Wittgenstein, Rape Law and the Language Games of Consent

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This paper is concerned with the legal meaning of consent within the law of rape. Both in ordinary language and in law, inquiries about consent appear to oscillate between reliance on the outward manifestations of consent and a search for some inner moment which lies behind the outward appearance. A central purpose of this paper is to examine the nature of this conceptual instability of 'consent' in mainly English and Australian rape law. We will consider how the concept has altered over time (especially with the modernisation of sex roles), in a manner which suggests a growing legal interest in the woman's mental state or point of view, rather than mere appearances, and the degree to which the concept now serves in fact to protect the sexual autonomy of women.

INTRODUCTION

In the law of rape, the concept of 'consent' is central. Most rape trials turn on the concept, with the accused arguing either that the woman consented or that he understood her to have done so.[1] In view of its centrality to rape law, it is perhaps surprising that the concept remains poorly defined and curiously unstable. Just a brief review of the case law and legal commentaries reveals different usages of the concept, though these differences tend to go unremarked. Indeed in the one case or commentary there can be a slippage from one meaning to another and back again, with no reflection on the change. There appear to be two broad usages of 'consent' which can each vary greatly in nuance. Sometimes the word connotes a public communication, an observable verbal or gestural exchange between the man and the woman. Other times, 'consent' is used to refer to the subjective or inner state of mind of the woman — her understandings of the encounter and her consequent intentions: in short,

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1 See Jenny Bargen and Elaine Fishwick, *Sexual Assault Law Reform: A National Perspective* (1995); NSW Department for Women, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault* (1996); Law Reform Commission of Victoria, *Rape: Reform of Law and Procedure*, Appendices to Interim Report No 42 (1991) Appendix 3, 84. The large majority of rapes are committed by men and have women as their victims, hence the use of pronouns . Also this paper is explicitly concerned with the operation of rape laws as they apply to relations between men and women.

the ensemble of mental states which comprise her point of view as it is directed towards the sexual transaction.[2]

George Fletcher, a leading American theorist, briefly examines these two meanings of 'consent' in a recent volume promoting the rights of victims of criminal conduct.[3] He refers to 'that *inner* moment called consent', what 'the person *really* has consented to' as opposed to 'the *outward* signs of consent [which may be] so strong that the other party may reasonably rely on the show or appearance of consent'.[4] His description of 'real consent' is worth quoting for it captures, unwittingly perhaps, many of the themes which we will examine in this paper:

> The only buttress . . . between rape and love, is the thin prop of consent. Yet we are not entirely sure what we mean by this chimerical assertion of personality. We do not know well enough what happens to the mind or the heart for us to say that a woman wants and decides in favour of sexual union with a man.[5]

What is significant, for our purposes, is the conceptual leap he makes with the identification of a woman's 'real' consent with her 'assertion of personality' her subjective appreciation of the encounter together with her desires, albeit 'chimerical'. In this account, consent becomes an expression of what a woman wants from a decision in favour of sexual union with a man. Elsewhere, Fletcher dilates upon the problems of defining this apparently private or inner mental state of the woman in a sexual encounter, when he refers to the 'mystification of the inner moment'.[6] Much of the mystification which Fletcher finds in the concept of consent, we suggest, reflects a wider uncertainty and ambivalence in legal discourse about not only the meaning of the term but, more particularly, about the degree to which it should be invoked to preserve a woman's sexual autonomy. Among judges and legal commentators, as we will see, there are profound concerns about linking the concept too securely to the woman's point of view.

The contrast between consent which is real, but ineffable, and consent which is only apparent, but nevertheless discernible or manifest, leads Fletcher to propose a curious bargain between the victim and the state. He proposes a division of trials for rape into two procedural stages, reflecting the inner moment (the mental state of the victim) and then the public communication. In the first, the jury would be asked if there was real consent to intercourse: 'was the woman raped' according to her subjective view of the encounter, her 'inner moment'?[7] The second stage of the inquiry would take up the issue of

2 These two meanings of consent have been identified and analysed by Nathan Brett in a recent article which argues the merits of the communication view of consent: Nathan Brett, 'Sexual Offences and Consent' (1998) 11 *The Canadian Journal of Law and Jurisprudence* 69. Brett's work is unusual in its rigorous application of ordinary-language philosophy (especially the philosophy of J L Austin) to the legal analysis of the concept of consent.

3 George P Fletcher, *With Justice for Some: Protecting Victims' Rights in Criminal Trials* (1995).

4 Ibid 124. Emphasis added.

5 Ibid.

6 We will consider the misogynist implications of this supposed mystery later.

7 Fletcher, above n 3, 126.

responsibility. If the jury concluded that there was no consent, the accused man would escape conviction if he made an honest and reasonable mistake and relied on a consent which was apparent rather than real.[8] Thus intercourse is rape in the absence of real consent which is a reference to a woman's appreciation of the encounter and her real desires in the light of that understanding. But it is the existence of *apparent* consent, or what she is taken to be committed to by her actions which, in Fletcher's view, should determine criminal liability.

In Fletcher's account, the interests of the victim in the exercise of sexual autonomy conflict with the interests of an accused who relies on what he takes to be the reasonable, 'external indices of willing cooperation'.[9] The interests of the victim are supposed to be protected by the verdict which assures her that she was raped. However, as far as the outcome of the criminal trial is concerned her right to sexual autonomy is trumped by the standards of those who are mystified by 'uncertainties about the magic moment of actual consent'.[10]

Fletcher's proposal for reform of American law[11] embodies a compromise which is familiar in English and Australian jurisdictions.[12] His brief discussion is unusual in its explicit distinctions between real and apparent consent and the premise that real consent is to be understood as an 'assertion of personality'[13] and rape as a 'violation of a preference' to avoid sex.[14] Apparent consent is a mere outward show, which may lead a man to mistaken inferences about his victim's hidden wants, choices or preferences. And yet apparent consent is what is to count in law.

Underlying Fletcher's discussion is the premise that real consent is a state of mind. In recent years, Anglo-Australian courts have displayed a similar concern to define the point of view of the rape victim, to find out what she wanted or did not want from the encounter and to make her state of mind the pivot of the case. For example Dunn LJ in the 1981 English Court of Appeal decision of *R v Olugboja* maintained that the jury 'should be directed to

8 Ibid 125, 184–5.
9 Ibid.
10 Ibid 124.
11 For an examination of the controversial and uncertain nature of the reasonable mistake defence in US rape trials, with specific reference to Fletcher's discussion, see Rosanna Cavallaro, 'A Big Mistake: Eroding the defense of mistake of Fact about Consent in Rape' (1996) 86 *Journal of Criminal Law & Criminology* 815.
12 There is considerable variation among jurisdictions on the precise formulation of the compromise and in particular, whether the mistaken belief must be one which was reasonable in the circumstances. *Crimes Act 1958* (Vic) ss 36–37; *Crimes Act 1900* (ACT) s 92D; *Criminal Law Consolidation Act 1935* (SA) s 48; *Crimes Act 1900* (NSW) s 61I; *Criminal Code Act 1899* (Qld) s 347(1); *Criminal Code Act* (NT) 1983 s 192; *The Criminal Code 1913* (WA) s 325; *Criminal Code Act 1924* (Tas) s 185. For the English position, see *Sexual Offences (Amendment) Act 1976* (UK) s 1. This restated the law in *DPP v Morgan* [1975] 2 All ER 347. *Morgan* was recently applied in *R v Gardiner* (1994) Crim LR 455. Australian jurisdictions are divided over the issue. Queensland, Western Australia, Tasmania and Northern Territory, which have codified their criminal law, require the mistake to be reasonable before it will excuse an act of sexual penetration without consent. In New South Wales, Australian Capital Territory, Victoria and South Australia, where the criminal law is not codified, *DPP v Morgan* prevails.
13 Fletcher, above n 3, 123.
14 Ibid 179.

concentrate on the state of mind of the victim immediately before the act of sexual intercourse, having regard to all the relevant circumstances, and in particular the events leading up to that act, and her reaction to them *showing their impact on her mind*.'[15] In 1984, the New South Wales Supreme Court considered the meaning of consent for the purposes of a charge of indecent assault and concluded that 'consent is a *state of mind* and what we are interested in here is the lady's consent'.[16] A year later, the South Australian Court of Criminal Appeal confirmed the need for 'a painstaking examination of respective *states of mind*', that is, both the defendant's and the complainant's.[17] In 1995, the Queensland Supreme Court insisted that for the purposes of Queensland rape law, 'consent refers to a subjective *state of mind* on the part of the complainant at the time when penetration takes place.'[18] In another context the House of Lords recently emphasised this subjective meaning of consent. In *Re H*, which involved a mother's abduction of her children from a country without the father's consent, Lord Browne-Wilkinson remarked that 'in ordinary speech a person would not be said to have consented or acquiesced if that was not in fact his state of mind whether communicated or not.'[19]

These judicial comments, like Fletcher's proposals, seem to make inner mental events determinative of the question of whether intercourse occurred without consent. Lord Brown-Wilkinson claims the authority of ordinary speech to support his assertion that consent is a state of mind. We doubt that ordinary language is so unequivocal on the point. Both in ordinary language and in law, inquiries about consent appear to oscillate between reliance on the outward manifestations of consent and a search for some inner moment which lies behind the outward appearance. A central purpose of this paper is to examine the nature of this conceptual instability of 'consent' in rape law. We will consider how the concept has altered over time (especially with the modernisation of sex roles), in a manner which suggests a growing legal interest in the woman's mental state or point of view, rather than mere appearances, and the degree to which the concept now serves to protect the sexual autonomy of women.

WITTGENSTEIN'S PHILOSOPHICAL THERAPY AND THE LANGUAGE GAMES OF CONSENT

The ensuing analysis of the concept of consent will in large part rely on a method advocated by Ludwig Wittgenstein to make sense of complex terms in flux. Wittgenstein cautions against the isolation of concepts from ordinary usage, the abstraction of them from their social contexts. This causes language to idle, 'to take a holiday' — indeed ultimately to lose its sense precisely

[15] *R v Olugboja* [1981] 3 All ER 443, 449. Emphasis added. *Oluboja* was recently affirmed in *R v Malone* [1998] 2 Cr App R 447.
[16] *R v Bonora* (1994) 35 NSWLR 74, 77 (Abadee J during argument). Emphasis added.
[17] *R v Egan* (1985) 15 A Crim R 20, 26(White J). Emphasis added.
[18] *R v IA Shaw* (1995) 78 A Crim R 150, 155 (Davies and McPherson JJ A). Emphasis added.
[19] *Re H (Minors) (Abduction: Acquiescence)* [1997] 2 All ER 225, 235.

because the sense of any given term is in the work that it does within a language game embedded in a form of life. To Wittgenstein, 'if we had to name anything which is the life of a sign we should have to say that it was its *use*.'[20] Use is a social phenomenon. It depends on shared conventions of social meaning. 'Only in the stream of thought and life do words have meaning.'[21] Or, as one interpreter of Wittgenstein has put it, 'the concepts of language . . . are not to be explicated by reference to hidden accompaniments to the use of words, but are essentially tied up with a distinctive pattern of behaviour or form of life.'[22] To acquire the sense of a concept we must examine it within 'the complex form of life that is revealed in the way speakers live and act, both in their past history and in their current and their future ways of acting and responding.'[23] We must examine the needs and purposes of language users and 'the structure of the life into which [they have] been enculturated'.[24]

In his later work, Wittgenstein's preoccupation was with what he termed the 'language games' of linguistic usage. The term 'game' helped to convey a number of qualities of language as Wittgenstein saw it. It highlighted the active nature of language, that it was always rule-governed (those rules being based on shared or agreed-upon conventions) and that it was transacted between players for a social purpose.

Wittgenstein's important point was that language was not to be explained through a search for hidden essences of meaning (he rejected the idea of Platonic forms) because meaning resided in social use — it was therefore fully open to view. Wittgenstein's philosophical theory was to remove this confusion about meaning (for example the idea that withdrawal from society and sustained introspection might reveal the meaning of a mental state), and to get us to see what we did with language (such as the language of intention), and how we put it to use. To know the meaning of a concept we must attend to our linguistic conventions — we must look at the concept as it is employed within the language games played within our 'form of life'. As Wittgenstein explained, 'the term "language-*game*" is meant to bring into prominence the fact that the *speaking* of language is part of an activity, or of a form of life.'[25]

But how do we determine the forms of life which house our language? Wittgenstein may be read as implying that the form of life in which 'our' language is embedded is unitary, homogeneous and, therefore, unproblematic. His consistent message is that meaning is to be found in the observable public shared agreed-upon conventions of 'our form of life'.[26] This might seem to preclude the possibility of a multiplicity of forms of life or diversity of meaning within a given form of life. It could also be read as excluding political dissent about the meanings shared, for to operate outside the conventions of a language game would seem to render oneself unintelligible.

[20] Ludwig Wittgenstein, *The Blue and Brown Books* (1969) 4.
[21] Ludwig Wittgenstein, *Zettel* (1967) [173].
[22] Marie McGinn, *Routledge Philosophy Guidebook to Wittgenstein and the Philosophical Investigations* (1997) 71.
[23] Ibid 93.
[24] Ibid 95.
[25] Ludwig Wittgenstein, *Philosophical Investigations* (1953) [23].
[26] Ibid.

According to feminist philosopher Naomi Scheman, this is not the case. 'An explicitly political reading of Wittgenstein', she suggests, 'one that starts from somewhere on the margins with an articulation of estrangement from a form of life . . . is . . . both responsible to his later work and illuminating of it.'[27] In her account of the later Wittgenstein, we are not being counselled by Wittgenstein to uncritical conformity with the given rules of a language game, because the rules of the game are all that render us intelligible. Rather we are being called to attend to the complexity of social practices which give our language meaning rather than to abstract language from its social context. And an understanding of the social practices determinative of meaning demands the inclusion of all who participate in the formation and reformation of the conventions of meaning, no matter how marginal.

Our not all going on in the same way about many things we all care about is part of the background against which our judgments get to be true or false about the world. The agreement in judgments Wittgenstein refers to does the work it does in part because we cannot take it for granted: we find it in some places but not in others.[28]

As Wittgenstein queried:

> But how many kinds of sentence are there? Say assertion, question, and command? — There are *countless* kinds: countless different kinds of use of what we call "symbols", "words", "sentences". And this multiplicity is not something fixed, given once and for all; but new types of language, new language-games, as we may say, come into existence, and others become obsolete and get forgotten.[29]

Wittgenstein's idea of 'family resemblances' also embraces the possibility of change of meaning effected by new judgments about appropriate usages. 'Wittgenstein's aim', as David Bloor explains, 'was to make the idea of universals, essences, ingredients and properties as problematic as possible'. His theory of concept application was based on judgments of similarity made within a language-game, and it was meant to replace the traditional accounts.[30]

The technical linguistic exercise of examining concepts in use to be undertaken below (which requires us to consider what is intelligible, to consider how the term is used and whether you can use it this way but not that way) requires us to think about which or whose language game we are playing and within what form of life. If there were a universally shared community of meaning, this would not be necessary. Therefore, to understand shifts in the meaning of consent we need to locate the concept within the relevant language game as it is played within a particular form of life and consider, within the rules of that particular game, what are the limits of the intelligible as well as what are the limits of the expressible. If the early Wittgenstein is taken out of context: 'Whereof one cannot speak, thereof one must be silent.'[31]

[27] Naomi Scheman, 'Forms of Life: Mapping the Rough Ground', in Hans Sluga and David G Stern (eds), *Cambridge Companion to Wittgenstein* (1996) 383.
[28] Ibid 398.
[29] Wittgenstein, aboven 25, [23]
[30] David Bloor, *Wittgenstein: A Social Theory of Knowledge* (1983) 30.
[31] Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (1922) 189.

Wittgenstein describes a language game of consent

A famous example in *Philosophical Investigations* provides an illuminating illustration of this method. It is particularly helpful, for present purposes, in that Wittgenstein is here concerned with what is in effect a language game of consent. There are two participants in this brief dialogue. For simplicity we call them Witt and Russ in our discussion:

> Someone [Russ] says to me [Witt], "Show the children a game". I teach them gaming with dice, and the other says "I didn't mean that sort of game."[32]

There is no reason to doubt Russ' account of what he meant. It just seemed obvious to him that the request could not have been meant to extend to gaming with dice. Nor was it necessary for Russ to rehearse in his mind beforehand, the limits of what he meant when he asked Witt to teach the children a game.[33] The case would be entirely different if Witt had taught the children Snakes and Ladders and Russ had rebuked him for teaching them that game. Though there was nothing overt in the request to indicate the limits which Russ meant to impose on the kinds of game which might be taught, the limits are implicit in the context of utterance.

The meaning of the original story would have been immediately obvious when the *Investigations* was published. Even now, in cultures far more accepting of gambling than those of the past, gaming retains links with sin and human weakness, from which children at least should be shielded. The story implies a larger complex of practice and conventions which distinguish children's games from gaming as forms of life. Even now, these conventions might still justify Russ' mild rebuke of Witt for what is obviously a mild form of wrongdoing.

The interest of the example, for our purposes, lies in the excuse which we would expect Witt to make in order to avoid blame. He would say that he had, or thought he had, Russ' agreement or consent. He did indeed teach the children a game, though it was not the kind of game which Russ meant, intended or wanted the children to learn. There are two quite different ways in which Witt might seek to rely on Russ' apparent consent as an excuse. In the first, forgiveness might be sought on the ground that Witt was ignorant of the conventions relating to games and gaming. In his country, he might say, children are taught to gamble from earliest childhood. On learning of Russ' cultural difference in this matter, he concedes that he was mistaken in taking Russ' request as an invitation to teach the children a dice game.

Witt might take a bolder tack. He might claim that he should be excused because Russ did in fact consent. He might insist on the 'literal' meaning of Russ' words or say that Russ committed himself and cannot retrospectively

[32] Wittgenstein, aboven 25, 33.

[33] But context makes a difference. Perhaps the children were at a holiday camp, the weather was fine, the children were in need of exercise and Russ meant Witt to teach the children an outdoor game. The circumstances of utterance may be as effective as a social or moral convention in conveying meaning.

withdraw his consent. This is a familiar move in some language games involving consent. In law and in everyday life, language games involving claims of consent are frequently adversarial. In contract law, for example, it may be permissible to take and retain an advantage gained by reliance on the literal terms of a consent which is known to be based on mistake, ignorance or oversight, so long as the misapprehension is not 'fundamental'.[34]

So too in rape law, as we will see, the concept of consent may be used to estop the victim from denying the apparently communicated 'yes', even though that consent is based on a misunderstanding on her part about the nature of the transaction (for example, she may believe that he is free from fatal contagious disease).[35] So long as courts decline to recognise her error as fundamental, she is taken to have consented to sexual intercourse and so cannot say that she was raped. As we shall see, legislation in some Australian jurisdictions and law reform proposals display signs of a significant shift in attitudes on this question.[36] Equally the woman who in the court's view, has failed to make her real inner (negative) feelings sufficiently manifest, even though she herself believed that the context of utterance (or silence) should have made those feelings plain, may find that she is legally committed to the appearance of consenting to intercourse.[37] In these adversarial language games, a wedge is inserted between the course which (in our example) Russ *meant* Witt to follow (his own understanding of what he was agreeing to) and the course of actions to which he might be said to have *given* his consent.[38]

What we may also learn about consent from Wittgenstein's gaming example is that the concept seems to have two possibly irreducible ingredients, but that it is a matter of negotiation within the rules of the game which ingredient is to be accorded the greater weight. The one ingredient is Russ' meaning, what Fletcher might call his 'inner moment' of consent — what he thought the encounter meant and hence what he thought he was agreeing to, and indeed why he agreed to it. The other ingredient is his public communication — what he is to be taken to be agreeing to based on external appearances — Fletcher's 'apparent consent'. The etymology of consent in fact suggests both meanings

[34] *Taylor and others v Johnson* (1983) 151 CLR 422; *Solle v Butcher* [1950] 1 KB 671. There is a limited license for sharp dealing, currently beyond the reach of equity, which depends on a claim that the other consented to deprivation.

[35] In *R v Clarence* (1888) 22 QBD 23 the woman believed just this and yet her mistake was thought not to be fundamental.

[36] See below, n 119–23.

[37] Brent Fisse, *Howard's Criminal Law* (5th ed, 1990) 179. This is the leading Australian text. It makes this crystal clear: 'although in theory D is not entitled to make any presumption of consent, the fact that P must prove non-consent as part of his case means in practice that if V consciously submits with passive acquiescence, subject only to a mental reservation, D should be acquitted ... V must make it clear to D ... that she does not consent.' In England, the decision of the Court of Criminal Appeal in *R v Malone* [1998] 2 Cr App R 447, 456 overturns a similar expression of opinion in P J Richardson (ed), *Archbold: Criminal Pleading, Evidence and Practice 1998* (1998) 1564, [20–27].

[38] It is significant that we say that consent is given and that one *obtains* consent or *takes* another's conduct as consent. Until it is *withdrawn*, consent is a shield against reproach. In these expressions, consent assumes the nature of an intangible piece of property, transferred from one person to the other. Wittgenstein's metaphorical identification of games and 'forms of life' games is particularly apt in its application to these adversarial contests.

exist together. *The Shorter Oxford Dictionary* tells us that consent comes from the Latin 'consentir' which means to feel together.[39] Consent is an agreement between at least two people. It therefore, of necessity, entails a communication (rather than simply a private mental state) which arrives at an accord, but an accord which is based on common feeling. *The Oxford Companion to Philosophy* asserts that consent 'is morally binding only in so far as it is voluntary, undertaken in full knowledge, after deliberation'.[40] Thus consent entails a commitment to another, but one based on understanding.

A further point of Wittgenstein's gaming hypothetical is that it suggests that there is no bright line separating these two meanings of consent: the inner moment of agreement and the public communication which commits one to the transaction. The relative contribution of these two senses of the concept will depend upon how the game is played and by whom and according to whose or what conventions. The closer the accord between the conventions of gaming and Russ' understanding of those conventions, the more likely it is that his view will prevail and Witt will not be allowed to escape blame with his assertion that Russ consented. However, when debates over consent take place in courts, conventions of ordinary usage can be distorted by the court's own view of those conventions combined, perhaps, with the exigencies of the criminal trial. In the legal environment, Witt's view may trump and Russ will be *taken* to have consented.

We accept that there is no bright line separating the inner moment and the public communication or commitment. We hope to show the way in which the placement of the line alters dramatically, according to the relative abilities of the parties to insist on the governing linguistic conventions. Of all the players of the language game of consent, we will suggest that the rape victim has been least well served by these linguistic manoeuvres.

RAPE LAW AND THE LANGUAGE GAMES OF CONSENT

For ease of exposition, the ensuing analysis of rape law identifies just two language games of consent to sex embedded within two very broad historical periods of sexual conventions: the traditional and the modern. It is important to recognise both the traditional and the modern games of sexual consent and not confine ourselves to the modern period. It is only with the second, modern game, that clear legal expression has been given to the need to recognise women's sexual autonomy, interpreted to mean what they really (that is subjectively) want. But it is the traditional game, which denied such autonomy, which continues to exert its effect.

[39] Lesley Brown (ed), *The New Shorter Oxford English Dictionary* (1993) Vol 1, 484.
[40] Ted Honderich (ed), *The Oxford Companion to Philosophy* (1995).153

The Language Game of Consent to Sex as it was Played when Sex Roles were Traditional

When Oscar Wilde spoke of 'the love that dare not speak its name'[41] he referred, among other things, to a love which was *unspeakable in courts of law*. The form of life which provided the framework of linguistic conventions for public speech about consent to sexual intercourse in courts assumed the prescriptive normality of the heterosexual encounter in which the man was socially, politically and economically dominant. This position of superiority was also reflected in the bedroom. He was taken to be the initiator, even aggressor, in sexual matters. The woman was the recipient of his sexual overtures, never the sexual agent. The model of the good woman, whose value was worth the protection of the law, was of someone who was positively reluctant to engage in sex, whose natural modesty and disinclination had to be overcome by a strong man with a vigorous persuasive sexuality. Her role in sex was, paradoxically, to have no active role at all.

Early twentieth century literature of sexual instruction and advice, addressed to married couples, provides a basis for sketching the conventions of traditional heterosexual encounters.[42] The marriage manuals, beginning with the publication of Marie Stopes, *Married Love*,[43] first published in 1918, sold in their hundreds of thousands. Theo van de Velde,[44] Havelock Ellis[45] and Eustace Chesser,[46] her principal competitors, published similarly popular accounts.[47] Though ostensibly directed to married couples, they were read by married and unmarried alike.[48]

The marriage manuals reflect the conventions of sexual relationship of their time. More pertinently, they reflect the limits of what could be expressed in public discourse about sex by the respectable classes in England and, we would add, Australia.[49] There can be no doubt that Stopes and Ellis were aware of the game they were playing and wrote to engage the widest possible audience. Together with others who published manuals of instruction for married couples, they extended the boundaries of subjects upon which couples could

[41] Wilde made the phrase famous but he was in fact drawing from A Douglas' poem, 'Two Loves' originally published in the Oxford undergraduate magazine, *The Chameleon*.

[42] We are indebted to the survey of the literature by Roy Porter and Lesley Hall in *Facts of Life*, their account of the creation of sexual knowledge in early modern Britain: Roy Porter and Leslie Hall, *The Facts of Life: The Creation of Sexual Knowledge in Britain*, 1650–1950 (1995).

[43] Marie Stopes, *Married Love: A New Contribution to the Solution of Sex Difficulties* (20th ed, 1931).

[44] Theodoor van de Velde, *Ideal Marriage* (1928).

[45] Havelock Ellis, *Psychology of Sex* (1959).

[46] Eustace Chesser, *Love Without Fear: A Plain Guide to Sex Technique for Every Married Adult* (1941).

[47] On the diffusion of sexual information via these and similar publications, see Porter and Hall, above n 42, ch 9.

[48] The form of the publication — advice to men and women who were married or contemplating marriage — provided guarantees of respectability and circulation for material which would have been considered frankly pornographic had it not taken this form.

[49] There were other language games current at the time of course. Witness the very different conventions of literary pornography.

talk, if only by supplying concepts and vocabulary. They provided women with a language for matters previously shrouded in euphemism, if spoken of at all, and gave men a mode of verbalising sexual and conjugal matters distinct from the smutty male subcultural discourses from which so many men gained sexual knowledge.[50]

We take these works as an index to the conceptual possibilities of educated public English discourse about sex during the first half of the century.[51] Our interest is in the limits of what could be said even by those who sought to articulate an ideal of sexual relationships between men and women. Stopes' *Married Love* and Ellis' *Psychology of Sex* are sufficiently different, yet representative for our purposes.

Both wrote of the need to cultivate physical love as an art. Their advice was primarily directed to changing the patterns of masculine sexual behaviour. The lover's art was compared to the art of the musician. Ellis, who borrowed the metaphor from Honoré de Balzac, made scathing reference to the artless and unskilled husband who is 'like an orang-outang with a violin'.[52] Marie Stopes, no less insistent that love was an art, believed that '[o]nly by learning to hold the bow correctly can one draw music from a violin'.[53] The instrumental metaphor reinforced the assumption, elsewhere explicit, that the husband was expected to play the dominant and creative role in the art of love.

Differences in male and female physiology,[54] differences in psychology[55] and periodicity of sexual desire,[56] combined with the pressures of modern city life,[57] masculine economic and physical dominance,[58] feminine

[50] Porter and Hall, above n 42, 221.

[51] Much that was said in courts and judgements would have fallen far short of this standard in crudity, prejudice and ignorance.

[52] Ellis, above n 45, 281.

[53] Stopes, above n 43, 50–1

[54] 'The excitable penis producing impulses of propulsivity, activity, mastery ... and the excitable vagina impulses of receptivity, passive submission', Ellis, above n 45, 280.

[55] Marie Stopes was the most explicit proponent of sexual difference, though her treatment makes psychology heavily dependent on physiological differences. In *Married Love* (above n 43) ch. 4 Stopes proposes a 'law of Periodicity of Recurrence of desire in women'. The requirement of masculine compliance with this 14 day cycle is central to her discussion of mutuality in sexual relationships. Ellis, above n 45, 288 argued to the contrary that supposed differences were a product of social convention: 'It is becoming increasingly evident that there is no special sexual psychology of women. That was a notion originated by ascetics and monks.' Elsewhere, however, he refers to 'far reaching psychological differences between men and women': Ibid.

[56] 'It would go ill with the men of our race had women retained the wild animal's infrequent seasonal rhythm and with it her inviolable rights in her own body save at the mating season. Woman ... has acquired a much more frequent rhythm, but as it does not equal man's he has tended to ignore and override it, coercing her at all times and seasons, either by force, or by the even more compelling power of "divine" authority and social tradition': Stopes, above n 43, 50–1; 'A fortnight is not too long for a healthy man to restrain himself with advantage': Ibid 58. '[I]n women ... sexual periodicity is ... pronounced. In this respect women are more profoundly primitive than men': Ellis, above n 45, 38.

[57] '[T]he opportunities for peaceful, romantic dalliance are less today in a city with its tubes and cinema shows than in woods and gardens where the pulling of rosemary or lavender may be the sweet excuse for the slow and profound mutual rousing of passion': Stopes, above n 43, 16–17.

[58] 'Our social institutions have grown up and been established on ... male dominance and this commonly received assumption: marriage, the legal headship of the husband, with the legal irresponsibility of the wife': Ellis, above n 45, 283.

modesty,[59] repression of the sexual impulse in women,[60] and the characteristic emotional coolness of the women of the Northern European races[61] were all invoked to explain and justify ceding the initiative to the husband in the art of love. The art of the lover was primarily expressed in courtship. Marie Stopes was particularly insistent on the point:

'The supreme law for husbands is: Remember that each act of union must be tenderly wooed for and won, and that no union should ever take place unless the woman also desires it and is made physically ready for it'.[62]

Stopes abandons her characteristic prose of lavender and violins momentarily to state an uncompromising conclusion, shocking in its blunt directness. In the absence of courtship a husband's insistence on sexual connection with his innocent bride was rape.[63] Almost eighty years were to elapse from the time Stopes wrote before courts and legislatures in England and Australia agreed with her that there is no conjugal 'right' to sexual intercourse and no marital immunity for rapists.[64]

The insistence on courtship, practical instruction in the art of love, and the emphasis on mutual fulfilment all provided concepts and vocabulary in support of woman's right to say 'no'. But even the best and most liberal of these books assumed a thin concept of women's sexual autonomy — a right to reject the utterly charmless suitor. The art of love is the art of the masculine seducer, civilised by the requirement of mutuality in enjoyment. Though the demands of courtship guaranteed a wife's right to say no, the husband could be forgiven, even encouraged, by these texts to take 'no' to mean 'not yet'. He was after all, the conscious practitioner of the art of love, one who was to hold his bow properly and draw music from the violin: 'It is his part to educate his wife in the life of sex; it is he who will make sex demands a conscious desire to her.'[65] Ellis expressed a similar view. Stopes' discussion is more complex but equally definite in ceding the creative role in the art of love to the husband

[59] 'Seldom dare any woman, still more seldom dare a wife, risk the blow at her heart which would be given were she to offer charming love-play to which the man did not respond': Stopes, above n 43, 26.

[60] '[I]t often happens that a woman is approaching or even past thirty years before she is awake to the existence of the profoundest calls of her nature': Stopes, above n 43, 36. '[T]he civilized woman, under the combined influences of Nature, art, convention, morality, and religion, has often tended to come into her husband's hands, usually at a rather late adult age, in a condition inapt for the conjugal embrace': Ellis, above n 45, 281.

[61] 'The surface freedom of our women has not materially altered, cannot materially alter, the pristine purity of a girl of our northern race. She generally has neither the theoretical knowledge nor the spontaneous physical development which give the capacity even to imagine the basic facts of physical marriage': Stopes, above n 43, 12.

[62] Ibid 60.

[63] Ibid 29, 32–3, 66.

[64] The marital immunity was abolished in Australia and England in *R v L* (1991) 174 CLR 379 and *R v R* [1992] 1 AC 612.

[65] Ellis, above n 45, 262.

seducer.[66] Once he awakens in his wife the consciousness of sexual desire he must go on to give it shape and form.[67]

The conventions denied expression to the possibility of woman exercising positive freedom to engage in a sexual relationship by choice and without commitment. The figures of wife and prostitute are counterpoised: 'The simulated transports of the prostitute have their meretricious value only because they simulate something real, something which should sweep over every wife when she and her husband unite'.[68] Outside the permanent commitment of marital union, sexual connection could only be random and indiscriminate. That was the definition of prostitution given by the United States Supreme Court in 1908: prostitutes were described as 'women who, for hire or without hire, offer their bodies to indiscriminate intercourse with men.'[69] To speak of sexual autonomy against this background is to speak of a threatened licentiousness, uncontrolled and potentially dangerous. Autonomy could only be expressed as the random and indiscriminate freedom of the prostitute.

The language of seduction employed a rich Romantic vocabulary, florid and over-stated to modern ears. The impression of anachronism stems from its explicit reliance on sexual difference and male dominance. Modern liberals would want to reject such overt inequality. The language of seduction was indeed a vocabulary spoken by men who assumed the only active role in sex. The man was the speaking subject; the woman his object. In this traditional form of relations between the sexes, the woman was not an active participant. She had a curious role in that she could not positively engage in this activity of seduction and yet it depended on her. In fact, one might even say that the sexual encounter was between men, for in many ways the conventions were agreed upon by them, within a form of life in which men were the social agents.[70]

We are now in a position to consider the language game of sexual consent as it was played within this sexual hierarchy. With heterosexual relations essentially understood as seduction, women experienced a problem of

[66] Stopes, above n 43, 66: '[M]an, who wants his mate out of season as well as in it, has a double duty to perform, and must himself rouse, charm and stimulate her to the local readiness which would have been to some extent naturally prepared for him had he waited till her own desire welled up. But here it is necessary to repeat what cannot be too vividly realised: woman's love is stirred primarily through her heart and mind, and the perfect lover need not lag awaiting her bodily and spontaneous help, but can rouse and raise it to follow their soaring minds.'

[67] Van de Velde cautions the husband against habituating his wife to a 'degree of sexual frequency and intensity' which he might find impossible to sustain: Van de Velde, above n 44, 240. In a similar vein, other manuals condemned men who engaged in extra marital seduction of young women, awakening passions from which she would be 'prevented ... from obtaining the natural relief': Edward F Griffith, *Modern Marriage and Birth Control* (1935).

[68] Stopes, above n 43, 31.

[69] *United States v Bitty* 208 US 393, 401 (1908).

[70] This is in fact the thesis advanced by Catharine MacKinnon, 'Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence' (1983) 8 *Signs* 635. It is also to be found in the work of Luce Irigaray in the aptly named, *This Sex Which is Not One* (C Porter (transl), (1985).

intelligibility, whether or not they desired sexual congress. There could be no open expression of sexual interest from the woman, no positive overture from her which would count as her consent for social and legal purposes, for such displays were reserved for the woman of loose morals and had neither moral nor legal value. Respectable women who were the objects of the law's protection did not initiate sex nor indicate unambiguously their sexual desires. Indeed, the respectable woman was by definition ignorant of sexual matters (which is not to say that she was truly ignorant). The conventions of sex called for a good deal of repression. It was the man's role to educate her into sexual ways once the appropriate forum had been established, and this was marriage. Lacking sexual knowledge, women could be said to lack the capacity for sexual autonomy. There could be no discernible inner state of consent in the woman, no 'inner moment' of personal desire which could then be given clear expression, because she was deemed to be sexually ignorant. Her sexual knowledge was necessarily obtained only when the right man had properly educated her into understanding his sexual desires and stimulating the same in her. For he knew her better than she knew herself.[71]

Because a show of reluctance was essential to indicate decency and respect, a woman's 'no', even a repeated refusal, could be taken as a conventionally required move on the way to an implicit assent. Too explicit an acceptance risked reduction of her status to whoredom. So what of the woman who truly did not want sex? Considerable protest was needed. As Stephen J remarked in 1867 in the New South Wales case of *Black Bob*: 'The law requires a woman so to act that she must lead the man to know that she resists; but it does not require that she should by her violent conduct induce the man to murder her.'[72] And, as Lord Hale insisted, 'if she made no outcry when the fact was supposed to be done, when and where it is probable she might be heard by others' this carries 'a strong presumption, that her testimony is false or feigned'.[73]

It is significant that *Black Bob* came after the 1845 case of *Camplin* which had effected a critical shift in the meaning of rape. Until *Camplin*, rape had been defined as 'the carnal knowledge of a female, forcibly and against her will'.[74] Clearly a struggle was required for the woman to manifest her dissent. With *Camplin* (a case involving an unconscious complainant), the court decided that want of consent would suffice. However, as the judge in *Black Bob* made plain nearly a decade later, the courts would nevertheless continue to look for unambiguous signs of vigorous resistance from the woman (though happily she was not expected to die in the course of defending her virtue).

For much of this century, a woman's consent to sex continued to be assumed if a man made a sexual overture and she failed to make completely explicit her dissent to that overture. Thus sex 'without consent' (rape) was conceived as an unambiguous observable communication of dissent to sexual

71 This led Irigaray to describe women as 'the sex which is not one': Ibid.
72 *R v Black Bob* (1867) 7 SCR (NSW) 120, 122.
73 M Hale, *History of the Pleas of the Crown*, (first published 1736, 1971 ed) vol 1, 633.
74 J Chitty, *A Practical Treatise on the Criminal Law* (first published 1816, 1978 ed) 810. Chitty referred to Coke and Blackstone as his authorities.

intercourse conveyed to the man at the time of the event and to the rest of the world after the event by her 'outcry'. It entailed an obligation on the woman of good morals faced with a sexual proposal to ensure that she made a wholly unambiguous communication to that effect to the accused and to the world at large. As Mansfield CJ observed as late as 1961 in the Queensland case of *Hinton*, the relevant questions to ask when consent is in issue are:

> (1) Is the girl virtuous? (2) Did she scream or call for help? (3) Did her body or clothing show any mark or tear indicating resistance to force?[75]

In 1983, Glanville Williams offered a similar account of English rape law. He thought that if a woman knew the man and was not intimidated and yet 'failed to use all means open to her to repel the man, including shouting for help if help was available, the jury may well think it unsafe to convict him [the defendant]'.[76] The sexual encounter precipitated by the man thus imposed on the woman a positive obligation to show manifest dissent by her appearance, her words and actions. In these accounts, lack of consent is transformed into its opposite and interpreted as a public communication of consent. In the absence of some crisply explicit rejection, a shout for help or forcible resistance to his demands, she was deemed to have consented, to have been seduced (whatever she actually thought and whatever her reasons for behaving as she did). Paradoxically, the failed communication of dissent functioned as a performative[77] and she was thus committed to a transaction. She was committed to sex, whatever her understanding of the situation and often despite her stated view of the matter.

Indeed a woman's explicit dissenting words alone were insufficient to manifest her public dissent to sex, as Mansfield CJ made plain. Her dress, comportment, gestures, the context of the encounter, as well as her previous sexual activities, all participated in this public communication and could undermine the effects of her stated words of dissent. It was, therefore, appropriate in a rape trial to inquire into the past and present sexual life of the complainant to determine whether she was the sort of woman who would consent. Evidence of an active sex life suggested not only that the complainant was the type of woman who did say 'yes' but that she could not be relied on to give truthful evidence. In other words, sexual history went to credit.[78]

There was little legal interest in her actual subjective appreciation of the sexual encounter: her wants, beliefs, motives, understandings or intentions. Good women did not have separate and distinctive sexual interests. Experienced women who wished to exercise a positive sexual preference for

[75] *R v Hinton* [1961] Qd R 17, 25.

[76] Glanville Williams, *Textbook of Criminal Law* (2nd ed, 1983) 238.

[77] The 'performative', the statement which performs a function of action, is a linguistic concept theorised by the language philosopher J L Austin. See J L Austin, in J O Urmson (ed) *How to Do Things With Words* (1965).

[78] The victim could be cross-examined about her sexual relations with others both in order to show that she was the sort of woman who was likely to consent and to impeach her credibility: *R v Holmes* (1871) 12 Cox CC 137; *Stokes v R* (1960) 105 CLR 279; *R v Hanrahan* [1967] 2 NSWLR 717.

one thing and not another were not the law's concern. A woman's insistence that despite these outward appearances she felt otherwise, did her little good.

The public communication of dissent was always complicated by the mores of seduction which rendered shows of reluctance, dissent and enthusiasm all consistent with consent (the prevailing conventions of seduction indeed ensured the ambiguity of her words). Making the stated 'no' intelligible was always difficult: any suggestion that the complainant was not a good woman could render her protestations meaningless being a mere display of coyness, a false show of modesty, concealing sexual desire. This is a view of sex as seduction which has proven remarkably durable, as we will see. Williams, as recently as 1983, was observing that women can be expected to put up 'token resistance' to the 'masterful advance'.[79] In 1990, Brent Fisse in the then leading criminal law text on the Australian common law, echoed Williams when he opined that a woman's outward reluctance to engage in sex might be only 'a concession to modesty or [even] a deliberate incitement to D to persuade a little harder.'[80] Although only the very clearest dissent would establish 'lack of consent', even then the communicated 'no' could be interpreted as its opposite. The language game of sexual consent, with its background conventions of seduction, meant that 'no' could mean 'yes'. Within this game, unless she beat him off with a stick, she was deemed to want sex with him.

Prevailing conventions about female psychology confirmed the wisdom of not relying on the woman's stated wants and beliefs. The emphasis on the rituals of courtship and role of the male as seducer, who awakened sexual desire from passivity, meant that courts were all too willing to conclude that women's minds were not their own in sexual matters. Women were regarded as mysterious and dissembling creatures; they were given to deception or to capricious changes of mind. There was, in consequence, a need to warn of the dangers of relying on their uncorroborated testimony.[81] This unreliability was deepened once a woman acquired sexual experience.[82] In 1933, Sigmund Freud was puzzling about what women wanted.[83] The underlying assumption was that a woman could not be trusted, that she might well manipulate the game of seduction to her own advantage, really wanting the sex but crying off afterwards.

In the 1980s, Williams was still making much of women's unreliability and confusion about their own state of mind. Women were strange, obscure, dissimulating creatures with no clearly defined will. They could not be relied upon to have a clear communicable understanding of what they wanted.[84] We

[79] Williams, above n 76, 238.

[80] Fisse, above n 38, 179.

[81] Hence the need for the corroboration warning. See below n 85.

[82] Thus the rules about previous sexual history evidence.

[83] Freud spoke of women as the 'dark continent' and puzzled about 'the riddle of the nature of femininity' in 'Femininity', in S Freud, *New Introductory Lectures on Psychoanalysis* (J Strachey (transl, ed); (1964) 112–35. These lectures were completed in 1932 and first published in 1933.

[84] For a critical feminist analysis of Williams' text see Ngaire Naffine, 'Windows on the Legal Mind: The Evocation of Rape in Legal Writings' (1992) 18 *Melbourne University Law Review* 741.

have argued that this masculine puzzlement over consent reflects an assumption, reinforced by prevailing conventions of sexual discourse, that a woman's mind was not her own to know when consent was in question. Rules were needed to test a woman's veracity, to protect the man from her malign intentions. Corroboration was needed to establish her lack of consent (her complaint alone was insufficient)[85] and evidence which revealed previous sexual activity was sufficient to establish her real desire for sex (and also went to credit), despite her protestations. Consequently, the law supplied various protections for vulnerable men against scheming women.[86]

Rape was therefore a very limited crime of violence entailing a highly public unambiguous verbal and physical communication of dissent. The language game of sexual consent had little to do with the protection of sexual autonomy, defined as what the woman really wanted or what Fletcher called her 'inner moment', because such personal desire was presumed not to exist in the good woman. And rape law was certainly not designed to protect the licentious woman, who knew more than her respectable sisters and whose exercise of her autonomy transgressed the conventional discourses of sexuality and consent.[87]

The Language Game of Consent to Sex as it is Played Now that Sex Roles Have Notionally Been Modernised

The formal legal recognition of equality between men and women within sexual encounters occurred in several stages and with it we may observe the (partial) emergence of a new sexual form of life in which both sexes are now, ostensibly, taken to be autonomous beings who can freely choose a sexual

[85] *R v Henry*; *R v Manning* (1968) 53 Cr App R 150, 153 (Salmon LJ):
> What the judge has to do is to use clear and simple language that will without any doubt convey to the jury that in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute.

R v Hester [1973] AC 296, 324–5 (Lord Diplock):
> But a witness whose evidence upon a particular matter might be expected to be of doubtful reliability for reasons which did not bring him within the category of an incompetent witness was always admissible at common law. ... But in criminal cases, for the protection of the accused it became the practice of judges in the second quarter of the 19th century to warn the jury of the danger of convicting upon such testimony unless it was corroborated by evidence from some other source.

Kelleher v R (1974) 131 CLR 534, 560 (Mason J):
> Its [ie the corroboration rule's] sole raison d'être is to ensure that the jury is alive to the danger of convicting on the uncorroborated evidence of a class of witnesses whose testimony may, for reasons already indicated, be untruthful. ... Although I have said that the trial judge is not bound to warn the jury of the danger of convicting on the uncorroborated evidence of the complainant in a sexual case, he should observe the practice of giving such a direction, even in cases when the evidence is substantial.

[86] See Williams, above n 76.

[87] And indeed this remains the case. Witness *Linekar* [1995] 3 All ER 503 in which the court refused to treat as rape intercourse with a prostitute in which payment was withheld. For further critical discussion of historical conceptions of consent see Bernadette McSherry, 'No! (means no?)' (1993) 18(1) *Alternative Law Journal* 27 and Bernadette McSherry, 'Constructing Lack of Consent', in P Easteal (ed), *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998) 26; and N Naffine 'Possession: Erotic Love in the Law of Rape' (1994) 57 *Modern Law Review* 10.

encounter. It is uncontroversial to assert that women and men are now supposed to be equal legal subjects and that their social and legal autonomy is supposed to extend to the bedroom. It is now commonplace to find leading legal commentaries and judicial, as well as legislative, statements which stress the sexual autonomy of women (the sexual autonomy of men has been taken as a given all along). Thus, according to the Australian Model Criminal Code, '[t]he law should protect the sexual integrity and personal autonomy of all members of the community'.[88] The Victorian Crimes Act reaffirms the fundamental right of a person (of either sex) not to engage in sexual activity. In 1991, the High Court, when removing the spousal immunity from rape prosecution, asserted:

> Far from relegating a wife to the position of a sexual chattel, the status of wife created by marriage confers on a wife a right (to adopt the language of the Scottish decree) to live with her husband, to have him listen and talk to her, to be cherished, to be entertained at bed and board and treated with respect. . . . Marriage is an institution which casts upon a husband an obligation to respect a wife's personal integrity and dignity; it does not give the husband a power to violate her personal integrity and destroy her dignity.[89]

Similarly the House of Lords has observed:

> Since then [when Hale wrote] the status of women, and particularly of married women, has changed out of all recognition. . . . [O]ne of the most important changes is that marriage is in modern times regarded as a partnership of equals, and no longer one in which the wife must be the subservient chattel of the husband.[90]

The recent history of rape law reform, designed to secure the autonomy of women, can be stated briefly. Changes both to adjectival and substantive law marked an apparent move to sexual equality. Three principal alterations to the adjectival law signalled this shift in legal attitudes to women who complained of rape. First, the compulsory corroboration warning was abolished, which meant that judges were no longer required to warn juries of the dangers of relying on the uncorroborated testimony of complainants of sexual assault. Women were no longer to be regarded as a 'class of suspect witnesses', as the High Court chose to put it.[91] Second, limits were placed on the questioning of complainants of rape about their sexual past and evidence of an active sexual life was no longer to go to credit. These new provisions were an implicit recognition that the rape complainant had received insufficient judicial protection in the witness box and had been subjected to inappropriate questioning which

[88] Model Criminal Code, *Chapter 5: Sexual Offences Against the Person*, Report (1999) 4.
[89] *R v L* (1991) 174 CLR 379, 396 (Brennan J).
[90] *R v R* [1992] 1 AC 612, 616 (Lord Keith of Kinkel).
[91] *Longman v R* (1989) 168 CLR 79, 87 (Brennan, Dawson and Toohey JJ). The corroboration warning has been abolished by statute in most Australian jurisdictions: *Evidence Act* 1929 (SA) s 34i(5); *Evidence Act 1906* (WA) s 50; *Crimes Act 1958* (Vic) s 61(1)(a); *Criminal Code Act 1924* (Tas) s 136; *Evidence Act 1971* (ACT) s 76F.

was simply not probative of the facts in issue.[92] Third, there were changes to the 'recent complaint' rule, which had provided an exception to the hearsay rule by admitting evidence of the woman's recent complaint to a third person (what Hale would have called her 'hue and cry'). The recent complaint rule was part of the traditional legal preoccupation with what the woman did and said; the insistence on manifest communication, rather than what she really thought and wanted. Its removal or amendment was again intended to signal a new respect for women's autonomy.[93]

Changes to the substantive law also took a number of forms. Marital immunity was lifted, which meant that married women could now complain of rape by their husbands; there was no longer a common law right of a husband to have sex with his wife.[94] The introduction of gender-neutral rape laws was intended to signal clearly that equality of the sexes had arrived. Reform proposals continue the trend. The sexual offence provisions of Chapter 5 of the Model Criminal Code, which offer a model for uniform law reform, draw no distinction between penetrator and penetrated in defining the offence of unlawful sexual penetration, the offence proposed as a successor to common law rape. If penetration occurs without the consent of one of the parties to the relationship, the other is to be held guilty of the offence.[95] This mechanical commitment to logical equivalences amounts, in Catharine MacKinnon's words, to 'equality with a vengeance'.[96] In addition, statutory amendments in a number of jurisdictions make it clear that women are no longer required to offer positive resistance to a sexual overture.[97] Simple want of consent is sufficient to establish the *actus reus* of the crime in these jurisdictions. Intercourse without consent is taken as a sufficient breach of a woman's autonomy.

The final change, and the most relevant one for our purposes, is the growing judicial interest in the woman's mental state (rather than an almost exclusive reliance on her overt communications). Once the crime of rape is perceived as a violation of sexual autonomy or sexual integrity,[98] it is her understanding of the encounter, rather than his, which determines the meaning of consent. The consequences of recognising rape as a wrong to sexual autonomy

92 Statutory limits to questions about sexual history are to be found in: *Sexual Offences (Amendment) Act 1976* (UK) s 2; *Evidence Act 1929* (SA) s 34i; *Evidence Act 1906* (WA) ss 36B, 36BA, 36BC; *Evidence Act 1910* (Tas) s 102A; *Evidence Act 1958* (Vic) s 37A; *Evidence Act 1971* (ACT) s 76G; *Crimes Act 1900* (NSW) s 409B.

93 Amendments to the recent complaint rule are to be found in: *Crimes Act 1958* (Vic) s 61(1)(b); *Crimes Act 1900* (NSW) s 405B; *Evidence Act 1906* (WA) s 36BD; *Evidence Act 1971* (ACT) s 76C(1).

94 See above n 64.

95 Model Criminal Code, above n 88, s 5.2.6. Liability extends equally to individuals who sexually penetrate another or who are sexually penetrated without the consent of the other.

96 Catharine MacKinnon, *Feminism Unmodified: Discourse on Life and Law* (1987) 72.

97 Statutory statements that women are not required to offer positive resistance are to be found in: *Criminal Law Consolidation Act 1935* (SA) s 48; *Crimes Act 1900* (NSW) s 61R(2)(d); *Crimes Act 1958* (Vic) s 37(b); *Criminal Code Act 1913* (WA) s 319(2)(b); *Crimes Act 1900* (ACT) s 92P(2); *Criminal Code Act 1983* (NT) s 192A(a).

98 See Nicola Lacey, 'Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law' (1998) 11 *Canadian Journal of Law and Jurisprudence* 47.

are strikingly apparent in recent Canadian law. In *Ewanchuk*[99] the Supreme Court reversed a 'not guilty' verdict on a charge of sexual assault because the trial judge had misunderstood the concept of consent. The offender, who was intent on seduction, almost certainly believed that his conduct was unexceptionable. His victim submitted to a massage before she could terminate the encounter, because she feared that outright rejection of the offender's attentions might result in violence. The Court declared that the trial judge should consider 'the complainant's perspective'[100] — what Fletcher would call her 'inner moment' — when consent is at issue. The emphasis is shifted in this way from publicly observable behaviour expressing consent or its absence, to a consideration of the victim's subjective appreciation of the situation and what she wanted or did not want from the encounter.[101]

The same concern with the protection of the victim's interests in her sexual integrity was apparent earlier, in the English case of *Olugboja*,[102] decided by the Court of Appeal in 1981. The facts accepted by the court were that the victim was frightened and crying but not struggling. The defence argued that the defendant had not used physical force, threats or fraud and therefore it did not constitute rape. The court was not convinced by this argument. Dunn LJ rejected the old formula that there must be 'force, fear or fraud' and directed the jury to concentrate on the state of mind of the victim. As Simon Gardner observed of the case, 'the *Olugboja* view of consent looks to a victim's own perception of her interests'.[103] It looks to her 'state of mind'.[104]

Australia's Model Criminal Code Report on Sexual Assault appears to agree in the emphasis given to the subjective reading of consent. In an extended commentary to the proposed legislation, the Report, which proposes uniform legislation, adopts the view that '[c]onsent is an attitude of mind and a phenomenon of the will'.[105] In short, it is about the subjective state of mind of the victim. The reason that consent 'is not easy to define' is that it covers 'a broad spectrum of states of mind "from actual desire on the one hand to reluctant acquiescence on the other" '.[106] Elsewhere we are told that 'consent should be seen as a *positive state of mind*' (emphasis added).[107]

[99] (1999) 131 CCC (3d) 481

[100] Ibid 482–83 per Major J, Lamer CJC, Cory, Iacobucci, Bastarache and Binnie JJ. See also *R v Matheson* (1999) 134 CCC (3d) 289 on vitiated consent in an exploitative relationship between a therapist and patient.

[101] To make its position doubly clear, the majority dissociates itself at p 350 from the position taken by Brett above n 2, 69, that consent is a performative concept, expressed in publicly observable behaviour.

[102] *R v Olugboja* [1981] 3 All ER 443.

[103] Simon Gardner, 'Appreciating Olugboja', (1996) 16 *Legal Studies* 275.

[104] Ibid 283.

[105] Model Criminal Code, above n 88, 23, quoting, with approval, Law Reform Commission of Victoria, *Rape and Allied Offences: Substantive Aspects*, Discussion Paper No 2 (1986) 10.

[106] Ibid 35, citing *R v Olugbaja* [1981] 3 All ER 443, 448–9

[107] Ibid 43. The commentary, however, claims too much. The legislative provisions proposed in the Report fall short of the commentary. They are ambivalent in their recognition of the sexual offences as violations of sexual autonomy and integrity. That ambivalence is particularly apparent in the provisions on fraud and consent, which are discussed in the

A series of recent Australian cases has also offered a clear mental reading of the concept of consent, referring to it variously as 'a subjective state of mind',[108] as 'free and voluntary',[109] as 'a free and informed exercise of the will'[110] and as 'a state of mind'.[111] Despite these repeated legal statements of concern for the woman's state of mind in a sexual encounter, we suggest that, in truth, poor expression is being given to women's subjectivity. Existing law and proposals for reform remain ambivalent and unwilling to recognise the sexual autonomy of women. We identify three ways in which the traditional language game of consent is still being played in the criminal courts, ensuring that women who complain of rape are being committed to meanings they do not intend. First, silence may still be construed as consent. Second, a stated 'no' may also be construed as consent. And third, a 'yes' which has been extracted by a deception on the man's part and/or an important misunderstanding on the part of the woman is also thought to be consistent with consent. To invoke Fletcher's terminology once again, 'apparent' consent is trumping 'the inner moment' in ways which undermine the proclaimed sexual autonomy of women. Or, to return to Wittgenstein's gaming hypothetical, Russ (who for our purposes stands in for the woman) is finding that (s)he has consented to something quite other than that which (s)he intended and the law is still taking Witt's (the man's) side.

conclusion of this paper. Though the tendency is far from uniform, recent legislation and case law suggest that the concept of consent will play a diminishing and peripheral role as a defining element in rape. This tendency is particularly apparent in the Canadian decisions. It appears to be an inevitable consequence of accepting that the essence of the offence is a violation of sexual autonomy. Rape and its modern variants are no longer bounded by definitions requiring proof of the gross physicality of sexual penetration against the will of the victim. The evolution of more subtle and sophisticated definitions of prohibited behaviour is a familiar element in the development of the criminal law. Though the rhetoric still outstrips achievement, the course of rape law reform resembles, in this respect, earlier stages in the evolution of the modern offence of theft. That offence was once defined by rules which required proof that the victim was physically deprived of tangible property. Physical deprivation is no longer required. Theft now extends to any dishonest appropriation of the rights of the owner whether property is tangible or intangible. This evolution of the law of theft has been accompanied by a diminution of the role of consent in defining the offence. Once it became possible to perceive theft as a derogation from the owner's autonomy, the requirement that the derogation be done without consent ceased to be a necessary element in the definition. (Thus the *Theft Act 1967* (UK) does not use the concept of consent to define the offence of theft.) The focus of attention moved from its original preoccupation with the victim's behaviour to the quality of the defendant's conduct — the issue of dishonesty — as the primary determinant of guilt (See *R v Peters* (1998) 192 CLR 493). We can expect, and should welcome, a similar shift of focus in the law of rape.

108 *R v I A Shaw* (1995) 78 A Crim R 150, 155.

109 *Question of Law Reserved on Acquittal Pursuant to Section 351(1a) Criminal Law Consolidation Act (No 1 of 1993)* (1993) 59 SASR 214, 220.

110 *R v PS Shaw* [1995] 2 Qd R 97, 111.

111 *Bonora* (1994) 35 NSWLR 74, 80.

Silence can still mean yes

We have said that 'equality with a vengeance' was ushered in with the modern law of rape. Gender-neutral rape laws provide a clear illustration of a new desire to confer equality on women. It is, however, a mechanical equality which disregards the persistence of inequalities (social, economic, physical and political) which might undermine these good intentions. Furthermore, in the vast majority of cases, it is still men who rape and women who are still their victims (providing a simple demonstration of the persistence of sexual difference). In the new liberal rhetoric, women are supposed to emerge as active, equal, autonomous and similar sexual players with separate and distinctive wills and sexual desires. There is therefore an underlying fiction supporting this new legal discourse. It is that women are now capable of engaging actively, articulately and meaningfully in sex, of making their 'positive state of mind' manifest, and that this is how sex in fact takes place. The clear implication is that women now can (and do) give full expression to their desires, saying what they want and do not want. Power differences do not feature in this analysis. And because women are now deemed capable of communicating a 'no' which means 'no', if they fail to speak up, if they fail positively to dissent, then they may well be taken to consent. The need for quite explicit communication therefore has not disappeared, despite the new declared interest in the woman's actual subjective point of view. Again if we return to the writings of two of the leading legal commentators of the Anglo-Australian law of rape, Williams and Fisse, this continuing expectation to communicate becomes plain. To Williams,

> a woman who submits to intercourse that she finds disagreeable, when she could decline it, consents to it; how little she likes it is of no legal interest. It does not matter in these cases whether we say that the complainant actually consented as a matter of law or that the defendant was entitled to suppose that he or she was consenting.[112]

Fisse says much the same thing about the woman who expresses her feelings too weakly, identifying what is in effect a legal presumption of consent.[113]

Perhaps it should be acknowledged that Williams was writing in 1983 and Fisse in 1990 and that the law has made some progress since then. In Victoria, for example, the continuing difficulties encountered by the woman who feels unable to speak her mind have now been recognised. In that jurisdiction, the judge is now obliged to advise the jury, in relevant circumstances, that silence is normally enough to show lack of consent, thereby recognising and

[112] Williams, above n 76, 551.
[113] See Fisse, above n 37, 179.

attempting to solve the problem of presumed consent in one swift move.[114] Other jurisdictions, such as South Australia, have remained faithful to the traditional conception of rape and the role of consent, and thus the sentiments of the likes of Williams and Fisse cannot simply be dismissed as interesting anachronisms.

Even a stated 'No', however, may not be treated literally because of the persistence of the conventions of seduction

Notwithstanding the new fiction of sexual equality, the old game of consent based on seduction in reality persists, serving to obscure and mystify women's intended meanings. The most important continuing effect of the persistence of the conventions of seduction is that a stated 'no' may still be interpreted as the false protestation of the woman seduced. The vocabulary of seduction and romance, which was based explicitly on sexual inequality, was actually very rich and this may partly account for its staying power. What rape law reformers have failed to do is invent a similarly rich vocabulary to reflect modern sexualities where the parties are taken to be sexual equals. We have already seen that the seduction game still has a secure place in the orthodox criminal legal literature: witness the writings of Fisse and Williams. Both write of the sexual powers of the masterly man, and of the coquettish woman who prevaricates, engages in sexual games and feels that she must say 'no' when she really means 'yes'. They write also of the woman who is truly disturbed by the encounter but who submits nevertheless. This too, in their view, is an effective legal agreement to sex. As Williams insists: 'Even consent given under protest, and in tears, is still consent.'[115] The decision in *Olugboja*[116] may represent a new willingness to recognise a woman's right to sexual autonomy, but Williams explicitly disagrees with the reasoning of the court in that decision.[117]

The conventions of seduction retain their tenacious grip on the legal imagination and still inform the arguments of defence counsel. A woman's refusal of sex, taken in the context provided by those conventions, is undermined. Her literal 'no', like failure to express dissent with sufficient vehemence, can still be taken as an inner 'yes'. As the South Australian Supreme Court observed in *Egan*, '[i]n the nature of things, men frequently bring some kind of "pressure" to bear to obtain a woman's consent, "pressures" in the way of compliments,

[114] *Crimes Act 1958* (Vic) s 37. However in *R v Laz* [1998] 1 VR 453 it was stated that section 37(a) 'does no more than require a trial judge to draw to the jury's attention the necessity, when considering the issue of consent, to have regard to the common human experience that, in general, people [do not] engage voluntarily in sexual activities without indicating by word or action their preparedness to do so.' The words 'in general' leave it open for the accused to argue that the complainant's silence still amounted to consent. The significance, actual and potential, of this section is discussed in McSherry, 'Constructing Lack of Consent', above n 87, 26.

[115] Williams, above n 76, 556.

[116] [1981] 3 All ER 443. See Gardner, above n 103.

[117] Williams, above n 75, 553–5.

blandishments, caresses, sexual touching and the like, all of which may legitimately be directed towards securing consent through her sexual arousal.'[118] Even when the court is convinced that a woman really did not want to engage in sex, it may still feel sympathy for a defendant who failed to get the message and persisted in the belief that her 'no' was really an incitement to vigorous persuasion. In *Ewanchuk*, the lower courts failed to perceive the defendant's assault as a crime, characterising it instead as an instance of incompetent seduction.

However a 'Yes' based on impaired understanding — that is 'Yes only if . . .' — may be taken literally to mean an unqualified 'Yes'

A third manner in which the modern law of rape is failing to accord full significance to the woman's actual understandings and sexual desires (still further undermining the modern legal concern with a woman's sexual autonomy) is through the rules governing the effects of fraud and misunderstanding on the validity of sexual consent. Although defective understandings on the victim's part are now regarded as more significant,[119] the courts and the legislature nevertheless continue to recognise as good, consent procured by a substantially impaired understanding of the event. In the rules on fraud and consent we may observe, once again, the continuing effects of the conventions of seduction, which ensure that deception is viewed as a legitimate sexual ploy in the art of love.

The view which has consistently been adopted by the courts, from the late nineteenth century to the present day, is that most frauds and misunderstandings do not vitiate consent. A woman is committed to sex once she appreciates that it is sex which she is having and she realises the identity of her intended partner. This, in law, constitutes a fundamental understanding of the encounter, of 'the nature and character of the act'. All other forms of misunderstanding are deemed not to be fundamental in nature and so the woman is said to agree. Thus in *Clarence*[120] the woman 'consented' to sex because she believed that her husband was free from disease. The fact that he was infected with contagious gonorrhoea did not destroy her consent. In *Papadimitropoulos*,[121] the woman was led to believe that she was married to the man and that was certainly the only basis upon which she would have consented to sex. Nevertheless her consent was said to be good. In *Mobilio*,[122] the woman consented to an internal examination with an ultrasound transducer only because she believed that it was for a legitimate diagnostic purpose. The consent was held good even though the penetration occurred for the sexual

[118] *Egan* [1984] 15 A Crim R 20, 26.
[119] Hence the feigned medical examination can no longer produce good consent. The following sections state that consent given to an act believed to be for medical or hygienic reasons is not good consent to an act performed for sexual reasons: *Criminal Law Consolidation Act 1935* (SA) s 73(5); *Crimes Act 1900* (NSW) s 61R(2)(a1); *Crimes Act 1958* (Vic) s 36(g); *Criminal Code Act 1983* (NT) s 192(2)(f).
[120] (1889) 22 QBD 23.
[121] (1957) 98 CLR 249.
[122] [1991] 1 VR 339.

gratification of the man. In this case law, a legal concept of consent to sexual intercourse marks the boundary beyond which fraudulent imposition and unwanted sex is *not* criminal.

Legislatures have been more responsive to liberal demands for the protection of sexual autonomy. In New South Wales and Victoria, legislation has overruled the decision in *Papadimitropoulos*. There is no consent to sex if the act takes place as a consequence of mistaken belief that the participants are married.[123] The decision in *Mobilio* was promptly reversed by the Victorian legislature, which declared that there is no consent if 'the person mistakenly believes that the act is for medical or hygienic purposes'.[124] Welcome as these changes are, they are limited in their effects. Though the New South Wales and Victorian amendments extend the list of frauds which vitiate consent, they implicitly delineate an area in which the deceiver is immune from liability for rape or its statutory equivalents.

Some State legislatures have gone further. In Western Australia,[125] the Australian Capital Territory[126] and Tasmania,[127] legislatures have simply declared that a consent obtained by fraud is no consent at all. The Model Criminal Code is more conservative in its recommendations on fraud. Chapter 5 of the Code proposes legislation declaring that consent means 'free and voluntary agreement' and that there is no consent to sexual intercourse if 'the person is mistaken about the essential nature of the act'.[128] The commentary expresses considerable unease over the limits of this bland formulation. It is said that 'conduct that is merely dishonest ... mere deceit or trickery' should not result in conviction for the offence of unlawful sexual penetration, which is the Code counterpart to common law rape.[129] The only example in the Report of a fraud which might result in liability for unlawful sexual penetration is the bogus marriage example drawn from *Papadimitropoulos*. The commentary goes on to suggest that the imposition of punishment for sexual misconduct which was 'merely dishonest' would 'undermine the seriousness of the offence.'[130] This implicit licence to deceive for the purpose of sexual

[123] *Crimes Act 1900* (NSW) s 61R(2)(a); *Crimes Act 1958* (Vic) s 57(2).

[124] *Crimes Act 1958* (Vic) s 36(g).

[125] *Criminal Code Compilation Act 1913* (WA) s 319: 'Consent means a consent freely and voluntarily given and ... a consent is not freely and voluntarily given if it is obtained by ... deceit or any fraudulent means.'

[126] *Crimes Act 1900* (ACT) s 92P: 'Consent of a person to sexual intercourse ... is negated if that consent is caused ... by a fraudulent misrepresentation of any fact made by the other person.'

[127] *Criminal Code Act 1924* (Tas) s 2A(2)(a): A consent is freely given where 'it is not procured by force, fraud, or threats of any kind'.

[128] Model Criminal Code, above n 88, 50.

[129] Ibid. The commentary supports its expression of concern with a quotation from Ian Cunliffe, 'Consent and Sexual Offences Law Reform in New South Wales' (1984) 8 *Criminal Law Journal* 271, 287: 'The possibility of misrepresentations are endless, ranging from one spouse's lie that he has obtained a job or that he is the benefactor of the delivered flowers, to assurances about possession of sexual dexterity and declarations of love or respect, to proffering a prostitute a worthless cheque.' See, too, Fisse, above n 37, 182 for a similar expression of concern, supported by the same quotation.

[130] Model Criminal Code, above n 88, 49.

seduction has no counterpart when offences against property are in question. And unlike legislation in a number of jurisdictions,[131] the Code does not include a lesser offence of deception with intent to induce consent to sex.

Case law and most statutory reforms, achieved and projected, continue to define rape in ways which deny women a reasonable measure of protection for sexual autonomy. The concept of consent in rape continues to give latitude to the liar and to tolerate those who resort to intimidation. The conventions of seduction, with their associated mythologies of activity and passivity, allow the seducer a two-way bet on acquittal of rape. A woman's explicit 'no' can then be trumped by the argument that her rejection of his advances is only apparent, belying an inner acquiescence. Her inner 'no' can be trumped by a literal 'yes', secured by tolerated threats or tolerated forms of fraud.

Thus it is that with the emergence of a modern language game of sexual consent, legal consent to sex and a woman's desire have remained divergent. Although the notion of a woman's sexual autonomy is now thinkable, we have not relinquished the idea that a woman should remain committed to external appearances as they are seen through the lens of the seducer. As a consequence, there has emerged the gap in meaning identified by Fletcher. It is the gap between 'real consent' (what she really wanted), which has at last received legal recognition (witness the court in *Olugboja*), and 'apparent consent' (what she is still to be committed to in law). Notwithstanding the modern liberal rhetoric of equality of the sexes, the effects of the Romantic tradition and seduction persist. The woman still finds that apparent consent is held against her. We may say, therefore, that there is a continuing battle over the meaning of consent, which turns on the relationship between what a woman wants and what she is to be committed to. The continuing legal reluctance to give a critical role to what the woman wants, the reluctance to allow her sexual autonomy to trump, is testimony to the continuing mystifications of the conventions of seduction with their underlying supposition of sexual inequality. It is also testimony to the persisting legal ambivalence about the very idea of a woman's sexual freedom. In the modern language game of sexual consent, women continue to play under imposed handicaps.

[131] For example Victoria *Crimes Act 1958* s 36A and NSW *Crimes Act 1900* s 66.