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WOMAN'S VOICE/LAW'S *LOGOS*: THE RAPE TRIAL AND THE LIMITS OF LIBERAL REFORM

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Abstract. This article challenges much existing scholarship on rape that asserts that the law has reached a best practice plateau and justice for victims is now being held back primarily by the aberrant 'attitudes' of criminal justice actors charged with implementing that law. It contends that previous writing on rape, law and linguistics has failed to adequately account for the question of why law continues to appear systematically deaf to the calls of untold numbers of women for justice in the aftermath of rape. It seeks to illustrate law's continuing complicity in the failure of the institutional response to the crime of rape with particular reference to the rape trial. While purporting to disavow sexist prejudice on one hand, on the other, law makes no ultimate concession to woman's unique sexuate difference. For this reason, it continues to enable the conditions that support the full flourishing of 'attitudes' that prevent the recognition of the crime of rape. This article argues that the law is complicit in its own failure because it is structurally invested, for its own survival and coherence, in the exclusion and erasure of woman's voice, which represents the possibility of a plural form of being and thinking and is thus a fundamental challenge to the legitimacy of law.

1.0 INTRODUCTION

On 8 February 2013, former spouses Michael and Hilary Brewer were found guilty at Manchester Crown Court in England of five counts of indecent assault and not guilty on three further counts of indecent assault and one count of rape. The offences had occurred around 1980 when their victim, Frances Andrade, was 14 or 15 years old and a student at the

Chetham School of Music in Manchester where Michael Brewer was the director of music and a prominent member of the community. Andrade's mental health had declined rapidly in the year leading up to the trial, with the police advising her not to seek counselling or other support services lest it compromise her testimony.¹ After giving evidence at the trial, during which she was labelled a "fantasist" by the defendant and repeatedly accused of lying by the defence lawyer, she described the experience to a friend as like being "raped all over again". Andrade said that she felt "fragmented" and that not even a guilty verdict in the case would allay this feeling.² She committed suicide before the trial was concluded.

It is very painful to hear in her words the *pathos* of Andrade's suffering, and words which were few; Andrade's husband stated that she barely spoke at all for three days after her trial experience.³ But in between this self-imposed silence, the silence after her courtroom ordeal and the ultimate silence of her death, I am interested to think about the imagery of fragmentation that Andrade evoked to describe how she felt. What does it mean to say that one feels 'fragmented' after one has testified to rape in a courtroom setting? What is it about the courtroom, the most prominent forum by which law dispenses 'justice' that induces this reaction? We can't ask Andrade what she meant, and I don't mean to put words into her mouth or to employ her words in a circular academic exercise for my own gratification that divorces them from their speaker. But I do mean to believe her when she testified to her rape,

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¹ Elizabeth Sanderson and Tom Hendry, "My wife killed herself because she was on trial, not the choirmaster": Husband's anguished account of how abused wife spiralled [sic] to suicide after court ordeal (online) 10 Feb 2013 <http://www.dailymail.co.uk/news/article-2276229/Frances-Andrade-Husbands-anguished-account-abused-wife-spiralled-suicide-court-ordeal.html> (accessed 28 Jul 2016). In England and Wales evidence law limits the extent to which the prosecution can prepare a witness for testimony. Evidence that a witness has been 'coached' prior to giving testimony, either by police, prosecutors or others, can be drawn on in court by the defence to undermine witness credibility and to infer that the evidence given is contaminated. It can also constitute grounds for appeal. Witnesses may be familiarised with the court layout and process but not 'trained' to give their evidence. See further, *Momodou and Limani* [2005] EWCA Crim 177.

² Sara Pidd and Philippa Ibbotson, *Sexual abuse victim killed herself after giving evidence at choirmaster trial* (online) 8 Feb 2013 <http://www.theguardian.com/uk/2013/feb/08/sexual-abuse-victim-killed-herself-trial> (accessed 14 May 2014).

³ Sanderson and Hendry above note 1.

and to how she felt after she'd talked about it in court, and to take these words as the basis for careful academic enquiry.

The imagery of fragmentation that Andrade evoked in the aftermath of her rape trial is one that has been called up before by feminist scholars interrogating women's experiences of the criminal justice system in the aftermath of rape.⁴ In this article I explore further the reasons for this fragmentation, and in so doing, challenge much existing scholarship on rape that asserts that the law has reached a best practice plateau and justice for victims is now being held back primarily by the aberrant 'attitudes' of criminal justice actors charged with implementing that law.⁵ Elsewhere I have argued that the primary reason that liberal law reform has failed to live up to its goal of increasing successful criminal justice outcomes for rape victims is the continuing commitment of Western legislatures, despite the appearance of 'progressive' reform, to sexual indifference.⁶ In this paper I develop this thesis further with reference to the implementation of the law in the rape trial.

Research into the experience of complainants as they give evidence during the rape trial has consistently illustrated the institutional impediments they face when attempting to represent their story to and through law.⁷ The micro-techniques of legal discourse which

⁴ Kristin Bumiller, *In an abusive state: How neoliberalism appropriated the feminist movement against sexual violence* (Duke University Press 2008); Alison Young, 'Waste land of the law, the wordless song of the rape victim' (1999) 22 *Melbourne University Law Review* 442.

⁵ Katrin Hohl and Elizabeth Stanko, 'Complaints of rape and the criminal justice system: Fresh evidence on the attrition problem in England and Wales' (2015) 12(3) *European Journal of Criminology* 324; Jan Jordan, 'Justice for rape victims? The spirit may sound willing, but the flesh remains weak' in Dean Ross and Stuart Wilson (eds) *Crime, victims and policy: International contexts, local experiences* (Palgrave Macmillan, 2015) 84; Susan Leahy, 'Bad laws or bad attitudes? Assessing the impact of societal attitudes upon the conviction rate for rape in Ireland' (2014) 14 *Irish Journal of Applied Social Studies* 18; Ilene Seidman and Susan Vickers, 'The second wave: An agenda for the next thirty years of law reform' (2005) 38 *Suffolk University Law Review* 467; Vivian Stern, *The Stern review* (Government Equalities Office 2010); Jennifer Temkin and Barbara Krahé, *Sexual assault and the justice gap: A question of attitude* (Hart 2008).

⁶ Yvette Russell, 'Thinking sexual difference through the law of rape' (2013) 24(3) *Law and Critique* 255.

⁷ Judith Herman, 'Justice from the victim's perspective' (2005) 11(5) *Violence against Women* 571; Liz Kelly, Jo Lovett and Linda Regan, *A gap or a chasm? Attrition in reported rape cases* (Home Office, 2005); Amanda Konradi, *Taking the stand: Rape survivors and the prosecution of rapists* (Praeger 2007); Wendy Larcombe, 'The "ideal" victim v successful rape complainants: Not what you might expect' (2002) 10 *Feminist Legal Studies* 131; Jeanne Gregory and Sue Lees, 'Attrition in rape and sexual assault cases' (1996) 36(1) *British Journal of Criminology* 1; Sue Lees, *Ruling passions: sexual violence, reputation, and the law* (Open University 1997); Julia Quilter, 'Re-framing the rape trial: Insights from critical theory about the limitations of legislative

operate imperceptibly, but incredibly effectively, to variously silence, discipline and cow the rape complainant during the trial have also been extensively catalogued.⁸ In this article I consider this literature again and argue that the structural bias inherent in the courtroom process exacerbate and compound the cultural consequences of sexual indifference by giving it a new legitimacy through the *logos* of law. It is my contention that law is complicit in many ways in the failure of its own provisions and that this is because it relies, for its own survival and coherence, on the erasure of woman as a subject. In this article I address the ways in which this erasure contributes to the fragmentation and undermining of female rape victims in the rape trial while reiterating the continuing need for critical rape scholars to peer beneath the text of the law and not simply assume its benevolence.⁹

reform (2011) 35 *Australian Feminist Law Journal* 23; Carol Smart, *Feminism and the power of law* (Routledge 1989); Jennifer Temkin, *Rape and the legal process* (OUP 2002); Young above note 4.

⁸ John M. Conley and William M. O'Barr, *Just words: Law, language, and power* (University of Chicago Press 2005); Susan Ehrlich, *Representing rape: Language and sexual consent* (Routledge 2001); Louise Ellison, 'Cross-examination in rape trials' (1998) *Criminal Law Review* 605; Nicola Henry, 'The impossibility of bearing witness: wartime rape and the promise of justice' (2010) 16 *Violence against Women* 1098; June Luchjenbroers and Michelle Aldridge, 'Conceptual manipulation by metaphors and frames: Dealing with rape victims in legal discourse' (2007) 27(3) *Text and Talk: An Interdisciplinary Journal of Language, Discourse Communication Studies* 339; Gregory Matoesian, *Reproducing rape domination through talk in the courtroom* (University of Chicago Press 1993), *Law and the language of identity: Discourse in the William Kennedy Smith rape trial* (OUP 2001), 'You might win the battle but lose the war: Multimodal, interactive, and extralinguistic aspects of witness resistance' (2008) 36(3) *Journal of English Linguistics* 195, 'Language and material conduct in legal discourse' (2013) 17(5) *Journal of Sociolinguistics* 634; Peggy Reeves Sanday, *A woman scorned: Acquaintance rape on trial* (University of California Press 1997); Andrew Taslitz, *Rape and the culture of the courtroom* (NYU 1999); Sarah Zydervelt, Rachel Zajac, Andy Kaladelfos and Nina Westera, 'Lawyers' strategies for cross-examining rape complainants: Have we moved beyond the 1950s?' (2016) *British Journal of Criminology* doi: 10.1093/bjc/azw023.

⁹ In conceptualising rape as a fundamentally gendered crime and one mediated by sexual difference, a consideration of the rape of men and their experience of the rape trial would necessarily require an independent analysis. As Louise du Toit has argued, the abjection of the body caused by the act of rape cannot be generalised to all bodies similarly. The abjection of women during rape occurs against a backdrop of a body *already* coded as abject; as waste, excess and mere matter. While the male victim is abjected by his feminisation during rape, this is not directly comparable to the female victim. "There is ... not a similar moment of recognition for the male rape victim, and he is likely to see the road to the recovery of his humanity as leading through a recovery or reconstitution of his masculinity, which in our symbolic order is closely aligned with the ability to overcome or subjugate the feminine." Louise du Toit, 'Sexual specificity, rape law reform and the feminist quest for justice' (2012) 31(2) *South African Journal of Philosophy* 465 at 475. In conceiving of the framework as I do in this paper there is an implicit erasure of other important axes of difference, like those of race and class. It is not my intention to relegate that discussion to a footnote, but to acknowledge its absence as I make a specific theoretical intervention into the literature on rape as it intersects with sexual difference.

2.0 RAPE AND THE LIMITS OF LIBERAL REFORM

Few pithy statements so aptly summarise the vast weight of history as English jurist Matthew Hale's 1736 edict on rape. Rape, he said, "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho' never so innocent".¹⁰ That this understanding of rape has endured so well in the popular and penal imaginary despite mountains of evidence to the contrary, attests to the continuing need to both deconstruct the ideological tools that maintain its ubiquity and to reconstruct a new story in the void that it leaves. Feminist scholars and activists have led this attempt at reconstruction, which has intensified over the last 40 years, and has often involved partnering with state institutions and legislatures globally. These collaborations have sought to implement sweeping legal and policy change to address the 'justice gap' between the prevalence of sexual violence, and the relatively meagre criminal justice response.¹¹ Examples of these changes include substantive modifications to the essential elements of many criminal offences, and significant changes to the laws of evidence, including the abolition of the requirement in sexual offences trials that the judge issue a warning to the jury that a woman's evidence alone, in the absence of independent corroboration, must be treated with caution, the restriction of the use of previous sexual history evidence in rape trials - evidence that was frequently used to impugn the credibility of a complainant and to invite inferences of her consent¹² - and the relaxation of procedural rules around the format and method by which the victim's evidence had to be given in court.¹³ Policy changes include the mainstream

¹⁰ Matthew Hale, *History of the pleas of the crown* (Sollom Emlyn 1736) 635. This book was published posthumously some 60 years after Hale's death.

¹¹ Kelly and others above note 7; Temkin and Krahé above note 5.

¹² Previous sexual history evidence, arguably, continues to function to impugn complainant credibility notwithstanding legislative attempts to limit its use. In England and Wales, for example, an evaluation in 2006 of the operation of section 41 of the Youth Justice and Criminal Evidence Act 1999 found that trial judges had interpreted the section as providing them a broad discretion to admit previous sexual history evidence to ensure a 'fair trial'. See, Liz Kelly, Jennifer Temkin and Sue Griffith, *Section 41: an evaluation of new legislation limiting sexual history evidence in rape trials* (Home Office Online Report 20/06 2006).

¹³ In a number of jurisdictions, for example, vulnerable witnesses can choose to submit their evidence behind a shield or by closed-circuit television bypassing the courtroom all together.

provision of specialised first-responder services, police and prosecutors to deal with sexual violence cases, provision of victim advocates or ombudsmen in various jurisdictions, and specialist courts. Alongside substantive legal and policy changes have sat enhanced provision of tools for measurement and institutional reporting, requirements for increased transparency, and independent monitoring of state bodies and their implementation of new laws.

As the dust has settled over this frenzy of law and policy reform in the last 10 years, feminist scholars in many jurisdictions have had to confront a more sobering reality in the form of a general consensus that the law appears to have failed to make any meaningful changes to the institutional response to rape.¹⁴ Attrition persists at every point of the system, and while reporting rises, criminal justice measures such as police ‘no-crime’ rates,¹⁵ prosecutions, and convictions stagnate.

Responses to the failure of liberal legal initiatives to ‘deal’ with the rape problem have varied, with some scholars pointing to the need to critically interrogate the meaning of ‘justice’ in this context, and to pursue alternative and innovative responses to sexual violence both within and outside the traditional apparatuses of the state.¹⁶ Simultaneously, there is a

¹⁴ Holly Johnson, ‘Limits of a criminal justice response: Trends in police and court processing of sexual assault’ Elizabeth Sheehy in *Sexual assault in Canada: Law, legal practice and women’s activism* (University of Ottawa Press 2012) 305; Jan Jordan, ‘Here we go round the review-go-round: Rape investigation and prosecution – are things getting worse not better?’ (2011) 17(3) *Journal of Sexual Aggression* 234; Wendy Larcombe, ‘Limits of the criminal law for preventing sexual violence’ in Nicola Henry and Anastasia Powell (eds) *Preventing sexual violence: Interdisciplinary approaches to overcoming a rape culture* (Palgrave Macmillan 2014); Clare McGlynn and Vanessa E. Munro (eds) *Rethinking rape law: International and comparative perspectives* (GlassHouse 2010); Nicole Westmarland and Geetanjali Gangoli (eds) *International approaches to rape* (Policy Press 2012).

¹⁵ There remains a huge disparity among police districts in England and Wales, for example, in the translation of reported offences to recorded offences; the phenomenon of ‘no-criming’ incidents reported as rape is common practice in some police districts. The Home Office Counting Rules define the circumstances under which a crime report may be ‘no crimed’. These include situations where a crime is considered to have been recorded in error or where, having been recorded, additional verifiable information becomes available that determines that no crime was committed, which can include details uncovered during investigations, retractions of allegations and occasions where it is later determined the offence took place under another force’s jurisdiction. The level of evidence needed to ‘no crime’ is higher than for the recording of a crime as it requires information to be available that determines that the offence did not happen, rather than the “balance of probabilities that a crime did happen”. (see further, Ministry of Justice, Home Office and the Office for National Statistics, *An overview of sexual offending in England and Wales* (Home Office 2013) at 65).

¹⁶ Wendy Larcombe, ‘Falling rape conviction rates: (Some) feminist aims and measures for rape law’ (2011) 19(1) *Feminist Legal Studies* 27; Clare McGlynn, Nicole Westmarland and Nikki Godden “‘I just wanted him to

growing body of research attesting to the ways in which feminist-led rape reform initiatives have been ‘captured’ by the political apparatus and used to justify the increasing use of state violence disproportionately against poor and racialised communities, with no concurrent concession to rethinking the state’s role in regulating gendered relations.¹⁷

For those still clinging to the siren call of law, the response has been more uniform and involved a need to diagnose the reasons for the continuing failure of liberal legal reform to address the rape problem. This scholarship is usually accompanied by a wary nod to the contingency of feminist project in law,¹⁸ but with the recognition that we must not let the criminal law “off the hook” for its complicity in the perpetuation of the sexual violence justice gap.¹⁹ From the vast swathe of academic and state-sponsored literature in this vein two conclusions come through most clearly. It is argued first, that while law and policy seems to have nearly hit a plateau of ‘best practice’, its inconsistent implementation is responsible for a significant amount of attrition. Second, it is argued that there are simply forces operating outside the strict remit of the criminal justice system over which it has no direct control. The contention here is that ‘rape myth acceptance’ haunts popular culture and, by viral-like extension, is suffused within the criminal justice apparatus infecting almost every avenue the state offers to deal with the rape problem.²⁰

hear me”: Sexual violence and the possibilities of restorative justice.’ (2011) 39 *Journal of Law and Society* 213; Anastasia Powell, Nicola Henry and Asher Flynn (eds) *Rape justice: Beyond the criminal law* (Palgrave Macmillan 2015).

¹⁷ Bumiller above note 4; Kristin Bumiller, ‘Feminist collaboration with the state in response to sexual violence’ in Aili Mari Tripp, Myra Marx Ferree, Christina Ewig (eds) *Gender, violence, and human security: Critical feminist perspectives* (NYU 2013) 191, ‘Explaining the volte-face: Turning away from the criminal law and returning to the quest for gender equality’ in Rosemary Gartner and Bill McCarthy (eds) *The Oxford handbook of gender, sex, and crime*, (OUP 2014) 118; Rose Corrigan, *Up against a wall: Rape reform and the failure of success* (NYU 2013); Aya Gruber, ‘Rape, feminism, and the war on crime’ (2009) 84 *Washington Law Review* 581.

¹⁸ Rosemary Hunter (ed) *Rethinking equality projects in law: Feminist challenges* (Hart 2008); Larcombe above note 16.

¹⁹ Vanessa E. Munro, *Law and politics at the perimeter: Re-evaluating key debates in feminist theory* (Hart 2007) at 72.

²⁰ Gerd Bohner, Friederike Eyssel, Afroditi Pina, Frank Siebler, and G. Tendayi Viki, ‘Rape myth acceptance: cognitive, affective and behavioural effects of beliefs that blame the victim and exonerate the perpetrator’ in Miranda Horvath and Jennifer Brown (eds) *Rape: Challenging contemporary thinking* (Willan 2009) 17; Louise

Observations like these have spawned a massive body of feminist-led socio-psychological and legal research into the way that ‘attitudes’ develop and manifest in culture and also in tribunal settings. Attrition is said to ‘map onto criminal justice’ despite mechanisms in place to avoid this, in ways that perpetuate rather than challenge the dominant narrative of woman’s complicity in rape.²¹ A self-perpetuating cycle seems, therefore, to underpin and ultimately thwart government-driven attempts to deal with the ‘rape problem’. This cycle is attested to by research at every point of the criminal justice apparatus, from the police,²² to prosecuting bodies,²³ the judiciary,²⁴ and finally, to the one ultimate, supposed, constitutional stop on executive and judicial power: the jury.²⁵

This need to move outside the system to investigate the forces working on the system now drives a significant amount of feminist analysis of rape law and practice and the

Ellison and Vanessa E. Munro, ‘A stranger in the bushes, or an elephant in the room? Critical reflections upon received rape myth wisdom in the context of a mock jury study’ (2010) 13(4) *New Criminal Law Review* 781, ‘Better the devil you know? Real rape stereotypes and the relevance of a previous relationship in (mock) juror deliberations’ (2013) 17(4) *The International Journal of Evidence and Proof* 299; Heike Gerger, Hanna Kley, Gerd Bohner and Frank Siebler, ‘The acceptance of modern myths about sexual aggression scale: Development and validation in German and English’ (2007) 33 *Aggressive Behavior* 422; Jennifer Temkin, Jacqueline M. Gray and Jastine Barrett, ‘Different functions of rape myth use in court findings from a trial observation study’ (2016) *Feminist Criminology* doi: 10.1177/1557085116661627.

²¹ Hohl and Stanko above note 5; Liz Kelly, ‘The (in)credible words of women: False allegations in European rape research’ (2010) 16 *Violence against Women* 1345; Vanessa E. Munro and Liz Kelly, ‘A vicious cycle? Attrition and conviction patterns in contemporary rape cases in England and Wales’ in Miranda Horvath and Jennifer Brown (eds) *Rape: Challenging contemporary thinking* (Willan 2009) 281.

²² Louise Ellison, Vanessa E. Munro, Katrin Hohl and Paul Wallang, ‘Challenging criminal justice? Psychosocial disability and rape victimization’ (2015) 15(2) *Criminology and Criminal Justice* 225; Hohl and Stanko above note 5; Stern above note 5.

²³ Rt Hon Dame Elish Angiolini, DBE QC, *Report of the Independent Review into The Investigation and Prosecution of Rape in London* (online) April 30 2015

http://www.cps.gov.uk/publications/equality/vaw/dame_elish_angiolini_rape_review_2015.pdf (accessed 30 July 2016); Clare Gunby, Anna Carline and Caryl Beynon, ‘Alcohol-related rape cases: Barristers’ perspectives on rape and the Sexual Offences Act 2003 and its impact on practice’ (2010) 74 *Journal of Criminal Law* 579.

²⁴ Patricia Easteal and Miriam Gani, ‘Sexual assault by male partners: A study of sentencing variables’ (2005) 9 *Southern Cross Law Review* 39; Jessica Kennedy and Patricia Easteal, ‘Colour “black letter” sexual assault law reform grey: An Australian example’ in Jaya Sagade, Vedna Jivan and Christine Forster (eds) *Feminism in the subcontinent and beyond: Challenging laws, changing laws* (Eastern Book Company 2014) 107.

²⁵ Louise Ellison and Vanessa E. Munro, ‘Reacting to rape exploring mock jurors’ assessments of complainant credibility’ (2009) 49(2) *British Journal of Criminology* 202, ‘Of ‘normal sex’ and ‘real rape’: Exploring the use of socio-sexual scripts in (mock) jury deliberation’ (2009) 18(3) *Social and Legal Studies* 291, ‘A stranger in the bushes, or an elephant in the room?’ above note 20, ‘Getting to (not) guilty: examining jurors’ deliberative processes in, and beyond, the context of a mock rape trial’ (2010) 30(1) *Legal Studies* 74, ‘Better the devil you know?’ above note 20; Emily Finch and Vanessa E. Munro, ‘Breaking boundaries? Sexual consent in the jury room’ (2006) 26(3) *Legal Studies* 303, ‘The demon drink and the demonized woman: Socio-sexual stereotypes and responsibility attribution in rape trials involving intoxicants’ (2007) 16(4) *Social and Legal Studies* 591.

necessity of this work to solving the rape problem is recognised by a shared consensus among most feminist scholars working on rape. While I certainly form part of that consensus, I remain sceptical of some of the assumptions upon which it proceeds. An important one of these is the idea that if we can only ‘fix’ attitudes then law and policy will be free to operate in the world as it should. The assumption then is that by calibrating the law in such a way that can be said to represent ‘best practice’, it returns to its status as a neutral, inanimate force for good simply waiting patiently for us to sort out our attitudes and put it to work. In this narrative attitudes arise spontaneously from the lives, histories and culture of individuals, which is certainly true. However, in my argument these attitudes are tacitly nurtured, enabled and supported by the law and associated policy that at the same time purports to disavow them.

Elsewhere I have argued that the legislative framework that dictates the confines and contours of the crime of rape fixes in law a neutral sexless subject that ultimately serves to militate against justice for rape victims.²⁶ Through an exploration of the blind spots of the current legislative framework in the United Kingdom, I suggested that the conceptual framework that underpins most contemporary rape law is one of sexual indifference that erases woman as subject in favour of a masculine legal subject through which it is very difficult to express or articulate the unique harm of rape to law. The only way that woman can become coherent before the law is to assume a position in respect of that masculine subject as either double, defective or opposite. I want to extend that analysis here by considering specifically the manifestation of the text of rape law in the trial. Much of the scholarly work that addresses the micro-processes of the rape trial endorses the analytic distinction made by some feminist rape scholars who sever the examination of ‘attitudes’ to rape, from the text of the law that is being interpreted as well as its discursive manifestation

²⁶ Russell above note 6.

in the trial. A good example of this type of analysis can be found in the writing of Gregory Matoesian, linguist and criminologist and long-time scholar of ‘trial talk’ in the courtroom, whose work I now go on to consider, in the context of a discussion of the sexual indifference of the rape trial.

2.1 The Rape Trial

There is by now a vast body of scholarship exploring victim experiences of the rape trial through several different frameworks with reference to the use, distribution and effect of various discursive tools of legal discourse and courtroom parlance.²⁷ Much of this work has illustrated how micro-techniques of legal discourse are marshalled in the service of destroying a complainant’s ability to represent her story. Courtroom procedure empowers experts, lawyers and judges linguistically over the witnesses they examine. A lawyer questioning a witness has considerable power to determine the sequence, pace and topic discussed and can interrupt and demand a witness conform to the terms of the dialogue as set. A lawyer may also request that a judge compel a witness to answer on pain of a holding of contempt. Witnesses have no comparable power. Thus, the structural arrangements of the court evidence palpable power asymmetries.²⁸ These asymmetries are most keenly observed in the context of the rape trial during the process of cross-examination. This is when linguistic and sequential capital is harnessed most effectively by defence lawyers in the name

²⁷ Conley and O’Barr above note 8; Ehrlich above note 8; Mark R. Keibell, Steven Deprez and Graham F. Wagstaff, ‘The direct and cross-examination of complainants and defendants in rape trials: A quantitative analysis of question type’ (2003) 9 *Psychology, Crime and Law* 49; Mark R. Keibell, Catriona M.E. O’Kelly and Elizabeth L. Gilchrist ‘Rape victims’ experiences of giving evidence in English courts: A survey’ (2007) 14 *Psychiatry, Psychology and Law* 111; Luchjenbroers and Aldridge above note 8; Matoesian 1993, 2001, 2008, 2013 above note 8; Zydervelt and others above note 8.

²⁸ Conley and O’Barr above note 8 at 21.

of ‘testing the veracity of the evidence’ and during which a victim is in the most powerless position.

Gregory Matoesian’s work is extremely important for its careful chronicling of the discursive processes by which women’s experience of rape is routinely re-scripted as consensual sex, by courtroom linguistic practices which become, he says, the “ultimate weapon[s] of domination” during the rape trial.²⁹ His research reveals powerful practices of ‘sense-making’ within the trial, by which lawyers are empowered to control everything from the topic of discussion, to the syntactic form of questions, to other sequential resources of parlance and utterance. Because access to these tools of talk are not distributed equally amongst trial participants, defence lawyers in particular benefit from a linguistic and sequential hierarchy in which their account of the event in question is given structural and logical priority to that of the victim. Rape is reproduced, argues Matoesian, in real time “...through a multiplex of sequentially driven, institutionally anchored, and patriarchally organized forms of talk”.³⁰

An important tenet of Matoesian’s schema is his insistence on the analytic distinction between “patriarchal modes of domination” and “legal disciplinary regimes”. These intersect, he says, during the trial to build the case for blame against the victim: “Rape myths, techniques of neutralization, or, more generally, patriarchal ideologies provide the linguistic rationalizations and interpretive frameworks for assessing the rape incident: for making sense of what happened, and for legitimating the sexual scripts governing male-female interactions”.³¹ Courtroom talk, says Matoesian, is an autonomous system of disciplinary power, “a system with its own internal logic, interacting with, yet in large measure independent from, patriarchal ideology in the rape trial”. The forcing of inconsistent

²⁹ Matoesian 1993 above note 8 at 1.

³⁰ As above at 2.

³¹ As above at 13.

testimony is a generic courtroom tactic that is used in most trials, “having nothing to do with patriarchy, even though drawing on patriarchal ideology in the rape trial”.

In a very Foucauldian way, while the legal system interacts with and draws on patriarchy in the rape trial, as it does with other social structures like class and race, it is not reducible to patriarchy, or to any other social structure, but functions instead as a distinct micro-mode of domination, a strict disciplinary system possessing an internally autonomous logic of knowledge, epistemology, and talk.³²

Matoesian seems to complicate his analysis of the intersection of legal discourse in the rape trial with patriarchal ideology in later work.³³ In a painstaking analysis of the transcript of the William Kennedy Smith rape trial and associated media Matoesian exposes, in microscopic detail, how an array of strategies of legal method and trial rituals are “contextually anchored and incrementally realized in discursive practice”.³⁴ The case concerned a prosecution for rape against William Kennedy Smith, the nephew of the late US President John F. Kennedy. In Matoesian’s analysis the rhythms of domination and linguistic strategies that intersect in the trial generate a gendered “logic of inconsistency” which impacts disproportionately on a victim giving evidence.³⁵

Matoesian’s schema illustrates how the logic of inconsistency operates to align certain behaviour through tools of trial ‘talk’ with “the cultural demands of male sexual logic in a given context”. This reveals, he says, “an inconsistency between the victim’s version of events and the expectations of patriarchal ideology governing victim identity”.³⁶ Matoesian examines how the victim becomes complicit in her own subjection during the trial through engagement with what he calls the ascription of identities of sexual sameness/difference.³⁷ By this he means that sexual desire between the victim and defendant is said to calibrate

³² As above at 20.

³³ Matoesian 2001 above note 8

³⁴ As above at 3.

³⁵ As above at 37.

³⁶ As above at 40.

³⁷ As above at 38.

through “patriarchal sexual logic” before the alleged incident of rape, and then to diverge at a certain point subsequently. This functions to illustrate both the irrationality of the victim’s logic but also the inherent rationality of patriarchal sexual logic.³⁸ For example, a defence lawyer during the process of cross examination, “sets the victim up via that logic to participate in an interactional process that contributes to her own undoing”.³⁹ By her very participation in and engagement with the topics and syntactic interaction of the specific mode of questioning, a victim tacitly affirms the relevance of certain topics, for example the consumption of alcohol, the sexualised mode of dress or appearance and other social and cultural tropes that feed into certain rape myth narratives. The defendant, victim and jury, thus, have the ‘same’ idea of what is relevant and what the appropriate standard of behaviour is to be expected, which is then contrasted through defence cross-examination of the victim by her failure to perform these actions, and thus the irrationality or ‘difference’ of her logic.

In his analysis of the Kennedy Smith rape trial Matoesian thus recognises the role of legal method in reproducing and constructing gendered bodies. The “patriarchal logic of sexual rationality” describes the “situated rhythms of language in which the law and patriarchal hegemony are microcosmically embodied in and concealed through objective legal discourse”.⁴⁰ Law, in this formulation, seems more intimately implicated in a conspiracy with “male-centred epistemology” to generate inconsistency in a victim’s account of rape. Notwithstanding this conceptual move, Matoesian maintains the analytic distinction between the “cultural demands of male sexual logic in a given context”,⁴¹ and the linguistic and conversational patterns of talk within the courtroom which enable the specific constitution of the victim’s account as inconsistent. However, he does seem to gesture

³⁸ As above at 46.

³⁹ As above at 60.

⁴⁰ As above at 6.

⁴¹ As above at 40.

towards an “absorption” of “patriarchal logic” into the master discourse of “legal reasoning” during the trial:

...the epistemological hegemony of this linguistic ideology interacts with the legal field through the poetic structures of talk and the sexual order to appropriate or coopt a generic practical reasoning device – inconsistency – to disqualify the female experience of sexual violence and to naturalize its own arbitrary status. The patriarchal logic of sexual rationality disappears during the transformation from bodily experience to the legal field and then reemerges cloaked as a neutral form of cultural/legal reasoning.⁴²

Matoesian’s analysis illustrates with great effectiveness the real-time marginalisation and discrediting of woman’s voice within the trial. I want to argue that the women in Matoesian’s research function as the irrationality that demonstrates the rationality of both masculine desire and law’s *logos*. While I agree with Matoesian that the tools of legal method militate to generate a ‘narrative of inconsistency’ in which woman becomes implicated, this is not, in my analysis, an anomalous or inconsistent coincidence of legal method and patriarchal ideology. It is, rather, *the inevitable conclusion* of a system that refuses and erases woman whilst relying on her for the matter upon which its ego is built.

In what follows I attempt to re-situate Matoesian’s analytical reading of the dynamics of various discursive interactions occurring during the rape trial. Matoesian’s work shows how the asymmetrical distribution of devices of discourse, and the specific deployment of procedures inherent to legal method, work to both silence and cow the complainant when she performs as witness. What Matoesian doesn’t do, to the degree I argue is necessary at least, is think about *why* this process takes place and what conditions underpin, enable and maintain its logic.⁴³ This is important because while critical of legal method and its manifestation in the rape trial, Matoesian’s framework leaves law itself insufficiently troubled.

⁴² As above at 68.

⁴³ Matoesian is not overly concerned with the question of *why* rape occurs although he does appear to adopt the radical feminist explanation for sexual violence against women (Matoesian 1993 above note 8 at 10-22), endorsing MacKinnon’s position that rape is a function of the masculine demand for unfettered sexual access to women’s bodies (see further, Catharine A. MacKinnon, *Feminism unmodified: Discourses on life and law*

I argue that the law's unwillingness to interrogate its own unconscious and the willingness of Matoesian and other critical rape scholars⁴⁴ to leave untroubled law's complicity with the phallogocentric symbolic order means that they are unable to see the way in which the law's inability to respond to the crime of rape is inured within its very fabric. If this is so, then Matoesian is wrong when he says that legal method is severable from 'patriarchy'; that law is always already existing above ideology in some pre-discursive void perverted by extra-legal considerations. Similarly, we cannot simply sever the text of the law from its implementation in the trial in practice by various criminal justice actors, focusing only on the 'attitudes' of those who come into contact with it. Law does not simply 'interact' with patriarchy to produce the conditions under which women are systematically prevented from representing the harm of rape to law, but law is predicated for its own survival on the erasure of the difference that would enable this articulation. This has important consequences when it comes to consider the crime of rape but it also means that law is, at a very fundamental level, always already unable to appreciate and represent the harm of rape.

In what follows I seek to chart the link between the necessary erasure of woman as subject from the Western philosophical and legal canon, and the establishment of law as an originary discourse. I then go on to consider how the absence of an independent feminine subjectivity might have consequences for the rape victim in the trial.

3.0 WESTERN THOUGHT AND THE DEATH OF THE MOTHER

One thing is plain, not only in everyday events but in the whole social scene: our society and our culture operate on the basis of an original matricide. When Freud, notably in

(Harvard 1987), *Towards a feminist theory of the state* (Harvard 1989), *Are women human? And other international dialogues* (Harvard 2007)). "The interpretation and discovery of rape are organized around the patriarchal standpoint. Hence, the force and coercion in rape are systematically concealed through the institutionalized power of law." (Matoesian 1993 above note 8 at 19). He does not, however, spend time thinking about *how* this "patriarchal standpoint" is generated in the first place.

⁴⁴ See in particular Ann J. Cahill, *Rethinking rape* (Cornell University Press 2001); Nicola Gavey, *Just sex? The cultural scaffolding of rape* (Routledge 2005).

Totem and Taboo, describes and theorizes about the murder of the father as the founding act for the primal horde, he is forgetting an even more ancient murder, that of the woman-mother, which was necessary to the foundation of a specific order in the city.⁴⁵

Luce Irigaray's analysis of the history of Western philosophy and psychoanalysis demonstrates in great detail how the masculine symbolic order is generated and sustained by the erasure of the 'feminine'. For Irigaray, matricide is a compulsory condition of the phallogocentric economy; it is the mode by which the dominant symbolic enacts its desire to exclude the mother and assume her generativity. Her psychoanalytic reading of that economy is informed primarily by her insight that through a process of specularisation man projects his ego on to the world which is then reflected back to him with his own image. Woman, as body and matter, stands in for that reflective mirror. It is the mother who is the primary support for the male imaginary, but because she also cannot be represented (because she *is* the mirror) she is symbolically murdered as part of the process by which man enters into culture.⁴⁶ Woman is therefore simultaneously erased within the specular economy whilst also an integral part upon which it is founded. This paradoxical dependence on and erasure of woman in culture is, as Irigaray suggests in the quotation above, a foundational contradiction upon which the whole 'social scene' rests. In Cheryl Lawler's words,

[the mother]... is murdered again and again in our mythologies and in our theories. It seems that she refuses to die once and for all, perhaps because it is her body/her blood... that is required to reproduce... the very culture that re-enacts her murder.⁴⁷

We see this motif of the dead mother repeat itself with surprising regularity in many of the most important Greek myths and tragedies, which continue to function as the foundation of the Western imaginary. For Irigaray, Aeschylus' *Oresteia* functions as the

⁴⁵ Luce Irigaray, *Sexes and genealogies* (trans Gillian C. Gill) (Columbia University Press 1993) at 11.

⁴⁶ Margaret Whitford, *Luce Irigaray: Philosophy in the feminine* (Routledge 1991) at 34.

⁴⁷ Cheryl Lawler, 'Orestes with Oedipus: Psychoanalysis and matricide' in Mary C. Rawlinson, Sabrina L. Hom and Serene J. Khader (eds) *Thinking with Irigaray* (2011) 13 at 20.

seminal patriarchal myth, and in particular the story of Clytemnestra.⁴⁸ In that myth, Clytemnestra's husband, Agamemnon, has been away for 10 years at war with Troy and, having heard nothing from him, she had assumed him dead. Agamemnon eventually returns, having sacrificed his and Clytemnestra's daughter, Iphigenia, in order to bring the expedition to a conclusion. Upon his return, he is accompanied by Cassandra, his slave and lover. Filled with a righteous rage, Clytemnestra kills Agamemnon and Cassandra. Supported by his sister, Electra, Clytemnestra's son, Orestes, then kills his mother to restore order in the cosmos and in accordance with the oracle of Apollo, beloved son of the God-father, Zeus. Upon committing the act, Orestes is driven mad by the Furies, a troop of women in the image of his mother seeking vengeance. Appealing to the goddess Athena for help, Orestes is eventually acquitted in a court of justice, and rescued from his madness, by virtue of her determining vote. The murder of the mother in the myth results, says Irigaray,

...in the non-punishment of the son, the burial of the madness of women – and the burial of women in madness – and the advent of the image of the virgin goddess, born of the father and obedient to his law in forsaking the mother.⁴⁹

The 'virgin goddess' Irigaray refers to is, of course, Athena, whose story is also integral to the *Oresteia* and, as Amber Jacobs argues, possibly the more important story. The murder of Athena's mother, Metis, "haunts" the *Oresteia* as a matricide "hidden and unspoken".⁵⁰ In the myth, Metis, goddess of wisdom, prudence and deep thought was captured and raped by Zeus. Afraid of her generative power, Zeus tricked Metis into turning herself into a fly, and swallowed her. However, Metis was already pregnant with their daughter Athena and inside his stomach, Metis transmitted her knowledge and wisdom to Zeus. Athena survived, and was 'birthed' wearing a coat of armour from the head of Zeus.

⁴⁸ Aeschylus, *Oresteia* (trans. Christopher Collard) (Oxford World Classics 2001).

⁴⁹ Luce Irigaray, 'The bodily encounter with the mother' in Margaret Whitford (ed) *The Irigaray reader* (Wiley Blackwell 1991) at 37-38.

⁵⁰ Amber Jacobs, *On matricide: Myth, psychoanalysis, and the law of the mother* (Columbia University Press 2008) at 60.

The myth reveals, in stark terms, the desire for matricidal violence that Irigaray argues is foundational in instituting a specific masculine symbolic order. Zeus literally consumes Metis' body, and with it, absorbs and assumes her wisdom and generative capacity. Her womb is transferred to his brain and she is obliterated so completely that even Athena knows not of the maternal body in which she was conceived.⁵¹

We see a similar pattern in law's origin stories. Feminist historians and legal theorists have long argued that women are excluded, denigrated and discriminated against by law. What I am interested in here, however, is the way in which legal norms, concepts, rules, and methods are incarnated, and rely for their coherence on this exclusion and denigration. As will become apparent, this erasure takes place in order to ensure and protect law's systematicity and its unity. A good example of this particular phenomenon is the story of Lucretia and the foundation of the jurisdiction of law in the Roman Republic. Fair, dutiful and chaste Lucretia was the wife of Collatinus, who had introduced her to Sextus Tarquin, the youngest son of Lucius Tarquinius Superbus seventh King of Rome. Upon seeing her, Tarquin was "seized by the evil desire to debauch her",⁵² and a few days later, made his way back to her home uninvited and without her husband's knowledge, whereupon he was welcomed as a guest. That evening he made his way to Lucretia's bed chamber, sword in hand, and woke her. He confessed his passion and desire for her and, through a combination of threats and entreaties, demanded she yield to him her chastity. Lucretia refused, even under fear of death. She yielded only when Tarquin threatened to disgrace her in death by leaving her body in her bed next to the naked body of a slave, evidence of adultery of the "basest sort." Distraught by her rape, Lucretia called her father and husband to her, each with a trusted friend. She confessed the incident and pleaded that revenge be sought in her name.

⁵¹ As above at 63. This figure of the omnipotent and divine god-father is familiar too in Christian mythology. As Lawler points out, "[b]y the time we arrive at the creation story in Genesis, any trace of the primordial mother has been erased. What emerges is a solipsistic, male, creator god – Yahweh – absolutely transcendent to his creation." (Lawler above note 47 at 20).

⁵² Livy, *The rise of Rome: Books 1-5* (trans T.J. Luce) (Oxford World Classics 1998) at 67.

Each of the men pledged to fulfil her wish, and offered her comfort. Unmoved, Lucretia pledged to absolve herself “of wrong, but not of punishment”, and plunged a knife she had been hiding into her breast.⁵³ In the wake of Lucretia’s sacrifice, Brutus, who had accompanied Collatinus, swore to vanquish the Tarquinius dynasty from Rome. Urged by Brutus to take up arms and moved by the grief of her father, and the sight of Lucretia’s dead body, the popular uprising that followed in 509BC led to the establishment of the Roman republic.

Maria Drakopoulou’s analysis of Lucretia’s death emphasises the legal credentials at the heart of story.⁵⁴ A family court is convened at Lucretia’s request to adjudicate the matter. However, this legal process is unilaterally usurped by Lucretia who by passing a capital sentence upon herself suspends and renders null the existing procedure. In so doing, says Drakopoulou, she initiates a “new dimension of critique of law”, directed not to her case, but the existing civic order, which is necessary to justify the vanquishing of the King and the birth of the Roman republic.⁵⁵ Lucretia’s suicide is an act of “moral exaltation”, yet she herself is not driven by a desire for personal freedom or revolt against the existing social and political order. Her death is necessary not as a “source of inspiration or active progress”, rather it is necessary because it “configures a female identity that is excluded from these politics.”

With her life erased along with the law of kings, there is no place for Lucretia in the latter part of the story. Banished from the space in which liberty and law come to reside, only her corpse – the enabling condition for the new law’s jurisdiction – enters the Forum. And when revenge is taken in her name, when all those who are subjects of law, who establish laws and wield them, are present, she is not. Lucretia has been exiled outside the time and space of the law to be. Yet her dead body, lying at its origin, irrevocably grounds it in sexual difference. Hence, Lucretia’s story is not merely one of law, it is one of law and sexual difference...⁵⁶

⁵³ As above at 68.

⁵⁴ Maria Drakopoulou, ‘Of the founding of law’s jurisdiction and the politics of sexual difference: The case of Roman law’ in Shaun McVeigh (ed) *Jurisprudence of jurisdiction* (Routledge Cavendish 2007) 33.

⁵⁵ As above at 42.

⁵⁶ As above at 42-43.

The account of the law's reliance on a particular form of sexual difference that arises from Lucretia's story mirrors the broader pattern excavated from Greek myth by Irigaray and others. It is over Lucretia that wars are fought and liberty is secured, but it is only her death that enables this process. How does the law continue to posit itself as the all-powerful, transcendent creator, and by which techniques does it erase woman as an independent subject in her own right? In what follows I consider law's modern origin story and the emergence of a form of legal discourse as a conceptual apparatus and a particular form of speech and method, which serves to instantiate and re-enact its own symbolic matricide.

3.1 Law's original matricide

Law's modern origin story is one characterised by the association of law with divine will, and the dissociation of femininity from that will. Peter Goodrich explores the origins of this contradiction in the context of legal history arguing that the problematic place, personality and political role of women also represented a significant constitutional problem for law.⁵⁷ In a careful analysis of John Fortescue's *De Natura Legis Naturae*,⁵⁸ written in the early 15th century and one of the first treatises directly addressing women in law, Goodrich elaborates the various rules relating to the capacities and functions of women generally traceable to Roman law. Exploring the law on succession, specifically, Goodrich unveils the links between English custom, divinity and nature, and in turn, the ultimate origin of law and laws in 'God alone'. Despite the "ineradicable origin and visceral transmission" of maternity, the mother is in civil law reconstituted as simply a facilitator of the paternal line.

⁵⁷ Peter Goodrich, *Oedipus Lex: Psychoanalysis, history, law* (University of California Press 1995) at 118-119.

⁵⁸ John Fortescue, *De natura legis naturae* (1859)

The figure of maternity thus represents an aberration or excess in the polity. This figure, says Goodrich, can at best only refer to a ‘plurality’ within jurisdictions; “[t]his plurality – this fluidity or contingency – of polities is potentially subversive of the hierarchy of laws...”⁵⁹

Goodrich investigates the development of a public law that served to institute a mode of thought that was also the limit of legal subjectivity. Although that subjectivity recognised two sexes, “it relayed only one form of personality, one gender, a singular mask”.⁶⁰ It is exceptional, he notes, the scope of legal sources drawn on to “substantiate the disassociation of the feminine imagery and grammatical gender of nature, justice, virtue, and the law from the dignity or civil office of women”.⁶¹ This allowed jurists of the time to substantiate as undeniable “[t]he inferiority of women within the hierarchy of ‘proper nature’ [as] a facet of the originary, of the state of innocence, and so an incontestable law of nature coincident with the spirit that preceded the generation of the sexes”.⁶²

The dissociation of woman from the origin or ‘nature’ of divinity and law, then facilitated an image of law that was said to belong to one order alone, to represent one source and to produce a singular testimony of reason. In John Fortescue’s words:

[J]ustice and the law of nature are proved to be of one substance... of one quality and nature... We are most surely instructed that the law of nature was created in one and the instant together with man; whence we are compelled to say that law and man are coeval, as were the first man, his reason, his will and his memory.⁶³

The image of justice is thus replaced by man, in the image of the father, an image coincident with law and whose genealogy is traceable back to the law of nature and to God Himself. Therefore in Goodrich’s reading of Fortescue and the history of the common law we can see revealed both an original matricide upon which law can be said to construct its

⁵⁹ Goodrich above note 57 at 123.

⁶⁰ As above at 130.

⁶¹ As above at 128.

⁶² As above at 129.

⁶³ Fortescue above note 58 at 243, cited in above at 130.

own body, but also the faint but undeniable figure of woman whose plural and fluid morphology is the ultimate threat to the systematicity, order and reason of judgment; that which could reveal the contingency of the whole enterprise and that "...escaped the unity of standard and sequence of law".⁶⁴

The figure of the dangerous woman is also present in the conceptual forms that law relies on. The concept of legal reason is one that has, of course, exercised jurists for centuries and more recently, been the subject of sustained feminist attention.⁶⁵ 'Reason' is the great mechanism through which legal discourse is animated and endowed with its exalted scientific status. In a critical rereading of St Thomas Aquinas' *Summa Theologica*, Margaret Denike argues that the doctrine of reason that emerges from Aquinas' theology, a foundational treatise of natural law, is "conditioned on the repudiation of woman and the sin of the sex ascribed to her."⁶⁶ Aquinas' association of woman with materiality and sexuality provides the rationale for her exclusion from social, religious and political life and underpins natural law and its contemporary iteration in human rights and humanitarian law.⁶⁷ Man's capacity for reason was the single most important mode through which he brought himself closer to the *telos* of his higher capabilities and thus, closer to God. In operating his capacity for reason man must distinguish himself from baser forms of existence consistently threatening his ability to actualise his potential and to participate in the eternal. So great was the threat to man's reason posed by the 'venereal pleasures' that women represented that man-made laws

⁶⁴ As above at 138.

⁶⁵ See, for example: Joanne Conaghan, 'Tort law and the feminist critique of reason' in Ann Bottomley (ed) *Feminist perspectives on the foundational subjects of law* (Cavendish 1996), *Law and gender* (OUP 2013); Lucinda Finley, 'Breaking women's silence: The dilemma of the gendered nature of legal reasoning' (1989) 64 *Notre Dame Law Review* 886; Regina Graycar and Jenny Morgan, *The hidden gender of law* (Allen and Unwin 1990); Genevieve Lloyd, *The man of reason: 'Male' and 'female' in western philosophy* (Routledge 1984); Martha Minow, 'Feminist reason: Getting it and losing it' (1988) 38 *Journal of Legal Education* 47; Ulrike Schultz and Gisela Shaw (eds) *Gender and judging* (Hart 2013); Smart above note 7.

⁶⁶ Margaret Denike, 'The sex of right reason: Aquinas and the misogynist foundations of natural law' in Maria Drakopoulou (ed) *Feminist encounters with legal philosophy* (Routledge 2013) at 20.

⁶⁷ As above at 21.

to guard against them were necessary. These included a ban on fornication, which was said to so corrupt natural reason that it overruled the divine will. Denike goes on:

In this way the rightness of man's reason is measured through the wrongness of *the sex* that weakens and nullifies it. It is the sin of (the feminine) sex that has the power to throw the dignifying principle of man off its tracks, and so filthy is the thought of sexual encounters with women that both man and woman invariably lose their dignity through them: and while man may recover from such loss, there is no recovery for women stained by the sexual act...⁶⁸

Just as the masculine *logos* relies for its coherence on an othering of women as emotional and irrational, weak and irresponsible, femininity is expelled from the legal form in order to buttress and sustain its particular view of itself. This is true also of law as a discursive form. As Elizabeth Grosz explains, woman's erasure in discourse happens by way of self-referential systems of logic which are fundamentally partial:

Discourses refuse to acknowledge that their own partiality, their own perspectivity, their own interests and values, implicitly rely upon conceptions of women and femininity in order to maintain their 'objectivity', 'scientificity', or 'truth' – that is, their veiled masculinity.⁶⁹

In his book, *Languages of Law*, Goodrich argues that the imagery of transmission by which law comes to posit itself as an originary discourse is sustained by rules, linguistic forms and techniques of interpretation which exceed the "memory of man" and which constitute more than mere language or vernacular.⁷⁰ The logic of the common law, he argues, "has been one of a comparable lack of alternatives, of a refusal to recognize that vast host of the other... What is their place in the law, what is their voice, whose language do they use?"⁷¹

⁶⁸ As above at 29.

⁶⁹ Elizabeth Grosz, *Jacques Lacan: A feminist introduction* (Routledge 1990) at 180.

⁷⁰ Peter Goodrich, *Languages of law: Logics of memory to nomadic masks* (Weidenfeld and Nicolson 1990) at vii.

⁷¹ As above at 184.

Goodrich traces law's language and links its particular vernacular dialect to its becoming present through divinity and memory. The connection between memory and the legal community as theocratic allows law to posit itself as an original linguistic order in which law becomes the mouthpiece for a language to mediate between God and humanity.⁷² This interpretative genealogy is sustained, says Goodrich, by rituals of jurisprudence that illustrate clear preferences for sources rather than arguments or dialogues, for validity rather than value, for judgment rather than justification or accountability as the authenticating marks of juridical speech.⁷³ Those abstract legal terms embrace a particular syntactic and grammatical form that can be said to mirror the universalised masculine morphology privileging, as it does, a particular self-referential and contained mode of expression.

Goodrich's analysis illustrates with great clarity the deeply-engrained structure of the common law in which the habitual logic of law continues to "systematically [obliterate] difference in all its manifestations, in all its discourses".⁷⁴ An erasure of difference then occurs at all levels of the symbolic as it manifests in law, and this is enabled by a juridical framework which is contingent for its authority and therefore, its survival, on an origin or absolute other which is simultaneously evoked and erased.

Discernible in this short history of the common law is a particular male angst regarding the ebb and flow of women's bodies. Irigaray has observed the ways in which this angst has instantiated itself within systems of representation and in particular an "historical lag in elaborating a 'theory' of fluids", reflective perhaps of the fact that "women diffuse themselves according to modalities scarcely compatible with the framework of the ruling symbolics".⁷⁵ The equation between fluids and waste is said to justify "a complicity of long

⁷² As above at 95.

⁷³ As above at 109.

⁷⁴ As above at 184.

⁷⁵ Luce Irigaray, *This sex which is not one* (trans Catherine Porter) (Cornell University Press 1985) at 106.

standing between rationality and a mechanics of solids alone”.⁷⁶ In the same way that man seeks to constitute himself without the mother, the law too erects itself from an undifferentiated *subjectum* that contains itself within itself, to the exclusion of all ‘others’.

The argument I want to make here is that the history of legal discourse mirrors this process of exclusion and erasure almost exactly and that this allows law to both present its own logic as *a priori*, as neutral and as inevitable whilst also concealing the genesis of its own becoming. This enables it then to refuse to acknowledge the other, to countenance even the possibility of another language, or another justice. Thus, the erasure of the feminine, of woman, within the deep economy of language generally, is also found in legal discourse, and therefore also in the rape trial – the very space in which law has no choice but to confront woman. As we will see, it deals with this confrontation in the only way it knows how: denying and erasing her difference, invoking her specular impossibility in order to shore up its own ego, and then transforming her into the double, defective or opposite of man.

To return to my critique of Gregory Matoesian’s theoretical framing of law in the rape trial elaborated earlier, I want to reiterate the connection, or indeed the inseparability of the masculine *logos* from law’s *logos*, or in Matoesian’s words of ‘patriarchal ideology’ and legal discourse. This is because the world of law is forever, at the very genesis of its becoming, closed to the cognisance of difference and in particular, sexual difference. It is immersed within, it revels in, it magnifies and it takes to its logical conclusion the masculine specular economy. The law functions as a closed system built on a repressed other, which is only coherent through a unified subject relation which requires the erasure of difference; the original matricide so carefully revealed by Irigaray in her excavation of Western thought, is also the origin upon which the legal system becomes coherent. In other words, ‘patriarchy’ is

⁷⁶ As above at 107.

inseparable from law because it is the *very mode* through which this discourse comes into being.

As discussed above, this contention is evidenced across two platforms: first, the symbolic system from which law claims its authority and second, the conceptual and discursive apparatus that support legal discourse and method. These are made manifest in the micro-techniques of language that Matoesian so carefully documents in his analyses of rape trials. These facets intersect but not in the way Matoesian thinks. They are bound by a shared commitment to and reliance on the suppression of woman's difference, whilst simultaneously feeding on a ceaseless supply of "matter for the functioning of the same discourse".⁷⁷ In my argument this genealogy of law's origin and unconscious not only sheds light on why legal method has been so effectively marshalled in the service of denying rape victims access to 'justice' in a traditional sense, but also why it remains impervious to liberal reform initiatives. In what follows, I go on to explore the implications of this critique for feminist legal scholarship and engagement with state sponsored mechanisms for law reform.

4.0 WOMAN'S VOICE/LAW'S LOGOS

Although it posits itself as an originary discourse - a discourse freed from the contingencies of culture, history and the social – the history of the common law explored here reveals a contingency upon a symbolic matricide. The spectre of woman's morphology has been dealt with in philosophy and psychoanalysis with the symbolic coding of fluidity as waste, by the erasure of the possibility of another subjectivity, and the positing of the masculine subject position as universal. Goodrich illustrates how this phenomenon has

⁷⁷ Luce Irigaray, *To speak is never neutral* (trans Gail Schwab) (Continuum 2002) at 228.

manifested itself in law with the retrospective construction of law's origin to erase the association of woman with nature and divinity (and therefore justice), and replace it with an image of justice as God the father. It has also been addressed with the creation of rules and orders to control and confine women's bodies, and systems to ensure the continuing mastery of man over law by the instantiation, and reiteration through legal method, of the vernacular dialect of legal discourse. The law takes the logic of the masculine *logos* to its only conclusion and it is structurally invested, for its own survival and coherence, in the exclusion and erasure of woman's voice, which represents the possibility of a plural form of being and thinking and is thus a fundamental challenge to the legitimacy of law.

The consequences of this analysis for complainants of rape who make it to trial can only be significant. It is true, of course, of every adjudication that the law makes a pronouncement of 'truth' based on its assessment of the veracity of the evidence. Matoesian and others argue that the difference with the rape trial is the ability of defence lawyers to call upon barely perceptible but powerfully palpable rape myths, or commonly exchanged narratives situating woman's sexuality in accordance with a masculine standard of desire.⁷⁸ This is, of course, true. However, in my argument the adjudication of rape is different not just because the normative or heuristic tropes relied upon by finders of fact are sexist but because their presence is generated from within, and sustained by, a logic that denies woman's very subjectivity. It is not enough, therefore, to call for jury instructions,⁷⁹ or expert evidence,⁸⁰ to counter the reliance of juries on rape myths to determine and dispense justice in rape trials. These measures ultimately do little to challenge the structural coherence of the system as a whole and with it, the systemic inability to fathom what rape means.

⁷⁸ See also Ehrlich above note 8.

⁷⁹ Kirsty Duncanson and Emma M. Henderson, 'Narrative, theatre and the potential interruptive value of jury directions for rape trials in Victoria, Australia' (2014) 22(2) *Feminist Legal Studies* 155.

⁸⁰ Louise Ellison and Vanessa E. Munro, 'Turning mirrors into windows? Assessing the impact of (mock) juror education in rape trials' (2009) 49(3) *British Journal of Criminology* 363.

Rape is different because it is *gendered*. This is the case in some jurisdictions in which only a man can be a defendant to a charge of rape,⁸¹ and in a statistical sense (women are its main victims), but also because it demands the consideration of sexual difference. It requires that woman narrate a confrontation with the real and in doing so that she relive the trauma of her symbolic homelessness in both her encounter with her rapist and her encounter with the law.⁸² As Louise du Toit argues so convincingly in her book *A Philosophical Investigation of Rape*, the harm of rape within the Western symbolic order is simply ‘impossible’ to fathom. Rape is fundamentally misconstrued within that symbolic and must, instead, she says, be understood against the backdrop of a construction of woman’s subjectivity as borderline, highly ambiguous or unstable.⁸³ The failure to recognise the harm of rape to woman as singular and sexuate subject in her own right means that the confrontation of woman during the act of rape with a fragmentary or partial subjectivity is replayed again in the courtroom, but this time woman is compelled to articulate a harm that has no name for an audience that can’t hear it.⁸⁴ Law is complicit in a system of logic that reproduces and resubstantiates as natural, over and over again, a legal subject which excludes, excises and renders impossible woman’s very existence.

Just because the underside of law’s unconscious is not so obvious in other cases doesn’t mean that ‘patriarchal ideology’ only activates itself during the rape trial, as Gregory Matoesian argues.⁸⁵ The rape trial forces the confrontation of law with the contradiction of its own existence because it is at this point that law must confront the particularity of woman.

⁸¹ For example, in England and Wales see Sexual Offences Act 2003, section 1; New Zealand see Crimes Act 1961, section 128; Ireland see Criminal Law (Rape) Act 1981, section 2.

⁸² Russell above note 6 at 257.

⁸³ Louise du Toit, *A philosophical investigation of rape: The making and unmaking of the feminine self* (Routledge 2009) at 33.

⁸⁴ Irigaray prefers the term ‘sexuate difference’ in her later work to ‘sexual difference’. She insists on this distinction in part as a way to deal with criticism that has conflated her use of the ‘sexual’ in sexual difference with sexuality.

⁸⁵ Matoesian 1993 above note 8 at 20.

This confrontation with the very essence of sexual difference and identity forces an eruption of the incoherence of law's existence.

While the process of objectifying woman during the trial is most keenly observed during cross-examination, the constrictions of legal procedure - the need for oral evidence, the requirements for formal speech, for sequential narrative, for clarity, for unequivocation - are also present during direct examination; the time during which the court allows the victim to tell her story.⁸⁶ Woman remains, in this phase, mired within the phallogocentric logic in which her ability to represent herself as a subject may well be undercut by sexed syntactic conventions.⁸⁷

This is not to say that women are stripped of all agency by the *logos* of law, nor that women who come before the court to testify to their rapes do not on some occasions succeed in convincing a jury that they are telling the truth by successfully transforming the "*pathos* of [their] victimisation into the *logos* of accusation".⁸⁸ Wendy Larcombe's research into characteristics of rape complainants whose cases resulted in successful prosecution illustrates how this process might occur, and she argues that her findings "disturb feminist understandings of how rape complaints are discredited in the criminal justice system".⁸⁹ Larcombe sought to trace with her research the process by which complainants' narratives of violation are either disqualified or validated during the process of the rape trial; her goal was

⁸⁶ Kebbell and others 2003 above note 27; Larcombe above note 7.

⁸⁷ Luce Irigaray's work on language is extensive and spans multiple methodological terrains including substantial empirical research into patterns of speech, grammar and syntax, and in particular the differences observable between women and men. Irigaray illustrates the effect of the 'veiled masculinity' present in dominant language systems in her extensive empirical research into the relationship between philosophy and linguistics (Luce Irigaray, *Le langage des dements* (Mouton 1973), *I love to you: sketch for a felicity within history*, (trans Alison Martin) (Routledge 1996), *To be two* (trans Marco M. Rhodes and Monique F. Cocito-Monoc) (Continuum 2000)). This work argues that linguistics are marked by sexual difference through first the usage of 'he' and 'she', however her empirical work illustrates that even the personal pronoun 'I' is sexually marked. Not only do men and women produce different elements of sexual difference through their respective speech, but the grammatical subject itself is also sexed: "grammar reflects, for both men and women, a valorization of masculinity and an erasure of femininity." (Margaret Hass, 'The style of the speaking subject: Irigaray's empirical studies of language production' (2000) 15(1) *Hypatia* 64 at 66.

⁸⁸ Young above note 4 at 465.

⁸⁹ Larcombe above note 7 at 132.

to trace a praxis of possible resistance to the discrediting processes used during the rape trial to disqualify the victim. Larcombe surveys the various ways in which police, prosecutors and defence lawyers, amongst others, deploy tactics to discredit and cow a rape victim at every point of the justice process. However, she argues that in her analysis of seven trials for rape in Australia, established feminist knowledge of which ‘types’ of rape victims are most likely to be believed by finders of fact was problematised by unexpected outcomes. She summarises her conclusions thus:

It can be seen that the “successful rape complainant” is not necessarily one with an unblemished sexual history. Rather, she has a strong sense of herself and takes overt offence at (rather than being taken by surprise or accepting as all too familiar) alternative and derogatory constructions of her character and credibility. She will need to be reasonably familiar with and experienced in managing power-loaded situations so that she can be polite but not compliant, co-operative but not submissive. She is not prone to exaggeration or embellishment but seems to talk straight. She answers questions quickly and precisely and speaks fairly frankly and without shame about sexual acts and activities.⁹⁰

Larcombe tentatively concludes her analysis with the assertion that the ‘ideal victim’ is unlikely to fall into the stereotypical category of the chaste, virtuous, ‘real rape’ victim so vaunted in classical literature, but instead is a victim who can perform with “resistance, continuity and consistency”.⁹¹

The characteristics of the ‘ideal victim’ that Larcombe details above, while not necessarily exclusive, are interesting for a number of reasons, but particularly for my analysis

⁹⁰ As above at 144. Access to the discursive tools of resistance will, of course, be highly contingent on a complainant’s subject position: their class, race, ethnicity, whether they are able bodied or not, etc. Indeed, Larcombe notes that “successful rape complainants in Australia are more likely working-class, young, able bodied, non-Aboriginal, English speaking women.” (as above). On the rape of women and differential access to criminal justice mechanisms due to racial difference see further: Patricia Hill Collins, *Fighting words: Black women and the search for justice*. (University of Minnesota Press 1998); Kimberle Crenshaw, ‘Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics.’ (1989) *University of Chicago Legal Forum* 139; Danielle L. McGuire, *At the dark end of the street: Black women, rape, and resistance - A new history of the civil rights movement from Rosa Parks to the rise of black power* (Vintage 2011).

⁹¹ Larcombe above note 7 at 146. Larcombe takes no solace in her conclusions: “There is no cause for celebration here, however. Even if women are no longer primarily disqualified on the basis of sexual and/or moral conduct, the discursive resistance that appears to characterize successful complainants is similarly exacting.” (As above at 145).

because they seem to describe a complainant who can, within the trial, transform herself most effectively into the double of man, who can harness law's *logos*, and who can speak most articulately through that dialect. In my argument this conclusion is far from surprising given the juridical and discursive strictures operating within the trial.

To return to where I started this discussion with the voice of Frances Andrade, it is perhaps easier to appreciate the circumstances that might coalesce during the rape trial to generate an experience for a victim which is 'fragmentary'. With the wholesale rejection and exclusion of a female imaginary in both language and in law, it is only logical for these reasons that a woman would, in Irigaray's words, "...experience herself only fragmentarily, in the little-structured margins of a dominant ideology, as waste, or excess, what is left of a mirror invested by the (masculine) 'subject' to reflect himself, to copy himself".⁹² Because woman cannot take the form of the signifier except as emptiness it is very difficult for woman to constitute herself within the dominant symbolic as anything other than an object. This has serious implications for a rape victim attempting to speak the harm of rape to law because law requires that the speaking subject enunciate her injury, which can only be done if warped into the language that the *logos* allows. Because this injury has no value in the dominant symbolic – because woman has no value - the recognition of any injury is contingent upon a translation of woman within the space to double, defective or opposite of man. There is, therefore, no necessary correlation between a woman complainant's understanding or explanation of the event, and the law's understanding.

The fragmentation of woman during the trial then is a consequence of both the exclusion of a female imaginary, but also of law's dogged adherence to the principal tenets of phallogocentrism in which woman's status in the dominant symbolic is only as object, waste or excess. The law's treatment of the crime of rape is, far from being anomalous, actually the

⁹² Irigaray above note 75 at 30.

logical conclusion of the order of the world according to masculine logic. The failure of rape law to do what it says it will do (protect the ‘sexual autonomy’ of all individuals), is actually, paradoxically, not a failure but a success because it shows how phallogocentrism consumes its subjects within a closed system in which the pieces can be moved around but the underlying logic remains the same.

Earlier, I alluded to the myriad of reforms both proposed and implemented in various Western jurisdictions to address factors that had been identified as contributing to attrition rates at the point of the rape trial. These included: the implementation of new rules in sexual offence trials designed to counter the reliance of lawyers and jurors on evidence designed purely to impugn a victim’s credibility;⁹³ the development of prosecutorial expertise and specialism in sexual offences trials; the use of expert evidence in trials aimed at dispelling rape myths to assist the jury in its deliberations; the briefing of complainants prior to trial; the recording of complainants when they make initial statements to police to be used as evidence in court and; the use of screens in court to protect the victim while giving evidence. These reform proposals and initiatives have been, in the main, directed at empowering the victim as speaking subject within the rape trial. Many have sought to address the power asymmetries illustrated by Matoesian and others, for example, by providing victims with advocates and their own legal representation, by allowing evidence to be given behind a screen or by videolink, or by written submission bypassing the courtroom altogether.⁹⁴ In many ways

⁹³ For example, in England and Wales, section 32 of the Criminal Justice and Public Order Act 1994 abolished the requirement in sexual offences trials that the judge issue a warning to the jury that a woman’s evidence alone, in the absence of independent corroboration, must be treated with caution and section 41 of the Youth Justice and Criminal Evidence Act 1999 sought to restrict the use of previous sexual history evidence in rape trials. Section 112 of the Coroners and Justice Act 2009 amended the power to admit consistent statements of complaint by repealing the requirement that the complaint must be made “as soon as could reasonably be expected after the alleged conduct”. Carline and Eastael describe this suite of measures as “the most radical rewriting of the orthodox rules for treatment of witnesses in the adversarial trial system in the common law world.” (Anna Carline and Patricia Eastael, *Shades of grey - Domestic and sexual violence against women* (Routledge 2014) at 199).

⁹⁴ Ministry of Justice, *First victims spared harrowing court room under pre-recorded evidence pilot* (online) 28 Apr 2014 <https://www.gov.uk/government/news/first-victims-spared-harrowing-court-room-under-pre-recorded-evidence-pilot> accessed 31 July 2016.

these reforms can be read less as ‘improvements’ in the law per se, than as adjustments designed to ‘soften’ or mitigate the essential (masculine) nature of law by taking into account woman’s nature. Read in this way, law seems to listen to the other and take account accordingly. Except, this is not what is happening at all. The ‘other’ in this formulation, remains stuck within the old dream of symmetry;⁹⁵ woman is simply the other of the same (the double of man) and the law attempts through reform initiatives to cure the defect of woman by concessions to her frailty. It makes no ultimate concession to the existence of a unique subjectivity, which it is essential to have access to in order to testify to the harm of rape. These measures are primarily formulated as matters of access and training - learning to speak to law more effectively on its own terms - whether this is behind a video screen or through an appropriately briefed advocate, or via laws of evidence which preclude the consideration of evidence designed to impugn the complainant’s credibility, thus potentially blocking her access to ‘justice’. There is no sense in which the very coherence of law’s *logos* is troubled or called into question; law remains static, buttressed by its history and the invisible genealogy of its own logic. It is we who have to change, ultimately, so that law can hear us better.

5.0 CONCLUSION

My analysis in this article has sought to draw together sometimes disparate bodies of literature in the service of trying to comprehend the law’s treatment of rape complainants, particularly those who find themselves testifying to their rape during the trial. I have argued that previous writing on rape, law and linguistics has failed to adequately account for the

⁹⁵ Luce Irigaray, *Speculum of the other woman* (trans Gillian C. Gill 1985) at 11-24. See also, Ngaire Naffine, “Possession: Erotic love in the law of rape.” (1994) 57(1) *Modern Law Review* 10.

question of *why* law continues to appear systematically deaf to the calls of untold numbers of women for justice in the aftermath of rape. I have sought to shed light on this question by arguing that law is not simply separable from the masculine *logos* and malleable at will. It is instead in thrall to the phallogocentric symbolic for its own survival. The instantiation of a system of logic governed by binary pairs and the process by which law comes to posit itself as an originary discourse mirrors the process by which Western philosophy and psychoanalysis come to symbolically murder the mother in order for man to place himself at the centre of a closed universe. The law is also a closed universe which consciously excludes the other in the name of a higher absolute: justice. It is simultaneously reliant on the exclusion of the feminine and dependent on the feminine other as a mirror.

What are the implications of this analysis, of exposing the contingency of law's logic and its steadfast complicity with the sexual indifference of the masculine *logos*? I suggested that one implication is the failure of law to respond to crimes against women, and specifically the crime of rape. In order to acknowledge the harm of rape, law must acknowledge woman as subject.

I do not mean to imply with this analysis that we should abandon our struggles with law in the present. Nor do I mean to suggest that recently proposed law reform initiatives addressed to improving the complainant's experience of the trial would have made no difference to Frances Andrade, and others like her. But I do want to suggest that it is important to recognise that work on reforming the trial process is but one feminist task of many. A feminist ethics of sexual difference confronts law's treatment of the crime of rape on multiple levels, it exposes its every move, its *a priori* logic, its very core. It forces it into a confrontation with the other, until it has no choice but to confront itself. It does this relentlessly, at every turn, at every opportunity. But most important of all perhaps: it listens.