# Towards a New Ethics of Sexual Self-determination: Finnish Rape Law through the Speculum of Feminist Philosophy

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**Abstract**

*Taking the perspective of feminist philosophy and feminist legal scholarship, this article discusses the idea of sexual self-determination on which the Finnish rape law is currently built. A transition from coercion-based model of criminalization to consent-based model of criminalization of rape is expected to take place also in Finland. Such a transition from one model to another calls for a discussion of the discourses of freedom and moral autonomy inherent in these models. Responding to that call, the article draws on a variety of sources, from travaux préparatoires and case law to influential philosophers, in order to elucidate current understandings of sexual self-determination. With the view of a possible redefinition of the foundations of rape law, the article introduces and discusses Luce Irigaray's notions of sexual difference, love and wonder. Finally, the article develops an Irigarayan inspired three A's approach – prohibition of assimilation, assumption and appropriation – in order to open a way towards new ethics of sexual self-determination.*

## 1. Returning to feminist philosophy

In 1998, more than twenty years ago, British professor of criminal law and gender studies Nicola Lacey asked in her inaugural lecture *Sexuality, Integrity, and Criminal Law*, why the law on sexual offences says so little about what is valuable for us in sexual relationships (Lacey 1998, 103). Her lecture has been read and cited by feminist criminal law scholars in the Nordics, and one could state it is a classic in its own field of study. In Finland it has been referred to by at least Johanna Niemi and

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Helena Jokila, and in Sweden by Ulrika Andersson and Linnea Wegerstad.[1] Why is her text still inspirational? Why do we – and why should we – go back to it, even after so many years?

One of the reasons for her resonance in Finland seems to be that her criticism on sexual autonomy as the starting point of British law was exactly spot on with what has been seen to be one of the core problems in Finnish law on sexual offences in recent decades. In Finland, sexual self-determination was defined to be the core value of the law on sexual offences in the 1990s. The Finnish Criminal Code Chapter 20 on Sexual Offences was basically fully renewed and came into force on the 1st of January 1999. The chosen emphasis on sexual self-determination has raised strong criticism among Finnish feminist criminal scholars ever since.[2] As Lacey puts it, the liberal discourse of autonomy and sexual self-determination closes off the possibility for developing a sophisticated conception of sexual harms, reducing the body to property (Lacey 1998, 113; see also Nousiainen 1997, 232). The discourse does not recognize the relationality of sexuality or the importance of relations to solid development of personal autonomy and finally, reduces sexuality to penetration.

Since 1999 Chapter 20 has been amended five times. The first amendments in 2004 and 2006 relate to the international framework for human trafficking (see Kimpimäki 2009, 211-226; Roth 2010). In 2011 significant changes were made in relation to implementation of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS 201) (see Ojala 2012, 12-28). The provisions concerning rape and sexual abuse of persons of 16 years and above were revised in 2011 and 2014 (see Ojala 2014, 17-26; Leskinen 2017). The last two revisions relate to powerful lobbying by NGOs on women's rights and the state's obligation to protect women and girls from sexual violence (see e.g. Amnesty International 2008). Even though the law has gradually changed, sexual self-determination as its core value has not been discussed. The question is even more topical now when the new Finnish government has announced that it will amend the law on sexual offences to be based on consent (Osallistava ja osaava Suomi, 89).

NGOs have been keeping up the discussion on consent and sexual self-determination (see e.g. Amnesty International 2019, 6). Last year in the aftermath of #metoo, several Finnish NGOs gathered their forces and produced a draft law on sexual offences based on consent (Suostumus2018). Their groundings start by stating that self-determination is a human right that belongs to everybody. The concept of self-determination is not discussed, but an important question is raised here. What would it mean that self-determination belongs to *everybody*, even to children and to those in various ways impaired or disabled? Is there a need to reassess the law's philosophical presuppositions?

1 See Jokila & Niemi 2019; Wegerstad 2015; Jokila 2010; Niemi-Kiesiläinen 2004; Andersson 2004. Non-feminist writers have also referred to the text, see e.g. Asp 2010.

2 See e.g. Niemi-Kiesiläinen 1998, 2000, 2004; Nousiainen 1999; Karma & Pohjonen 2006; Jokila 2010; Leskinen 2017.

In her lecture from 1998, Lacey suggests two different ways to approach the issue. Either the concept of sexual self-determination should be redefined or there should be an entirely new framework for sexual offences. Her suggestion is to shift the emphasis from sexual autonomy to sexual/bodily/human integrity, following the ideas of feminist legal theorists Drucilla Cornell and Jennifer Nedelsky (Lacey 1998, 117). How to understand integrity in this specific setting clearly depends on the chosen theorists. The Oxford dictionary's formal definition of integrity is a state of being whole and undivided. The dictionary definition itself resonates somewhat too much with old-fashioned moralistic views on feminine sexuality emphasizing virginity and chastity, which used to be a leading principle for rape law (see e. g. Utriainen 2010; Jokila 2010; Lidman 2017). We need to understand how integrity has been understood by feminist legal theory in order to understand what Lacey is aiming at.

For Lacey, Drucilla Cornell's theory on the imaginary domain seems to reflect best what she also means by integrity. Integrity includes bodily integrity, access to symbolic forms as the capability to differentiate ourselves from others and protection of the imaginary. The space to pursue personhood is not only mental but embodied and sexed, including our sexual desire (Lacey 1998, 117). As Cornell herself puts it, her theory of the imaginary domain is a theory on the minimum conditions of individuation, giving us the chance of freedom (Cornell 1995, 5). Jennifer Nedelsky's project, Lacey's other point of reference, is also about encompassing the body (Lacey 1998, 119). But Nedelsky is not giving up the idea of autonomy. She wants to redefine it as relational, building in a corporeal aspect of dependency as its precondition. The ability to become governed by our own laws is given us by others whom we are in relation to and depending on. (Nedelsky 1989, 25.) In her much later book, *Law's Relations* (2011), Nedelsky goes on to argue that gaining this relational autonomy is something that the liberal state should protect.

In Finland, Johanna Niemi-Kiesiläinen, in her article in 2004, advocated a shift from the concept of sexual self-determination to sexual integrity. She creates a linear narrative, in which sexual self-determination belongs to the era of modern law of the liberal state whereas sexual integrity marks a shift to feminism, postmodernism and an understanding of the legal subject as relational instead of individual and atomistic. The concept of sexual self-determination could hold its place as part of the concept of sexual integrity. However, emphasizing integrity would, according to Niemi-Kiesiläinen, allow us to recognize that the subject is always in a relation with others. What Niemi-Kiesiläinen has in mind is not only the safety of women from physical violence but structural and contextual abuse of power as an equally important context for sexual offences. (Niemi-Kiesiläinen 2004, 182-184.)

In her dissertation on rape law in 2010, Helena Jokila also suggested that sexual integrity and trust should replace sexual self-determination. Her point of view seems to be more psychological than philosophical, emphasizing the meaning of trustful and safe emotional relations as a prerequisite for developing individual autonomy in the first place (Jokila 2010, 296). In conclusion, feminist scholarly criticism in

Finland has quite clearly framed sexual self-determination and its contemporary understanding as the primary suspect for the unsatisfying and 'blind' outcome of the legislative and judicial process. In their recent article, Jokila and Niemi have argued for further inclusion of trust, relationality and contextuality into the formulation of rape law. Their legal solution would be inclusion in domestic law of the coercive circumstances doctrine developed in international criminal law (Jokila & Niemi 2019).

In Finland, Sweden is quite often used for benchmarking when looking critically at the law on sexual offences. In Sweden, the two concepts of integrity and autonomy have been used side by side in *travaux préparatoires* for the past twenty years. The Swedish rape law was fully renewed in 2018 and is now based on lack of free will on the part of the victim, also referred to as consent-based criminalisation. The link between enhanced protection of sexual integrity and more victim-oriented, even feminist, criminal law seems to be reinforced. Nevertheless, the view on the progressivity of Swedish law is to some extent challenged by Linnea Wegerstad's dissertation on sexual harassment from 2015. According to her analysis, the Swedish *travaux préparatoires* involve a built-in 'success story'. With each and every amendment the view on sexual crime is 'sharpened' and protection of sexual integrity is made 'as covering as possible'. Sexual integrity, on the other hand, is always self-evident and never explained. (Wegerstad 2015, 74-78.) This seems to be very similar to the situation in Finland, where sexual self-determination is repeatedly used as a basis for revising the law on sexual offences but the content of the concept itself is not open to discussion.

According to Wegerstad's analysis, sexual self-determination in the Swedish *travaux préparatoires* is seen as freedom from another's sexual desire, not as freedom from being sexualised as a woman (Wegerstad 2015, 189). Wegerstad's analysis of the case law shows that desire usually needs to take a physical form before it is recognized by the courts. Acts which are seen as 'worthy of punishment' are physical attacks with a sexual motive and purpose. This means that the counterpart to 'worthy of protection' is physical integrity. Her analysis also shows that even in Sweden emphasis is sometimes placed on the will of the victim in order to get protection for her integrity. (Wegerstad 2015, 308-309.) This means that the victim needs to express her objection and thus actively exercise her sexual self-determination. Wegerstad's analysis shows that it would be too simplified to think that concepts themselves would lead to certain laws or interpretations. It seems though, that different concepts lead to different emphasis: if we look at sexual integrity, the question seems to be what counts as a 'sexual' act and what does not, whereas if we look at sexual self-determination, the question is: who is using sexual self-determination and how is it used in relation to others?

Reading Lacey's lecture could also open up other paths yet unexplored. Before advocating the turn from autonomy to integrity using Cornell and Nedelsky, Lacey discusses corporeality and embodiment in feminist philosophy, naming some key works of the 1990s such as Judith Butler's *Bodies that Matter* (1993) and Elizabeth

Grosz's *Volatile Bodies* (1994). Lacey emphasizes the need to affirm the corporeal frame, the body, through which affective and intellectual life is lived – including in terms of sexuality. In addition to Butler and Grosz, she uses Irigaray as a 'striking example […] on the role of feminine embodiment in the generation of distinctive sensibilities and knowledges'. Lacey notes how Irigaray uses 'the image of lips as a way of expressing a form of feminine and relational human subjectivity different from that of the unitary and rational individual of modern thought'. (Lacey 1998, 110.)

After this statement, Lacey does not return to Irigaray but continues to discuss legal theory with Cornell and Nedelsky. This is a point where an opening is available – but she does not use it. I agree with Lacey that reading Irigaray opens the possibility to think about human subjectivity very differently from that of modern thought – and modern law. Going back to what seems more familiar to lawyers, namely legal theory, takes her back to exactly what she tried to escape here, to modern subjectivity and its relations to freedom, state and law. I demonstrate this shortly by looking at how Jennifer Nedelsky and Drucilla Cornell understand the legal subject.

The subject for Nedelsky is definitely a corporeal and relational being. However, her approach is rather psychological and pragmatic than philosophical. This becomes even more clear in her recent work *Law's Relations* (2011), in which she rejects law's individualistic and boundary-focused approach to the (legal) subject and claims that the liberal state should include in its tasks a transformation of the relation between men and women (Nedelsky 2011, 228). By this she means the end of domination and fear (Nedelsky 2011, 216), and rejection of control and independence as core components of autonomy (Nedelsky 2011, 303). For her, freedom seems not to be freedom from state-bound restrictions but constituted by the state through law. As she writes on the widely-praised Canadian law on rape, it imposes more responsibilities on both parties: 'It commands that men offer women a respectful attention to their wishes about sexual contact, and it requires women to be more forthright about their sexual desires (Nedelsky 2011, 226)'.

Cornell's view, on the other hand, is more philosophical. At the beginning of her book *The Imaginary Domain,* Cornell discusses her view of the human subject. The subject for Cornell is the *Perso-na*, in Latin, which literally means a shining-through. To be able to shine through, says Cornell, a person must be able to imagine themselves as a whole even though they can never reach this wholeness. Freedom for Cornell is the chance to struggle to become a person, and the (liberal) state needs to protect this chance as a legal matter of equality. (Cornell 1995, 4-5.) This approach seems to be even more liberal than Nedelsky's, recalling the capabilities approach of Amartya Sen and Martha Nussbaum. For Nussbaum, imagination is one of the core capabilities that all democracies should support. Her approach is Aristotelian, picturing humanity and human dignity as nobility shining through even in the middle of difficulties (Nussbaum 2008, 73).

One could claim this is also a question of a humanistic world view. Is the subject of law and legal theory actually humanist? Is it one that chooses courses of

action, cultivates itself, seeks happiness? One needs only to read the preface to Judith Butler's *Bodies that Matter* to understand that Butler's question is totally different from e.g. Cornell's. This is not about individuation but politics, and our possibility to gain critical agency in a world where we do not decide on gender, but gender is part of what defines us as a subject. Butler emphasizes that 'the materiality of sex is constructed through a ritualized repetition of norms', trying to find a way out of the dualism between humanism and determinism. (Butler 1993, x.) Similarly, Elizabeth Grosz theorizes on the body and sexual difference. The body is an *open materiality* which cannot be reduced to biology understood as an equation: 'subject minus culture'. It is a lived reality, an ontological structure with (infinite) tendencies the development of which is not consciously chosen. Also for Grosz, sexual difference demands sexual ethics. (Grosz 1994, 190-192.) What both Butler and Grosz are pointing out is that any theory based on dualisms of biology and culture, body and language, or choice and determinism is too simplified.

I claim that thinking with Irigaray offers even deeper possibilities to question modern (legal) ideas of subjectivity. But what can we say about the Irigarayan subject and its relation to the state or power or law? In the works of the 1970s, *Speculum of the Other Woman (1974)* and *The Sex That is Not One (1977),* both translated into English in 1985, she demonstrates – by using the technique of philosophical inversion – how 'the whole of Western philosophy is the mastery of the *direction* of will and thought by the subject, historically man'.[3] The Irigarayan female subject is no doubt a political actor. However, her possibilities to define herself are limited by the existing symbolic, phallocentric order. Irigaray's background in psychoanalysis is clear when she evokes *mimesis* as the thinking, writing and speaking process through which the female subject can try to challenge and alter this order, the 'Father's Law'. For Irigaray, though, it is not the subject, or even the gendered subject as such but the *sexual difference* she wants to make the centre of her philosophic exploration. At the same time, she is insisting that this difference is placed between men and women (and no one else), and treats other questions of difference as secondary (Irigaray 1996, 47), a statement that has evoked a critique of essentialism by thinkers such as Judith Butler.

Even though the Finnish law on sexual offences has been gender-neutral since the reform in 1999, rape still remains a crime that is committed mainly by men and the victims of which are mainly women. In a world in which we would like to think that gender does not matter but we are forced to admit it does, Irigarayan thinking might prove its persuasive power. As the American philosopher Debra Bergoffen states on the essentialist dangers recognized in Irigaray's thinking:

> This dangerous ambiguity is part of the power of Irigaray's thinking. […] I think that it comes from Irigaray's refusal to accept the nature-culture divide; that it is embedded in the way she grounds her understanding of the sexual difference

3 This is an explanation she gives herself much later on, in *I love to you: Sketch of a Possible Felicity in History* (Irigaray 1996, 45).

> in the materialities of our desire; in the way she looks to these materialities for ethical directives; and in the way she calls on these ethical directives to structure our political commitments. (Bergoffen 2007, 152.)

According to Bergoffen, we need to understand Irigaray's use of different couple relations in order to exactly understand why the man-woman relationship is for Irigaray the origin of ethics. Bergoffen claims that Irigaray's other couples such as the pregnant woman-foetus and the mother-daughter (both contesting the social order based on the contract between men) are only almost-ethical, whereas the man-woman-relationship is the only situation in which the phallocentric symbolic order can be challenged and changed. I will come back to the symbolic order in the third section, but for now it suffices for my argument to point out that it is the unity of the rational, imaginarily-neutral but in-reality-male human being, and the singularity of the ethical subject that Irigaray is contesting. For her, it is not the subject that is universal but the sexual difference (Irigaray 1996, 47).

Is this so very different from what Nedelsky means by relational autonomy, i.e., that we are never truly alone-standing but always dependent on others? The answer seems to be both yes and no. In an ethical sense, both Irigaray and Nedelsky are emphasizing the being in relations. So, in that sense there is a connection to be drawn here. But Nedelsky does not cast doubt on the ability of the liberal state (in its current form) and its (criminal) laws also to accommodate the relational subject and protect women as its citizens. Quite the contrary: Irigaray argues that citizenship does not include women. In many of her works published in the 1990s and after, Irigaray speaks more directly of law and the need to incorporate specific women's rights into law (see e.g. Joy 2011). She is sceptical of the sufficiency of criminal law alone and sees the right to physical and moral inviolability as a question of (women's) civil identity to be guaranteed by civil law (Irigaray 1996, 132; Joy 2011, 231). Since the emphasis in this article is on the development of criminal law whereas she is turning more towards the discourse of rights, our paths part here.

Even though Irigaray herself does not divide her works into different phases, the problematics of her later works has been well analysed by Morny Joy. As Joy notes, in 'Irigaray's program for the liberation of women' there are two intertwining projects: (1) attainment of self-determination and respect (autonomy) by means of a sexually-marked civil law and (2) reaching a personal state of integrity and self-possession in 'divinity' (Joy 2011, 221). Both of these projects seem to include a claim, firstly as to what being feminine means and, secondly, how this femininity should come to expression both in law and in the self-realization of real-life women. Irigaray's – convincing – argument that there is an ontological-ethical sexual difference would also appear to imply how we should deal with sexual violence and criminal law. But her idea of a 'natural identity' (woman or man) as a basis for civil identity (Irigaray 1996, 53; Joy 2011, 234) is, arguably, nothing worth pursuing by means of law: we do not need sex-specific rules but universal rules which can accommodate sexual difference.

Irigaray's turn towards prescribing how women should pursue their autonomy

and integrity is also interesting from the point of view of her psychoanalytical interest. As Rachel Jones notes, it is Irigaray who shows us how psychoanalytic theory 'continues to perpetuate a sexual indifference driven by an underlying desire for the same'. The desires and sexuate specificity of women remain unacknowledged. (Jones 2011, 139-140.) In that light, it seems plausible enough that Irigaray claims that it is now time for women to consciously find 'genuine modes of expression for their own desires' (Joy 2011, 227). But there is a very small step from the generative power of the sexuate difference to the paralyzing effect of forced femininity, whatever content that may have. This is crucial from the point of view of sexual violence, since the idealized meanings given to concepts such as sexual self-determination and sexual integrity can easily turn into tools that divide victims of sexual violence into those who deserve and those who do not deserve state protection.

Nevertheless, I think that it is possible to use Irigaray's philosophy as a starting point for a different understanding of sexual violence even though one would not agree with her later ideas as to how autonomy and integrity should be developed in concrete legal terms. In this article, I will attempt to show where following Irigaray (the philosopher) might lead us. I am also interested in the psychoanalytical traits in Irigaray's philosophy since they enable us to think about the role of sexuality in subjectivation and who exactly are the subjects thinking and speaking in the fields of law. I attempt to start a discussion about the content of freedom, autonomy, self-determination, sexual difference and ethics in the framework of Finnish law on sexual offences. As a starting point I will use the Finnish *travaux préparatoires* and also include some recent cases by the Finnish Supreme Court where sexual self-determination has been discussed. Inspired by feminist philosophy, I ask the question how sexual self-determination could be redefined and how the legal order in which it came to be could be altered. As Nicola Lacey suggested more than twenty years ago, feminist philosophy has a lot to offer for this discussion. In this article, I try to dig deeper into the question what that something could be.

## 2. Origins of sexual self-determination

When the Finnish Criminal Code Section 20 on Sexual Offences was renewed in 1998, sexual self-determination was the idea that was chosen to symbolize the 'good' that law on sexual offences ought to protect (Niemi-Kiesiläinen 2004, 176). The first time the notion appeared was in a working group draft law in 1993. It is not clear or self-evident where the idea came from or why it was chosen in the first place. Neither the memorandum of the working group from 1993 nor the Government Bill from 1998 give any explanation. Johanna Niemi-Kiesiläinen has linked this comparably sudden change from strict sexual morals and double standards to freedom and respect for privacy to the sexual liberation of the 1960s and 1970s (Niemi-Kiesiläinen 2004, 189). But in Finnish official documents, neither is the history of the idea discussed, nor are its possible options. Nevertheless, the Finnish *travaux préparatoires* give a one-sentence definition of sexual self-determination. As the working group memorandum from 1993 states and as is repeated in the Government Bill five years

later, *everyone should be allowed to exercise their sexual self-determination freely except when they violate someone else's sexual self-determination.*[4]

When the Government Bill was published in 1998, there was direct criticism of the chosen perspective. Johanna Niemi-Kiesiläinen pointed out that the focus on sexual self-determination assumes a woman who is independent and capable of taking care of her rights herself. If other perspectives, such as the safety of women or respect for integrity, had been chosen, the outcome of the law might have been different. (Niemi-Kiesiläinen 1998, 19.) On the other hand, Minna Kimpimäki (whose critique is not exactly feminist at this point) accused the *travaux préparatoires* of conceptual confusion. Whereas the working group used sexual self-determination as a restricting principle against too many limitations on sexual freedom, in the Government bill the notion of self-determination was used mainly for purposes of systematisation. In Kimpimäki's opinion, the concept as such was clear enough, though, and in line with Finnish liberal (and restrictive) criminalization theory. (Kimpimäki 1998, 21-22.) What is striking, though, is that the formulation of the definition is not further discussed in these critiques.

In Nicola Lacey's lecture, the idea of autonomy is traced back to John Stuart Mill's essay *On Freedom* from 1859 (Lacey 1998, 105). For John Stuart Mill, the boundary of one's autonomy is the prohibition on inflicting *harm* to others:

> That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. […] Over himself, over his own body and mind, the individual is sovereign. (Mill 1977, 223-224.)

It is to be noted that Mill was not an advocate of social contract theory. His approach is rather practical, claiming that 'living in a society renders it indispensable that each should be bound to observe a certain line of conduct towards the rest' (Mill 1977, 276). What he is specifically talking about is the state's right to intervene in individual conduct and the legitimate use of force such as penalties. According to Mill, any case of conduct is taken out of the 'province of liberty' and placed in that of morality or law, whenever there is damage or risk of damage to an individual or the public (Mill 1977, 282). What Mill is trying to do is to find a balance between an individual's freedom to pursue a good life of their own definition and responsibilities of the individual towards society, which are seen as antagonists. Mill's definition of liberty is thus a version of negative freedom.

If we read more closely the definition given to sexual self-determination in the Finnish *travaux préparatoires*, the question arises whether we really can trace it back to Mill or whether we should look for other references in order to better understand its origin and problematics. As stated above, for Mill an individual is sovereign only

4 Oikeusministeriön lainvalmisteluosaston julkaisu 8/1993: Seksuaalirikokset. Rikoslakiprojektin ehdotus, 3-4; HE 6/1997 vp, 161.

when their actions concern solely themselves, and in all other cases society has the right to intervene if there is a risk of harming others. In the Finnish formulation, *the boundary of freedom is the violation of someone else's freedom,* not inflicting harm or risk of damage. Is there then a difference between violating someone else's freedom and causing harm? It does appear that there is, and it is important to highlight it. The different definitions regulate the relations between perpetrator, victim and state power differently and call for state intervention differently. If the harm principle is left out, the responsibility to set the boundaries between human beings shifts from the state to individuals. If the responsibility of the state is *only* to protect freedom, it is up to individuals to articulate violation of their freedom. What happens is that moral freedom is emphasized over protection of the vulnerable.

Since the Finnish definition of sexual self-determination as individual freedom seemed not to fully correspond to the British liberal-utilitarian line of thinking, I turned my gaze towards German philosophy, where one of the outstanding and highly influential thinkers in terms of legal philosophy can be found – namely, Immanuel Kant. Philosophically seen, the most equivalent version of freedom is provided by Kant in *The Metaphysics of Morals*:

> *Freedom* (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity (Kant 2006, 393, translation Mary J. Gregor; in original Kant 1966, 345).

At first, the formulation seems not too different from that of Mill's. They both seem to agree that freedom is a sphere that is not created by the state but where the state lets the individual act without intervention (also known as *negative freedom*). This is what Kant refers to as 'originality' of freedom. But the difference between Kant and Mill becomes evident in how important the relationship between the state and the individual is in the analysis. For Kant, freedom is not solely freedom from state intervention but – as Panu Minkkinen formulates it – a 'transcendental idea' that explains human faculties such as morality and ethics (*Sittlichkeit*) (Minkkinen 2002, 43). Or as Luce Irigaray would put it, what Kant creates here is a 'sublime dynamic which predestines man to be (only) a moral being' (Irigaray 1987, 209). It is an economy of moral self-recognition that, according to Irigaray, has its cost, to which I shall return later.

In *The Groundwork of the Metaphysics of Morals* Kant elaborates further how freedom is linked to will, reason and morality. He comes to the conclusion that freedom is a part of the will, and will belongs to all reasonable beings (Kant 1966, 82-83). Thus, it would not be meaningful to speak of freedom without first establishing the human being as a *rational and willing* being. Further, without a will that is autonomous, choosing according to reason and thus law-creatively, no morality would be possible (Kant 1966, 41). Through our free will we choose the 'good' that becomes our own law, and that which is recognized by the individual as their own law has the potential to become state law. State law cannot pre-exist individual

morality.[5] Only through our freedom that is bound by the categorical imperative do we develop the capability to make laws that have the ability to be binding for others (Kant 1966, 347). However, Irigaray suspects that the universality which the Kantian subject claims to recognize is only their own picture in the mirror.

Why is this idea of a Kantian moral subject so well-fitted to criminal law? Several reasons can be suggested for it. As Minkkinen explains, the transcendental idea of freedom shows that freedom and nature are not necessarily an unsolvable paradox. There is physical causality and there are natural laws, but also the possibility to act and choose freely. (Minkkinen 2002, 40-43.) Criminal responsibility assumes a subject who could have acted otherwise but chose to act against the law. In order to punish, the state must symbolically equip its citizens equally with reason, freedom and a will of their own. The Kantian subject has all these capabilities. The ability to be a moral being and recognize moral actions clearly does not include a natural causality to always act morally, which in turn explains the need for criminal law. The purpose of criminal law can be limited to punishing actual wrongdoers, and purely symbolic messages should be omitted (see Melander 2008, 364). Kantian morality also creates an idea of unity and universality. Thus reason, if listened to, leads to actions which claim universal acceptability and lay the ground for positive law. (Nousiainen 1997, 228-229.) For Irigaray, this is the old story of Adam and Eve retold: 'Since he freely consented to sin, it follows that he equally has the native capacity to rise up to the good (Irigaray 1987, 210).'

The problematics become evident when the other party to sexual intercourse is brought into the picture. In the Kantian formulation of morality there is only one party, the individual himself. This does not mean that Kant would completely forget others and one's responsibilities towards them but the other is reduced to a part of moral self-referentiality. The other is visible in the acknowledgement that each and every reasonable being has intrinsic value (*Zweck an sich selbst*) (Kant 1966, 59-60). But even in here, it is the individual that is in focus: only in morality that is based on freedom can this intrinsic value actualize (Kant 1966, 68-69). Acknowledging the intrinsic value of others could be seen as a way to reveal the intrinsic value of oneself. The dignity of humankind is in the simultaneous ability (or paradox) to be autonomous, that is law-creating, and yet bound by these laws (Kant 1966, 74) – a circular movement towards oneself.

What I am pointing out here is that freedom in this sense includes only one relation and it is the perpetrator's relation to themselves. Even though the Finnish *travaux préparatoires* seem to state that both the perpetrator and the victim have equal shares of self-determination that ought to be protected by law, is this type of understanding theoretically possible? If freedom is seen as a movement

5 Since Kant, the idea of maximal and equal freedom has been repeated by several thinkers, of which John Rawls and Jürgen Habermas would probably be the most widely read in Finnish legal scholarship. For Rawls e.g., the equal right to the most extensive basic liberty, compatible with a similar liberty for others, is the first principle of justice (Rawls 1988, 60). Even though he later admits that the worth of this liberty might not be the same for everyone because of their ability to use it, the liberty itself is still the same (Rawls 1988, 204).

towards universal moral law, how could conflicting interests or even difference be conceptualised? What Irigaray is stating in her essay on Kant, *Paradox a Priori*, is that this moral economy in its claim to sovereign discretion includes an inevitable forgetting of the original relation to nature (*materia*), suppressing the sensual and weakening of the imaginary, which in psychoanalytical terms is expressed as incest taboo:

> The principle 'noli tangere matrem' locates its economy of reason and desire in the categorical imperative. Fear and awe of an all-powerful nature forbid man to touch his/the mother and reward his courage in resisting her attractions by granting him the right to judge himself independent, while at the same time encouraging him to prepare himself to continue resisting dangers in the future by developing (his) culture. (Irigaray 1987, 210.)

Thus, for Irigaray this move towards sovereignty and culture (that in my opinion entails law), is a move away from the feminine (understood as matter, nature or maternal) and an obstacle for recognition of difference. According to her, 'the desire for reason to reunite the in-finite of the sensual world into one whole' (Irigaray 1987, 209) leads to imaginative blindness. As Rachel Jones notes, it is a self-constitutive move that is motivated by the threatening instability of nature/matter (Jones 2011, 123-124; Jones 2013, 274-276). This is very interesting to put into contrast with Drucilla Cornell's idea of the imaginary. For Cornell, Kant's definition of freedom is a foundation for individual pursuit of happiness (Cornell 1995, 11-12). Cornell sees no problem in adding her concept of the imaginary domain, which includes bodily integrity, as a prerequisite for this pursuit (Cornell 1995, 5). To be able to imagine oneself as a whole, it is essential 'that no one is forced to have another's imaginary imposed upon herself or himself in such a way as to rob him or her of respect for his or her sexuate being' (Cornell 1995, 8). The question that raises is whether Cornell's imaginary is truly inclusive of the bodily aspect or is the imaginary, the ability to recognize wholeness in oneself, inherently bound to the idea of the subject which Irigaray is trying to expose as suppressive.

The value of Irigaray lies exactly in her ability to problematize the very foundations of the production of universal truths. Like philosophy, legal science also has a tendency – or should we say, the task – to produce universal truths, which then become difficult to question. As Irigaray writes later on in *Speculum of the Other Woman* in an essay on Plato, reason, truth and law are inherently bound in the production of knowledge:

> For the optics of Truth in its credibility no doubt, its unconditional certainty, its passion for Reason, has veiled or else destroyed the gaze that remained mortal. With the result that it can no longer see anything of what had been before its conversion to the Father's Law. (Irigaray 1987, 362.)

As stated before, Irigaray is both philosopher and psychoanalyst, and *Speculum* is a work in which she constantly, be it Kant or Plato or other Western philosophers she

comments on, is demonstrating how philosophy is the discipline of the man striving to become the Father of the Oedipus complex through claiming to be the holder of the certainty of his knowledge. Especially, the mixing of truth and law in authority is a question of losing sight of the female other. As Irigaray writes on:

> Alone, then, in the closed circle of his 'soul', that theatre for the re-presentation of likeness, that vertigo of a god that recognizes nothing but himself now. (Ibid.)

The concept of soul brings us back to Irigaray's reading of Kant. In the creation of the moral being the soul is the solution to the disagreement between imagination and reason. But as Irigaray emphasizes, the soul cannot exist without culture and the abstraction of the sensible world (Irigaray 1987, 209). As Margaret Whitford puts it, Irigaray's reading of Kant's philosophy involves a 'ruthless refusal to recognize its debt to the sensible, by seizing the imaginary (which is bodily in form) and reallocating it to the intelligible, the understanding' (Whitford 1991, 157). The self-referentiality of the Kantian moral subject is, in my reading, the Irigarayan 'closed circle of his soul' that sees and hears no one else any more, that has abstracted everything into his own reason. The subject that believes and desires to be autonomous in the sense of law-making is the one losing sight. As Whitford reads the desire of truth, there is also a question of exchange that would not be possible without a standard against which everything else can be measured (Whitford 1991, 187).

The desire for universal truth has its counterpart in legal philosophy as the desire for justice and understanding what justice is (see Hirvonen 2000, 22). The subject who is all about reason, is in their hubris mixing what is and what should be (*Sein und Sollen*) the universal (law) and the singular (event) – a distinction that should be the very foundation of law. The (moral) law imposed by the subject becomes the truth. In this circular economy of the truth as the Greek *aletheia*, nothing else but sameness is revealed:

> The economy of this optical jiggery-pokery now demands that the aletheia be named. We will have to wait only for the next trick of deduction, or the next paragraph. But this particular paragraph is really worth its weight in gold, for it under-lies the whole Socratic dialectic: nothing can be named as 'beings' except those same things which all the same men see in the same way in a setup that does not allow them to see other things and which they will designate by the same names, on the basis of the conversation between them. Whichever way up you turn these premises, you always come back to *sameness.* (Irigaray 1987, 263).

Irigaray's understanding of female sexuality, as seen in the metaphors she uses, is also profoundly illuminating of the blindness described above. The concept of sexual self-determination that creates two distinct fields of freedom and a clear border between them leaves out the two different *bodies* meeting and intertwining in this encounter, and especially that of the female. Irigaray's description of female sexuality as plurality highlights the phallocentric truth of the rape law. In her well-

known essay *This Sex Which Is Not One* she writes:

> But *woman has sex organs more or less everywhere*. She finds pleasure almost anywhere. Even if we refrain from invoking the hystericization of her entire body, the geography of her pleasure is far more diversified, more multiple in its differences, more complex, more subtle, than is commonly imagined – in an imaginary rather too narrowly focused on sameness. (Irigaray 1985, 28.)

Regardless of whether we try to pin down a universal definition of sexual self-determination, sexual integrity or female sexuality, the problem arises, as I read Irigaray, in this gesture of universal fixing and quest for unity as one truth. But in law, would it be possible *not* to have a law that claims universality? Is it not what we are aiming at with all laws and their application? That they are binding to all and applied equally? Would it be possible to reason otherwise, to do law otherwise? Is there a possibility of self-referential moral contemplation that would not be listening to one's own justice but to justice that is communicated by the Other?[6] For Irigaray that would mean not to go out from our own needs but from love towards the other who is not me and never will be mine (Irigaray 1996). And this is what raises the question and need for a new ethics of sexual self-determination.

## 3. Redefining sexual self-determination

In this section, I first want to present two recent cases of the Finnish Supreme Court to exemplify how the concept of sexual self-determination has lately been used in court practice and how the understanding of it has changed in the last twenty years. Historically, the criticism has been that women have had to put up a fight to be seen as deserving victims (see e.g. Utriainen 2010; Jokila 2010). Sexual self-determination has been something women needed to protect themselves to the utmost in order to receive protection from the state. Another point of feminist criticism has been that the point of view taken by the court has been that of the male perpetrator and what he has been allowed to subsume from the behaviour of the victim. My argument is that even though the emphasis on violence has diminished, self-determination remains something that is looked at from the outside (male) perspective. This is problematic since if we define sexual self-determination as freedom from outside definitions, how can we define the truth about the use of it instead of the person themselves? After discussing the cases, I will turn back to Irigaray to discuss the grounds for further redefinition of sexual self-determination.

Despite the emphasis on sexual self-determination discussed in the last chapter, in the Government Bill from 1997 rape is mainly seen as a violation of the *physical* integrity of the victim in the form of violently executed forced penetration. This violation of physical integrity is, according to the Bill, the most serious violation of

6 Susanna Lindroos-Hovinheimo has used Emmanuel Levinas' philosophy of the Other in her ethics of legal interpretation. In this article I am not able to discuss the differences and similarities of the Levinasian Other and feminist philosophy. For that discussion see e.g. Chanter 1995.

sexual self-determination one could possibly think of (HE 6/1997 vp, 174). It is self-evident that the use of force negates the ability of the victim to avail themselves of self-determination and free action. The only setting comparable to violence, recognized in the *travaux préparatoires*, was if the perpetrator had drugged the victim before the act or otherwise caused the victim to be in 'a helpless state'. One of the key themes of feminist critique in the 2000s was that there should be no difference in law regarding the reason for the helpless state. If the helpless state was caused by the victim herself e.g. as a result of excessive use of alcohol, the act used to qualify only as sexual abuse, which was not as severe a crime as rape. The fact that the rape law was changed in 2011 to accommodate cases of self-inhibited helplessness as well was to a large extent a result of a campaign for women's rights (see e.g. Amnesty International 2008).

But what is interesting, is that in the *travaux préparatoires* from 2011 the concept of sexual self-determination is made even more private. The Government Bill, which is a rather short document, first states that the starting point of the law on sexual offences is sexual self-determination, which needs to be protected by the state. But then the tone changes, and self-determination is 'privatized' and 'psychologized': it becomes a subjective feeling of the victim. It is not said that sexual self-determination is equally violated in all cases of abuse of a helpless state. Instead, the Government Bill states that the victim *might feel* that her self-determination is equally violated by non-consensual intercourse even when she has caused her original helpless state herself (HE 283/2010 vp, 7). From the point of view of state protection of sexual self-determination this seems quite ambiguous. Was the amendment a statement that there is something deserving of punishment here, or is it again left to the victim to state that their equal right to sexual self-determination was indeed violated in the particular case?

The Supreme Court has taken up this question in a recent precedent.[7] The background to the case is that a group of friends was spending time on a boat and during that time alcohol was consumed. In the course of the evening, the victim decided to go to bed and became unconscious partly because of the alcohol and partly because of tiredness. The perpetrator, who had made unsuccessful advances to the victim during the evening, penetrated her while she was asleep. Because she was unconscious there was no need for violence. He also stopped immediately when she woke up and told him to stop. The Court takes a clear stance, stating that the act severely violates the victim's right to sexual self-determination. She was clearly not able to make a choice herself since she was sleeping. *Sexual self-determination needs to be acted out and thus realized in sexual intercourse*. Even though violent coercion is mentioned in the first paragraph of the section on rape and abuse of a helpless state in the second paragraph, there are no grounds to think that abuse would be only 'second class rape', reasons the Court.

The core question in the case is whether the perpetrator should be sentenced to unconditional imprisonment. Indeed, that is the conclusion the Supreme

7 KKO:2018:91. The precedents are available in Finnish at: https://www.finlex.fi/fi/oikeus/kko/ (visited on 18th of October 2019).

Court reaches in light of the reasoning above. In this setting of the victim's full unconsciousness and total lack of any communication between the parties, the concept of sexual self-determination seems to work quite well and reflects equality and mutuality as a starting point. The result would probably not have been any different if sexual integrity had been the protectable good. The judgment also takes up issues, such as breaking the trust of the victim, that have been on the agenda of feminist legal scholarship for years (see Jokila 2010). To conclude, the precedent seems to mark the climax of a success story in terms of changing the basic understanding of rape. On the other hand, the concept of sexual self-determination is not challenged. The victim is clearly a person who is fully able to use her self-determination, but at the moment of the crime she is severely hindered from doing so because of her unconscious state. One could also ask: what was the importance of the fact that the victim had turned the perpetrator down during the evening, thus taking active steps as a holder of sexual self-determination and setting up her boundaries.

I take up a second case to further emphasize the meaning of setting the boundaries. The case is about sexual abuse of children and the restriction of criminal liability. In Finland, sexual intercourse with a child under 16 years is statutory rape (in legal terms, aggravated sexual abuse of a child). But according to the restriction, an act that *does not violate the sexual self-determination of the victim* and where there is no great difference in the mental and physical maturity of the parties will not be deemed sexual abuse of a child. In a recent Supreme Court precedent[8] a perpetrator aged 17 had sexual intercourse two to three times with two victims, one aged 14-15 and the other 15. The victims, two girls, had spent time with the perpetrator and his friends smoking cannabis and drinking alcohol. The perpetrator had offered them cannabis at least once, but none of the witnesses remembered clearly who from the party offered the girls alcohol. The sexual intercourse took place in the flat of the perpetrator or one of his friends. It was not a question of a relationship between any of the parties and the motivation of the girls to spend time with these older males seemed to be access to cannabis and alcohol. The sexual acts themselves were committed voluntarily, as stated by the Court. The main question in this case came to be whether the acts in these circumstances violated the sexual self-determination of the girls.

The Court stated that the circumstances described above did not automatically mean that the girls would not have been able to equally and independently use their sexual self-determination when making a choice whether or not to become involved in sexual intercourse with the perpetrator. One of the arguments was that it was not shown that the perpetrator would have offered the girls cannabis and alcohol in order to impair their self-determination, nor was it shown that sex was demanded as payment for these goods. The sexual self-determination of the girls had thus not been hindered in an unacceptable manner and the perpetrator was not guilty of a crime.[9]

8 KKO:2018:74.

9 The situation would have been different if the perpetrator had been older as in case KKO:2018:35 where a 23-year-old perpetrator was sentenced to 2 years imprisonment without parole for having sex with a drunken

The judgment was not unanimous, though. Two of the judges were of the opinion that it mattered not who offered the girls cannabis and alcohol. The meetings took place only because of the drugs offered to the girls. According to the two dissenting judges, in that kind of circumstances there could not have been equal or free choice.

What this case shows clearly is that the liberal idea of the 'equal and maximal amount of self-determination' does not work in circumstances where unequal power structures are at play. It is clear that the victims in this case were influenced by the circumstances and that their ability to use their self-determination was weakened. Despite the uneasiness this clearly caused in the judges' contemplation, the majority settled with the end result that the girls had 'enough' of their freedom left still to be considered self-determined. The question was clearly not whether all the persons involved were as autonomous and equally as free as the others. In comparison to the previous case, this precedent makes it evident just how difficult a concept sexual self-determination is, if it is made into an ability of the victim. If there is no ability at all to exercise one's sexual self-determination, as in the first of these cases,[10] then the concept works. However, as soon as the victim is able to some extent, the perpetrator's responsibility to respect the equal freedom of the other turns into the victim's responsibility to actively set boundaries for the perpetrator's free action.

Bringing ability into the discussion also turns the question of sexual self-determination into an inquiry as to the cognitive capacities of the victim(s). Even if the question risks being patronizing, can we assume that all the parties in these cases are Kantian reasonable beings striving towards their moral autonomy, or even pursuing their happiness provided by freedom as their 'most original right'? Whereas in the 1990's sexual self-determination was introduced to clear the law on sexual offences from all morals and emphasize the free will of the parties in determining their sexual behaviour, these cases show that the state cannot exclude itself from the deeply moral question as to how we relate to each other in sexual relations. Sexual intercourse is not a space that can be divided into two, where both parties would have their equal shares of freedom to do what they want. It is always a space where two persons not only coexist but communicate, relate, intertwine. The use of sexual freedom is in its core a deeply moral and ethical question. What is needed is also a much deeper understanding of the difference between sexual morals guiding 'acceptable sexual behaviour' and ethicality as a relation to or attitude towards other human beings.

This question brings us back to Luce Irigaray. In her later work *The Ethics of Sexual Difference* it becomes evident that her philosophical project is not about destroying the foundations of Western philosophy. She returns to classical continental philosophy with a very different approach, not with critique but with love. Her earlier works such as *Speculum* and *The Sex That Is Not One* demonstrate

13-year-old-girl at a home party. In that case sexual self-determination did not need to be discussed since the restrictive provision only applies to situations where there is no big difference between the ages of victim and perpetrator.

10 KKO:2018:91.

how the sexual difference is the forgotten question of philosophy, whereas in *The Ethics of Sexual Difference* she uses the same heritage to formulate a new ethics of sexual difference. What I am claiming is that Irigaray's ethics of sexual difference could also provide a basis for a different (legal) understanding of freedom, sexual autonomy and integrity. In Sara Heinämaa's reading of Irigaray's ethics of sexual difference, two concepts are emphasized over others – wonder and love (Heinämaa 2000). For Irigaray, love is an utterly political concept. It relates not only to sexuality but also to questions of uneven division of work, property and discourses (Irigaray 1993, 66-67). On the other hand, her new ethics mark the need for a new economy of desire changing the relations between human and god(s), human and human, human and the world, and man and woman (Irigaray 1993, 8). Bringing divinity and the transcendental into connection with the material, sensible, maternal and carnal, is a reaction to Western philosophy that has not acknowledged their meaning in the making of subjectivity (see Joy 2006, 40; Jones 2013, 94-95; Lehtinen 2014, 139).

I start with wonder. Heinämaa emphasizes that it is *Cartesian* wonder that Irigaray wants to return between the sexes. For Descartes, wonder is a sentiment that precedes all other sentiments and has no counterpart. Thus, wonder is beyond e.g. respect or generosity, joy or pleasure. Wonder is an interruption in both theoretical thinking and conventional perceiving. (Heinämaa 2000, 65.) This interruption is essential for the sexual difference and ethics to emerge (Irigaray 1993, 74). In order to wonder we need to stop measuring the other with our own values and goals (Heinämaa 2000, 65). As Irigaray herself writes, we need to resist what we consider comfortable or suitable for us. If we evaluate the other as suitable, we have already reduced them into ourselves. For Irigaray, approaching the other in questioning mode is a way to be and become. (Irigaray 1993, 74.) Thus, wonder can be seen as a space for freedom between the subject and the world, freedom *from* being the master of the world, objects and the other. Even desire is secondary to wonder (Irigaray 1993, 77), and love comes only after it: 'It is the passion of that which is already born and not yet re-enveloped in love (Irigaray 1993, 82)'. Intriguingly, what Irigaray does is that she turns the Cartesian idea of wonder as a reflex into a generative power that can free the Cartesian thinking subject from its desire for self-sufficiency (see Jones 2011, 115-117).

Both wonder and love are 'intermediate terrains' but in her reading of Diotima's speech in Plato's Symposium, Irigaray emphasizes love not only as a terrain between man and a woman but as a 'space-time of permanent *passage* between mortal and immortal', as demonic (Irigaray 1989, 39). Love is a way to knowledge, both practical and metaphysical, but as a mediator it should never be abolished in this knowledge (Irigaray 1989, 33). This is, though, exactly what happens when love is turned into a method of production during Diotima's speech. But, as Tina Chanter points out, Irigaray is very much aware that Diotima is not speaking directly. Her words are reported by Plato, who might not have understood or remembered them correctly. (Chanter 1995, 162.) In the course of the speech, the wisdom of love is reduced to governance, rationality and teleology of will (Irigaray 1993, 29). For Irigaray, this is

a 'miscarriage', but is it the fault of Diotima or the 'midwife' Socrates, who is the one speaking? Is this not again an example of women not speaking, not having a voice (see, Braidotti 1991, 256)?

Quoting Tina Chanter, 'the problem of philosophy only being able to talk in the name of universality is a problem that Irigaray addresses in several contexts' For Irigaray, women are different in a way that will have positive political significance. (Chanter 1995, 167-168). This is what brings together her earlier works, critique, and later works, offering solutions such as wonder and love. According to Rosi Braidotti, 'Irigaray's work can be read as a "positive" reaction to the crisis of modernity', thus maintaining the link between rationality and the divine (Braidotti 1991, 248). Her ethics of sexual difference demands the recognition of the equal *worth* of the two sexes, a redefinition of heterosexual ethics on the symbolic plane (Braidotti 1991, 261). In the context of sexuality, Irigaray's idea of love could mean an ethics of not consuming the other for one's own needs (be it symbolical, theoretical or factual), and secondly, production of knowledge that would not be satisfied in being mere mortal wisdom of governance: *raison d'état* (Irigaray 1993, 30).

The question is, of course, how could these ideas of wonder and love enter the legal field that seems to be quite closed, almost self-evidently reflecting the masculine *logos*? It is not entirely clear, either, how Irigaray tackles the fact that psychoanalysis itself is committed to a theory of a symbolic order that is based on suppressing the feminine. In her article *The Question of the Subject and The Matter of Violence*, philosopher Debra Bergoffen discusses ‑ in the light of psychoanalytic theory ‑ why women are seen as legitimate targets of heterosexual violence. She gives a reading of the symbolic order through Sigmund Freud's *Totem and Taboo*. The social contract as described by Freud is based on the murder of the tyrant father and the following 'solidarity' of the brothers, who limit their autonomy in the fear of one of them becoming a new tyrant. The contract based on the politics of fraternity leaves women explicitly out of its sphere. The lack of freedom of these men in the public sphere is compensated by their absolute freedom in the private sphere. As Bergoffen writes, domestic and wartime violence against women are real-life examples of how women's bodies belong to men. She credits Freud for his analysis of how the social contract is very far from being a rational arrangement, leading to women's alienation from their sexual pleasure (Bergoffen 2017, 205-208). On the other hand, Freud's contract theory is very similar to Rousseau, who also denied the authenticity of women's expression of will (Nousiainen 1990, 20).

According to Bergoffen, for Irigaray 'the hope of the feminist project lies in the vision of the emergence of a symbolic order in which the death drives will not be fed by women's blood' and 'a radically different history in which rape […] would be seen not only as a foreclosure of the two lips of women's desire, but an assault on the possibility of a democratic politics' (Bergoffen 2017, 214). In the Irigarayan project, the way to do feminist critique is mimicry, *mimesis* as she calls it. In *Speculum of the Other Woman* Irigaray introduces the concept of 'good' mimesis as an attempt to join the Father (God). Anyone who speaks 'in truth' becomes a 'subject' of his

*logos* alone. (Irigaray 1987, 337.) As Rosi Braidotti points out, Irigarayan *mimesis* as a feminist method is on the contrary not striving for any rightfulness or unity. It is essentially anti-Hegelian, opposing the synthesis dissolving differences. The metaphor of lips kissing each other, caressing each other, breaks the union of desire and death (Braidotti 1991, 258). It is a play with the philosophical tradition that aims to overturn the goal of the philosophical thinking process. For Braidotti, the Irigarayan method of practicing difference is a political act. The woman who is *not yet,* will gain her self-determination by her *mimesis* (Braidotti 1991, 259). She will not be satisfied in her 'sovereignty' that is given her only by excluding the feminine *jouissance* from the political.[11]

In conclusion, mimesis brings us back to the question of subjectification. On the individual (psychoanalytical) and political level, there seems to be space for re-negotiating the terms of being. In Irigaray's terms the space depends on the mimetic positions which a woman can take in order to question old – and create new – truths without losing herself in the process (Lehtinen 2014, 147). In his theory of legal practice, Samuli Hurri argues that court cases offer a possibility to resist domination and normalisation in return for legal subjectification (Hurri 2011, 359). I am sceptical though, to what extent this could be done in the frame of Finnish criminal law practice with dogmas such as literal interpretation of the law (the legality principle) and quite strong interpretative value given to *travaux préparatoires* in resolving any ambivalence. The term *secondary victimization* used in victimology to describe how (rape) victims experience the legal process in which they are not heard, met or believed, describes the limits of any re-negotiation of the understanding of sexual self-determination during the investigation of the crime or the criminal process. Thus, in order to meet the standards of legality and the realities of praxis, discussion on sexual self-determination and the legal subject needs to take place in the law-making process. Since the Finnish government has announced the need to amend the Finnish rape law to be based on consent, the time for that discussion is now.

## 4. Epilogue

> This wondrous, non-reductive encounter with difference, which does not assimilate to an existing frame of reference, becomes for Irigaray the prototype for all sexual relationships (Joy 2006, 48).

The aim of my article has been to challenge the current understandings of what the law on sexual offences could, and should, protect. At the beginning of the article I took up the question posed by Nicola Lacey, namely, why does criminal law say so little about what is valuable in sexual relationships? Following the path opened by Lacey, I have evoked Luce Irigaray's philosophy of sexual difference in order to ask the question

11 Quite intriguingly, legal philosopher Panu Minkkinen offers us a completely different reading of *Totem and Taboo*, and the Freudian-Lacanian concept of feminine *jouissance*. Whereas men are left prisoners of their fear and desire, never reaching full autonomy, women in the realm of their jouissance are the only true sovereigns (Minkkinen 2009).

whether criminal law could protect love and wonder as a new ethical orientation in all sexual encounters. I have also analysed how our ideas on subjectivity affect our possibilities to grasp the meanings of human relations, the state, morals and laws. In doing so, my aim has been to exemplify how love and wonder as an ethical gesture intertwine with challenging ontological and epistemological presumptions. The way Luce Irigaray is able to move on all of these three philosophical domains, with her concepts of difference, wonder and love, is both remarkable and inspirational.

Depending on the author and perhaps the time of reading, either the ontological or epistemological dimensions of the Irigarayan project have been emphasized. For Irigaray, sexual difference, a difference that is ontologically inassimilable, is not only material but potentially transcendental. If we let sensations guide us, as Rachel Jones notes, they can open us up beyond ourselves, into a transcendence that is both sensible and spiritual (Jones 2013, 296). Wonder and love, as well as desire, are mediatory in many senses: between man and woman, between the subject and the world, and between the carnal and the divine (Joy 2006, 48). In Joy's reading, 'the two' as a basis for the new ontology and new ethics is 'the sole agent of disruption of the monopoly of the one' (Joy 2006, 148). The more epistemologically oriented readings emphasize the 'other' side of the two, the feminine, and its possibilities to think, speak and write. As Margaret Whitford puts it, 'the only way in which the status of women could be fundamentally altered is by the creation of a powerful female symbolic to represent the other term of sexual difference against the omnipresent effects of the male imaginary' (Whitford 1991, 92). In doing so, love should not be limited to how we relate to the sexually other but expanded to production of knowledge. In Virpi Lehtinen's words, 'loving wisdom means striving for wisdom in all of these sensual-transcendental relations', meaning sensible relations to ourselves, to the (sexually) other, and to the world (Lehtinen 2014, 208). I would like to suggest that this call on philosophers as lovers of wisdom could be directed at legal scholars as well.

As a legal scholar, I have to admit that using the word 'love' in the context of law is far from easy. This might have to do with the Cartesian idea of sensations as something that cannot be trusted and need to be 'domesticated' (Joy 2006, 49–50), or with the Kantian need to go beyond what we can sense by our ability to reason morally (Jones 2013, 282-283). In these traditions, the sensible has rather been a problem than a solution in the quest for a 'good life'. It belongs to the infinite maternal matter that needs to be forgotten in the process of becoming an autonomous, self-contained subject (Jones 2013, 293). This morally self-contained subject is such a prevalent figure that it is hard to see other ways to build subjectivities. As Morny Joy notes, Irigaray has also been considered utopian because of her ethics of sexual difference as a 'new form of relations between man and woman' based on mutual recognition that 'will foster the emergence of a culture where love can flourish' (Joy 2006, 1). Irigaray herself denies this label, stating that she considers herself rather a 'political militant for the impossible' (Irigaray 1996, 10).

To defend the impossible in the discipline of legal philosophy is made difficult by both of the faculties, law and philosophy. As another French philosopher, Michèle

Le Dœuff, writes, there is an in-built pressure in philosophical practice to 'remain always on the outside and to challenge from any point of view anything that states a content', a strand she calls 'a dogmatism of the impasse, doubt or void' (*aporia*) (Le Dœuff 1991, 18). Le Dœuff continues that this type of philosophical negativity is 'harder to root out than dogmatic conviction'. As a legal scholar I might disagree with the latter statement. Our dogmatic convictions on criminal law are the boundaries to what we as legal scholars consider possible (or impossible) to implement. To challenge these convictions (both dogmatic and aporetic), one could involve Irigaray's mimetic method. What would then be the mimetic positions available? The feminist point of view is typically that of the victim's, but at least Virpi Lehtinen is sceptical as to whether 'the desired woman' could ever occupy the position of speaking and writing, for she has no authority (Lehtinen 2014, 140). The more powerful position would be 'the teacher of love' that occurs in Irigaray's philosophy in the figure of the goddess Diotima. But, as Irigaray herself emphasizes, even Diotima was talking from absence in Plato's *Symposium* (Lehtinen 2014, 148). And this is what might happen to a feminist legal scholar speaking of love and wonder, as well. She might not be invited to speak before the 'ideal audience' consisting of her fellow scholars.[12] And even if she was, could she ever persuade a majority of its 'rational members' to let love enter the legal discourse?

Why, then, should love and wonder enter legal discourse? Why are we in need of new concepts? Are we not well served with the concept of sexual self-determination? And if not, would it not suffice to replace or supplement it with sexual integrity? In this article, my aim has firstly been to show that sexual self-determination as a basis for Finnish rape law is an empty shell that can be used for any type of amendment. Secondly, in practice it has been used against women as victims of sexual violence. In court, protecting sexual self-determination has turned into a question, namely, what the victim could or should have done to resist. In jurisdictions in which rape law is based on consent, the prerequisite for mutual voluntariness turns easily into the question of whether and how the victim has expressed her will.[13] Even Irigaray herself seems to fall into this trap in her later works when she demands civil rights for women. Each woman 'receives the right to be a woman' by birth, and she has the duty to 'respect, cultivate, and historically develop this right' (Irigaray 1996, 51).

With statements of this kind, Irigaray contributes herself to the controversy on her claimed essentialism. I, too, have a problem with the idea of the right to be a woman and a duty to cultivate this womanhood protected by the state. My understanding of what it means to be a woman is about recognition: either one belongs to the same sex as the mother, or one does not. This recognition features a

12 'The ideal audience' refers to Aulis Aarnio's theory of legal justification according to which 'Legal dogmatics ought to attempt to reach such legal interpretations that could secure the support of the majority in a rationally reasoning legal community' (Aarnio 1987, 227-228).

13 This can be seen even in Sweden, which implemented a consent-based rape law in 2018. See, Högsta Domstolen, B 1200-19, 11.7.2019. Available on <http://www.hogstadomstolen.se/Avgoranden/Vagledande-domar-och-beslut-prejudikat/2019/> (visited on 9th of August 2019); Leskinen 2019.

corporeal aspect: the capacity to give birth. (Jones 2013, 275-276.) Thus, female sex brings with it a different type of (inter)subjectivity characterized as lack of spatial distance to the other. As Sara Heinämaa points out, it can best be described in the self-other-relationship of the unborn child and its mother (Heinämaa 2007, 252-256). Still, as Virpi Lehtinen emphasizes, for Irigaray 'woman, both as a potential mother and as a beloved woman in the sexual act, represents the place for man from which to desire and to which to desire', both concretely and symbolically (Lehtinen 2014, 92). This is what I see as the core of the Irigarayan, psychoanalytically inspired, idea of female subjectification. Becoming autonomous happens in the recognition of the fact that being a woman means potentially becoming a place for others. If sexual integrity is seen as wholeness, it is always already being shared. If sexual self-determination is seen as setting up your boundaries, those boundaries are always already shifting. And, according to Debra Bergoffen, this means that women are not equal with men: they are trapped in a social contract that involves a risk of becoming a victim of sexual violence (Bergoffen 2017).

Inspired by Irigaray's notions of sexual difference, wonder and love, I will conclude this article with an outline of a three A's approach for further development of the law on sexual violence. The three points relate to the ontological, epistemological and ethical dimensions of Irigaray's philosophy. I have named them prohibitions of (1) assimilation, (2) assumption, and (3) appropriation. The first – prohibition of assimilation – should serve as a basis for law on sexual offences. Even though Chapter 20 on Sexual Offences in the Finnish Criminal Code has been formulated gender-neutrally since the 1998 amendment, sexual crimes are in reality gendered (Niemi-Kiesiläinen 1998). The prohibition of assimilation would mean that even though the rules remained universal, the phenomena are not, a factor that needs to be taken into account when assessing the need for further amendments.

The prohibition of assimilation intertwines with the prohibition of assumption. It is directed not only at the parties to a sexual encounter, it is an ethical claim directed at legislator and judiciary, as well. The behaviour of a woman is not a reason to assume anything about the behaviour of another woman. The previous behaviour of a woman is not a reason to assume anything about her future behaviour. Wonder as a basis of a new ethics between the sexes means that no assumptions can be made as to the willingness of a particular woman to participate in a sexual encounter. In relation to desire, wonder seems to form the total opposite of Kantian moral law. Based on what I desire, no assumption can be made on what the other desires. Thus, moral action based on reason alone does not suffice. We need to encounter and sense the other according to Irigaray's imperative: 'always as if for the first time' (Irigaray 1991, 171).

Thirdly, we return to love. In the tradition of Western philosophy, carnal love has been seen as a failure of subjectivity (Lehtinen 2014, 139). Therefore, in Irigaray's philosophy, love becomes a bridge between the sensible and the transcendental. Love is thus a generative power constitutive of subjectivity, seen as a way leading to personal integrity and genuineness in 'divinity' (Joy 2011, 230). The sensible takes its

form in the gesture of the caress of two lips, whereas the transcendental is best grasped in the notion of fecundity without production, preached by Diotima (Lehtinen, 109-110 and 155-156). If, in the ideal sexual encounter, the other is not only left the other but constituted as the other, the least it demands in the 'real world' is reciprocity and respect for the other (see Nieminen 2019, 411). This respect should not only cover what the other wants or has expressed as his or her will but the entire being of the other and their potentiality as a being. This – as I claim – could be expressed as a prohibition of appropriation. No one should be turned into a commodity only serving the (sexual) needs of the other.

An example of legislation that moves in this direction can be found in Sweden, which in July 2018 implemented a new law on sexual offences based on mutual voluntariness.[14] This is not to say that the new law is perfect, but it provides a good starting point for a similar amendment in Finland. One of the greatest challenges is how to define the responsibilities of the parties. Based on what I have said above about wonder as a prohibition of assumption, it follows that there should be a responsibility to know what the other desires rather than a responsibility to express what one oneself desires. We should also consider criminalizing negligent rape, which would apply if the perpetrator makes no effort to know their counterpart. In addition, mutual voluntariness should be understood as a process that lasts during the entire sexual encounter. Consent should not be conceptualised as an act of reason prior to the sexual encounter but as an immanent part of the sexual act. These might become steps towards a law that would protect love as a principle of not claiming ownership over the other, that at least for Irigaray is not a utopia but 'the only possibility of a future' (Irigaray 1996, 10).

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14 For further analysis in Finnish see Leskinen 2019.

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