

Working Paper Series

Villanova University Charles Widger School of Law

Year 2010

What is Due to Others: Speaking and Signifying Subject(s) of Rape Law

Penelope J. Pether

Villanova University School of Law, pether@law.villanova.edu

This paper is posted at Villanova University Charles Widger School of Law Digital Repository.
<http://digitalcommons.law.villanova.edu/wps/art155>

WHAT IS DUE TO OTHERS

Speaking and Signifying Subject(s) of Rape Law

Penny Pether*

Australian journalist Paul Sheehan's representation of the alleged and convicted immigrant Muslim/Arab rapists he demonises in *Girls Like You*, like his representation of the rape survivors in that text, has much to tell us about the law's production of rape law's speaking and signifying subjects, 'real rape' victims and survivors, false accusers and perpetrators. This article uses a variety of texts, including *Girls Like You*, recent Australian rape law jurisprudence and legislative reform, texts involving two controversial recent US rape cases — one from Maryland and one from Nebraska — and a recent UK study on attrition in rape prosecutions, to explore some persistent legal problems in responding to the social harm of rape. It concludes that recent work on biopolitical models of rape law, applied to the New South Wales rape reform prompted in significant part by the *Skaf* and *K* rape cases, suggests that there is little hope of this law reform initiative reducing rape attrition. More disturbingly, via a somatechnological critique of the reform's production of 'infralegal' subjects, it also proposes that its ends can be differently understood.

This is a sordid, distressing, sad little case. From any perspective, its facts are appalling.¹

The old saw that hard cases make bad law has its basis in experience. But petty cases are even more calculated to make bad law. The impact of a sordid little case is apt to obscure the implications of the generalization to which the case gives rise ... It is true also of journeys in the law that the place you reach depends on the direction you are taking. And so, where one comes out on a case depends on where one goes in.²

Those at the margins of world politics understand violence.³

This article addresses persistently high levels of attrition in the prosecution of rape cases, evidencing the failure of successive waves of rape law reform in the common law world — even in jurisdictions that have made apparently radical statutory reforms, ostensibly to address rape prosecution attrition. It emerges from several distinct bodies of my recent work. The first has involved picking up feminist work

* Professor, Villanova University School of Law, Villanova, PA, USA.

¹ *In Re John Z*, 60 P3d 183 (Cal 2003) at 189 (Brown J dissenting).

² *United States v Rabinowitz* 339 US 56 (1950) at 68–69 (Frankfurter J dissenting).

³ Agathangelou and Ling (2004), p 521.

on rape law, law reform and language,⁴ put aside in 1999.⁵ The second is work on the theory and practice of common law judging in the contemporary United States,⁶ part of a larger project on theorising ethical judging practices and subjects, tentatively titled *Fresh Judging*. The third is comparative constitutional law scholarship on ‘post-9/11 constitutionalism’ and constitutional adjudication in common law countries, which has engaged with the treatment by legal institutions and subjects of two groups of paradigmatic ‘others’ of the contemporary nation-state: Islamic ‘suspected terrorists’ or ‘unassimilable’ asylum-seekers (two categories which frequently bleed, de facto, *de jure*, or discursively one into the other); and that group of sex offenders who in the United States are called ‘sexually violent predators’.⁷ To simplify the complex, constitutional courts — including constitutional courts of final jurisdiction in the United States, Britain and Australia — have in the last decade, and increasingly since 9/11, addressed what constitutional rights or criminal procedural protections should be available to these ‘others’ in circumstances where legislatures have sought radically to abridge or circumscribe them.

The productive uses of a somatechnological critique for examining the phenomenon of rape attrition, which persists despite ostensibly radical reforms both of legal texts and the cultural formation of actors in the legal system responsible for instantiating the state’s response to the ‘social harm’ of rape, are considerable. ‘[Troubl[ing] the boundary between embodied subject and technologized object’,⁸ somatechnics draws attention to the production of the body through ‘the *techné* of symbolic manipulation’,⁹ as ‘the tangible outcome of historically and culturally specific techniques and modes of embodiment processes’.¹⁰ If rape attrition instantiates a violent and persistent failure of intersubjective ethics, giving the lie to the promises of the liberal nation state, somatechnological critique opens up the possibility of a ‘re-evaluation and reframing of [those] ethics — of the proper regard for the interrelationship between other, self and world’.¹¹ Additionally, I conclude in this article that a distinctively biopolitical model of rape statute and discourse on rape law reform has been mobilised in contemporary Australia both to instantiate ‘altercidal violence directed at [Islamic] bodies in Australia’¹² and to enact a reactive white ‘hypermasculinity’¹³ through the identification of the state as a patriarchal guarantor of ‘women’s rights’, which it at once grants and denies. Further, rape itself, and the law’s failure to turn the resources of state power to effectively ‘discipline and punish’ it, advance both the ‘anatamo-political’ and the

⁴ Pether (2008b, 2007b).

⁵ Pether (1999).

⁶ Pether (2009a, 2007a, 2005, 2004).

⁷ Pether (2009b, 2008a, 2008c).

⁸ Pugliese and Stryker (2009), p 1.

⁹ Pugliese and Stryker (2009), p 2.

¹⁰ Pugliese and Stryker (2009), p 2.

¹¹ Pugliese and Stryker (2009), p 2.

¹² Pugliese and Stryker (2009), p 6.

¹³ Agathangelou and Ling (2004), p 519.

‘biopolitical’ ends of sovereign power, to ‘reproduc[e] violent and unequal relations’¹⁴ of gender and of “‘culturalist’ racism”.¹⁵

Let me draw these strands of thinking and writing together. In *Just Silences*, a book about ‘modern law, its speech and silences, and its relationship to what is arguably the traditional concern of jurisprudence — justice’,¹⁶ Marianne Constable concludes that:

the [various] silences of the law [just, unjust, ambiguous] open up questions of the speaking of law and its current grounding in social power. In an age of loquacious and powerful positive law, silences tell of what lies buried, concealed and hidden and possibly dead, within positive law.¹⁷

In *Tess of the d’Urbervilles*, Thomas Hardy, a Victorian novelist and poet and also a pessimistic herald of the modern, deploys silence, speech and writing to explore a persisting question about law, society and justice that likewise concerns me: how to address, to name and respond to what a student of criminal law learns to call ‘the social harm’ of rape.

We — or at least some of ‘us’ — know, of course, of the sociological data that attests to the social harm of rape: its staggering frequency and the frequency with which its victim is not recognised or is disbelieved; the differing kinds of damage it does to those who are its victims — psychic, physical, reputational, relational, existential, economic.¹⁸ But as Constable’s insistent scepticism about legal sociology’s empiricist discourse of totalising knowledge and law’s equally totalising solipsistic positivism might suggest, that knowledge is inadequate to do justice — or even, perhaps, to make it possible, because at last and in context, imaginable.

In Hardy’s novel, Tess’s rape is registered by silence,¹⁹ marked in the most uncompromising of generic silences of the (originally serialised) Victorian novel, the anti-climactic chapter break that also constitutes a decisive narrative lacuna, because in this novel it is not picked up neatly by seamless chronology and continuous emplotment when the new chapter begins.²⁰ It is also registered by a cacophony of accounting for it. Hardy’s voluble and opinionated narrator,²¹ that narrator’s omniscient counterpart²² and characters in the novel²³ — including proxies

¹⁴ Pugliese and Stryker (2009), following Foucault and Agamben, pp 3–4.

¹⁵ Pugliese (2009), following Balibar, p 11.

¹⁶ Constable (2005), p 8.

¹⁷ Constable (2005), p178.

¹⁸ Criminal Justice Sexual Offences Task Force, Attorney-General’s Department of NSW (2006); Fitzgerald (2006); Kelly et al (2005).

¹⁹ Hardy (1988), p 77.

²⁰ Hardy (1988), p 81.

²¹ Hardy (1988), pp 77, 81, 91.

²² Hardy (1988), p 85.

²³ Hardy (1988), p 95.

for ‘Nature’²⁴ — all tell stories about the rape ‘itself’, about cultural stories that surround rape, about the intelligible signs of the harm the rape has done to Tess, about the circumstances that might bring about the unlikely coincidence of rape, law and justice. For Tess, justice — although not judgment — is deferred, suspended, foreclosed: as the novel ends, Tess hangs for the murder of her rapist, in circumstances that offer her no (legal) defence. So too the autonomy symbolised by her resistance to her rapist had proved chimerical, ‘expos[ing] the double standards and inequalities of Western liberalism’,²⁵ aptly signified by the brutal faithlessness of her husband, Angel Clare, Hardy’s poignant symbol of the Enlightenment and of colonialism. Her (chaste) younger sister, her symbolic intactness, her sexual integrity foregrounded — ‘a tall budding creature, half girl, half woman ... a spiritualised image of Tess, slighter than she, but with the same beautiful eyes’²⁶ — takes her place with the husband whose rejection of Tess — a product of embodied culture as of the rape, itself a practice embedded in structural inequality and embodied violence — has, like the rape itself, led to the murder.

This article begins, then, from the point to which research for it led, with a conclusion that might well arrest work of the kind the article constitutes in its tracks. After successive waves of reform in many jurisdictions across the world, the law — in which I include statutory language; common law rules and judicial glosses on statutory language; evidentiary rules; courtroom practices and discourses at interlocutory, trial and appellate levels; the situated material practices of legal actors including law enforcement officers, prosecutors and defence lawyers, juries, judges and law reform professionals — continues to find itself not even approximately equal to addressing the social harm of rape, let alone to anything that might be recognised as justice. Rape remains, with a stubborn persistence, common, under-recognised, under-reported, under-detected, under-prosecuted, under-convicted and under-punished.

Recent studies documenting the extraordinarily high contemporary rates of what is called ‘attrition’ in rape prosecutions can be found in the *New South Wales Criminal Justice Sexual Offences Taskforce Report*, published in April 2006,²⁷ and in the British Home Office’s 2005 Report, *A Gap or a Chasm? Attrition in Reported Rape Cases*.²⁸ Read against statistics documented in the law and social science literature on rape that proliferated in the 1980s and 1990s, the contemporary data establish that statutory rape law reform, whether substantive (as in offence definitions) or procedural (as in evidentiary rules), and associated law reform directed to embodied subjects, including reform of police practices and judicial education, have had no effect on improving the rates of the prosecution of and conviction for rape. In his landmark 1989 sociological study of rapes reported in Indianapolis in a three-year period in the early 1970s, Gary LaFree reported that only 12 per cent of rapes reported to police resulted in conviction, and also that

²⁴ Hardy (1988), p 77.

²⁵ Pugliese (2009), p 18.

²⁶ Hardy (1988), p 383.

²⁷ Criminal Justice Sexual Offences Task Force, Attorney-General’s Department of NSW (2006).

²⁸ Kelly et al (2005).

‘these 881 reported cases no doubt represent only a fraction of all rapes that actually occurred in Indianapolis during the years of my study’.²⁹ To quote the British Home Office Report, ‘the two patterns in reported rape cases in England and Wales over the past two decades ... [are] a continuing and unbroken increase in reporting; and a relatively static number of convictions’.³⁰

In a parliamentary debate on a criminal procedure reform Bill that responded in part to the *New South Wales Criminal Justice Sexual Offences Taskforce Report*, New South Wales MHR Chris Hartcher said:

The New South Wales Bureau of Crime Statistics and Research figures show a dramatic increase in the number of sexual assaults reported to police — in 2002–03, 9,151 and to the end of June 2004, 11,000.

The Australian Bureau of Statistics estimates that only 20 per cent of rapes are reported, which means we are looking at a potential figure of approximately 60,000 sexual assaults in New South Wales in the past year. For that same period, there were just 247 convictions. So the gap between reported sexual assaults and convictions is enormous. It is a serious challenge to our society that must be accepted and met if our society is going to afford women the protection and dignity to which they are entitled and the respect and protection that the law must afford all its citizens. A further report in January of this year in respect to the 300 people who responded to the landmark survey of 2005, that I have already addressed, stated that the latest figures showed that 98 per cent of accused sex attackers walked free in 2004. That would equate with a figure that was supplied to me — and I believe is accurate but I cannot find its source — that only 1 per cent of sexual assault complaints result in a prison sentence. Any society in which 98 per cent of sex attackers can walk free is a society that does not adequately address the issue.³¹

Let me articulate as precisely as I can the evidence that exists to account for the stubborn resistance of rape law to reform. Most rapes are what Susan Estrich, a long time ago, called ‘simple rapes’.³² That is, they are not what she famously called ‘real rapes’,³³ but rather ‘rapes in which there is some type of relationship between the assailant and the victim; rapes in which the victim and assailant know one another; rapes in which little physical (extrinsic) violence is present; rapes in which an extralegal victim precipitation logic is employed; and rapes in which the “contributory behavior” of the victim forms the primary defense strategy’.³⁴ Thus

²⁹ LaFree (1989), p 236.

³⁰ Kelly et al (2005), p 25.

³¹ Second reading speech, Criminal Procedure Amendment (Sexual and Other Offences) Bill, 25 October 2006, www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LA20061025002.

³² Estrich (1988).

³³ Estrich (1988).

³⁴ Matoesian (1993), p 215.

the rape to which the law has persistently not been able to do justice is 'really' not the so-called 'real' rape, which is (comparatively) possible to prosecute to conviction if the perpetrator is identified, but the overwhelming majority of 'simple' rape. As studies — including the recent Home Office study and LaFree's research — show, victim social marginalization and/or 'nontraditional behavior',³⁵ characteristics which arguably define 'simple' rapes, increase the rate of attrition and decrease the likelihood of successful prosecution. In rape and in rape law, then, gendered bodies speak volumes; they *matter*, although they are rarely 'listene[ed] out for, nor recognized'.³⁶

This has both a social/evidentiary and a doctrinal aspect. Victims who do not conform to stereotypes of chaste women — which arguably includes all victims of 'simple rape' — are subject to layers of social and institutional disbelief of their stories. Additionally, allegations that 'victims had ... engaged in nontraditional behavior' were particularly important in 'jury-ried rape cases ... when the major disputed issue involved whether the complainant was a rape victim'.³⁷

nontraditional victim behavior was most often alleged in cases in which the major legal defense was either consent or no-intercourse. Such allegations were less likely when the major defense was either identification or the defendant's diminished responsibility. The extremes were consent and diminished-responsibility defenses. In the former, victims were always portrayed as gender-role nontraditional; in the latter, they never were.³⁸

The inscription of bodies matters too: rape law reform operates in cultural contexts that get in the way of the effectiveness of conventional strategies of reform aimed at offence definition, evidentiary and other procedural rules, and the 'education' of police and judges. As Iglesias, one of a group of feminist scholars undertaking interdisciplinary law and linguistic humanities work on rape in the late 1980s and 1990s, registered, those cultural contexts include 'dominant cultural narratives'³⁹ about sex and gender, and the extralegal structures, institutions, embodied subjects (police, prosecutors, jurors, judges, perpetrators, victims) and practices that sustain them. In similar vein, Frohmann and Mertz concluded that to 'effectuate social change through legal reform ... formal attempts to alter statutes and policies must be supplemented by analysis of the social and cultural patterns that shape the implementation, interpretation, and effect of the law'.⁴⁰

Iglesias and Frohmann and Mertz made important contributions to the body of (frequently linguistic) sociolegal work in the late twentieth century that studied those cultural narratives and social and cultural patterns. Other reform-oriented rape law scholars working in the sociolinguistic traditions or employing insights drawn

³⁵ Kelly et al (2005), pp 23–24, 51–53, 58–63, 67, 72, 74, 80–82, 84; LaFree (1989), p 241.

³⁶ Smith (2004), quoted in Agathangelou and Ling (2004), p 536.

³⁷ LaFree (1989), p 241.

³⁸ LaFree (1989), p 240.

³⁹ Iglesias (1996), p 887.

⁴⁰ Frohmann and Mertz (1995), p 835.

from those traditions in that period included Greg Matoesian,⁴¹ Kim Lane Scheppelle,⁴² Stephen Schulhofer⁴³ and Andrew Taslitz.⁴⁴ Many of those scholars, like Mertz and Scheppelle, have moved on to other areas of research. Why? Let me hazard a guess: the work is unprofitable. We have disinterred a great deal of information from and about the unjust silences of rape law; we know why to speak of justice in the context of rape law likewise attests to a blind and unjustified faith in the efficacy of positive law to do justice; we know much about what changes — to stories, to speech and to silence — might mitigate injustice. But all the speech and the writing, the scholarship and the legislation and the training programs and manuals and the textual artefacts of law reform have changed nothing, except perhaps that a larger number of women in many cultures are reporting rapes, only to experience the various instantiations of the embodied institutional and discursive ‘second rape’ that is one of the predictors of attrition.

Is change (and perhaps justice) *possible*? After all, the relationship of gender discourses and credibility discourses — which are both written and spoken, and silent (tacit and/or unconscious) — manifests many consistencies over time and across space: some kinds of women are presumed in many cultures at many times to lie about alleged rapes for reasons ranging from a gendered lack of integrity to feminine hysteria or madness to revenge to guilt to seeking to excuse consensual sexual behaviour. Nonetheless, some of the excellent recent historical scholarship on rape and law in the United States establishes that:

There are constants in the female experience of rape. The typical rape victim in the seventeenth century, as today, was unmarried, employed, knew her attacker, and was unlikely to report the assault. Her assailant, in the unlikely event of prosecution, offered a defense as effective in the early modern world as today: the sexual activity had been consensual; there had been no struggle; and, he would assert, her sexual reputation was such that no reasonable man would have expected to meet with a refusal.⁴⁵

Historically, experiences of rape have also been capable of variation or change. For example, ‘[a]mong Puritans, men were assumed to have a “proclivity for lying”, and women, despite their personal histories, were largely believed. In the [seventeenth century] Chesapeake, rather than give credence to a [white] woman’s word, magistrates doubted it, unless her assailant was black’.⁴⁶ Lisa Lindquist Dorr’s work on interracial rape prosecutions in Virginia in the twentieth century argues that the work of the civil rights movement of the mid-twentieth century, together with influential postwar Freudian accounts of female sexuality, led to some limited improvements in the legal outcomes experienced by black men accused of raping white women, and still more limited improvements to legal protections for

⁴¹ Matoesian (1993).

⁴² Scheppelle (1992).

⁴³ Schulhofer (1998).

⁴⁴ Taslitz (1999).

⁴⁵ Hambleton (2001), p 27.

⁴⁶ Snyder (2001), p 50.

black women raped by white men.⁴⁷ Elsewhere, Lindquist Dorr discerns evidence of complex social contexts in which interracial rape in twentieth century Virginia operated,⁴⁸ showing — like Hambleton — that reputation and social class and community status of rape victims — indexes of citizenship, if you like — played a significant role in the likelihood that an accusation of rape would result in a conviction, even in the context of interracial rape in the Jim Crow South.

So, if we know a great deal about the kinds of changes that might enable law to do justice to the crime of rape, and we know that while such change is difficult there is some evidence that change can occur, why have the waves of rape law reform since the mid-twentieth century not made a difference to the law's ability to do justice in the case of rape?

As a means to find an answer to that question, and to begin to imagine how to bring rape to justice, I have been working on two (relatively recent)⁴⁹ US cases on the relatively rare phenomenon of withdrawn consent or post-penetration rape prosecutions, speculating that if we put the marginal at the centre we might find out how adequately to respond to the social harm of rape.⁵⁰ These cases are a particularly acute site for contestation about what is rape and what is consensual sex; they purport to be able to distinguish between rape and consensual sex when they are in very close quarters; they likewise show that some judges find it very hard to tell the difference between rape and consensual sex. In the three withdrawn consent cases of which my earlier work offered extended readings⁵¹ — *Kaitamaki*, a 1980 'real rape' case from New Zealand,⁵² the 2003 California case *John Z*⁵³ and the 2006–08 Maryland case *Baby*⁵⁴ — the formal legal inquiry proceeded on the basis that consensual sex might change into rape. Thus it proceeded on the logic that the law can tell the difference and focused, unusually literally and explicitly, on what imaginary or at least legally inscribed bodies, and embodied subjects and their words, might enable it to do so. The jury verdicts in each case and the final result of all three on appeal⁵⁵ might be viewed as evidence of 'progressive' rape law reform of a kind analogous to the ending or limiting of the marital rape immunity in many Western common law jurisdictions. In each case, however, there was at least one judicial officer⁵⁶ who engaged in what used to appear to me to be the kind of

⁴⁷ Lindquist Dorr (2001), p 247.

⁴⁸ Lindquist Dorr (2004).

⁴⁹ *Baby v State* 916 A2d 410 (Md App 2007); *State v Baby* 922 A2d 573 (Md) (2008); *In Re John Z* 60 P3d 183 (Cal 2003).

⁵⁰ Pether (2007b).

⁵¹ Pether (2007b).

⁵² *R v Kaitamaki* (1980) 1 NZLR 59.

⁵³ *In Re John Z* 60 P3d 183 (Cal 2003)

⁵⁴ *Baby v State* 916 A2d 410 (Md App 2007); *State v Baby* 922 A2d 573 (Md) (2008).

⁵⁵ In *State v Baby* 922 A2d 573 (Md) (2008), the Maryland Court of Appeals reversed the Court of Special Appeals decision on the cognisability of post-penetration rape under Maryland law in *Baby v State* 916 A2d 410 (Md App 2007), remanding the case for retrial.

Martian reasoning that, in semiotic analysis's equivalent of *res ipsa loquitur*, would make starkly visible to law students the traces — less evident but often present in other cases — of continuously circulating and powerful cultural discourses apparently proving what is often presented as one of Catherine MacKinnon's more contested claims: that, under current sociocultural conditions, sex is believed to be 'what women are for'⁵⁷ and, by extension, many women's consent to sex may be assumed.

These cases, then, were of the class that I used to think about as gifts to the feminist legal scholar and teacher — that is, where a judge is so evidently working within an interpretive universe that is flagrantly patriarchal and misogynist that most ordinary, reasonable people, or at least the average law student with no particular commitment or even some hostility to feminist ways of reading the law, will perceive him as a troglodyte, and transfer that perception from judicial officer to our legal culture's paradigmatic way of defining the crime of rape. And that

⁵⁶ Justice Woodhouse, in *Kaitamaki*, harshly criticised the survivor whose house had been burgled by the man who claimed he did not realise that she was not consenting until halfway through his second act of intercourse with her. Her archetypal or stereotypical feminine fickleness, he wrote, had turned an innocent man into a rapist: 'after he had entered her with consent she ... transform[ed] his innocent an acceptable conduct into criminal activity of the most serious kind'. The Court of Special Appeals in *Baby*, unanimously reversing the defendant's convictions for first-degree rape, first-degree sexual offence and three counts of third-degree sexual offence *inter alia* on the basis that post-penetration rape was not a cognisable offence under Maryland law, referred, *inter alia*, to an account of 'Middle Assyrian Laws' in an article (ironically, or perhaps surreally, in context) advocating feminist rape law reform and 'English common-law' in concluding that 'the initial "de-flowering" of a woman was the real harm or insult which must be redressed by compensating, in legal contemplation, the injured party — the father or husband ... [and] provided the basis for the criminal proceeding against the offender. But, to be sure, it was the act of penetration that was the essence of the crime of rape; after this initial infringement upon the responsible male's interest in a woman's sexual and reproductive functions, any further injury was considered to be less consequential. The damage — viewed from the perspective of the husband's or father's interest in the reproductive functions of the victim — was done. It was this view that the moment of penetration was the point in time, after which a woman could never be "re-flowered," that gave rise to the principle that, if a woman consents prior to penetration and withdraws consent following penetration, there is no rape. Maryland adheres to this tenet ...' In *John Z*, Justice Janice Rogers Brown, in dissent, found that 'the facts in this case, as described solely by the prosecution witness, create doubt both about the withdrawal of consent and the use of force', and responded to the majority's dismissal of the defence argument that 'in cases involving an initial consent to intercourse, the male should be permitted a "reasonable amount of time" in which to withdraw, once the female raises an objection to further intercourse ... "[b]y essence of the act of sexual intercourse, a male's primal urge to reproduce is aroused. It is therefore unreasonable for a female and the law to expect a male to cease having sexual intercourse immediately upon her withdrawal of consent. It is only natural, fair and just that a male be given a reasonable amount of time in which to quell his primal urge".' Justice Brown wrote that the majority opinion 'does not tell us how soon would have been soon enough. Ten seconds? Thirty? A minute? Is persistence the same thing as force?'

⁵⁷ MacKinnon (1983), p 653.

person will be able to identify less flagrantly patriarchal or misogynistic cultural scripts when he or she strikes them elsewhere in the law's texts, including US legal culture's paradigmatic, distinctive and comparatively reform-resistant way of defining the crime of rape.

The recent law reform texts referred to above, and the withdrawn consent cases, showing that a certain well of common sense about presumed consent has remained pristine over the course of nearly 30 years of law reform, mean that I increasingly do not take that reading of bodies and words for granted. Radically differing perceptions of what bodies and words mean in rape law's contexts may be more or less culturally natural or even accessible, depending on how one reads and from which perspective, and thus what one sees and hears.

Thus *Baby v State*⁵⁸ involves normative judgments both about whether withdrawn consent can ground a forcible rape conviction, and how evidence in rape cases against men and boys who use deception, coercion and/or violence, familiarity with cultural texts, and/or the force of numbers to coerce vulnerable, because especially powerless, women and girls⁵⁹ — those who, for reasons that frequently include socioeconomic disadvantage, manifest 'nonconformity to stereotypical gender roles'⁶⁰ — into sex should be read.

Should bodies and words be read on the one hand with an eye to evidence of locked doors, isolated places, beatings, perpetrators holding victims down while other perpetrators rape them, or themselves physically forcing compliance with sex acts in the face of struggles and verbal expressions of non-consent? Or, on the other, should they be read with an eye for 'bad girls' who put themselves in unsafe places and get what they deserve, an ear deaf to what was evidently perceived by the *John Z* dissenter and the *Baby* interim appellate court as the lack of integrity signaled by 'evidently' inarticulate manifestation of and evidence about non-consent and resistance? Should they be approached from a perspective informed by the understanding that 'simple' rape is in fact 'real' rape, rather than the vast middle excluded by the binary of rape and consensual sex, and thus the business of a court attentive to the call of justice — or, as the interim appellate court did in *Baby*: excavating texts from rape law's doctrinal history and asserting that they bound its future?

Likewise, Justice Brown's dissent in *John Z* is salutary. Drawing on cultural resources also available to the dissenter in *Kaitamaki*, she opined that 'sexual intercourse is not transformed into rape merely because a woman changes her mind'.⁶¹ Of even more salience for my purposes here are her concession that '[o]rdinarily, these cases involve a credibility contest in which the victim tells one story, the defendant another', and her characterisation of the facts as a 'sordid, distressing, sad little case', involving as it did the actualised sexual objectification and abuse of a 17-year-old girl, 'alone in a house with four young men ... [o]ne of

⁵⁸ *Baby v State* 916 A2d 410 (Md App 2007).

⁵⁹ As *Baby* and *John Z* both do.

⁶⁰ Iglesias (1996), p 869.

⁶¹ *In Re John Z* 60 P3d 183 at 190 (Cal 2003).

... [whom] is “sort of” her boyfriend’, by both the ‘boyfriend’, who pled to charges of sexual battery and unlawful sexual intercourse, and John Z.⁶²

The answer to the question about how to use insights about law and language and culture, and centring the marginal that is actually the excluded middle to change the grim picture of rape attrition that I tentatively reached in this inquiry, and the one I would have been inclined to give until relatively recently, is summarised by what Carolyn Heilbrun and Judith Resnik wrote in *Convergences: Law, Literature, and Feminism*: ‘Different texts. The same texts read differently. Other voices included in the conversation. Different behavior.’⁶³

That is, ‘bodies and languages’, as Alain Badiou dismissively puts it⁶⁴ — or what Pierre Bourdieu calls the *habitus*, embodied experience⁶⁵ — matter. This instinct is not confined to scholars: in the recent high-profile successive (unsuccessful) rape prosecutions of Pamir Safi in Nebraska, the victim, Tory Bowen, was willing to risk the mistrial that eventually aborted the second, and in the event final prosecution of this alleged serial rapist, by publicly protesting the trial judge’s gag order that had sought to prevent her using a range of words in her testimony: one of them was ‘rape’.⁶⁶ Seeking such gag orders has become standard operating practice for defence lawyers in US rape cases.⁶⁷

What can be done to change this? I would have suggested reading legal texts against the grain, intertextually and contextually, in order both to make visible circulating networks of meaning and representation in legal and other cultural texts, and to determine ‘how [it is] ... possible [for judges] to know that, to think that’,⁶⁸ and thus to pass judgment and read and write the law the way they do. One could then go on to use this ‘disrespectful’ approach to reading the law and strategies based on pedagogy grounded in the critical theoretical traditions to produce ‘different affective and ethical outcomes’ in judging.⁶⁹

But as I worked on the withdrawn consent cases, I was struck by two insights. One was that survivor-oriented law reform of rape law doctrine and practice is almost always at best a two steps forward/one step back process, and at worst and increasingly it seems to me characteristically, a practice marked by stasis or regression. Why is this so? Next, even for a reader attuned to notice the stark differences between the selective narrative constructed from the trial transcript by majority and dissent, there is a certain commonsense resonance to Justice Brown’s visceral reaction to the facts of *John Z*: coerced group sex involving multiple young male perpetrators and a teenage victim, which is what both the recent US cases on

⁶² *In Re John Z* 60 P3d 183 at 189 (Cal 2003).

⁶³ Heilbrun and Resnik (1990), p 1948.

⁶⁴ Badiou (2006).

⁶⁵ Bourdieu (1991).

⁶⁶ Paul Hammel, ‘Attempts to “Intimidate” Cited in Rape Case Mistrial’, *Omaha World-Herald*, 13 July 2007, p A1.

⁶⁷ Meg Massey, ‘Putting the Term “Rape” on Trial’, 23 July 2007, www.time.com/time/nation/article/0,8599,1646133,00.html?xid=feed-cnn-topics.

⁶⁸ Pether (1999), p 60, quoting an unpublished draft of Pether and Threadgold (1999).

⁶⁹ Pether (1999), p 57.

post-penetration rape discussed in this article involve. Tegan Wagner,⁷⁰ the survivor of one of the *K* brothers' 'gang rapes' in New South Wales, makes similar suggestions about contemporary Australian culture.⁷¹

At that point, I began to understand the problem of attrition in rape cases differently, and much less hopefully. What brought me to that position? The first thing was the stark evidence of the brutal impoverishment of lives of socially marginalised adolescents. As I read some of the many texts other than Tegan Wagner's produced to account for the *Skaf* and *K* gang rape prosecutions in Sydney, I encountered other, similar lives: there were distinctive factual similarities, and similarities in victim profile, between the two recent 'withdrawn consent' rapes, and the *Skaf* and *K* 'gang' rapes.⁷² What is the bad news about addressing attrition that emerged from these intertextual comparisons? Law reforms operate in cultural contexts: the *British Home Office Report* indicates that the number of teenage rape victims was increasing and most sexual assaults were committed by 'known men';⁷³ the girls in these Australian 'gang rape' cases often engaged in the 'non-traditional behavior' that is associated with rape and rape attrition,⁷⁴ and if the characteristic profile of rape victims has changed little between the seventeenth century and the twenty-first, as Hambleton's research suggests, there is also data suggestion that coercive sex came increasingly to characterise the life experiences of female adolescents in the United States in the 1990s.⁷⁵ The 'good' news? In both *John Z* and *Baby*, the law was 'changed' in 'progressive' ways by the decisional courts; New South Wales saw some radical rewriting of its rape statute, at least partly in response to the *Skaf* and *K* cases.⁷⁶

Even before those putatively survivor-oriented reforms, New South Wales' sexual assault statute was radical by contemporary comparative common law standards. When I teach rape law to law students in the United States, I have them do some comparative law analysis of rape statutes from differing jurisdictions, usually accompanied by some statutory drafting. It would go without saying to any US-based criminal law scholar or teacher that students know that they are not in Kansas, and affirmatively not in my present home state of Pennsylvania, when they read a rape statute that refers to a 'surgically constructed vagina'.⁷⁷ Even more capable of turning the world of US criminal law upside down is the recently reformed definition of the *mens rea* term 'knowledge': section 61 HA(3) of the New South Wales *Crimes Act* provides that:

⁷⁰ Wagner (2007).

⁷¹ Wagner (2007), p 225.

⁷² With arguably signal differences that in some *K* and *Skaf* cases knives were used to threaten victims, and an alleged gun used for that purpose in one *Skaf* case.

⁷³ Kelly et al (2005), p x.

⁷⁴ Kelly et al (2005), pp 23–24, 51–53, 58–63, 67, 72, 74, 80–82, 84; LaFree (1989), p 241.

⁷⁵ Cherry (2001), pp 268–69.

⁷⁶ Chris Hartcher, second reading speech, Criminal Procedure Amendment (Sexual and Other Offences) Bill 2006 (NSW), 25 October 2006, www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LA20061025002.

⁷⁷ *Crimes Act* 1900 (NSW), s 61(1)(a).

Knowledge about consent

A person who has sexual intercourse with another person without the consent of the other person knows that the other person does not consent to the sexual intercourse if:

- (a) the person knows that the other person does not consent to the sexual intercourse, or
- (b) the person is reckless as to whether the other person consents to the sexual intercourse, or
- (c) the person has no reasonable grounds for believing that the other person consents to the sexual intercourse.⁷⁸

Law reform of the kind we see inscribed in the New South Wales sexual assault statute betrays beliefs in both bodies and words: as the transgendered body is recognised by rape law, so the male-to-female transgendered person who experiences rape becomes a legal subject ‘protected’ by the state, which will prosecute crimes against her; as ‘knowledge’ of consent is radically reinscribed, so it means anything but itself, so patriarchal stories that tell us all that consent to sex may be assumed, that sex is what women are for, at least formally no longer signify at law.

I will end, however, on a less optimistic note, registering as I do so that to be optimistic about rape law reform is to run the risk of being perceived as delusional. I opened this article with a discussion of a jurisprudential text by a rhetorician of law who makes a powerful case for the necessary complexity with which we should think of language and silence and law and justice, and with a literary text that might be said to suggest that rape is not a site to which the law is equal to doing justice, unless the world which the law makes and in which it is made in its turn is turned upside down. I want to end with a discussion of other texts of positive law and of popular — or populist — legal sociology, a discussion that is informed by the Islamic legal historian Ruth Miller’s work about rape and biopolitics.⁷⁹

I will suggest that some more radical ways of understanding the development of contemporary legal regimes for criminalising or otherwise responding to the social harm of rape might at once demonstrate precisely how radical reform might need to be to make justice speak, and that she will remain, unjustly, silent — except to the extent that she is co-opted into fresh discourses of injustice. I quoted earlier from the New South Wales MHR Chris Hartcher’s speech in the parliamentary debate on a criminal procedure reform Bill that responded in part to the *New South Wales Criminal Justice Sexual Offences Taskforce Report*. In addition to delivering statistics about rape attrition, Hartcher also said:

As well as the staggering number of reported gang rapes and child sexual assault the New South Wales Rape Crisis Centre reported 196 adults stepping forward for the first time to admit they were sexually assaulted when they were children. There were 77 people aged 55 and older who reported being raped. In addition, the bureau report showed that 63 people contacted the

⁷⁸ *Crimes Act 1900* (NSW, s 61 HA(3)).

⁷⁹ Miller (2007).

service believing they had fallen prey to sexual assault as a result of drink spiking.⁸⁰

In January 2008, the most recent in a series of recent (twenty-first century) reforms to the New South Wales substantive and evidentiary rape laws, of which section 61 HA(3) of the New South Wales *Crimes Act* formed part, came into force. Those reforms focus on a redefinition and reframing of consent of the kind Miller identifies as paradigmatic of rape law reform under biopolitical sovereignty:⁸¹ placing the burden of proof of the victim's consent on the defendant.⁸² Both this reform and related procedural reforms had been impelled in significant part by aspects of contemporary (and specifically post-9/11) race relations in Australia: the widely-reported 'gang rapes' of Anglo-Australian women and girls by 'Islamic' men and boys to which I have referred earlier.⁸³ These statutes are not the only texts generated by these events and their discursive construction in Australian media, governmental and law reform institutions. The journalist Paul Sheehan's virulently Islamophobic *Girls Like You: Four Young Girls, Six Brothers, and a Cultural Timebomb*,⁸⁴ which followed his extensive coverage of these cases in the *Sydney Morning Herald*, and rape survivor Tegan Wagner's *The Making of Me: Finding My Future After Assault*,⁸⁵ both tell stories about rape; some of the recent statutory reforms were indeed directly responsive to Sheehan's and Wagner's (and other victims of the *Skaf* and *K* perpetrators) telling stories about rape, and law, and visions of justice rather than to the recommendations of professional law reformers;⁸⁶ such speech likewise (proximately) brought the formal law reform initiative itself into being.⁸⁷

⁸⁰ Chris Hartcher, Second Reading Speech, Criminal Procedure Amendment (Sexual and Other Offences) Bill 2006 (NSW), 25 October 2006, www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LA20061025002.

⁸¹ Miller (2007), pp 8–9, 113.

⁸² Miller (2007), p 113.

⁸³ Other examples of sovereign biopolitics that have manifested themselves in Australia include aspects of the Howard government's pre-election strategies in both the 2001 and 2007 federal election campaigns, which led to the *Tampa* incident and the deaths of many 'Islamic' asylum seekers trying to reach Australia from Indonesia, and to the 'intervention' in Northern Territory Indigenous Australian communities, instantiated in part by the army in response to reports of the widespread sexual abuse of children. They also include New South Wales and Queensland's 'sexually violent predator' legislation; all are beyond the scope of this article.

⁸⁴ Sheehan (2006).

⁸⁵ Wagner (2007).

⁸⁶ Second Reading Debate, Criminal Procedure Amendment (Evidence) Bill 2005 (NSW), 23 March 2005, www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LA20050323055.

⁸⁷ Second Reading Debate, *Criminal Procedure Amendment (Sexual and Other Offences) Bill 2006 (NSW)*, 25 October 2006, www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LA20061025002.

While the shifting of the burden of proof of consent may be characteristic of biopolitical rape law reform, the reform to the definition of the *mens rea* for sexual assault in New South Wales, which is ‘knowledge’ of non-consent, is especially remarkable, offering space for the exercising of ‘experiment[s] in thought’⁸⁸ of the kind Constable describes as apt to rhetoricians of law. It effectively defines ‘knowledge’ as knowledge, recklessness or negligence.⁸⁹ One could say many things about the provision, including admiring the ingenuity with which positive law’s silence about the experience and facticity of rape was made to speak about what ‘simple rape’, which is actually the dominant reality of rape, is; or registering the sleight of hand that has redefined a restrictive *mens rea* term so it no longer means itself, has become untethered from doctrine’s solipsism. Or one could marvel at how the law was made to speak differently, to hear volumes about the experience of women and girls like the victims in *Baby* and *John Z* that is usually consigned to silence or inaudibility in the institutional and discursive lacunae that constitute attrition, precisely because Tegan Wagner — a girl much like them — spectacularly broke silence about her rape, ‘mark[ing] the place of the oppressed, of victims, of the powerless’.⁹⁰

What I will conclude about it is, however, rather different — indeed dissonant. First, the resonating histories of the texts of positive law’s refigurings of rape do not encourage unreflective hope, or perhaps any hope, that these reforms will alter attrition or do justice to those who experience rape or live lives diminished and circumscribed by its shadows. Further, if Ruth Miller’s disconcerting account of the emergence of the new passive feminine, universal citizen of modern biopolitics is correct — and the texts of the New South Wales Parliament’s legislative sessions introducing the state’s recent rape law reforms, with their focus on the consent of the victim and on her bodily integrity, are replete with evidence that (at least for a rhetorician) suggest it is — not merely the reduction of women’s bodies to passive space,⁹¹ starkly visible in the persisting sections of the definition of sexual assault in New South Wales (themselves the creatures of twentieth century reforms) is in evidence:

- (1) For the purposes of this Division, *sexual intercourse* means:
 - (a) sexual connection occasioned by the penetration to any extent of the genitalia (including a surgically constructed vagina) of a female person or the anus of any person by:
 - (i) any part of the body of another person, or
 - (ii) any object manipulated by another person, except where the penetration is carried out for proper medical purposes, or
 - (b) sexual connection occasioned by the introduction of any part of the penis of a person into the mouth of another person, or
 - (c) cunnilingus, or

⁸⁸ Constable (2005), p 15.

⁸⁹ *Crimes Act 1900* (NSW), s 61HA(3).

⁹⁰ Constable (2005), p 8.

⁹¹ Miller (2007), p 128.

(d) the continuation of sexual intercourse as defined in paragraph (a), (b) or (c).⁹²

There is also evidence in the texts surrounding the reforms that in biopolitical regimes, including Hartcher's discourse on children and elderly women — paradigmatically 'innocent', and thus deserving, victims because their integrity and autonomy, the latter figured as the incapacity to consent — are taken for granted, written on their bodies, '[r]ape is a crime not because there is an absence of consent, but because sex is an assault on politically defined biological boundaries'⁹³.

The conflation of autonomy and integrity that we see ... in contemporary rape legislation — the positing of an attack on both in the event of criminal sex — produces an important backdrop for early twenty-first century sovereign relations ... The result is a completely passive sexualized body, a body ready (via integrity) and willing (via autonomy) to operate as a setting for the spectacle of the rule of law.⁹⁴

Law's somatechnological production of women's gendered bodies, then, operates at once to promise the archetypically sexually passive 'intact' woman or girl that her 'human dignity' — the currency of rights, which government bestows while representing itself as fettered by them — and the 'citizenship' which binds her to, and defines her in terms of, her subjection to the governmentality contiguous with the nation formed upon 'boundaries, and enemies',⁹⁵ and to ensure that they are partial, 'prosthetic'.⁹⁶ It effaces the gendered violence its institutions, discourses and subjects — from perpetrators to police to prosecutors — make real in the lives of rape's real victims, and all women who live in the shadows cast by the 'inexhaustible futurity'⁹⁷ that fear of rape shares with fear of terrorism, playing out the logic of the liberal state, promising gender equality while delivering the inequality on which it is hierarchically predicated.⁹⁸

If law always-already writes itself on bodies, then texts always bespeak contexts. The emergent biopolitical discourse on the rape victim/citizen who, so the texts of and discourses on New South Wales' recent rape law reforms suggest, at last calls positive law and society to 'justice' is likely to operate as biopolitics does, managing populations, 'turn[ing] sex into something in need of constant regulation'.⁹⁹ Other ways of thinking about the disciplinary operation of rape law in other centuries have suggested that legal institutions' failure adequately to respond — on liberal and many radical feminist accounts — to rape's marginalised paradigm case advanced governmental economic interests in limiting the numbers

⁹² *Crimes Act 1900* (NSW), s 61H.

⁹³ Miller (2007), p 114.

⁹⁴ Miller (2007), p 115.

⁹⁵ Seuffert (2006), p 2.

⁹⁶ Pugliese (2009), p 26.

⁹⁷ Pugliese (2009), p 11.

⁹⁸ Pugliese (2009), p 19.

⁹⁹ Miller (2007), p 114.

of illegitimate children in seventeenth century Massachusetts, as well as a governmentally privileged communitarian ideology grounded in religious morality.¹⁰⁰ It likewise operated as a ‘pedagogy of sexual behaviour’, educating the population of late twentieth century Britain about ‘the forms of behavior which guarantee legal protection, and those which lead to exposure and punishment’,¹⁰¹ and thus, *inter alia*, contributing significantly to rape attrition.

There is evidence, starkly visible in Sheehan’s representation of the victims of the *K* rape cases, that these governmental investments and disciplinary effects are likewise congruent with the interests of contemporary biopolitical sovereignty, ‘disciplin[ing] the body’s biological substance in order to maximize its productive capability, [its availability for education, socially-sanctioned reproduction, and wage work] while simultaneously increasing its docility ... aimed at the body’s “integration into systems of efficient and economic control”’;¹⁰² deploying the body’s ‘generative and reproductive capacities ... as a resource upon which sovereign power could draw’.¹⁰³ For all its performance of empathy for the victims and overt critique of a legal system that does not accede to his demand that offenders like the *K* brothers, embodiments of ‘a type of ... incipient criminality’,¹⁰⁴ culturally racialised bearers of a ‘taken-for-granted criminal status’,¹⁰⁵ be denied the criminal procedural ‘liberties and rights’¹⁰⁶ that keep the white perpetrators of most of the rapes, the ‘simple’ rapes that are in fact intractable to liberal legality and are denied recognition of their overwhelming reality unprosecuted and unpunished, Sheehan has other fish to fry.

Sheehan’s text is profoundly complicit with state power’s interest in maintaining rape attrition, using ‘non-normative expression[s]’ of sexuality as ‘pretext for the disciplinary intervention of institutions such as the ... [educated white middle class] family’,¹⁰⁷ the school and the law, in the latter case with the repetitive violence it exacts on women who have the temerity to seek legal redress for rape, vividly chronicled in the survivor testimony reported in *A Gap or a Chasm*¹⁰⁸

Cassie, thirteen when she was raped, never recovered enough stability to attend school, because of all the delays in her trial dates. ‘She hasn’t gone to bloody school because of all this’, her mother told me. She was living with her mother and had a boyfriend. Like her mother before her, who was gang-raped in her teens and pregnant by the time she was 21, Cassie herself

¹⁰⁰ Hambleton (2001), p 29.

¹⁰¹ de Carvalho Figueiredo (2001), p 262.

¹⁰² Pugliese and Stryker (2009), p 2.

¹⁰³ Pugliese and Stryker (2009), p 3.

¹⁰⁴ Pugliese (2009), p 15.

¹⁰⁵ Pugliese (2009), p 21.

¹⁰⁶ Pugliese (2009), p 21.

¹⁰⁷ Pugliese and Stryker (2009), p 3.

¹⁰⁸ Kelly et al (2005), Ch 4.

became pregnant when young. On 12 January 2006, she gave birth to a healthy baby boy. The mother was seventeen. The father was eighteen.¹⁰⁹

Like the adjudicators of the ‘withdrawn consent’ rape cases, Sheehan purports to be able to tell the difference between ‘acquaintance’ or ‘simple’ rape and real rape: in *Girls Like You*, it happens when the victims are white and the perpetrators are Islamic. Sheehan’s text overtly excoriates the legal system for its inadequate response to the social harm of rape, contextually ironically presented as a paradigm of a miscarriage of justice when those accused are Islamic men who are at once ‘gang rapists’ and ‘acquaintance rapists’ of white Australian girls. Its real political investments are in deploying ‘racializing somatechnologies ... in order to reproduce racist stereotypes and foment cultural panics’,¹¹⁰ as it signals in matters such as devoting its penultimate chapter to Sheik Taj Din al-Hilaly’s notorious and misogynistic ‘cat’s meat’ address, represented as evidence of treason against ‘Australian’ society’s values of tolerance;¹¹¹ the title of its opening chapter, ‘Anzac Bridge’; its extended identification in the early chapter, ‘Scorpions and Rock Spiders’, of the K brothers as ethnically Pashtun immigrants; and its characterisation of ‘ethnic Pashtuns ... [as] the wellspring of the Taliban, the most extreme of fundamentalists, who took power in Afghanistan by force during the late 1990s, then harboured Osama bin Laden and his organisation as it planned the attacks of September 11, 2001’.¹¹² Pashtun culture, ‘primitive ... [and] more severe than Koranic law’, produced not only the Taliban, but the K brothers:

Pashtun culture was not noted for its embrace of feminism. Clan and family were far more important than country, which explained why the Ks did everything together in Australia, and why two of the brothers, Sami and Yusef, married two teenage sisters from their local community and had children within a year of marriage.¹¹³

Sheehan’s text and the rape reforms his journalism in part engendered are, then, paradigmatic texts of the ‘reactive hypermasculinity’ characteristic of both Osama bin Laden and many Western politicians post 9/11.¹¹⁴ Like that of Hartcher, Sheehan’s rhetoric of Australian values operates to construct the victims of Islamic sexual predators as needing ‘protect[ion] by [the] hypermasculinized patriarch[al state]’,¹¹⁵ constructing their bodies and their selves as sites for the expression of ‘desire for an execution of “national security”’ ... [represented by] sovereign, stable boundaries and identities’, as embodiments of the violation of ‘sovereign desire ... , provoking fears of an external threat and danger usually embodied by the alien,

¹⁰⁹ Sheehan (2006), p 345

¹¹⁰ Pugliese (2009), p 9.

¹¹¹ Sheehan (2006), p 374.

¹¹² Sheehan (2006), p 17.

¹¹³ Sheehan (2006), p 17.

¹¹⁴ Agathangelou and Ling (2004), p 519.

¹¹⁵ Agathangelou and Ling (2004), p 526.

barbaric Other'.¹¹⁶ The irony of this usage of 'racism, sexism, and neocolonialism to deflect and distract social dissent'¹¹⁷ for the purposes of neocolonial governmentality in a white colonial nation whose deployment of interracial sexual violence in furtherance of the nation-building logic of genocide is savage, if tragically predictable: 'sexual matters [are] ... foundational to the material terms in which colonial projects were carried out'.¹¹⁸

History suggests, then, that the simple rapes that are the real rapes, the 'marginal' cases that in fact are the overwhelming numerical centre, will continue to operate to discipline the real rape victims who are not 'really' raped. In the 'twenty-first century "spectacular post-democratic society," ... a society in which "politics knows no value (and consequently no non-value) other than life"',¹¹⁹ they will remain exceptional, marginal, except insofar as some of them can be framed and cultivated as sites for the production of a biopolitics of hate, the management of a multiracial and multiethnic population and of the nation's porous boundaries, whether geographic or constituted by the passive feminine citizen upon whom the biopolitical state confers 'rights' that collapse consent and bodily integrity; and the displacing on to 'others' of responsibility for what Tegan Wagner, unlike Paul Sheehan, is clear-eyed enough to see: 'Australian guys rape women too'.¹²⁰

The US history of the imbrications of race and rape until the middle of the twentieth century suggests that when (white) women were meted out a little of what might — or might not — pass for justice in the operation of rape law, it was at the expense of injustice experienced by men (and women) of colour, all contributing to the reproduction of 'sexual-property rules' in a stratified market in 'sexual-property relations' controlled by white men.¹²¹ Recent sexual offenses legislation in Australia — the consent reforms¹²² referred to above and related evidentiary reforms which, for example, prevent an unrepresented rape defendant from cross-examining his victim,¹²³ together with other recent legislation directed at 'date rape drugs'¹²⁴ and 'sexually violent predators'¹²⁵ — can be read not as 'progressive' reforms able at last to do justice to the state of exception in which simple rape really flourishes and women's citizenship is at once paradigmatic and partial, but as a biopolitical technique for production of a new category of 'real' rape, committed by newly cultivated categories of strangers to be managed, not men and boys 'like us': foreigners, of whom the Islamic immigrant and the 'animal' who is the sexually violent predator are the (present) paradigm. And likewise, they can be read as a way to manage a passive citizenry through techniques drawn from the politics of hate

¹¹⁶ Agathangelou and Ling (2004), p 525.

¹¹⁷ Agathangelou and Ling (2004), p 531.

¹¹⁸ Stoler (2002), p 14.

¹¹⁹ Miller (2007), p 2, quoting Agamben (1998), p 10.

¹²⁰ Wagner (2007), p 235.

¹²¹ LaFree (1989), p 238.

¹²² *Crimes Act 1900* (NSW), s 61HA(3).

¹²³ *Criminal Procedure Act 1986* (NSW), s 294A.

¹²⁴ *Crimes Amendment (Drink and Food Spiking) Act 2008* (NSW).

¹²⁵ *Crimes (Serious Sex Offenders) Act 2006* (NSW).

and fear, and through the newly paradigmatic category of rights-bearing citizen subjects who continue to be the victims of most rapes, because:

Only a sober young woman, who does not have a bad reputation, who has not behaved sexually provocatively and who has said no in the right way can be raped, and only by a young man who is sober and 'deviant' and with whom she is not in love.¹²⁶

References

- Giorgio Agamben (1998) *Homo Sacer: Sovereign Power and Bare Life*, Daniel Heller-Rozen (trans), Stanford University Press.
- Anna M Agathangelou and LHM Ling (2004) 'Power, Borders, Security, Wealth: Lessons of Violence and Desire from September 11', 48 *International Studies Quarterly* 517.
- Alain Badiou (2006) 'Bodies, Languages, Truths', www.lacan.com/badbodies.htm.
- Pierre Bourdieu (1991) *Language and Symbolic Power*, Harvard University Press.
- Robert Cherry (2001) 'Sexual Coercion and Limited Choices: Their Link to Teen Pregnancy and Welfare', in Merrill D Smith (ed), *Sex Without Consent: Rape and Sexual Coercion in America*, New York University Press.
- Marianne Constable (2005) *Just Silences: The Limits and Possibilities of Modern Law*, Princeton University Press.
- Criminal Justice Sexual Offences Task Force, Attorney-General's Department of NSW (2006) *Responding to Sexual Assault: The Way Forward*, Attorney-General's Department of NSW.
- Susan Estrich (1988) *Real Rape*, Harvard University Press.
- Débora de Carvalho Figueiredo (2002) 'Discipline and Punishment in the Discourse of Legal Decisions on Rape Trials', in Janet Cotterill (ed), *Language in the Legal Process*, Palgrave Macmillan.
- Jacqueline Fitzgerald (2006) *The Attrition of Sexual Offences from the New South Wales Criminal Justice System*, NSW Bureau of Crime Statistics and Research.
- Lisa Frohmann and Elizabeth Mertz (1995) 'Legal Reform and Social Construction: Violence, Gender, and the Law' 19 *Law and Social Inquiry* 829.
- Else L Hambleton (2001) "'Playing the Rogue": Rape and Issues of Consent in Seventeenth-Century Massachusetts', in Merrill D Smith (ed), *Sex Without Consent: Rape and Sexual Coercion in America*, New York University Press.
- Thomas Hardy (1988) *Tess of the d'Urbervilles*, Oxford University Press.
- Carolyn Heilbrun and Judith Resnik (1990) 'Convergences: Law, Literature and Feminism' 99 *Yale Law Journal* 1913.
- Elizabeth M Iglesias (1996) 'Rape, Race, and Representation', 49 *Vanderbilt Law Review* 869.
- Liz Kelly, Jo Lovett and Linda Regan (2005) *A Gap or a Chasm? Attrition in Reported Rape Cases*, Home Office Research, Development and Statistics Directorate.
- Gary LaFree (1989) *Rape and Criminal Justice: The Social Construction of Sexual Assault*, Wadsworth.
- Lisa Lindquist Dorr (2001) "'Another Negro-Did-It-Crime": Black on White Rape and Protest in Virginia, 1945-1960', in Merrill D. Smith (ed), *Sex Without Consent: Rape and Sexual Coercion in America*, New York University Press.

¹²⁶ Kelly et al (2005), p 81, quoting Jeffner (2000).

- Lisa Lindquist Dorr (2004) *White Women, Rape, & the Power of Race in Virginia 1900–1960*, University of North Carolina Press.
- Catharine A MacKinnon (1983) ‘Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence’ 8 *Signs* 635.
- Gregory M Matoesian (1993) *Reproducing Rape: Domination Through Talk in the Courtroom*, University of Chicago Press.
- Ruth A Miller (2007) *The Limits of Bodily Integrity: Abortion, Adultery, and Rape Legislation in Comparative Perspective*, Ashgate.
- Penelope Pether (1999) ‘Critical Discourse Analysis, Rape Law and the Jury Instruction Simplification Project’ 24 *Southern Illinois University Law Journal* 53.
- Penelope Pether (2004) ‘Inequitable Injunctions: The Scandal of Private Judging in the US Courts’ 56 *Stanford Law Review* 1435.
- Penelope Pether (2005) ‘Take a Letter, Your Honor: Outing the Judicial Epistemology of *Hart v Massanari*’ 62 *Washington & Lee Law Review* 1553.
- Penelope Pether (2007a) ‘Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish US Law’ 39 *Arizona State Law Journal* 1.
- Penelope Pether (2007b) ‘The Sociology of “He Would, Wouldn’t He?”’, invited paper presented at The Language of Judicial Opinions in Sexual Assault Trials Conference, Sexual and Domestic Violence Project, Center for Law and Social Responsibility, New England School of Law, March.
- Penelope Pether (2008a) ‘Militant Judgment? Judicial Ontology, Constitutional Poetics, and “The Long War”’ 29 *Cardozo Law Review* 2279.
- Penelope Pether (2008b) ‘Exceptional Subjects: Reconstituting Rape’, paper presented at the Annual Meeting of the Association for the Study of Law, Culture, & the Humanities, University of California-Berkeley, March.
- Penelope Pether (2008c) ““No-one Does That Any More”: On Tushnet, Constitutions, and Others’ 26 *Quinnipiac Law Review* 671.
- Penelope Pether (2009a) ‘Constitutional Solipsism: Toward a Thick Doctrine of Article III *Duty*; or Why the Federal Circuits’ Nonprecedential Status Rules Are (Profoundly) Unconstitutional’ 17 *William & Mary Bill of Rights Journal* 955.
- Penelope Pether (2009b) ‘Comparative Constitutional Epics’, 22 *Law and Literature* 106.
- Penny Pether and Terry Threadgold (1999) ‘Feminist Methodologies in Discourse Analysis: Sex, Property, Equity?’, in Cate Poynton and Alison Lee (eds), *Culture and Text: Discourse and Methodology in Social Research and Cultural Studies*, Allen & Unwin.
- Joseph Pugliese (2009) ‘Compulsory Visibility and Infralegality of Racial Phantasmata’, 19 *Social Semiotics* 9.
- Joseph Pugliese and Susan Stryker (2009) ‘Introduction: The Somatechnics of Race and Whiteness’, 19 *Social Semiotics* 1.
- Kim Lane Scheppelle (1992) ‘Just the Facts, Ma’am: Sexualized Violence, Evidentiary Habits, and the Revision of Truth’, 37 *New York Law School Law Review* 123.
- Stephen J Schulhofer (1998) *Unwanted Sex: The Culture of Intimidation and the Failure of Law*, Harvard University Press.
- Nan Seuffert (2006) *Jurisprudence of National Identity: Kaleidoscopes of Imperialism from Aotearoa New Zealand*, Ashgate.
- Paul Sheehan (2006) *Girls Like You: Four Young Girls, Six Brothers and a Cultural Timebomb*, Pan Macmillan Australia.

- Terri L Snyder (2001) 'Sexual Consent and Sexual Coercion in Seventeenth-Century Virginia', in Merrill D Smith (ed), *Sex Without Consent: Rape and Sexual Coercion in America*, New York University Press.
- Ann Laura Stoler (2002) *Carnal Knowledge and Imperial Power: Race and the Intimate in Colonial Rule*, University of California Press.
- Andrew E Taslitz (1999) *Rape and the Culture of the Courtroom*, New York University Press.
- Tegan Wagner (2007) *The Making of Me: Finding My Future After Assault*, Pan Macmillan.

Cases

- Baby v State* 916 A2d 410 (Md App. 2007).
- In Re John Z* 60 P3d 183 (Cal 2003).
- R v Kaitamaki* (1980) 1 NZLR 59.
- State v Baby* 922 A2d 573 (Md) (2008).
- United States v Rabinowitz* 339 US 56 (1950).

Legislation

- Crimes Act* 1900 (NSW).