Fudan J. Hum. Soc. Sci. (2018) 11:129–144
https://doi.org/10.1007/s40647-018-0217-z

ORIGINAL PAPER

Criminal Law and the Moral Education of Men

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Received: 29 December 2017 / Accepted: 21 February 2018 / Published online: 6 March 2018

Abstract For much of its history, the criminal law of England, and hence of its colonies, counselled husbands to control and correct their wives. The ability to exercise effective domestic authority was an important index of manliness. So too was the willingness to use measured force in order to secure sexual relations with an unwilling wife. Criminal law thus immunised husbands from the crime of rape. The great political theorist John Stuart Mill condemned these extensive powers of the husband and called the patriarchal family a 'nursery of the vices'. The leading Victorian criminal law jurist James Fitzjames Stephen took the opposite view. The manly man should take control of his little kingdom of the family and criminal law should cede him his sex rights, as it did. Modern criminal law has modernised men and curtailed these rights to women. The husband's immunity from rape prosecution has been abolished. What was once endorsed in a manly man is now officially condemned. And yet the discipline of criminal law, as a whole, has not been reconsidered or reconceived. There has been remarkably little reflection about its gendered history and what is has meant for the past and present moral education of men.

Keywords Rape law · Marital immunity · Masculinity

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1 Introduction

The modern liberal individual of the modern democratic state is meant to be a civil person without a gender, anyone who can bear and exercise the full range of legal rights and duties, whether they are male or female. But if we examine the history of the moral and legal formation of the civil individual, especially through the jurisprudence of criminal law, we discover a less than civil male character: a man who has been accustomed to behaving badly especially in his relations with women, and with the aid of law. The great social and legal power wielded by men over women, I suggest, has not been good for men and their moral education. It has made them uneasy bearers of equality.

British social historian John Tosh made such a point when he commented on 'the incontrovertible fact of men's social power' and what it did to men as civil persons. According to Tosh, 'men have seldom advertised the ways in which authority over women has sustained their sense of themselves as men' (Tosh 1994, 184). This was one of the reasons for the 'intense unpopularity' of the great political theorist John Stuart Mill in some circles: 'he voiced unpalatable truths in precisely this area—like his assertion in *The Subjection of Women* that "the generality of the male sex cannot yet tolerate the idea of living with an equal"' (Tosh 1994, 184).

The focus of this article is on mainly English criminal law and criminal lawyers and the ways that the most influential men of law—scholars, judges and lawmakers—employed criminal law to enforce and to justify their authority over women and so sustain their sense of themselves as men, but without advertising the fact. English criminal law has been enormously influential, spreading its rules and principles across the common law world and so shaping the criminal law of the modern period.

To make my case, I will draw heavily on the words of influential legal men about their own moral character, and their sense of civil conduct. By adopting the point of view of some of the most powerful men of criminal law, I let them speak for the mainstream of the discipline of criminal law. With Tosh, I will argue that for some of the most instrumental men of law, their 'authority over women … sustained their sense of themselves as men' and in a manner which compromised and even flouted their most basic principles, as jurists.

I suggest also that the best way to discover the moral character of legal men, *as men*, is to see how they defined themselves in relation to women, the other sex. And the place where they located and expressed these supposed gender differences, and felt them most keenly, was in their own homes and in relation to the woman with whom they were living and from whom much was expected—their wife. The criminal law governing this sphere is therefore very revealing about the character of men.[1]

In their public lives, the men of law—the lawmakers and the judges—had ensured that women were largely out of the way as competitors, commentators and as threats. Women were not permitted to occupy the most important public offices; they could not attend university; they could not vote; and upon marriage, their

[1] For a much fuller account of the role of marriage within criminal law, see Naffine (forthcoming).

money was handed over to the husband; and marriage was the main occupation permitted women. Until the final resolution of the persons' cases, statutes granting 'persons' the right to hold public office were taken to be referring to men, not women. This was made quite clear in the celebrated line of English and North American cases on women as legal 'persons'.[2] So in public life, for all of the nineteenth century and much of the twentieth century, men essentially dealt with men and their economic concerns and physical fears were directed at other men. And it was the harms that could be inflicted by men that men of legal influence sought to make criminal and punish.

Men's fears and concerns were therefore internal to their sex. In terms of the public lives of men, women had been on the whole eliminated as persons of any influence and judges repeatedly declared women not to be 'persons' up to nearly the fourth decade of the twentieth century. Middle class men had commerce with other middle class men and passed criminal laws to ensure that they were as safe as they could be, as they necessarily encountered other men in their public lives. Their fears for their own safety and their uses of criminal law were directed at other men, as Lindsay Farmer shows clearly in his recent history of English criminal law (Farmer 2016). Consistently, men are revealed to be the subjects and objects of public concern.

But at home, men had daily contact with the other sex and looked to criminal law to ensure that they were not impeded in the pursuit of their interests, which to put it simply were to have access to the person and the property of the wife. Mill declared that 'the generality of the male sex cannot yet tolerate the idea of living with an equal' (Mill 1991b, 500). And it was 'the living with' a woman who was legally and economically not his equal, which brought man's interests, perceived needs and own character, as a man, sharply into focus. An equal woman, a real other person, would necessarily have as her most fundamental right the ability to exclude all others from her person. Criminal law did not support the wife in this: it was employed positively and negatively to ensure that the husband could exercise personal control in the most intimate ways, including the use of force, and in a manner which was utterly anathema to criminal law as a general body of law and principle. In other words, he could lawfully rape her (Hasday 2000).

In this article, I use what is commonly referred to as 'the marital' or 'spousal' immunity from rape prosecution, as a barometer of men's changing mores, as codified by criminal law. The husband's rape immunity, I suggest, is a useful metric of men's changing moral standards for themselves. I cover a great sweep of time, and so my method relies on a small but judicious selection of influential legal men's writing and especially what they have had to say about the propriety of marital rape.

[2] The classic survey of the English and American persons' cases is Sachs and Wilson (1978).

2 Men Condoning Unprincipled or Immoral Conduct for Themselves (As They Themselves Defined Unprincipled Conduct)

The right not to be touched, without consent, and the right not to be hurt have been regarded as the moral underpinning of criminal law as a principled discipline, committed to ensuring civility in our public and private lives. The fundamentally accepted proposition is that criminal law and justice sets out to protect our physical selves, our so-called bodily integrity. The moral and political starting premise of the discipline is that we all, equally, have this right to exclude others from our bodies, sometimes called our persons. John Stuart Mill in *On Liberty* (1991a) called it our 'sovereignty', our very personhood.

To influential criminal law theorists, this State condemnation of unwanted intrusions and the associated use of force—from assault, to rape, to murder—continues to supply the moral centre or 'core' of their discipline. Repeatedly, the view is expressed that both rape and murder must be condemned outright, and this condemnation is essential to the moral legitimacy of criminal law. A polity which failed to make criminal such conduct, it is asserted, would be failing to respect the personhood of all and so could not call itself civilised. This is why rape and murder are often called 'core' or 'central' crimes (Feinberg 1984; Tadros 2005; Duff 2007; Simester and Von Hirsch 2011).

And yet the most influential men of criminal law suspended the requirement not to assault and not to rape in the case of the husband wanting sex with an unwilling wife (Ryan 1995). This spoke of self-interest and the abandonment of their own moral principles, those which they counted dearest. Legal scholars and jurists went along with this, accepting the immunity: sometimes explicitly; sometimes by implication; sometimes through silence. The rape immunity undermined the foundational claims of criminal law to protect our persons, impartially. And importantly for our men of law, it conferred on them powers over, and rights to, another which were antithetical to their foundational moral claims. It shaped their moral natures, suspending their moral duties and endowing them with rights to the person of another (Freeman 1981; Hasday 2000).

I wish to reflect on these moral compromises within the thinking of the men of law, how they managed and sublimated these tensions, because male right to women was so important to them, but so was their sense that they were doing no wrong by asserting it. This was a profound tension because marriage was fundamental to male life and male interests. Marriage, and their lives with women, was not just an incidental feature of men's lives. This was a sphere which men were positively expected to enter, occupy and dominate in order to become whole men (O'Donovan 1985).

I start this necessarily abbreviated inquiry into the character of the men of criminal law in roughly the middle of my study period, the 1970s, then cast back to the Victorian period and beyond, for the provenance of this thinking by legal men about male right to women. And then I will track forward to the end of the twentieth century and into the present and consider the implications for the moral education of modern men.

3 The Problem of the Mixed Morality of Men Illustrated: The Marital Rape Case of *DPP v Morgan* [1976] AC 182

One night in August 1973, in the English city of Wolverhampton, Daphne Morgan was home asleep in the bedroom of her young son, in a single bed, where she habitually slept. She was woken by the presence of four men in the room. One was her husband William Morgan, and the others were his friends. All were members of the RAF, but William was a good deal older and senior in rank. Daphne was seized and 'frogmarched' to another bedroom with a double bed and then serially raped. The three friends raped her first, with the incitement and physical assistance of her husband, and then William raped her too.

At trial, the three friends who were charged with rape informed the court that William Morgan had told them that his wife liked 'kinky' sex and that they should ignore any signs of struggle. They said that they believed they had her consent when she did in fact struggle and so were not responsible for rape. Morgan knew the truth of the matter, but he was not charged with rape as a principal offender because he was the husband.

Three years after the rapes, the appeal case of *DPP v Morgan* [1976] AC 182 was decided by the House of Lords and went on to become a landmark rape case (Farmer 2017). On the facts accepted by the court, the claims of belief in consent were found to be preposterous. But the court went on to assert that the man who did in fact genuinely believe he had consent, no matter how unreasonable that belief, did not have the guilty mind of a rapist. He was not criminally responsible.

William Morgan, the husband, was called to account for some things, but not for others. As the husband of the alleged victim, who orchestrated the group rape, William Morgan was not charged as the main offender and, it was assumed, could not be charged. *Morgan* is perhaps the most famous English case on the law of rape and probably the one that has caused the most controversy, but not for the immunity from prosecution of the main rapist. This fact about the case of *Morgan* passed with little comment. And I am particularly interested in the nature of the attention and inattention to *Morgan* as a marital rape case—what was noticed and thought to be of interest, and what slipped into the background. The scholarly response to *Morgan* suggests limited and selective concerns about the moral behaviour of men. Some forms of sexual violence were accepted (Morgan's rape of his wife); others were condemned outright (the rapes by the friends).

4 Contemporary Legal Experts Accepting the Immunity

Around the time of *DPP v Morgan*, a number of England's and Australia's leading experts in criminal law scrutinised and endorsed the husband's immunity from rape prosecution and even the associated violence. There was no doubt in their minds that marital rape per se, on its own, was lawful and appropriately so. The differences of agreement were about whether the attendant force would give rise to other offences against the person, such as assault, the rape itself remaining lawful. None

expressed deep concern about the immunity or found it of great intellectual or moral interest. Some explained why it made good sense. Later, when it looked like the immunity would be abolished, some actively protested.

The easy acceptance of the immunity, and the assumed good sense of it, was evident in the scholarship emerging from the leading law schools of Australia and England. Twenty years before *Morgan*, in 1954, Norval Morris and AL Turner had all but recommended the use of force by a husband against a wife in the following terms.

> Intercourse…is a privilege at least and perhaps a right and a duty inherent in the matrimonial state, accepted as such by husband and wife. …. If the wife is adamant in her refusal the husband must choose between letting his wife's will prevail, thus wrecking the marriage, or acting without her consent. It would be intolerable if he were to be conditioned in his course of action by the threat of criminal proceedings for rape (Morris and Turner 1954, 259).

Morris, with Turner, imagined wife rape as a sort of marriage problem: if a wife assumed unnatural authority, the husband might have to assert himself in this sexual manner. In their view, this was not a matter for criminal law.

In 1965, the author of Australia's leading textbook on criminal law, Colin Howard, declared that: **'**[A] husband should not walk in the shadow of the law of rape in trying to regulate his sexual relationships with his wife' (Howard 1965, 146). In 1977 and 1982, in successive editions of his criminal text, Howard examined the degrees of violence that the criminal law would tolerate from the husband wanting sex from an unwilling wife. He surmised that.

> If a husband cannot be guilty of rape upon his wife, it follows that he is entitled to overcome her resistance to intercourse. Logically … 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 (Howard 1977, 62–71).

It was only if the husband employed 'unjustifiable brutality' that he might be convicted of assault (Howard 1982, 163).

Glanville Williams, England's most influential criminal law scholar for much of the twentieth century, maintained a consistent position on the domestic power of the husband which he implicitly endorsed. In 1947, he described the marital unity principle—the principle that husband and wife are legally one person—as a 'venerable maxim'. He appreciated that 'the spouses' do not 'participate equally in the personality that is thus created for them', but did not regard this as a problem (Williams 1947, 16).

Decades later Williams spoke in defence of the husband's rape immunity and gave a variety of explanations and defences of the husband's sex rights. Williams was seriously worried about the exposure of the husband to criminal prosecution for rape. After all, the husband might act 'in pursuance of what he misguidedly thinks of as his rights' or he might be 'suffering from an unbearable sense of the loss of his partner by separation' or 'he may even, stupidly, think that by forcing himself upon her he may regain his affection' or he might be 'distraught by what he regards as the

unfaithfulness of his wife'. (Williams 1992, 13) And anyway 'rape by a cohabitee…though horrible cannot be so horrible and terrifying as rape by a stranger' (Williams 1992, 12). For all of these reasons the foolish husband 'deserves some consideration' (Williams 1992, 13).

Williams and Howard were not only leading scholars, but they held the levers of law making; they sat on the government committees that provided critical recommendations about the future of law; thus they provided instrumental advice, in the interests of men and against those of women (Criminal Law Revision Committee 1984).

In other ways, these men of law were committed to a principled criminal law (Williams 1983). Glanville Williams was a liberal progressive thinker who campaigned for abortion and euthanasia rights. Norval Morris campaigned for the rights of prison inmates. It is this progressivism which makes their thinking about the moral rights of husbands over wives more striking and perhaps more indelible. It suggests an entrenched system of thought and engrained attitudes about what was acceptable moral behaviour in a man, especially when he was at home with a wife.

5 Subjectivism: What *Morgan* Came to Stand For

Other members of the legal community spent a good deal of time studying the marital rape case of *Morgan* but made little of the non-prosecution of William Morgan, as husband. This fact hardly registered. Their attention was instead directed elsewhere, to other legal principles which were of greater disciplinary concern.

DPP v Morgan became intensely interesting to criminal legal scholars in quite another way and it becomes an important case in the ensuing analysis and teaching of criminal law, for decades (Wells 1982; Temkin 1982, 1983, 2002; Bronitt 1992). It came to stand for the principle that there should not be responsibility for very serious crime in the absence of subjective fault. In the case of rape, this meant that the accused must realise that the victim was not consenting. Even a grossly unreasonable belief in consent should be incompatible with responsibility. Rape and *Morgan* became a preoccupation of the scholar debating the appropriate mental state for truly serious crime and trying to ascertain the principled solution.

Meanwhile, *Morgan* was largely invisible to the scholarly community as a marital rape case—or rather as a case where the main rapist was considered legally incapable of rape, as a principal offender and so was not charged as such. An examination of the facts and charges in Morgan therefore demonstrates, in a dramatic manner, the selective and qualified manner in which criminal law criminalised rape and called men to account for forced sex. The reception of this case, and what it came to stand for, is also revealing. Lawful wife rape was a given thing, in the background of rape law. What was of real interest was how much a man had to know to be blamed for the rape of a woman to whom he was not married.

6 Going Back in Time: How Did Male Right to Another's Person Come to Seem Normal and Natural and Not a Perversion of Criminal Law? And Where Did It Come From?

In 1736, Sir Matthew Hale in his *History of the Pleas of the Crown* provided a brief statement of the sexual rights of the husband to the wife. Hale said 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 up herself in this kind unto her husband which she cannot retract' (Hale 1971, 629). This was written extra-judicially and published posthumously, but it came to assume the force of law, by sheer repetition (Lesses 2014). Hale has been revered over the centuries as a great jurist.

And yet late in his career, in 1662, Hale presided over a trial of two women charged with the crime of witchcraft, provided a condemning summing up to the jury, the jury swiftly convicted, and Hale sentenced these two old women to death and they hanged. Hale firmly believed in possession by the Devil, and at a time when belief in witches was in retreat, and Hale considered the criminal law an appropriate response to women who used their alleged powers to bewitch in order to harm others. This case then formed an important precedent for the Salem trials (Geis and Bunn 1997).

The more complete and chilling legal account of male right over women came from William Blackstone who is still feted for his *Commentaries on the Laws of England* (first edition 1765). Though Blackstone overstated the case, he wrote of and approved the legal annihilation of women *by men* and their legal absorption *into* a man, upon marriage.

> 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 and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything… her husband, [is] her *baron*, or lord; and her condition during her marriage is called her *coverture*. Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by marriage…For this reason, a man cannot grant anything to his wife, or enter into covenant with her, for the grant would be to suppose her separate existence: and to covenant with her would be only to covenant with himself… (Blackstone 1803, 442).

This statement of the doctrine of 'coverture' by Blackstone has come to be treated as an account of the incapacities of wives, neglecting the fact that it is as much a statement about the assumed rights and powers and the legal and moral character of men as husbands. It enunciates and approves a man's right to the money, the body, and in Blackstone's own words, the very 'existence' of the wife.

Coverture bloated and extended the married man: the property, the person and the very will of another became his. Rather than confining himself to his own human borders, as he was expected to do with other men, he was permitted to extend

himself into his wife. Hale and Blackstone supply the legal setting of the Victorians and are revered figures to the present day. I now make a leap forward in time to the Victorian period and reflect on the thoughts of two great public figures on the sort of male right endorsed by Blackstone. One was repulsed by the idea that men should exercise such domestic power; the other endorsed it.

7 The Victorian Debate

In 1869, a century after Blackstone, the political philosopher John Stuart Mill offered a powerful critique of marriage and considered its implications for the moral character of men. In *The Subjection of Women*, Mill described 'the law of marriage' as 'a law of despotism' with 'the wife [as] the actual bond-servant of her husband' (Mill 1991b, 501).

> Above all, a female slave has (in Christian countries) an admitted right, and is considered under a moral obligation, to refuse her master the last familiarity. Not so the wife: however brutal a tyrant she may be unfortunately chained to, though it may be his daily pleasure to torture her, and though she may feel it impossible not to loathe him - 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 (Mill 1991b, 504).

Mill openly recognised the abuses of married life, where uncivilised behaviour was permitted and indeed countenanced by the state—positively creating men of bad character. Mill was unusual in that he reflected on the implications of the rape immunity for male responsibility and accountability, how it shrivelled the moral personhood of men. To Mill: 'Even the commonest of men reserve the violent, the sulky, the undisguisedly selfish side of their character for those who have no power to withstand it. The relation of superiors to dependents is the nursery of these vices of character' (Mill 1991b, 509).

In *Liberty, Equality and Fraternity*, first published in 1873, James Fitzjames Stephen offered a direct reply to Mill. Stephen was arguably the most influential criminal legal scholar of the nineteenth century, a judge and also the uncle of Virginia Woolf. He said:

> There is something… unpleasant…in prolonged and minute discussions about relations between men and women, and the characteristics or women as such. I will therefore pass over what Mr Mill says on this subject with a mere general expression of dissent from nearly every word he says (Stephen 1993, 134–135).

To Stephen,

> There are some propositions which it is difficult to prove, because they are so plain, and this is one of them…men are stronger than women in every shape. They have greater muscular and nervous force, greater intellectual force, greater vigour of character….These are the facts, and the question is whether

> the law and public opinion ought to recognize this difference? (Stephen 1993, 138).

Stephen believed that it ought. For Stephen, criminal law should not regulate marriage. Rather the husband should. As his biographer observed, Stephen characterised 'marriage in terms of the ultimate supremacy (or sovereignty) of one party' (Smith 1988, 188).

Stephen's conviction that the powers of the husband extended to the person of his wife were revealed in another landmark case, *The Queen v Clarence* in 1888 (vol 22 Queen's Bench Division 23). Here, a husband was at trial charged and convicted for inflicting grievous bodily harm to his wife by transmission of gonorrhoea which he knew he had and which he also knew would cause his wife to refuse sex should she be told about it and so he said nothing. His conviction was quashed on appeal largely due to the reasoning of Stephen. Stephen insisted that the concealment of the disease did not destroy her consent and also that the transmission of the disease did not constitute grievous bodily harm. Along the way, Stephen also indicated that he accepted the marital rape immunity anyway, though this was not essential to the case, and so remained obiter (a statement of legal principle not essential to the final decision and so not officially binding on later courts of law).

Piecing together Stephen's judicial and extrajudicial writing on men, we can see that he was consistently and openly patriarchal. He cast the legal actor, law's primary rights holder and duty bearer, as a man and in his own image. Women were primarily thought of as wives who were under the protection and control of their husbands who were their natural superiors. Each husband was sovereign of his domestic estate. Stephen was dismissive of Mill's concerns—that such unqualified power would eat away at the characters of men (Smith 1988).

And Stephen was of course not alone in his thinking about the natures of men: why men were natural rulers in the domestic sphere and why they alone should exercise power in the public sphere, in so-called civil society. Among the Victorians, there was 'an unquestioned belief that men and women belonged to different categories' (O'Donovan 1985, 75).

I have already described the legal thinking of the middle of the twentieth century leading up to and around the time of *Morgan* in the 1970s. Then, the immunity of husbands from wife rape was still settled and accepted law and either drew little comment or was positively endorsed. I now consider the formal legal moves to remove the immunity and whether they led to a new critical view of criminal law and its permissive attitudes to male sexual violence in the home.

8 Modernisation/Assimilation/Revision in the 1980s and 1990s

In 1976, the author's home State of South Australia was the first common law jurisdiction in the common law world to criminalise rape in marriage, but, by statute, it confined the crime to aggravated rape. There was considerable resistance to even this change (Chappell and Sallmann 1982). In the 1980s, the various Australian state jurisdictions legislated to criminalise wife rape completely. Canada

did so in 1983. New Zealand did so in 1985. Other jurisdictions outside the common law world still regard wife rape as lawful (Ryan 1995; Hasday 2000).

In the last two decades of the twentieth century, the immunity was also considered and removed at common law, with minimal comment and without deep reflection. In 1989, the Scottish High Court of Judiciary employed the euphemistic language of female modernisation in *S v HM Advocate* 1989 SLT 469 in which it recognised the right of the married woman to complain of rape. The law was bound to change because married women had emerged out of status. 'By the second half of the 20th century … the status of women, and the status of a married woman, in our law have changed quite dramatically' (473). And so the law followed suit. Nothing was said about the changing moral character of men which was necessarily also implicated in this reform. After all, the change in law represented a reining in of male rights.

In 1991, the House of Lords in its abolition of the immunity in *RvR* [1992] 1 AC 599 employed similar, terse reasoning, when it too spoke of modernisation: '[of] the removal of a common law fiction which has become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it'. (611) The unfortunate implication is that it was not offensive before. In the same year, the Australian High Court in *R v L* (1991) 174 CLR 379 employed comparable rhetoric in the equivalent Australian judgment:

> The notion [of the immunity] is out of keeping …with recent changes in the criminal law of this country made by statute, which draw no distinction between a wife and other women in defining the offence of rape. It is unnecessary for the Court to do more than to say that, if it was ever the common law that by marriage a wife gave irrevocable consent to sexual intercourse by her husband, it is no longer the common law (389–390).

Here, there is even a suggestion that the Australian common law may never have recognised the immunity, though the entire legal community acted as if it did—from police, to prosecutors, to judges, to legal intellectuals. This idea was to be revived by the Australian High Court some 20 years later in 2012 when it formalised this liberal reinvention of the past.

9 *PGA v The Queen*

In *PGA v The Queen* 2012 HCA 21, the official tale of modernisation of the roles of men and women finds a recent reprise. In *PGA*, the Australian High Court was asked to decide whether a husband could be found guilty of the rape of his wife in 1963, whether it was a crime then known to law, and the majority of the court decided that he could be prosecuted because it was a crime. The court declared that by the 1960s, Australia was an enlightened country in its treatment of women by men so that the crime of rape could even be committed against a wife. Legal improvement had come early to Australia because Australia was an especially progressive nation. Thus, to the surprise of the Australian legal community and probably the common law world the Court declared:

> By the time of the enactment in 1935 of the Criminal Law Consolidation Act, [the relevant South Australian law] if not earlier (a matter which it is unnecessary to decide here), in Australia local statute law had removed any basis for [the immunity] …. as part of the English common law received in the Australian colonies. Thus, at all times relevant to this appeal, and contrary to Hale's proposition, at common law a husband could be guilty of a rape committed by him upon his lawful wife. Lawful marriage to a complainant provided neither a defence to, nor an immunity from, a prosecution for rape (par 384).

The dissenting judges decided that this was not so. They observed that the leading legal intellectuals of the 1960s and 1970s, such as Howard and Williams, claimed that a man could not be prosecuted for the rape of his wife and indeed that the crime was virtually never prosecuted. This was unfortunate perhaps, they implied, but it conformed to the thinking of the times. It was only in the late 1970s that South Australia criminalised the aggravated rape of a wife when there was exceptional violence, not just normal justified force (Chappell and Sallmann 1982). Other jurisdictions in Australia and the rest of the common law world then commenced a programme of criminalisation and modernisation of rape law through the 1980s and into the 1990s (Hasday 2000).

PGA is a tale of progress and enlightenment, of steady improvement; of bringing law up to date and ensuring its full and proper reach. There is little sense of the human rights abuses, by husbands of wives, sanctioned by a law which not only made rape lawful but also made lawful the force, otherwise known as assault, needed to achieve sexual intercourse when compulsion was needed. Rather there is anodyne talk of changing times. The revisionist history of *PGA* is not an open consideration of male misuses of law and the promotion of immoral conduct; it is more in the form of a denial that men were ever permitted by law to behave in this way (Larcombe and Heath 2012).

10 The New Modern Men?

So where are we now? I have argued that male sexual right was explicit in the Victorian period. It was still there in the middle of the twentieth century, but it was treated more euphemistically. By the end of the century, in the jurisdictions under consideration, male right to a wife was removed: the immunity of husbands from rape prosecution was steadily abolished and in the name of modernisation of women's lives rather than as a new limitation on the powers of men. And modernisation brings with it a new supposedly gender-neutral character: the person or the individual of the sexual and non-sexual offences against the person, now meant to encompass both men and women, without fear or favour. In the modern period, the search for legal principle is regarded as something which can be done without reference to the profoundly gendered history of criminal law.

What I have observed in this article is an explicitly male leading legal character supposedly undergoing a transformation, a modernisation, so that he is no longer a

particular sex but an anyone. By the modern period, these explicitly assertive and controlling men of criminal law have all but disappeared as legal characters; the person has become abstracted; the individual, the citizen, the person and the subject are rigorously used as terms to keep men and women out of it. In some of the most influential modern scholarship in criminal law today, there is a concerted endeavour to find the wrong or harm of the most serious offences in a manner which removes the need to talk about men and women and their very different histories in criminal law. Theory is developed at a remarkably high level of abstraction. There is talk of harm to persons, wrongs to individuals, and there is hardly a man or woman in sight (e.g. Duff 2007; Farmer 2016).

Legislation too tries to remove men and women from the picture. For example, the New Zealand Crimes Act offence of 'sexual violation', which includes the crime of rape, uses the following abstracted language: 'Person A rapes person B if person A has sexual connection with person B, effected by the penetration of person B's genitalia by person A's penis'. I assume that Person A who has the penis is meant to be a man, but the term is studiously avoided. English rape law uses similarly abstracted language which fails to refer to men. Thus: 'A person (A) commits an offence if—(a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis, (b) B does not consent to the penetration, and (c) A does not reasonably believe that B consents'.

Sometimes the pronoun used by criminal law scholars to theorise about criminals and criminality is sexed female just to drive home the point that now women can cover the male case. In a discipline seeking to define, punish and explain criminality, this is hardly a compliment to women who are not responsible for the majority of offending (Naffine 2009).

But we have not had the necessary accompanying reflection on the moral and intellectual effects on men of the simple fact that they have occupied all the positions of influence. Men have been the judges, lawmakers, academics, the theorists of the state, colonial administrators, and they have actively preserved their terrain. They have been all the public figures of influence, and they have also been the authority figures in the home and actively asserted that authority through criminal law. They have engineered the rules of civil society both outside and inside the home.

So the conversation of criminal law has been conducted between men, about men and their lives, it has been directed towards men and the threats they pose to each other, though men have not been mentioned as men. The same men permitted themselves to intrude into the persons of women, without their consent.

This is an in-group talking to themselves, excluding from the discussion those who are unlike them, who might offer a different and critical point of view. Wives, for one, are remarkably absent from this discussion. If no robust and respected counter point of view/understanding is permitted, the influential way will just look right and normal and the less influential and different views will seem to be misguided.

There is in fact a very tight demographic to be observed among the men of legal influence. It is a small and privileged social and legal world populated by a small culturally homogeneous group of persons, a male elite of rule makers and rule

interpreters, located within intellectual families of influence, often actively guarding its terrain, and delivering its opinions to the like-minded (Naffine 2017).

Criminal law has a dark history which remains suppressed. Men's story, within criminal law and the polity, is still not understood as such, nor treated as intellectually interesting—and thus we lose sight of the fact that men's concerns and codes of conduct have been at the centre of criminal law. Men once gave themselves licence to use force for certain sexual purposes, if employed within a lawful marriage. And they surrendered this sex right only with the greatest reluctance and only quite recently (and in many jurisdictions they have retained the right). There is a continuing failure to consider the intellectual and moral bias effects of men studying men, with men holding all the main positions. Men still remain remarkably under-defined and un-visualised in criminal law analysis.

Because we still do not have a criminal legal story of men, *as men*, and their changing standards of public behaviour, we do not have a criminal legal understanding of modern men, as men. The dominance of men as offenders across most types of offending is also not treated as a central intellectual, moral, and policy problem of law. There is a failure to look at the big picture, criminal law and justice conceived as a whole. Concerns about male behaviour in relation to women are confined to certain laws. As Tosh explains, 'In the historical record it is as though masculinity is everywhere but nowhere' (Tosh 1994, 180).

11 Summary and Conclusion

For much of its history, the criminal law of England, and hence of its colonies, accepted and endorsed the right of husbands to be forceful figures of authority. The ability to exercise effective domestic authority was an important index of manliness, as was the willingness to use measured force in order to secure sexual relations with a recalcitrant wife. Criminal law therefore immunised husbands from the crime of rape.

The great political theorist John Stuart Mill condemned these extensive powers of the husband and called the patriarchal family a 'nursery of the vices'. The leading Victorian criminal law jurist James Fitzjames Stephen took the opposite view. The manly man should take control of his little kingdom of the family and criminal law should cede him his sex rights, as it did. It should recognise the muscular and superior nature of men.

Modern criminal law has modernised men and curtailed the rights of husbands to the persons of their wives. These legal measures send a new message to men and from the heartland of criminal law: the so-called central or core offences of rape and assault. These most serious of crimes have been modified to contain men. New standards of male civility have been set but without open and serious discussion of these new moral standards for men.

Criminal law reflects the social history of men, and changing male mores about the uses of violence. We have seen a slow reining in of the powers of men to use force to maintain control and authority. What was once endorsed in a manly man is now officially condemned. And yet the discipline of criminal law, as a whole, has

not been reconsidered or reconceived. There has been remarkably little reflection about its gendered history.

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