‘RELATIONSHIP EXPECTATIONS’, CONSENT AND WOMEN’S SELF-OWNERSHIP

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INTRODUCTION

Historically, rape laws have been plagued by overtly sexist assumptions and standards that challenge the notion that the law is rational, objective or even fair. [1] The problems inherent in contemporary rape law stems largely from the fact that courts still employ the same gendered assumptions that have contaminated rape law for centuries. These gendered assumptions work to deny women full rights of self-ownership over their own bodies. Hence, when interpreting contemporary rape doctrine, courts continue to employ gendered assumptions to the detriment of women.[2] This will be demonstrated by a critical deconstruction of the recent Supreme Court case *Christian v R*.[3] I argue that the Supreme Court's interpretation of 'consent' in *Christian* was influenced by a set of problematic gendered assumptions that work to deny women the ability to claim full and exclusive use and control over their bodies in the context of a pre-existing sexual relationship. Accordingly, the Supreme Court negotiate the level of protection for women's self-ownership from the male point of view. The failure of the law in guaranteeing women's self-ownership illustrates the regulatory nature of rape law: *regulating* who gets raped rather than *prohibiting* it from happening. Therefore, the law operates ideologically according gendered assumptions about sexual relationships and self-ownership that reflect and reinforce patriarchal values in legal decision making, which justify legal forms of gender inequality.[4]

Chapter I begins with an exploration of the gendered ideology in the law of rape. It details how the origins and evolution of doctrinal rape law are infected with the history of patriarchy, which has long deprived women the ability to claim full self-ownership over their bodies. Chapter II demonstrates how patriarchal values continue to contaminate judicial interpretation of rape law through a critical deconstruction of the Supreme Court's decision in *Christian*. Here, I argue that the Supreme Court's decision was influenced by background gendered assumptions that continue to deny women full rights of self-ownership in 'relationship' contexts. Chapter III contends that the Supreme Court's decision is illustrative of the regulatory nature of rape law. In this chapter I also consider whether the regulatory nature of rape law is a justified attempt to strike the appropriate

[1] Joan McGregor "Why When She Says No She Doesn't Mean Maybe and Doesn't Mean Yes: A Critical Reconstruction of Consent, Sex, and The Law" (1996) 2 Legal Theory 175 at 176.

[2] At 176.

[3] *Christian v R* [2017] NZSC 145 (*Christian*).

[4] Gary Minda *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York University Press, New York, 1995) at 128.

balance between vindicating rights and identifying culpable behaviour. Finally, chapter IV assesses the practical ramifications of the law taking self-ownership seriously. If sexual assault laws are to protect the interest they are supposedly designed to protect, then a different judicial approach to consent is needed.

Throughout this dissertation I adopt male-accused/female-complainant pronouns. The adoption of these pronouns reflects the reality that the majority of sexual violence victims are female.[5] It is also used to symbolise rape as an "oppressive practice employed by a (social) man against a (social) woman."[6] While it is true that a man can be the victim of rape, "in the process he is placed in the position of the woman...he is constituted as feminine in the act".[7] Hence, the use of these pronouns help to denote rape as an extreme manifestation of oppressive gender relations in our society.[8]

[5] Janet Fanslow and E.M. Robinson "Violence against Women in New Zealand: Prevalence and health consequences" (2004) 117 NZ Med J 1206; Ministry of Justice *New Zealand Crime and Safety Survey (2006, 2009, & 2014)* (Personal Communication, April 2016).

[6] Monique Plaza "Our costs and their benefits" in Lisa Adkins and others (eds) *Feminist Perspectives on The Past and Present Advisory Editorial Board* (1980) 183 at 186.

[7] Mary Heath & Ngaire Naffine "Men's Needs and Women's Desires: Feminist Dilemmas About Rape Law 'Reform'" (1994) 3 A Fem LJ 30 at 40 citing Vicki Bell "Beyond the 'Thorny Question': Feminism, Foucault and the Desexualisation of Rape" (1991) 19 Int'l J Soc L 83.

[8] See Catharine MacKinnon "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence" (1983) 8 Signs: Journal of Women in Culture and Society 635; and Catherine MacKinnon "Reflections on sex equality under law" (1991) 100 Yale LJ 1281.

CHAPTER I: GENDERED IDEOLOGY IN THE LAW OF RAPE

This dissertation adopts a critical legal perspective of the law. Critical legal theorists emphasise that the law neither operates in a historical vacuum nor does it exist independently of ideological struggles in society.[9] They claim that the law is not an objective, rational process of impartial decision making. Instead, it is a fragile structure fraught with contradictory and arbitrary categorisations that are endlessly redefined and reworked. The inherent indeterminacy and malleability of the legal process and it's discrete doctrinal components means that legal rules, principles and standards can be used to justify an almost infinite range of possible outcomes.[10] The outcomes reached in a particular case will depend mainly on the social context that the Judge encounters, rather than with any overarching scheme of legal rules or legal reasoning. This is because neither judges nor the law they apply are neutral.[11] Judges inevitably rely upon their own set of normative assumptions, beliefs and values to substantiate and give meaning to indeterminate and malleable legal rules. Accordingly, legal rules will always be interpreted in a way the reflects the ideology of the interpreter.[12] In other words, ideology (rather than legal rules) necessarily determines how the law is interpreted and applied.

Ideology is inherently *gendered*.[13] In no other area of law is this more clear than the law of rape. By making gender the focus of my analysis I take a particularly feminist approach to the study of rape law. Feminist legal critics, whilst remaining in the realm of critical legal studies, have generally engaged in more concrete analysis that challenges both structural inequalities and the normative assumptions that underlie them.[14] Accordingly, through a critical deconstruction of the Supreme Court's judgment in *Christian,* I will reveal and challenge the gendered ideology inherent in the law of rape. I contend that the indeterminacy of current legal doctrine allowed a set of gendered assumptions about (hetero)sexual relationships, and their limiting effect on women's self-ownership, to influence the outcome of the case in *Christian*. These gendered assumptions involve the privileging of male sexual expectations over securing women's rights of self-ownership.

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[9] Allan Hutchinson and Patrick Monahan "Law Politics and the Critical Scholars: The Unfolding Drama of American Legal Thought" (1984) 36 Stan L Rev 199 at 206.

[10] At 211.

[11] Stuart Russell "The critical legal studies challenge to contemporary mainstream legal philosophy" (1986) 18 Ottawa L Rev 1 at 12.

[12] At 12.

[13] See Deborah Rhode "Feminist Critical Theories" (1990) 42 Standford L Rev 616.

[14] Rhode, above n 13, at 637.

As such, the Supreme Court give legal effect to gendered assumptions that endorse the dominance of men over women, meaning that the law functions to maintain unequal gender relations in society. By adopting this methodology, I will demonstrate how judges rely on gendered assumptions that reflect and reinforce patriarchal values in legal decision making, which justify legal forms of gender inequality.[15] However, before getting to my analysis of *Christian* in chapter II, it is important to understand where these patriarchal values in legal decision making come from.

The reflection and reinforcement of patriarchal values in the law of rape has a long history. This chapter discusses how the history of rape laws have been plagued by overtly sexist assumptions and standards that challenge the notion that the law is rational, objective or even fair.[16] The chapter starts with a discussion on rape and its relationship to self-ownership. It then explores how the origins and evolution of rape law have been shaped according to problematic gendered ideologies. Recognising how gendered ideologies have shaped the law of rape throughout history is essential to understanding the Supreme Court's reasoning in *Christian.*

A Rape and self-ownership

The claim of property in oneself is an assertion of the fundamental right to exclude others from one's own body.[17] Hence, self-ownership is lost when the flesh is no longer subject to one's own control or is surrendered to another.[18] Alexandra Wald claims the prevalence of rape demonstrates that women cannot claim absolute bodily entitlement and often cannot exclude others from their bodies. [19] Therefore, women lack the privileges of self-ownership with regard to controlling sexual access to their bodies.[20] The deprivation of this right is not accidental. It is the product of the legal systems devaluation of a woman's right to exclude others from her body.[21] The value that the legal system attributes to women's self-ownership is inextricably linked to gendered assumptions held about the role of women's bodies in (hetero)sexual relationships. Throughout this dissertation I presume that rape

[15] Minda, above n 4, at 128.

[16] McGregor, above n 1, at 176.

[17] Ngaire Naffine "The legal Structure of Self-Ownership: Or the Self-Possessed Man and the Woman Possessed" (1998) 25 JL & Soc 198.

[18] At 202.

[19] Wald, above n 19, at 467.

[20] At 467.

[21] At 467.

laws regulate the level of control a woman has over her body according to male standards of consent. Hence, what follows is a discussion on how the origins and evolution of rape law have been shaped according to gendered ideology about sex and women's self-ownership. This historical background is important to understanding how and why contemporary rape law continue to deny women the ability to claim full self-ownership over her own body.

B The origins of rape law

Ngaire Naffine uses rape doctrine to demonstrate how the law is formulated to correspond to gendered assumptions about sex and self-ownership. In her article, *The Legal Structure of Self-Ownership: Or the Self-Possessed Man and the Woman Possessed,*[22] Naffine explains that the law of rape was originally formulated according to the assumption that women were incapable of self-ownership. Women were considered not as persons, but as objects to be owned by men. Rape law reflected this commonly held assumption by defining rape as a property crime of a man against a man. While the conception of rape as a crime against the property rights of certain men has since been socially and legally challenged, Naffine's argument demonstrates how rape law has been formulated to correspond to problematic assumptions about the role of women's bodies in (hetero)sexual relationships.

Naffine explains how traditional laws governing sex and the sexes reflect gendered assumptions about a 'natural' form of heterosexual sex. This form of sex is possessive in nature, with an active, appropriating male sexuality and a complementary passive and surrendering female sexuality; this remains the romantic norm.[23] This 'normal' form of sex is one which allows a man to retain property in his own body, while appropriating the body of a woman. Since women are 'naturally' appropriated, the form of sex assumed by both law and convention was incompatible with female self-ownership. As Naffine puts it: "Women's bodies were not susceptible to the sort of self-mastery required of a self-proprietor."[24] It was believed that women could not contain themselves because, in the act of sex, their bodies contained the male, and then they contained the future generation.[25] This 'natural' form of sex conflicted with the traditional concept of self-ownership, which

[22] Naffine, above n 17.
[23] At 210.
[24] At 203.
[25] At 203.

relied upon a form of mind-body dualism. Integral to self-ownership, or self-mastery, was the ability for the subject mind to retain control over the object body.[26] However, as nature's containers, women could not, and must not, rise above their brute natures for the demands of reproduction obliged them to surrender to the flesh and to allow others access to their bodies. For women to exclude others from their physical beings would mean the end of life.[27] Women were therefore deemed insufficiently individuated to own themselves in the sense of mind controlling body. Thus, since women were not perceived as capable of owning themselves, and reproduction required men be secured access to their bodies, both law and convention required women be denied exclusive property rights in their own bodies. As a result, rape law endorsed the legal fiction that women were objects to which men could assert and enforce claims of ownership.[28] It did this by defining rape foremost as a property crime, framed wholly within a context of male ownership of the female body.

> "Rape entered the law through the back door ... as a property crime of man against man."[29]

As a result of the social understandings about women's bodies, English and American common law treated rape, not as a violation of women, but as a violation of another man's property. Women did not own their bodies; instead, rights in sexual access to a wife or unmarried daughter were the property, respectively, of a husband or father. Most notably, the law protected a husband's interest in his wife's fidelity and a father's interest in his daughter's virginity. [30] As one United States Court commented when overturning the historic marital rape exemption: "the purpose behind [traditional state laws] against rape was to protect the chastity of women and thus their property value to their fathers or husbands."[31] Under this view of the law a male complainant could receive damages for the rape of a woman in whom he held a property interest.[32] This reduced women's status to a chattel, to be owned by, and transferred between, affiliated men. Susan Brownmill writes:[33]

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[26] At 202.

[27] At 204.

[28] Kevin C. Paul "Private/Property: A Discourse on Gender Inequality in American Law" (1988) 7 Law & Ineq 402.

[29] Wald, above n 19, at 459 citing Susan Brownmiller *Against our will: Men, women and rape* (1975).

[30] Wald, above n 19, at 488.

[31] *People v. Liberta*, 64 N.Y.2d 152, 167, 474 N.E.2d 567, 573 (1984).

[32] Wald, above n 19, at 470.

[33] Wald, above n 19, at 489 citing Brownmiller, above n 19.

> In the nineteenth century, a married woman was considered by law to be the property of her husband, and any abuse to her person was considered, by law, to be an abuse to his property. If the woman was not married, the abuse was to *her father's* property.

Early laws on rape therefore worked to regulate men's acquisition of property, namely, the exclusive right of sexual access to a woman. Transferring the right of sexual access to a woman between affiliated men denied women of the ability to claim full ownership of their body property. This denial of rights was in no way accidental. It was the law's reflection of the conventional assumption that women's bodies did not meet the requirement for self-ownership, because 'nature' demanded them to surrender bodily access to men. This demonstrates how the crime of rape was originally formulated to correspond to problematic normative assumptions about women's bodies. As such, Naffine reveals how rape law was created by, and is the product of, *gendered* ideology.

Throughout the evolution of doctrinal rape law, problematic gendered ideology continues to shape legal understandings of rape. While rape laws no longer overtly endorse sexist standards, sexists assumptions continue to influence our understanding of the law and hence shape legal definitions of rape. Problematic gendered assumptions about the role of women's bodies in (hetero)sexual relationships – namely, that a sexual relationship will limit a woman's ability to claim full self-ownership over her body – continues to inform legal understandings of rape. This assumption has manifest in various forms as doctrinal rape law has evolved. A reflection on the evolution of rape law shows that despite doctrinal changes, the law is constantly understood in way that corresponds to this background gendered assumption about sexual relationships and their limiting effect on women's self-ownership.

C The evolution of rape law

1 Marital rape exemptions

Rape law continues to be understood according to the assumption that, in the context of (hetero)sexual relationships, a woman's right to exclusive use and control over her body is limited. The last overt vestige of this rational was the marital rape exemption. In New

Zealand, it was legal for a husband to rape his wife until 1985.[34] While non-consensual sex may have taken place, the law did not recognise the act as rape due to the fact of marriage. When society exempts a man from raping his wife, it effectively grants him "a legally enforceable claim to use, enjoy, indeed, possess her sexuality".[35] Marital rape exemption was the law's way of telling men whom they could "legally fuck".[36] Wives were 'legally fuckable' but other women were not.[37] This reflected the assumption that a wife was an object of sexual property, a physical being over which a husband exercised exclusive rights of use and possession. Lord Hale rationalized the marital rape exemption with the notion that a woman bargains away her bodily integrity as part of the marriage contract.[38] Despite there being no underlying common law authority for this notion, it nevertheless became accepted legal doctrine in both England and the United States.[39] However, the extension of marital rape immunity in the United States reveals that the heart of the marital rape exemption was not the marriage contract per se, but was the *sexual* relationship. Hence, a man's right to exclusive use of a woman's body, or the inference of ongoing consent, did not derive from the marriage contract itself, but from informal sexual use over a sufficient period of time. Once it is revealed that at the core of the marital rape exemption was sex, not marriage, we can see how the law is concerned with ensuring certain men retain sexual access to certain women (regardless of marital status). The partial erosion of marital rape exemptions shows how the law can be manipulated to reflect gendered assumptions that work to deny women full rights of self-ownership in relationship contexts.

[34] The marital rape exemption was abolished in 1985 when the present s 128 of the Crimes Act, 1961 was enacted. Section 128(4) now provides that a person can be convicted of sexual violence in respect of sexual connection with another person notwithstanding that they are married at the time the sexual connection occurred.

[35] Paul, above n 28, at 416; See also the discussion in Ngaire Naffine "Possession: Erotic Love and the Law of Rape" (1994) 57 MLR 10.

[36] Catharine Mackinnon "Rape: On coercion and consent" in Katie Comby and Nadia Medina and Sarah Stanbury (eds) *Writing on the body: Female embodiment and feminist theory* (Columbia University Press, 1997) 42 at 46.

[37] At 46.

[38] "But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract" Paul, above n 28, at 412 citing Matthew Hale *History of the Pleas of the Crown* (1736) 629.

[39] Paul, above n 28, at 415.

2 The partial erosion of marital rape exemptions

After a shift in societal values that endorsed the legitimacy of extramarital sex, a number of states in America adjusted the focus of their marital rape exemptions from formal marital status to the substantive matter of sexual relations.[40] In 1962, the Model Penal Code (which is designed to standardize and organize the often-fragmentary criminal codes enacted by the states), supplemented its comprehensive marital rape immunity with a provision that included cohabitants. It said: "Whenever in this article the definition of an offense excludes conduct with a spouse, the exclusion shall be deemed to extend to persons living as man and wife, regardless of the legal status of their relationship."[41] This provision thereby expanded the common law marital rape immunity to unmarried individuals who were living together. This took place when social change meant it was now more commonplace for unmarried couples to be in a sexual relationship. However, at that time the law only exempted *married* men from raping their wives. Thus, to ensure *unmarried* men were also granted secured access to 'their' women, the law had to adapt. The timing of the extension of marital rape immunity to non-married couples is crucial. It came at a time where unmarried sexual relationships were now considered legitimate, which provides an irresistible inference that the law was primarily concerned with securing certain men rights of sexual access rather than protecting all women from rape. As Catherine Mackinnon argues, the partial erosion of marital rape exemptions seems less of a change in the equation between women's experience of sexual violation and men's experience of intimacy, and more like a legal adjustment to the social fact that acceptable heterosexual sex become increasingly not limited to the legal family.[42]

The partial erosion of marital rape exemptions not only impacted those living in "cohabitation", but also those who were mere "voluntary social companions". The Model Penal Code downgraded first-degree rape to second-degree if the victim was "a voluntary social companion of the actor upon the occasion of the crime" who had "previously permitted him sexual liberties."[43] The inclusion of "voluntary social companions" appears to imply that by merely allowing sexual intimacy once, a woman grants consent to future sexual advances. This shows how Hale's inference of ongoing consent that justified the

[40] Michelle Anderson "Marital immunity, intimate relationships, and improper inferences: A new law on sexual offenses by intimates" (2002) 54 Hastings LJ 54 1465 at 1521.

[41] Mode Penal Code § 213.6(2)(d) (2001).

[42] MacKinnon "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence", above n 8, at 648.

[43] Mode Penal Code § 213.1(1)(d) (2001).

marital rape exemption is an inference that extends to parties who share previous sexual history. [44] The transformation of doctrinal rape law from one that focused on marital status to one that included voluntary social companions confirms that it was not the marriage at the heart of the marital rape exemption. It was the *sexual* relationship. Further, downgrading first-degree rape to second-degree based on prior sexual connection reveals a belief that rape by a previous (or current) partner is less harmful, or serious, than rape by a man the victim has not encountered before. This shows that where a woman has granted previous sexual access to a man, her rights of self-ownership will be attributed less legal value in the future. As we will see, this understanding continues to inform contemporary rape law, and illustrates that the marital rape exemption did far more than just protect a man from being prosecuted for raping his wife. It presaged the devastating impact that a prior sexual relationship between a defendant and a complainant has on a claim of rape today.[45]

3 Relationships and rape

While the marital rape exemption has been formally abolished, the existence of a prior sexual connection continues to influence our understanding and treatment of rape. Where a woman is raped by a current or previous sexual partner, the harm of rape is considered to be less than if she was raped by a man she had never encountered before.[46] The perceived harm of rape is lessened because the concept of self-ownership, and hence sexual autonomy, is inextricably linked to notions of property and associated ideas of depreciation and devaluation.[47] In other words, women's self-ownership rights are attributed less legal value when her body has previously been shared with the man concerned. This results in the legal systems belittlement of 'relationship rape'.

Notions of women's bodies as property influence how the harm of rape is perceived. If rape is seen as a violation of sexual autonomy conceived as the person's freedom to withhold access to their bodily property, then a complainant who has previously granted access to her body property may see a diminution in the value attributed to that property the next

[44] Anderson, above n 40, at 1522 citing David Finkelhor and Kersti Yllö *License to rape: Sexual abuse of wives* (Simon and Schuster, 1987).

[45] Anderson, above n 40, at 1474.

[46] See MacKinnon "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence", above n 8, at 649; and Yvette Russell "Thinking sexual difference through the law of rape" (2013) 24 Law & Crit 24 255.

[47] Russell, above n 46, at 264.

time the question of access arises.[48] The use-value attached to her body property has been diminished by previous access, and therefore her sexual autonomy has not been violated to the same degree that it would have been if it was accessed by someone she had never encountered before (a 'real' rape scenario). As a result, the existence of a prior sexual relationship results in rape being treated less seriously. Two quotes from prosecuting barristers when asked about their views on the prosecution of rape in cases where the victim and defendant had had a previous relationship illustrate this point:[49]

> If somebody has been having a sexual relationship with somebody before, whether it's because juries feel the same way as I do, that it's really not a terrible offence...

> I feel very strongly about this. I feel very strongly that it's a great waste of public money to prosecute the ex-husband [for] rape or the ex-boyfriend [for] rape unless there is extreme violence involved or it's part of a sort of campaign of harassment. I have had to prosecute an awful lot of cases where people have still been sort of seeing each other after having a relationship, where he wants it and she doesn't and it happens. Well she says it was a rape and probably, yes, it really was. But frankly does it matter?

This demonstrates that there is something in the *circumstances* which bear on how non-consensual sex is to be treated. Specifically, the existence of a prior sexual connection is a circumstance that will lessen the perceived harm of rape. As such, the violation to one's sexual autonomy, as a result of unwanted bodily intrusion, in circumstances of a prior sexual connection is not treated with the same degree of concern as the *same* violation of autonomy in circumstances where there was no prior sexual connection. Thus, the concept of self-ownership, and hence autonomy, is not granted the same level of respect or legal protection where a prior sexual relationship exists. This reveals that the understanding of rape continues to be informed by the background assumption that a woman's right to exclusive use and control over her body is limited by a pre-existing (hetero)sexual relationship. It also suggests that rape law is more concerned with protecting a man's right of access to 'his' woman, rather than guaranteeing a woman's right to exclude others from her body. Much like the marital rape exemption, the existence of a prior sexual relationship (and the bearing it has on the legal treatment of non-consensual sex), is illustrative of the regulatory nature of rape law. Previous sexual history divides women into categories which

[48] Russell, above n 46, at 264.

[49] Jennifer Temkin "Prosecuting and defending rape: Perspectives from the bar" (2000) 27 JL & Soc 219 at 226.

signal their 'legal fuckability' to men.[50] Where there is shared sexual history between the parties' consent is inferred and thus a woman will experience a lesser level of legal protection for her self-ownership. The impact a prior sexual connection has on the standard of consent is illustrative of the regulatory nature of rape law: *regulating* rape according to male standards of consent, rather than *prohibiting* it from happening.[51] How our rape law divides women into categories of consent to regulate rape (as a result of the Supreme Court's decision in *Christian*) will be discussed in detail in chapter III.

D Summary

Doctrinal rape law is infected with the history of patriarchy, which protects the interests of men and fails to protect the interests of women.[52] Historically, rape laws have been plagued by overtly sexist assumptions and standards that challenge the notion that the law is rational, objective or even fair.[53] The problems inherent in contemporary rape law stems largely from the fact that courts still employ the same gendered assumptions that have contaminated rape law for centuries. Specifically, courts continue to rely on gendered assumptions about (hetero)sexual relationships and their limiting effect on a woman's ability to claim full self-ownership over her own body. This is demonstrated in the following chapter by a critical deconstruction of the Supreme Court's decision in *Christian.* This analysis will show how contemporary adjudication of rape still operates ideologically, and how courts continue to employ gendered assumptions to the detriment of women.[54]

[50] MacKinnon, above n 36, 46

[51] Paul, above n 28, at 416.

[52] See generally Catherine MacKinnon *Towards a Feminists Theory of the State* (Harvard University Press, 1989); Stephen Schulhofer "Taking Sexual Autonomy Seriously: Rape Law and Beyond" (1992) 11 Law & Phil 35; and McGregor, above n 1.

[53] McGregor, above n 1, at 176.

[54] McGregor, above n 1, at 176.

CHAPTER II: CHRISTIAN

Contemporary rape law continues to reflect and reinforce patriarchal values that justify legal forms of gender inequality. Through a critical analysis of the recent Supreme Court case *Christian*, I will demonstrate how judicial interpretation of rape law continues to be influenced by gendered assumptions about sex and self-ownership that have infected rape law for centuries. Here, I argue that the Supreme Court's interpretation of 'consent' under s 128A(1) of the Crimes Act 1961 was not determined by legal rules, principles or standards. Instead, it was the product of a certain gendered ideology about sexual relationships and their limiting effect on women's self-ownership. Due to the inherent indeterminacy and malleability of s 128A(1), the Court was able to ignore existing legal principles that pointed against their chosen interpretation. The Court provided no supporting evidence or 'legal' authority to justify the inconsistencies of their approach. Legal inconsistencies and lack of justification for the Supreme Court's approach to s 128A(1) helps to reveal the role that background gendered assumptions played in the Court's reasoning process. As a result of pervasive gendered assumptions, the Supreme Court created a legal standard ('relationship expectations') that denies women the ability to claim full self-ownership over their own bodies in the context of a pre-existing sexual relationship. This shows that the adjudication of contemporary rape law continues to operate ideologically to the detriment of women.

What follows is a discussion of *Christian*, including the material facts and details of the both the Court of Appeal and Supreme Court's judgment. The legal inconsistencies of the Supreme Court's approach to s 128A(1) will then be examined before discussing how those inconsistencies reveal the role that problematic gendered assumptions played in the Court's reasoning process.

A The case

In *Christian* the Supreme Court was asked to decide the significance of a complainant's silence and inactivity during (allegedly non-consensual) sex. The court found that while silence or passivity itself cannot constitute consent, nor is it a reasonable basis to assume consent, 'relationship expectations' can justify proceeding to penetration, even if the complainant has done and said nothing on this occasion to suggest this is what she wants.[55]

[55] Andrea Ewing "Case Note: Consent and 'Relationship Expectations' – Christian v R [2017] NZSC 145" (2017) NZCLR 357 at 357.

1 The facts

Mr. Christian ran a church in a small town. One day in 1996 Mr. Christian came into the house where the complainant lived, removed her trousers and had sexual intercourse with her. She was then around 13 or 14. She did not say anything to him, because she was too scared and did not know what to say. She unequivocally did not consent, and this incident founded the first rape charge.[56]

The other two rape charges were representative charges, reflecting ongoing rapes during the subsequent three-year period (1996-1999). Over this period, Mr. Christian continued to have sex with the complainant – first while she lived on his property (the basis of the second, representative rape charge);[57] and later once she moved into a house bus with him (which resulted in a third, representative rape charge, when she was aged around 14- 16).[58] According to the complainant, these rapes occurred "heaps of times", and she was unable to say anything, so just let him do it. She said she did not want the sexual encounters to happen, and never said "yes I wanna have sex".[59] She also said that the appellant told her not to tell anyone and made implied threats against her mother and her sister so that the complainant would remain on the property.

The sexual encounters came to an end when the complainant's mother became suspicious and beat the complainant until she confessed to having regular sex with the appellant. When interviewed by the police, the complainant said "it" was consensual, without making it clear what she was referring to. She later swore an affidavit stating the allegations were entirely made up and that she had not slept with the appellant. However, during the trial the complainant stated the affidavit was made at the behest of the appellant and was not her own words.

At trial, it was not suggested that Mr. Christian had had a consensual relationship with the complainant. Rather, his defence was that the complainant had fabricated the sexual contact. The Judge explained all three elements of sexual violation but instructed the jury that consent and reasonable belief in consent were not live issues. If they were sure

[56] Count 2.

[57] Count 4.

[58] Count 5.

[59] *Christian v R* [2016] NZCA 450 ("*Christian* (CA)") at [65].

penetration had occurred, their verdicts would be guilty. The jury convicted Mr Christian of all three counts of rape.

2 The Judgment

The issue before the Supreme Court was whether the Judge ought to have directed the jury on consent, and reasonable belief in consent. The conclusion to this question rested on a far more conceptual inquiry: is there an evidential basis for finding a 'reasonable belief in consent' while a complainant simply does and says nothing while penetration occurs?[60]

The relevant statutory provision subject to interpretation was s 128A(1) of the Crimes Act 1961. Section 128A specifies various factual circumstances that do not constitute consent to sexual activity. Subsection 1 provides:[61]

> A person does not consent to sexual activity just because he or she does not protest or offer physical resistance to the activity.

Whether s 128A(1) deals with both 'consent' and 'reasonable belief in consent' has previously been somewhat unclear. *R v Tawera* considered a complainant's failure to express dissent – even if insufficient to prove she had consented – could nonetheless be relevant to the reasonableness of a defendant's belief in consent.[62] The Court in *Tawera* acknowledged that under s 128A(1) passivity does not of itself constitute consent, but found that the section did not really bear on the issue of belief in consent. The Supreme Court in *Christian* disagreed with that position:[63]

> The word 'consent' must have the same meaning when referring to the existence of consent and to the existence of a reasonable belief in consent. If a failure to protest or resist cannot, of itself, constitute consent, a reasonable belief that a complainant is not protesting or resisting cannot, of itself, found a reasonable belief in consent.

Consequently, *Tawera* is no longer good law and silence or passivity alone cannot provide reasonable grounds to believe a complainant is consenting. Accordingly, the Supreme Court in *Christian* found that "something more" than passivity alone is required to infer

[60] Ewing, above n 55, at 360.

[61] Crimes Act 1961, section 128A(1).

[62] *R v Tawera* (1996) 14 CRNZ 290 (CA) at 293 ("*Tawera"*).

[63] *Christian*, above n 3, at [32].

consent.[64] However, the Supreme Court disagreed with the Court of Appeal's conclusion that "something more" requires an affirmative expression of consent.[65] In the Court of Appeal's opinion, s 128A(1) requires consent to be actively expressed (either by words or conduct):[66]

> …the direction in s 128A(1) to the fact-finder is that the complainant's silence by itself must not be taken as consent and nor can her failure to resist in some physical way. *It follows that consent, however it might be expressed, must be actively expressed.* Neither silence nor inactivity can provide any basis for an inference of consent. Thus, the law on consent does not impose an obligation on a complainant to say "no", either by words or conduct. Rather, there must be the *suggestion of "yes" in the complainant's words or conduct* in order for a trial Judge to be satisfied that there is a sufficient narrative for the issues of consent *and reasonable belief in consent* to go to the jury in a case where the act itself is denied.

The Court of Appeal relied upon the position tentatively adopted in *Ah-Chong v R* where the Supreme Court questioned if s 128A(1) permits a complainant's passivity to be the basis of a reasonable belief in consent.[67] The Court suggested that the focus in *Tawera* on the complainant's failure to protest or resist was "arguably at odds with the principle that s 128A(1) appears to be based upon, namely, that consent to sexual activity is something which must be given in a positive way."[68] Accordingly, the Court of Appeal in *Christian* found there was no credible narrative on the evidence of consent or reasonable belief in consent with respect to any of the three counts of rape. The complainant's unchallenged evidence was that she remained silent and passive throughout the sexual encounters.[69] Therefore, the trial Judge was not required to leave these issues to the jury, and no miscarriage of justice resulted from failure to do so.[70]

The Supreme Court took a different view. While the Supreme Court agreed that "something more" than a lack of protest is required before it will be reasonable to infer consent, that "something more" may be something other than a positive expression of consent. The

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[64] At [5](c).

[65] At [5](c).

[66] *Christian* (CA), above n 59, at [49]. See also at [60]. Emphasis added.

[67] *Ah-Chong v R* [2015] NZSC 83, [2016] 1 NZLR 445 at [54]–[55] (*"Ah-Chong*").

[68] At [55].

[69] While the complainant's Police statement said that "it" was consensual, her unchallenged evidence at trial was that that statement was a lie (Mr. Christian's assertion was that it was a lie but for a different reason, i.e. there was no "it").

[70] *Christian* (CA), above n 59, at [72].

Supreme Court thought that the Court of Appeal "overstated the position" in *Ah-Chong* by saying that consent must be positively expressed – that is, conveyed by the complainant's words or conduct at the time:[71]

> While a failure to protest or offer physical resistance does not, of itself, constitute consent and something more is required, that "something more" may be something other than a positive expression of consent.

The Supreme Court found that, even where a complainant fails to protest or resist, consent may still be legitimately inferred from either the "words used, conduct or *circumstances* (or a combination of these)."[72] It would seem to be important to define what constitutes "circumstances" given it was the basis for the Supreme Court considering the Court of Appeal was wrong in its approach to the law about when consent and reasonable belief in consent can arise.[73] However, the Supreme Court provide no more than a paragraph on what "circumstances" are able to transform a complainants silence into a sign of consent:[74]

> One such factor could be a positive expression of consent. But there could be others. For example, if the participants in the sexual activity are in a relationship in which expectations have developed over time and the sexual activity is in accordance with those expectations, that may be capable of evidencing consent if there is nothing to indicate that the mutual expectations are no longer accepted.

'Relationship expectations' are said to be an example of the "circumstances" that may transform a complainant's silence into a sign of consent, and can justify proceeding to penetration, even if the complainant has done and said nothing on this occasion to suggest this is what she wants. As such, a pre-existing sexual relationship will place a caveat on s 128A(1) that permits a complainant's silence and passivity to constitute consent.

Accordingly, the Supreme Court found that as time wore on the complainant continued to submit to sex without complaint. This provided a basis for the jury to find the complainant had consented in relation to both counts 4 and 5.[75] Therefore, the trial Judge's failure to direct the jury on consent and reasonable belief in consent resulted in a miscarriage of

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[71] *Christian*, above n 3, at [5](c).

[72] At [45]. Emphasis added.

[73] Ewing, above n 55, at 361.

[74] At [46].

[75] At [67].

justice on counts 4 and 5.[76] However, the position for count 2 is different from counts 4 and 5 because it did not relate to sexual interactions over a period of time. Count 2 was the first sexual encounter between the appellant and complainant, so there was no background relationship in respect of which some expectations of the kind described above could have arisen.[77] Therefore, the Court upheld the conviction on count 2 but quashed convictions and ordered a new trial on counts 4 and 5.

B Legal inconsistencies of the Supreme Court's approach to s 128A(1)

The Supreme Court found that s 128A(1) precludes silence or passivity of itself constituting consent or a reasonable belief in consent.[78] However, this position is overturned in circumstances of a prior sexual relationship. On the Supreme Court's approach, s 128A(1) is interpreted to allow a reasonable inference of consent from someone's lack of protest on *this* occasion, combined with the "circumstance" of their consent to similar sexual activity with the same partner on a *previous* occasion.[79] However, this interpretation of s 128A(1) is inconsistent with established legal principles on consent. Established legal principles, including the time at which consent is to be addressed, and the policy rationale behind s 128A(1), both point *against* the Supreme Court's chosen approach to s 128A(1). The Supreme Court had the opportunity to reason consistently with these aforementioned legal principles by adopting the Court of Appeal's approach to s 128A(1). However, the Court forewent this opportunity and created a legal standard that is inconsistent with existing legal material. This illustrates how s 128A(1) is inherently indeterminate and malleable, which provides the scope for background gendered assumptions about sexual relationships and their limiting effect on women's self-ownership to influence and shape it's meaning.

1 Consent is to be addressed at the time penetration occurs

On the Supreme Court's approach, s 128A(1) is interpreted to allow a reasonable inference of consent from someone's lack of protest on *this* occasion, combined with the "circumstance" of their consent to similar sexual activity with the same partner on a

[76] At [68].
[77] At [58].
[78] At [32].
[79] Ewing, above n 55, at 362.

previous occasion.[80] However, relying on a past consent as indicating present consent undermines the fact consent and a reasonable belief in consent is to be addressed *at the time* penetration occurs.[81] 'Relationship expectations' allows that fact of past consent to sex to indicate present consent to sex. As such, the Supreme Court have allowed the complainant's behaviour *before* the act to be decisive of consent. The Supreme Court had the opportunity to reason consistently with this legal principle by adopting the Court of Appeal's approach to consent. In deciding that consent must be actively expressed by either a complainant's words or conduct, the determination of consent and a reasonable belief in consent, is restricted to expressions of a person's willingness to engage in sex *at that time*. This interpretation represents what one would assume to be a fairly non-contentious proposition: that present consent cannot be inferred from past consent or an existing sexual relationship. It should be obvious that a person's decision to engage in sex turns on his or her wishes at that time, not on the identity of a particular person.[82] Unfortunately, the Supreme Court's approach fails to recognise that consent is 'bespoke', not given to a particular person for all of time.

2 Policy rationale behind s 128A(1)

The rationale behind s 128A(1) also points against the creation of 'relationship expectations' as a legal standard. Section 128A(1) "makes impermissible reasoning that absence of protest amounts to consent because such reasoning flies in the face of experience about power imbalance and the ways in which complainants may be deprived of choice."[83] In other words, under s 128A(1) silence is not permitted to constitute consent because this would fail to protect vulnerable victims who feel they cannot voice dissent to sex. However, the Supreme Court permit silence to constitute consent in circumstances of a prior sexual connection. This imposes an obligation on a complainant to say "no" to sex. The imposition of such an obligation ignores that fact that vulnerable victims (like in *Christian*), are often groomed into submitting to sex without complaint, or otherwise feel they cannot voice dissent despite the fact sex (or, as the Court found in *Christian*, rape) has occurred before.[84]

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[80] Ewing, above n 55, at 362.

[81] *R v Adams* CA70/05, 5 September 2005 at [48] "The material time when consent, and belief in consent, is to be considered is at the time the act actually took place. The complainant's behaviour and attitude before or after the act itself may be relevant to that issue, but it is not decisive."

[82] Ewing, above n 55, at 362.

[83] *Christian*, above n 3, at [105] per Elias CJ.

[84] Ewing, above n 55, at 363.

Again, the Supreme Court could have followed the Court of Appeal's approach to s 128A(1). Requiring consent by words or conduct has the ability to maximise autonomy and minimise coercion and subordination,[85] and therefore respects the purpose for which s 128A(1) was enacted. Presuming non-consent to sex unless there is a suggestion of "yes" (either by words or conduct) gives women the ability to grant *permission* for others to enter her body. This gives a woman an enhanced ability to control access to her body, and thus helps to reduce potential power imbalances between parties. The Court of Appeal acknowledged the influence that a power imbalance had on the presence of consent in *Christian.* They did so by highlighting the complainant's vulnerability and identifying several contextual factors which suggested that the complainant was deprived of the choice to consent.[86] The Supreme Court acknowledged that these were very strong factors pointing against the possibility of consent. However, they found that they could not rule out the possibility that interactions did involve the complainant consenting, "albeit as a consequence of [Mr. Christian's] grooming of her."[87] This reasoning overlooks the fact the submission to sex as a consequence of "grooming" often does not reflect true consent.[88] As such, 'relationship expectations' creates unsatisfactory outcomes. Most obviously where vulnerable complainants are groomed into submitting to sex without complaint and/or otherwise feel they cannot voice dissent despite the fact sex (or even rape) has occurred before. By ignoring the policy rationale behind s 128A(1), the law is effectively turning its back on vulnerable complainants like the woman in *Christian.*

[85] See Michelle Anderson "Negotiating Sex" (2005) 78 S Cal L Rev 78 101.

[86] *Christian* (CA), above n 59, at [66] the Court noted that factors suggesting the absence of any credible narrative of consent included: "wide difference in age; the complainant's immature knowledge of sexual matters; the complainant's particular vulnerability because of isolation from and a poor relationship with her mother or any other support person; the appellant's status as a church leader and de facto guardian; the evidence of the appellant's implicit threat to the complainant that she was not to tell anyone about the offending as he knew "heaps of people", which the complainant took to refer to his gang connections. The complainant also said in evidence that if she tried to leave the appellant would tell her that he would kill her mother and sister; and the appellant gave the complainant money and drugs such as cannabis."

[87] *Christian*, above n 3, at [67].

[88] *R v Robinson [2011]* EWCA Crim 916, [2011] All ER (D) 264, at [23] the Court held that "a jury was entitled to find that [the complaint's] immaturity, coupled with the evidence of acquiescence rather than enthusiastic consent, particularly in the context of what could be perceived as grooming, meant that there was no proper consent"; *R v Ali* [2015] EWCA Crim 1279 at [57] and [58] where the Court noted that "[o]ne of the consequences when vulnerable people are groomed for sexual exploitation is that compliance can mask the lack of true consent on the part of the victim".

C What legal inconsistences reveal about the Supreme Court's reasoning

It would be assumed that providing an explanation as to why 'relationship expectations' necessitated creating a legal standard that goes against existing legal principles on consent would be important. However, the Supreme Court provided no formal or substantive justifications for why 'relationship expectations' justifies a different approach to consent under s 128A(1). Below I expose the dearth of supporting evidence for the notion that "circumstances" of a pre-existing relationship are sufficient to constitute consent or a reasonable belief in consent. The legal inconsistencies and lack of justification for those inconsistencies illustrates the indeterminate and malleable quality of s 128A(1), which allows the meaning of the section to be shaped by problematic gendered assumptions about sex and self-ownership.

The Supreme Court found that under s 128A(1) silence or passivity alone cannot constitute consent or a reasonable belief in consent. Accordingly, "something more" than passivity alone is required to infer consent. The Court interpret that "something more" can include words, conduct or *circumstances,* indicating consent. An explanation on why some "circumstances" can transform silence into an indication of consent would seem important. After all, this provided the basis for the Supreme Court to decide the Court of Appeal was wrong in its approach to the law. However, the Supreme Court failed to explain or justify why "circumstances" of a sexual encounter can bear on whether the complainant is consenting. In fact, the Supreme Court provide only a single paragraph on this point.

This single paragraph refers to 'relationship expectations' as an example of a "circumstance" that can transform a complainant's silence into a sign of consent.[89] The Court does not refer to any legal rule, standard or principle that supports this conclusion. In fact, the majority provide no explanation at all as to why a prior sexual connection will bear on the meaning of consent. It is simply stated as a matter of fact. Now this is not to disregard a prior sexual connection as irrelevant to a reasonable belief in consent. Prior sexual connection may form *part* of the basis for a reasonable belief in consent, and may enable the defendant to better interpret the complainant's behaviour. But this is quite different to saying that past consensual sex is of itself a sufficient basis to assume consent.[90] However, the Supreme Court found that past consent to sex (or rape in *Christian*) is of itself a sufficient basis to infer present consent. Yet, the Court provide no formal or

[89] At [46].

[90] Ewing, above n 55, at 363.

substantive justification for why 'relationship expectations' are sufficiently (socially) important to override the position that silence of itself cannot constitute consent under s 128A(1).

The lack of justification provided by the Supreme Court seems strange given that there were legal constraints pointing *against* the Court's conclusion. However, the fact the Supreme Court could create a legal standard that is inconsistent with established legal principles on consent illustrates the indeterminate and malleable quality of s 128A(1). Where the law is indeterminate and malleable, background gendered assumptions are permitted to play a greater role in influencing and shaping judicial interpretation. Here, the meaning that Court gave to s 128A(1) was significantly influenced by problematic gendered assumptions about sexual relationships and women's self-ownership that have plagued the history of rape law.

D The role of gendered assumptions in the Supreme Court's reasoning

The Supreme Court's interpretation of s 128A(1) reflects a particularly gendered ideology that has manifest throughout the history of rape law. That is, that a pre-existing sexual relationship will limit a woman's ability to claim full self-ownership over her own body. As we saw in chapter I, this gendered assumption has contaminated the interpretation of rape law since its conception. In *Christian*, this gendered assumption resulted in the creation of a problematic ideological legal standard ('relationship expectations'). 'Relationship expectations' functions ideologically because it privileges male expectations of ongoing sexual access to 'his' partner, over female expectations of having full control over access to her body. It is also endorses the troublesome perception that 'relationship rape' is less harmful or less serious than other forms of rape. The ideological nature of 'relationship expectations' is problematic because it operates to the detriment of women by denying them the ability to claim full self-ownership over their own bodies in the context of a pre-existing sexual relationship.

1 The privileging of male expectations

'Relationship expectations' provides a choice as to whose expectations about sex in the context of silence the law should give priority too. 'Relationship expectations' presumes a woman in an intimate relationship is always consenting to sex unless she communicates otherwise. To exercise her right to refuse access to her body she must overtly communicate

a refusal to sex. If she does not do so, her silence will be taken as a sign of consent. In allowing silence to indicate consent in relationship contexts, 'relationship expectations' privileges *his* expectations of ongoing sexual access over *her* expectations of having full control over access to her body. Therefore, in the construction of 'relationship expectations', the law is falling into the same trap it has been stuck in for centuries. That is, protecting (or regulating) male interests in pursuing sexually intimacy, over guaranteeing women's rights of self-ownership.

The privileging of male sexual expectations is a familiar concept that has manifest throughout the history of rape law. Until 1985, the law overtly endorsed this form of male privilege via the marital rape exemption. Under the marital rape exemption, a husband's expectation of ongoing sexual access to his wife was privileged (and guaranteed by law), over any expectation a wife had of having full control over access to her body. It was assumed that a wife bargained away her right to bodily integrity upon entering the marriage.[91] In a similar vein, 'relationship expectations' assumes a woman forgoes full rights of self-ownerships upon entering a sexual relationship. 'Relationship expectations' presumes a woman in a relationship is always consenting to sex (unless she says "no"). Unlike other women, a woman in an intimate relationship is unable to rely on her silence to evidence non-consent to sex. As such, women in intimate relationships will experience a diminished level of legal protection under s 128A(1). It is like this right (to have silence evidence your non-consent), has been bargained away once a woman grants a man sexual access to her body. As such, 'relationship expectations' suggests that women forgo full rights of self-ownership upon entering an intimate (hetero)sexual relationship (just as the marital rape exemption stipulated).

The fact that women in intimate sexual relationships experience a diminished level of legal protection under s 128A(1), suggests that the Court's reasoning was informed by the same assumption informing the martial rape exemption. That is, that a pre-existing sexual relationship will diminish a woman's ability to claim full self-ownership over her body. 'Relationship expectations' reflects this assumption because it results in the existence of a pre-existing sexual relationship limiting a woman's ability to refuse sex (because the ability to refuse someone access to her body will depend on her ability to communicate her refusal). Hence, the standard limits a woman's ability claim full self-ownership over her own body in relationship contexts. In this way, 'relationship expectations' embodies a modern day marital rape exemption. It gives legal effect to problematic gendered

[91] Paul, above n 28, at 412 citing Hale, above n 38.

assumptions about intimate relationships and their limiting effect on women's self-ownership.

2 Reflecting the perceived harm of rape

The Supreme Court's interpretation of s 128A(1) can also be understood as a reflection of the perceived harm of rape. Rape by someone you know is perceived to be less harmful or less serious than rape by someone you do not know.[92] Again, this understanding is informed by the assumption that a woman's self-ownership is diminished by the existence of a sexual relationship. The Court reflected this gendered assumption about the perceived harm of rape by interpreting s 128A(1) differently depending on whether the act constituted the initial sexual encounter (count 2), or a subsequent sexual encounter (counts 4 and 5).

In *Christian*, the complainant was unequivocal that she never once consented to sexual intercourse. This was unchallenged evidence at trial.[93] Therefore, counts 2, 4 and 5 all entailed occasions of non-consensual sex. On all counts, the complainant's sexual autonomy had been violated to the same degree by unwanted bodily intrusion. However, the Court's response to acts of non-consensual sex, and hence violations of the complainant's sexual autonomy, differed depending on whether there was a prior sexual connection. Where there was no prior sexual connection, the Court favoured a narrow interpretation to s 128A(1), which resulted in the complainant's silence precluding the possibility of consent or a reasonable belief in consent. Hence, non-consensual sex was treated as rape (count 2). Where there was a prior sexual connection, s 128A(1) was interpreted in a way that allowed more scope for the appellant to claim that the complainant had consented, or that he reasonably believed in consent. As such, silence did not preclude the possibility of consent. This reduced the level legal of protection for the complainant's sexual autonomy in relation to counts 4 and 5, and resulted in rape convictions being quashed. This suggests that where there is a prior sexual connection, rape is treated less seriously. In this context, women will experience a depreciation in the value attributed to their self-ownership, and hence sexual autonomy. Accordingly, violations to self-

[92] See MacKinnon "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence", above n 8, at 648; Russell, above n 46; and Temkin, above n 49.

[93] While the complainant's Police statement said that "it" was consensual, her unchallenged evidence at trial was that that statement was a lie (Mr Christian's assertion was that it was a lie but for a different reason, i.e. there was no "it").

ownership are perceived as less harmful and thus treated with less concern in the context of a pre-existing sexual relationship.

As discussed in chapter 1, the perceived harm of rape is lessened in relationship contexts because the concept of self-ownership, or sexual autonomy, is inextricably linked to notions of property and associated ideas of depreciation and devaluation.[94] Since rape is perceived as a violation of one's ability to withhold access to their bodily property, a complainant who has previously granted access to her body may see a diminution in the value attributed to that property the next time the question of access arises.[95] The use-value attached to her body property has been diminished by previous access, and therefore her sexual autonomy has not been violated to the same degree it would have been if it was accessed by someone she had never encountered before (a 'real' rape scenario). In *Christian,* because the complainant continued to submit to sex without complaint, the use-value attached to her body property was diminished by each instance of sexual access. Therefore, in relation to counts 4 and 5, it was perceived that her sexual autonomy was not violated to the same degree as it was by the initial non-consensual sexual encounter (count 2). This gendered understanding about the harm of rape was reflected by the Court through their interpretation of s 128A(1). Where a pre-existing sexual connection existed, the Court reflected the assumption that the harm of rape is less, by reducing the level of legal protection under s 128A(1). As such, in circumstances of a pre-existing sexual relationship, it will be harder for a woman to claim she was not consenting to sex because she must be able to prove express words or conduct that indicated non-consent. The fact that the Court considered circumstances of a prior sexual connection to warrant a qualification on s 128A(1) is evident of the devaluation of women's self-ownership rights in 'relationship' contexts. As a result of the gendered assumption (that 'relationship rape' is less harmful than other forms of rape), rape in circumstances of a pre-existing sexual connection will be met by a different legal standard than rape in circumstances where no pre-existing sexual connection exists. The different legal standard of consent under s 128A(1) in 'relationship' contexts, denies women the ability to claim full self-ownership over their bodies. Therefore, the law is operating ideologically to the detriment of women.

[94] Russell, above n 46, at 264.

[95] At 264.

E Summary

The recent Supreme Court decision in *Christian* demonstrates how judicial interpretation of contemporary rape law continues to employ gendered assumptions to the detriment of women. The Court's interpretation of s 128A(1) was not constrained by legal rules, principles or standards. Instead, the meaning given to 'consent' under s 128A(1) was shaped by a long-standing and pervasive gendered ideology about sexual relationships and their limiting effect on women's self-ownership. In relying on these gendered assumptions to give meaning to s 128A(1) the Court created a problematic ideological legal standard. 'Relationship expectations' operates according to patriarchal ideology by privileging male sexual expectations over securing a woman's right to bodily integrity. It reduces the level of legal protection under s 128A(1) given to women in the context of a pre-existing sexual relationship. In this way, 'relationship expectations' separates women into different categories of consent. The standard of consent applied to a particular to a case will turn on whether or not there was a prior sexual connection between the parties. Where there is a prior sexual connection, a woman will experience a lesser level of legal protection for her self-ownership rights under s 128A(1). In the following chapter I argue that 'relationship expectations' and its influence on the standard of consent applied under s 128A(1) is illustrative of the regulatory nature of rape law: *regulating* who gets raped rather than *prohibiting* it from happening.

CHAPTER III: REGULATING RAPE

'Relationship expectations' as formulated by the Supreme Court in *Christian,* denies women the ability to claim full self-ownership over their own bodies in the context of a pre-existing sexual relationship. The standard of consent under s 128A(1), and hence level of control a woman will have over access to her body, will depend on the status of the man concerned (whether or not he is a previous sexual partner). Accordingly, 'relationship expectations' negotiates the level of protection for women's self-ownership from the male point of view. This fails to *guarantee* rights of self-ownership, and hence sexual autonomy, for women in sexual relationships. This means that the law, as it currently stands, fails to adequately protect the interest it is supposedly designed to protect: the fundamental value of autonomy over one's body.[96] The failure of s 128A(1) in guaranteeing self-ownership rights for women in the context of a pre-existing sexual relationship, is suggestive of the regulatory nature of rape law: *regulating* who gets raped and when, rather than *prohibiting* it from happening.

What follows is a discussion on the failure of 'relationship expectations' in protecting women's self-ownership, and how this is illustrates the regulatory nature of the law. Next it is argued that by allowing rape to continue under certain circumstances the law is reinforcing women's oppression, which occurs in part through sexual practices.[97] The end of this chapter considers the possibility that 'relationship expectations' as a regulatory mechanism is an attempt to strike the appropriate balance between vindicating rights and identifying culpable behaviour. Though I argue that even where the law claims to regulate rape to identify culpable behaviour, it does so from the male point of view.

A 'Relationship expectations' and self-ownership

'Relationship expectations', as formulated by the Supreme Court in *Christian,* is at odds with the fundamental value of having control over who touches your body and how.[98] In allowing silence to indicate consent in the context of a pre-existing sexual relationship, the

[96] Anna High "*Christian v R*" [2018] NZLJ 47.

[97] Mackinnon, above n 8.

[98] *Christian* (CA), above n 59, at [49] citing *R v Ewanchuk* [1999] 1 SCR 330: "[h]aving control over who touches one's body, and how, lies at the core of human dignity and autonomy" The Court of Appeal in *Christian* found that "The requirement for active consent in s 128A is a logical corollary of that fundamental value."

Supreme Court presumes a woman in an intimate relationship will exercise the use of her body in a particular way (to engage in sex), and subsequently imposes an obligation on her to rebut that presumption (to say "no" in her words or conduct). Placing the onus on the woman to rebut a presumption in favour of consent runs counter to what should be the underlying principle of all sexual violation laws. The purpose of all sexual violation laws should be to protect the fundamental value of autonomy over one's own body. Hence, the onus should always be on the initiator to ensure sex is consensual by obtaining permission, rather than presuming consent unless non-consent is communicated.[99] However, 'relationship expectations' presumes consent in circumstances of a pre-existing sexual relationship, and so the onus is on the person (woman) being penetrated to unequivocally communicate non-consent. Rather than being able to rely on silence and passivity as a sign of her non-consent (as prescribed by s 128A(1)), a woman in an intimate relationship must go further and *communicate* dissent. Hence, a woman cannot exercise full control over her body unless she communicates her choice to refuse her partner access. However, imposing an obligation on a complainant in an intimate relationship to say "no", either by words or conduct, fails to adequately protect women's rights of self-ownership, especially of those who feel they cannot voice dissent to sex (as was the case in *Christian*).

Outside of the 'relationship context', there is no obligation on woman to communicate her choice to exercise her right to refuse access to her body. The requirement to say "no", either by words or conduct, is not imposed on women who have no shared sexual history with the man concerned. Here, silence alone is presumed as indicating *non*-consent.[100] This means that women who do have shared sexual history with the man concerned must take an additional/communicative step to exercise her rights of self-ownership. However, women who have no shared sexual history with the man concerned do not have to take this additional/communicative step to exercise her rights of self-ownership. This reveals that the law does not guarantee *all* women's rights of self-ownership. Instead, the level of legal protection granted for women's self-ownership turns on the status of the man concerned (whether or not he is a previous sexual partner). Accordingly, 'relationship expectations' as a legal standard, functions to *regulate* rape according to male standards of consent.

[99] High, above n 96, at 51; Jesse Wall "Sexual Offences and General Reasons Not to Have Sex" (2015) 35 OJLS 777; and Jesse Wall "Justifying and Excusing Sex" Criminal Law and Philosophy 1-25 (forthcoming).

[100] *Christian,* above n 3, at [32]: "a failure to protest or resist cannot, of itself, constitute consent".

B The regulatory nature of 'relationship expectations'

"Rape from a woman's point of view is not prohibited, it is regulated."[101] According to MacKinnon, all law is utterly rooted in patriarchy. Therefore, the law of rape operates according to the male point of view because "the law sees and treats women the way men see and treat women."[102] In MacKinnon's view, sexual assault laws do not exist in order to guarantee women's sexual autonomy (or self-ownership), but rather to regulate male sexuality according to male standards of consent, which have nothing to do with women's desires or choices.[103] Under this regime, the law of rape divides women into spheres of consent depending on how much control they are legally presumed to have over access to their bodies by given categories of men.[104] The absence or presence of consent will depend on what category a woman falls into. Some women cannot consent (underage girls). For other women (wives, girlfriends, partners), consent is inferred. For these women, consent depends on the status of the man concerned: "If the accused knows us, consent is inferred."[105] Accordingly, the real question seems to be: "Who has the control over this woman's capacity to consent?" Is it her father? Husband? Or a man known to her? Either way, the answer never seems to be that *she* does.[106] These categories of consent create a dividing line between rape and 'normal' sex. Or in MacKinnon's words: "Categories of consent tell men whom they can legally fuck."[107]

The most recent overt regulatory regime was the marital rape exemption. A wife was 'legally fuckable' because she was deemed to always be consenting to sex with her husband. Under this regime, the control a woman was granted over access to her body depended on the status of the man concerned: a married woman was not granted full control over the access to her body because she was presumed to always consent to her husband, but not necessarily to other men.[108] Her husband controlled her capacity to consent by virtue of marriage.

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[101] MacKinnon "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence", above n 8, at 654.

[102] At 644.

[103] At 646.

[104] At 648.

[105] At 648.

[106] Heath and Naffine, above n 7, at 33; See also the discussion Naffine, above n 35.

[107] MacKinnon, above n 36, at 46.

[108] MacKinnon "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence", above n 8, at 646.

'Relationship expectations' may not be an overt regulatory regime like the former marital rape exemption. However, it operates according to the same gendered ideology. It creates a category of consent which deems women in intimate relationships more 'fuckable' than other categories of women. Adjudicating the level (or categories) of consent will still depend on the status of the man concerned. Where the man concerned has previously accessed the woman's body, consent is inferred. Where the man concerned has not previously accessed the woman's body, non-consent is inferred. Since the standard of consent under s 128A(1) turns on whether a man has had previous sexual relations with the complainant, consent depends on the status of the man concerned, not on the desires or choices of the woman.[109] This suggests that consent is not used to enforce women's control over her own body and sexuality, but is used as a regulatory regime to distinguish rape from sex according to male standards of consent. 'Relationship expectations' as a standard of consent functions as a *regulating* mechanism. It regulates a different standard of consent depending on the status of the man concerned (whether or not he has had previous sexual connection with the women concerned). In this way, 'relationship expectations' is a modern day marital rape exemption. The level of control granted to women in 'relationship contexts' is lessened because, to an extent, her partner is deemed to control her capacity to consent. This suggests 'relationship expectations' is a device used to protect male interests in pursing sexual intimacy with his partner at the expensive of vindicating women's rights of self-ownership. As such, 'relationship expectations' is suggestive of the regulatory nature of rape law in general: *regulating* who gets raped rather than *prohibiting* it from happening. This works to reinforce unequal distributions of power between men and women.

C Regulating rape and women's oppression

Rape is a deeply entrenched social practice that both expresses and reinforces the oppression of women. MacKinnon argues that the social domination of women by men occurs in large part through sexual practices.[110] Rape, rather than being a deviant form of social behaviour, is an extreme expression of the subordination of women that occurs in many places.[111] "Rape is an oppressive practice employed by a (social) man against a

[109] "For MacKinnon, there is little evidence of women's presence or desires in this law - no hint of what women may want in (hetero)sexual relations" Heath and Naffine, above n 7, at 33.

[110] MacKinnon, above n 8.

[111] Cass Sunstein "Feminism and Legal Theory" (1998) 101 Harv L Rev 826 at 828.

(social) woman."[112] It is true that a (biological) man can be raped, "[but] in the process he is placed in the position of the woman...he is constituted as feminine in the act".[113] Hence, when rape is understood in its social context, it appears as a brutal manifestation of the basic characteristics of all gender relations in our society.[114] In other words, rape is not a discrete anti-social act, it is the most drastic epitome of inequality between men and women.[115] Therefore, (regulatory) legal standards such as 'relationship expectations' that permit rape to continue under certain circumstances perpetuate the social domination of women by men. This helps reveal the laws role in maintaining and reinforcing unequal distributions of power between men and women. 'Relationship expectations' serves male interests in retaining sexual access to 'his' woman, over securing a woman's fundamental right to bodily integrity. Accordingly, the law (through oppressive regulatory standards) embodies, serves, and institutionalises male power.[116]

D Why might rape be regulated?

If rape is the most drastic manifestation of women's oppression in society, how can the law justify regulating it rather than prohibiting it? According to the liberal story of law, the principal concern of the criminal law is to get the balance right between the freedom and the safety of each citizen.[117] Hence, rape law is caught between two (often conflicting) impulses: vindicating rights and identifying culpable behaviour. It follows that regulation of rape law is a way of avoiding imposing punishment where there is no culpability.[118] Accordingly, rape requires mens rea for a person's act to be criminal. Mens rea refers to what he actually understood at the time or to what a reasonable man should have understood under the circumstances.[119] As Mackinnon points out, the problem is that the injury of rape lies in the meaning of the act to its victims, but the standard for its criminality lies in the meaning of the same act to the assailants. Hence, the *crime* of rape is defined and adjudicated from the male point of view.[120]

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[112] Plaza, above n 6, at 186.

[113] Heath and Naffine, above n 7, at 40 citing Bell, above n 7.

[114] Igor Primorac "Radical Feminism on Rape" (The Hebrew University, Jerusalem, 1998) 497 at 500.

[115] At 500.

[116] MacKinnon, above n 8.

[117] Heath and Naffine, above n 7, at 31.

[118] See Chapter IV for a more detailed discussion on consent standards and moral culpability.

[119] MacKinnon "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence", above n 8, at 652.

[120] At 652.

Since there may not be a single, objective state of affairs, rapes will often involve an honest man and a violated women. The law tries to solve this dilemma through a standard of reasonableness. Again, the problem is that 'reasonableness' is measured from the male point of view.[121] For example, 'relationship expectations' deems it 'reasonable' to infer consent from a complainant's silence coupled with her consent to similar sexual activity in the past. However, 'relationship expectations' operates ideologically according to *male* expectations of sex in intimate relationships, rather than female expectations of having full control over access to her body. Therefore, the assessment of reasonableness here in the context of silence is one-sided: male sided. Hence, even where s 128A(1) claims to regulate rape to allow 'reasonable' mistakes, it does so according to a male standards of reasonableness.

Whether or not a contested interaction is considered rape ultimately comes down to whose meaning wins. For MacKinnon, the crucial point is that it is the man's perception, not the women's sense of injury, that takes precedence,[122] as was the case in *Christian.* Where a woman suffers a serious violation of her personhood due to unwanted penetration, but the man does not perceive his actions as criminal (i.e. because he has previously had sex with her and she didn't say "no"), the law will not perceive his actions as criminal, and her sense of injury will be erased. Accordingly, it is the man's perception of the woman's desires that determine whether she is deemed violated.[123] By regulating rape according to male perceptions of consent, women's violation is erased. When a rape prosecution fails to prove lack of consent, or the defence succeed in proving a reasonable belief in consent, she is considered not to have been injured at all.[124] And so, as Mackinnon points out, even where the law claims to regulate rape to identify culpability, it does so from a male point of view, which erases women's violation. Accordingly, the law operates ideologically to allow serious violations of women's self-ownership and sexual autonomy to continue. If the law were to take violations of women's self-ownership seriously, and hence take *rights* of self-ownership seriously, a different judicial approach to consent is needed. Taking self-

[121] At 653.

[122] MacKinnon "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence", above n 8, at 652; See also Emily Jackson "Catharine MacKinnon and Feminist Jurisprudence: A Critical Appraisal" (1992) 19 JL & Soc 195.

[123] MacKinnon "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence", above n 8, at 653.

[124] At 653.

ownership seriously and its implications on consent is the focus of Chapter IV. Chapter IV will also provide a more detailed discussion on moral culpability and consent.

CHAPTER IV: TAKING SELF-OWNERSHIP SERIOUSLY

Throughout this dissertation I have argued that the Supreme Court in *Christian* did not take women's self-ownership seriously. As a result, the Court created a legal standard ('relationship expectations') that allows a man's unilateral expectation of sex to override a woman's ability to claim full and exclusive control over her own body. Accordingly, through an oppressive regulatory legal standard, the law endorses the dominance of men over women. However, what if the law were to take self-ownership seriously?

The purpose of this chapter is to answer that very question. In this chapter I will detail what the law would look like if it were to take self-ownership seriously. Here, I note that the formalist temptation is to legislate. However, staying consistent with my methodology I will avoid this temptation. Critical feminist theorists are sceptical about using the law to institute change.[125] This is because legal doctrine will always be interpreted in a way that reflects the ideology of the interpreter.[126] As such, any new legislation on consent is bound to be interpreted to reflect similar gendered assumptions that informed the Supreme Court's decision in *Christian.* So, since the law will always be determined by ideology the goal is to expose and apply critical pressure to the ideological assumptions that inform legal interpretation. Exposing the gendered assumptions that inform judicial interpretation of consent is critical for change. It forces interpreters to look at their own embeddedness and examine the background assumptions that shaped his or her decision making. Once interpreters are aware of the background assumptions that determine judicial decisions, they have a moral responsibility to ensure those background assumptions do not reflect or endorse oppressive social conventions. In other words, through critical legal analysis we can attempt to persuade judges to rely on *sound* normative assumptions, rather than *problematic* ones, when interpreting the law.

In this context, that means relying on the background assumptions that informed the Court of Appeal's reasoning in *Christian,* as opposed to the Supreme Court's reasoning. This is because the Court of Appeal's decision reflects sound normative assumptions about sexual intimacy that are consistent with women's self-ownership. If judges were to rely on background assumptions consistent with self-ownership when interpreting the law, the

[125] "The law sees and treats women the way men see and treat women" MacKinnon "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence", above n 8, at 651; "legal reforms are not only slow but they may be injurious to women or they may simply hide or relocate the problem" Carol Smart *Feminism and the Power of Law* (London: Routledge, 1989) at 49.

[126] Russell, above n 11, at 12.

implications of this would be threefold: (1) we would arrive at an expressive consent standard as outlined by the Court of Appeal in *Christian*; (2) by requiring expressive consent individuals will become culpable where they otherwise would not have been culpable; (3) by requiring expressive consent judges will have to interpret the law in a way that is contrary to conventional (socio)sexual scripts. These three layers of implication are what inevitably follows if we want our law to take self-ownership seriously.

A Expressive consent

If the law is to take self-ownership seriously, then the law will arrive at a standard of expressive consent (first layer of implication). As mentioned above, if background normative assumptions determine the law, we should at least ensure that assumptions relied upon are *sound* normative assumptions. This means interpreters should follow the assumptions that informed the Court of Appeal's decision in *Christian*. The Court of Appeal relied upon sound normative assumptions about sexual intimacy and accordingly arrived at a legal standard consistent with women's self-ownership: *expressive consent*. Expressive consent requires an express manifestation of a person's *willingness* to engage in sexual activity by a suggestion of "yes", in either the person's words or conduct.[127]

Unlike the Supreme Court, the Court of Appeal took the demands of self-ownership seriously. The starting point for taking self-ownership seriously was a recognition of what should be the underlying principle of all sexual assault laws: the fundamental value of autonomy over one's own body. This right is so important because it "lies at the core of human dignity and autonomy."[128] The Court of Appeal recognised that the best way to protect this fundamental right of self-ownership is to place the onus on the initiator to obtain permission before engaging in sex, rather than presuming consent unless non-consent is communicated. As a result, the Court arrived at a standard of expressive consent. This requires consent to be actively expressed in either the complainant's words or conduct.[129] Ensuring a person's express manifestations of willingness to engage in sex are

[127] See Aya Gruber "Consent Confusion" (2016) 38 Cardozo L Rev 415l; Stephen Schulhofer "Consent: What It Means and Why It's Time to Require It" (2016) 47 U Pac L Rev 665; Anderson, above n 85; Jesse Wall "Justifying and Excusing Sex" Criminal Law and Philosophy 1-25 (forthcoming); Nicholas Little "From no means no to only yes means yes: The rational results of an affirmative consent standard in rape law" (2005) 53 Vand L Rev 1321.

[128] *Christian* (CA), above n 59, at [49].

[129] At [49]. See also at [60].

considered before proceeding to penetration is the best way to protect a person's fundamental right of having control over their own body:[130]

> As the Canadian Supreme Court noted in *R v Ewanchuk*, "[h]aving control over who touches one's body, and how, lies at the core of human dignity and autonomy." The requirement for active consent in s 128A is a logical corollary of that fundamental value.

Here the Court is acknowledging that a woman's ability to claim full self-ownership over her own body is the primary concern of sexual assault laws because that ability lies at the heart of human dignity and autonomy. If we respect that value, then the natural arrival point is a requirement for expressive consent. Placing the onus on the initiator to obtain permission before engaging in sex respects the demands of self-ownership. Self-ownership does not impose an obligation on a woman to say "no" to sex. Instead, self-ownership is so fundamental to our humanity and dignity that it requires we grant *permission* for others to cross our intimate borders.[131] This understanding of self-ownership views consent as something an agent has to perform that grants permission to do what would otherwise be impermissible. The most clear and logical way to show that permission to enter another's body has been unequivocally granted, is through a suggestion of "yes" in the complainant's words or conduct":[132]

> It follows that consent, however it might be expressed, must be actively expressed. Neither silence nor inactivity can provide any basis for an inference of consent. Thus, the law on consent does not impose an obligation on a complainant to say "no", either by words or conduct. Rather, there must be the suggestion of "yes" in the complainant's words or conduct

The Court of Appeal confirms that self-ownership does not impose an obligation on a complainant to express her *unwillingness* to engage in sex (i.e. say "no" to sex). The ability to exercise full control over one's body is independent of a person's relationship status and/or her ability to communicate a refusal to sexual activity. Instead, self-ownership requires permission to enter one's body be granted through a manifestation of a person's *willingness* to engage in sexual activity. Accordingly, the Court of Appeal presume non-consent to sex, unless a suggestion of "yes" is given in either the complainants words or conduct. This understanding of sexual intimacy views women not as silent objects of male

[130] At [49].

[131] McGregor, above n 1, at 196.

[132] *Christian* (CA), above n 59, at [49].

desire but as active agents with their own sexual desires and choices. This helps to destabilise rather than reinforce the dominant (hetero)sexual script. The dominant (hetero)sexual script envisages different forms of sexuality for men and women: the former active, assertive, even aggressive, the latter initially passive and subsequently responsive to male initiative.[133] Some pressure on the part of the man and some pretence of unwillingness or reluctant acquiesce on the part of the woman are often considered 'normal' preliminaries to sexual intercourse.[134] The Court of Appeal trouble this problematic sexual script by acknowledging women as active agents as opposed to passive objects in sexual contexts, and hence give greater weight to women's sexual autonomy and self-ownership. As a result of this understanding of sexual intimacy, the Court arrived at a legal standard of consent that is consistent with self-ownership. Expressive consent hands women the keys to her own body. A man can only legally enter her body if she grants him permission to do so via an expression of her willingness to engage in sex. Accordingly, expressive consent best protects the value that rape law should be designed to protect: the fundamental value of having control over who touches one's body, and how. Hence, if background assumptions are going to determine the law, we must require interpreters to rely on assumptions about sexual intimacy that are consistent with this fundamental value of having control over one's own body. It follows that if interpreters do rely on assumptions about sexual intimacy consistent with self-ownership, they will arrive at a standard of expressive consent (just as the Court of Appeal did). Hence, expressive consent is the first layer of implication that follows from taking self-ownership seriously.

B Moral culpability

If self-ownership is taken seriously, it follows that interpreters arrive at a standard of expressive consent (first layer of implication). A natural corollary of requiring expressive consent, is that those who proceed to have sex in the absence of *words or conduct* indicating "yes" will be punishable. This means that some people will be punishable where they otherwise would not have been (second layer of implication). Accordingly, expressive consent encompasses varying degrees of culpability, including those who may have *genuinely* believed silence was an indication of a person's willingness to engage in sex. Since our law does not yet have the means of calibrating degrees of culpability, all culpable actors will be held to the same legal standard. I admit that subjecting someone who *genuinely* mistakes silence as consent to the same standard of punishment as someone who

[133] Primorac, above n 114, at 498.

[134] At 498.

engaged in sex *knowing* the other person was not consenting, is a somewhat uncomfortable conclusion. However, I argue that this somewhat uncomfortable conclusion is nevertheless the *right* conclusion for two main reasons: (1) without expressive consent the law is unable to capture the culpability of defendants like *Christian*, who proceed to have sex without a consideration of another person's expression of willingness to engage in sex; (2) Without expressive consent the law permits people to rely on oppressive social norms to justify infringing someone's fundamental right of bodily integrity – a right that speaks to the very core of human dignity and autonomy.

1 Expressive consent and strict liability

One of the main concerns with expressive consent standards regards the implications it has on the culpability of defendants. Some commentators argue that transitioning to expressive consent may punish people who are not morally culpable, and thus the law risks having a rape without a rapist.[135] Ordinarily, the imposition of criminal liability and punishment requires mens rea. The criminal law typically recognizes that persons who make reasonable mistakes of fact that rebut mens rea are not subject to punishment.[136] So, where a man can prove that he had a reasonable but mistaken belief in consent, they will not be held morally culpable for sexual violation and will not be subject to punishment. However, transitioning to expressive consent reduces a person's ability to claim a reasonable but mistaken belief in consent. Since consent will only be present if there are words or conduct indicating "yes", a person can only argue they had a reasonable belief in consent if that belief was based upon words or conduct that indicated "yes". Ferzan claims that this could lead to substantively strict liability.[137] This is because expressive consent requirements disallow proof that the defendant honestly believed consent was present. Hence the requisite mens rea is absent and thus the law may condemn someone who did not do anything morally culpable.[138] For example, a man may genuinely believe silence in the context of an intimate relationship equates to consent. However, since he will not be able to point to *words or conduct* indicating a person's willingness to engage in sex, he will liable for rape despite not doing anything 'morally culpable' (because he did not *know* she was not consenting).

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[135] See Douglas Husak and George Thomas III "Rapes without rapists: Consent and reasonable mistake" (2001) 11 *Philosophical issues* 86; and Kimberly Ferzan "Consent, Culpability, and the Law of Rape" (2015) 13 *Ohio St J Crim L* 397.

[136] Husak Thomas, above n 135, at 87.

[137] Ferzan, above n 135, at 399.

[138] At 417.

Nevertheless, I argue that there is mens rea in acting without concern for a person's willingness to engage in sex. Without expressive consent the law is unable to capture this type of culpability.

2 Capturing culpability

Without expressive consent the law is unable to capture the culpability of defendants who proceed to have sex with someone without a consideration of that person's expressions of *willingness* to engage in sex. Proceeding to have sex without considering another person's expression of willingness to engage in sexual activity is a morally wrong act and should be punished.[139] Without a requirement for expressive consent, the law is unable to capture the moral culpability of these defendants, as was this case in *Christian.* The Supreme Court allowed *Christian's* 'reasonable' belief in consent to be built upon an initial rape, and then subsequent sexual encounters which involved *Christian* using his position of power to groom the complainant into submitting to sex without complaint. At no stage did his deliberation over the use of force on her body (to achieve penetration) include a consideration of her willingness to engage in consent. This is a morally wrong act and should be punished.[140] Without expressive consent to capture this type of culpability, the law is (in effect) affirmatively rewarding men with acquittals for not comprehending the woman's point of view on sexual encounters.[141] As such, the law continues to disregard women's perspectives in sexual matters. If we want the law to capture the culpability of defendant's who demonstrate complete disregard for a person's expressions of willingness to engage in sex, then a standard of expressive consent is needed. Expressive consent would have resulted in *Christian* being found guilty on both representative rape charges because at no point did the complainants *words or conduct* express that she wanted sex. Without expressive consent, the likes of *Christian* can continue to exploit and sexually groom vulnerable victims without fear of legal sanction. Hence, the law fails to protect the interests it is supposedly designed to protect.

[139] Wall, above n 127.

[140] Wall, above n 127.

[141] MacKinnon "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence", above n 8, at 654.

3 Combatting oppressive social norms

Without expressive consent the law also permits people to rely on oppressive social norms to justify infringing someone's fundamental right to bodily integrity – a right that speaks to the very core of human dignity and autonomy. As such the law reinforces rather than destabilises an oppressive (socio)sexual script, which accords to male standards of sexuality. A man who proceeds to have sex when a complainant lies completely silent and still (like in *Christian*), is relying on *his* unilateral expectation of ongoing sex in a relationship. This person may still *genuinely* believe that the silent and still woman is consenting. This genuine belief, like all other sexual behaviour, is informed by normative gendered assumptions about sexual intimacy that inform our sexual script (i.e. in an intimate relationship the absence of a "no" means "yes").[142] However, this normative assumption, which forms part of our sexual script, is oppressive towards women because it prioritises a man's sexual expectations over a woman's expectations of having full control over access to her body. In allowing a reasonable belief in consent to be based on a unilateral expectation of ongoing sex in a relationship (rather than an expression of a person's willingness to engage in sex), the law is reinforcing this oppressive sexual script. It is (in effect) rewarding men with acquittals for relying on oppressive social norms as a justification for infringing another person's fundamental rights. It follows, that to prevent perpetuating oppressive sexual norms, a standard of expressive consent is required. Without expressive consent, the law allows people to justify non-consensual sex by simply pointing to an oppressive normative standard that informed their so called 'reasonable' belief. Measuring consent from the socially reasonable (meaning objective man's) point of view, is to adopt the point of view which creates the problem.[143] Men are socially conditioned to buy into an oppressive (socio)sexual script, so to assesses genuineness from his point of view is to adopt the point of view which creates the problem.[144] Therefore, the standard of 'reasonableness' in rape law only perpetuates an oppressive sexual script. Having a legal standard that reinforces oppressive social norms is a more uncomfortable

[142] See Kathryn Ryan "The relationship between rape myths and sexual scripts: The social construction of rape" (2011) 65 Sex Roles 774; Stevi Jackson "The social context of rape: Sexual scripts and motivation" (1978) 1 Women Stud Int Forum 27; Terry Humphreys "Perceptions of sexual consent: The impact of relationship history and gender" (2007) 44 J Sex Res 307; Louise Ellison and Vanessa Munro. "Of 'normal sex'and 'real rape': Exploring the use of socio-sexual scripts in (mock) jury deliberation" (2009) 18 Soc & Leg Stud 291.

[143] MacKinnon "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence", above n 8, at 654.

[144] At 654.

conclusion than punishing someone for acting in the absence of expressive consent, especially considering expressions of consent and non-consent are not difficult to obtain.

An unfortunate corollary of expressive consent is that a person who *genuinely* mistakes silence and stillness as consent will be subject to the same standard of punishment as a man who engages in sex *knowing* the complainant is not consenting. However, this is not to say the man with the genuine belief in not culpable at all. It also highlights a fault in the current state of the law in failing to provide the means of calibrating degrees of culpability. Until the law provides a mechanism to respond to varying degrees of culpability, conflating culpability is the inevitable (albeit slightly unfortunate) implication of requiring expressive consent, and requiring expressive consent is the inevitable implication of taking self-ownership seriously.

C Troubling the sexual script

In taking self-ownership seriously, we arrive at a standard of expressive consent (first layer of implication). A natural corollary of expressive consent is that a person who proceeds to sex in the absence of expressive consent will be punishable (second layer of implication). This means a person cannot rely solely on (oppressive) normative standards that form part of a conventional (socio)sexual script to justify penetration. Accordingly, judges must interpret consent in a way that is contrary to 'conventional' (socio)sexual scripts (third layer of implication). This is a necessary and important implication because judges *should* take moral responsibility for ensuring his or her application of the law does not reflect or endorse oppressive social conventions. 'Conventional' sexual scripts are troublingly gendered and oppressive toward women.[145] Therefore, interpreting consent in a way that contradicts an oppressive sexual script will help to destabilise, rather than reinforce, unequal heterosexual relations.

It is judges who have the ultimate power in determining the meaning of our law. Hence, they must take moral leadership to ensure that the law reflects values society should aspire

[145] See Aya Gruber "Rape, Feminism, and the War on Crime" (2009) 84 Wash L Rev 581; MacKinnon "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence", above n 8; Diane Richardson "Sexuality and male dominance" in Diane Richardson and Victoria Robinson and Jo Campling (eds) *Introducing women's studies: feminist theory and practice* (Macmillan International Higher Education, 1993) 74.

to.[146] This is not to say that the criminal law is necessarily an appropriate or effective tool for social change. However, through legal interpretation, judges have the ability to make powerful normative statements about how things *ought* to be. As such, judges can interpret the meaning of consent by reference to what our sexual scripts *ought* to look like (not merely what they are). This should be a sexual script that respects the fundamental right of self-ownership. Hence, our sexual scripts should be built on a requirement of mutual communication and negotiation because that is consistent with the rights of self-ownership. It also ensures that people treat their sexual partners with respect and humanity.[147] Even critics often concede the wisdom of expressive consent and agree that best sexual practices involve clear communication.[148]

Expressive consent does require a higher bar for consent than that set by traditional sexual consent scripts (which do not generally require permission for sexual activity be obtained in words or conduct). However, this does not mean expressive consent imposes an onerous duty on a person engaged in sexual activity. Requiring an initiator obtain an expression of consent (by either words or conduct) before engaging in sex hardly sets an exacting standard of 'reasonable' conduct in sexual matters. After all, where a person lies completely silent and still, showing no encouragement or enthusiasm toward sex, it is only too simple to ask her. Communication about consent does not have to involve legal documents or formal terms; it can be as simple as asking, "Do you want me to __?" "Are you ready?" or "Do you like this?" While this does set a higher bar than that imposed by the conventional sexual consent script, it hardly sets demanding requirements on a man; and there is little on the other side of the ledger that could warrant a lower threshold.[149] When the law requires these types of behavioural practices in sexual activity (via a requirement for expressive consent), it helps to trouble a dominant and oppressive sexual script.

I am not claiming that a requirement of expressive consent will stamp out sexual ambiguity. Sexual consent scripts will always involve ambiguity and this will be reflected in any law

[146] McGregor, above n 1; Gruber, above n 127, at 443 (discusses the aspirational argument for affirmative consent).

[147] Anderson, above n 85.

[148] See Cathy Young, *Campus Rape: The Problem with 'Yes Means Yes'*, TIME (Aug. 29, 2014), http://time.com/3222176/campus-rape-the-problem-with-yes-means-yes cited in Gruber, above n 127, at 445.

[149] Ewing, above n 55, at 363.

that governs them.[150] Nor am I claiming that a requirement of expressive consent will immediately flip the dominant (hetero)sexual script. However, I do claim that a requirement for expressive consent *troubles* the conventional sexual script as opposed to *reinforcing* it (as the Supreme Court's decision in *Christian* does). By interpreting consent in sexual activity as requiring express words or conduct suggesting "yes" to sex, judges are making a powerful normative statement about how persons involved in sexual activity *ought* to behave. In doing so, judges are destabilising or troubling the conventional sexual consent script. This is important because our conventional sexual consent script is inherently gendered and oppressive toward women.[151] Therefore, as an implication of requiring expressive consent, judges will have to interpret the law contrary to conventional sexual scripts. However, this is both necessary and important because conventional sexual scripts are harmful towards women so should be both challenged and troubled.

D Summary

If we go back to the central inquiry of this chapter ("what if the law were to take self-ownership seriously?"), we find that the answer involves three layers of implication. In taking self-ownership seriously, interpreters will rely on normative assumptions about sexual intimacy that are *consistent* with self-ownership. Hence, interpreters will arrive at a standard of expressive consent (first layer of implication). A natural corollary of expressive consent is that any person who proceeds to sex in the absence of expressive consent will be punishable, even those who *genuinely* mistake silence for consent (second layer of implication). Accordingly, judges will have to interpret consent in a way that is contrary to 'conventional' (socio)sexual scripts (third layer of implication). This is important because conventional sexual scripts are harmful towards women so should be troubled. In sum, the aforementioned implications outline what our law would look like if it we to take rights of self-ownership *seriously*.

[150] Even with a soft affirmative consent standard, there will always be an element of ambiguity over what type sexual *conduct* is sufficient to constitute consent. See Gruber, above n 127, at 443.

[151] Ryan, above n 142; Jackson, above n 142; Humphreys, above n 142; Ellison and Munro, above n 142.

CONCLUSION

This dissertation has demonstrated that contemporary rape law operates ideologically to the detriment of women. The Supreme Court's decision in *Christian* was influenced by a set of problematic gendered assumptions about sexual relationships and their limiting effect on women's self-ownership. Accordingly, the Court created a legal standard that denies women the ability to claim full control over their own bodies in the context of a pre-existing sexual relationship. The level of legal protection granted for women's self-ownership under s 128A(1) is regulated according to male standards of consent and reasonableness. Regulating rape according to male standards of consent and reasonableness perpetuates the social domination of women by men, which occurs in part through sexual practices.[152] It also reinforces, rather than troubles, an oppressive sexual script which is known to be harmful toward women.[153] In this way, the law embodies, serves, and institutionalises male power.[154] If we are to move toward a legal system that destabilises, rather than reinforces, oppressive social scripts and structural inequalities, then exposing and critically challenging judicial decisions and the normative assumptions that underlie them is crucial for change. After all, if ideology is law, then it is ideology we must challenge. Without applying this critical pressure we allow background gendered ideology to shape the meaning of the law in harmful and problematic ways.

[152] MacKinnon, above n 8.

[153] Gruber, above n 145; MacKinnon "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence", above n 8; Richardson, above n 145.

[154] MacKinnon, above n 8.

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