CONSENT INTERRUPTUS: RAPE LAW AND CASES OF INITIAL CONSENT

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This article is an in-depth analysis of the operation of Australian criminal laws around rape in situations where sex begins with the initial consent of the parties but is then continued without the consent of one of them. It sets out the historical development of the relevant law from the conflicting series of case authorities in the mid-20th century about 'carnal knowledge' through to the introduction of specific continuation provisions within modern statutory reforms. It argues that despite these reforms there are still a number of substantial legal difficulties with the application of the current law, including a lack of clarity about what it means to 'continue' sex, whether non-consent needs to be communicated to the continuing party and how to evaluate the effectiveness of such communications.

I INTRODUCTION

In her widely-cited 1986 article 'Rape', Estrich observed that the criminal law has handled different instances of non-consensual sex in very different ways.[1] She identified that in both the formulation and enforcement of law a particular kind of non-consensual sex was 'generally acknowledge[d]' and treated as a 'serious crime'.[2] She called this 'traditional rape', by which she meant non-consensual sex situated within the broad factual pattern of a strange man using threats/violence to overcome the resistance of a woman.[3] Importantly, Estrich also identified that non-consensual sex that 'deviate[d] in one or many respects from this' pattern was often treated by the law as being relatively trivial and was sometimes not

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1 Susan Estrich, 'Rape' (1986) 95 *The Yale Law Journal* 1087.

2 Ibid 1092.

3 Ibid.

even prohibited at all.[4] She called these deviations 'non-traditional rape', including non-consensual sex where the people involved were married or dating, threats/violence were not used, the setting was a private space like a bedroom, etc.[5] Through this varied treatment of non-consensual sex a legal line was drawn between 'what counts as sex' and 'what counts as rape',[6] and the latter category has historically been quite limited.

From the 1970s onward a wave of feminist-inspired law reform dramatically redrew the line between sex and rape in Australian law.[7] Amongst other things the marital immunity for spousal rape was progressively dismantled, rape offences were reformulated so that the narrow focus on penile–vaginal sex was widened to include various other bodily orifices and parts (as well as objects), evidentiary rules were altered and some jurisdictions even abandoned the use of the term 'rape' itself.[8] These reforms were intended *inter*

4 Ibid.

5 Ibid.

6 Mary Heath, 'Disputed Truths: Australian Reform of the Sexual Conduct Elements of Common Law Rape' in Patricia Easteal (ed), *Balancing the Scales: Rape, Law Reform & Australian Culture* (The Federation Press, 1998) 13, 24.

7 For a brief summary of some of the key changes see Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, *Responding to Sexual Assault: The Challenge of Change* (Publishing Service DPP, 2005) 5-6.

8 See generally Gail Mason, 'Reforming the Law of Rape: Incursions into the Masculinist Sanctum' in Diane Kirby (ed) *Sex, Power and Justice: Historical Perspectives on Law in Australia* (Oxford University Press, 1995) 50. The Australian Capital Territory, the Northern Territory and Western Australia have all abandoned the use of the term rape in their relevant criminal statutes, in favour of terminology such as 'sexual intercourse without consent': *Crimes Act 1900* (ACT) s 54, *Criminal Code Act 1983* (NT) s 192; and 'sexual penetration without consent': *Criminal Code Act Compilation Act 1913* (WA) s 325. New South Wales abolished the common law offence of rape and now uses the term 'sexual assault' for the offence involving sexual intercourse without consent, however this section appears in a Division still entitled 'Offences in the nature of rape …': *Crimes Act 1900* (NSW) s 61I. Although there may be sound reasons why these jurisdictions no longer use the term 'rape', for ease of expression this term will be used throughout this article to refer collectively to both rape offences and to those offences identified within this footnote from jurisdictions that no longer use the term.

alia to broaden the criminal law around sexual offences,[9] and the ambit of modern law now formally captures much of what Estrich called 'non-traditional rape'. One particular part of the reform process is the focus of this article, namely the introduction of statutory sections dealing with situations in which non-consensual sex begins consensually. I will refer to situations like this as 'cases of initial consent'.[10] Such cases clearly fall far outside Estrich's model of 'traditional rape' and because they involve both consensual and non-consensual sex within the same encounter they straddle the border-line between sex and rape. So where exactly does Australian criminal law draw the line here?

Australian commentators have had very little to say about cases of initial consent, perhaps because such cases are 'relatively rare'[11] and have been described as a 'peculiar phenomenon'.[12] This area of law has typically only been addressed in Australian criminal law

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[9] See, eg, the comments made during the second reading speeches for the bills introducing such reforms in the 1980s in both New South Wales and Western Australia: New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 March 1981, 4758 (Mr Wran, Premier); Western Australia *Parliamentary Debates,* Legislative Assembly, 3 September 1985, 699 (Mrs Beggs).

[10] I borrow this term from Kyker, who refers to this as 'initial consent rape': Brett M Kyker, '"Initial Consent" Rape: Inherent and Statutory Problems' (2005-2006) 53 *Cleveland State Law Review* 161. The more commonly used name in American jurisprudence is 'post-penetration rape', which was coined earlier by McLellan: Amy McLellan, 'Post-Penetration Rape — Increasing the Penalty' (1991) 31 *Santa Clara Law Review* 779. However, post-penetration rape is inapt for use in reference to Australian law given that in some Australian jurisdictions 'penetration' has a specific statutory definition (one that also includes continuing acts of penetration). Davis prefers to refer to these kinds of situations as 'revoked-consent' cases: Amanda O Davis, 'Clarifying the Issue of Consent: The Evolution of Post-Penetration Rape Law' (2005) 34 *Stetson Law Review* 729-766. This too is inapt for use in reference to Australian law as there is no specific requirement anywhere in Australia that consent be explicitly revoked or withdrawn for there to be criminal liability in such cases (as will be discussed in Part III).

[11] Penny Pether, 'What is Due to Others: Speaking and Signifying Subject(s) of Rape Law' (2009) 18(2) *Griffith Law Review* 237, 244.

[12] Henry F Fradella and Kegan Brown, 'Withdrawal of Consent Post-Penetration: Redefining the Law of Rape' (2005) 41(1) *Criminal Law Bulletin* 3, 3.

textbooks,[13] a publication format which understandably lends itself more to brief description rather than in-depth coverage. In contrast, this article provides both detailed engagement with the historical development of the law around cases of initial consent as well in-depth analysis of the current law.[14] It argues that despite modern statutory reforms the application of the law in such cases is still plagued by a number of substantial legal difficulties, including the unclear meaning of 'continue' in statutory continuation provisions and the uncertain legal standards set for the communication of non-consent. This argument proceeds over the next two parts. In Part II the historical development of the law in this area is charted from the mid-20th century common law conflict around 'carnal knowledge' to the relevant aspects of the modern statutory reforms around rape. In Part III the legal difficulties with the current law around cases of initial consent are identified and discussed, in particular what exactly it means to continue sex and whether, and how, non-consent should be communicated.

II LEGAL DEVELOPMENT

To fully engage with the current legal difficulties involved in cases of initial consent it is important to understand how the relevant law has developed over the previous decades. This is because the current law is partly a response to a conflicting series of mid-20th century judicial decisions about whether carnal knowledge should be understood as a continuing act. This Part demonstrates how modern

[13] See, eg, Mirko Bagaric and Kenneth J Arenson, *Criminal Laws in Australia: Cases and Materials* (Oxford University Press, 2nd ed, 2007) 302-303; David Ross, *Ross on Crime* (Thomson Reuters, 4th ed, 2009) [18.170]; E Colvin, J McKechnie and J O'Leary, *Criminal Law in Queensland and Western Australia: Cases and Commentary* (LexisNexis Butterworths, 7th ed, 2015); Kelley Burton, Thomas Crofts and Stella Tarrant, *Principles of Criminal Law in Queensland and Western Australia* (Thomson Reuters, 2nd ed, 2016) 174-175; John Devereux and Meredith Blake, *Kenny Criminal Law in Queensland and Western Australia* (LexisNexis Butterworths, 8th ed, 2013) 327.

[14] It should, however, be noted that in some of the cases discussed below the evidence of the complainant is that they never consented to sex at all, and that issues of initial consent only come to be addressed by the court because they were raised by either the defence or by the jury.

rape law reforms resolved this conflict by sidelining the concept of carnal knowledge and introducing statutory continuation provisions.

A *Common Law and Carnal Knowledge*

Australian criminal law historically defined rape as 'carnal knowledge of a woman against her will'.[15] The term 'carnal knowledge' was itself defined as being 'penetration of the vagina by the penis', which meant that '[o]ther [forms of] non consensual sexual conduct' could not constitute rape and were left to alternative legal categories such as buggery, sodomy, indecent assault, etc.[16] Until the statutory reforms of the late 20th century the 'offence of rape remained largely unchanged from colonialism',[17] and Australian law thus contained elements of the historical legal development of carnal knowledge. One such element was a provision in most jurisdictions that carnal knowledge was 'deemed complete upon proof of penetration only'.[18] The rationale behind these deeming provisions may not be immediately apparent. However, an explanation is contained in the expanded wording of a very similar provision which was introduced into s 18 of the *Offences Against the Person Act 1828* (UK) during the 19th century:

> And whereas upon trials for the crimes of buggery and of rape … offenders frequently escape by reason of the difficulty of the proof which has been required of the completion of those several crimes; for

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15 Mason, above n 8, 51.

16 Heath, above n 6, 14. As the Royal Commission on Human Relationships explained in 1977, 'rape relates to heterosexual vaginal intercourse. This excludes all other forms of sexual abuse, however damaging and humiliating. It also means that rape is a heterosexual offence, committed by a man upon a woman': Commonwealth, Royal Commission on Human Relationships, *Volume 5*: *The Family*, *Final Report* (1977) 206.

17 Heath, above n 6, 13.

18 See, eg, *Crimes Act 1900 (NSW)* s 62 (prior to its repeal); *Crimes Act 1958* (Vic) s 70 (historical version). Cox mentions the various Australian formulations of this kind of deeming provision and notes that Tasmania historically had a slightly different wording, namely 'that carnal knowledge *means* penetration to any the least degree': W J E Cox, 'Law Reform and Rape Under the Tasmanian Criminal Code' in Jocelyne A Scutt (ed), *Rape Law Reform* (Australian Institute of Criminology, 1980) 49, 51.

> remedy thereof be it enacted, that it shall not be necessary, in any of those cases, to prove the actual emission of seed to constitute carnal knowledge, but that the carnal knowledge shall be deemed complete upon proof of penetration only. [19]

The effect of this section can be observed shortly after in the 1839 case of *R v Henry Allen*.[20] Here a woman walking home was accosted by a man as she passed by a public-house. He followed her until they reached a quiet area of road and then attacked her. Although she fought him off, her evidence was that he briefly penetrated her vagina with his penis. He was charged with rape and part of the defence's argument was that the carnal knowledge element of the offence required the man to 'satisfy his lust within her person' and this could not fulfilled by evidence of mere penetration alone.[21] In summing up the law to the jury, Tindal CJ rejected this argument and referred to the statutory section extracted above, noting that: '[t]he only question … for the jury, in such a case, is, whether the private parts of the man did enter into the person of the woman'.[22]

Deeming provisions that made carnal knowledge complete upon proof of penetration thus made some rape cases easier to prosecute by doing away with additional evidentiary requirements beyond proof of penetration, such as proof of ejaculation. However, such provisions also made cases of initial consent more difficult to prosecute as rape (though they could still be prosecuted as indecent assault). For if rape is carnal knowledge without consent and carnal knowledge is complete upon penetration, then the absence of consent seems to legally matter only at the specific point of penetration. The absence of consent after penetration has occurred but whilst sex is continuing is thus irrelevant, with the effect that 'a woman who ha[s] consented to carnal knowledge … [can]not thereafter revoke the

[19] The similarity between this 19th century Act and the wording of 20th century Australian legal definitions of carnal knowledge is identified by Skerman J in *R v Mayberry* [1973] Qd R 211, 286.

[20] (1839) 173 ER 727.

[21] *R v Henry Allen* (1839) 173 ER 727, 727.

[22] Ibid 728.

same until after the carnal knowledge had ceased'.[23]

This problematic feature of carnal knowledge was highlighted in a series of Australian cases in the mid-20th century. In 1969 the South Australian Supreme Court in *R v Salmon*[24] considered a case where a man had been charged with rape but was ultimately convicted of indecent assault. On Salmon's account, he had begun having consensual sex with the woman, she had then screamed, he punched her twice and persisted regardless. On the woman's account she had never consented at all. At trial the judge directed the jury that on the woman's account Salmon was guilty of rape but that it was open for them to convict Salmon of indecent assault on the basis of Salmon's account. One of the questions raised on appeal was whether this direction was legally correct; was Salmon guilty of rape on his own account if he continued sex after knowing that she no longer consented? In a unanimous joint judgement the Court answered no. After repeating the relevant law that carnal knowledge was 'deemed complete upon proof of penetration',[25] the Court held that '[i]f the facts are that there was penetration with consent, then in our view, no matter what happens after that, there can be no rape until there is a further act of penetration'.[26] Whilst the Court acknowledged that the law's focus on the absence of consent only at the point of initial penetration created an 'artificial line', they regarded this as the inevitable outcome of the statutory wording.[27]

A very different outcome was reached soon after in the 1973 Queensland decision of *R v Mayberry*.[28] In this case two men, Mayberry and Goodall, were convicted in relation to the rape of a woman, Heather. On the facts Mayberry and Goodall had driven Heather and her friend Kay into a remote area of bush. Goodall then

[23] Kenneth J Arenson, 'The Chaotic State of the Law of Rape in Victoria: A Mandate for Reform' (2014) 78 *Journal of Criminal Law* 326, 327.
[24] [1969] SASR 76.
[25] *R v Salmon* [1969] SASR 76, 77 (citing the then current *Criminal Law Consolidation Act 1935* (SA) s 73).
[26] Ibid 78.
[27] Ibid 82.
[28] [1973] Qd R 211.

took Kay to sit on a log some distance away in order to leave Mayberry and Heather alone in the car. Mayberry then raped Heather. Heather screamed at the point of being penetrated by Mayberry's penis and when Kay started to move towards the car to assist her friend Goodall physically restrained Kay to prevent her from doing so. At trial Mayberry was convicted of rape and Goodall was convicted of aiding in the commission of the rape. On appeal it was argued that Goodall's conviction was improper because the offence had already been committed by the time of Goodall's supposed aid. As carnal knowledge was 'complete upon penetration',[29] the argument was that Mayberry had already committed rape at the time of the scream and thus Goodall was merely restraining Kay in the aftermath of the offence. Hanger CJ rejected this argument outright (Hart J agreeing),[30] observing that the statutory definition of carnal knowledge does not mean:

> [T]hat at the instant of time when penetration takes place, what takes place thereafter e.g. ejaculation, is not part of the act of rape. I am quite unable to understand that a man, having effected penetration, ceases to be having carnal knowledge of a woman at that instant of time, though he remains to complete the act of sexual intercourse for some time thereafter, the normal reason for his attack.[31]

The court's ultimate decision, therefore, was that Goodall was properly convicted of aiding Mayberry in the commission of rape. However, Skerman J dissented. Citing *R v Henry Allen* as authority, Skerman J stated that he was:

> [A]t a loss to understand how Goodall could be legally and properly convicted of aiding *in the commission* of the crime of rape when the only active step or steps alleged against him was his action in preventing or restraining Kay … from going to the car to assist Heather after penetration.[32]

[29] *Criminal Code* (Qld) s 6.
[30] *R v Mayberry* [1973] Qd R 211, 295.
[31] Ibid, 229.
[32] *R v Mayberry* [1973] Qd R 211, 286 (emphasis in original).

The conflict between the decisions in *R v Salmon*[33] and *R v Mayberry*[34] was of particular significance to cases of initial consent. If *R v Salmon* was preferred and carnal knowledge is focused solely on the point of initial penetration, then continuing sex without consent could not give rise to liability for rape. If *R v Mayberry* was preferred and carnal knowledge extends beyond initial penetration, then continuing sex without consent could give rise to liability for rape. This conflict played out across a number of subsequent court decisions.

In *Richardson v The Queen* in 1978,[35] the Tasmanian Supreme Court preferred the interpretation of carnal knowledge given in *R v Salmon*. Here Green CJ observed that 'carnal knowledge consists of the act of entering the vagina and I think that the act is complete upon entry or penetration taking place to the slightest degree. I do not think that the meaning of the expression can be properly extended to include the act of remaining within the vagina'.[36] Both Crawford and Nettlefold JJ concurred, finding that carnal knowledge was focused solely on the point of 'initial entry' and was not concerned with the absence of consent after penetration had taken place but whilst sex continued.[37] Although both Green CJ and Nettlefold J emphasised that this was the result of a technical legal reading of the statutory definition of carnal knowledge, Nettlefold J opined that this nevertheless 'produces a realistic and acceptable result'.[38]

At this stage, this issue was considered by the Privy Council in an appeal case from New Zealand. *Kaitamaki v The Queen*[39] involved a situation where a man broke into a woman's house and had sex with her twice. The prosecution contended that these were both non-

[33] [1969] SASR 76.
[34] [1973] Qd R 211.
[35] [1978] Tas SR 178.
[36] *Richardson v The Queen* [1978] Tas SR 178, 181.
[37] Ibid 184 (Crawford J) and 188 (Nettlefold J).
[38] Ibid 188.
[39] (1984) 79 Cr App R 251.

consensual rapes whilst the defence initially argued that the sex was consensual or, alternatively, that the man had honestly believed that she was consenting. However, during evidence at trial the man admitted that he had become aware that the woman was not consenting partway through the second act of sex but had continued regardless.[40] In summing up, the trial judge instructed the jury that 'as a matter of law … if, having realised she is not willing, he continues with the act of intercourse, it then becomes rape'.[41] The man was subsequently convicted of rape. Whether this jury instruction was legally correct was the sole appeal point before the Privy Council. The *Crimes Act 1961* (NZ) at the time had abandoned the concept of carnal knowledge in favour of the term 'sexual intercourse' but had nevertheless retained a familiar provision defining sexual intercourse as being 'complete upon penetration' for the purposes of rape.[42] In determining the effect of this provision, the Privy Council rejected arguments based on the Australian authorities discussed above as being irrelevant to the proper construction of the New Zealand statute. The Privy Council also held that the word 'complete' in the New Zealand provision 'is used … in the sense of having come into existence, but not in the sense of being at an end. Sexual intercourse is a continuing act which only ends with withdrawal.'[43] Accordingly, the appeal was dismissed and the man's conviction upheld.

Despite this international development Green CJ immediately reaffirmed the *R v Salmon* line of authority in the 1984 decision of *R v Sanders*.[44] For the same reason that the Privy Council rejected the relevance of Australian authorities, Green CJ rejected the relevance of the Privy Council's decision: the statutory context was held to be

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40 *Kaitamaki v The Queen* (1984) 79 Cr App R 251, 253.

41 Ibid.

42 *Crimes Act 1961* (NZ) s 127.

43 *Kaitamaki v The Queen* (1984) 79 Cr App R 251, 253. This decision was subsequently followed in the domestic English case of *R v Cooper and Schaub* [1994] Crim LR 531, and the notion that penetration is a continuing act was then adopted into the relevant statute law around sexual offences: Michael Allen, *Textbook on Criminal Law* (Oxford, 12th ed, 2013) 408; A P Simester, J R Spencer, G R Sullivan and G J Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (Hart Publishing, 4th ed, 2010) 461-462.

44 (Unreported, Tasmanian Supreme Court, 22 November 1984, Green CJ) 6.

importantly different as 'carnal knowledge' under the Tasmanian statute was not directly comparable to 'sexual intercourse' under the New Zealand statute.[45] Green CJ again held that carnal knowledge was focused solely on the point of initial penetration and was not a continuing act.

B *Statutory Reform and Continuation Provisions*

From the 1970s onwards, a wave of reform dramatically altered the legal landscape around rape in Australia. These reforms were broad-ranging in nature but contained two aspects of particular importance for cases of initial consent. Firstly, the concept of carnal knowledge was largely abandoned as an element of rape offences. Instead of being defined as 'carnal knowledge of a woman against her will',[46] modern rape offences are now typically defined in terms of 'sexual intercourse',[47] or 'sexual penetration',[48] involving another person without that person's consent. Queensland is the sole jurisdiction to retain carnal knowledge as an element of rape.[49] Secondly, in all jurisdictions, both common law and Code law alike, rape offences are now largely governed by statute law and the statutory definitions of the new terms 'sexual intercourse' and 'sexual penetration' have introduced provisions that specifically define them as being continuing acts (a 'construction' in keeping with the decision in *Kaitamaki v The Queen*).[50] Such continuation provisions were first introduced in New South Wales in 1981[51] — with Western

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45 *R v Sanders* (Unreported, Tasmanian Supreme Court, 22 November 1984, Green CJ).

46 Mason, above n 8.

47 *Crimes Act 1900* (ACT) s 54; *Crimes Act 1900* (NSW) s 61I; *Criminal Code Act 1983* (NT) s 192; *Criminal Law Consolidation Act 1935* (SA) s 48; *Criminal Code Act 1934* (Tas) s 185.

48 *Criminal Code Act Compilation Act 1913* (WA) s 325; *Crimes Act 1958* (Vic) s 38.

49 *Criminal Code 1899* (Qld) s 349. The concept of carnal knowledge is, however, retained in some jurisdictions for other offences. For example, in Western Australia see *Criminal Code Act Compilation Act 1913* (WA) ss 6, 181, 186, 192, 398.

50 Bagaric and Arenson, above n 13, 303.

51 See the *Crimes (Sexual Assault) Amendment Act 1981* (NSW) sch 1 s 4, which inserted s 61A into the *Crimes Act 1900* (NSW).

Australian quickly following suit in 1985[52] — and were described as being 'totally new and innovative' at the time.[53] Such provisions are now, however, a standard feature in all Australian jurisdictions except Queensland.[54]

Each current statutory definition of sexual intercourse and sexual penetration contains a list of sexual acts, such as vaginal penetration, anal penetration, fellatio, cunnilingus, various other forms of penetration, etc, alongside a provision specifying that the definition also extends to continuing these acts. There is some minor variation in the wording of the continuation provisions across jurisdictions but they are broadly similar in effect. The Australian Capital Territory, New South Wales and Tasmania all define 'sexual intercourse' as including the 'continuation of sexual intercourse',[55] South Australia defines 'sexual intercourse' to include the 'continuation of such activity',[56] and the Northern Territory specifies that 'sexual intercourse ... continues until the withdrawal of the part of the body or object from the mouth, vagina or anus into which it was inserted or the cessation of cunnilingus or fellatio, as the case may be'.[57] In Western Australia, to 'sexually penetrate means … to continue sexual penetration',[58] and in Victoria 'sexual penetration' includes

[52] See the *Acts Amendment (Sexual Assaults) Act 1985* s 8, which inserted s 324F(e) into the *Criminal Code Act Compilation Act 1913* (WA). This WA provision was deliberately 'modelled on [the] New South Wales legislation': Western Australia, *Parliamentary Debates,* Legislative Assembly, 3 September 1985, 699-700 (Mrs Beggs).

[53] Crown Law Department, *Review of Sexual Assault Laws: A Report to the Attorney-General of Western Australia* (1988) 13.

[54] The process of introducing these continuation provisions was not, however, entirely seamless in every Australian jurisdiction. For example, before eventually introducing a continuation provision, South Australia first took the intermediate step of adopting the terminology of 'sexual intercourse' alongside a new deeming provision that held that 'sexual intercourse is sufficiently proved by proof of penetration': *Criminal Law Consolidation Act 1935* (SA) s 73 (historical version). The application of this now defunct provision to cases of initial consent was explored in *R v Murphy* [1988] 52 SASR 186.

[55] *Crimes Act 1900* (ACT) s 50(1)(f); *Crimes Act 1900* (NSW) s 61H(1)(d); *Criminal Code Act 1924* (Tas) s 1.

[56] *Criminal Law Consolidation Act 1935* (SA) s 5(1).

[57] *Criminal Code Act 1983* (NT) s 1.

[58] *Criminal Code Act Compilation Act 1913* (WA) s 319(1)(e).

situations in which a person, having introduced either a part of their body or an object into another person's vagina or anus or having introduced their penis into another person's mouth, 'continues to keep it there'.[59] Although Queensland has maintained the concept of carnal knowledge, as well as a deeming provision that makes carnal knowledge 'complete on penetration to any extent',[60] modern case law applying this section suggests the ascendance of the continuing act interpretation in line with the decisions in *R v Mayberry* and *Kaitamaki v The Queen*.[61]

These statutory reforms effectively resolved the historical conflict about whether cases of initial consent can constitute rape. Whilst consent may previously have only been relevant at the time of initial penetration under the carnal knowledge formulation of rape, the shift away from carnal knowledge and the introduction of the continuation provisions now means that consent is relevant at all stages of sex and to continue sex without consent can indeed constitute rape.

III DIFFICULTIES WITH THE CURRENT LAW

Despite the statutory reform process a number of key legal difficulties still plague cases of initial consent. Indeed, many of these difficulties stem from the introduction of the continuation provisions themselves and the resulting questions that are raised about how, exactly, they operate. In particular, what does it mean to continue sexual intercourse/penetration? If sex begins with initial consent,

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59 *Crimes Act 1958* (Vic) s 37D(1)(d)–(f).

60 *Criminal Code 1899* (Qld) s 6(1).

61 See, eg, the decision in *R v Johnson* [2015] QCA 270 where it is simply assumed, and indeed passes without comment, that a factual scenario involving non-consent arising partway through sex can ground a rape conviction. This was raised as a live issue in argument in the earlier case of *R v McLennan* [1999] 2 Qd R 297 but the court did not decide on this point. Accordingly, whilst it seems likely that Queensland law is broadly in line with the other jurisdictions around cases of initial consent, the lack of equivalent statutory reforms means that the Queensland 'position is less clear': Devereux and Blake, above n 13, 327.

must current non-consent be somehow communicated to the continuing party? If so, what constitutes effective communication of non-consent? In recent years, the difficulties involved in answering these kinds of questions have been highlighted by two sources. Firstly, since the introduction of the continuation provisions a small number of Australian judicial decisions have addressed these kinds of issues.[62] Secondly, a growing body of academic commentary on cases of initial consent within the United States of America raises concerns that are also relevant to Australian law.[63] Drawing on this material, this Part will identify and analyse the legal difficulties around cases of initial consent, in particular the unclear meaning of continue in the continuation provisions and the uncertain legal standards for the communication of non-consent.

Before this analysis can progress any further, however, it is worth

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[62] In addition to those cases mentioned elsewhere in this article, initial consent and continuation issues have also been considered in *R v Gill* (Unreported, Supreme Court of Tasmania, Wright J, 10 October 1989); *R v Tolmie* (1995) 37 NSWLR 660; *R v Holland* [2002] NSWCCA 469; *R v Moss* [2011] SASCFC 93.

[63] See, eg, McLellan, above n 10; Fradella and Brown, above n 12; Davis, above n 10; Matthew R Lyon, 'No Means No?: Withdrawal of Consent During Intercourse and the Continuing Evolution of the Definition of Rape' (2004) 95(1) *Journal of Criminal Law & Criminology* 277; Erin G Palmer, 'Antiquated Notions of Womanhood and the Myth of the Unstoppable Male: Why Post-penetration Rape Should Be A Crime in North Carolina' (2003-2004) 82 *North Carolina Law Review* 1258; Tiffany Bohn, 'Yes, Then No, Means No: Current Issues, Trends, and Problems in Post-Penetration Rape' (2004-2005) 25 *Northern Illinois University Law Review* 151; Nicole Burkholder Walsh, 'The Collusion of Consent, Force, and Mens Rea in Withdrawal of Consent Rape Cases: The Failure of *In Re John Z*' (2004-2005) 26 *Whittier Law Review* 224; Dana Vetterhoffer, 'No Means No: Weakening Sexism in Rape Law by Legitimizing Post-Penetration Rape' (2004-2005) 49 *St Louis University Law Journal* 1229; Michelle D Albert, '*State v Baby*: One Step Forward for Maryland — Protecting a Woman's Right to Withdraw Consent, But Sending a Conflicting Message to Appellate Courts Reviewing Multiple-Conviction Cases' (2009) 68 *Maryland Law Review* 1019; Susan Ehrlich, 'Post-Penetration Rape and the Decontextualization of Witness Testimony' in Chris Heffer, Frances Rock and John Conley (eds), *Legal-Lay Communication* (Oxford University Press, 2013) 189; Sarah O Parker, 'No Means No… Sometimes: Developments in Post-Penetration Rape Law and the Need for Legislative Action' (2012-2013) 78(3) *Brooklyn Law Review* 1067.

noting that the modern continuation provisions can apply to a broader scope of initial consent cases than the historical common law concept of carnal knowledge. Whilst carnal knowledge was restricted to penile-vaginal sex, the contemporary legal definitions of 'sexual intercourse' and 'sexual penetration' — which include the continuation provisions — encompass a wider range of persons, orifices, objects and sex acts. Although many of the recent initial consent cases nevertheless still involve penile–vaginal sex, this Part will at times make arguments and draw on case examples that go beyond this particular model of sex.

A *The Unclear Meaning of Continue*

One difficulty with the current law is the lack of clear guidance about what it means to continue sex without consent. In a situation where a person consensually penetrates another person and that other person then effectively communicates their current non-consent, it cannot be the case that at that exact point in time the offence of rape is committed. Something more must be needed for the conduct to constitute continuation, but what?

The earliest Australian case to deal with this is *Ibbs v The Queen* in 1988.[64] This matter has a troubling legal history. At trial Ibbs was convicted of sexual penetration without consent and his 1988 appeal against conviction was dismissed by the Supreme Court of Western Australia. However, after two key figures in the case pleaded guilty to conspiracy to pervert the course of justice, this conviction was eventually quashed and a verdict of acquittal entered in 2001.[65] Nevertheless the statements of law from the 1988 appeal case remain cogent. The facts that formed the basis of Ibbs' conviction at trial related to a sexual encounter he had with a female neighbour, a woman with whom he had an ongoing sexual relationship. The neighbour's evidence at trial was that she reluctantly agreed to have sex with Ibbs on this particular occasion but had protested by saying it was wrong because Ibbs' wife was her best friend. When Ibbs

[64] [1988] WAR 91.
[65] *Ibbs v The Queen* [2001] WASCA 129.

persisted she continued to say that it wasn't right and started crying, Ibbs said words to the effect of 'I'm just about to shoot it won't be long', he then ejaculated within 30 seconds and withdrew.[66]

At trial the jury asked a series of questions about consent which the trial judge attempted to clarify. The trial judge first instructed them that:

> Consent can be withdrawn at any time prior to the final withdrawal of the male from the female, but of course there must be a reasonable time which elapses between either the withdrawal of the consent or the appreciation of the accused that he honestly and reasonably but mistakenly believed that she was consenting. That is, you cannot go immediately from consent or mistaken belief of consent, to the creation of the offence. There must be a reasonable period of time which elapses … The question really remains one for you: the reasonableness of the opportunity of the male to withdraw …[67]

Additional instructions were also given with regard to what constitutes a reasonable period of time:

> You have to look at the circumstances and reach a conclusion as to what he did. Did he continue with what he was doing for an appreciable time? 30 seconds, if that were the conclusion which you reach which was the time he gave approximately in his record of interview — that would not be a reasonable time … It cannot be an instantaneous matter but once he has decided that she is not consenting or that she has withdrawn her consent, or that there comes a time when he ceases honestly and reasonably to believe that she has consented, then he must immediately withdraw. He cannot continue the act beyond that time. It may be that it is not instantaneous but it must be nearly instantaneous I would think.[68]

The trial judge then further clarified that the test of reasonableness was a question entirely for the jury and that it was up to them to decide whether 30 seconds was too long if that was how long they found the sex to have continued.[69]

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66 *Ibbs v The Queen* [1988] WAR 91, 97.
67 Ibid 99.
68 Ibid 100.
69 Ibid 100.

One of the points raised in the 1988 appeal was whether the trial judge had misdirected the jury in relation to what constitutes continuation. This appeal point was unanimously rejected by the Supreme Court, with Burt CJ and Brinsden J writing separate reasons and Smith J agreeing with both. Burt CJ noted that the recent abandonment of carnal knowledge now meant that the absence of consent mattered even 'after penetration had been achieved'.[70] He also observed that cases of initial consent under the new statutory provisions 'raise … a difficult question of fact to decide although the question as a question is not difficult to formulate. It simply is … whether the accused continued to penetrate without the consent of the female'.[71] To answer this question, he held that it is not correct to:

> [A]sk whether the accused with knowledge of the absence of consent withdrew within a reasonable time. The question is simply whether he continued sexual penetration. The time taken to withdraw will, of course, be relevant to that question but it is not the law, the consent having been withdrawn, that the accused can 'continue' for a reasonable time. The question simply is: Did he continue?[72]

Brinsden J also rejected the allowance of a reasonable time to withdraw.[73] He held that although the jury might consider 'how long the accused took to withdraw from the time when he knew or ought to have known she was no longer consenting or might not be consenting … it was wrong on my view to concentrate on the issue as if it was simply a question of how many seconds expired before withdrawal'.[74] Instead of a reasonable time to withdraw, Brinsden J found that there was an 'obligation upon the appellant … to

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70 Ibid 93.
71 Ibid 93.
72 Ibid 93-94.
73 Indeed, Brinsden J noted that '[t]he issue in the case was not how long a man might reasonably take in withdrawing after he became aware that the woman concerned was not consenting, or might not be consenting, but whether the appellant continued sexual penetration without the consent of the complainant, knowing that she was not or might not be consenting': *Ibbs v The Queen* [1988] WAR 91, 102.
74 *Ibbs v The Queen* [1988] WAR 91, 102.

withdraw from penetration immediately he knew that there was no consent or had no reasonable grounds to believe that consent was still live'.[75] Although the Supreme Court found that the trial judge misdirected the jury this misdirection was not to the detriment of Ibbs.

The meaning given to 'continue' in *Ibbs v The Queen* is not entirely clear. Although Burt CJ and Brinsden J agreed that there is no allowance for a reasonable time for withdrawal, Burt CJ declined to elaborate on the wording of the continuation provisions whilst Brinsden J found that withdrawal should take place immediately. Burt CJ's approach appears to have been favoured in *Saibu v The Queen*[76] (discussed in detail below), another Western Australian case that was decided a few years afterwards. Here, a trial judge's directions to the jury about the meaning of the continuation provision were also called into question on appeal. After explaining the statutory definition of 'sexual penetration' to the jury, the trial judge had stated that: 'So "to sexually penetrate" also includes "to continue to sexually penetrate". They are English words. They make sense. They tell you what they mean.'[77] At the appellate level, Pidgin J approved this direction on the basis that 'no further explanation of continuing penetration was needed or indeed could be made'.[78] Franklyn J also approved the direction, noting that 'the concept of continued sexual penetration itself does not generally require specific elaboration and the direction … was adequate in the circumstances'.[79]

In the absence of any further substantive case authority since this point, there is very little guidance about what exactly the continuation provisions mean. Three alternative interpretations have been offered in the cases of *Ibbs v The Queen* and *Saibu v The Queen*: that to continue means failure to withdraw within a reasonable time, that it means failure to withdraw immediately, or

[75] Ibid.
[76] (1993) 10 WAR 279.
[77] *Saibu v The Queen* (1993) 10 WAR 279, 289.
[78] Ibid.
[79] Ibid 292.

that it has simply its ordinary meaning. The balance of the decisions in these cases seems to favour the last of these meanings but given the scant nature of the authorities here all three will be worked through.

1 *Reasonable Time to Withdraw*

The notion that law should allow a reasonable time to withdraw in cases of initial consent is thoroughly problematic. This allowance was also suggested in the American case of *In re John Z*[80] in 2003. At trial in that case, defence argued that there should be a '"reasonable" period of time for someone engaged in intercourse to complete the act once the other party withdraws consent', because the male sex drive is a powerful 'primal urge' and it would be unreasonable for law to require a man to stop immediately once he is engaged in sex.[81] Although the appellate court disagreed with this argument on the basis that it lacked any supporting authority,[82] there are numerous further reasons why it is weak. It has been said to feed into and support one of the many harmful 'rape myths' that influence both legal and social understandings of non-consensual sex.[83] In particular, this kind of 'primal urge' argument has been said to perpetuate the myth of the 'unstoppable male': the idea that a man cannot control himself during sex and should thus not bear responsibility for the effects of his rampant sexuality.[84] This myth is said to be both 'insulting to men and frightening to women',[85] and has undertones of victim-blaming through the implication that cases of initial consent are the woman's fault for arousing the man in the first place.[86] This myth has also been denigrated as 'factually

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80 60 P 3d 183 (2003).
81 Fradella and Brown, above n 12, 19.
82 Ibid.
83 See the discussions in Vetterhoffer, above n 63; Davis, above n 10, about the role of this, and other, rape myths in cases of initial consent. For a classic discussion of rape myths generally, see: Lois Pineau, 'Date Rape: A Feminist Analysis' (1989) 8 *Law and Philosophy* 217.
84 Palmer, above n 63.
85 Ibid 1276.
86 Vetterhoffer, above n 63, 1255-1256.

unfounded',[87] on the basis that 'the greater part of a sexual encounter comes well within the bounds of morally responsible control of our own actions'.[88] As an example, Fradella and Brown ask readers to imagine the following:

> [S]uppose an 18-year old male engages in sexual intercourse with his girlfriend in her parents' house. Both he and his girlfriend believe they have the house to themselves. If one of her parents unexpectedly enters the room, would it not be a certainty that the sex act would end immediately? Surely, the girl's parent not would think it necessary that he be provided with a reasonable period of time to finish the sex act.[89]

Even if it was accepted that reigning in one's sex drive is particularly taxing on a person's self-control, it is unclear why this should result in law carving out an allowance for a reasonable time to withdraw anyway. Part of law's purpose is to provide a check on natural instincts where they may pose a risk of harm (or cause actual harm) to others, and '[l]iving within society requires control of one's "primal desires"'.[90] For this same reason no argument on the basis of a supposed 'primal urge' towards aggression should provide any allowance, of a reasonable time or otherwise, for a person to physically attack someone else if they are angry.

Moving beyond the 'primal urge' line of argument, there are other sound reasons why the law should not allow a reasonable time to withdraw. One of the key goals of much feminist-driven rape law reform has been shifting legal (and social) attitudes towards proper respect for the notion that 'no means no'.[91] An allowance for reasonable time 'hinders the right to say "no"',[92] as the law here would be translating this 'no' into 'a bit more is fine'. The law

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87 Parker, above n 63, 1093.

88 Pineau, above n 83, 231.

89 Henry F Fradella and Chantal Fahmy, 'Rape and Related Offences' in Jennifer M Sumner and Henry F Fradella (eds) *Sex, Sexuality, Law, and (In)Justice* (Taylor and Francis, 2016) ch 5, 25.

90 Parker, above n 63, 1093.

91 For example, Estrich has argued that '"consent" should be defined so that "no means no"': Estrich, above n 1, 1182.

92 Davis, above n 10, 750.

around cases of initial consent should not send the troubling legal message that 'just a *little* non-consensual sex is okay'.[93] This is clearly not in keeping with a vision of rape law under which people are valued and protected 'as sexually autonomous individuals with a right to bodily integrity',[94] as it would explicitly allow for the infringement of both autonomy and integrity for the duration of this reasonable time.

But just how long is a reasonable time anyway? The indeterminacy of this time period has also proven contentious. In the case of *In re John Z* on one account sex continued for 4–5 minutes after non-consent was taken to have been communicated.[95] In *Ibbs v The Queen* sex continued for approximately 30 seconds.[96] In the 2008 American case of *State v Baby* sex continued for around 5–10 seconds.[97] By providing for some period of time but not setting out exactly how long this is, an allowance for reasonable time has been said to provide neither clear legal guidance about how to resolve subsequent cases of initial consent nor a clear standard for the public to abide by in order to avoid criminal liability.[98] The lack of specificity of reasonableness has, however, been argued to be a strength rather than a weakness, in that it allows the law to work on a 'case-by-case' basis when dealing with 'complex' cases of initial consent rather than using 'a *per se* approach that defines an explicit unit of time as reasonable'.[99] Indeed, it has been argued that the notion of 'reasonableness' is an 'objective standard [that] is not uncommon in criminal law',[100] and functions effectively in these other areas. But the relative weakness of a fixed time limit is not a particularly strong argument for the strength of the non-specific reasonableness test. This is because there are other legal

93 Parker, above n 63, 1092 (emphasis in original).
94 Palmer, above n 63, 1278.
95 60 P 3d 183 (2003).
96 [1988] WAR 91.
97 946 A 2d 463 (2008).
98 Mary Huff, 'The "New" Withdrawal of Consent Standard in Maryland Rape Law: A Year After *Baby v. State*' (2009) 5(Fall) *Modern American* 14; Bohn, above n 63, 170-171; Lyon, above n 63, 307-308.
99 Lyon, above n 63, 308-309.
100 Bohn, above n 63, 171.

requirements that could be used in cases of initial consent that rely neither on a specific time limit nor the unclear concept of reasonableness.

2 *Immediate Withdrawal*

One such alternative would be a legal requirement for immediate withdrawal. This provides a clearer standard, without setting a fixed unit of time, and is also more respectful of sexual autonomy and bodily integrity. A number of American commentators have championed some kind of immediacy-based approach. For example, Fradella and Brown argue that sex 'should cease immediately' when non-consent is communicated,[101] and Parker agrees that in an 'ideal, egalitarian, and consensual sexual relationship, each partner would freely give or withdraw his or her consent, and partners would comply immediately'.[102] Davis attempts to bridge the gap between reasonableness and immediacy by arguing that a reasonableness requirement should be used, but that this test for reasonableness should substantively require that a person 'discontinued intercourse or physically interrupted it *as soon as*' non-consent is communicated.[103]

Whilst an allowance for reasonable time to withdraw may be flawed because it under-values a person's general self-control during sex, a requirement for immediate withdrawal may be flawed for over-valuing a person's self-control at each and every stage of sex. As sexual arousal increases it may very well be that there are 'a few seconds in the "plateau" period just prior to orgasm in which people are "swept" away by sexual feelings to the point where we could justifiably understand their lack of heed for the comfort of their partner'.[104] To impose criminal liability for rape for a failure to withdraw immediately at this stage could be argued to be

[101] Fradella and Brown, above n 12, 19.
[102] Parker, above n 63, 1094.
[103] Davis, above n 10, 758 (emphasis added).
[104] Pineau, above n 83, 231. It may even be the case that questions about the voluntariness of a person's sexual actions arise during this late plateau and orgasmic period.

disproportionate to the culpability of continuing sex during these few seconds.

Furthermore, a legal requirement for immediacy does not reflect the fact that some sexual positions and activities may not be able to be ceased split-second and unilaterally in a safe manner. In the case of *In re John Z*,[105] part of the sex that took place after non-consent was communicated was in the 'Woman on Top' (or 'cowgirl') position. In this sex position, withdrawal might only be practically possible for a male partner through a slower process of extrication than immediacy would seem to allow. In addition to certain sex positions, certain sexual activities may also take additional time to safely bring to an end. For example, fisting of either the vagina or the anus, the use of certain sex toys or urethral sounding (all of which fall under the Australian definitions of sexual intercourse and sexual penetration).[106] It is tempting to build some kind of fact-based flexibility into an immediacy requirement in order to temper the rigidity of its application in such situations. However, this would bring an immediacy requirement uncomfortably close to simply allowing a reasonable time to withdraw, with all the attendant lack of clarity that immediacy is meant to resolve in the first place.[107] Furthermore, stretching the concept of immediacy to allow for more time in certain situation also seems to undercut one of its key strengths, that is the respect that it demonstrates for sexual autonomy and bodily integrity.

3 *Ordinary Meaning*

Underlying the analysis in this Part so far is an assumption that begs the question of what it means to continue sexual intercourse. The

[105] 60 P 3d 183 (2003).

[106] For a discussion of whether and in what circumstances the manipulation of an inserted sex toy could constitute the continuation of 'sexual intercourse' see the very recent case of *R v Turvey* [2017] SASCFC 28.

[107] An alternative way to temper any immediacy requirement may be to require withdrawal 'as quickly as is practicable under the circumstances': Bagaric and Arenson, above n 13, 303. Though meritorious such a requirement has not appeared yet in the authorities.

assumption is that continuation simply means the failure of a person to physically withdraw either a body part or a manipulated object from their partner. The wording of the continuation provisions clearly supports this, especially under the Victoria and the Northern Territory legislation. In the other jurisdictions it stands to reason that where the legal terms 'sexual intercourse' and 'sexual penetration' are defined as including the penetration of a bodily orifice (vagina, anus, etc) by a body part or object (penis, tongue, sex toy, etc) then as long as that penetration is still occurring then sexual intercourse/penetration must also be continuing as well. But a closer focus on the ordinary meaning of the word 'continue' makes this conclusion problematic.

To continue, as defined by the *Macquarie Dictionary*, means relevantly to 'go forwards or onwards in any course of action', to 'go on with or persist in', to 'remain in a particular state or capacity', to 'remain in a place; abide; stay', etc.[108] Whilst the case authorities suggest that this ordinary meaning of continue speaks for itself there is some ambiguity about how long sex needs to take place after non-consent is communicated before a person can be properly said to be continuing sex. On a strict reading of these definitions, even a second of further sex could be enough as even this short period would seem to fulfil the notion of going on with or persisting in having sex. Reading these definitions more generously, a progressive winding down of sex over a short period of time could fall outside continuation as this would not be consistent with the notion of a person who is going forwards/onwards with sex.

Furthermore, within the different definitions of 'continue' there is a marked distinction between active and passive continuation: between continuation as going onwards and continuation as remaining in a particular state. What, if anything, should the law make of this? This issue was addressed in *R v Morton*,[109] a 1998 case in which initial consent was not an issue but the continuation of sex was. Here a man was charged with sexual intercourse with a person

[108] *Continue* (2017) Macquarie Dictionary <www.macquariedictionary.com.au>.
[109] (1998) 143 FLR 268.

under 10 years and elected to have a trial by judge alone. The evidence of the victim, a girl who was 7 years old at the time, was that she and two other young girls had pulled the man's pants down, pushed him over onto his bed and then, at the urging of the other girls, she had begun to suck his penis. The man's evidence in relation to these events was effectively the same. On this basis, the trial judge noted that 'it seems clear that the initial introduction of the accused's penis into her mouth did not occur as the result of any voluntary act on his part'.[110] However, the trial judge held that this conduct met the relevant statutory definition of 'sexual intercourse' and that if the man 'voluntarily caused or permitted that sexual intercourse to subsequently continue then he was guilty of an offence' due to the continuation provision.[111] The girl was not able to say how long she had sucked his penis but the man's evidence was that this went on 'for a few seconds'.[112] He also gave multiple reasons as to why he did not immediately withdraw from her mouth, including that he was worried she might bite him and that his severe visual impairment meant that he tended to 'freeze' when something unexpected happened. The ambitious defence argument that the circumstances amounted to duress was rejected and the man was convicted on the basis that the 'decisive issue in relation to this count fell for determination in the context of facts which were largely undisputed'.[113]

In *R v Morton* the ambit of the continuation provision was understood to self-evidently encompass not only the active but also the passive, even completely unmoving, continuation of sex. If a person is involved in initially consensual sexual intercourse and their partner communicates their non-consent, it may not be enough then for that person to simply stop what they are doing. In order to avoid falling under the continuation provisions that person seems to be legally required to take positive steps to bring sex to an end by withdrawing from their partner's body. This kind of requirement has

[110] *R v Morton* (1998) 143 FLR 268, 270.
[111] Ibid.
[112] Ibid.
[113] Ibid 274.

been described as imposing 'a duty to terminate the intercourse',[114] and the failure to withdraw as constituting 'rape by omission'.[115]

Although both passive and active continuation of sex will attract the same liability for the offence of rape, there does seem to be a clear difference in culpability between a person who doggedly 'goes at it' after non-consent is communicated and a person who simply freezes up and doesn't move. It is questionable whether this difference in culpability is something that can, let alone should, be reflected solely at the sentencing stage. Furthermore, it is unclear what responsibility, if any, the non-consenting party has to take steps of their own to either withdraw from sex or to facilitate their partner's withdrawal once they communicate their non-consent. The imposition of any such responsibility would, however, run counter to the trend within rape law reform to draw the law away from closely focusing on the conduct of the victim and to focus more on the conduct of the person who is actually on trial.[116]

There is also tension between the apparent requirement to take positive steps to withdraw and Pidgeon J's judgement in *Saibu v The Queen*.[117] In this case, a man was charged with multiple offences after breaking into a woman's house at night and physically attacking her. He was also charged with two counts of sexual penetration without consent. On the woman's version of events, he had non-consensual sex with her (the first count), she then went to the bathroom, went back to bed and then fell asleep. When she awoke in the morning he was naked and on top of her (the second count). On the man's version of events, he had consensual sex with

[114] Alan Reed, 'Case Comment: Omission to Act Can Amount to Assault or Battery' (2004) 68(6) *Journal of Criminal Law* 459, 461.

[115] Mary J Kennedy and B J Brown, 'Rape by Omission' (1981) 5 *Criminal Law Journal* 280.

[116] Indeed, a number of commentators over the years have even developed reform proposals that would shift rape law away from a narrow preoccupation with the consent of the victim and instead look to the accused and any use of force, violence, fraud, etc, to procure sex. See, eg, Simon H Bronitt, 'Rape and Lack of Consent' (1992) 16 *Criminal Law Journal* 289; Victor Tadros, 'Rape Without Consent' (2006) 26(3) *Oxford Journal of Legal Studies* 515-543.

[117] (1993) 10 WAR 279.

her and then they both fell asleep almost immediately. When he awoke some hours later, his penis was still inside her vagina and he began having sex with her again. At trial, the man was acquitted of the first count of sexual penetration without consent but was convicted of the second. When considering the man's appeal Pidgeon J commented that:

> The facts of the present case, on the applicant's evidence, were that there was an act of intercourse but no withdrawal with a further act of intercourse some hours later. These were clearly two separate events … It would be against reason to suggest it was a continuation of the one act and this, very properly, was never suggested by counsel for the defence at trial …[118]

It is immediately apparent that this passage complicates the reading of the continuation provision as necessarily requiring positive steps to withdraw in order to avoid continuing sex. For if two legally separate and distinct acts of sex took place in *Saibu v The Queen*, then the first of these acts has an end-point that was not marked by withdrawal. The implication is that one can continue to physically penetrate one's partner without necessarily legally continuing sex because sex can cease in ways other than withdrawal, such as through the passage of time and/or both parties falling asleep.

4 *Lack of Clarity about Continuation*

It is unclear what exactly it means to continue sex under the continuation provisions that now exist in every state and territory (except Queensland). The scant case law on this point seems to reject an allowance for a reasonable time to withdraw after non-consent is communicated, and this rejection is supported both by the weight of academic commentary and by consideration of the relevant policy issues. It is unclear whether the continuation provisions require a person to withdraw from sex immediately after non-consent is communicated, as this has only marginal support in the authorities and may not be entirely practical. The case law seems to suggest that

[118] *Saibu v The Queen* (1993) 10 WAR 279, 289.

to continue sex is something to be determined on the ordinary meaning of the words. The ordinary meaning of 'continue', however, covers very different factual situations with varying levels of culpability, including both active persistence as well as passive omission. Furthermore, there is unresolved tension around whether withdrawal is necessarily required in all cases in order for sex to legally cease.

B *Uncertainty about Communicating Non-Consent*

Another difficulty with the current law is the lack of a clear legal standard around the communication of non-consent to sex. In a situation where a person consensually penetrates another person and that other person then no longer consents to sex, it seems unlikely that the offence of rape could be successfully prosecuted if penetration continues in the absence of any indication of that other person's non-consent. Some verbal or behavioural communication or other indication of non-consent must surely be needed before criminal liability could be imposed for such a serious offence. But what?

There are no specific statutory sections that explicitly address the communication of current non-consent in cases of initial consent. Rather, the law here depends on broader aspects of how criminal liability operates within the relevant jurisdiction. In many of the Code law jurisdictions, such as Western Australia, Queensland, Tasmania and the Northern Territory, 'mistake of fact' is a statutory defence to criminal liability.[119] To use Western Australia as an example, under this defence:

> A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.[120]

[119] *Criminal Code Act Compilation Act 1913* (WA) s 24; *Criminal Code Act 1983* (NT) s 32; *Criminal Code 1899* (Qld) s 24; *Criminal Code Act 1924* (Tas) s 14.
[120] *Criminal Code Act Compilation Act* (WA) s 24.

In cases of initial consent a failure to clearly communicate non-consent may work to insulate the continuing party from criminal liability for rape. This is because the defence could argue that because of the presence of initial consent the continuing party had an honest and reasonable belief that the entire sexual encounter was consensual. If this defence was raised then the prosecution would need to establish that either the continuing party was actually aware that the sex was no longer consensual (going to the honesty of any mistaken belief) or that it was unreasonable for the continuing party to not be aware that the sex was no longer consensual (going to the reasonableness of any mistaken belief). For certain sexual offences, Tasmania has modified the application of the defence of mistake of fact with regard to mistakes about consent. Under s14A of the *Criminal Code Act 1924* (Tas), when a person is charged with rape their mistaken belief about consent is not honest or reasonable if the mistake resulted from their self-intoxication, if they were 'reckless' as to whether there was consent, or if they 'did not take reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act'. These modifications to the operation of the mistake of fact defence mirror aspects of the relevant legal principles at play in the jurisdictions discussed below.

The other jurisdictions, including both common law jurisdictions and the remaining Code jurisdictions, do not have a statutory mistake of fact defence. Instead, the relevant rape offence in these jurisdictions includes a mental, or *mens rea*, element that touches on the accused's knowledge or belief about consent. For example, in the Australian Capital Territory, to commit the offence of sexual intercourse without consent a person must not only 'engage … in sexual intercourse with another person without the consent of that other person' but must also be 'reckless as to whether that other person consents to the sexual intercourse'.[121] The mental element of recklessness can be established by proof of either actual knowledge of non-consent or recklessness itself.[122] Similarly, in NSW a person

[121] *Crimes Act 1900* (ACT) s 54(1).
[122] Ibid s 54(3).

only commits the offence of sexual assault if they have 'sexual intercourse with another person without the consent of the other person' and they also 'know … that the other person does not consent to the sexual intercourse.[123] A person is taken to have such knowledge if they have actual knowledge that the other person does not consent, they are reckless as to whether the other person consents or if they have no reasonable grounds for believing that the other person consents.[124] Recklessness is generally understood to mean that the person 'acted (or omitted to act) with knowledge (or an awareness or foresight) that there was a *possibility* … that some or all of the results forbidden by the definition of the crime would result'.[125] In Victoria, an element of the offence of rape is that the person who sexually penetrates another person without that other person's consent 'does not reasonably believe that [that other person] consents to the penetration'.[126] The reasonableness of this belief is something that 'depends on the circumstances', and includes 'any steps that the person has taken to find out whether the other person consents'.[127] Finally, in South Australia an element of the offence of rape is that the person who engages, or continues to engage, in 'sexual intercourse' with someone who does not consent either 'knows, or is recklessly indifferent to, the fact that the other person does not so consent or has so withdrawn consent'.[128] 'Reckless indifference' has a detailed statutory definition in South Australia that covers being 'aware of the possibility' of there being no consent but deciding to 'proceed regardless of that possibility', being 'aware of the possibility' of there being no consent but failing to 'take reasonable steps to ascertain' whether there was consent 'before deciding to proceed', as well as not 'giv[ing] any thought' as to whether there was no consent 'before deciding to proceed'.[129]

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123 *Crimes Act 1900* (NSW) s 61I.
124 Ibid s 61HA(3)(a)-(c).
125 Kenneth J Arenson, Mirko Bagaric and Peter Gillies, *Australian Criminal Law in the Common Law Jurisdictions: Cases and Materials* (Oxford University Press, 3rd ed, 2011) 25.
126 *Crimes Act 1958* (Vic) s 38(1)(a)-(c).
127 Ibid s 37G(1)-(2).
128 *Criminal Law Consolidation Act 1935* (SA) s 48(1).
129 Ibid s 47.

Despite the marked similarities within the wording of the continuation provisions around Australia, there is obviously much more divergence in relation to the legal standards around communication of non-consent. No jurisdiction contains a formal requirement that the non-consenting party explicitly revoke or withdraw their initial consent before liability for rape can be imposed on the continuing party. However, given the operation of the mistake of fact defence in some jurisdiction and the mental element of the rape offence in other jurisdictions, as a matter of practicality it would be very difficult for the prosecution to successfully establish such liability in the absence of some form of communication of non-consent. In all jurisdictions if the continuing party can be shown to have actual knowledge of non-consent as a result of such a communication then they will be liable for rape, as such knowledge would prevent a mistake of fact defence from being successfully raised and would also satisfy the mental element of the offence. The legal position is less clear around cases that involve communications of non-consent that fall short of conveying actual knowledge of non-consent. Ambiguous communications that may possibly indicate non-consent raise a number of difficult legal questions that would be relevant to the successful prosecution of cases of initial consent. For example, what kinds of communications would make a mistaken belief in consent unreasonable? What kinds of communications would make it reckless for the other party to continue? If sex begins with consent, what steps should a person take to check that it remains consensual?

1 *Ambiguous Communication*

Not all cases of initial consent involve difficulties about communication. In some situations, it is clear from the facts that a mistake of fact defence could not be successfully raised or that the mental element of the rape offence could easily be made out. For example, in *R v Salmon*[130] where the woman screamed during sex and Salmon then punched her twice and persisted. Another example is the 2015 case of *R v Johnson*, where a man persisted with sex

[130] [1969] SASR 76.

despite the woman, on her evidence, trying to push him away and 'saying "stop" three or four times, "this is hurting", "I don't want any part of this", "stop, you have to stop. What do you not understand about this is hurting? ... [W]hat do you not understand about not hurting me?"'.[131] In such cases any claim of a mistaken belief as to consent would be obviously dishonest or unreasonable and any continuation would be self-evidently reckless or recklessly indifferent to the possibility of the absence of consent.

However, there are situations where the possible legal outcome is ambiguous despite there being an attempt at the communication of non-consent. In the American case of *In re John Z* Laura gave evidence that she attempted to communicate her non-consent to John by attempting (unsuccessfully) to pull away from sex and telling him that 'she needed to go home'.[132] To which '[h]e said, "just give me a minute," and she said, "no, I need to get home." He replied, "give me some time" and she repeated, "no, I have to go home."'[133] He nevertheless continued and was subsequently convicted of rape. On appeal, the majority of the court upheld this conviction but Brown J dissented, commenting that:

> The majority finds Laura's 'actions and words' clearly communicated withdrawal of consent … But, Laura's silent and ineffectual movements could easily be misinterpreted. And, none of her statements are unequivocal. While Laura may have felt these words clearly conveyed her unwillingness, they could reasonably be understood as requests for reassurance or demands for speed.[134]

Some subsequent commentary agrees that 'it seems less than clear that Laura had, in fact, withdrawn her consent and had clearly communicated that withdrawal to John'.[135] Part of the ambiguity in this case is that although the victim clearly 'said "no" … was it, "No, I don't want to have sex anymore," or, "No, hurry up?"'.[136]

[131] [2015] QCA 270, [30].
[132] 60 P 3d 183 (2003), [23].
[133] *In re John Z* 60 P 3d 183 (2003), [23].
[134] Ibid [53].
[135] Fradella and Brown, above n 12, 12.
[136] Davis, above n 10, 756.

Similarly, in the 1988 Australian case of *R v Murphy*, communication of non-consent was argued to take place either when the victim said 'Stop, stop, it's hurting' and began to cry or when she later said 'Quick, it's them' upon hearing the noise of a car and realising that her mother had returned from the shops.[137] Although the former communication seems to clearly convey non-consent, the latter is more ambiguous. Would it be unreasonable to understand the statement 'Quick, it's them' to mean 'quickly finish' rather than 'quickly withdraw'?

The problem here is that human communication can be messy and imprecise, especially when it is about sex. Duncan observes that 'differences in communication can lead to misunderstandings and miscues in the bedroom',[138] and in cases of initial consent 'resistance may be misinterpreted as enthusiastic co-operation; protestations of pain or disinclination, a spur to more sophisticated or more ardent love-making; a clear statement to stop, taken as referring to a particular intimacy rather than the entire performance'.[139] The problem of sexual miscommunication is not unique to cases of initial consent and is a longstanding issue within rape law as a whole. However, these difficulties are amplified in cases of initial consent because any attempts at communicating non-consent occur whilst the parties are already having sex and come in the context of initial consent having already been given. Indeed, Kyker believes that '[o]ftentimes, an act of "initial consent" rape will be the product of miscommunication' in the heat of the moment rather than a more premeditated attempt to 'violate the victim'.[140]

Given that 'the criminal law should be designed for real flesh and blood people rather than the disembodied spirits contemplated by the

[137] [1988] 52 SASR 186, 191-192.

[138] Meredith J Duncan, 'Sex Crimes and Sexual Miscues: The Need for a Clearer Line Between Forcible Rape and Nonconsensual Sex' (2007) 42 *Wake Forest Law Review* 1087, 1117.

[139] Richard H S Tur, 'Rape: Reasonableness and Time' (1981) 1(3) *Oxford Journal of Legal Studies* 432, 441.

[140] Kyker, above n 10, 177.

law of contract',[141] we cannot expect people to formulate their communication of non-consent in precise legal terms such as 'I hereby immediately withdraw my consent to any further sexual activity'. But some standard by which to measure the effectiveness of such communications is still necessary. Due to the inherent difficulties here numerous American commentators have suggested that the relevant legal standard should be explicitly set out within statute law. McLellan, for example, has proposed a statutory section requiring that 'the person withdrawing consent must clearly communicate his or her withdrawal of consent'.[142] She further defines 'clear communication of withdrawal of consent' as being in 'a way that a reasonable person would be aware that consent has been withdrawn'.[143] Bohn backs a proposal for a similar legislative requirement based on 'clearly-communicated revocation of initially-granted consent',[144] as does Parker with her suggestion that 'the victim's withdrawal of consent, whether by words or actions, must be capable of being understood by a reasonable person in the defendant's circumstances'.[145] Davis prefers a requirement of unequivocality rather than clarity, noting that 'when a partner decides to revoke consent during the act of sexual intercourse, his or her actions should be unequivocal, by words, actions, or both'.[146]

In contrast to these American proposals there is no specific standard for the effective withdrawal of consent to sex in Australian law which, as noted above, diverges between a generic mistake of fact defence and a more loosely-framed mental element of the offence. The lack of an explicit standard here is problematic for two reasons. Firstly, the law does not offer clear legal guidance to the

[141] Tur, above n 139, 440.
[142] McLellan, above n 10, 805.
[143] Ibid.
[144] Bohn, above n 63, 171-172.
[145] Parker, above n 63, 1094.
[146] Davis, above n 10, 754-755. Palmer proposes requirements for both clarity and unequivocality: 'The increased likelihood of a good faith mistake regarding consent in post-penetration rape is another reason to scrutinize these cases carefully… [In *In re John Z*] the California court missed an opportunity to state that a clear, unequivocal withdrawal of consent is required for the State to meet its burden of proof in post-penetration rape cases:' Palmer, above n 63, 1274-1275.

general community about what constitutes criminally liable behaviour in cases of initial consent, something which is particularly important given the seriousness of the offence of rape. Secondly, this is a missed opportunity to use law's symbolic power to challenge rape myths and shape public perceptions of what constitutes rape.[147] The inclusion of a specific legal provision that states that the continuation of sex after a clear communication of non-consent constitutes rape would work to 'debunk' the myth of the 'unstoppable male',[148] whilst also providing explicit support for the right to say 'no' to sex at any point in time.[149]

There is another notable point of difference between the current Australian law and the proposals put forward by American commentators. Whilst the American proposals tend to set out legal standards focused on the nature of the communication of current non-consent (was the communication clear? was it unequivocal?) Australian legal standards instead focus on the knowledge and conduct of the continuing party (was their mistaken belief in consent honest and reasonable? were they reckless as to the possibility of absence of consent?). Whilst the substance and style of any communication of current non-consent are obviously still relevant to the application of the Australian standards this difference of focus is nevertheless important. Consider the following hypothetical cases of initial consent set out by Davis:

> Case One: The woman turns her head and whispers, 'No.' The man says, 'What?' but she does not respond, so he continues the intercourse. The intercourse ends five minutes later …
>
> Case Three: The woman, experiencing stomach pains, says, 'Wait.' The man does not respond. A minute goes by**,** but she is still in pain, so she repeats, 'Wait ... stop.' The man discontinues the intercourse.[150]

Davis can confidently conclude that because both the

[147] See, generally, Vetterhoffer, above n 63; Davis, above n 10.
[148] Palmer, above n 63, 1276.
[149] Vetterhoffer, above n 63, 1251.
[150] Davis, above n 10, 759. Case Two is not relevant for our purposes here.

communications are ambiguous it is unlikely that the man in either case would be convicted of rape under her proposed requirement for clear and unequivocal communication of non-consent. Under Australian law, however, the ambiguity of the communications would not necessarily be a bar to criminal liability because the focus is on the continuing party's beliefs and conduct instead. What would Australian law require of a person in each of the situations above for them to avoid criminal liability for rape? The answer may well vary between jurisdictions and their slightly different formulations of the rape offence, and it is not immediately apparent whether either a mistake of fact defence could be successfully raised or the mental element of rape could be successfully made out. The only clear way to avoid criminal liability would be for a person in either of these situations to withdraw immediately from sex, that is, as soon as the ambiguous communication was made by their partner and certainly *before* making any attempt to clarify the ambiguity. Continuing sex whilst simultaneously seeking further information would be legally risky (as in Case One), as if a person were to seek clarification from their partner about whether their partner still consents then that person is implicitly acknowledging their awareness of consent being something that is questionable at this stage. It could also be argued that it would be unreasonable or reckless for a person to continue sex whilst simply disregarding the fact that an ambiguous communication had been made by their partner (as in Case Three). Human nature dictates that when someone tries to communicate something during sex that communication will typically relate to the sex itself, and for a person to simply assume that their partner's ambiguous communication was not a protestation may constitute an unreasonable belief in consent or a reckless disregard of the possibility of non-consent.

2 *Is Overt Communication Always Required?*

So far the analysis has focused on overt acts of communications of non-consent as the key way to successfully establish the continuing party's criminal liability for rape. This is because such communications are the most obvious means of either defusing a mistake of fact defence or of satisfying the mental element of the rape offence. However, overt acts of communication may not

necessarily be required in all cases.

Returning to *Saibu v The Queen*,[151] we can recollect that the man's evidence was that he had consensual sex with the woman and they then both fell asleep. When he later awoke, his penis was still inside her vagina and, whilst she was asleep, he began having sex with her again. The appeal raised the conjoined issues of whether this conduct could properly be described as the continuation of sex and, if so, whether this continuation was without consent. In addressing these issues, Franklyn J commented that:

> It does not *necessarily* follow in my opinion, that, in the case of non-consensual continuation of a consensual penetration, there must be some overt act or statement made withdrawing consent. That is not what … [the relevant statutory provisions] contemplate or provide for. What those sections require to be proven is that the continuation be without consent. That requires identification of a time at which the consent previously given no longer operates, for whatever reason. A consent to a particular act of penetration which is allowed to continue for a period does not, as a matter of fact, necessarily extend to an indefinite continuation thereof. In my view, that is particularly and obviously so once the consciousness of the person said to be consenting is lost …[152]

Alongside unconsciousness via sleep we can speculate that other situations where there is a similar loss of capacity to consent could also be regarded as bringing consent to an end despite the absence of an overt act of communication. Consent to sex would arguably also no longer be operative in situations involving a sudden medical event, like a seizure, or the on-set of the effect of certain drugs, like anaesthetics. The further observation should be added that despite the lack of overt communication in such cases there must also be some actual awareness, unreasonable disregard or recklessness by the continuing party of the factors that result in initial consent no longer being currently operative. Otherwise either the mistake of fact defence would apply or the mental element of the offence would not be able to be established.

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[151] (1993) 10 WAR 279.

[152] *Saibu v The Queen* (1993) 10 WAR 279, 291 (emphasis in original).

3 *Difficulties in Determining Effective Communication*

Australian law does not formally require that non-consent be communicated in order to hold the continuing party liable for rape in cases of initial consent. However, it does seem to practically require this for a successful prosecution due to the operation of the mistake of fact defence in some jurisdictions and the mental element of the rape offence in other jurisdictions. Although the law here might be clear in cases involving communications that result in the continuing party having actual knowledge of non-consent, the legal situation is murkier for cases involving ambiguous attempts at communication. The lack of specific legal standards by which to judge the effectiveness of communications of non-consent means there is no clear guidance about how ambiguous communications should be treated, no clear legal standard set for community behaviour and a missed opportunity for the law here to symbolically combat rape myths. This general lack of legal clarity is further compounded by the suggestion that overt acts of communication may not even be needed to impose liability for rape in all cases of initial consent.

IV CONCLUSION

Beyond the legal difficulties that have been addressed in this article there are also substantial evidentiary difficulties involved in cases of initial consent. Not all instances of non-consensual sex result in physical evidence that can be used in a court of law, and indeed '[i]n many rape cases the question of the defendant's guilt or innocence hinges upon whether the jury believes the defendant's version of the facts or the victim's'.[153] However, in some rape cases there may be certain kinds of forensic evidence that can tend to be prove guilt that are either not available or that would be irrelevant for cases of initial consent. For example, physical evidence that tends to prove that sex took place may assist in some rape cases but will have minimal probative value in cases of initial consent where this is already accepted to have occurred. '[T]rauma evidence such as vaginal cuts,

[153] McLellan, above n 10, 796.

scratches, and bruises' can potentially indicate the use of force in some rape cases,[154] but because sex begins consensually in cases of initial consent the 'prosecution typically has little, if any, access to physical evidence' like this.[155] In cases of initial consent third-party eyewitnesses are also very unlikely because '[c]onsensual sexual intercourse', which is how such cases begin, 'often occurs in a private environment'.[156]

These evidentiary difficulties in proving cases of initial consent have been speculated to be 'one of the reasons so few … cases are prosecuted'.[157] It is also fair to speculate about whether another reason for this is the legal difficulties involved in such cases. As this article has shown in its analysis of the law in this area, modern statutory reforms resolved the historical conflict about the meaning of carnal knowledge and it is now settled that cases of initial consent can attract liability for rape. However, these reforms have led to their own resulting legal difficulties, such as determining the exact meaning of 'continue' and setting clear standards around communications of non-consent. Whether the continuation provisions allow for withdrawal within a reasonable time, require immediate withdrawal or simply have the ordinary meaning of their constituent words is not entirely settled, nor is what the ordinary meaning of such words cover in any event. The lack of specific legal standards around the communication of non-consent has resulted in a lack of both clear legal guidance about how to treat ambiguous communications as well as clear legal standard-setting for community behaviour, and this is further complicated by the suggestion that overt communication might not always be needed.

It would be troubling indeed if the legal difficulties involved in

[154] Bohn, above n 63, 175.
[155] Ibid. See also Palmer, above n 63, 1274.
[156] Kyker, above n 10, 168 (footnote omitted).
[157] McLellan, above n 10, 796. Mason makes the same point in the Australian context, commenting that 'due to onerous evidentiary requirements' the modern laws applying to cases of initial consent 'have been only minimally utilised': Mason, above n 8, 54.

cases of initial consent did function as a barrier to their prosecution. There are sound reasons why society typically values a person's 'present dissent' to something over their 'past consent' to that same thing.[158] There are overwhelming reasons why law values a person's present non-consent to sex over their initial consent to it. It should undoubtedly be the case that '[i]f a person consents to sexual intercourse, there is not a point of no return. That person has the right to stop the activity at any time.'[159] However, in order to properly allow for the exercise of this right, Australian criminal law must draw a clearer line between 'sex' and 'rape' in cases of initial consent.

[158] Tom Dougherty, 'Fickle Consent' (2014) 167 *Philosophical Studies* 25, 26.
[159] Davis, above n 10, 752.