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Feminism and consent: a genealogical inquiry

Maria Drakopoulou

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Consent, power and the female self

The sheer diversity of the feminist engagement with consent is testament not only to the fruitfulness and inventiveness of feminist scholarship but perhaps most importantly to the protean nature of the concept itself. Consent moves beyond disciplinary boundaries and through diverse territories within each discipline, attaching itself both to conceptual apparatuses and their practical applications. Privileged in accounts of the legitimacy of government and in normative ones concerning political obligation and citizenship, it has been posited as a fundamental principle of democratic ideology and social organization, whilst as a qualifying element for the legality of specific acts it has proven itself foundational to areas of both private and criminal law.

In pursuing consent across such a rich variety of sites and citations, feminists have produced an impressive body of critical scholarship animated by an apparent discord between, on the one hand, the abstraction of consent's theoretical postulation as a constitutive element of the political, ethical and legal order, and, on the other, its pragmatic application in concrete social contexts. These critiques can be broadly divided into two categories loosely distinguishable along disciplinary lines. Most of those oriented towards political theory, ethics and philosophy interrogate the relationship between the rhetoric of consent and the everyday experience of women's personal lives wherein consent holds pivotal practical importance. In contrast, those undertaken by feminist legal scholars tend to focus on the micro-politics of consent, exploring law's treatment of consent in specific contexts such as sexual violence, prostitution, the trafficking of women for the purpose of sexual exploitation, and the relationships between spouses.¹ Yet despite exhibiting considerable variation these encounters share a common, unifying characteristic: they scrutinise consent in reference to liberal individualism's vision of humanity. This is not to suggest that feminists engaged with issues of consent are necessarily advocates of liberal theory; rather that their writings apprehend consent as articulating a normative commitment to liberal subjectivity, one which privileges a specific representation, both of the consenting subject and the act of consent itself. The former is apprehended from the point of view of qualities that adorn the liberal self: a sense of self ontologically prior to any form of society and predicated upon an atomistic, disembodied, rational agency. The latter becomes more than a mere act of assent. According to the liberal ethic its essence lies in both its voluntarily nature and inner rationality, it being the outcome of individual judgement stemming from the subject's freedom of will and independent choice to maximize self interest, welfare or pleasure, and being limited only by the negative effects it has upon the interests of others.

Within feminist discourse this conception of consent as a function of liberal subjectivity has profound consequences, for not only does it fashion the substance and

form of the discourse, it also shapes its direction and the solutions proposed to any problems the use of the concept poses. For example, feminist re-readings of the idea that the social contract forms the basis for political association challenge contemporary representations of modern democratic society as a post-patriarchal social and political order. They contend that women neither consented to the original social contract nor to the sexual contract said to have preceded it and according to which they voluntarily subjected themselves to men. Here, the very evocation of the notion of social contract is seen to sustain a veneer of equality that masks real and continuing structural inequalities between the sexes and to thereby represent much of women's social misery as 'consensual'. Drawing mainly upon data concerning sexuality and women's experience of family life, feminists argue that the current normative paradigms under which existing social institutions operate disqualify female experience and effectively negate the possibility of genuine choice for women. In so doing these paradigms are seen to make a mockery of the notion of female freedom of consent and to repudiate the classical liberal view that these institutions were consensually born amongst equal, free, rational individuals (see Pateman, 1980, 1988, 1997; see also Clarke, 1979; Coole, 1986, 1994; Frazer and Lacey, 1993: 70-77). Similarly, feminist legal scholars ground their critiques of consent on juxtapositions of women's social and legal realities. For example, judicial interpretations of the legal requirement of female consent in cases of annulment of arranged or forced marriages, and likewise those of 'sexually transmitted debt' involving wives as sureties, are seen as sustaining and reinforcing representations of women as immature or inexperienced, and as either too dependant on men, or as their victims in need of protection (Cretney, 1992: 537; Kaye, 1997: 46-47; Lim, 1996: 204-11; Diduck and Kaganas, 2006: 40-41).

Such representations, in constructing women as submissive or victimised, in short, as bereft of the 'blessings' of the liberal self, are said to devalue and undermine the capability of real women to exercise meaningful consent. However, for others the legal recognition of women's consensual capacity, as, for instance, in regard to prostitution or being trafficked for the purpose of sexual exploitation, is to be applauded. They see it as conferring upon women the power of agency and the status of rational and autonomous actor, and hence, as affirming women's possession of the self-same liberal subjectivity credited to men (Sullivan, 2003: 76-79, 2004: 136-38; Doezema, 1998, 2005). Still others argue that law's formal adherence to the concept of consent as the decisive criterion of the legality of an act ignores the pragmatic constraints that harsh reality places upon women's consensual freedom and exercise of rational choice. For them, judicial indifference to or disregard of what they see as clear expressions of women's non-consent, for instance in cases concerning sexual violence, or where courts are insensitive to emotional pressure in situations where a woman acts as surety for husband or partner, serve to sustain male power over women and erase women's possibility for agency, independent choice and self-determination (MacKinnon, 1989: 176-83, 2005: 242-48; Fehlberg, 1994: 474-75, 1996: 693-94; Naffine, 1994: 24-31; Duncan, 1995: 368-44; Richardson, 1996: 382-83; Auchmuty, 2002). Furthermore not only do feminist interrogations of the concept of consent rest within the limits of the liberal legacy: so too do the solutions they propose to the problems they reveal. Any hope for change is either invested in propositions for a transformative normative politics or is directed towards pragmatic policy interventions. The first either embraces feminist attempts to remodel consent though remaining within the context of the contractarian tradition, or seeks to decentre and replace it as an analytical category of female experience with other, more suitable liberal values.² The second aims to remove structural barriers preventing the flourishing of women's freedom and autonomy and to give 'true' meaning to the notion

of female consent (Pateman, 1980, 1989; MacKinnon, 1982, 1983; Vega, 1988).

This entanglement of consent with liberal individualism's notion of self has become so pervasive within feminism that not only has the ability to consent come to signify the presence of the liberal female self, but a belief in the truth of this signification has come to provide the criterion for the feminist judgement on consent. For critics of contractarian stories of origin, consent is found wanting because its connotation of the liberal self is identified as a fiction; those emphasising the contextual obstacles to women's consensual freedom label the requirement for consent as misleading, not because consent erroneously manifests this self, but because the real-life situations in which it is sought are seen to be so complex as to fundamentally disrupt the signification process; and both positive and negative attitudes towards the law's demand for consent depend upon the critic's faith in this process. Here, questions concerning the validity of the concept are largely conflated with those of female subjectivity. Yet this is not the result of a consensus within the feminist discourse in respect to liberal subjectivity. Rather, it is because the attachment of consent to the liberal self registers the existence and operation of another important parameter, namely that of power. Put simply, consent and female subjectivity are bound together by issues of power: the power men exercise over women, women's power over themselves and their own lives, and the belief in the need to further empower women. Endorsement or rejection of consent is therefore predicated not only upon how effectively it communicates women as autonomous, rational and responsible political, social and economic actors, but also the anticipation of what will best affirm real women's agency and mastery over themselves and strengthen their equal standing in private and public life. Similarly, the solutions, strategies and measures that feminist considerations of consent have to offer are designed to reduce and redress systemic power imbalances between the sexes, both as a whole and within the particularity of individual circumstances.

In reading questions of consent as questions of female subjectivity and power, this chapter is not seeking to offer yet another exposition of the problems consent presents for feminist analysis. Neither is the intention to add to the solutions already suggested. Instead it poses the feminist discourse on consent as the object of inquiry and engages with questions about its nature and form. In short, it asks what precipitated the present configuration of this discourse. More specifically, it explores the conditions that allowed the apprehension of consent to become bound up with ideas of liberal subjectivity and the way in which they became indivisible from notions of power. In so doing however, it proffers neither an exhaustive historical account of the concept of consent nor a causative explanation for its attachment to the liberal subject. It presents a genealogical inquiry (see Foucault, 1977) into the relationship of consent and selfhood, one which, in exploring hitherto unsuspected affiliations and seemingly insignificant elements, maps out the historical 'moments' at which significant shifts occur in the apprehension of the relationship of consent and selfhood, and thereby reveals the singularity of events responsible for the way consent is employed within contemporary feminist scholarship.

To this purpose the following text is divided into three parts. The first considers the initial valorisation of the concept of consent in Roman law and Stoic philosophy in the constitution of a hermeneutics of human action; the second traces a shift in the meaning of consent wherein as a key element of a religious or civic subjectivity it became a necessary condition of the creation and legitimacy of the order of the social - a shift revealed in the texts of the radical reformers and natural law lawyers of the 16th and 17th centuries; and the third, secured by the historical footholds provided by the preceding two, accounts for consent's association with notions of power and offers an appraisal of the modern feminist discourse of consent, the affiliations and aspirations it bears, and a

critical evaluation of the possibilities it promises.

Consent and the hermeneutics of human action

Derived from the Latin verb *consentire*, meaning to share physically, emotionally or intellectually, the word ‘consent’ originally emphasized the inter-relational element present in all instances of compliance and communicated an act of voluntary agreement. It was this apprehension, of consent as the objective, ‘neutral’ descriptor of mutual concurrence, which marked its adoption and use during Greek and Roman antiquity, both in judicial and philosophical accounts of human action.

As early as the period of the Republic, in Roman law the presence of consent comprised the sole requirement for granting legal status to a number of everyday activities, ranging from marriage and the formation of partnerships, to hiring, purchasing and sales. For example, a distinct category of legally binding contract demanded no other condition or formality besides having been agreed, and was equally easily invalidated by consent to the contrary (Sohm, 1907: 374, 396-408; Schulz, 1951: 524-26; Buckland, 1957: 251-54, 277-78, 348).³ Similarly, engagements and marriages, which were likened to consensual contracts by Gaius (*Digest* 20.1.4), were legally validated or dissolved simply by the informal declaration of consent from the interested parties (*Digest* 23.1.4, 23.2.2., 35.1.15).⁴ Such legal privileging of consent stemmed from jurists’ efforts to project legal meaning onto conventional articulations of human volition bearing particular significance for the individuals directly involved and the wider community. Consent was therefore understood very much in a pragmatic way, functioning in law, as it did in common language, as a sign of agreement, with its juridical exercise connoting voluntary participation of parties in a specific action and their assent to its legal effects. Indeed, the overwhelmingly practical nature of this engagement is attested to by the absence of any definition in law as to what the term consent actually meant. It was there to be objectively discovered in each instance and was a matter of fact rather than one of legal principle.⁵

Outside law the first major employment of consent as a key concept took place in schools of Hellenistic philosophy, most notably that of the Stoics.⁶ Here, in contrast with other philosophers who identified reason alone as being in charge of purposive activity, the Stoics posited a cooperation of reason with ‘assent’ (συγκατάθεσις) (Long and Sedley, 1987: 40b, I, h3, k3, o).⁷ They understood the process as involving two additional elements, ‘presentation’ and ‘impulse’, which together with ‘assent’ and ‘reason’ were considered to be powers of the soul inhabiting the heart and to operate in combination to generate human action.⁸ The first of these, ‘presentation’, referred to the stimulus received, and, as the impression of the external world upon the soul, comprised the force providing the direct cause of action. However, in being mere impressions of the external world, presentations in themselves could not constitute objects of consent. It was only when transformed into language as words and concepts to be clarified and built upon through discursive thought to form and inform meaningful propositions, that they ceased to provide more than a mere awareness in the subject. Only then did they enter the realm of human reason as rational propositions, become evaluated as objects of assent, and the impulse they generated be granted or refused (Long and Sedley, 1987: 33c, 33d; see also Inwood, 1987: 57-60). Whereas in animals the impulses were thought of as mechanical, instinctive, responses to the impressions wrought by the environment, in humans they were seen as mediated by the mental act of assent, the rational approval of one’s impression and the course of action it suggested.

As in law, the Stoic’s ‘isolation’ and incorporation of consent was predicated

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upon its function as an objective descriptor, although here it did not indicate agreement between persons about the performance of specific acts. Instead, in being posited as the *locus* wherein the rationality of the action-guiding process was manifested, it connoted accord between reason and the voluntary execution of *any* act, a concurrence deemed necessary to all activities appropriate to achieving one's ends. So whether the context was legal or philosophical, the centrality of consent essentially depended on its instrumental value, with its 'discovery' dictated by the logic of an interpretative account, it being incidental to a legal or philosophical hermeneutics of human action. In being incorporated in this way, consent did more than signify acts as consensual; it also distinguished them from others and, in so doing, provided an analytical category of human action.

Within Roman law this analytic significance of consent lay in the separation and differential legal treatment of certain consensual acts, with justification for this distinction being found, not solely in the nature of the act, but also in its association with the nature of its subject. Specific acts were seen as 'natural' and peculiarly suited to humankind because their performance was either in accord with human physical characteristics or was associated with the rational ordering of their general interests and consequently necessary to humanity's common welfare. In being considered essentially natural, these acts produced self-evident obligations requiring no further explanation as to why they were actionable other than that they were expressions of the universality of the human condition.⁹ Indeed, this connection is attested to by their being grounded upon nature's law, the law common to all living things, or resting within the jurisdiction of *ius gentium*, the law established by natural reason and applicable to all persons, not only the Roman citizens (*Digest* 1.1.1.3, 23.2.1, 1.1.9, 19.2.1, 18.1.1.2; Gaius, 1988: 33.154; Cicero, 1975: I.4.11-13). So in endowing commonplace, informal, real-life consensual activities with legal form, jurists did more than engage in a legal hermeneutics of action; they also embraced a hermeneutics of the self, for within the interpretative claims they articulated about human action there resided the truth of the acts themselves and, most importantly, that of the performing subject.

Unlike the jurist, for the Stoic philosopher the analytic significance of consent lay not in separating 'naturally' consensual acts from others: the very assertion that a moment of assent prefaced every voluntary action precluded such distinctions. Also unlike the jurist, the Stoic philosopher's adoption of assent provided no testament to the indisputable rationality of a particular act: assent always connoted agreement with reason and so demonstrated the rational quality of *all* human activity.¹⁰ Yet despite the capacity to assent being the property of all humans, it was conditional upon age, natural aptitude and intelligence, with its lack, presence, or quality distinguishing the activities of animals from humans, adults from young children, and the intelligent from the simple (Long and Sedley, 1987: 41a).¹¹ Moreover, any 'decision' to grant or withhold assent, in being the actor's 'internal' response to the action suggested by the 'impulse', was within the person's control, being formed and informed by personal circumstances, nationality, profession, gender, social and familial status, as well as by individual habits, beliefs and education, and thus the expression of the actor's personality and character (Rist, 1969: 34; Long, 1991: 118; Long, 2000: 164-72). Assent was now transformed into a highly individualized measure of human activity, separating and selecting acts in accord with one's better judgement, reason, virtue, or vice, while rejecting all others.

This apprehension of assent did not, however, signal a belief in the agent's liberal choice of action, as it has been suggested (see, e.g., Kahn, 1988: 244; Taylor, 1989, 137). Central to Stoic philosophy was the notion of fate, of Zeus's will, securing the certainty that accompanied the 'natural arrangement of all things', a providentially ordered plan according to which the world and everything in it followed a pre-ordained path (Long and

Sedley, 1987: 20e, h, f, 38e, g, 54b, v, 55, 70g; see also Gould, 1974; Sandbach, 1994: 79-82). Hence, in addition to the capability for assent being determined by fate, fate also marked the life and experience of the agent and thereby directed and shaped assent's choice of action. That the agent could not help but act as s/he did negated neither the fact that it was s/he who acted nor the praiseworthy or shameful nature of this act; it did nothing to diminish ethical responsibility for the failure or success to act in agreement with one's own particular humanity. Though bound by divine will, assent's choice of acts marked the ethical quality of these acts, with the only freedom to assent being exercised in the responsibility to fulfil the potential of one's own nature, a freedom often defined as the 'freedom to obey God' (Seneca, 1932: 15.7; Diogenes Laertius, 1925: II.7.147).¹²

Operating at the intersection of cognition and moral life, assent therefore functioned both as an objective criterion of human conduct, distinguishing acts by assigning them to different developmental stages of life, and as a subjective one, authorising acts agreeable with the actor's natural and social potentials. In so postulating consent as a generic principle of human activity and in associating it with the individual's ethical and social *persona*, the Stoic philosopher, in a similar way to the jurist, engaged in an interpretative account of human action while at the same time articulating knowledge claims about the truth of the consenting subject. Here then, as in law, a hermeneutics of action was intimately linked to a hermeneutics of the self. For Roman lawyers and Stoic philosophers alike, knowledge of the truth of the self resided not in *a priori* posited ontological qualifications but in the very acts the self performed. Only in the nature and quality of the assented acts, in the degree of maturity and wisdom they exhibited, could the universal, natural and concrete, singular humanity of the subject, be laid bare.¹³

Thus was the appreciation of consent in antiquity, though anthropological in nature, not anthropocentric in focus. Neither the legal nor philosophical accounts of consent were driven by subjectivist concerns or claimed constituency to a metaphysics of the subject. No reference was made to a 'thinking thing', a unity of consciousness and self consciousness, which, in being sole author of its own volitions, possessed freedom of will and moral autonomy; this would be the subject much post-Cartesian philosophy would cherish so highly. Instead, being validated as a qualifier of purposive conduct within a legal and philosophical hermeneutics of action, which was also espoused to a hermeneutics of the self, consent was not only a necessary condition of the former but it also became a constitutive part of the latter.

In the centuries to come, the apprehension of the relationship of consent and selfhood remained essentially unchanged, although St Augustine's 'invention' of the human will as an independent faculty of the mind modelled upon that of God, tarnished consent's centrality in the process of the generation and ethical qualification of human action.¹⁴ Not only was the will the sole 'mover' of all intellectual and practical activity but because all activity lay within its power, it was also the *locus* of the actor's ethical responsibility.¹⁵ Whether thought of as free to do as it wished, as aided by rational deliberation, or as irrevocably wounded by original sin, vulnerable to concupiscence, and thus in need of God's grace, it was in the nature and quality of the acts to which the will assented that the knowledge and truth of the self was to be sought (Augustine, 387-8/1964: I.xiii, xvi.117, II. i.5, II.xviii, III.Ix, xx; Augustine, 427/1964: 4; Aquinas, 1265-74/1970: Ia.82.3-4, 83.4, Ia2ae.15, Ia.IIae.77.3). Consensual acts were hence no longer differentiated into natural and juristic ones or into those whose performance may or may not fail to conform to the individual actor's 'fated' nature. They provided no testimony as to the humanity, personality or character of the performing subject, but instead, being bearers of its intentions, secret thoughts and inner-most desires motivating its decision to act, were the marks of the presence or lack of a sinful will. Whether actually performed or

just wished therefore, they needed to be deciphered; they must be closely examined and interrogated so that the disposition of the actor's will was established and the truth of the Christian self revealed. So within the voluntaristic tradition of the Middle Ages, consent, although continuing to partake in a process embracing explications of the 'mechanics' of human action and of the performing subject, now loses its 'autonomy' and resides in the shadow of the human will. Still communicating an act of agreement, it does so neither as an objective descriptor of the nature of an act nor as a power of the rational soul sharing equal standing with reason: it does so as a representation of the human will, with actions 'called voluntarily from the fact that we consent to them' (Aquinas 1265-74/1970: Ia.IIae.15.4).

Consent and the deontology of order

The sixteenth and seventeenth centuries witnessed a radical shift in the way consent was apprehended. Though still associated with the faculty of will consent ceased to be privileged solely as the mark of its disposition, and consensual acts became more than merely evidence of the soul's struggle to choose godly pursuits over earthly pleasures. Expanding beyond the interiority of the self to embrace the external world, consent became bound up with the subject's worldly being and took on a pivotal role in the constitution of any of the multiplicity of visions of social order offered by the times; those theocratic and salvational, as articulated in the teachings and experiments of the radical reformers, and secular ones of a moral and political nature advocated in the 'civil philosophies' of the modern natural law thinkers.¹⁶ This is not to suggest that a socially oriented appreciation of consent had been entirely unknown during the Latin Middle Ages. It had been widely employed in medieval ecclesiology and the political theories of the scholastics, where in representing community will it had been closely associated with notions of secular and religious government. As either assemblies of the people or bodies of the faithful, communities had been seen to possess a corporate personhood, and hence to enjoy a common, singular will to enter into agreements binding upon each and every member.¹⁷ Yet this form of consent had not been essential for the appointment of legitimate authority because existing hierarchical political arrangements, together with each person's place within them, were unquestionably accepted as divinely ordained. The community's granting of consent was of procedural significance only, simply affirming the natural necessity of rule, together with people's obligation of obedience and voluntary submission to a ruler whose legitimacy was already established; it was a result rather than cause of legitimate government¹⁸ (Kern, 1948: 69-70; Ullman, 1957; Gough, 1963: 41, 46-47; Tierney, 1982: 39-41; Oakley, 1983: 324). With its new incarnation however, consent was no longer to be perceived of in a corporate sense, nor was its social relevance realised in its facilitating a procedural step in the establishment of government. Instead, in embracing the life of every individual member of the community, it became central to what Taylor (1989: 13-14, 23) describes as the Protestant Reformation's 'affirmation of ordinary life'.

Reformation calls for a new way of living that revived the communal ways of the Apostolic Church with its commitment to teaching and living the Gospel, rested on the belief that whoever answered the call entered into a covenant with God in the hope of becoming the 'elect' of His love and mercy; those for whom the promise of salvation and eternal life would be fulfilled.¹⁹ Founded in Christ's suffering and death, this covenant, a sign of divine justice manifesting the will of a provident and omnipotent Lord, was central to all reformation theology, both magisterial and radical alike (Calvin, 1949: II. vi;

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1540-64/1958: Gen.17.7, 25.33, Heb. 9.15, John 3.16, Mt.10.6; Zwingli 1525/1981: 99-100).²⁰ For the magisterial reformers, since establishing a saving relationship with God was a matter of divine predestination and election, the offer of the covenant was neither grounded upon the dignity of human nature nor depended upon merits evidenced in the possession of unassailable faith or the practice of good works; it relied on God's grace alone. Consequently, its fulfilment required neither rational deliberation nor the presence of a free will on the part of the believer (Calvin, 1949: II. ii. 10-13, III. ii 11-12; 1540-64/1958: Dan. 9.4, Mal.1.1, Rom. 11.34, John 6.40; Zwingli 1525/1981: 118-137).²¹ For the radical reformers however, the covenant was a voluntary and mutually binding agreement according to which the faithful had to earn their place at His table by a total and free commitment of will to a complete regeneration of the Christian self (Müntzer, 1524, cited in Gritsch, 1989: 57-61; Denck, 1526/1957: 94, 96, 100-1; Hubmaier, 1527/1957: 124-32; Hut, 1520-27/1991: 162-63; Hofmann, 1533, cited in Williams, 1962: 263, 285; Riedeman, 1545/1968: 146; Karlstadt and Grebel, cited in Pater, 1984: 152).²² This could not be achieved purely with a spiritual preparation of one's soul to receive the Divine. Although faith was indispensable, this regeneration also required material rebirth through voluntary immersion in a novel form of social existence the 'truly converted' practised in communities the radical reformers established for this very purpose. The human side of the covenant thus involved a free and voluntary agreement to assume a strictly disciplined life, which, though lived on earth, partook of the heavenly fabric. Only here, in a society separated from the godless world and its degenerate established Churches, its State, laws, courts and oaths, as well as its wars and violence, could the 'brethren' who broke bread together, pursue a pure, honest life in full accord with His word (Sattler, 1527/1968; see Troeltsch, 1956: 694-99 and Clasen, 1972: 152-209).²³ Fulfilment of the covenant, and hence redemption of the Christian self therefore, depended not only on adherence to the prescriptions of an ethical and otherworldly salvational order, but also on actually enacting them within a congregation of equals that transcended the boundaries of the institutional Church.

Agreement to this double pledge demanded an act of verification that clearly and unambiguously communicated the individual believer's consent as being freely given. This act, likened to a 'signature' to the terms of the covenant, was the request and performance of baptism (Troeltsch, 1956: II.695-6; Williams and Mergal, 1957: 21; Hillerbrand, 1971: 73; Clasen, 1972: 95-106; Hostetler, 1974: 7-8; Baylor, 1991: xvii). However, the radical reformers, in seeing children as having neither the maturity nor will to understand the meaning and significance of the covenant and hence to be unable to consent to it either truly or freely, believed strongly that baptism should only be available to adults (Hut, 1520-27/1991: 161; Grebel, 1524/1991: 127-28; Manz, 1525/1991: 98-100; Sattler, 1527/1968: 131; Karlstadt cited in Sider, 1974: 292-93). Adult baptism was thus vested with an importance far in excess of its conventional sacramental meaning, and the role of consent thereby ascribed unprecedented social value. Posited as the single, indispensable requirement for novices seeking membership of a covenantal society, it provided the foundation upon which such societies were constituted, and, as such, became firmly attached, not only to a vision of a spiritual life, but to a specific social reality. Whilst faith led the soul in the battle against the corruption and sinfulness of the fallen human nature, it was the free choice to comply with the norms and rules of the community, which guided and strengthened the earthly battle against the flesh.

This close association of consent with social order was to prove to be more than a peculiarity of the mind of the Reformation. Perennating into the next century, it would capture the intellectual tradition of the civil philosophies of modern natural law theory, and fortified and consolidated, would endure to the present day. This is not to suggest a

direct lineage, with transmission of an unadulterated intellectual inheritance; rather, to emphasize that despite their apparent irreconcilable opposition, with the former offering blueprints of ‘kingdoms of God on earth’ and the latter reconfiguring designs of the secular, they nevertheless shared a common understanding and use of the concept. Both claimed the individual subject of consent to possess a will freed from its ‘bondage’ to sin and asserted its capability to choose good and useful acts without committing the sin of pride (Grotius, 1604/1950: 18-19; Hobbes, 1642/1998: II.I.8, 1889/1969: 12.3-8; Pufendorf, 1673/1991: I.9, 11).²⁴ Similarly, for both, the presence of consent represented more than a general freedom of will. It also marked the willing commitment of the subject to a specific order of being and signified the ascendancy of the artificial and social over the natural and free. Choosing the exclusive, highly organised mode of life practiced in the voluntary and self-selected communities that the radical reformers espoused was therefore neither a renunciation of temporal life in favour of a holy one of solitude and contemplation, nor the expression of a preference for one social form over another. Instead, the abandoned order was seen as mirroring the natural condition of fallen humanity, and, with the fundamental nature possessed by all Adam’s descendants being corrupt, depraved and full of lust, the world inhabited by Christians bereft of divine similitude was simply a natural order of carnal servitude, darkness and sin (Hut, 1520-27/1991: 164, 166; Grebel, 1524/1991: 42; Sattler, 1527/1968: 132). Similarly, in those visions of order advocated by the civil philosophies the choice to live in a community grounded upon the consent of its members was predicated upon the rejection of a life of absolute freedom in the state of nature (Grotius, 1604/1950: 9-11, 19-21; Hobbes, 1651/1991: XIII, 1642/1998: I; Pufendorf, 1673/1991: I.3). So whether imagined as a ‘community of saints’ or as a carefully delimited domain of profanity inhabited by secular selves, the social order being envisaged was constituted as a concatenation of individually articulated wills of equal standing; wills which, in voluntarily consenting to the terms of a founding covenant, pact or contract, breathed life into the consensual artifice.²⁵

This demarcation between, on the one hand a natural mode of being associated with a space prior to history and apart from society, and on the other, an artificial one contingent upon human volition and associated with the order of the social, gave rise to two distinct modes by which consent and its relation to selfhood was apprehended. As the representation of the will’s elective capabilities and freedom of action consent communicated intrinsic essential properties of the ontologically defined self. Yet, though marking generic features of humanity it was no longer valorised as central to a hermeneutics of action. Consent acquired meaning and significance as an articulation of the natural, base self, such that it provided testimony to the individuality of a will both unique and free to choose any possibility set before it. What drove individual consent to adopt a course of action was neither fate, an *a priori* recognition of the common good, nor obedience to divine commandments; for, whether the creation of an omnipotent and benevolent God, or ‘self-begotten’, as with Milton’s rebel angels in *Paradise Lost*, this base self, always ontologically posited prior to the social, inhabited a natural state of anomie wherein it cared little as to the wicked or virtuous nature of the acts it performed. Here, equal among equals, it fashioned a solitary trail, guiding its actions towards the achievement of private ends dictated by its passions, desires or needs, and aided only by the precepts of nature that experience and the exercise of reason revealed (Hubmaier, 1527/1957:16-124; Hobbes 1651/1991:I.13, 1889/1969:I.14.1; Pufendorf 1672/1729:II.ii.3, 1673/1991:II.1.3-8; Locke 1698/1989:II.ii.4-7).²⁶ Thus immune to ethical concerns and endowed with a strong subjective quality, consent was now posited as a natural and anthropocentric concept, one whose moral significance derived not from

its abstraction as a representation of the ontological possibilities of human nature, but from its concrete, specific, function as a means to some individual end freely chosen and pursued by the consenting subject.

In addition to this natural and anthropocentric apprehension, consent, remaining faithful to its etymological root, also communicated an act of voluntary agreement. As an objective descriptor of human action it was concerned with the effects rather than the function of the individual will; with the very meaning and significance of consensual acts. This normative understanding of consent and its subject could neither boast ontological primacy nor dwell in an anomic state because herein the actual performance of consensual acts would necessarily be found wanting. Given freely by the natural Christian self living in a fallen world seething with animal desires consent could easily and unwittingly take the devil's path, whilst for inhabitants of a natural order in which unfettered wills chose as they pleased it was prey to multifarious, often contradictory, passions and desires, and hence, was of accidental and fleeting efficacy. So although in the state of nature consensual acts remained a possibility, the lack of any will superior to that of the natural self, rendered their security conditional upon the strength, cupidity, self-interest or self-love of all other agents living in natural equality with the performing subject (Hobbes, 1642/1998: II.11, 13 V.1, 1651/1991: I.XV.71; Pufendorf, 1672/1729: II.ii.3, VII.i.4, 1673/1991: I.1.11-12, I. 3.4-5, II. 1. 9-10). Accordingly, since the social order alone possessed the means of ensuring respect for the performance of voluntary acts by directing, suspending or moderating the freedom of human will, this normative apprehension of consent could only be envisaged as an occurrence of the social. Consensual acts thereby acquired an unprecedented significance. They provided the key to the founding covenant, but also bore responsibility for forging the bonds between the Christian or civic self and the order of the social.

The imperatives authorising and justifying the creation of the social were predicated neither upon previously extant principles concerning the common good nor teleological injunctions about the natural or ethical condition of humanity. Whether that which moved the individual will to enter the original covenant was hope of salvation, the feebleness of human nature, or the desire for self-preservation, it was recognition of the necessity to transgress the state of nature that precipitated the need for the social, whilst it was the voluntary and free nature of the consent that provided its moral legitimacy. Therefore the only social and ethical bonds the social could legitimately claim were of instrumental value, being aimed at the willing acceptance of and compliance with the moral entities the social artifice invented, namely, the nexus of public and private rights, duties and obligations, which, in functioning as 'bridles of natural liberty', directed the natural self's freedom of choice and action (Hobbes 1651/1991: I.xiv, 1642/1998:II-III; Pufendorf 1672/1729:I.vi, 1673/1991:I.ii.I.2,15; Selden 1689/1927:36-7).²⁷ Without such impositions neither self-restraint in regard to self-interest, self-control over one's own passions and desires, nor the cooperation or orderly conflict of individual wills could be achieved, and consequently, neither lawfulness and peace nor the justice of the social, be maintained.

Duties and obligations were fulfilled in the ordinary, everyday performance of voluntary acts, in the ready exercise of acts of obedience to one's superiors, and it was in the voluntary honouring of contracts, those private agreements forming the sole *locus* of the birth, renouncement or transference of rights, that the triumph of the social over the natural was nurtured and its moral legitimacy preserved. Hereafter consensual acts bore no truth of the performing subject. Situated within a web of hierarchically structured positions, with each anchored in and identified with the performance of specific duties and obligations and the possession of corresponding rights, the artificial, socially-created

Christian or civic self, now found its truth as the bearer of the sum of rights and responsibilities assigned to the office it voluntarily assumed. Moulded by requirements of this ‘office’, whether that of preacher, faithful or regenerate, magistrate, master, father, husband or monarch, slave, mother, wife or daughter, the social individual was defined, evaluated and judged according to the mode, manner and degree to which s/he performed specific obligations, fulfilled particular duties and exercised rights whilst respecting those of others.

With the seventeenth century drawing to a close the ancient and scholastic conceptual unity of an anthropological and a normative understanding of consent thus finally broke down. Unleashed from its past and no longer tied to a hermeneutics of action and of self, consent, newly bound to an ontology of the self and a deontology of order, would now linger unhindered into its future.

Postscript or consent and the *nomotechnics* of the self

No longer part of the ‘great chain of being’, that ontological scale upon which everything once had been carefully graded according to its degree of ‘perfection’ liberated from moral prescriptions of the medieval teleological universe, the subject of the anthropocentric understanding of consent became endowed with an unlimited, autonomous freedom “...to act in accordance with his own will” and thus be “...subject not to another’s will but to his own” (Lovejoy, 1936:58-9; Huizinga, 1963:46-55; Grotius, 1604/1950:18). Freely exercising the will’s elective capacity individual agents could now initiate, decide upon or veto any course of action they wished; although as lone authors of these actions they bore moral responsibility for them as well (Grotius, 1627/1957:I.iii.viii; Hobbes, 1651/1991: XXI.108; 1673/1991: I.1.9; Pufendorf, 1673/1991: I.i.10, I.7.5; Locke, 1698/1989: I.ii.7).²⁸ This requirement that individual consent be freely given also demanded an elective process untrammelled by ‘alien elements’; for any influence, even the merest hint of coercion, would be seen as morally wrong because it wounded the agent’s autonomy. Thus, despite being held common to all humanity, possessed by each individual in equal measure, consensual freedom, in embodying the right to exclude all other wills from one’s own decision-making, also acquired a distinctly personal and private nature.

Whether God’s benevolent gift to the first humans, a merciful offering to aid in the redemption of the fallen self, or an individual right inscribed in nature’s laws, for radical reformers and civil philosophers alike this freedom of the will’s choice was fundamental to their understanding of human nature.²⁹ As a ‘natural freedom’ it was akin to the exclusive ownership of property, such that each individual, as the sole and original source of this freedom, enjoyed the right to not only ‘dispose’ of it at will, but to legitimately prohibit external attempts to intervene in it (Grotius, 1604/1950:18, 1625/1957 I.2.1.5, I.17.2; Pufendorf 1673/1991: I.12.3; Lilburne, 1646/1938, 1647/1964: 2-5; Locke, 1698/1989: II.V.27).³⁰ Although invariably extended to embrace the person and their life as a whole, this equation of natural freedom with property ownership (*dominium*) enunciated a novel understanding of the relationship between consent and selfhood; one clearly manifested in the practices of the radical reformers and explicitly theorized in seventeenth century thought (see Buckle, 1991:35-52, 161-179; Tully, 1982:95-124). Here, consenting subjects claimed total proprietorship of all they called their own (*suum*) alongside the right to prevent its possession by any other.³¹ In so doing, they were not only possessive owners, as many have argued, but they were also vigilant and watchful owners, standing sentinel over the essential possessions recognised as theirs.³² Where freely given by the autonomous, natural self, consent served to ethically

justify the ‘creation’ of the social. Yet the possessive self’s concern to maintain proper respect for his or her material property and ‘natural freedom’, necessitated and sustained a voluntary acceptance of the socially instituted ‘fountains’ of authority. Safeguarding this possessive self’s property thus fuelled the watchful self’s right to judge the authority and the mode of government it had consented to and to respond accordingly. So the freedom to grant or withhold consent not only sanctioned the consenting subject’s right to interrogate and critique the true nature of the acts of the sovereign authority, but, in light of the watchful owner’s obligation of self-defence, it also explicitly granted a mandate to resist them whenever necessary.

Although specific attitudes to the Sword and baptism provided the main division between magisterial and radical reformers, questions of consent, government and resistance were centrally important to both.³³ Mainstream reformation leaders, those who believed that the power of the Sword ordained by God and passed from Adam to his sons maintained the worldly order by punishing evil and protecting good, saw the essential duties of the Christian as revolving around obedience and non-resistance. True, many did cast doubt upon such duties and advocated the right to resist any government which ceased to enjoy its subjects’ consent, but this was a right granted to magistrates in response to a tyrant Prince, rather than one belonging to every private person (Luther, 1526/199:4-10, 34-43; Calvin, 1536/1991:50-55, 56, 74,78-82; Zwingli, 1523 cited in Stayer, 1976:61-5; Mornay, 1579/1969:146-56, 167-8, 180-197; Beza, 1574/1969: 101-10,131-5).³⁴ For the radical reformers, the faithful, in voluntarily espousing a separatist mode of life, neither participated in civil government nor asked for its justice, and therefore owed no such duty of obedience to the godless secular and religious leaders they labelled as violators of God’s will and law. Consent to enter the polity of Christians and conduct their lives according to its norms, rules, practical values and principles, constituted an act of faith based on a conscious and free decision. It was also testimony to their individual power to act and choose without ‘external’ influences upon their preferred mode of life. So whenever their capacity to freely grant consent was endangered, questioned or disputed, as private persons they had a right of resistance and self-defence. Hence did zealous consent to a regenerate life often acquire considerable political force, not simply inducing castigation and critique of worldly authorities, but precipitating acts of civil disobedience, active resistance or even revolutionary violence (Karlstadt, 1524/1991 and in Pater 1984:124, 145; Müntzer, 1524/1991: 27-32; Hubmaier, 1527/1991:206; Anonymous, 1525/1991: 103-110,118-124; Lilburne 1645/1965:261,291,1649/1964:402-413; Overton:1646/1976).³⁵ Couched in religious language and frequently interwoven with eschatological arguments and apocalyptic visions, the writings of radical reformers advocated ‘grass-roots’, egalitarian, often communistic, ways of life grounded upon the individual consent of the faithful, and cast a critical eye on the political and social institutions of the time. Provision of real-life alternatives gave this stance material hypostasis and, together with their writings, imbued considerations of consent with questions of power and truth. Celebrating the right of consenting subjects to question the nature and extent of political authority and existing practises, they asserted their individual power to resist and thereby provided the first locus of modern political critique.³⁶

Over a century later, though proffered in a different language and different spirit, modern natural law theory once again placed consent at the heart of a critical discourse which also bound the consenting subject to notions of power and truth (see Foucault, 1996: 385-86). Civil philosophers, in emphasizing the individuality and freedom of the will, were essentially seeking to construct a novel moral basis for political authority and obligation rather than challenge it (see Tully, 1993:9-10; White, 1996: 11-26; Hunter,

2001: 150-1; Hunter and Saunders, 2002: 3-5).³⁷ Their efforts to construct models of unified and secular sovereignty inevitably engaged with the nature and origin of political power, alongside issues of legitimacy, its reasonable limits, and the corresponding rights of the subject. Although lacking the radical reformers' critical thrust, they still discussed and theorized widely on religious tolerance, the exercise of right of conscience and resistance (Locke, 1675-1679/1997: 230-5, 246-8, 267, 276. See also Laslett, 1989: 34-6, 79-93; Tuck, 1991: xviii-xxv; Tully, 1991: xvi-xxiv).

The bare, sovereign self, the 'atomistic individual' so often postulated as ancestor to our 'modern and liberal self'; s/he who, in triumphantly entering upon the stage of history, captures it in a critical gaze, does however possess a darker, more 'sinister' side. Posited as the only source of outward action, and in enabling autonomous agents to direct their own bodily movements and personal conduct, the natural self's freedom of will also shapes the empirical world they have chosen to live in and allows the possibility of voluntarily shying away from exercising this freedom. The original voluntary agreement that animated the social, its laws, norms and its system of punishments was, both for radical reformers and civil philosophers, an act of profound resignation; for it was not an act celebrating the consenting subject's natural freedom, but rather an act of its transgression. This freedom was exchanged for a Christian or civic liberty which bore the yoke of normative prescription; for even though the choice to abandon the natural was not imposed externally but resulted from self-reflective inquiry, the autonomous possessive and watchful subject of consent had now to give way to a watched and, at the same time, self-watching subject (Pufendorf, 1672/1729:I.i.3-4; Locke, 1698/1989: II.vi.63). Whether envisaged as in thrall to the flesh, permanently at war with all others, or as weak and incapable of safe existence, a realisation of the bare self's lack of resources of orderliness, self-help or self-protection led to a free choice of self-effacement. The watched and self-watching subject that rose in its place could henceforth only be the subject of the normative and juridical understanding of consent, never that of a natural and anthropocentric one. However, despite its contrasting so markedly with the free and *sui iuris* natural self, this social and disciplined subject was similarly located within a discourse on power, truth and subjectivity.

This discourse neither asserts possession of critical power, the right to question truth, nor criticises the imposition and exercise of sovereign power and its right to define what is to be true. Instead it speaks of a true liberty whilst simultaneously exhorting obedience and advocating artificial chains, bonds, penalties and moral impositions, all of which it sees as emanating from the subject's consensual acts (Hobbes, 1642/1998:XIII.15-7, 1651/1991:XXI.108; Pufendorf, 1673/199: I.2.5-8). Premised as the first and ultimate source of the power that is exercised in the social order, the subjects of consent become themselves the recipients of this power. Bound by their own consensual acts, without signs of indocility, they willingly abide within the limits of social liberty and come to govern their own conduct according to the prescribed normative requirements; those duties, obligations and rights attached to the 'social offices' they have freely accepted to occupy.³⁸ Here consensual acts, acquiring a life of their own, are transformed into little more than social practises of subjugation. They themselves are the embodiment of power; but a power without a face, a power which neither belongs to nor is exercised by subject or sovereign. Instead it is an evasive, insidious power, one which relies on its ability to affect conduct, and one which resides in the web of consensual acts that authorise, sustain and legitimise the social. It is a power that pervades the social body as veins do the corporeal, and a power whose effects bear upon all actions and interactions to produce the socially governed and self-governing self (see Foucault, 1982: 218-22).

It is my contention that the double apprehension of consent, as natural and anthropocentric and as normative and juridical, together with the discourses on power and truth it set in motion, announces both the concept's modern and feminist history; the feminist critic's location and interrogation of consent within a discourse on power, truth and subjectivity. It allows for the granting and withholding of consent to function as an axis of freedom and to empower critique, whilst also activating conditions of domination and self-subjugation.

Whether engaging with the employment of consent in theoretical discourses or with its function in social and legal practises, the feminist scholar, in associating the concept with the possession of liberal subjectivity so mindful of the natural bare self, is not just beguiled by the promise of its optimistic imaging. In predicating her critique or endorsement of the concept upon its ability to bestow essential, intrinsic qualities of the natural self upon the female subject, she seeks to appropriate for herself those possessions of freedom, agency, and autonomy, and thereby assert her right as both possessive and watchful owner to question the truth of social and political discourses and judge social institutions and practises. For her, consent's seduction therefore lies not only in its enticing promise of the riches of the possessive self, but also in the critical power and right of resistance enjoyed by the watchful owning self. However, amidst our efforts to claim possession of that which history and culture have for so many centuries denied us, we can lose sight of the possessive and watchful self's 'other' side, the watched and self-watched governable self, the consenting subject of the social order. And in granting consent its mythical status as the fundamental guarantee of freedom within the social, we remain immune to its starker side, its function as a threat to our freedom.³⁹

In concluding this brief genealogical inquiry into the concept of consent and its bearing upon feminist scholarship I realise that I may have opened myself to the criticism that I have covered too much ground in too little a space and consequently have omitted much. This may indeed be the case, yet I would still maintain the position that the radical shift I have identified as occurring in the meaning and understanding of consent, which took place in the thought and practises of the sixteenth-century radical reformers and seventeenth-century civil philosophies, did indelibly mark its future, laying down the conditions that made possible the specific form and priorities of the modern feminist explorations of consent. This is neither to deny the concept's subsequent history in political theory and philosophy, for example the works of Rousseau, Kant and Hegel, nor to devalue significant feminist work on this area (see Hampton, 1991). It is rather to impress upon the reader my view that feminist inquiry, even when attempting alternative readings of consent, does so in order to claim possession of the natural and metaphysical self, which, whilst boasting ontological primacy and celebrating its freedom, autonomy and agency outside history and society, at the same time entrusts its possessions to the keep of the social. By emphasizing this modern direction of feminist engagement with consent and as a way of bringing my argument to a close, I want to pose the question: Do we really need to centre our inquiry on consent on the natural self and the liberal subjectivity it promises? It might be that the problem is neither one of a lack of recognition of we women as free, autonomous agents, nor the disempowerment this is thought to precipitate. Maybe the problem is that female subjectivity is nothing more than the historical correlation of processes of subjectification built into our history, social technologies prescriptive of the 'laws' of the self, such as the structure of consensual acts associated with the normative understanding of consent. So perhaps the solution lies in our first being able to historically locate such 'nomotechnics' of the self and then attempt to change them.

Bibliography

- Annas, J (1990) 'Stoic epistemology', in Everson, S (ed) *Epistemology*, Cambridge: Cambridge University Press, pp 184-203
- Anonymous (1525/1991) 'To the Assembly of the Common Peasantry' in Baylor, M (ed) *The Radical Reformation*, Cambridge: Cambridge University Press, pp. 101-129
- Aquinas, T (1265-74/1970) *Summa Theologiae*, London: Blackfriars
- Auchmuty, R (2002) 'Men behaving badly: an analysis of English undue influence cases', *Social and Legal Studies* 11, pp 257-82
- Augustine, St (387-88/1964) *On Free Choice of the Will*, Indianapolis: Bobbs-Merrill
- Augustine, St (427/1964) 'Retractions', in *On Free Choice of the Will*, Indianapolis: Bobbs-Merrill
- Bainton, RH (1963) 'The left wing of the Reformation', in Bainton, RH (ed), *Studies in the Reformation*, London: Hodder & Stoughton, pp 119-129
- Baylor, MG (1991) *The Radical Reformation*, Cambridge: Cambridge University Press
- Benhabib, S (1987) 'The generalized and the concrete other: the Kohlberg-Gilligan controversy and feminist theory', in Benhabib, S and Cornell, D (eds), *Feminism as Critique: Essays on the Politics of Gender in Late Capitalist Societies*, Oxford: Polity Press, pp 77-95
- Beza, T (1574/1969) 'Rights of Magistrates', in Franklin, JH (ed) *Constitutionalism and Resistance in Sixteenth Century*, Pegasus: New York, pp. 97-135
- Brennan, S (1999) 'Recent work in feminist ethics', *Ethics* 109, pp 858-93
- Buckle, S (1991) *Natural Law and Theory of Property Grotius to Hume*, Oxford: Clarendon Press
- Buckland, WW (1957) *A Manual of Roman Private Law*, Cambridge: Cambridge University Press
- Cantarella, E (2005) 'Gender, sexuality and law', in Gagarin, M and Cohen, D (eds), *Cambridge Companion to Ancient Greek Law*, Cambridge: Cambridge University Press, pp 236-53
- Calvin, J (1949) *Institutes*, London: James Clark
- Calvin, J (1536/1991) 'On Civil Government', in Höpfl, H (ed) *Luther and Calvin on Secular Authority*, Cambridge: Cambridge University Press, pp47-86
- Calvin, J (1540-64/1958) *Commentaries*, New York: SCM Press
- Clark, L (1979) 'Women and Locke: who owns the apples in the Garden of Eden?', in Clark, L and Lange, L (eds), *The Sexism of Social and Political Thought*, Toronto: University of Toronto Press, pp16-40
- Clasen, CP (1972) *Anabaptism: A Social History 1525-1618*, Ithaca: Cornell University Press
- Cicero (1975) *De Officiis*, Cambridge, MA: Harvard University Press, Loeb Classical Library
- Cohen, EE (2005) 'Commercial law', in Gagarin, M and Cohen, D (eds), *Cambridge Companion to Ancient Greek Law*, Cambridge: Cambridge University Press, pp 290-302
- Coole, D (1986) 'Rereading political theory from a woman's perspective', *Political Studies* 34, pp 129-48
- Coole, D (1994) 'Women, gender and contract', in Boucher, D and Kelly, P (eds), *The Social Contract from Hobbes to Rawls*, London: Routledge, pp 191-210
- Cretney, S (1992) 'The little woman and the big bad bank', *Law Quarterly Review* 109, pp 534-39
- Cushman, RE (1950) 'Faith and reason in the thought of St Augustine', *Church History*

19, pp 271-94

Dalton, C (1985) 'An essay in the deconstruction of contract doctrine', *Yale Law Journal* 94, 999-1114

Damrosch, L (1979) 'Hobbes as a Reformation Theologian: Implications of the Free-Will Controversy', *Journal of the History of Ideas* 40/3, 339-352

Daw, EB (1917) 'Love fayned and unfayned and the English Anabaptists', *Proceedings of the Modern Language Association* 32, pp 267-91

Denck, J (1526/1957) 'Whether God is the cause of evil', in Williams, GH and Mergal, A (eds), *Spiritual and Anabaptist Writers Documents Illustrative of the Radical Reformation*, Philadelphia: The Westminster Press, pp 88-111

Diduck, A and Kaganas, F (2006) *Family Law, Gender and the State*, Oxford: Hart Publishing

Digest (1973), in Scott, SP (ed), *The Civil Law*, Cincinnati: The Central Trust Company

Dioegenes Laertius (1925) *Lives of Eminent Philosophers*, Cambridge, MA: Harvard University Press, Loeb Classical Library

Doezema, J (1998) 'Forced to choose. beyond the voluntary v forced prostitution dichotomy', in Kemadoo, K and Doezema, J (eds), *Global Sex Workers. Rights, Resistance, and Redefinition*, London: Routledge, pp 34-50

Doezema, J (2005) 'Now you see her, now you don't: sex workers at the UN Trafficking Protocol negotiations', *Social and Legal Studies* 14, pp 61-89

Dihle, A (1982) *The Theory of Will in Classical Antiquity*, Berkeley: University of California Press

Drakopoulou, M (2000) 'The ethic of care, female subjectivity and feminist legal scholarship', *Feminist Legal Studies* 8, pp 196-226

Drakopoulou, M (2001) 'Equity, conscience and the art of judgement as *Ius Aequi et Boni*', *Law Text Culture* 5, pp 345-75

Duncan, S (1995) 'Law's sexual discipline: visibility, violence and consent', *Journal of Law and Society* 22, pp 326-52

Epicetetus (1928) *Discourses*, Cambridge, MA: Harvard University Press, Loeb Classical Library

Elazar, DJ (1996) *Covenant & Commonwealth*, New Brunswick: Transaction Publishers

Fehlberg, B (1994) 'The husband, the bank, the wife and her signature', *Modern Law Review* 57, pp 467-75

Fehlberg, B (1996) 'The husband, the bank, the wife and her signature - the sequel', *Modern Law Review* 59, pp 675-94

Foucault, M (1996) 'What is Critique?' in Schmidt, J (ed) *What is Enlightenment? Eighteenth Century Answers and Twentieth Century Questions*, Berkeley: University of California Press, pp.382-398

Foucault, M (1993) 'About the beginning of the hermeneutics of the self: two lectures at Dartmouth', *Political Theory* 21, pp 198-227

Foucault, M (1982) "The Subject and Power" in Dreyfous, H and Rabinow P Michel (eds), *Foucault beyond Structuralism and Hermeneutics*, Hemel Hempstead: Harvester, pp. 208-226

Foucault, M (1977) 'Nietzsche, genealogy and history', in Bouchard, DF (ed), *Language, Counter-Memory, Practice*, Ithaca: Cornell University Press, pp 139-64

Frazer, E and Lacey, N (1993) *The Politics of Community A Feminist Critique of the Liberal-Communitarian Debate*, Hemel Hempstead: Harvester Wheatsheaf

Friesen, A (1990) *Thomas Muentzer, a Destroyer of the Godless*, Berkeley: University of California Press

Gaius (1988) *Institutes*, Gordon WM and Robinson, OF (trans), London: Duckworth

- Gaismair, M (1526/1991) 'Territorial Constitution for Tyrol' in Baylor, M (ed) *The Radical Reformation* (Cambridge: Cambridge University Press), pp. 254-260
- Gierke, O (1938) *Theories of the Middle Age*, Cambridge, Cambridge University Press
- Gilbert, NW (1963) 'The concept of will in early Latin philosophy', *Journal of the History of Philosophy* 1, pp 17-35
- Gill, C (1998) *Personality in Greek Epic, Tragedy, and Philosophy*, Oxford: Clarendon Press
- Gilson, E (2002) *The Christian Philosophy of St. Thomas Aquinas*, Notre Dame: University of Notre Dame Press
- Gordley, J (1992) *The Philosophical Origins of Modern Contract Doctrine*, Oxford: Clarendon Press
- Gottel, L (2007) 'Risky Women and Canadian Sexual Assault Law' paper presented at the LSA Conference, Berlin
- Gough, JW (1963) *The Social Contract*, Oxford: Clarendon Press.
- Gould, JB (1974) 'The Stoic concept of fate', *Journal of the History of Ideas* 35, pp 17-32
- Grebel, C (1524/1991) 'Letter to Thomas Müntzer', in Baylor, M. (ed), *The Radical Reformation*, Cambridge: Cambridge University Press, pp 36-48
- Gritsch, EW (1989) *Thomas Müntzer: A Tragedy of Errors*, Minneapolis: Fortress Press
- Grotius, H (1604/1950) *Commentary on the Law of Prize and Booty*, Williams, G (trans), Oxford: Clarendon Press
- Grotius, H (1625/1957) *Prolegomena to the Law of the War and Peace*, London: Bobbs Merrill
- Hampton, J (1993) 'Feminist contractarianism', in Antony, L and Witt, C (eds), *A Mind of One's Own: Feminist Essays on Reason and Objectivity*, Boulder: Westview Press, pp 227-56
- Hampton, J (1991) "Two faces of contractarian thought", in Vallentyne, P (ed), *Contractarianism and Rational Choice*, Cambridge: Cambridge University Press, pp. 31-55
- Hekman, SJ (1995) *Moral Voices, Moral Selves*, Oxford: Polity Press
- Hergot, H (1527/1991) 'On the New Transformation of the Christian Life' in Baylor, M (ed) *The Radical Reformation* (Cambridge: Cambridge University Press), pp. 210-225
- Hillerbrand, HJ (1971) *Christendom Divided*, London: Hutchinson
- Hostetler, JA (1974) *Hutterite Society*, Baltimore: John Hopkins University Press
- Hobbes, T (1889/1969) *The Elements of Law Natural and Politic*, London: Frank Cass & Co.
- Hobbes, T (1642/1998) *On the Citizen*, Tuck, R and Silverthorne, M (eds), Cambridge: Cambridge University Press
- Hobbes, T (1651/1991) *Leviathan*, Tuck, R (ed), Cambridge: Cambridge University Press
- Hubmaier, B (1527/1957), 'On free will', in Williams, GH and Mergal, A (eds), *Spiritual and Anabaptist Writers: Documents Illustrative of the Radical Reformation*, Philadelphia: The Westminster Press, pp 114-35
- Hubmaier, B (1527/1991) 'On the Sword' in Baylor, M (ed) *The Radical Reformation*, Cambridge: Cambridge University Press, pp. 181-209
- Huizinga, S (1955) *The Waning of Middle Ages*, Harmondsworth: Penguin
- Hochstrasser, T and Schröder, P (2003) *Early Modern Natural Law Theories*, Dordrecht: Kluwer Academic Publications
- Hunter, I (2001) *Rival Enlightenments*, Cambridge: Cambridge University Press
- Hunter, I and Saunders, P (2002) *Natural Law and Civil Sovereignty*, London: Palgrave
- Hut, H (1520-27/1991) 'On the mystery of baptism', in Baylor, M (ed), *The Radical*

- Reformation*, Cambridge: Cambridge University Press, pp 152-71
- Inwood, B (1987) *Ethics and Human Action in Early Stoicism*, Oxford: Clarendon Press
- Jaggar, A (1993) 'Taking consent seriously: feminist practical ethics and actual moral dialogue', in Winkler, E and Coombs, J (eds), *Applied Ethics: A Reader*, Cambridge: Basil Blackwell, pp 69-86
- Jones, RM (1914) *Spiritual Reformers in the 16th and 17th Centuries*, London: Macmillan
- Kahn, CH (1988) 'Discovering the will: from Aristotle to Augustine', in Dillon, JM and Long, AA (eds), *The Question of 'Eclecticism': Studies in Later Greek Philosophy*, Berkeley: University of California Press, pp 234-59
- Karlstadt, A (1524/1991) 'Whether One Should Proceed Slowly' in Baylor, M (ed) *The Radical Reformation*, Cambridge: Cambridge University Press, pp. 49-73
- Kaye, M (1997) 'Equity's treatment of sexually transmitted debt', *Feminist Legal Studies* 5, pp 35-55
- Kern, F (1948) *Kingship and Law in the Middle Ages*, Oxford: Basil Blackwell
- Levy, E (1949) 'Natural law in Roman thought', *Studia et Documenta Historiae Iuris* 15, pp 1-23
- Kingdon, RM (1994) 'Calvinism and resistance theory 1550-1580' in Burns, JH (ed) *The Cambridge History of Political Thought 1450-1700*, Cambridge: Cambridge University Press, pp.193-218
- Laslett, P (1989) 'Introduction' in Locke, J (1698/1989) *Two Treatises of Government* P. Laslett (ed), Cambridge: Cambridge University Press, pp 3-123
- Lim, H (1996) 'Messages from a rarely visited island: duress and lack of consent in marriage', *Feminist Legal Studies* 4, pp 195-220
- Lilburne, J. (1649/1964) 'The Legal Fundamental Liberties of the People of England' in Haller, W and Davies, G (eds), *The Levellers Tracts 1647-1653*, Cloucester Mass.: Peter Smith, pp 399-449
- Lilburne, J. (1647/1964) 'The Just Defence of John Lilburne' in Haller, W and Davies, G (eds), *The Levellers Tracts 1647-1653*, Cloucester Mass.: Peter Smith, pp 450-464
- Lilburne, J (1646/1938) 'Free-man's Freedom Vindicated' in Woodhouse, A (ed), *Puritanism and Liberty*, London: Dent, pp 317-8
- Lilburne, J (1645/1965) 'England's Birth-Right Justified' in Haller, W (ed), *Tracts on Liberty 1638-1647* vol III, New York: Octagon Books, pp 258-307
- Locher, GW (1981) *Zwingli's Thought New Perspectives*, Leiden: E.J. Brill
- Locke, J (1693/1997) 'Man before and after the fall', in Goldie, M (ed), *Political Essays*, Cambridge: Cambridge University Press, pp 320-21
- Locke, J (1698/1989) *Two Treatises of Government* P. Laslett (ed), Cambridge: Cambridge University Press
- Locke, J (1675-1679/1997) 'Toleration, A, B, C, D', in Goldie, M (ed), *Political Essays*, Cambridge: Cambridge University Press, pp 230-35, 246-8, 269, 276-7
- Locke, J (1663-4/1997) 'Essays on the Law of Nature', in Goldie, M (ed), *Political Essays*, Cambridge: Cambridge University Press, pp 79-133
- Long, AA (1971) *Problems of Stoicism*, Cambridge: Cambridge University Press
- Long, AA (1982) 'Soul and body in Stoicism', *Phronesis* 27, pp 34-57
- Long, AA (1991) 'Representation and the self in Stoicism', in Everson, S (ed), *Psychology*, Cambridge: Cambridge University Press, pp 102-20
- Long, AA (2000) 'Greek ethics after Macintyre and the Stoic community of reason', in Long, AA (ed), *Stoic Studies*, Cambridge: Cambridge University Press, pp 156-178
- Long, AA and Sedley, DN (1987) *The Hellenistic Philosophers*, Cambridge: Cambridge University Press
- Lovejoy, AO (1936) *The Great Chain of Being*, Cambridge: Harvard University Press

- Luther, M (1525/1957) *The Bondage of the Will*, Parker, JI and Johnston, OR (eds), London: James Clarke & Co.
- Luther, M (1526/1991) 'On Secular Authority', in Höpfl, H (ed) *Luther and Calvin on Secular Authority*, Cambridge: Cambridge University Press, pp 3-43
- MacIntyre, A (1987) *A Short History of Ethics*, London: Routledge
- Macpherson, C (1962) *The Political Theory of Possessive Individualism Hobbes to Locke*, Oxford: Oxford University Press
- MacKinnon, C (1982) 'Feminism, marxism, method and the state: an agenda for theory', *Signs* 7, pp 515-44
- MacKinnon, C (1983) 'Feminism, Marxism, method and the state: toward feminist jurisprudence', *Signs* 8, pp 635-58
- MacKinnon, C (1989) *Toward a Feminist Theory of the State*, Cambridge, MA: Harvard University Press
- MacKinnon, C (2005) *Women's Lives - Men's Laws*, Cambridge, MA: The Belknap Press
- Maffi, A (2005) 'Family and property law', in Gagarin, M and Cohen, D (eds), *Cambridge Companion to Ancient Greek Law*, Cambridge: Cambridge University Press, pp 254-66
- Manz, F (1525/1991) 'Protest and defence', in Baylor, MG (ed), *The Radical Reformation*, Cambridge: Cambridge University Press, pp 95-100
- Marcus Aurelius Antoninus (1989) *Meditations*, Oxford: Oxford University Press
- Mornay, P (1579/1969) 'Vindiciae Contra Tyrannos' in Franklin, JH (ed) *Constitutionalism and Resistance in Sixteenth Century*, Pegasus: New York, pp. 141-199
- Müntzer, T (1524/1991) 'Sermon to Princes' in Baylor, M (ed) *The Radical Reformation*, Cambridge: Cambridge University Press, pp. 11-35
- Naffine, N (1994) 'Possession: erotic love in rape', *Modern Law Review* 57, pp 10-37
- Nedelsky, J (1989) 'Reconceiving autonomy: sources, thoughts and possibilities', *Yale Journal of Law & Feminism* 1, pp 7-36
- Nussbaum, MC (1999) *Sex and Social Justice*, Oxford: Oxford University Press
- Oakley, F (1981) 'Natural law, the Corpus Mysticum and consent in Conciliar thought from John of Paris to Mathias Ugonius', *Speculum* 56, 786-810
- Oakley, F (1983) 'Legitimation by consent: the question of medieval roots', *Viator* 14, pp 303-35
- Okin, SM (1989) *Justice, Gender, and the Family*, New York: Basic Books
- Oestreich, G (1982) *Neostoicism and the Early Modern State*, Cambridge: Cambridge University Press
- Overton, R (1646/1976) *An Arrow Against All Tyrants*, Exeter:
- Ozment, SE (1969) *Homo Spiritualis*, Leiden: EJ Brill
- Πανταζόπουλος, ΝΙ (1968) *Ρωμαϊκόν Δίκαιον εν Διαλεκτική Συναρτήσει προς το Ελληνικόν*, Θεσσαλονίκη: Αφοι Σάκκουλα
- Patel, CA (1984) *Karlstadt as the Father of the Baptist Movements*, Toronto: University of Toronto Press
- Pateman, C (1980) 'Women and Consent', *Political Theory* 8, pp 149-68
- Pateman, C (1988) *The Sexual Contract*, Cambridge: Polity Press
- Pateman, C (1989) 'Feminism and Democracy', in *The Disorder of Women*, Cambridge: Polity Press, pp 210-25
- Pateman, C (1997) 'Beyond the Sexual Contract?', in Dench, G (ed), *Rewriting the Sexual Contract*, London: Institute of Community Studies, pp 1-9
- Pateman, C (2002) 'Self-Ownership and Property in Person: Democratization and a Tale of Two Concepts' *The Journal of Political Philosophy* 10/1, pp. 20-53
- Pater, CA (1984) *Karlstadt as the Father of the Baptist Movements*, Toronto: University

of Toronto Press

Pennock, R and Chapman JW (eds.) (1972) *Coercion Nomos XIV Yearbook of the American Society for Political and Legal Philosophy*, Chicago: Aldine

Popkin, R (1979) *The History of Scepticism from Erasmus to Spinoza*, Berkeley: University of California Press

Pufendorf, S (1672/1729) *On the Law of Nature and Nations*, London: J Walthoe et al

Pufendorf, S (1673/1991) *On the Duty of Man and Citizen*, Tully, J (ed), Cambridge: Cambridge University Press

Reynolds, PL (1994) *Marriage in the Western Church*, Leiden: EJ Brill

Richardson, M (1996) 'Protecting women who provide security for a husband's, partner's or child's debts: the value and limits of an economic perspective', *Legal Studies* 13, pp 368-86

Riedemann, P (1545/1968) 'Account of our religion', in Hillerbrand, HJ (ed), *The Protestant Reformation*, London: Macmillan, pp 143-46

Riley, P (1982) *Will and Political Legitimacy*, Cambridge, MA: Harvard University Press

Rist, JM (1969) *Stoic Philosophy*, Cambridge: Cambridge University Press

Rupprecht, HA (2005) 'Greek law in foreign surroundings: continuity and development', in Gagarin, M and Cohen, D (eds), *Cambridge Companion to Ancient Greek Law*, Cambridge: Cambridge University Press, pp 328-42

Saller, RP (1993) 'The social dynamics of consent to marriage and sexual relations: the evidence of Roman comedy', in Laiou, A (ed), *Consent and Coercion to Sex and Marriage in Ancient and Medieval Societies*, Washington: Dumbarton Oaks Research Library Collection

Salmon, JH (1994) 'Catholic resistance theory, Ultramontanism, and the royalist response, 158-1620', in Burns JH (ed) *The Cambridge History of Political Thought 1450-1700*, Cambridge: Cambridge University Press, pp. 219-253

Sandbach, FH (1994) *The Stoics*, London: Duckworth

Sattler, M (1527/1968) 'The Schleithem confession of faith', in Hillerbrand, HJ (ed), *The Protestant Reformation*, London: Macmillan, pp 129-36

Scattola, M (2003) "Before and After Natural Law: Models of Natural Law in Ancient and Modern Times", in Hochstrasser, T and Schröder, P (ed), *Early Modern Natural Law Theories*, Dordrecht: Kluwer Academic Publications, pp. 1-23

Schulz, F (1951) *Classical Roman Law*, Oxford: Clarendon Press

Sealey, R (1990) *Women and Law in Classical Greece*, Chapel Hill: University Press of North Carolina Press

Selden, J (1689/1927) *Table-Talk of John Selden*, London: Quaritch

Seneca (1932) 'On the happy life', in *Moral Essays*, Cambridge, MA: Harvard University Press, Loeb Classical Library

Seneca (1995) 'On anger', in *Moral and Political Essays*, Cooper, JM and Procopé, JF (eds), Cambridge: Cambridge University Press

Sevenhuijsen, S (1991) 'Justice, moral reasoning and the politics of child custody', in Meehan, W and Sevenhuijsen, S (eds), *Equality Politics and Gender*, London: Sage, pp 88-103

Sevenhuijsen, S (1998) *Citizenship and the Ethics of Care*, London: Routledge

Sider, RJ (1974) *Andreas Bodenstein von Karlstadt*, Leiden: EJ Brill

Shanley, M (1982) 'Marriage Contract and Social Contract in Seventeenth Century English Political Thought' in Elshtain, J (ed), *The Family in Political Thought*, Brighton: Harvester, pp. 80-95

Skinner, Q (2000) *The Foundations of Modern Political Thought 2*, Cambridge: Cambridge University Press

- Sohm, R (1907) *The Institutes*, Oxford: Clarendon Press
- Spencer, WW (1931) 'St Augustine and the influence of religion in philosophy', *International Journal of Ethics* 41, pp 461-79
- Stayer, JM (1976) *Anabaptists and the Sword*, Lawrence: Coronado Press
- Sullivan, B (2003) 'Trafficking in women, feminism and new international law', *International Feminist Journal of Politics* 5, pp 67-91
- Sullivan, B (2004) 'Prostitution and consent: beyond the liberal dichotomy of "free or forced"', in Cowling, M and Reynolds, P (eds), *Making Sense of Sexual Consent*, Aldershot: Ashgate
- Syme, R (1986) 'Dynastic marriages in the Roman aristocracy', *Diogenes* 135, pp 1-10
- Taylor, C (1989) *Sources of the Self the Making of the Modern Identity*, Cambridge: Cambridge University Press
- Tierney, B (1982) *Religion, Law, and the Growth of Constitutional Thought 1150-1650*, Cambridge: Cambridge University Press
- Treggiari, S (1991) *Roman Marriage*, Oxford: Clarendon Press
- Troeltsch, E (1956) *The Teaching of the Christian Churches* vol II, London: George Allen & Unwin Ltd
- Tuck, R. (1979) *Natural Rights*, Cambridge: Cambridge University Press
- Tuck, R (1987) 'The "modern" school of natural law', in Pagden, A (ed), *The Languages of Political Theory in Early Modern Europe*, Cambridge: Cambridge University Press, pp 99-122
- Tuck, R (1991) 'Introduction' in Hobbes, T (1651/1991) *Leviathan*, Tuck, R (ed), Cambridge: Cambridge University Press
- Tuck, R (1993) *Philosophy and Government 1572-1651*, Cambridge: Cambridge University Press
- Tully, J (1993) *An Approach to Political Philosophy: Locke in Contexts*, Cambridge: Cambridge University Press.
- Tully, J (1991) 'Introduction' in Pufendorf, S (1673/1991) *On the Duty of Man and Citizen*, Tully, J (ed), Cambridge: Cambridge University Press, pp xiv-xxxvi
- Tully, J (1982) *A Discourse on Property: John Locke and his adversaries*, Cambridge: Cambridge University Press
- Watanabe, M (1972) 'Authority and consent in church government: Panormitanus, Aeneas Sylvius, Cusanus', *Journal of the History of Ideas* 33, pp 217-36
- White, R.S. (1996) *Natural law in English Renaissance Literature* Cambridge: Cambridge University Press
- Williams, GH (1962) *The Radical Reformation*, Philadelphia: The Westminster Press
- Williams, GH and Mergal, A (1957) *Spiritual and Anabaptist Writers: Documents Illustrative of the Radical Reformation*, Philadelphia: The Westminster Press
- Ullmann, W (1975) *Law and Politics in the Middle Ages*, London: The Sources of History Ltd
- Vega, J (1988) 'Coercion and consent: classical liberal concepts in texts on sexual violence', *International Journal of the Sociology of Law* 16, pp 75-89
- Zwingli, U (1525/1981) *Commentary on True and False Religion*, Durham: The Labyrinth Press

¹ This list is by no means exhaustive. There is a substantial feminist literature critical of consent in the area of obligations. See for example the work of Dalton (1985: esp 1106 ff) and the special issue of *Feminist Legal Studies* (8/1, 2000) on 'gendered readings of obligations'.

² Feminist contractarians believe that although the concept of consent evokes images of disembodied and self-interested subjects, if exercised with respect for women's autonomy, equality and freedom, it can be successfully employed in the context of women's personal relationships. See, for example, Okin (1989), Hampton (1993) and Jaggar (1993). For an overview, see Brennan (1999: 874-79). Of those arguing that consent should be replaced by another liberal value, MacKinnon (1982, 1983) favours self-determination, Nedelsky (1989) favours autonomy, and Nussbaum (1999: 29-32) dignity. A substantial feminist literature embracing 'relational feminism' or 'the care perspective' advocates abandoning consent and liberal individualism altogether, but does not directly engage with the concept of consent. For a discussion of the impact of the 'care perspective' in political theory and moral philosophy, see Benhabib (1987), Hekman (1995) and Sevenhuijzen (1998). For a discussion in relation to law, see Sevenhuijzen (1991) and Drakopoulou (2000).

³ This category of consensual contract had no counterpart in Greek law, where the legal recognition of contract was premised upon its performance and not simply upon the presence of consent (Παναζόπουλος 1968: 61-62; Cohen, 2005: 298-99; Rupperecht, 2005: 335-37).

⁴ Of course the requirement for consent did not necessarily mean that of the bride and groom. For example in early Rome it was that of the *pater familias* (Treggiari, 1991: 16). For a discussion of the significance of consent in Roman marriage and cohabitation see Reynolds (1994: 22-30), Sohm (1907: 456-57) and Treggiari (1991: 146-47, 70-76). For a discussion of the coercion of consent, see Saller (1993). In Greek law, consent was also crucial to betrothal and marriage, but only the consent of the fathers of the bride and groom (Sealey, 1990: 25-26, 86-88; Cantarella, 2005: 246-47; Maffi, 2005: 254).

⁵ Similarly, notions of duress, fraud and mistake, though acknowledged as defences in consensual contracts, were never explained in terms of any theoretical understanding of what constituted consent (Gordley, 1992: 33).

⁶ It was in the teachings of Chrysippus in particular (circa 280 BC) that the concept of consent held a pivotal position (Inwood 1987:54; Kahn 1988:245; Sandbach 1994:121).

⁷ In this paper I am using the concepts of consent and assent interchangeably. They both have a common etymological root though consent seems to emphasize more an inter-relational element. However later in the Middle Ages consent as a concept was used in relation to the will, while assent to the intellect (Aquinas, 1265-74/1970: Ia2ae.15.3). A similar distinction is preserved in the Oxford English dictionary.

⁸ The Stoics perceived the soul as having a material existence. It was thought to be a 'breath', a compound of air and constructive fire integrated throughout the body (including flesh, bones, sinew, etc) and to which it gave life, warmth, growth and maintenance. However the soul was also believed to possess a commanding part (the *hegemonikon*), which was the seat of reason, assent, impulse, passion and sensation (Long and Sedley, 1987: 53h, k-m). For the presentation of the Stoic sources on the soul, see Long and Sedley (1987: 53); for an exposition of the Stoic concept of the soul, see Sandbach (1994: 82-85) and Long (1982).

⁹ In stating that these obligations were natural the Romans did not consider them to derive from a natural or divine order they thought superior to the *ius gentium*. For a discussion of the Roman conception of natural law and its relation to *ius gentium*, see Levy (1949). This distinction between natural obligations arising in the *ius gentium* and civil ones arising in civil law continued in the writings of the medieval jurists (Gordley, 1992: 41-45).

¹⁰ The Stoics maintained a monistic theory of human activity according to which the process of generating voluntary action was always rational. In contrast, Aristotle and Plato acknowledged two distinct faculties, reason and the passions, both of which were instrumental in the production of activity. Conduct guided by the passions and sensual appetite and not by the intellect and deliberation, though voluntary, was considered to be irrational.

¹¹ Children below 'the age of reason', those under seven years old (full acquisition did not take place until the age of 14), were said to lack the power of assent. Like animals, they could not help but yield to the power of presentations (Inwood, 1987: 72-75; Sandbach, 1994: 3). Similarly, a lack of education or ignorance was also thought to produce only a 'weak' assent (Annas, 1990: 187-88).

¹² This apprehension of freedom as obedience, which may be seen as prophetically announcing the coming of Christianity, is powerfully evidenced in Cleanthes' famous *Hymn to Zeus*. Cleanthes was a student of Chrysippus. The text of the *Hymn* may be found in Long and Sedley (1987: 54i).

¹³ This interpretation of the self through its acts was perhaps most clearly evidenced in Stoic admonitions to review one's own actions through a process of personal introspection, often represented as a form of inner dialogue functioning as a means of recollecting one's own acts and measuring them against what ought to be done so that a closer correlation between personal character and future purposive action would be secured. For examples of the process of thinking as an inner dialogue see Epictetus (1928: 1.1.7, 2.1.4, 2.22.29, 4.6.34), Seneca (1995: iii.12.2-4, 26.3-5, 36) and Marcus Aurelius (1989: xii.18). For a further discussion of

the Stoic conception of the inner dialogue see Gill (1998: 56-60, 226-32), Inwood (1987: 81-85), Long (1991: 111-20) and Foucault (1993: 206-7).

¹⁴ It has been argued very persuasively that a concept of Will as a distinct faculty was unknown to ancient Greek philosophers and that it only emerged in the writings of St Augustine (Dihle, 1982: 20-67, 123; Kahn, 1988: 234-47). For a discussion of the concept of Will in Hellenistic and Latin philosophy see Gilbert (1963) and specifically in Augustine see Dihle (1982: 123-44) and Spencer (1931: 473-76).

¹⁵ Of course there were different epistemological accounts of the role of the will in the attainment of knowledge, ranging from that of Augustine, who posited will as the source of all thought, to Aquinas, who accepted the Aristotelian cooperation of will and reason; although even for Aquinas the will was the prime mover of all powers of the soul. For a discussion of the voluntaristic nature of Augustine's theory of knowledge, see Cushman (1950) and for the relationship of will and reason in Aquinas, see Gilson (2002: 236-48).

¹⁶ The term 'radical reformers' was used in opposition to 'magisterial reformers', notably Luther, Calvin and Zwingli, who, in seeking protection from the civil magistracy, acknowledged its authority. Although Anabaptists formed the core of the 'radical reformers', this so-called 'left wing' of the reformation was by no means homogenous. For a discussion of these groupings, see Troeltsch (1956: II.691-700), Williams and Mergal (1957: 20-35, 1962: xxiii-xxxi), Bainton (1963) and Baylor (1991: xi-xvii). For a discussion of the appeal of the radical reformation in England, see Daw (1917) and Troeltsch (1956: II.706-14). The term 'civil philosophies' is Hunter's (2001), describing the 17th century body of juristic and political thought, which employed a secularised concept of natural law and which attempted to desacralise ethics and politics. For a discussion, see Tuck (1987, 1993: xiv-xv), Hunter (2001: 63-65, 366-68) and, Hochstrasser and Schröder (2003: ix-xvii).

¹⁷ The idea of society as a corporation was a medieval development of the Roman law concept of partnership (*societas*). For a discussion, see Tierney (1982: 19-28) and Maitland's Introduction in Gierke (1938: xviii-xliii).

¹⁸ While legitimating reasons could be virtue and courage, the service of the common good, divine descent, sacral status, or blood lineage, the necessity of government was grounded in scripture or Roman law (Paul, Romans: 13.1; *Digest* 1.1.5, 8). A doctrine of popular sovereignty, according to which legitimate government, whether secular or ecclesiastical, should be established by popular consent and could be withdrawn at will from an incorrigible ruler, emerged in the conciliar movement of the 14th and 15th centuries, and was developed in the writings of scholastics such as Bartolus of Saffoferato, John of Paris, William of Ockham, Nicolaus of Cusa, Marsiglio of Padua, Pierre d'Ailly and Jean Gerson. For a discussion see Gierke (1938: 36-41), Kern (1948: 117-33), Watanabe (1972: 221-25), Oakley (1981: 791-800, 1983: 314-23) and Tierney (1982: 56-65).

¹⁹ For a discussion of the history of the theological concept of covenant, see Elazar (1996: 19-37).

²⁰ With the exception of Luther, the magisterial reformers developed a fairly homogenous concept of covenant. Luther's doctrine of justification by faith alone, perhaps best evidenced in the severe soteriological limitations he placed on human conscience, was not congenial to the development of covenantal theology. For a discussion of Luther's concept of covenant, see Ozment (1969: 139-58) and for one of conscience, see Drakopoulou (2001: 354-56).

²¹ For the magisterial reformers faith and the willingness to abide by the Word, were not thought of as the causes of electing grace, but rather they were its merciful gifts, breathed into the Christian soul by the Holy Spirit, signifying the regenerate Christian's spiritual communion with the Holy and offering peace and assurance to the open, repentant heart, which acknowledging human sinfulness and surrendering total control of everyday life to follow the Word, hoped to receive God's saving grace. The magisterial apprehension of faith was reflected in the Confession of Faith of Protestant Churches of France (1559, cited in Popkin, 1979: 9) and in the Westminster Confession of Faith (1646, Chapters VII and IX). For a comparison of the theologies of Luther and Calvin see Troeltsch (1956: 576-92) and for a discussion of the differences in the theologies of Luther, Calvin and Zwingli of their doctrines of predestination, election and Christian faith see Locher (1981:182-210).

²² Indeed, John Tauler, a German mystic of the 13th century, whose views influenced many radical reformation leaders, saw the covenant as a business agreement; a 'fair bargain' with God (Ozment, 1969: 32). For a discussion of his influence on Thomas Müntzer, one of the most notorious radical reformers, see Friesen (1990: 6, 14-20, 48-50) and Grietsch (1989: 13).

²³ Michael Sattler (c. 1490-1527) a leader of the Swiss and South German Anabaptism was the main author of *The Schleitheim Confession of Faith*, the oldest credal statement of the Anabaptists proclaimed in a conference of the Swiss Brethern (1527) in which the radical reformers' views on social life are clearly set out.

²⁴ Magisterial reformers' believed that individuals possessing corrupted cognitive and volitional powers could not contribute to their own salvation because this would ascribe to the individual that which belonged to God. This led them to condemn any claims that charitable acts resulted from free will were due to self-love and pride (Luther, 1525/1957; Zwingli, 1525/1981: 83-84, 95-96, 118-19, 271-78; Calvin 1536/1949: II.3.4). Such ideas permeated theological debates on the freedom of will, notably those between Pelagius and Augustine (5th century) and between Erasmus and Luther (16th century).

²⁵ For a discussion of parallels between the covenant and the social contract, see Oestreich (1982: 135-54).

²⁶ The distinctive feature of modern natural law theory is that natural law is thought of as deriving from human rather than divine origin. For a discussion, see Hochstrasser and Schröder (2003: ix-xvi) and Scattola (2003). For a discussion of the radical reformer's views on the possession of freedom of will and reason as an inward experience of the divine guiding life, see Jones (1914: xxii-xxxviii).

²⁷ For a discussion of Selden's ideas of consent, contract and obligation see Tuck (1979:82-100).

²⁸ Although there was a difference of opinion as to whether the freedom of will included the freedom to will there was common agreement amongst radical reformers and natural law philosophers that a freedom of will to choose existed. For a discussion of this in relation to Scholastic and contractarian thought see Riley (1982: 5-16). Perhaps the most controversial philosopher on this point was Hobbes/ His writings include contradictory passages, some supporting, others negating the freedom of will. For a discussion of Hobe's views on the will see Damrosch (1979) and Riley (1982: 23-33).

²⁹ Some radical reformers saw the freedom of will to be a divine gift given in the Creation, and as lost with the fall, only to be reinstated with the spilling of Christ's blood on the cross, orher ssaw it as a permanent possession (Denck, 1526/1957:91; Hubmaier, 1527/1957: 114; Pater, 1984:128-31).

³⁰ This understanding of property (*dominium*) as an exclusive form of private ownership dominated the writings of seventeenth-century natural law theories. For a discussion of this point in relation to Grotius see Tully (1982: 68-72).

³¹ Grotius' definition of the *suum* is "A man's life is his own by nature (not indeed to destroy it but to preserve it and so is his body, his limbs, his reputation, his Honour and his Action".

³² For the description of what constitutes possessive individualism, see Macpherson (1972: 263-5). For a critique of Macpherson's understanding of possessive individualism, see Tully (1993:71-95). For a feminist critique, see Pateman (2002).

³³ 'Sword' was a term that designated the worldly order. Luther supported a sharp distinction between the jurisdictions of temporal and spiritual government and defined the Sword in the widest sense as embracing all secular authority and the laws, rights, offices associated with it (Luther 1523/1991:22-34). For a discussion of Luther's ideas, see Stayer (1976: 33-44). Calvin's ideas, initially very similar to Luther's, gradually fused the two into a theocratic model of government which he instituted in Geneva. For a discussion of Zwingli's ideas, see Stayer (1976:49-69).

³⁴ For a discussion of Calvinist theories of resistance, see Skinner (2000:189-238) and Kingdon (1994:193-218). Although I engage with Protestant theories of reformation these issues were so widely debated that they were also pivotal in writings of the Catholic Counter Reformation. For a discussion, see Salmon (1994:219-253)

³⁵ For a discussion of the views on the Sword of the German Anabaptist leaders Hubmaier, Denck, and Hut, see Stayer (1976: 133-66) The revolutionary action advocated by some German radical leaders led to the Peasants' war in Germany (1524-6) which was the largest popular revolt in Europe prior to the French Revolution.

³⁶ Although it could be argued that such radical individualism was already evident in a particular strand of Christian thought, namely mystics and spiritualists, and reaching back into the Cisterian and Franciscan traditions, this emphasis on the individuality of will in relation to political and social questions is characteristic of radical reformation thought. For an example of blueprints of community, see Gaismair (1526/1991) and Hergot (1527/1991) and for a discussion of the Hutterite communities which advocated communal ownership of property, see Clasen (1972: 210-97) and Hostetler (1974: 5-59).

³⁷ Hunter and Saunders (2002:1-5) argue that modern natural law theory, what they call "post-scholastic", as an intellectual reaction against Catholic scholasticism and its varied strands, comprised different strategies for justifying political authority. They identify as common themes permeating these strategies, their juridical and political nature and their de-transcendentalism, i.e. the rejection of the metaphysical basis of civil law and political authority.

³⁸ The predominance of contract as the basis of social relationships, especially marital relationships, are discussed in considerable detail in the thought of the times duties. For a feminist discussion of the concept of contract in marriage, see Shanley (1982).

³⁹ For a discussion of consent's 'darker side' in the context of sexual violence, see Gottel (2007).