987, pp 703-704.

25 See for example McDonnell, S, 'Most rape victims know their attacker, study finds', *Weekend Australian*, December 14-15 1991, and Houweling, S, 'Rape — and its shame', *Sunday Telegraph*, January 31 1993. More generally, see MacKinnon, C A, 'Rape: On Coercion and Consent', in *Toward a Feminist Theory of the State*, Cambridge, Mass, Harvard University Press, 1989.

protection and that their greatest threat came from the men closest to them. The home is notoriously the most dangerous place in the world for a woman. Justice Bollen's remarks present that danger as normal, and present its violence as an acceptable and reasonable form of seduction.

Many of us are accustomed to such levels of intimate brutality that many cases of domestic violence go unremarked as well as unreported. I am reminded of one of the defences to Mike Tyson's rape charge - that as Tyson was renowned for being a rough and brutal man, women who came near him could reasonably be expected to have consented to this level of roughness. As Sinead O'Connor noted, apparently without irony,

> Poor Mike Tyson ... He's only a tiny little baby and all of these people are trying to fuckin' kill him ... If he looks for solace in the arms of lots of women, what do you expect him to do?[26]

Justice Bollen instructs us in what we should expect a husband to do when he is seducing his wife. And he instructs us in what we should expect a man to do, and in how to recognise when he is acting as a man.[27] He educates us in what we can expect men to do who seek solace in the arms of women. He tells us that we should expect men to requite solace with brutality, that we should expect men to take advantage of the tenderness of those women. He tells us that we should expect a man to treat the woman with whom he seeks solace as a mirror of his own needs, not as a person whose very presence is worthy of and deserves respect.

Is it not possible for the law to instruct us that a man should love that in which he takes solace? Not the love of romantic devotion, perhaps, but the love of openness and attention to the presence of the other person concerned.

Such a question is of course open to attack on several grounds. If we were to take the presence of mutuality of desire or the absence of violence as the test of legally defensible sexual relations, a great deal of 'normal' or everyday sexual behaviour to which there is ostensible consent would be criminalised. This criticism hardly seems decisive. First, it evades the

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26 Light, A, 'Sinead Speaks', (1992) *Rolling Stone*, no. 478, 77.

27 To rephrase MacKinnon, CA, *Feminism Unmodified: Discourses on Life and Law*, Cambridge, Mass., Harvard University Press, 1987 at 173: 'Pornography codes how to look at women, so you know what you can do with one when you see one.'

question of *why* we accept rough handling as a feature of our everyday sexual behaviour. And secondly, such a criticism seems to construe sexual relations as blind surges of sensations demanding satisfaction, rather than as a complex of feelings and thought, of ideas about what *should* be unexceptionable and unpunishable behaviour. Most people, and most judges, now accept that a husband's use of violence against his wife, while certainly a feature of everyday life, should be punishable under the law and not just be seen as a harmless surge of affect.

I suppose it may sound like a highfalutin intellectualization to see passionate relations as involving ideas as well as surges and stirrings. However, stirrings are washed through and through with ideas, ideas about what a man is and what a woman is for.[28] No doubt each person has his or her own subjective motivations for intercourse. But underlying these different motivations, and structuring their expression, is a common idea about what a woman is and how to use one. This idea rests on a commonplace fantasy, a fantasy that women and their bodies are there for the expression of men's needs.[29] And judges and the law have played a decisive part in the construction of this fantasy.

It is of course a common excuse that men who abuse or harm women are themselves wounded, that they are sick or fearful or incapable of love.[30] But what is at issue in violence against women, whether it is crude, gentle or rougher than usual, is *not* a sickness or weakness, not even hate. What is at issue is a failure of love. Such violence is a failure of love in the sense that it is a refusal of attentive openness to the particular persons from whom shelter has been sought.

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28 This position is elaborated upon, in somewhat different contexts by, for example, Nussbaum, M, 'The Stoics on the Extirpation of the Passions', (1987) 20 *Apeiron*, 129, and Leitz, CA, *Unnatural Emotions: Everyday Sentiments on a Micronesian Atoll and their Challenge to Western Theory*, Chicago, University of Chicago Press, 1988.

29 See Dworkin, A, *Intercourse*, New York, Free Press, 1987 at 48.

30 In a recent case, the Victorian Court of Criminal Appeal overturned the ruling of a judge who imposed a lighter sentence on a rapist after concluding that the victim was not 'traumatised' because she was unconscious during the attack. Justice Norman Michael O'Bryan reportedly noted in his judgment of 10 November 1992: 'The sexual attack was probably a spontaneous reaction to the circumstance that the victim was opportunely in a secluded place and provided an easy target for your pent-up lust'. Justice O'Bryan also described the man as 'unlucky in love'.

What is at stake in this violence is *not* merely an emotional weakness, for we are all passionate, weak and vulnerable creatures in search of solace. Men's violence against women relies on a construal of that common weakness as a license to harm and maim and even to kill. This violence is founded on an idea, or rather a structure of thought and feeling, which implies that another person is there for one's own ends, not for her own. Even more than harm and injury then, brutality against women is a violation of love, and hence of justice.

In cases concerning sexual relations, the conduct of trials and the words of judges convey ideas about love and justice which powerfully shape our perceptions of what is acceptable and reasonable in our intimate lives. The idea Justice Bollen conveys is that a woman's yielding to the persuasion of gentle violence is consent, and that a man's successful practice of such persuasion is virile seduction. These are dangerous lessons to teach in the school of the passions.

Quoted in Gosman, K, 'Judges on trial: Are they asking for it?', *Sydney Morning Herald*, 14 May 1993.