THE LEGAL LANGUAGE OF RAPE

Kylie Stephen

A feminist reconstruction of rape.

In recent years the Australian judiciary has come under heavy fire, from women's groups and the community in general, for its gender bias in relation to cases involving sexual assault or rape. Several Supreme and County Court judges have been criticised for comments they made during rape trials. They include: Victorian County Court Judge David Jones commenting, when sentencing a man found guilty of raping a prostitute in August 1991, that the gravity of the crime was lessened because the psychological effect on the victim would have been less than that on 'a chaste woman' (*Courier Mail* 28.5.93, p.13); South Australian Supreme Court Justice Derek Bollen commenting during a rape-in-marriage trial in August 1992 that 'there is nothing wrong with a husband using rougher-than-usual handling to persuade his wife to have sex' (*Courier Mail* 28.5.93, p.13.); and Victorian County Court Judge John Bland observing during a rape trial in April 1993: 'that "no" often subsequently means "yes"' (*Courier Mail* 28.5.93, p.13.).

Such comments have been criticised as offensive, outdated, and overarchingly sexist. Consequently, there have been a series of recommendations for judicial reform. In May 1993 it was announced that the Senate Standing Committee on Legal and Constitutional Affairs would investigate whether comments made by the judiciary in sexual offence cases reflected a failure by judges to understand 'gender' issues. The committee would also make recommendations to deal with any problems of gender bias in the judiciary (*Courier Mail* 27.5.93, p.11). The Federal Attorney-General Michael Lavarch made two recommendations: first, that more women lawyers be appointed to the bench; and second, that judges should attend gender awareness courses to eliminate their gender bias. These recommendations reflect the belief that by merely eliminating the sexist attitudes of judges, rape victims will be given a 'fairer deal' in court. I contend that these beliefs and recommendations are part of a general concern with the *sexism* and *misogyny* of law in the wider Australian community. However, in this paper I argue that the problems women face with law lie much deeper in the *phallocentrism* of law. First, I shall illustrate the distinction between sexism and phallocentrism. Second, I shall engage in a specific discussion of the phallocentrism of law, showing how law is phallocentric and the manner in which women are sexed by law. Third, I shall discuss two related problems: the debate, not new in the 1990s, about the renaming, or redefining, of rape and the misleading nature of this debate in terms of its ability to help the law to protect women against rape, and to help feminists challenge persistent phallocentric cultural norms. I contend that attempts at reframing rape law remain within phallocentric cultural structures as they retain phallocentric conceptions of sexuality and heterosexual intercourse. I illustrate the parameters of this cultural construction and the victim status it imposes on women.

Sexism versus phallocentrism

My argument can be situated within the theoretical work of Elizabeth Grosz who describes the difference between sexism and phallocentrism while discussing the anti-sexist project of the feminist movement. Grosz says:

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> The critical, anti-sexist project is directed against the methods, assumptions and procedures by which patriarchal discourses reduce women to a necessary dependence on men as well as against more insidious, structural expressions of misogyny, which, rather than making sexist pronouncements about women instead present perspectives on the world from a masculine point of view as if such a position were sexually neutral.[1]

Thus, there are two parts to the anti-sexist critique. Sexism involves making stereotypical and discriminatory pronouncements about women, for example, that the psychological effect of rape for a prostitute would be less than that for a chaste woman; or that there is nothing wrong with a husband using rougher-than-usual handling to persuade his wife to have sex. On the other hand, phallocentrism involves the premising of concepts on the behaviour and characteristics of men which are falsely represented as universal and abstract *norms* for all humanity. For example, the concept of the normal working life of an individual is premised on the average, uninterrupted male working life. However, focusing on only sexism maintains phallocentric norms and seeks, for women, an equality of sameness to men. Focusing only on sexist pronouncements about women leaves in place 'the more insidious, structural expressions of misogyny' that Grosz highlights. Feminist theory must be involved in displacing the very foundations upon which traditional theories are based – foundations which are premised on the exclusion of women and the feminine – if anti-sexist critique is to be even partially successful in its goal of subverting discriminatory discourses.

My argument follows from this distinction. Because the concern for reforming the judiciary remains as a critique of sexism, it bypasses the deeper problems of law that relate to women, specifically the level of protection law affords women against rape. The recommendations that have been made are concerned only with eliminating sexual stereotypes according to gender, sexual exploitation and discrimination. They are concerned with the equal treatment of all people who come before the court of law. However, equality in this instance translates as sameness to men. Thus, the basis of the phallocentrism of law, which 'reduces women to theories appropriate for and developed from the masculine view point', is ignored.[2] The result of this is that assumptions about women's sexuality are constructed and reinforced by law because law is situated within the context of, and actively engaged in the projection of, a phallocentric vision of female sexuality and heterosexuality. Consequently, law, in its statutory framing, recognises the current political and cultural structures of society. Rape law represents a particularly relevant example whereby women's sexualities are framed by phallocentric legal language.

The phallocentrism of the law

The legal discourse of rape is situated within the social and political context of a phallocentric culture. As a part of this larger phallocentric cultural system, it must be acknowledged that law participates in the construction and reproduction of masculine centred thinking. Law constructs and reconstructs masculinity and femininity, and contributes regularly to common perceptions of sexual difference which sustain the phallocentric culture feminism attempts to challenge.[3]

Take for example the legal rights to the custody of children. Although there have been positive steps in recent times to ensure that both parents have the same rights in this specific situation, we are well aware that certain assumptions about the sanctity of motherhood and women's *natural* nurturing role prevail. It is also significant to note that should a husband and wife be treated in the same way in their attempts to gain custody of their children, the wife will still be disadvantaged. This is because of her likely inability to provide the children with adequate economic support. However, the main point of this example is to make clear the way in which law constructs women as family members, wives, mothers or daughters. This example represents the phallocentrism of the law because it illustrates the deeper structural bias of the legal process. Even when treated equally, the criteria of custodial law demands that women's lives closely approximate men's lives – which are seen as the norm. When women are unable to meet the masculine standard – as may be the case in terms of their ability to provide economic support for their children – law confirms women in their discursive space as 'natural woman' (woman as defined by man) and does so within the context of a powerful discourse.[4]

Clearly then, criticising sexism is not enough to eradicate gender bias in law. It is not enough to object to the sexism of law in its failure to adhere to its own professed equal standards, with an uncritical acceptance of law's own view of the social and political world.[5] It is exactly 'law's own view of the social and political world' – a phallocentric view – that requires analysis. Feminist theory should seek effective forms of subverting the fundamental phallocentric assumptions in cultural power systems like law, and replace them with more appropriate premises.

The sexing of women through rape law

It is important to understand phallocentric approaches to sexuality in order to highlight the ways in which women are sexed by rape law. Within phallocentric culture, sexuality is always presumed to be heterosexuality. This heterosexuality is, in turn, 'overdetermined by the prioritised activity of intercourse' which becomes little more than penetration and pleasure; merely the duration of intercourse or ejaculation.[6] Female pleasure is seen as unimportant and/or mysterious at best. Women are made passive receptacles in this context and they are ascribed feminine characteristics and roles. That is, women are seen as emotional, weak, dependent on others and intimately bound to their reproductive functions. Their sexuality is meant to complement men's which is powerful, active and dominant.

It is within this dominant regime of phallocentric meanings that law presides over contested accounts of rape. An examination of Australian rape law can make clear how women's sexual subjectivity has been framed in a phallocentric manner by the language of rape. In Queensland, the legal definition of rape is found in s.347 of the Criminal Code:

> Any person who has *carnal knowledge* of a female without her consent or with her consent if it is obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false and fraudulent representations as to the nature of the act, or, in the case of a married woman, by personating her husband, is guilty of a crime, which is called rape.[7] [Emphasis added]

The Queensland Criminal Code Review Committee (June 1992), recommended that the offence be extended to apply to anal as well as vaginal intercourse, and hence that rape be specified in gender neutral terms. It recommended that rape law be redrafted as follows:

> Any person who has carnal knowledge or carnal knowledge by anal *intercourse* of another person, without that other person's consent, is guilty of a crime, and is liable to imprisonment for life. [Emphasis added]

In Western Australia, s.324D of the Criminal Code 1991 defines the offence of 'sexual assault':

> Any person who sexually *penetrates* another person without the *consent* of that person is guilty of a crime and is liable to imprisonment for 14 years. [Emphasis added]

In Victoria the term rape is retained and defined in accordance with a new term '*sexual penetration*'.

> The Victorian *Crimes Sexual Offences Act 1980* made rape a 'gender neutral' offence by providing that rape could also occur where there was the introduction of a penis into the anus or mouth of another person, or the introduction of an object manipulated by a person into the vagina or anus of another person. The *Crimes (Sexual Offences) Act 1991* has expanded this definition further to include *penetration* of the anus or vagina by any part of the body. An important effect of this amendment has been to extend the offence of rape to acts involving digital penetration of the vagina or anus.[8] [Emphasis added]

This offence is graded. There are two levels: rape and indecent assault.[9] Similarly, in New South Wales, under s.61 of the *Crimes Act* there are two basic offences: 'sexual assault' (sexual penetration without consent) and 'indecent assault'. Aggravating circumstances are defined for each.

It can be seen from this selection of examples that there are a variety of laws that cover what we commonly know as rape. I argue that the language of rape used in all of these examples represents the phallocentrism of the legal discourse on rape in two specific ways: first, terms used consistently within rape law, such as penetration, intercourse and consent, reinforce the existence of active and passive actors in the rape scenario. The penetrator is the active *doing* participant in the rape context and is subsequently seen as empowered. The passive *receiving* participant in the rape context is acted upon – is penetrated – and is subsequently powerless. Sexual passivity, and powerlessness, are commonly associated with feminine characteristics which are seen to be disadvantageous in liberal democratic theory. The passive and powerless actor does not represent the masculinist norm of having an objective regard for the body and being able to deploy it at will. Thus, words like penetration, intercourse and consent presuppose, as universal and abstract norms, phallocentric conceptions of power and action.

Second, the focus in rape law on the genitalia, for example the vaginal and anal cavities and the penis, maintains the phallocentric concern with sex as representative of an individual's true subjectivity. Phallocentric conceptions of heterosexuality demand that sex represents the essence of a person that is untainted by society. Woman as her sex, is a sexed body that is vulnerable to the desires of men. '[T]he political efficacy of seeing rape as the fixed reality of women's lives', argues Marcus, results in 'an identity politics which defines women by [their] violability'.[10] Associated with this point, the use of the term carnal knowledge implies that knowledge of the sex of a person can only be had by the active, doing party – the penetrator – and not by the passive, receiving party, upon whom penetration is enacted. When a woman's sex is then violated/or known she becomes a victim – her essence is seen to be destroyed. Thus, the law of rape silences all but one account of rape, an account which produces the rapable woman of legal discourse.[11]

The rape scenario can be seen to be fulfilling the phallocentric construction of heterosexuality. 'The language of rape positions women as endangered and men as legitimately violent'.[12] Thus, the rape experience, and women's sexual subjectivity, are already constructed in the language of rape law and alternative knowledges, understandings and experiences are excluded.

The rape law reform debate

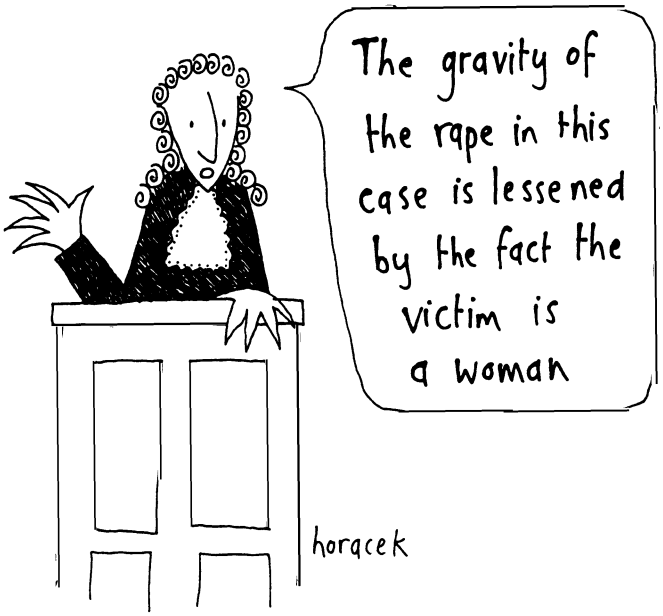
In light of my argument to this point, what can be said about attempts to redefine rape law in Australia ? The debate concerning the renaming and/or redefining of rape has centred around the question of whether rape is about sex or violence. There are two distinct perspectives on this debate:

- those who support the idea of retaining the term 'rape' in legal statutes but wish to expand this to include male victims, acts of anal and oral sex, and the use of objects other than the penis; and
- those who argue for doing away with the term rape and implementing a new concept – sexual assault.

Both of these positions have been influenced by a theoretical shift in feminist thinking which argues that rape is about violence against women. The aim of this thinking is to 'take the sex out of rape' and this has two purposes:

- to move away from stereotypical notions of men having uncontrollable sexual desires that require gratification (acts of rape may thus be excused as natural); and
- to eliminate or minimise the present legal focus on the question of the woman's consent and the woman's capacity to prove that she has in fact been raped.

The current emphasis on the woman having to prove that she did not give consent to sexual intercourse causes the legal and moral culpability of the rape to be attributable to the victim.



Those who argue for renaming rape as sexual assault (Women's Electoral Lobby), and those who wish to extend the terms of rape law (Scutt), do so on the basis that rape is a male word referring to the plundering of another man's property. In this view rape is an unsatisfactory term imposed on women by the dominant male culture. Consequently, women need to develop their own 'language to describe the misogyny inherent in acts of sexual assault'.[13] Those who argue for strictly retaining the term rape (Women Against Rape Collective) do so on the basis that it is a political crime of aggression against women by men. 'To call it any other name detracts from the reality of the world where men hold economic, political, social and legal power to the detriment of women'.[14] To change the words would be to further disguise who rapes (men) and who is raped (women). Renaming for these proponents would constitute *not* naming rape.

I argue that these sorts of debates do not extend beyond criticism of the sexism of law. They are concerned, at a superficial level, with changing or eliminating certain words in rape law but not the meanings of words. They do not subvert the phallocentric social contexts and constructs in which the language of

law is set. As Grosz indicates 'the politics or power of the text cannot . . . be automatically read off from what the text overtly says, but . . . from how it says it, what is invoked, and what is thus effected'.[15] Hence it is important for feminists debating rape law reform to recognise that the language of rape law derives its strength from 'the power to structure women's lives through imposing cultural scripts'.[16] What is needed, then, is a much deeper analysis of the embedded problems of phallocentrism in rape law – something debates over sexist terminology miss.

Law has attempted to make provisions for a variety of different rape contexts through different legal definitions. I would argue, however, that there are specific continuities between the old and the revised rape laws that render them inadequate. These continuities relate to the maintenance of phallocentric conceptions of sexuality and heterosexual intercourse. Subsequently, the renaming of rape is misleading in its endeavour to provide more adequate protection for women from rape.

Using the analysis suggested by Cheah,[17] it can be argued that Australian laws against rape and sexual assault maintain phallocentric constructions of sexuality in two specific ways. First, rape law continues to reflect sexual relations as having an active doing party and a passive consenting party. However, rape law's emphasis on the question of *consent* clearly assumes an equality between the man and the woman which mystifies phallocentric sexual relations as these are culturally constructed. The masculinist construction of female desire is significant in discussing consent. This is because women's sexuality is defined as complementary to men's; the woman must 'desire the penis', and is thus caught in the bind of 'being unable to withhold her consent'.[18] Within phallocentric culture women are treated as objects and not subjects or autonomous agents. Consequently, heterosexual relations of mutual negotiation and communication of desires between men and women, 'never [take] place within the scene of sexual offences'.[19] In the rape scenario there is no situation or context of possible consent/non consent. When women are not even considered to be autonomous agents, there is no possibility of consent because women are unable to do so. Consequently, I would argue that rape law's emphasis on the primacy of consent/non-consent to establish whether a crime has been committed is misplaced. Talk of consent, as an objective fact of sexual relations presumes the existence of a will capable of being given. This is a will that does not exist for women within the phallocentric structures of sexuality that culture sets for them.

I agree with Cheah's conclusion that rape law symbolically recognises and satisfies the general cultural structures characterising rape – it symbolically realises the phallocentrism of heterosexuality, thus reinforcing inequality between men and women. Thus, a woman takes no part in her rape except as object. The intercourse is a symbolic relationship between men. It represents what Pateman calls the fraternal bond because:

> [men] share a common interest in upholding the contract which legitimises their masculine patriarchal right and allows them to gain material and psychological benefit from women's subjection.[20]

Individuals can be a part of a fraternity/brotherhood even though they are not brothers in the strictest sense of the term, because they share an ascriptive bond *as men*. Hence, as Pateman says, 'to explore the subjection of women is also to explore the fraternity of men'.[21] Thus, the intercourse maintains men's control over women's sexual subjectivity and reinforces their own culturally constructed active sexual behaviour. Men confirm their own power in the rape scenario and do this by using using women as objects.

Second, when we examine the definition of sexual intercourse in laws of rape or sexual assault, similar problems arise. All attempts at definition focus on the basic premise of the commonly understood rape scene – the penetration of orifices. They all describe an active penetrating object and a passive receiving space, and command that this act alone represents the violation of rape/sexual assault. Thus, all laws represent the phallocentric understanding of heterosexual intercourse and hence women's sexual subjectivity.

I argue that it is probably possible for men and women to think themselves beyond phallocentric views of sexuality and not view sexual intercourse as the penetration of women's bodies. Intercourse may be able to be viewed as something women do to men, where women are the active agents. There is substantial evidence to suggest that penile invasion of the vagina may be less pivotal to women's sexuality and pleasure, than it is to male sexuality.[22] However, when sexual penetration is still defined as the *insertion* of the penis or phallic objects into the victim's anal, vaginal or oral cavities (an offence committed by a man or a woman) women are still not afforded much protection. Such legal definitions of rape accept a phallocentric configuration of woman and always exclude women's experiences and understandings of sexuality. Law does not get to the heart of what *exactly* is the violation of rape *for women* (defined in their own terms). The extension of the original definition of rape to sexual assault only reproduces the phallic precept underlying the legal definition.[23]

Law's maintenance of phallocentric configurations of sexual intercourse confirms the pervasiveness of rape. Law fails to prevent women from being raped because it actually affirms the status quo. As Marcus states:

> Attempts to stop rape through legal deterrence fundamentally choose to persuade men not to rape. They thus assume that men simply have the power to rape and concede primary power to them, implying that at best men can secondarily be dissuaded from using this power by means of threatened punishment from a masculinised state or legal system.[24]

All law can do is manage the social system and attempt to seek justice where necessary or possible. However, law does nothing to rectify the fundamental base of the problem.

Conclusion

How then can we define rape if concepts such as consent and penetration are problematic ? Quite clearly, I think we are forced to re-examine what constitutes the violation of rape. Rape is commonly understood as the penetration of orifices and is premised on masculinist notions of violation. What would this violation be if women were able to construct their own sexuality and become autonomous and active agents ? There may be other accounts of rape which could become forms of resistance rather than sources of victimisation. In which case Marcus suggests that:

> We can begin to develop a feminist discourse on rape by displacing . . . what the rape script promotes – male violence against women – and putting into place what the rape script . . . excludes – women's . . . agency, and capacity for violence.[25]

I think there are many possibilities for a feminist reconstruction of rape, and that inevitably we *should* redefine what we mean by rape. However, to date, as I have illustrated, this has not been done adequately. My argument does not imply that we should cease to be involved in pressing for rape law reform. In fact I would argue that there are still strong grounds for supporting rape law reform. Recommended changes to the definition of rape have tried to move away from the phallic precept of sexual intercourse, and have tried to understand rape in relation

to a series of other general assaults. I would suggest, however, that we actually rethink or reconceptualise what we understand to be the 'act' of rape itself if we are to be clearer about what exactly it is that we are legislating against. We should also not just assume that the social context – a phallocentric society – in which law operates, and in which rape takes place, is correct or satisfactory to all its participants. As I have illustrated, the law of rape has denied women self autonomy and the ability to define their own sexual subjectivity. Consequently, and perhaps most importantly, we should listen more to what women have to say about their rape experiences and what they understood these experiences to mean. Law reform is clearly both necessary and essential for women's liberation. However, we need to be more aware of what exactly it is that we are trying to reform and the possibility of doing that via 'law reform'.

References

1. Grosz, E. 'Conclusion: What is feminist theory ?', in Pateman, C. and Grosz, E. (eds) *Feminist Challenges: Social and Political Theory*, Allen and Unwin, Sydney, 1986.
2. Grosz, E., above, p.196.
3. Smart, C. 'Law's power, the sexed body, and feminist discourse', (1990) 17 *Journal of Law and Society* 194-210 at 201.
4. Smart, C., above, pp.202-4.
5. Naffine, N., *Law and the Sexes: Explorations in Feminist Jurisprudence*, Allen & Unwin, Sydney 1990, p.3.
6. Smart, C., above, p.202.
7. *Carters Criminal Law of Queensland*, 1993.
8. Law Reform Commission of Victoria, *Rape: Reform of Law and Procedure*, Appendices to Interim Report No. 42, 1991, pp.2-3.
9. Law Reform Commission of Victoria, *Reform of Law and Procedure*, Report No. 43, 1991, pp.33-4.
10. Marcus, S. 'Fighting Bodies, Fighting Words: A Theory And Politics Of Rape Prevention, (1992) in Butler, J. and Scott, J. (eds), *Feminists Theorise the Political*, Routledge, New York, 1992, p.387.
11. Smart, C. 'Penetrating Women's Bodies: The Problem of Law and Medical Technology', in P. Abbott and C. Wallace (eds), *Gender, Power and Sexuality*, MacMillan, London, 1991, p.206; Marcus, S., above, p.387.
12. Marcus, S., above, p.390.
13. Scutt, Dr J., 'Rape Law Reform: Who Chooses the Direction?', (1981) 6(1) *Legal Service Bulletin* 10-12 at 11.
14. Scutt, J., above, p.11.
15. Grosz, E., above, p.201.
16. Marcus, S., above, p.389.
17. Cheah, P. 'The Law of/as Rape – Poststructuralism and the Framing of the Legal Text', (1991) 9(2) *Law in Context* 117-129.
18. Cheah, P., above, p.123.
19. Cheah, P., above, p.126.
20. Pateman, C. 'The Fraternal Social Contract', in John Keane (ed.) *Civil Society and the State: New European Perspectives*, Verso, London, 1988, p.113.
21. Pateman, C., above, p.122.
22. MacKinnon, C. 'Feminism, Marxism, Method, and the State: Towards Feminist Jurisprudence', (1983) 8(4) *Signs* 635-658 at 647.
23. Cheah, P., above, p.122.
24. Marcus, S., above, p.388.
25. Marcus, S. above, p.395.

Letter

Dear Editor

Unfortunately the Brief published in your last issue 'Police interrogation' by Kirsten Deane (*Alt.LJ* (1994) 19(4) 194) creates a rather muddled if not false impression of the Independent Third Person (ITP) Program, auspiced through the Office of the Public Advocate.

The article uses the term ITP interchangeably in the two case studies, one dealing with a child and the other with a person with a disability. The Independent Witnesses scheme, prescribed by s.464 of the *Crimes Act* is separate and distinct from the ITP Program, covered by Police Standing Orders in relation to people with an intellectual disability, or mental impairment, including psychiatric illness, acquired brain damage or senile dementia.

The author clams that 'the programs have failed to live up to expectations' and that 'little attention has been paid to the critical issues of recruitment, training and on-going support'. It is disappointing that in making such damning criticisms the author failed to up-date her research on the ITP Program, apparently relying on data from 1992.

The Simm case was extremely complex and the article hardly does justice to the full story of the ITP's role and involvement. Training and recruitment are obviously crucial to this volunteer Program, and the volunteers who have participated over the Program's four years of operation have done so with genuine commitment to the rights of people with disability.

To up-date your readers, the Office is currently planning a review of the Program, taking into account emerging issues such as video taping of interviews, changes to legislation and process and procedural issues raised by the Simm case.

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