MUCH REPENTED: CONSENT TO DNA SAMPLING

JEREMY GANS*

INTRODUCTION: ALICE SPRINGS, SEPTEMBER 1998

At around 6am on a Thursday morning early in September 1998, four occupants of the Grape Room at Toddy's Backpackers were woken in turn by noises from their roommate's bed: female moans and a male voice saying 'shush'. The first three simply listened, embarrassed and annoyed, but the fourth switched on the light and yelled: 'Gwen†, do you have any idea who the fuck you're in bed with?'. The English tourist's only response was to say 'oh my God, oh my God', before curling into a ball, fast asleep. Told to 'Get the fuck out!', the naked man in Gwen's bed stood, dressed and left the room, whispering 'I'm sorry'.[1] When the police arrived, they were confronted by the question: had Gwen consented to sex with the man, or had her roommates lain listening – one of them for around 20 minutes – to a rape?

Before the investigation was over, a second question of consent arose, when the police asked 19-year old Steven Braedon to place a cotton bud in his mouth and rub it over his cheeks and gums. He was given a form outlining the procedure's purpose: to obtain his DNA profile as potential evidence in the rape investigation. The teenager swabbed his mouth and, though he could not read, signed the form.[2] When DNA from Braedon's saliva was found to match DNA from semen recovered from Gwen's body,[3] the police knew that they had found the man from the Grape Room. The Northern Territory Supreme Court would later be asked: did the police obtain his DNA lawfully?

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† In this article, pseudonyms are used in place of complainants' actual names.

1 Transcript of proceedings, No 9823567, *Police v Steven Jerry Braedon*, (Northern Territory of Australia Court of Summary Jurisdiction, Ms C Deland SM, 7 February 2000 to 28 April 2000) ('Transcript, Braedon committal') 14-15, 252-253.

2 Transcript of proceedings, SCC No 9823567, *The Queen v Steven Jerry Braedon* (Voir Dire) (The Supreme Court of the Northern Territory, Martin CJ, 17 August 2000 to 31 August 2000), ('Transcript, Braedon voir dire') 10-13, 42-44, 55-57.

3 Transcript, Braedon committal, 238-244.

DNA identification, first used in criminal justice over two decades ago, now plays a routine role in the investigation of serious crimes and an increasing role in the investigation of routine crimes in Australia. However, despite the passage of detailed statutes across Australia giving the police the authority to take DNA samples from suspects and offenders,[4] the majority of investigative DNA sampling – in NSW, around 95 per cent of suspect and offender sampling, as well as nearly 100 per cent of other sampling[5] – is instead done on the ostensible basis that the person sampled consented to that sampling.

Recently, the NSW Ombudsman labelled concerns about the validity of many of these consents 'well founded', observing that stated reasons for consenting ranged from a wish to cooperate to a desire to appear innocent, a belief that there was no real choice, and threats of force or lengthy detention.[6] Despite this, the Ombudsman favoured the continuing use of consensual DNA sampling of suspects, asserting that it 'gives suspects a sense of control'.[7] By contrast, other reviews of DNA sampling have recommended abolishing the regime for consensual sampling in some circumstances.[8] Earlier this year, South Australia

4 Cth: *Crimes Act 1914* (Cth) pt 1D, div 4, 5, 6A; ACT: *Crimes (Forensic Procedures) Act 2000* (ACT) pt 2.4, 2.5, 2.7, applicable in Norfolk Island through the *Crimes (Forensic Procedures) Act 2002* (ACT); NSW: *Crimes (Forensic Procedures) Act 2000* (NSW) pt 4, 5, 7; NT: *Police Administration Act 1978* (NT) ss 145, 145A (see also *Prisons (Correctional Services) Act 1980* (NT) s 95B); Qld: *Police Powers & Responsibilities Act 2000* (Qld) ch 17, pt 3 & pt 5, div 3; SA: *Criminal Law (Forensic Procedures) Act 2007* (SA) pt 2, div 2 & 3; Tas: *Forensic Procedures Act 2000* (Tas) pt 2, div 3, 4 & 5 & pt 3; Vic: *Crimes Act 1958* (Vic) ss 464R-464W, 464ZF-464ZFAAA; WA: *Criminal Investigation (Identifying People) Act 2002* (WA) ss 42-46, 51. Except where otherwise indicated, all further references to a jurisdiction's legislation are to these statutes.

5 NSW Ombudsman, *DNA sampling and other forensic procedures conducted on suspects and volunteers under the Crimes (Forensic Procedures) Act 2000* (2006) ('NSW Ombudsman Suspects Report') 88; NSW Ombudsman, *The Forensic DNA Sampling of Serious Indictable Offenders under Part 7 of the Crimes (Forensic Procedures) Act 2000* (2004) ('NSW Ombudsman Offenders Report') 93. All other statutory sampling in NSW is labelled 'volunteer' sampling, which requires the volunteer's consent, except in the case of an 'incapable' volunteer: see s 76, *Crimes (Forensic Procedures) Act 2000* (NSW).

6 NSW Ombudsman Suspects Report, above n 5, 96. It also noted that consensual sampling was difficult to audit and that police did not seem to understand the relevant law: at 88-89, 96.

7 Ibid 98. Instead, it recommended better police training, plain language versions of information given to suspects and abolishing a rule that encouraged police to use a more painful sampling method on people who refused consent: recommendations 3, 10, 19.

8 Commonwealth, *Review of the Crimes (Forensic Procedures) Act 2000*, Parl Paper No 1118 (2002) recommendation 25; Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia*, Report No 96 (2003), recommendation 41-1(a); NSW Ombudsman Offenders Report, recommendation 21.

became the first Australian jurisdiction to repeal its statutory authorisation of the consensual DNA sampling of suspects.[9]

Australian DNA statutes set out procedures that must accompany consent if it is to authorise DNA sampling,[10] but none define consent.[11] Australian judicial decisions on consent to DNA sampling or other bodily procedures are rare, given the courts' power to admit evidence obtained without valid consent in the public interest.[12] The extensive Australian case law on confessions, where 'voluntariness' is a prerequisite for admissibility, centres on the issues of self-incrimination and reliability, which have no application to DNA evidence.[13] Consent is the subject of considerable jurisprudence in other parts of the law, but the contexts often involve property or commerce (eg, search warrants, contract law) and associated concepts (eg, third party consent, unconscionability) that have no analogue in DNA sampling.[14]

This article looks for an understanding of consent to DNA sampling in an analogy with rape law, which routinely engages the issue of consent to a different bodily interaction: sex. It is not suggested that the position of those asked for a DNA sample is equivalent to that of rape complainants. None of the criminal defendants discussed in this article faced pain, shame or a second victimisation in court. While doubts are expressed about their consent to DNA sampling, the resulting intrusion they faced was trivial compared to those asserted by the rape complainants in their cases. Moreover, the police conduct criticised below is just a shadow of the violence of rapists. Rather, the analogy drawn concerns the underlying structure of the law of consent as it is applied to bodily interactions. It will be argued that, whether the bodily interaction in question is sex or DNA sampling, the law systematically favours the resolution of disputes about consent in favour of the alleged recipient of consent over the alleged giver.

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9 *Criminal Law (Forensic Procedures) Act 2007* (SA), s 14. The remaining jurisdictions expressly authorise consensual DNA sampling of suspects: Cth: div 3; ACT & NI: Part 2.3; NSW: Part 3; NT: s 145(2)(a); Tas: pt 2, div 2; Vic: s 464R(2)(a); WA: s 40(1), s 51(1). All jurisdictions except South Australia (s 7(2)(a)) and Queensland (which has no provisions governing volunteers) also permit the DNA sampling of suspects under general provisions permitting the consensual DNA sampling of all capable adults: Cth: div 6B; ACT & NI: pt 2.8; NSW: pt 8; NT: s 145B; Tas: pt 4; Vic: s 464ZGB; WA: pt 4, div 2. Query whether the common law also authorises the consensual sampling of all persons, including suspects, in all these jurisdictions, including South Australia: see *DPP v Boyce* [2005] IE CCA 143, making such a finding in relation to the *Criminal Justice (Forensic Examinations) Act 1990* (Ireland); cf *R v T* [1999] 2 NZLR 602, where a prosecution argument along these lines failed only because of express language in the *Criminal Investigations (Blood Samples) Act 1995* (NZ).

10 Cth: ss 23WF, 23XWG & 23XWR; ACT & NI: ss 21, 69, 80; NSW: ss 9, 67, 75F, 77; NT: s 145B(2); Qld: Chapter 17, Part 2; SA: ss 8, 12; Tas: ss 8, 10, 29 & 30; Vic: s 464S(1), 464ZGB(3); WA: ss 19, 25, 26, 37, 38, 39.

11 On the concept of 'valid consent', see Alan Wertheimer, *Consent to Sexual Relations* (2003) 121-124.

12 *Bunning v Cross* (1978) 141 CLR 54; Uniform Evidence Legislation, s 138. See David Dixon et al, 'Consent and the Legal Regulation of Policing' (1990) 17 *Journal of Law & Society* 345, for broader reasons why consensual procedures are at odds with legal regulation and accountability.

13 See Jeremy Gans and Andrew Palmer, *Australian Principles of Evidence* (2004) 467-510.

14 See Peter Young, *The Law of Consent* (1986). For the extensive US jurisprudence on third party consent to property searches, see Wayne LaFave, *Search & Seizure: A treatise on the Fourth Amendment* (3rd ed, 1996) 713-826.

The study will examine in detail all the decisions made about consent in the three rape trials that produced the three major published judgments in Australia on consent to DNA sampling, examining the judgments themselves and the full transcripts of each proceeding. This methodology has been adopted for three reasons. First, by juxtaposing cases where the same person – the rape defendant – is both the alleged giver of consent to one bodily interaction and the alleged recipient of consent to another, the analysis can identify approaches (and biases) that flow from the law of consent itself, rather than biases for or against rape defendants. Second, the methodology allows an assessment of the potential for the two disputes about consent to interact. As will be seen below, this approach yields an important but unexpected finding: that the way the law resolves disputes about consensual DNA sampling may add weight to the defence's case on the substantive issue of guilt or innocence of rape. Finally, the twin disputes in the three cases each illuminate the role of one of the three parties to any dispute about consent: the court, the alleged giver of consent and the alleged recipient. It is the combined impact of the law's application to each of these parties that will generate the article's main hypothesis. The three cases – and the role of these parties – will be addressed in this article in turn, with the discussion moving between DNA sampling and rape as analogous issues are observed.

This article's purpose, like many similar studies of rape trial decision-making, is aimed at ensuring that law reform debates are properly informed by current law and practice. The well-known problems of rape law are multifaceted, emerging from a bundle of legal, procedural and practical issues that together produce a lopsided result. This article will argue that consent to DNA sampling is similarly problematic and that this is no coincidence. However, it does not follow that the law of consensual DNA sampling should be subjected to wide-reaching reforms analogous to the rape law reform movement. There is a fundamental difference between DNA sampling and sex: non-consensual sex is always anathema, but the law empowers non-consensual DNA sampling in many circumstances. So, whereas rape law reformers must attempt to unravel the Gordian knot that is the issue of consent to sex, the law of DNA sampling can be reformed by a simple cut: barring consensual DNA sampling when the police's purpose is to confirm or negate the involvement of the person sampled in a criminal offence. The conclusion will canvass the application of this reform to the three cases in the study.

II PROVING CONSENT: ILPARPA CAMP, JANUARY 1998

Many bodily interactions take place in private, a fact that creates a problem for courts asked to resolve disputes about consent. The apparent rape at Toddy's Backpackers was unusual in that it was witnessed by several people, but not its apparent victim. However, eight months earlier, a dispute about consent to DNA sampling arose while Alice Springs police were investigating a more typical rape allegation. Sometime after 9pm on a Wednesday evening in late January, Amanda was woken by a man she didn't recognise. She told the police that he put his hand over her mouth, removed her underwear and, saying 'I've got you

now', raped her. The incident lasted just minutes. On that stifling night, Amanda had left her relatives' crowded house for the peace and fresh air of a mattress in a nearby dirt yard.[15] So, there were just two witnesses to the incident.

A DNA match soon revealed that the other witness was Robert Mellors, a relative of Amanda's. At his rape trial two years later, Mellors' lawyer asked the court to throw out the DNA evidence implicating his client on the ground that it was taken from his mouth without his consent.[16] To obtain Mellors' DNA, the police had eschewed Mellors' community, a town camp on the outskirts of Alice Springs,[17] in favour of the privacy and air-conditioning of the Alice Springs police station.[18] So, again, there were no independent witnesses.

How do the courts resolve disputes about consent where the only witnesses to a disputed bodily contact are the parties to it? The discussion below will address two factual findings that courts can make about such disputes: findings that a party is lying and findings about what actually happened.

A Finding Lies

The investigation of Amanda's rape was over within 24 hours. When Alice Springs police arrived at Ilparpa camp at 9.30pm, they found a group of people gathered in front of an ambulance and a woman sitting on the ground, washing her crotch.[19] After Detective Senior Constables Wayne Brayshaw and Paula Dooley-McDonnell arrived at midnight, they spoke to members of Amanda's household and visited the hospital where she was being forensically examined.[20] The next afternoon, they were told that a doctor had phoned the police to say that a resident of Ilparpa camp had named Mellors as the rapist.[21] Returning to the camp at 3.30pm, they spoke briefly to the resident and Amanda, and then approached the teenager.[22]

According to Mellors, the three of them first spoke about an unpaid fine, before the detectives asked him to come to the station for 'a little talk'.[23] However, the detectives testified that there was no preliminary conversation; Mellors just agreed to come with them to assist in the rape investigation. The trio

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15 Transcript of Proceedings, SCC No 9809500, *The Queen v Robert Samuel Mellors* (The Supreme Court of Northern Territory, Thomas J, 30 May 2000 to 4 June 2000) ('Transcript, Mellors trial') 131-134.

16 Transcript, Mellors trial, 3, 104-113.

17 Ilparpa camp is one of around twenty 'town camps' scattered throughout and around Alice Springs that offer social support based on familial, linguistic or geographic ties, but suffer from poor infrastructure, overcrowding and alcohol abuse: Department of Local Government, Housing and Sport, *About Town Camps,* Northern Territory Government <http://www.towncamps.nt.gov.au/about_town_camps> at 31 October 2007. Ilparpa, located at the town's southern outskirts, consists of roughly a dozen buildings housing about sixty permanent and (up to) twenty temporary residents: Denise Foster et al, *Population and mobility in the town camps of Alice Springs* (2005) Desert Knowledge CRC 23 <http://www.desertknowledgecrc.com.au/publications/downloads/report-and-cover-for-web.pdf> at 31 October 2007.

18 Transcript, Mellors trial, 8, 33.

19 Ibid 188.

20 Ibid 6-7.

21 Ibid 20.

22 Ibid 17.

23 Ibid 66-67, 74-75.

drove away from Ilparpa camp just after 4pm and returned less than two hours later.[24] Mellors was taken to an upstairs office in the Alice Springs police station. He described his and others' movements the previous evening, up to when 'I reckon around about 9pm I went to bed', while Brayshaw typed his statement on a computer.[25]

Dooley-McDonnell left the room periodically to attend to administrative tasks. She was absent during the crucial period around 5pm when Mellors' and Brayshaw's accounts diverged.[26] Brayshaw testified that, after detailing his movements, Mellors readily agreed to provide a saliva swab and to sign his statement, which concluded:

> I'm happy to give police a photograph of myself. I am also happy to provide a mouth swab for a DNA sample to police. I am aware that this may be used to check if I raped [Amanda]. I've provided this sample to Detective Brayshaw at 5.05pm.[27]

However, Mellors testified that he initially refused to do either, only agreeing when the detective accused him of lying, predicted that he would go to prison and threatened to put him in a cell.[28]

So, the factual dispute was between two scenarios: one was that Mellors gave his saliva willingly *and* was now falsely claiming otherwise; the other was that Mellors did not want to give his sample *and* Brayshaw was lying. In both scenarios, the parts that are most plausible are the subsequent false claims. Mellors had a motive to say that he only gave his DNA in response to threats, as otherwise the DNA evidence against him would undoubtedly be admissible in his trial for Amanda's rape. Likewise, Brayshaw had a motive to falsely deny making those threats, as to admit them would threaten the prosecution's case against Mellors and (possibly) expose Brayshaw to professional discipline.

On the other hand, the two accounts of the swabbing itself differ in their apparent plausibility. Brayshaw's behaviour, as alleged by Mellors, was unethical but nevertheless rational. Threatening Mellors was an efficient way to further the rape investigation. It carried little risk of rebounding on Brayshaw, given the absence of witnesses and that his alleged tactics were limited to mere words. By contrast, Brayshaw's depiction of Mellors' willingness to give his saliva to the police on a purely voluntary basis was a seemingly irrational instance of good citizenship on the part of the teenager. As the DNA match itself proved, Mellors' statement had a vital omission: that he had ejaculated in Amanda's vagina the previous evening. Why would he willingly give the police the only evidence that could prove that?[29]

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24 Transcript, Mellors trial, 24, 30, 33, 45.

25 Ibid 168-172.

26 Ibid 34-37.

27 Ibid 9-10.

28 Ibid 68-69.

29 Cf *Higgins v United States* 209 F 2d 819, 820 (1954). This case held that because 'no sane man who denies his guilt would actually be willing that policeman search his room for contraband which is certain to be discovered', no ostensible consent should be accepted absent 'some extraordinary circumstance, such as ignorance that contraband is present': at 820.

The question of whether or not Mellors raped Amanda also involved two conflicting factual scenarios. However, as with most disputes about sexual contact, rationality did not feature in either. There was no rational explanation for why a teenager would rape a distant relative who he referred to as 'aunty'.[30] Likewise, there would seem to be no reason why a woman in her forties would willingly participate in fleeting semi-public sex with someone who had just woken her.

Nevertheless, both sides at Mellors' rape trial tried to portray the events that night as plausible. The prosecution relied on what appeared to be the only time that Amanda and Mellors ever spoke privately. Several hours before the alleged rape, Amanda called her husband on a public phone as Mellors sat nearby. After the phone call, the two had a very brief conversation: he asked her for sex and she called him a 'wee-eye' (uninitiated male). The prosecutor suggested that the rejection and taunt made Mellors angry enough to rape her.[31] The defence argued that Amanda's unhappiness at being at Ilparpa camp – her relatives were fighting and she had decided that day to go back home to her husband – as well as intoxication and the attentions of a young man, may have led her to agree to casual sex that evening.[32] However, these arguments were by the by.

Participants in rape trials often observe that the central question hanging over such trials is not about the plausibility of the accounts of the disputed event itself, but rather the motive behind the subsequent allegation.[33] Mellors' denial of the rape scenario is unremarkable, no matter what happened that night. Amanda's allegation is readily explainable if it was true. The hard question is: if the sex was consensual, as Mellors claimed, why would she later tell the police that he raped her? Australia's courts regard this question as so difficult that they ban it from being voiced by prosecutors or judges in rape trials, for fear that it would undermine the prosecution's burden of proof beyond reasonable doubt.[34] Of course, no-one seriously thinks that this silence will be reflected in the jury room.[35]

In Mellors' trial, his lawyer chose to take on the question directly, putting his suggested answer to Amanda in cross-examination:

> I think he wasn't very gallant and had sex and then left and you felt pretty bad about that? *It does happen, sorry.*
>
> …
>
> 'Just those two came running out and everyone else was too busy doing their own thing. They came to see if I was all right, then they decided to ring the police or the ambulance. I said thing just to tell them what happened and they carried away and rang the police and the ambulance.'? --- *Yeah.*
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> …

30 Transcript, Mellors trial, 171.
31 Ibid 202-203.
32 Ibid 147, 152.
33 Jeremy Gans, '"Why Would I Be Lying?": The High Court in *Palmer v R* Confronts an Argument that may Benefit Sexual Assault Complainants' (1997) 19 *Sydney Law Review* 568.
34 *Palmer v The Queen* (1998) 193 CLR 1.
35 Cf *R v Gell* [2006] VSCA 255, [9]. Here the jury voiced the question to an embarrassed court.

> And then that's when the policeman was there and started asking you what happened and you felt shame of having sex---? --- *I was (inaudible)* ---
>
> ---with this young bloke, didn't you? You felt this shame? --- *I never had sex with any young bloke.*
>
> And that's when you brought up the word 'rape'. That's when you – that's how it came about, didn't it? --- *I said I was attacked.*[36]

In other words, the suggestion was that Amanda falsely alleged rape as a way of preventing her relatives from learning that she had consented to casual sex with Mellors.

There is no doubt that, even today, women (much more than men) risk criticism if they have casual sex. Mellors' lawyer's argument depends on a commonly claimed corollary of this social double standard: that women who consent to casual sex might deny that they consented. In *Don Juan*, Byron famously portrayed a woman denying consent *while* consenting to sex with her seducer:

> A little still she strove, and much repented,
>
> And whispering 'I will ne'er consent' – consented.[37]

Mellors' lawyer's story skipped the doublethink; instead, he simply suggested that Amanda repented soon after the sex was over. The significance of this argument is that it supplies a generic answer to the otherwise difficult question of why someone would falsely accuse a consensual sex partner of rape.

In earlier arguing that Mellors consented to giving his DNA to the police, the prosecution likewise relied on a generic argument about criminals to bolster its otherwise surprising claim that Mellors freely volunteered the very evidence that linked him to the alleged rape:

> In hindsight, people wish to retract that they volunteered bodily samples. Why they volunteered in the first place doesn't really have to be inquired into, because we all know that there can be a lot of motivations from people. There can be – well, perhaps the police are bluffing me – and perhaps that's an interpretation of what he says, 'that this will show whether you had sex with [Amanda]', 'well I think they're bluffing me'. 'But I'll call their bluff, I'll give this body sample, because hopefully nothing more will come of it.' And there can be many conscious and unconscious motivations for voluntary matters.[38]

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36 Transcript, Mellors trial, 153-156.

37 Lord Byron, *Don Juan*, canto 1, stanza 117 at <http://www.geocities.com/~bblair/canto1.htm> at 31 October 2007.

38 Transcript, Mellors trial, 95; cf *People v James*, 561 P 2d 1135, 1143 (1977): 'Contrary to defendant's implication, there may be a number of 'rational reasons' for a suspect to consent to a search even though he knows the premises contain evidence that can be used against him: for example, he may wish to appear cooperative in order to throw police off the scent or at least lull them into conducting a superficial search; he may believe that the evidence is of such a nature or in such a location that it is likely to be overlooked; he may be persuaded that if the evidence is nevertheless discovered he will be successful in explaining its presence or denying any knowledge of it; he may intend to lay the groundwork for ingratiating himself with the prosecuting authorities or the court; or he may simply be convinced that the game is up and further dissembling is futile'.

This argument paints criminals under investigation as potentially subject to a swirl of 'motivations' to cooperate.[39] In particular, they might respond to the prospect of DNA sampling with a mixture of hubris and hope, leading them to gamble that the police's technology would happen to fail in their case.

If courts are willing to accept that criminals can be foolish in this way at the time of a DNA sampling request, then the claim that a suspect consented to a procedure, only to repent when faced with the consequences, will always be a plausible one.

B Finding Truths

Privacy is (almost) a prerequisite for sexual contact, consensual or not. However, Mellors' lawyer argued that his client's DNA sampling could and, indeed, should have been a more public event. Australian crime suspects facing questioning in a police station must be offered an opportunity to communicate with a third party.[40] Australian law also requires the recording of police interviews with suspects.[41] But Brayshaw and Dooley-McDonnell had a simple explanation for why none of these procedures applied to Mellors: he was not a suspect at the time his DNA was taken.[42]

This claim might be thought to raise another plausibility problem in light of what the detectives admitted they knew at the time they approached Mellors. On top of the second-hand accusation that Mellors was the rapist, the detectives knew that Mellors had asked Amanda for sex just hours before the alleged rape.[43] In addition, Amanda's description of her alleged rapist – young, skinny and with little hair – matched Mellors.[44] Finally, he was present in the camp that evening and had been drinking at Amanda's family's house for several hours that day.[45] This information was probably sufficient grounds to treat Mellors as a suspect, if the detectives had been inclined to do so.[46]

It is one thing to find that what the police knew justified their suspicion that someone committed a crime; it is another to find that the knowledge obliged them to be suspicious. This is especially the case when there are competing leads. Brayshaw and Dooley-McDonnell told the court of information that suggested Mellors *was not* the rapist: that Amanda had said that she did not recognise the

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39 See *United States v Mendenhall* 446 US 544, 559 (1980), in which a majority of judges in the US Supreme Court agreed with Justice Stewart's observation that 'the question is not whether the [person alleged to have consented] acted in her ultimate self-interest, but whether she acted voluntarily'. The middle portion of this article will address the relevance of motivations to the validity of an alleged consent.

40 See, eg, *Police Administration Act 1978* (NT) s 140.

41 See, eg, *Police Administration Act 1978* (NT) s 142.

42 Transcript, Mellors trial, 8, 40.

43 Ibid 19.

44 Ibid 7, 18, 39-40.

45 Ibid 18.

46 Suspicion is 'more than a mere idle wondering… it is a positive feeling of actual apprehension or mistrust': *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, 303, quoted with approval in *George v Rockett* (1990) 170 CLR 104, 115-116. See *R v Frangulis* [2006] NSWCCA 363, [18] for a recent application.

voice of the rapist as Mellors', instead telling the detectives about 'some man [who] had been hanging around the camp and asking questions',[47] that the relative who accused Mellors of rape told them that her accusation had no factual basis[48] and that many youths in Alice Springs were skinny and hairless.[49] Faced with this evidence, the court had little choice but to accept the detectives' insistence that Mellors was, to them, a mere 'person of interest' when he was sampled.[50]

These circumstances – when compelling leads point both towards and away from a particular person – effectively allow investigators to choose which legal rules apply when they seek a DNA sample.[51] Brayshaw and Dooley-McDonnell had the option of treating Mellors as a suspect, arresting him if necessary, informing him of the evidence against him and, perhaps, utilising their compulsory powers to acquire a sample from him. Instead, by deciding that he was not a suspect, they were able to ask for his DNA without either informing him of their suspicions, justifying their request, making independent advice available or recording the interaction. Indeed, there was nothing to stop them from pursuing these approaches in sequence, first informally asking for a voluntary elimination sample and then, if he refused, using that fact to treat him as a suspect subject to more formal processes. In Mellors' case, the second step was not needed.

Mellors' admissibility hearing proceeded exactly as many critics of police practices would fear. Both detectives denied any specific recollection of what they actually said to Mellors two years earlier. Instead, they relied on their notes and assertions of their 'general practice', testimony that is very difficult to impeach.[52] Mellors' lawyer queried why the police would take a non-suspect to a station and swab him, but the detectives replied that these were standard investigative processes for persons of interest.[53] They pointed out that they also

47 Transcript, Mellors trial, 31, 40.

48 Ibid 20.

49 Ibid 46.

50 *The Queen v Mellors* [2000] NTSC 41, [10].

51 Cf NSW Ombudsman Suspects Report, above n 5, pp 84-88. The report noted a phenomenon of NSW police treating apparent suspects as volunteers, which it attributed to the police's lack of understanding of the law. The Ombudsman found that treating suspects as volunteers was to their advantage, as suspects' DNA profiles can be used more extensively than volunteers'. However, this ignores the possibility that suspects who are treated as suspects may be less likely to consent in the first place, as they must be told that they are suspected of an offence.

52 Transcript, Mellors trial, 7, 9, 35, 51. Compare *R v Montella* [1992] 1 NZLR 63, 65, where the trial judge had to resolve diametrically opposed accounts by two police officers and a doctor (testifying that the defendant consented to blood sampling knowing that it would be used for DNA testing) and the defendant's lawyer (who testified that, in the face of his client's refusal to undergo DNA testing, the police asked him to consent to blood sampling for the limited purpose of an AIDS test). The trial judge, ruling that all four witnesses appeared to be testifying honestly, held that the prosecution had failed to establish its 'onus of establishing consent'.

53 Transcript, Mellors trial, 21-23, 36.

took a station statement from one of Mellors' cousins and a DNA sample from another.[54]

By contrast, Mellors' testimony about these events was easily exposed as confused on details such as the timing of Brayshaw's request for a saliva swab and the wording of the threats allegedly used to procure it.[55] Most damningly, after initially testifying that Brayshaw himself placed the swab in his mouth, Mellors conceded that he had placed the swab in his own mouth.[56] The prosecution also pointed out that Mellors did not make an official complaint about his mistreatment[57] and consented to giving a DNA sample in a separate rape investigation (without threats of detention) about four months later.[58] At the end of the two day hearing, the trial judge, after a brief adjournment, ruled that the DNA sample was admissible.[59] Mellors' lawyer responded with a formal admission that Mellors had had sex with Amanda on the night of the alleged rape.[60]

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The rape trial then proceeded exactly how many supporters of rape complainants would fear. Mellors gave a brief account of sex with Amanda, asserting that, after going to bed at 9pm, he couldn't sleep and simply decided to wake Amanda in the hope of some sex, despite her earlier rebuff. He testified that she immediately consented by parting her legs and murmuring her agreement (though he could not recall what she actually said). He readily conceded that, after ejaculating, he simply got up and left.[61] Amanda's testimony, by contrast, traversed not only the details of the alleged rape but also its public aftermath, topics that clearly embarrassed her.[62] Mellors' lawyer portrayed her memory as diminished by sleepiness and drunkenness and skewered her for inconsistencies on the sequence of events.[63] The cross-examination revealed her drinking habits and that the married complainant had a local boyfriend.[64]

The early acts of the investigators afforded Mellors a further advantage: his lawyer was able to plausibly assert that Mellors cooperated with the police's investigation into Amanda's allegations.[65] Brayshaw conceded that, because Mellors wasn't a suspect, his questioning was limited to asking about Amanda's rape allegation, rather than whether or not Mellors had sex with her.[66] So,

54 Ibid 20-21, 31-32, 46. The cousin who gave a statement was accompanying Amanda, his mother-in-law, when she gave her statement. The other cousin was DNA sampled over two months after Mellors was sampled.
55 Ibid 77-78, 82.
56 Ibid 80-81; *The Queen v Mellors* [2000] NTSC 41, [19].
57 Transcript, Mellors trial, 86-87.
58 Ibid 87-88.
59 Ibid 114; *The Queen v Mellors* [2000] NTSC 41, [25], [28], [31].
60 Transcript, Mellors trial, 194.
61 Ibid 199-200.
62 Ibid 132-139.
63 Transcript, Mellors trial, 144, 148, 151-153, 156.
64 Ibid 141-143, 145.
65 Ibid 174.
66 Ibid 175.

Mellors' lawyer was able to argue that his client had merely given an incomplete account to the detective, something that the court decided could not lawfully be equated with a lie.[67] Moreover, Mellors testified that he was 'happy to give a mouth swab' to the police when they asked for his DNA.[68] Brayshaw, of course, corroborated this:

> And you mentioned to the jury just when we were talking about the statement that there was something about what you called a buccal swab? *Yes, a DNA mouth swab.*
>
> …
>
> Who does – who did that? Was that you who did that or him? *Yes, that was me. Oh, he actually rubbed it on the inside of his mouth, yes.*[69]

While, of course, Mellors' testimony on this point was the opposite of what he had claimed two days earlier at the admissibility hearing, it was entirely consistent with the court's ruling. Brayshaw was forced to concede that he had wrongly told Mellors the DNA would prove whether or not he had raped Amanda, allowing the teenager's willingness to be sampled to be portrayed as the rational actions of someone who had been falsely accused of rape.[70] After hearing two days of testimony, it took the jury just 30 minutes to acquit Mellors of raping Amanda.[71]

III GIVING CONSENT: DARWIN, 1990 & 1995

Ten years before Mellors was acquitted, at the other end of the Northern Territory, Rebecca woke her husband at 3am to tell him that 'someone has been … trying to make love to me.' Her husband stood at the top of the stairs and yelled 'Get the gun!', confusing Rebecca. The young Darwin family did not own a gun. Instead, she checked on her sleeping children, phoned the police and began to pray.[72]

On that Sunday morning in mid-June 1990, Rebecca was already contemplating an issue that she would later identify as '[w]hether I had consented to the person, or given permission to the person'.[73] It would take her eight years to resolve the question: what does it mean to consent to bodily contact? Under the most common legal approach, consent is a state of mind.[74] Two aspects of thinking underlying an alleged consent – motivations and knowledge – as they

67 Ibid 223.
68 Ibid 207.
69 Ibid 168-169.
70 Ibid 175. On the use of consent to be DNA sampled as 'consciousness of innocence' evidence, see *R v C(G)* (1997) 8 CR (5th) 49; *R v Richards* (1997) 87 BCAC 21; *R v B(SC)* (1997) 10 CR (5th) 302; *State of Wisconsin v Santana-Lopez*, 2000 WI App 122.
71 Transcript, Mellors trial, 253-255.
72 Transcript of Proceedings, No 9521313, *Police v Reuben James Jones* (Northern Territory of Australia Court of Summary Jurisdiction, Mr I Gray CSM, 21 May 1996 to 27 June 1996) ('Transcript, Jones committal') 23.
73 Transcript, Jones committal, 56.
74 See Wertheimer, above n 11, ch 7, on alternative conceptions of consent that add or replace subjectivity with objective or communicative requirements.

applied in the prosecution of Rebecca's alleged rapist, will be discussed in turn below.

A Limited Choices

The first time Reuben Jones heard Rebecca's name was when he was arrested for raping her. Woken by the police at his home early one morning in mid-September 1995, he recognised the address where they said the rape occurred: it had been his parents' home and he had lived there for much of his life. However, his family had moved before 1990, first leasing the house and then eventually selling it. Jones denied having returned to the house and asked for a lawyer.[75] The police advised him to tell his lawyer that they 'would like to take fingerprints, photographs, and [they] would also like a blood sample'.[76] In later discussing the proposed blood sampling, Detective Sergeant Barry Frew gave Jones a generic warning that 'the specimen that is collected may provide evidence relating to an offence'.[77] However, he also pointed out that the offence alleged was 'a charge of unlawful sexual assault'.[78]

Jones would have been well aware that his response to the request for blood would be judged by the investigators. Frew could determine (or at least strongly influence) whether he would be held for longer, charged, granted bail or ultimately prosecuted. A refusal might convince him that Jones' denial of involvement in the rape was false. On the other hand, there were significant downsides to giving blood. The consent form Frew had given to him to sign warned that his blood 'may provide evidence relating to the said offence *or to any other offence punishable by imprisonment*'.[79] So, his blood sample could link him to any serious crime he had committed, even if he was exonerated for the rape. After reading the form, Jones asked to speak to his lawyer again.[80]

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Once she learnt of it some months later, Jones' arrest in turn put Rebecca in a dilemma about how to proceed in the face of conflicting internal and external pressures. At Jones' committal, she testified that she troubled 'long and hard' about whether to give evidence against her alleged rapist, explaining that her Christian faith taught forgiveness. She said that she was also embarrassed about speaking in court about the difficulties she had had with her children that night.[81] Rebecca told the police that she would never be able to identify the man who woke her. Six years later, she made it clear that she did not even want to look at Jones, as that would 'put a face to … this horrible incident ... that will come to

75 Transcript of Proceedings, No 9521313, *The Queen v Reuben James Jones* (The Supreme Court of the Northern , Mildren J, 14 September 1998 to 18 September 1998) ('Transcript, Jones voir dire') 65-67.
76 *The Queen v Reuben James Jones* [1998] NTSC 88, 4.
77 Ibid.
78 Ibid.
79 Ibid (emphasis added).
80 Ibid.
81 Transcript, Jones committal, 60.

haunt her in the future'.[82] Testifying via closed-circuit television at his committal,[83] she conceded that she had blocked out parts of her memories of that evening and that she held doubts about the statement she gave to the police in 1990.[84] Asked by Jones' lawyer what troubled her when she re-read her statement, she admitted on oath that she remained concerned by the issue of consent.[85]

Rebecca's account was that she had spent much of the evening struggling to get her daughters to sleep. Her youngest child had the advantage, as she was less tired than her exhausted mother and kept running around the house. In the end, the four-year old fell asleep on her parents' bed, so Rebecca opted to sleep in the child's room. In the midst of a dream about her children, she woke to find a man kissing her, his breath smelling faintly of alcohol.[86] She testified that, as she drifted in and out of sleep, she became aware that the kissing was 'quite revolting'. Eventually, she was shocked fully awake by a cold hand in her shorts. When she sat up, the man touched her breast, removed her pants and put his penis in her vagina. She wasn't lubricated, so his thrusting hurt her. After some time, she exclaimed 'Praise God!'. Eventually she poked the man in the ribs and asked 'haven't I got a say in this?'. Grunting in disgust, the man withdrew his penis and left her daughter's bedroom.[87]

This is clearly not an account of sex that Rebecca wanted, much less enjoyed. But, according to her, it might have been consensual:

> At the time that man left [your daughter's] bedroom –? –*Yes*.
>
> – if it had been your husband, you'd say you consented, and if it wasn't your husband you say you didn't consent; is that what you say? – *That's right.*[88]

Rebecca's answer doesn't reflect a bleak history of resigned marital sex with her husband. She insisted that her husband had never made her uncomfortable during sex before and she had found it unbelievable that he was doing so then.[89] But it was the discomfort that was her immediate concern, not the sex.

Explaining that her actions were predicated on her belief that the man was her husband, Rebecca testified that she reacted to his 'revolting' kisses by kissing back, in order to show 'how to kiss properly'. She responded to the hand in her shorts and on her breast by touching the man's groin. When he undressed her, she advised him 'I'm not ready yet'.[90] Describing the man's thrusting as 'stimulating but painful', she said that she pretended to enjoy it in order to bring it to a quicker end. It was only after these various attempts to improve things

82 Ibid 3-4.
83 Ibid 5, on the ground that the prosecutor expressed 'grave reservations of her ability to give evidence if she has to do it in open court': at 4.
84 Ibid 82-84.
85 Ibid 56.
86 Ibid 14-18, 81-82.
87 Ibid 17-21.
88 Ibid 90.
89 Ibid 66.
90 Rebecca emphasised that she did not say 'Stop, I'm not ready yet': ibid 68.

failed that she complained that she was being ignored. The man withdrew, thankfully sparing her the immediate recognition that she was being raped.[91]

Was Rebecca's assessment of the hypothetical where the man was her husband correct? Can someone ever be said to have consented to sex when they did not want it to start when it did, found it painful while it was happening, wanted it to end before it did and felt ignored throughout? Rebecca was never asked to explain her thinking in court. One possibility was that she was willing to endure the discomfort for a time in the hope that it would pass and the sex would become enjoyable. A further motivation may have been to bear it for her partner's benefit, either for his sexual enjoyment or to avoid hurting his feelings.

Some would baulk at this depiction of a decision to endure sex as consent.[92] However, such choices are surely an occasional (and sometimes common) feature of both casual and committed sexual relationships. While most rape laws rule out consent motivated by fear of force or harm,[93] none take the step of criminalising sex merely because it is unromantic, mundane, depressing or unpleasant.[94] Rather, the definition of consent encompasses not only decisions made with enthusiasm but also choices involving the weighing up of pros and cons.[95]

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In the case of blood sampling, enthusiasm is unusual and reluctance, endurance and calculation are the norm. Frew was surely aware that Jones, if he agreed to be sampled, would be doing so grudgingly and with very mixed motivations. But, just like the man who had sex with Rebecca, the detective could simply ignore what the other was thinking. Unlike a person's words, whose evidential worth depends on the motive for speaking, a person's DNA is not affected by the reasons for consenting. Indeed, Jones' actual decision mattered little. If Jones refused, Frew could have just applied for a court order to require him to comply,[96] something Jones' lawyer presumably would have pointed out to his client. Unsurprisingly, after his second consultation with his lawyer, Jones signed Frew's consent form.[97]

The availability of legal powers to compel a person to comply is a dramatic point of contrast between DNA sampling and sex. Force, while incompatible with lawful sex,[98] is an established aspect of lawful policing. So, many instances of consent to investigative acts – not just DNA sampling, but also bodily

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91 Ibid 17-20.

92 See Wertheimer, above n 11, 135-139 for a discussion and criticism of proponents of 'strong reciprocity', which ties valid consent to 'reciprocity or equality or communication or non-exploitation'.

93 See, eg, *Criminal Code Act 1983* (NT) s192(2)(a).

94 'Arguments about consent abound just because consent to sexual intercourse extends from passionate enthusiasm to reluctant or bored acquiescence': *R v Bree* [2007] EWCA Crim 256, [22].

95 Cf Young, above n 14, 45.

96 *Police Administration Act 1978* (NT), s 145.

97 Transcript, Jones voir dire, 29; cf *R v Su & Goerlitz* [2003] VSC 305, [72]. This case rejected a complaint that the defendant's consent was vitiated because he was wrongly denied access to a lawyer, noting that 'the extent of any legal advice could only have been to either provide the sample or to require the police to seek an order from the Magistrates' Court': at [72].

98 See *Question of Law (No 1 of 1993)* (1993) 59 SASR 214.

searches, property searches and attendance at a police station – are simply an acknowledgement of the (almost) inevitable. Unsurprisingly, the courts have rejected out-of-hand arguments that an awareness of the police's lawful powers negates an apparent consent to bodily contact.[99]

B Mistaken Choices

The breadth of the definition of consent explains why neither of the claims of non-consent at Jones' trial was founded on the pressures that Rebecca and Jones thought they were facing, respectively, in 1990 and 1995. Instead, the claims were based on what the parties *did not* know at the time they purportedly consented.

Jones' argument for excluding his blood sample was that, when he consented, he was unaware that his DNA had already been linked to Rebecca's alleged rape. In mid-1995, Jones pled guilty to causing criminal damage to a window of a Darwin clothing shop.[100] Unbeknownst to him, his blood had been collected from the window and Frew had asked for it to be analysed so that a profile could be based on Darwin's nascent DNA database.[101] Around the same time, Rebecca, now living interstate, had coincidentally phoned Frew to advise of a new address and ask after clothing and bedding the police had retained. Frew, realising her alleged rape had occurred two years before DNA identification was introduced in the Territory, asked the Darwin lab to look for a DNA sample.[102] The database soon yielded a cold hit between Jones' DNA profile and a semen stain on underwear retained in Rebecca's file.[103]

Frew conceded that he did not tell Jones about the DNA match as 'I don't normally tell people things like that' and he didn't think the match was a 'relevant consideration for him in deciding whether he wanted to consent to give

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99 See, eg, *R v Papp & Rancic* (Unreported, Court of Appeal of Victoria, Phillips CJ, Crockett and Fullagar JJ, 17 December 1992):

> The submission rested on this exchange: "'You have also refused to be fingerprinted?' Answer: 'That's my right'. Sergeant Payne: 'Under recently proclaimed legislation, I have the capacity to apply to a Magistrates' Court for a court order to fingerprint you and if you continue to refuse, forcibly fingerprint you'. Answer: 'Does that mean you'll get the court order and then have six blokes sit on me while you do it?' 'If necessary, yes'. 'Okay. If that's the situation, I'll give them to you'." The argument advanced at the trial and repeated in this court was that the passage discloses facts from which it should be inferred that the police were acting oppressively so as to subdue the applicant's will to refuse to give consent. The judge did not take the submission seriously. Nor can we.

See also *R v Su & Goerlitz* [2003] VSC 305, [73]. On the need to accurately communicate constraints on police powers to a person asked to consent, see *United States v Faruolo*, 506 F 2d 490 (1974) (Newman J) . On the invalidity of consent where the police *falsely* claim to have legal authority to use force, see *Bumper v North Carolina*, 446 US 544 (1980). See generally LaFave, above n 14, 649-654.

100 Transcript, Jones voir dire, 11-14, 23.

101 Ibid 19-20. It appears that the report on Jones' blood had been mistakenly sent to the CIB, as one of the detectives in Frew's office had a similar surname to the uniformed officer who handled the criminal damage case.

102 Ibid 27-28.

103 Shown the underpants at Jones's committal, Rebecca said 'I don't recollect having underpants like this': Transcript, Jones committal, 39; however, a police officer testified that she put the underpants Rebecca had been wearing that evening into the exhibit bag that was delivered to the lab five years later: Transcript, Jones committal, 131.

the blood or not'.[104] But Jones insisted that the pre-existing match made his fresh sampling a 'waste of time' from his perspective.[105] Indeed, Frew admitted that the blood sampling had the goal, not of checking Jones' link to Rebecca's alleged rape, but rather of generating DNA evidence that was free of the continuity and legal pitfalls of the window sample.[106] Jones' lawyer argued, in a bid to force the prosecution to rely on the more problematic sample from the shop window, that Frew's deception meant that the later blood sampling was unlawful and inadmissible.[107]

In Australia, the authority for what knowledge is necessary for a valid consent to bodily contact emerged is a famous rape appeal from the 1950s. John Papadimitropoulos and his fiancée of several days visited a Melbourne registry office and signed several forms. According to the prosecution, the bilingual groom told his Greek-speaking bride that the ceremony was a wedding. After the apparent marriage was consummated at a boarding house 'two or three times', Papadimitropoulos decamped and his fiancée discovered that they had never been married. A jury convicted him of rape.[108] However, the High Court of Australia acquitted him, rejecting the relevance of Papadimatropoulos' fiancée's belief that their sex was marital:

> To say that in having intercourse with [Papadimitropoulos] she supposed that she was concerned in a perfectly moral act is not to say that the intercourse was without her consent. To return to the central point; rape is carnal knowledge of a woman without her consent: carnal knowledge is the physical fact of penetration; it is the consent to that which is in question; such a consent demands a perception as to what is about to take place, as to the identity of the man and the character of what he is doing.[109]

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104 Transcript, Jones voir dire, 56.

105 Ibid 67.

106 *The Queen v Reuben James Jones* [1998] NTSC 88, 6. On the availability of compulsory DNA sampling orders for this purpose, see *R v Paul* (Unreported, Ontario Superior Court of Justice, Trafford J, 4 March 2004).

107 Transcript, Jones voir dire, 77-78, 82-83. The earlier blood sample had been subjected to a less detailed DNA analysis, bolstering a potential argument that the match was a coincidence. Kuhl estimated that the chance of a random unrelated person sharing the profile from the underwear was about 1 in 14 million: Transcript, Jones committal, 186. However, the chance of a coincidental match would be higher if Rebecca's alleged rapist was a relative of Jones'. A better argument that might have explained the DNA match is that Jones' profile (or a relative's) might have remained in the house after he moved out and ended up on Rebecca's clothing. Interestingly, Jones' blood and Rebecca's clothing were in the lab within days of each other. Kuhl reported profiling the window blood on 18 July 1995; her lab received Rebecca's clothing two days later: Transcript, Jones voir dire, 14, 28. For an instance where contamination between exhibits that were in the same lab within days of each other implicated an innocent party, see Graeme Johnstone, *Inquest into the Death of Jaidyn Leskie* (2006) 83-85. However, this explanation seems implausible in light of Jones' family link to the crime scene. On innocent explanations for DNA matches, see Jeremy Gans and Gregor Urbas, 'Use of DNA in the Criminal Justice System' (2002) 226 *Trends & Issues in Criminal Justice* 1, 3 and Kirsten Edwards, 'Cold Hit Complacency: The Danger of DNA Databases Re-Examined' (2006) 18 *Current Issues in Criminal Justice* 92.

108 *Papadimitropoulos v The Queen (*1957) 98 CLR 249, 251-254. The jury curiously found 'mitigating circumstances'.

109 Ibid 261.

The Court held that even Papadimatropoulos' alleged fraud did not matter, as it didn't affect his fiancée's knowledge of what they physically did together.[110]

The law's exclusive focus on knowledge of *physical* facts when assessing the validity of an apparent consent dooms Jones' argument that the DNA sample he gave to Frew was inadmissible. When Jones was cross-examined, he had to admit that what he thought would physically occur when he signed the consent form – 'watch a doctor take your blood and put in a container and label it and give it to the police' – is precisely what did occur.[111] The court held that Jones consented to giving his blood and that the DNA evidence derived from it was admissible.[112]

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By contrast, Rebecca's stated premise for some of her actions on the evening of the alleged rape – that she was having sex with the man she had married years earlier – was at odds with the physical reality. In fact, she was touching and being touched by a totally different man. However, the question of consent remained murky because Rebecca stopped short of testifying that she believed that she was having sex with her husband; rather, 'sexual intercourse happened between me and another man, with me being *uncertain* of the identity of that person'.[113]

At Jones' committal, Rebecca testified that her state of mind shifted over the half hour or so of the incident, from thinking the man was her husband (or, at least, 'wasn't aware that it wasn't') to realising 'briefly, just very briefly' that he

110 Ibid 260. See also *R v Mobilio* [1991] VR 339 but cf *Crimes Act 1958* (Cth) s 36(g) and Jenny Morgan, 'Rape in Medical Treatment: The Patient as Victim' (1991) 19 *Melbourne University Law Review* 403. For a discussion and critique of the general law on deception and sexual consent, see Wertheimer, above n 11, ch 9.

111 Transcript, Jones voir dire, 70; cf *R v Cannon* (Unreported, NSW Court of Criminal Appeal, Gleeson CJ, Cripps JA, Grove J, 30 August 1993), special leave to appeal to the High Court of Australia refused (1994) 69 ALJR 114, holding that consensual DNA sampling is valid regardless of whether or not the person sampled knows of the purpose of the sampling. On the approach in the United States to deception and consent, see *Lewis v United States*, 385 US 206, upholding a search as consensual despite deception as 'the agent [didn't] see, hear, or take anything that was not contemplated'; cf, in Canada, *R v Sheon* 2000 Ont. Sup. C.J. LEXIS 1608: 'Counsel has failed to produce any jurisprudence to satisfy me that the investigation police officers have been so emasculated by The Charter that they cannot develop techniques to elicit information and bodily fluid as the case may be through possibly "devious interrogative procedures" provided the interviewee has received the appropriate warnings and rights and clearly understands them.'

112 *The Queen v Reuben James Jones* [1998] NTSC 88, 7-9. The court noted that Frew never told Jones that his blood sample might eliminate him from the investigation. Of course, even if Frew had done so, Jones' consent would still have been valid, although perhaps his deception might have supported an argument that the evidence should be excluded for impropriety. By contrast, the court excluded statements made by Jones ('Oh-Serg I couldn't tell you but I'd have to be blind drunk Serg to do such an offence') after he was confronted with the DNA match. One reason was deliberate deception by Frew after Jones was DNA sampled, when Frew told Jones that there was a 'witness' who could place him at the house on the night of the alleged rape. In fact, the witness was Joy Kuhl, the Territory's Chief Forensic Biologist, who had done the DNA analysis: at 12. In addition, the court held that it was unfair to ask Jones to speculate on the reasons for the match: at 14.

113 Transcript, Jones committal, 71 (emphasis added). She testified that she didn't give permission for anyone other than her husband to have sex with her and that, had she known it definitely wasn't her husband, she wouldn't have given permission for the sex to continue: at 34.

was not her husband and, thereafter, having an open mind.[114] By the time the sex commenced, Rebecca testified that 'I thought it was my husband' but 'I wasn't sure' as 'some things weren't adding up'.[115] Her personal mystery was only conclusively resolved after the sex ended, when she left the room and saw her husband asleep in their bedroom.[116]

The legal mystery will never be resolved. On the first scheduled day of Jones' trial in 1998, the prosecutor told the court that he had received new information from Rebecca that morning, after she spoke with a church leader and a counsellor the day before:

> The matters which were told me in the morning were to the effect that it was no longer a case of mistaken identity, that she was aware that the person was not her husband in the room and that, as she later expressed it, she didn't want what he wanted but she wanted to have sex insofar as she appears to be rationalising from the point of view that the manner in which the sex was performed was to her liking or expectation. But before the penetration occurred she had done certain things in no doubt she wanted to have sex and that also would have been apparent to the other person who was in the room.[117]

The trial judge discharged Jones from further proceedings for raping Rebecca.[118]

What happened on that Sunday morning in 1990 remains unclear. Even assuming that Rebecca's new account to the prosecutor was accurate,[119] it only covers the beginning of the encounter. It is unlikely that her earlier statement to the police or her court testimony was invented from whole cloth. Rather, the sex may well have been much as she described at Jones' committal, with any desire she might have had for sex with a stranger quickly fading as the reality of contact with an uncaring man became apparent. The man's callousness towards her might have permitted her to rationalise what would seem to her to have been a white lie, allowing her to tell her husband what had physically happened that night while assuming that the stranger would never be identified. One can imagine her misery at being told by Frew about the DNA evidence and serendipities that led to Jones' arrest five years later.

Rebecca's experience, whatever it was, demonstrates how a meeting of bodies – even a consensual one – can occur without any meeting of minds. As Rebecca simply observed, 'she didn't want what he wanted'.[120] Indeed, the man in

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114 Ibid 18, 35. In cross-examination, Rebecca conceded that the man and her husband differed in kissing technique, sexual technique, attention to her feelings, height, physical fitness, muscle-tone, amount of hair and apparent age. The only apparent similarity was their thick moustaches: at 52-54, 64-66. During sex, she tried to 'clarify' the man's identity by running her hand along his back: at 70. She observed that he was very thin, unlike her husband. On the other hand he had curly hair at the nape of his neck, like her husband (albeit a little lower down): at 20.

115 Ibid 25.

116 Ibid 22, 34, 70. Her reaction then was one of disbelief : at 33. The recognition that she was raped came several days later: at 70-71.

117 Transcript of Proceedings, No 9521313, *The Queen v Reuben James Jones* (The Supreme Court of the Northern Territory, Mildren J, 18 September 1998 to 2 November 1998) ('Transcript, Jones trial') 8.

118 Ibid 9. The trial judge declared this development 'doesn't greatly surprise me'.

119 As opposed to being a means of ending a prosecution she was reluctant to participate in: see Transcript, Jones committal, 60.

120 Transcript, Jones trial, 8.

Rebecca's bedroom – whoever he was – could not possibly have known what she was thinking that night. In particular, he would have no way of knowing whether Rebecca's actions were motivated by irrational lust or a far more rational fear of him.

IV SEEKING CONSENT: ILLAMURTA SPRINGS, OCTOBER 1998

The day after the collapse of the prosecution case against Jones, Braedon was arrested for raping Gwen at Toddy's Backpackers. Like Mellors and Jones, Braedon contested the admissibility of the DNA evidence used to link him to Gwen, arguing that he did not consent to the sampling. The court's response mirrored those in the other two cases. Like Mellors, Braedon's account of the police's conduct – that they gave him an instruction, not a choice – was rejected in favour of the police officers' testimony that giving a choice was their 'standard procedure'.[121] Like Jones, the facts that Braedon 'may have felt under some pressure' from the police and may not have understood that the procedure 'may provide damning evidence through DNA testing' were found to be compatible with his consent to it.[122]

The officers who sampled Braedon's saliva were the same pair who sampled Mellors' nine months earlier: Detectives Brayshaw and Dooley-McDonnell. In a dispute about a person's consent to bodily contact, what is the relevance of the conduct and history of the other party? The discussion below first examines conduct at the time consent was allegedly given. It then examines the relevance of the recipient's behaviour at other times.

A Taking Advantage

In the two months after the incident in the Grape Room, Brayshaw and Dooley-McDonnell took DNA samples from 10 or so men on the basis of their ostensible consent.[123] In late October, after phoning ahead to check that Braedon was there, Brayshaw and Dooley-McDonnell drove to Illamurta Springs, 260

121 *R v Braedon* [2000] NTSC 68, [5], [7].

122 Ibid [7], [10].

123 Transcript, Braedon committal, 145, 192. The detectives were pursuing their best non-DNA lead: a neighbour's sighting of a red car with three men in it near Toddy's Backpackers: at 140. They quickly identified the car and two of its occupants, who admitted to trespassing in the resort on the morning of the apparent rape. However, neither matched the DNA found on Gwen and both insisted that they couldn't recall who the third passenger was: at 109, 193. The other men sampled were the pair's associates. Eventually, their prodding paid off: they were told that the mother of one of the pair had a piece of paper with a name written on it: Steven Braedon: at 191.

kilometres south-west of Alice Springs.[124] The visit was brief. The detectives spoke with Barry Abbott, a senior figure in the community and a relative of Braedon's, who called his 'nephew' over. The four then sat outside while the detectives related the incident at Toddy's, assisted by Abbott as Braedon preferred to speak in Luritja. After Braedon said that he had been at Illamurta Springs since late August (that is, before Gwen's apparent rape), Brayshaw raised the topic of a 'mouth swab'.[125]

Braedon's complaint about the admissibility of his DNA sample was that the police request was really a command, in both form and substance.[126] As in Mellors' case, neither detective could recall exactly what they said, but Brayshaw insisted that his 'normal procedure' was to say 'it's your choice, it's up to you'.[127] The conversation was not audiotaped.[128] Rather, Brayshaw gave Braedon a form developed for obtaining consensual elimination samples from victims of property theft.[129] The detective conceded that he neither asked Braedon whether he could read it nor communicated the document's contents.[130]

Braedon's lawyer argued that the sampling was unlawful even on the detectives' account, because they took insufficient steps to ensure that Braedon understood what he was doing.[131] However, the court held that neither scenario provided a reason to exclude the DNA evidence:

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124 Transcript, Braedon committal, 193-194. As he did in Mellors' admissibility hearing, Brayshaw testified that Braedon was a 'person of interest', but 'he definitely wasn't a suspect' at the time of their visit. The trip's purpose 'wasn't… to obtain a swab', but rather 'to find out what he knew about the matter': transcript, Braedon voir dire, 46. However, Brayshaw's partner contradicted him: 'Officer Dooley, before you went out to Illamurta Springs on 23 October you regarded Steven Braedon as a suspect, didn't you? *Yes I did.*': at 57; 'Now, when you went out there, what was your intention of going all the way to Illamurta Springs? *To obtain a voluntary buccal swab*': Transcript, Braedon committal, 193; cf Transcript, Braedon voir dire, 58. Braedon's lawyer queried both detectives as to why they chose a five-hour round trip in preference to putting their questions or requests to Braedon over the phone. Brayshaw said there was no reason 'other than to speak to him in person': at 47. Dooley-McDonnell felt it was 'not a fair approach doing it over the telephone': at 58.

125 Transcript, Braedon voir dire, 10-13, 30-33, 42-43, 55-56.

126 Ibid 13.

127 Ibid 47-48.

128 Abbot later testified that he left the other three alone at that point, not knowing what a mouth swab was and feeling 'it wasn't my business really'. Ibid 31, 36. Braedon's account was similar: at 11, 21. However, the detectives insisted that Abbott came with them to their car, where Braedon was swabbed: at 43-44, 56. Dooley-McDonnell conceded that Abbot might have stepped away to smoke at one point and, indeed, that she missed the swabbing herself as she was busy with paperwork: at 56.

129 Transcript, Braedon committal, 148.

130 Transcript, Braedon voir dire, 49.

131 Ibid 78.

> It is not shown that the police engaged in any unlawful conduct in obtaining the swab … Nor do I discern any way in which I could be persuaded that the conduct of the police was wrong. He was not tricked into giving the sample, all that was said against the police is that the accused did not understand that he could refuse and they did not ensure he had a clear understanding of what it was all about and how it might implicate him.[132]

In short, the detectives' behaviour would only have been significant to the question of consent if they had done something illegal or deceptive.

In its ruling, the court observed that the police could have lawfully taken Braedon's DNA without his consent simply by gathering it from something the teenager had touched, such as a bottle.[133] As the judge had earlier pointed out to Braedon's lawyer, simply telling someone to rub a cotton bud in their mouth is not a crime.[134] The detectives' choice to use words rather than their hands was equally (un)constrained by the law, which only looks to whether or not their efforts to get Braedon's consent succeeded. Indeed, the fact of his consent is logically evidenced by their exertions to obtain it; as George Eliot's Mrs Poyser (cannily rejecting an offer of 'mutual advantage') said: 'it's them as take advantage that get advantage i' this world'.[135]

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Two weeks after the visit to Illamurta Springs, Brayshaw arrested Braedon and told him that his DNA matched a swab taken from Gwen's vulva after the incident at Toddy's.[136] But Braedon denied raping Gwen. Instead, he conceded that he had been at the Backpacker's trying to steal a bicycle when he saw Gwen entering the Grape Room; however, when he broke in and felt under her bed for her wallet, she invited him to have sex:

> All right. Did you find a wallet? *Nah. That lady grabbed my hand.*
>
> How did that lady grab your arm? *When I was feeling around for her trousers, like for a wallet, pillow side for it, and she was asleep.*
>
> All right, and where did she put your hand? *Down there, between the leg.*[137]

At Braedon's trial for raping Gwen, the prosecutor invited the jury to reject Braedon's suggestion that 'the woman is the culprit'. Instead, it was Braedon, the

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132 *R v Braedon* [2000] NTSC 68, [11]. For a similar approach, see the United States Supreme Court decision of *Scheckloth v Bustamonte*, 412 US 218, 248 (1973), holding that a consent can be relied upon if proven to be 'voluntarily given, and not the result of duress or coercion, express or implied' and deeming 'knowledge of the right to refuse' as a mere 'factor to be taken into account', an approach justified by the investigative utility of consensual searches and the burden a requirement of knowledge would place on policing. Cf *R v Wills* (1992) 70 CCC (3d) 529, 546 rejecting this approach in Canada.

133 *R v Braedon* [2000] NTSC 68, [11].

134 Transcript, Braedon voir dire, 72.

135 George Eliot, *Adam Bede* (1859), ch 32 <http://www.princeton.edu/~batke/eliot/bede/bede_32.html> at 31 October 2007.

136 Transcript, Braedon voir dire, 50. Brayshaw told Braedon that this proved that he was a rapist.

137 Transcript of Proceedings, SCC No 9823567, *The Queen v Steven Jerry Braedon* (The Supreme Court of the Northern Territory, Angel J, Monday 20 August 2001) 10.

'sexual predator', who saw an extremely drunk woman and 'proceeded to have his way with her', using her like a 'rag doll'.[138]

This argument encountered a host of problems. Braedon's first trial miscarried because the prosecutor backed up her argument with an unproven translation of Braedon's account to the police.[139] At the second trial, the trial judge asked her (at the defence's request) not to use the terms 'sexual predator' or 'rag doll', observing that 'in sex cases like this … it's better to keep emotion out of it'.[140] Moreover, the jury was also told to assume that his plan when entering the Grape Room was to steal, rather than to rape Gwen, because Braedon was not charged with trespass with intent to rape.[141] The result was that the question of Braedon's guilt or innocence of raping Gwen was to be determined by reference to fact-finding about Gwen's alleged conduct, not Braedon's.

B Getting Advantage

The prosecutor's view that Braedon was a sexual predator was almost certainly based on additional information that was kept from the jury. Braedon was initially charged, not only with Gwen's rape, but with two other incidents at Toddy's Backpackers that night. The first concerned an unlawful entry into a female tourist's private room. She had woken to find a cap-wearing stranger next to her bed, who remained talking with her until she insisted that he leave.[142] The second was the sexual assault of one of Gwen's roommates, who was woken by a man kissing her, licking her vagina and saying 'shush'. After the man's cap came off, revealing that he was a stranger, she threw him out of the room (twice) and locked the door.[143] She observed the man drinking from a bottle outside and Braedon's fingerprint was later found to be a match to it.

When the roommate, who was the one who later interrupted Braedon's sex with Gwen, testified at the rape trial, she was carefully instructed to avoid any mention of earlier events.[144] The Northern Territory Supreme Court had previously held that, if the jury knew of either of the other incidents and decided Braedon was the cap-wearing man – something he had denied to the police – then they might be 'persuaded that he had sexual intercourse with [Gwen] without her consent'.[145]

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138 Transcript of Proceedings, SCC No 9823567, *The Queen v Steven Jerry Braedon,* (The Supreme Court of the Northern Territory, Martin CJ, Thursday 8 February 2001) 4, 7, 11.

139 Transcript of Proceedings, SCC No 9823567, *The Queen v Steven Jerry Braedon* (The Supreme Court of the Northern Territory, Martin CJ, Tuesday 6 February 2001 to Friday 9 February 2001) 178-179.

140 Transcript of Proceedings, SCC No 9823567, *The Queen v Steven Jerry Braedon* (Supreme Court of the Northern Territory, Angel J, 16 August 2001 to 21 August 2001) ('Transcript, Braedon second trial') 105.

141 Transcript, Braedon second trial, summing up, 16.

142 Transcript, Braedon committal, 245.

143 Ibid 11-14.

144 The trial judge at the second trial, who was new to the case, nearly caused a mistrial when he asked the roommate about why she interrupted the sex between Gwen and Braedon, prompting the reply: 'Because I knew that what was happening wasn't right. I knew that there was something wrong'. Transcript, Braedon second trial, 46. The trial judge ultimately decided to proceed by telling the jury to put the question and answer out of their minds: at 52-59.

145 Transcript of Proceedings, SCC No 9823567, *The Queen v Steven Jerry Braedon* (Supreme Court of the Northern Territory, Martin CJ, 9 February 2001).

It is not uncommon for a jury to consider evidence of the defendant's alleged similar behaviour on other occasions to work out how he might have acted during the incident in dispute, especially when apparently related events are separated by (at most) hours.[146] However, some courts baulk at permitting this reasoning in trials such as Braedon's, where the formal dispute concerns the other person's consent. Recently, Australia's High Court held that a boy accused of sexual offences by six different girls had to have six separate trials, because consent was at issue in each instance.[147] According to the Court:

> It is impossible to see how, on the question of whether one complainant consented, the other complainants' evidence that they did not consent has any probative value. It does not itself prove any disposition on the part of the accused: it proves only what mental state each of the other complainants had on a particular occasion affecting them, and that can say nothing about the mental state of the first complainant on a particular occasion affecting her.[148]

In other words, even a finding that a person is a serial predator does not rule out – and, according to Australia's High Court, does not even cast light on[149] – the possibility that the other person nevertheless consented to what happened this time.

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If the same reasoning is applied to disputes about consent to DNA sampling, then it is the police that avoid scrutiny. At Braedon's admissibility hearing, the court was aware of another occasion when Brayshaw and Dooley-McDonnell obtained Braedon's DNA. Braedon challenged the admissibility, not only of his saliva sampling at Illamurta Springs, but also of his blood sampling taken when he was arrested two weeks later. As he was clearly a suspect at that point, the encounter had to be recorded, avoiding the need for the court to depend on the word of the detectives themselves. The tape revealed that Brayshaw, then aware of Braedon's poor English, sought his consent simply by reading out the lengthy consent form to him without pause. The conversation then immediately turned to the practicalities of taking him to a hospital for the sampling.[150] Braedon never had an opportunity to signal his consent or lack of consent.

After listening to the tape, the court ruled the blood sample inadmissible, for want of proof of consent.[151] However, the court did not reconsider its earlier finding that Braedon had consented to the saliva sampling, even though that ruling relied on the detectives' insistence that their 'standard practice' was to offer a choice to the person being sampled. Similarly, the court made no reference to an admission by Brayshaw that he had performed a further forensic procedure – photographing Braedon nude to check him against descriptions of the naked man in the Grape Room – without telling him that he could refuse to be

146 See above n 13, ch 16.
147 *Phillips v The Queen* (2006) 158 A Crim R 431.
148 Ibid 443.
149 For a critique, see Jeremy Gans, 'Similar Facts After *Phillips'* (2006) 30 *Criminal Law Journal* 224, 227-233.
150 *R v Braedon* [2000] NTSC 68, [28]-[29].
151 Ibid [29].

photographed.[152] The court likewise made no inquiry about the circumstances of the other 10 samples that the detectives had obtained during their investigation or their alleged conduct with Mellors, who also said that Brayshaw gave him no choice. In short, it was Braedon, not Brayshaw, who was under scrutiny in the admissibility hearing, because the law treats consent as a unilateral act.

Even those who routinely take advantage – and sometimes get it by stealing – may nevertheless occasionally be given it. Indeed, routine gatherers of ostensibly consensual DNA samples may have little capacity to see the difference. The court hearing Braedon's case ruled that, even if the police's conduct at Illamurta Springs could be characterised as unlawful or improper, it still was not sufficient cause to exclude the mouth swab, given the seriousness of the offence under investigation.[153] Such a ruling would generally only be made under Australian law if the police's wrong conduct was neither intentional nor reckless,[154] a finding that was presumably bolstered by the police's bland insistence that everything they did conformed to their usual practice.

At the end of the rape trial, the jury wanted to know more about Braedon. They sent the trial judge a note asking: 'How did the police know to take a DNA sample from the defendant?' The judge responded that he did not know and that it was not 'necessary' for them to 'know those details'. Instead, it was sufficient for them to know that Braedon's DNA was identical to the semen found on Gwen and, indeed, that he had pled guilty to trespass in the Grape Room that night.[155] The judge apparently failed to recognise that the jury had already been told one detail about the events at Illamurta Springs: that 'a mouth swab was supplied to police by [Braedon], with his consent'.[156] So, as in Mellors' trial, the jury may have been left with the incorrect impression that Braedon had effectively turned himself in to the investigators.[157]

During its deliberations, the jury turned its attention to Gwen's behaviour, asking questions such as '[i]s the act of grabbing a person's hand and touching the privates to be construed as consent?'[158] After six hours, they returned with a guilty verdict.[159] However, in sentencing, the judge looked to Braedon's nonchalant conduct that night – saying 'shush' to Gwen and his slow exit from the room – to conclude that this was not 'a case of somebody clearly taking advantage, quite deliberately taking advantage, of somebody who is non-

152 Transcript, Braedon committal, 169-173. Brayshaw had also neglected to comply with a statutory provision requiring him to seek authorisation from a superior.

153 *R v Braedon* [2000] NTSC 68, [12].

154 *R v Su & Goerlitz* [2003] VSC 305, [74]; *Pollard v R* (1992) 176 CLR 177, 203-204; cf *Bunning v Cross* (1978) 141 CLR 54, 79.

155 Transcript, Braedon second trial, summing up, 1.

156 Transcript, Braedon second trial, 95.

157 The trial judge also tried, unsuccessfully, to conceal from the jury that Braedon absconded during his second trial shortly after the prosecutor delivered her closing arguments. He only returned after being arrested by Dooley-McDonnell: Transcript, Braedon second trial, 126; Transcript of Proceedings, SCC 9823567, *The Queen v Steven Jerry Braedon* (Supreme Court of the Northern Territory, Angel J, 24 August 2001) 3.

158 Transcript, Braedon second trial, jury deliberations, 10.

159 Transcript, Braedon second trial, 136.

compos'.[160] Instead, he was sentenced on the basis that 'this was an opportunistic crime that occurred on the spur of the moment and that he [unreasonably] thought she was consenting because she did not actively resist what was happening'.[161] Noting his youth and family circumstances – by the time of the trial, he now had a wife and five-month old child – Braedon was given a mostly suspended sentence.[162]

V CONCLUSION: DARWIN 2002

Braedon's conviction for rape – the only such outcome in the three cases discussed in this article – did not stand for long. The following year, in a separate case, the Northern Territory's Court of Criminal Appeal ruled that general provisions governing criminal responsibility in the Territory meant that an honest but unreasonable belief in consent was a defence to a charge of rape.[163] Given the sentencing judge's finding, drawn from the defendant's relaxed demeanour in the Grape Room, that Braedon held precisely such a belief, his conviction couldn't stand. He was released seven months into his sentence and, eventually, his appeal was allowed. The prosecution did not seek a retrial.[164]

So, in all three DNA sampling hearings and in all three rape trials, the issue of consent was ultimately decided in favour of the recipient of that consent, rather than the alleged giver. Mellors, Jones and Braedon were found to have consented to their DNA sampling by the police, but were each cleared of having non-consensual sex with Amanda, Rebecca and Gwen. While these are only six of the hundreds of disputes about consent to bodily contact that come before Australian courts every year, the reasons behind them suggest a broader phenomenon at work: that the recipient of an alleged consent has dramatic – often unassailable – advantages over the alleged giver when a dispute about consent to bodily contact comes to court.

Mellors' DNA sample was admitted because of his motive to deny giving consent and the police's decision not to treat him as a suspect; however, he turned the tables at his rape trial, portraying Amanda as motivated to deny her own acts and his alleged consent to DNA sampling as consistent with his innocence. Jones was held accountable for his pressured and ill-informed decision to give his DNA sample, but his rape charges were dropped when Rebecca took responsibility for her similarly unwise choice. Brayshaw and Dooley-McDonnell's behaviour when they sampled Braedon escaped scrutiny because they broke no laws and the court drew no adverse inferences from wider evidence of their standard approach to obtaining consent; however, Braedon, in

160 Transcript of Proceedings, SCC 9823567, *The Queen v Steven Jerry Braedon* (Supreme Court of the Northern Territory, Angel J, 7 September 2001) ('Transcript, Braedon sentence') 17-18.

161 Transcript, Braedon sentence, 18.

162 Ibid 18-19. The full sentence was four-and-a-half years, but all but one year was suspended.

163 *DPP Reference No 1 of 2002* (2002) 137 A Crim R 158.

164 *Braedon v R* (Unreported, Northern Territory Court of Criminal Appeal, Martin CJ, Thomas and Riley JJ, 19 April 2005), which followed the High Court's confirmation of the Court of Criminal Appeal's ruling in *DPP (NT) v WJI* (2004) 219 CLR 43.

turn was ultimately cleared of rape by a court that read his calm actions with his alleged victim in a favourable light while excluding evidence of a wider pattern of predation.

As noted in the introduction, the plight of Mellors, Jones and Braedon in no way compares with the horrors asserted by their accusers; likewise, the sharp tactics of Frew, Brayshaw and Dooley-McDonnell are in a different league to the evil of rape. It is precisely these differences that prompt the question of why DNA sampling should continue to be carried out on the same legal foundation that the criminal law uses to distinguish lawful sex from rape. The enormous reform efforts devoted to the law of rape are neither merited by nor suited to addressing the law's approach to each of the three parties to disputes about DNA sampling.

The courts have long been a focus of rape law reformers, who have fought a difficult battle to combat judges' and jurors' use of stereotypes in reasoning about the credibility of rape complainants, even though, as Amanda's rape trial demonstrates, those efforts may often be negated by a robust defence. As both Mellors' and Braedon's trials show, prosecutors' similar success at caricaturing those who challenge the admissibility of DNA evidence as foolish repenters can rebound on rape complainants, because the ruling that DNA was given voluntarily will leave jurors with the impression that the alleged rapists willingly submitted themselves to forensic scrutiny. But the level of criticism and reform that has been brought to bear on 'rape myths' could never be mustered to prevent judges from making assumptions about what suspects are thinking when they are asked for DNA. Indeed, given the wide definition of consent, it is doubtful that courts are reaching the wrong conclusions when they rule on the legality of ostensibly consensual DNA sampling.

Those who ostensibly give consent have received mixed blessings from rape law reformers' goal of supporting sexual autonomy. The definition of consent encompasses pressured and unwise decisions because of the law's reluctance to treat even grim encounters like the one Rebecca experienced as illegal. While it can be hoped vast imbalances in knowledge, motivation, empathy and power are uncommon in sex, they are the norm for interactions between police and their suspects. So, non-Territorian statutes purporting to require 'informed consent' to DNA sampling could do little to ameliorate the circumstances of suspects and potential suspects who are asked for DNA. Indeed, informed consent procedures in policing statutes and cases highlight not merely the choices available, but also DNA identification's capacity to separate the guilty from the innocent and the police's powers to take DNA when consent is removed;[165] as Jones' case shows, such procedures are themselves facilitative of consensual sampling and remove, rather than enhance, samplees' 'sense of control'.[166] By contrast, in clinical

165 See the provisions listed in n 10. Cf *R v Wills* (1992) 70 CCC (3d) 529, 546. This case required that 'the giver of the consent was aware of the potential consequences of giving the consent': at 546.

166 Cf NSW Ombudsman Suspects Report, above n 5, 98 and cf *R v Fash* (1999) 244 AR 146, [143] arguing that '[t]he admonition: "…if you are the person [who committed the crime] you should not voluntarily provide the samples" places the suspect in the position of "damned if you do, damned if you don't"', depriving the suspect of a 'meaningful choice'.

settings, informed consent aims to give subjects of bodily procedures the knowledge and confidence to choose what is best for them.[167] Effecting such a transformation in an imbalanced relationship requires, not merely good procedures, but also good intentions. The scenario of Frew genuinely assisting Jones (or his lawyer) to appreciate that DNA sampling was not in his interests is no more plausible than the man who woke Rebecca cautioning her about the wisdom of sex with a home intruder.

Finally, the alleged recipients of consent have been targeted by the rape law reform movement, which has sought to place their behavioural patterns under scrutiny; however, this goal has been stymied by the courts' reluctance to subject those exposed to possible imprisonment to tests of reasonableness or analyses of their character, instead focussing on their subjective awareness (or otherwise) of what the other party was going through.[168] When consent to DNA sampling is questioned, the police rarely (if ever) face any form of discipline, but there are other liberties at stake that render investigative contexts even less amenable to regulation of standards than sexual ones. The more the courts scrutinise the behaviour of those who gather evidence, the greater the chance that factually guilty criminals will be freed because significant evidence against them is excluded. For this reason, in many instances of DNA sampling, the law of consent is facilitative, rather than restrictive, of the behaviour of police, operating merely as an informal alternative to the statutory procedures governing the use of investigative powers. Moreover, just as rape trial jurors sometimes find that, although the complainant was raped, the defendant was not a rapist,[169] Australian judges routinely decline to exclude illegally obtained DNA samples on the ground that the police's error was inadvertent and done with the best of intentions for the wider community.[170]

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167 For a discussion of ethical DNA sampling in non-investigative settings, see Mylene Deschenes et al, 'Human genetic research, DNA banking and consent: a question of "form"?' (2001) 59 *Clinical Genetics* 221, describing a consent form as 'a tool that stimulates dialogue between researchers and potential participants': at 221. Deschenes et al further argue that '[t]he burden of determining serious conflict [of interest] should not be shifted to participants' but 'should be resolved at the institutional level': at 229.

168 See generally David Brown et al, *Criminal Laws* (4th ed, 2006) 747-756.

169 That is, the actus reus (intercourse and non-consent) could be proved but mens rea (intent or recklessness) couldn't be proved beyond reasonable doubt. The prevalence of such findings is difficult to determine: see Jeremy Gans, 'Rape Trial Studies: Handle with Care' (1997) 30 *ANZ Journal of Criminology* 26, and Terese Henning, *Consent and Mistaken Belief in Consent in Tasmanian Sexual Offences Trials* (2000) 41. On whether inadvertence to the other party's consent suffices to establish that someone is a rapist, see *R v Kitchener* (1993) 29 NSWLR 696; cf *Banditt v The Queen* [2005] HCA 80.

170 Bram Presser, 'Research Note: Public Policy, Police Interest: A Re-Evaluation of the Judicial Discretion to Exclude Improperly or Illegally Obtained Evidence' (2001) 25 *Melbourne University Law Review* 757, 776-781. For an instance of such a ruling in relation to a purportedly consensual DNA sample, see *R v Su & Goerlitz* [2003] VSC 305, [74]; contrast *R v Stillman* [1997] 1 SCR 607, [75]-[101], holding that 'compelled' bodily samples obtained without legally authorised samples must be automatically excluded in Canada. See also the 'good faith' exception to the United States non-discretionary exclusionary rule: *United States v Leon*, 468 US 897 (1984), which is framed around invalid warrants but may have a wider application to warrantless policing; see LaFave, above n 14, §1.3(g). Cf the argument that the Fourth Amendment is avoided if the police had reasonable grounds to think that a person consented to a search at §8.1(b).

So, the task of reforming the law of consent to DNA sampling is arguably less appealing than that faced by rape law reformers. But why reform the law, when you can just abolish it? The law affords alleged rapists the benefits of dubious proofs, foolish choices and a generous view of their behaviour in order to keep – depending on your perspective – the wrongly accused, people's bedrooms and/or men's sexual access free from legal restriction. However, there is far less need to offer similar advantages to police officers, because the criminal justice system already provides an avenue for gathering DNA evidence that does not depend on the legal fictions, broad definitions and narrow inquiries of the law of consent. The alternative is the statutory system of compulsory DNA sampling, some variety of which has been in place in most jurisdictions for a decade or more.[171]

In Australia (except South Australia), consensual DNA sampling is available to investigators alongside their compulsory powers.[172] The parallel methods of obtaining DNA can undermine each other. The availability of police powers means that the law of consent has little meaning for suspects or the courts who enforce it; however, the informality of the law of consent tempts the police to obtain DNA on an inexact footing. Frew's decision to seek Jones' cooperation required him to hide his true purposes and, by saying yes, Jones was able to utilise that deception to challenge his link to the crime scene. The irony is that, if Jones had said no (or had never been asked), then the information Frew withheld would have sustained a court order placing the admissibility of Jones' sample beyond doubt.[173] A court order would also likely have been available to obtain Mellors' DNA, had Brayshaw and Dooley-McDonnell opted to arrest him.[174] The minor inconvenience of seeking the order would have avoided the much more cumbersome admissibility hearing two years later, as well as the appearance that Mellors willingly gave his DNA.

Braedon's DNA sampling at Illamurta Springs is more problematic, as it is doubtful that the detectives had sufficient evidence on that day to justify his arrest. Rather, his case demonstrates the utility of DNA sampling of non-suspects in difficult investigations where leads are few. The sampling of non-suspects yielded the detectives Braedon's name, his saliva and (ultimately) his admission that he was the man in the Grape Room. While it later emerged that Braedon probably would have been located anyway (by virtue of his fingerprint, which was already on the police's files)[175] the broader point remains that consensual DNA sampling may yield results that compulsory DNA sampling presently cannot.

So, there is a choice to be made between four unhappy alternatives. One is the status quo, which permits DNA to be readily obtained on a legal footing so broad

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171 See, eg, the very broad contemporary powers of the Northern Territory police to collect DNA samples in s 145A of the *Police Administration Act 1978* (NT) (introduced in 1998).

172 See the provisions listed in n 9, above. The approach of retaining consensual DNA sampling alongside compulsory options can be traced (in Australia) to Victoria's 1998 Coldrey Committee report: see Jeremy Gans, 'Something to Hide: DNA, Surveillance and Self-Incrimination' (2001) 13 *Current Issues in Criminal Justice* 168, 171.

173 See the (then) s 145(3)(b) of the *Police Administration Act 1978* (NT).

174 See the (then) s 145(3) of the *Police Administration Act 1978* (NT).

175 Transcript, Braedon committal, 223-225.

that it will often be fictitious. The second is to pursue reform of the law of consent, against the backdrop of rape law reformers' very mixed success at this goal. The third is to bar the police from obtaining DNA evidence consensually, reducing the utility of this investigate tool in cases such as Braedon's. The final alternative is to extend the police's compulsory powers to non-suspects to entirely replace the consensual option.[176] If the cases of Mellors, Jones and Braedon are indicative of contemporary practices, then this reform may simply amount to a more honest relabelling of the contemporary law of consensual DNA sampling.

176 The question of whether the police's compulsory powers should be extended of course depends on many other questions of legal policy, some of which (self-incrimination, alternative investigative methods and alternative sampling methods) have been or will be the subject of articles by the author. See Gans, above n 172; Jeremy Gans 'Catching Bradley Murdoch: Tweezers, Pitchforks and the Limits of DNA Sampling' (2007) 19 *Current Issues in Criminal Justice* 34. On the broader legal policy issues of wider DNA sampling powers, see the articles collected in (2006) 34(2) *Journal of Law, Medicine & Ethics*.