



# Kent Academic Repository

**Russell, Yvette (2014) *Thinking Sexual Difference Through the Law of Rape.* Doctor of Philosophy (PhD) thesis, University of Kent,.**

## Downloaded from

<https://kar.kent.ac.uk/47940/> The University of Kent's Academic Repository KAR

## The version of record is available from

## This document version

UNSPECIFIED

## DOI for this version

## Licence for this version

UNSPECIFIED

## Additional information

## Versions of research works

### Versions of Record

If this version is the version of record, it is the same as the published version available on the publisher's web site. Cite as the published version.

### Author Accepted Manuscripts

If this document is identified as the Author Accepted Manuscript it is the version after peer review but before type setting, copy editing or publisher branding. Cite as Surname, Initial. (Year) 'Title of article'. To be published in *Title of Journal*, Volume and issue numbers [peer-reviewed accepted version]. Available at: DOI or URL (Accessed: date).

### Enquiries

If you have questions about this document contact [ResearchSupport@kent.ac.uk](mailto:ResearchSupport@kent.ac.uk). Please include the URL of the record in KAR. If you believe that your, or a third party's rights have been compromised through this document please see our [Take Down policy](https://www.kent.ac.uk/guides/kar-the-kent-academic-repository#policies) (available from <https://www.kent.ac.uk/guides/kar-the-kent-academic-repository#policies>).

# **THINKING SEXUAL DIFFERENCE THROUGH THE LAW OF RAPE**

**Yvette Russell**

**Submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy**

**Kent Law School, University of Kent**

**August 2014**

Word Count: 82,696

# Abstract

---

2013 marked ten years since the Sexual Offences Act 2003 was passed. That Act made significant changes to the law of rape which appear now to have made very little difference to either prosecution or conviction rates. This thesis argues that the Act has failed against its own measures because it remains enmeshed within a conceptual framework of sexual indifference in which woman continues to be constructed as man's (defective) other. This construction both constricts the frame in which women's sexuality can be thought and distorts the harm of rape for women. It also continues woman's historic alienation from her own nature and denies her entitlement to a becoming in line with her own sexual identity. It effaces woman's specificity leaving her suspended in an ahistorical space in which the unique and gendered meaning of rape for women is also erased. This thesis argues that the law is complicit in its own failure because it is structurally invested, for its own survival and coherence, in the exclusion and erasure of woman's voice, which represents the possibility of a plural form of being and thinking and is thus a fundamental challenge to the legitimacy of law. Using Luce Irigaray's critical and constructive frameworks, the thesis seeks to imagine how law might 'cognise' sexual difference and thus take the preliminary steps to a juridical environment in which women can more adequately understand and articulate the harm of rape. It argues that the prevention of rape is not just about prohibitive laws that fix the iteration of the sex act and of sexed bodies. It first requires an ethics of subject-subject relations and the recognition of two distinct and different subjects. Only then can we hope to generate a minor jurisprudence capable of providing justice owed to women who are raped.

# Acknowledgments

---

This thesis was written with generous support from the University of Kent in the form of a Kent Research Studentship, which I held 2009-2012. I would also like to acknowledge the support of the Spencer Mason Travelling Scholarship in Law that allowed me to travel from New Zealand to the UK in 2009 to reside and write the thesis. Chapters three and four rely in part on material previously published in Yvette Russell, 'Luce Irigaray: An Ode to (A-)Luce' in Benoit Dillet et al. (eds.) *The Edinburgh Companion to Poststructuralism* (Edinburgh University Press 2013) 291-307, and chapters five and six incorporate in part material previously published in Yvette Russell, 'Thinking Sexual Difference Through the Law of Rape' (2013) 24(3) *Law and Critique* 255-275.

This thesis was written under the supervision of Professor Rosemary Hunter who has been to me over the last five years so much more than just a supervisor. I have learnt so much of what I know about what it means to be a good scholar, writer, colleague and teacher from observing you. It took a long time to get to this point, but you never wavered in your support and encouragement, and I know that must have taken a lot of patience! I can never repay your time, generosity and your care but I am so grateful that we were brought together.

While at Kent Law School I came to benefit from an environment in which I was fully integrated into the life of the school, where every door was open and where I was actively nurtured and encouraged in my learning and development as a scholar and teacher. In particular, I would like to thank Maria Drakopoulou for her advice and love, and for creating a space for a fully inclusive postgraduate research community in which students could flourish. I will always be grateful for the opportunities I was given at KLS and the support from which I still benefit.

I also benefitted at KLS from a cohort whose vitality and solidarity sustained my spirits over these five years, in particular Nayeli Urquiza Haas, Arturo Sánchez-García, and Nick Piška who has read over and commented on so much of my work over the years. Thanks also to my friend Sarah Keenan, who has been an inspiration and a constant source of support over the last three years, and to Joanne Conaghan for her steadfast support over the last year, especially, and for her feedback on a number of chapters in this thesis.

I would like to acknowledge the generosity of Luce Irigaray, to whom I am indebted for the inspiration of so much of my work, and the participants of the Luce Irigaray International Seminars of 2012 and 2014, during which I feel that I made significant strides with my thinking.

I would like to express my heart-felt gratitude to Jonathan Coleman, Phillipa McKenzie and Haden Henderson, and Elena Vassiliou Lefkariti and family, who variously, and with selfless generosity, kindness and love, supported me financially and with places to live and rest over the three years I spent in England, and without whom I couldn't have continued with this PhD. I'd like to also thank Clare M who helped me create the space in which to finish this thesis, and Robert Jamison who cared for me during the hardest time.

Finally, I want to thank my parents, Coralie and Max, who made sacrifices so that I could have every opportunity to succeed, who have never questioned my decisions, and who love me unconditionally. It is to them I dedicate this thesis.

# Contents

---

<b>Abstract.....</b>	<b>2</b>
<b>Acknowledgments .....</b>	<b>3</b>
<b>Introduction .....</b>	<b>6</b>
Research questions .....	8
Methodology.....	10
Chapter outline .....	12
<b>Chapter One: Rape in England and Wales .....</b>	<b>16</b>
Introduction .....	16
Rape in History and Culture .....	16
Rape in England and Wales: 1956 - 2002 .....	21
Reviews, Reform and the Sexual Offences Act 2003.....	29
Improvement or Retrenchment? .....	35
The Current Context.....	40
Discussion.....	45
Conclusion .....	48
<b>Chapter Two: Rape, Law and Feminist Theory.....</b>	<b>50</b>
Introduction .....	50
‘Rape is Violence/Rape is Sex’ .....	51
PART I .....	54
The Poststructuralist Turn in Feminist Theorising on Rape.....	54
PART II .....	59
Rape, Power and the Problem of Resistance .....	59
Conclusion .....	78
<b>Chapter Three: Shifting the Focus .....</b>	<b>79</b>
Introduction .....	79
PART I.....	80
Irigaray: History, Culture and Sexual (in)Difference.....	86
PART II .....	90
Conclusion .....	99
<b>Chapter Four: A New Framework for Law? Irigaray and her Critics.....</b>	<b>101</b>
Introduction .....	101
Irigaray and her Critics .....	102
A Framework for Law? .....	111
Conclusion .....	120

<b>Chapter Five: Rape, Law and Sexual Indifference .....</b>	<b>122</b>
Introduction .....	122
Rape in the Sexual Offences Act 2003: A Reiteration of the Same .....	123
Gender Neutrality .....	127
Sexual Autonomy .....	136
Consent .....	143
Conclusion .....	150
<b>Chapter Six: Law’s Logos/Woman’s Voice .....</b>	<b>153</b>
Introduction .....	153
PART I .....	154
Raped bodies/fragmented bodies.....	154
Rape, Law and Legal Method .....	160
PART II .....	167
Masculine Logos.....	167
Law’s Logos: One and the Same.....	174
Law’s Logos/Woman’s Voice.....	181
PART III .....	183
Rape is Different.....	183
Conclusion .....	189
<b>Chapter Seven: Rape, Law and Sexual Difference.....</b>	<b>191</b>
Introduction .....	191
PART I .....	192
Rape, Law and Sexual Difference: Concepts and Consciousness .....	192
PART II .....	203
Women’s Law: A (not so) New Horizon.....	203
PART III .....	214
Christine Helliwell and the Dayak of Gerai.....	214
Conclusion .....	224
<b>Conclusion.....</b>	<b>226</b>
<b>Bibliography .....</b>	<b>233</b>

# Introduction

---

We need to ask, today perhaps more than ever, why men turn against women when it is their own masculinity that is threatened; why does assaulting a woman appear so often to be the best way to compensate masculine failing and distress? To pose this question takes us down difficult paths, into the darkest zones of the soul, where feminism, perhaps alone of political movements, does not... fear to tread.<sup>1</sup>

In a book chapter published in 2010 considering the feminist philosopher Luce Irigaray's romance with Greek mythology, tragedy, and philosophy, Gail Schwab paused briefly to muse on her broader project and motivations. Irigaray, says Schwab, draws on 'the Greeks' as a model and a source of inspiration, and asks: 'Where did we go wrong?' Following her long time interlocutor, Heidegger, Irigaray proceeds with this enquiry knowing that 'if we do not succeed in finding answers to this question, we are doomed to perpetuate the intellectual and technological errors that threaten Western civilization today'.<sup>2</sup> It is very much in this philosophical and ethical tradition that this project asks: *Where did we go wrong with rape law?*

Rape has long represented for feminist scholars and activists the defining example of patriarchal dominance and of cultural, historical, and social misogyny. As Andrea Dworkin noted, 'the celebration of rape in story, song, and science is the paradigmatic articulation of male sexual power as a cultural absolute'.<sup>3</sup> For Robin Morgan rape was 'the perfected act of male sexuality in a patriarchal culture – it is the ultimate metaphor for domination, violence, subjugation, and

---

<sup>1</sup> Jacqueline Rose, 'We need a bold, scandalous feminism' (*Guardian Online*, 17 October 2014) <http://www.theguardian.com/books/2014/oct/17/we-need-bold-scandalous-feminism-malala-yousafzai> accessed 17 October 2014.

<sup>2</sup> Gail Schwab, 'Mothers, sisters, and daughters: Luce Irigaray and the female genealogical line in the stories of the greeks' in Elena Tzelepis & Athena Athanasiou (eds) *Rewriting Difference: Luce Irigaray and 'the Greeks'* (SUNY 2010) 79.

<sup>3</sup> Andrea Dworkin, *Pornography: Men Possessing Women* (Dutton, New York 1989) 23, cited in Ann J. Cahill, *Rethinking Rape* (Cornell University Press 2001) 15.

possession'.<sup>4</sup> And so too in Susan Griffin's words, '[a]s the symbolic expression of the white male hierarchy, rape is the quintessential act of our civilization'.<sup>5</sup> That this is still very much the case nearly 40 years since Morgan and Griffin's words were published provides the impetus for this thesis.

I began the journey that culminated in this project, I believe, long before my PhD registration commenced at Kent Law School in 2009. Male violence against women came to my attention early through undergraduate study of the criminal law, and I have never really 'moved on' from this point. That there is no solution in the West, it seems, to the problem of male violence, or rather, that the problem has defied solving, is a major driving force behind this project. The rape of women by men is pervasive in the culture in which I grew up and with which I am most familiar. While it is certainly pervasive in its actual occurrence, it has an intangible permeability that seems to seep quietly through the language, myth and history of our society to finally rest within daily lives of women, especially, in such a way that makes it particularly difficult to touch or to contain.

It is this sense of not being able to really grasp or regard the phenomenon of rape in its entirety that has sustained my intellectual and personal interest in this topic. But it is also a creeping sense of dissatisfaction with much of the academic writing on rape. A lot is written about rape and sexual violence; it seems that many people experience the need to appreciate or to contribute to the debate on the subject. Because the field is saturated with scholars trying to make sense of rape, I have constantly had to ask myself how this work contributes to the debate, whether it in fact does, and if it does, how it is different. As I came to appreciate the nuances of the debate on rape and rape law in feminist scholarship, and outside, a sense that something was missing became more acute. In this thesis I have attempted to expose the problems I see with much existing scholarship

---

<sup>4</sup> Robin Morgan, *Going Too Far: The Personal Chronicle of a Feminist* (Random House 1977) 164, cited in *ibid*.

<sup>5</sup> Susan Griffin, 'Rape: The All-American Crime' in Mary Vetterling-Braggin et al (eds.) *Feminism and Philosophy* (Littlefield 1977) 332, cited in *ibid*.



on rape law and to lay out my own framework as an alternative way to approach and address the research questions I have identified.

## **Research questions**

The starting point for this enquiry is in many ways the same as for many legal scholars who consider the issue of rape. I am concerned essentially with asking whether the current law in the United Kingdom governing rape 'works'. If the law does not work I want to ask why that is so. If rape law is a failure, who or what is responsible for that failure and what can be done about it? How is this failure explained by feminist scholars and is this explanation satisfactory? If not, is there a better way to understand or explain the failure of rape law?

Concurrent with these enquiries about the success or failure of rape law and how they are conceived by the existing literature, this thesis is also guided by the following research questions:

- What is the harm of rape and how does law capture this?
- What are the concepts that underpin the current statutory framework and are they fit for purpose?
- How does the current framework influence the experience of the rape trial for victims and the outcomes of the trial?
- Is it possible to construct a new framework which could radically reimagine the law of rape and through which the rape of women could be dealt with in a way that more accurately accords with the demands of justice?
- And finally, what does this reflection have to contribute to feminist strategy on rape and rape law.

I have been inspired primarily in developing my conceptualisation and analysis of rape and rape law by the work Luce Irigaray. I have referred extensively to her work because I think both her critical and constructive projects offer the most sophisticated and accurate framework through which to address the research questions I have identified. In other words, I think Irigaray is right about where we as a culture and society have gone wrong and I think, ultimately, she is right about what we must do to fix it. There are slips, elisions and omissions within her framework and I have attempted to address these to the extent they can be; I am sure some difficulties remain. Despite this, and as I argue in chapter three, Irigaray's framework, to my mind, provides the best opportunity to think-through the problems with rape law free from the shackles of the dominant mode of logic in which we have come to be so deeply mired. Irigaray's style eschews this logic, being simultaneously analytic, allegorical, philosophical and poetic and seeking, as it does, to '...introduc[e] a series of ignored[,] excluded or "private" values into the public sphere, into the symbolic'.<sup>6</sup> This, as Peter Goodrich notes, raises a question of law.

First, it argues for a law of value, an ethics which suspends and judges law, a justice derived from a history of other relations and other loves. The literary and genealogical recovery of another law based upon a certain reversal, upon the nature and proximity of the feminine, is not only of symbolic value. In conventional genealogical terms it traces a maternal lineage, another origin or source of laws, a legitimacy which is not that of the established secular order. The designation of such an historical project as imaginary thus raises a further and quite direct question of positive law.<sup>7</sup>

That Irigaray's work has such far reaching consequences for how we think law and legal space is something I am concerned to argue for in the context of this thesis, in particular having regard to the ambivalence of most academic legal feminists towards her later work, in particular. Irigaray's attempt to resurrect woman's history and the history of the feminine is a fundamentally political act which problematises or challenges the current schema or order of juridical value upon which all law is made and our lives are ordered.

---

<sup>6</sup> Peter Goodrich, *Law in the Courts of Love* (Routledge 1996) 42.

<sup>7</sup> *ibid* 43.

The value of such recollection of alternative traditions is not simply that of providing further possible identities or places and jurisdictions of the feminine. It is more strongly that of empowering a politics of the feminine, of symbolic and civic spaces appropriate to what has hitherto been devalued as unreal or dismissed as merely subjective... So long as it remains at the level of such 'subjective' (or simply imaginary) presences, it lacks political force or symbolic value and for that reason will only have genuine transformative potential if introduced into law and so given what in contemporary terms is perceived to be the objectivity, the visibility and enforcement, the full status of serious social speech, of law.<sup>8</sup>

A juridical space generated by the existence of a feminine subject of law, as Irigaray's project conceives it, has potential far removed from those which we currently imagine, demanding, as it does, a link between law and its temporality and the 'subjectivity and corporeality upon which both relationships and law are inscribed.'<sup>9</sup> These considerations are important for this thesis, as I hope will become clearer, because they implicate not just the doctrine or process of the law, but the machinations of the world in which we live and in which law as a body of knowledge and practices operates. In my argument, the law of rape cannot be excised from the broader societal, historical, institutional and cultural context in which it takes place. It follows, therefore, that the 'solution' to the problem of rape and the failure of rape law, to the extent that there is one, must also be understood and worked through in light of those broader considerations.

## **Methodology**

The work undertaken in preparing this thesis has been entirely desk-based. It did not, therefore, require ethical approval. The focus of this project is the social, historic and cultural phenomenon of rape, and the law that governs it in the modern context. These elements are not mutually exclusive in my argument, and my approach to the legal sources cited in this thesis is informed by an

---

<sup>8</sup> *ibid*

<sup>9</sup> *ibid* 44.

interdisciplinary research method that has drawn on feminist theorists, legal scholars, philosophers, psychologists and others.

The project draws on a wide range of principally, though not exclusively, theoretical materials to excavate the underside, the unconscious, of concepts regularly and unproblematically deployed in statutory language and legal discourse on rape. To this end it draws also on government and institutional policy literature, on statutes and case law, on case commentary and other legal analyses. But it does not limit itself to legal writing; it seeks to generate new insights by peering through the looking glass from otherwise discarded, forgotten or seemingly tangential perspectives and disciplines.

In many ways it attempts to employ a dialogic method in bringing together and synthesising previously unfriendly bodies of work. For example, in chapter six I read Irigaray's work together with that of the legal theorist Peter Goodrich in reinterpreting sociologist Gregory Matoesian's Foucauldian analysis of rape trial discourse. In so doing, I hope to generate new answers to my own research questions concerning the operation of rape law.

My other key 'meta-method' concerns my engagement with Irigaray's project. As I will explain in chapter two, Irigaray's early work is characterised by a practice that she calls 'mimesis' or mimicry and involves her adoption of the tools of the dominant discourse in order to expose or thwart them. This project attempts, in part, a mimesis of Luce Irigaray's critical and constructive project; a mimesis of a mimesis, if you like.<sup>10</sup> While I am certainly not attempting to thwart Irigaray's project, I see my tracing of her project as an experimental research design adopted with a view to 'testing' or illustrating the coherence of that project; and in particular its coherence for legal analyses. As I discuss in chapter three, Irigaray's later work is rarely called upon by feminist legal scholars and this project attempts a cautious resurrection of that work and argues for its continuing relevance.

---

<sup>10</sup> See below at p. 83 for a discussion of the use of mimesis in Irigaray's work.

As with all time limited research projects, this thesis contains its analysis within certain boundaries. It is concerned only with the domestic law of the United Kingdom, and specifically England and Wales.<sup>11</sup> In addition, while the analysis implicates perpetrators, this thesis is primarily concerned with victims of rape. And of those victims, it is almost exclusively concerned with women. This is because, as I will go on to discuss in chapter one, women are the overwhelming majority of victims of rape, both of recorded offences and in self-reported surveys. But primarily it is because in my analysis it is impossible to answer the research questions I have identified without conceptualising rape as a gendered crime. While there is much in this thesis that I think would be of interest to scholars concerned with sexual violence against men, a thesis about male victims, in my argument, would look quite different. I hope this precept becomes clearer for the reader as I develop my argument in chapter five that rape law can only become coherent when it is reliant on a framework of sexual difference that proceeds from the position that the world is made up of (at least) two different and distinct subjectivities.

## **Chapter outline**

The thesis is divided essentially into two parts: the first four chapters are in some ways preparatory in setting up the scene and the framework for my original intervention into the existing scholarship on rape and rape law. These chapters provide the reader with the historical, political, cultural and legal context necessary to follow the analysis presented in the later chapters. They also provide details of the theoretical scaffolding that supports my analysis.

---

<sup>11</sup> Rape law in England and Wales is governed by the same statute, the Sexual Offences Act 2003. This was adopted in its entirety by Northern Ireland in the Sexual Offences Order (Northern Ireland) 2008. Scotland is governed by a separate statutory scheme in the Sexual Offences (Scotland) Act 2009, which is excluded from this discussion. Statistics are collected separately for each jurisdiction. Hence this thesis refers only to the jurisdictions of England and Wales in its analysis, though the critique of the statutory framework is applicable to the Northern Irish Order.

In chapter one I spend some time orientating the reader with the context in which this thesis sits and setting the scene further for the discussion that follows by elaborating on the statutory regime governing rape and the contemporary environment in which offences occur in England and Wales. I look at the institutional response to those offences, and recent government and public body reviews of policy and practice and I situate these trends and policies within their historical and sociological context. I argue that rather than a linear progression through a historical time period in which law 'modernises' by fixing the problems of the past, the most notable pattern to emerge is one of retrenchment. Certainly significant legal, policy and institutional reform have happened, however, the implementation of this change has, in Baroness Stern's words, remained 'patchy', and its effect on conviction rates for rape has been negligible.<sup>12</sup> With few caveats, I conclude that the legal response to rape over the last 25 years has been a failure.

In chapter two, I begin my investigation of the reasons for this failure by considering how others have conceptualised and responded to it. The focus of my enquiry is recent feminist theorising on rape and rape law informed by the poststructuralist turn in philosophy. This turn, I argue, is attributable primarily to the wholesale failure of liberal law reform initiatives to respond adequately to sexual violence against women. I note the disagreement amongst feminist rape scholars that this way of thinking has generated while arguing that the dominant strand of poststructuralist feminist work on rape and rape law, informed predominantly by the work of French philosopher Michel Foucault, provides an unsatisfying and ultimately flawed response to the important questions that remain to be answered including how to conceive of rape's harm, how to critically evaluate current law and policy on rape, how to think justice in this context and how to think about feminist strategy.

Chapter three lays the framework for my productive intervention into this particular body of feminist scholarship on rape and into the debates on rape law in the UK. In that chapter I elaborate on the critical and constructive projects of the philosopher Luce Irigaray, through whose work I

---

<sup>12</sup> Vivien Stern, *The Stern review* (Government Equalities Office 2010) 8.

develop my framework to interrogate rape law and practice. Chapter four addresses some of the criticism that Irigaray's work has faced and in particular, the criticism of feminist legal scholars. This criticism, while exposing some of the problems in Irigaray's schema, has also had the effect of drawing feminist legal scholars away from her later work. I note that while accepting that there are not necessarily ready answers to some of the problems within Irigaray's work, the existence of these problems is not fatal to the integrity of my analysis.

In chapter five I commence my investigation into the conceptual underpinnings of rape law in England and Wales with reference to the theoretical framework previously elaborated. I argue that attentiveness to an Irigarayan critique reveals the sexual indifference of current (and former) rape law in England and Wales; an insight neglected by much contemporary feminist scholarship on rape and law. I consider reasons for this failure of rape law arguing that the law governing rape has failed because it remains enmeshed within a conceptual framework of sexual indifference in which woman continues to be constructed as man's (defective) other. The critique focuses on three aspects of the Sexual Offences Act 2003, the governing statute on rape: the move to gender neutrality in section 1; the reliance on a particular notion of sexual autonomy and; the operation of the consent provisions.

In chapter six, I consider the practice of rape law in more detail through an analysis of the rape trial space. I argue that the structural bias inherent in the courtroom process exacerbates and compounds the cultural consequences of sexual indifference by giving it a new legitimacy through the *logos* of law and that most theoretically informed scholarship in the area fails to appreciate this. I argue that justice requires that law acknowledge the presence of two distinct and different subjects and that a conceptual shift is required for the law to perceive the harm of rape, but also to reconfigure its role as the respectful mediator between *two*: man and woman.

In chapter seven I attempt to address the inevitable question that my analysis generates: So what is the alternative? While I am profoundly skeptical of feminist strategies that prioritise law

reform initiatives, I argue that the urgency and importance of these particular feminist demands for justice for victims of rape should not preclude the consideration of a more radical agenda for social, political and legal change. In this chapter I take up the challenge of a radical reimagining of a social and juridical environment which is not merely one, but in which two subjects are contemplated and provided for. Drawing on Irigaray constructive project, I explore the possibility of a new or alternative conceptual and cultural order in which, I argue, there is the potential to more accurately articulate the harm of rape, to reimagine a juridical order, or a minor jurisprudence, that is equipped to respond to the needs of two different subjects, and in which we could contemplate the conditions for a rape-free society.

I conclude by noting that feminism must embrace a complex approach operating on multiple registers to fight rape, in which liberal law reform initiatives are but one strategy of many. A feminist ethics of sexual difference contemplated by this thesis confronts law's treatment of the crime of rape on many levels by exposing its every move, its *a priori* logic, its very core. It does this by forcing law into a confrontation with its other, woman, until it has no choice but to confront itself, and it does this relentlessly, at every turn, at every opportunity. This process will take us down, as Jacqueline Rose predicts in the quote that began this introduction, 'difficult paths, into the darkest zones of the soul'.<sup>13</sup> However, on the basis of my research for this thesis, I do not think it is an overstatement to contend that justice and the very future of humanity depends on our ability to undertake this journey.

---

<sup>13</sup> Rose, above n 1.



# Chapter One: Rape in England and Wales

---

## Introduction

As mentioned in the introduction to this thesis, rape remains a problem in most societies of the world that seemingly defies solving, notwithstanding significant state-led attempts to address it. In this chapter I sketch the nature and extent of that problem in England and Wales through an appraisal of contemporary law and policy, its recent history, and assessments of its effectiveness. I note also the historical and cultural context in which current law and policy sits. I conclude by asserting that the recent history of rape law and policy in England and Wales has been a failure against its own measures and that despite significant changes to the law and its implementation, the weight of the recent history of rape law is one of retrenchment not progression.

## Rape in History and Culture

Few pithy statements so aptly summarise the vast weight of history as Matthew Hale's 1736 edict on rape. Rape, he said, 'is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho' never so innocent'.<sup>1</sup> That this understanding of rape has endured so well in the popular and penal imaginary despite mountains of evidence to the contrary, attests to the continuing need to both deconstruct the ideological tools that maintain its ubiquity

---

<sup>1</sup> Matthew Hale, *History of the Pleas of the Crown* (Sollom Emlyn 1736) 635.

and to reconstruct a new story in the void that it leaves. I will here briefly contextualise the historical space in which Hale's statement finds its coherence and longevity.

In a critical rereading of St Thomas Aquinas' *Summa Theologica*, Margaret Denike argues that the doctrine of reason that emerges from Aquinas' theology, a foundational treatise of natural law, is 'conditioned on the repudiation of woman and the sin of the sex ascribed to her.'<sup>2</sup> Aquinas' association of woman with materiality and sexuality provides the rationale for her exclusion from social, religious and political life and underpins natural law and its contemporary iteration in human rights and humanitarian law.<sup>3</sup> Man's capacity for reason was the single most important mode through which he brought himself closer to the *telos* of his higher capabilities and thus, closer to God.<sup>4</sup> In operating his capacity for reason man must distinguish himself from baser forms of existence consistently threatening his ability to actualise his potential and to participate in the eternal; '[w]omen – and the principle of femininity in general – ... embody the lure of sin of the fallen world'.<sup>5</sup> So great was the threat to man's reason posed by the 'venereal pleasures' that women represented that man-made laws to guard against them were necessary. These included a ban on fornication, which was said to so corrupt natural reason that it overruled the Divine Will. Denike goes on:

In this way the rightness of man's reason is measured through the wrongness of *the sex* that weakens and nullifies it. It is the sin of (the feminine) sex that has the power to throw the dignifying principle of man off its tracks, and so filthy is the thought of sexual encounters with women that both man and woman invariably lose their dignity through them: and while man may recover from such loss, there is no recovery for women stained by the sexual act...<sup>6</sup>

Goodrich too considers the figure of woman as the enemy of right reason in the genealogy of the ancient Roman law. Referring to the *Digest* - the compendium of Roman law compiled in the sixth

---

<sup>2</sup> Margaret Denike, 'The sex of right reason: Aquinas and the misogynist foundations of natural law' in Maria Drakopoulou (ed), *Feminist Encounters with Legal Philosophy* (GlassHouse 2013) 20.

<sup>3</sup> *ibid* 21.

<sup>4</sup> *ibid* 28.

<sup>5</sup> *ibid*.

<sup>6</sup> *ibid* 29.

century - Goodrich notes its extensive 'prohibitions, incapacities, and denigrations of women as persons ...subject to another's control'.<sup>7</sup> Among these was a general prohibition preventing women from performing any civic function or undertaking any obligations. These provisions were tempered by a general uncertainty on the part of lawmakers of the constitutional place of women who, on the one hand, were the 'vehicles of biological and cultural transmission' and on the other hand excluded from participation in public life by virtue of their sex.<sup>8</sup> Like the threat woman represented for Aquinas to the force of right reason, she also threatened the logic of the common law:

Women, by having no fixed value, by virtue of their uncertainty and ephemerality as also by virtue of their worldliness or reproductive force, were a threat not simply to the temporal order of political sovereignty but also to the logic of the common law. This had inherited both Roman and ecclesiastical conceptions of *universalia* and with them, the notion of lawful meaning as a transcendent or spiritual property of eternal decrees and the reign of a reason that moved from like to like within the inexorable realm of the same.<sup>9</sup>

This had quite serious consequences for the constitution, as Goodrich explains, with the conundrum most often resolved not by the recognition of women as a legal category but rather as a 'series of statuses spelled out in relation to specific property rights and transactions.'<sup>10</sup>

Clearly the fear of women's sexuality precedes the early Roman thinkers and certainly long precedes Aquinas' *Summa*, but the link that Denike and Goodrich make between this fear and the foundations of modern law is useful in contextualising the treatment of rape complainants and the changing legal terrain that governs rape law.

The importance of historic conceptions of women's sexuality to the development of modern understandings or conceptions of rape has long been the subject of feminist debate and

---

<sup>7</sup> Peter Goodrich, 'Gynaetopia: Feminine genealogies of common law' (1993) 20(3) *Journal of Law and Society* 276, 278.

<sup>8</sup> *ibid* 279.

<sup>9</sup> *ibid* 298.

<sup>10</sup> *ibid* 285.

scholarship.<sup>11</sup> As this thesis will demonstrate, this history is simply impossible to sever from any meaningful analysis of rape law. Indeed, the continuing purchase of many of these notions, concepts and ‘myths’

...attests to the on-going need for an understanding of sexual violence and a response to rape-supportive attitudes which recognizes law’s continuing complicity in the perpetuation of problematic gender norms in the broader context of its role in the construction and maintenance of a gendered social order.<sup>12</sup>

The mediaeval genealogy of the modern crime of rape can be traced back to the Roman crime of ‘raptus’, a reference to the Latin term ‘rapio’ meaning to steal, abduct or ‘carry-off’ live prey. The offence was a matter of civil law with the male guardian as plaintiff in his position as the injured party. The crime was thus traditionally understood foremost as a property crime, concerned primarily with the theft of virginity and framed wholly within a context of male ownership of female sexuality. In 1275 the first Statute of Westminster provided that the ravishment of any woman was an offence punishable with a penalty of two year’s imprisonment and ransom. Ten years later it became a capital offence under the second statute of Westminster.<sup>13</sup>

The emergence of the ideal of virtuous feminine sexuality, which has been clearly traced back to the medieval period, is a good example of the way in which a certain logic that supports a particular conception of rape takes hold. The conception of woman in the dominant symbolic as simultaneously chaste, mute and receptive whilst also calculating, unruly and seductive spawned a social framework in which women were valued primarily according to their sexual virtue. Chastity was an essential currency for a woman looking to marry and functioned as a proxy guarantee to a

---

<sup>11</sup> See for example: Zsuzsanna Adler, *Rape on Trial* (Routledge 1987); Joanna Bourke, *Rape: A History from 1860 to the Present* (Virago 2007); Shani D’Cruze, ‘Sexual violence in history: a contemporary heritage?’ in Jennifer Brown & Sandra Walklate (eds) *Handbook on Sexual Violence* (Routledge 2012) 23-52; Estelle Freedman, *Redefining rape* (Harvard University Press, 2013); Nicola Gavey, *Just Sex? The Cultural Scaffolding of Rape* (Routledge 2005); Joan McGregor, ‘The legal heritage of the crime of rape’ in Jennifer Brown & Sandra Walklate (eds) *Handbook on Sexual Violence* (Routledge 2012) 69-90; Carol Smart, *Feminism and the Power of Law* (Routledge 1989).

<sup>12</sup> Joanne Conaghan & Yvette Russell ‘Rape Myths, Law, and Feminist Research: “Myths About Myths”?’ (2014) 22(1) *Feminist Legal Studies* 25, 40.

<sup>13</sup> Home Office, *Setting the Boundaries: Reforming the law on sex offences: Volume 2 Evidence* (Home Office 2000) 82.

prospective spouse of the exclusive use and enjoyment of her body, and the continuation of a legitimate male line and the associated transfer of property rights.<sup>14</sup> Because of the contradictory understanding of women's nature – overtly shy, passive and retiring, but covertly sexually insatiable and vociferous - it was to be expected that some force might be necessary in obtaining sexual gratification as this allowed women to maintain a façade of respectability while also 'giving in' to their 'true' desires. This expectation was supported by medical experts of the time, and adopted by prominent jurists in the early nineteenth century, who maintained it was physically 'impossible' to rape a resisting woman.<sup>15</sup> Certain classes of women were simply unrapable, being black or working class and therefore inherently without virtue and always already highly sexualised.<sup>16</sup> Married woman could also never be raped by their husbands as consent was presumed upon marriage.<sup>17</sup> The limits that these understandings placed, therefore, on the 'legitimate' class of rape victims were profound:

The 'real' rape victim could only be a woman of a certain class, attacked by a man of a certain class who was a stranger, whose chastity could be firmly ascertained and whose injuries were so severe that they could not be explained away as evidence of token resistance.<sup>18</sup>

The corollary to the 'real' rape victim - the deserving victim whose virtue is beyond reproach - is of course the lying, mad, vindictive harpy who uses her insatiable sexuality to entrap and 'ruin' the decent and unsuspecting man. The idea that women habitually lie about rape is perhaps the most enduring of all rape myths and this figure of the woman who 'cries rape' was developed, stoked and nurtured in a variety of legal and non-legal forums. Hall and Post detail evidence in the thirteenth century of the fear that an allegation of rape could be used to force a man into a contract of

---

<sup>14</sup> Conaghan & Russell, above n 12, 40.

<sup>15</sup> Bourke, above 11, 24

<sup>16</sup> *ibid* 27; Kimberle Crenshaw, 'Demarginalizing the intersection of race and sex: A Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics' (1989) *The University of Chicago Legal Forum* 139, 157-159.

<sup>17</sup> Hale, above n 1, 628.

<sup>18</sup> Conaghan & Russell, above n 12, 41.

marriage in the event that a woman was unchaste, or that her prospects of marriage were poor.<sup>19</sup> This fed into a general mistrust of women who complained of rape, supplemented in large part by the medical discourse of the time which pathologised woman's inherent propensity to lie. Other incentives to make up rape allegations included the prospect of notoriety, financial compensation, and securing the mantel of victimhood.<sup>20</sup>

That this history has not simply ended and cannot be readily severed from a discussion of contemporary rape law becomes quickly apparent when looking at the governing legal regime in England and Wales. It is to this and its recent history that I now turn.

### **Rape in England and Wales: 1956 - 2002**

The law governing the crime of rape in England and Wales currently is the Sexual Offences Act 2003 (the 'SOA'). Its prior iteration had been in place since 1956, with eight amendment Acts passed before the definitive 2003 Act. Section 1 of the Sexual Offences Act 1956 read as follows:

#### 1 Rape

- (1) It is felony for a man to rape a woman.
- (2) A man who induces a married woman to have sexual intercourse with him by impersonating her husband commits rape.

Two amendments were made to the original provision above including section 1 of the Sexual Offences (Amendment) Act 1976 which made the following clarification of the meaning of the rape provision:

---

<sup>19</sup> George Hall, (ed) *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill* (Nelson 1965) 6; J.B. Post, 'Ravishment of women and the Statutes of Westminster' in *Legal records and the historian*, J.H. Baker (ed) (London Royal Historical Society 1978) 152-153.

<sup>20</sup> Bourke, above 11, 31-41.

## 1 Meaning of “rape”

(1) For the purposes of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if—

(a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and

(b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it; and references to rape in other enactments (including the following provisions of this Act) shall be construed accordingly.

(2) It is hereby declared that if at a trial for a rape offence the jury has to consider whether a man believed that a woman was consenting to sexual intercourse, the presence or absence of reasonable grounds for such a belief is a matter to which the jury is to have regard, in conjunction with any other relevant matters, in considering whether he so believed.

This particular provision, notably section 1(2), was passed in response to the decision of the House of Lords in *DPP v Morgan*.<sup>21</sup> That case found that the relevant *mens rea* requirement for section 1 was an ‘honest belief’ in consent. This was so notwithstanding evidence that no reasonable person would have believed that the complainant was consenting to sexual intercourse.

Section 142 of the Criminal Justice and Public Order Act 1994 substituted a new definition in section 1 to recognise men as victims of rape and to legislate for the House of Lords decision in *R v R*.<sup>22</sup> The Court in *R v R* had overturned the principle set out in Hale's *History of the Pleas of the Crown*,<sup>23</sup> confirmed by the 1976 Amendment Act's reference to ‘unlawful sexual intercourse’, which prevented the prosecution of a husband for the rape of his wife:

## 1 Rape of woman or man

(1) It is an offence for a man to rape a woman or another man.

(2) A man commits rape if—

(a) he has sexual intercourse with a person (whether vaginal or anal) who at the time of the intercourse does not consent to it; and

---

<sup>21</sup> [1975] 2 WLR 913

<sup>22</sup> [1992] 1 AC 599.

<sup>23</sup> Hale, above n 1.

- (b) at the time he knows that the person does not consent to the intercourse or is reckless as to whether that person consents to it.
- (3) A man also commits rape if he induces a married woman to have sexual intercourse with him by impersonating her husband.
- (4) Subsection (2) applies for the purpose of any enactment.

A raft of complementary changes to evidentiary and procedural rules were also made prior to the 2003 Act, including section 32 of the Criminal Justice and Public Order Act 1994 which abolished the requirement in sexual offences trials that the judge issue a warning to the jury that a woman's evidence alone, in the absence of independent corroboration, must be treated with caution. This was followed by section 41 of the Youth Justice and Criminal Evidence Act 1999 which sought to restrict the use of previous sexual history evidence in rape trials, evidence which was frequently used to impugn the credibility of a complainant and to invite inferences of her consent. That section was, however, swiftly limited in its scope by the House of Lords in the decision of *R v A (No. 2)*.<sup>24</sup> In that case the House of Lords effectively read down the ambit of section 41, holding that it was only 'common sense' that evidence of a previous sexual relationship between a complainant and a defendant was relevant to the assessment of the complainant's consent in the present situation, and that to preclude the admission of such evidence could breach the defendant's right to a fair trial.<sup>25</sup>

Conaghan and Russell summarise the implications of that holding:

What was at issue in *R v A* was the relevance of a woman's *prior* consent to sex to the question of her consent on a subsequent occasion. In determining that it was, their Lordships endorsed a logic of propensity, in which a woman's consent in the past evidenced a *propensity* to consent to sex in the present, a logic which derives support from an associated assumption that a woman's word on the matter cannot be believed. Thus, we see in the reasoning of the House of Lords in *R v A* the force of rape's history invoked not as myth, not as a hangover from a less informed, less enlightened, less 'equal' bygone era, but as 'common sense'. In reading evidence of a prior relationship as a 'cue that indicates [a woman's] precipitating role'..., the Court reproduces a conception of female sexuality which is a direct legacy of women's historical social and sexual subordination.<sup>26</sup>

---

<sup>24</sup> [2001] UKHL 25, [2002] 1 AC 45.

<sup>25</sup> *ibid.* per Lord Lynn of Hadley 10; Lord Steyn 31, 32, 43, 45.

<sup>26</sup> Conaghan & Russell, above n 12, 42, citation omitted.



The steady wave of law reform from 1956 onwards, seemingly reflecting more 'modern' attitudes to rape suits, therefore, within an unhappy and ongoing legacy of a particular understanding of woman's sexuality. This too was mirrored by the implementation of the law by different institutional arms outside the courts. In the mid-late 1990s, a series of studies and reports were published attesting to serious problems with the investigation and prosecution of the crime of rape.<sup>27</sup> The most visible effect of these problems was the extremely high rate of attrition of rape complaints at every point of the system from report to court. Jennifer Temkin's literature review of research into rape and sexual assault for the Home Office published in 2000 noted the following attrition rates over the period 1987 to 1997 which, while showing a steady increase in recorded offences, showed a marked decrease in conviction rates:

There has been a dramatic increase in the number of offences of rape recorded over the past decade. In 1987, there were 2,471 recorded offences of rape of a female as against 6,281 cases in 1997. But the proportion of prosecutions has dropped sharply. In 1987, 1048 prosecutions were brought, 42% of the number of recorded offences whereas in 1997, 1868 prosecutions were brought, 30% of the number of recorded offences. The number of convictions has similarly not kept pace with the number of recorded offences. In 1987, there were 425 convictions, 17% of the number of recorded offences in that year. But in 1997, there were 574 convictions at the Crown Court, 9% of recorded offences.<sup>28</sup>

Gregory and Lees' research investigating changing police practice in respect of rape and sexual assault complaints in two London police stations between 1988 and 1990 revealed possible reasons for these attrition rates.<sup>29</sup> Research conducted in the mid-1980s on sexual assault and institutional practice and prior to Gregory and Lees' study<sup>30</sup> had attested to high attrition rates and poor police

---

<sup>27</sup> I have limited my appraisal of the myriad of reviews and reports into the law and policy of sexual offences to the period immediately prior the Home Office review in 1999. This is primarily for expediency and because I am concerned in this section with giving context to the current law in the SOA.

<sup>28</sup> Home Office, *Setting the Boundaries: Volume 2*, above n 13, 82, citations omitted.

<sup>29</sup> Jeanne Gregory & Sue Lees, 'Attrition in rape and sexual assault cases' (1996) 36(1) *British Journal of Criminology* 1.

<sup>30</sup> Gerry Chambers & Ann Millar, *Investigating Sexual Assault* (Scottish Office Central Research Unit Study, HMSO 1983); Sharon Grace et al, *Rape: From Recording to Conviction* (Home Office Research Unit 1992); Lorna Smith, *Concerns about Rape* (Home Office Research Study 106, HMSO 1989); Richard Wright, 'A Note on Attrition of Rape Cases' (1984) 25(4) *British Journal of Criminology* 399.

and prosecutorial practice and low convictions rates at trial and the authors sought to find out whether new policy initiatives had effected change. Various policies implemented prior to the research being conducted included the following:

In 1986 the Crown Prosecution Service was created and took over responsibility for the prosecution of criminal cases, a task formerly undertaken by the police. In the same year, as a result of pressure from the Women's National Commission following the publication of its report on Violence Against Women (1985), the Home Office issued circular 69/86 calling for new police training inputs on rape and sexual assault, the appointment of more women police surgeons, and better facilities for the medical examination of women who had been attacked. At the same time, in response to public outrage at lenient sentences imposed by a number of judges in cases of rape and attempted rape, Lord Chief Justice Lane issued new sentencing guidelines and took steps to ensure that such cases would in future be heard only by senior members of the judiciary (*R v Billam* (1986) 1 All ER 985).<sup>31</sup>

The authors reviewed case files of all complaints of sexual assault received by officers in the two sites over the two-year period and interviewed complainants, police, prosecutors and agency stakeholders. Despite changes in policy regarding the treatment of sexual assault complainants, the authors found that attrition rates remained high at every point of the system, from police 'no-crime' rates (43% for cases of rape and attempted rape),<sup>32</sup> to Crown Prosecution Service (CPS) decisions to decline prosecution, and low rates of conviction for cases brought to court.<sup>33</sup> Overall, Gregory and Lees noted an attrition rate from report to court of 92%, and that the possibility of gaining a conviction had actually diminished over the period since the various policy and institutional changes had been implemented, despite complainants being treated with 'greater sensitivity'.<sup>34</sup> They noted that despite the ubiquity of the belief that women make false allegations, more cases were taken forward but thwarted by the 'difficulty with obtaining convictions'.<sup>35</sup> Concluding their study, the authors recommended a package of reforms to the judicial process aimed mainly at improving the

---

<sup>31</sup> Gregory & Lees, above n 29, 2.

<sup>32</sup> *ibid* 4. When police class a reported offence as 'no-crime' this means that they have determined that the incident does not constitute a crime, which then allows them to expunge the incident from official crime records. See further below at n 109 on current Home Office counting rules and circumstances in which a report can be no-crime.

<sup>33</sup> See below at n 109 for further discussion and explanations of these processes in the contemporary context.

<sup>34</sup> Gregory & Lees, above n 29, 15.

<sup>35</sup> *ibid*.

conviction rate and including reform to evidence laws like those governing sexual history evidence and the similar fact rule, special training for barristers on the 'effects of rape', the use of expert evidence in trials, the briefing of complainants prior to trial, the recording of complainants when they make complaints, the use of screens in court and the continued monitoring of the court process.<sup>36</sup>

Gregory and Lees' report was followed in 1999 by a Home Office commissioned paper that sought to investigate what factors influence whether an initially recorded rape leads to a conviction for rape, whether such factors had changed recently and whether further changes in institutional procedures were required.<sup>37</sup> The study examined close to 500 case files recorded by police in 1996 as rape. It traced their progress through the system including through the prosecution process and supplemented this with interviews with police, CPS, lawyers, judges and complainants.<sup>38</sup> The sample revealed a 6% conviction rate from recorded cases with 25% of cases being no-crimes by the police,<sup>39</sup> no further action taken against suspects in 31% of cases, and 8% of cases referred to the CPS were eventually discontinued.<sup>40</sup> The authors concluded their review with a comprehensive list of recommendations including the following:<sup>41</sup>

- Observation and monitoring of police no-crime policy.
- The provision of greater support to complainants that could involve a multi-agency approach.
- Further and more comprehensive inter-agency collaboration between police and the CPS to avoid the too ready dismissal by police of 'borderline' cases that should be referred.
- Better evidence gathering at the investigative phase to ensure more cases are referred from police to the CPS.

---

<sup>36</sup> *ibid.*

<sup>37</sup> Jessica Harris & Sharon Grace, *A question of evidence?: Investigating and prosecuting rape in the 1990s* (Home Office 1999) ix.

<sup>38</sup> *ibid.*

<sup>39</sup> *ibid.*

<sup>40</sup> *ibid.* x.

<sup>41</sup> *ibid.* xiii-xv.

- The development of 'best practice' and further training for police in dealing with rape cases.
- Improvement of prosecution standards and avoidance of an imbalance of expertise by ensuring equal pay between the defence and prosecution barristers.
- Further policy change to give protection to vulnerable witnesses.
- Further research into the particularly acute problems with attrition in cases of acquaintance or intimate rape, the treatment of complainants early in the process to shed light on attrition at the investigative stage, comparative jurisdictions' experiences with prosecution witness briefings prior to trial, types of offences where plea bargaining and charge reduction takes place, the consideration of gradated offences of rape, and for provision to be made for a longitudinal study tracing separate cases from report to court in order to identify the reasons for dropped cases.

These reports were followed in 2002 by two further government-commissioned reports into the investigation and prosecution of cases of rape, and the nature and extent of the rape of women.<sup>42</sup>

The first of these was undertaken by Her Majesty's Inspectorate of Constabulary (HMIC) and Her Majesty's Crown Prosecution Service Inspectorate (HMCPSI). Its purpose was to

analyse and assess the quality of the investigation, decision-making and prosecution by the police and the ...CPS of allegations of rape. In doing so, its aim was to ascertain, if possible, the reasons for the high attrition rate, and to identify good practice and make recommendations to address this.<sup>43</sup>

The inspection involved a detailed analysis of police and CPS practice and procedures across nine CPS areas in England.<sup>44</sup> This included the analysis of over 1,700 crime records across the CPS areas, the analysis of nearly 400 advice files and prosecution files, and observations of trials. It also

---

<sup>42</sup> HMCPSI, *A report on the joint inspection into the investigation and prosecution of cases involving allegations of rape* (HMCPSI 2002); Andy Myhill & Jonathan Allen, *Rape and sexual assault of women: the extent and nature of* (Home Office 2002). While these reviews ran and reported concurrently to the Home Office review and did not, therefore, feed in to the broader review process it seems, I am including them here because they preceded the Act's passage.

<sup>43</sup> HMCPSI, above n 42, 1.

<sup>44</sup> Avon and Somerset, Devon and Cornwall, Greater Manchester, Humberside, Leicestershire, London Metropolitan Police, Northumbria, North Wales and Staffordshire.

involved interviews with police and CPS personnel, medical examiners and forensics staff, staff at sexual assault referral centres and local stakeholders.<sup>45</sup> The report made extensive recommendations for improvements from victim care to recording procedure to trial practice.<sup>46</sup> Amongst these it emphasised the need to better train police in dealing with rape complaints<sup>47</sup> and to develop prosecutor specialists and expertise.<sup>48</sup> It highlighted the paradox involved in crime reporting whereby police forces were incentivised to minimise recorded crime, resulting in a wild disparity across forces of recorded rape data,<sup>49</sup> and emphasised the need for a more concerted approach during the investigative phase to gather evidence.<sup>50</sup> The report also noted the need to consider how evidence and information could be given to the jury to counter myths and preconceptions jurors may have which the defence ‘so often try to reinforce’.<sup>51</sup> It concluded its recommendations with the following caveat:

We consider that if the steps outlined in the report are adopted, and if there is a concerted effort, and joined up approach, on the part of all those involved in the investigation and prosecution of rape offences, the attrition rate could be reduced. However, acquittals occur even where cases are properly investigated, prepared and presented. It cannot be overlooked that wider issues are involved that require an effort on the part of the criminal justice system itself.<sup>52</sup>

Myhill and Allen’s report for the Home Office on the nature and extent of the rape of women analysed data from the 1998 and 2000 British Crime Surveys.<sup>53</sup> A nationally representative sample of 6,944 women aged 16 to 59 answered the 2000 self-completion module and these responses were used to estimate the extent of sexual victimisation. In order to examine the nature of incidents, the 1998 and 2000 modules were combined, to give a total of 1,183 female victims.<sup>54</sup> This report is important because it illustrates the disparity between official statistics and self-reported

---

<sup>45</sup> HMCPSI, above n 42, 3-4.

<sup>46</sup> *ibid* 7-17.

<sup>47</sup> *ibid* para 3.3.

<sup>48</sup> *ibid* 3.33.

<sup>49</sup> *ibid* 3.6.

<sup>50</sup> *ibid* 3.9 & 3.16.

<sup>51</sup> *ibid* 3.34.

<sup>52</sup> *ibid* 3.35.

<sup>53</sup> Myhill & Allen, above n 42.

<sup>54</sup> *ibid* v.

incidents of rape and sexual assault amongst women and in so doing adds to the research on the nature of attrition. The study estimated from the 2000 responses that approximately three-quarters of a million or 4.9% of women in England and Wales had been raped on at least one occasion since age 16.<sup>55</sup> Only 18% of incidents of sexual violence reported to the survey were reported to the police. Of rape victims who had contact with the police, 32% were 'very satisfied' with the way the police handled the matter, while 22% were 'very dissatisfied'.<sup>56</sup>

In 1999, spurred on no doubt by these and other studies attesting to the failure of rape law and policy at the time, the Home Office announced a wide-ranging review of sexual offences in the UK. In the next section I will elaborate on that review process, the new rape provisions that were passed into law in the SOA in 2003 as a result of it, and the assessments of the SOA's effectiveness that have followed its passage.

### **Reviews, Reform and the Sexual Offences Act 2003**

On 25 January 1999 the Home Office announced a review of sexual offences that was ultimately to culminate in the passing of the SOA in 2003. That review sought to examine the existing law and as such did not address matters outside the statutory regime, such as police and prosecution practice. It sought to recommend a new statutory framework that improved on the previous regime; '...a patchwork quilt of provisions ancient and modern that works because people make it do so, not because there is a coherence and structure'.<sup>57</sup> Much of the law, the Home Office noted, was old and dated 'from nineteenth century laws that codified the common law of the time, and reflected the social attitudes and roles of men and women of the time'.<sup>58</sup> With the new century around the

---

<sup>55</sup> *ibid* vi.

<sup>56</sup> *ibid* vii.

<sup>57</sup> Home Office, *Setting the Boundaries: Reforming the law on sex offences* (Home Office 2000) iii.

<sup>58</sup> *ibid*.

corner, and the advent of the Human Rights Act 1998, the time was right to ‘take a fresh look at the law to see that it meets the needs of the country today’.<sup>59</sup>

The report that was published from this review was entitled *Setting the Boundaries* and was released in July 2000. It reflects what must have been a valiant attempt by the Home Office to incorporate and balance a myriad of competing evidence, information and stakeholder views. This evidence, much of it commissioned for the review, included several literature reviews by prominent academics in the area, seven consultation seminars or conferences with stake-holders and members of the public, statistical appraisals, comparative analyses with other jurisdictions, and site visits.<sup>60</sup>

As part of the review the Home Office commissioned the Law Commission to provide recommendations for ‘coherent and clear sex offences which protect individuals, especially children and the more vulnerable, from abuse and exploitation; enable abusers to be appropriately punished; and [are] fair and non-discriminatory in accordance with the ECHR and Human Rights Act.’<sup>61</sup> The Law Commission had in 1993 undertaken a broader project considering the concept of consent in the criminal law and in its report to the Home Office was asked to consider the meaning of consent, capacity issues, consent and fraud, and existing *mens rea* requirements in the context of sexual offending. The Commission’s report makes interesting reading in light of the subsequent law in the SOA, which seems to adopt few of its key recommendations in respect of rape.

At the heart of the Commission’s review was its recommendation for a definition of consent to be included in the statute to ‘illuminate the concept for juries’.<sup>62</sup> The Commission’s definition of consent read as ‘subsisting, free and genuine agreement’. This agreement could be express or implied, evidenced by words or conduct, whether present or past.<sup>63</sup> This was accompanied by a definition of the term ‘genuine’ and for the provision of a lesser charge or alternative to rape where

---

<sup>59</sup> *ibid.*

<sup>60</sup> Home Office, *Setting the Boundaries: Volume 2*, above n 13.

<sup>61</sup> Law Commission, *Consent in sex offences: A report to the Home Office sex offences review* (Law Commission 2000) para 4.26.

<sup>62</sup> *ibid.* 2.9.

<sup>63</sup> *ibid.* 2.12.

consent was obtained by fraud.<sup>64</sup> The Commission declined to recommend any substantial change to the existing *mens rea* for rape,<sup>65</sup> but did recommend that additional jury instructions be given regarding the accused's knowledge at the time of the offence.<sup>66</sup>

Those directions would be

(1) that the jury should, in addressing these issues, have regard to whether the defendant availed himself of any opportunity to ascertain whether the victim consented; and

(2) that, if his asserted belief in consent was caused solely by reason of his voluntarily intoxicated state, whether through drink or drugs, then his failure to appreciate that she might not consent is no defence.<sup>67</sup>

The Home Office was eventually to recommend a definition of consent, which was to become section 74 of the SOA, but this was to refer only to 'free agreement', rather than the 'subsisting, free and genuine agreement' that the Law Commission had recommended.<sup>68</sup> The Commission also made further recommendations in respect of consent and regarding the *mens rea* for the offence of rape that were adopted in the Home Office report. These included the provision in the statute for a non-exhaustive list of examples of where consent would be recognised in law as not being present,<sup>69</sup> and to maintain, in essence, the existing *mens rea* for rape - knowledge or recklessness as to lack of consent - with the caveat that the defence of honest belief in consent could only be available in the absence of self-induced intoxication or recklessness as to consent, or if the accused had taken all 'reasonable steps in the circumstances to ascertain free agreement at the time'.<sup>70</sup>

---

<sup>64</sup> *ibid* 5.45.

<sup>65</sup> Which was at the time knowledge that the complainant did not consent, or recklessness as to whether s/he consented.

<sup>66</sup> Law Commission, above n 61, 7.44.

<sup>67</sup> *ibid*.

<sup>68</sup> It felt that the Law Commission's proposal was 'too complex and introduced an unnecessary semi-contractual complication into consent'. Home Office, *Setting the Boundaries*, above n 57, para 2.10.5.

<sup>69</sup> *ibid* 2.10.9 & 2.10.6. This included circumstances classes as deceptive where the deception was said to nullify the consent. This clearly rejected the Law Commission's proposal for a lesser offence for consent obtained by deceptive acts. See further *ibid* 30.

<sup>70</sup> *ibid* 2.13.14.



The white paper that was eventually produced from the Home Office review was entitled *Protecting the Public* and again distilled from the review only a selection of its recommendations.<sup>71</sup> The white paper adopted the 'free agreement' definition of consent, but varied significantly the Home Office's recommendations on including in the statute a non-exhaustive list of specific situations, evidence of which would negate consent. It instead adopted a three-stage approach to consent. First, the statute would contain a provision whereby evidence of certain deceptive conduct, if proved, would automatically nullify consent. If these were not proved, the second stage was to consult another provision that detailed an exhaustive list of circumstances that could be raised by the prosecution as evidential presumptions against consent. These could be rebutted by the defendant to the standard of the balance of probabilities. These circumstances were where a complainant: was subject to force or the fear of force; was subject to threats or fear of serious harm or serious detriment to themselves or another person; was abducted or unlawfully detained; was unconscious; was unable to communicate his or her decision by reason of physical disability; or had agreement given for them by a third party.<sup>72</sup> If none of these circumstances existed in evidence the third step was to refer to the general definition of consent as 'free agreement'.

The white paper completely disregarded the Home Office recommendations on *mens rea* and substituted instead a test of 'reasonable belief' in consent.<sup>73</sup> It adopted the Home Office recommendation to retain a separate offence of administering drugs or other substances with intent to stupefy a victim in order that they be subjected to an indecent act without their consent, and to increase the maximum penalty to 10 years imprisonment.<sup>74</sup>

---

<sup>71</sup> Home Office, *Protecting the Public: Strengthening the protection against sex offenders and reforming the law on sexual offences* (Home Office 2002).

<sup>72</sup> *ibid* 16.

<sup>73</sup> *ibid* 17.

<sup>74</sup> *ibid* 22.

The SOA was enacted on 20th November 2003 making significant changes to the law as laid out first in the 1956 Act. Section 1 of the Act reads as follows:

1 Rape

(1) A person (A) commits an offence if—

(a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,

(b) B does not consent to the penetration, and

(c) A does not reasonably believe that B consents.

(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.

(3) Sections 75 and 76 apply to an offence under this section.

(4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life.

The changes made to the offence of rape thus included reform to both the *actus reus* and *mens rea* components of the offence. There were four key changes to the *actus reus* provisions in section 1. First, the term ‘sexual intercourse’ was replaced with intentional penile penetration. This change was designed to give more clarity to the *actus reus* and also to ensure an exclusive male defendant; women cannot be prosecuted for rape as principals, but can be charged as accomplices and can be charged with Assault by Penetration under section 2. The second change in the SOA is the replacement of the parties named as ‘man’ and ‘woman’ to person ‘A’ and person ‘B’. This change was ostensibly to ensure the protection of transgendered individuals or persons with ‘artificially constructed’ genitals.<sup>75</sup> The third key change was the addition of the penile penetration of the mouth to the definition of rape in recognition of the seriousness of that particular violation, along

---

<sup>75</sup> Section 79(3). See further the Australian case of *Cogley* (1989) 41 A Crim R 198 in which an appeal was lodged against a conviction for assault with intent to rape and detention for the purpose of sexual penetration. In this case the victim of the assault was a woman who had previously undergone sex reassignment surgery. It was contended by the appellant that the judge at first instance had erred in finding that the victim was a ‘woman’ and had a vagina capable of being penetrated in circumstances amounting to rape.

with those of the vagina and anus. Finally, a number of changes were made to define and specify consent in respect of section 1. While I will discuss these changes in more detail in chapter five it bears mentioning that the list of evidential presumptions set out in the government white paper was varied in the final version of the statute to include the situation in which a 'person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be stupefied or overpowered at the time of the relevant act'.<sup>76</sup> It also omitted the circumstance in which agreement was given for a complainant by a third party.

As mentioned above, the 1976 amendment to the 1956 Act clarified the *mens rea* of rape as knowledge of a lack of consent or recklessness as to the consent, with a declaration that if belief in consent was argued, the jury was to have regard to the presence or absence of reasonable grounds for such a belief. This was varied again in the SOA to a lack of 'reasonable belief' in consent, thus moving the *mens rea* requirement firmly from a subjective standard to an objective standard. Section 1(2) notes further that in determining whether a belief is reasonable the finder of fact is to have 'regard to all the circumstances, including any steps A has taken to ascertain whether B consents'.

In my experience of teaching first year undergraduate law students the recent history of rape law, their almost uniform opinion of the amendments brought in by the SOA is that these represent positive and progressive changes to the law. Legal commentators around the time of the Act's passage shared this opinion, with some reservations, and the reform initiatives were generally welcomed as improvements in the law.<sup>77</sup> However, as the Act's implementation proceeded it became clearer and clearer that while there may have been a small increase in the reporting of rape,

---

<sup>76</sup> Section 75(2)(f).

<sup>77</sup> See for example: Sharon Cowan, "'Freedom and Capacity to Make a Choice': A Feminist Analysis of Consent in the Criminal Law of Rape" in Vanessa Munro & Carl Stychin (eds), *Sexuality and the Law: Feminist Engagements* (Routledge-Cavendish 2007) 62; Emily Finch & Vanessa Munro, 'Breaking Boundaries? Sexual Consent in the Jury Room' (2006) 26 *Legal Studies* 303, 306; Vanessa Munro, 'Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy' (2008) 41 *Akron Law Review* 923, 935.

on other traditional measures of success this law has failed.<sup>78</sup> As Philip Rumney pointed out as early as 2001,

...the review's focus on the legal definition of rape reveals a highly questionable assumption that the revision of substantive legal rules will have a significant impact upon the enforcement of the criminal law and in accordance with the aims of the [Home Office] Review, provide increased protection to victims'.<sup>79</sup>

### **Improvement or Retrenchment?**

After the SOA's passage a flurry of government commissioned reviews and other academic studies were published. There were at least ten government-sponsored publications in the ten years following the Act, in addition to numerous other independent studies on policy, practice and attrition. I will here highlight only a few of the key reports in order to illustrate the weight of evidence regarding the effectiveness of the Act and associated institutional policy and practice in the period after the Act's passage.<sup>80</sup> I will go into more detail regarding the effectiveness of the SOA's rape provisions in chapter five.

The government's own stocktake of the SOA's effectiveness since its implementation was published in 2006. While noting that in the opinion of the majority of people who participated in the stocktake the SOA was 'good piece of legislation that has brought clarity to the arena of sexual

---

<sup>78</sup> See further discussion in chapter five on the measurement of 'success' in cases of rape pp. 125-127.

<sup>79</sup> Philip Rumney, 'The review of sexual offences and rape law reform: Another false dawn?' (2001) 64(6) *Modern Law Review* 890, 893.

<sup>80</sup> Other government reviews excluded from this appraisal include: Liz Kelly et al, *A gap or a chasm: Attrition in reported rape cases* (Home Office Research 2005); HMCPSI, *Without consent: A report on the joint review of the investigation and prosecution of rape offences* (Central Office of Information 2007); A Feist et al, *Investigating and detecting recorded offences of rape, Home Office Online Report 18/07* (Home Office 2007); Sara Payne, *Rape: the victim experience review* (Home Office 2009); Jennifer Brown et al, *Connections and disconnections: Assessing evidence, knowledge and practice in responses to rape* (Government Equalities Commission 2010); Liz Kelly & Jo Lovett, *Different systems, similar outcomes? Tracking attrition in reported rape cases in eleven countries* (CWASU 2009); HMCPSI & HMIC, *Forging the links: Rape investigation and prosecution. A joint inspection by HMCPSI and HMIC* (HMCPSI and HMIC 2012).

offending’,<sup>81</sup> it was faced with the blunt reality that there was ‘little evidence to show that, to date, the Act has helped to secure a greater number of convictions against sex offenders, particularly rapists’.<sup>82</sup> The stocktake noted too that awareness of the SOA’s provisions remained ‘patchy’ and that there was a ‘clear need for training for those investigating and prosecuting sexual offences and those working with the victims and survivors of sexual violence’.<sup>83</sup> The stocktake concluded by noting the belief amongst most of its respondents that ‘more needed to be done to publicise and promote the provisions of the Act and to make tackling sexual offending a higher priority for government’.<sup>84</sup> So too it noted the importance of raising levels of public awareness ‘so that there was no doubt in the minds of potential perpetrators or subsequent juries what is acceptable and what is unacceptable sexual behaviour’. It would be only be once this knowledge existed ‘that the true benefits of the Act would be felt’.<sup>85</sup>

In the same year and only three years after the SOA was passed, the government was again consulting on rape law.<sup>86</sup> The conviction rate for rape, it stated, remained ‘unacceptably low’ and it was ‘determined to do more to tackle the barriers to the successful prosecution of rape...’<sup>87</sup> Increasing conviction rates was vital, it said, ‘in terms of reducing the incidences of rape, both by preventing rapists from committing further offences and also by sending a powerful deterrent message to potential offenders’.<sup>88</sup> This time its focus was ‘strengthening the existing framework’ by removing barriers to successful prosecution. Priorities included witness preparation and support, how best to utilise expert evidence, and countering ‘rape myths’ amongst jurors.<sup>89</sup>

---

<sup>81</sup> Home Office, *Sexual Offences Act 2003: A Stocktake of the Effectiveness of the Act since its Implementation*. (Home Office 2006) 28.

<sup>82</sup> *ibid* 3.

<sup>83</sup> *ibid*.

<sup>84</sup> *ibid* 28.

<sup>85</sup> *ibid* 29.

<sup>86</sup> Office for Criminal Justice Reform, *Convicting rapists and protecting victims – justice for victims of rape* (Office for Criminal Justice Reform 2006).

<sup>87</sup> *ibid* 4.

<sup>88</sup> *ibid*.

<sup>89</sup> *ibid* 5.

The response to that consultation document was published the following year and drew on 94 written submissions.<sup>90</sup> The government undertook to implement the following changes in light of that consultation: provision would be made for video-recorded evidence of complainants' police interviews to be entered into evidence-in-chief; it would 'look for a fair way' to provide juries with expert evidence aimed at dispelling rape myths to assist in their deliberations; and it would legislate to make victims' complaints to other people ('hearsay' evidence) that they had been raped admissible as evidence in criminal trials.<sup>91</sup> The consultation also sought advice on capacity issues, noting the extremely high rates of attrition in particular where complainants were intoxicated. Somewhat fortuitously, the report coincided with the Court of Appeal's decision in *R v Bree*, which considered the issue and purported to lay down a general principle of law on consent and capacity.<sup>92</sup> The report declined, therefore, to make any recommendations on capacity given that *Bree* had now made the issue 'clear'.<sup>93</sup>

Of the many reviews published after the SOA's passage considering the implementation of law through institutional practice, the most prominent was the Stern Review in 2010. Baroness Vivien Stern was commissioned by the Home Secretary and Minister for Equalities in November 2009 to conduct an independent review into how rape complaints were handled by public authorities in England and Wales. Stern's report was limited to the response of public authorities to those making complaints of rape and as such, did not look specifically at the letter of the law on rape. The review's terms of reference asked her to 'consider how the response [of public bodies] could be improved so that more victims might report what had happened to them; more cases

---

<sup>90</sup> Criminal Justice System, *Convicting rapists and protecting victims – justice for victims of rape: Response to consultation* (Criminal Justice System 2007).

<sup>91</sup> Criminal Justice System, 'Convicting rapists and protecting victims - Government announces new measures' (*The National Archives*, 7 November 2007)

[http://webarchive.nationalarchives.gov.uk/20080107211140/http://cjsonline.gov.uk/the\\_cjs/whats\\_new/new\\_s-3624.html](http://webarchive.nationalarchives.gov.uk/20080107211140/http://cjsonline.gov.uk/the_cjs/whats_new/new_s-3624.html) accessed 10 August 2014.

<sup>92</sup> [2007] EWCA Crim 804. See further discussion below at p 144.

<sup>93</sup> Criminal Justice System, 'Convicting rapists and protecting victims - Government announces new measures', above n 91.

would end with prosecution and conviction; and victims would receive better treatment'.<sup>94</sup> The report drew on evidence obtained through interviews with over 200 individuals and groups including victims, representatives from victims' organisations, judges, police officers, prosecutors, doctors and others.<sup>95</sup> It also drew on solicited evidence and independent written submissions.<sup>96</sup>

The current policy on sexual offending, noted Stern, had changed substantially in recent years along with 'attitudes'. There were extensive systems in place in the police, CPS and judiciary which specialised in dealing with rape and which were informed by best practice:

In England and Wales we now have a system with specialisation in dealing with rape at the police, prosecuting and judicial level. In many places those reporting rape to the police are treated respectfully. We have measures in the courtroom to minimise the trauma of the trial. We have everywhere a programme to provide state-of-the-art medical centres where victims of rape can be examined and assisted. In the extensive literature about rape, most of the suggestions made for ways of increasing the number of rapes that are reported to the authorities and undertaking successful prosecutions have been adopted as policy.<sup>97</sup>

Stern noted that these policies were the 'right ones' and that few recommendations for change were necessary. The problem, she stated, was the failure of implementation:<sup>98</sup>

There are still public authorities where the staff have dismissive attitudes, police forces where the investigations are badly done, prosecutors who do not see the point of building a difficult case, and areas where the help and support for victims are sparse.<sup>99</sup>

The review's conclusions make interesting reading in light of previous reviews and official government reports on the effectiveness of the criminal justice system. This is primarily because, while fulfilling the review's terms of reference, Stern's primary conclusion amounts essentially to a call to turn at least part of the focus when assessing outcomes for victims away from criminal justice measures. While asserting that the universal adherence to current policies would almost certainly guarantee that 'more rape cases would be able to proceed to court and more would end with a

---

<sup>94</sup> Vivien Stern, *The Stern Review* (Government Equalities Office 2010) 7.

<sup>95</sup> *ibid* 137-140.

<sup>96</sup> *ibid* 141.

<sup>97</sup> *ibid* 115.

<sup>98</sup> *ibid* 8.

<sup>99</sup> *ibid* 115

conviction’,<sup>100</sup> Stern noted that ‘the criminal justice route will not be open to every complainant’. Indeed, she said, ‘...it may be time to take a broader approach to measuring success in dealing with rape’.<sup>101</sup>

It is this observation which comes through most strongly from the review and which formed the basis of her approach to the treatment of victims. This led her to criticise the overwhelming focus on the conviction rate for rape, which has had the effect of ‘tak[ing] over the debate to the detriment of other important outcomes for victims’.<sup>102</sup>

We need to look at rape victims as people who have been harmed, whom society has a positive responsibility to help and to protect, aside from the operations of criminal law. Whether the rape is reported or not, whether the case goes forward or not, whether there is a conviction or not, victims still have a right to services that will help them to recover and rebuild their lives. Victims and those who work with them told us that the criminal process is important, but getting support and being believed is as important. Processes should be in place that are about ‘honouring the experience’.<sup>103</sup>

The review issued 23 recommendations, with which the government ‘generally agreed’ or ‘partially agreed’ to all but two.<sup>104</sup> These were focused primarily on: ensuring the implementation of existing policy and increased monitoring; ensuring the accurate provision of information to the public on statistics on rape and the detail of the ‘basic elements of the SOA’; and the provision of adequate sexual assault referral facilities in all police force areas and the joined up working between police, NHS and local government in their provision.<sup>105</sup> I return again to Stern’s comments in chapter five when I re-evaluate the reasons for the failure of law and policy in the area, despite what looks like a ‘sound’ framework.

---

<sup>100</sup> *ibid* 117.

<sup>101</sup> *ibid*.

<sup>102</sup> *ibid*.

<sup>103</sup> *ibid* 9.

<sup>104</sup> HM Government, *The government response to the Stern review: An independent review into how rape complaints are handled by public authorities in England and Wales* (HM Government 2011). The response did not agree with two of Stern’s recommendations: 21 - that the eligibility criteria of the Criminal Injuries Compensation Scheme in respect of character, as evidenced by unspent criminal convictions, exclude rape victims and; 23 - annual Parliamentary reporting on police and CPS implementation of best practice guidance.

<sup>105</sup> Stern, above n 94, 119-124.



In what follows I conclude this review of statistics, law, policy and practice over the last twenty years with a summary of the most recent statistics on rape in England and Wales and a discussion of what we can take from this cycle of seemingly endless reviews on rape law and policy.

## The Current Context

In 2013/14 police in England and Wales recorded 18,528 rapes of a female and 2,197 rapes of a male.<sup>106</sup> Recording has generally increased over the operation of the SOA with 12,378 female rapes and 894 male rapes recorded in 2003/4.<sup>107</sup> The biggest jump in recording came in the year ending March 2014, when 3,727 more rapes of a female were recorded than the previous year, a 21% increase. Police attributed this rise in reporting and recording of sexual offences to the ‘Yewtree effect’ or the highly publicised investigation of historic sex offences that had occurred in the wake of the Jimmy Savile scandal of 2012.<sup>108</sup>

As any scholar of the crime of rape knows, however, and as the foregoing appraisal of law and policy illustrates, analysis of statistics on rape can only start with police recorded data. There remains a huge disparity among police districts in the UK in the translation of reported offences to recorded offences; the phenomenon of no-criming incidents reported as rape is common practice in some police districts.<sup>109</sup> A joint Ministry of Justice, Home Office and Office of National Statistics

---

<sup>106</sup> Office for National Statistics, ‘Crime in England and Wales, period ending March 2014’ (17 July 2014) <http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-328153> accessed 3 August 2014. These figures include three separate categories of offence: rape of a female (16 years and over), rape of a female child (under 16 years), and rape of a female child (under 13 years). The categories for male rape are the same.

<sup>107</sup> *ibid.*

<sup>108</sup> BBC News, ‘Sexual offences recorded by police “up 20%”’ (*BBC News online*, 17 July 2014) <http://www.bbc.co.uk/news/uk-28340196> accessed 18 July 2014. See further on Savile: <http://www.bbc.co.uk/news/uk-20026910>

<sup>109</sup> ‘The Home Office Counting Rules define the circumstances under which a crime report may be ‘no crimed’. These include situations where a crime is considered to have been recorded in error or where, having been recorded, additional verifiable information becomes available that determines that no crime was committed, which can include details uncovered during investigations, retractions of allegations and occasions where it is later determined the offence took place under another force’s jurisdiction. The level of evidence needed to ‘no

(MOJHOONS) report published in 2013 found that in 2011/12, 4,155 sexual offences that were initially recorded by the police were later no-crimed. This equated to 7.2% of all initially reported sex crimes and was significantly higher than no-crime rates for all offences, which stood at 3.4% in 2011/12. No-crime levels for rape are higher than for other sexual offences, at 10.8%.<sup>110</sup> An investigation of seven London police boroughs in 2013 saw between 34% and 40% of rape reports dismissed by the London Metropolitan Police as no-crimes or ‘crime-related incidents’, enabling the allegations to be dropped from official police recorded crime data.<sup>111</sup> In addition, research suggests that no-crime trends for sexual violence are compounded when victim characteristics are taken into account. As Betsy Stanko notes in relation to her work with the London Metropolitan Police, rape of the most vulnerable women has effectively been decriminalised.<sup>112</sup> Stanko’s research suggests that two thirds of all reported offences ‘drop out’ during the course of the police investigation, with victims with mental illness 40% less likely and victims with learning difficulties 67% less likely to have their cases referred for prosecution than people without these difficulties.<sup>113</sup> Marianne Hester’s work tracing rape cases from reporting to conviction across three police force areas in the North East of England revealed similar trends with only half of the cases she traced being recorded as crimes, and only half of these being referred to the CPS for prosecution.<sup>114</sup> Cases involving very

---

crime’ is higher than for the recording of a crime as it requires information to be available that determines that the offence did not happen, rather than the ‘balance of probabilities that a crime did happen’. (MOJHOONS, *An Overview of Sexual Offending in England and Wales* (Home Office 2013) 65).

<sup>110</sup> *ibid* 22.

<sup>111</sup> Melanie Newman, ‘Seven London boroughs dismiss a third of rape allegations’ (*The Bureau of Investigative Journalism*, 17 December 2013) <http://www.thebureauinvestigates.com/2013/12/17/seven-london-boroughs-dismiss-a-third-of-rape-allegations/> accessed 2 June 2014. The seven boroughs included were Barking, Lambeth, Bexley, Greenwich, Sutton, Tower Hamlets and Westminster.

<sup>112</sup> Melanie Newman, ‘Rape has been ‘decriminalised’ for the most vulnerable says senior Met adviser’ (*The Bureau of Investigative Journalism*, 28 February 2014) <https://www.thebureauinvestigates.com/2014/02/28/rape-has-been-decriminalised-for-the-most-vulnerable-says-senior-met-adviser/> accessed 2 July 2014.

<sup>113</sup> *ibid*.

<sup>114</sup> Marianne Hester, *From Report to Court: Rape cases and the Criminal Justice System in the North East Executive Summary* (University of Bristol in association with the Northern Rock Foundation 2013) 2.

vulnerable victims, such as those with mental illness, were the least likely to progress through the criminal justice system or to be recorded as crimes in the first place.<sup>115</sup>

In addition to, or alongside, these issues of data collection, rape is a hugely underreported offence, second only to property crime in its supposed underreporting. As Myhill and Allen's 2002 study first confirmed,<sup>116</sup> self-reported studies consistently show a much higher prevalence of sexual assault and rape against both men and women than is reflected in either reported or recorded official data. The Crime Survey of England and Wales in 2012 revealed that 3.8% of female and 0.2% of male respondents reported experiencing rape since the age of 16.<sup>117</sup> These figures extrapolated to the general population indicate that the real number of victims of rape could be upwards of one million women and 56,000 men, similar figures to those reported by Myhill and Allen 12 years ago.<sup>118</sup> Of the 136 female respondents to the survey who reported a serious sexual offence in the last 12 months, only 15 had reported the offence to the police.<sup>119</sup>

If a victim decides to report to police and this report is recorded as a crime by police, the next stage in the current process is for police to apply a sanction to the record. A 'sanctioned detection' is one where police issue an offender with a formal sanction usually in the form of a charge or summons.<sup>120</sup> A 'non-sanctioned detection' is one where the offence is considered 'cleared-up' but this can mean that no further action has been taken, an offender has not been identified or has died, or usually, that the CPS has declined to prosecute. The sanctioned detection rate for rape of a female in 2011/12 was 22.7% and 29.6% for rape of a male. The rate for crime

---

<sup>115</sup> *ibid.*

<sup>116</sup> Myhill & Allen, above n 42.

<sup>117</sup> MOJHOONS, above n 109, 18.

<sup>118</sup> See above p 28. These figures were estimated from population data based on 28,724,412 women in England and Wales and 27,843,384 men: Office of National Statistics, 'Population Estimates for UK, England and Wales, Scotland and Northern Ireland, Mid-2011 and Mid-2012' (8 August 2013) <http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-319259> accessed 2 July 2014.

<sup>119</sup> MOJHOONS, above n 109, 17.

<sup>120</sup> Other forms of sanctioned detection include a caution, a penalty notices for disorder and offences that are asked to be 'taken into consideration' by a court.

overall was 27.1% for the same period.<sup>121</sup> Recent investigations reveal a sharp decline since 2011 of police referrals of rape cases to the CPS for prosecution. While 8,130 cases were referred in 2010/11 only 5,404 were referred in 2012/13, with significant variation across police districts.<sup>122</sup> As a result of this drop, the CPS released in 2014 revised guidelines for coordinating with police on referrals and evidential standards.<sup>123</sup>

Once the CPS decides to take a case to prosecution a whole new institutional process is triggered. The vast majority of offenders charged with rape will be committed for trial at the Crown Court.<sup>124</sup> Of the 5,850 recorded offences of rape referred to the CPS in 2013/14, 3,621 were charged (62%) and 1,857 resulted in no prosecution (32%).<sup>125</sup> Of those cases prosecuted, 60% resulted in convictions and 40% were 'unsuccessful'.<sup>126</sup> Of those prosecutions that were unsuccessful, 60% resulted in a jury acquittal, and in 33% of cases the prosecution was dropped due to a discontinuation, a lack of evidence or a withdrawal.<sup>127</sup> 1,397 or 36% of those charged pleaded guilty, and 951 were convicted after a not-guilty plea (24%). These figures have generally remained steady since 2007/08.

While I have referred to mixed data sets in this discussion and it is generally difficult to get an accurate reading without tracing individual cases through the system,<sup>128</sup> by way of illustration: in 2013/14 police recorded 20,725 offences of rape (of both men and women), in the same year 5,850

---

<sup>121</sup> MOJHOONS, above n 109, 25-26.

<sup>122</sup> Melanie Newman & Oliver Wright, 'Revealed: Thousands of rape cases thrown out as charges fall following new CPS guidelines' (*The Independent*, 4 February 2014) <http://www.independent.co.uk/news/uk/crime/revealed-thousands-of-rape-cases-thrown-out--as-charges-fall-following-new-cps-guidelines-9105454.html> accessed 2 June 2014.

<sup>123</sup> Crown Prosecution Service 'Joint CPS and Police Action Plan on Rape' (June 2014) [http://www.cps.gov.uk/news/latest\\_news/cps\\_and\\_police\\_announce\\_new\\_measures\\_to\\_tackle\\_rape/](http://www.cps.gov.uk/news/latest_news/cps_and_police_announce_new_measures_to_tackle_rape/) accessed 2 July 2014.

<sup>124</sup> In 2011, only 0.7% of offenders were found guilty of rape at the magistrate's court: MOJHOONS, above n 109, 32.

<sup>125</sup> Crown Prosecution Service, 'CPS Violence against Women and Girls crime report 2013-2014 data' [http://www.cps.gov.uk/data/violence\\_against\\_women/vawg\\_2013\\_14\\_report.html](http://www.cps.gov.uk/data/violence_against_women/vawg_2013_14_report.html) accessed 2 April 2014. The remaining 6% were disposed of out of court or 'administratively finalised'.

<sup>126</sup> *ibid.*

<sup>127</sup> *ibid.* The remainder were dismissed after a full trial or were judge directed acquittals.

<sup>128</sup> As Marianne Hester points out in her work above n 114, many cases will be recorded by police but will not be completed the same financial year, in which case it is hard to make definitive statements about the trajectory of report to court from the raw figures alone.

were referred to the CPS and the CPS prosecuted 3,621 cases. 2,348 cases prosecuted resulted in conviction for rape roughly equating to an 11% rate of conviction from recorded offences. These figures are difficult to assess in a vacuum, which is why it is useful to compare rape to other offences of like seriousness. MOJHOONS analysis of data from 2009 to 2011 illustrates that of the proceedings commenced for rape in 2009 matched to an outcome in either the magistrates or Crown Court by 2011, 55.9% were convicted of an offence (33.2% found guilty of the offence charged).<sup>129</sup> In contrast, 81% of defendants charged with murder were found guilty of an offence (48.2% found guilty of the offence charged).<sup>130</sup> The conviction rate for charges of rape heard in the Crown Court when an offender pleaded not guilty was 27%,<sup>131</sup> where the conviction rate for murder from not guilty pleas was 58%.<sup>132</sup>

This most recent data in England and Wales reflects a pattern of significant attrition at every point of the criminal justice system from report to court in cases of rape. Rape is underreported, it is often under-recorded by police as constituting crime, it is then under-referred for prosecution, under-prosecuted by the CPS, and then has a higher rate of acquittal than other crimes of like seriousness. This pattern has remained steady over the period of time that the SOA has been in force, and while reporting of rape has certainly increased and recorded rapes have increased, there has been no significant changes in any of the other major indicia of criminal justice outcomes over the nearly 30 years that this appraisal has covered. While there is certainly a perception that law, policy and attitudes have progressed with time, the weight of evidence suggests rather a clear pattern of retrenchment.

---

<sup>129</sup> MOJHOONS, above n 109, 37.

<sup>130</sup> *ibid* 39.

<sup>131</sup> *ibid* 38.

<sup>132</sup> *ibid* 40.

## Discussion

Reviews come, reviews go, and women are still raped.<sup>133</sup>

Considering in 2011 the cycle of reviews and reports commissioned and published by government bodies addressing rape, Jan Jordan describes the last thirty years as a veritable 'review-go-round'.<sup>134</sup> This description seems particularly apt in light of the foregoing summary of reviews in England and Wales which reads as an endless cycle of measurement and recommendations with little pause, it seems, to reflect perhaps on broader issues. As Jordan notes with some wariness, '[t]he refrain from each review [is] strikingly familiar - victims are not dealt with as well as they should be and things need to change'.<sup>135</sup>

In their forthcoming paper providing an up-to-date picture of the extent of attrition in England and Wales, Hohl and Stanko echo Jordan, concluding that despite the 'the plethora of inspection reports and reviews commissioned by the government' that 'give the impression of activity and progress', the stagnation in detections, prosecutions and convictions for rape means attrition has actually 'gone from bad to worse'.<sup>136</sup> In Hohl and Stanko's report this is attributable to two key factors: the absence of adequate funding to match the rhetoric of inspection reports and policy documents to the actual implementation of their findings and; the persistence of 'rape myths and stereotypes', which continues to ensure that 'the police and CPS are still reluctant to investigate and prosecute otherwise law-abiding white men, and fail vulnerable victims at a higher rate'. They note that there needs to be a greater focus on victim vulnerability, which proved critical in determining how, whether and why rape 'happened'.<sup>137</sup>

---

<sup>133</sup> Jan Jordan, 'Here we go round the review-go-round: Rape investigation and prosecution – are things getting worse not better?' (2011) 17(3) *Journal of Sexual Aggression* 234, 245.

<sup>134</sup> *ibid.*

<sup>135</sup> *ibid* 235.

<sup>136</sup> Katrin Hohl & Elizabeth Stanko, 'The attrition of rape allegations in England and Wales' (*forthcoming*) 15.

<sup>137</sup> *ibid* 18.

These conclusions engender a profound sense of skepticism of both the official process and the ability of law in general to respond to the rape of women. Although, as Jordan points out, maybe we just need to adjust our expectations; 'it could be argued that the benefit from having government reviews lies not so much in the substance of the findings and recommendations made, as in the comforting rhetoric that something is being done.'<sup>138</sup> If there is any comfort, it is certainly cold and leaves hanging the eternal question: 'where to next'?

Among the consistent messages emanating from the reviews discussed in this chapter, and reiterated again by Hohl and Stanko, are two that come through most clearly: first, while law and policy seems to have nearly hit a plateau of 'best practice', its inconsistent implementation is the source of a significant amount of attrition and; second, that there are simply forces operating outside the strict remit of the criminal justice system over which it has no direct control. These observations are central to Stern and others' conclusions on the operation of institutional practice, and support a broader critique of police and prosecution culture, which challenges the notion that bad practice is attributable to a few aberrant 'bad apples' instead of the fact that the entire barrel is rotten.<sup>139</sup> Here it seems that we are destined to return to where we started, in Jordan's words:

This bias was not necessarily the result of malevolence towards women; rather, it evolved as an extension, a logical progression even, of the politics and philosophies that had been dominant for centuries. Men knew they owned women's bodies; men knew women were inferior; and men knew women lied about rape. Men founded justice systems based on their beliefs about the inherent natures of men and women and orientated towards protecting their rights as men. While this ethos has been strongly challenged and some of the worst excesses of the systems erased, the legacy of patriarchy still infuses the central core. No wonder the review-go-round continues.<sup>140</sup>

Observations like these have spawned a massive body of feminist-led socio-psychological and legal research into the way that 'attitudes' develop and manifest in culture and also in tribunal settings. Attrition is said to 'map onto criminal justice' despite mechanisms in place to avoid this, in ways that

---

<sup>138</sup> Jordan, above n 133, 245.

<sup>139</sup> *ibid* 244.

<sup>140</sup> *ibid* 245-246.

perpetuate rather than challenge the dominant narrative of woman's complicity in rape.<sup>141</sup> A self-perpetuating cycle seems, therefore, to underpin and ultimately thwart government-driven attempts to deal with the 'rape problem'. This cycle extends also through the police, CPS and judiciary to the one ultimate, supposed, constitutional stop on executive and judicial power: the jury.<sup>142</sup>

This need to move outside the system to investigate the forces working on the system now drives a significant amount of feminist analysis of rape law and practice and the necessity of this work to solving the rape problem is recognised by a shared consensus among most feminist scholars working on rape.<sup>143</sup> While I certainly form part of that consensus, I remain skeptical of some of the assumptions upon which it proceeds. An important one of these is the idea that if we can only 'fix' attitudes then law and policy will be free to operate in the world as it should. The assumption then is that by calibrating the law in such a way that can be said to represent 'best practice', it returns to its status as a neutral, inanimate force for good simply waiting patiently for us to sort out our attitudes and put it to work. In chapters five and six I argue that we need to return again to the law's text and to the spaces in which rape law operates (in my analysis this will be the rape trial space) and challenge the too ready presumption that attitudes are the central cause of the situation we now find ourselves in. This narrative assumes that attitudes arise spontaneously from the lives, histories and culture of individuals, which is certainly true. However, in my argument these attitudes

---

<sup>141</sup> Liz Kelly, 'The (In)credible words of women: False allegations in European rape research' (2010) 16 *Violence Against Women* 1345; Vanessa Munro & Liz Kelly, 'A vicious cycle? Attrition and conviction patterns in contemporary rape cases in England and Wales' in Miranda Horvath & Jennifer Brown (eds) *Rape: Challenging Contemporary Thinking* (Willan Publishing 2009) 99-123.

<sup>142</sup> Louise Ellison & Vanessa E. Munro, 'Reacting to rape exploring mock jurors' assessments of complainant credibility' (2009) 49(2) *British Journal of Criminology* 202; Louise Ellison & Vanessa E. Munro, 'Turning mirrors into windows? Assessing the impact of (mock) juror education in rape trials' (2009) 49(3) *British journal of criminology* 363; Louise Ellison & Vanessa E. Munro, 'Of 'normal sex' and 'real rape': Exploring the use of socio-sexual scripts in (mock) jury deliberation' (2009) 18(3) *Social & Legal Studies* 291; Louise Ellison & Vanessa E. Munro, 'A stranger in the bushes, or an elephant in the room? Critical reflections upon received rape myth wisdom in the context of a Mock Jury study' (2010) 13(4) *New Criminal Law Review* 781; Louise Ellison & Vanessa E. Munro, 'Getting to (not) guilty: examining jurors' deliberative processes in, and beyond, the context of a mock rape trial' (2010) 30(1) *Legal Studies* 74; Louise Ellison & Vanessa E. Munro, 'Better the devil you know? Real rape stereotypes and the relevance of a previous relationship in (mock) juror deliberations' (2013) 17(4) *The International Journal of Evidence & Proof* 299.

<sup>143</sup> cf: Helen Reece, 'Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong?' (2013) 33(3) *Oxford Journal of Legal Studies* 445.



are tacitly nurtured, enabled and supported by the law and associated policy that at the same time purports to disavow them.

## **Conclusion**

In this chapter I have attempted to set the scene for the discussion that follows in this thesis. I began with a description of the historical context in which contemporary rape law sits, arguing that there is a legacy of a particular conception of women's sexuality, which continues to haunt and dictate law on rape and its implementation today. I then embarked on a review of the law and policy context that led to the current law governing rape in England and Wales in 2003, the SOA. I detailed the relevant changes to the law and the reception of the law and relevant monitoring of its implementation by police, CPS and courts. The current context in which the official criminal justice response sits is one characterised by much action and attention, but little change. The continuous cycle of reviews, reports and reform has created the impression of progress but in reality this is simply an illusion; attrition remains a serious and ongoing problem at every point of the criminal justice process.

In the face of this creeping reality, feminist scholars have increasingly turned their focus away from the criminal justice system itself and looked instead at cultural and sociological factors that continue to undermine the effective implementation of law. Much of this scholarship proceeds on the assumption that a change to 'attitudes' may be the panacea we have all been looking for, that a change in the way people think and understand rape, rape victims and the perpetrators of rape will allow the criminal justice system to function as it should. In the next chapter I turn to consider feminist theorising on rape and rape law. I look at second wave analyses of rape and the criticisms these have sustained from feminists influenced by the poststructuralist turn in philosophy.

I will go on to argue that the problem of attitudes that haunts the criminal law of rape is enabled and nurtured by the very system that purports to banish them.

# Chapter Two: Rape, Law and Feminist Theory

---

## Introduction

In this chapter I will give a brief overview of the major debates to have animated second wave feminist analyses of rape, and the law reform initiatives they inspired in England and Wales and elsewhere. The main focus of my enquiry here, however, will be recent feminist theorising on rape and rape law informed by the poststructuralist turn in philosophy. In part I of the chapter I turn to this particular strand of feminist writing on rape that, I argue, has been spurred on by the general disenchantment of philosophers and critical theorists with the neoliberal political and intellectual paradigm but also, specifically in the case of sexual violence, by what I (and many others) argue has been the wholesale failure of liberal law reform initiatives to respond adequately to sexual violence against women. This failure has generated some hand-wringing amongst feminist theorists, particularly with respect to the best way to engage with legal and state-sponsored mechanisms in the fight against sexual violence, but also with respect to how best think about what rape means and what a society without rape requires.

In part II of this chapter I draw this body of poststructuralist feminist writing on rape together in order to explore the principle tenets of its approach to theorising rape. In my argument the dominant strand of poststructuralist feminist work on rape and rape law, informed predominantly by the work of French philosopher Michel Foucault, provides an unsatisfying and ultimately flawed response to the important questions that remain to be answered including how to conceive of rape's harm, how to critically evaluate current law and policy on rape, how to think

justice in this context and how to think about feminist strategy. In the chapter following, I elaborate on this critique with reference to my own theoretical framework through which I argue we can more adequately understand and articulate the harm of rape for women, and think through what is required of the law in response to that harm.

### **'Rape is Violence/Rape is Sex'**

The feminist literature theorising rape is vast; however, two main competing strands of thinking on rape and rape law have dominated the discourse. Emerging from the second wave, the work of Susan Brownmiller and Catharine MacKinnon on rape have come to form the bases of many introductory feminist courses on violence against women.<sup>1</sup> The crude reduction of their respective work to the positions of 'rape is about violence not sex' and 'rape is about sex not violence' is often extremely frustrating but one which demands further elaboration and explanation, particularly given the ubiquity of their thinking. My experience teaching MacKinnon on rape law is almost always the same; students usually balk at the catchphrase often attributed to her (usually by academics or others who have never actually read her work) that 'all sex is rape'. When I ask them to elaborate on this thesis and to explain how it is that MacKinnon got to this point, they are often unable to. While the problems with MacKinnon's thesis, and Brownmiller's too, have been discussed at length elsewhere, the framework that supports their conclusions continues to inform much contemporary feminist theorising on rape including, in many ways, that which supports this thesis.

In *Against Our Will*, Brownmiller engaged in a critical re-reading of traditional literature on rape and sexual violence by placing rape as a social, historical and cultural phenomenon squarely within a feminist analysis of patriarchal oppression. As she famously states in the introduction to

---

<sup>1</sup> Susan Brownmiller, *Against Our Will: Men, Women and Rape* (Bantam, New York 1976); Catharine A. MacKinnon *Feminism Unmodified* (Harvard, Cambridge 1987); Catharine A. MacKinnon, *Towards a Feminist Theory of the State* (Harvard, Cambridge 1989).

her book '[rape] is nothing more or less than a conscious process of intimidation by which *all men* keep *all women* in a state of fear'.<sup>2</sup> Brownmiller's analysis is an historically situated account of the links between women's social, political and economic subjugation and the role of sexual violence in maintaining this subjugation. Rape, she argues, is not motivated by sexual drives but is a political tool through which men seek to dominate and degrade women. The fear of rape functions to keep women in chains and tied to individual men for protection. Marriage is an example of a state-sanctioned mechanism through which women's reliance on men is institutionalised.<sup>3</sup> In claiming that the primary purpose of rape is political Brownmiller seeks to discredit early rape myths supported by medical and psychological discourse that attested to a man's biological inability to 'resist' a beautiful woman. This move of separating rape from sexuality and insisting on the violence of rape as a crime was thus an important contribution to a broader feminist intervention into discourse of the time that naturalised and excused sexual violence.

One important consequence of this analysis, and one which I will consider later in chapter five, is the move towards the acceptance and promotion by feminist activists of gender-neutral legal definitions of rape. If sexuality is irrelevant to the motivation for rape, then there is no reason to include sex within a legal definition, particularly if it is at the expense of highlighting the serious violence inherent in the act of rape.

Catharine MacKinnon's intervention into the debate on rape, sex and law came most explicitly over 10 years later in her book *Towards a Feminist Theory of the State*.<sup>4</sup> In that book MacKinnon challenged the ready ontological distinction made by Brownmiller and others between (hetero)sex and rape. Rape, she argued, must be understood squarely within the construction of what is considered 'normal' heterosexual sex. Violence, coercion or force are insufficient indicia for distinguishing between sex and rape, because elements of these are often present in what popular and legal discourse declared to be 'normal' sex. This state of affairs is attributable primarily to the

---

<sup>2</sup> Brownmiller, above n 1, 5, emphasis in original.

<sup>3</sup> *ibid* 16-17.

<sup>4</sup> MacKinnon, *Towards and Feminist Theory of the State*, above n 1.

way in which rape is defined in law from a male perspective with little or no regard for a woman's experience of violation. Given this context, MacKinnon argues, 'to seek to define rape as violent not sexual is as understandable as it is futile.'

The view that derives more directly from victims' experiences, rather than from their denial, construes sexuality as a social sphere of male power to which forced sex is paradigmatic. Rape is not less sexual for being violent. To the extent that coercion has become integral to male sexuality, rape may even be sexual to the degree that, and because, it is violent.<sup>5</sup>

The centrality of dominance and coercion to the heterosexual paradigm, defined and maintained by and for men and their desire, means that heterosexual intercourse is always, to some degree, tainted by force. Male supremacy, in this analysis, makes it very difficult, if not impossible, for women to give meaningful consent to sexual activity.<sup>6</sup>

MacKinnon's work has faced a number of criticisms for the way in which it seems to render virtually all heterosexuality coercive and confine women to the position of victim. Indeed, there doesn't seem to be any 'way out' of this mire:

Women, insofar as their heterosexual identities were formed contrary to their own desires and interests (so much so that even their desires are not their own), could hardly be capable of envisioning an alternative, for they have virtually no capabilities outside those determined by the masculine paradigm.<sup>7</sup>

Despite the problems that MacKinnon's framework presents for the potential agency of women, the questions her analysis poses for feminists concerned with trying to understand the prevalence of rape and its resistance to legal intervention, remain salient. Elements of her radical critique sit comfortably beside a poststructuralist understanding of a continuum of permissible sexuality and the contradictions this poses for understanding what rape means and what its harm is.<sup>8</sup>

---

<sup>5</sup> *ibid* 173.

<sup>6</sup> Andrea Dworkin adopts this analysis in her investigation of pornography and prostitution. See Andrea Dworkin, *Pornography: Men Possessing Women* (Dutton, New York 1989).

<sup>7</sup> Ann J. Cahill, *Rethinking Rape* (Cornell University Press, Ithaca 2001) 43.

<sup>8</sup> See for example Nicola Gavey, *Just Sex? The Cultural Scaffolding of Rape* (Routledge, New York 2005). In that book Gavey argues from an explicitly poststructuralist perspective (refer further to discussion below p. 66) that discourses of heterosex serve to produce and set up the boundaries of 'women's passive, acquiescing

While these similarities seem readily able to be drawn, the rejection of both the polemics of Brownmiller and MacKinnon's work, and the seemingly intractable problems exposed in their frameworks, spurred on a new era of feminist theorising of rape and rape law. In my argument, this move was as much to do with the shift in thinking in the academy as it was to do with the slow but steady realisation of the manifest failure of feminist-inspired liberal law reform initiatives to the crime of rape. It is to this new wave of theory on rape and rape law that I now turn.

## PART I

### *The Poststructuralist Turn in Feminist Theorising on Rape*

In a 2002 article in *Signs*, Carine Mardorossian alleged that sexual violence had become a taboo subject of feminist theory.<sup>9</sup> 'The kind of theoretical and genealogical scrutiny that other aspects of women's lives...have occasioned is remarkably absent from studies of sexual violence. Rape has become academia's undertheorized and apparently untheorizable issue.'<sup>10</sup> She lamented the lack of engagement of postmodern<sup>11</sup> feminists with the issue of rape, and suggested that this lacuna could only be explained by the renewed focus of prominent postmodern feminist theorists on 'interiority', which had led to a turning away from 'antirape politics' to a concentration on 'a psychic dimension'.<sup>12</sup> This 'turning away' was thus symptomatic of the move towards postmodernism in feminist theory and may have heralded the theoretical limit of postmodernism as a tool for analysis of rape.<sup>13</sup>

---

(a)sexuality, and men's forthright, urgent pursuit of sexual release', which in turn provide the frame or scaffolding for a rape culture (p. 3).

<sup>9</sup> Carine M. Mardorossian, 'Towards a New Feminist Theory of Rape' (2002) 27(3) *Signs* 743.

<sup>10</sup> *ibid*

<sup>11</sup> I am using the terms 'poststructuralist' and 'postmodern' in this discussion synonymously.

<sup>12</sup> Mardorossian, above n 9, 747.

<sup>13</sup> *ibid*.

While not infused with the same type of polemics, Mardorossian's critique came fast on the heels of a number of incendiary feminist debates concerning the increasing visibility of postmodern-influenced feminist writing.<sup>14</sup> Martha Nussbaum's excoriating 'take-down' of Judith Butler in 1999 in the *New Republic* is emblematic of this particular strain of criticism.<sup>15</sup> In that article Nussbaum elucidates the concerns shared by herself and 'other liberal feminists' when she notes that 'feminism in America has [long] been closely allied to the practical struggle to achieve justice and equality for women'. It is Nussbaum's contention that it is a point of honour amongst those feminists who remain in the academy to connect theory with proposals for social change with their eyes always on the material conditions of real women, 'writing always in a way that acknowledges those real bodies and those real struggles.'<sup>16</sup> She goes on to contrast these aims against those of Butler and her poststructuralist cronies whom, she says, have virtually turned away from the material side of life to a symbolic politics that 'makes only the flimsiest of connections with the real situation of real women'.<sup>17</sup>

Nussbaum characterises Butler's poststructuralist focus on performativity, discourse and parodic resistance as involving a 'proud neglect' of the material side of life. Resistance, for Nussbaum, is not just some narcissistic parody of self-presentation, but it involves building laws and institutions 'without much concern for how a woman displays her own body and its gendered nature.' Butler's feminism lets scores of young women off the hook, telling them that they need not 'work on changing the law, or feeding the hungry, or assailing power through theory harnessed to material politics.'<sup>18</sup> Butler is in this narrative a purveyor of 'cruel lies' who 'delights in her violative

---

<sup>14</sup> See in particular Catharine MacKinnon, 'Points against postmodernism' (1999) 75 *Chicago-Kent Law Review* 687.

<sup>15</sup> Martha Nussbaum, 'The Professor of Parody' (Feb 22, 1999) *The New Republic* 37.

<sup>16</sup> *ibid* 37.

<sup>17</sup> *ibid* 38.

<sup>18</sup> *ibid* 44-45.



practice' and '...collaborates with evil', confining women in desperate conditions to bondage, hunger, illiteracy, disenfranchisement, beating and rape.<sup>19</sup>

The implication of this type of critique, therefore, is that the inevitable outcome of the postmodern analysis is to dichotomise 'politics' and 'theory', which either irreparably damages the women's movement (Nussbaum), or stymies productive theorising (Mardorossian). Postmodernism focuses too much on the 'psychology of power' and not enough on the 'discursive study of rape and victimization',<sup>20</sup> or on the lives of the women in whose name it purports to describe and analyse.

While sympathetic to the postmodern interrogation of power and systems of representation, Mardorossian takes issue particularly with Wendy Brown and Joan Scott and the 'Experience is not Feminist Epistemology' mantra for which they (along with Foucault), she says, are largely responsible. Foucault heavily influences Wendy Brown's critique of liberal feminist projects in her important 1995 book *States of Injury*.<sup>21</sup> Her discussion of the political consequences of the 'speak-out' as a strategy to transform rape culture draws particular criticism from Mardorossian. Mardorossian contests first Brown's allegation that exposing rape through speak-outs obscures the ideological system that maintains the conditions for rape's existence.<sup>22</sup> The forums for making rape visible, says Mardorossian, 'often [entail] precisely the kind of denaturalizing postmodernists advocate, namely, that of the equivalence of sex and identity or correlatively of sexual violence and self-loss.'<sup>23</sup> Second, the empowerment that is fostered by feminist forums like the speak-out is not achieved because it provides access to a 'true' inner self, but because of the act of voicing the experience itself. What ultimately empowers survivors of sexual assault at speak-outs, she argues, is not the process of reclaiming a unified self so much as 'the production of narrative itself...'. Empowerment in this respect is about accessing one's life as material rather than depth.<sup>24</sup>

---

<sup>19</sup> *ibid* 43-44.

<sup>20</sup> Mardorossian, above n 9, 761.

<sup>21</sup> Wendy Brown, *States of Injury* (Princeton University Press 1995)

<sup>22</sup> Mardorossian, above n 9, 764.

<sup>23</sup> *ibid*.

<sup>24</sup> *ibid* 765.

Renee Heberle has also considered the social effects of speaking out in a discussion of Sharon Marcus' work.<sup>25</sup> Heberle draws on Elaine Scarry's analysis of pain and torture to highlight the risks involved with the 'exposure' of speaking out, questioning whether this strategy of narrating stories of sexual violence 'will necessarily achieve the transformation advocates claim is immanent to its goal of persuading society of its reality as a rape culture.'<sup>26</sup>

Heberle's concerns here mirror those of Joan Scott when she questions the 'reality' that is attested to by stories of experience. These, says Scott, obscure the constructed nature of that 'reality' and reproduce (rather than contest) the system from which it is generated.<sup>27</sup> What if, Heberle asks, in our exposure of this hidden reality, 'we participate in setting up the event of sexual violence as a defining moment of women's possibilities for being in the world?...[W]hat if this strategy furthers the reification of masculinist dominance?'<sup>28</sup> For Heberle, the feminist movement against sexual violence should not be contingent on 'finally piecing together the puzzle that is the reality of rape culture but should view its shifts across an historical context as opportunities to interrupt its effectivity in prescribing the terms on which women live their lives.'<sup>29</sup> Strategically, this might mean emphasising the divergence in women's experience of sexual violence, rather than the commonalities.

Brown comes to remarkably similar conclusions as Heberle in her discussion of the speak-out. For Brown, the speak-out suffers from the same problems detailed by Foucault in his discussion of confessional revelations;<sup>30</sup> in its desire to deliver the 'truth' about women it in fact enshrines and reifies their subordinated subject position as victim. Strategies like the speak-out

---

<sup>25</sup> Renee Heberle, 'Deconstructive strategies and the movement against sexual violence' (1996) 11(4) *Hypatia* 63.

<sup>26</sup> *ibid* 63.

<sup>27</sup> Joan Wallach Scott, "'Experience'" in Judith Butler and Joan Wallach Scott (eds) *Feminists Theorize the Political* (Routledge 1992) 22-40, 25.

<sup>28</sup> Heberle, above n 25, 65.

<sup>29</sup> *ibid* 72.

<sup>30</sup> Michel Foucault, *The History of Sexuality: An Introduction* (Robert Hurley tr, Vintage 1980) 58-63, cited in Brown, above n 21, 42.

..[require] suspending recognition that women's 'experience' is thoroughly constructed, historically and culturally varied, and interpreted without end. Within feminist standpoint theory as well as much other modernist feminist theory, consciousness-raising thus operates as feminism's epistemologically positivist movement. The material excavated there...is valued as the hidden truth of women's existence...<sup>31</sup>

On Mardorossian's reading of the effects of the work of Brown, Scott and others, any discussion of the victimisation of complainants of sexual violence is suspect because it is said to entrench powerlessness. Victimhood thus becomes a site of passivity, suffering and interiority.<sup>32</sup> Because we can no longer trust the voices of victims to speak the 'truth' of their experience, they are, in effect, relegated to the 'backdrop of the [feminist] movement, cast as a uniform group of individuals driven by an emotionally incapacitating response to their own experience.'<sup>33</sup>

Mardorossian calls instead for an alternative approach to theorising rape which eschews a hyper-focus on subjectivity and the individual psyche, while maintaining a critical approach to the category of 'experience'. This involves retaining access to narrative accounts of rape in order to explode the dichotomy between victimhood and agency, and in so doing, reconceptualising the term 'victimisation'. By this Mardorossian envisages a return to spaces in which women are invested with the agency necessary to represent their experience as 'truth', and how we hear that experience is informed by a critical understanding of the variable ways in which individuals are attentive to and make sense of the discursive context in which their experience is given meaning.<sup>34</sup> A victim is no longer simply passive, but an agent whose story is told within a particular context that affects its telling and its hearing. This methodology requires postmodern feminists to engage with 'systemic practices of power' and to resist the 'hegemonic discourse on victimization [which] reduces the political to the personal'.<sup>35</sup>

---

<sup>31</sup> Brown, above n 21, 41.

<sup>32</sup> Mardorossian, above n 9, 766.

<sup>33</sup> *ibid* 770.

<sup>34</sup> *ibid* 769.

<sup>35</sup> *ibid* 772.

In the following chapters of this thesis I will take up Mardorossian's challenge and argue that a poststructuralist analysis attentive to the complexities of sexual difference can speak more adequately to the issues with which she is concerned. Here, however, I consider Mardorossian's critique in more detail in conjunction with an exposition of the work of other poststructuralist feminists writing on rape. In part II I will ultimately agree with her conclusion on the inadequacy of this dominant strand of poststructuralist work on rape, albeit for different reasons.

## **PART II**

### *Rape, Power and the Problem of Resistance*

Mardorossian singles out the work of Sharon Marcus for particular critical attention in her article. Marcus proposes a poststructuralist understanding of rape as a language and the use of this insight 'to imagine women as neither already raped nor inherently rapable'.<sup>36</sup> She urges a shift from analysis of the rape and its aftermath to preventative measures. Marcus echoes many familiar poststructuralist criticisms of rape law, or feminist conceptualising of rape, when she notes that rape is often represented as an 'inevitable material fact of life.' This treatment of rape as a mere reality of women's lives, one to which their physical bodies condemn them, is problematic for Marcus because it endows sexual violence 'with an invulnerable and terrifying facticity which stymies our ability to challenge and demystify [it].'<sup>37</sup>

---

<sup>36</sup> Sharon Marcus, 'Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention' in Judith Butler and Joan Wallach Scott (eds) *Feminists Theorize the Political* (Routledge 1992) 385-403, 387.

<sup>37</sup> *ibid.*

Marcus' concerns mirror those of Winifred Woodhull in an influential chapter published four years earlier.<sup>38</sup> In discussing the nexus of power, sexuality and rape, Woodhull emphasises the need to 'investigate the cultural codes that inform human sexuality in order to understand the role they play in engendering and consolidating the power relations of a given society.'<sup>39</sup>

If we are seriously to come to terms with rape, we must explain how the vagina comes to be coded – and experienced – as a place of emptiness and vulnerability, the penis as a weapon, and intercourse as violation, rather than naturalize these processes through references to 'basic' physiology.<sup>40</sup>

Marcus' understanding of rape as a 'linguistic fact...enabled by narratives...' leads her to similar conclusions.<sup>41</sup> The 'grammar of violence' creates a gendered polarisation '...in which the male body can wield weapons...[and] the female body...[is] universally vulnerable, lacking force, and incompetent to supplement its deficiencies...'<sup>42</sup> The psychological rape script 'characterizes female sexuality as inner space, rape as the invasion of this inner space...the entire female body comes to be symbolized by the vagina, itself conceived of as a delicate, perhaps inevitably damaged and pained inner space.'<sup>43</sup>

Woodhull's analysis combines a Marxist appreciation of a historically constituted subject with a psychoanalytic analysis of the instability of that subject; one that is 'produced by a complex interplay of social, discursive, somatic, and psychic forces...'<sup>44</sup> She criticises the notion of the liberal individual produced by law, and the principle of 'bodily self-determination' that goes with it. Biology, often presented as a 'transhistorical fact' when deployed to explain the 'wrong' of rape, denies the specificity of women's experience of rape as a gendered harm. While this biological account as described by Woodhull fails to acknowledge the materiality of the historically produced

---

<sup>38</sup> Winifred Woodhull, 'Sexuality, Power, and the Question of Rape' in Irene Diamond and Lee Quinby (eds) *Feminism and Foucault: Reflections on Resistance* (Northeastern University Press 1988) 167.

<sup>39</sup> *ibid* 171.

<sup>40</sup> *ibid*.

<sup>41</sup> Marcus, above n 36, 388-389.

<sup>42</sup> *ibid* 395.

<sup>43</sup> *ibid* 398.

<sup>44</sup> Woodhull, above n 38, 174.

gendered subject, an analysis infused with a Foucauldian appreciation of the interplay between power and sexuality may be more effective.

...[I]f the individual's experience of and relation to the body and other bodies is seen as culturally produced at every level, feminists can work more effectively to generate new concepts that permit a recognition of that experience as one that is in struggle and whose destructive aspects can be altered.<sup>45</sup>

Marcus too takes issue with the focus of many liberal feminist projects on attempts to stop rape through legal deterrence. To her, this strategy cedes the 'primary power' to men, and neglects to consider 'strategies which will enable women to sabotage men's power to rape, which will empower women to take the ability to rape completely out of men's hands.'<sup>46</sup> 'The language of rape...invites men to position themselves as legitimately violent and entitled to women's sexual services...[it] structures physical actions and responses...for example...our commonplace sense of paralysis when threatened with rape.'<sup>47</sup> However, because rape is seen here as enabled by narratives, it can also be changed through narrative; '[e]ach act can perform the rape script's legitimacy or explode it.'<sup>48</sup> Marcus thus urges the consideration of rape as a 'scripted interaction in which one person auditions for the role of rapist and strives to manoeuvre another person into the role of victim.' In this way, rape is seen as a 'process of sexist gendering which we can attempt to disrupt.'<sup>49</sup>

Woodhull's analysis leads her to look at examples of various women's organisations that challenge the prevailing understanding of power, sexuality and law, in pragmatic strategies of rape prevention. Rape crisis centres, for instance, provide a woman-centred space for debate, discussion and support. Women's ride services, similarly, 'establish a degree of control by rejecting the notion that women must either stay home or depend on the company of "protective" men when going out at night.'<sup>50</sup> While acknowledging the limits on these initiatives, Woodhull suggests that their

---

<sup>45</sup> *ibid.*

<sup>46</sup> Marcus, above n 36, 388.

<sup>47</sup> *ibid* 390.

<sup>48</sup> *ibid* 392.

<sup>49</sup> *ibid* 391.

<sup>50</sup> Woodhull, above n 38, 175.

strength is as a form of collective resistance, and the forum for a shared political consciousness of rape that they provide.<sup>51</sup> Marcus, in contrast, suggests that in order to prevent rape women must resist the culturally scripted force of rape; the 'self-defeating notions of polite feminine speech'.<sup>52</sup> They must also engage in physical strategies of self-defence.<sup>53</sup> In doing so, women position themselves as subjects in their own right, resisting and responsive to acts of aggression. Rewriting the script will involve a myriad of strategies which may also include a 'refus[al] to take it seriously and treating it as a farce...'.<sup>54</sup> To Mardorossian, Marcus' recommendation is just another example of the postmodern focus on interiority gone awry:

Arguing that the dynamics of sexual violence can simply be reversed through a more self-reflexive attitude assumes that women have a linear and simplified relationship to the social codes that constitute them. A model like Marcus's therefore downplays that 'materiality of gender' and ignores that social inscriptions – that is, our physical situatedness in time and space, in history and culture – do not simply evaporate because we are made aware of them.<sup>55</sup>

This is linked unfavourably to Butler's 'performativity' and is said to 'suffer[] from the same shortcomings'. On Mardorossian's reading, both Butler and Marcus are hamstrung by their own intellectual gymnastics, at the expense of 'concrete contexts' and a thorough-going analysis of the materiality of the body.<sup>56</sup>

Though published a number years after her article, on the basis of the foregoing analysis of her objections to poststructuralist writing on rape Mardorossian might well have raised the same objections to the work of South African philosopher Louise du Toit. Du Toit's analysis of rape, while reliant on an explicitly different theoretical framework from Marcus, comes to remarkably similar political conclusions.<sup>57</sup> For du Toit, challenging rape is about challenging the dominant symbolic order which views women's subjectivity as marginal, ambiguous and ultimately impossible. Du Toit's

---

<sup>51</sup> Woodhull, above n 38, 175.

<sup>52</sup> Marcus, above n 36, 389.

<sup>53</sup> *ibid* 397

<sup>54</sup> *ibid* 392.

<sup>55</sup> Mardorossian, above n 9, 755.

<sup>56</sup> *ibid*.

<sup>57</sup> Louise Du Toit, *A Philosophical Investigation of Rape: The Making and Unmaking of the Feminine Self* (Routledge, New York 2009).

strategic objective is to invest women, and hence rape victims, with a subjectivity that will have the potential to alter power relations in a way that might provide a path towards a rape-free society.<sup>58</sup> She attempts this with reference to psychoanalytic and phenomenological accounts of subjecthood. This approach emphasises ‘the constitutive relations between body, self, world and other’<sup>59</sup> and gives her access to a selection of narrative accounts of rape victims who have put their experiences in writing. These allow her to forge an alternative vocabulary for theorising the damage of rape and, in turn, its potential subversion. This subversion is firmly grounded in psychoanalytic strategies, drawn particularly from Luce Irigaray, including the restoration of the maternal voice<sup>60</sup> and (re)introduction of the feminine divine.<sup>61</sup>

Du Toit links her work back to rape through an interpretive reading of *The Rape of Sita*, a book by Lindsey Collen.<sup>62</sup> Collen’s novel is an account of the inner turmoil of Sita, the title character, in the aftermath of being raped by a family friend and her attempts to reconcile her experience in a broader context of political and social unease. In the story, Sita finds herself in a situation where she anticipates she is about to be raped. In this circumstance, as told by du Toit, Sita draws on a cultural history of matriarchal resistance, shouting confidently at her rapist, growing tall and dignified and angrily ripping off her own clothes. Her rapist, Rowan, is ashamed and terrified by this show of brute female strength and he ‘lo[s]es his nerve’. ‘Even though she could not prevent the rape itself’ du Toit goes on, ‘Sita managed to turn the shame on the rapist and retain her female dignity.’ She characterises Rowan’s experience faced with Sita’s resistance as ‘his least “successful” rape ever.’<sup>63</sup>

In du Toit’s account of the story, the protagonists ‘adopt an attitude towards rape which speaks of the possibility of a new and transformed symbolic order’.<sup>64</sup> While careful not to overstate the emancipatory force of such a reading, for du Toit this story presents a ‘hopeful vision’ in which

---

<sup>58</sup> ibid 181.

<sup>59</sup> ibid 64.

<sup>60</sup> ibid 166.

<sup>61</sup> ibid 189.

<sup>62</sup> Lindsey Collen, *The Rape of Sita* (Heinemann Educational Publishers 1993).

<sup>63</sup> Du Toit, above n 57, 217.

<sup>64</sup> ibid 211.



rape becomes ridiculous. 'The strategy of rape falls flat...because it is confronted by healthy, strong and self-confident female sexual subjectivities rooted in a women's world and supported by the mother as the resurrected goddess.'<sup>65</sup> In Collen's novel, du Toit finds 'women who resist the overarching symbolic order's attempt to inflict upon them the "wound of femininity", those who refuse to play the game of the rapists, [and] to buy into the rapists' attempts to erase their subjectivity...'.<sup>66</sup>

For du Toit, and for Sharon Marcus also, the ultimate strength of these analyses lie in the subversive parody they make of rape as a patriarchal strategy of domination. In refusing to reify rape as something biologically inevitable and constituent of personhood, it is stripped of its dominating power and revealed as farce; as ridiculous. For du Toit, this alternative understanding of personhood is grounded in a different appreciation of self-world-other - an assumption of matriarchal subjectivity - while Marcus describes it as an assertion of woman's agency, 'not her violability, and a woman's power, rather than her fearful powerlessness.' For Marcus '...we fend off the rape by positioning ourselves as if we were in a fight.'<sup>67</sup> Reminiscent of du Toit's reflections on Sita's story, Marcus notes '[a] rapist confronted with a wisecracking, scolding, and bossy woman may lose his grip on his power to rape...'.<sup>68</sup>

Introducing her analysis of *The Rape of Sita*, du Toit stresses that her intention is not to imply that women are responsible for the damage of rape, or that adopting a different attitude to rape can erase its harm.<sup>69</sup> However, her interpretation arguably still suffers from many of the pitfalls identified by Mardorossian in Marcus' work. In Collen's book, Sita is raped despite her brave attempt at resistance. She experiences her body 'desecrated. Not of itself. Just a shell...Ravaged against her will'.<sup>70</sup> She reflects on her actions, concluding that 'she would never win a case...He

---

<sup>65</sup> ibid 211.

<sup>66</sup> ibid 212

<sup>67</sup> Marcus, above n 36, 397.

<sup>68</sup> ibid 396

<sup>69</sup> Du Toit, above n 57, 211.

<sup>70</sup> Collen, above n 62, 154.

would plead consent. How could she prove to the contrary?<sup>71</sup> In the context of the legacy of the rape in Sita's life (it is eight years and nine months before she can speak about it, during which time she contemplates suicide), it is difficult to take any comfort in the rape being Rowan's 'least "successful" ever'.

These reservations about the political force of du Toit's project perhaps leave hanging the question of how useful a theory of the feminine symbolic is when addressing issues such as rape, in the absence of an institutional critique of power and domination.<sup>72</sup> This conclusion is shared by Mardorossian (discussing Marcus), who insists on a continued need for feminists to engage with systemic practices of power in their engagement with rape.<sup>73</sup> For her, this requires the reunification of victims with the movement and 'a return to collective sites of democratic enunciation'.<sup>74</sup> Woodhull too argues for a broader critique of systems of domination to complement the insights of psychoanalysis. While psychoanalytic theory allows us to see how the gendered subject is generated, she says, 'a psychoanalytic account of women's experience must be grounded in an analysis of patriarchy as it takes shape in relation to a particular mode of production.'<sup>75</sup>

Mardorossian concludes her paper with a call for the feminist community to 'become more alert to the ways in which the source of women's powerlessness is constantly located within victims themselves rather than in the institutional, physical, and cultural practices that are deployed around them.'<sup>76</sup>

---

<sup>71</sup> *ibid* 155-156

<sup>72</sup> Yvette Russell, 'Louise du Toit: A Philosophical Investigation of Rape: The Making and Unmaking of the Feminine Self' (2010) 18(1) *Feminist Legal Studies* 103. While I am skeptical of du Toit's use of Sita's story in her book to illustrate the implications of her analysis, ultimately I think her theoretical intervention into feminist rape scholarship is the most important since Brownmiller's *Against our Will*. As I will go on to argue in chapter five of this thesis, with reference to her work, the framework that she relies on is premised on a particular understanding of personhood, which rather than foreclosing a critique of institutional power and domination, actually enables it.

<sup>73</sup> Mardorossian, above n 9, 772.

<sup>74</sup> *ibid* 769

<sup>75</sup> Woodhull, above n 38, 171.

<sup>76</sup> Mardorossian, above n 9, 772.

These reductions of the work of Marcus and others to what Mardorossian interprets as an almost single-minded focus on the psyche of individual women, is itself contentious and should be scrutinised. It is clear with respect to Marcus, at least, that she is not suggesting that the 'grammar of violence' is *caused* by women or the victims of rape, but rather that the linguistic facts of rape become integrated into subjectivity and, in doing so, become self-fulfilling. And so for du Toit as well, the dominant symbolic produces itself in and around the bodies of women. So on this understanding, the psyche is simultaneously the battleground and the origin of the fear, and the meaning, of rape and thus becomes an important site of analysis and resistance. Mardorossian may be missing here the more radical implications of Marcus' critique; the broader cultural implications of a disruption to 'the rigidly gendered "grammar of violence" that makes women automatically subjects of fear and objects of violence.'<sup>77</sup> The reflexivity required by this approach depends for its coherence on a particular understanding of the harm of rape, not one couched in rights discourse or liberal notions of bodily integrity, but one centered on a specifically poststructuralist appreciation of the relationship between power, subjectivity and sexuality.<sup>78</sup>

Nicola Gavey has also considered Marcus' work in a historical analysis of sexual violence against women and 'fighting praxis'.<sup>79</sup> While undertaking archival research at the Schlesinger Library on the History of Women in America, Gavey discovered documents from the 1970s which attested to a 'rich body of feminist anti-rape praxis' and included a number of examples of direct action that overlapped with those suggested by Marcus and other anti-rape theorists.<sup>80</sup> Included in these is evidence of an aggressive rhetoric which manifests itself in a kind of 'attitude of refusal',<sup>81</sup> a resonance of which Gavey sees in Marcus' aspiration for women to transform into the subjects,

---

<sup>77</sup> Nicola Gavey, 'Fighting Rape' in Renee Heberle & Victoria Grace (eds) *Theorizing Sexual Violence* (Routledge 2009) 113.

<sup>78</sup> Mardorossian recognises this and on her negative reading of the political consequences of this analysis, suggests that postmodernism might have reached its theoretical limit.

<sup>79</sup> Gavey, 'Fighting Rape', above n 77.

<sup>80</sup> See in particular Martha McCaughey, *Real Knockouts: Physical Feminism of Women's Self-defense* (New York University Press, 1997).

<sup>81</sup> Gavey, 'Fighting Rape', above n 77, 115.

rather than the objects, of violence.<sup>82</sup> She also relates a strong theme of physical activism which focused on training women in self-defence and promoting modes of embodiment which belie women's vulnerability and passivity, and a deconstruction of cultural fictions regarding men's invulnerability. In addition, Gavey catalogues examples of rebellious humour 'stretched into a kind of retaliation catharsis',<sup>83</sup> strongly reminiscent of Marcus' idea of a 'wisecracking, scolding, and bossy woman' and du Toit's notion of rethinking rape as ridiculous farce. These included plays and poems which illustrated, for Gavey, 'an aggressive refusal of passive victimisation'.<sup>84</sup> Thus, '...at least some elements of the early activism seem to embody some of the deconstructive impulse behind the poststructuralist-informed recommendations for preventing rape.'<sup>85</sup>

Reflecting on these connections between 1970s activism and some more contemporary poststructuralist feminism, Gavey poses the following question: '[W]hat does the prior existence, and subsequent demise, of this kind of activism mean for how we read the transformative potential of the more contemporary visions for eliminating rape that are informed by poststructuralist critiques?' Gavey does not answer this question but gestures towards reasons why we might still find strategies like promoting self defence among women useful. Focusing primarily on this notion of a 'physical feminism', one which promotes an alternative conception of female embodiment invested with a fighting spirit, Gavey sees a potential to 'reconfigure the gendered identities and power relations that are brought to the intimate realm of sex.'<sup>86</sup>

The underpinnings of this approach – which are informed by a blend of poststructuralist and radical feminist insights – lend it ambitious aspirations beyond simply the individualistic goal of helping women to resist rape. Rather, the nature of relations between women and men, as well as the balance of power between the sexes, would be transformed, as men would be enticed and/or incited to change in response...[S]uch changes within the matrix of gender would force reconfigurations of masculinity, hopefully weakening the hold of those modes of masculinity that celebrate the sexual objectification...of women and other forms of male sexual entitlement and the glorification of men's aggressive physical prowess. To the extent that it

---

<sup>82</sup> ibid 101.

<sup>83</sup> ibid.

<sup>84</sup> ibid 102.

<sup>85</sup> ibid 110.

<sup>86</sup> ibid 115.

works to these ends, self-defence and broader more diverse outgrowths of physical feminism are valuable, possibly even essential, tools in fighting rape.<sup>87</sup>

Gavey's approach here tends to emphasise the political force of the prescriptive elements of Marcus' work rather than the critique. For Marcus, rape is the logical result of a gendered grammar of violence which constructs the subject positions both of men and women (read: perpetrators and victims). Both Marcus and Gavey, however, tread a fine line between what they see as deconstructive, and the reconstitutive pitfalls Foucault warns against. The vision that Marcus enunciates, and Gavey seeks to illustrate by reference to 1970s radical feminist activism, involves the use of a reverse discourse whereby women assert their agency and are empowered through the use of language which can also be said to sustain the 'gendered grammar of violence.' As Foucault states, 'there is not on the one side, a discourse of power, and opposite it, another discourse that runs counter to it.'<sup>88</sup> Such discourses circulate between strategic positions without changing their form. To this extent, there may be reasons to problematise the assertion that strategies like physical feminism are in fact deconstructive of dominant hegemony. They may instead just lead back to an attempted inversion of bi-directional power relations.

Gavey's analysis is heavily reliant on her earlier work on rape culture and rape myths which is also supported by an explicitly poststructuralist theoretical framework.<sup>89</sup> In that work she traces the ways in which various discourses of heterosex are produced and how they set up the boundaries of 'women's passive, acquiescing (a)sexuality, and men's forthright, urgent pursuit of sexual release', which in turn provide the frame or scaffolding for a rape culture.<sup>90</sup> Part of Gavey's project in this book is to show the ways in which different professional and medical discourses have established and maintain the particular cultural scripts through which (hetero)sex is negotiated. A major problem with the dominant model in Gavey's reading is the fact that 'women's consent is always up

---

<sup>87</sup> *ibid.*

<sup>88</sup> Foucault, above n 30, 101-102.

<sup>89</sup> Gavey, *Just Sex?*, above n 8.

<sup>90</sup> *ibid* 3.

for question'.<sup>91</sup> This is because of the difficulty inherent in distinguishing in this model between 'female reluctance that is genuine disinterest or revulsion from female reluctance that is a normal and proper part of the "game" of "courtship"'.<sup>92</sup> The nuances of heterosexual cultural norms bind both women and men within a framework, or scaffolding, in which rape is often indistinguishable from 'just sex'.

Gavey is reliant, like many of her contemporaries, on a Foucauldian understanding of power relations in order to make her claim for the continuing dominance of rigidly policed scripts of heterosex and the social production of sexuality and subjectivity.<sup>93</sup> She uses this framework to interpret women's accounts of unwanted sex and to illustrate how 'the cultural conditions of possibility in which heterosexual sex is practiced set[s] up a dynamic that can be seen to clearly support rape.'<sup>94</sup>

Gavey's analysis is sophisticated and path-breaking and her exploration of the various discursive mechanisms by which rape culture comes to morph imperceptibly into the public imaginary allows us to understand rape as a social and cultural phenomenon in much more complex ways. However, in my argument, Gavey is eventually hamstrung by her framework because, essentially, it leaves her ill-equipped to imagine a discourse of (hetero)sex outside of the logic that supports a rape culture. As I will argue in the following chapter, and also with reference to the work of Ann Cahill below,<sup>95</sup> this is primarily due to the inattention within this framework to sexual difference.

In the penultimate chapter of her book *Just Sex?* entitled 'Turning the Tables, Women Raping Men?' Gavey follows through with her Foucauldian reading of sexual negotiation with an analysis of a scene in the film *White Palace*.<sup>96</sup> This analysis is used in the service of illustrating what

---

<sup>91</sup> *ibid* 22.

<sup>92</sup> *ibid* 20.

<sup>93</sup> *ibid* 79-98.

<sup>94</sup> *ibid* 98.

<sup>95</sup> Cahill, above n 7.

<sup>96</sup> Gavey, *Just Sex?*, above n 8, 193-213.

Gavey argues to be the radically disruptive potential of counter-discourses, or resisting praxis, to challenge the existing scripts of heterosex which confine women and men within certain pre-defined roles. In the scene with which Gavey is concerned, a woman performs oral sex on a sleeping man after he has made it clear that he does not consent to sexual activity. In Gavey's analysis this scene provides an important point of departure from the dominant narratives of woman's sexuality 'that cast women as passive and men as active; and which... work to support the material conditions of women as victims and men as agents of sexual coercion and sexual violence'.<sup>97</sup>

In this way listening to the possibility that women could be sexual aggressors or that men could be victims of women's coercion has radical potential for a feminist analysis of rape and sexual coercion (of women, by men)... From a poststructuralist point of view that holds that discourse contains the cultural possibilities for acting and being, then the value of such modification of our gendered stereotypes is *not* that it somehow frees up women to assault men, but that it opens up the possibilities for a complete rewriting of the dominant discourses of sexuality, in ways that unhinge sex/gender from the rigidly specified forms of identity, experience and practice.<sup>98</sup>

Gavey is careful to note that her analysis is not meant to be a 'glib celebration of women's sexual "aggression"...'. In her argument, considering the very possibility of woman's sexual aggression is nonetheless important because it 'arguably shores up the possibilities of women's nonpassivity and men's vulnerability – essential possibilities for a revised form of heterosexuality in which it would be less possible to confuse rape and sex'.<sup>99</sup>

The value for Gavey in highlighting attempts to make sense of this scene of female sexual aggression, as she does by putting the scene for comment to various lay focus groups, is to 'invite a critical understanding of the dynamics of heterosexual coercion of *women*'.<sup>100</sup> Gavey is critical of the tendency of many focus group participants to simply read the woman's actions in *White Palace* through reversing the genders of the participants such that the woman is simply constructed as (male) rapist and the man as (female) victim. This, she argues, illustrates how 'in the absence of

---

<sup>97</sup> *ibid* 194.

<sup>98</sup> *ibid*.

<sup>99</sup> *ibid* 196.

<sup>100</sup> *ibid* 206.

recognition of sexual difference and gendered power relations, a pernicious effect of the rhetoric of gender reversal can be an undermining of feminist emphasis on men's responsibility for rape (of women) and a reiteration of women's blame for (some) rapes (of women)'.<sup>101</sup> Gavey insists then on the need for 'some recognition of sexual difference' for understanding the ontology, but also the moral and political implications of rape.<sup>102</sup> By 'sexual difference' here, Gavey is referring primarily to the embodied realities or experience of sexual violence for women and men, within the context of lives lived within a rape culture and under conditions of inequality that genders women and men differently.

Concluding her discussion Gavey notes that her research reveals the continued purchase of binary representations of male and female sexuality which played into generating responses to the scene in *White Palace* that '[deny its] radical potential'. That scene 'disrupts the familiar mapping of male/female difference onto an active/passive binary...' but can only be truly radical when freed from the 'operation of gender reversal and the assumptions of a gender-neutral subject...'

The presence of sexual difference must be considered in attempts to understand the dynamics of heterosexual rape and sexuality, and denying such difference in the interests of feminist moves towards gender equality is a head-in-the-sand approach that only perpetuates the often invisible and naturalized effects of gender oppression.<sup>103</sup>

Gavey continues in the final chapter of *Just Sex?* to consider various feminist anti-rape political strategies, in light of her critique.<sup>104</sup> One of these strategies includes what she labels a tactics of 'representational deconstruction',<sup>105</sup> and is illustrated with reference to a discussion of a famous Levi's advertising campaign in the mid-1980s.<sup>106</sup> In that ad, a young man walks into a launderette and strips to his underwear and the women in the launderette are shown admiring the man's body. Gavey argues that the image in this ad represents an 'ambiguity [which creates] a legitimate public

---

<sup>101</sup> *ibid.*

<sup>102</sup> *ibid* 208.

<sup>103</sup> *ibid* 212.

<sup>104</sup> *ibid* 223-224.

<sup>105</sup> *ibid* 224.

<sup>106</sup> *ibid* 225.



space and encouragement for women to step into the position of active, desiring heterosexual subjects.<sup>107</sup>

I think it is important to recognize the potential within such representations to provide new forms of understanding gender and sexuality. In theoretical terms, culture jamming of this kind... contributes to the power-knowledge nexus that makes new ways of being possible. An advertisement like this can be a moment of 'savoir' that expands 'pouvoir'.<sup>108</sup>

Anticipating criticism of her analysis for its 'objectification of the male body', Gavey responds by arguing that the objectification of women's bodies that feminist analyses highlights is not necessarily applicable to the male body:

Where this does occur [the objectification of the male body] it still does so within a context of discursive and structural power relations in which meanings of women's and men's bodies and desires are not interchangeable. From a feminist point of view such images can be appreciated for their transgressive queering potential to expand normative constructions of feminine and masculine sexualities.<sup>109</sup>

Gavey's reading of the Levi's ad and the scene in *White Palace* are problematic from a number of perspectives but the one I want to highlight is her insistence on the radical potential of these images for re-writing the dominant heterosexual paradigm. Gavey occupies in these analyses two contradictory and ultimately untenable positions. The first is that she is at pains to stress the radical potential of women occupying the (masculine) position of sexual aggressor or objectifier, and the second is that it is impossible to 'interchange' masculine and feminine subject positions but these images are still, nonetheless, 'transgressive' in their ability to expand what we normally attribute to masculine and feminine subjectivities. This inherent contradiction arises, in my view, from Gavey's failure to sufficiently theorise sexual difference. At the end point of her critique and in her attempt to think resistance, she has simply nowhere to go in terms of reconstituting feminine sexuality, except to the existing images and tools of the dominant masculine symbolic. Within this symbolic, women must resist rape and in doing so they must constitute their bodies as strong,

---

<sup>107</sup> *ibid.*

<sup>108</sup> *ibid.*

<sup>109</sup> *ibid.*

resisting machines. The problem with her examples of so-called resisting praxis is that the logic of rape culture remains untroubled; the subject positions are unmoved. The scene in *White Palace* is only radical because a woman becomes active and a man passive, and similarly in the Levi's ad. There are only two subject positions here to which we can refer in imagining a different bodily constitution. And as Irigaray shows, and as I will elaborate further in chapter three, these are simply derived from the same.

The women in the launderette whose eyes linger on the semi-naked male body simply reiterate the logic of the male gaze. Gavey asserts that this scene portrays feminine desire, but we have no idea what feminine desire would look like in conditions of sexual difference. As I will argue in the next chapter, Gavey remains trapped in her analysis within a logic of sexual *indifference*. Gavey calls for a 'radical' potentiality but in the end her framework is not radical enough, being chained, as it is, to the existing masculine symbolic order.

Remarkably similar themes and conclusions are canvassed by Ann Cahill in her 2001 book *Rethinking Rape*.<sup>110</sup> In that book Cahill situates her analysis within feminist literature on the body in order to consider rape as an 'embodied experience' marked by sexual difference.<sup>111</sup> In approaching rape from this perspective Cahill seeks to uncover the 'unique wrongness of rape' as an attack on the integrity of the person.<sup>112</sup> Cahill mirrors Gavey's critique of sex neutrality in rape law, noting that the embodied experience of rape for women and men is incapable of being interchanged and serves to obfuscate the realities of sexual politics.<sup>113</sup> Cahill is critical of Brownmiller, MacKinnon and Dworkin for their failure to adequately account for the role of rape in 'the formation of the feminine body, and the implications of that role in the experience and phenomenon of rape itself'.<sup>114</sup> The emphasis that Cahill places on approaching rape first as an embodied experience necessitates, she says,

---

<sup>110</sup> Cahill, above n 8.

<sup>111</sup> *ibid* 8.

<sup>112</sup> *ibid* 14.

<sup>113</sup> *ibid* 35. See further discussion in chapter five at p 133.

<sup>114</sup> Cahill, above n 8, 48.

...a consideration of the embodied effects of the discourses and environments that have surrounded the always-becoming subject. ... Because all victims of rape are embodied, rape always has bodily significance; because embodiment is always marked by difference, that significance varies widely among victims.<sup>115</sup>

Analysing rape as embodied experience, says Cahill, 'by assuming difference rather than trying to eradicate it, allows us to consider the particular conditions of a case of rape without subjecting that particular experience to a universal standard of harm'.<sup>116</sup> Cahill's intervention into the feminist literature on rape then is to bring to prominence a consideration of sexuality and sexual difference as crucial factors in the analysis of rape.

By understanding rape as an embodied experience, as an attack on an embodied subject that directly involves and invokes the sexuality of both the assailant and the victim, we can perceive the phenomenon as a threat to the possibility of embodied subjectivity, a threat to the victim's (sexually specific) personhood and intersubjectivity.<sup>117</sup>

In Cahill's reading, an understanding of sexual difference and its role in thinking about bodily comportment and feminine (and masculine) selves becomes centrally important in acknowledging the 'threat of rape... [as] a constitutive and sustained moment in the production of the distinctly feminine body'.<sup>118</sup>

With regard to rape, the ethical significance of sexual difference is at least twofold. On the one hand, as contemporary feminist theories of the body have already suggested, there should not be an assumption of a single, universally experienced and imposed wrong of rape. The phenomenon of rape will, it may be assumed, itself be differentiated not only by sex but by other facts of personhood. It is notable that many theoretical attempts to discern the ethical wrong of rape have explicitly sought a formulation that holds in any and all given cases of rape.<sup>119</sup>

Cahill's call for consideration of the importance of sexual difference to an understanding of the crime of rape is one with which I wholly agree. However, in my argument she falls into the same

---

<sup>115</sup> *ibid* 114-115.

<sup>116</sup> *ibid* 118.

<sup>117</sup> *ibid* 138.

<sup>118</sup> *ibid* 161.

<sup>119</sup> *ibid* 191-192.

trap as Gavey when she comes to consider 'resistance' in the final chapter of *Rethinking Rape*.<sup>120</sup> This is primarily because her understanding of sexual difference is stuck within what Irigaray would call 'vertical transcendence'.<sup>121</sup> By this I mean that her framework, while enabling her critique of certain elements of feminist theorising of rape and rape law, leaves her little room to manoeuvre when it comes to her constructive project.

While acknowledging the importance of work on legal reform Cahill argues for a broader approach to resistance that counters the construction of women's bodies as distinctly feminine and thus particularly vulnerable to sexual attack.<sup>122</sup>

[W]omen's socialized weakness...renders them vulnerable to attacks that are not sexual; but precisely because that weakness is deemed crucial to their femininity, which is crucial to their social acceptability, which is crucial to their 'successful' interactions with men, women *are even less physically and psychically* prepared to fend off sexual attacks than ones that are merely physical. ... In other words, the instincts that are embedded in women, including the instincts not to fight back, not to resist, not to have faith in one's bodily strength, make them an easy target precisely as they render them feminine.<sup>123</sup>

Cahill returns at this point to consider women and self-defence training, as Gavey also does in her chapter discussed above.<sup>124</sup> In a discussion of Martha McCaughey's book *Real Knockouts*, Cahill argues that women's bodies can be re-cultivated with self-defence training to embody a new and more radical motility.<sup>125</sup> Reorganising women's bodies into 'self-defending beings' makes sense as a critical feminist strategy against rape because 'it is an embodied solution to an embodied problem'.<sup>126</sup> This is not a mere response to women's victimisation but 'a profound challenge to the political structure that shapes women in the form of victims'.<sup>127</sup> This 'physical feminism' is an embodied resistance 'which has the possibility of threatening the conditions that allow for a rape

---

<sup>120</sup> *ibid* 198-207.

<sup>121</sup> See Luce Irigaray, *I love to you: sketch for a felicity within history* (Alison Martin tr, Routledge 1996) 103-108.

<sup>122</sup> Cahill, above n 8, 200.

<sup>123</sup> *ibid* 200-201, emphasis in original.

<sup>124</sup> Gavey, 'Fighting Words', above n 77.

<sup>125</sup> Cahill, above n 8, 201-202.

<sup>126</sup> *ibid* 205.

<sup>127</sup> *ibid* 202.

culture'.<sup>128</sup> It does this first by undermining the assumption of women as victims, by situating the origin of resistance in women themselves.<sup>129</sup> Second, it takes seriously the threats that women face in society and posits a powerful reaction to it.<sup>130</sup> And third, it acts as a potential deterrent, giving would-be rapists reason to fear women.<sup>131</sup>

Similarly to Gavey above, Cahill here backs herself into a corner from which she is forced to return to the tools of the masculine symbolic to reimagine woman's motility. This sits uncomfortably with her critique of gender neutrality in rape and her assertion throughout that women and men's experience of their embodiment is simply incapable of reversal. She attempts to respond to this problem thus,

I would argue that the increased physical ability of women and their capability to defend themselves from sexual attacks would not constitute an 'equalization' of the sexes in the sense of making them essentially similar. Rather, women's bodies would adopt habits and practices that would utilize their own potential for power. ... Because the recodification of the female body would involve not an emulation of the male body, but rather the development of particularly feminine kinds of strength and power, the embodied subjects who undertake such recodification will be no less marked by sexual difference than previously. *Femininity* itself will be redefined...<sup>132</sup>

The problem here, of course, is that the ideas of 'strength and power' referred to are taken from within an existing paradigm that has been constructed with no reference to women's bodies, sexuality or desire. Cahill understands the need to rethink femininity, but her insufficient attention to sexual difference means that she is left with too few resources to think through what a recodification of the body might mean. It is not clear how this analysis shifts the terms of personhood and humanity with which she is rightly concerned, nor how the system of logic which supports these 'rapable' forms of embodiment is being deconstructed. Once again, the site of agency or responsibility remains within women themselves. Cahill's concept of sexual difference is

---

<sup>128</sup> *ibid.*

<sup>129</sup> *ibid* 203.

<sup>130</sup> *ibid* 204.

<sup>131</sup> *ibid* 204-205.

<sup>132</sup> *ibid* 206.

insufficiently attentive to the way in which structural, political and institutional mechanisms are *also* sexually indifferent.

The problem of the rape of women is not tied to woman's designation as passive victim and man as aggressive and virile. It is tied to the very logic in which these designations come into being; in theory anybody can occupy that subject position. Women usually do because their sex is so fundamentally denigrated in modern western culture. Reversing the paradigm does not change, fix or disrupt the logic of rape. It does not challenge the norms of heterosexuality in any meaningful way and it does not give woman the language to speak about rape.

Both Gavey and Cahill insist on the need for an alternative framework or system of reference to think through resistance to rape. However, it is not clear from either of their analyses from where this framework could be generated, except from within. In my argument, this is wholly unsatisfactory.

I want to return briefly once more to Carine Mardorrosian and her call for a renewed attentiveness to the ways in which a particular feminist focus on the psyche can divert attention away from institutional, material and cultural practices that contribute to the maintenance of a rape culture. While I certainly agree with her criticism of the inadequacy of some feminist theorising on rape, it is not because (some of) this work eschews a broader political critique in favour of rethinking the meaning of rape for victims and for society. In my argument the problem is that *the way in which* it does this rethinking is flawed. In what follows, I will argue that Luce Irigaray's project involves an understanding of sexual difference that poses the problem and the solution in a different way. There is a logic by which, and into which, the morphology of subjects comes to be constituted and this is not independent from a discourse on heterosex, but logically part of it. Part of this logic is the systematic erasure of woman from culture and history. Within the Foucauldian framework women as a class come to fulfil a specific subject position - that of rape victim - by virtue of their position in the discourse. However, this does not think about the way in which institutions, systems

of language and logic have always already erased women from view and constituted themselves at the beginning and end of the world. This is not only about a discourse that positions two subjects in a certain way with respect to each other – it is about a system of logic, thought and practice that erases even the *possibility* of two different subjects.

## **Conclusion**

In the foregoing discussion I have elaborated on contemporary theoretical debates in poststructuralist feminist writing on rape. In the following chapter I will present my own theoretical framework through which I intend to intervene in this literature and elaborate further on why feminist theorising on rape is inadequate in dealing with the problem. In my critique, their conceptualization of sexual difference is insufficiently developed and this means that they are left with nowhere else to go except to talk about micro-resistance and subversive embodiment within the dominant paradigm. This is inadequate, given the scope of their critique, because it leaves law and the dominant symbolic order insufficiently challenged.

I will argue in chapter six, that an analysis of rape and the harm of rape must also interrogate the legal response to rape and that this involves a critical examination of law and legal method. No analysis of rape can proceed without troubling the underlying structures which enable its continuation. Rape cannot be understood without an interrogation of the tools by which society and the state purport to address it. This helps to shape and determine the limits and boundaries of what we understand as violation, but also what is then considered ‘just sex’. In my argument there is a historical and cultural symmetry in the legal treatment of the crime of rape which means that the logic which supports the conditions under which the offence occurs are mirrored and maintained by law.

# Chapter Three: Shifting the Focus

---

## Introduction

In the previous chapter I argued that much contemporary poststructuralist feminist theorising on rape and rape law is flawed because it insufficiently accounts for the importance of sexual difference. This omission, I contended, has serious consequences for the development of a strategic feminist politics of resistance when addressing the crime of rape. In this chapter I elaborate in more detail on the theoretical framework I adopt in this thesis. This framework is reliant primarily on the work of Luce Irigaray whose ethics of sexual difference, I suggest, is fundamentally important for understanding the context in which the crime of rape occurs and, indeed, the legal scaffolding that has been erected to address it. This exposition will inform the subsequent analysis in this thesis which attempts to uncover the sexual indifference of both the law on rape (chapter five), and the operation of this law within the trial space (chapter six).

This thesis is informed not only by the substance of Irigaray's writing, but also by the scope and trajectory of her project. As I explained in the introduction, my project attempts to trace the trajectory of Irigaray's work through its exploration of rape law and associated discourse. In Part I of this chapter I will first elaborate on the earlier critical phase of Irigaray's work which I will then employ to critique the current legal regime concerning rape in chapters five and six. In Part II I will explain Irigaray's constructive project in the latter phase of her work, which I will go on to discuss in more detail as it might be useful to rethink rape and rape law in chapter seven. In chapter four I will



consider some feminist criticisms of Irigaray's project and justify my fidelity to her framework in this thesis despite these problems.

## PART I

Irigaray's oeuvre defies brief summarisation. Reflecting on her most well known text, *Speculum of the Other Woman*,<sup>1</sup> she commented that the text itself has no beginning or end and that a key part of her project is the very disruption of phallographic laws that insist on a particular form of representation and ordering.<sup>2</sup> Despite these limitations and my desire to stay true to the ethos of her ethico-political endeavour, I will here follow the linear trajectory of her work as she has described it:

...[T]he first part of my work amounts to a criticism of the Western tradition as constructed by a single subjectivity, a masculine subjectivity, who has elaborated a logic and a world according to his own necessities. In the second part, I try to indicate mediations which permit a feminine subjectivity to emerge from the unique and so-called neutral Western culture, and to affirm herself as autonomous and capable of a cultivation and a culture of her own. The third part of my work is devoted to defining and rendering practicable the ways through which masculine subjectivity and feminine subjectivity could coexist, enter into relation without submitting or subjecting the one to the other, and construct a world shareable by the two with respect for their own worlds.<sup>3</sup>

These three phases are, however, not necessarily mutually exclusive. As Irigaray goes on to say in the same interview, even in *Speculum* she was already in the process of trying to imagine an alternative to the current order: 'I talk about the necessity of a double, and even triple, dialectics in order to allow culture to take into consideration the existence of two different subjects'.<sup>4</sup>

---

<sup>1</sup> Luce Irigaray, *Speculum of the Other Woman* (Gillian Gill tr, Cornell University Press 1985).

<sup>2</sup> Luce Irigaray, *This Sex which is not One* (Catherine Porter tr, Cornell University Press 1985) 68.

<sup>3</sup> Luce Irigaray & Elizabeth Grosz, 'Sexuate Identities as Global Beings Questioning Western Logic' in Luce Irigaray (ed) *Conversations* (Continuum 2008) 124.

<sup>4</sup> *ibid.*

Irigaray's overall methodology mirrors, in some ways, a dialectical process of discovery, or an Irigarayan reworking of the Hegelian dialectic. Here the 'negative' (the anti-thesis), or the second phase in which a culture in the feminine is elaborated, is irreducible to the One of the masculine paradigm (the thesis), defined not by lack or inversion but instead thought in its own unique particularity. The third phase of the project represents not a synthesis of the two but, in Irigaray's terms, a 'sensible transcendental'<sup>5</sup> which preserves the eternal play between subjects, man and woman; an irreducible coexistence of two beings.

Before I move on to address the substantive elements of the framework it is useful to first situate Irigaray amongst her contemporaries and to consider her influences and methodology. This assists with interpreting the more opaque elements of her work and in contextualising some of the themes and ideas.

In some ways Irigaray's work can be said to represent the conscience of the poststructural event in that her critique of the history of philosophy has involved exposing the suppression of the feminine upon which the origins of philosophy are grounded, but the constructive part of her project seeks to imagine a space for woman's voice not only in the symbolic but also in the world. She is thus one of very few philosophers whose work seeks to traverse the chasm between theory and praxis whilst maintaining a commitment to poststructuralist methods and thinking.<sup>6</sup> Her importance, consistently neglected and underestimated, is profound in both the history of the poststructural event in philosophy, but also because of what her thinking and personal intellectual journey continues to offer feminism today.<sup>7</sup>

---

<sup>5</sup> See further Tamsin Lorraine, *Irigaray and Deleuze: Experiments in visceral philosophy* (Cornell University Press 1999) 67-89.

<sup>6</sup> Irigaray would no doubt contest this labelling of her work as 'poststructuralist': 'I have repeated that I do not want to belong to any 'ism' category, be it feminism, post-feminism, post-modernism, etc.' Luce Irigaray & Gillian Howie, 'Becoming Woman, Each One and Together' in Luce Irigaray (ed) *Conversations* (Continuum 2008) 74.

<sup>7</sup> See Margaret Whitford, *Luce Irigaray: Philosophy in the Feminine* (Routledge 1991) 1, for discussion of Irigaray's exclusion from mainstream philosophical records. See also Pheng Cheah and Elizabeth Grosz, 'Of Being-Two: Introduction' (1998) 28(1) *diacritics* 3, 5, commenting on her contributions to political theory being overlooked and a general dearth of thorough analysis of her later work.

Engaging with Irigaray is, necessarily, a dialogic encounter, which requires an openness in the reader and a willingness to suspend oneself and to listen. Possibly one of the most unique aspects of Irigaray's work, and the one that can make her difficult to access, is her use of widely varied, non-traditional methodologies. Irigaray's method or 'style' plays a central role in her philosophical project and in many ways sets her apart from her contemporaries. Trained in linguistics, psychoanalysis and philosophy, these disciplines infuse her writing. Her training as a linguist and her intensive engagement with specific philosophical and literary texts has meant that her work has often been classed as literary studies, a classification that she contests with some frustration. She situates her work squarely within the domain of the philosophical, an area traditionally reserved for men.<sup>8</sup>

Irigaray's texts are often intentionally misleading, opaque, contradictory and open to several (or more) interpretations. She uses a vast range of rhetorical devices without any clear systemacy, including ironic word-play, pastiche and allusion. In addition to this, her subversion of traditions of citation, representation and ordering means that a reader must be supremely attentive to the canon within which she is operating in order to catch relevant references. She addresses Lacan in detail, for example, in *This Sex Which is not One*, without once mentioning him by name and only sparingly referencing the text to which she refers. She moves readily, also, between a mode of exchange that is in direct dialogue with the text she is addressing, and that with herself and her imagined interlocutor. A reader must be prepared to suspend notions of objectivity when engaging with her and be prepared to insert oneself into the discussion, often at a very visceral and affective level, in order to fully appreciate her movements.

To the extent that she embraces a style that eschews the propositional logic characteristic of Aristotelian rationalism, she enacts an 'overflow of meaning, structure [and] argument, putting phallogocentric oneness into question'.<sup>9</sup> Reflecting on her method in *Speculum*, Irigaray has described

---

<sup>8</sup> Elizabeth Hirsh and Gary Olson, "'Je-Luce Irigaray": A Meeting with Luce Irigaray' (1995) 10(2) *Hypatia* 93, 97.

<sup>9</sup> Elizabeth Grosz, *Sexual Subversions: Three French Feminists* (Allen & Unwin 1989) 127.

her process as 'hav[ing] a fling with the philosophers'.<sup>10</sup> This is a reference to her most radical methodological tool introduced first in *Speculum*: the use of mimesis. Irigaray describes her use of mimesis, thus:

There is, in an initial phase, perhaps only one 'path,' the one historically assigned to the feminine: that of *mimicry*. One must assume the feminine role deliberately. Which means already to convert a form of subordination into an affirmation, and thus to begin to thwart it. ... To play with mimesis is thus, for a woman, to try to recover the place of her exploitation by discourse, without allowing herself to be simply reduced to it. It means to resubmit herself... in particular to ideas about herself, that are elaborated in/by masculine logic, but so as to make 'visible,' by effect of playful repetition, what was supposed to remain invisible: the cover-up of a possible operation of the feminine in language.<sup>11</sup>

Her use of this technique has numerous resonances as a tool of critique but also of critical inversion; she is psychoanalysing the psychoanalysts. Her critique is from inside psychoanalysis, she is using the methods of psychoanalysis but she is appropriating them against themselves in order to expose their hidden assumptions and prejudices. She uses mimicry too to parody the female hysteric, to give voice to woman's body.

To properly appreciate her writing it is necessary to accept that her style is an integral part of her project, that it is necessarily political, and that for her, there is no distinction between how she is speaking and what she is speaking about. So the plurality present in the text as she attempts to speak (as) woman is mirrored in various metaphors and allegories throughout her work. She writes the feminine body as multiple, oscillating seamlessly between analyst and analysand, inhabiting a location outside a strictly dialogic space through which to invoke a relationship between women where phallogocratic laws do not apply. As Elizabeth Grosz points out,

To speak with a multiplicity of meaning within a discipline that values precision, clarity, a single line of argument, the 'translatability' of concepts independent of their materiality, formalisability, truth functions and so on... [functions both in the form of political critique, but also] ...reveals what must be repressed and unspoken in phallogocentric discourses: that there is always a *different way of proceeding*...<sup>12</sup>

---

<sup>10</sup> Irigaray, *This Sex*, above n 2, 150.

<sup>11</sup> *ibid* 76.

<sup>12</sup> Grosz, *Sexual Subversions*, above n 9, 127-128.

The use of lyrical and poetic language is also a style for which the writers associated with *écriture féminine* have become known.<sup>13</sup> Irigaray is both a part of these traditions, but also separate from them, in that her broader project extends itself organically towards an imagining of woman's voice in the social and political worlds in which it speaks.

There is no way to trace a clear scholarly genealogy for Irigaray's work; her command of the literature is so sophisticated and her sources so vast that she seems to almost dip in and out of various thinkers and traditions at will. Irigaray's work did (and does) exist, however, within a context and that context is reflected in her approach. It is possible to see clear strains of Lacan and Derrida, for example, in her work. However, in Carolyn Burke's words, they do not figure in her work as 'straightforward influences' but instead appear '...“intertextually”'; they are interwoven into the web of her own text's unfolding'.<sup>14</sup>

Irigaray's use of different deconstructive strategies clearly draws on Derrida's thinking. As Whitford noted, Derrida's tactics, destabilising the metaphysical opposition by privileging the hierarchically inferior term, can be compared with Irigaray's claim in *this Sex Which is Not One* that 'one must assume the feminine role deliberately'. And her statement that 'there is no simple, manageable way to leap to the outside of phallogocentrism, *nor any possible way to situate oneself there, that would result from the simple fact of being a woman*' parallels Derrida's view that 'one cannot step outside the metaphysical enclosure'.<sup>15</sup>

Elizabeth Weed has considered the way in which Derridean 'style' has influenced Irigaray's work and concluded that there is strong agreement between the two on the question of style,

---

<sup>13</sup> See further: Zoe Brigley Thompson, 'Écriture Féminine' in Benoit Dillet et al (eds) *The Edinburgh Companion to Poststructuralism* (Edinburgh University Press 2013) 143-162; Tara Puri 'Hélène Cixous and the Play of Language' in Benoit Dillet et al (eds) *The Edinburgh Companion to Poststructuralism* (Edinburgh University Press 2013) 270-290.

<sup>14</sup> Carolyn Burke, 'Irigaray through the Looking Glass' in Carolyn Burke et al (eds), *Engaging with Irigaray: Feminist Philosophy and Modern European Thought* (Columbia University Press 1994) 39.

<sup>15</sup> Margaret Whitford, 'Reading Irigaray in the Nineties' in Carolyn Burke et al (eds), *Engaging with Irigaray: Feminist Philosophy and Modern European Thought* (Columbia University Press 1994) 16-17.

particularly woman's style, manifest in a 'deconstructive encounter of the texts'.<sup>16</sup> This is not to say that the way they write is similar but that their approach to the encounter between the text being written and the text being read involves a similar deconstructive impulse in which the conventions of propositional logic are called into question.

Weed also considers Irigaray's relationship with Lacan in a close reading of her essay 'Così Fan Tutti', concluding that ultimately, Irigaray and Lacan share the same critique of the phallic order.<sup>17</sup> However, suggests Weed, Irigaray parts company with Derrida, Lacan, and her other contemporaries in the way she evokes a female positivity in her deconstructive reading of the 'blind spots' of philosophical texts, but also how she strives to extend this project beyond its limits.<sup>18</sup> So while Irigaray agrees with Lacan that woman occupies an excluded place '...*internal* to an order from which nothing escapes: the order of (man's) discourse',<sup>19</sup> she faults Lacan on his refusal to accept the possibility of an alternative discourse outside of the phallogocentric system. Irigaray insists on the possibility of a positively conceived sexual difference in which a female symbolic can exist unmediated by the phallus. Where Irigaray really makes her mark, says Weed, is in the way in which she ventures into the unthinkable:

Rejecting the temptation to appeal either to an archaic prior to metaphysics or to a utopian positivity that could only defamiliarize, she remains within a present signifying history and writes her female positivity and her positive sexual relation through other texts and other traces. ... Where Lacan and Derrida expose the effects of the phallic economy and figure their critiques as 'feminine,' Irigaray attempts to write what is blocked by phallic categories of reading and writing and calls what she does 'woman's style'. ... Irigaray is thus able to write the culture's symptoms *and* to evoke a different symbolic organization.<sup>20</sup>

It is this positivity, and what she does with it, that really marks Irigaray apart from her poststructuralist contemporaries, and which she has developed over the course of her vast body of work. It is to the substance of this work that I now turn.

---

<sup>16</sup> Elizabeth Weed, 'The Question of Style' Carolyn Burke et al (eds), *Engaging with Irigaray: Feminist Philosophy and Modern European Thought* (Columbia University Press 1994) 83.

<sup>17</sup> Irigaray, *This Sex*, above n 2, 86-105.

<sup>18</sup> Weed, above n 16, 86-87.

<sup>19</sup> Irigaray, *This Sex*, above n 2, 88.

<sup>20</sup> Weed, above n 16, 100-101.

*Irigaray: History, Culture and Sexual (in)Difference*

How can I say it? That we are women from the start. ... And that their history, their stories, constitute the locus of our displacement. It's not that we have a territory of our own; but their fatherland, family, home, discourse, imprison us in enclosed spaces where we cannot keep on moving, living, as ourselves. Their properties are our exile. Their enclosures, the death of our love. Their words, the gag upon our lips.<sup>21</sup>

In the early critical phase of her vast body of work Irigaray revisits the seminal texts of philosophy and psychoanalysis and contests the defining concepts of enlightenment thought: idea, substance, subject, transcendental subjectivity and absolute knowledge.<sup>22</sup> Through dialogic readings of the 'blind spots' of the texts of Freud, Plato, Lacan, Kant and others, she excavates and exposes the monosubjective character and tradition of Western history and culture, arguing that the universal subject espoused by the canon is not universal, or neutral, but in fact masculine and has achieved its domination through the suppression and denial of the feminine. Irigaray's analysis illustrates how the feminine has been colonised by a male fantasy of an inverted other through which he can project himself as subject, while woman functions only as object for and between men. The masculine projection of the feminine is thus defined in accordance with male perceptions and experiences of the world and involves the elaboration of norms for keeping the feminine within certain boundaries. These boundaries are premised upon the negation of specific female bodies in history and their replacement with masculine constructions of the feminine as wife and mother. Women's bodies are materialised insofar as they serve the male world. This compels woman to cede to a universal that requires she 'renounc[e] her singular desires'; her relationship to her own nature.<sup>23</sup> The law that orders society is thus 'hom(m)osexual' in that it values, and is in service

---

<sup>21</sup> Irigaray, *This Sex*, above n 2, 212.

<sup>22</sup> Irigaray, *Speculum*, above n 1.

<sup>23</sup> Luce Irigaray, *I love to you: sketch for a felicity within history* (Alison Martin tr, Routledge 1996) 21.

exclusively to, men's needs and desires, and exchanges among men.<sup>24</sup> Moreover, within this order 'sexual difference', as the regulatory and apparently 'natural' order of relations between and among women and men is not a 'real' one, but rather a 'sexual *indifference* that underlines the truth of any science, the logic of every discourse'.<sup>25</sup>

This 'phallocentrism' necessitates what Irigaray exposes as a representational economy in which woman's difference can only be conceptualised as a defective variation of the same. Woman is conceived variously as 'simulacrum, mirror-image or imperfect double of masculinity'.<sup>26</sup> Woman exists in an 'economy of the same' in that equality is conceived as becoming equivalent to a man, however inclusion in phallogratic logic through equivalency with men does nothing to disrupt that logic; it remains the same. Thus, '[s]exual difference is a deviation from the problematics of sameness, it is, now and forever, determined within the project, the projection, the sphere of representations, of the same'.<sup>27</sup> In such a symbolic order, woman has no entitlement to her own unique genealogy, culture or becoming and as such cannot enter into civil society as woman, for herself.

Because the current understanding and organisation of sexual difference within Western culture is dominated by male morphology and structured according to masculine norms, it does not support an 'equally' valorised presence of the feminine within the symbolic/cultural realm.

In other words, there is no sexual difference in the social imaginary of the West because the female body has not yet acceded to the cultural order and because the male phallographic imaginary has had the historic privilege of speaking within only *one* culture for *two* bodies.<sup>28</sup>

It has done this by arranging the 'parameters of identity according to which the feminine and female sexualities and bodies are defined and by measuring these against a "male morphology" which

---

<sup>24</sup> Irigaray, *This Sex*, above n 2, 171.

<sup>25</sup> Irigaray, *Speculum*, above n 1, 69, emphasis added.

<sup>26</sup> Elizabeth Gross, 'Irigaray and Sexual Difference' (1986) 1(2) *Australian Feminist Studies* 63, 68.

<sup>27</sup> Irigaray, *Speculum*, above n 1, 26-27.

<sup>28</sup> Ovidiu Anemtoaicei & Yvette Russell 'Luce Irigaray: Back to the Beginning' (2013) 21(5) *International Journal of Philosophical Studies* 773, 774.



continues to project itself into the symbolic as general and, therefore, sexless'.<sup>29</sup> Irigaray's critique of Freud in *Speculum* is illustrative in this respect. Entitled 'The Blind Spot of an Old Dream of Symmetry', the first section of *Speculum* is a close reading of Freud during which she simultaneously quotes, dissects and parodies his text and method in order to expose the 'blind spot' in psychoanalytic theory which she alleges is the concept of woman.<sup>30</sup> For Irigaray, Freud is paradigmatic of the tendency of western culture and theory to erase and preclude the creation of an independent feminine identity. As Grosz explains:

...Freud *deduces* (rather than observes) a femininity that complements male development, and satisfies men's needs. In other words, Freud develops a model of human subjectivity that represents all the variations of subjectivity only according to a singular (Western, capitalist, white, Eurocentric) male model. Femininity is always represented in some relation of dependence on this model, a lack or absence of the qualities characterising masculinity.<sup>31</sup>

Her critique of Lacan too is just as effective for the way in which she engages with the text on its own terms and turns it against itself. In *Speculum*, while not engaging with Lacan directly, she is clearly referring to his thinking when talking about the imaginary but also importantly the mirror, which Lacan famously uses to explore the emergence of subjectivity.<sup>32</sup> In her critique of the mirror phase in Lacan she points out that the flat mirror can only reflect a surface image, thus representing woman's genitality as 'hole'.<sup>33</sup> What is needed instead is a different sort of instrument, a speculum for example. This observation functions both literally but also as a metaphor for her critical approach to psychoanalysis in the text; an interrogation of its practice from the 'inside'.

Because woman is represented as hole or lack, she only emerges in those blind spots that Irigaray identifies in Freud and Lacan to both support the production of the symbolic and to represent what is outside the imaginary. She describes women as 'residue', or as a 'sort of magma...from which men, humanity, draw nourishment, shelter, the resources to live or survive for

---

<sup>29</sup> *ibid.*

<sup>30</sup> Irigaray, *Speculum*, above n 1, 65.

<sup>31</sup> Grosz, *Sexual Subversions*, above n 9, 105.

<sup>32</sup> Jacques Lacan, *Écrits: A Selection* (Routledge 2001) 1-7.

<sup>33</sup> Irigaray, *Speculum*, above n 1, 89.

free'.<sup>34</sup> This allows her the freedom to conceive of this excess, this residue, in a way that disrupts the dominant *logos* and provides the foundation for her constructive intervention.

On the basis of this wide ranging critique of philosophy and psychoanalysis, Irigaray is critical of the figure of the neutral 'equal' citizen as the aspiration of liberal democracy which, she argues, is a fiction which serves primarily to obscure the masculine as universal and justifies the continued denial of woman's entitlement to her own unique becoming in line with her own sexual difference. Women's liberation movements that base their goals on claims to equality with men are thus fundamentally flawed: '...claiming to be equal to a man is a serious ethical mistake because by so doing woman contributes to the erasure of natural and spiritual reality in an abstract universal that serves only one master: death'.<sup>35</sup> This erasure, or perversion, of nature is the direct result of the establishment of a universal that has been staked out by one side only. That men have claimed the exclusive monopoly on truth and have reserved for themselves the exclusive right to legislate in the name of that truth has meant that while laws and rights are said to be neutral, in practice they are not.

Thus, argues Irigaray, after the gains of egalitarian politics are carefully examined, women's inclusion in politics and culture has failed to acknowledge their distinct and different position from men, and from each other, and in doing so has left intact the ahistorical, neutral (sexless) citizen of the nation state.<sup>36</sup> 'The demand for the equality of the sexes often forms a part of this plan to neuter familial and sexual singularity for the benefit of the State and its laws... Yet these laws have openly sacrificed woman and covertly sacrificed man.'<sup>37</sup> Because patriarchy relies for its coherence on the denial of sexual difference it cannot be overcome by either reversal or reform. If women are to become subjects, argues Irigaray, it will most likely not be because they have first become

---

<sup>34</sup> Luce Irigaray, *Ethique de la difference sexuelle* (Minuit 1984) 102, quoted in Margaret Whitford, *Luce Irigaray: Philosophy in the Feminine*, above n 7, 67.

<sup>35</sup> Irigaray, *I love to you*, above n 23, 27.

<sup>36</sup> Nicole Fermon, 'Women on the global market: Irigaray and the democratic state' (1998) 28(1) *diacritics* 120.

<sup>37</sup> Luce Irigaray, *Sexes and Genealogies* (Gillian Gill tr, Columbia University Press 1993) 112.

accepted as men, or as sexually neutral citizens. What is required instead is a wholesale transformation of the civil law as *two*.

## PART II

Irigaray's disruptive rereading of the texts that define the history of philosophy is both a challenge to their position of mastery but also necessary 'in order to pry out of them what they have borrowed that is feminine... to make them "render up" and give back what they owe the feminine'.<sup>38</sup> That is why the second and third phases of her constructive project have been addressed to the creation of a space for a (undefined) feminine subjectivity within a culture of sexual difference whereby 'we must constitute a possible place for each sex, body and flesh to inhabit'.<sup>39</sup> This necessarily involves a non-hierarchised relational identification, or in Irigaray's terms a 'horizontal transcendence'; a 'new model of possible relations between man and woman, without the submission of either one or the other'.<sup>40</sup> It is this desire to see the creation of a new mode of relations which leads Irigaray in the constructive phase of her work. As Penelope Deutscher explains:

'Sexual difference' in Irigaray's work refers to an excluded possibility, some kind of femininity (open in content) that has never become culturally coherent or possible. [...] Sexual difference is not empirically known, except by its exclusion.<sup>41</sup>

Paradoxically, the link between nature and civil society can only come through sexual difference because '[i]t necessitates a law of persons appropriate to their natural reality, that is, to their sexed identity'. In Irigaray's reading sexual difference is not simply anatomical, it is *morphological*. This refers to the meaning of the body in its social and psychical context and an exploration of how the

---

<sup>38</sup> Irigaray, *This Sex*, above n 2, 74.

<sup>39</sup> Luce Irigaray, *An Ethics of Sexual Difference* (Carolyn Burke & Gillian Gill tr, Cornell University Press 1993) 18.

<sup>40</sup> Hirsh & Olson, above n 8, 96.

<sup>41</sup> Penelope Deutscher, *A Politics of Impossible Difference: The Later Work of Luce Irigaray*, (Cornell University Press 2002) 29.

body comes to be coded, placed and experienced in a social network and its meaning in culture.<sup>42</sup> Sexual difference is thus the 'living universal' that can rejoin spirit and nature, so bringing an end to the domination characteristic of contemporary culture and politics.<sup>43</sup>

The constructive part of her project in *Speculum* then, and subsequently, is to reveal a space in which the female imaginary can be created and thought in language and outside the dominant symbolic which is constructed upon the erasure of the mother and valorises a masculine subject masquerading as universal. An autonomous feminine imaginary for Irigaray can only be thought with the guarantee of two preconditions. The first of these is that the debt that western culture owes to the maternal must be acknowledged and given its appropriate due. For Irigaray, this means the recalibration of the mother/child, and more specifically the mother/daughter, relationship outside a symbolic order that represents woman as lack and erases the maternal in favour of the father. Related to this, the second precondition is that the symbolic order must be reconceived in such a way that represents the feminine in 'woman-orientated terms', including the 'autonomous conce[ption] of female sexuality, corporeality and morphology'. Such a challenge necessarily assumes, and indeed requires, a complete reimagining of systems of representation and meaning – of language itself.<sup>44</sup>

In her work subsequent to *Speculum*, Irigaray goes about exploring the possibility of the reorganisation of language and systems of representation. The first chapter of *This Sex Which is Not One* presents a good example of her project in this way. Writing herself into the chapter as A-Luce, a play on the protagonist in Alice in Wonderland, Irigaray attempts to inhabit a space through the looking glass in Lewis Carroll's story where phallogocentric logic no longer applies and where she becomes 'the subject of the *speculative* inversion undertaken in *Speculum...*'.<sup>45</sup> The book ends with the famous essay 'When Our Lips Speak Together' which can be seen as the culmination of her

---

<sup>42</sup> Grosz, *Sexual Subversions*, above n 9, 111-112.

<sup>43</sup> Cheah & Grosz, 'Of Being-Two', above n 7, 10.

<sup>44</sup> Grosz, *Sexual Subversions*, above n 9, 109. I discuss this work in much more detail in chapter six.

<sup>45</sup> Gross, above n 23, 67.

looking glass utopia, a space in which love between women is celebrated in the lyrical and poetic style “as if” we could forget the logical and emotional requirements of the phallic economy’.<sup>46</sup> Her description of the metaphor of the two lips in her essay is particularly poignant and gestures towards what is potentially at stake in her project: the existence of the ‘double syntax’ in which the two aspects of the self - ‘...the mediated “I” of the Symbolic (in the “Name-of-the-Father”) and the immediate “I” experienced as fusion with the Other (in the name of the mother, we could say)’ - disable the phallic economy.<sup>47</sup>

Between our lips, yours and mine, several voices, several ways of speaking resound endlessly, back and forth. One is never separable from the other. You/I: we are always several at once. ... By our lips we are women... Kiss me. Two lips kissing two lips: openness is ours again.<sup>48</sup>

Through the two lips Irigaray eschews the parameters of masculinity as it defines the ‘parts’ of the female sex as simply the vagina. For her the two lips return the female sex to unity:

...[O]ne can never determine of these two, which is one, which is the other: they are continually interchanging. They are neither identifiable nor separable one from the other. Besides, instead of that being the visible or the form which constitutes the dominant criteria, it is the *touch* which for the female sex seems to me primordial: *these ‘two lips’ are always joined in embrace.*<sup>49</sup>

In *This Sex Which is Not One*, Irigaray muses upon what has come to be perhaps the central question of her work, that is, ‘how can the double demand – for both equality and difference – be articulated?’<sup>50</sup> The answer to that question in large part is her insistence on the need for a double universal. The double universal is the conduit for the full positive affirmation of two sexes and the reconfiguration of the subject beyond the ‘one’. The elaboration of a feminine universal, alongside a masculine universal reconfigured to take account of the feminine, would involve the proliferation of alternatives discourses, knowledges, values and frames of reference.

---

<sup>46</sup> Burke, above n 14, 48.

<sup>47</sup> Maggie Berg, 'Luce Irigaray's "Contradictions": Poststructuralism and Feminism' (1991) 17(1) *Signs* 50, 64.

<sup>48</sup> Irigaray, *This Sex*, above n 2, 209-210.

<sup>49</sup> Luce Irigaray 'Women's Exile: Interview with Luce Irigaray' in Deborah Cameron (ed) *The Feminist Critique of Language* (Couze Venn tr, Routledge 1990) 83.

<sup>50</sup> Irigaray, *This Sex*, above n 2, 81.

The sexes as we know them today have only one model, a singular and universal neutrality... But the idea that sexual difference entails the existence of at least two points of view, sets of interests, perspectives, two types of ideal, two modes of knowledge, is yet to be considered.<sup>51</sup>

In thinking through the possibility of the double universal in her constructive project Irigaray turns increasingly to the law. She is critical of law as an institution which remains mired in the *logos* of patriarchy and which has been established for and maintained by men-amongst-themselves.

[V]alue, and values, have been codified in the men's camp: they are not appropriate to women, or not appropriated by them. The law has not been written to defend the life and property of women. A few partial changes in rights for women have been won in recent times. But even these are subject to recall. They are won by partial and local pressures whereas what is needed is a full-scale rethinking of the law's duty to offer justice to two genders that differ in their needs, their desires, their properties.<sup>52</sup>

Law is necessary, nonetheless, in order to initiate that 'full-scale rethink' of the civil system she envisages. 'Equality between men and women cannot be achieved without a theory of gender as sexed and a rewriting of the rights and obligations of each sex, qua different, in social rights and obligations'.<sup>53</sup> Such a law must have the capacity to regulate the subjective and objective relations between (sexually) different persons thus facilitating a universal made up of two equal but different subjects.

In the second phase of her project Irigaray turns her attention to institutional and political objectives which involves the consideration of law and legal regulation. The change of direction in her work can be seen first in parts of *An Ethics of Sexual Difference* in which she starts a more programmatic elucidation of her claim for sexual difference as the founding episteme. Sexual difference, she says, 'could be our "salvation" if we thought it through'.<sup>54</sup> 'Sexual difference is...the most powerful motor of a dialectic without masters or slaves. ...It necessitates a law of persons

---

<sup>51</sup> Elizabeth Grosz, 'The Force of Sexual Difference' in Ellen Mortensen (ed) *Sex, Breath, and Force* (Lexington 2006) 10.

<sup>52</sup> Luce Irigaray, *Je, tu, nous: toward a culture of difference* (Alison Martin tr, Routledge 1993) 4.

<sup>53</sup> *ibid* 13.

<sup>54</sup> Irigaray, *Ethics*, above n 39, 5.

appropriate to their natural reality, that is, to their sexed identity'.<sup>55</sup> In order to realise this vision of a life lived through sexual difference, and influenced by her work with the Italian communist party, Irigaray turns to consider feminist strategy and, in turn, law and legal reform.<sup>56</sup> She expresses frustration with the fragmentary approach of much modern legal feminist work; law, she argues, has been stunted in its development and as such has never actually established positive laws designed to protect the engendering of life.<sup>57</sup>

In her writing after *Ethics*, Irigaray is more explicit about the political implications of her thinking on sexual difference and engages law as an important forum through which to rethink women's civil rights on a basis other than equality. Her proposal for sexuate rights is the most explicit exposition of this thesis.<sup>58</sup> Irigaray proposes, in the style of a legal code, a number of specific demands to be made of law with the aim of establishing a civil identity for women.<sup>59</sup> These can be ordered loosely into four general categories. The first of these includes the right to human identity, which Irigaray describes as a right to 'virginity'. More than just physiological, virginity involves respect for both physical and moral integrity including the regulation of '...images and language consistent with the value of women's sexuality'. It is conceived of then as both bodily and spiritual and achieved through a cultivation of becoming.

There is no doubt that we are born virgins. But we also have to become virgins, to relieve our bodies and souls from cultural and familial fetters. For me, becoming a virgin is synonymous with women's conquest of the spiritual.<sup>60</sup>

---

<sup>55</sup> Irigaray, *I love to you*, above n 23, 51.

<sup>56</sup> Irigaray speaks of her involvement with the Italian Communist Party in *Thinking the difference: for a peaceful revolution* (Karen Montin tr, Athlone Press 1994) and in greater detail in the prologue to *I love to you*, above n 23.

<sup>57</sup> Gail Schwab, 'Women and the law in Irigarayan theory' (1996) 27(1-2) *Metaphilosophy* 146, 163.

<sup>58</sup> Later in her work Irigaray starts deploying the term 'sexuate difference' in place of the term 'sexual difference'. She uses the adjective 'sexuate' to connote a broader description of what is involved in a culture of sexual difference and to avoid criticism of the omission in her work of a consideration of sexuality. With respect to law, her proposal for sexuate identities involves the rights of all individuals to cultural self-expression as sexed beings.

<sup>59</sup> Irigaray, *Je tu nous*, above n 52, 86-89; *Thinking the Difference*, above n 56, 60-62; *I love to you*, above n 23, 132.

<sup>60</sup> Irigaray, *Je tu nous*, above n 52, 117. See also Luce Irigaray, *Between East and West* (Stephen Pluháček tr, Columbia University Press 2002) 68.

'This means that public signs, as well as mass media programmes and publications, must respect women's sexual identity. It would be a civil offence to depict women's bodies as stakes in pornography or prostitution...'.<sup>61</sup> Conceived in this way, as a right to bodily and psychic integrity, Irigaray extends her thinking on subjectivity. As Gail Schwab notes, in Lacan, the development of subjectivity relies on imaginary constitutions of body corporeality.

Any threat to that corporeal integrity is a threat to subjectivity and identity – hence a threat to the very existence of the individual. Virginité, constituted as a women's [sic] right to the maintenance of her own identity, would allow women to bring charges against anyone who threatened it.<sup>62</sup>

In Schwab's reading, the right to virginité can be read broadly as 'protection against sexual persecution and/or violation of any kind'.

Irigaray writes of women's fears of having to confront public places like parks or train stations in solitude, fears due to the various forms of unmotivated violence to which women are subject. Protection, via a right to virginité, would effectively recognize women's civil existence, their right to exist anywhere in society, and not only in private space marked as belonging to a male 'protector' – who can, and often does become an attacker.<sup>63</sup>

Irigaray's first category of sexuate rights also includes the right to dignity, which is closely linked with the concept of virginité, and again, intimately connected with the recognition and protection of difference:

...[O]ur need first and foremost is for a right to human dignity for everyone. That means we need laws that valorize difference. Not all subjects are the same, nor equal, and it wouldn't be right for them to be so. That's particularly true for the sexes. Therefore, it's important to understand and modify the instruments of society and culture that regulate subjective and objective rights. Social justice, and especially sexual justice, cannot be achieved without changing the laws of language and the conceptions of truths and values structuring the social order.<sup>64</sup>

A second set of rights is related to motherhood, rights in respect of the protection of children and freedom of choice. A third set are dedicated to the protection of cultural traditions and aesthetic

---

<sup>61</sup> Irigaray, *Thinking the Difference*, above n 56, 74-75.

<sup>62</sup> Schwab, 'Women and the law', above n 57, 165.

<sup>63</sup> *ibid.*

<sup>64</sup> Irigaray, *Je tu nous*, above n 52, 22.



sensibilities of the feminine, and a fourth to socio-economic rights and entitlements to political representation for women.

What is at issue for Irigaray then is not simply access to civil rights that are equally distributed amongst sexually neutral subjects, but access to rights which enable different persons to fulfil her or his existence as a sexuate being.<sup>65</sup> This thinking thus connects not only the legal but the symbolic and subjective elements of becoming. In essence, Irigaray argues for a law that provides rights guaranteeing citizenship for women, recognising their difference and thus allowing them the public space to think, act, speak and live.<sup>66</sup> Her commitment to theorising law in a positive, and not simply prohibitive, way in this second phase of her work can thus be seen on a continuum with her earlier work which seeks to excavate a positive sexual difference from the history of philosophy.

Irigaray's exploration of the conditions for the coexistence of masculine and feminine subjectivity in the third phase of her work includes the exploration of political economy and spirituality,<sup>67</sup> transcendence and relational identity,<sup>68</sup> her practice of yoga and experience of non-western culture,<sup>69</sup> spaces of living and dwelling,<sup>70</sup> and a return to previously explored themes, such as desire, touch and breathing.<sup>71</sup> It also focusses in one direction on a new universal: the fecund couple.

Why there? Because it is there that two subjects exist who should not be placed in a hierarchical relationship, and because these two subjects share the common goal of preserving the human species and developing its culture, while granting respect to their differences.<sup>72</sup>

---

<sup>65</sup> Cheah & Grosz, 'Of Being-Two', above n 7, 9.

<sup>66</sup> Peter Goodrich, 'Writing Legal Difference: Helena Kennedy's *Eve Was Framed: Women and British Justice* and Luce Irigaray's *J'aime à toi: esquisse d'une félicité dans l'histoire*' (1993) 4(3) *Women: a cultural review* 317, 320.

<sup>67</sup> See Luce Irigaray, *Key Writings* (Continuum 2004) 145-196; Luce Irigaray, 'Towards a Divine in the Feminine' in Gillian Howie & J'annine Jobling (eds) *Women and the divine: Touching transcendence* (Palgrave Macmillan 2009) 13-25.

<sup>68</sup> Luce Irigaray, *The Way of Love*, (Heidi Bostic & Stephen Pluháček tr, Continuum 2002); Luce Irigaray, *Sharing the World* (Continuum 2008).

<sup>69</sup> Irigaray, *Between East and West*, above n 60.

<sup>70</sup> See Luce Irigaray & Andrea Wheeler, 'Being- Two in Architectural Perspective' in Luce Irigaray (ed) *Conversations* (Continuum 2008)

<sup>71</sup> Irigaray, 'The age of breath' in *Key Writings*, above n 68, 165-170; Luce Irigaray, 'Perhaps Cultivating Touch Can Still Save Us' (2011) 40(30) *SubStance* 130.

<sup>72</sup> Luce Irigaray, 'The Question of the Other' (1995)(87) *Yale French Studies* 7, 12.

The couple here represent the foundation of a new ethical social community in which the absolute alterity of the other is respected and in which lives are shared, intersubjectively, in a model that then reflects in civil society.<sup>73</sup>

In her most recently published work, *In the Beginning, She Was*, Irigaray continues her rumination on the fecund couple within a dialogue with the pre-Socratic and Socratic philosophers and other familiar interlocutors including Hegel, Heidegger, Hölderlin and Nietzsche.<sup>74</sup> A consistent theme throughout her later work, including in this her latest work, is an attempt to rethink the very concept of 'humanity' 'which, she argues, remains a fiction in the West because of the continued forgetting/effacing of 'She – nature, woman, Goddess' by and through 'the fabricated dream world of men'.<sup>75</sup> Irigaray argues that we return to the pre-Socratic conception of the world for understanding intersubjectivity, or the 'between-us', of today.

This is precisely because She (woman) was not yet at that time forgotten in culture and history. However, she says, something happened on the path of Socratic philosophical thought with the idea that 'truth' could only be acceded to through the teaching of the 'master'. This 'truth' was genealogically passed between (male) disciples, thus instantiating a solipsistic male discourse exchanged only between men amongst themselves. It was thus at this very moment when She became a 'beyond' of discourse, a gap, something outside the logos, a trace nevertheless, through the enclosure of the male world paralleling/doubling the real of life and of the relation with Her. Woman, in Irigaray's classic reading, is thus engulfed/effaced by the neuter (such as a third, a God, etc.). Man, projecting a God in the masculine, put himself as the beginning and the end of world, on the one hand, and as the ecstasy opened by Her, on the other hand.<sup>76</sup>

Man, she argues, posits himself in the image of God which in turn becomes 'origin, truth, logos, the same – a same which masks itself through dichotomies and oppositions, such as being/non-being, love/discord, whole/parts, near/distant, etc'.<sup>77</sup> A consequence of this logic, says Irigaray following

---

<sup>73</sup> *ibid* 17.

<sup>74</sup> Luce Irigaray, *In the Beginning, She Was* (Bloomsbury 2013).

<sup>75</sup> Anemtoacei & Russell, above n 28, 775.

<sup>76</sup> *ibid*.

<sup>77</sup> *ibid*.

Heidegger, 'is that thinking itself comes to represent being, meaning that being is subjected to the rules of the male logos and logic thus substitutes being'.<sup>78</sup> The task for our age, therefore,

...instead of continuing to refine and proliferate the logos as one expression of technique through which men put the world at their disposal, we must...cultivate the 'between-us', the negative between the two of the sexuate difference. The 'between-us' is possible only through transcendence, through an alternation of being and letting be, and humanity in its turn, is possible only through the between-us.<sup>79</sup>

Irigaray continues her consideration of language in her later work, arguing that the 'discursive doubling of the real is based on the forgetting of living, of perception, life and growth. Because of this forgetting, speech and language, as exiles of men, are cut off from the real and are implicitly artificial'.

In the same manner, men's logic became a substitute for and the negation of the real, of life and of her. In other words, the production of meaning in language and logic double the engendering, the production and the cultivation of life, which was re-presented and kept by men's truth only as 'natural' engendering, while the cultural fecundity, the possibility of engendering between two, has remained unknown. Originally, the Greek word *genos* signified both gender and generation. This second meaning perhaps resulted from the first, but strangely it supplanted and in a way effaced it. Generation, possible thanks to gender, has become that in which the importance of gender is forgotten, and what gender presupposes as duality and the negative necessary for its preservation. That the one is not the other, and that this non-Being between them is a source of relations in difference, is still unrecognized.<sup>80</sup>

Because only *natural* engendering is recognised in language with regard to gender, the two genders have in this way merged into a lack of differentiation.<sup>81</sup> It is this very lack of differentiation, she argues, that is at the foundation of a world where gender

(as the limit, the negative, the finitude) is not yet conceived of as participating in a cultivation of desire between women and men, for a different between-us, and therefore of humanity. It is through such a cultivation, through a new speech, where saying and being would not be opposed and where humanity can be properly realized.<sup>82</sup>

---

<sup>78</sup> *ibid.*

<sup>79</sup> *ibid* 776.

<sup>80</sup> *ibid.*

<sup>81</sup> *ibid.*

<sup>82</sup> *ibid.*

There are familiar themes present in much of Irigaray's later work 'such as the re-thinking of humanity and transcendence in terms of (a de-sexualized) desire, concepts addressed to relational identity, and the cultivation of sexual energies'.<sup>83</sup> Her Heideggerian critique of language supports an argument 'that we need a reworking of language, through which to escape the artificiality of the logos built on the rupture between words and life'.<sup>84</sup>

A return to the elemental life of the world, such as the air, also implies a return to our bodies. In the latter parts of the book Irigaray returns to her rumination, for example, on the cultivation of breathing as a necessity for a return to the elements in which man and woman can work towards a shared humanity.<sup>85</sup>

## **Conclusion**

In the foregoing discussion I explicated Irigaray's critical and constructive project in order to give context to the framework which I will go on to employ in my analysis of rape law and practice in the following chapters. Irigaray's work can be crudely understood in three key phases in which she excavates the underside of philosophy and psychoanalysis in order to diagnose the sexual indifference that plagues modern culture, endeavours to find a space for the articulation of the feminine in history and culture and finally, seeks to define and render practicable the ways through which men and women could coexist and construct a world respectful of two subjectivities.

Irigaray's later work has not received the same attention or acclaim as her earlier work. In the following chapter I elaborate on some of the criticisms that her work has faced and justify my fidelity to her framework despite these problems.

---

<sup>83</sup> *ibid* 776-777.

<sup>84</sup> *ibid* 777.

<sup>85</sup> *Ibid*.



# Chapter Four: A New Framework for Law? Irigaray and her Critics

---

## Introduction

In a hugely influential special issue of the journal *diacritics* edited by Elizabeth Grosz and Pheng Cheah and published in the spring of 1998, the assembled authors consider the ‘political future of sexual difference’ in Irigaray’s work and beyond. A well-known piece from that issue is an interview that was conducted by the editors with Judith Butler and Drucilla Cornell, scholars whose early work had been heavily influenced by Irigaray.<sup>1</sup> This interview marks, in my opinion, a watershed moment in both the uptake and reception of Irigaray’s later work, primarily because of the criticism that it sustains from both Butler and Cornell.<sup>2</sup> It is an important moment also for feminist legal scholars who, in my experience, have a much greater familiarity with Irigaray’s earlier work than with the later. Cornell’s influence in this regard cannot be underestimated and the criticism within feminist legal circles, particularly of Irigaray’s brief foray into law with ‘sexuate rights’, is often traceable back to comments she made during this interview.<sup>3</sup> In this chapter I consider Butler and Cornell’s critique and the response of Grosz and others to the points made during the discussion. I will then go on to

---

<sup>1</sup> Pheng Cheah & Elizabeth Grosz, ‘The future of sexual difference: An interview with Judith Butler and Drucilla Cornell.’ (1998) 28(1) *diacritics* 19.

<sup>2</sup> There are, of course, other critiques of Irigaray in feminist scholarship and elsewhere. See for example: Toril Moi, *Feminine Sexual/Textual Politics* (Methuen 1985) 126-149; Jacqueline Rose, ‘Introduction’ in Juliet Mitchell & Jacqueline Rose (eds), *Feminine Sexuality: Jacques Lacan and the école freudienne*, (Jacqueline Rose tr, W.W. Norton 1999) 27-58; Alison Weir, *Sacrificial Logics: Feminist Theory and the Critique of Identity* (Routledge 1996) 106; Ewa Ziarek *An Ethics of Dissensus: Postmodernity, Feminism, and the Politics of Radical Democracy* (Stanford University Press 2001) 151-182.

<sup>3</sup> Butler elaborates in much more detail on her critique of Irigaray in Judith Butler, ‘Bodies that Matter’ in Carolyn Burke et al (eds) *Engaging with Irigaray* (Columbia University Press 1994) 141. For a thorough and thoughtful consideration of Butler’s objections to Irigaray’s later work and the success of these see Alison Stone, *Luce Irigaray and the Philosophy of Sexual Difference* (CUP 2006) 52-86.

justify my adherence to Irigaray's framework, despite the existence of some problematic elements within her schema. I argue that the objections that Cornell and other legal feminist have raised to Irigaray's use of sexuate rights betray a misunderstanding of their purpose and that closer attention to Irigaray's broader constructive project in her later work illustrates how potentially radical and malleable sexuate rights can be, particularly when understood as a conduit for a minor jurisprudence.

### **Irigaray and her Critics**

The move in Irigaray's work from critique to construction has inevitably drawn criticism from those who disagree with the trajectory of her work or for whom the ontologisation of sexual difference as man and woman involves an unacceptable foreclosure of different modes of being together. Alison Stone has identified four key 'problems' with Irigaray's later work which, she says, some critics have found overwhelming.

The first problem, argues Stone, is the proximity of Irigaray's later work to 'biological determinism'. By arguing that sexual difference is 'natural' Irigaray may be suggesting that biology shapes culture and experience, which in turn implies that cultural formation cannot be changed.<sup>4</sup> Second, Irigaray argues that Western culture systematically denies and devalues the feminine, but this may be a false generalisation; even the most patriarchal texts may leave open the possibility of a 'positive redefinition of the female'.<sup>5</sup> The third problem that Stone identifies is Irigaray's insistence on the primacy of sexual difference as the determinative plurality and her contention that the resolution of sexual indifference will precipitate the dissolution of all other inequalities. This is compounded also by her insistence on the primacy of the heterosexual relation.<sup>6</sup> Finally, Stone

---

<sup>4</sup> Stone, *Luce Irigaray*, above n 3, 46.

<sup>5</sup> *ibid* 47.

<sup>6</sup> *ibid* 48.

notes that the reliance in Irigaray's schema on the assumption that all persons are either male or female is problematic because it excludes bodies that do not conform to this model.<sup>7</sup>

The first two problems can be relatively easily dismissed as poor or superficial readings of Irigaray's broader project (and indeed Stone ultimately concludes that all of these criticisms fail to appreciate the scope and depth of Irigaray's thought).<sup>8</sup> As to the second point Stone raises above, criticisms that suggest Irigaray has been less than generous with the canonical texts she exposes for their devaluation of the feminine miss the nuance of first her mimetic method, and second her overarching critique of western philosophy and psychoanalysis, that the devaluation of the feminine is inured within the fabric of the text's unfolding, within the unconscious. Irigaray mimics the text she is reading in order to expose the exclusionary framework upon which it is based, for example, the murdered mother. To this end, she argues that the feminine cannot be rescued from within a text in which she has no singular subjectivity or in which she is denied or erased; sexual difference within this paradigm is simply impossible. At the same time, however, Irigaray interrogates these texts of Western philosophy and psychoanalysis in large part to discover "that latency or "excess" beyond the limits of the "cultural imaginary" which she identifies as the feminine unconscious".<sup>9</sup> While woman's ego does not simply submit to the dominant discourse, the margins or slips within that discourse can only be discovered from inside, hence the mimetic method. It would be naïve to think that we can simply remove ourselves from the current symbolic regime in order to peer back upon it from outside.<sup>10</sup>

Similarly, claims that Irigaray is essentialist misinterpret her references to nature and culture in the context of her broader excavation of Western metaphysics.<sup>11</sup> When Irigaray speaks of a

---

<sup>7</sup> *ibid* 49.

<sup>8</sup> *ibid* 45.

<sup>9</sup> Luce Irigaray, *This Sex which is not One* (Catherine Porter tr, Cornell University Press 1985) 163, cited in Maggie Berg, 'Escaping the cave: Luce Irigaray and her feminist critics' in Gary Wihl & David Williams (eds) *Literature and Ethics* (McGill-Queen's University Press 1988) 69.

<sup>10</sup> Berg, above n 9, 69.

<sup>11</sup> A good example of this type of critique can be found in Ann Jones, 'Writing the body: Towards an understanding of *l'écriture féminine*' (1981) 7(2) *Feminist Studies* 247. See also, Ann Murphy, 'Beyond performativity and against "identification": Gender and technology in Irigaray' in Maria Cimitile & Elaine Miller



nature appropriate to the feminine she is not referring to essential or pre-discursive characteristics of 'womanhood' that women need to return to; to define a woman's nature would be to engage in a phallogocentric politics of representation. She is referring to an as yet unknowable morphology of the female sex informed by systems of language and representation unmediated by the phallus. Nature, for Irigaray, is always in becoming. As Grosz explains,

Her work is not a *true* description of women or femininity, a position that is superior to *false*, patriarchal conceptions. ... Her aim is quite different: it is to devise a *strategic* and combative understanding, one whose function is to make explicit what has been excluded or left out of phallogocentric images.<sup>12</sup>

Irigaray has on occasion connected the female body to specificity, for example through her discussion of the ontological connection between woman and fluids and the way in which the forgetting of fluids contributes to the originary matricide upon which Western culture rests.<sup>13</sup> Anti-essentialist critics have read this link in Irigaray's work as an unproblematised acceptance of the 'female body in its hormonal instantiation'.<sup>14</sup> While Irigaray is here linking the female body to the mechanics of fluidity, she is doing this not as part of a purely physiological investigation, but rather as part of her wide-ranging and critical analysis of science.<sup>15</sup> Naomi Schor makes a distinction here between what her critics have labeled essentialism and what is actually a critical engagement with materialism, which in Irigaray's work functions as a conduit for an interrogation of the real: 'The real in Irigaray is neither impossible, nor unknowable: it is the fluid'.<sup>16</sup>

Irigaray's use of the categories masculine and feminine and her concern with the bodies and matter associated with these respective subject positions, implicates the fourth criticism raised by Stone above; that Irigaray's schema explicitly excludes bodies that do not conform to the

---

(eds) *Returning to Irigaray* (SUNY 2007) 77-93. For a comprehensive rebuttal of the charge that Irigaray is essentialist see Berg, above n 9, 62-76.

<sup>12</sup> Elizabeth Grosz, *Sexual Subversions: Three French Feminists* (Allen & Unwin 1989) 110.

<sup>13</sup> Irigaray, *This Sex*, above n 9, 140.

<sup>14</sup> Naomi Schor, 'This essentialism which is not one: Coming to grips with Irigaray' in Carolyn Burke et al (eds) *Engaging with Irigaray* (Columbia University Press 1994) 68.

<sup>15</sup> *ibid* 69.

<sup>16</sup> *ibid*.

male/female dyad. Critics mistake Irigaray's emphasis on sexual difference as an emphasis on biology as the mode through which difference is constituted, rather than *morphology*, the body as it is lived in language, culture and history. Because of Irigaray's emphasis on morphology and the body as lived in culture, there is no reason, in theory, why trans bodies would threaten sexual difference by leading inexorably to monosexuality and the neuter. 'Irigaray's insistence that "identity, equality, and sameness" are a problem does not lead to the further conclusion that people who are transsexual and transgender would collapse the distinction between women and men'.<sup>17</sup> This is because trans people still live their bodily morphology in such a way that implicates either masculine or feminine subject positions. Danielle Poe reads Irigaray in *Between East and West* as refining her understanding of nature as cultivated, thus while Irigaray insists that our bodies already have ties to nature and the cosmos, this does not mean that those ties and the body's sensibilities cannot be refined and cultivated.<sup>18</sup> As such, sexual difference in Irigaray's work reflects a dynamism that is always in flux, fluid and reproducing itself in a process of cultivation between the one and the two. Poe's work thinking through trans narratives of transition with Irigaray is a thoughtful illustration of how the process of becoming oneself that Irigaray develops particularly in her later work can be read to provide a radical openness to new ways of becoming sexual outside the male/female dyad.<sup>19</sup> In these narratives Poe finds an example of the full flourishing of sexual difference, or what Stone has described as '...ubiquitous and maximal sexual difference, [which] would not restrict individuality or autonomy, but show unprecedented permissiveness in the extent to which it allowed and solicited individuals to realize themselves in accordance with their natural drives'.<sup>20</sup> Poe reads the memoir of Deirdre McCloskey, a trans woman who describes her transition as necessary so that her physical identity 'could match her psychological and spiritual identity'.<sup>21</sup> This narrative, says Poe, illustrates

---

<sup>17</sup> Danielle Poe, 'Can Luce Irigaray's notion of sexual difference be applied to transsexual and transgender narratives?' in Mary C. Rawlinson et al (eds), *Thinking with Irigaray* (SUNY 2011) 111-128, 119.

<sup>18</sup> *ibid*, citing Luce Irigaray, *Between East and West* (Stephen Pluháček tr, Columbia University Press 2002).

<sup>19</sup> Poe, above n 17, 121-126.

<sup>20</sup> Alison Stone, 'The sex of nature: A reinterpretation of Irigaray's metaphysics and political thought' (2003) 18 *Hypatia* 60, 73.

<sup>21</sup> Poe, above n 17, 122.

Irigaray's notion of the body as working 'with the mind, emotions, and spiritual beliefs to define sexual identity and to establish sexual difference'. In McCloskey's case this required a 'conscious cultivation' of her sexuate being and becoming.<sup>22</sup>

The third criticism that Stone identifies above - Irigaray's insistence on sexual difference as the primary plurality and, by implication, the reification of the heterosexual relation - needs further discussion as it persists in critical appraisals of Irigaray's work and forms the basis of Butler and Cornell's objections in the *diacritics* interview.

The central question that is most often raised by the later phase of Irigaray's work is whether it is in keeping with her earlier project to maintain a radical openness to becoming in accordance with one's unique sexual difference. A criticism this part of her work has suffered in particular is that the legal protection of the sexuate rights she envisages may in fact attribute a static fixity or unity to any possible future identities constructed under them. Butler and Cornell raise this objection in their interview with Cheah and Grosz, citing in particular a perception they both share of the reduction in Irigaray's later work of all alterity to the model of sexual difference. Cornell, for example, states that Irigaray's schema of sexual difference cannot account for the complex identifications of different individuals in an increasingly globalised world. She argues that Irigaray's elevation of sexual difference as the determinative plurality fails to account for an identity such as the 'Latina', a feminine identity that describes the coalescence of a complex set of historical, cultural, linguistic and political factors.

Irigaray simply cannot grapple with someone who is a woman whose 'feminine difference' is inseparable from imposed personas that she has to live within a racist society like our own, one in which Spanish culture and society has been evacuated of cultural significance. ... [O]ur categories of traditional gender-understanding simply cannot grapple with the kinds of oppressions and alliances that are mandated by a sense of 'being a woman'.<sup>23</sup>

Cornell goes on to argue that the sexual difference that emerges from Irigaray's later work promotes a kind of 'political conservatism', 'confirmed' for her by sexuate rights, whereby the heterosexual

---

<sup>22</sup> *ibid.*

<sup>23</sup> Cheah & Grosz, 'Interview with Judith Butler and Drucilla Cornell', above n 1, 40.

couple is privileged over all other expressions of intimate and familial relationships.<sup>24</sup> Sexuate rights, in Cornell's critique, are hopelessly in thrall to a law that 'inevitably closes the domain of other sexual possibilities'.<sup>25</sup> Butler goes as far as to allege that Irigaray's conception of masculine/feminine as the paradigmatic interval of difference 'completely obliterate[s] the way in which an ethically enabling difference exists in homosexual love.'<sup>26</sup> In an at times terse exchange with the editors, Butler notes what she perceives as a shift in Irigaray's work marked by *An Ethics of Sexual Difference* in which an ontological fixity permeates the text and a more rigid heterosexism comes to bear.

...[T]he intense overt heterosexuality of *An Ethics of Sexual Difference* and indeed of the sexuate rights discourse, which is all about mom and motherhood and not at all about postfamily arrangements or alternative family arrangements, not only brought to the fore a kind of presumptive heterosexuality, but actually made heterosexuality into the privileged locus of ethics, as if heterosexual relations, because they putatively crossed this alterity, which is the alterity of sexual difference, were somehow more ethical, more other-directed, less narcissistic than anything else.<sup>27</sup>

As Gail Schwab notes, Butler seems to misread sexuate rights here: 'Irigaray does not insist that mothers... need special state protection for their children [but] ... can be read as requiring that society recognize its responsibilities when it comes to nurturing and educating the next generation.'<sup>28</sup>

In response to Cornell's criticisms of sexuate rights, Grosz suggests that much of Irigaray's project is addressed at asking 'unanswerable political questions, questions that to be answered would require complete social reorganization'. The point then may well be that sexuate rights are impossible.<sup>29</sup> In disagreeing with this, Cornell asserts that she had always read Irigaray as being programmatically serious about the realisability of sexuate rights and points out the appropriateness

---

<sup>24</sup> *ibid* 21.

<sup>25</sup> *ibid* 25.

<sup>26</sup> *ibid* 28.

<sup>27</sup> *ibid* 27.

<sup>28</sup> Gail Schwab, 'Reading Irigaray (and her readers) in the Twenty-First Century' in Mary C. Rawlinson et al (eds), *Thinking with Irigaray* (SUNY 2011) 34.

<sup>29</sup> Cheah & Grosz, 'Interview with Judith Butler and Drucilla Cornell', above n 1, 25.

of the notion of sexual rights and duties to the French civil legal system but distinguishes her own notion of 'equivalent rights' from Irigaray's concept.<sup>30</sup>

Both the editors come to Irigaray's defence during the interview to suggest a different interpretation from those proffered by Butler and Cornell, including one that Grosz had formulated in previously published work.<sup>31</sup> Irigaray's work can be read, suggests Grosz, not as heterosexist, but as asking:

[W]hat would other relations of sexuality be like if and when there was a recognition of the existence of more than one sex? What changes would there be to homosexuality, to love between women, between men, to sexual love of all kinds, if this recognition were possible?<sup>32</sup>

In this way, says Cheah, Irigaray's project 'does suggest that a culture and a legal system that respects sexual difference will also generate a woman-to-woman sociality or man-to-man sociality ...such that the interval of sexual difference would also exist between woman and woman, man and man'.<sup>33</sup>

Irigaray's ontological claim that the only true universal that unites society is that life is engendered by men and women is hard to refute and cannot, in and of itself, be labelled heteronormative. In addition, as Cheah points out,<sup>34</sup> Irigaray's is a vision of radical futurity: 'I am... a political militant for the impossible, which is not to say a utopian. Rather, I want what is yet to be as the only possibility of a future'.<sup>35</sup> As such, the questions and the alternative that she poses contain not a prescription for sexual life, but a possibility of a particular ethical, but ultimately unknowable, existence, one in which the spectre of life constructed of *two*, instead of one, could generate desire (including same sex desire) beyond what is currently imaginable. Sexual difference, for Irigaray, is not a model for the appreciation and recognition of other differences, but the most basic universal difference in which the '...question of relational identity is... [realized as] the original connection

---

<sup>30</sup> *ibid* 26.

<sup>31</sup> Elizabeth Grosz 'The Hetero and the Homo: The Sexual Ethics of Luce Irigaray' in Carolyn Burke et al (eds) *Engaging with Irigaray* (Columbia University Press 1994) 335-350.

<sup>32</sup> Cheah & Grosz, 'Interview with Judith Butler and Drucilla Cornell', above n 1, 28.

<sup>33</sup> *ibid* 29.

<sup>34</sup> *ibid* 32.

<sup>35</sup> Luce Irigaray, *I love to you: sketch for a felicity within history* (Alison Martin tr, Routledge 1996) 10.

between body and culture'.<sup>36</sup> And as such, it forms the basis of a 'practical ethics generalizable to all classes and cultures where both women and men become productive agents in the shaping of their future world'.<sup>37</sup>

Penelope Deutscher considers in some detail the objections raised by Butler and Cornell in the *diacritics* interview in her book *Impossible Difference*.<sup>38</sup> What is the role of Irigaray's work in generating a legal creativity in which civic and sexual identity is reimagined, she asks.<sup>39</sup> Deutscher appears to agree with Grosz in this text in asserting that Irigaray's work on law is about imagining the impossible and she explores this impossibility in the context of a discussion of the politics of recognition. In addressing Cornell's objections, Deutscher notes that it is the way in which Irigaray attempts to give content, or to actualise sexual difference through sexuate rights that Cornell cannot countenance. Cornell makes this objection even more explicit in *At the Heart of Freedom*:

The attempt to give rights, thought through gender difference as universal, denies women the freedom to reimagine their sexual difference. For Irigaray, there are naturally two sexes. Her ontologization of the two denies that women live their biology in infinitely different and original ways. In the imaginary domain, sexes cannot be counted because what we will become under freedom cannot be known in advance.<sup>40</sup>

Deutscher challenges Cornell's reading here by referring again to Irigaray's strategic mode of both invoking sexual difference without specifying its content at some moments while at others 'transform[ing] traditional notions until they lose their sense'.<sup>41</sup> She continues:

Certainly, Irigaray speaks in the rhetorical mode of programmatic seriousness about sexuate rights. But the question is whether they function rhetorically for us as possible or impossible. What Cornell takes to be a mistaken attempt to give content can also be interpreted as a program of sexuate rights insisting on their own impossibility... The more serious the spirit, the more they perform as impossible. While questions remain about the utility of an Irigarayan politics of impossible recognition, the assumption that the specific content of sexuate rights works to undermine their function as impossible is surely mistaken.<sup>42</sup>

---

<sup>36</sup> Luce Irigaray & Gillian Howie, 'Becoming Woman, Each One and Together' in Luce Irigaray (ed) *Conversations* (Continuum 2008) 77.

<sup>37</sup> Pheng Cheah and Elizabeth Grosz, 'Of Being-Two: Introduction' (1998) 28(1) *diacritics* 3, 14.

<sup>38</sup> Penelope Deutscher, *Impossible Difference: The Later Work of Luce Irigaray* (Cornell 2002) 42-55.

<sup>39</sup> *ibid* 43.

<sup>40</sup> Drucilla Cornell, *At the Heart of Freedom* (Princeton University Press 1998) 122, cited in *ibid* 54.

<sup>41</sup> Deutscher, above n 38, 54.

<sup>42</sup> *ibid* 54-55.

Rachel Jones has also addressed the concerns raised by Butler and Cornell in the interview, attempting a slightly different conceptual move to Deutscher in her argument that the charge of heterosexism against Irigaray's work is misplaced.<sup>43</sup> She does this by insisting on a separation between *sexuate* difference in Irigaray's work, and heterosexual relations and sexual difference as it pertains to sexuality; it is *sexuate* difference *not* heterosexuality that has ontological priority in Irigaray's work.<sup>44</sup> It is essential, says Jones, to read Irigaray's later work in concurrence with her earlier exposé of the 'hom(m)osocial' order, in which she makes the demand for the cultural recognition and representation of feminine autonomy, dignity and particularity. This is a precondition to the cultivation of a culture of two, which is also the precursor to an order in which women could also love each other as women.<sup>45</sup>

Irigaray's later investigations into the question of how two *sexuate* subjects might listen and speak to each other are thus centrally informed by the answers she has already begun to develop to her earlier question[s]... Far from reinscribing an existing heterosexual norm, Irigaray's demand for a culture of two seeks to displace an existing hom(m)osociality in favour of a heterosexuality... that has not yet existed, and that would allow for two, different but non-opposed, subjects.<sup>46</sup>

Further, argues Jones, a key point that is overlooked here is the difference in Irigaray's schema between *sexuate* and *sexual*. By prioritising our existence as *sexuate* Irigaray is not attempting to prescribe our *sexuality*:

[I]t's important not to confuse sexual choice with sexual difference. For me sexual difference is a fundamental parameter of the socio-cultural order; sexual choice is secondary. Even if one chooses to remain among women, it's necessary to resolve the problem of sexual difference. And likewise if one remains among men.<sup>47</sup>

---

<sup>43</sup> Rachel Jones, *Irigaray* (Polity 2011).

<sup>44</sup> *ibid* 183.

<sup>45</sup> *ibid* 186.

<sup>46</sup> *ibid* 186-187.

<sup>47</sup> Elizabeth Hirsh & Gary A. Olson, "'Je—Luce Irigaray': A Meeting with Luce Irigaray" (1995) 10 (2) *Hypatia* 93, 112, cited in *ibid* 187.

In other words, the project of rethinking feminine desire and pleasure is inseparable from a broader project to reconfigure woman's relationship to herself and to the other as a sexuate subject.<sup>48</sup> The culture of two, thus, leaves entirely open what the desire of those reconstituted subjects might be.

### **A Framework for Law?**

My own view of these problems raised by Butler, Cornell and others probably straddles the difficult middle between an investment in the success and coherence of Irigaray's schema with a wariness of being wilfully blind to any problems buried deep within it. For that reason I accept many of the interpretative contributions of Cheah, Grosz, Deutscher, Jones and others, who have done a significant amount of work to fill in gaps left by Irigaray in some of her later work. However, I retain a certain suspicion of any critical or philosophical project that aims to discern the 'true intentions' of an author by creative fiat in order to preserve the integrity of a broader project perhaps, in which we all have so much invested. Poe's work on Irigaray and transgender narratives discussed above is a good example of this conundrum. Poe suggests that Irigaray's later writing on the cultivation of nature provides the space in which to think trans narratives of transition in such a way that does not trouble or invalidate her framework or the primacy she attributes to sexuate difference. However, in the same breath Poe notes that Irigaray would not, and does not, accept such an expansion to her work.<sup>49</sup> This gestures towards much broader methodological and ethical questions about how much we as readers and researchers, in Butler's words, 'subject ourselves' to an author in the interests of justifying our own continued fidelity to their work.<sup>50</sup> To what extent can we attempt to 'fix' problems within the matrix in order to manipulate the levers for the success of our own projects? If Irigaray's framework actually precludes the multiplicity of sexuate beings whom she professes to

---

<sup>48</sup> Jones, above n 43, 187.

<sup>49</sup> Poe, above n 17, 123 & 126.

<sup>50</sup> Cheah & Grosz, 'Interview with Judith Butler and Drucilla Cornell', above n 1, 29.



seek to free, does this spell the end for this thesis and its aim to seek new answers and generate new knowledge with respect to the research questions it identifies?

There are no ready answers to these questions however, I will return to the methodological precepts of this project which, as well as involving a heavy investment in the coherence of Irigaray's work, also attempts a mimesis of her overall project in order to argue for its continuing relevance for feminist legal scholarship and in particular, for a critical analysis of rape law in the UK. I will shortly in chapter five commence my analysis of UK rape law, but I proceed on in my analysis in the spirit of Irigaray's texts, which are always about a dialogic engagement between interlocutors, never pre-defined in their outcome. It is in deference to this methodology and ethics which, while reserving the right to maintain some critical reservations about elements of Irigaray's schema, leads me to reject the type of hurried interpretation of Irigaray's work on sexuate rights, for example, that other feminist legal scholars have engaged in, and which has prevented the type of productive engagement with her work with which this thesis is concerned.

Nicola Lacey's engagement with Irigaray in her book *Unspeakable Subjects* is a good example of the type of reading that fails against these measures.<sup>51</sup> In that important and influential feminist legal text, published in the same year as both the *diacritics* special issue and Cornell's *At the Heart of Freedom*, Lacey all but dismisses Irigaray's foray into law, reading sexuate rights as the repetition of a sexist notion of femininity which simply reinscribes woman as other within the dominant paradigm.<sup>52</sup> These stereotypes, if enshrined within law, argues Lacey, would have the effect of fixing women within identities 'virtually indistinguishable from the images of femininity in the most sexist discourse'.<sup>53</sup> While noting that it was paradoxical that Irigaray's broader project serves to fundamentally undermine these types of representations,<sup>54</sup> Lacey concludes nonetheless that even if that is what Irigaray is continuing to attempt to do with sexuate rights, her 'rhetoric' is so 'obtuse'

---

<sup>51</sup> Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart 1998).

<sup>52</sup> *ibid* 215-216.

<sup>53</sup> *ibid* 215.

<sup>54</sup> *ibid*.

that it would take a ‘highly qualified philosopher’ to detect it, and that a requirement ‘for such a close reading can hardly count as an effective contribution to feminist politics.’<sup>55</sup>

Lacey’s project in *Unspeakable Subjects* includes an investigation of the role of the criminal law in constructing sex and sexuality and an exploration of how to go about ‘ensuring the acceptance of varying ways of life as a precondition for a meaningful politics of recontextualisation’,<sup>56</sup> which certainly has resonance with this project. However, she is limited in her ability to realise the full potential of Irigaray’s proposals by her impatient reading of Irigaray’s work and her misreading of sexuate rights. As discussed in chapter three, Irigaray has been very clear that she has no desire to reconstitute the masculine system of meaning in which ‘virginity’, ‘motherhood’ and ‘caring’ are currently understood. This, as she notes, would simply be to reiterate a phallographic mode of representation.<sup>57</sup> What is at issue instead is a project to both expose the contingency of these concepts as deployed within the dominant paradigm, and attempt to reappropriate them within a new symbolic order. On the basis of her misreading, Lacey concludes with ambivalence on the political potential of ‘difference feminism’, asserting that Irigaray’s argument for sexuate rights ‘provides neither a compelling image of difference nor a comprehensive political strategy’.<sup>58</sup>

Though she is a scholar of Irigaray, it is for similar reasons to those above that I do not employ Cornell’s ‘equivalent rights’ in the place of sexuate rights. While equivalent rights owe much to Irigaray’s critique, Cornell ultimately diverges from her framework in favour of more normative or liberal theorists, such as John Rawls and Amartya Sen.<sup>59</sup> Following Irigaray, Cornell argues that women within the current symbolic order bear the wound of femininity such that their sex is

---

<sup>55</sup> *ibid* 216.

<sup>56</sup> *ibid* 217.

<sup>57</sup> Irigaray, *This Sex*, above n 9, 78.

<sup>58</sup> Lacey, above n 51, 218.

<sup>59</sup> For example, Cornell appropriates John Rawls’ thinking in *A Theory of Justice* (Harvard University Press 2009) as a framework through which to work-up her imaginary domain, insisting that self-respect be considered a primary good within the imaginary domain. Self-respect is thus the minimum expectation to which Cornell suggests all people should be entitled in an equal society. Self-respect also provides the bar against which normative judgments are made and moral reasoning proceeds as we pursue our own sexual imaginary. See: Drucilla Cornell, *The imaginary domain: abortion, pornography & sexual harassment* (Routledge 1995) 9.

fundamentally devalued and degraded and they are denied the full entitlements of citizenship and personhood.<sup>60</sup> To counter the weight of this wound, Cornell does not demand sameness with men, or indeed legal recognition of sexual specifics, but equivalence. Equivalence means 'of equal value, but not of equal value *because of likeness*'.<sup>61</sup> It does not rest on privileging the masculine as the norm, nor does it seek the reduction of all humanity to asexuality. 'Instead, she demands recognition "that the feminine sex is of equivalent value to the masculine sex, in the name of women's equal personhood before the law"'<sup>62</sup>

Such a formulation does not require that any specific content be given to the notion of either masculine or feminine sexual difference, but it does require that female sexual specifics be thought (and thus brought) together with full personhood. This approach thus forces the law to look at the sex specific ways in which women and girls need to be protected by the law in order to ensure that they have an equivalent chance at becoming persons...<sup>63</sup>

Cornell's approach to the question of justice is premised on this view of legal equality as the 'equivalent chance to become a person', which, she says, protects the conditions necessary to 'effectively get the project of becoming a person off the ground'.<sup>64</sup> These conditions ensure citizens the chance to self-actualise or to transform themselves into individuated beings, 'persons beyond the persona or masquerade of femininity'<sup>65</sup> who can fully participate as equals in public and political life.<sup>66</sup> The three minimum conditions required to enable this equality are: bodily integrity; access to symbolic forms sufficient to achieve linguistic skills permitting the differentiation of oneself from others and; the protection of the imaginary domain.<sup>67</sup>

---

<sup>60</sup> Cornell, *The imaginary domain*, above n 59, 10.

<sup>61</sup> Drucilla Cornell, *Transformations* (Routledge 1993) 141.

<sup>62</sup> Cornell, *The imaginary domain*, above n 59, 19, cited in Louise du Toit 'Sexual specificity, rape law reform and the feminist quest for justice' (2012) 31(2) *South African Journal of Philosophy* 465, 477.

<sup>63</sup> Du Toit, above n 62, 477.

<sup>64</sup> Cornell, *The imaginary domain*, above n 59, 12.

<sup>65</sup> *ibid* 8.

<sup>66</sup> *ibid* 4.

<sup>67</sup> *ibid*.

Cornell's imaginary domain is crucial to her idea of the 'process of justice' as one that is not simply to be achieved, but to be struggled for<sup>68</sup> and which requires the provision of a moral and psychic space in and through which we can realise our own sexual being.<sup>69</sup> The importance of the availability of this imaginary domain for Cornell is tied to her view of personhood as 'involving an endless process of working through'. 'A person is not something "there"...but a possibility, an aspiration...'<sup>70</sup> In order to ensure equality the law must protect the imaginary domain, the space in which the continual renewal and 'reimagining of who one is and who one seeks to become' takes place.<sup>71</sup> Ultimately, Cornell can be read as arguing for a novel jurisdiction in law in which 'new forms of identity and of desire are allowed to develop within separate jurisdictions and diverse political forms'.<sup>72</sup>

Equivalent rights then function as a guarantor of equality and, therefore, facilitate the three preconditions that allow all individuals to become fully human. They seek to 'value the specificity of feminine sexual difference, beyond the current stereotypes of femininity imposed by the gender hierarchy.'<sup>73</sup> Cornell relies on Amartya Sen's view of equality to argue for equivalent rights as 'equality of capability and welfare':

We need a vision of equality if we are to protect equivalent rights from degenerating into a new defense of separate but equal. The best vision of equality by which to justify equivalent rights is Amartya Sen's equality of welfare and capability. Sen defines equality of welfare and capability as follows: 'Capability reflects a person's freedom to choose between different ways of living.' Such a view of equality is important for two reasons: First, it allows for the respect and recognition of diversity and different lifestyles. Second, it allows for affirmative measures on the part of the state to restructure current work arrangements to guarantee equality welfare and capability.<sup>74</sup>

---

<sup>68</sup> Drucilla Cornell, *Beyond accommodation: ethical feminism, deconstruction, and the law* (Rowman & Littlefield 1999) 16.

<sup>69</sup> *ibid* xxv.

<sup>70</sup> Cornell, *The imaginary domain*, above n 59, 5.

<sup>71</sup> *ibid*.

<sup>72</sup> Peter Goodrich, *Law in the Courts of Love* (Routledge 1996) 61.

<sup>73</sup> Cornell, *Transformations*, above n 61, 113.

<sup>74</sup> *ibid* 155.

Cornell gives a number of examples to explain how she sees a scheme of equivalent rights operating in law, including the right to abortion. Abortion rights implicate bodily integrity, one of the minimum conditions for equality.<sup>75</sup> This is because our freedom as sexual beings ‘can never be separated from an affirmative relationship to our “flesh”’, where flesh connotes the full integration of physical being and psychical being.<sup>76</sup>

The crossover between Cornell’s framework and Irigaray’s critical diagnostic are plain, but there are some important differences. In Cornell’s own explanation of the difference between sexuate and equivalent rights in the interview with Cheah and Grosz she emphasises the distinction between what she sees as the imaginary domain as a ‘moral right’ to ‘sexuate being’, and contrasts this with Irigaray’s attempt to have sexuate rights recognised in law.

So rather than having the state say, ‘okay, you are under the category we now think of as “women”, and therefore your duties and responsibilities are such and such’ - including giving women very radical duties to themselves and to their daughters, which I admire her courage in articulating, I would say that because we are the source of our own evaluations, the state cannot impose any engendered duties upon anyone, or any meaning to national identification. So the ideal of the imaginary domain doesn't have to deny the ethical and political significance of racial and national oppression. But on the level of the concept of right, you are the source of the evaluation and no one else.<sup>77</sup>

The law, in other words, guarantees the moral right to the imaginary domain ‘through which we come to terms with even the not yet dreamt of meanings of our “sex”’.<sup>78</sup> This then avoids the problem she sees in Irigaray’s schema in which the attempt to articulate sexuate difference in law has a chilling effect on new representations of ‘Woman’.

For Cornell then, an understanding of women’s abjection and its articulation should take place as part of an infinite cultural project ‘of contesting the imposed definitions of what it means to be a woman’, rather than a narrow legal project to define the terms of that abjection.<sup>79</sup> In this way

---

<sup>75</sup> *ibid* 145.

<sup>76</sup> *ibid* 144.

<sup>77</sup> Cheah & Grosz, ‘Interview with Judith Butler and Drucilla Cornell’, above n 1, 26.

<sup>78</sup> Cornell, *Beyond accommodation*, above n 68, xxv.

<sup>79</sup> Cornell, *The imaginary domain*, above n 59, 27.

her proposal can be said to 'mediate between equality (understood as universal) and sexual difference (or specificity) by appealing to a view of the self as dynamic, changing and simultaneously inter-subjectively vulnerable'.<sup>80</sup>

I want to address briefly both the objections Cornell raises to sexuate rights in the interview and in her work on two main fronts. First, I agree with Grosz, Deutscher and others that sexuate rights do not function in Irigaray's work as a programmatic schema, and therefore, they do not necessarily impose the limits on the becoming of woman that Cornell seems to think they do. Following from this point, I argue that there is scope to elaborate sexuate rights, or the ethos that supports them, as a minor jurisprudence. A minor jurisprudence, according to Peter Goodrich, is one that 'challenges the law of masters, the genre and categories of the established institution of doctrine and its artificial and paper rules' and which neither aspires nor pretends to be the only law or universal jurisprudence.<sup>81</sup> Goodrich argues that minor jurisprudences promise both a 'history of the legal unconscious' and that this history is of 'the dark side of law... of that which it does not know and so cannot control.'<sup>82</sup> In this way, I argue that sexuate rights have the potential to open up, rather than close down, sexuate becoming. Read in such a way, sexuate rights function in Irigaray's work to generate outcomes similar to those Cornell envisages in her own framework.

Irigaray's project of sexuate rights is rooted primarily in the 'demand for the bifurcation of the traditional conception of legal personality so as to recognise both the duality of the sexes and the fact that (heterosexual) relationship takes place between the spheres of sexual difference'.<sup>83</sup> While this bifurcation is named as masculine and feminine, as Grosz points out, it does not necessarily follow from this that other identifications are excluded.<sup>84</sup> The relevant question that Irigaray's project poses is what form would interpersonal relations take if there was the recognition of more than one subjectivity? Because woman has no independent subjective existence outside

---

<sup>80</sup> Du Toit, above n 62, 478.

<sup>81</sup> Goodrich, above n 72, 2.

<sup>82</sup> *ibid* 3.

<sup>83</sup> *ibid* 58.

<sup>84</sup> Cheah & Grosz, 'Interview with Drucilla Cornell and Judith Butler', above n 1, 28.

the phallogocratic paradigm, it follows that the recognition in law of sexuate rights is impossible. It is however, paradoxically, in their impossibility that sexuate rights have such radical transformative potential. They involve for their coherence the symbolic affirmation of feminine difference and in the absence of this affirmation in the dominant paradigm, they force a confrontation of law with their impossibility. This confrontation, as Peter Goodrich points out, has the potential to ‘...constitute the beginnings of a very serious challenge to jurisdiction and order of law which is predicated upon the unity of system and singularity of its sources’.<sup>85</sup> Seeing these rights as ultimately impossible, or outside a strict legalistic or programmatic schema, they take on a greater malleability than I think Cornell gives them credit for. In chapter seven I will argue that sexuate rights and the conceptual framework that underpins them can act as a starting point or conduit to a more radical reimagining of the role of law in the aftermath of rape. Referring to the right to virginity and to equivalent linguistic and symbolic systems of exchange, I explore how these concepts might reframe a consideration of the harm of rape and also woman’s ability to speak that harm through the *nomos* of law. My use of these concepts, or ‘rights’, does not involve reaffirming the phallogocratic notion of virgin woman used to confine and control woman’s sexuality, for example, but instead functions as a conduit for the fuller elaboration of sexuate personhood, never predefined. In this way, sexuate rights can be seen to function as the basis for the elaboration of a minor jurisprudence.

The second point I want to make concerns Cornell’s schema of equivalent rights as an alternative to sexuate rights. While Cornell’s framework purports to avoid the pitfalls she sees in Irigaray’s schema it may still involve its own limitations. In its haste to return to Enlightenment universals, equivalent rights risks what Louise du Toit argues is a descent back into gender neutrality. This may risk sacrificing a dynamic understanding of sexuate personhood, a consequence that Cornell seeks to avoid by refusing to give content to the nature of woman’s specificity in law.

---

<sup>85</sup> Goodrich, above n 72, 58.

Considering Cornell's work alongside the work of Debra Bergoffen,<sup>86</sup> du Toit illustrates the way in which both of these authors strive towards new concepts of human rights in law which would offer protection to men and women equally, whilst also retaining room to challenge the devaluation of the feminine inherent in the neutral standard of 'human'.<sup>87</sup> Du Toit is wary of the danger that the move back to gender neutrality involved in these formulations may 'once again re-affirm an idealised, masculine [framing] of key concepts, including vulnerability, that covertly [dominate] legal imaginaries'.<sup>88</sup> The effect of this, as is seen frequently in the dominant paradigm, is the continued denial of the possibility to affirm feminine difference as equivalent. While du Toit notes that Cornell clearly appreciates in her formulation the importance of a recognition of feminine specificity to reformulate the universal, she nonetheless rejects her 'eagerness to end up in a gender neutral position again...'<sup>89</sup> noting that a too hasty return to neutrality risks a reiteration of the same problems we currently face.

In the context of reimagining law, it is essential, argues du Toit, that 'some theory of female sexual specificity as a lived and newly valorised subject position is needed in every instance' in order to avoid the continuing covert dependence on 'an idealised masculine subject valued on the basis of its presumed superiority to, and transcendence of, a devalued feminised sub-human...'<sup>90</sup>

We cannot get to a fairer legal dispensation for women if we limit our strategy to acknowledging that all humans are physically vulnerable or that people's conditions for becoming a person must be protected. In every instance we will have to make arguments explicitly supporting the equivalent evaluation of the female sex by considering the particularities or specificities pertaining to that sex and thinking them together with full and equal personhood.

While noting that Cornell's formulation does engage in this process of advocating for equivalent evaluation of the feminine, du Toit notes that this process in Cornell's work is not ongoing or

---

<sup>86</sup> Debra Bergoffen, 'February 22, 2001: Towards a Politics of the Vulnerable Body' (2003) 18(1) *Hypatia* 116.

<sup>87</sup> Du Toit, above n 62, 478.

<sup>88</sup> *ibid* 479.

<sup>89</sup> *ibid*.

<sup>90</sup> *ibid* 480.



dynamic; '[she] seem[s] to want to do it once and for all, and get it over with'. In du Toit's formulation, the demands of justice require that this process be continuous:

For me there should instead be an ongoing dialectical movement between sexual specificity and universality – universal concepts, and especially their application, should always be tested anew against the demand of justice toward sexual specificities. Also, our own interpretations of sexual specificities should be scrutinized continuously regarding their capacity to include those so positioned under the rubric of the person or the human.<sup>91</sup>

In my argument, *sexuate rights* function, alongside Irigaray's broader project, as an ethics which enables the dialectic du Toit refers to here between equality as universal, and the specific *sexuate* subjectivity necessary to become a person. Irigaray's retooling of the negative in Hegel operates to preserve a dynamic space between the two in which the collapse into the neuter that so worries du Toit in Cornell's work, is simply impossible. I will illustrate further how I envisage *sexuate rights* informing the reimagining of a juridical space in which rape can be more adequately articulated and understood in chapter seven.

## **Conclusion**

In this chapter I have elaborated on a number of criticisms that Irigaray's work has faced, in particular by feminist legal scholars who have objected to elements of her later constructive project. I have sought to justify my continuing fidelity to Irigaray's project in this thesis by arguing that these criticisms are either not fatal to Irigaray's project, or are misplaced. I have argued that Cornell's understanding of *sexuate rights* in Irigaray's work may be unnecessarily limiting, and that closer attention to Irigaray's broader constructive project in her later work illustrates how potentially radical and malleable *sexuate rights* can be, particularly when understood as a conduit for a minor jurisprudence. I noted also that this thesis proceeds in the spirit of Irigaray's work, which involves a dialogic encounter with the text, never predefined in its outcome. This functions in my work as a

---

<sup>91</sup> *ibid.*

critical methodology that supports the dynamic generation of new ideas, and in this case a new analysis of rape and rape law in England and Wales.

In the next chapter I commence my analysis of that rape law with an investigation of the governing statutory framework in the SOA. I undertake this analysis informed by Irigaray's critical project in order to expose the 'blind spots' of the current law and in so doing, identify the contingencies of the conceptual framework upon which it is based. Ultimately I will conclude that this framework has failed against its own measures because it remains mired within a morass of sexual indifference, unable to either perceive or respond to the harm of rape and thus fundamentally unable to serve justice.

# Chapter Five: Rape, Law and Sexual Indifference

---

## Introduction

In the previous two chapters I elaborated on the philosophical foundation that informs the theoretical framework employed in this thesis. In this chapter I undertake an investigation into the conceptual underpinnings of rape law in England and Wales with reference to that framework. I suggest that attentiveness to an Irigarayan critique reveals the sexual indifference of current rape law in England and Wales; an insight neglected by much contemporary feminist scholarship on rape and law. This chapter proceeds with its analysis of the rape provisions in the SOA in light of the discussion in chapter one of the thesis, in which I argued that despite the best intentions of the legislature to remedy the ‘archaic... incoherent ...and discriminatory’ elements of the law on sexual offences,<sup>1</sup> the current law governing rape has failed. The failure of the law of rape has most often been attributed to inconsistent implementation or the ‘bad attitudes’ of those who purport to apply it. I challenge these assumptions and contend we need to return again to the text of the statute to understand why it has failed. I argue that the law governing rape has failed because it remains enmeshed within a conceptual framework of sexual indifference in which woman continues to be constructed as man’s (defective) other. This construction both constricts the frame in which women’s sexuality can be thought and distorts the harm of rape for women. It also continues woman’s historic alienation from her own nature and denies her entitlement to a becoming in line with her own sexuate identity. Inspired by Irigaray’s programme of sexuate rights for women, I

---

<sup>1</sup> Home Office, *Protecting the Public: Strengthening the protection against sex offenders and reforming the law on sexual offences* (Home Office 2002) 5.

argue that law should have facilitative, protective and symbolic roles in inaugurating sexual difference and this is particularly and acutely necessary at the point of confrontation with that difference in rape. I will illustrate this critique with reference to an analysis of the sexual indifference of the rape provisions in the SOA. The critique focuses on three aspects of the SOA: the move to gender neutrality in section 1; the reliance on a particular notion of sexual autonomy and; the operation of the consent provisions. In chapter six I will extend this analysis further with an analysis of the practice of rape law in the rape trial and argue that a conceptual shift is required for the law to perceive the harm of rape, but also to reconfigure its role as the respectful mediator between *two*: man and woman.

### **Rape in the Sexual Offences Act 2003: A Reiteration of the Same**

November 2013 marked 10 years since the governing statute on rape law, the SOA, became law. As explained in chapter one, that Act made significant changes to the law of rape with the express intention of rectifying the incoherence of the previous regime and modernising the law to better reflect the current 'social attitudes and roles of men and women'.<sup>2</sup> The changes made to the offence of rape specifically included reform to both the *actus reus* and *mens rea* components of the offence, and the creation of three new sections designed to clarify the meaning of consent.<sup>3</sup> These were accompanied by a significant number of policy recommendations to enhance procedures for the reporting, investigation and prosecution of rape and other serious sexual crimes.<sup>4</sup> These recommendations were made in response to damning evidence of the failure of law and associated

---

<sup>2</sup> Home Office, *Setting the Boundaries: Reforming the law on sex offences* (Home Office 2000) iii.

<sup>3</sup> Refer to discussion above at chapter one, p. 29.

<sup>4</sup> Home Office, *Protecting the Public*, above n 1, 19-20. See also discussion in chapter one.

institutional policy to respond adequately to high rates of attrition and low rates of prosecution and conviction,<sup>5</sup> and were followed by a flood of reviews and reports assessing their effectiveness.<sup>6</sup>

While the legislature may have succeeded in encouraging an increase in the reporting of rape,<sup>7</sup> on other traditional measures of success this law has failed. Recent investigations show high rates of police no-criming of rape complaints,<sup>8</sup> and low rates of prosecution.<sup>9</sup> The most recent data shows that only just over half of all prosecutions for rape will result in a conviction, and only 33% for the offence charged, with conviction rates from jury trials at around only 27% where a defendant pleads not guilty, well below the conviction rate for crimes of comparable seriousness.<sup>10</sup> Research continues to find evidence of systematic institutional failures at almost every point in the process, despite the alignment of policy with currently accepted best practice.<sup>11</sup> Police continue to investigate rape allegations inadequately,<sup>12</sup> while the CPS has faced irregular but ongoing criticism for the haste with which it dismisses cases that are perceived as weak.<sup>13</sup> Judges continue to subvert

---

<sup>5</sup> Refer to discussion above at chapter one, pp. 21-29.

<sup>6</sup> Refer to discussion above at chapter one, pp. 35-40.

<sup>7</sup> Refer to discussion above at chapter one, p. 40.

<sup>8</sup> Melanie Newman, 'Seven London boroughs dismiss a third of rape allegations' (*The Bureau of Investigative Journalism*, 17 December 2013) <http://www.thebureauinvestigates.com/2013/12/17/seven-london-boroughs-dismiss-a-third-of-rape-allegations/> accessed 2 June 2014.

<sup>9</sup> Melanie Newman & Oliver Wright, 'Revealed: Thousands of rape cases thrown out as charges fall following new CPS guidelines' (*The Independent*, 4 February 2014) <http://www.independent.co.uk/news/uk/crime/revealed-thousands-of-rape-cases-thrown-out--as-charges-fall-following-new-cps-guidelines-9105454.html> accessed 2 June 2014.

<sup>10</sup> MOJHOONS, *An Overview of Sexual Offending in England and Wales* (Home Office 2013) 37-40.

<sup>11</sup> Vivien Stern, *The Stern Review* (Government Equalities Office 2010) 8.

<sup>12</sup> See for example discussions of the cases of John Worboys and Kirk Reid and the London Metropolitan Police: IPCC, *IPCC independent investigation into the Metropolitan Police Service's inquiry into allegations against John Worboys* (IPCC 10 January 2010); IPCC, *IPCC independent investigation into the Metropolitan Police Service's inquiry into allegations against Kirk Reid* (IPCC 18 November 2010). See also the IPCC investigation into the operation of the Met Police's Sapphire Unit cataloguing widespread police failures in the investigation of sexual offending: IPCC, *Southwark Sapphire Unit's local practices for the reporting and investigation of sexual offences, July 2008 – September 2009* (IPCC 26 February 2013)

<sup>13</sup> See Liz Kelly et al., *A gap or a chasm? Attrition in reported rape cases* (Home Office Research Study 293, 2005); HMCPSI, *Without consent: A report on the joint review of the investigation and prosecution of rape offences* (Central Office of Information 2007); Jennifer Temkin & Barbara Krahe, *Sexual assault and the justice gap: A question of attitude* (Hart 2008); HMCPSI & HMIC, *Forging the links: Rape investigation and prosecution. A joint inspection by HMCPSI and HMIC* (HMCPSI and HMIC 2012).

laws put in place to rectify bias against complainants,<sup>14</sup> and jurors continue to employ prejudicial and discriminatory measures to assess the veracity of women's complaints of rape.<sup>15</sup>

Against the weight of this failure, feminists and others have changed the focus of their analyses away from the text of the law to forces outside the criminal justice system. A substantial body of literature now exists attesting to the 'problem of attitudes' that is said to pervade the criminal justice system, perverting the successful implementation of the statutory provisions and the best practice that supports them.<sup>16</sup> Another tactic has been to challenge the premises or tools of measurement that are being deployed by government researchers and others to count success. A good example of this type of analysis was highlighted earlier in chapter one, when in her assessment of the practice and policy of rape law, Vivien Stern noted that 'the criminal justice route will not be open to every complainant' and indeed that '...it may be time to take a broader approach to measuring success in dealing with rape'.<sup>17</sup> Amongst other conclusions, and while careful not to dismiss the importance of criminal justice outcomes, Stern noted the need to focus on 'rape victims as people who have been harmed, [and] whom society has a positive responsibility to help and to

---

<sup>14</sup> Liz Kelly et al, *Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials* (Home Office Online Report 20/06 2006).

<sup>15</sup> Louise Ellison & Vanessa E. Munro, 'Reacting to rape exploring mock jurors' assessments of complainant credibility' (2009) 49(2) *British Journal of Criminology* 202; Louise Ellison & Vanessa E. Munro, 'Of 'normal sex' and 'real rape': Exploring the use of socio-sexual scripts in (mock) jury deliberation' (2009) 18(3) *Social & Legal Studies* 291; Louise Ellison & Vanessa E. Munro, 'A stranger in the bushes, or an elephant in the room? Critical reflections upon received rape myth wisdom in the context of a Mock Jury study' (2010) 13(4) *New Criminal Law Review* 781; Louise Ellison & Vanessa E. Munro, 'Getting to (not) guilty: examining jurors' deliberative processes in, and beyond, the context of a mock rape trial' (2010) 30(1) *Legal Studies* 74; Louise Ellison & Vanessa E. Munro, 'Better the devil you know? Real rape stereotypes and the relevance of a previous relationship in (mock) juror deliberations' (2013) 17(4) *The International Journal of Evidence & Proof* 299.

<sup>16</sup> See for example: Gerd Bohner et al., 'Rape myth acceptance: cognitive, affective and behavioural effects of beliefs that blame the victim and exonerate the perpetrator' in Miranda Horvath & Jennifer Brown (eds) *Rape: Challenging Contemporary Thinking* (Willan 2009) 17-45; Hannah Frith, 'Sexual scripts, sexual refusals and rape' in Miranda Horvath & Jennifer Brown (eds) *Rape: Challenging Contemporary Thinking* (Willan 2009) 99-122; Nicola Gavey, *Just Sex? The Cultural Scaffolding of Rape* (Routledge 2005); Heike Gerger et al., 'The Acceptance of Modern Myths About Sexual Aggression Scale: Development and Validation in German and English' (2007) 33 *Aggressive Behavior* 422; Clare McGlynn & Vanessa Munro (eds) *Rethinking rape law: international and comparative perspectives* (Routledge 2010); Temkin & Krahé, above n 13.

<sup>17</sup> Stern, above n 11, 117.

protect, aside from the operations of criminal law'. She noted the importance of supporting processes that allowed a victim to feel 'believed' and enabled to '[honour] the experience'.<sup>18</sup>

Stern's reticence in this particular independent report to just simply continue prodding, peering and poking at the various mechanisms of the vast machinery of criminal justice in the face of evidence that it should, in theory at least, be 'working' mirrors a number of feminist interventions into the debate, notably that of Wendy Larcombe.<sup>19</sup> In an important article published in 2011, Larcombe sought to 'problematise the value of conviction rates as a measure, and to demonstrate that increasing conviction rates is not itself a valid objective of law and policy reform'.<sup>20</sup> She argues that strategies associated with increasing conviction rates may in fact be in direct conflict with feminist aims to fight rape myths and stereotypes which have infiltrated legal discourse about the virtuous raped woman. Larcombe points out that a focus on conviction rates inevitably leads to the selective prosecution of only a small number of reported rapes which fit within the 'real rape' template, and are thus more likely to accord with the myths and stereotypes of rape that jury members have been shown to draw upon when making decisions on evidence in a trial.<sup>21</sup> Instead she argues, following Rosemary Hunter, for a measure of the effectiveness of law reform which would distinguish between 'occasions of respect' and 'occasions of oppression'.<sup>22</sup>

Adapting this test for present purposes, we can understand 'occasions of respect' in the criminal justice response to rape complaints as ones in which the complainant is listened to by a criminal justice officer who feels a responsibility to provide accurate and relevant information and to facilitate the victim/survivor's access to appropriate services and support. Further, if reporting is to be an occasion of respect, the prevalence of violence against women should be acknowledged and decisions should be taken with a view to ensuring the future safety of all women and children... Occasions of oppression, by contrast, will confirm the fears of victim/survivors that they will not be believed by those in authority, or that the abuse they experienced will be trivialised and dismissed.<sup>23</sup>

---

<sup>18</sup> *ibid* 9.

<sup>19</sup> Wendy Larcombe, 'Falling rape conviction rates: (Some) feminist aims and measures for rape law.' (2011) 19(1) *Feminist Legal Studies* 27.

<sup>20</sup> *ibid* 42.

<sup>21</sup> *ibid* 29.

<sup>22</sup> See Rosemary Hunter, 'Consent in violent relationships' in Rosemary Hunter & Sharon Cowan (eds) *Choice and consent: Feminist engagements with law and subjectivity* (Routledge 2007) 158–173, cited in *ibid*.

<sup>23</sup> Larcombe, above n 19, 41, citation omitted.

Both of these developments in the literature on rape and rape law – the move to focus on attitudes and the investigation of outcomes other than those prescribed by the criminal justice system – have engendered, in my opinion, important and necessary discussions. In this chapter, however, I am concerned with an analysis that runs logically prior to these debates. There is an assumption in at least some of Stern’s report, for example, that law and policy on rape has reached (or is reaching) a best practice plateau and that if only consistent implementation could be achieved, many of the current problems could be solved. In this reading law is returned through effective reform to its status as a benign and inanimate tool through which we implement justice, perverted only by the aberrant attitudes of those who come into contact with it. I argue that we need to challenge this assumption, and that by so doing we can further inform our discussions of the ‘attitude problem’ and of the broader meaning of justice for victims of rape. In what follows I return to the text of the statute and to its unfolding and suggest that much of its failure is due to a conceptual framework which inherently denies and erases women’s difference. This can be seen in the SOA in three key areas: its professed gender neutral provisions, its operating understanding of sexual autonomy, and the presumptions that underpin its notion of consent.

### *Gender Neutrality*

In seeking to address the myriad of problems with the law on sexual offences the government commissioned a review of existing law on sexual offences in 1999 to make recommendations for legal and policy reform. As detailed in chapter one, this culminated in the SOA’s passage in 2003 and was preceded by a review consultation document entitled *Setting the Boundaries* (‘the review’), which outlined the proposed changes to the SOA and associated rationale.<sup>24</sup> The review aspired

---

<sup>24</sup> Home Office, *Setting the Boundaries*, above n 2. Refer to chapter one pp. 29-35 for an in depth discussion of the review.



with its proposals to ‘provide a framework of law that will deter and prevent sexual violence from happening, enable perpetrators to be prosecuted fairly and to provide justice to victims’.<sup>25</sup> It was guided in its recommendations by three key themes: protection, fairness and justice. In justifying its second theme of ‘fairness’ the review said:

In looking at the present law, and considering proposals for reform, the review adopted a set of principles which reflected the requirements of the European Convention on Human Rights and the overarching commitment of the Government to equality and fairness. It was an important part of our task to recommend a law that was self-evidently fair to all sections of society, and which made no unnecessary distinctions on the basis of gender or sexual orientation. We saw this as a positive contribution to achieving a ‘safe, just and tolerant society’.<sup>26</sup>

The review was thus very much guided by a traditional notion of legal equality which sought, as far as possible, to draw a Rawlsian veil over the citizenry and dispense justice without fear or favour. This commitment to fairness via the figure of the neutered liberal citizen manifested itself in a number of ways throughout the report with specific regard to the discussion of and recommendations for the reform of the law of rape. So while noting that the victims of sexual violence and coercion are mainly women, the review was careful to maintain that ‘the law needs to be framed on the basis that offenders and victims can be of either sex...’ and so it recommended the creation of ‘offences that are gender neutral in their application, unless there was good reason to do otherwise’.<sup>27</sup> The commitment to gender neutrality is seen in its starkest terms in the rape provision (section 1) of the SOA where the defendant is termed ‘person (A)’ and the victim ‘person (B)’; the relevant enquiry being whether person A penetrated (with a penis) the relevant orifice of person B, without consent, with the requisite intention. Section 1 then is a sort-of ‘half-way house’ approach to gender neutrality whereby only men can be charged as principals with rape, but both men and women (whether or not these designations represent their birth sex) can be complainants of rape.

This move towards gender neutrality in the language of rape statutes throughout the western world has been the subject of much debate in legal and feminist circles. Most of the

---

<sup>25</sup> Home Office, *Setting the Boundaries*, above n 2, 3.

<sup>26</sup> *ibid.*

<sup>27</sup> *ibid.* iv.

positive responses to these changes echo the liberal principles of the review above, emphasising the broader access to protection and justice that neutrality represents. These benefits are elaborated clearly by Louise du Toit in an article published in 2012.<sup>28</sup> Discussing South African law specifically, and arguing ultimately against gender neutrality in rape laws, du Toit first considers the advantages she sees of gender neutrality in rape law.<sup>29</sup> First is the acknowledgment and inclusion of male victims of rape that neutrality affords.<sup>30</sup> Du Toit also considers the inclusion in South Africa of women perpetrators an advantage, particularly given evidence of the role of some women in perpetrating and facilitating rape during war time. The inclusion in statute of women as perpetrators also entails an important acknowledgement of ‘women as sexual agents and as capable of aggression and violence, even sexual violence’.<sup>31</sup> Another advantage, suggests du Toit, is that the South African Act extends the definition of rape past penile penetration of the vagina with the penis to other penetrative injuries and other bodily orifices, the recognition of which is to be welcomed.<sup>32</sup> Lastly, du Toit notes her hope that the new gender neutral statute might help disrupt the rigid boundaries of sexuality ascribed to men and women which serve to embed ‘a naturalised sexual hierarchy of male sexual domination in which female rape injury becomes hard to detect.’

Within this hierarchy, rape is naturalised, normalised and thus trivialised ... The explicit inclusion of men as potential rape victims may thus contribute to an enhanced status for female rape victims, because rape is no longer viewed as ‘merely a women’s issue’, but is recognised as a social or shared *human* problem. Of course, it should be possible to acknowledge that rape is typically although not exclusively a women’s issue and at the same time a *human* concern, but the still pervasive symbolic order which constructs human sexuality as a hierarchical binary, makes this difficult to achieve.<sup>33</sup>

---

<sup>28</sup> Louise du Toit ‘Sexual specificity, rape law reform and the feminist quest for justice’ (2012) 31(2) *South African Journal of Philosophy* 465.

<sup>29</sup> See 18 No. 30599 Government Gazette, 14 December 2007 Act No. 32, 2007 Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007 (South Africa).

<sup>30</sup> Du Toit, ‘Sexual specificity’, above n 28, 466.

<sup>31</sup> *ibid* 467.

<sup>32</sup> *ibid* 467.

<sup>33</sup> *ibid*, citations omitted.

While many of these advantages are echoed and welcomed by feminists, the weight of academic opinion appears to be ultimately against gender neutral laws. Familiar arguments against are that gender neutrality in rape functions to disguise the reality of predominantly female victimisation, that it enforces a 'non-neutral status quo',<sup>34</sup> and that it discourages or stymies a gendered analysis of law.<sup>35</sup> Patricia Novotny argues that gender neutrality has the effect of disguising the victimisation of women by assimilating their concerns as rape victims into a broader collective concern that may or may not fragment or disable dominant sexual paradigms of female passivity and male dominance.<sup>36</sup> Similarly, Ngaire Naffine is critical of the 'crude' reversal and reciprocity of sex rights and responsibilities in modern liberal rape law through gender neutral language which, she argues, fails to extinguish, but serves to mystify, women's unequal gendered reality.<sup>37</sup> Annabelle Mooney argues that gender neutrality in rape law fails to annul linguistic discrimination against women in the courtroom, the privileging of patriarchal norms, or the existence of sexist behaviour and attitudes.<sup>38</sup> The 'gender problem' in rape law, she argues, is 'not simply one of representation, but one of experience lived and corporeal'.<sup>39</sup> Ann Cahill has also written in opposition to gender neutrality in

---

<sup>34</sup> Catharine MacKinnon, 'Liberalism and the death of feminism' in Dorchen Leidholdt & Janice Raymond (eds) *The Sexual Liberals and the Attack on Feminism* (Teachers College Press 1990) 3-13, 12. See also Susan Estrich, *Real Rape* (Harvard University Press 1987) 82.

<sup>35</sup> Christine Boyle, 'Sexual assault and the feminist judge'. (1985) 1 *Canadian Journal of Women and the Law* 93.

<sup>36</sup> Patricia Novotny, 'Rape victims in the (gender) neutral zone: The assimilation of resistance?' (2003) 1 *Seattle Journal for Social Justice* 743, 751.

<sup>37</sup> Ngaire Naffine, 'Possession: Erotic love in the law of rape' (1994) 57 *Modern Law Review* 10, 25. See also Annabelle Mooney, 'When a woman needs to be seen, heard and written as a woman: rape, law and an argument against gender neutral language' (2006) 19 *International Journal for the Semiotics of Law* 39, 62.

<sup>38</sup> Mooney, above n 37, 41-42.

<sup>39</sup> *ibid* 43. Cf: Philip Rumney, 'In defence of gender neutrality within rape' (2007) 6 *Seattle Journal of Social Justice* 481; Philip Rumney, 'Gender neutrality, rape and trial talk' (2008) 21 *International Journal of Semiotics and Law* 139; Philip Rumney & Martin Morgan-Taylor, 'Recognizing the male victim: Gender neutrality and the law of rape: Part one' (1997) 26 *Anglo-American Law Review* 198; Philip Rumney, 'Recognizing the male victim: Gender neutrality and the law of rape: Part two' (1997) 26 *Anglo-American Law Review* 330. Philip Rumney has argued passionately against feminist objections to gender neutrality in rape law around the world. In his analysis, gender neutrality in rape law simply extends the protection of the criminal law to all persons and 'reflects modern understandings of the nature, effects, and dynamics of nonconsensual penetrative sex acts, and is an evidence-led means of appropriately labeling criminal conduct' (Rumney, 'In defence of gender neutrality within rape', 481). Neutrality does not seek to harm women or erase their experience, but simply reflects and acknowledges the evidence of male victimisation. Underpinning Rumney's position is his insistent dismissal of feminist arguments against gender neutrality in rape law based on what he labels 'theory' in favour of his own account, which he terms 'reality' – 'grounded in the wider legal and social science literature'

rape law. In her analysis gender neutrality 'obfuscate[s] the force of sexual politics entirely, and ... reduce[s] rape only to a set of meanings that have currency in a masculinist field, and that are likely, perhaps certain, to be incapable of accurately describing women's experiences.'<sup>40</sup> There can, therefore, be no interchange of the experience of rape for men and women because the negotiation of heterosexual sex is saturated with sexualised power dynamics which function to enforce a hierarchy between men and women.

...[T]he violence and the power present in the act of rape are particularly sexualized; they gain, at least in part and perhaps entirely, their meaning from a particular sexual hierarchy. Considering rape free from its sexed and gendered meanings is to miss the mark entirely. While the play of gender biases served to silence women's experiences, an attempt at gender neutrality would almost certainly have similar results.<sup>41</sup>

Following Irigaray, I argue that we must interpret the effacement of woman from section 1 of the SOA against a backdrop of a systemic historic effacement of woman as subject from law and culture in favour of an ostensibly universal subject. In section 1 of the SOA woman has no law specific to her through which her sexually differentiated self, and the damage to that self as the result of rape, can be expressed. The consequences of this erasure are potentially far-reaching. As du Toit points out, the effacement of woman's specificity in gender neutral law may serve to hide, and thereby reinforce, 'covert but lingering gender assumptions concerning the construction of rape perpetrator and victim around masculine-dominant and feminine-subordinate sexualities respectively'.<sup>42</sup> This may impact subjects on *either* side of the justice divide:

On the rape perpetrator side, such covert male-biased understandings may lead to a distortion of female perpetrators and their agency ..., because female perpetrators of rape are viewed very differently from the implicit norm of male perpetrators of rape. For instance, women perpetrators of rape-as-genocidal-violence are portrayed as 'crazier and more monstrous than the men they act with or alongside' ..., and their actions are thought to emanate from their excessive or distorted femaleness.<sup>43</sup>

---

(ibid). Gender neutrality in his argument 'does not prevent the gendered analysis of rape', but is 'a means of appropriately labeling conduct that is similar in nature and effect.' (ibid 482-484).

<sup>40</sup> Ann J. Cahill, *Rethinking Rape* (Cornell University Press 2001) 35.

<sup>41</sup> ibid 36.

<sup>42</sup> Du Toit, 'Sexual Specificity', above n 28, 469.

<sup>43</sup> ibid 468, citations omitted.

Moreover, she argues, the retention of the consent standard within the law is likely to mean that the victim of rape, whatever their gender, will be feminised, given that the role of consenting party in the (hetero)sexual exchange is 'seen as the appropriate form of weak sexual agency for those designated 'female' or 'feminine'.<sup>44</sup>

In my argument, the need for a law respectful of sexual difference is of particular symbolic importance in a statute on rape; an offence in which the sex of the relevant parties is of central importance and which carries with it a particular social, cultural and historical meaning for women. Women's behaviour is at the centre of socio-cultural scripts which determine whether a complainant is believed or not when she alleges rape, and therefore whether the law chooses to attribute 'truth' to her claim or not. As seen in chapter one, the interpretation of this behaviour is linked back to historically invested notions of appropriate female sexuality as chaste and as the property of her father or husband. Non-compliant behaviour that calls these notions into question increases the rate of attrition and decreases the likelihood of successful prosecution,<sup>45</sup> and continues to heavily influence juror deliberation.<sup>46</sup> The historic construction of woman as weak, confused, emotional, but also sexually vociferous continues to undermine her claims to credibility before the law through its legacy in the popular ubiquity of rape myths like 'no means yes', and the pervasive belief that women frequently fabricate claims of rape to obviate their clear responsibility for their unruly bodies. In addition to these realities faced by women who enter the criminal justice system in the aftermath of rape, the fear of rape continues to limit many women's use of public and private space.<sup>47</sup>

In addition to these personal and institutional responses to women's behaviour and bodily comportment are the differential meanings and effects of rape on the unconscious of men and

---

<sup>44</sup> *ibid.*

<sup>45</sup> Refer to citations above n 13.

<sup>46</sup> Refer to citations above n 15.

<sup>47</sup> Cahill, above n 40, 159; Margaret Gordon & Stephanie Riger, *The female fear: The social cost of rape* (University of Illinois Press 1989); Esther Madriz, *Nothing bad happens to good girls: Fear of crime in women's lives* (University of California Press 1997); Mark Warr, 'Fear of rape among urban women' (1985) *Social problems* 238.

women within the dominant symbolic order. I agree with Cahill that an experience of rape cannot be reduced to a single model, nor separated from its particular historical and cultural context, but this is not just the case because of any essential characteristics of manhood or womanhood. It is so because it replicates a reduction of all difference to an economy of the same and this has implications not just for the representation of an experience but also for the very capacity to *think* and to articulate that harm which is obfuscated by gender neutrality. As du Toit explains, the abjection of the body caused by the act of rape cannot be generalised to all bodies similarly. The abjection of women during rape occurs against a backdrop of a body *already* coded as abject; as waste, excess and mere matter.

Women are forced through rape into a shameful complicity with their own demise as subjects and forced to acknowledge on a deep level that a woman's body particulars - her body as sex object - is incompatible with full humanity.<sup>48</sup>

By contrast, says du Toit, while the male victim is abjected in his feminisation during rape, this is not directly comparable to the female victim because his 'shame and injury cannot depend on the pervasive symbolic abjection of his body particulars, because those are still the valorised male particulars'.

There is thus not a similar moment of recognition for the male rape victim, and he is likely to see the road to the recovery of his humanity as leading through a recovery or reconstitution of his masculinity, which in our symbolic order is closely aligned with the ability to overcome or subjugate the feminine.<sup>49</sup>

The perpetuation of the sexual indifference of law under the guise of legal equality with its erasure of the sex of the victim is thus also an erasure of the gendered harm visited on the victim of rape. As du Toit points out, 'The rape of women is so devastatingly effective, because it reminds women of something they have always known, namely the sex-specific fragility of their selfhood'.<sup>50</sup>

---

<sup>48</sup> Du Toit, 'Sexual Specificity', above n 28, 474.

<sup>49</sup> *ibid* 475

<sup>50</sup> Louise du Toit, *A Philosophical Investigation of Rape: The Making and Unmaking of the Feminine Self* (Routledge 2009) 5.

Women and girls are targeted for rape *because* they are female/feminine; if this is lost from sight in a strictly gender neutral approach to rape, rape is misconstrued as a purely private, arbitrary crime detached from systems of gender oppression.<sup>51</sup>

In such a rendering of the victim of rape as a sexually neutral subject the harm of rape is conceptualised as simple equivalency. In the language of section 1, the harm to person B in one case, is the same as the harm to person B in another case, whether those victims are male or female. Woman is thus written into the law of rape not as woman but as male equivalent within an economy of the same.

These points are not raised to suggest that male or transgender victims of rape should be excluded from protection from the crime of rape; the unique experience of rape for a man is also elided by section 1. Nor is this argument addressed at somehow ranking the harm of rape to men and women, respectively. It is about asserting that that harm is different because of women's disproportionate victimisation, the historical legacy of rape for women and because of sexual difference, and suggesting a historically contextual approach to law-making that is respectful of that difference.

In its discussion of who should be able to be prosecuted for rape the review panel abandoned its presumption of gender neutrality when it recommended an exclusive male defendant.<sup>52</sup> This was in acknowledgement of the seriousness of penile penetrative assault:

We felt rape was clearly understood by the public as an offence that was committed by men on women and on men. We felt that the offence of penile penetration was of a particularly personal kind, it carried risks of pregnancy and disease transmission and should properly be treated separately from other penetrative assaults.<sup>53</sup>

---

<sup>51</sup> Du Toit, 'Sexual specificity', above n 28, 470.

<sup>52</sup> Cf: Philip Rumney, 'The review of the sex offences and rape law reform: Another false dawn?' (2001) 64(6) *Modern Law Review* 890, 896 and; Jennifer Temkin, *Rape and the legal process* (OUP 2002) 60-62, heavily criticising the review panel for failing to acknowledge incidences of female perpetrated rape, arguing that the panel was not 'equal enough' given its professed '...overarching commitment...to equality and fairness' (Home Office, *Setting the Boundaries*, above n 2, 3).

<sup>53</sup> Home Office, *Setting the Boundaries*, above n 2, 15.

In my argument the review overlooks similarly compelling reasons to maintain gendered language in the text of the statute. Simultaneously, the review occupies an ultimately contradictory position with respect to its declaration that penetrative penile assault is a special case. The implications of its move to gender neutral language and, incidentally, the irony of the review's focus on the meaning of the penis as weapon are also revealed by closer attention to the discourse of gender neutrality. While the penis is clearly gendered in the review's consideration, the other body parts and organs mentioned by section 1 (the anus and mouth) apparently are not. In this way, '...gender neutrality seems to discourage consideration of sex-specific aspects of human embodiment'.<sup>54</sup> While the SOA retains the terms 'penis' and 'vagina' these organs are possessed by undifferentiated beings ('A' and 'B'), where 'A' is in possession of a penetrative penile weapon, and 'B' an inherently penetrable and passive vagina/anus/mouth. The flaw inherent in this formulation is revealed, as du Toit points out, in the case of a male rape victim whose supposedly weaponised 'penis may be symbolically castrated, rendered 'useless' through the rape, as his sexuality may be feminised and rendered henceforth available for male appropriation'.<sup>55</sup>

The half-way house approach the SOA adopts with respect to gender neutrality occupies a wholly unsatisfactory conceptual position. In its haste to both recognise the symbolic coding of the penis as the weapon through which the specific harm of rape is enacted, and extend the protection of the law by erasing the sexuate identity of the rape victim, it renders its own conceptual framework incoherent. It is incoherent because it simultaneously fixes certain subject positions in law - the acquisitive, penis-wielding perpetrator and the passive, consenting, orifice-possessing victim - whilst also stripping those subjects of the sexuate identity which might help them to make sense of that subject position. In the end gender neutrality serves no deconstructive or 'progressive' purpose but rather shrouds the reiteration of the logic of the same in the rhetoric of 'fairness' and

---

<sup>54</sup> Du Toit, 'Sexual specificity', above n 28, 472

<sup>55</sup> *ibid* 473.



‘protection’. The supreme irony being, of course, that woman’s subjectivity in this formulation remains that of defective man.

Gender neutrality is ultimately incoherent because it does away with the tools through which we might seek to better understand what rape means and what the harm of rape is. As Irigaray shows, the double universal is necessary to provide woman with a civic identity that a legacy of phallogentrism has denied her; it has symbolic importance but it is also facilitative. Similarly, law’s role in the regulation of sexual conduct cannot be limited to merely one of ‘appropriately labelling criminal conduct’.<sup>56</sup> One of these roles must be to protect the symbolic importance of the double universal and to safeguard woman’s entitlement to her own sexual identity. In failing to do this the SOA fails to provide a law appropriate to woman in her own particularity, further effacing woman’s tenuous entitlement to her own becoming and an adequate expression of its disruption in the aftermath of rape. For these reasons, gender neutrality cannot ‘safeguard against the effective influence of pervasive and enduring symbolic constructions pertaining to male and female sexuality and of a normalised hierarchical binary constructed between the two sexes, in particular where sexual relations are concerned’<sup>57</sup>

### *Sexual Autonomy*

One of Irigaray’s most insistent criticisms of the operation of patriarchal law is its overwhelming focus on the protection of property and its characterisation of the individual in terms of his or her relationship to ownership. This fixation with the subject/object relation is at the expense of law that regulates relations between and amongst persons. Law, she argues, is ‘defined from the standpoint of the accumulation and ownership of property, thus from a position of relative exteriority in

---

<sup>56</sup> Rumney, ‘In defence of gender neutrality within rape’, above n 39, 481.

<sup>57</sup> Du Toit, ‘Sexual specificity’, above n 28, 465.

relation to persons'.<sup>58</sup> This has the effect of alienating subjectivity in possession, and prevents an elaboration of personhood in line with sexed belonging.

Underpinning the substantial changes in the SOA was an express commitment to better protecting the freedom of the individual to exercise autonomy in all matters sexual. It was in these terms that the review situated the 'wrong' of rape: 'We thought that rape and sexual assault are primarily crimes against the sexual autonomy of others. Every adult has the right and the responsibility to make decisions about their sexual conduct and to respect the rights of others'.<sup>59</sup> The debate surrounding the legislative framing of the crime of rape has often been couched in these terms of choice, freedom and autonomy, the key issue of contestation being the relative success or failure of the legislation to protect these entitlements. As Temkin argues:

Amongst those who influence the development of the law, it is still far from accepted that the overriding objective of the law of rape and allied offences should be the protection of sexual choice, that is to say, the protection of the right to choose, whether, when, and with whom to have sexual intercourse so long as that choice does not impinge on the same rights [of] others.<sup>60</sup>

The conception of sexual autonomy that the review endorses is linked to a specific characterisation of the legal person, or what Naffine has termed the 'naturalist' legal person.<sup>61</sup> This is the idea of the person as an 'enclosed, bounded and sovereign being' who exercises an inherent and naturally endowed right to physical self-governance of their own bodily property.<sup>62</sup> As Margaret Davies illustrates, that notion of the modern legal being as rational, self-determining, autonomous and self-owning is traceable back primarily to the work of John Locke on liberty and the individual.<sup>63</sup> Locke's theory of labour extends first from the principle that 'every Man has a *Property* in his own *Person*'.

---

<sup>58</sup> Luce Irigaray, *I love to you: sketch for a felicity within history* (Alison Martin tr, Routledge 1996) 53.

<sup>59</sup> Home Office, *Setting the Boundaries*, above n 2, 14.

<sup>60</sup> Temkin, *Rape and the legal process*, above n 52, 96.

<sup>61</sup> Ngaire Naffine, 'Women and the cast of legal persons' in Jackie Jones et al (eds) *Gender, Sexualities and Law* (Routledge 2011) 18.

<sup>62</sup> *ibid.* 18-19.

<sup>63</sup> Margaret Davies, *Property* (Routledge-Cavendish 2007) 87-96.

What man goes on to mix his labour with then, is properly his.<sup>64</sup> What is, however, immediately clear from a cursory reading of Locke on property is that his 'every Man' does not extend to every man, and certainly not to every woman. Locke expressly excluded from his formulation women, servants, and slaves, relying on an essential hierarchy informed by the public/private distinction and by race, class and gender.<sup>65</sup> While law has moved beyond these bright distinctions in theory at least, the old Lockean hierarchies, argues Davies, 'remain embedded in the symbolism and the broad cultural resonance of property.'

...[D]istinctions of gender, race and class still inflect what it means to be a person and a proprietor, and persons as proprietors remain one norm of a contemporary legal and political discourse. In other words the meaning of property and the meaning of the person remain intermingled in a network of racial, class and gender associations.<sup>66</sup>

The adoption of the rhetoric of self-ownership has arguably perpetuated the discrimination blatant in Locke's conception, and shrouded in the subtext of liberal law reform and the language of formal equality. Indeed, in multiple ways the law can be said to not just treat different persons differently but to '[diminish] the property rights over self of various sections of the population, while sustaining a rhetoric of universal self-ownership.'<sup>67</sup> This, I will argue, is certainly the case with complainants of rape.

This mode of self-governance gives way to a central contradiction which Davies and Naffine elaborate: 'How can it make sense to describe a single entity or being – the human being – as both the subject and object of property rights?'<sup>68</sup> The answer to this question seems to lie in the constructive split within the person into subject *and* object, or in Cartesian terms, mind and body.<sup>69</sup>

---

<sup>64</sup> John Locke, *Two Treatise on Government* (P Laslett ed, first published 1690, CUP 1988) 287-8, cited in *ibid* 89.

<sup>65</sup> Davies, above n 63, 90.

<sup>66</sup> *ibid* 91.

<sup>67</sup> Margaret Davies & Ngaire Naffine, *Are persons property? Legal debates about property and personality* (Ashgate 2001) 68.

<sup>68</sup> *ibid* 75.

<sup>69</sup> *ibid* 76-77.

‘The important thing for self-ownership is that the subject ‘I’ – the person as mind – should retain control of its object body; no one else should exercise this self-possession or self-control.’<sup>70</sup>

Jennifer Nedelsky describes the link, in the context of American constitutional law, between this autonomous bounded self of modern legal personhood and a conception of property by analogy to the architecture of modern dwellings.<sup>71</sup> From the paradigm of property rights at the foundation of the modern republic emerged a notion of human beings that envisioned freedom and security in terms of bounded spheres tied to bundles of rights; or the idea that autonomy consists of building protective walls around the individual. ‘Property provided an ideal symbol for this vision of autonomy, for it could both literally and figuratively provide the necessary walls’.<sup>72</sup> The propertied conception of the individual implies a conception of self-ownership that demands the mind exercise control over the body and that the body has the capacity to fend off unwanted intrusion. ‘Self-ownership, and hence autonomy, is lost when the flesh is no longer subject to one's own control or is surrendered to another’.<sup>73</sup> This conception is mobilised in law, as Blackstone imagined it, as a ‘legally-enforceable right to police the boundaries of the body’.<sup>74</sup>

That the offence of rape has its origins in the property crime of theft is a fact that makes Irigaray's critique above of the legally protected subject/object relation particularly pertinent. With its mediaeval genealogy in the Roman crime of ‘raptus’, the offence was a matter of civil law with the male guardian as plaintiff in his position as the injured party. The crime was thus traditionally understood foremost as a property crime, framed wholly within a context of male ownership of female sexuality. With the abolition of the last overt vestige of this rationale in the marital rape exemption,<sup>75</sup> modern rape law has moved towards a characterisation of the harm of rape as a wrong against the ‘sexual autonomy’ of the victim. However, in a very real sense this notion remains mired

---

<sup>70</sup> *ibid* 77.

<sup>71</sup> Jennifer Nedelsky, ‘Law, Boundaries, and the Bounded Self’ in Robert Post (ed) *Law and the Order of Culture*. (University of California Press 1991).

<sup>72</sup> *ibid* 167.

<sup>73</sup> Davies & Naffine, above n 67, 78.

<sup>74</sup> *ibid*.

<sup>75</sup> *R v R* [1992] 1 AC 599.

within a propertied conception of personhood that fails to adequately capture the harm of rape by disassociating it from its psychic and subjective impact and encouraging the 'simple' rape/ 'real' rape dichotomy.<sup>76</sup>

As the conception of the wrong of rape as a crime against the property rights of certain men has been socially and legally challenged it has been replaced with this modern notion of sexual autonomy which we see in the language of the review above. This is characterised as a universal concept to which all persons are equally entitled under law, thus shifting the ownership of the female body from the male owner to the woman herself.<sup>77</sup> Sexual autonomy in this reading is the inherent right of the bounded legal person with sovereign control over their bodily property. The wrong of rape then is the invasion and appropriation of that property without consent. Or in other words, the idea that I own the property of my person and that my right to dispose of that property in the way in which I choose is violated when I am raped.

Feminists who have considered the operation of this conception of sexual autonomy in the law of rape have criticised its failure to adequately articulate the harm involved in rape. Nicola Lacey has argued that a consequence of conceiving the harm of rape as a violation of 'sexual autonomy' is the erasure of the embodied or affective elements of rape:

...[T]he idea of harm communicated by the legal definition of rape is indeed a peculiarly mentalist, incorporeal one. Its essence lies in the violation of sexual autonomy understood as the right to determine sexual access to one's body. Thus it might be inferred that rape amounts to something between expropriation of a commodity [and] violation of a will. The ultimate trespass on the liberal legal subject's sexual personhood is that his sexuality is appropriated without his consent.<sup>78</sup>

What is needed instead, she argues, is a law of rape which adequately captures a conception of sexual integrity informed by a relational notion of autonomy which more fully accounts for the real

---

<sup>76</sup> Estrich, above n 34.

<sup>77</sup> Du Toit, *A Philosophical Investigation of Rape*, above n 50, 36.

<sup>78</sup> Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart 1998) 112.

damage of rape, ‘...the way in which rape violates its victims’ capacity to integrate psychic and bodily experiences’.<sup>79</sup>

Du Toit shares Lacey’s wariness of the object, property and commodity models of sexual autonomy, criticising its tendency to ‘separate out self from body and sexual identity from sexualised body’. On this model, she says, ‘rape leaves the true or mental self of the victim intact; it happens only to the inessential body which can be viewed as analogous to any piece of property.’

If rape is viewed in this light, it becomes very hard to prove that rape is very damaging to the selfhood of the victim, and that a huge amount of harm is inflicted, because ‘self’ and ‘body’ are sharply and problematically distinguished.<sup>80</sup>

Thus, she argues, it is simply impossible within the current patriarchal symbolic order to understand the harm of rape as the violent erasure of women’s sexual subjectivity because that order fundamentally and systematically denies and undermines women’s sexual subjectivity.<sup>81</sup> In doing so it is unable to comprehend the full, devastating damage of rape to the whole self of the victim, stuck as it is in a contractarian paradigm that limits sexual autonomy to ownership over body property.

This erroneous construction of the harm of rape has a number of consequences and may also serve to explain the continued distinction in the popular and penal imaginary between ‘simple’ and ‘real’ rape. Such a distinction implies that there is a hierarchy of rapes and that ‘simple’ rape, rape unaccompanied by extreme violence or perpetrated by a known or former intimate, is really ‘not that bad’, the implicit denial being that rape is harmful in and of itself.<sup>82</sup> If rape is seen as a violation of sexual autonomy conceived as the person’s freedom to withhold access to their bodily property, then a complainant who has previously granted access to her bodily property may see a diminution in the value attributed to that property the next time the question of access arises. So while the law might profess the need for fresh ‘free agreement’ (SOA section 74) in each instance of sexual activity, this is undermined by a concept of sexual autonomy linked inextricably to notions of

---

<sup>79</sup> *ibid* 118.

<sup>80</sup> Du Toit, *A Philosophical Investigation of Rape*, above n 50, 41.

<sup>81</sup> *ibid* 33.

<sup>82</sup> *ibid* 43.

property and associated ideas of depreciation, deflation and devaluation. Two quotes from prosecuting barristers asked in interviews about their views on the prosecution of rape in cases where the victim and defendant had had a previous relationship illustrate this point:

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

I feel very strongly about this. I feel very strongly that it's a great waste of public money to prosecute the ex-husband [for] rape or the ex-boyfriend [for] rape unless there is extreme violence involved or it's part of a sort of campaign of harassment. I have had to prosecute an awful lot of cases where people have still been sort of seeing each other after having a relationship, where he wants it and she doesn't and it happens. Well she says it was a rape and probably, yes, it really was. But frankly does it matter?<sup>83</sup>

The prosecutors quoted seem to accept as a strict legal matter that a rape in law has occurred, but that there is something about the circumstance of the rape, i.e. the existence of a prior relationship, which makes the harm to the victim somehow lesser than perhaps the classic 'real' rape scenario. If the wrong of rape is seen as a violation of your body property, if the property in your body has already been shared with that person or accessed by the person who then goes on to access your body on another occasion without permission, the value of your property is not being diminished in the same way as in the case where you are raped by someone who you have never encountered before. In the 'simple' rape scenario, the value attached to access to your body has diminished, and so the use-value in your body has diminished, in which case your sexual autonomy has not been violated to the same degree it would have been in the stranger rape or 'real' rape scenario. This rationale thus renders invisible the harm of rape to the sexual subjectivity of the victim, annexing as it does the victim's body from her broader being.

If the law is to have a role in inaugurating sexual difference, as Irigaray's critique suggests it must, the conceptual framework that underpins the notion of sexual autonomy must be rethought. Sexual autonomy and the extent of its violation in the act of rape cannot be quantified with

---

<sup>83</sup> Jennifer Temkin, 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27(2) *Journal of Law and Society* 219, 226.

reference to generic measures external to the person, instead that concept must be capable of capturing the individual harm of rape and in so doing, enable the elaboration of personhood in line with sexed belonging.

### *Consent*

As discussed in chapter one, the SOA brought in for the first time a statutory definition of consent designed to better assist the jury in determining what is in most cases, the key issue of contestation in the rape trial.<sup>84</sup> That definition is found in section 74 and reads: ‘...a person consents if he agrees by choice, and has the freedom and capacity to make that choice’. Consent had previously been interpreted with reference to ad hoc and decidedly opaque case law, and to the ‘good sense’ of the jury. The case of *Olugboja* illustrates one such interpretative directive.<sup>85</sup> That case concerned consent obtained by unspecified threats and the court considered the nature of consent and the process by which a jury should determine the existence of consent. The court took the view that while there was a difference between consent and submission, the line between the two was difficult to draw and ultimately the jury must just ‘apply their combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of th[e] case’.<sup>86</sup> The review sought to settle with section 74 the lack of clarity inherent in much of the case law, and to reiterate a commitment to sexual autonomy.

The vast majority of the case law on consent in rape has concerned the issue of capacity to consent, with cases frequently arising of instances where victims had been incapacitated or semi-conscious due to alcohol consumption and where courts have been asked to determine what the legal test was for determining first whether a complainant had the capacity to consent to sex, and

---

<sup>84</sup> See chapter one, p. 34.

<sup>85</sup> *R v Olugboja* [1982] QB 320.

<sup>86</sup> *ibid* 332.



second whether, given a complainant's capacity, or lack thereof, an accused had the required *mens rea* for rape. Early commentary on section 74 of the SOA, while noting the clear attempt of the legislature to acknowledge and take account of the surrounding circumstances in which consent occurs, instead of a focus on the single moment of assent, observed that it did not speak to the most difficult issues associated with determining 'freedom' or in settling capacity.<sup>87</sup> Sharon Cowan noted that section 74 provided no answers to questions that had plagued legal scholars before the SOA was brought in:

...[J]ust how free does a choice have to be before it is valid? What is the meaning of a genuine consent as opposed to acquiescence or submission? And what counts as free agreement in the face of non-violent coercion? ... [W]hat sorts of information must... a person have before she is said to have the freedom to make the choice?<sup>88</sup>

Cowan notes the case of *Gardner* in 2005, decided under the SOA, as an example of the continuing problem of 'having a vague definition of consent which is left open to case-by-case interpretation by individual judges and juries.'<sup>89</sup> In that case a 19-year old boy pleaded guilty to a charge of sexual activity with a child under section 9 of the SOA. The boy had admitted the digital penetration of the 14 year-old victim, who was drunk, knowing she was under the age of 16. The appeal was related to the length of the sentence. The court addressed the issue of consent during the appeal in dicta, stating that the facts of the case illustrated the defendant had a reasonable belief in consent and that that consent did in fact exist. Cowan comments on the implicit assumptions behind such a finding:

The finding that not only was there reasonable belief in consent, but that consent existed, albeit drunken and under-age, is open to fundamental challenge. A 14-year-old girl who is extremely drunk and vomiting at a party, unable to communicate with a defendant about what he wants to do (to her), nevertheless to the Court, does appear to have the capacity to make the choice to consent.<sup>90</sup>

---

<sup>87</sup> Sharon Cowan, "'Freedom and Capacity to Make a Choice': A Feminist Analysis of Consent in the Criminal Law of Rape" in Vanessa Munro & Carl Stychin (eds), *Sexuality and the Law: Feminist Engagements* (Routledge-Cavendish 2007) 55.

<sup>88</sup> *ibid.*

<sup>89</sup> *R v Gardner* [2005] EWCA Crim 1399.

<sup>90</sup> Cowan, above n 87, 57.

The supposedly determinative case of *Bree* on capacity and consent came in 2007 and was also decided under the new legislation.<sup>91</sup> That case was an appeal against judicial directions at trial on consent and held that if a complainant had temporarily lost her capacity to choose, she was not consenting and that would be rape. However, where a complainant voluntarily consumed substantial quantities of alcohol, but nevertheless remained capable of choosing, and agreed to have sex, that would not be rape. Noting that ‘the practical reality is that there are some areas of human behaviour which are inapt for detailed legislative structures’,<sup>92</sup> the Court emphasised that the question of whether a complainant was capable of consenting was once again for the jury to decide on the facts and with reference to their ‘good sense’.<sup>93</sup>

While to the legislature and judiciary *Bree* had settled the matter,<sup>94</sup> research into capacity and consent and the decision-making process of judges and jurors indicated that the issue was far from ‘clear’. For example, in Finch and Munro’s research into the attribution of blame in rape trials involving intoxicants, they found that the mock jurors attributed a high level of responsibility to complainants who were intoxicated, even when that intoxication was not entirely voluntary.<sup>95</sup> This logic had implications for the jurors’ assessments of consent: ‘[I]f a woman is responsible for her intoxicated behaviour, it follows that her intoxicated consent must be treated as valid.’<sup>96</sup> An example of this logic is deployed by a mock juror in Finch and Munro’s study in the context of applying the consent standard under section 74 of the SOA in a trial involving surreptitious strengthening of an alcoholic drink: ‘it’s this freedom and capacity isn’t it? If you deliberately put yourself into a situation in which your freedom or capacity is likely to be less, does that not affect

---

<sup>91</sup> *Bree* [2007] EWCA Crim 804

<sup>92</sup> *ibid* para 35.

<sup>93</sup> See also *R v H* [2007] EWCA Crim 2056; *Nathan Wright* [2007] EWCA Crim 3473.

<sup>94</sup> Criminal Justice System, ‘Convicting rapists and protecting victims - Government announces new measures’ (*The National Archives*, 7 November 2007) [http://webarchive.nationalarchives.gov.uk/20080107211140/http://cjsonline.gov.uk/the\\_cjs/whats\\_new/new\\_s-3624.html](http://webarchive.nationalarchives.gov.uk/20080107211140/http://cjsonline.gov.uk/the_cjs/whats_new/new_s-3624.html) accessed 10 August 2014.

<sup>95</sup> Emily Finch & Vanessa E. Munro, ‘The demon drink and the demonized woman: Socio-sexual stereotypes and responsibility attribution in rape trials involving intoxicants.’ (2007) 16(4) *Social & Legal Studies* 591.

<sup>96</sup> Alan Wertheimer, ‘Intoxicated Consent to Sexual Relations’ (2001) 20(4) *Law and Philosophy* 373, 374, cited *ibid* 600.

the situation?<sup>97</sup> This research seems to suggest that what is relevant here is less about capacity *in fact*, but about which party is to bear the moral responsibility for unwanted sex.

Anticipating, perhaps, continuing problems with capturing such an amorphous concept as consent through a vague definition, section 74 was accompanied in the SOA by sections 75 and 76. Those provisions detailed evidential and conclusive presumptions, respectively, against consent. If the prosecution could prove the existence of one of the circumstances in section 75, it would be established that the complainant did not consent and the defendant did not reasonably believe in that consent. However, the defendant would at that point be entitled to bring evidence to rebut the presumption.<sup>98</sup> By contrast, should the prosecution establish the existence of one of the circumstances detailed in section 76, a lack of consent and of reasonable belief in consent would be conclusively proved. The circumstances included in section 75 are as follows:

- (2) The circumstances are that—
  - (a) any person was, at the time of the relevant act or immediately before it began, *using violence* against the complainant or causing the complainant to fear that immediate violence would be used against him;
  - (b) any person was, at the time of the relevant act or immediately before it began, causing the complainant to fear that violence was being used, or that immediate *violence* would be used, *against another person*;
  - (c) the complainant was, and the defendant was not, *unlawfully detained* at the time of the relevant act;
  - (d) the complainant was *asleep or otherwise unconscious* at the time of the relevant act;
  - (e) because of the complainant's *physical disability*, the complainant *would not have been able at the time of the relevant act to communicate* to the defendant whether the complainant consented;
  - (f) any person had administered to or caused to be taken by the complainant, without the complainant's consent, a substance which, having regard to when it was administered or taken, was capable of causing or enabling the complainant to be *stupefied or overpowered* at the time of the relevant act.<sup>99</sup>

The circumstances included in section 76 are as follows and are limited to cases of consent obtained by fraud:

---

<sup>97</sup> Finch & Munro, above n 95, 601.

<sup>98</sup> *Shanjil Zhang* [2007] EWCA Crim 2018

<sup>99</sup> Emphasis added.

- (2) The circumstances are that—
- (a) the defendant intentionally deceived the complainant as to the *nature or purpose* of the relevant act;
  - (b) the defendant intentionally induced the complainant to consent to the relevant act by *impersonating a person known personally* to the complainant.<sup>100</sup>

Sections 75 and 76 were met with skepticism similar to that directed at section 74, shortly after they came into force. Ashworth and Temkin, commenting on the new ‘three-track’ approach of sections 74, 75 and 76, noted that by making the circumstances included in section 75 exhaustive, the legislature had left no room for further situations and circumstances to be added to the list.<sup>101</sup> They also noted that by specifying cases of consent obtained by fraud as being conclusive presumptions, the legislature had in effect created a hierarchy of circumstances in which consent was illegitimately obtained.

A preliminary question here is whether the types of fraud singled out by s.76(2) are necessarily the worst types of deception, compared with deception as to intentions, powers and other matters .... A more pressing question, however, is whether obtaining compliance by fraud or deception is worse than other ways of avoiding true consent, such as using threats or violence, administering drugs, or taking advantage of a sleeping or unconscious person. Obtaining compliance by using violence or threats of immediate violence seems no less heinous than doing so by deception, and yet the Act creates a conclusive presumption in the latter case and only a rebuttable presumption in the former.<sup>102</sup>

Ashworth and Temkin’s wariness of the implicit assumptions behind the two new provisions and their workability was subsequently borne out by the Government’s own stocktake which concluded that the presumptions had been infrequently utilised and had had little impact on prosecution of rape cases.<sup>103</sup> This was confirmed by research undertaken with prosecutors working under the new

---

<sup>100</sup> Emphasis added.

<sup>101</sup> Andrew Ashworth & Jennifer Temkin, ‘The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent’ [2004] *Criminal Law Review* 328, 339.

<sup>102</sup> *ibid* 337.

<sup>103</sup> Home Office, *Sexual Offences Act 2003: A Stocktake of the Effectiveness of the Act since its Implementation* (Home Office 2006) 17.

provisions who attested that the presumptions were 'rarely' used and sometimes intentionally 'side-tracked' and 'circumvented'.<sup>104</sup>

While the SOA's consent provisions were designed to clarify the law and to 'protect victims' they appear to have clarified very little. Finch and Munro's work suggests that jurors' individual attitudes and presumptions about blame and responsibility continue to subvert the law's intentions, while barristers and judges alike either did not appear to have the requisite knowledge of the new provisions, or did not trust them.<sup>105</sup> While these factors certainly appear to have thwarted the SOA's implementation, and notwithstanding the criticisms of Cowan and Ashworth and Temkin, there is again an assumption operating in some of the commentary on the consent provisions that if only the law could be put to work as it had been intended, free from the aberrant attitudes of jurors, and skepticism of criminal justice actors, it would serve as a benign force for good. It bears returning to the statute itself again to peer beneath the text to the conceptual framework through which these provisions were constructed and are operationalised.

In its lengthy consideration of consent, the review looked at the approaches of different jurisdictions to the construction of their relevant statutes on rape, finally settling on reiterating a commitment to the concept of consent: 'We concluded consent was the essential issue in sexual offences, and that the offences of rape and sexual assault were essentially those of violating another person's freedom to *withhold sexual contact*'.<sup>106</sup> The essence of the harm of rape according to the review then, is a harm against the autonomy and freedom of the rape victim. This is operationalised as a negative freedom; the freedom to 'say no'.<sup>107</sup> The review thus invokes an implicit construction of heterosexual sexual negotiations whereby woman (person B) consents or does not consent to sex, while man (person A) is the acquisitive penetrating party who ascertains consent. Feminists have

---

<sup>104</sup> Clare Gunby et al, 'Alcohol-related rape cases: Barristers' perspectives on the Sexual Offences Act 2003 and its impact on practice' (2010) 74(6) *Journal of Criminal Law* 579.

<sup>105</sup> *ibid.*

<sup>106</sup> Home Office, *Setting the Boundaries*, above n 2, 14, emphasis added.

<sup>107</sup> For a more detailed discussion of the link between autonomy and consent in the SOA see Vanessa E. Munro, 'Constructing consent: Legislating freedom and legitimating constraint in the expression of sexual autonomy.' (2008) 41 *Akron Law Review* 923.

long been critical of this extremely limited conception, or denial, of woman's sexual subjectivity in the law of rape, a denial that mirrors the act of rape itself. The only thing determining the line between 'normal' (heterosexual) sex and rape is the overt response of the victim to the defendant's (man's) actions. The default position this appears to presume then is that the person being penetrated wants sex, a presumption only rebutted if she communicates her lack of consent in such a way that the defendant cannot, in 'all the circumstances...reasonably believe' otherwise (SOA sections 1(1)(c) & 2). '[T]his type of rape law normalises male sexual agency as acquisitive, assertive, primary and active, even forceful, and female sexual agency as secondary, derivative, passive and responsive'.<sup>108</sup> Ngaire Naffine has criticised this construction of sexual relations as stuck in an 'old dream of symmetry implicit in the traditional form of "erotic love": the dream is that one party (the man) possesses another (a woman), who wishes only to be possessed'.<sup>109</sup>

In this construction of woman as man's defective other, woman's sexuality is written into law as static fixity. The only movement envisaged is straightforward reversal. In discussing its proposal for the inclusion of a definition of consent in what was to become section 74, the review noted that it wanted to avoid criticism like that offered by du Toit and Naffine of consent as something sought by the stronger party and given by the weaker. It noted that '[i]n today's world it is important to recognise that sexual partners are each responsible for their own actions and that there should be parity of status. In defining consent we are not seeking to *change* its meaning, rather to clarify the law so that it is clearly understood'.<sup>110</sup> This 'parity of status' presumably means that women 'should' also be able to act as the acquisitive party in (hetero)sexual negotiations. Naffine points out the Irigarayan critique of this logic when she notes that this view of sexual equality has changed 'neither the possessive form nor direction of sex... [but] ha[s] simply inverted this possessive relation without considering whether it is appropriate to regard the sex protected by

---

<sup>108</sup> Louise du Toit, 'The Conditions of Consent' in Rosemary Hunter & Sharon Cowan (eds) *Choice and Consent: Feminist Engagements with Law and Subjectivity* (Glasshouse 2007) 58-73, 61.

<sup>109</sup> Naffine, 'Possession', above n 37, 25.

<sup>110</sup> Home Office, *Setting the Boundaries*, above n 2, 17.

such law as possession'.<sup>111</sup> In this way, the consent paradigm present in the SOA is still one very much enmeshed in an economy of the same in which sexual equality is conceived entirely through a phallogocratic paradigm.

The sex of rape is self-identical, is at one with the sexuality of the initiator conceived as legal and sexual subject. It is never about two distinctive beings who are cherished in their distinctiveness... Nowhere is there a sense of sexual autonomy as mutuality, as mutual transformation. ... In modern rape law...there is no sense of sexual difference, of sexual specificity: of men and women as two sexes and sexed beings. We must say, therefore, that the sex of our rape law does not actually recognise two sexes. In modern rape law, there is no such thing as sexual difference...<sup>112</sup>

What this critique of the conceptual framework underpinning the consent provisions in the SOA reveals is the way in which, while ostensibly 'clarifying' the law to enable more successful prosecutions for sexual offences and to make it easier for juries to understand consent, the legislature actually reiterates a commitment to the sexual indifference of law. The consent provisions, structured as they are, continue to enable overt discrimination against rape complaints by covertly maintaining their fidelity to the dominant phallogocratic paradigm which dictates the boundaries and limits of acceptable sex based on a singular masculine subjectivity.

## **Conclusion**

Just prior to its passing in 2003, the SOA was feted as a law that was 'fit for the 21st century [and] that provide[s] confidence and protection and remain[s] true to the time honoured and accepted parameters of a free and civilised society'.<sup>113</sup> It purported to fulfill these aims by delivering on the promise of liberal legalism. Within that framework equality as sameness was invoked in order to extend the protection of the law to those who had been previously denied it, and to instill a regime that reflected the values of fairness upon which the constitution of the modern criminal justice

---

<sup>111</sup> Naffine, 'Possession', above n 37, 25.

<sup>112</sup> *ibid* 32-33.

<sup>113</sup> Home Office, *Protecting the Public*, above n 1, 5.

system was based. While this conceptual framework was coherent to the extent that it was implemented in the rape provisions of the SOA, the problem was that it supported a regime that has failed on its own measures. In my argument, this is not primarily because of its inconsistent application or the attitudes of those who have been charged with its implementation, but because it remains mired in a morass of sexual indifference in which woman continues to be constructed as man's other. The basis upon which its provisions proceed are *at their inception* already closed to the cognisance of the other, and this means that logic of the same which denies woman's subjectivity remains untroubled and continues to support the conditions under which rape occurs and attrition rates soar.

In this chapter I have argued that Irigaray's critique of western history and philosophy helps to expose the 'blind spot' of the current law of rape in the SOA and its sexual indifference. I illustrated this sexual indifference with reference to three aspects of the rape provisions in the SOA. First, I argued that the half-way house approach to gender neutrality that the SOA adopts is both incoherent on its own terms, but also serves to continue the historic effacement of woman from history and culture in preference for a universal masculine subject. This has significant consequences for how we understand what rape means and what the specific sexual harm of rape is for women because it reduces all difference to sameness, thus failing to provide a law appropriate to woman in her own particularity. Second, I addressed the concept of sexual autonomy inherent in the SOA's formulation, arguing that it remains attached to an understanding of propertied personhood, long criticised in feminist theory as inadequate to capturing the unique harm of rape for women. I argued that it exacerbates the dichotomy between simple and real rape by implicitly attaching specific value to different types of violations, making it doubly difficult for women to represent the harm of rape to law. Finally, I looked at the consent provisions in the statute. I argued that while the legislature attempted to clarify the law relating to consent with a view to increasing successful criminal justice outcomes, it both failed to do this while also affirming a standard in law



that is beholden to the dominant phallogocratic paradigm which enables the discriminatory attitudes adopted by criminal justice actors to deny those outcomes.

The implications of this critique for law are potentially far-reaching. They imply that absent a radical re-thinking of subjecthood, autonomy and becoming the law reform in its liberal manifestation is unlikely to have a lasting or effective impact on criminal justice outcomes. As Irigaray's critique illustrates, in the instance of consent, for example, instilling woman with her own sexual subjectivity cannot be achieved by simply reversing the possessive paradigm. What is required is a space for woman to think her own sexuality; what it might mean for woman to say 'yes', as woman. The conceptual framework upon which the law is currently based prevents it from seeing the harm of rape or from conceiving of woman's difference as anything other than a defective variation of the same. It effaces woman's specificity leaving her suspended in an ahistorical space in which the unique and gendered meaning of rape for women is also erased. In the next chapter I will continue this investigation of the phallogocratic origins of rape law with an analysis of the implementation of the SOA in the trial space.

# Chapter Six: Law's *Logos*/Woman's Voice

---

## Introduction

Feminist research into the experience of complainants as they give evidence during the rape trial has consistently illustrated the institutional impediments they face when attempting to represent their story to and through law.<sup>1</sup> The micro-techniques of legal discourse which operate imperceptibly, but incredibly effectively, to variously silence, discipline and cow the rape complainant during the trial have also been extensively catalogued.<sup>2</sup> In this chapter I consider this literature again with reference to the conceptual critique of rape law already elaborated. I argue that the structural bias inherent in the courtroom process exacerbates and compounds the cultural consequences of sexual indifference by giving it a new legitimacy through the *logos* of law. Contrary to Gregory Matoesian's conclusions on the ready severability of 'patriarchal ideology' from legal discourse, I argue, with reference to Irigaray's critical reading of the phallogocentric symbolic, that law is always already inured within and in thrall to the masculine *logos*. I situate this critique within a broader consideration of legal

---

<sup>1</sup> Kristin Bumiller, *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement Against Sexual Violence* (Duke University Press 2008); Liz Kelly et al., A gap or a chasm? Attrition in reported rape cases (Home Office Research Study 293, 2005); Amanda Konradi, *Taking the Stand: Rape Survivors and the Prosecution of Rapists* (Praeger 2007); Wendy Larcombe, 'The "Ideal" Victim v Successful Rape Complainants: Not What you Might Expect' (2002) 10 *Feminist Legal Studies* 131; Jeanne Gregory & Sue Lees, 'Attrition in rape and sexual assault cases' (1996) 36(1) *British Journal of Criminology* 1; Sue Lees, *Ruling passions: sexual violence, reputation, and the law* (Open University 1997); Jennifer Temkin, *Rape and the legal process* (OUP 2002); Alison Young, 'Waste Land of the Law, the Wordless Song of the Rape Victim' (1998) 22 *Melbourne University Law Review* 442.

<sup>2</sup> John M. Conley & William M. O'Barr, *Just Words: Law, Language, and Power* (2<sup>nd</sup> edn, University of Chicago Press 2005); Susan Ehrlich, *Representing Rape: Language and sexual consent* (Routledge 2001); Gregory Matoesian, *Reproducing Rape Domination through Talk in the Courtroom* (University of Chicago Press 1993); Gregory Matoesian, *Law and the Language of Identity: Discourse in the William Kennedy Smith Rape Trial*, (OUP 2001); Gregory Matoesian, 'You Might Win the Battle but Lose the War: Multimodal, Interactive, and Extralinguistic Aspects of Witness Resistance' (2008) 36(3) *Journal of English Linguistics* 195; Gregory Matoesian 'Language and material conduct in legal discourse' (2013) 17(5) *Journal of Sociolinguistics* 634; Peggy Reeves Sanday, *A Woman Scorned: Acquaintance Rape on Trial* (University of California Press 1997); Andrew Taslitz, *Rape and the Culture of the Courtroom* (NYU 1999).

discourse arguing that a logically linked genealogy can be traced through which law has come to posit itself as an ordinary discourse by which *thinking* is very much conflated with *being*, or in other terms, law is conflated with justice. This has consequences both for woman's capacity to speak or represent the harm of rape to law, but also for law's ability to 'hear' woman's voice and objectively adjudicate in cases of rape. This chapter will argue that justice requires that law acknowledge the presence of two distinct and different subjects.

## **PART I**

### *Raped bodies/fragmented bodies*

To be silent is to appear without presence, it is to be an image without reference, it is to be nothing other than the visual, a sign that vanishes without a trace because it was never the mark of anything external to itself – it was simply what it was, a contingency, a woman.<sup>3</sup>

On 8 February 2013 Michael and Hilary Brewer were found guilty in Manchester Crown Court of five counts of indecent assault and not guilty on three further counts of indecent assault and one count of rape. The offences had occurred around 1980 when their victim, Frances Andrade, was 14 or 15 years old and a student at the Chetham School of Music in Manchester where Brewer was the director of music and a prominent member of the community. Andrade's mental health had declined rapidly in the year leading up to the trial, with the police advising her not to seek counselling or other support services lest it compromise her testimony.<sup>4</sup> After giving evidence at the trial, during which she was labelled a 'fantasist' by the defendant and repeatedly accused of lying by

---

<sup>3</sup> Peter Goodrich, *Oedipus Lex: Psychoanalysis, History, Law* (University of California Press 1995) 136-137.

<sup>4</sup> Elizabeth Sanderson & Tom Hendry, "My wife killed herself because she was on trial, not the choirmaster": Husband's anguished account of how abused wife spiralled [*sic*] to suicide after court ordeal' (10 Feb 2013) *Daily Mail Online* <http://www.dailymail.co.uk/news/article-2276229/Frances-Andrade-Husbands-anguished-account-abused-wife-spiralled-suicide-court-ordeal.html> (accessed 15 May 2014).

the defence barrister, she described the experience to a friend as like being ‘raped all over again’. Andrade said that she felt ‘fragmented’ and that not even a guilty verdict in the case would allay this feeling.<sup>5</sup> She committed suicide before the trial was concluded.

It is very painful to hear in her words the *pathos* of Andrade’s suffering, and words which were few; Andrade’s husband stated that she barely spoke at all for three days after her trial experience.<sup>6</sup> But in between this self-imposed silence, the silence after her courtroom ordeal and the ultimate silence of her death, I am interested to think about the imagery of fragmentation that Andrade evoked to describe how she felt. What does it mean to say that one feels ‘fragmented’ after one has testified to rape in a courtroom setting? What is it about the courtroom, the most prominent forum by which law dispenses ‘justice’, that induces this reaction; this feeling of disconnection, of alienation, of fragmentation? We can’t ask Andrade what she meant, and I don’t mean to put words into her mouth or to employ her words in a circular academic exercise for my own gratification which divorces them from their speaker. But I do mean to believe her when she testified to her rape, and to how she felt after she’d talked about it in court, and to take these words as the basis for an important and careful academic enquiry. Which is of course also, an important feminist methodology, or what I will argue is required by a feminist ethics of sexual difference.

The imagery of fragmentation that Andrade evoked in the aftermath of her rape trial is one that has been called up before by feminist scholars interrogating women’s experiences of the criminal justice system in the aftermath of rape. Alison Young in her famous article ‘The Wasteland of the Law’ evokes this imagery to describe the way in which women’s bodies are constituted as ‘disarticulated’, ‘discombobulated’, simultaneously sexual and violable during the course of the trial.<sup>7</sup> Through a reading of the women of TS Eliot’s ‘The Waste land’ Young draws similarities with the criminal law of rape which she says is ‘drenched with the same desire for the dissection of

---

<sup>5</sup> Helen Pidd & Philippa Ibbotson ‘Sexual abuse victim killed herself after giving evidence at choirmaster trial’ (*Guardian Online*, 8 Feb 2013) <http://www.theguardian.com/uk/2013/feb/08/sexual-abuse-victim-killed-herself-trial> (accessed 15 May 2014).

<sup>6</sup> Sanderson & Hendry, above n 4.

<sup>7</sup> Young, above n 1.

women's bodies...'.<sup>8</sup> Rape victims are often systematically stripped of their lived being-ness during the course of the trial, constructed instead as meaty, fleshy organisms that ebb and flow, and upon whom desire and meaning are projected and interpreted.

Kristin Bumiller has described this reduction of women to fragmented bodies in the courtroom during her analysis of two high profile rape trials in the United States.<sup>9</sup> Bumiller suggests that the process takes place first in the prosecution narration of events, where the female body is constructed as the scene or landscape for the interpretation of events. Through medical and scientific evidence of physical markers of the attack - including injuries and signs of resistance, and a description of contact with the defendant - 'bits' of a complainant's body are 'visualized as they become relevant'.<sup>10</sup> Bumiller notes a model of questioning in the trials she analysed which required the complainant to be very specific about what she saw and how she felt and how different parts of her body were positioned at different moments during the event. Bumiller describes this (de)construction of the complainant's body as a sustained process that erases her agency:

The medical and legal construction of events treats her body as a terrain of verifiability: first, it shows that harm has been inflicted, and second, its injuries reveal that she has offered resistance to the rape. This way of viewing the crime strips away her agency because she can report only what has been done to her body. In this way, what she has to say about the attack is only legally relevant to making the case if it also confirms what can be seen by spectators. The legal verification of rape in the courtroom diminishes her voice in contrast to the overwhelming presence of her body: she is voiceless form or mechanical woman. Without the victim's voice, the power of interpretation belongs to the law's vision of sexual crime. The legal filter of relevancy erases her own experience from a retelling of events that focuses on men's transgression against her body.<sup>11</sup>

Bumiller's description of the silencing effects of this process echoes Young's conclusions on the way that different projections of bodily 'texts' reveal the law's inability to 'hear' the narrative of rape complainants or indeed, she alleges, its intentional exclusion of these voices. Young's analysis illustrates the way in which implicative questioning during cross-examination works on a cumulative

---

<sup>8</sup> *ibid* 444.

<sup>9</sup> Bumiller, above n 1.

<sup>10</sup> *ibid* 44.

<sup>11</sup> *ibid* 46.

basis to pose a complete defence narrative of events, while simultaneously demolishing the victim's account heard during direct examination.<sup>12</sup> The victim's responses during cross-examination are rendered immaterial by their failure to halt the defence narrative, reproducing the insignificance of any 'no' uttered during the course of the rape.

A significant amount of feminist energy has been spent on cataloguing and exposing how various elements of the rape trial coalesce to constitute what is commonly referred to by complainants as a 'second rape'.<sup>13</sup> Carol Smart's work has been pioneering in illustrating the disjuncture within the trial space between law's 'truth' and women's experience.<sup>14</sup> Informed by a Foucauldian conception of power, Smart considered the ways in which legal method works to disqualify other forms of knowledge, including those informed by feminism.<sup>15</sup> This involved revealing the mechanisms by which 'law consistently fails to "understand" accounts of rape which do not fit with the narrowly constructed legal definition (or Truth) of rape.'<sup>16</sup>

The legal form through which women's accounts of rape are strained constitutes a very precise disqualification of women and women's sexuality. This 'precision' is imparted by the legal method that is deployed during the rape trial... [T]he rape trial distils all of the problems that feminists have identified in relation to law. Here we find the problem of legal method, the problems of the 'maleness' of law, the disqualification and disempowering of women, and the public celebration of all these things.<sup>17</sup>

Smart's primary criticism of legal method was its collusion with the binary system of logic which she said precluded a more complex understanding of rape. In court, a woman cannot simply 'tell her story'. The court process does violence to women's experiences by rendering incomprehensible their narrative of violation, 'except in those cases where her rape fits precisely with the legally

---

<sup>12</sup> Young, above n 1, 463-464.

<sup>13</sup> See for example: Susan Brownmiller, *Against our will: men, women and rape* (Penguin 1976); Sue Lees, *Carnal knowledge* (Women's Press 2002); Catherine A. MacKinnon, *Feminism unmodified: discourses on life and law* (Harvard University Press 1987); Catherine A. MacKinnon, 'Rape, Genocide and Women's Human Rights' in A. Stiglmeier (ed), *Mass Rape: The War Against Women in Bosnia-Herzegovina* (Bison Books 1994) 183; Catherine A. MacKinnon, *Are Women Human? And Other International Dialogues* (Harvard University Press 2006); Jennifer Temkin, *Rape and the legal process* (2nd edn OUP 2002).

<sup>14</sup> Carol Smart, *Feminism and the Power of Law* (Routledge, London 1989) 4

<sup>15</sup> *ibid* 6

<sup>16</sup> *ibid* 26

<sup>17</sup> *ibid* 26

acceptable notion of rape'.<sup>18</sup> In this way, law constructs the category 'Woman' as a unity, and the individual woman 'is subsumed into this single category...which is known to be capricious and mendacious.'<sup>19</sup>

In her later work, Smart focuses her critique on the way in which she says the law constructs woman as sex or the body.<sup>20</sup> This construction, in turn, deems these bodies 'problematic and disruptive of the modern social order.'<sup>21</sup> Smart's critique is of both the cultural myths that law helps perpetuate of the body as something 'simply given', and an interrogation of the meanings legal discourse has given these bodies. For Smart, the body 'is a site of cultural production where there are no self-evident meanings or functions.' Because of this, 'the way we experience our bodies, the meanings we give to them and the difference we perceive between them, are all historically and culturally located.'<sup>22</sup>

Smart contends that within legal discourse there are a number of essential constructions of women which appear again and again; when the law considers women it is inevitably in these forms. One such construction is the 'raped woman'.<sup>23</sup> In the criminal law, women's bodies are created as a site for unlawful practices. 'Women are a problem because their bodies invite unlawful behavior, or because their bodies escape the formal constraints that law attempts to impose on them.'<sup>24</sup> It is primarily the woman's body which is a site of contestation in the rape trial.

A woman's reason is invoked, but this reason is regarded as subordinate to her body... [F]or example, it is understood that while a woman's reason may say 'no' her body (apparently) can be saying 'yes' and it is this discontinuity between reason and unreason...which is seen as inviting the 'desire' which was enacted upon it. [Indeed] [r]ape, incest and unlawful sexual intercourse – as legal notions – are all premised upon the idea of acts performed on the female body. The man's body (penis) is his instrument, the woman is her body. Ironically, it is the latter which is regarded as dangerous, unstable, and vindictive. It is the latter which must be

---

<sup>18</sup> ibid 34.

<sup>19</sup> ibid 42.

<sup>20</sup> Carol Smart, *Law, Crime and Sexuality: Essays in Feminism* (Sage 1995) 221.

<sup>21</sup> ibid 222.

<sup>22</sup> ibid 224.

<sup>23</sup> ibid 221.

<sup>24</sup> ibid 224.

interrogated... It is her body which is constructed as unruly, as outside the bounds of social and legal convention.<sup>25</sup>

Because the law inscribes and reinscribes on women's bodies a predisposition to 'invite trouble', the trial becomes an interrogation into 'whether or not this trouble was self-induced or not'. The trial thus fails to 'subvert the idea that it is this body that is the problem. On the contrary, it continuously revisits this site to fix, ad nauseam, this meaning on the feminine body.'<sup>26</sup>

For Smart, the power of this textual analysis of the trial is its ability to 'see' the operation of law and its gendered implications in a new way. She cautions, however, against investing too much in this 'woman of legal discourse' at the expense of the voices of women who have actually been raped, stating that 'we must never forget that women discursively construct themselves.'<sup>27</sup> Smart has faced criticism for this part of her discussion for falling back on a transcendental female subject whose ontological status is somehow outside the constraints of law's fallacious construction.<sup>28</sup> Her pioneering insights, however, remain salient and gesture towards the two major sites of analysis upon which poststructuralist feminist critiques of the rape trial have developed.

One thing that is clear from the discussion above of the work of Young, Bumiller and Smart is the centrality of a consideration not only of the place of woman's narrative within the trial space, but the discursive forum through which it is channelled; that of legal discourse itself.

---

<sup>25</sup> Ibid.

<sup>26</sup> Ibid 225.

<sup>27</sup> Ibid 231.

<sup>28</sup> See Maria Drakopoulou, 'Postmodernism and Smart's Feminist Critical Project in *Law, Crime and Sexuality*' (1997) 1(1) *Feminist Legal Studies* 107 arguing that Smart's critique of legal discourse's 'raped woman' 'assumes that there is something in the accounts of really raped women which provides a valid reference point' upon which to base these arguments. 'Smart's postmodern feminism does not provide a way of avoiding either dogmatism or scepticism.' (p. 118)



Previous writers have looked at the issue of victim experience of the rape trial through several different frameworks and have assessed the use, distribution and effect of various discursive tools of legal discourse and courtroom parlance.<sup>29</sup> This work has variously illustrated how micro-techniques of legal discourse are marshalled in the service of destroying a complainant's ability to represent her story. Courtroom procedure empowers experts, lawyers and judges, linguistically over the witnesses they examine. A lawyer questioning a witness has considerable power to determine the sequence, pace and topic discussed and can interrupt and demand a witness conform to the terms of the dialogue as set. A lawyer may also request that a judge compel a witness to answer on pain of a holding of contempt. Witnesses have no comparable power. Thus, the structural arrangements of the court evidence palpable power asymmetries.<sup>30</sup> These asymmetries are most keenly observed in the context of the rape trial during the process of cross-examination. This is when linguistic and sequential capital is harnessed most effectively by defence barristers in the name of 'testing the veracity of the evidence' and during which a victim is in the most powerless position.

Gregory Matoesian's work is extremely important for its careful chronicling of the discursive process by which women's experience of rape is routinely re-scripted as consensual sex, by courtroom linguistic practices which become, he says, the 'ultimate weapon[s] of domination' during the rape trial.<sup>31</sup> His research reveals powerful 'sense-making practices' and procedures of talk at work during the trial. Lawyers 'control the topic, the syntactic form of questions, and the sequential resources with which to manipulate words, utterances, and turns ...' Because access to these tools of talk are not distributed equally amongst trial participants, defence lawyers in particular possess the '...linguistic and sequential capital to make his/her account [of the event] "count" relative to the

---

<sup>29</sup> Refer to work cited above n 2.

<sup>30</sup> Conley & O'Barr, above n 2, 21.

<sup>31</sup> Matoesian, *Reproducing Rape*, above n 2, 1.

victim.<sup>32</sup> Rape is reproduced, argues Matoesian, in real time ‘...through a multiplex of sequentially driven, institutionally anchored, and patriarchally organized forms of talk’.<sup>33</sup>

An important tenet of Matoesian’s schema is his insistence on the analytic distinction between ‘patriarchal modes of domination’ and ‘legal disciplinary regimes’. These intersect, he says, during the trial to ‘fashion the penetrating thrust of blame attributions against the victim’.<sup>34</sup> ‘Rape myths, techniques of neutralization, or, more generally, patriarchal ideologies provide the linguistic rationalizations and interpretive frameworks for assessing the rape incident: for making sense of what happened, and for legitimating the sexual scripts governing male-female interactions’.<sup>35</sup>

The legal system ‘constitutes a gendered mode of domination... which enshrines male predatory sexual activity as the normal model of sexuality while disqualifying the female’s individual and cultural experience of rape’.<sup>36</sup> However, this is attributable to the unique ‘convergence between law and patriarchal culture’ that occurs during the course of the rape trial. Courtroom talk, says Matoesian, is an autonomous system of disciplinary power, ‘a system with its own internal logic, interacting with, yet in large measure independent from, patriarchal ideology in the rape trial’.<sup>37</sup> The forcing of inconsistent testimony is a generic courtroom tactic that is used in most trials, ‘having nothing to do with patriarchy, even though drawing on patriarchal ideology in the rape trial’.<sup>37</sup>

In a very Foucauldian way, while the legal system interacts with and draws on patriarchy in the rape trial, as it does with other social structures like class and race, it is not reducible to patriarchy, or to any other social structure, but functions instead as a distinct micro-mode of domination, a strict disciplinary system possessing an internally autonomous logic of knowledge, epistemology, and talk.<sup>38</sup>

---

<sup>32</sup> *ibid* 2.

<sup>33</sup> *Ibid*.

<sup>34</sup> *Ibid*.

<sup>35</sup> *ibid* 13.

<sup>36</sup> *ibid* 17.

<sup>37</sup> *ibid* 20.

<sup>38</sup> *Ibid*.

Matoesian seems to complicate his analysis of the intersection of legal discourse in the rape trial with patriarchal ideology in later work.<sup>39</sup> In a painstaking analysis of the transcript of the William Kennedy Smith rape trial and associated media Matoesian exposes, in microscopic detail, how an array of strategies of legal method and trial rituals are 'contextually anchored and incrementally realized in discursive practice'.<sup>40</sup> The case concerned a prosecution for rape against William Kennedy Smith, the nephew of the late US President John F. Kennedy. In Matoesian's analysis the rhythms of domination and linguistic strategies that intersect in the trial space generate a gendered 'logic of inconsistency' which impacts disproportionately on a victim giving evidence.<sup>41</sup> Matoesian illustrates how the victim becomes complicit in her own subjection during the trial through engagement with what he calls the ascription of identities of sexual sameness/difference.<sup>42</sup>

In Matoesian's schema he illustrates how the logic of inconsistency operates to align certain behaviour through tools of trial 'talk' with 'the cultural demands of male sexual logic in a given context'. This illustrates, he says, 'an inconsistency between the victim's version of events and the expectations of patriarchal ideology governing victim identity'.<sup>43</sup> Another tool which generates this inconsistency is the use of what Matoesian calls sameness/difference logic. By this he means that sexual desire between the victim and defendant is said to calibrate through 'patriarchal sexual logic' before the alleged incident of rape, and then to diverge at a certain point subsequently. This functions to illustrate both the irrationality of the victim's logic but also the inherent rationality of patriarchal sexual logic.<sup>44</sup> For example, a defence barrister during the process of cross examination, 'sets the victim up via that logic to participate in an interactional process that contributes to her own undoing'.<sup>45</sup> By her very participation in and engagement with the topics and syntactic interaction of the specific mode of questioning, a victim tacitly affirms the relevance of certain topics, for example

---

<sup>39</sup> Matoesian, *Law and the Language of Identity*, above n 2.

<sup>40</sup> *ibid* 3.

<sup>41</sup> *ibid* 37.

<sup>42</sup> *ibid* 38.

<sup>43</sup> *ibid* 40.

<sup>44</sup> *ibid* 46.

<sup>45</sup> *ibid* 60.

the consumption of alcohol, the sexualised mode of dress or appearance and other social and cultural tropes that feed into certain rape myth narratives. The defendant, victim and jury, thus, have the 'same' idea of what is relevant and what the appropriate standard of behaviour is to be expected, which is then contrasted through defence cross-examination of the victim by her failure to perform these actions, and thus the irrationality or 'difference' of her logic.

In his analysis of the Kennedy Smith rape trial Matoesian thus recognises the role of legal method in reproducing and constructing gendered bodies. The 'patriarchal logic of sexual rationality' describes the 'situated rhythms of language in which the law and patriarchal hegemony are microcosmically embodied in and concealed through objective legal discourse'.<sup>46</sup> Law, in this formulation, seems more intimately implicated in a conspiracy with 'male-centred epistemology' to generate inconsistency in a victim's account of rape.<sup>47</sup> Notwithstanding this conceptual move, Matoesian maintains the analytic distinction between the 'cultural demands of male sexual logic in a given context',<sup>48</sup> and the linguistic and conversational patterns of talk within the courtroom which enable the specific constitution of the victim's account as inconsistent. However, he does seem to gesture towards an 'absorption' of 'patriarchal logic' into the master discourse of 'legal reasoning' during the trial:

...the epistemological hegemony of this linguistic ideology interacts with the legal field through the poetic structures of talk and the sexual order to appropriate or coopt a generic practical reasoning device – inconsistency – to disqualify the female experience of sexual violence and to naturalize its own arbitrary status. The patriarchal logic of sexual rationality disappears during the transformation from bodily experience to the legal field and then reemerges cloaked as a neutral form of cultural/legal reasoning.<sup>49</sup>

Matoesian's analysis illustrates with great effectiveness the real-time marginalisation and discrediting of woman's voice within the trial space. In my analysis it also clearly illustrates the constitution of woman by law in Luce Irigaray's terms as variously double, opposite and/or defective

---

<sup>46</sup> *ibid* 6.

<sup>47</sup> *ibid* 38.

<sup>48</sup> *ibid* 40.

<sup>49</sup> *ibid* 68.

man. As I will argue in Part III of this chapter, the women in Matoesian's research function as the irrationality that demonstrates the rationality of both masculine desire and law's *logos*. While I agree with Matoesian that the tools of legal method militate to generate a 'narrative of inconsistency' in which woman becomes implicated, this is not, in my analysis, an anomalous or inconsistent coincidence of legal method and patriarchal ideology. It is, rather, *the inevitable conclusion* of a system that refuses and erases woman whilst relying on her for the matter upon which its ego is built.

In Part III of this chapter I will re-interpret Matoesian's analytical reading of the dynamics of various discursive interactions occurring during the rape trial. Matoesian's work shows how the asymmetrical distribution of devices of discourse, and the specific deployment of procedures inherent to legal method, work to both silence and cow the complainant when she performs as witness. What Matoesian doesn't do, to the degree I argue is necessary at least, is think about *why* this process takes place and what conditions underpin, enable and maintain its logic.<sup>50</sup> This is important because while critical of legal method and its manifestation in the rape trial, Matoesian's framework leaves law itself insufficiently troubled.

Susan Ehrlich's work on rape, language and sexual consent, builds on the work of Matoesian and others to explore the broader sociological context in which trial discourse is generated.<sup>51</sup> In her book *Representing Rape*, she argues that it is not only the power and flow of 'talk' within the courtroom that revictimises rape victims, but 'rather its role in defining and delimiting the meanings that came to be attached to the events and subjects under scrutiny'.<sup>52</sup> Ehrlich traces an overarching interpretative framework in her analysis of adjudicative proceedings 'so seamless in its coverage that

---

<sup>50</sup> Matoesian is not overly concerned with the question of *why* rape occurs although he does appear to adopt the radical feminist explanation for sexual violence against women (*Reproducing Rape*, above n 2, 10-22), endorsing MacKinnon's position that rape is a function of the masculine demand for unfettered sexual access to women's bodies. 'The interpretation and discovery of rape are organized around the patriarchal standpoint. Hence, the force and coercion in rape are systematically concealed through the institutionalized power of law.' (ibid 19). He does not, however, spend time thinking about *how* this 'patriarchal standpoint' is generated in the first place.

<sup>51</sup> Ehrlich, above n 2.

<sup>52</sup> ibid 1.

[victims'] understandings of the events were rendered unrecognisable or imperceptible'.<sup>53</sup> This interpretative framework influences not only discursive practices but also the institutional settings in which these practices are generated. 'Institutional coerciveness' has a role in shaping and constraining the types of gendered identities that are produced within and outside the courtroom space.<sup>54</sup> Ehrlich is concerned with the ways in which trial talk represents and privileges masculine sexuality at the expense of women's sexual autonomy. These representations, she argues, 'transmit androcentric values... [yet also] shape and structure witnesses' own accounts of the events...'.<sup>55</sup> Thus, cross-examining questions not only 'reproduce rape' in the sense that Matoesian suggests, but 'they also perform substantive ideological work'.

Specifically, through the pseudo-declaratives and presuppositions embedded in questions – many of which were reformulations of complainants' previous propositions ... That is, although the complainants described their experiences as sexual assault, they were discursively represented and produced as 'passive' and 'ineffectual' agents, their so-called lack of resistance being construed as tantamount to consent.<sup>56</sup>

This transformation of the complainant into an ineffectual agent occurs at a micro-level during the trial and feeds into the construction of woman complainants in accordance with various tropes of women's sexuality which align with rape myths. This allows a complainant's narrative of violation to be rescripted as consensual sex,<sup>57</sup> and any residual disagreement between the parties' interpretations of the events to be dismissed as mere 'miscommunication'.<sup>58</sup> In Ehrlich's analysis legal discourse generates a contradiction in the production of gendered subject positions during the trial. These are distributed unequally amongst trial participants, with male perpetrators being afforded the weight of cultural intelligibility, and female victims very rarely extended the same 'latitude and range' of subject positions.

---

<sup>53</sup> Ibid.

<sup>54</sup> Ibid 4.

<sup>55</sup> Ibid 11.

<sup>56</sup> Ibid 76. Ehrlich's conclusions were based on her own analysis of the transcripts of criminal proceedings and University disciplinary tribunal proceedings against a single perpetrator by two complainants of sexual assault.

<sup>57</sup> Ibid 94. See also Nicola Gavey, *Just sex? The cultural scaffolding of rape* (Routledge 2005).

<sup>58</sup> Ehrlich, above n 2, 121-148. See also Hannah Frith, 'Sexual scripts, sexual refusals and rape', in Miranda Horvath and Jennifer Brown (eds) *Rape: Challenging contemporary thinking* (Willan 2009).

[Victims'] identities as 'ineffectual agents' are thrust upon them by a dominant discourse that constrained their possibilities for representing their strategic agency. Indeed the gendered subject positions made available [in the case of the male perpetrator] and thwarted (in the case of the complainants and their witnesses) within these institutional settings all worked in the service of the same goal: protecting a range of sexual prerogatives for [the perpetrator] at the expense of the complainants' sexual autonomy.<sup>59</sup>

This phenomenon exposes, argues Ehrlich, the ubiquity of 'hegemonic masculinity' and the performance of a particular sexuality that this entails.<sup>60</sup> This enables the male perpetrator in the cases that Ehrlich reviewed to rationalise his behaviour and interpretations of the particular situations with the complainants with the authority and 'cultural weight of a sexist and androcentric belief-system...'

While undoubtedly having access to [the victim's] perspective, that is, to her fear of sexual and physical violence that shaped her communicative acts of resistance, [the perpetrator] was able to strategically ignore such a perspective, given its culturally-subordinate status... Indeed, what [the perpetrator] and the tribunal characterized as 'miscommunication' [between the parties] is better understood as culturally-sanctioned ignorance.<sup>61</sup>

Ehrlich's methodology, compared with Matoesian's, is much more overtly reliant on feminist theory and linguistics,<sup>62</sup> which explains the cross-overs present in her analysis with other feminist work on women's experiences of the rape trial.<sup>63</sup> Her critical appraisal is more keenly attuned to the specific materiality of the gendered operation of language and identity and thus allows her to better think through the intersection of power and legal discourse in the strategic ignorance of women's experience of sexual violation during the rape trial.

In Part III, I will take Ehrlich's salient points further through tracing the emergence of the logic that supports and maintains a particular form of legal knowledge of women's sexuality and sexual violation. I argue that the law's unwillingness to interrogate its own unconscious and the

---

<sup>59</sup> Ehrlich, above n 2, 150.

<sup>60</sup> *ibid* 151.

<sup>61</sup> *ibid* 148.

<sup>62</sup> *ibid* 4-30.

<sup>63</sup> Refer to work cited above n 2.

willingness of Matoesian and other critical rape scholars<sup>64</sup> to leave untroubled law's complicity with the phallogocratic symbolic means that they are unable to see the way in which the law's inability to respond to the crime of rape is inured within its very fabric. If this is so, then Matoesian is wrong when he says that legal method is severable from 'patriarchy'; that law is always already existing above ideology in some pre-discursive void perverted by extra-legal considerations. Law does not simply 'interact' with patriarchy to produce the conditions under which women are systematically prevented from representing the harm of rape to law, but law is predicated for its own survival on the erasure of the difference that would enable this articulation. This has important consequences when it comes to consider the crime of rape but it also means that law is, at a very fundamental level, always already unable to appreciate and represent the harm of rape. In Part II I explicate the framework upon which I draw in elaborating this argument. I will go on to argue that in the depths of law's unconscious we can see a fidelity to what Irigaray argues is the systematic erasure of the feminine, made possible by what Peter Goodrich illustrates as the establishment of positive law as an originary discourse. It is in this very connection between law and the erasure of woman's difference that we find the basis upon which the rape trial space operates and, I argue, continues to be unable *at its very genesis*, to understand or hear woman's voice as she testifies to her trauma.

## **PART II**

### *Masculine Logos*

And interpreting them where they exhibit only their muteness means subjecting them to a language that exiles them at an increasing distance from what perhaps they would have said to

---

<sup>64</sup> See in particular Ann J. Cahill, *Rethinking Rape* (Cornell University Press, Ithaca 2001) and; Gavey, *Just sex?*, above n 57.



you, were already whispering to you. If only your ears were not so formless, so clogged with meaning(s), that they were closed to what does not in some way echo the already heard.<sup>65</sup>

In the throes of her mimetic exposure of the lie of phallographic discursive unity in *Speculum of the Other Woman*, Irigaray paused on the impossibility of woman's voice and remarked that 'it [was] still better to speak only in riddles, allusions, hints, parables.' Even if asked to clarify a few points. Even if people plead that they just don't understand. After all, she said, 'they never have understood'. Why not challenge the limits of speech, and of representation '[u]ntil the ear tunes into another music, the voice starts to sing again...'.<sup>66</sup> This exhortation in her earlier work to speak *through* difference is something with which Irigaray has continued to be concerned throughout her corpus. 'How does the subject come back to itself after having exiled itself within a discourse?', she asked in *To speak is never neutral*; '[t]his is the question of any era'.<sup>67</sup>

Irigaray's critique of masculine language systems follows logically from her broader critique of history and culture first elaborated 40 years ago in *Speculum*, and discussed at length in chapter three. Irigaray argues that systems of language and logic rather than being universal and neutral are set up and maintained to serve male interests. Irigaray's psychoanalytic reading of language is informed primarily by her insight that through a process of specularisation man projects his own ego on to the world which is then reflected back to him with his own image. Woman, as body and matter, stands in for that reflective mirror. It is the mother who is the primary support for the male imaginary, but because she also cannot be represented (because she *is* the mirror) she is symbolically murdered as part of the process by which man enters into culture.<sup>68</sup> Woman is therefore simultaneously erased within the specular economy whilst also an integral part upon which it is founded. This paradoxical dependence on and erasure of woman in culture, argues

---

<sup>65</sup> Luce Irigaray, *This Sex Which is Not One* (Catherine Porter tr, Cornell University Press 1985) 112-113.

<sup>66</sup> Luce Irigaray, *Speculum of the Other Woman* (Gillian C. Gill tr, Cornell University Press 1985) 143.

<sup>67</sup> Luce Irigaray, *To Speak is Never Neutral* (Gail Schwab tr, Continuum 2002) 4.

<sup>68</sup> Margaret Whitford, *Luce Irigaray: Philosophy in the Feminine* (Routledge 1991) 34.

Irigaray, is mirrored in patriarchal systems of language and discourse. As Elizabeth Grosz explains, this happens by way of self-referential systems of logic which are fundamentally partial:

Discourses refuse to acknowledge that their own partiality, their own perspectivity, their own interests and values, implicitly rely upon conceptions of women and femininity in order to maintain their 'objectivity', 'scientificity', or 'truth' – that is, their veiled masculinity.<sup>69</sup>

Thus the masculine *logos* relies for its coherence on an othering of women as emotional and irrational, weak and irresponsible, which then implies the unacknowledged fragility of associations of the male with reason, strength, discipline, and civil responsibility.<sup>70</sup> The historic erasure of the feminine in culture is evident in the 'deep economy of language' where patriarchal culture has reduced the value of the feminine to 'an abstract nonexistent reality'.<sup>71</sup> In other words, 'language, rather than anatomy, now consigns woman to her role as object and [o]ther, but she is no less trapped: indeed in some ways, Irigaray suggests, the situation is worse'.<sup>72</sup> It is Lacan's insistence that woman's position as non-existent is a necessary feature of language; or the 'effect of a logical requirement', which makes it impossible to simply 'appeal to another language in which woman is not defined in terms of lack but might instead participate as a speaking subject herself'.<sup>73</sup>

Just as an actual woman is often confined to the sexual domain in the strict sense of the term, so the feminine grammatical gender itself is made to disappear as subjective expression, and vocabulary associated with women often consists of slightly denigrating, if not insulting, terms which define her as an object in relation to the male subject. This accounts for the fact that women find it so difficult to speak and be heard as women. They are excluded and denied by the patriarchal linguistic order. They cannot be women and speak in a sensible, coherent manner.<sup>74</sup>

What is required instead is a wholesale rethinking of language and its constitutive structures: 'the division between self and other, intelligible and perceptible, language and body'.<sup>75</sup>

---

<sup>69</sup> Elizabeth Grosz, *Jacques Lacan: A Feminist Introduction* (Routledge 1990) 180.

<sup>70</sup> Penelope Deutscher, *Politics of Impossible Difference: The Later Work of Luce Irigaray* (Cornell University Press 2002) 28.

<sup>71</sup> Luce Irigaray, *Je, tu, nous: towards a culture of difference* (Alison Martin tr, Routledge 1993) 20.

<sup>72</sup> Rachel Jones, *Irigaray* (Polity 2011) 150.

<sup>73</sup> *ibid.*

<sup>74</sup> Luce Irigaray, *Je, tu, nous*, above n 71, 20.

<sup>75</sup> Jones, above n 72, 152.

Irigaray develops this psychoanalytic critique further in her famous essay 'The Mechanics of Fluids'. That essay speaks to a particular male angst regarding the ebb and flow of women's bodies and the ways in which this angst has instantiated itself within systems of representation.<sup>76</sup> Irigaray notes an 'historical lag in elaborating a "theory" of fluids',<sup>77</sup> reflective perhaps of the fact that 'women diffuse themselves according to modalities scarcely compatible with the framework of the ruling symbolics'.<sup>78</sup> The equation between fluids and waste is said to justify 'a complicity of long standing between rationality and a mechanics of solids alone'.<sup>79</sup> The inability of language to incorporate the 'reality' of fluidity, or that which escapes symbolic articulation, may signify '...the powerlessness of logic to incorporate in its writing all the characteristic features of nature'.<sup>80</sup>

The masculine *logos* thus reserves to itself the sole ability to direct and constrain meaning. This necessary reduction of the play of meanings to mirror the male morphology bears witness, says Irigaray, to the very separation of man from 'the mother-nature'. 'This separation, constitutive of man as man, requires that he erect himself as solid entity out of an undifferentiated subjectum'.<sup>81</sup>

As Grosz explains,

A language that considers itself readily translatable, capable of being formalized in terminology of logic, in the form of axioms, deductions, conclusions, theorems, and aims to limit the play of multiple meanings so that only one clear, precise meaning exists is analogous to the oedipalized male sexuality (which puts in place of the pleasures of the whole body/language system, the primacy of one organ/meaning).<sup>82</sup>

It is this reduction of the play of meaning to unity that necessarily eschews the fluidity and plurality represented by woman. This plurality is represented most memorably in Irigaray's work as the two-

---

<sup>76</sup> Irigaray, *This Sex Which is Not One*, above n 65, 106-118.

<sup>77</sup> *ibid* 106 emphasis omitted.

<sup>78</sup> *Ibid*.

<sup>79</sup> *ibid* 107.

<sup>80</sup> *ibid*.

<sup>81</sup> Irigaray, *To Speak is Never Neutral*, above n 67, 233.

<sup>82</sup> Grosz, above n 69, 178.

lips.<sup>83</sup> The two-lips confound the dominant discourse as an alternative signifier to the phallus because there can no longer be a unity in the subject.

There [is] always...a plurality in feminine language... at each moment there is always for women 'at least two' meanings, without one being able to decide which meaning prevails, which is 'on top' or 'underneath', which 'conscious' or 'repressed'.<sup>84</sup>

The refusal of the dominant discourse to countenance woman's language renders it today still 'censored, repressed, unrecognized', despite the fact, says Irigaray, that 'the science of the dynamics of fluids could already provide a partial explanation.'

The science of the subject is resistant to carrying out its own 'Copernican revolution.' It refuses to question, in its mono-sexual causality, the truth it has established as normative. Whatever the other sex contributes is unacceptable, except as stylistic figures added on to a logical functioning that remains unshakable. The reality of the dynamics of fluids is dissolved into a few flowers of rhetoric, within a fundamentally unchanged dis-course, regulating principle that does not recognize that the *logos* represents a rhetoric of solids.<sup>85</sup>

Irigaray's work on language is extensive and spans multiple methodological terrains including substantial empirical research into patterns of speech, grammar and syntax, and in particular the differences observable between women and men.<sup>86</sup> Irigaray illustrates the effect of the 'veiled masculinity' present in dominant language systems in her extensive empirical research into the relationship between philosophy and linguistics. Her basic experimental design in works like *I love to you* includes developing a formal analysis from responses received from subjects given cues from which they are asked to form sentences.<sup>87</sup> Irigaray's analysis of the sentences that subjects responded with focused on the following questions: 'Who is the subject in the sentence? Who is acted upon? Who/what is in relation in the sentence? What mode of speech (declarative, interrogative, negative, etc.) is used?' Her general findings are summarised by Margorie Hass thus:

---

<sup>83</sup> See Irigaray, *This Sex Which is Not One*, above n 65, 205-218.

<sup>84</sup> Luce Irigaray, 'Women's exile' in Deborah Cameron (ed) *The Feminist Critique of Language* (Couze Venn tr, Routledge 1990) 83.

<sup>85</sup> Irigaray, *To Speak is Never Neutral*, above n 67, 234.

<sup>86</sup> Luce Irigaray, *Le langage des dements* (Mouton 1973); Luce Irigaray, *I love to you: sketch for a felicity within history* (Alison Martin tr, Routledge 1996); Luce Irigaray, *To Be Two* (Monique M. Rhodes & Marco F. Cocito-Monoc trs, Routledge 2000).

<sup>87</sup> Irigaray, *I love to you*, above n 86.

- i. Men are more likely than women to designate themselves as speakers, more likely to 'take speech in their name.'
- ii. Women are more likely than men to use a dialogic structure. Whereas men privilege their relationship to the world in their responses, women privilege relationships between persons.
- iii. Women are more likely than men to characterize difference as positive, and women are more likely to use interrogatives.
- iv. Both women and men are unlikely to designate a woman as the subject of a sentence or direct a constructed sentence towards a woman.<sup>88</sup>

Irigaray traces how linguistics are marked by sexual difference through first the usage of 'he' and 'she', however her empirical work illustrates that even the personal pronoun 'I' is sexually marked. Not only do men and women produce different elements of sexual difference through their respective speech, but the grammatical subject itself is also sexed: 'grammar reflects, for both men and women, a valorization of masculinity and an erasure of femininity.'<sup>89</sup> Irigaray's constructive project draws on these insights to assert the need to create a new 'linguistic home' in which woman is no longer the universal predicate upon which the meta-language rests.<sup>90</sup> This will necessarily require a change in the very *position* of the subjects of enunciation. But it will also require a new attentiveness to that to which previously we were deaf:

We need to listen (psycho)analytically to its procedures of repression, to the structuration of language that shores up its representations, separating the true from the false, the meaningful from the meaningless and so forth. This does not mean that we have to give ourselves over to some kind of symbolic, point-by-point interpretation of philosophers' utterances. Moreover, even if we were to do so, we would still be leaving the mystery of 'the origin' intact. What is called for instead is an examination of the *operation of the 'grammar'* of each figure of discourse, its syntactic laws or requirements, its imaginary configurations, its metaphoric networks, and also, of course, what it does not articulate at the level of utterances: *its silences*.<sup>91</sup>

In her later work, notably *The Way of Love, Sharing the World* and *In the Beginning, She Was*, Irigaray develops further her dialogue on language with her long-time interlocutor, Heidegger.<sup>92</sup>

---

<sup>88</sup> Margorie Hass, 'The Style of the Speaking Subject: Irigaray's Empirical Studies of Language Production' (2000) 15(1) *Hypatia* 64, 66.

<sup>89</sup> *ibid* 70.

<sup>90</sup> Luce Irigaray, *An Ethics of Sexual Difference* (Carolyn Burke and Gillian C. Gill tr, Continuum 2004) 107.

<sup>91</sup> Irigaray, *This Sex Which is Not One*, above n 65, 75, emphasis in original.

<sup>92</sup> Luce Irigaray, *The Way of Love* (Heidi Bostic and Stephen Pluháček trs, Continuum 2002); Luce Irigaray, *Sharing the World* (Continuum 2008), Luce Irigaray, *In the Beginning, She Was* (Bloomsbury 2013).

Irigaray is indebted to Heideggerian phenomenology in her work revealing the conditions which create the possibility of discourse, and indeed in the development of her constructive political project.<sup>93</sup>

In her latest work Irigaray extends and refines her analysis of Aristotelian logic in her dialogue with Heidegger in a way that is useful for thinking about law's *logos*.<sup>94</sup> She argues that we need to turn back to the pre-Socratic conception of the world for understanding intersubjectivity, as it was at this point that woman has not yet been erased from culture. Irigaray traces the origin of Socratic thought through the notion of 'truth', illustrating how truth could only be acceded to through the teaching of the 'master'. A consequence of this logic, says Irigaray, is that *thinking* itself comes to represent *being*, meaning that being itself is in thrall to the rules of the male *logos*. My argument is that the history of legal discourse mirrors this process of exclusion and erasure almost exactly and that this allows law to both present its own logic as *a priori*, as neutral and as inevitable whilst also concealing the genesis of its own becoming. This enables it then to refuse to acknowledge the other, to countenance even the possibility of another language, or another justice. Thus, the erasure of the feminine, of woman, within the deep economy of language generally, is also found in legal discourse, and therefore also in the rape trial – the very space in which law has no choice but to confront woman. As we will see, it deals with this confrontation in the only way it knows how: denying and erasing her difference, invoking her specular impossibility in order to shore up its own ego, and then transforming her into the double, complement or opposite of man. In what follows I elaborate this process with reference to the work of Peter Goodrich on law, language and memory. In Part III I will reflect on the implications of this analysis both for feminist theorising on rape and also for the law reform agenda.

---

<sup>93</sup> See further Maria C. Cimitile, 'Irigaray in Dialogue with Heidegger' in Maria C. Cimitile and Elaine P. Miller (eds) *Returning to Irigaray* (SUNY Press 2007) 267.

<sup>94</sup> Luce Irigaray, *In the Beginning, She Was*, above n 92.

## *Law's Logos: One and the Same*

The authoritative word is located in a distanced zone, organically connected with a past that is felt to be hierarchically higher. It is, so to speak, the word of the fathers. Its authority was already acknowledged in the past. It is a prior discourse. It is therefore not a question of choosing it from among other possible discourses that are its equal. It is given [it sounds] in lofty spheres, not those of familiar contact.<sup>95</sup>

Peter Goodrich's work on law, history and language is extremely important both for thinking through the implications of Irigaray's critique for law, but also for its careful documenting of law's little acknowledged genealogy, or its unconscious origin. In his book, *Languages of Law*, Goodrich argues that the imagery of transmission by which law comes to posit itself as an originary discourse is sustained by rules, linguistic forms and techniques of interpretation which exceed the 'memory of man' and which constitute more than mere language or vernacular.<sup>96</sup> The logic of the common law, he argues, 'has been one of a comparable lack of alternatives, of a refusal to recognise that vast host of the other... What is their place in the law, what is their voice, whose language do they use?'.<sup>97</sup> Goodrich traces that 'vast host of the other' through the vernacular dialect of law, and in later work to the depths of law's unconscious.

Goodrich's work is heavily influenced by psychoanalysis which he uses to interrogate and reveal law's 'other scene' or unconscious and which, he argues, is a threat to the order and reason of the legal system.<sup>98</sup> That threat reveals itself most clearly in Goodrich's analysis through the figure of woman. Woman, he argues, occupies in law an ultimately contradictory position:

In ecclesiastical, civil, and local law, the ambiguous place of women as the vehicles of biological and cultural transmission whose sex nevertheless overwhelmingly excluded them *de iure* from participation in political office, institutional function, or real property right, was evidently a significant issue. It was recognized that all human beings passed through the maternity and

---

<sup>95</sup> Mikhail Bakhtin, *The Dialogic Imagination* (University of Texas Press 1981) 342-3, cited in Peter Goodrich, *Languages of Law: Logics of Memory to Nomadic Masks* (Weidenfeld & Nicolson 1990) 191.

<sup>96</sup> Goodrich, *Languages of Law*, above n 95, vii.

<sup>97</sup> *ibid* 184

<sup>98</sup> Peter Goodrich & David Gray Carlson, 'Introduction' in Peter Goodrich & David Gray Carlson (eds.), *Law and the Postmodern Mind: Essays on Psychoanalysis and Jurisprudence* (UMich Press 1998) 3.

tutelage of the *gynaecium* and yet, despite this crucial place and pedagogy of the feminine, civil law continued to deny it any direct association with the polity or public sphere.<sup>99</sup>

Goodrich explores the origins of this contradiction in the context of legal history arguing that the problematic place, personality and political role of women also represented a significant constitutional problem for law.<sup>100</sup> In a careful analysis of John Fortescue's *De Natura Legis Naturae*,<sup>101</sup> one of the earliest treatises directly addressing women in law, Goodrich elaborates the various rules relating to the capacities and functions of women generally traceable to Roman law.<sup>102</sup> Exploring the law on succession, specifically, Goodrich unveils the links between English custom, divinity and nature, and in turn, the ultimate origin of law and laws in 'God alone'. Thus, '[t]he question of which legal forum and which law is to decide the issue of feminine sovereignty raises questions of theology, nature, and positive law, of written and unwritten prescription, of regal and political dominion'.<sup>103</sup>

The contradiction of the constitution and being of women required an elaborate resolution. Despite the 'ineradicable origin and visceral transmission' of maternity, the mother is in civil law reconstituted as simply a facilitator of the paternal line. The figure of maternity thus represents an aberration or excess in the polity. This figure, says Goodrich, can at best only refer to a 'plurality' within jurisdictions; '[t]his plurality – this fluidity or contingency – of polities is potentially subversive of the hierarchy of laws...'.<sup>104</sup>

The order of law begins with man's abandonment of original justice... and state of grace. This means that the origin or originary law is unknowable: its past presence cannot any longer be recollected, it cannot be other than the immemorial and inconstant representation, *simulacrum* or *vestigium* of a prelapsarian state. It is termed divine providence... fate, law or will, and it is the mother of nature law. ... This Christian *amor matris*, or love of an ineffable mother, of incertitude as the feminine source of the descent of all law, is expressed more directly in the figure of justice herself.<sup>105</sup>

---

<sup>99</sup> Goodrich, *Oedipus Lex*, above n 3, 118.

<sup>100</sup> *ibid* 118-119.

<sup>101</sup> John Fortescue, *De Natura Legis Naturae* (1869).

<sup>102</sup> Goodrich, *Oedipus Lex*, above n 3, 119.

<sup>103</sup> *ibid* 123.

<sup>104</sup> *ibid*.

<sup>105</sup> *ibid* 123-124.



Woman as justice is an age-old motif and Goodrich notes Fortescue's use of feminine imagery in his discussion of the iconography of justice. While the femininity of justice could be interpreted as 'merely' '... its materiality, its contingency and not its essence',<sup>106</sup> this still reveals certain anomalies and 'suggest[s] separate orders and genders of the common law'.<sup>107</sup> Goodrich continues,

The femininity of justice is not only the representation of a material and so contingent form of judgment, justice is memory as reminiscence and as legitimacy, the memory of generation, of maternity, of the certitude of the only begetting to the only begotten... The femininity of justice is the cunning of memory as reminiscence, as the *mirror of the plurality of experience*; it is the reason of likeness... And justice itself is paradoxically a woman. ... Justice is like a woman because even the law has a body and it is in bodies that sex exists... It is feminine because if it is a question of the application of law, a question of experience and judgment, of likenesses and their material inscriptions, then *justice requires that the law acknowledge the ethical and contingent logic, the fluidity, of the event*. Fortescue admits such contingency as one face of the common law but denies that such feminine attributes are ever anything other than secondary to the speculative logic of law. ... To adopt even a very simplified psychoanalytic reading of Fortescue's denial of the significance of the female form of justice, it would have to be said that *the denial, or more properly the negation, precisely confirms that the plural figure of woman is inseparable from that of law*.<sup>108</sup>

Therefore in Goodrich's reading of Fortescue and the history of the common law we can see revealed both an original matricide upon which law can be said to construct its own body, but also the faint but undeniable figure of woman whose plural and fluid morphology is both justice itself, but also the ultimate threat to the systematicity, order and reason of judgment; that which could reveal the contingency of the whole enterprise. Feminine difference was thus dangerous, as a sign of plurality that '...escaped the unity of standard and sequence of law'.

Such plurality intimated the possibility of thought outside the law for such was the genius and the madness of the feminine, that of challenging the norm, of replacing the habitual body of legal personality with the lived body – the [particularity] – of the feminine erudition, that of images, contingencies, surfaces, and their various bodies and inscriptions. From the point of view of the law, [particularity] is precisely that which escapes the line of the term of judgment the singular dissolves beyond the boundaries of the rule, it deconstructs the rule by doubting

---

<sup>106</sup> *ibid* 124.

<sup>107</sup> *ibid* 125.

<sup>108</sup> *ibid* 125-126 emphasis added.

the relevance of its normativity and by challenging its abstraction, its method. For the law such a challenge is dangerous.<sup>109</sup>

Goodrich goes on to consider the implications of this analysis for the logic upon which law functions. The Public Law, he notes, 'instituted a reason, a mode of thought, a rhetoric that was also the limit or definition of subjectivity.' Although that subjectivity recognised two sexes, 'it relayed only one form of personality, one gender, a singular mask'.<sup>110</sup> It is exceptional, he notes, the scope of legal sources drawn on to 'substantiate the disassociation of the feminine imagery and grammatical gender of nature, justice, virtue, and the law from the dignity or civil office of women'.<sup>111</sup> This allowed jurists of the time to substantiate as undeniable '[t]he inferiority of women within the hierarchy of "proper nature" [as] a facet of the originary, of the state of innocence, and so an incontestable law of nature coincident with the spirit that preceded the generation of the sexes'.<sup>112</sup> The dissociation of woman from the origin or 'nature' of divinity and law, then facilitated an image of law that was said to belong to one order alone, to represent one source and to produce a singular testimony of reason.<sup>113</sup> In Fortescue's words:

[J]ustice and the law of nature are proved to be of one substance... of one quality and nature... We are most surely instructed that the law of nature was created in one and the instant together with man; whence we are compelled to say that law and man are coeval, as were the first man, his reason, his will and his memory.<sup>114</sup>

The image of justice is thus replaced by man, in the image of the father, an image coincident with law and whose genealogy is traceable back to the law of nature and to God Himself. Moreover, this notion of justice as an originary form 'from which man withdrew ... through feminine deceit'<sup>115</sup> represents not only '...an epistemic order, a way of knowing the cause of reason of civility and flesh,

---

<sup>109</sup> *ibid* 138.

<sup>110</sup> *ibid* 130.

<sup>111</sup> *ibid* 128.

<sup>112</sup> *ibid* 129.

<sup>113</sup> *ibid* 130.

<sup>114</sup> Fortescue, above n 101, 234, in *ibid* 130.

<sup>115</sup> Goodrich, *Oedipus Lex*, above n 3, 130.

[but] it is also an ontology, it institutes an order of being, it fabricates, it makes the soul. Law stands on the boundary between knowing and being'.<sup>116</sup>

That order of being involved also the rationalisation of feminine subjection and its attendant duties. One of these duties, says Goodrich, is silence. Feminine speech has a problematic history (Eve seduces Adam to fall with her speech) and is thus associated with the 'verbal seduction' of rhetoric so despised by the 'doctrine of plain speaking' embraced by law.<sup>117</sup> Rhetoric, says Goodrich, 'denotes an internal threat or simply a fear of a language that may escape the confines of the institution, a poetry that may speak of woman as *logos* or word of temptation to a disparate thought'.<sup>118</sup> The only logical consequence then of the fear of woman's speech is her silence.

If woman is to be excluded from the public sphere, if she is neither to govern, judge, hold office or teach, then she is left without speech and cannot be other than an image. In a sense, the law could be said explicitly to institute woman as an image so as to denounce her nonbeing.<sup>119</sup>

Logically then, the basis upon which law's *logos* is founded must carry through to the very vernacular through which it purports to dispense 'justice'. In earlier work, Goodrich traces law's language and links its particular vernacular dialect to its becoming present through divinity and memory. As a science, says Goodrich, 'the discipline of law exists to constrain the use, the possibilities of language, including the language of the body'.

[I]t is an arcane, initiate or esoteric language that destroys the play of meanings in the act of establishing literal or artistic legal terms. It is consequently an insider knowledge, a language of shibboleths, of coded terms... to criticise the law if one lives through the law is a circular and unproductive activity; it is always likely that one does not so much escape it as return to it. The value of failure, of the non-occurring history, is thus precisely the value of the outside within: it provides, perhaps it alone provides, the possibility of a criticism that inhabits a place both outside the law and yet internal to its terms, its causes it rules.<sup>120</sup>

Goodrich's work traces this process in two important ways: through its origins in theocracy and; the role and importance of memory in legal method. 'Memory in the hands of the legal tradition is not

---

<sup>116</sup> *ibid* 131.

<sup>117</sup> *ibid* 135-136.

<sup>118</sup> *ibid* 136.

<sup>119</sup> *ibid*.

<sup>120</sup> Goodrich, *Languages of Law*, above n 95, 17-18.

an historical method but rather a technique of faith: through establishment of precedent, the law continuously rediscovers itself; it is made present to itself as *logos* or the word incarnate'.<sup>121</sup> The connection between memory and the legal community as theocratic allows law to posit itself as an original linguistic order in which law becomes the mouthpiece for a language to mediate between God and humanity.<sup>122</sup>

Legal discourse and texts through which it gains its positive formulations are simple representations of a primary speech that pre-exists and authorises the legal textual community. That origin is hidden, distant and dark. It is the *logos*, the source or oracle of law ... variously name[d] as God, nature, time immemorial ... so the discourse of law remembers and repeats an ideal that is ever elsewhere, an origin or absolute other into whose face we may never look, whose back is ever turned towards us.<sup>123</sup>

That origin, or absolute other, as we have seen, is the figure of woman. This interpretative genealogy is sustained, says Goodrich, by rituals of jurisprudence that illustrate clear preferences for sources rather than arguments or dialogues, for validity rather than value, for judgment rather than justification or accountability as the authenticating marks of juridical speech.<sup>124</sup>

The principal linguistic task of legal speech, then, is 'to translate and reformulate vernacular dialects into the apparently separate and unitary genre of legal discourse'.<sup>125</sup>

To be heard in court, arguments must be reformulated in the abstract legal terms of the case, presented on cue and subject to the potentially censorious intervention of the court. By way of conclusion, it may be noted that resistance to the legal imposition of order and forms of argument in court is generally disadvantageous.<sup>126</sup>

Those abstract legal terms embrace a particular syntactic and grammatical form which can be said to mirror the universalised masculine morphology privileging, as it does, a particular self-referential and contained mode of expression.

---

<sup>121</sup> *ibid* 51.

<sup>122</sup> *ibid* 95.

<sup>123</sup> *ibid* 108-109.

<sup>124</sup> *ibid* 109.

<sup>125</sup> *ibid* 193.

<sup>126</sup> *ibid* 206.

...[F]rom the perspective of the history of linguistics and of jurisprudence...the concepts of universal grammar and of univocal legal code...have specific political and ideological motives and affiliations; they are broadly those of the desire to enclose and protect linguistic study and legal practice by presenting them as specialised, non-rhetorical, activities removed from the everyday commitments and discourses of social and political practice and conflict.<sup>127</sup>

As Goodrich observes, the particularity of law's language serves as a powerful mode of exclusion of certain bodies,

...however powerful the arguments or cause, however justified the case in terms of natural justice or moral competence, it is unlikely to be to the advantage of the laity to speak for themselves in legal settings; they are unlikely to be heard. More specifically, they cannot be heard in the sense that any recognition of the vernacular, and of all that the vernacular implies in terms of values and references, would place the court in a position of relativity; the language of law would itself become just one more dialect, one more register or code, a further vernacular to be weighed in the scales of legitimacy. In purely pragmatic terms, the vernacular must therefore efface itself and the non-legal speaker learn through that erasure of voice to benefit from complicity in the community of legal language, a complicity that takes place through representation and lodges both civility and fate in the hands of the profession.<sup>128</sup>

In his interrogation of the linguistics of courtroom speech Goodrich analyses the trial transcript of *Western Forest Products Ltd v Richardson and Others* (1985) (unreported), which concerned an application for an injunction by Western Forest Products (WFP) against Chief Richardson, the president of the Council of Haida nations. The Haida had been attempting to obstruct the logging by WFP of the Lyell Islands in British Columbia which, they argued, threatened their economic viability, the lifestyle of their community as well as subverting their rights to the use and enjoyment of the island in accordance with their custom. Goodrich reads the transcript of the case primarily with a view to examining those places 'in which the discourse of the Haida comes into conflict with and even subverts the language of an essentially colonial law'.<sup>129</sup> Chief Richardson refused to retain legal counsel for his defence and instead presented testimony to the Court in the form of 'symbolic dress, mythologies, masks and totem poles as well as the legends, stories, poems, songs...'. The argument, says Goodrich, 'was both lyrical and visual, narrative and aesthetic, and it extended far beyond the

---

<sup>127</sup> Peter Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (Macmillan Press 1987) 5.

<sup>128</sup> Goodrich, *Languages of Law*, above n 95, 185.

<sup>129</sup> *ibid* 181.

contours of contemporary Western languages of law...'.<sup>130</sup> Judgment was eventually given granting the injunction with the judge declaring the 'evidence presented as to the Haida title to and relationship with the islands... not legally relevant to the case being heard, which simply concerned interference with a valid logging licence'.<sup>131</sup> This methodical application of the relevant law in this case has at its core, says Goodrich, the 'annihilation of the opposing language, the non-legal language in which the defence had been conducted'.

That language was annulled in the simple, direct and brutal sense that it was not even referred to save as a curiosity, a relic, and primitive remnant of a more savage past. The court would not compare mythologies, it refused even to countenance the question of the 'other', because to do so would raise questions of its 'self', of the social and mythic construction of its own body, its social role and actions...<sup>132</sup>

Goodrich's analysis of *Richardson* here illustrates with great clarity the deeply-engrained structure of the common law in which the habitual logic of law continues to 'systematically [obliterate] difference in all its manifestations, in all its discourses'.<sup>133</sup> An erasure of difference then occurs at all levels of the symbolic as it manifests in law, and this is enabled by a juridical framework which is contingent for its authority and therefore, its survival, on an origin or absolute other which is simultaneously evoked and erased. This darkened, shrouded and silenced other says Goodrich, is variously cited in traditional jurisprudence as God, nature or time. However, as is illustrated through the figure of 'justice', that erased other is actually woman.

#### *Law's Logos/Woman's Voice*

To briefly return for a moment to Gregory Matoesian's theoretical framework elaborated in Part I, I want to draw the works of Irigaray and Goodrich together to illustrate the connection, or indeed the

---

<sup>130</sup> *ibid* 183.

<sup>131</sup> *ibid*.

<sup>132</sup> *ibid*.

<sup>133</sup> *ibid* 184.

inseparability of the masculine *logos* from law's *logos*, or in Matoesian's words of 'patriarchal ideology' and legal discourse. This is because, as Goodrich's work illustrates, the world of law is forever, at the very genesis of its becoming, closed to the cognisance of difference and in particular, sexual difference. It is immersed within, it revels in, it magnifies and it takes to its logical conclusion the masculine specular economy. Law illustrates the consequences of the masculine doubling of the real through the *logos*. The law is a closed system built on a repressed other, which is only coherent through a unified subject relation which requires the erasure of difference; the original matricide so carefully revealed by Irigaray in her excavation of western thought, is also the origin upon which the legal system becomes coherent. In other words, 'patriarchy' is inseparable from law because it is the *very mode* through which this discourse comes into being.

As discussed above, this contention is evidenced across two platforms: first, the overall coherence of the system from which law claims its authority and second, the micro-techniques of language which Irigaray's linguistic research reveals, and which Matoesian so carefully documents in his analyses of rape trials. These facets intersect but not in the way Matoesian thinks. They are bound by a shared commitment to and reliance on the suppression of woman's difference, whilst simultaneously feeding on a ceaseless supply of 'matter for the functioning of the same discourse'.<sup>134</sup> In my argument this genealogy of law's origin and unconscious not only sheds light on why legal method has been so effectively marshalled in the service of denying rape victims access to 'justice' in a traditional sense, but also why it remains impervious to liberal reform initiatives. In Part III I go on to explore the implications of this critique for feminist legal scholarship and engagement with state sponsored mechanisms for law reform.

---

<sup>134</sup> Irigaray, *To Speak is Never Neutral*, above n 67, 228.

### PART III

#### *Rape is Different*

In chapter one, I argued that the recent history of rape law in England and Wales evidenced a pattern of retrenchment rather than progression and in chapter five, I argued that the primary reason for this was the continuing commitment of the law to sexual indifference. In this chapter I have sought to understand in more detail the source of this commitment and the ways in which it merges imperceptibly through the text of the law to the practice of the rape trial. In my argument, the *logos* of law is inseparable from the masculine *logos* itself. Although it posits itself as an originary discourse - a discourse freed from the contingencies of culture, history and the social - the law shares its history with the history of humanity in general which, as Irigaray's critique shows, is a history built upon a symbolic matricide. As that research illustrates, the spectre of woman's morphology has been dealt with in philosophy and psychoanalysis with the symbolic coding of fluidity as waste, and the refusal to attribute coherence to woman's hysterical voice. Goodrich illustrates how this phenomenon has manifested itself in law with the retrospective construction of law's origin to erase the association of woman with nature and divinity (and therefore justice), and replace it with an image of justice as God the father. It has also been addressed with the creation of rules and orders to control and confine women's bodies, and systems to ensure the continuing mastery of man over law by the instantiation, and reiteration through legal method, of the vernacular dialect of legal discourse. The law takes the logic of the masculine *logos* to its only conclusion and it is structurally invested, for its own survival and coherence, in the exclusion and erasure of woman's voice, which represents the possibility of a plural form of being and thinking and is thus a fundamental challenge to the legitimacy of law.



The consequences of this analysis for complainants of rape who make it to trial can only be significant. It is true, of course, of every adjudication that the law makes a pronouncement of ‘truth’ based on its assessment of the veracity of the evidence. Matoesian and Ehrlich argue that the difference with the rape trial is the ability of defence attorneys to call upon barely perceptible but powerfully palpable rape myths, or commonly exchanged narratives situating woman’s sexuality in accordance with a masculine standard of desire. This is, of course, true. However, in my argument the adjudication of rape is different not just because the normative or heuristic tropes relied upon by finders of fact are sexist but because their presence is generated from within, and sustained by, a logic that denies woman’s very subjectivity. It is not enough, therefore, to call for jury instructions,<sup>135</sup> or expert evidence,<sup>136</sup> to counter the reliance of juries on rape myths to determine and dispense justice in rape trials. These measures ultimately do little to challenge the structural coherence of the system as a whole and with it, the systemic inability to fathom what rape means.

Rape is different because it is *gendered*. This is the case in England and Wales in a strict legal sense (only a man can be a defendant to a charge of rape),<sup>137</sup> and in a statistical sense (women are its main victims),<sup>138</sup> but also because it demands the consideration of sexual difference. It requires that woman narrate a confrontation with the real and in doing so that she ‘[confront] the brutality of her symbolic homelessness first through the encounter with her rapist, and second through her encounter with an institutional apparatus invested in that homelessness’.<sup>139</sup> As Louise du Toit argues so convincingly in her book *A Philosophical Investigation of Rape*, the harm of rape within the western symbolic order is simply ‘impossible’ to fathom.<sup>140</sup> Rape is fundamentally misconstrued within that symbolic and must instead, she says, be understood against the backdrop

---

<sup>135</sup> Kirsty Duncanson & Emma M. Henderson, ‘Narrative, Theatre and the Potential Interruptive Value of Jury Directions for Rape Trials in Victoria, Australia’ (2014) 22(2) *Feminist Legal Studies* 155.

<sup>136</sup> Louise Ellison and Vanessa E. Munro, ‘Turning mirrors into windows? Assessing the impact of (mock) juror education in rape trials.’ (2009) 49(3) *British journal of criminology* 363.

<sup>137</sup> Sexual Offences Act 2003, section 1.

<sup>138</sup> In 2011/2012, there were 14,767 recorded rapes of a female and 1,274 rapes of a male in England and Wales. MOJHOONS, *An Overview of Sexual Offending in England and Wales* (Home Office 2013) 20.

<sup>139</sup> Yvette Russell, ‘Thinking sexual difference through the law of rape’ (2013) 24(3) *Law and Critique* 255, 257.

<sup>140</sup> Louise Du Toit, *A philosophical investigation of rape: The making and unmaking of the feminine self* (Routledge 2012).

of a construction of woman's subjectivity as borderline, highly ambiguous or unstable.<sup>141</sup> The failure to recognise the harm of rape to woman as singular and sexuate subject in her own right means that the confrontation of woman during the act of rape with the 'sex-specific fragility of her self-hood'<sup>142</sup> is replayed again in the courtroom, but this time woman is compelled to articulate a harm that has no name for an audience that can't hear it. Law is complicit in (propels, revels in, reifies, magnifies) a system of logic that reproduces and resubstantiates as natural, over and over again, a legal subject which excludes, excises and renders impossible woman's very existence.

Just because the underside of law's unconscious is not so obvious in other cases doesn't mean that 'patriarchal ideology' only activates itself during the rape trial, as Gregory Matoesian argues. The rape trial forces the confrontation of law with the contradiction of its own existence because it is at this point that law must confront the particularity of woman. This confrontation with the very essence of sexual difference and identity literally forces an eruption of the incoherence of law's existence.

While the process of objectifying woman during the trial is most keenly observed during cross-examination, the constrictions of legal procedure - the need for oral evidence, the requirements for formal speech, for sequential narrative, for clarity, for unequivocation - are also present during direct examination; the time during which the court allows the victim to tell her story. Woman remains, in this phase, mired within the phallographic logic in which, as Irigaray's research into sexed speech patterns shows, her ability to represent herself as a subject may well be undercut by sexed syntactic conventions.

This is not to say that women are stripped of all agency by the *logos* of law, nor that women who come before the court to testify to their rapes do not on some occasions succeed in convincing a jury that they are telling the truth by successfully transforming the 'pathos of [their] victimisation

---

<sup>141</sup> *ibid* 33.

<sup>142</sup> *ibid* 5.

into the *logos* of accusation'.<sup>143</sup> Wendy Larcombe's research into characteristics of rape complainants whose cases resulted in successful prosecution illustrates how this process might occur, and she argues that her findings 'disturb feminist understandings of how rape complaints are discredited in the criminal justice system'.<sup>144</sup> Larcombe sought to trace with her research the process by which complainants' narratives of violation are either disqualified or validated during the process of the rape trial; her goal was to trace a praxis of possible resistance to the discrediting processes used during the rape trial to disqualify the victim.<sup>145</sup> Larcombe surveys the various ways in which police, prosecutors and defence lawyers, amongst others, deploy tactics to discredit and cow a rape victim at every point of the justice process. However, she argues that in her analysis of seven trials for rape in Australia, established feminist knowledge of which 'types' of rape victims are most likely to be believed by finders of fact was problematised by unexpected outcomes. She summarises her conclusions thus:

It can be seen that the 'successful rape complainant' is not necessarily one with an unblemished sexual history. Rather, she has a strong sense of herself and takes overt offence at (rather than being taken by surprise or accepting as all too familiar) alternative and derogatory constructions of her character and credibility. She will need to be reasonably familiar with and experienced in managing power-loaded situations so that she can be polite but not compliant, co-operative but not submissive. She is not prone to exaggeration or embellishment but seems to talk straight. She answers questions quickly and precisely and speaks fairly frankly and without shame about sexual acts and activities.<sup>146</sup>

Larcombe tentatively concludes her analysis with the assertion that the 'ideal victim' is unlikely to fall into the stereotypical category of the chaste, virtuous, 'real rape' victim so vaunted in classical literature, but instead is a victim who can perform with 'resistance, continuity and consistency'.<sup>147</sup> The characteristics of the 'ideal victim' that Larcombe details above, while not necessarily exclusive, are interesting for a number of reasons, but particularly for my analysis because they seem to

---

<sup>143</sup> Young, above n 1, 465.

<sup>144</sup> Larcombe, above n 1.

<sup>145</sup> *ibid* 132.

<sup>146</sup> *ibid* 144.

<sup>147</sup> *ibid* 146. Larcombe takes no solace in her conclusions: 'There is no cause for celebration here, however. Even if women are no longer primarily disqualified on the basis of sexual and/or moral conduct, the discursive resistance that appears to characterise successful complainants is similarly exacting' (*ibid* 145).

describe a complainant who can, within the trial space, transform herself most effectively into the double of man, who can harness law's *logos*, and who can speak most articulately through that dialect. In my argument this conclusion is far from surprising given the juridical and discursive strictures operating within the trial space.

To return to where I started this discussion with the voice of Frances Andrade, it is perhaps easier to appreciate the circumstances that might coalesce during the rape trial to generate an experience for a victim which is 'fragmentary'. With the wholesale rejection and exclusion of a female imaginary in both language and in law, it is only logical for these reasons that a woman would, in Irigaray's words, '...experience herself only *fragmentarily*, in the little-structured margins of a dominant ideology, as waste, or excess, what is left of a mirror invested by the (masculine) 'subject' to reflect himself, to copy himself'.<sup>148</sup> Because woman cannot take the form of the signifier except as emptiness it is very difficult for woman to constitute herself within the dominant symbolic as anything other than an object. As Irigaray, drawing on Lacan, illustrates, woman has no independent existence in language. This has serious implications for a rape victim attempting to speak the harm of rape to law because law requires that the speaking subject enunciate her injury, which can only be done if warped into the language that the *logos* allows. Because this injury has no value in the dominant symbolic – because woman has no value - the recognition of any injury is contingent upon a translation of woman within the space to double, complement or opposite of man. There is, therefore, no necessary correlation between the speaking subject's understanding, or explanation of the event, and the law's understanding.

The fragmentation of woman during the trial then is a consequence of both the exclusion of a female imaginary, but also of law's dogged adherence to the principal tenets of phallogocentrism in which woman's status in the dominant symbolic is only as object, waste or excess. As with Irigaray's analysis of hysteria and schizophrenia in her earlier work,<sup>149</sup> the law's treatment of the

---

<sup>148</sup> Luce Irigaray, *This Sex Which is Not One*, above n 65, 30 emphasis added.

<sup>149</sup> Irigaray, *Le langage des déments*, above n 65.

crime of rape is, far from being anomalous, actually the logical conclusion of the order of the world according to masculine logic. The failure of rape law to do what it says it will do (protect the 'sexual autonomy' of all individuals),<sup>150</sup> is actually, paradoxically, not a failure but a success because it shows how phallogocentrism consumes its subjects within a closed system in which the pieces can be moved around but the underlying logic remains the same.

In chapter one, I detailed the myriad of reforms both proposed and implemented to address factors that had been identified as contributing to attrition rates at the point of the rape trial. These included: the implementation of new rules in sexual offence trials designed to counter the reliance of barristers and jurors on evidence designed purely to impugn a victim's credibility;<sup>151</sup> the development of prosecutorial expertise and specialism in sexual offences trials; the use of expert evidence in trials aimed at dispelling rape myths to assist the jury in its deliberations; the briefing of complainants prior to trial; the recording of complainants when they make initial statements to police to be used as evidence in court and; the use of screens in court to protect the victim while giving evidence.<sup>152</sup> These reform proposals and initiatives have been, in the main, directed at empowering the victim as speaking subject within the rape trial. Many have sought to address the power asymmetries illustrated by Matoesian and others, for example, by providing victims with advocates and their own legal representation, by allowing evidence to be given behind a screen or

---

<sup>150</sup> Home Office, *Protecting the public: Strengthening the protection against sex offenders and reforming the law on sexual offences*. (Home Office 2002) 14.

<sup>151</sup> For example, section 32 of the Criminal Justice and Public Order Act 1994 abolished the requirement in sexual offences trials that the judge issue a warning to the jury that a woman's evidence alone, in the absence of independent corroboration, must be treated with caution and section 41 of the Youth Justice and Criminal Evidence Act 1999 sought to restrict the use of previous sexual history evidence in rape trials. Section 112 of the Coroners and Justice Act 2009 amended the power to admit consistent statements of complaint by repealing the requirement that the complaint must be made 'as soon as could reasonably be expected after the alleged conduct'.

<sup>152</sup> Gregory & Lees, above n 1; HMCPSI, *A report on the joint inspection into the investigation and prosecution of cases involving allegations of rape* (HMCPSI 2002); Criminal Justice System, 'Convicting rapists and protecting victims - Government announces new measures' (*The National Archives*, 7 November 2007) [http://webarchive.nationalarchives.gov.uk/20080107211140/http://cjsonline.gov.uk/the\\_cjs/whats\\_new/new\\_s-3624.html](http://webarchive.nationalarchives.gov.uk/20080107211140/http://cjsonline.gov.uk/the_cjs/whats_new/new_s-3624.html) accessed 10 August 2014.

by videolink, or by written submission bypassing the courtroom altogether.<sup>153</sup> In many ways these reforms can be read less as ‘improvements’ in the law per se, than as adjustments designed to ‘soften’ or mitigate the essential (masculine) nature of law by taking into account woman’s nature. Read in this way, law seems to listen to the other and take account accordingly. Except, this is not what is happening at all. The ‘other’ in this formulation, remains stuck within the old dream of symmetry; woman is simply the other of the same and the law attempts through reform initiatives to cure the defect of woman by concessions to her frailty. It makes no ultimate concession to the existence of a unique subjectivity which, as I argued in chapter five, it is essential to have access to in order to testify to the harm of rape. These measures are primarily formulated as matters of access and training - learning to speak to law more effectively on its own terms - whether this is behind a video screen or through an appropriately briefed advocate, or via laws of evidence which preclude the consideration of evidence designed to impugn the complainant’s credibility, thus potentially blocking her access to ‘justice’. There is no sense in which the very coherence of law’s *logos* is troubled or called into question; law remains static, buttressed by its history and the invisible genealogy of its own logic. It is we who have to change, ultimately, so that law can hear us better.

## Conclusion

My analysis in this chapter has sought to draw together three separate bodies of literature in the service of trying to comprehend the law’s treatment of rape complainants, particularly those who find themselves testifying to their rape within the trial space. I have argued that previous writing on rape, law and linguistics has failed to adequately account for the question of *why* law continues to appear systematically deaf to the calls of untold numbers of women for justice in the aftermath of

---

<sup>153</sup> Owen Boycott, ‘Pre-recorded evidence to spare vulnerable victims court ordeal’ *Guardian online* (11 June 2013) <http://www.theguardian.com/law/2013/jun/11/pre-recorded-evidence-victims-court> (accessed 31 May 2014).

rape. By reading Irigaray on language and Goodrich on law, history and memory together, I have sought to shed light on this question by arguing that law is not simply separable from the masculine *logos* and malleable at will. It is instead in thrall to the phallogocratic symbolic for its own survival. The instantiation of a system of logic governed by binary pairs and the process by which law comes to posit itself as an originary discourse mirrors the process by which Western philosophy and psychoanalysis come to symbolically murder the mother in order for man to place himself at the centre of a closed universe. The law is also a closed universe which consciously excludes the other in the name of a higher absolute: justice. It is simultaneously reliant on the exclusion of the feminine and dependent on the feminine other as a mirror. Irigaray has shown how this process is prevalent in the hard sciences;<sup>154</sup> we can also see it in law through Peter Goodrich's analysis of the genealogy of law's origin.

What are the implications of this analysis, of exposing the contingency of law's logic and its steadfast complicity with the sexual indifference of the masculine *logos*? I suggested that one implication is the failure of law to respond to crimes against women, and specifically the crime of rape. In order to acknowledge the harm of rape, law must acknowledge woman as subject.

I do not mean to imply with this analysis that we should abandon our struggles with law in the present. Nor do I mean to suggest that if the recently proposed law reform initiatives noted above had been in place for Frances Andrade that they would have made no difference to her or her experience, or that perhaps her ordeal would have been eased and she might be still alive. But I do want to suggest that it is important to recognise that work on reforming the trial process is but one feminist task of many. A feminist ethics of sexual difference confronts law's treatment of the crime of rape on multiple levels, it exposes its every move, its *a priori* logic, its very core. It forces it into a confrontation with the other, until it has no choice but to confront itself. It does this relentlessly, at every turn, at every opportunity. But most important of all perhaps: it listens.

---

<sup>154</sup> Luce Irigaray, 'Is the Subject of Science Sexed?', Edith Oberle (tr) (1985) *Cultural Critique* 73.

# Chapter Seven: Rape, Law and Sexual Difference

---

Women's exploitation is based upon sexual difference; its solution will only come through sexual difference.<sup>1</sup>

## Introduction

In chapters five and six I argued that the failure of the legislature to improve successful criminal justice outcomes for victims of rape is primarily due to the continuing sexual indifference of law, the consequences of which are clearly visible during the rape trial. In this chapter I attempt to address the inevitable question that this analysis generates: So what is the alternative? As I hope is clear by now, the 'answer' to this question, to the extent that it is possible, is not, in my analysis at least, to be found in the legislative halls or policy-making dens of Westminster. This is not to say, however, that my analysis leads inexorably to 'turning away' from politics and activism in the present, but that the urgency and importance of these particular feminist demands for justice for victims of rape should not preclude the consideration of a more radical agenda for social, political and legal change. This chapter is concerned with taking up the challenge of a radical reimagining of a social and juridical environment which is not merely one, but in which two subjects are contemplated and provided for. In what follows I return to Irigaray's constructive project to explore the possibility of a new or alternative conceptual and cultural order in which, I argue, there is the potential to more accurately articulate the harm of rape, to reimagine a juridical order that is equipped to respond to the needs of two different subjects, and in which we could contemplate the conditions for a rape-free society.

---

<sup>1</sup> Luce Irigaray, *An Ethics of Sexual Difference* (Carolyn Burke & Gillian Gill tr, Cornell University Press 1993) 12.



In the first part of the chapter I return to Irigaray's critique of dominant phallographic notions of personhood and of language. I elaborate on her subsequent discussions of virginity as an alternative to the liberal notion of autonomy, and to her work on rethinking the conditions for communication in intersubjectivity. These alternatives present, in my argument, not only a new horizon of 'being-with' in society, but also a new way of thinking about what rape means. This, in turn, has the potential to facilitate a new juridical environment in which difference guides what is owed to each person as justice. In imagining what this environment might look like I turn to historical examples of women who can be said to have exercised the rights and responsibilities of sexual difference in the name of law or in legal settings, and to systems of law that draw on alternative values and in which women have a stake in the terms and procedure of justice, *as women*. Finally, I engage in a re-reading of Christine Helliwell's ground-breaking analysis of gender and sexuality amongst the Dayak community of Gerai in Indonesian Borneo, arguing that the Gerai, according to Helliwell's observations, represent a good example of a community living according to what could be described as an ethics of sexual difference and in which rape does not occur and is literally incomprehensible.

## **PART I**

### *Rape, Law and Sexual Difference: Concepts and Consciousness*

As discussed in chapter three, Irigaray's later work is concerned primarily with the elaboration of an intersubjective coexistence of two distinct beings (man and woman) living a life faithful to their own sexual identity. The ethics of sexual difference that emerges from Irigaray's work seeks equality through the inauguration of sexual difference in law with the concomitant guarantee of the protection of space between the two. This phase of Irigaray's work, I argue, has important

implications for addressing or rethinking the problems I identified in the preceding two chapters with rape law and trial practice. I say this because my analysis leads me to the conclusion that law reform and policy adjustments within the current liberal framework are simply incapable of generating the degree and kind of societal and cultural change necessary to provide the response to rape that justice demands or, ultimately, to create a rape-free society. What is needed instead, and what Irigaray's constructive project is explicitly trying to do, is to identify what it will take to radically refound culture with sexual difference as our shared horizon.

As should be clear from the scope of the critique, there is no one single conceptual change that will necessarily act as a panacea to make rape law and practice 'work'. With this in mind, it is nonetheless useful to explore how such conceptual change might act as a starting point or conduit to a more global radical reimagining. In what follows I speculate on how cognisance of the right to virginity and to equivalent linguistic and symbolic systems of exchange might reframe a consideration of the harm of rape and also woman's ability to speak that harm through the *nomos* of law.

#### Virginity: Personhood and Sexual Difference

As I argued in chapter five, there is a very real sense in which the notion of sexual autonomy, the animating concept behind the law of rape in the UK, is underpinned by a legacy of individualistic and propertied notions of personhood. As my analysis illustrated, the consequences of this particular formulation include the inevitable instantiation of a hierarchy between 'real' and 'simple' rape whereby the former is readily conceived or understood within the dominant symbolic as a harmful violation of personhood, but the latter frequently is not. Where personhood is measured in increments of value determined largely externally to the person, it seems that it is difficult to access the conceptual tools in which simple rape can be readily understood as harmful. Irigaray's critique is

prescient here because she illustrates how the possessive paradigm, such as that instantiated in rape law, has the effect of alienating subjectivity. In her argument there is a clear necessity to move away from this conception in order to reconcile law with 'natural reality'.<sup>2</sup>

Irigaray's analysis gestures towards a real need to reconsider personhood and with it the harm of rape not just for the generic person 'B' of section 1 of the SOA, but for both women *and* men, as different subjects respectively. Her legal code for women is a clear attempt to facilitate the departure from law's focus on property or possessory rights and also to incorporate her earlier criticism of the hom(m)osexual monopoly on systems of exchange.<sup>3</sup> Irigaray posits her legal code as a 'law of persons' that, she states, 'will enable us to overcome the splits and contradictions between subjectivity and objectivity concerning needs and demands that arise from a person's own will'.<sup>4</sup> Legal objectivity is thus no longer dependent on a frame of reference external to the person, which then leaves open the possibility of 'subjectivities developing without alienation in possession...'

Respecting the law thus becomes, with this definition, a moral and ethical task. It regulates the spiritual behavior of every individual – man or woman – and regulates the organization of society... Law can thus function as a dialectical tool between subjective will in the self and for the self. Law constitutes an objectivity. Yet, if it accords with the reality of the person, it has a subjective aspect. It guarantees a subjectivity faithful to itself, one not defined by the object and not alienated in it.<sup>5</sup>

In privileging the regulation of human relations Irigaray eschews the strictly prohibitive force of law in favour of a facilitative and positive account as a frame through which women can pass from nature to civil life, from the personal to the community. In doing so she inaugurates in law a number of values essential to the needs of the person. As detailed in chapter two, in the first set of rights these include dignity, identity and virginity, but also implicit is the importance of mutuality and also autonomy. All of these values are ultimately facilitative of an ability to transform oneself, or to become oneself, from *inside*:

---

<sup>2</sup> Luce Irigaray, *I love to you: sketch for a felicity within history* (Alison Martin tr, Routledge 1996) 51.

<sup>3</sup> Luce Irigaray, *This Sex which is not One* (Catherine Porter tr, Cornell University Press 1985) 170-191.

<sup>4</sup> Irigaray, *I love to you*, above n 2, 51.

<sup>5</sup> *ibid* 52.

The goal that is most valuable is to go on becoming infinitely. In order to become, it is essential to have a gender or an essence as horizon.... To become means fulfilling the wholeness of what we are capable of being.<sup>6</sup>

This is contrasted against woman's becoming within the phallographic symbolic:

She is constituted from outside in relation to a social function, instead of to a female identity and autonomy. Fenced in by these functions, how can a woman maintain a margin of singleness for herself, a nondeterminism that would allow her to become and remain herself?<sup>7</sup>

Irigaray's reappropriation of the concept of virginity is instructive here and her understanding of the law's role in protecting woman's virginity as the protection of the unique moral and physical inviolability of woman arguably provides a more adequate framework through which to think the harm of rape.

For Irigaray, the virginity of woman is an essential condition for autonomy. Because the body is objectified in the phallographic symbolic it is still necessary to talk about autonomy in terms of property and possession. Irigaray uses the notion of virginity to try and support an understanding of autonomy which is an expression and elaboration of a particular natural and sexual belonging. The virginity of woman is also linked inextricably to the self-affecting of feminine subjectivity. This process of self-affecting involves searching for one's becoming within oneself, as opposed to outside the self '...in objects, things, and their representations or mental reduplications'.<sup>8</sup> An ability to affect oneself relies on access to a cache of signifiers appropriate to woman's natural reality. Irigaray suggests that such a signifier can be found in the morphology of the two lips, a model for the plurality of the feminine.<sup>9</sup> The two lips are always in embrace, always touching and thus represent woman's fluidity, her multiplicity. The two lips challenge the unified subject required in the phallographic symbolic, they defy binary logic because they are at once 'inside and outside, one and

---

<sup>6</sup> Luce Irigaray, *Sexes and Genealogies* (Gillian Gill tr, Columbia University Press 1993) 61.

<sup>7</sup> *ibid* 72.

<sup>8</sup> Luce Irigaray, 'The return' in Luce Irigaray & Mary Green (eds) *Teaching* (Continuum 2008) 221.

<sup>9</sup> Irigaray, *This Sex*, above n 3, 205-219.

two, genital and oral'.<sup>10</sup> This allusion to the ability of woman to affect herself through the lips touching one another without any external intervention or tool '... allows woman to come back to the self, within the self... and to cultivate [her] own becoming...'.<sup>11</sup>

Virginity cannot be understood without an appreciation of the space in which it is optimally relied upon in the new social paradigm. In other words, the essence of the concept is the recognition of the other first, and second, seeing in the other an irreducible otherness. In woman that irreducible otherness is described as virginity.<sup>12</sup> The importance of horizontal transcendence between the two is important here and generates the space through which communication can take place, not through possession, appropriation or submission of either one to the other, but a place 'of respect which is both obligated and willed[;] a place of possible alliance'.<sup>13</sup>

The other is and remains transcendent to me through a body, through intentions and words foreign to me: 'you who are not and will never be me or mine', you are transcendent to me in body and in words, in so far as you are an incarnation that cannot be appropriated by me, lest I should suffer the alienation of my freedom. The will to possess you corresponds to a solitary and solipsistic dream which forgets that your consciousness and mind do not obey the same necessities.<sup>14</sup>

A possible question that a conceptual proposal like this raises is perhaps how virginity is different from, say, the notion of human dignity favoured by international bodies and instruments to confer rights or obligations on persons and/or states and which is generated from a universal predicate of shared humanness.<sup>15</sup> The difference of course is that dignity is used in this context as a reductive and universalising tool said to apply equally and without distinction to all humans, whereas virginity is generated first from a space of inviolability linked to the sexuate specificity of the person claiming it. Subjectivity thus is realised from within the subject (woman) herself rather than with reference to

---

<sup>10</sup> Elizabeth Grosz, *Sexual Subversions: Three French Feminists* (Allen & Unwin 1989) 115.

<sup>11</sup> Irigaray, 'The return', above n 8, 228.

<sup>12</sup> Luce Irigaray, *Key Writings* (Continuum 2005) 24.

<sup>13</sup> *ibid* 14

<sup>14</sup> *ibid*.

<sup>15</sup> A classic example of the use of this concept is to be found in the UN's Universal Declaration of Human Rights. The preamble of which notes the '...inherent dignity and... the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...' <http://www.un.org/en/documents/udhr/> (accessed August 11 2014).

concepts and values predetermined with reference to only one way of living, thinking and being; that of man.

In returning subjectivity to woman herself, rather than conceiving her subjectivity (or lack thereof) in terms of its relation to an object, we can begin to see perhaps how the crime of rape involves a harm to woman that affects the whole of her being, and becoming. In such a reading rape becomes a harm in and of itself, a violation of the inviolable, one in which a distinction between 'real' and 'simple' rape is rendered meaningless. The law must be required to safeguard and recognise virginity, '...if the word signifies safeguarding a space-time for what has yet to come'.<sup>16</sup> This 'what has yet to come' is violated and retarded by the act of rape in its complete and fundamental disregard for the very personhood of the subject and the circumstance under which that violation occurs becomes irrelevant in an assessment of the nature of that harm.

This conceptualisation of otherness and of the space through which that otherness is preserved is present also in Irigaray's work on language and systems of linguistic exchange: the most important mediation for the 'relational life' engendered through sexual difference is language.<sup>17</sup>

#### Language: Speaking-Of to Speaking-With

If we don't find a language, if we don't find our body's language, it will have too few gestures to accompany our story.<sup>18</sup>

As elaborated in chapter five, Irigaray's essential critique of the masculine *logos* is to point out that the historic erasure of the feminine is also evident in the 'deep economy of language' where patriarchal culture has reduced the value of the feminine to 'an abstract nonexistent reality'. The

---

<sup>16</sup> Luce Irigaray, *In the Beginning, She Was* (Bloomsbury 2013) 62.

<sup>17</sup> Irigaray, *Key Writings*, above n 12, 78.

<sup>18</sup> Irigaray, *This Sex*, above n 3, 214.

fact that woman is defined in language as an object in relation to the male subject, says Irigaray, explains why women find it so difficult to speak and be heard as women. 'They are excluded and denied by the patriarchal linguistic order. They cannot be women and speak in a sensible, coherent manner'.<sup>19</sup> We imagine language as an inanimate technique or tool through which we designate that which we perceive, however, argues Irigaray, this is not so:

The encodings through which we lay claim to appropriate the world purport to be objective and not subjective, objectivity being assimilated with the arbitrary, more than remaining close to real, in order to avoid being marked by our subjective experience. We become more and more distant from ourselves in order to become knowledgeable, confusing the acquisition of knowledge with human development... Subjectivity then is often sacrificed to what is only a dream of objectivity, as opposed to real objectivity, and the subject becomes submitted to the constitution of the object. Herein hides the will, not to communicate subjectively – through exchange of individual information, proper to each, and not subjugated to *a priori* codes that neither participant in the dialogue can grasp without the specific difference of each individual subjective world – but to dominate all that lives, and to be the master.<sup>20</sup>

Irigaray's constructive project in respect of language consists of both looking for the articulation of the female sex in discourse, and also the creation of a new space for linguistic exchange. This requires change on the part of both subjects: the masculine subject must embark on a concerted deconstruction of 'an autological cultural universe, which has not yet accorded any place to the language of the other' and; for the feminine subject 'it is more a question of elaborating a world by organizing in a specific way relationships between nature, language and alterity'.<sup>21</sup> This is so having regard to the negative as a dialogic method through which alterity is no longer resolved by man as a simple reduction to the same, but a resistance of the urge to absorb the other into his realm of mastery; to retain the other in his or her mystery. This is certainly not an easy process, as Irigaray wryly notes, '[t]his gesture undermines and challenges our most deeply embedded logical categories'.<sup>22</sup> These same categories are sustained and constantly reiterated through language and linguistic exchange. Thus, she asks, '[h]ow do we speak together, outside a subjugation to meanings

---

<sup>19</sup> Irigaray, *Ethics*, above n 1, 20.

<sup>20</sup> Irigaray, *Key Writings*, above n 12, 78.

<sup>21</sup> *ibid* 73.

<sup>22</sup> *ibid* 72.

already defined independently of us? How do we communicate between us other than communicating to each other information most often already external to us?<sup>23</sup>

Irigaray's code of civil rights for women initiates the radical reformulation of language and logic in its third and fourth sets of rights through its attempt to find an appropriate cultural place for feminine genealogy, divinity and language. Woman, argues Irigaray, '...ought to be able to find herself, among other things, through the images of herself already deposited in history and the conditions of production of the work of man, and not on the basis of his work, his genealogy'.<sup>24</sup>

Irigaray suggests in her legal code that women should have the right to defend their traditions and religion against unilateral decisions made according to male law. She also suggests that systems of exchange, such as linguistic exchange, should be revised in order to guarantee the right to equivalent exchange for men and women.<sup>25</sup> Irigaray's earlier work both works to destroy the phallographic discursive mechanism,<sup>26</sup> but also posits an alternative discourse that embraces the plurality of the feminine through the metaphor of the two lips, as discussed above.

What is clear first is the necessity of moving towards a space in which a feminine discourse can be thought and in which the masculine *logos* can be *unthought*; a space for speaking and being-with.

Speaking-with and being-with necessitate a respect for difference which will preserve the duality of subjects. The space between the two will be kept by silence, a silence which does not amount to a lack of words but to a safeguard of a place which belongs neither to the one nor to the other, which is neither proper to each one nor common to the two.<sup>27</sup>

The necessity of that space in which silence is said to preserve or represent a guarantee against the reduction of either one to object to be spoken of requires, says Irigaray, 'another sort of listening-to: no longer an acknowledging of meanings already coded for transmitting information but a listening

---

<sup>23</sup> *ibid* 79.

<sup>24</sup> Irigaray, *Ethics*, above n 1, 10.

<sup>25</sup> *ibid* 89.

<sup>26</sup> Irigaray, *This Sex*, above n 3, 76.

<sup>27</sup> Irigaray, *Key Writings*, above n 12, xiii.



to the still unspoken words of the other, to his or her singular personal discourse, furthermore addressed to a specific person.<sup>28</sup>

The implications of this proposal are far-reaching and point towards a necessary suspension of discourse and truth as we know them in order that we might refound culture between us. It is not so much that we might together substitute a *new* reality or truth but instead that we might accept a limit to our ability to perceive reality or truth as universal once and for all.

It is by listening to this other and not by judging that I will initiate myself to that which, left to myself, I will never know. But what I learn thus will never become mine unless it becomes reduced to something other than its own reality or truth.<sup>29</sup>

How then does one establish relations with another through language? '[H]ow do we speak together outside the language used to designate objects, to appropriate the real...?'<sup>30</sup> The answer, unsurprisingly, is to work from *sexuate* difference:

Dialogue within difference engenders a reality and a truth of both contents and forms of discourse which can never be formalized once and for all. Raised to the status of producer of culture, sexual difference in some ways inverts our linguistic habits, by making dialogue the privileged locus of the generation of language, of truth. A truth that can never be stockpiled with already pronounced utterances, one that is never assimilable to already acquired scientific knowledge, never subject to technical programmes.<sup>31</sup>

This fundamental change to language and language production requires first, says Irigaray, a move from *speaking-of* to *speaking-with*, 'this requires passing from a preference for mental or material objects to a preference for exchange between subjects.'<sup>32</sup> In linguistic and syntactic terms this means first, an exchange between subjects that is not simply a mere 'transfer of information', but the interchangeability of locutor and interlocutor. 'For which concerns *sexuate* difference, this means that male and female subjects must become alternately "I" and "you".'<sup>33</sup> This is important,

---

<sup>28</sup> *ibid* xiv.

<sup>29</sup> *ibid* 75.

<sup>30</sup> *ibid* 79.

<sup>31</sup> *ibid* 75-76.

<sup>32</sup> *ibid* 91.

<sup>33</sup> *ibid* 79.

because as Irigaray's early empirical work on language indicated, 'I' and 'you' do not currently occupy equivalent positions for both sexes, evidencing a difficulty of exchange at a very basic level.<sup>34</sup>

Such a change may seem trivial or unimportant but as my analysis of victims' speech within the rape trial space illustrates, phallographic systems of linguistic exchange mirror the dominant culture's need to dominate, possess and appropriate the feminine. The emergence of a new subjectivity not alienated in possession and able to express itself with reference to its own history and genealogy can only lead to the emergence of new values in which the relationship with the other is fundamental and 'independent of supposedly common material or mental objects.'<sup>35</sup>

Rape is a crime in which the victim experiences a profound deconstruction of the self, this is then exacerbated by an institutional apparatus that repeats this process on a discursive level. In compelling women to speak the harm of their rape through this phallographic *logos* law demands the articulation of harm that has no name. The word of law is thus '...bound in a same that nullifies...[difference] and reduces...exchange to a tautology, an already programmed scenography, a monologue in two voices'.<sup>36</sup> In a very real way the rape trial requires that women submit and contribute to the development and maintenance of an artificial language that is not their own and which depersonalises them. As Irigaray point out, this does not equate with having 'equal rights'.<sup>37</sup>

Law's *logos* is part of an '...isomorphism with the masculine sex, [one which] privilege[s] unity, form of the self, of the visible, of the specularizable...'.<sup>38</sup> This logic is created and maintained without reference to the female sex which cannot be described or represented in unitary terms.

---

<sup>34</sup> *ibid* 80.

<sup>35</sup> *ibid* 92.

<sup>36</sup> Luce Irigaray, *The Way of Love*, (Heidi Bostic & Stephen Pluháček tr, Continuum 2002) 47.

<sup>37</sup> Luce Irigaray, *Je, tu, nous: toward a culture of difference* (Alison Martin tr, Routledge 1993) 84.

<sup>38</sup> Luce Irigaray, 'Women's Exile: Interview with Luce Irigaray' in Deborah Cameron (ed) *The Feminist Critique of Language* (Couze Venn tr, Routledge 1990) 82.

Thus, '[j]ust as the female genitals are "plural"... so women's language will be plural, autoerotic, diffuse, and undefinable within the familiar rules of (masculine) logic'.<sup>39</sup>

In imagining an outside to Aristotelian logic so prized by law Irigaray imagines a realm of an as yet unknowable; how woman would then constitute herself forms a horizon of possibilities. 'If the female imaginary were to deploy itself, if it could bring itself into play otherwise than as scraps, uncollected debris, would it represent itself, even so, in the form of one universe?'.<sup>40</sup> The first step to a realisation of sexual difference in law must be a recognition of this possibility of woman's voice and a respect for her history and genealogy and of her unique (sexuate) humanity. Such a frame of reference implicates a woman's ability to render her experience of rape intelligible within her own symbolic universe and in turn to counter her dismemberment during the process of the rape trial. In Drucilla Cornell's words, 'the legal system must be forced to hear women without translating their suffering into a harm already recognised as such within the system. If women cannot express their reality within the legal system, their reality disappears...'.<sup>41</sup>

Providing a space for woman's voice would then involve the deconstruction or questioning of the hegemony of legal discourse, the consequences of which become plain when woman is forced to speak the harm of rape through the filter of legal (masculine) logic. If the law is required to provide this space and to respect equivalent modes of exchange for both sexes women will have the chance to articulate a bodily integrity essential for personhood and thus, perhaps, to grasp and express the harm of rape.

Irigaray's legal code and her constructive political project have important implications for the reconstitution of the juridical landscape and, by implication, the environment in which the crime of rape is seen, spoken and heard.

---

<sup>39</sup> Carolyn Burke, 'Irigaray through the Looking Glass' in Carolyn Burke et al (eds), *Engaging with Irigaray: Feminist Philosophy and Modern European Thought* (Columbia University Press 1994) 38.

<sup>40</sup> Irigaray, *This Sex*, above n 3, 30.

<sup>41</sup> Drucilla Cornell, *Transformations* (Routledge 1993) 82-3.

In part II of this chapter I turn to historical examples of women who can be said to have exercised the rights and responsibilities of sexuate difference in the name of law or in legal settings, and to systems of law which draw on alternative values and in which women have a stake in the terms and procedure of justice, *as women*. These examples are useful in thinking through the implications of a radically different social, cultural and symbolic order for law and illustrate both law's radical contingency and its possibility.

## **PART II**

### *Women's Law: A (not so) New Horizon*

An important part of Irigaray's project has been to resurrect feminine culture and genealogy from a long-forgotten history in order to gather the tools through which we might start to constitute an alternative symbolic order. Greek myth has been important in Irigaray's work in this regard and in this part I discuss the figure of Antigone in her writing. Antigone is especially relevant to a discussion of women's law as she is a figure who has been frequently read as refusing to abide by the legal dictates of the masculine state. Peter Goodrich has taken up Irigaray's project in exploring women's law also, and his work on *Gynaetopia* and the Courts of Love is vitally important in understanding both the alternative genealogy of the common law and also how sexuate rights might facilitate a new juridical environment. Goodrich's work suggests that the history of law is not a history of one and that there is an historical precedent for difference in law and, specifically, women's difference.

## Antigone

Sophocles' *Antigone* has fascinated historians and philosophers alike for centuries.<sup>42</sup> She has also been a constant presence in Irigaray's work, right from *Speculum* in 1974 to her newest work *In the Beginning, She Was* in 2013.<sup>43</sup> Sophocles' play takes place during Thebes' civil war in which Creon, the new ruler of Thebes, decrees the public shaming of the rebel Polynices whose body will be denied the holy rites and lie unburied on the battlefield as prey for vultures. Antigone is the sister of Polynices who buries his body in defiance of Creon's edict. When Creon finds out, he sentences Antigone to be buried alive. She defends the morality of her actions and the immorality of the edict until she hangs herself, before her final punishment can be carried out.

In Irigaray's work Antigone's story usually performs two clear functions: 'it is given as an example (indeed the example) of what a culture in the feminine means and it is an historical touchstone from which Irigaray discerns the environmental, legal, ethical and cultural requirements for a life in intersubjectivity'.<sup>44</sup>

Antigone's great contribution in Irigaray's reading is to show how respect for a 'singular concrete sexuate identity' is an ethical necessity in establishing humanity in intersubjectivity. Such identity existed in Antigone's time before masculine law rendered the universal neuter and supplanted the cultivation of desire with natural immediacy.<sup>45</sup>

Antigone is important for thinking through the implications of Irigaray's schema of sexuate rights for law because she represents an historical figure who 'at the dawn of our culture, was struggling to

---

<sup>42</sup> See for example: Judith Butler, *Antigone's claim: Kinship between life and death* (Columbia University Press 2002); G. W. F. Hegel, *Phenomenology of Spirit* (A. V. Miller tr, Oxford University Press 1977) chap. 6; Martin Heidegger, *Hölderlin's Hymn 'The Ister'* (Indiana University Press 1996) pt 2; Friedrich Hölderlin, 'Remarks on Antigone' (1988) *Essays and Letters on Theory* 109.

<sup>43</sup> See 'The eternal irony of the community' in Luce Irigaray, *Speculum of the Other Woman* (Gillian C. Gill tr, Cornell University Press 1985) 214-226 and; 'Between myth and history: the tragedy of Antigone' in *In the Beginning*, above n 16, 113-139.

<sup>44</sup> Ovidiu Anemtoaicei & Yvette Russell 'Luce Irigaray: Back to the Beginning' (2013) 21(5) *International Journal of Philosophical Studies* 773, 780-781.

<sup>45</sup> *ibid* 782-783.

maintain feminine laws against an imperialist masculine power'.<sup>46</sup> Antigone's story occurs, argues Irigaray, at the cusp of the descent of modern culture into phallocracy, from which we have still to free ourselves. Antigone 'demanded rights to be respected and the order of the city to be maintained.'<sup>47</sup> For these reasons, she represents an historical figure whose ethics embody the rights and responsibilities associated with sexuate difference and her legacy, says Irigaray, demands that we '[enter] another time of History, [revive her] message... and [pursue] its embodiment in our culture.'<sup>48</sup>

It is clear from her latest work that Irigaray's fascination with Antigone reflects a deeply personal connection to her story. Attesting to sharing Antigone's 'tragic fate', Irigaray notes in some detail the pain she endured subsequent to the publication of *Speculum* in France when she was expelled from the Université de Paris VIII Vincennes after displeasing Lacan.

I have shared Antigone's tragic fate: the exclusion from socio-cultural places because of my public assertion of a truth that has been repressed, or at least not recognized as such, and that thus disturbs our usual order ... Expelled from public organizations, enclosed or shrouded within a silence that I sometimes felt to be the opaque wall of a tomb ... I have been expelled from the polis, the city, the human society to which I belong and sent back to the natural world that my contemporaries no longer appreciate or consider of much value, and hence something of which it was unnecessary to deprive me.<sup>49</sup>

Paradoxically, this is reframed by Irigaray as something she is grateful for in that it has allowed her closer access to Antigone's story and its radical implications. Fortunately, she says,

if I have been excluded from society – from universities, psychoanalytical institutions, circles of scientists and even of friends, in part from publishing houses and, more recently, from my house itself – I have not been deprived of my relation to the natural world ... Being sent back to the natural world in this way has allowed me to survive or, better, to rediscover what life itself is. Furthermore it has helped me to unearth that Greek world in which Antigone's character appeared, and to perceive the meaning of her tragic destiny.<sup>50</sup>

---

<sup>46</sup> Irigaray, *Key writings*, above n 12, 198.

<sup>47</sup> *ibid.*

<sup>48</sup> Irigaray, *In the Beginning*, above n 16, 116.

<sup>49</sup> *ibid.* 115.

<sup>50</sup> *ibid.*

Irigaray's analysis of the state in which Antigone's story plays out 'relies on Hegel's historical critique of the polis as a body that demands that citizens cede their individuality developed within the family to the needs of human law'.<sup>51</sup> Irigaray reveals the way in which Antigone overturns the rationality upon which the state is based in her position as outsider 'by rejecting the expectation that her role should be circumscribed by the needs of the state'.<sup>52</sup> In refusing to accept the legitimacy or rationality of the state and human law by which Creon would deny her the ability to fulfill her duty to provide her brother a burial Antigone, like Irigaray herself, was compelled to 'sp[ea]k and [act] in the name of an order repressed in our tradition, an order that it is necessary to consider again with the becoming and accomplishment of humanity in mind.'<sup>53</sup>

In trying to understand Antigone's actions Irigaray reads the existence of sexual difference in nature as informing Antigone's desire to fulfill her duty to three important laws, those of the cosmos, generational order and sexual differentiation. These are laws no longer recognised by Creon's administration but which are valued by Antigone as of paramount importance in maintaining justice and balance.

In respect of the cosmic order, yet to be reduced to a 'fabricated human world' which no longer respects a natural equilibrium between nature, gods and humans,<sup>54</sup> Antigone understands that a failure to provide her brother, Polynices, with the appropriate ritual of burial would harm the living world that surrounds it.<sup>55</sup> Antigone's respect for this order, for the cosmos and for her duty to respect life, preserves, says Irigaray, her 'autonomy and her feminine world, and prevents her from becoming a mere function or role in the patriarchal world ...'.<sup>56</sup>

In respect of generational order, Antigone, says Irigaray, 'embodies in her actions a faithfulness to a maternal order which Creon is attempting to destroy through his use of arbitrary

---

<sup>51</sup> Anemtoaicei & Russell, above n 44, 782.

<sup>52</sup> Tina Chanter, *Ethics of Eros* (Routledge 1995) 81.

<sup>53</sup> Irigaray, *In the Beginning*, above n 44, 118.

<sup>54</sup> *ibid* 119.

<sup>55</sup> *ibid* 123.

<sup>56</sup> *ibid* 124.

law. Polynices is her mother's son and in carrying out his burial she is respecting generational conditions'.<sup>57</sup>

Finally, regarding sexuate differentiation, Antigone's story reflects for Irigaray a respect for the duality present in nature itself and in which horizontal transcendence first appeared. This is not between the fecund couple or between mother and son, but between sister and brother between whom 'genealogy becomes the generation of two different horizontal identities: appearance of the transcendence of sexuate identity with respect to the body'.<sup>58</sup>

Unlike those other relations, sister and brother are not distinguished by reproductive or parental function at the 'service of nature', but a true and unfabricated sexuate differentiation. ... In the act of burying Polynices Antigone, says Irigaray, preserves a 'transcendental world' in which her brother's world is recognised as different from her own and irreducible to sameness. In recognising such transcendence humanity can 'emerge from undifferentiation and enter a relational cultural world'... This model for a new cultural order that does not fall back into undifferentiation is first present between sister and brother and provides the basis upon which a 'third world' could be elaborated through relations in difference.<sup>59</sup>

Antigone's story thus embodies that ethics of sexual difference in which the possibility for a space between the two is preserved and in which rights and responsibilities very much accord with her identity as a sexuate being.

#### Gynaetopia? The Feminine Origins of the Common Law

In order to further elaborate on the notion of women's law and on juridical environments operating according to alternative values and systems of legality different from that under which we currently live, I turn now to Peter Goodrich's work on feminine genealogies and the common law. This work is important because it explicitly challenges the narrative or story of the common law, discussed in chapter six, which posits an origin or history inexorably leading to woman's exclusion. Goodrich's

---

<sup>57</sup> Anemtoaicei & Russell, above n 44, 783.

<sup>58</sup> Irigaray, *In the Beginning*, above n 16, 133.

<sup>59</sup> Anemtoaicei & Russell, above n 44, 783-784.



archaeology of the common law exposes the genealogy of an alternative origin and a long forgotten history in which women and women's law was not an impossible aberration. Goodrich pursues one such analysis in a reading of a little known work of John Selden, who argued in *Jani Anglorum* in 1610 that 'common law comes from a feminine *nomos* and is distinctive not least by dint of that origin'.<sup>60</sup> Femininity, argued Selden, was the 'other face' of law evidenced by mythology, fragmentary records, and 'a feminine imaginary and its figures of virtue'.<sup>61</sup>

Selden was an English jurist and scholar whose radical politics of the time saw him imprisoned on more than one occasion.<sup>62</sup> Goodrich notes that *Jani Anglorum* is essentially a genealogy of the sources of English common law in which Selden notes a tradition of mixed government and 'multiple sources of juridical rule.' Selden's text is a challenge to the hereditary right of the monarchy and a testament to the diversity of sources and custodians of the common law.<sup>63</sup>

As I noted with reference to Goodrich's work in chapter six, women represented a problem both conceptually and constitutionally for sixteenth century jurists as they had no independent legal status but 'statutes spelled out in relation to specific property rights and transactions'.<sup>64</sup> Selden's work addresses this conundrum through the figure of the Janus, the 'back face' of English common law, or the little-known stories, myths and legends of the common law. This Janus comes through forcefully in Selden as a feminine face of justice.

...[B]ehind the legends of origin and of source of common law, behind the narratives of its diverse temporal beginnings, the representation or image of common law, its symbolic descent,

---

<sup>60</sup> John Selden, 'The reverse or back-face of the English Janus' in *Tracts written by Selden* (first published 1610 as *Jani Anglorum facies altera*, London 1683) cited in Peter Goodrich, 'The accidental feminist: On the Pythagorean roots of John Selden's *Jani Anglorum*' in Maria Drakopoulou (ed), *Feminist Encounters with Legal Philosophy* (GlassHouse 2013) 40.

<sup>61</sup> Peter Goodrich, 'Gynaetopia: Feminine genealogies of common law' (1993) 20(3) *Journal of Law and Society* 276, 287.

<sup>62</sup> Goodrich, 'The accidental feminist', above n 60, 41.

<sup>63</sup> *ibid* 43.

<sup>64</sup> Goodrich, 'Gynaetopia', above n 61, 285.

is consistently portrayed as being from a variety of feminine images and female figures, the forgotten faces of a law which was never one.<sup>65</sup>

Selden trawls the underside of various historical records to trace the legal constitution of England, leading him to a wealth of illustrious female legislators, lawmakers and sovereigns and indeed to the 'first judges of the common law':

In the time of the laws, old heroes went by the names of gods and in the druidical Celtic colony of Britain the *semnaitheia* or 'venerable Goddesses' ruled. These were the goddesses of justice, the Furies, 'also called Themis', who sat 'upon the skirts of the wicked' and, as (by *antiphrasis*) the Eumenides, rewarded the good and 'such as are blameless and faultless'. They are the first judges of the Celtic common law, the *deis matribus* or mother goddesses to whom altars were inscribed and before whose dreadful justice the populace would tremble and shake.<sup>66</sup>

Selden's political view, says Goodrich, was that 'women had governed and that they should govern'. His research had led him to challenge the prevailing wisdom which held that natural law prohibited women's inclusion in the polis, because of historical counter-examples and also because male rule, far from being the universal norm, was actually the historical exception.<sup>67</sup>

Goodrich concludes his complex analysis of woman as the paradoxical image, origin or outside of law by noting that there is no common essence or definition of woman in law but a plurality of concepts or usages. What is clear, however, is that the power or threat of femininity came from its difference, a reference to which sustained early feminist critiques of law calling for a separate and positive status for women.<sup>68</sup> Goodrich notes examples of such calls which sought the establishment of institutions separate from the 'world of men' for personal and political development and the development of a 'philosophy of the feminine as well as a society dedicated to the furtherance of the education of its own sex.'<sup>69</sup>

---

<sup>65</sup> *ibid* 286.

<sup>66</sup> *ibid*.

<sup>67</sup> *ibid* 287.

<sup>68</sup> *ibid* 299.

<sup>69</sup> *ibid* 299-300.

This forgotten history of women's law is important because it offers 'a juridical narrative of the feminine genre and a language of difference as a practical sign of reciprocal right'.<sup>70</sup> Feminine justice represents the 'strangeness of language and so the possibilities of interpretation and also of plural forms of knowledge'.<sup>71</sup> It forces law into an encounter with another site of knowledge and challenges 'the law of masters, the genre and categories of the established institution of doctrine and its artificial and paper rules'.<sup>72</sup>

### The Courts of Love

An important example of a juridical narrative of difference is to be found again in Goodrich's work on minor jurisprudences and the Courts of Love in France, as detailed in Andreas Capellanus' *Tractatus de amore* first published in 1176.<sup>73</sup> This work is important because in it Goodrich illustrates further both the credibility of law operating according to sexuate rights as Irigaray envisaged it, and an historic example of this operation. The decisions of the Courts of Love challenge, says Goodrich, the 'monistic imagination and the unifying logic of positive law' in such a way that gestures towards 'a plurality of regimes of regulation dispensing justice according to the ethical dictates of their subject-matter'.<sup>74</sup> Those dictates necessarily involve emotion and 'the phenomenology of relationship' and by placing law face to face with the reality of love, says Goodrich, the Courts offer an important opportunity to consider contemporary legal concerns with 'the rights of sexuality as well as the sexuality of rights'.<sup>75</sup>

---

<sup>70</sup> *ibid* 301.

<sup>71</sup> Peter Goodrich, *Law in the Courts of Love* (Routledge 1996) 2.

<sup>72</sup> *ibid*.

<sup>73</sup> Andreas Capellanus, *Tractatus de amore et de amoris remedio* in P.G. Walsh, *Andreas Capellanus on Love* (P.G. Walsh tr, first published 1176, Duckworth 1982) cited in *ibid*.

<sup>74</sup> Goodrich, *Law in the Courts of Love*, above n 71, 4.

<sup>75</sup> *ibid* 31.

Courts of Love were traditionally made up of noble women of relevant districts and held jurisdiction over questions concerning love, and over disputes between lovers. Rulings of the Courts constituted a body of law according to which regulations concerning love and loving were written and accepted as such. Examples of disputes brought before the Courts included a man seeking to enforce a promise of love from a woman who was married to another,<sup>76</sup> a woman seeking to enforce a promise from a man who had asked for her love in exchange for payment but had reneged on the arrangement when he had a dream of her which had allayed the 'ardor threatening to consume him',<sup>77</sup> and an ethical question of 'whether the greater affection lay between lovers or spouses' (the Court determined in that case that the two emotional states were so radically distinct they could not be compared).<sup>78</sup>

Goodrich notes disagreements amongst historians about the credibility of the evidence of the Courts. '[M]easured against the demands of the real', and despite ample evidence, many historians agree that the Courts cannot be said to have existed. In literary history the Courts are 'simply erased'. Goodrich attributes this skepticism to a normative patristic tradition that 'could neither imagine nor perceive the relevance of women's courts'.

That women, who were defined early on in the patristic tradition as lack or as nothing, should produce nothing as their law, that their courts and their rules should be perceived as madness or depicted as taking the form of fantasies regulating imaginary relationships, fits all too well within the historiographical tradition.<sup>79</sup>

The judgments of the Courts of Love constitute instead, in Goodrich's view, a unique form of sexual justice that referred to law

...neither of the established monarchical state nor of the church but of a feminine public sphere.... Women's courts spoke to the law of emotion and a corresponding jurisdiction concerned not with individual rights or passions but rather with a space in between lovers and independent of any recognised right, property or established propriety.<sup>80</sup>

---

<sup>76</sup> ibid 29.

<sup>77</sup> ibid 38-39.

<sup>78</sup> ibid 30.

<sup>79</sup> ibid 37.

<sup>80</sup> ibid 30-31.

Goodrich discusses a particular decision of the Court of the Countess of Flanders that illustrates his point well.<sup>81</sup> In that hearing a man, who is described as being ‘utterly without moral worth or human value’ and without the love of any woman, was granted the love of a woman who counseled him in the ways of love such that he attained the ‘highest moral character and became the object of general praise for his honesty’. Now desirable to other women, he succumbed to such seductions and the woman pleaded to ‘recall’ her lover. The Court ordered that he return to his first lover in recognition of her ‘industry and labour’ in raising his moral worth. This decision is interesting, says Goodrich, for its conceptualisation of the weight of justice in the case.

In one sense the man is made to pay for the time and the love which he took, but that payment is not of the order of possession or of some other existential proprietary right. It insists upon a recognition of the other, a justice of proximity, a species of art made into law. It also comes some way towards addressing the question not of individual right but of a right between two parties...<sup>82</sup>

This is a good example of the operation of a code of law or ethics accounting for sexuate rights, which requires ‘treating persons of whatever gender according to the reasoned principles of love and according to the spaces of desire or imagination which such rights made possible’.<sup>83</sup> He continues:

What is crucial and specific to the justice of love is a recognition of a subjectivity that does not belong to either of the parties but which exists between them as an event, as a temporality and as a libidinal and so juristic exchange. Love in the time of object-choice is always potentially love in the time of law. It is in terms of a justice appropriate to the time and intentionality of love as a radical emotion, as a desire which moves and changes the prior identities or purposes of its subjects, that judgment must recognise a space of relationship between parties rather than conceiving rights as the property of an individual. The difference of such a justice resides in a fluidity or contingency that can only judge according to the sudden and future orientated acts of a subjectivity created between two subjects, a mixing of subjectivities or ‘interpenetration’, a space between, a space – touch, caress, body or bond – that is not of itself but rather for the other.

---

<sup>81</sup> *ibid* 65.

<sup>82</sup> *ibid* 65-66.

<sup>83</sup> *ibid* 64.

The judgments may appear to concern private or trivial matters not properly for law but this, as Goodrich points out, is 'simply the value that we place on them'.<sup>84</sup> It is what they represent that is potentially much more radical:

[A]n attempt to think through the most pervasive, the most political and the most immediate problems of social intercourse and institutional life, namely the relation between the sexes conceived neither as a war of the sexes nor as a play of power and possession but rather as a question of reciprocal recognition and mutual right. That the desire for truth in relationships, in the interaction of the sexes, be deemed a feminine characteristic, or that values of care, relationship, fidelity and truth be regarded as matters outside of law does not reflect upon the judgments of love so much as it condemns the contemporary institutions and doctrines of law.<sup>85</sup>

What is therefore so radical about these judgments and the minor jurisprudence that their existence evidences is that there might be something of civic or even legal significance 'in the domain of intimate relationships'. This gestures towards the 'valuation of an ethics that recognises both the subject and its speech as necessarily embedded in desire and as belonging to a truth which is exterior to any prior proprietary right'.<sup>86</sup> In other words, the existence of a minor jurisprudence in which the law is concerned with the regulation of human relationships and intersubjectivity raises the spectre of an entirely new legal hermeneutics.

In part III I move on to consider further the radical implications of a refounding of culture and law in which sexuate difference functions as a shared horizon.

---

<sup>84</sup> *ibid* 70.

<sup>85</sup> *ibid* 70-71.

<sup>86</sup> *ibid* 69.

### PART III

#### *Christine Helliwell and the Dayak of Gerai*

In 1985 and 1986 the anthropologist Christine Helliwell undertook participant observational research within the Dayak community of Gerai in Indonesian Borneo.<sup>87</sup> In a mesmerising article published in the journal *Signs* in 2000, Helliwell opens with an account of an event that occurred during her time living with the tribe in September 1985.<sup>88</sup> Helliwell awoke one morning to hear a group of women laughing and talking loudly and excitedly among one another recounting something that had occurred the night previous. A young woman of the tribe had awoken the previous night with a start in the freestanding house that she shared with her elderly mother, sister and young children to find a man attempting to climb into her bed with her. The man had apparently climbed in through a window and was urging her to ‘be quiet’ as he grabbed her shoulder. The woman responded to the man’s actions by getting up and pushing him violently backwards until he became tangled in her mosquito net. Eventually freeing himself, clothes askew, he fled into the night with the woman in pursuit yelling his name and screaming abuse in his direction; the commotion woke many of the surrounding neighbours.

Helliwell recounts her shock and indignation upon hearing the women of the tribe describing the event and their obvious amusement at doing so, particularly given what they were describing was, to Helliwell at least, clearly an attempted rape. Speaking to the woman who had been the subject of the man’s unwanted actions, Helliwell again expressed her outrage at what she characterised as a sexual assault and questioned the woman about her reaction the night before. The woman’s response forms the basis for Helliwell’s subsequent analysis in the article and bears repeating in full:

---

<sup>87</sup> The community was made up of approximately 700 individuals.

<sup>88</sup> Christine Helliwell, “‘It’s only a penis’: Rape, feminism and difference’ (2000) 25(3) *Signs* 789.

Her anger was palpable, and she shouted for all to hear her determination to exact a compensation payment from the man. Thinking to obtain information about local women's responses to rape, I began to question her. Had she been frightened? I asked. Of course she had - Wouldn't I feel frightened if I awoke in the dark to find an unknown person inside my mosquito net? Wouldn't I be angry? Why then, I asked, hadn't she taken the opportunity, while he was entangled in her mosquito net, to kick him hard or to hit him with one of the many wooden implements near at hand? She looked shocked. Why would she do that? she asked - after all, he hadn't hurt her. No, but he had wanted to, I replied. She looked at me with puzzlement. Not able to find a local word for rape in my vocabulary, I scabbled to explain myself: 'He was trying to have sex with you,' I said, 'although you didn't want to. He was trying to hurt you.' She looked at me, more with pity than with puzzlement now, although both were mixed in her expression. 'Tin [Christine], it's only a penis,' she said. 'How can a penis hurt anyone?'<sup>89</sup>

Why, Helliwell asks,

does a woman of Gerai see a penis as lacking the power to harm her, while I, a white Australian/New Zealand woman, am so ready to see it as having the capacity to defile, to humiliate, to subjugate and, ultimately, to destroy me?'<sup>90</sup>

In the two years Helliwell spent with the Dayak, she heard of no other instances of sexual assault or violence. In fact, she says, when she questioned men and women about sexual assault their responses ranged 'from puzzlement to outright incredulity to horror',<sup>91</sup> leading her to characterise the community as 'rape-free'. I want to look more closely at Helliwell's research and in particular her analysis of her observations and the conclusions she comes to. There are clearly important limitations to interpreting someone else's data, especially after they themselves have interpreted it (an interpretation of an interpretation...), and I certainly don't profess to argue that Helliwell is wrong, given my wholly partial access to her material. However, I will argue that the interpersonal relations between men and women in Gerai she is describing could be interpreted in a different way to the way she has chosen to interpret them and that this has important implications for thinking through a life lived with a shared horizon of sexual difference.

---

<sup>89</sup> ibid 790.

<sup>90</sup> ibid 797.

<sup>91</sup> ibid 798.



Helliwell criticises what she sees as the tendency of Western feminists to universalise rape and the fear of rape among women as endemic to the modern condition. This stems from two assumptions, she says, relating to the way in which difference is formulated which, when societies and cultures outside the West are examined, become problematic. These are first, the tendency to see patriarchy and the oppression of women by men as an historical fact, and rape as a quintessential tool through which men dominate, control and possess women as a universal condition.<sup>92</sup> And second, that there is a biological inevitability to rape by virtue of the differential constitution of men's and women's bodies; men are born with penises which are inherently capable of penetrating women's vaginas and therein lies the universal capacity for all men to brutalise all women.<sup>93</sup> As Helliwell points out, these presumptions have been problematised by white feminists primarily for fixing the identities and bodies of men and women within a heterosexual matrix in which masculinity and femininity are strictly defined.<sup>94</sup> However, in her observation and analysis of life with the Dayak people, Helliwell seeks to push this critique further, challenging the emphasis of some feminists on *difference*, rather than *identity*, as that which is determinative of sex and gender, arguing that the reliance on difference to explain rape cannot be taken as given the world over. Attention must be paid, she says, to localised discourses in which gendered and sexual relations and practices are iterated, 'including the practice of rape'.<sup>95</sup>

Helliwell describes the relations between men and women in Gerai as egalitarian in many respects but highlights aspects of these relations which could easily be described as unequal, particularly with respect to the civil or community roles of men and women. Men are described by

---

<sup>92</sup> *ibid* 794.

<sup>93</sup> *ibid* 795-796.

<sup>94</sup> See for example Judith Butler, *Gender Trouble* (Routledge 1990) and; Sharon Marcus, 'Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention' in Judith P. Butler & Joan Wallach Scott (eds) *Feminists Theorize the Political* (Routledge 1992) 385-403.

<sup>95</sup> Helliwell, above n 88, 798.

the Gerai as 'higher' than women and this manifests itself in their greater speaking roles in community meetings, their monopoly on legal expertise, the degree of formal authority they hold over their wives, and the greater weight their evidence is accorded in a moot.<sup>96</sup> Despite these seemingly inegalitarian characteristics of Gerai life, this superior authority and status, says Helliwell, does not manifest itself as a power to dominate and control women sexually.<sup>97</sup>

Helliwell goes on to analyse this particular cultural state with reference to what she reads as a particular Gerai understanding of men and women not reliant on an inherent and immutable notion of *difference*, but on *sameness*.

In Gerai, men and women are not understood as fundamentally different types of persons: there is no sense of a dichotomized masculinity and femininity. Rather, men and women are seen to have the same kinds of capacities and proclivities, but with respect to some, men are seen as 'more so' and with respect to others, women are seen as 'more so.' Men are said to be braver and more knowledgeable about local law (*adat*), while women are said to be more persistent and more enduring. All of these qualities are valued.<sup>98</sup>

Crucially, says Helliwell, the ability to nurture and care, seen in western culture as a feminine quality, is attributed to men and women equally in Gerai.<sup>99</sup> These differences in conceptualising personhood are linked inextricably to work and specifically to the role of rice production in sustaining the individual and community.

[In Gerai] rice is the source of life, and its (shared) production humanizes and socializes individuals. ... Women and men have identical claims to personhood based on their equal contributions to rice production (there is no notion that women are somehow diminished as persons even though they may be seen as less 'high').<sup>100</sup>

The notion of the 'good life' for the people of Gerai, says Helliwell, is the same for all members of the community and marked by the wish for a successful and bountiful rice harvest and the desire to raise healthy children. This life is dependent on a particular notion of partnership between men and

---

<sup>96</sup> *ibid* 799.

<sup>97</sup> *ibid*.

<sup>98</sup> *ibid* 800.

<sup>99</sup> *ibid*.

<sup>100</sup> *ibid*.

women in which their respective capacities for certain types of work is not assumed by a rigid division of labour, but does involve the acknowledgement that 'men are much better at men's work, and women are much better at women's work'.<sup>101</sup> This illustrates, in Helliwell's reading, not a stress on 'radical difference' but on 'identity between men and women'.<sup>102</sup>

This emphasis on identity extends, says Helliwell, to sex and sexuality. Men and women are said by people of the community to both menstruate, to both be capable of lactation and, indeed, to both have the capacity for pregnancy and childbirth (though women are said to normally carry out this work as they are 'better' at it).<sup>103</sup> This demonstrates, says Helliwell, 'the community's stress on bodily identity between men and women'.<sup>104</sup> Furthermore, Helliwell found that in Gerai the way in which men and women's sexual organs were conceived was essentially the same.

[W]hen I asked several people who had been to school (and hence were used to putting pencil to paper) to draw men's and women's respective organs for me: in all cases, the basic structure and form of each were the same. One informant, endeavoring to convince me of this sameness, likened both to wooden and bark containers for holding valuables (these vary in size but have the same basic conical shape, narrower at the base and wider at the top). In all of these discussions, it was reiterated that the major difference between men's and women's organs is their location: inside the body (women) and outside the body (men). In fact, when I pressed people on this point, they invariably explained that it makes no sense to distinguish between men's and women's genitalia themselves; rather, it is location that distinguishes between penis and vulva.<sup>105</sup>

'In line with the stress on sameness' says Helliwell, is the conceptualisation in Gerai culture of the sex act itself. This is seen 'as an equal coming together of fluids, pleasures, and life forces' which is said to lead to the conception of a fetus created through 'the mingling of equal quantities of fluids

---

<sup>101</sup> *ibid* 802.

<sup>102</sup> *ibid*.

<sup>103</sup> *ibid*.

<sup>104</sup> *ibid* 803.

<sup>105</sup> *ibid*.

and forces from both partners'.<sup>106</sup> The sex act can only occur through a mutually reciprocated 'need' between partners, without which the balance required to complete the act would be lacking.<sup>107</sup>

[T]he sexual act is understood as preeminently mutual in its character, including in its initiation. The idea of having sex with someone who does not need you to have sex with them - and so the idea of coercing someone into sex - is thus almost unthinkable to Gerai people. In addition, informants asserted that any such action would destroy the individual's spiritual balance and that of his or her rice group and bring calamity to the group as a whole.<sup>108</sup>

What this illustrates, according to Helliwell, is not the coming together of two different bodies as in Western culture but 'it is the similarity of the two bodies that allows procreation to occur'.<sup>109</sup> Helliwell does concede that while the emphasis is on 'identity, mingling, balance and reciprocity' the Gerai do have a strong sense of the importance of women and men as conjugal pairs that 'fit' together and have complementary 'life forces'.<sup>110</sup> This life force is conceived as the spiritual essence that animates the person and gives the person life, which is also said to be true of all other elements of the universe. While the Gerai 'stress sameness over difference' they do, nevertheless, see their life forces 'oriented differently'. This again, explains Helliwell, relates primarily to the respective roles of each in the rice production cycle of the community, as opposed to their biology.<sup>111</sup> Helliwell concludes that the Gerai have no conception of genital dimorphism upon which most Western feminist analyses of rape proceed, nor any regulatory regime of heterosex in the Foucauldian sense against which gendered bodies are produced and sexed.

Returning to the story with which she commenced the article, Helliwell attributes the origins of her own reaction to the events to her 'girling' within her own culture, in which she learnt to fear acquisitive, aggressive male sexuality and to protect her own passive, vulnerable sexuality. The Gerai woman, by contrast, had no fear of sexual violence when awoken by a male intruder. 'She

---

<sup>106</sup> *ibid.*

<sup>107</sup> *ibid* 808.

<sup>108</sup> *ibid.*

<sup>109</sup> *ibid* 803.

<sup>110</sup> *ibid* 804.

<sup>111</sup> *ibid* 805-806.

ha[d] no such fear because in the Gerai context "girling" involves the inscription of sexual sameness, of a belief that women's sexuality and bodies are no less aggressive and no more vulnerable than men's'.<sup>112</sup>

The impetus for Helliwell's critique of feminist reliance on 'difference' to explain the phenomenon of the rape of women by men seems to be influenced by an intersectional feminist critique of radical feminism and its universalizing tendencies, and her desire as an anthropologist to trouble the radical feminist assumption of the cultural ubiquity of rape. In this sense, Helliwell does not appear to be aligning herself in her desire to challenge feminist reliance on difference to explain rape with the radical urge to erase sexual difference and hence, the source of women's oppression. Rather her focus in this article is to think about how 'the practice of rape inscribes such differences'.<sup>113</sup> In this way, her project is very much in keeping with my own enquiry in this thesis about the way in which rape *law* inscribes difference. However, Helliwell's conception of sexual difference in this piece seems to be limited to biological difference, or difference as it is conceived in the dominant symbolic; what Irigaray would probably call 'sexual *indifference*'. This fails to capture the notion of *sexuate* difference as *morphological*. This distinction is important because the morphology of difference does not stop at the body's surfaces but considers the social and psychical context of the body's coding in culture. I say this not as a criticism but because I think in Helliwell's observations there is the potential to read a quite clear morphology of *sexuate* difference in the culture and society of the Gerai.

Certainly Helliwell's research suggests that there is no prediscursive coding of bodies as masculine or feminine as in Western discourse and in this sense there is not the immediate dimorphism that then dictates a specific type of gendered performance. However, men and women are still distinguished in this culture by their morphology. As Helliwell says, men and women have different values that are not seen in hierarchy with one another but are necessary for balance. This

---

<sup>112</sup> *ibid* 810.

<sup>113</sup> *ibid* 795.

came through most clearly in my view in the idea of the complementary 'life forces' which, as Helliwell described it, is very much an energy coming from an individual's unique and uniquely different sexuate being. The presence of the life force and the esteem in which that was held, not as a generic 'good' or 'worth' of each community member but as an ultimately unknowable alterity of the sexuate individual, also indicated a space between the two in which neither could consume the other but in which the creation of the energy required to sustain and generate life was nurtured. Helliwell's description of the life force reminded me of Irigaray's insistence on the need for a double universal as the conduit for the full positive affirmation of two sexes and the reconfiguration of the subject beyond the 'one'. The life force here forms the basis of a subjecthood different in respect of each being which in turn generates alternative knowledges, practices and values.

Reading Helliwell's observations psychoanalytically it is possible to discern almost immediately the apparent absence in this community and culture of the phallus as the mediating signifier. There is no sense in which the penis is coded as a weapon and the vagina as lack or hole or a single dominating standard against which value is attributed. There is not, therefore, a sense in which women are conceived as complement, double or opposite of man, man being the standard against which all difference is judged.

Helliwell reads as evidence of sameness the Gerai's description and drawing of their genitals as essentially similar; 'hav[ing] the same basic conical shape, narrower at the base and wider at the top'. This was likened by participants 'both to wooden and bark containers for holding valuables',<sup>114</sup> which had important significance in the Gerai culture as the receptacles for containing their life source, rice, and also connoting the containing womb and the value placed in the community on nurturing and caring. This receptacle or container seems to take on the role in this reading of an alternative signifier, analogous to Irigaray's two lips, which mediates the Gerai desire for the good

---

<sup>114</sup> *ibid* 803.

life and moderates their intersubjective relations which appear to be entirely free of any kind of coercive sexuality, as we understand it.

Helliwell's mesmerising description of the sex act as recounted to her seemed to all but preclude the physical possibility of rape; it would, at least, be impossible to translate the Gerai notion of a mutual coming together of bodies reciprocating their shared need into the framework of permissible sex implicitly prescribed by section 1 of the SOA. In other words, there is simply no sense in which one party acquires the consent of another party who is inherently passive. As Helliwell puts it, 'sexual intercourse and conception are viewed as involving a mingling of similar bodily fluids, forces, and so on, rather than as the penetration of one body by another with a parallel propulsion of substances from one (male) body only into the other, very different (female) one'.<sup>115</sup>

While there is clearly not equality in this society in the way in which we perceive it in the liberal West (men are generally considered 'higher' than women), this 'formal inequality' does not also mean that men dominate and control women through their sexuality. What I argue we can draw from Helliwell's observations is important data about the prevention of rape and also about the type and nature of cultural change that is required for that discussion to be meaningful. The prevention of rape is not just about prohibitive laws that fix the iteration of the sex act and of sexed bodies. It first requires an ethics of subject-subject relations that can be read in Irigarayan terms as a form of respect for the absolute otherness of that which I cannot consume.

I was struck finally by the image that Helliwell conjures at the start of her article of the sound of the women of the village laughing loudly recalling the previous night's events in which, as she saw it, a woman had been the victim of an attempted rape. The image of women laughing together is one that has emerged at various times during this project in unexpected ways. Being interviewed for French television, Irigaray stated that laughter was her first reaction when reflecting

---

<sup>115</sup> *ibid* 804.

on the position of women in respect of the dominant masculine symbolic.<sup>116</sup> “Women ... begin by laughing,” she added (i.e. make progress by laughter). In order, she explained, not simply to usurp what she called the “masculine monopolization of the symbolic,” it is important “not to forget to laugh”.<sup>117</sup> Laughter tears apart language; in Derrida’s words, it ‘bursts through only on the basis of an absolute renunciation of meaning.’<sup>118</sup> Helliwell’s scene of women laughing reminded me of the story of Sita, recounted by Louise du Toit in her book *A Philosophical Investigation of Rape*.<sup>119</sup> As I discussed in chapter two, Sita’s story is of her rape by a family friend and her attempt to reconcile this experience in her life.<sup>120</sup> In du Toit’s reading, Sita resists her rapist by shouting confidently, growing tall and dignified and angrily ripping off her own clothes. The ‘hopeful vision’ generated by Sita’s resistance and du Toit’s reading of it is sustained by an alternative understanding of personhood grounded in matriarchal subjectivity; rape becomes ridiculous in a way that ‘speaks of the possibility of a new and transformed symbolic order’.<sup>121</sup>

While du Toit reads Sita’s resistance as successful in that she ‘managed to turn the shame on the rapist and retain her female dignity’,<sup>122</sup> Sita is raped anyway and suffers the attendant personal consequence of that rape.<sup>123</sup> The key difference between Sita’s subversive parody of her rapist, and the laughter of the women of Gerai in the aftermath of an attempted rape is the symbolic order in which it occurs. Sita’s resistance is ultimately unsuccessful, in my view, because it has no meaning within the current paradigm; it is unrecognisable as resistance, or if it is recognisable it is readily subsumed by an order of meaning in which the domination and possession of women sexually by

---

<sup>116</sup> Maggie Berg, ‘Escaping the cave: Luce Irigaray and her feminist critics’ in Gary Wihl & David Williams (eds) *Literature and Ethics* (McGill-Queen’s University Press 1988) 62, 65.

<sup>117</sup> *ibid.*

<sup>118</sup> Jacques Derrida, *Writing Difference* (Alan Bass tr. University of Chicago Press 1978) 256, cited in Berg, above n 116, 69.

<sup>119</sup> This motif of rape as farce or parody is also referred to by Sharon Marcus in her chapter ‘Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention’ in Judith P. Butler & Joan Wallach Scott (eds) *Feminists Theorize the Political* (Routledge 1992) 385-403 and also see Nicola Gavey, ‘Fighting Rape’ in Renee Heberle & Victoria Grace (eds) *Theorizing Sexual Violence* (Routledge 2009) 115.

<sup>120</sup> Lindsey Collen, *The Rape of Sita* (Heinemann Educational Publishers 1993).

<sup>121</sup> Louise Du Toit, *A Philosophical Investigation of Rape: The Making and Unmaking of the Feminine Self* (Routledge 2009) 211.

<sup>122</sup> *ibid* 217.

<sup>123</sup> Collen, above n 120, 154.



men takes logical precedence. The attempted rape of a woman in Gerai, by contrast, *is* ridiculous. It occurs within an order in which rape is a physical, psychical, and symbolic impossibility. Considering these two examples side by side it is possible to consider the scope and scale of social and cultural change needed to end rape.

## **Conclusion**

In this chapter I argued that Irigaray's constructive project in her later work is instructive in showing how a new horizon of sexual difference protected and facilitated by law might change how we perceive and respond to the crime of rape. Irigaray's legal code institutes rights which seek to give women access to a civic identity and thus equality, based on sexual difference. Her insistence on the need for law to be harnessed in the service of the protection of humanity, and not property, is particularly pertinent for a law which continues to conceive of rape's harm as a wrong against the property in the person. Such a conception obscures the damage of rape to the whole being, and becoming, of the victim. Conceiving of rape as a violation of the virginity of the victim instills woman with a subjectivity grounded in her own inviolability and thus more adequately captures rape's harm. Similarly, Irigaray's work on the need for woman to have access to her own language and reference to the symbolic exposed the difficulty faced by women during the rape trial. In attempting to speak the harm of rape through the filter of legal (masculine) discourse, woman's alienation from her own nature is laid bare. If law is to evidence a commitment to objectivity in its approach to the crime of rape it must address the double demand of equality and sexual difference by first providing the space for and protection of an equivalent system of exchange for women.

In part II of the chapter I looked at some mythic and historic examples of the exercise of the rights and responsibilities of sexual difference in the name of law or in legal settings, and of systems of law that draw on alternative values and in which women have a stake in the terms and

procedure of justice, *as women*. These examples of women's law offer precedent for the instantiation of difference within the juridical environment and the possibility for a reevaluation of the law in the service of mediating and preserving the space between two. Finally, I considered the work of Christine Helliwell whose observational research with the Dayak of Gerai in Indonesian Borneo illustrates, in my reading, an example of a community living according to an ethics of sexuate difference in which rape is an impossibility.

# Conclusion

---

We kid ourselves if we think that human fear of sexuality, and then the hatred of women that is so often its consequence, is something that the so-called reason or enlightenment of our modern world can simply and safely dissipate. I do not want feminism to hitch itself to this wagon. Indeed, rather than the idea of light triumphing over darkness, confronting dark with dark might be the more creative path.<sup>1</sup>

Twenty seven years after the publication of the Milan Women's Bookstore Collective's (MWBC) treatise of a feminist politics of sexual difference,<sup>2</sup> Jacqueline Rose's recent call to return to confront the dark spaces in which we dare not tread in order to '[rip] the cover from the illusions through which the most deadly forms of power sustain and congratulate themselves' strikes a familiar cord. 'It is time to return to what feminism has to tell us', says Rose, but the 'perils of our modern world' cannot be exposed along the lines that have become most familiar.<sup>3</sup> Re-reading the MWBC's account of feminist attempts during the 1970s and 1980s to develop a theory of social-symbolic practice very much along the lines of what Rose seems to be talking about here, illustrates the extent to which the dynamic force of feminist politics shifts and moves, and not always in a linear manner.

The MWBC project considered, among other things, the implication of sexual difference feminism for law and, in particular, the law of sexual violence. The book charts the disagreements and conceptual pitfalls of feminist activism at the time and in many ways, reveals evidence of discussions and disagreements among feminists similar to those implicated in this thesis. The book charts the attempt by a group of feminists in 1979 in Italy to initiate a 'grassroots law' against sexual

---

<sup>1</sup> Jacqueline Rose, 'We need a bold, scandalous feminism' (*Guardian Online*, 17 October 2014) <http://www.theguardian.com/books/2014/oct/17/we-need-bold-scandalous-feminism-malala-yousafzai> accessed 17 October 2014.

<sup>2</sup> The Milan Women's Bookstore Collective, *Sexual difference: A theory of social-symbolic practice* (Indiana University Press 1987).

<sup>3</sup> Rose, above n 1.

violence.<sup>4</sup> The bill as drafted proved controversial, not least because it purported to promote the mandatory prosecution of sexual offences, even when this was against a complainant's wishes.<sup>5</sup> The book's reflection on the 'bitter' disagreement among feminists about the bill is less about the terms it proposed, however, and more about the conceptual and political impasse that women found themselves in when considering it. The conflict is summarised by the authors thus,

On the one hand, there were those who believed that women were an oppressed social group [who] needed to be represented, [who] had claims to make, and needed incisive solutions for at least part of their problems. Others instead believed that women are a sex which wants to give itself social existence, a language, effectivity in social relations, starting from its original difference and its living singularity, so that each woman, two women, several women in relation to each other, must speak out for themselves and find their own way of translating the substance and meaning of their experience into social meaning, without male mediation.<sup>6</sup>

These positions are in many ways mirrored by those discussed in chapter two of this thesis of, for example, Martha Nussbaum and Carine Mardorossian, who were critical of the turn to poststructuralism in feminist analyses of sexual violence, arguing that this represented a 'turning away' from politics and activism in the present, with real and damaging consequences for women.<sup>7</sup> Feminist activism here is primarily conceived as engagement with political and legal mechanisms of the state and its various institutions. The MWBC elaborates on the reasons for its skepticism of this type of feminist activism by arguing, paradoxically, that it is actually the action by women of asking the state to 'resolve some of the social conflicts in which they are implicated [that does] damage to [women] or involve[s] [them] in agonizing contradictions'.<sup>8</sup> The attempt of some women to approach law to resolve the issue of sexual violence against women in the 1979 bill was thus flawed because by 'intervening at the pathological moment of rape and isolating it from the whole of female destiny, from its ordinary forms...' it served to erase the 'invisible violence' against women

---

<sup>4</sup> Milan Women's Bookstore Collective, above n 2, 72.

<sup>5</sup> *ibid* 74.

<sup>6</sup> *ibid* 78.

<sup>7</sup> Martha Nussbaum, 'The Professor of Parody' (Feb 22, 1999) *The New Republic* 37; Carine M. Mardorossian, 'Towards a New Feminist Theory of Rape' (2002) 27(3) *Signs* 743.

<sup>8</sup> Milan Women's Bookstore Collective, above n 2, 73.

that state institutions perpetuate, which robs the female sex of its 'living unity of mind and body.'<sup>9</sup> Because these institutions were set up to serve and maintain men's interests, they could not then be relied upon for justice that required the recognition of woman's difference. The prescience of this critique was confirmed for the authors five years after the grassroots feminist bill was presented in the Italian Parliament:

...[I]t finally reached the Chamber of Deputies in such an amended form that its own proponents did not recognize it. But at that point, they, as well as all the other women who had signed the proposed bill, had no more to say in the matter. They entrusted themselves to an institution which could not represent them; they bet on the impartiality of the law. And they lost.<sup>10</sup>

I raise this discussion here not to justify a position that advocates for feminists to turn away from law, but to illustrate how the problem that rape presents for feminists is complex and cannot be addressed in one register or on one front alone. It is important, however, that the collective knowledge of feminist activists and those concerned about the rape of women be shared so that we can confront that 'dark space' that Rose refers to, armed with tools that can assist us to craft a dynamic practice of resistance. It is in this spirit that I have approached the research questions I identified in the introduction to this thesis. And it is also in this spirit that I suggest a fourth position to those elaborated above; fourth because the MWBC itself attempted to mediate between the two by adding a third position. That third position sought to invest the women's movement with 'maximum authority' to determine its own means and methods and in doing so, 'practice free relations among women'.<sup>11</sup> Regarding law, this was conceived as a site of potential activism whereby a 'women's practice' of law could evolve to build a sense of inclusive solidarity among women lawyers who promoted themselves as 'bearers of original knowledge [capable] of leaving a female-gendered mark on the law.'<sup>12</sup> The act of speaking to one another as women, and developing

---

<sup>9</sup> *ibid* 76.

<sup>10</sup> *ibid*.

<sup>11</sup> *ibid* 79.

<sup>12</sup> *ibid* 71.

a dynamic social-symbolic practice of law along these lines, they said, may also involve the inscription in laws of the 'symbolic revolution' generated by such a practice.<sup>13</sup>

While careful to note that this position did not represent a synthesis of the two positions elaborated earlier, the MWBC seem to be describing here a vision of women's inclusion or recognition in law. That recognition would be unlike anything seen before, because it would involve a new mode of relations between men and women and between women themselves. In this sense, the proposal is radical because it seeks the reconstitution of woman as she is currently conceived in the dominant symbolic and it mandates the law recognise this 'new' reality; new in the sense that woman has no independent existence currently.<sup>14</sup>

What I have elaborated in this thesis is, I think, in some ways different. There is a sense in which, despite its incisive critique, the MWBC leaves law in its third position ultimately untroubled. While women must of course force the law to recognise their unique difference, in my formulation the law must also reconstitute itself. In this sense I think we could see a fourth position of feminist activism in law as working towards a minor jurisprudence operating according to an ethics of sexual difference. Such a juridical space would be unrecognisable to law as it currently is by demanding the cognisance of two distinct and different subjectivities. In this thesis I have elaborated an analysis that I hope has the capacity to give more content to that vision and to also make the case for why such a project is necessary. I have done that with reference to the critical and constructive projects of Luce Irigaray, in whose work, I argued, we can find the means for the reconstitution of culture in sexual difference.

---

<sup>13</sup> *ibid* 79.

<sup>14</sup> A good example of feminist activist scholarship that purports to follow the MWBC in seeking the inclusion or recognition of woman's difference in law is the *Feminist Judgments Project*. Rather than merely accepting women's 'invisibility and powerlessness' within the dominant juridical paradigm, in writing and promoting feminist judgments the authors attempt to exercise 'collective agency to attempt to leave a female-gendered mark on law'. See Rosemary Hunter et al., (eds) *Feminist Judgments: From Theory to Practice* (Hart 2010) 8.

Underlying much of Irigaray's work to date has been a fascination with the conditions for and the possibility of love between two. In *To Be Two*, Irigaray considers the limits of intersubjective coexistence and the spectre of rape:

In love, the gaze often remains fascination, enchantment, occasionally rape and possession. Why it is that the other who looks at me during or after loving can injure me? He looks at an object, not a subject. He is unfaithful to an intention, to an interiority, to a gaze which we can share.<sup>15</sup>

Her thinking thus emphasises the crucial importance of a shared horizon of becoming grounded in a respect for difference.

In order to go beyond a limit, there must be a boundary. To touch one another in intersubjectivity, it is necessary that two subjects agree to the relationship and that the possibility to consent exists. Each must have the opportunity to be a concrete, corporeal and sexuante subject, rather than an abstract, neutral, fabricated, and fictitious one.<sup>16</sup>

It is in this utopian vision that she sees the possibility for love between two in intersubjectivity. That hers is a politics of the impossible should not distract from the force of this vision. As Rosi Braidotti observes, '...Irigaray is already looking onto a universe where the regime of phallogocentrism is over'.<sup>17</sup> And as such 'if sexual difference ever emerged in our culture, we would cognize it, not recognize it'.<sup>18</sup> If therefore, sexual difference is impossible, its legal recognition must also be impossible. 'Nonetheless, [Irigaray] does imagine the possible constitution of sexual difference. She imagines how it might involve a paradoxical legal recognition of its own possibility. Sexual difference would not precede the time of its legal recognition. It would be instituted by it'.<sup>19</sup>

In a similar way we must also imagine a future in which men no longer rape women with impunity and where women can go to the law to seek protection, justice and recompense in the

---

<sup>15</sup> Luce Irigaray, *To be two* (Routledge 2001) 42.

<sup>16</sup> *ibid* 26.

<sup>17</sup> Rosi Braidotti, 'Of bugs and women: Irigaray and Deleuze on the becoming-woman' Carolyn Burke et al (eds), *Engaging with Irigaray: Feminist Philosophy and Modern European Thought* (Columbia University Press 1994) 111.

<sup>18</sup> Penelope Deutscher, *A Politics of Impossible Difference: The Later Work of Luce Irigaray*, (Cornell University Press 2002) 43.

<sup>19</sup> *ibid*.

aftermath of rape without having their injury compounded by an institutional apparatus systematically blind to their reality. In such a vision law functions not as a power over but as respectful mediator between the two. The law is thus in service of the two with the protection of life as its priority.

This thesis has consisted essentially of two parts. In the first part, I set the scene for my discussion and elaborated on the theoretical framework that supported it. In chapter one I elaborated the context in which this thesis sits, detailing the statutory regime governing rape and the contemporary environment in which offences occur in England and Wales. I summarised the recent history of government and public body reviews of policy and practice and I situated these trends and policies within their historical and sociological context. I concluded that the process of review and law reform of recent times evidenced a pattern of retrenchment and that ultimately, the law of rape was a failure.

In chapter two, I sought to understand how this failure had been conceptualised by feminists writing about rape and rape law. I focused on feminist theorising of rape and rape law informed by the poststructuralist turn in philosophy and detailed various disagreements among feminist scholars of rape. I argued that the dominant strand of poststructuralist feminist work on rape and rape law provides an unsatisfying and ultimately flawed response to the important questions that remain to be answered, including how to conceive of rape's harm, how to critically evaluate current law and policy on rape, how to think justice in this context and how to think about feminist strategy. In order to answer these questions in a more adequate way, I set about in chapter three laying the foundations for my productive intervention into feminist scholarship on rape and into the debates on rape law in the UK. In that chapter I elaborated on the critical and constructive projects of the philosopher Luce Irigaray, through whose work I developed my framework to interrogate rape law and practice. In chapter four I addressed some of the criticism that Irigaray's work has faced and in particular, the criticism of feminist legal scholars. I argued that many of these criticisms were



misplaced or did not account for the full scope of Irigaray's project, and for these reasons they were not fatal to the integrity of my analysis.

In chapter five I commenced my investigation into the conceptual underpinnings of rape law in England and Wales with reference to Irigaray's critique. I argued that rape law in England and Wales was a failure because it remains enmeshed within a conceptual framework of sexual indifference. This had the consequence of distorting the harm of rape for women and of fixing in law a phallographic figure of woman as defective other, which was simply incapable of recognizing woman as subject in her own right and, therefore, of adequately responding to rape. In chapter six, I considered the practice of rape law in more detail through an analysis of the rape trial space. I argued that the consequences of the sexual indifference of rape law extend to and are compounded in the rape trial. I concluded that justice for rape victims requires that law acknowledge the presence of two distinct and different subjects and that a conceptual shift is required for the law to perceive the harm of rape, but also to reconfigure its role as the respectful mediator between *two*: man and woman.

In chapter seven I attempted to address the inevitable question that my analysis generates: So what is the alternative? I echoed Jacqueline Rose's call for a feminist politics that does not preclude more radical calls for social change in its urgency to prioritise familiar strategies. I attempted to imagine such a radical reimagining in a social and juridical environment which is not merely one, but in which two subjects are contemplated and provided for. Drawing on Irigaray's constructive project, I explored the possibility of a new or alternative conceptual and cultural order in which, I argue, there is the potential to more accurately articulate the harm of rape, to reimagine a juridical order that is equipped to respond to the needs of two different subjects, and in which we could contemplate the conditions for a rape-free society. In this reimagining, I argued lay the seeds of a minor jurisprudence guided by an ethics of sexual difference, and in which we might contemplate the conditions for a rape-free society. I hope the research in this thesis will serve to initiate a discussion that makes that vision a reality.

# Bibliography

---

- Adler, Zsuzsanna, *Rape on Trial* (Routledge 1987).
- Anemtoacei, Ovidiu & Yvette Russell, 'Luce Irigaray: Back to the Beginning' (2013) 21(5) *International Journal of Philosophical Studies* 773.
- Ashworth, Andrew & Jennifer Temkin, 'The Sexual Offences Act 2003: (1) Rape, Sexual Assaults and the Problems of Consent' [2004] *Criminal Law Review* 328.
- Bakhtin, Mikhail, *The Dialogic Imagination* (University of Texas Press 1981).
- BBC News, 'Sexual offences recorded by police "up 20%"' (*BBC News online*, 17 July 2014) <http://www.bbc.co.uk/news/uk-28340196> accessed 18 July 2014.
- Berg, Maggie, 'Escaping the cave: Luce Irigaray and her feminist critics' in Gary Wihl & David Williams (eds) *Literature and Ethics* (McGill-Queen's University Press 1988) 62.
- , 'Luce Irigaray's "Contradictions": Poststructuralism and Feminism' (1991) 17(1) *Signs* 50.
- Bergoffen, Debra, 'February 22, 2001: Towards a Politics of the Vulnerable Body' (2003) 18(1) *Hypatia* 116.
- Bohner, Gerd et al., 'Rape myth acceptance: cognitive, affective and behavioural effects of beliefs that blame the victim and exonerate the perpetrator' in Miranda Horvath & Jennifer Brown (eds) *Rape: Challenging Contemporary Thinking* (Willan 2009) 17-45.
- Bourke, Joanna, *Rape: A History from 1860 to the Present* (Virago 2007).
- Boycott, Owen, 'Pre-recorded evidence to spare vulnerable victims court ordeal' *Guardian online* (11 June 2013) <http://www.theguardian.com/law/2013/jun/11/pre-recorded-evidence-victims-court> (accessed 31 May 2014).
- Boyle, Christine, 'Sexual assault and the feminist judge'. (1985) 1 *Canadian Journal of Women and the Law* 93.
- Braidotti, Rosi, 'Of bugs and women: Irigaray and Deleuze on the becoming-woman' Carolyn Burke et al (eds), *Engaging with Irigaray: Feminist Philosophy and Modern European Thought* (Columbia University Press 1994).
- Brigley Thompson, Zoe, 'Écriture Féminine' in Benoit Dillet et al (eds) *The Edinburgh Companion to Poststructuralism* (Edinburgh University Press 2013).
- Brown, Jennifer et al., *Connections and disconnections: Assessing evidence, knowledge and practice in responses to rape* (Government Equalities Commission 2010).
- Brown, Wendy, *States of Injury* (Princeton University Press 1995).
- Brownmiller, Susan, *Against Our Will: Men, Women and Rape* (Bantam, New York 1976).
- Bumiller, Kristin, *In an Abusive State: How Neoliberalism Appropriated the Feminist Movement Against Sexual Violence* (Duke University Press 2008).
- Burke, Carolyn, 'Irigaray through the Looking Glass' in Carolyn Burke et al (eds), *Engaging with Irigaray: Feminist Philosophy and Modern European Thought* (Columbia University Press 1994).
- Butler, Judith, *Gender Trouble* (Routledge 1990).

- , 'Bodies that Matter' Carolyn Burke et al (eds) *Engaging with Irigaray* (Columbia University Press 1994).
- , *Antigone's claim: Kinship between life and death* (Columbia University Press 2002).
- Cahill, Ann J. *Rethinking Rape* (Cornell University Press 2001).
- Capellanus, Andreas, *Tractatus de amore et de amoris remedio* in P.G. Walsh, *Andreas Capellanus on Love* (P.G. Walsh tr, first published 1176, Duckworth 1982).
- Cheah, Pheng & Elizabeth Grosz, 'Of Being-Two: Introduction' (1998) 28(1) *diacritics* 3.
- , 'The future of sexual difference: An interview with Judith Butler and Drucilla Cornell.' (1998) 28(1) *diacritics* 19.
- Chambers, Gerry & Ann Millar, *Investigating Sexual Assault* (Scottish Office Central Research Unit Study, HMSO 1983).
- Chanter, Tina, *Ethics of Eros* (Routledge 1995).
- Cimitile, Maria C. 'Irigaray in Dialogue with Heidegger' in Maria C. Cimitile and Elaine P. Miller (eds) *Returning to Irigaray* (SUNY Press 2007).
- Conaghan, Joanne & Yvette Russell 'Rape Myths, Law, and Feminist Research: "Myths About Myths"?' (2014) 22(1) *Feminist Legal Studies* 25.
- Conley, John M. & William M. O'Barr, *Just Words: Law, Language, and Power* (2<sup>nd</sup> edn, University of Chicago Press 2005).
- Cornell, Drucilla, *Transformations* (Routledge 1993).
- , *The imaginary domain: abortion, pornography & sexual harassment* (Routledge 1995).
- , *At the Heart of Freedom* (Princeton University Press 1998).
- , *Beyond accommodation: ethical feminism, deconstruction, and the law* (Rowman & Littlefield 1999).
- Cowan, Sharon, "'Freedom and Capacity to Make a Choice": A Feminist Analysis of Consent in the Criminal Law of Rape' in Vanessa Munro & Carl Stychin (eds), *Sexuality and the Law: Feminist Engagements* (Routledge-Cavendish 2007).
- Crenshaw, Kimberle, 'Demarginalizing the intersection of race and sex: A Black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics' (1989) *The University of Chicago Legal Forum* 139.
- Collen, Lindsey, *The Rape of Sita* (Heinemann Educational Publishers 1993).
- Criminal Justice System, *Convicting rapists and protecting victims – justice for victims of rape: Response to consultation* (Criminal Justice System 2007).
- Criminal Justice System, 'Convicting rapists and protecting victims - Government announces new measures' (*The National Archives*, 7 November 2007) [http://webarchive.nationalarchives.gov.uk/20080107211140/http://cjsonline.gov.uk/the\\_cj\\_s/whats\\_new/news-3624.html](http://webarchive.nationalarchives.gov.uk/20080107211140/http://cjsonline.gov.uk/the_cj_s/whats_new/news-3624.html) accessed 10 August 2014.
- Crown Prosecution Service 'Joint CPS and Police Action Plan on Rape' (June 2014) [http://www.cps.gov.uk/news/latest\\_news/cps\\_and\\_police\\_announce\\_new\\_measures\\_to\\_tackle\\_rape/](http://www.cps.gov.uk/news/latest_news/cps_and_police_announce_new_measures_to_tackle_rape/) accessed 2 July 2014.
- , 'CPS Violence against Women and Girls crime report 2013-2014 data' [http://www.cps.gov.uk/data/violence\\_against\\_women/vawg\\_2013\\_14\\_report.html](http://www.cps.gov.uk/data/violence_against_women/vawg_2013_14_report.html) accessed 2 April 2014.

- Davies, Margaret, *Property* (Routledge-Cavendish 2007).
- Davies, Margaret & Ngaire Naffine, *Are persons property? Legal debates about property and personality* (Ashgate 2001).
- D'Cruze, Shani, 'Sexual violence in history: a contemporary heritage?' in Jennifer Brown & Sandra Walklate (eds) *Handbook on Sexual Violence* (Routledge 2012) 23-52.
- Denike, Margaret, 'The sex of right reason: Aquinas and the misogynist foundations of natural law' in Maria Drakopoulou (ed), *Feminist Encounters with Legal Philosophy* (GlassHouse 2013).
- Derrida, Jacques, *Writing Difference* (Alan Bass tr. University of Chicago Press 1978).
- Deutscher, Penelope, *A Politics of Impossible Difference: The Later Work of Luce Irigaray*, (Cornell University Press 2002).
- Drakopoulou, Maria, 'Postmodernism and Smart's Feminist Critical Project in Law, Crime and Sexuality' (1997) 1(1) *Feminist Legal Studies* 107.
- Duncanson, Kirsty & Emma M. Henderson, 'Narrative, Theatre and the Potential Interruptive Value of Jury Directions for Rape Trials in Victoria, Australia' (2014) 22(2) *Feminist Legal Studies* 155.
- Du Toit, Louise, 'The Conditions of Consent' in Rosemary Hunter & Sharon Cowan (eds) *Choice and Consent: Feminist Engagements with Law and Subjectivity* (Glasshouse 2007) 58-73.
- , *A Philosophical Investigation of Rape: The Making and Unmaking of the Feminine Self* (Routledge, New York 2009).
- , 'Sexual specificity, rape law reform and the feminist quest for justice' (2012) 31(2) *South African Journal of Philosophy* 465.
- Dworkin, Andrea, *Pornography: Men Possessing Women* (Dutton, New York 1989).
- Ehrlich, Susan, *Representing Rape: Language and sexual consent* (Routledge 2001).
- Ellison, Louise & Vanessa E. Munro, 'Reacting to rape exploring mock jurors' assessments of complainant credibility' (2009) 49(2) *British Journal of Criminology* 202.
- , 'Turning mirrors into windows? Assessing the impact of (mock) juror education in rape trials' (2009) 49(3) *British journal of criminology* 363.
- , 'Of 'normal sex'and 'real rape': Exploring the use of socio-sexual scripts in (mock) jury deliberation' (2009) 18(3) *Social & Legal Studies* 291.
- , 'A stranger in the bushes, or an elephant in the room? Critical reflections upon received rape myth wisdom in the context of a Mock Jury study' (2010) 13(4) *New Criminal Law Review* 781.
- , 'Getting to (not) guilty: examining jurors' deliberative processes in, and beyond, the context of a mock rape trial' (2010) 30(1) *Legal Studies* 74.
- , 'Better the devil you know? Real rape stereotypes and the relevance of a previous relationship in (mock) juror deliberations' (2013) 17(4) *The International Journal of Evidence & Proof* 299.
- Estrich, Susan, *Real Rape* (Harvard University Press 1987).
- Feist, A et al., *Investigating and detecting recorded offences of rape, Home Office Online Report 18/07* (Home Office 2007).
- Fermon, Nicole, 'Women on the global market: Irigaray and the democratic state' (1998) 28(1) *diacritics* 120.

- Finch, Emily & Vanessa Munro, 'Breaking Boundaries? Sexual Consent in the Jury Room' (2006) 26 *Legal Studies* 303.
- ~, 'The demon drink and the demonized woman: Socio-sexual stereotypes and responsibility attribution in rape trials involving intoxicants.' (2007) 16(4) *Social & Legal Studies* 591.
- Fortescue, John, *De Natura Legis Naturae* (1869).
- Foucault, Michel, *The History of Sexuality: An Introduction* (Robert Hurley tr, Vintage 1980).
- Freedman, Estelle, *Redefining rape* (Harvard University Press, 2013).
- Frith, Hannah, 'Sexual scripts, sexual refusals and rape' in Miranda Horvath & Jennifer Brown (eds) *Rape: Challenging Contemporary Thinking* (Willan 2009).
- Gavey, Nicola, *Just Sex? The Cultural Scaffolding of Rape* (Routledge 2005).
- , 'Fighting Rape' in Renee Heberle & Victoria Grace (eds) *Theorizing Sexual Violence* (Routledge 2009)
- Gerger, Heike, et al., 'The Acceptance of Modern Myths About Sexual Aggression Scale: Development and Validation in German and English' (2007) 33 *Aggressive Behavior* 422.
- Goodrich, Peter, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (Macmillan Press 1987).
- , *Languages of Law: Logics of Memory to Nomadic Masks* (Weidenfeld & Nicolson 1990) 191.
- , 'Gynaetopia: Feminine genealogies of common law' (1993) 20(3) *Journal of Law and Society* 276.
- , 'Writing Legal Difference: Helena Kennedy's *Eve Was Framed: Women and British Justice* and Luce Irigaray's *J'aime à toi: esquisse d'une félicité dans l'histoire*' (1993) 4(3) *Women: a cultural review* 317.
- , *Oedipus Lex: Psychoanalysis, History, Law* (University of California Press 1995).
- , *Law in the Courts of Love* (Routledge 1996)
- , 'The accidental feminist: On the Pythagorean roots of John Selden's *Jani Anglorum*' in Maria Drakopoulou (ed), *Feminist Encounters with Legal Philosophy* (GlassHouse 2013).
- Goodrich, Peter & David Gray Carlson, 'Introduction' in Peter Goodrich & David Gray Carlson (eds.), *Law and the Postmodern Mind: Essays on Psychoanalysis and Jurisprudence* (UMich Press 1998).
- Gordon, Margaret & Stephanie Riger, *The Female Fear: The Social Cost of Rape* (University of Illinois Press 1989).
- Grace, Sharon, et al., *Rape: From Recording to Conviction* (Home Office Research Unit 1992).
- Gregory, Jeanne & Sue Lees, 'Attrition in rape and sexual assault cases' (1996) 36(1) *British Journal of Criminology* 1.
- Griffin, Susan, 'Rape: The All-American Crime' in Mary Vetterling-Braggin et al. (eds.) *Feminism and Philosophy* (Littlefield 1977).
- Gross, Elizabeth, 'Irigaray and Sexual Difference' (1986) 1(2) *Australian Feminist Studies* 63.
- Grosz, Elizabeth, *Sexual Subversions: Three French Feminists* (Allen & Unwin 1989).
- , *Jacques Lacan: A Feminist Introduction* (Routledge 1990).
- , 'The Hetero and the Homo: The Sexual Ethics of Luce Irigaray' in Carolyn Burke et al. (eds) *Engaging with Irigaray* (Columbia University Press 1994) 335-350.

- , 'The Force of Sexual Difference' in Ellen Mortensen (ed) *Sex, Breath, and Force* (Lexington 2006).
- Gunby, Clare, et al., 'Alcohol-related rape cases: Barristers' perspectives on the Sexual Offences Act 2003 and its impact on practice' (2010) 74(6) *Journal of Criminal Law* 579.
- Hale, Matthew, *History of the Pleas of the Crown* (Sollom Emlyn 1736).
- Hall, George, (ed) *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill* (Nelson 1965).
- Harris, Jessica & Sharon Grace, *A question of evidence?: Investigating and prosecuting rape in the 1990s* (Home Office 1999).
- Hass, Margorie, 'The Style of the Speaking Subject: Irigaray's Empirical Studies of Language Production' (2000) 15(1) *Hypatia* 64.
- Heberle, Renee, 'Deconstructive strategies and the movement against sexual violence' (1996) 11(4) *Hypatia* 63.
- Hegel, G. W. F. *Phenomenology of Spirit* (A. V. Miller tr, Oxford University Press 1977).
- Heidegger, Martin, *Hölderlin's Hymn 'The Ister'* (Indiana University Press 1996).
- Helliwell, Christine, "'It's only a penis": Rape, feminism and difference' (2000) 25(3) *Signs* 789.
- Hester, Marianne, *From Report to Court: Rape cases and the Criminal Justice System in the North East Executive Summary* (University of Bristol in association with the Northern Rock Foundation 2013).
- Hirsh, Elizabeth and Gary Olson, "'Je-Luce Irigaray": A Meeting with Luce Irigaray' (1995) 10(2) *Hypatia* 93.
- HMCPSP, *A report on the joint inspection into the investigation and prosecution of cases involving allegations of rape* (HMCPSP 2002).
- , *Without consent: A report on the joint review of the investigation and prosecution of rape offences* (Central Office of Information 2007).
- HMCPSP & HMIC, *Forging the links: Rape investigation and prosecution. A joint inspection by HMCPSP and HMIC* (HMCPSP and HMIC 2012).
- HM Government, *The government response to the Stern review: An independent review into how rape complaints are handled by public authorities in England and Wales* (HM Government 2011).
- Hohl, Katrin & Elizabeth Stanko, 'The attrition of rape allegations in England and Wales' (*forthcoming*).
- Hölderlin, Friedrich, 'Remarks on Antigone' (1988) *Essays and Letters on Theory* 109.
- Home Office, *Setting the Boundaries: Reforming the law on sex offences* (Home Office 2000).
- , *Setting the Boundaries: Reforming the law on sex offences: Volume 2 Evidence* (Home Office 2000).
- , *Protecting the Public: Strengthening the protection against sex offenders and reforming the law on sexual offences* (Home Office 2002).
- , *Sexual Offences Act 2003: A Stocktake of the Effectiveness of the Act since its Implementation*. (Home Office 2006).
- Hunter, Rosemary, 'Consent in violent relationships' in Rosemary Hunter & Sharon Cowan (eds) *Choice and consent: Feminist engagements with law and subjectivity* (Routledge 2007) 158–173.

- Hunter, Rosemary, et al. (eds), *Feminist Judgments: From Theory to Practice* (Hart 2010).
- IPCC, *IPCC independent investigation into the Metropolitan Police Service's inquiry into allegations against John Worboys* (IPCC 10 January 2010)
- , *IPCC independent investigation into the Metropolitan Police Service's inquiry into allegations against Kirk Reid* (IPCC 18 November 2010).
- , *Southwark Sapphire Unit's local practices for the reporting and investigation of sexual offences, July 2008 – September 2009* (IPCC 26 February 2013)
- Irigaray, Luce, *Le langage des dementés* (Mouton 1973).
- , *Ethique de la différence sexuelle* (Minuit 1984).
- , 'Is the Subject of Science Sexed?', Edith Oberle (tr) (1985) *Cultural Critique* 73.
- , *Speculum of the Other Woman* (Gillian Gill tr, Cornell University Press 1985).
- , *This Sex which is not One* (Catherine Porter tr, Cornell University Press 1985)
- , 'Women's Exile: Interview with Luce Irigaray' in Deborah Cameron (ed) *The Feminist Critique of Language* (Couze Venn tr, Routledge 1990).
- , *An Ethics of Sexual Difference* (Carolyn Burke & Gillian Gill tr, Cornell University Press 1993).
- , *Je, tu, nous: toward a culture of difference* (Alison Martin tr, Routledge 1993).
- , *Sexes and Genealogies* (Gillian Gill tr, Columbia University Press 1993).
- , *Thinking the difference: for a peaceful revolution* (Karen Montin tr, Athlone Press 1994).
- , 'The Question of the Other' (1995) (87) *Yale French Studies* 7.
- , *I love to you: sketch for a felicity within history* (Alison Martin tr, Routledge 1996).
- , *To Be Two* (Monique M. Rhodes & Marco F. Cocito-Monoc trs, Routledge 2000).
- , *Between East and West* (Stephen Pluháček tr, Columbia University Press 2002).
- , *The Way of Love*, (Heidi Bostic & Stephen Pluháček tr, Continuum 2002)
- , *To Speak is Never Neutral* (Gail Schwab tr, Continuum 2002).
- , *Key Writings* (Continuum 2004)
- , *Sharing the World* (Continuum 2008).
- , 'The return' in Luce Irigaray & Mary Green (eds) *Teaching* (Continuum 2008).
- , 'Towards a Divine in the Feminine' in Gillian Howie & J'annine Jobling (eds) *Women and the divine: Touching transcendence* (Palgrave Macmillan 2009).
- , 'Perhaps Cultivating Touch Can Still Save Us' (2011) 40(30) *SubStance* 130.
- , *In the Beginning, She Was* (Bloomsbury 2013).
- Irigaray, Luce & Elizabeth Grosz, 'Sexuate Identities as Global Beings Questioning Western Logic' in Luce Irigaray (ed) *Conversations* (Continuum 2008).
- Irigaray, Luce & Gillian Howie, 'Becoming Woman, Each One and Together' in Luce Irigaray (ed) *Conversations* (Continuum 2008).
- Irigaray, Luce & Andrea Wheeler, 'Being- Two in Architectural Perspective' in Luce Irigaray (ed) *Conversations* (Continuum 2008).
- Jordan, Jan, 'Here we go round the review-go-round: Rape investigation and prosecution – are things getting worse not better?' (2011) 17(3) *Journal of Sexual Aggression* 234.

- Jones, Ann, 'Writing the body: Towards an understanding of *l'écriture féminine*' (1981) 7(2) *Feminist Studies* 247.
- Jones, Rachel, *Irigaray* (Polity 2011).
- Kelly, Liz, 'The (In)credible words of women: False allegations in European rape research' (2010) 16 *Violence Against Women* 1345.
- Kelly, Liz, et al., *A Gap Or a Chasm: Attrition in Reported Rape Cases* (Home Office Research 2005).
- , *Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials* (Home Office Online Report 20/06 2006).
- Kelly, Liz & Jo Lovett, *Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases in Eleven Countries* (CWASU 2009).
- Konradi, Amanda, *Taking the Stand: Rape Survivors and the Prosecution of Rapists* (Praeger 2007).
- Lacan, Jacques, *Écrits: A Selection* (Routledge 2001).
- Lacey, Nicola, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart 1998)
- Larcombe, Wendy, 'The "Ideal" Victim V Successful Rape Complainants: Not What you Might Expect' (2002) 10 *Feminist Legal Studies* 131.
- , 'Falling rape conviction rates: (Some) feminist aims and measures for rape law.' (2011) 19(1) *Feminist Legal Studies* 27.
- Law Commission, *Consent in Sex Offences: A Report to the Home Office Sex Offences Review* (Law Commission 2000).
- Lees, Sue, *Ruling Passions: Sexual Violence, Reputation, and the Law* (Open University 1997).
- Locke, John, *Two Treatise on Government* (P Laslett ed, first published 1690, CUP 1988).
- Lorraine, Tamsin, *Irigaray and Deleuze: Experiments in Visceral Philosophy* (Cornell University Press 1999) 67-89.
- MacKinnon, Catharine A., *Feminism Unmodified* (Harvard, Cambridge 1987).
- , *Towards a Feminist Theory of the State* (Harvard, Cambridge 1989).
- , 'Liberalism and the death of feminism' in Dorchen Leidholdt & Janice Raymond (eds) *The Sexual Liberals and the Attack on Feminism* (Teachers College Press 1990) 3-13.
- , 'Rape, Genocide and Women's Human Rights' in A. Stiglmayer (ed), *Mass Rape: The War Against Women in Bosnia-Herzegovina* (Bison Books 1994).
- , 'Points against postmodernism' (1999) 75 *Chicago-Kent Law Review* 687.
- , *Are Women Human? And Other International Dialogues* (Harvard University Press 2006).
- Madriz, Esther, *Nothing Bad Happens to Good Girls: Fear of Crime in Women's Lives* (University of California Press 1997).
- Marcus, Sharon, 'Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention' in Judith Butler and Joan Wallach Scott (eds) *Feminists Theorize the Political* (Routledge 1992) 385-403.
- Madorossian, Carine M. 'Towards a New Feminist Theory of Rape' (2002) 27(3) *Signs* 743.
- Matoesian, Gregory, *Reproducing Rape Domination through Talk in the Courtroom* (University of Chicago Press 1993).
- , *Law and the Language of Identity: Discourse in the William Kennedy Smith Rape Trial*, (OUP 2001).



- , 'You Might Win the Battle but Lose the War: Multimodal, Interactive, and Extralinguistic Aspects of Witness Resistance' (2008) 36(3) *Journal of English Linguistics* 195.
- , 'Language and material conduct in legal discourse' (2013) 17(5) *Journal of Sociolinguistics* 634.
- McCaughey, Martha, *Real Knockouts: Physical Feminism of Women's Self-defense* (New York University Press, 1997).
- McGlynn, Clare & Vanessa Munro (eds) *Rethinking Rape Law: International And Comparative Perspectives* (Routledge 2010).
- McGregor, Joan, 'The legal heritage of the crime of rape' in Jennifer Brown & Sandra Walklate (eds) *Handbook on Sexual Violence* (Routledge 2012) 69-90.
- The Milan Women's Bookstore Collective, *Sexual Difference: A Theory of Social-Symbolic Practice* (Indiana University Press 1987).
- Moi, Toril, *Feminine Sexual/Textual Politics* (Methuen 1985).
- MOJHOONS, *An Overview of Sexual Offending in England and Wales* (Home Office 2013).
- Mooney, Annabelle, 'When a woman needs to be seen, heard and written as a woman: rape, law and an argument against gender neutral language' (2006) 19 *International Journal for the Semiotics of Law* 39.
- Morgan, Robin, *Going Too Far: The Personal Chronicle of a Feminist* (Random House 1977).
- Munro, Vanessa, 'Constructing Consent: Legislating Freedom and Legitimizing Constraint in the Expression of Sexual Autonomy' (2008) 41 *Akron Law Review* 923.
- Munro, Vanessa & Liz Kelly, 'A vicious cycle? Attrition and conviction patterns in contemporary rape cases in England and Wales' in Miranda Horvath & Jennifer Brown (eds) *Rape: Challenging Contemporary Thinking* (Willan Publishing 2009) 99-123.
- Murphy, Ann, 'Beyond performativity and against "identification": Gender and technology in Irigaray' in Maria Cimitile & Elaine Miller (eds) *Returning to Irigaray* (SUNY 2007) 77-93.
- Myhill, Andy & Jonathan Allen, *Rape and sexual assault of women: the extent and nature of* (Home Office 2002).
- Naffine, Ngaire, 'Possession: Erotic love in the law of rape' (1994) 57 *Modern Law Review* 10.
- , 'Women and the cast of legal persons' in Jackie Jones et al (eds) *Gender, Sexualities and Law* (Routledge 2011).
- Nedelsky, Jennifer, 'Law, Boundaries, and the Bounded Self' in Robert Post (ed) *Law and the Order of Culture*. (University of California Press 1991).
- Newman, Melanie, 'Seven London boroughs dismiss a third of rape allegations' (*The Bureau of Investigative Journalism*, 17 December 2013) <http://www.thebureauinvestigates.com/2013/12/17/seven-london-boroughs-dismiss-a-third-of-rape-allegations/> accessed 2 June 2014.
- , 'Rape has been 'decriminalised' for the most vulnerable says senior Met adviser' (*The Bureau of Investigative Journalism*, 28 February 2014) <https://www.thebureauinvestigates.com/2014/02/28/rape-has-been-decriminalised-for-the-most-vulnerable-says-senior-met-adviser/> accessed 2 July 2014.
- Newman, Melanie & Oliver Wright, 'Revealed: Thousands of rape cases thrown out as charges fall following new CPS guidelines' (*The Independent*, 4 February 2014) <http://www.independent.co.uk/news/uk/crime/revealed-thousands-of-rape-cases-thrown-out-as-charges-fall-following-new-cps-guidelines-9105454.html> accessed 2 July 2014.

- Novotny, Patricia, 'Rape victims in the (gender) neutral zone: The assimilation of resistance?' (2003) 1 *Seattle Journal for Social Justice* 743.
- Nussbaum, Martha, 'The Professor of Parody' (Feb 22, 1999) *The New Republic* 37.
- Office for Criminal Justice Reform, *Convicting rapists and protecting victims – justice for victims of rape* (Office for Criminal Justice Reform 2006).
- Office of National Statistics, 'Population Estimates for UK, England and Wales, Scotland and Northern Ireland, Mid-2011 and Mid-2012' (8 August 2013) <http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-319259> accessed 2 July 2014.
- , 'Crime in England and Wales, period ending March 2014' (17 July 2014) <http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-328153> accessed 3 August 2014.
- Payne, Sara, *Rape: the victim experience review* (Home Office 2009).
- Pidd, Sara & Philippa Ibbotson 'Sexual abuse victim killed herself after giving evidence at choirmaster trial' (*Guardian Online*, 8 Feb 2013) <http://www.theguardian.com/uk/2013/feb/08/sexual-abuse-victim-killed-herself-trial> accessed 15 May 2014.
- Poe, Danielle, 'Can Luce Irigaray's notion of sexual difference be applied to transsexual and transgender narratives?' in Mary C. Rawlinson et al (eds), *Thinking with Irigaray* (SUNY 2011) 111-128.
- Post, J.B. 'Ravishment of women and the Statutes of Westminster' in *Legal records and the historian*, J.H. Baker (ed) (London Royal Historical Society 1978).
- Puri, Tara, 'Hélène Cixous and the Play of Language' in Benoit Dillet et al (eds) *The Edinburgh Companion to Poststructuralism* (Edinburgh University Press 2013) 270-290.
- Rawls, John, *A Theory of Justice* (Harvard University Press 2009).
- Reece, Helen, 'Rape Myths: Is Elite Opinion Right and Popular Opinion Wrong?' (2013) 33(3) *Oxford Journal of Legal Studies* 445.
- Reeves Sanday, Peggy, *A Woman Scorned: Acquaintance Rape on Trial* (University of California Press 1997).
- Rose, Jacqueline, 'Introduction' in Juliet Mitchell & Jacqueline Rose (eds), *Feminine Sexuality: Jacques Lacan and the École Freudienne*, (Jacqueline Rose tr, W.W. Norton 1999).
- , 'We need a bold, scandalous feminism' (*Guardian Online*, 17 October 2014) <http://www.theguardian.com/books/2014/oct/17/we-need-bold-scandalous-feminism-malala-yousafzai> accessed 17 October 2014.
- Rumney, Philip, 'The review of sexual offences and rape law reform: Another false dawn?' (2001) 64(6) *Modern Law Review* 890.
- , 'In defence of gender neutrality within rape' (2007) 6 *Seattle Journal of Social Justice* 481.
- , 'Gender neutrality, rape and trial talk' (2008) 21 *International Journal of Semiotics and Law* 139.
- Rumney, Philip & Martin Morgan-Taylor, 'Recognizing the male victim: Gender neutrality and the law of rape: Part one' (1997) 26 *Anglo-American Law Review* 198.
- , 'Recognizing the male victim: Gender neutrality and the law of rape: Part two' (1997) 26 *Anglo-American Law Review* 330.
- Russell, Yvette, 'Louise du Toit: A Philosophical Investigation of Rape: The Making and Unmaking of the Feminine Self' (2010) 18(1) *Feminist Legal Studies* 103.

- , 'Luce Irigaray: An Ode to (A-)Luce' in Benoit Dillet et al (eds.) *The Edinburgh Companion to Poststructuralism* (Edinburgh University Press 2013) 291-307.
- , 'Thinking Sexual Difference Through the Law of Rape' (2013) 24(3) *Law and Critique* 255.
- Sanderson, Elizabeth & Tom Hendry, "'My wife killed herself because she was on trial, not the choirmaster": Husband's anguished account of how abused wife spiralled [sic] to suicide after court ordeal' (10 Feb 2013) *Daily Mail Online* <http://www.dailymail.co.uk/news/article-2276229/Frances-Andrade-Husbands-anguished-account-abused-wife-spiralled-suicide-court-ordeal.html> accessed 15 May 2014.
- Schwab, Gail, 'Women and the law in Irigarayan theory' (1996) 27(1-2) *Metaphilosophy* 146.
- , 'Mothers, sisters, and daughters: Luce Irigaray and the female genealogical line in the stories of the greeks' in Elena Tzelepis & Athena Athanasiou (eds) *Rewriting Difference: Luce Irigaray and 'the Greeks'* (SUNY 2010).
- , 'Reading Irigaray (and her readers) in the Twenty-First Century' in Mary C. Rawlinson et al (eds), *Thinking with Irigaray* (SUNY 2011).
- Schor, Naomi, 'This essentialism which is not one: Coming to grips with Irigaray' in Carolyn Burke et al (eds) *Engaging with Irigaray* (Columbia University Press 1994).
- Scott, Joan Wallach, "'Experience'" in Judith Butler and Joan Wallach Scott (eds) *Feminists Theorize the Political* (Routledge 1992) 22-40.
- Selden, John, 'The reverse or back-face of the English Janus' in *Tracts written by Selden* (first published 1610 as *Jani Anglorum facies altera*, London 1683).
- Smart, Carol, *Feminism and the Power of Law* (Routledge 1989).
- , *Law, Crime and Sexuality: Essays in Feminism* (Sage 1995).
- Smith, Lorna, *Concerns about Rape* (Home Office Research Study 106, HMSO 1989).
- Stern, Vivien, *The Stern Review* (Government Equalities Office 2010).
- Stone, Alison, 'The sex of nature: A reinterpretation of Irigaray's metaphysics and political thought' (2003) 18 *Hypatia* 60.
- , *Luce Irigaray and the Philosophy of Sexual Difference* (CUP 2006).
- Taslitz, Andrew, *Rape and the Culture of the Courtroom* (NYU 1999).
- Temkin, Jennifer, 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27(2) *Journal of Law and Society* 219.
- , *Rape and the Legal Process* (OUP 2002)
- Temkin, Jennifer & Barbara Krahé, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart 2008).
- Warr, Mark, 'Fear of Rape Among Urban Women' (1985) *Social Problems* 238.
- Weed, Elizabeth, 'The Question of Style' Carolyn Burke et al (eds), *Engaging with Irigaray: Feminist Philosophy and Modern European Thought* (Columbia University Press 1994).
- Weir, Alison, *Sacrificial Logics: Feminist Theory and the Critique of Identity* (Routledge 1996).
- Wertheimer, Alan, 'Intoxicated Consent to Sexual Relations' (2001) 20(4) *Law and Philosophy* 373.
- Whitford, Margaret, *Luce Irigaray: Philosophy in the Feminine* (Routledge 1991).
- , 'Reading Irigaray in the Nineties' in Carolyn Burke et al (eds), *Engaging with Irigaray: Feminist Philosophy and Modern European Thought* (Columbia University Press 1994).

- Woodhull, Winifred, 'Sexuality, Power, and the Question of Rape' in Irene Diamond and Lee Quinby (eds) *Feminism and Foucault: Reflections on Resistance* (Northeastern University Press 1988).
- Wright, Richard, 'A Note on Attrition of Rape Cases' (1984) 25(4) *British Journal of Criminology* 399.
- Young, Alison, 'Waste Land of the Law, the Wordless Song of the Rape Victim' (1998) 22 *Melbourne University Law Review* 442.
- Ziarek, Ewa, *An Ethics of Dissensus: Postmodernity, Feminism, and the Politics of Radical Democracy* (Stanford University Press 2001).