associated with the 'male' and higher valued side of each of these dualisms.[54] This means that law adopts the values of the privileged side of the dualisms, such as the self-interested, 'rational' exchange values of the marketplace, or the shunning of emotion. It also means that legal language has few terms for comprehending in a positive, valuable way the content of the devalued sides of the dualisms – or those, such as women, who are associated with the devalued sides. For example, law's operation within a perceived dichotomy of public/private, and its preference for the public as the proper area for its concern, leaves law largely ignorant of and unresponsive to what happens to women within the private realm. Thus the 'public' language of law contributes to the silencing of women.

The conflict aspect of legal language – the way it talks about situations and social problems as matters of conflicting rights or interests – fosters polarised understandings of issues and limits the ability to understand the other side. It also squeezes out of view other ways of seeing things, nonoppositional possibilities for dealing with social problems. Since a language of conflict means that one side has to be preferred, there will always be winners and losers. In a polarised language of hierarchical dualisms set within a patriarchal system, it will often be women, and their concerns, that will lose, be devalued, or be overlooked in the race to set priorities and choose sides.

Another problematic instance of the language of conflicting rights is the law's approach to issues of women's reproductive freedom. These issues are being framed by the law as conflicts between maternal rights, such as the right to privacy and to control one's body, and foetal rights, such as the right to life, or the right to be born in a sound and healthy state. They are also framed as conflicts between maternal rights and paternal rights, such as the man's interest in reproductive autonomy. To talk about human reproduction as a situation of conflict is a very troublesome way to understand this crucial human event in which the well-being, needs, and futures of all participants in the event, including other family members, are inextricably, sensitively connected. Just because everything that happens to one participant can affect the other does not mean they are in conflict. It suggests, rather, that they are symbiotically linked. The foetus is not there and cannot exist without the mother. An action taken for the sake of the mother that may, in a doctor's but not the mother's view, seem to pose a risk to the foetus, such as her decision to forego a caesarean birth, or to take medication while pregnant, may actually be necessary (although perhaps also still presenting a risk of harm) for the foetus because without an emotionally and physically healthy mother there cannot be a sustained foetus or child.[55]

If we stop talking about reproductive issues as issues of opposing interests, but discuss them as matters where the interests of all are always linked, for better or worse, then there is much less risk that one person in the equation – the woman – will drop out of the discussion. Yet that is what often happens in dualistic, win–lose conflict talk. As one commentator has said, 'respect for the foetus is purchased at the cost of denying the value of women.[56] Legal discourse is

54 For a discussion of the dualisms that structure liberal legal thinking see A Jagger, *Feminist Politics and Human Nature*, 1983; F Olsen, 'The Sex of Law', in Kairys, *The Politics of Law* (1990).

55 For a work that seeks to approach abortion in terms of the connections between mother and foetus, see R Goldstein, *Mother Love and Abortion: A Legal Interpretation* (1988).

56 Farrel-Smith, 'Rights-Conflict, Pregnancy and Abortion' in C Gould (ed), *Beyond Domination: New Perspectives on Women and Philosophy* (1983), p 27.

frequently guided by the male-based medical perspective, which when matched with the erasing process of win–lose legal discourse, pushes the mother further into the recesses of invisibility. Dawn Johnsen offers an insightful analysis of how this process works: '[b]y separating the interests of the foetus from those of the pregnant woman, and then examining, often *post hoc*, the effect on the foetus of isolated decisions made by the woman on a daily basis during pregnancy, the state is likely to exaggerate the potential risks to the foetus and undervalue the costs of the loss of autonomy suffered by the woman.[57] A chilling example of the process of obliterating the woman occurred in a case in which a court ordered a caesarean section performed on a woman over her religious objections. The mother virtually disappeared from the text, and certainly her autonomy was of little concern to the court, as the judge wrote that all that stood between the foetus and 'its independent existence, was, put simply, a doctor's scalpel'.[58] The court did not even say an incision in 'the mother', just 'a scalpel' – the mother was not mentioned as a person who would be cut by that scalpel, who would have to undergo risky surgery. She was not mentioned as someone whose health and existence were necessary to the child's life; she was no more than an obstacle to the foetus's life.

The legal approach to the problem of pornography as if it presented a conflict between women's and men's interests in not being objectified and degraded, and the societal interest in free speech, is another example of unproductive conflict talk which limits our understanding of a problem and of women's experiences. The equation of not being degraded and objectified with the diluted word 'interest' is troubling. The very thought that an abstract principle like free speech could be considered more important than working against domination, violence, injury, and degradation, and redressing the needs of those who have suffered from these things, is also disturbing. Talking about the pornography issue as presenting an inherent conflict with free speech, and thus simply a matter of balancing the weights of the respective interests, leaves the meaning and scope to be given to 'speech' undiscussed. The conflict talk also leaves the framework of free speech law unexamined. Yet the terms of that framework define moral harm to the consumers of pornography, and not physical harm to the people who are used to make it or are victimised by it as the appropriate focus of legal concern. The legal rhetoric also squeezes out from the debate the question whether there really is a conflict between 'free speech' and women's civil rights.

The dichotomous, polarised, either/or framework of legal language also makes it a reductionist language – one that does not easily embrace complexity or nuance. Something either must be one way, or another. It cannot be a complicated mix of factors and still be legally digestible. The law has a hard time hearing, or believing, other languages. That is part of its power.

One of the other languages that the law does not easily hear is that associated with the emotions, with expression of bursting human passion and aspirations. Law is a language firmly committed to the 'reason' side of the reason/emotion dichotomy. Indeed, the law distrusts injuries deemed emotional in character; it suspects them as fraudulent, as feigned, as not important. The inability to hear the voice of emotion to respond to thinking from the emotions, is one of the limitations of the legal voice. There are some things that just cannot be said by

57 Johnsen, 'The Creation of Foetal Rights: Conflicts with Women's Constitutional Rights in Liberty, Privacy and Equal Protection' (1986) 95 *Yale Law Journal* 599, p 613.

58 'In the Matter of Madyun Foetus' (1986) 114 *Daily Washington L Rep* 2233, 2240 (DC Super. Ct, July 26, 1986).

using the legal voice. Its terms, depoliticise, decharge, and dampen. Rage, pain, elation, the aching, thirsting, hungering for freedom on one's own terms, love and its joys and terrors, fear, utter frustration at being contained and constrained by legal language – all are diffused by legal language.

Examples of the 'fit' problem can be found throughout law. How can we fit a woman's experience of living in a world of violent pornography into obscenity doctrine, which is focused on moral harm to consumers of pornography? How can women fit the reality of pregnancy into equality doctrine without getting hung up on the horns of the sameness–difference dilemma? How can women fit the difference between a wanted and an unwanted pregnancy into the doctrinal rhetoric of privacy and 'choice'? This rhetoric presumes a sort of isolated autonomy alien to the reality of a pregnant woman. How can women fit the psychological and economic realities of being a battered woman into criminal law, which puts the word 'domestic' before 'violence'? This choice of terminology reduces the focus on the debilitating effects of violence and increases all supposedly free to come and go as we 'choose'. How can women fit the way incest victims repress what has happened to them until the memory is released by some triggering event in adulthood with the narrow temporal requirements of statute of limitations law? How can women fit the fact that this crime, and others of sexualised violence against women, so often happens behind closed doors with no 'objective witnesses', into the proof requirements of evidentiary law? How, as Kristin Bumiller explores in her article, *Rape as a Legal Symbol: An Essay on Sexual Violence and Racism*,[59] can we fit the experience of having what a woman thought was a pleasant social interaction but then crosses the invisible line to become threatening violence, into rape doctrine? Rape law focuses on sex, not on violence. It focuses on the woman's consent to sex, from the male point of view – and so it presumes that any indication of assent to social interaction is also assent to 'do what the man wants'. How, as Lucie White asks in her paper, *Unearthing the Barriers to Women's Speech: Notes Toward a Feminist Sense of Procedural Justice*,[60] can a black mother on welfare ever convey her world to the welfare bureaucracy that is charging her with an overpayment because she followed its erroneous advice and spent an injury insurance check? What is important to this woman is that she did nothing wrong, and that she was able to buy her children Sunday shoes. But what is relevant to the state's welfare law is not her view of right and wrong, or her own understanding of what was necessary for her family – in her world, having Sunday shoes was essential to human dignity – but whether the items she bought with the insurance check fit the state's definition of 'necessities' of life.

Legal language frames the issues, it defines the terms in which speech in the legal world must occur, it tells us how we should understand a problem and which explanations are acceptable and which are not. Since this language has been crafted primarily by white men, the way it frames issues, the way it defines problems, and the speakers and speech it credits, do not readily include women. Legal language commands: abstract a situation from historical, social, and political context; be 'objective' and avoid the lens of nonmale experience; invoke universal principles such as 'equality' and 'free choice'; speak with the voice of dispassionate reason; be simple, direct, and certain; avoid the complexity of varying, interacting perspectives and overlapping multitextured explanations;

59 (1988) *University of Miami Law Review* 75.

60 (1990) 38 *Buffalo Law Review* 1.

and most of all, tell it and see it 'like a man' – put it in terms that relate to men and to which men can relate.

Feminist theory, on the other hand, which is not derived from looking first to law, but rather to the multiple experiences and voices of women as the frame of reference, tells us to look at things in their historical, social, and political context, including power and gender; distrust abstractions and universal rules, because if objectivity is really perspectived and abstractions just hide the biases; question everything, especially the norms or assumptions implicit in received doctrine, question the content and try to redefine the boundaries; so distrust attributions of essential difference and acknowledge that experiences of both men and women are multiple, diverse, overlapping and thus difference itself may not be a relevant legal criterion; break down hierarchies of race, gender, or power; embrace diversity, complexity, and contradiction – give up on the need to tell 'one true story' because it is too likely that that story will be the story of the dominant group;[61] listen to the voice of 'emotion' as well as the voice of reason and learn to value and legitimate what has been denigrated as 'mere emotion'.[62]

Dealing with the dilemma of legal language

So, what's a woman do? Give up on law, on legal language entirely? Disengage from the legal arena of the struggle? Neither of these strategies is really an available option. We cannot get away from law, even if that is what we would like to do. Because law is such a powerful, authoritative language, one that insists that to be heard you try to speak its language, we cannot pursue the strategy suggested by the theorists from other disciplines such as the French feminists, of devising a new woman's language that rejects 'phallologocentric' discourses.[63]

Nor can we abandon caring whether law hears us. Whether or not activists for women look to law as one means for pursuing change, the law will still operate on and affect women's situations. Law will be present through direct regulation, through non-intervention when intervention is needed, and through helping to keep something invisible when visibility and validation are needed.[64] Law will continue to reflect and shape prevailing social and individual understandings of problems, and thus will continue to play a role in silencing and discrediting women.

Since law inevitably will be one of the important discourses affecting the status of women, we must engage it. We must pursue trying to bring more of women's experiences, perspectives, and voices into law in order to empower women and

61 For example, white feminists tend to tell a story of women's true situation that excludes the differing situations of poor women and women of colour and women of different ethnic backgrounds. For development of this critique of white feminism by other white feminists, see E Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* (1989) and Kline, 'Race, Racism and Feminist Legal Theory' (1989) 12 *Harvard Women's Law Journal* 115.

62 For examples of work that seeks to value the voice of caring, see C Gilligan *In a Different Voice*; N Noddings, Caring – A Feminine Approach to Ethics and Moral Education, 1984; S Ruddick, *Maternal Thinking: Toward a Politics of Peace*, 1989; Bender, 'A Lawyer's Primer on Feminist Theory and Tort' (1989) 38 *Journal of Legal Education*; Tronto, 'Beyond Gender Difference to a Theory of Care' (1987) 12 *Signs*: J. *Women in Culture and Society* 644.

63 For examples of the French feminist theory, see L Irigaray, *This Sex Which is Not One* (C Porter, trans 1985), and *Speculum of the Other Woman* (G Gill, trans 1985); Cixous, *Laugh at the Medus* in *New French Feminisms*.

64 For discussion see K O'Donovan, *op cit* (1985) (extracted above); F Olsen, 'The Myth of State Intervention in the Family' (1985) 18 *University of Michigan J L Rev* 835.

help legitimate these experiences. But this is not as easy as it sounds, because there is no 'one truth' of women's experiences, and women's own understandings of their experiences are themselves affected by legal categorisations.

There have been examples of promising word changes and consequent meaning changes in legal discourse. Consider the now widespread use of the term 'sexual harassment', for what used to be considered a tort of invading individual dignity or sensibilities; the term 'battering' for domestic violence. But even these language changes get confined by the legal frameworks into which they are placed. For example, the individualistic and comparative discrimination framework now applied to sexual harassment leaves some judges wondering about bisexual supervisors as a means to deny that discrimination is what is occurring. The contract model of damages in discrimination law means that the dignity and personal identity values that tort law once recognised often go undercompensated.[65] And the use of the term 'sexual assault' in place of 'rape' in some rape reform statutes has not obviated the problems of 'objective' male perspective judgments of female sexuality and consent.

It is not my purpose to offer a simple, neat, for all times solution to the dilemma of legal language. Indeed, to even think that is possible would be contradictory to my message – it would be a capitulation to the legal ways of thinking that I seek to destabilise in order to expand. But I am not without solutions to the dilemma of the gendered nature of legal reasoning. This leads to self-conscious strategic thinking about the philosophical and political implications of the meanings and programmes we do endorse. For example, just what are the implications of arguing either sameness or difference? If both have negative implications, then this should suggest the need to reframe the issue, to ask previously unasked questions about the relevance or stability of differences, or about the role of unexamined players such as employers and workplace structures and norms. Critical thinking about norms and what they leave unexamined opens up conversations about altering the norms and thus the vision of the problem. This leads to thinking about new ways of reasoning and talking. It leads to offering new definitions of existing terms; definitions justified by explorations of context and the experiences of previously excluded voices. Or, it leads to thinking about offering wholly new terms.

In addition to critical engagements with the nature of legal language, another promising strategy is to sow the mutant seeds that do exist within legal reasoning. Because legal reasoning can be sensitive to context, we can work to expand the context that it deems relevant. By pulling the contextual threads of legal language, we can work towards making law more comfortable with diversity and complexity, less wedded to the felt need to universalising, reductive principles.

The law's oft proclaimed values of equity and fairness can also work as mutating agents. The equity side of law counsels taking individual variations and needs into account. Arguments about when this should be done in order to achieve fairness must proceed with reference to context, to differing perspectives, and to differing power positions. The more we can find openings to argue from the perspective of those often overlooked by legal language, such as the people upon whom the legal power is being exercised, or those disempowered or silenced or

65 See eg Schoenheider, 'A Theory of Tort Liability for Sexual Harassment in the Workplace' (1986) 134 *U of Pennsylvania Law Review* 1461.

rendered invisible by the traditional discourse, the more the opportunities to use the engine of fairness and equity to expand the comprehension of legal language.

THE MIRROR TELLS ITS TALE: CONTRUCTIONS OF GENDER IN CRIMINAL LAW[66]

Sheila Duncan[67]

... As a rape complainant, the woman is denied subjectivity, constructed as 'other' through a variety of evidential provisions. First, she has been subject to a corroboration warning which requires the judge to tell the jury that they must be careful if they are to convict on her uncorroborated testimony because she may have ulterior motives for bringing these charges.[68] Even with the abolition of this warning under s 32(1)(b) Criminal justice and Public Order Act 1994, it may still be given in the judge's discretion. The woman is not the subject here, her truth story is undermined by these warnings.

Secondly, only in rape does the defendant – the male subject – retain his shield, his protection against the court's taking his previous convictions into account if he attacks the character of the complainant.[69] In any other offence, an attack on the character of the complainant leaves the defendant open to having his previous convictions put in evidence. In the rape trial alone, the complainant can be constructed as whore, as temptress, as liar, with impunity.

Thirdly, it is open to the defendant in the rape trial to apply to the court for the complainant's previous sexual history to be put in evidence.[70] Research shows that on a consent defence, the majority of defendants make this application and the majority of judges grant it.[71] If the complainant were present as subject, her previous sexual relationships could not possibly be relevant to whether she entered into this sexual encounter as a freely consenting and desiring subject.

The Criminal Justice and Public Order Act 1994 now extends the offence of rape to cover men who have anal intercourse forced upon them. It will be very interesting to see whether, and how, the male subject victim is subjected to these legal indignities of erased subjectivity. Will his previous sexual history be applied for or put in evidence? Will attacks on his character still leave the defendant's shield unblemished? Will the test for consent remain as honest, not necessarily reasonable, belief?[72]

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66 *Feminist Perspectives on the Foundational Subjects of Law* (ed) Anne Bottomley (Cavendish Publishing, 1996), Chapter 9. See also Chapter 9 on victims of violence and the criminal law.

67 Lecturer in Law and Social Theory, University of Warwick.

68 It is stated in *R v Henry* and *R v Manning* (1968) 53 Cr App Rep 150 p 153 that women have a tendency to invent stories.

69 The provision that the defendant should lose his protection against his previous convictions being put in evidence where he casts imputations on the character of a prosecution witness is made under s 1(f)(ii) Criminal Evidence Act 1898. *DPP v Selvey* [1970] AC 304 provides that in rape alone the defendant does not lose his shield under these circumstances.

70 Under ss 2(1) and (2) Sexual Offences (Amendment) Act 1976 the defendant must apply for the judge's leave to cross-examine the complainant.

71 A study by Zsuzanna Adler, *Rape on Trial* (Routledge and Kegal Paul, 1987) p 73 showed that nearly 60% of defendants using the consent defence applied to put the complainant's previous sexual history in evidence: 75% of them were successful.

72 Or, most interestingly, will the male complainants with homosexual histories find themselves open to erased subjectivity and will the case of a raped heterosexual man be dealt with very differently? Will the complainant's proven heterosexuality counter any of the defendant's claims of honest belief in consent, or conversely, will his homosexuality imply …

It is possible to see in the law of rape and prostitution how the woman is excluded from subjectivity; the mechanisms of that exclusion can be very concretely grasped by tracing the central concepts of reason and consent through aspects of the criminal law.

Notions of reason and consent

The construction of reason is central to the construction of the male subject, both in its attribution to him, and the concomitant ascription of emotionality to the female other. It is necessary now to dig more deeply into the text of criminal law to deconstruct the notions of reason that may be found there.

The criminal law's concept of consent is one of the most central constructors of gender. Its use and construction are saturated with gender. They vary across a range of offences which differentially construct the female other and the male subject and differential discipline their respective bodies.

Further, it will be argued that there is an important interplay between these notions of reason and consent, which further construct gender in the criminal legal text.

Reason

The role of reason in the rape trial can be illustrated by a deconstruction of *Morgan*,[73] the 1976 case which still provides the precedent test for consent in rape.

There are two aspects to the issue of consent in substantive rape law. The first is: was the woman consenting and the second: did the defendant believe that she was consenting? This dual aspect combined with the principle established in *Morgan* that the defendant's belief in consent only had to be honest, not necessarily reasonable, creates the space for legitimate rape. A nonconsenting woman can be subjected to sex with no legal redress if the defendant honestly believed she was consenting.[74]

What is the role of reason in the rape trial? As law's primary tool it appears in many masks in the case of *Morgan*. Defence counsel for the three younger defendants in *Morgan* argued before the House of Lords that the judgment of the reasonable man could be no guide to the beliefs of the three young men who came with *Morgan* to have sex with his wife, assured by him that she would be a willing partner albeit that they were told to expect resistance. Under these circumstances, reason could not be an appropriate test. These were reasonable men for whom, under the circumstances, reason should be suspended.

Prosecuting counsel in *Morgan* argued that reason must set the external standard for honest belief. If the belief were mistaken, then it must be reasonable, otherwise the defendant could too easily claim honest belief based on his drunkenness or his vanity. Such a test of belief in consent would have narrowed the space for the male subject's legitimate desire. In delivering their judgment on *Morgan*, the majority of the judges – Lords Cross, Hailsham and Fraser – each side-step the reasonableness test for the defendant's honest belief. Lord Cross chooses to step outside legal discourse and into popular discourse, arguing that

… consent and honest belief in it? For the parallels between the construction of the male homosexual and the female other see S Duncan 'Law's Sexual Discipline: Visibility, Violence and Consent' (1995) 22 *Journal of Law and Society*, p 326.

73 [1976] AC 182.

74 See S Duncan, 'Law as Literature: Deconstructing the Legal Text' in (1994) 5 *Law and Critique* p 1 for a full discussion of the case of *Morgan*.

it is necessary to consider the ordinary man's understanding of the word rape and finds that, 'according to the ordinary use of the English language, a man (cannot) be said to have committed rape if he believed that the woman was consenting to intercourse'.[75] Even if she were not, consenting.

In delivering a judgment from within legal discourse in the highest appeal court, Lord Cross finds it necessary to move from the terms of legal discourse to consider the way in which the ordinary man defines an offence and then to follow that definition. Lord Cross chooses to side-step reason and he literally invests the male subject with power to determine whether his behaviour constitutes rape.

Lords Hailsham and Fraser both concur in countering reasonable belief with intention. To intend to have intercourse with a woman who does not consent or even to be reckless as to whether she is consenting is the men's reason for rape. Such intention or recklessness side-steps the need for honest belief to be reasonable. Lord Fraser summarises their position:

> If the defendant believed (even on unreasonable grounds) that the woman was consenting to intercourse then he cannot have been carrying out an intention to have intercourse without her consent.[76]

On this basis, the legal text's own established principle that mistaken honest belief must be reasonable is jettisoned in rape, and the space is provided for the male subject to rape legitimately.

Although *Morgan* was decided in 1976 on a three to two majority judgment, it still remains the authority for the test for consent in rape. It was further shored up in the case of *Satnam and Kewal*[77] where Lord Hailsham's position on intention was quoted with approval. Public outrage after the judgment on *Morgan* led to the passing of a provision in the 1976 Sexual Offences (Amendment) Act requiring that reasonableness was one factor to be taken into account in determining whether the defendant had an honest belief in consent. A major criminal law textbook calls this a 'public relations exercise'.[78]

A further exclusion of reasonableness from rape trials occurs as a result of the decision that *Cunningham*[79] rather than *Caldwell*[80] recklessness would apply in the case of reckless rape. In *Cunningham* recklessness, the defendant simply has to know that there was a risk that the complainant was not consenting. In *Caldwell* recklessness, he would have the necessary men's reason if he failed to consider a risk which the reasonable person would have considered. Again, the rape defendant is provided with an expanded space in which to construct the consent of the female other.

Constructing consent

Two related issues flow from the construction of consent in legal discourse. First, constructions of consent construct the male as subject and the woman as other in aspects of the text of criminal law. Secondly, differential notions of consent result in differential disciplining of the male and female bodies,

75 *Morgan*, p 203.

76 *Ibid*, p 237.

77 *R v Satnam S and Kewal S* [1983] 78 Cr App Rep 149.

78 Smith and Hogan, *Criminal Law* (1992, 7th edn), p 452.

79 *R v Cunningham* [1981] 2 All ER 863.

80 *R v Caldwell* [1980] Cr App Rep 237, CA.

What must be focused on here is the space in which the woman is not consenting to sexual intercourse but the law does not acknowledge that what is happening is rape: the male subject's honest belief in consent where none exists. In this space, the woman is rendered powerless and unprotected; she is obliged to mirror his desires, she is constructed as other. The *Morgan* and *Caldwell* tests, the possibility of her sexual history being put in evidence, the defendant's unassailable shield, the remnants of the corroboration requirements – all these construct her as other and him as subject.

Morgan, both as precedent and as symbol, creates the possibility that even in the extremes of gang rape using all forms of resistance open to her and with her children present in the wings, the word of her husband as to her consent could have exonerated the three younger defendants and Morgan by default if only they had stuck to their story of resistance and not argued that Mrs Morgan was enjoying and participating in these activities. This is the literal and symbolic construction of the female as other and the man as desiring subject. Mrs Morgan was not consenting, the jury and both appeal courts accepted that, but the defendants were allowed to legitimately construct consent on the word of her husband and there was nothing she could do to undermine this.

The construction of the male subject's space for the legitimate expression of his sexual appetite with a nonconsenting woman extends beyond the issue of nonconsent to the issue of consent induced by fraud 'as to the nature and quality of the act'. Here there are two issues: first, the nature of sexual intercourse which was being consented to, and, secondly, consent by the female other to a nonsexual act which is sexually motivated and conducted by the male subject to the ontological degradation of the female other.

In the case of *Clarence*,[81] Mrs Clarence consented to sexual intercourse with her husband although he knew and she did not know that he suffered from venereal disease. The legal issue was whether there was fraud as to the nature and quality of the act. The court held that there was not. The act to which Mrs Clarence consented was constructed by the law as it was constructed, by the male subject. Mrs Clarence's subjectivity in consent is disregarded. She did not knowingly consent to intercourse with a diseased man. She did not consent to the grievous bodily harm which she sustained and which was foreseeable to her husband, but, although the issue here is exclusively her consent, her consent is constructed as consent to the act which he desired, ignoring the consequences of which only he was aware. Her consent has been constructed to mirror what the court established to be his primary purpose: the satiation of his desire.

Consent to nonsexual acts which are sexually motivated revolve around medical circumstances where the body of the female other, in these situations of vulnerability, is still constructed by the law for the pleasure of the male subject: through a notion of consent which denies her subjectivity.

In *Bolduc and Bird*[82] a doctor conducting a vaginal examination secured the presence of a friend by passing him off as another doctor. The court held that there was no fraud as to the nature and quality of the act. It was still a medical

81 *R v Clarence* (1888) 22 QBD 23.

82 *R v Bolduc and Bird* [1967] 63 CLR (2d) 82. This case arose in British Columbia, Canada. The final appeal was heard in the Supreme Court of Canada and the case is precedent in English law. The issues were whether the 'examination' was 'consented' to and whether there was fraud as to the nature and quality of the act.

examination, even if done for the prurient sexual pleasure of the doctor's friend and, possibly, the doctor himself.

In *Mobilio*,[83] the defendant penetrated a number of his female patients with an ultrasound transducer. This was for no medical purpose, without medical authorisation and entirely for the defendant's sexual gratification. Again, the court constructed consent against the female other to exonerate the male subject. There was held to be no fraud.

The male subject's legitimate space for nonconsensual sex is further underlined by the law of incest. Section 10 Sexual Offences Act 1956 forbids a man to have vaginal intercourse, irrespective of consent, with his granddaughter, daughter, sister or mother. In practice, the great majority of incest is committed by fathers with their daughters. This area of law arguably protects the girl (possibly woman) within the family. In practice it is rarely charged and, further, it only protects where there is a blood relationship between the two parties and does not protect in the event of step or adoptive relationships.[84] The rationale for the legislation has been argued to be its attempt to prevent the production of any defective resulting progeny[85] not to protect the young girl vulnerable to the power of the male subject in the family.

Technically the issue of consent does not arise because the defendant commits the offence whether or not the woman consents. However, in practice the issue does arise in two ways. First, where the girl does not consent, the man can be charged with rape but, whatever her age, she will still have to pass all the hurdles of establishing nonconsent to a rape charge.[86] It is important to stress here that for the female other in the context of the power of the male within the family, the notion of consent may be meaningless: she cannot tell her mother; her father is an all-powerful authority figure; she has nowhere else to go.

Acknowledging the space for legitimate nonconsensual sex, the law creates an offence under s 11 which can only be committed by a girl/woman over the age of 16 which is that of permitting a man in the prohibited degrees to have sexual intercourse by her consent. But it is possible for a man to have sexual intercourse with (for example) his daughter over 16 and for her not to be charged with a s 11 offence although he is not charged with rape. In other words, for the law she has not permitted intercourse to take place by her consent but neither can she establish nonconsent for the purposes of a rape charge. The space between not permitting intercourse, and the male subject's honest belief in consent, is the male subject's space for nonconsensual sex.

In his judgment in *Attorney General's Reference (No 1 of 1989)*,[87] Lord Lane gave sentencing guidelines on incest. In the first instance, he considers sex between the father and the prepubescent girl as a crime which 'falls far short of rape', although that girl may well have been coerced by fear of her father and silenced by the constellation of the family. The girl who approaches and then reaches

83 *R v Mobilio* [1991] 1 VR 339. This was an Australian case heard in the Supreme Court of Victoria and is a precedent in English law.

84 Liz Kelly states, in *Surviving Sexual Violence* (Polity, 1988), that incestuous abuse other than by a biological father is overwhelmingly likely to be by an adult male relative in a 'social father' position in relation to the victim. Quoted in N Lacey, C Wells and D Meure (eds) *Reconstructing Criminal Law* (Weidenfeld and Nicolson, 1990) p 355.

85 *R v Winch* [1974] Crim LR 487.

86 The man could be charged with indecent assault because, unlike in the case of rape, a girl under the age of 16 cannot consent. See *R v Satnam S and Kewal S* [1983] 78 Cr App Rep 149.

87 [1989] 3 All ER 571.

puberty is in this judgment increasingly constructed not merely as fully consenting but as temptress:

> The older the girl, the greater the possibility that she may have been the willing or even instigating party to the liaison, a factor which will be reflected in sentence.[88]

The equation is made between puberty and consent and the female other is constructed to mirror or even to create the desire of the male subject. Her absence of subjectivity is underlined in the case of *R v Bailie-Smith*[89] where the defendant successfully appealed against an incest conviction arguing that he mistook his 13 year old daughter for his wife. How could such a mistake have been possible? For the court this was a female body without subjectivity.

One of the biggest dichotomies in legal notions of consent arises in the distinction between consent to offences of physical violence and consent to offences of sexual violence. This distinction in itself is problematic in that sexual violence is always physical to the extent that it has a physical dimension and physical violence may also be sexual. It is easier to draw a distinction by considering specific offences which have or do not have a sexual or physical dimension to their legal definitions. Rape, indecent assault and incest all have sexual dimensions without which the offence is not committed. In the cases of rape and incest, sexual intercourse is required. The offences of common assault, assault occasioning actual bodily harm, grievous bodily harm, and grievous bodily harm with intent do not have a sexual element as part of their legal definitions, although within any one case there may be a sexual dimension. Consent is theoretically a defence in respect of all of the aforementioned offences.

The great majority of these offences of legally defined physical violence are committed by men and the great majority of them are committed against men.[90] Just as the sexual space of the male subject is constructed by the laws relating to sexual violence, so the physical space of the male subject is constructed by the law relating to physical violence. It is this space which defines the male subject's possibilities for self-expression in violence, most specifically consensual violence between men/boys.

The construction of the male subject through his participation in 'manly sports' is ensured through a line of cases from *Coney*[91] to *Attorney General's Reference (No 6 of 1980)*[92] which have preserved a space for that construction. It is possible to consent to visible violence in the case of 'properly conducted'[93] games and sports. In other areas of violent self expression, the male subject is in more difficulties. If there is no visible, physical harm, consent can be a defence but the test here will be whether the conduct of the complainant viewed as a whole could have been considered to have constituted consent[94] – a very different test from the completely subjective one in rape.

88 *Ibid*, p 571.

89 [1977] 64 Cr App Rep 76.

90 Patricia Mayhew, *Summary Findings British Crime Survey* (HMSO, 1994). This summary, which is based on the 1993 statistics, shows that the great majority of victims of assault crimes are males aged between 16 and 29.

91 (1882) 8 QBD 534.

92 [1981] All ER 1057.

93 *Attorney-General's Reference (No 6 of 1980)* [1980] All ER 1057, p 1059.

94 *R v Donovan* [1934] 2 KB 498. Even for common assault, consent will not be an effective defence in the case of prize fights, presumably because they are illegal in any event.