

Should Communicative Sexuality be Written into English Law on Rape?

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Introduction: *Setting the Boundaries* on 'free agreement'.

Current English law states that a man commits rape if:

- a. He has sexual intercourse with a person (whether vaginal or anal) who at the time of the intercourse does not consent to it; and
- b. At the time he knows the person does not consent to the intercourse or is reckless as to whether that person consents to it.¹

A tradition stemming from the seventeenth century held that rape was intercourse without consent achieved by 'force, fear or fraud'. The current position, as established by the Court of Appeal, is that the question is simply: 'At the time of sexual intercourse did the woman consent to it?' The prosecution has to prove that she did not, but need not prove 'force, fear or fraud', although 'one or more of these factors will no doubt be present in the majority of cases'.² A mixture of common law and precedent has established some guidelines as to how this can be interpreted. The committee that produced *Setting the Boundaries* considered that the central element in rape is violation of consent, and commented: 'In defining consent we are not seeking to *change* its meaning, rather to clarify the law so that it is clearly understood'.

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¹ *Criminal Justice and Public Order Act, 1994, s. 142.*

² Smith, J. C., and Hogan, B., *Criminal Law*, 8th Edition, (London: Butterworths, 1996), p. 469.

They wanted to emphasise that consent is to be seen not as something 'sought by the stronger and given by the weaker', but that there should be 'parity of status'.³ To emphasise this they recommended that consent be defined at law as 'free agreement'.⁴ To make clear what this is they decided that a non-exhaustive list of examples where consent was not present should be included in statute, based largely on existing common law. These included:

- Where a person is submits or is unable to resist because of force, or fear of force.
- Where a person submits or is unable to resist because of threats or fear of serious harm or serious detriment of any type to themselves or another person.
- Where a person was asleep, unconscious, or too affected by alcohol or drugs to give free agreement.
- Where a person did not understand the nature of the act.
- Where a person was mistaken or deceived as to the identity of the person or the nature of the act.
- Where a person is submits or is unable to resist because they are abducted or unlawfully detained.
- Where agreement is expressed by a third party not the victim.⁵

³ *Setting the Boundaries* 2.10.3. *Setting the Boundaries* is most easily available on the internet at <http://www.homeoffice.gov.uk/cpd/sou/vol1main.pdf>

⁴ *Ibid.* 2.10.5.

⁵ *Ibid.* 2.10.9.

In addition to this they recommended that there should be a standard set of directions to juries, probably in statutory form. The aim would be to shift consideration from 'what was in the victim's mind' to 'what the accused *did* to ascertain whether there was free agreement', but without establishing any 'presumption of lack of consent'.⁶ An example of such a direction would be:

In deciding whether the complainant freely agreed to sexual intercourse on the occasion in question you should not assume:

- *That the complainant did freely agree just because they did not say or do anything.*
- *That the complainant did freely agree just because they did not protest or physically resist.*
- *That the complainant did freely agree just because they were not physically injured, etc.*⁷

In spite of the quoted statement about not establishing any 'presumption of lack of consent', English law already incorporates this principle in some senses. A woman who is unconscious or extremely drunk is assumed to be non-consenting, whereas if non-consent involved an act of will or communication she would need some other form of legal protection, being unable to will or communicate anything. In addition, notwithstanding the committee's desire to promote the idea of sexual communication between equals, it is nevertheless important that a rather

⁶ *Ibid.* 2.11.4.

⁷ *Ibid.* 2.11.5.

passive woman who does not do anything much to demonstrate non-consent should enjoy the protection of the law. What the committee did not want, which raises the issue of communicative sexuality, is the reversal of the burden of proof. Their emphasis was on 'what the accused *did* to ascertain whether there was free agreement' but it was still a matter for the prosecution to establish that the complainant did not consent. The committee acknowledged that '[p]eople have devised a complex set of messages to convey agreement and lack of it - agreement is not necessarily verbal, but it must be understood by both parties.'⁸

Communicative Sexuality advocated.

The proposals outlined above represent the Committee's acknowledgement, but not full endorsement, of the case for incorporating communicative sexuality into the law on rape. This begs a consideration of the arguments for incorporating communicative sexuality into the law.

One origin of this argument is a concern with falling conviction rates. A comparison of the number of women going to the police and complaining of rape and the number of convictions shows a conviction rate around 6% in England and Wales, compared to about 34% in 1974.⁹ Worse than that, women are frequently reluctant to go to the police to complain of rape because they think they will have an unsympathetic reception, or because they fear the traumas associated with rape trials. Based on survey evidence the number of rapes and attempted rapes in England and Wales could be anything up to 270,000 each year rather than

⁸ *Ibid.* 2,10.4.

⁹ See the article by Kate Cook elsewhere in this volume for fuller details.

the 6,000 plus complaints at police stations or the 4-500 convictions in court.¹⁰ It would appear that violent stranger rape continues to be prosecuted in much the same way, whilst acquaintance rape, which is the focus of very many of the rising number of complaints to the police, results in convictions relatively rarely. There are numerous problems with the way the criminal justice system in England and Wales handles rape, some of which are being addressed by the current government.¹¹ A major difficulty is with the handling of acquaintance rape, where the accused is almost certain to argue that the complainant consented. Under current law, defendants frequently get away with extremely dubious claims in this area, and the idea of writing communicative sexuality into the law is to help secure convictions. To some extent, at least, advocates argue, this idea has been written into the law in Canada, California and the Australian state of Victoria.¹²

The other origin is an aspiration to encourage sexual relations based on mutual negotiation and clear communication between the people involved. These ideas are promoted, for example, in codes of conduct and introductory classes in US universities.

a. *Lois Pineau*

¹⁰ For discussion see Cowling M *Date Rape and Consent*, (Aldershot: Ashgate, 1998), Ch. 3.

¹¹ For a critique of the current system, see Lees, S., *Carnal Knowledge: Rape on Trial*, (London: Hamish Hamilton, 1996).

¹² In particular advocates of this approach look to the state of Victoria in Australia, where the idea of 'free agreement' was written into rape law in 1991 and where about 25% of complaints to the police result in convictions (*Setting the Boundaries*, Vol. 2, pp. 233-4). This sounds encouraging, but there is not enough detail in *Setting the Boundaries* to be sure on what basis a 'complaint' is recognised and whether other features of the Victorian system for prosecuting rape are responsible for the higher conviction rate.

An important source for the case for communicative sexuality is an essay by Lois Pineau.¹³ Pineau's mental image of acquaintance rape is of a woman who, on a first date, goes along with the aggressive sexual advances of the man because she is drunk and because she fears she has led him on somewhat and he might get violent if she refuses, although she has no very strong evidence of this. Pineau then says it is pretty clear how a court would respond to this description, assuming the case ever reached that stage. The man's aggressive tactics are only normal seduction; and the woman's failure to resist in any forceful way shows that in the end she accepted his advances.¹⁴ However, Pineau argues, for the woman this is a perverse way of looking at things. Her obvious motive for having uncoerced sex is sexual enjoyment, which is most obviously based on sexual attraction. '[S]ubmission to an overbearing and insensitive lout' is not the obvious way to achieve sexual enjoyment: did she get some other sort of payoff, such as money or tickets for the opera?¹⁵ As she did not, the burden of proof shifts to the man to prove that she had good reasons for going along with his wishes.

What about the idea that she led him on to some extent? Pineau considers the idea that the woman effectively made a sexual contract at some stage. She argues that first, contracts normally take a standard form so that people know what is involved (e.g. marriage), or that they are carefully specified in writing, so this implied contract is different from all others. More important, the proper recourse when contracts are not fulfilled is to a court, which will normally provide monetary compensation to the wronged party. There is no provision in modern law for

¹³ Pineau, L., (1996), 'Date Rape: A Feminist Analysis', in Francis, L. (ed.), *Date Rape: Feminism, Philosophy and the Law*, (Pennsylvania: Pennsylvania State University Press, 1996) pp. 1-26.

¹⁴ *Ibid.* pp. 8-9.

¹⁵ *Ibid.* p. 8.

the private enforcement of contracts.¹⁶ A more plausible approach to the question of leading on is to say that at some point the man's sexual impulses become unstoppable. Pineau agrees that this is true for a few seconds around the time of orgasm, but argues that otherwise sexual satisfaction is best achieved for both partners by comfort, communication, a lack of pressure, and caring for one's partner.¹⁷

Given this approach in which male sexual desire is seen as controllable, Pineau argues that where a woman complains in court that she was subjected to high-pressure seduction tactics the burden of proof should lie with the defendant to show that he persuaded the woman to have sex even though there are no 'visible reasons' why she should. Once this is accepted there is no reason why women should not be sexually provocative, since they do not 'deserve' any sex they do not want.¹⁸ The major sexual obligation on this view becomes one of knowing what one's partner feels and wants, the practice of communicative sexuality.¹⁹ The appropriate model for sexual relationships is the mutuality characteristic of friendship: friends doubtless do have rights and obligations against each other, but if they are worrying about these it is a sign that the friendship is breaking down.²⁰

In a court, then, defendants would need to explain why they persisted in the face of voiced reluctance. Rather than questioning the rape victim about how much she resisted, the focus would be on how much the defendant had tried to communicate: did he ask her what she liked? Was contraception discussed? Did he actually ask if she wanted penetration and in

¹⁶ *Ibid.* pp. 14-15.

¹⁷ *Ibid.* p. 15.

¹⁸ *Ibid.* p. 17.

¹⁹ *Ibid.* p. 18.

what position? His failure to answer such questions satisfactorily would be part of the proof of his guilt.²¹ Pineau seems to accept the idea that consent can be non-verbal, provided it is clear, and commentators on the communicative sexuality law in Victoria also judge it to allow for unequivocal non-verbal behaviour.²² This is very important where the argument (below) is that most sexual consent is probably non-verbal.

b. Antioch College Sexual Offence Policy

Although the Antioch College Sexual Offence Policy was adopted independently of Lois Pineau's essay, its underlying intentions are clearly very much the same. The crucial central feature of the policy is the part on consent, which reads:

Antioch College Sexual Offence Policy (part)²³

1. For the purposes of this policy, 'consent' shall be defined as follows:

the act of willingly and verbally agreeing to engage in specific sexual contact or conduct

2. If sexual contact and/or conduct is not mutually and simultaneously initiated, then the person who initiates sexual contact/conduct is responsible for getting the verbal consent of the other individual(s) involved.

²⁰ *Ibid.* pp. 20-23.

²¹ *Ibid.* p. 24. For broadly similar arguments to Pineau's, but without the use of the term 'communicative sexuality', see McGregor, J., 'Force, Consent and the Reasonable Woman', in Coleman, J. L. and Buchanan, A., eds, *In Harm's Way*, (Cambridge: Cambridge University Press, 1994), pp. 231-54.

²² On this point I appear to disagree with David Archard – see Archard, D. (1997) "A Nod's as Good as a Wink": Consent, Convention and Reasonable Belief, *Legal Theory*, Vol. 3, pp. 273-290 p. 283 f. 16.

²³ The full text of the policy and a further account of its development and context can be found in Francis, *Date Rape*, pp. 135-75. See also <http://www.antioch-college.edu/community/html/cg.html> .

3. Obtaining consent is an ongoing process in any sexual interaction. Verbal consent should be obtained with each new level of physical and/or sexual contact/conduct in any given interaction, regardless of who initiates it. Asking 'do you want to have sex with me?' is not enough. The request for consent must be specific to each act.

The Antioch policy is, of course, a college code not a law, and is to some extent seen as more a form of sex education rather than as a legal document. The point to note is that it insists on specific verbal agreement.²⁴

Communicative Sexuality Criticised

There are three main philosophical lines of criticism of communicative sexuality used as a criterion of non-coercive sex. First, the question of what happens to women who are passive and romantic sexually, who like *Mills and Boon* (in America, *Harlequin Romances*) novels, admire the scene in *Gone With the Wind* where Rhett Butler sweeps Scarlet O'Hara upstairs protesting but where she is happy the next morning. Second - the main issue in this discussion - is to question whether the ideal of communicative sexuality is too remote from too much of real life. Third, there is what might be called the Dworkin/MacKinnon objection, which basically assimilates consensual sex under patriarchy to rape, thus rendering communicative sexuality suspect. This position is important, though it is possible to mount trenchant criticisms of the full-blown version of it whilst accepting a limited version, but it is not

²⁴ A third way of advocating communicative sexuality is to argue that sexual relations should be approached as a 'confidential relationship' requiring a heightened duty of care from the man - see Balos, B., and Fellows, M. L. (1991) 'Guilty of the Crime of Trust: Nonstranger Rape', *Minnesota Law Review*, Vol. 75, pp. 599-618. As explained in Cowling *Date Rape and Consent* Ch. 4, this approach involves a danger of defining women as inherently feeble in addition to some further complications, and they are not pursued here.

pursued here.²⁵ There are also some less direct worries that require brief note before moving on to the substantive discussion.

a. Communication isn't everything

Pineau or supporters of the *Campaign to End Rape* would probably agree with everything in this paragraph, which is merely intended to briefly point out that a sexual transaction that includes the woman's specific verbal consent may still be suspect. First and foremost, there may be a sufficient background of coercion or unequal power to invalidate anything she says: discussions between a concentration camp guard and a woman inmate, or between an adult man and a child are obvious examples. How far this argument is taken is obviously contentious. Most people would not regard specific verbal consent from a woman as invalid simply because the man she consents to is a bit stronger than her and earns 5% more. Second, there is the problem of whether the woman knows what she is consenting to if, for example, she is rather drunk but not paralytic.²⁶ Third, a woman may consent rather reluctantly in order to maintain a relationship, perhaps because she does not want to spoil a romantic weekend. Most people would regard this as valid consent. If her partner then takes to badgering her and vaguely threatening violence doubts start to come in, and clearly at some point as his threats become more realistic and her reluctance greater she starts to experience rape.²⁷ Following these very brief indications of some major problems not solved by explicit consent, let us move on to the main detailed criticisms of communicative sexuality.

²⁵ See Cowling *Date Rape and Consent*, Ch. 5.

²⁶ These points are reflected in *Setting the Boundaries*, 2.10.9 - see above.

²⁷ This hypothetical example is intended to replicate some of what is intended by Liz Kelly's 'continuum of sexual violence' - see Liz Kelly, L., *Surviving Sexual Violence*, (Cambridge: Polity Press, 1988), pp. 82-148.

b. The Mills and Boon Objection

The *Mills and Boon* objection asks whether there is anything inherently wrong with women liking passive sexuality where they are swept off their feet by a stern, handsome but basically sensitive man? The point is not that the critics particularly admire this type of approach, but they do contend that it is ironic if a 'feminist' approach to date rape actually deprives numerous women of the sort of experience that they value.²⁸

From the standpoint of the Antioch code, this criticism is dismissed out of hand. There is no role whatsoever for romantic fantasies within it: a Rhett Butler figure that cautiously insists on a verbal confirmation that his every move is acceptable simply loses all his dashing self-assurance. The Antioch riposte to the first criticism would be that the loss to romantic souls is the gain in security of most women.

Pineau's response to this criticism is quite lengthy, but ultimately similar. She questions whether romantic fantasies actually correspond to what women want: there is reason for thinking that they want to be swept off their feet only against the background of an agreement to marry, or something close to that. Pineau's further asserts that people may fantasise about all sorts of things, but it does not mean they want them to happen. Nonetheless, and she seems to acknowledge this, the persistence and popularity of romantic fantasies would seem at least to offer some pointers to some women's sexual desires in our culture.

²⁸ See, for example, Adams, D. M. (1996), 'Date Rape and Erotic Discourse', in Francis, *Date Rape*, pp. 27-39, p.34, Catharine Pierce Wells (1996), 'Date Rape and the Law: Another Feminist View', Francis, *Date Rape*, pp. 41-50, p.45. It will be noticed that the discussion moves easily from 'acquaintance rape' to discussing 'date rape' here. This assumes that 'date rape' is a sub set of acquaintance rape, which occurs where there has been at least some prior romantic involvement, see Cowling *Date Rape and Consent*, Ch. 4.

Even if an ideology such as that of romantic fantasy is entrenched, Pineau continues, that is not to say it is either desirable or impossible to alter in the long term. If women want this sort of nonconsensual sex it might be possible to arrange for it within a contractual arrangement that permits of a 'get-out', similar to the arrangements sado-masochists make (their torturer will not stop if they scream, beg or reason, but will stop at once if they say an agreed safe word, for example, 'green'). Pineau also finds this sort of arrangement satisfactory for women who enjoy full-blown heterosexual masochism.²⁹ Short of such agreements, the loss of spontaneity experienced by aspiring participants in romantic novels has to be seen as a cost of a reform which will protect women in general from rape - it is a less serious cost than the experience of rape without legal redress, which is what current legislation provides. Finally, there is nothing wrong with changing the law provided it is done in the normal way, i.e. starting with a process of public discussion, moving on to a legislative process that the public can watch and influence, and ending with officially-announced legal changes published in the media. She sees these arguments as a counter to the objections that her position is 'utopian', and responds by arguing that her critics are effectively very entrenched conservatives.³⁰

Women who wish to act out romantic fantasies are an acknowledged problem from Pineau's perspective, but the argument that they should accept that their loss is other women's gain is persuasive. As it is not clear how widespread is the desire to act out such fantasies, it is difficult to know how serious this problem is. That said, the idea of modelling sexual relations for women who are shy about articulating their sexual needs on sado-masochistic contracts seems unlikely to be appealing: it is surely pretty damaging to a romantic fantasy to set it

²⁹ Lois Pineau (1996), 'A Response to my Critics', in Francis, *Date Rape*, pp. 63-107, pp. 78-9, 100-101.

³⁰ Lois Pineau, 'A Response to my Critics', pp. 68-84.

down in a contract.

c. Communicative sexuality and real life

Possibly, the most serious of the criticisms of communicative sexuality as a criterion for judging whether rape has occurred is the second, the question of whether it departs too far from normal life. If this criticism were seen as ultimately rendering the ideal of communicative sexuality non-viable then the prospects for women with romantic fantasies would improve as well.

Real life i. ongoing relationships

The second criticism is that most consenting sexual encounters do not conform to the ideal of communicative sexuality. Pineau herself acknowledges this when she mentions that the Antioch code is not appropriate for 'professed lovers', i.e. a couple in an established relationship where nothing has happened to call the relationship into question. In these circumstances to meet and kiss immediately is natural rather than a violation of someone's right to consent.³¹ As most consenting sexual encounters occur within established relationships, this means that the ideal of communicative sexuality applies to most sexual life in only an attenuated form. Pineau says that she does not think this is a problem provided that 'no' still means 'no'. However, this returns to the starting point that rape is simply sex without consent, but in an existing relationship it will be particularly necessary to manifest lack of consent. The implicit and partial continuing consent of such relationships is something that Pineau acknowledges as a problem for a concept of communicative sexuality.

Consider again the degenerating relationship, modelled on Liz Kelly's interviews, which were mentioned above. The woman (wife?) moves from consenting willingly when she does not want to spoil a romantic weekend, through to consenting but rather unwillingly because she knows her husband will be in a bad temper if she does not, through to consenting against a background of economic threat, through finally to consenting against a threat of violence. At least until things get to the violent stage her 'No' will be respected; perhaps her husband is also quite considerate, provided he is getting sex, about the matters Pineau says communicative lovers consider - contraception, sexual position etc. The ideal of communicative sexuality seems to offer protection to this wife only to the extent that her husband has taken it on board as a general approach to life: to treat his wife as a friend to be considered, not simply as a means to his ends. Feminist campaigners have been rightly very insistent that marriage, or a past or existing sexual relationship does not preclude the possibility of rape, so it is a shame that these relationships fit the full ideal of communicative sexuality so badly.

Real life ii. new relationships

What about the situation Pineau mainly has in mind, couples becoming intimate for the first time? A promising alternative approach to prescribing communicative sexuality for all would seem to be to study how couples agree to engage in consenting sex for the first time. If one or more clear patterns that are generally used can be established, then rape could be understood as a departure from these patterns.

Writing in general terms of how consent is given, Flathman comments that a statement: 'I

³¹ *Ibid.* pp. 66-67.

consent to X' is adequate but unusual; more common are informal locutions such as 'OK', 'go ahead if you wish' 'It's all right with me' 'good' 'I have no objections', or a nod of the head, handshake, approving smile, or simply acting in a manner which, in the circumstances, which would be taken to be evidence of consent 'by persons who understand the form of life and know the language'.³² Two possible examples of this last way of giving consent are bidding at an auction by, say, raising one's hand and getting into a taxi and stating a destination. Both actions imply a willingness to pay an amount established by convention. Consent can also be indicated by silence, as in a meeting where the chair invites comments on the accuracy of the minutes, hears nothing, and takes this to involve consent to their accuracy.

This raises the issue of whether, in sexual terms, people 'understand the form of life and know the language'? In one sense evidently people must, as there are numerous instances of consenting sex between newly-intimate couples in Britain of which only a small proportion are rape even on the widest of criteria from Koss or Russell.³³ The first time two people decide to make love is also a favourite theme of film makers. One approach to consent, therefore, is to use the analogy of understanding taxi journeys. A typical transaction might be one in which someone gets into a taxi and states a destination, thereby also agreeing to pay the fare.

³² Flathman, R. E. *Political Obligation* (London: Croom Helm, 1972), p. 219.

³³ Russell, D. E. H. (1982), 'The Prevalence and Incidence of Forcible Rape and Attempted Rape of Females', *Victimology*, Vol. 7, pp. 81-93, Russell, D. E. H., and Howell, N. (1983), 'The Prevalence of Rape in the United States Revisited', *Signs*, Vol. 8, No. 4, pp. 688-95 Russell, D. E. H., *Sexual Exploitation: Rape, Child Sexual Abuse and Workplace Harassment*, (Beverly Hills, CA: Sage, 1984), see Koss's survey in Warshaw, R., *I Never Called it Rape: The MS report on Recognising, Fighting and Surviving Date and Acquaintance Rape*, (New York: Harper and Row, 1988), Koss, M. P., and Cook, S. L. (1988), 'Facing the Facts: Date and Acquaintance Rape are Significant Problems for Women', in Gelles, R. J., and Loseke, D. R., (eds), *Current Controversies on Family Violence*, (Newbury Park, CA: Sage, 1993, Koss, M. P. (1988), 'Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education', in Burgess, A. W., (ed.), *Rape and Sexual Assault*, Vol. 2, (London and N.Y: Garland, 1988), pp. 3-20, Koss, M. P., Woodruff, W.J., and Koss, P. G. (1991) 'Criminal Victimization among Primary Medical Care Patients: Prevalence, Incidence and Physician Usage', *Behavioral Sciences and the Law*, Vol. 9, pp. 85-96, Koss, M. P. (1992), 'The Underdetection of Rape: Methodological Choices Influence Incidence Estimates', *Journal of Social Issues*, Vol. 48, 1, pp. 61-75.

Deviations from the typical taxi transaction are not necessarily theft or cheating. The driver and passenger might surround a standard transaction with much more elaborate courtesies than is customary; they might curtail the customary transaction because this particular passenger always wants to go to a particular destination at a particular time and is paid for by a company account, so no words are spoken or money exchanged at all; they might develop their own terminology over time, so that they both knew what they were doing but an outsider would be surprised by the mismatch between what they said and what happened. All these deviations, however, are built around the standard transaction and can be referred back to it.

At first sight this seems like a promising approach to the identification of rape: identify the normal way or ways of agreeing to have sex, then, if these have not been followed, assume that there is a *prima facie* case of rape, but bear in mind that those involved may have developed a non-standard way of communicating which suits them. Oddly enough, this has been afforded little attention. There is a great deal of literature on date rape, on what sort of couples have sex earlier in their relationship or later, on factors involved in the use of condoms, on how men and women see particular situations and possible cues differently, on how women indicate they are willing to be approached by a suitable man (approached by, not have sex with). However, there is very little literature on how women actually communicate a willingness to have sex.³⁴ The existing articles describe rather small-scale studies on

³⁴ To the extent such a literature exists it comprises: Perper, T., and Weis D. (1987), 'Proceptive and Rejective Strategies of US and Canadian College Women', *Journal of Sex Research*, Vol. 23, pp. 455-80, Byers, E. S. and Lewis, K. (1988), 'Dating Couples' Disagreements Over the Desired Level of Sexual Intimacy', *Journal of Sex Research*, Vol. 24, pp. 15-29, which contains a reference to a further article not obtained for this discussion: Byers, E. S. (1980), 'Female Communication of Consent and Nonconsent to Sexual Intercourse', *Journal of the New Brunswick Psychological Association*, Vol. 5, pp. 12-18. See also Moore, M. M., and Butler, D. L. (1989), 'Predictive Aspects of Nonverbal Courtship Behaviour in Women', *Semiotica*, Vol. 76, Nos 3/4, pp. 205-15, which deals with female non-verbal signals indicating they might like to be approached by a man - evidence in the right direction, but not remotely indicative of consent. Some further relevant articles may be found in the next three notes. Thus as Husak, D. N., and Thomas III, G. C. (1992), argue: '...too much of the literature about the nature

something that may well vary from one subculture to another, so one is reluctant to put too much weight on them.

The studies suggest that typical behaviours would be non-verbal and indirect: offering the man a drink, inviting him somewhere romantic and private, inviting him to listen to music or dance, conversing with him on non-sexual topics. In the early stages of an encounter, women engage in more non-verbal flirtation than men (grooming gestures, positive facial expressions, brief and not overtly sexual touching). All of these female behaviours are, of course, ambiguous. They might just be part of being friendly, or of pursuing non-sexual mutual interests. It seems generally up to the man to take things further.³⁵ The woman then responds warmly to each stage of escalation (he puts his arm round her, she snuggles up to him, he holds her hand, she holds his willingly etc.). If she is unwilling at this stage, suggest Perper and Weis, she may possibly engage in blunt rejection, but is more likely to engage in 'incomplete rejection', for example accepting being held but not responding really warmly. Naomi McCormick basically supports this view, with the added points that male strategies for having sex are also typically indirect, and that both sexes' strategies for avoiding sex tend to be more direct.³⁶ A study of Australian adolescents broadly supports this point. However, amongst the Australians, both sexes had a *similar* set of strategies for encouraging their partner to have sex (see below).³⁷

of rape and how to avoid it neglects the related issue of how couples ever manage to engage in consensual sex' - 'Date Rape, Social Convention and Reasonable Mistakes', *Law and Philosophy*, Vol. 11, pp. 95-126, p. 101.

³⁵ See Naomi McCormick, N. B., and Jones, A. B. (1989), 'Gender Differences in Nonverbal Flirtation', *Journal of Sex Education and Therapy*, Vol. 15, No. 4, pp. 271-82.

³⁶ McCormick, N. B. (1979), 'Come-ons and Put-offs: Unmarried Students' Strategies for Having and Avoiding Sexual Intercourse', *Psychology of Women Quarterly*, Vol. 4, No. 2, pp. 194-211.

³⁷ Rosenthal D., and Peart, R. (1996), 'The Rules of the Game: Teenagers Communicating about Sex', *Journal of Adolescence*, Vol. 19, pp. 321-32.

In summary, then, consenting behaviour, as it appears in the limited research available, involves issuing ambiguous invitations and responding warmly to (mainly physical) male advances. If the woman says 'no' firmly but at a late stage, and even more if she is simply silent or ambiguous at a late stage, it is easy to see how a man might feel 'led on', or feel that protests were out of line with the woman's previous behaviour and not to be taken too seriously. However, according to Byers, both attempts to initiate sex and female acceptance are typically non-verbal.³⁸ To the extent this is right, those who interpret communicative sexuality to mean that there must be affirmative *verbal* consent from the woman are recommending wholesale changes to sexual customs.³⁹

The studies described so far assume a 'traditional' sexual script in which the man initiates and the woman acts as a gatekeeper.⁴⁰ There is some evidence, both anecdotal and from psychological surveys, that this pattern of dating, although still predominant, has been supplemented by patterns where there is mutual seduction, or where the woman takes the lead much more clearly than in the above: one British journalistic comment was 'nobody knows the rules any more'.⁴¹ Kate Fillion in *Lip Service* argues this point very strongly as part of her general thesis that women are just as aggressive as men, but have established ways of

³⁸ Byers, E. S., and Lewis, K. (1988), referring to the research in Byers (1980).

³⁹ Liz Kelly is quoted as taking this line: 'I don't believe that consent can be presumed in any circumstances other than a woman saying I want to have sex with you', *Observer*, 15 June 1997. The Antioch College policy definitely takes this approach - see above.

⁴⁰ For a straightforward account of this drawn from surveys of students in the Boston area in the 1970s, see Peplau, L.A., Rubin, Z., and Hill, C. T. (1977), 'Sexual Intimacy in Dating Relationships', *Journal of Social Issues*, Vol. 33, No. 2, pp. 86-109.

⁴¹ Souter, T. (1995), 'Date Expectations', *Guardian*, 3 August 1995. For a more academic analysis see O'Sullivan, L. F., and Byers, E. S (1992), 'College Students' incorporation of Initiator and Restrictor Roles in Sexual Dating Interactions', *The Journal of Sex Research*, Vol. 29, No. 3, 1992, pp. 435-46. In a small survey of students, Mongeau found some 70% had been on a female-initiated first date - see Mongeau, P. A. et. al. (1993), 'Who's wooing whom? An investigation of female-initiated dating', in Kalbfleisch, P. J. (ed.), *Interpersonal communication: Evolving interpersonal relationships*, (Hillsdale, N. J.: Erlbaum, 1993), pp. 51-68.

hiding it which largely act to their detriment.⁴² Within established relationships both men and women on occasion try to influence their partner to more sexual activity than she or he desires, a process which appears to be seen as a normal part of a relationship, not leading to coercion or rated by either partner as unpleasant.⁴³ In cases of mutual seduction, where she responds to his fondling by starting to undress him, and so forth, he is surely getting implicit consent by her actions, and specific verbal discussion seems redundant. If she is clearly and consistently taking the lead there is even less need for him to establish her consent, although she may arguably need to establish his. The Australian teenagers in Rosenthal and Peart's study seem to fit this model to some extent at least. Both sexes agreed that acceptable strategies for having sex included: various forms of direct physical stimulation and responsiveness; suggesting a quiet place; producing a condom; mentioning contraception; undressing your partner. These strategies are chiefly physical rather than verbal.⁴⁴ Their strategies for avoiding sex, however were more specifically verbal, the favourite with both sexes being 'Tell clearly when gone far enough'.⁴⁵ For the rest of this article a more traditional model is generally assumed because it seems more likely to feature in accusations of rape.

Given this approach, how would someone make sense of an 'ideal type' of date rape described by Andrea Parrott? Here is her description, from the introduction to *Acquaintance Rape: The Hidden Crime*:

⁴² Fillion, K., *Lip Service*, (London: Pandora/Harper Collins, 1997), Chs. 4,5.

⁴³ O'Sullivan, L., and Byers, E. S. (1993) 'Eroding Stereotypes: College Women's Attempts to Influence Reluctant Male Sexual Partners', *Journal of Sex Research*, Vol. 30, No. 3, pp. 270-282; Byers, E. S., and Lewis, K. (1988) 'Dating Couples' Disagreements over the Desired Level of Sexual Intimacy', *The Journal of Sex Research*, Vol. 24, pp. 15-29.

Mary and John had been dating for two weeks. Both Mary and John had slept with people in the past but they hadn't had sexual intercourse with each other. On their fourth date, after John took Mary out for a lobster dinner and then to a wild party to meet some of his friends, the couple went to John's apartment. Mary was wearing a sexy, provocative dress. She had spent a lot of time getting ready, because she wanted to look her best for a special evening. After they got to his apartment, they shared a bottle of wine, listened to music, talked, laughed and kissed. Mary told John what a wonderful time she was having with him. John suggested that they move to his bedroom where they could get more comfortable. She nodded in agreement. In the bedroom, they started dancing erotically and kissing passionately. John caressed Mary's breasts, and Mary moaned. When he started to unbutton her blouse, Mary asked him to stop. He kissed her gently and continued to undress her. She begged him to stop. She told him 'No!' emphatically and said that she was not ready for sex with him. He continued anyway, telling her that he knew she wanted it. He told her to relax and that she was really going to like it. John assured Mary that he loved her and that he had been thinking about this moment ever since they first met. He pulled up her skirt and pulled down her panties. While holding both of her arms with one of his hands, he unzipped his fly, took out his erect penis, and penetrated her.

Parrott follows this description up by asserting that Mary was raped.⁴⁶ Parrott is plainly right to assert this given Mary's clear non-consent, yet an alternative version of the story can be read from this example that fits the research described above.

⁴⁴ Rosenthal and Peart (1996), p. 327.

⁴⁵ *Ibid.* p. 325.

Before the rape, Mary engages in the following ambiguous-but-encouraging behaviour: i.) she agrees to go on four dates with John; ii.) she wears a sexy, provocative dress; iii.) she accepts an expensive lobster dinner; iv.) she agrees to go on to a party with him; v.) she agrees to go to his apartment; vi.) she shares a bottle of wine with him; vii.) she kisses him; viii.) she tells him she is having a wonderful time; ix.) she agrees to go into his bedroom; x.) she dances erotically and kisses passionately with him; xi.) she moans when he caresses her breasts. Mary has engaged in what might be called extensive 'pre-consenting' behaviour. Nothing she does amounts to consent to sex; on the other hand, at each of the eleven points described she could easily do something else that would be a blunt rejection.

Views on pre-consenting behaviour vary. Flathman sees pre-consenting political behaviour, for example attending meetings of a potential pressure group, or saying a certain set of arrangements would be very desirable, as *not* tacit consent. For example, someone might attend anti-pornography meetings because she is a pornographer and wants to keep an eye on a group that might restrict her freedom. Simmons, on the other hand, looking at the same sort of issues, is willing to see someone who goes along with a process of this sort as engaging in tacit consent.⁴⁷ At minimum, someone who engages in extensive pre-consenting behaviour would do well to either explain as things progress that it is not what it seems ('I'm inviting you to my apartment for a discussion of Parmenides and nothing else'), or to make herself very clear if she changes her mind after a great deal of behaviour which seems to

⁴⁶ Parrott, A., and Bechhofer, L. *Acquaintance Rape: The Hidden Crime*, (New York: John Wiley, 1991), p. 9.

⁴⁷ Flathman, *Political Obligation*, pp. 225-7, Simmons, A. J., *Moral Principles and Political Obligation*, (Princeton N.J: Princeton University Press, 1979), p. 89.

point the other way.⁴⁸

The concept of 'pre-consenting behaviour' is probably too wide. In the John and Mary example, Mary is certainly not indicating a willingness to have sex with John by going out with him the first time. On the other hand, behaviours ix.) to xi.) appear to be quite close to consenting. If one adds xii.) Mary helps John strip naked; xiii.) Mary strips naked; xiv.) Mary lies on John's bed; xv.) Mary inserts her diaphragm and says 'Come here', she has still not, strictly speaking, consented to sex in that she has not actually said 'Come here and make love to me', but she has got so close to that that most observers would think she has clearly consented. Of course, consenting behaviour could be matched by a set of explanations that entirely negates their apparent meaning, for example John and Mary are actually making a film, so that the next scene is in fact the producer saying 'Cut' and the crew and cast having mugs of cocoa. The idea that acting brackets off behaviour from its apparent meaning is clearly established in our society. Other attempts to bracket off behaviour are more ambiguous. In Ol Parker's television play *In Your Dreams* on the theme of date rape, one important moment is when Claire is persuaded by Jamie to invite him up to her room for coffee. She makes it clear that it is only an invitation for coffee; partly because of her earlier behaviour he assumes it is for more. A group of students shown the play disagreed (not on male/female lines) about the extent to which 'come up for coffee' at the end of an evening is a coded invitation for sex⁴⁹.

⁴⁸ Paul Reynolds and Jill Radford, both of whom were kind enough to read this material in draft form, both pointed out that the discussion of this paragraph is over-simplified. It is quite possible to imagine circumstances where a man and a woman both intend simply to have a discussion of Parmenides when setting off for his apartment, but then things develop differently. Or one of them might be thinking this way while the other was not.

⁴⁹ The play was shown on BBC2 on 14 December 1997; for the discussion, see *The Guardian*, 11th December 1997.

This last problem introduces a further complication about pre-consenting behaviour: as well as being ambiguous, some consenting words and actions are metaphorical or symbolic. Thus 'shall we go to bed?' in the right context could be deemed a sexual invitation, but it is not literally one. This seems to have been a source of problems in two recent English date rape cases. In both the woman in question invited the man to go to bed with her, apparently simply meaning to sleep, and both made accusations of rape when the man started having sex when they had actually fallen asleep. In one case the woman also showed the man her collection of sadomasochistic materials and consented to cunnilingus, both activities which might be deemed pre-consenting activities close to consent. Neither resulted in a conviction in court.⁵⁰

In her discussion of date rape Katie Roiphe talks of the problem as partly one of 'class prejudice and race prejudice' when, say, 'the southern heiress goes out with the plumber's son from the Bronx': today's American universities, she says, contain many students who do not understand the conventions of upper class American society.⁵¹ The problem - apart from straightforward prejudice - may be one of different metaphors and conventions about consent. It certainly makes sense that a man coming from, say, a strict Moslem background would find the standard summertime behaviour of young European women, sunbathing nude or topless by day and engaging in very clinging dancing in the evening an indication that sexual consent was but a very small step away. There is insufficient evidence or research to assert this firmly, but something similar but less dramatic might well apply between the various US subcultures.

Keith Burgess-Jackson stresses this diversity of conventions, and argues that because of possible misunderstandings about something so serious it is degrading to a woman to allow a

⁵⁰ For a brief account and discussion, see Freely, M., *Guardian*, 8 December 1994.

man to rely on a convention in assuming her sexual consent: he should instead be required to ask her whether or not she consents.⁵² In a specific critique of the sort of approach advocated in this article, Archard makes a similar point.⁵³ However, Burgess-Jackson's man still has to rely on *linguistic* conventions. Might not ambiguous language but decisive physical actions be clearer than straightforward language combined with clear bodily resistance: compare 'let's get more comfortable', whilst removing his and her clothes with 'Go on then, if you must', whilst remaining dressed and rigid. Such conventions as are involved here are typically specific to a situation and cumulative. Thus 'Come up for coffee' is not a sexual invitation when uttered at 10 a.m. in the context of writing a seminar presentation but may be one when uttered at the end of a romantic evening. There is also the issue of what is implied in consenting to heterosexual sex. There are (not clearly established) conventions, so that a woman consenting could be assumed to have also consented to having her hair stroked and neck kissed, but not to anal sex. To this it would seem reasonable to add a tolerant and considerate atmosphere, in which the woman would make it clear if she does not like having her hair stroked, but not take offence at the man doing so without explicit additional permission and the man would readily desist if refusal were asserted.

If a woman's sexual consent is usually currently established by some mixture of male initiative and female acceptance, often of an ambiguous sort, and the use of metaphorical language and acts, then most current consenting sexual initiatives would fall foul of Pineau's ideal of communicative sexuality.

⁵¹ Roiphe, K., *The Morning After*, (London: Hamish Hamilton, 1993), pp. 78-9.

⁵² Burgess-Jackson, K., *Rape: A Philosophical Investigation*, (Brookfield, Vermont: Dartmouth, 1996), p. 151-3.

⁵³ Archard (1997).

In turn this raises a set of male nightmares, currently groundless but potentially serious. Supposing, the worry goes, that John from our extended John and Mary example in which Mary finally inserts her diaphragm and says 'Come here,' got accused of rape. He did not get an explicit verbal consent to each stage of escalation, but on the current ambiguous and metaphorical pattern there was every indication of consent.⁵⁴ Supposing the trial was held according to the criteria of communicative sexuality. Plainly he 'wouldn't have a leg to stand on', yet according to most fair-minded people the encounter would be held to be consensual.

A further step in this nightmare is that the trial might become a version of a show trial, a trial where the main issue is not the guilt or innocence of the accused but the education of the public. John would be imprisoned not for any real crime he has committed but to show all men that they must follow the rules of communicative sexuality. Pineau's answer to this male nightmare is clear. The law would have been changed, and John should have taken notice of it and asked clear questions at each stage. However, there is quite a danger that a jury would not convict John - after all, he was only doing what most of them would have done, without any sense that they were doing something wrong (or having something wrong done to them). If John was convicted there might well be a sense that this is a law that has been disobeyed by most of the population, and that convictions under it were random rather than justified.⁵⁵ In other words, there is a very big stride from current practice to the use of communicative

⁵⁴ In O'Sullivan and Byers (1992), of sexual activities initiated by the man, direct verbal initiation took place in a quarter of cases, physical contact, suggestive movements and ambiguous verbal cues being much more common; a broadly similar pattern applies to female initiation except that a third of the women used direct verbal initiation - see p. 441.

⁵⁵ Cf. Turk, C. L., and Muehlenhard, C. L. 'Force versus consent in definitions of rape', paper quoted in Muehlenhard, Charlene L. et. al. (1992), 'Definitions of Rape: Scientific and Political Implications', *Journal of Social Issues*, Vol. 48, No. 1, pp. 23-44.: only 28% of a sample of college students supported a definition of rape as sex without explicit verbal consent for a student code. The percentage might have gone down if they had been asked about changes to the law. (See p. 32.)

sexuality as a criterion for sexual consent. This is the line taken by some of Pineau's critics: the standard used for determining consent in courts of law should be whether a reasonable person in the defendant's position would have grounds for believing that consent had been given, and this involves paying attention to the current social customs.⁵⁶ This raises particular anxieties in respect of Pineau's remarks about female provocativeness. If she simply means that women should be able to make themselves look attractive and go where they please without the accusation that they were 'asking for it', that would presumably meet with common agreement. The argument that just because a woman makes herself look sexually attractive, it does not mean she wants sex with any old man without more ado is a powerful one. However, as illustrated in the extended story about John and Mary, specific and extended female provocativeness directed at one particular man shades off into what most people would recognise as consent to sex. As with pre-consenting behaviour, specific provocativeness varies from somewhat encouraging behaviour that is not remotely consent to sex through to an invitation to sex in all but name.

Conclusion

The committee that wrote *Setting the Boundaries* achieved a wise compromise between the law as it stands and the more extreme ideas encapsulating communicative sexuality. Thus interpreting consent as 'free agreement' advocates discussion and communication between equals. It makes it harder to argue that words or actions that were not remotely sexual consent somehow imply it. The examples of non-consent as they stand simply codify existing case law, but could be extended. The list of statutory judicial instructions is also helpful, and debate on its contents has considerable educational potential. On the other hand, the

⁵⁶ See, for example, Wells (1996), p. 44, Husak and Thomas , (1992).

committee did not take up Pineau's idea of reversing the burden of proof, which has an alarming potential for reversing the 'innocent until proven guilty' principle of the law. Wisest of all is its recognition that '[p]eople have devised a complex set of messages to convey agreement and lack of it - agreement is not necessarily verbal, but it must be understood by both parties.' This allows for the reality of sexual consent as it is actually negotiated in real life.

This begs a proposal for building on *Setting the Boundaries*. The ideas about the real life negotiation of consent in this article are based on a relatively few existing surveys. However, the existing surveys tend to look at what women would do in a particular situation if they were interested in having sex, and answers include such things as suggesting having a drink together or going somewhere private. Neither of these comprises consent to sex. Devising appropriate questions may be quite difficult. It may well be that couples do not pay very careful attention to exactly what indicates that the woman is consenting to sex unless something goes wrong with the encounter. Much consenting behavior is probably metaphorical (as in 'let's get more comfortable') or symbolic (as in 'shall we go to bed?'), and some of the symbols and metaphors are doubtless very local, confined to small groups of people. As a first step an experiment should be done in which people are asked to keep diaries in which they record consenting sexual encounters, and in which they indicate what it was about these encounters which supports the belief that they were indeed consenting encounters.