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MEDIAEVAL RAPE: A CONCEIVABLE DEFENCE?

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AT five o'clock in the morning of 30 July 1436 William Pulle, together with a small band of ruffians, broke into Bewsey Hall in Lancaster where Lady Isobel Butler, widow of Sir John Butler, and her three children lived. There he raped and abducted her, taking her into the "wylde and desolate places of Wales"—to Birkenhead in the County of Chester—and imprisoned her for nearly a week. He then took her to the nearby parish church at Bidstone and forced her to marry him, threatening her with death if she refused. After the marriage, she was taken back to Birkenhead and raped again. Pulle, becoming aware of the issue of the King's Commission to take him prisoner, consequent upon the protestations of Lady Butler's friends, then fled, leaving her to be found in Birkenhead by Sir Thomas Stanley, one of the King's Commissioners. The wronged lady, however, was not one to ignore such an outrage, and she petitioned the King in Parliament twice—once to ask that a Writ of Proclamation be issued out of the Chancellery of Lancaster, requiring Pulle to appear before the justices of the County Palatine or be attainted of high treason if he did not, and once to ask that she have her appeal of rape against the miscreant within Lancaster rather than Chester (neither County Palatine having power over the other), despite the marriage.[1]

There Lady Butler's sad story might have ended, another casualty of the lawless era which presaged the Wars of the Roses, but for a curious addendum in a later case report from which it

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[1] Lady Isobel's petitions, containing her story, may be found in the *Rolls of Parliament* (Record Commission), IV, 497–498. It should be noted that later writers (*e.g.*, W. Farrer and J. Brownbill, *The Victoria History of the County of Lancaster*, Vol. 1, pp. 346–347) state that the attack happened in 1437. As the year of the petitions to Parliament was 1436, this does not seem likely, although it is possible that it occurred even earlier, in 1435, as the petitions date the attack to "the Monday next after the Feast of Saint James the Apostle last passed". The Feast of St. James was 25th July. The only other records extant appear to be two writs, the first of which (PRO PL 26/1/2 f. 38) is a command to the Sheriff of Lancaster to "exact" (or call for the appearance of) the already indicted William de Pull (amongst others), in five of his county courts. On the reverse of the writ is the response of the Sheriff noting that none of those indicted had appeared at the courts and thus had been outlawed. The second writ (PRO PL 26/1/2 f. 37), almost identical in format to the first, serves the same function for John Gregory, servant of William del Pole.

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appears that, as a result of her ordeal, she conceived a child.[2] This event could have had the most serious repercussions on the outcome of her appeal of rape against William Pulle.

Tucked away in Book I of Volume II of the early legal text *Fleta*, at the very end of Chapter 33[3] is a statement that seems very odd to the modern mind. This part of the chapter deals with appeals of rape, and the necessity for the defendant to be put to a jury trial, as the woman appellor naturally could not offer battle as proof of the charge. The final sentence of the chapter then states:

> If, however, the woman should have conceived at the time alleged in the appeal, it abates, for without a woman's consent she could not conceive.

Fleta is generally agreed to have been written in the late 1200s, quite probably over a period of years perhaps ranging from the late 1280s to the late 1290s.[4] *Britton*, most likely based upon *Fleta*,[5] adopted and expanded slightly upon this rule:

> With regard to an appeal of rape, our pleasure is, that every woman, whether virgin or not, shall have a right to sue vengeance for the felony by appeal in the county court within forty days, but after that time she shall lose her suit; in which case, if the defendant confesses the fact, but says that the woman at the same time conceived by him, and can prove it, then our will is, that it be adjudged no felony, because no woman can conceive if she does not consent.[6]

Finally, that much vilified work, *The Mirror of Justices*, again most probably written sometime during the 1290s or shortly afterward and in Norman French, makes its own reference to the matter:

> In appeal of rape he may defend the felony, and say that he did not corrupt her against her will, but with her assent, as fully appeared from this that she conceived a child by him at the same hour . . .[7]

Strangely, however, Bracton,[8] written around the early to mid 1200s, makes no mention of this rule, nor does the Lincoln's Inn

[2] *Babington* v. *Venour* (1465) Long Quinto f.61.
[3] *Fleta,* Bk. I, c. 33, ed. and trans. H.G. Richardson and G.O. Sayles, Selden Society Publications, vol. 72 (London 1953), p. 89.
[4] H.G. Richardson and G.O. Sayles, *Fleta* Vol. IV, Selden Society Publications, vol. 99 (London 1983), Introduction, pp. xx–xxii.
[5] Richardson and Sayles, *Fleta,* vol. IV, p. xxv.
[6] *Britton*, Bk. I, Chap. XXIV 45 b, (ed. F.M. Nichols (Oxford 1865), 17).
[7] *The Mirror of Justices,* Bk. III, s. 21 (ed. W.J. Whittaker, Selden Society Publications, vol. 7 (London 1893), p. 103).
[8] Bracton, *On the Laws and Customs of England,* trans. S.E. Thorne, vol. II (Cambridge MA, 1968), pp. 344–345, 353, 359, 394, 403, 414–420.

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manuscript identified by S.E. Thorne as Gilbert de Thornton's *Summa de Legibus*,[9] most probably written shortly after 1285.

How is it, then, that such an opinion entered into English law, presumably sometime in the thirteenth century? Where could it have come from? We do not necessarily have the answers to all these questions, but the answers we do have make it clear that the sources of law at this time do not necessarily lie completely within the confines of the mediaeval legal system, for the debate which led to this single sentence being included in *Fleta* began many centuries before, in a completely different sphere of thought.

1. The Early Greeks

From very early times indeed much effort has been devoted to understanding the nature of conception. Although not the first, but, however, perhaps the most coherent attempt at an analysis of the way in which children are conceived is associated with the name of Hippocrates[10], in a corpus of writings in which the doctrine of the two seeds is explained. Essentially, it was claimed, both male and female produced seed, which, combining with each other, created the foetus, which was then nourished during its growth upon the menstrual blood. It is important, however, to understand that this female "seed" postulated in the Hippocratic corpus cannot be equated with the ovum of today's medical knowledge. There was no empirical knowledge of the female seed—it was, rather, a necessary postulate in a theory designed to explain conception and especially the passage of characteristics of the maternal parent to the child.

The philosophers were ambivalent about their terminology—the finer details of the process of production of the seed, for example, were the cause of some debate. General agreement was reached, however, that as women, like men, produce seed, then clearly they must, like men, experience pleasure in the act of intercourse in order for the seed to be emitted and conception to ensue:[11]

> In the case of women, it is my contention that when during intercourse the vagina receives friction and the womb is

[9] Linc. Inn MS. Hale 135 ff. 46–48. See also S.E.Thorne, "Gilbert de Thornton's Summa de Legibus" (1947) 7 University of Toronto Law Journal, 1–26.

[10] Born around 460 B.C. It is accepted that much of the material in the Hippocratic corpus cannot, in fact, be attributed to Hippocrates himself, although the works on generation can clearly be, at most, only marginally later than Hippocrates. See J. Needham, *A History of Embryology*, 2nd ed. (Cambridge 1959), pp. 31–32.

[11] See Angus McLaren, *A History of Conception* (Oxford 1990), p. 22. Lesley Dean-Jones, *Women's Bodies in Classical Greek Science* (Oxford 1994), pp. 157–159 notes, though, that "the description of a woman's pleasure in *Genit*. 4 (vii. 474. 14–476. 8), however, hardly shows an intimate knowledge of feminine experience: "*Mul*. I.17 (viii. 56.19–21) directs a man whose wife does not conceive straightaway simply to continue having intercourse with her as the activity itself will excite her desire, *i.e*., she will eventually become pregnant".

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> disturbed, an irritation is set up in the womb which produces pleasure and heat in the rest of the body. ... Once intercourse has begun, she experiences pleasure throughout the whole time, until the man ejaculates. If her desire for intercourse is excited, she emits before the man, and for the remainder of the time she does not feel pleasure to the same extent; but if she is not in a state of excitement, then her pleasure terminates along with that of the man. ... both the pleasure and the heat reach their peak simultaneously with the arrival of the sperm in the womb, and then they cease ...[12]

Ranged against this doctrine of male and female seed, however, were the adherents of the view that the female did not produce seed, and merely provided the environment and nutrition in which the embryo grew.[13] Unlikely as this argument sounds to the modern ear, it drew its persuasion from the logic which took the Hippocratic theory to its inexorable conclusion: if the female produced seed and provided both environment and nutrition for the embryo, then what place was there for the male seed at all in the process? The simple division of elements—male seed and female environment—was a most attractive theory, and one taken up and strongly argued by Aristotle:

> Now it is impossible that any creature should produce two seminal secretions at once, and as the secretion in females which answers to semen in males is the menstrual fluid, it obviously follows that the female does not contribute any semen to generation .... There are some who think that the female contributes semen during coition because women sometimes derive pleasure from it comparable to that of the male and also produce a fluid secretion. This fluid, however, is not seminal; it is peculiar to the part from which it comes in each individual ...[14]

If the female does not produce seed, then it is obvious, logically, that there is no necessity for her to experience pleasure in intercourse for conception to be achieved, for the necessity of that pleasure was predicated on the need for her seed to be emitted:

> A sign that the female does not emit similar semen to the male, and that the offspring is not formed by a mixture of

[12] Hippocrates, *On Generation*, 4.

[13] See, for example, Aeschylus, *Eumenides*, (trans. Herbert Weir Smith (Cambridge, MA 1971), 657 at p. 335): [Apollo speaking] "The mother of what is called her child is not its parent, but only the nurse of the newly implanted germ. The begetter is the parent, whereas she, as a stranger for a stranger, doth but preserve the sprout ...". Kathleen Freeman, *The Pre-Socratic Philosophers* (Oxford 1946), at pp. 272–283 notes Anaxagoras of Clazomenae (c. 460 B.C.) and Diogenes of Apollonia as among other adherents of the "one seed" theory.

[14] Aristotle, *On the Generation of Animals,* 727a–727b (ed. J. Barnes, *The Complete Works of Aristotle* (Princeton 1984), 1129). Aristotle also pointed out that if the Hippocratic theory was correct, then the woman would be able to reproduce by herself, having all the elements necessary for procreation within her own body.

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> both, as some say, is that often the female conceives without the sensation of pleasure in intercourse, and if again the pleasure is experienced by her no less than by the male and the two sexes reach their goal together, yet often no conception takes place ...[15]

Thus were the lines drawn of a debate that was to last for many centuries, well into the mediaeval era. In general, it was the Hippocratic theory that drew the most support, especially with its acceptance by Galen in his work *De semine* (probably written some time after 169 A.D.), who argued trenchantly against the Aristotelian viewpoint and in favour of the existence of female seed.[16] The significance of his stance cannot be overestimated, as it was the Galenic tradition of medicine and theory that was transmitted to the West earliest and formed the basis of most medical science during the mediaeval era.

Even so, it is still a matter of conjecture to elucidate from this early Greek debate on conception a rule about rape enunciated in the thirteenth century in England. The picture can, however, be drawn in finer detail.

Around the 2nd century A.D. the Greek physician Soranus wrote his *Gynecology*. Soranus himself seems to have stood somewhat apart from either tradition, his work being far more of a practical nature than a philosophical treatise, but he was firmly convinced that in order for conception to ensue, the female must have an "urge and appetite for coitus":

> Just as without appetite it is impossible for the seed to be discharged by the male, in the same manner, without appetite it cannot be conceived by the female. And as food swallowed without appetite and with some aversion is not well received and fails in its subsequent digestion, neither can the seed be taken up or, if grasped, be carried through pregnancy, unless urge and appetite for intercourse have been present.[17]

If such was the case, of course, it was inevitable that an explanation be provided for situations where a woman who clearly appeared to have no such appetite had in fact conceived. This Soranus did:

> For even if some women who were forced to have intercourse have conceived, one may say with reference to them that in any event the emotion of sexual appetite existed in them too, but was obscured by mental resolve. Similarly in women who mourn, appetite for food often exists but is obscured by grief

[15] Aristotle, *On the Generation of Animals,* 727b (Barnes, *Complete Works of Aristotle*, 1129).
[16] Galen, *De semine* (ed. & trans. p. De Lacy (Berlin 1992)).
[17] Soranus, *Gynecology*, Bk. I x 37 (trans. O. Temkin (Baltimore, 1991)).

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> from their misfortune. Indeed later they are compelled to eat by reason of exceeding hunger, putting aside their resolve.[18]

Soranus seems to be postulating, in order to support his theory, a type of latent "appetite" within the body, which can respond despite the mental distaste for the act. It is a perfectly understandable proposition, driven by the belief that pleasure, or "appetite", is necessary for conception, and it was to be taken up in the continuing debate centuries later by the proponents of the Hippocratic view in order to answer this obvious Aristotelian criticism of the two seed theory.

2. The Mediaeval Debate

Over the passing centuries, throughout the period of the Dark Ages, much of that Greek thought was lost and remained lost to Europe. In the East, however, a different story may be told of the reception of Greek thought by the conquering Arab culture, and the transmission of that thought via Arabic intellectual works over the period of centuries during which the civilisation of Europe had fallen to its lowest ebb. In due course the eleventh century saw a revitalisation of Western intellectual life, and, not so very long afterward, Europe convulsed with the Crusades. Through the renewed contact of West with East in this way, the Arabic learning, which had preserved much more of the vibrant thought of the ancient Greek culture, was transmitted to the eager minds of the new intellectuals in the twelfth century.

One of the main geographical points of contact for this transmission was southern Italy: Greek speaking and for many centuries part of the Byzantine Empire, and now under Norman rule. From here, for example, came the knowledge of Justinian's legal code. The little spa town of Salerno, south of Naples, however, had already become famous as a centre of practical medical learning, and it was from Salerno that the Galenic scientific tradition[19] was introduced to the rest of the Western world primarily through the work of Constantinus the African, who lived at both Salerno and Montecassino, and translated many ancient Greek scientific and medical works, including Galen and Hippocrates, from the Arabic in which they had been preserved into Latin. As intellectuals visited the schools of Salerno and Montecassino in search of knowledge, the learning of the ancients spread around the Western world, and through travellers like

[18] Soranus, *loc. cit*.
[19] Brian Lawn, *The Salernitan Questions* (Oxford 1963), p. 19.

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Adelard of Bath, who also took the time to study Arabic, the old knowledge came afresh to England.

During the twelfth century the school at Salerno developed the practice of writing commentaries upon the Constantinian translations, slowly transmuting itself from a school of practical medicine towards a more theoretical seat of learning. In its teaching it used the typical mediaeval literary form, the question and answer: "concise, clear, easily memorized, this was the form used by both masters and pupils, and the one through which these particular doctrines were diffused throughout the length and breadth of Europe, as time went on".[20] The elements of the Salernitan questions had been gathered together over a long period of time, added to by different masters, and disseminated and added to again across the known world. They certainly influenced Adelard of Bath, and, most interestingly, the philosopher William of Conches, master of the renowned school at Chartres from 1120, who seems to have drawn upon the Latin and Graeco-Latin learning of Adelard's *Quaestiones,* upon the Salernitan traditions and upon Arabic medical science in his work *De Philosophia mundi*.

William himself, upon his retirement from Chartres, took on the post of tutor to Geoffrey the Fair's son, Henry Plantagenet, later to become Henry II of England. During that tutorship (*c*. 1146–1149) he produced his *Dragmaticon Philosophiae*, a far fuller work than his *Philosophia*, and one which was to become vastly influential in the mediaeval world of scientific learning, drawing with a more mature leaning upon all the major sources of learning available at that time. Both *Philosophia* and *Dragmaticon* were cast in the standard "question and answer" form, and covered a range of questions about the natural sciences—meteorology, botany, anthropology, and, towards the end of each work, a series of questions about gynaecology.

William, an adherent of the two seed doctrine passed through the Galenic, and then Arabic, tradition into the mediaeval world, found himself in the same position as Soranus. It was necessary for the woman to experience pleasure before her seed would be emitted, and thus for conception to occur:

> Conception is not possible from one seed. For unless the seed of a man and of a woman meet, the woman does not conceive. Prostitutes, therefore, who have sexual relations for money only, having no pleasure therein, emit nothing and they do not conceive.[21]

[20] Lawn, *Salernitan Questions,* p. xi.
[21] William of Conches, *Dragmaticon Philosophiae,* VI, 8.6, Corpus Christianorum, Continuatio Mediaevalis, 152 (Brepols 1997).

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Then what of the woman who is raped and conceives? Whether or not he drew upon Soranus for his answer cannot be determined, although his position certainly has overtones of a similar nature:

> Dux: It comes to my memory that I have recently said that nothing is conceived without the seed of a woman; that is not very plausible. For we see that raped women, who are protesting and crying out that they have suffered violence, have conceived. Whereupon it appears that they had no pleasure in that action. But the seed cannot be emitted without pleasure.
> Philosophus: Even though the action is displeasing to the raped women in the beginning, nevertheless due to the weakness of the flesh it pleases in the end. Again there are two dispositions in man, one rational and one natural, which we often feel are in opposition within us. For that which is pleasing to the flesh, is often displeasing to the rational mind. Therefore even though there is no will of the reason in the raped woman, there is the pleasure of the flesh. And why do you doubt that there is the seed of the mother in the conception, when you see sons being born, who are similar to their mothers and who are carrying their weaknesses.[22]

Thus we find that in the middle of the twelfth century in France the question of rape and conception is being discussed in the scientific world. But is there any evidence that this particular material has been transmitted to England? Certainly there was a large group of English students at Chartres, and John of Salisbury himself studied for a time under William of Conches, but this alone cannot prove the transmission of this question to England.

Fortunately, though, it is possible to provide concrete evidence of the transmission to England of the question about rape at the beginning of the thirteenth century. Brian Lawn, in his continuing investigation into the Salernitan questions, has edited a manuscript from the Bodleian Library[23] that consists of a compilation of a large number of Salernitan questions and answers. This manuscript is written in "an English, semi-cursive bookhand of about the year 1200, not that of a professional scribe, but a scholar's hand ...",[24] and has extracted from William of Conches' *Dragmaticon* some twenty-two gynaecological questions, with occasional additions and interpolations from the compiler. Here we find, in Question 10, William's thoughts on prostitutes and conception, and, in Question 11, with only minor differences from the original, his explanation of how the raped woman can conceive.[25]

[22] William of Conches, *Dragmaticon,* VI.8.9.
[23] Auct. F. 3. 10.
[24] Brian Lawn, *The Prose Salernitan Questions* (Oxford 1979), p. ix.
[25] Question 11 of Bodleian manuscript Auct. F. 3 .10, transcribed in Lawn, *Prose Salernitan Questions* (trans. Dr. S. Sneddon, for the author):

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The provenance of this manuscript can only be traced with certainty to the Austin priory of St. Thomas the Martyr at Stafford in the fifteenth century[26] from external evidence, but the internal evidence suggests a different, earlier English provenance. Lawn has discovered a number of internal additions to the *Dragmaticon* text, which appear to derive from the compiler of the questions. In particular, at the end of Question 8 a passage has been added which describes:

> the venereal capabilities of five masters, three of whom were Hereford men, namely magister Hugh de Mapenore, who later became bishop of Hereford (1216–1219), magister Johannes Burgensis, who occurs as a witness in a Hereford document assigned to the period 1185–1205, and magister Phillipus Rufus Cornubiensis, who is perhaps to be identified with a magister Phillip who was a witness in Hereford documents of the years 1200–8, and with a magister Phillipus Rufus whose obit year is given as c. 1220. The other two masters ... remain so far untraced.[27]

Quite reasonably, therefore, Lawn has postulated a definite link between Hereford at the beginning of the thirteenth century and the compiler of the questions in this manuscript, whom, he notes, "seems to have been unusually preoccupied with sexual matters and gynaecology".[28] Further, a Hereford provenance for the manuscript becomes even more likely, given that Hereford appears to have been a centre for the learning of Arabic science during the second half of the twelfth century. J.C. Russell has illuminated the lives of a number of Hereford translators of Arabic works in this period, and has suggested that their presence in the area "points to a cathedral school at Hereford at which the liberal arts, theology, and Arabic science were taught".[29] It could be further speculated that this school might have been the heritage of that Master Robert who set up a school at Melun, and taught both John of Salisbury

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> It is asked why some women conceive without any seed or pleasure? Answer: The question and the premise do not make sense. However, we see that women who have been raped, wailing and weeping because of the violence, have conceived. From this it appears that they had no pleasure in this act. But without pleasure sperm cannot be discharged: in this act there is no will or pleasure on the part of the woman, nor any discharge of her sperm, therefore no conception follows, for conception and generation have to take place through emission of the sperm of both parties. The solution: In man there are two wills, the rational and the natural, which we often feel in opposition within us, for what pleases the flesh displeases the reason; and although there is no will of the reason, there is nevertheless in her the will which is the pleasure of the flesh. And how can you doubt that the mother's sperm is involved in conception when you see children born who are like their mothers and who contract their infirmities?

[26] Lawn, *ibid.*
[27] Lawn, *Prose Salernitan Questions,* pp. xv–xvi.
[28] Lawn, *Prose Salernitan Questions,* p. xvii.
[29] J.C. Russell, "Hereford and Arabic Science in England about 1175–1200" (1932) 18 Isis 14, at p. 25.

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and Thomas Becket at his school. As soon as Becket became Archbishop of Canterbury in 1162, he made sure to obtain the see of Hereford for his former teacher.

Such speculation aside, however, we can, with reasonable certainty, place William of Conches' thoughts on how a raped woman could conceive in Hereford in England, around 1200 A.D. Like Soranus, he has been forced to postulate two separate "wills"—of rational and natural, or, we might suggest, of mind and body, in order to explain within the Hippocratic "two seed" theory how the woman can conceive from sexual relations without pleasure. What is apparent, though, is the overlay of Christian theological thought in William's analysis, with the statement that the "weakness of the flesh" results in pleasure "in the end", thus, whether intentionally or not, suggesting an equation of the event with the familiar "temptation of the flesh" in fornication to the less subtle reader. The entire locus of the explanation, though, is within the theoretical debate on the nature of conception, as is made clear from his final sentence. This explanation was soon to be stripped of its context and defined as a simple rule within the English legal system, which would not have been a problem but for the fact that the finer distinctions of rational and natural wills in the debate were swept aside, to be replaced by the simplistic view that conception equated to consent to the act.

How well known would William's thoughts on rape have been in England? It is difficult to tell, but it appears that early copies of his *Dragmaticon* were certainly available in a number of mediaeval libraries of the thirteenth century. A thirteenth century copy seems to have been held originally by the Benedictine Abbey of St. Edmund in Bury St. Edmunds,[30] another by the Benedictine Abbey of St. Augustine in Canterbury,[31] and another in Oriel College, Oxford.[32] The Bodleian Library currently holds at least two other copies of the *Dragmaticon*, one early thirteenth century[33] and the other from the later years of that century,[34] but the provenance of these is uncertain. There may well have been more, although perhaps not many, in other libraries. In the early thirteenth century, Alexander Nequam (1157–1217), in his *Speculum Speculationum*, written around 1200, appears to show an awareness of William's writing,[35] although this could, perhaps, be partly as a result of his

[30] N.R. Ker, *Medieval Libraries of Great Britain* (London 1941), now no. 225 in the Gonville and Caius College Cambridge library catalogue.
[31] Ker, *Medieval Libraries,* now no. 171 in the St. John's College Cambridge library catalogue.
[32] Ker, *Medieval Libraries,* now in the Bodleian Library, Cat. Mus. 121.
[33] MS. Auct. F. 5. 25.
[34] MS. Auct. F. 5. 28.
[35] Alexander Nequam, *Speculum Speculationum,* ed. R.M. Thomson (Oxford 1988), Introduction, p. xv: "Although he never names him, it seems clear that Nequam knew William of Conches'

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borrowings from the *Tractatus de Anima* of John Blund, written by 1204. Blund himself lectured on Aristotle in Oxford and Paris in the early thirteenth century and his *Tractatus* clearly displays its author's personal knowledge of William's *Dragmaticon*[36].

In addition to this, though, by the mid thirteenth century Vincent of Beauvais had gathered together the major philosphical writings of his time and collected excerpts from them to form the draft of his *Speculum Maius*.[37] Within this work, in the volume entitled *Speculum Naturale*, he reproduced, and attributed, William's thoughts about rape and conception almost verbatim.[38] The *Speculum Maius* became an enormously popular work. Ker, in his *Medieval Libraries of Great Britain*, lists late thirteenth to early fourteenth century manuscripts of Vincent's *Speculum Maius* in the Canterbury library, the Bridgettine Abbey of St. Saviour at Syon in Middlesex, the Cathedral Church of St. Peter in Exeter, and the Benedictine Cathedral Priory of the Holy Trinity in Norwich, although whether these all contained his *Speculum Naturale* is uncertain. It would be quite reasonable, therefore, to say that the major natural philosophers of the era would be likely to have knowledge of William's work, or, at least, of the existence of his *Dragmaticon*, either from their own reading, or from the works of other English philosophers, and even, possibly, mention in early thirteenth century lectures at Oxford. Whether this knowledge would extend to the detail of this theory on rape and conception would be a harder question to answer, although any natural philosopher interested in the question of conception would very likely have turned to the *Dragmaticon,* amongst other works, for guidance.

By the beginning of the thirteenth century Galen's works had already pervaded English medical and natural science, as had the translations of Arabic writers such as Avicenna, who was also a proponent of the "two seed" theory, and it would be fair to suggest that, at this point, the existence of female sperm was evident as a majority opinion of philosophers of the time, although theories differed as to its actual function in the conception process.[39]

writings (at least his *Timaeus* Commentary) . . .". Nequam was at Oxford in the 1190s, and retired to the Augustinian canonry at Cirencester in 1200.

[36] Iohannes Blund, *Tractatus de Anima*, ed. D.A. Callus and R.W. Hunt (London 1970), Introduction, p. xvii: Blund was a clerk in the service of Henry III from 1227, Archbishop of Canterbury from 1232 (but never consecrated), and Chancellor of York Cathedral until he died in 1248.

[37] Vincent himself is thought to have been born sometime between 1184 and 1194, and his *Speculum Maius* is thought to have been complete in draft form by around 1247. He died *c.* 1264. See J.M. McCarthy, *Humanistic Emphases in the Educational Thought of Vincent of Beauvais* (Leiden 1976), pp. 6–11.

[38] Vincent of Beauvais, *Speculum Naturale*, lib. 31, chap. 26 (in *Bibliotheca Mundi* (Douai 1624), vol. 1, col. 2313).

[39] See, for example, D. Jacquart and C. Thomasset, *Sexuality and Medicine in the Middle Ages*, (Princeton 1988), p. 63 for the "two seed" theory of Bartholomew the Englishman, and pp. 68–69 for the thoughts on this topic of Albertus Magnus, who allowed the existence of

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However, the rediscovery of Aristotle's works, together with the translations of the Greek and Arabic scientific texts at the end of the twelfth and beginning of the thirteenth centuries began a revolution in the teaching and knowledge of the time. The curricula of the Universities of Paris and Oxford became transformed over the next fifty years, with Aristotle's logic revitalising the art of dialectic, and his philosophical and scientific works underpinning the rest of the curriculum. Naturally the debate on the nature of conception was re-ignited in the latter years of the century, with writers such as Giles of Rome attempting to reconcile the medical traditions with the theories of Aristotle on the non-existence of female sperm,[40] but ultimately the more widespread Hippocratic and Galenic tradition was impossible to dispel and continued as the more generally accepted theory.

This, then, was the milieu in which the author of *Fleta* wrote his work. If a date for *Fleta* of around 1290 AD is accepted, then, presumably, the author was receiving his education sometime during the middle of the thirteenth century—the time when Aristotelian thought reigned at Oxford. We could, therefore, possibly infer, though with no certainty, that it was slightly more likely that he was educated in a cathedral school rather than formally at Oxford. Certainly if he had known of, and accepted, the Aristotelian theory, he could never have written in such a manner on the subject of rape. He was clearly familiar with the more widespread tradition on the theory of female sperm, and transformed one aspect of a medical and philosophical debate into a legal opinion. How much effect on the development of the law on rape did that opinion have?

3. Transmission of Fleta and Britton

It is extremely difficult to ascertain how much credence was, in reality, placed upon the statements of *Fleta* and *Britton* about rape and conception.[41] Clearly, if these statements were accepted as law, then by definition a woman who was raped and fell pregnant would have no colour of a case to bring against her attacker, and we would have no case law for that reason. Alternatively we may have

female sperm, but only as an aid to reproduction rather than a prime force. The position was not completely dominant, however—the popular mediaeval book of knowledge *Sidrak and Bokkus* is clear in its statement that it is only male sperm that brings about conception: see Robert E. Nichols, Jr., "Procreation, Pregnancy, and Parturition: Extracts from a Middle English Metrical Encyclopedia", (1967) 11 Medical History, pp. 175–181.

[40] M.Anthony Hewson, *Giles of Rome and the Medieval Theory of Conception A Study of the De formatione corporis humani in utero,* (London 1975).

[41] The *Mirror of Justices* only survives in one manuscript, and is virtually ignored by later legal writers for some centuries, so it is unlikely that it had any large part to play in the transmission of the doctrine.

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few case records for the simple, and more usual, reason that they have not survived the distance of the centuries. In other words, absence of material gives no conclusive evidence of the regard for this statement one way or the other.

However, we do have available the record of one possible case of rape and pregnancy, that of the Lady Isobel Butler, whose story has been told earlier, which throws some light upon the matter. The materials available, although not forming a coherent whole, do prove that *Fleta's* opinion did indeed have an effect upon the law of the time. The first legal reference to her case comes in a passage within the yearbook case of *Babington* v. *Venour* in 1465, some thirty years after her ordeal:

> Recently, in the time of Henry VI, a gentlewoman of Lancashire was raped, and she had a child by the ravisher, and then she escaped from him and came here to London and sued against him in parliament and had him attainted of the rape *etc*. And she was asked by a lord how she could say that she did not assent to the ravisher when she was pregnant by him. To which she answered, that although her flesh was in a way accordant to her ravisher, nevertheless in her innermost will and in her soul she always bore a grudge against him and in her soul never assented, namely in all her entire will of her soul, so that she was not at ease until she was disannexed and gone from his person *etc*.[42]

Although no names are mentioned in the account of the "gentlewoman of Lancashire", the circumstantial evidence provided—the correct date, the status of the lady, her county, and her petitions to Parliament—makes it almost certain that it is a reference to the case of Lady Butler. The only new piece of information is of her pregnancy and the consequent questioning she faced—which, although it may have then merely been a result of current popular thought, is now, with the deliberate mention in *Babington* v. *Venour*, clearly taking on the colour of a legal doctrine. What is fascinating about Lady Butler's explanation is that it uses the same basis for explanation as Soranus, and William of Conches, in that it divides the flesh from the will, acknowledging that even though the will is against the act, the flesh, despite this, may in some latent fashion have an appetite for the act. It is not too much to surmise that Lady Butler or her advisers were familiar with the philosophical debate and she might well have been carefully prepared with an answer to this particular question.

[42] *Babington* v. *Venour* (1465) Long Quinto. f. 61. I am grateful to Sir John Baker for drawing my attention to this case, and kindly providing his suggestions as to provenance together with his own translation of the year-book passage: Letter to the Author, 17 July 1998.

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The one thing this case does not provide us with, however, is any indication of the success or otherwise of Lady Butler's argument. It seems, though, that her pregnancy may in fact have become the deciding factor in her case, for some thirty years later that case was mentioned again in a legal context—this time in a collection of Inner Temple Readings:

> In an appeal of rape it is a good plea to abate the writ that she is pregnant by the same rape, because that proves her consent. It was said by the counsel of Bishop Nevill of York that although the body consents nevertheless the mind does not; to which the justices said that their authority extended only to the body and not the mind. That occurred in the Lady Butler's case in the time of Edw. IV.[43]

Although this reading places Lady Butler's case in the time of Edward IV, Sir John Baker has tentatively identified it with the Lady Isobel Butler of our narrative[44]. This internal misdating could well be explained if the Reading was in fact referring to the *Babington* v. *Venour* explication of the case, as *Babington* v. *Venour* is itself dated to Edward IV. Some inconsistencies remain, however, for, as the authors of the *Readings and Moots* volume point out, the Bishop Nevill concerned here was George Nevill, Archbishop of York 1465–1476—again, of the time of Edward IV, and just at the time of *Babington* v. *Venour*, but not at the time of Lady Butler herself. Further, the ominous statement that the authority of the justices extends "only to the body" is new material, unlikely to been part of the Parliamentary events as Lady Butler's petitions were granted, and this statement very much implies that she failed in her appeal of rape. This evidence, taken together with the reference to "the justices", suggests that the source of this reading was in fact some document or memory about Lady Butler's actual appeal of rape either before or, most likely, after her Parliamentary petition, probably in conjunction with the yearbook record of *Babington* v. *Venour*.

Yet again the theme of division between body and mind (or soul) is continued as her explanation for the pregnancy following the rape—but this time we can see that it has been totally divorced from its original context, and now rejected as a mere theological construct to be disposed of with an unpleasant witticism from the justices in the case. That witticism, however, should not be ignored,

[43] S.E. Thorne and J.H. Baker, *Readings and Moots at the Inns of Court in the Fifteenth Century Vol. II,* Selden Society Publications, vol. 105 (London 1989), p. 275. The reading is extracted from MS Hargrave 87 in the British Library, probably compiled in the 1530s, but covering the period from the 1490s to 1504. The authors note that "[h]ow far the learning exercises themselves were used as authorities, in written form, is more difficult to judge".

[44] Letter to the Author, 17 July 1998.

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for it was born of a very different view of the nature of consent in mediaeval times, a view that ignored the subjective, or internal, in favour of the objective, or external, supposed proof of consent. Indeed, it is indicative of a deep confusion about consent that has permeated the common law up until the most recent of times.

4. The Early Notion of Consent

It is not easy to discern from the available writings exactly how the concept of consent was viewed by the legal fraternity at this time. To begin with, it is well known that the definition of rape included the use of force upon the victim—Bracton, for example, includes it in one of the two cases where a woman has an appeal—"... for a forcible harm done to her body, as for rape ...",[45] and this definition itself also had currency in the thought of the Church Fathers as well. Thomas Aquinas, for example, had already sketched the anatomy of seduction, adultery and rape, and had placed the dividing line at the use of violence.[46]

In addition, there was also a long tradition of repetition by legal authors from Bracton[47] onwards of the actions required of the woman immediately after the rape in order to add weight to her claim:

> She must go at once and while the deed is newly done, with the hue and cry, to the neighbouring townships and there show the injury done her to men of good repute, the blood and her clothing stained with blood, and her torn garments ...

It is clear that the immediate reporting of the deed and the showing of force or violence in its accomplishment had a twofold effect—it not only added weight to the veracity of the claim in general,[48] but also indicated the lack of consent—essentially, what can be theorised about the way in which consent was viewed is that evidence of the use of physical force at minimum tended to equate

[45] Bracton, *On the Laws and Customs of England*, vol. 2, p. 419; and at p. 416 the words of the woman's appeal of rape are detailed: "... the said B. came with his force and wickedly and against the king's peace lay with her ...".

[46] Thomas Aquinas, *Summa Theologiae,* 2, 2, Question 154, Article 12; written in the middle of the thirteenth century: "... and consequently adultery is worse than seduction. Both are aggravated by violence, and therefore raping a virgin is worse than seducing her, and raping a wife is worse than committing adultery". (New York 1968, vol. 43, p. 249).

[47] Bracton, *On the Laws and Customs of England,* vol. 2, p. 415.

[48] It should be noted that at this time the defendant in the trial was not permitted to speak upon his own behalf to present his version of the events. Thus, inevitably, physical proofs of the events could take on a greater corroborative role than in the modern day trial. Whether there were further issues about the evidentiary value of a woman's evidence in these early times is unknown. Certainly from early modern times onward, most probably as a result of Sir Matthew Hale's personal warnings about the ease of making an accusation of rape (*Historia Placitorum Coronae*, pp. 635–636) and the difficulty of defending against the accusation, the value of the woman's testimony was debased and was in later centuries accompanied by a judicial warning against conviction without corroborative evidence.

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to evidence of the absence of consent. It proved that the act was "against the woman's will"—a definition maintained not only by the author of the *Mirror of Justices*,[49] but also, as noted by Sir John Baker, in fourteenth century texts, and in the usual wording of indictments for rape.[50]

Indeed it is probable that this definition of rape invited the requirement of proof of the use of physical force as an element of the crime, and in itself forced the focus on such proofs in a way in which the more modern definition of "without her consent" might not have done; for the latter definition suggests a focus on what "consent" is, whereas the former suggests more of an active, physical clash as a necessity for the crime. Although the use of force and the absence of consent are clearly seen as two distinct aspects of the crime of rape today, it is suggested that the combination of the words of this definition with the focus on violence not only laid some fundamental lines of thought about the nature of the crime of rape for many centuries, but also diverted any serious consideration of the nature of consent away from the "internal" into the "external" evidences of the crime. In other words, proof of violence tended to become equated with proof that the act was against the woman's will.

That focus on violence as proof that the act was against the woman's will meant that issues such as submission under threat of violence and the consequent absence of physical indicia of violence, or indeed any requirement of force as an element of the offence itself in such circumstances (in, for example, the case of a woman made insensible by alcohol), remained unaddressed by legal writers for many years. By the time it was addressed the link between force and absence of consent was so strong that, as we shall see, the early modern writers were constrained by their complete acceptance of that equation to analyse absence of evidence of resistance as consent.

With regard to consent, the focus of the mediaeval legal writers was upon the physical evidence of violence as proof of lack of consent and within that focus it is easy to understand that another type of physical evidence—that of conception—could be adduced to refute the claim—to prove consent, or that the act was not against the woman's will. In an era in history when the population concentrated upon proofs of guilt or innocence such as the ordeals

[49] *Mirror of Justices*, p. 103: "... and on the other hand no presumption arises that he took her against her will since there were no torn clothes, bloodshed, hue and cry, or other evidence of violence".

[50] Sir John Baker, *The Oxford History of the Laws of England*, vol. VI, 1483–1558 (Oxford 2003), p. 563, n. 96.

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this is quite understandable.[51] The inherent paradox of the existence of both types of physical evidence, as in Lady Butler's case, did not provoke intellectual speculation about the nature of consent, but a simple reliance on one dogma over another.

What can reasonably be said from the available evidence is that *Fleta's* statement did not just vanish into history: from Lady Butler's case and later legal works it is clear that it took root in the legal mind as a legal rule. Instead of being a theoretical construct designed to further the conception debate, it was plucked from that context and placed into legal texts, with the consequent loss of the nuances of the philosophical debate. Even though the author of *Fleta* may have understood it within its context (although it is impossible to tell from that work), certainly as it became transmitted down the centuries lawyers saw it as a simple rule. Interestingly, it was *Britton* rather than *Fleta* that was responsible for the transmission, which probably indicates, not surprisingly given the larger number of extant copies by comparison with those of *Fleta*, that *Britton* was the work which most lawyers had to hand. Sir William Staunford in his *Pleas of the Crown* in 1557,[52] for example, quoted *Britton's* statement on rape being no rape with conception, and *Britton* was also followed by Ferdinando Pulton in 1609[53] and by Finch, who cited both *Britton* and Staunford in support, in 1613.[54] Again, Dalton's *Countrey Justice* of 1622 references *Britton* and Staunford in support of the doctrine, and by the 1635 edition was adding Finch to the list of supporting references.[55] One other legal work, however, the *Boke of Justices of Peas*, from 1509 onwards, does not seem at any point to have mentioned this doctrine.[56]

5. The Later Rape and Pregnancy Cases

Given this reasonably comprehensive transmission of *Fleta's* remark, it is of interest, therefore, to find that some records do

[51] The ordeals, physical trials endured by the defendant in an appeal to God to prove guilt or innocence (by, for example, non-corruption after three days of a hand that had been dipped in boiling water) are not the only indicators of the very physicality of the mediaeval focus. George Fletcher's thesis of "manifest criminality" as part of the explanation of the peculiar development of the law of larceny provides intriguing reminders of this physicality: G. Fletcher, *Rethinking Criminal Law* (Boston 1978).

[52] Sir William Staunford [Stamford], *Les Plees Del Coron* (London 1557), p. 24.

[53] Ferdinando Pulton, *De Pace Regis Et Regni* (London 1609), pp. 133–134: "By the opinion of Britton, if a woman at the time of the supposed rape doe conceive with child by the ravisher, this is no rape, because a woman cannot conceive with child, if she doe not consent".

[54] H. Finch, *Nomotexnia* (London 1613) Bk. 2, p. 25: "Rape est le carnall abuser de feme encounter sa volunt: Mes si feme conceive lou el est carnalment abuse, ceo nest rape, carel ne poet conceive sinon que el consent".

[55] M. Dalton, *The Countrey Justice* (London 1622), p. 256: "If a woman at the time of the supposed rape, doe conceive with child, by the ravishor, this is no rape, for a woman cannot conceive with child, except she do consent".

[56] *The Boke of Justices of Peas* (London 1506?; reprint Amsterdam 1976).

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exist of a small number of rape and pregnancy cases. Unfortunately the records do not divulge anything about the existence of the legal rule, being either incomplete or mere records of indictment and depositions, without reasons given, naturally, for decision.

Thus, on 1 July 1590 Joan Somers, of Downham in Essex appeared before the Archidiaconal Court of Essex accused of fornication, almost certainly because she was, by then, clearly pregnant:

> [*Dominus objecit quod commisit fornicationem*] *ipsa respondente*, that upon a certen working day, happening abowte Christmas last, this respondente beinge in a ploughe felde, servinge of her dame's cattel, the said Ryce [*viz*. Rice Evans] came unto her and told her that she mighte now crye her harte owte, before anie bodye colde here her crie, and so indeede as she saith he did violentlye abuse her bodye and committed fornication with her.[57]

Alas, at this point the proceedings were left unfinished and we have no record of the Church's response to this issue, although it is tempting to suggest that the debate Joan's response engendered may have been the reason the proceedings did not continue.

In addition, J.A Sharpe, in his study of the seventeenth-century Essex records has noted in the Quarter Sessions depositions one clear case of a rape accusation by a pregnant woman, although "the indictment, whether through respect to Dalton or the inherently suspicious nature of the charges, was found *ignoramus*".[58] He also details a paternity case which developed into a rape accusation in 1687, with as little result.[59]

On the other hand, some possible confirmation of the fact that *Fleta's* opinion had become an operative rule derives from the bastardy depositions taken from women at Quarter Sessions in order to force a man to maintain his child. Nazife Bashar has recorded three from the Sussex Record Office:

> Francis Haddon, master of Lydia Prince, "did sweare by the Lord Jesus hee would teare her in pieces if shee did not let him lye with her". Elinor Symonds said that she was pregnant because Ralph Brown overtook her on the road, "Carryed her forcibly into John Pinkes barne and had Carnal knowledge of her body against her Consent 2 or 3 times and threatened to kill her this Examinant if she made the least noise". Esekiell

[57] W.H.Hale, *A Series of Precedents and Proceedings in Criminal Causes Extending from the Year 1475 to 1640*, (London 1847), p. 200. The case is taken from the Court's Act-Book 1588–1590, f. 284.

[58] J.A.Sharpe, *Crime in Seventeenth-century England* (Cambridge 1983), p. 64, referring to E.R.O. Q/SR 324/103; Q/Sba 2/56. The jury, by returning *ignoramus* to the indictment, effectively indicated their refusal to allow the charge—but the basis of that refusal must remain a mystery.

[59] Sharpe, *Crime in Seventeenth-century England*, referring to E.R.O. D/DCv 2/16.

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> Filder stopped his servant's mouth with a sheet and when she resisted threatened to kill her if she told anyone.[60]

These depositions show evidence of rape clear enough for the woman to have made her appeal or obtained an indictment in the normal way. Obviously one conclusion that could legitimately be drawn from this material is that the conception and birth of a child could have been a major factor in the lack of prosecution for rape, given the broad circulation of this unhappy doctrine by the sixteenth and seventeenth centuries. However, there are certainly other possible reasons for non-prosecution of rape—for example, the extreme rarity of conviction (given that, amongst other things, the punishment was death), the humiliation of making the claim, or even, it could be speculated, that the rapist was of more use alive and maintaining a child than hung for felony, with all possessions forfeit.[61]

6. *Death of a Doctrine: the Nature of Consent Illuminated*

Lady Butler's case itself made a reappearance in Coke's *Institutes*, but only in a passage, taken from the *Rolls of Parliament*, descriptive of "what detestation hath been had of this heinous offence",[62] and no mention of the matter of her pregnancy is made. This passage, however, was sufficient to provoke a considered analysis of her marital problem by Sir Matthew Hale in his *Historia Placitorum Coronae*, written in the mid seventeenth century, although his thoughts are confined to the issue of whether she could still bring an appeal of rape against William Pulle despite the marriage.[63] It is quite clear from these two works that neither author knew anything of the possible pregnancy of Lady Butler, especially as, shortly afterwards in his work, Hale briefly

[60] N. Bashar, "Rape in England between 1550 and 1700", in *The Sexual Dynamics of History, Men's Power, Women's Resistance* (London 1983), pp. 36–37.

[61] My thanks to Professor John Mee of Cork University for this latter suggestion. Certainly the prevalence of bastardy presentments in the Church courts (normally well over 50% of their business) confirms a general hostility to bastardy, driven not merely by outraged morality, but also by financial concerns of the locality, which would be obliged to bear the burden of maintenance of bastard children unless the father was identified. See Martin Ingram, *Church Courts, Sex and Marriage in England, 1570–1640* (Cambridge 1987), pp. 260–261. Ingram also notes at p. 265, without further comment, the cases of three women tried in the period 1615–1621 who "claimed to have been raped by men totally unknown to them, one while she was in a state of drunken sleep at an alehouse".

[62] Sir Edward Coke, *The Third Part of the Institutes of the Laws of England* (London 1648), Cap 11.

[63] Sir Matthew Hale, *Historia Placitorum Coronae,* vol. I (1736, reprinted London 1971), pp. 629–630. Although the marriage was obtained by force, it was merely voidable rather than void (for Lady Butler could have affirmed the marriage), and thus required either the Act of Parliament which Lady Butler obtained to allow her to bring an appeal of rape, or to be dissolved by the Church courts. Hale's opinion was that once the marriage had been dissolved then Lady Butler could have brought her own appeal of rape, for the marriage would have been made void *ab initio*, and the rape remain punishable.

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commented on the doctrine of *Britton* and others about pregnancy and rape, but did not link it with Lady Butler whom he had written about only two pages earlier. His discussion, however, began to turn the tide of legal thought against this doctrine.

This comment appears in the context of Hale's thoughts about consent. Having stated that a consent upon menace of death is "not a consent to excuse a rape", he continued:

> And therefore that opinion of Mr. *Finch* cited by Dalton *ubi supra*, and by *Stamford*, chap. 14. fol. 24 out of *Britton*, that it can be no rape, if the woman conceive with child, seems to be no law, *mulier enim vi oppressa concipere potest* [for a woman who has been overcome by force can conceive].[64]

This is a strange linkage of argument—from forced consent to disproof of the "no rape with conception" doctrine. What is the reasoning behind this statement? Hale might simply be denying the old opinion outright and saying that a woman overcome by force can still conceive, but this would not explain the linkage of his statement with consent upon menace by use of the word "therefore".

The real link seems to be the concept of violence. It has already been suggested that the mediaeval lawyers linked, whether overtly or covertly, consent and violence—it is a natural link: physical evidence of violence proves, amongst other things, lack of consent. Let us take a further step in this analysis: how does evidence of violence prove lack of consent? Quite simply, by showing that the woman resisted the act—effectively, evidence of resistance is evidence of lack of consent. The mediaeval preference for physical proofs of criminal events has already been demonstrated—in the Inner Temple analysis of Lady Butler's case, her statement about her subjective lack of consent had been rejected as being disproved by the physical evidence of her pregnancy—and it is suggested that little or no distinction was drawn between lack of consent itself (in reality a subjective state) and the proof of that lack of consent. Essentially, a long tradition of relying on physical evidence had developed, in which evidence of resistance was equated with lack of consent. Is it, however, possible to go further and suggest that absence of physical evidence of resistance was equated with consent itself? Certainly the *Mirror of Justices* comes very close indeed to making that connection in the advice about defences to an appeal of rape quoted previously:

> ... he may defend the felony, and say that ... on the other hand no presumption arises that he took her against her will

[64] Hale, *Historia*, p. 631. Trans. Mr. Ian Paterson, Mallesons, Solicitors.

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> since there were no torn clothes, bloodshed, hue and cry, or other evidence of violence.[65]

The touchstone, however, of this theory comes with Hale's analysis of "forced consent". Hale was considering the issue of consent under menace and dissected the act of rape as: violence by way of threat, followed by a "consent", followed by the physical act. A clue to Hale's meaning is given by William Hawkins in his *Treatise of the Pleas of the Crown*, published in 1716. In it he says "[o]ffences of this Nature are not any way mitigated, by shewing that the Woman at last yielded to the Violence, if such her Consent was forced by Fear of Death, or of Duress ...".[66] Both Hale, and especially Hawkins, are referring to the yielding under threat as "consent". The inference is inescapable that they are equating a physical yielding, or lack of resistance to the act, as a consent—the subjective element, other than a decision whether to resist or not, is completely absent. The same argument applies to either physical yielding or spoken words of consent under force—only the external evidences are relevant to the issue of consent—if those evidences are there, then it is a real consent. Whether or not absence of proof of physical resistance equated to consent to the early modern lawyers, it certainly seems that, at minimum, the decision to offer no physical resistance when under threat was treated as a true consent to the act.

In essence, this consent is being treated as real—it is a yielding upon the menace, but it is seen as a real consent although forced: the woman's strength has been overcome, by struggling no further, or not at all because in fear of her life, she has consented. This provides the final key to Hale's linkage of forced consent with the rape and pregnancy doctrine. If the yielding indicates a real consent, then upon such forced consent it would be possible for the woman to conceive under that doctrine. If this is possible, however, the old opinion about it being no rape if the woman conceives cannot be correct, because the law now insists that it is still rape despite a forced consent (evidenced by the pregnancy)—for in law that forced consent cannot excuse the previous violence or threat. The conflict is now between two doctrines of law: forced consent does not excuse a rape, and there is no rape with conception—and the doctrine of forced consent has won. What is of deep concern, however, is the suggestion that a forced consent is still a valid consent. Rather than saying a decision to offer no resistance is no proper consent at all, it is allowed to be a consent—the violence

[65] *Mirror of Justices*, p. 103.
[66] William Hawkins, *A Treatise of the Pleas of the Crown* (London 1716), Bk. I, p. 108.

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which precedes it has been yielded to, and in the yielding, or the decision to yield as evidenced by the lack of resistance, is the consent to the following physical act. Consent has been analysed in terms of the physical and external appearances, rather than the mental; or at the very least, the mental decision not to resist has been equated to consent.

If this analysis of Hale's argument is correct, then one more intriguing conclusion follows—that he views the opinion about rape and conception as a purely theoretical legal opinion having no necessary basis in physical reality. As shown earlier, the opinion was based upon a theoretical and philosophical conclusion about physical reality, and translated through *Fleta* and prevailing medical theory into a rule based on what was believed to be the physical reality. For Hale, however, it is a pure conflict between rules of law—if he believed in an underlying physical reality that a woman could not conceive unless she had enjoyed the act, then he could not possibly have argued that the rule was not law on the basis that another rule of law about forced consent could overcome it—he is arguing on legal theory about consent alone and using logic to disprove the rape and conception rule: if one law says it is still rape, despite a forced consent, then, given that the woman has consented, and even conceived, the dogma that says that is not rape must be wrong—for it could still be rape in law. He does not necessarily seem to be arguing with the basis of rape and conception rule—that conception is one of the indications of consent—but he is saying that if that consent has been obtained by violence or threat it is still in law a rape, despite the consent.

The final implication of this material is that the mediaeval lawyers saw continuing violence as the essence of the crime of rape—that is, violence, and resistance, throughout the act. The suggestion is that continuing physical resistance by the woman is the indicator of her lack of consent—once that resistance stops, or once words of permission are spoken, it means that she has consented. It is only an implication, for there is no early discussion of the nature of consent until Hale's dissection of the crime, but the very fact that he and Hawkins seem to be arguing that forced consent is not excusable in law suggests that there might have been a prevailing trend to see the lack of overt violence and lack of evidence of continuing resistance as meaning that no rape had taken place in these cases—that consent had been given, and thus, at the moment of the act, it was no rape. Consent, therefore, was most likely heavily linked to physical resistance—and Hale and Hawkins were dealing with situations where physical resistance was not present, or not continuing during the act. They naturally,

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therefore, still linked consent to physical resistance, and they allowed that the consent was real—but maintained that the violence was "not excused" by the forced consent. Essentially, they were the product of a very long tradition of relying upon the external evidences (physical resistance, or words of permission) as consent itself, rather than distinguishing between evidence of consent or its lack, and the subjective reality of consent.

Hale's forceful rebuttal of the early doctrine was echoed and expanded upon by Hawkins. He called the opinions of *Britton et al.* very questionable. As he put it:

> Also it hath been said by some to be no Rape to force a Woman who conceives at the Time; for it is said, That if she had not consented, she could not have conceived: but this Opinion seems very questionable, not only because the previous Violence is in no way extenuated by such a subsequent Consent, but also because if it were necessary to shew that the Woman did not conceive, this Offender could not be tried till such Time as it might appear whether she did or not, and likewise because the Philosophy of this Notion may very well be doubted of.[67]

The first of Hawkins' arguments suggests that the earlier analysis of Hale's argument may well be correct—Hawkins allows, for the purpose of his legal argument, that the basic notion of pregnancy indicating "such a subsequent consent" is not doubted—but where that consent was obtained by previous violence, the subsequent consent cannot legitimate the original act of force used to obtain the consent: the law is that it is still a rape.

We can see the development of a legal way of thought here, and an attempt to apply legal rationality and logic to a rule that was really never meant to exist in this context. Clearly the mediaeval basis of the doctrine in pleasure and conception has been completely forgotten, and it just appears now as a simple rule. Because its justification has been forgotten, it is treated simply as an exercise in logic—and it fails to stand up to the lawyer's new rationality in the context of the development of intellectual thought about forced consent. Although Hale must be credited with the initial rebuttal (and, perhaps, rehabilitated a little after his comments upon rape within marriage), Hawkins, with his detailed analysis of its flaws, delivered to the doctrine the real *coup de grace*. Perhaps the best indicator, however, of the new intellectual age of logic and rationality, is Hawkins' final comment that the very validity of the notion is to be doubted—at last the coffin had been prepared for the doctrine itself.

[67] Hawkins, *Pleas of the Crown,* p. 108.

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Both writers were extremely influential, and their doubts about the doctrine began to be quoted in other legal works. In addition, on the medical front, new theories about conception began to be developed during the seventeenth century. Whereas at the beginning of the century the theory that a child was formed from the mixture of male and female seed, preferably emitted at the same moment,[68] was the most popular, by the late 1600s new ideas about the pre-formation of the child within the seed of one partner had gained much ground.[69]

However, old ideas take time to die, as can be seen from an intriguing report of the cross-examination of Sarah Robertson, who claimed that one Benjamin Jones had raped her, in 1755:

> Council [*sic*.]. I can't conceive how there could be any possibility of his penetrating your body.
> S. Robertson. He did enter my body a little.
> Q. To what degree; describe which way it could be?
> S. Robertson. He did indeed a little way.
> Q. How far might he get within you?
> S. Robertson. I tell you but a very little way.
> Q. Are you apprehensive you could be with child by him?
> S. Robertson. I am not that I could, because it is a thing impossible, for where a woman has no inclination, it is impossible there can be a child.
> Q. Who told you that?
> S. Robertson. Because I have been a married woman a great many years.
> Q. Supposing you had consented, have you any reason to think you might have been with child by the consequence of it; you say he entered your body as your husband did?
> S. Robertson. I don't say I am with child, I don't think I have any reason to think I am with child. My husband never used me in such a manner.
> Q. Then he did not lay with you in so complete a manner as your husband did?
> S. Robertson. No, he did not, because of my struggling.
> Q. Did you perceive . . .?
> S. Robertson. I know what you mean; no I did not.[70]

Whatever the reason for adopting this line of questioning,[71] one thing is clear: in the minds of both legal counsel and Sarah

[68] Ambrose Pare, *Works* (London 1631), p. 262.

[69] J. McMath, in his work *Expert Mid-wife* (Edinburgh 1694), p. 5, although himself adhering to the "two seed" theory of conception, noted that other physicians saw the woman as "the Field only, into which the Mans Seed is committed".

[70] *Old Bailey Sessions Papers,* No. II, Part II for the Year 1755, Case No. 91, pp. 76–80 at p. 78.

[71] One possibility would be to elicit whether emission of semen had taken place, as, even though Hale deemed it unnecessary, he also noted at least one case in Coke's time that had insisted that both penetration and emission were required to make a rape (Hale, *Historia*, p. 628). Obviously, the other possibility is that counsel was trying to obtain an admission of pregnancy, which would then be used as evidence of consent to the act.

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Robertson lay a knowledge of the doctrine that pregnancy indicates a consent to the act. Indeed, the way in which Sarah Robertson revealed her knowledge tends to indicate that the doctrine was part of the general oral background knowledge that a married woman obtained, one of the normal "wives' tales" of the time. Although in the legal world changes were taking place, in the common knowledge of the lay person the doctrine was accepted as a norm.

Even in that legal world, change was not quick to come about. In 1780, for example, Burn's *Justice of the Peace* quotes the normal *Britton*, Stamford, Finch and Dalton on the matter, but then points out that Hale doubted it, and also Hawkins.[72] However, even though there was still some trailing uncertainty in the minds of the legal writers, for once they seem to have been slightly ahead of the medical fraternity at this time. In the late 1700s the first medical jurisprudence books were being published, and Samuel Farr, in his *Elements of Medical Jurisprudence* of 1788 opined that:

> It may be necessary to inquire how far her lust was excited, or if she experienced any enjoyment. For without an excitation of lust, or the enjoyment of pleasure in the venereal act, no conception can probably take place. So that if an absolute rape were to be perpetrated, it is not likely she would become pregnant.[73]

By 1792, however, not even Burn's *Justice of the Peace* mentions the doctrine at all, and in 1803 East simply says: "it is now admitted on all hands that such an opinion has no sort of a foundation either in reason or law".[74] It died a quiet death in the face of the new legal rationalism and the new experimentalism of the seventeenth and eighteenth centuries.

It took some five hundred years for this unhappy doctrine to vanish from the legal textbooks, and although it is, of course, impossible to tell how many women it disadvantaged during its currency, the reader may be surprised to hear that recent statistical research in the USA has suggested that "a single act of rape may be more than twice as likely to make a woman pregnant as a single act of consensual sex".[75] That research claimed that nearly 8 per

[72] Richard Burn, *The Justice of the Peace and Parish Officer* (London 1780), pp. 66–67.

[73] Samuel Farr, *Elements of Medical Jurisprudence*, (London 1788), pp. 42–43. Farr may also have been responsible for the canard that it is not physically possible to rape a woman for he was of the opinion that a consummated rape "by which is meant a compleat, full and entire coition, which is made without any consent or permission of the woman, seems to be impossible, unless some very extraordinary circumstances occur: for a woman always possesses sufficient power, by drawing back her limbs, and by the force of her hands, to prevent the insertion of the penis into the body, whilst she can keep her resolution entire".

[74] Edward Hyde East, *Pleas of the Crown*, vol. I (1803, reprinted London 1972), p. 445.

[75] M. Walker, "Bad Behaviour", in New Scientist, 23 June 2001, Conference Highlights, pp. 10–11. Previous studies of pregnancy rates from rape had been criticised for a variety of reasons—"some rely on crime statistics, which may skew the figures: rape victims who become

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cent. of women who had suffered a single act of rape fell pregnant, as compared to 3.1 per cent. of women who had fallen pregnant from a single act of consensual sex. In other words, statistically speaking, of every 100 women who were raped once over that four hundred year period, it is possible that 7 or 8 fell pregnant, if this research is accurate. Although danger lies in taking modern day statistics and presuming their applicability to the more remote past, this statistic at least gives some idea of a possible pregnancy rate, and suggests that it is very likely indeed that the number of women disadvantaged by *Fleta's* opinion was not at all insignificant.

What has been detailed thus far is the life and death of a legal doctrine. Through this investigation, another story has come to light—a tale of underlying assumptions about the nature of consent stretching forward from mediaeval times. The latter story is a far subtler one about reliance on external evidences, the denial of consent as a subjective matter, and a confusion of physical proof of consent with consent itself, and of non-resistance with consent. This tale of assumptions did not end with that of its partner. It continued into the present day.

Even in 1965 it was still possible for Lord Parker C.J. to say "... it seems to this court that in the case of a girl under sixteen, the prosecution, in order to prove rape, must prove either that she physically resisted, or if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist".[76] It would be hard to find a clearer equation of consent and lack of resistance, and one which sustains Susan Brownmiller's conclusion in 1975 that "[i]n reviewing the act, in seeking to determine whether or not a crime was committed, the concept of consent that is debated in court hinges on whether or not the victim offered sufficient resistance to the attack ...".[77]

It was not until the case of *Malone*[78] in 1998 that the Court of Appeal finally managed to break the link completely between

pregnant may be more likely to report the crime than those who do not. Others fail to measure the influence of contraception—either preventive or post-coital ... and some include acts of oral and anal rape, which cannot result in pregnancy". The latest study was made by Jon and Tiffany Gottschall (St. Lawrence University, Canton, New York) using the *National Violence Against Women Survey* (released by the National Institute of Justice and the Centers for Disease Control and Prevention in the USA) and follow-up interviews, with parameters designed to avoid the above problems.

[76] *Howard* (1965) 50 Cr.App. Rep 56. The court was in the course of deciding whether consent could provide a defence to a charge of rape in the case of a girl under 16, given that such consent gave no defence to a carnal knowledge charge.

[77] Susan Brownmiller, *Against Our Will* (New York 1975), p. 383. See also Vivian Berger, "Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom", (1977) 77 Columbia Law Review 1, 10–11, noting that "[b]y now almost all [American] states have dropped "utmost resistance" requirements in favour of a standard of reasonable conduct under the circumstances. Several jurisdictions have passed statutes completely relieving the prosecution of the need to show resistance as proof of nonconsent; others will likely follow suit".

[78] [1998] 2 Cr.App.R 447.

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physical evidence and real consent in the *actus reus* of rape. In that case it was argued that where no force, threat or deception was used, there must be demonstrable evidence of the absence of consent in resistance either by speech or physical conduct in response to the defendant's advances. In dismissing the argument, Roch L.J. held that:

> There is no requirement that the absence of consent has to be demonstrated or that it has to be communicated to the defendant for the *actus reus* of rape to exist. ... it is not the law that the prosecution in order to obtain a conviction for rape have to show that the complainant was either incapable of saying no or putting up some physical resistance or did say no or put up some physical resistance.

It has taken a very long time indeed for the common law to shed the shackles of mediaeval thought about the crime of rape.[79] Although the doctrine that there was no rape if the woman fell pregnant was laid to rest some three hundred years ago, the mediaeval concentration on and confusion of the proof of consent with a true inner consent has stayed with us until the end of the twentieth century and may still be with us in a variety of subtle ways of thought.

To develop a definition of consent that properly explores the subjectivity of consent is not a task for the faint-hearted. But help is at hand from deep within the history of the law itself—for we already know what real lack of consent, at least, is:

> "in her innermost will and in her soul she ... never assented, namely in all her entire will of her soul, so that she was not at ease until she was disannexed and gone from his person ...".

[79] It is not only the common law that is constrained by the notion of physical resistance—see Brownmiller, *Against Our Will,* p. 374, quoting the conclusions of a study of the American jury system (H. Kalven and H. Zeisel, *The American Jury* (Boston 1966), pp. 250–251): "The two professors found that juries preferred to acquit when there was no overt sign of physical force. 'The jury's stance,' they suggested, 'is not so much that involuntary intercourse under these circumstances is no crime at all, but rather that it does not have the gravity of rape ...'".

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