

RAPE: LAW AND THE DISQUALIFICATION OF WOMEN'S SEXUALITY

In Chapter One I develop the idea that law exercises authority through its 'claim to truth' and that it is possible to trace both a conflict and confluence of different mechanisms of power. I also raise the crucial issue of how law as a discourse disqualifies other, supposedly inferior, knowledges. In this chapter, I wish to pursue this issue of the power to disqualify other knowledges in relation to the subject of rape. I hope to reveal 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. In this denial of women's accounts law is not unique, but arguably it is a particularly important forum. This is because legal decisions affect many individual women, but the law also sets and resets the parameters within which rape is dealt with more generally in society. Law reflects cultural values about female sexuality, but I shall argue that it goes far beyond merely re-producing these norms. 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. So, I shall argue that the 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 of these things.

Before I construct these main arguments it is necessary to review, in general terms, wider cultural views of women's sexuality. These constitute the basis of the legal treatment of sexually abused women and pose the Women's Movement with a much larger problem than law alone. Indeed, ultimately they are inseparable as political goals for

change. However, my main concern is to argue that in our culture male and female (hetero)sexualities inhabit—metaphorically speaking—different worlds, and that this is reflected in magnified proportions in the rape trial.

THE PHALLOCENTRIC CULTURE

It is perhaps worth considering the concept of phallocentrism in some detail at this stage as it is a concept which combines references to the problems of masculine sexual power and heterosexism. Loosely it implies a culture which is structured to meet the needs of the masculine imperative. However, the term phallocentric takes us beyond the visible, surface appearance of male dominance to invoke sexuality, desire, and the subconscious psychic world. So whilst the term can simply apply to the positive value placed on things identified as masculine, or the way in which specific gendered values have come to dominate, phallocentric has a specific resonance in feminist psychoanalytic work (Duchen 1986). Briefly, the Lacanian feminist psychoanalytic school has taken the notion of the Oedipal phase as a way of understanding the process by which women enter into the Symbolic Order, which is male. As Duchen has elaborated,

Women are said by some to be excluded from the Symbolic and live in a world that is, at a most fundamental level, not theirs. Others have given a different attention to the Symbolic, starting from the observation that the Symbolic Order, founded on the Father's Law, is thus always patriarchal, and, working at the level of the unconscious as it does, brings the little girl into unconscious structures that are always masculine, and represses her (and his) femininity, which never is, and never can be, expressed.

(Duchen 1986:79)

There is considerable debate as to whether the phallic Symbolic Order can in fact be overcome or whether it is inevitably masculine. Some feminists argue that there are strategies by which the essential feminine can be allowed to emerge (e.g. the Psych and Po group, Duchen 1986), others argue that we can alter the Symbolic Order by altering our socialization practices (Chodorow 1978). Without becoming enmeshed in this argument it is possible to extract what is useful about the debate for

my purposes, which is the insight it gives into the prevailing dominance of the masculine experience of, and meaning of, sexuality. Sexuality is comprehended as the pleasure of the Phallus, and by extension the pleasures of penetration and intercourse—for men. Although this does not disallow the possibility of homosexuality, it undeniably renders lesbianism incomprehensible and pathological. Female pleasure is assumed either to coincide with the male definition or to be beyond understanding. The former presumption is articulated in the remarkably constant belief that rape must be pleasurable for women because it involves penetration. The latter is demonstrated in the belief that when women deny the pleasure of penetration they are frigid or man-hating. The idea that what pleasures women might be different to men's pleasure presents a mystery in a phallogentric culture. I am not implying by this that all women have only the same pleasure, nor that intercourse may not be pleasurable at times, but that the focus on phallic pleasure does not inevitably coincide with the potential of female sexuality. It is this possibility that upsets the phallogentric applect.

PATHOLOGIZING FEMALE SEXUALITY IN A PHALLOCENTRIC CULTURE¹

It might be useful to consider some examples of this pathologization to which all women are vulnerable, most especially as this 'incomprehension' is imported wholesale into the rape trial. The following quotations come from a survey of men's 'sex lives' carried out by the magazine *Woman* (Sanders 1987). In this book the men are said to speak for themselves about aspects of their sexual relationships, their satisfactions and dissatisfactions. What is clear is that they speak volumes on phallogentrism. In fact these men do not simply speak for themselves since the author of the book adds the necessary framework to ensure that these men's comments are understood 'correctly'. In case we fail to take the message from the men themselves Sanders informs us that women are too reserved and guilty to enjoy sex and satisfy their husbands. In other words the comments are contextualized into the phallogentric framework—as if this were really necessary. Unfortunately it does not occur to the author that there could be another interpretation of these men's comments.

My wife is very conventional when it comes to sex. These days she will not let me give her oral sex...and she has never given oral sex

to me. She tried it once but she didn't like the taste of it. I have offered to put some sort of different flavour on my penis but she still won't try.

I have bought her sexy underwear and offered to buy some for me, but she is not interested. She will not wear suspender belt and stockings for sex as she thinks it is kinky.

I would like my wife to be much keener on sex than she is now. Her lack of interest bothers us both but we are trying to adjust to it.

I would like to try anything in bed but to have to persuade her a little at a time. This has to be a slow process as nothing destroys an intimate atmosphere quicker than realising she is 'closing her eyes and thinking of England.' She *must* enjoy it as well, (emphasis added)

(Sanders 1987:94, 98)

These quotations are so familiar that they might be a script that is rehearsed over and over again. Basically the complaint is that wives do not 'come across' enough. What is implicit is the view that women possess something they are not prepared to share. This sharing is seen as a simple thing which could be easily achieved and which would make men very happy. This view is given substance by the often stated 'fact' that these wives used to provide the right kind of sex, either before marriage or during the early years. This recollection is presented as 'proof' that women can do it, can enjoy a particular form of sexual relationship, and confirms the belief that women are either selfish and unloving, or that their libido deteriorates, hence demonstrating the problematic nature of female sexuality (which contrasts with the virile straightforwardness of male sexuality).

The commonsense accounts provided by the men in the quotations are, of course, real experiences. The point is not to deny their reality, nor indeed the frustrations of these men, but to try to understand how male and female sexuality has been constructed and why this discourse, which pathologizes female sexuality, has so much currency. It must be stressed that there is no simple biological imperative underlying these understandings of sexual desire and frustration. The construction of sexuality and desire results from a complex interplay between culture (language), the psyche, and the body and it is precisely the

deconstruction of sex-as-natural that feminists (e.g. Campbell 1980; Coward 1984), historians (e.g. Weeks 1981), psychoanalysts (e.g. Mitchell 1975), and philosophers (e.g. Foucault 1979a) have managed to achieve. Hollway (1984), for example, has challenged the conceptualization of sex-as-natural and has argued that the discourse of the insatiable male sex drive empowers men and constructs women as the passive objects of desire. She goes further, however, to reveal that part of this discourse entails the belief that women are potentially powerful and dangerous, and that they can 'swallow up' men who show weakness. Hence men's desire is constructed as omnipotent yet vulnerable to the wiles of women who, although appearing passive, will castrate them emotionally if they can. Men must therefore resist women on an emotional level, whilst exploiting them fully on a sexual level. The ideal therefore becomes the unemotional but highly proficient (hetero)sexual stud.

We need to consider how this widely disseminated discourse and its relationship to the everyday experiences of men (and women) relate to rape. It would follow that if all women are seen as having the thing that men most need, if they are also seen as grudging with it, or as so out of touch with their 'real' sexual feelings that they deny it to themselves and to men, then the problem for men is how to gain control of women's sexuality in spite of women themselves. This is as much a scenario for 'seduction' as for rape, but rape also serves to avoid the potential 'trap' of emotionality. As with prostitution, the raped woman cannot assert her 'misconceived' power by trapping the man into commitment or love.

In this formulation women's sexuality is constructed as separate from women themselves. Figuratively speaking women are seen as having charge of something which is of greater value to men than to women themselves. At the same time women can enjoy sex 'in spite of themselves'. So this sexuality of which they have charge is construed as an essence which can by-pass consciousness or which has a will of its own. This in turn allows for the construction of women's consciousness simply as a one-dimensional prudery, an inappropriate moral standard imposed by mothers on daughters. It is not regarded as an expression of a woman's will but rather the mouthing of a convention which defeats the woman's own potential for sexual satisfaction. In other words if women say 'no' they do not *really* mean it. This view is articulated clearly in *The Woman Report on Men*,

Marriage may have made it officially OK for a woman to be sexual, but the parental prohibitions are still there in her head.... 'Mother' is still in there, making her tense when her husband approaches her sexually, blocking her from making a pass when she feels sexy.

(Sanders 1987:73-4)

Not only do Mothers wreck things for their husbands, it seems they can spoil things for the next generation of men too.

It is these accounts which also form the basis of many accounts of rape. From the judge to the convicted rapist there is a common understanding that female sexuality is problematic and that women's sexual responsiveness is whimsical or capricious. As women do not know their own sexual responsiveness and enjoyment, it is held that it could occur in the most unlikely circumstances. It is held to occur even when a woman is in fear of her life or being gang raped. Yet by the same token it can simultaneously be maintained that it does not matter if she enjoys it or not. As men cannot 'really know' when they give pleasure to women, they can really only hope to please themselves. Men therefore do not have to trouble themselves with the mystery of women's pleasure. The following statements from convicted rapists reveal the continuity of this heterosexist discourse.

Rape is a man's right. If a women [sic] doesn't want to give it, the man should take it. Women have no right to say no. Women are made to have sex. It's all they are good for. Some women would rather take a beating but they always give in; it's what they are for.

I think I was really pissed off at her because it didn't go as planned. I could have been with someone else. She led me on but wouldn't deliver... I have a male ego that must be fed.

Rape gave me the power to do what I wanted to do without feeling I had to please a partner or respond to a partner. I felt in control, dominant. Rape was the ability to have sex without caring about the woman's response. I was totally dominant.

(Scully and Marolla 1985:261, 258, 259)

Clearly there are themes here that resonate with the articulations of men who would not define themselves as rapists. For example, 'I feel my wife has the upper hand all the time. My sex life is what my wife will allow me to have and not what I would like' (Sanders 1987:62).

The resentment felt by this man is clear, he would much rather be able to control his wife's sexual responsiveness and he sees her as too powerful because she can say 'no' and he does not want to risk taking other partners in case his wife divorces him. From where he stands she has failed to meet the contractual exchange of security and commitment for freely available sex. In his terms he has 'reason' to be angry and it is not hard to see that this resentment can extend to a generalized misogyny. The point is, however, that this contract represents the material and psychic oppression of women. Little wonder that so many women try to find a way out of such contracts. Yet women who do are the focus of abuse, and *all* women may be regarded as potential renegades and hence contemptible.

It is clear that in saying 'no' to sex, women are also challenging (even if unwittingly) the extensive power of men which goes beyond sex. The 'no' is understood as a challenge to manhood (or phallocentrism) which, in a way, it is. It is a form of resistance which goes beyond the site of individual relationships. It would be a mistake to see it as a form of unified guerrilla action on the part of women because this 'no' is really only overtly political in the case of political lesbianism or feminist celibacy. But the 'no' is very widespread—why else would there be so many jokes about wives having headaches or so many complaints from men that their wives are not responsive enough?

This 'no' is the very core of the rape trial. A wife's 'no' is meaningless in English law; she is simply not entitled to say it to her husband. So the law does not (yet) have to concern itself with its possibility. But theoretically a woman can say 'no' to a man who is not her husband. The question is how can women say 'no' in law when their subjective 'no' is objectively overlaid with contradictory meanings. What anger does her 'no' inevitably tap, not simply in the mind of the rapist but in the minds of the judge, the jury, the barristers, the police (not all of whom are men)? I shall now turn to the specifics of how law disqualifies women's experience of rape before drawing these two themes together in an examination of the rape trial.

LEGAL MECHANISMS

In the last chapter I focused on the problem of legal method and how it serves to disqualify knowledge derived through other methods. In the criminal trial this is much more than an academic concern because it

operates a rigid system of exclusion, yet what it includes may be irrelevant to the question of rape as far as women are concerned. Hence legal method determines that a woman's sexual history is relevant to the question of rape, but a man's is not. As I shall explain in greater detail below, a woman is not allowed to tell her own story of rape, only what is deemed relevant in legal terms will have any influence.

At this stage I want to follow what may appear to be a slight detour in my argument. I want to show how legal method combines with the broader notion of a binary system of logic, to present an impervious obstacle to a more complex understanding of rape. Put simply, the binary system of logic refers to the way in which we think in oppositional terms. For example active/passive, truth/lie, culture/nature, rationality/emotionality, man/woman. These binary opposites are not of equal value however. Basically one is subordinate to the other, and the subordinate one is associated with the female. Hence the concept of masculinity or maleness can only be understood by reference to femininity and femaleness, and basic to this understanding is the knowledge (meaning) that the latter is inferior to the former. These ideas have been pursued in a variety of ways in French feminist writings. For my purpose, however, I want to follow an argument which links binary thought to law's 'claim to truth' and the specific instance of rape. I hope to show that this binary logic, which insists on binary opposites like truth/untruth, guilty/innocence, consent/non-consent, is completely inappropriate to the 'ambiguity' of rape.

I have already said that the law defines what is relevant in issues that are brought to law for adjudication. In criminal law in England the outcome must always be a finding of guilt or innocence. This may be entirely acceptable except that in rape cases guilt and innocence are dependent on the outcome of another pair of opposites—this is consent/non-consent. The rape trial hinges on whether consent or non-consent can be established. In practice it would seem that consent is assumed and the raped woman must prove non-consent— but this is a different issue.

For the sake of my argument here the point I wish to make is that the consent/non-consent dyad is completely irrelevant to women's experience of sex. Neither begins to approach the complexity of a woman's position when she is being sexually propositioned or abused. This is not to say that women themselves do not know whether they want a sexual encounter or not, but the 'telling' of a story of rape or abuse inevitably reveals ambiguities.

Hence a woman may agree to a certain amount of intimacy, but not to sexual intercourse. In the legal model, however, consent to the former is consent to full intercourse. There is also no room for the concept of submission in the dichotomy of consent/non-consent which dominates the rape trial. Yet submission may be what the majority of raped and sexually abused women have endured. In other words, in fear of future violence or in fear of losing a job, women may submit unwillingly to sex. Yet in legal terms, submission fits on the consent side of the dichotomy. Having submitted, but failing to meet the legal criterion of non-consent, women are deemed to have consented to their violation. The only alternative when non-consent is not established is to presume consent—and hence the innocence of the accused.

This legal process of narrowing down the possible interpretations of behaviour is, in turn, linked to law's 'claim to truth'. This is because law is a powerful voice or signifier which has the authority to assert that the version of events it allows to prevail is the *only* truth of the event. The outcome of every rape trial which finds the accused innocent is also a finding of sexual complicity on the part of the victim. The woman must have lied. In this way the phallogocentric view of women's capricious sexuality is confirmed. In the symbolic sense, every rape case that fails is a victory for phallogocentric values.

THE RAPE TRIAL

A great deal has been written about the rape trial (Brownmiller 1975; Burgess and Holstrom 1979; London Rape Crisis 1984; Adler 1987). It must by now be well known that the trial, and even the pre-trial events in police stations (Chambers and Millar 1983) are experienced as profoundly disturbing by many women who have been assaulted. The trial is truly Kafkaesque for the woman who has experienced terror and/or humiliation but who is treated like a bystander to the events she apparently willed upon herself and for which she is seen as seeking an unjustified and malevolent revenge. The Kafkaesque analogy is useful in that it can enable an appreciation of the woman's position. The experience she wishes to convey to the court is quite incomprehensible (except in those cases where her rape fits precisely with the legally acceptable notion of rape). The language she will use to explain her experience will be

seen as flawed, and may introduce 'ambiguities' which immediately imply she is guilty of consent.

The whole rape trial is a process of disqualification (of women) and celebration (of phallocentrism). It is true that not all women are disqualified and some men are convicted and punished, but these instances never challenge the basic ritual which reaffirms the phallocentric view of sex. This is not a question of whether some judges are progressive enough to restrain the defence counsel's cross-examination of a raped woman, nor a question of the introduction of carpeted interview suites in police stations. Certainly it is possible to mitigate some of the worst horrors of the process of disqualification. But whether the disqualification is done nicely or not, it is still achieved. Equally, the rape trial may not celebrate random rape, but it does celebrate the deep-seated notions of natural male sexual need and female sexual capriciousness.

Consider the following judicial utterances. They are unusual only in the sense that the judges do not prevaricate. The views they express are common, even if the forcefulness of their statement drew a certain amount of public criticism from women's groups and the liberal press.

It is well known that women in particular and small boys are liable to be untruthful and invent stories. (Judge Sutcliffe 1976)

Women who say no do not always mean no. It is not just a question of saying no, it is a question of how she says it, how she shows and makes it clear. If she doesn't want it she only has to keep her legs shut and she would not get it without force and there would be marks of force being used. (Judge Wild 1982)

It is the height of imprudence for any girl to hitch-hike at night. That is plain, it isn't really worth stating. She is in the true sense asking for it. (Judge Bertrand Richards 1982)

(All quoted in Patullo 1983:18-21)

Human [sic] experience has shown that girls and women do sometimes tell an entirely false story which is very easy to fabricate but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate, and sometimes for no reason at all.

(R v Henry and Manning, 1968, 53 Cr.App.R. at 153)

The question that must be asked is how these beliefs are maintained. How is it that for a woman to say yes to a lift means she is saying yes to something completely different (e.g. sex)? What (hu(man's) experience confirms that women lie in these matters whilst men do not? Why is it held that a woman's 'no' means 'yes' if she happens to be referring to sex? All of these statements are a denial of women's reality. But the transformation of a rape into 'normal sex' during the rape trial is often far more subtle than this. Judges do not have to instruct juries to understand that a woman's no means yes; they are led to this conclusion by innuendo, 'common sense', and the very vulnerability of the woman that contributed to her rape in the first place. Adler (1987) has shown that in her study of rape trials at the Old Bailey that raped women can be found 'guilty' of consent by the skilful use of sexist and racist innuendo, for example, suggesting that a woman likes to have sex with 'coloured' men, or that she is 'unclean' or infected. But the problem is deeper than this still. A woman does not have to be tricked or led by skilful cross-examination to be found guilty of consent.

CONSENT AND PLEASURE

Consent is recognized as the central pivot of the rape trial, but the question of pleasure is equally important even if it is less obvious. In practice this means that a woman must show, beyond all reasonable doubt, that she was unwilling to have intercourse *and* that she could not possibly have enjoyed it. The denial of enjoyment is vital because if there is any suggestion that she might have taken pleasure, then lack of consent becomes immaterial. No matter what violence might have been used to achieve submission, the slightest possibility of pleasure erases any responsibility for the preceding behaviour on the part of the man. This is summed up by a passage from a cross-examination noted by Adler in her study of the rape trials at the Old Bailey.

Prosecution Counsel: And you say she consented?

Defendant: I didn't say she consented, or that she didn't.

Prosecution Counsel: Did she agree?

Defendant: She didn't agree.

Prosecution Counsel: Having said no at first, she just gave in?

Defendant: She enjoyed it.

RAPE

Judge: The enjoyment wiped out her initial resistance—is that what you are saying?

Defendant: Yes.

(Adler 1987:10)

This focus on pleasure is something that Judith Rowland discusses in *Rape: the ultimate violation* (1986). The following passage comes from her account of a rape case in which she was the prosecutor.

Q: What positions were you in?

A: The positions changed. We were side by side, and then I was on top of her.

Q: Was she fondling your penis?

A: Yes. She stroked it.

Q: Did she put her mouth on your penis?

A: I don't recall.

Q: Did she help you put your penis in her vagina?

A: She enjoyed it. I think it got inside by itself. She was wet, she definitely wasn't dry. She was enjoying it.

Where had I heard that same language before? Or, I suppose, the question should be: when hadn't I heard it?

(Rowland 1986:245)

But how do juries know whether women enjoy particular sexual experiences? I have argued above that women's sexual pleasure remains opaque in a phallocentric culture. Men can never be sure, so it is deemed that women have no pleasure (are frigid) or take pleasure from acts defined as pleasurable by men. The latter can, in turn, become a double jeopardy for women. Not only is it asserted that women must enjoy penetration (because men do) but even where women may not enjoy the physical sensations of penetration, it is not infrequently argued that our pleasure is derived from being the vehicle of men's pleasure. So as long as men are enjoying themselves, women cannot deny pleasure; it is inevitably altruistic if it is not egoistic.

That women deny pleasure is unimportant in a legal forum. Their denials will usually carry weight only where class or racial difference is so great that the idea of pleasure is inconceivable. But even racial difference or social distance are no guarantee that a woman will be

believed because they can be transformed into sexual preferences or perversions. Hence the racist presumption that a white woman would only have a sexual relationship with a black man if she was forced, becomes transformed into the equally racist idea that it is a kind of perversion that white women practice in choosing to have these sexual relationships. In both of these formulations the woman has no voice of her own. The black woman is also in this double bind. Racist stereotypes of black women as sexually voracious and constantly available fit black women much more readily than white women into the category of the woman who takes pleasure from promiscuous encounters or forced sexual contacts. In these circumstances, where all rapes can be deemed pleasurable, how can the jury ever be certain that a woman did not feel some pleasure? And if she felt pleasure can it be rape?

It is, of course, often argued that the fact that the legal system does convict some men and even imprisons them for rape, is proof that the system can work for women. Yet we know that the men who are ultimately convicted and imprisoned are a tiny minority of men who sexually abuse women (Adler 1987). There is now a well-documented process by which women's complaints of rape are filtered out of the legal system long before they get to the trial stage (Chambers and Millar 1983; Blair 1985). Informal processes, which are less visible than the trial, operate to deny women's account of rape in the same way that a legal hearing does. In addition we know that many women will not enter into the endurance test of the legal process in the first place. In view of how easy it is to disqualify her experience this should be no surprise.

SEXUALIZING WOMEN'S BODIES

There are a number of levels on which women's experiences are disqualified in the process of the trial. Yet there is one further level—the level of women's bodies. Women's bodies are now sexualized terrain. Bits of female anatomy are heavily encoded with sexual messages and women are aware, whether consciously or not, of the sexual meaning of parts of their bodies or the movement of their bodies (Haug 1987). In a rape trial she knows that she must name parts of her body, parts which in the very naming overtly reveal their sexual content. She must talk in public of her breasts, her vagina, her anus and, of

course, what the accused did to these parts of her sexualized body, and with what parts of his body.

Catharine MacKinnon (1987) has argued that women do not want to go to court with cases of rape or sexual harassment precisely because 'in the flesh in court' women come to embody the standard fantasy of the pleasure of abuse and sexual power. It is not just that they must repeat the violation in words, nor that they may be judged to be lying, but that the woman's story *gives pleasure* in the way that pornography gives pleasure. The naming of parts becomes almost a sexual act, in that it draws attention to the sexualized body. But her account, distorted by the cross-questioning techniques of the defence counsel, does not only sexualize her, it becomes a pornographic vignette. Unfortunately for the woman in the dock she differs from the photograph because she is there in the flesh to feel her humiliation. The judge, the lawyers, the jury, and the public can gaze on her body and re-enact her violation in their imaginations. As MacKinnon argues, the statement that the trial is a second violation is more than metaphorical.

Take the following extract from a rape trial, reported by Adler (1987), as an example of what I mean by the pornographic vignette.

Defence Counsel: I suggest that you put a record on an started to dance around on your own. While you were doing that, the defendants sat down and opened three bottles of lager.

Victim: I put no music on and didn't dance.

DC: You were offered a lager with a glass—you just took the bottle. You continued dancing and drank it rather quickly.

V: No.

DC: You went on dancing and went up to one of the defendants and told him to get up and dance.

V: This is all being made up.

DC: He said he wasn't dancing. You grabbed him by the arm and pulled him to his feet.... You said you were a bad woman and ripped open your blouse. That's when various buttons fell off.

V: It's all lies.

DC: [Later] you told one of the defendants that you liked him and asked him where the bedroom was.

V: It's all lies.

DC: I suggest you said you were tired and wanted to relax.

(Adler 1987:110)

In this exchange the woman is required to deny her part in a standard soft porn fantasy scenario. This account is common currency, not only in pornographic magazines, but in downmarket tabloid newspapers. Accounts of 'sexy housewives' and 'frustrated nymphettes' abound. In these accounts the women became lascivious and reveal, usually after the minimum of encouragement, that their sole enjoyment is sexual intercourse with total strangers, often in the most unlikely circumstances. These fantasies, like the standard window cleaner tale, or the man who picks up the hitch-hiker, reflect the notion of the lucky man (or group of men) who find(s) a real 'goer'. The problem is that the wide currency of such accounts adds to their plausibility. One might imagine that this is how many women lead their lives. More importantly for the rape trial, the jury only has to believe that this is how the woman in the dock leads her life. It is little wonder that the reporting of rape trials is little more than a pornographic form.

There is now historical evidence which traces the rise of the rape trial as a pornographic spectacle. Anna Clark (1987) has examined the treatment of rape in England in the eighteenth and nineteenth centuries. She has shown that as sexual mores changed in the Victorian era, the woman who was able to tell of her violation in open court was regarded as immoral. Modesty insisted that a pure woman could never speak of such acts in public, so the woman who complained of rape became lewd herself. The extreme of this was the tendency of magistrates to dismiss cases on the basis that a public airing of the case would corrupt public morals. So the woman who spoke of her violation would be deemed to have immoral effects, as well as providing proof of her sexual immorality. The twentieth-century rape trial may differ from this, but the consequences for a woman of openly talking about sexual abuse have not changed dramatically. Somehow it is still seen to reflect upon her own person rather than the rapist's.

Clark points to the dilemma for women arising from the growth in forensic medicine and a more efficient criminal justice system. It became imperative for women to give a very detailed account of every aspect of sexual abuse. In other words women were forced to become more and more of a sexual spectacle if they wished to prosecute rapists. The reporting of such cases in nineteenth-century newspapers became a pornographic genre. Yet whilst those women who could speak of their violation were disqualified, their sisters who did not have the words or who were too ashamed were equally disqualified. The law could not

prosecute a man if the witness could not name his offence. This remains a major problem today, most especially where children are raped and they cannot use the discourse of the adult sex manual, combined with legal terminology.

Whilst there are continuities between the nineteenth-century and twentieth-century legal treatment of rape, it would be a mistake to give the impression that nothing has changed. Clark argues that consent was crucial in the nineteenth century, but the meaning of that consent was quite different to the meaning of consent now. She points out that consent was not a matter of a woman's will or whether she resisted or not. Rather consent was a matter of how she conducted herself, whether she—by her conduct—made it clear that she was the sexual property of her husband or father or the common property of all men. So if a woman was deemed to be unchaste, it did not matter that she clearly resisted the rape, she had consented at a general level. The legal concept of consent does not work in this way now. Although feminist writers have pointed out that certain categories of women find it almost impossible to establish that they have been raped (e.g. black women, prostitutes), the white, middleclass matron may also find it increasingly difficult to establish non-consent. This is because consent and non-consent are no longer the self-evident properties of certain categories of women. Consent is being psychologized, it is becoming a state of mind which can be attributed to all or any women. To this extent rape is being democratized.

It would seem that the law no longer simply exonerates certain classes of women whilst selecting others for particularly callous treatment. Rather, we can see that it is womanhood itself, the sexualization of *all* women and the removal of certain (limited) privileges in the field of sex, that almost equalizes the position of all women *vis-à-vis* rape. This is not to say that class and ethnicity have no relevance, but it is incorrect to assume that, in the UK at least, being white and middle class will protect a woman from the full rigours of the rape trial or will ensure a conviction.²

This is a point which is possibly open to misinterpretation so I wish to make it clear that I am not arguing that class and ethnic differences between women are no longer important. Nor am I arguing that women are an undifferentiated category, united by their sexual anatomy. But the rape trial does precisely this. It constructs a category of Woman as if it was a unity. The individual woman who has been raped is subsumed into this single category of Woman which is known

to be capricious and mendacious. This construction of Woman is confirmed by a common sense which is fed by routine phallocentric orthodoxy. Examples of this mythic category of Woman appear on a daily basis in tabloid newspapers with their stories about promiscuous women, women who say no when they mean yes, oversexed but hypocritical housewives and so on. The jury will recognize this Woman, they have been warned about her (whether they are men or women), it will be hard for them to be absolutely certain that the individual woman before the court is not this archetypal Woman. If she is black, or poor, or a prostitute it will just be easier to fit her into this category.

It is easier still to subsume the individual into the general category, when her account is manipulated into the standard pornographic vignette in the process of the trial. But even without this cross-examination the woman's story would still hang on the concepts of consent and pleasure. These are the core problems on which the rape trial is built, and they remain no matter how much we alter the form of the trial. They remain because they are the basic problem of heterosexual sex in a phallocentric culture.

Whilst the rape trial deals with the category of Woman in which differentiation embellishes rather than constructs the treatment of the victim, it can also be said that the trial deals with and celebrates the category of Man. This is not the same as saying that the trial celebrates the rapist, nor even condones those few men who are convicted of rape. But in the rape trial male sexuality and its satisfaction is always its own excuse or justification. Being a sexual predator is regarded as normal, even desirable for men. Sexualizing all women is equally regarded as natural. Pressing a woman until she submits is a natural, pleasurable phallocentric pastime. The rape trial will not allow for any criticism of this 'natural' activity. Even women share with men the view that this is natural, the only difference is that women may feel that men's pleasure is a cross for them to bear. If we find it difficult to attach responsibility to men in sexual matters, how much more difficult it is to attribute blame to him in a criminal trial. For the woman jurist who has been pressured into sex but who has not called this rape, how difficult is it for her to identify another woman's submission as rape? The jury must find a man guilty beyond all reasonable doubt, this means the woman's account must raise no doubts. This must be almost impossible in a culture in which Woman=sexual duplicity.

RAPE

The restatement in court of the inevitable and natural sexual predatoriness of Man, which is condemned only if it oversteps certain boundaries, is equivalent to an unauthorized permission, a legal truth which confirms common sense. If our 'wise men' assert in solemn legal ritual that men are prey to specific sexual desires and that this in turn is the law of nature, those who challenge this received wisdom put themselves outside the Logos. Quite literally, they cannot be comprehended, they appear to be talking nonsense, they can be disqualified.

RESPONDING TO THE PROBLEM OF RAPE

For a decade or more feminists have been writing about rape and making suggestions for legal reform, setting up Rape Crisis Centres and advocating self-defence for women. But in the UK it is still not a legal offence for a husband to rape his wife, women who are raped still face an ordeal at the hands of the criminal justice system (Chambers and Millar 1983; Adler 1987), and women are still reluctant to complain of rape (London Rape Crisis Centre 1984). Of course it is unrealistic to expect that there might be dramatic changes in a decade, but what is becoming increasingly apparent is that legal reforms are not simply slow but that they may be injurious to women or they may simply hide or relocate the fundamental problem. I shall consider some examples of these consequences in turn, but first I want to consider the thorny question of whether rape is a question of violence or of sex.

VIOLENCE v SEX

Catharine MacKinnon (1987) has argued that it is a mistake for feminists to collapse rape, sexual harassment, and pornography into the single category of violence against women. Not only does this erase the distinction between these different modes of oppression, but for MacKinnon collapsing rape into violence excludes precisely what is so problematic about rape. She argues,

So long as we say that those things are abuses of violence, not sex, we fail to criticize what has been made of *sex*, what has been done

to us *through* sex, because we leave the line between rape and intercourse, sexual harassment and sex roles, pornography and eroticism, right where it is.

(MacKinnon 1987:86–7)

MacKinnon argues that, the closer we look the more we realize that it is extremely difficult to differentiate rape from sex, and that by calling rape violence, we fail to mount a critique of heterosexuality. So she points out the fact that courts and juries cannot differentiate between when a woman is raped and when she is ‘seduced’ should lead us not to call rape something else to avoid this problem, but to investigate why they cannot differentiate. For her, they cannot differentiate precisely because there is not much difference, all (hetero)sex is coercive. As all (hetero)sex contains an element of violence (whether in the form of physical force or economic power or even love (see MacKinnon 1987:88) she argues that it is not helpful for feminists to try to create a false differentiation between coercive and non-coercive sex by calling one violence as this presumes there can be no objection to the other.

In this critique MacKinnon has identified an important problem for feminist strategy. There has been a tendency to try to treat rape as separate from (hetero)sex in terms of tactics, if not analysis. Hence taking the sex out of rape has been seen as a way to improve the treatment of raped women by the criminal justice system. Yet such strategies are bound to fail as you cannot, by fiat, take the sex out of a sexual act, it will creep back in at every point. However, there is a difference between saying that we should not call rape violence because this means we fail to face the larger and more difficult problem of phallocentric sex, and saying that we should not call rape violence because all (hetero)sex is violence. Whilst I support the former, I disagree with the latter. Kelly (1987), for example, has pointed to the continuum between (hetero)sex and rape, revealing that both share common ingredients. Yet this does not mean that they are the same thing. Arguably, in terms of strategy, the problem about calling rape violence is that it attempts to avoid male sexuality. Yet male sexuality, and its prerogatives, are precisely what rape, and the rape trial, are about.

SOME STRATEGIES CONSIDERED³

In Canada during the 1970s feminists were very active in pushing for reforms to the law on rape. Most notably Clark and Lewis (1977) argued that women who were raped could not be treated fairly by the criminal justice system as long as the sexual aspect of rape was prioritized over the assault or violence aspect. They argued that the issue of consent was a major stumbling block and that, as a consequence, the crime of rape should be replaced with a crime of assault in which consent would be immaterial or less significant. Consent, for example, could be no defence to a sexual assault carried out with a weapon. In other words Clark and Lewis identified sex as the problem, but sought to resolve it by focusing on violence, and collapsing the sex into violent acts. Notwithstanding the difficulties of this, the Canadian legislature took this kind of argument seriously and in 1981 a new Bill (C-127) was passed into legislation to become part of the Criminal Code. This Act abolished rape, replacing it with an offence of sexual assault which had three levels of gravity. The first was simple sexual assault which could carry ten years imprisonment. The second was a sexual assault involving a weapon, bodily harm or threats to a third party. This carries a penalty of up to 14 years imprisonment. Finally aggravated sexual assault which involves wounding, maiming, disfiguring, or endangering life. This carries a life sentence.

This device did not remove consent as a defence to rape, although the claim that a woman consented to the assault in anything other than the simple assault category could be regarded as fraudulent (Snider 1985). It is questionable how well this legislation works. As Adler (1987) has shown in the British context, 'common sense' about female sexuality has a way of invalidating legal reforms which seem to go against the conventional wisdom. However, the point about the Canadian legislation is that the apparent feminist victory (even marital rape was criminalized) brought with it disadvantages. The most apparent disadvantage was the increased penalties for sexual assaults (rape). Whilst the feminists wanted a more effective criminal justice system, they did not want to support the conservative law and order argument which demanded harsher punishments. It has to be recognized as well that, where juries are reluctant to convict men for doing 'natural' manly things, this reluctance may be increased if the penalties are seen as unreasonably high.

As Snider (1985) points out, this is not the only problem facing the Canadian feminists. As a general strategy they wanted to reduce the power of the state to regulate sexuality whilst increasing the autonomy of women by providing effective remedies against abuse. However, the feminist rape reform proposals became part of a package of greater regulation over sexual behaviours deemed undesirable, e.g. homosexuality or under-age sex (the age of consent in Canada being as high as 18 for 'consensual' sex with a person over 18). So the feminist reforms coincided with other demands for greater control over sexual behaviour, but only those which gave more powers to the criminal justice system were adopted (Snider 1985). What was achieved was a promise of easier conviction for rape (a promise which may not be honoured in practice) in exchange for a tightening of the net of regulation.

This is precisely the kind of problem facing feminists in the UK where pro-women demands can be co-opted into more reactionary law and order demands which in turn enhance pro-family, anti-feminist rhetoric which is so powerful in the 1980s. Similar problems are also being faced in North America, the Antipodes, and Europe. The political climate in the 1980s is such that any demand around sexuality becomes transposed into the language and policy of the traditional moral purity campaign. Feminist analyses of sexuality have not gained sufficient ground to provide an alternative scenario.

It is also a dubious feminist strategy that, in finding sex problematic, attempts to transpose it into violence as something easier to deal with. It overlooks that violence is not violence if it is sexualized, or that violence is exonerated if pleasure can be said to be achieved. The same problem lies at the core of many suggested feminist reforms (for example the right for raped women to be attended by women doctors or questioned by women police officers, the abolition of corroboration, or the creation of a legal advocate to protect the interests of women in court). All of these demands are reasonable, and should be welcomed if they help women deal with the nightmare of the Kafkaesque trial. But the trial remains a denial of women's experience, and the chances of raising the rate of convictions for rapes that do not fit with the legal idea of rape still remain remote.

One suggestion that has been made to challenge the notion of the 'ideal' response to rape (if not the legal ideal of rape) is to educate juries about rape trauma syndrome (see Burgess and Holstrom 1979). Rowland (1986) has argued that there is a much better chance of

securing a conviction for rape where a jury is provided with a testimony from an expert witness about the different ways that women respond to rape. Her argument is based on tactics she used successfully whilst a prosecutor with the San Diego County District Attorney's Office. Her aim was to make individual women who had been raped appear more credible to the jury through the method of using psychologists and other experts to explain why the woman had reacted as she had done during and after the rape. In this way behaviour like crying continuously, or failing to tell anyone about the assault for some considerable time, or being angry rather than upset, could be explained as a psychological reaction to rape. Behaviour which is thought to be 'inappropriate' could then be presented as understandable and not as a sign that the woman is making a false accusation. Rowland is basically attempting to deal more favourably with the 'ambiguities' of a woman's account which the law currently treats as evidence *against* her. The expert witness is also someone who can speak for the raped woman as, in British courts at least, she has no barrister to speak on her behalf.

Rowland's strategy is an interesting one as it does introduce the opportunity to challenge some of the prevailing assumptions about raped women. There is strong resistance to introducing such a scheme into the English legal system, however. As Helena Kennedy remarks in her introduction to Rowland's book, English judges are not favourably inclined towards expert witnesses whose claim to knowledge lies in the field of human behaviour. Forensic scientists are one thing, but in the field of criminal law the 'psy' professionals are less welcome. But even if such a reform were possible, it would mean that women would be saved from the law, only to be surrendered to the 'psy' complex. Rowland's suggestion does not 're-qualify' women's accounts, it simply empowers the 'psy' professions to speak for women. Women remain the 'victims' in this system, and it is interesting in this respect that, throughout her book, Rowland refers to raped women as victims. It would seem that even should her proposals lead to more convictions, this can only be achieved by making women embrace their victim status even more warmly.

A more considered appraisal of the scheme to introduce representation for women who have been raped is given by Temkin (1987). She acknowledges the resistance to the scheme, but constructs the model for representation in a way which might be more acceptable to the British courts. In her model the person protecting the interests of the woman would be a lawyer who could protect her rights in relation

to anonymity and compensation, and could also protect her against unacceptable forms of cross-examination in court. This process would not pathologize the raped woman and it might provide much needed support and keep the woman informed about the progress of the case. In this model the advocate does not speak for the woman, nor does she bring in others to do so, but the basic adversarial system is left untouched. The main benefit of this strategy is that it can at least provide a guide through the labyrinth of the legal process for women. It does not necessarily promise to change the ordeal but at least the woman is not alone. This strategy of providing a legal guide (and interpreter) should be compared with the strategy of encouraging the woman to speak for herself. The Canadian legal system allows a raped woman to write her own account of her assault and this becomes part of the 'sexual assault evidence kit'. This kit will contain medical and forensic evidence, evidence of a woman's past sexual history, her own account, and any other evidence which is relevant. Allowing the woman to 'speak' was seen, as a liberalizing measure since it abolished the old system of a police officer transforming her account into police-speak. Yet the whole kit, which forms the basis of the prosecution case, also forms the basis of the defence case. The woman's story simply becomes vulnerable to the legal process *before* the trial rather than during it. She is 'empowered' to speak her story, but it is listened to in the same old way. In the light of this reform, it may be that Temkins's model for an advocate-as-guide would be more beneficial to the women who are so vulnerable to the legal process.

CONCLUDING REMARKS

It might be argued that rape remains an important area for feminist legal work, because even if the reforms that can be achieved are small, it provides an opportunity for confronting the problem of phallocentric sexuality. To a certain extent this is true, but there can be drawbacks. The first and paramount drawback is that we have no justification for using women who have been raped as horror stories in a kind of propaganda war. Rape Crisis Centres rightly refuse to do this because they are so clearly aware of the thin line between the woman's story and its use as a kind of pornography which is damaging to women. It is also a dubious practice that puts vulnerable women who have 'gone public' on their abuse in the vanguard of a

struggle that concerns all women. The question that we must ask is whether it is a valid feminist policy to make the trial process tolerable enough to encourage women to use it, without any guarantee that the basic phallogocentric assumptions of the trial have been altered. But here we have the horns of a dilemma. It is impossible not to object to what women must endure if they report a rape. For example, the requirement for the corroboration of a woman's evidence in English rape trials amounts to an overt disqualification of women's accounts on sexual matters. Yet it is clear that whilst its abolition would remove an objectionable practice, it would make little difference to whether a woman's account could be believed *beyond all reasonable doubt*. More worryingly, it could be presented as a major breakthrough for women, ironically strengthening the view that men acquitted of rape thereafter had most definitely been falsely accused. So a reform which is ineffectual in women's terms, may have the counter-effect of celebrating a system of justice which still tolerates the sexual abuse of women. It is precisely this irony which insists that, after the revelation and reform of a major abuse in the legal process, the English legal system is the best in the world. The more flaws we discover the more this proves the flawlessness of the basic system which allows us to articulate its flaws.

Of course to follow this argument to its logical conclusion would lead to total inactivity and political paralysis. I am not recommending that feminist policy should stop campaigning around rape and the law. Rape is already in the legal domain, therefore it must be addressed on that terrain. But, as Adler (1987) and Temkin (1987) have perhaps unintentionally implied, feminist legal victories in this area may be phyrhic until we can address the fundamental problem of phallogocentrism which disqualifies women's experience of sexual abuse. It may be that we should tackle the law on rape in order to provide an alternative account rather than in the expectation that reforms as such will have a direct benefit for women. As Weedon (1987) has argued, law constitutes a discursive field. That is to say, it provides an important way of giving meaning to the world and of organizing social institutions and processes. Whilst law occupies this position, from which it can define women's sexuality in such an oppressive form, it cannot be ignored. It must be challenged most fundamentally, but we should not make the mistake that law can provide the solution to the oppression that it celebrates and sustains.