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Julia A. Quilter
University of Wollongong, jquilter@uow.edu.au

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Abstract

Through a close reading of a rape trial, this article discusses the seemingly intractable problem of the disconnect between rape law reform and the resilience of outdated common law practices being used in the courtroom. It is argued that certain requirements (the location of the event; a focus on resistance and the presence of injuries; recent complaint; and the underlying assumption of the untrustworthiness of the complainant) form a 'rape schema' which operate to distinguish the 'true' from the 'false' complaint of rape. Finally, this article turns to the insights of critical theory to think about how concepts of 'readability', intentionality and the performance of embodied knowledge by legal subjects might enable us to intervene differently in order to achieve justice for rape victims.

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RE-FRAMING THE RAPE TRIAL: INSIGHTS FROM CRITICAL THEORY ABOUT THE LIMITATIONS OF LEGISLATIVE REFORM

*Julia Quilter**

Abstract: Through a close reading of a rape trial, this article discusses the seemingly intractable problem of the disconnect between rape law reform and the resilience of outdated common law practices being used in the courtroom. It is argued that certain requirements (the location of the event; a focus on resistance and the presence of injuries; recent complaint; and the underlying assumption of the untrustworthiness of the complainant) form a ‘rape schema’ which operate to distinguish the ‘true’ from the ‘false’ complaint of rape. Finally, this article turns to the insights of critical theory to think about how concepts of ‘readability’, intentionality and the performance of embodied knowledge by legal subjects might enable us to intervene differently in order to achieve justice for rape victims.

Truth is undoubtedly the sort of error that cannot be refuted because it has hardened into an unalterable form in the long baking process of history.¹

In the past three decades there has been considerable debate around, literature produced on and reform of, the laws of rape both in Australia and internationally.² In spite of the vast body of knowledge and work that has been undertaken in this area of the law, reporting rates remain low,³

* BA (Hons, University Medal) (Syd), LLB (UNSW, University Medal), PhD (Mon), PLTC (College of Law). Julia Quilter is a Senior Lecturer in the Faculty of Law, University of Wollongong. She is a member of the Legal Intersections Research Centre, UOW, and Co-Managing Editor of *Law Text Culture*. She has recently returned to academia after a decade practising as a solicitor and barrister primarily in public law (constitutional and criminal). Research for this article was supported by a grant from the Law Society of NSW Public Purpose Fund Legal Scholarship Support Scheme. The author would also like to thank Terry Threadgold for her invaluable insights that helped shaped this article and Luke McNamara for his comments on drafts of this article and for his mentorship. Email: J.Quilter@uow.edu.au

¹ Foucault Michel, ‘Nietzsche, Genealogy, History’ in Rainbow Paul (ed) *The Foucault Reader* Pantheon Books New York 1984 p 76 at 79.

² A recent edited collection on this topic demonstrates the breadth of the work that has been accomplished: see McGlynn Clare and Munro Vanessa eds *Rebinking Rape Law: International and Comparative Perspectives* Routledge UK 2010.

³ While reporting rates have increased (see Bricknell Samantha ‘Trends in violent crime’ *Trends & Issues in crime and criminal justice* No 359 Australian Institute of Criminology June 2008 at 3) many sexual assaults remain unreported to police: see Australian Bureau of Statistics *Sexual Assault in Australia: A Statistical Overview* Catalogue No 4523.0 September 2004 at 14 and 54–57. Jacqueline Fitzgerald indicates that only 10 to 30% of adult female sexual assault victims report to police (Fitzgerald Jacqueline ‘The attrition of sexual offences from the New South Wales criminal justice system’ (2006) 92 *Crime and Justice Bulletin* 3 at 4) while Daly and Bourhours’ comparative study indicates that only an average of 14% of victims report to police: Daly Kathleen and Bourhours Brigitte ‘Rape and attrition in the legal process: A comparative analysis of five countries’ in Michael Tonry ed *Crime and Justice: A Review of Research* Vol. 39 University of Chicago Press Chicago 2010, 565–650 at 568, and see also at 574–575, 579–582 for a discussion of the issues.

attrition rates are high,⁴ conviction rates low⁵ and, even where there is a conviction, conviction appeals in sexual assault matters have one of the highest rates of success.⁶ Furthermore, general dissatisfaction with the criminal justice system remains a key issue for victims of sexual assault⁷ — and, more importantly, we know that rape remains an all too common event⁸ and one with life-long consequences.⁹ As someone who completed a doctoral thesis in the area in the late 1990s, and now as I return to the area after some ten years practising in criminal law, one is hit with the depressing question, ‘Has anything changed?’

⁴ See for instance: Lievore D *Non-reporting and hidden recording of sexual assault: An international literature review* (2003) Office of the Status of Women Canberra; Lievore D *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004) Office of the Status of Women Canberra; Fitzgerald states that of the 10 to 30% of adult female sexual assault victims who do report to police, criminal proceedings are initiated in only 19% with only 10% of recorded incidents involving adults resulting in a sexual offence being proven in court. The major points of attrition are between reporting and clear up and between clear up and the commencement of criminal proceedings: Fitzgerald above note 3 at 4. See also generally, ch 26 ‘Reporting, Prosecution and Pre-trial Processes’ in ‘25. Sexual Offences’ in Australian Law Reform Commission Final Report *Family Violence — A National Legal Response* Report No 114 (2010); and for a comparative analysis of attrition rates across countries (Australia, Canada, England and Wales, Scotland and US) see Daly and Bouhours above note 3.

⁵ See for example: Fitzgerald above note 3; Natalie Taylor ‘Juror attitudes and biases in sexual assault cases’ (2007) *Trends & Issues in crime and criminal justice* No 344 Australian Institute of Criminology June 2007 at 2–3; ABS report (2004) above note 3 at 78; Law Reform Commission (Vic) *Sexual Offences: Final Report* (2004) at xxi; and Office for Criminal Justice Reform (UK) *Convicting Rapists and Protecting Victims — Justice for Victims of Rape: A Consultation Paper* Spring 2006 at 5, 8–9.

⁶ Chapter 13 ‘Sexual assault appeals’ in Hugh Donnelly *Conviction Appeals in New South Wales* Research Monograph 35 Judicial Commission of NSW (June 2011) 197 at 220. Furthermore, Donnelly indicates that sexual assault and related offences are over-represented in conviction appeal cases, leading to the observation that sexual assault cases are more likely to be appealed (at 220) and that on order of a re-trial, sexual assault cases have the highest no-bill rate of any Australian Standard Offence Classification division (at 221).

⁷ While the most recent Victorian Law Reform Commission report suggests that victim survivors with prior experience of the criminal justice system have noticed an improvement (see Department of Justice (Vic) *Sexual Assault Reform Strategy: Final Evaluation Report* January 2011) the evidence suggests that many victims continue to be dissatisfied with the system: see for instance, Haley Clark ‘“What is the justice system willing to offer?” Understanding sexual assault victim/survivors’ criminal justice needs’ (2010) 85 *Australian Institute of Family Studies* 28 at 31; Natalie Taylor and Jacqueline Joudo ‘The impact of pre-recorded video and closed circuit television testimony by adult sexual assault complainants on jury decision-making: an experimental study’ Research and Public Policy Series No 68 Australian Institute of Criminology 2005; and see Daly Kathleen ‘Conventional and innovative justice responses to sexual violence’ (2011) No 12 *ACSSA Issues* 1 at 6–7.

⁸ The ABS found that 28% of women said they had experienced sexual harassment, sexual violence or stalking in the last 12 months (in the period in question): ABS 2004 above note 3 at 18, 20. A recent study has cited that in the US, 17% of women report rape or attempted rape and more than one-fifth of women report intimate partner violence, stalking or both: Susan Rees et al ‘Lifetime Prevalence of Gender-Based Violence in Women and the Relationship With Mental Disorders and Psychosocial Function’ (2011) 306(5) *Journal of American Medical Association* 513 at 513. Younger women (girls aged 10–19 years) having the highest sexual assault victimisation rates: Australian Bureau of Statistics *Recorded Crime — Victims, Australia 2003* Catalogue No 4510.0 May 2004.

⁹ Susan Rees et al found that gender based violence was significantly associated with mental health disorder, dysfunction and disability. Furthermore, women exposed to three or four types of gender based violence had higher rates of anxiety disorders, mood disorder, substance use disorder and suicide attempts: Susan Rees et al above note 8 at 518. See also Mark H, Bitzker K, Klapp BF and Rauchfuss M ‘Gynaecological symptoms associated with physical and sexual violence’ (2008) 29(3) *Journal of Psychosomatic Obstetrics & Gynecology* 164; Morrison Zoe, Quadara Antonia and Boyd Cameron *Ripple affects of sexual assault* Issue No. 7 Australian Centre for the Study of Sexual Assault June 2007; and VicHealth *The health costs of violence: Measuring the burden of disease caused by intimate partner violence, A summary of findings* Victorian Department of Health June 2004.

It is true that some of the themes in the literature have moved on. For instance, ‘attrition rates’ have become a major focus in much of the recent literature¹⁰ together with the role policing practices may play in attrition rates¹¹ and the possibilities for using expert evidence to dispel some of the ‘myths’ surrounding rape¹² — something I will return to at the end of this article. There is also some evidence to suggest that some legal reforms have been effective.¹³ For instance, the line between traditional ‘victims’¹⁴ has shifted with changes in the law and increasingly more victims of non-stranger sexual assaults are being reported to police.¹⁵

But mainly what I have been struck by is the inability of all of this law reform, all of this work, to affect justice for victims of sexual assault.¹⁶ As Penny Pether has recently written:

But all the speech and the writing, the scholarship and the legislation and the training programs and manuals and the textual artifacts 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 attribution.¹⁷

It is a rather depressing dilemma.

In light of this, it seems timely to return to some of the work of continental theorists, to ask what the insights of critical theory may offer for this dilemma? In doing so, this article is in three parts. The first is an analysis of what I have called the ‘rape schema’. In the second part, I examine a rape trial to think about law reform, bodies in practice and their relation to the rape schema. The final part attempts a dialogue of sorts between work on law reform and critical theory. Through an analysis of the concepts of ‘iterability’ (from Derrida), the ‘habitus’ and ‘the

¹⁰ See for instance the reference in note 4 above. See also the projects completed in New Zealand (Triggs Sue, Mossman Elaine, Jordan Jan, Kingi Venezia ‘Responding to Sexual Violence: Attrition in the New Zealand Criminal Justice System’ Ministry of Women’s Affairs 2009), a rape attrition study of 11 UK and European countries (Lovett Jo and Kelly Liz *Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases across Europe* Final Research Report Child and Woman Abuse Studies Unit London Metropolitan University 2009), and a rape attrition study planned for South Africa (Gender, Health and Justice Research Unit ‘Rape Attrition: Understanding Case Withdrawals’ <http://www.ghju.uct.ac.za/projects.htm#rapeattrition>).

¹¹ See for instance, Robyn McLean and Jane Goodman-Delahunty ‘The influence of relationship and physical evidence on police decision-making in sexual assault cases’ (2008) 40(2) *Australian Journal of Forensic Sciences* 109.

¹² See for instance Office for Criminal Justice Reform above note 5 at 16–21 (chapter 4 ‘Adducing General Expert Evidence in Rape Cases’); Victorian Law Reform Commission 2004 note 5 at chapter 7, Rec 173; Ellison Louise and Munro Vanessa ‘Reacting To Rape: Exploring Mock Jurors’ Assessments of Complainant Credibility’ (2009) 49 *British Journal of Criminology* 202; and Ellison Louise and Munro Vanessa ‘Turning Mirrors Into Windows? Assessing the Impact of (Mock) Juror Education in Rape Trials’ (2009b) 49 *British Journal of Criminology* 363. I note that recent amendments to the *Evidence Act 1995* (NSW) now allow such evidence of childhood development (including the impact of sexual abuse on children and their development and behaviour during and following sexual abuse) by excluding the operation of the opinion rule in relation to such specialised knowledge: see *Evidence Act 1995* (NSW) s 79(2).

¹³ See for instance the most recent report of the Department of Justice (Vic) 2011 as above at 7.

¹⁴ A line that Anne Summers convincingly documented many years ago in *Damned Whores and God’s Police: The Colonization of Women in Australia* Penguin Books England & New York 1975.

¹⁵ See for instance, Daly 2011 note 7 at 6.

¹⁶ See for instance Clark above note 7.

¹⁷ Pether Penny ‘What is Due to Others: Speaking and Signifying Subject(s) of Rape Law’ (2009) 18 *Griffith Law Review* 237 at 243.

field' (from Bourdieu), I suggest that making law reforms 'readable' in the courtroom is intimately tied to how practitioners repeat or practice the law and in turn that that is affected by what those subjects know about rape.

1.0 INTERPRETATIVE SCHEMAS AND LEGAL CATEGORIES: THE TRUE RAPE

... if we could further our understanding of what judges know, how they know it, how this shapes the construction of reality in judgments — that is, how judges 'orient' their narratives — how this is all affected by gender, then maybe things could change.¹⁸

There is (now) nothing new in raising the concern over the ineffectiveness of law reform to grapple with the complex set of issues surrounding sexual assault. Indeed, for many years there has been considerable re-evaluation of the progress that has been made by law reform in the area of sexual assault law.¹⁹ What has been increasingly recognised is that 'reforming' the law may *potentially* improve the situation of rape complainants, yet it relies precariously upon the *practices* of those laws.²⁰ For instance, in 1982, Adler — one of the early feminist proponents of law reform in the United Kingdom — suggested that the 'intentions' of those who initiated the amendments to English rape laws, are being circumvented by the practices of the law.²¹ These practices continue to use old methods of running a rape trial, in particular admitting sexual history evidence that is meant to be inadmissible under the new legislation. Adler's point here is that we cannot assume that the 'intentions' of law reformers will/can govern the 'practices' of the law.

¹⁸ Graycar Regina 'The gender of judgments: an Introduction' in Thornton Margaret (ed) *Public and Private: Feminist legal Debates* Oxford University Press Melbourne 1995 p 262 at 269.

¹⁹ The recent edited collection of work McGlynn and Munro above note 2, covering international jurisdictions from England and Wales to Sweden, Canada, US, Australia and South Africa, has once again questioned the effectiveness of law reform: see in particular, Part III 'National Perspectives'. See also Pether above note 17; ALRC Report 114 (above note 4 at [24.96] refers to this as the 'implementation gap'); Law Reform Commission (Vic) 2004 above note 5 at xxiv; Department For Women *Heroines of Fortitude: the experiences of women in court as victims of sexual assault* NSW Department for Women November 1996; Heenan Melanie and McKelvie Helen *The Crimes (Rape) Act 1991: An Evaluation Report* Rape Law Reform Evaluation Report No.2 Department of Justice Melbourne (1997); Law Reform Commission (Vic) *Sexual Offences: Interim Report* June 2003 at [4.4]; Naffine Ngaire and Heath Mary 'Men's Needs and Women's Desires: Feminist Dilemmas about rape law "Reform" 1994' 3 *Australian Feminist Law Journal* 30; Daly 2011 note 7; and Eastaer Patricia (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* Federation Press Sydney 1998

²⁰ McGlynn Clare 'Feminist activism and rape law reform in England and Wales: a Sisyphean struggle?' in McGlynn and Munro above note 2 p 139 at 144, 146; Gotell Lise 'Canadian sexual assault law: neoliberalism and the erosion of feminist-inspired law reforms' in McGlynn and Munro above note 2 p 209 at 214; Dripps Donald 'Rape, law and American society' in McGlynn and Munro above note 2 p 209 at 228; and Law Reform Commission (Vic) 2004 above note 5 at xxiv and 141–186 (ch 3 'Increasing the responsiveness of the criminal justice system').

²¹ See Adler Zsuzanna 'Rape — The Intention of Parliament and the Practice of the Courts' (1982) 45 *Modern Law Review* 664.

Adler's claims have been backed up by all major studies (past, recent and present) monitoring the (in)effectiveness of law reform.²² This work has shown that the possibilities of legislative reform are in particular tied to the way judicial officers and legal practitioners perform the law. In other words, 'uptake' of legislative change is governed by its repetitions; by the subjects engaged in the legal process, not necessarily by legislative 'intentions'. As Smart argued:

... the main dilemma for any feminist engagement with law reform is the certain knowledge that, once enacted, legislation is in the hands of individuals and agencies far removed from the values and politics of the women's movement.²³

Many of the major studies monitoring law reform in this area have commented on this issue. For instance, an early Victorian Law Reform Commission report stated:

The statute books are littered with provisions that have never been properly implemented because once the legislation was adopted; nobody bothered to make the necessary adjustments at the level of *organizational practice*. Another limitation of relying on legislation is that the legislative process is slow and *somewhat unpredictable*.²⁴

And more recently:

... reforming rape law feels like a Sisyphian task, with constant pressure leading to reforms, only to have such 'successes' neutralized in practice; the boulder falling back down the mountain.²⁵

To put it bluntly, changing 'the laws' (the body of rules about rape) — while an important and tangible goal — does not fix the problem. In the final part of this article I will explore this problem through the work of critical theory. What then is the current legal configuration of the offence of sexual assault in NSW?

1.1 The Legal Offence of Sexual Assault

Section 61I of the *Crimes Act 1900* (NSW) provides for the offence of sexual assault as follows:

Any person who has sexual intercourse with another person without the consent of the other person and who knows that the other person does not consent to the sexual intercourse is liable to imprisonment for 14 years.

²² For instance, attrition rates remain one of the key issues in this area: see the references above at notes 3, 4 and 10. See also Criminal Justice Sexual Offences Taskforce *Responding to Sexual Assault: The Way Forward* NSW Attorney General's Department December 2005 at 8–17; and for some of the older law reform reports see the references below in note 39.

²³ Smart Carol *Feminism and the Power of Law* Routledge London 1989 at 164.

²⁴ Law Reform Commission (Vic) *Rape: Reform of Law and Procedure* Interim Report No 42 July 1991 at 16, emphasis added.

²⁵ McGlynn above note 20 at 150.

To prove an offence under s 61I, the Crown must prove beyond reasonable doubt two *actus reus* elements: sexual intercourse²⁶ and that the sexual intercourse was without the complainant's consent.²⁷ The prosecution must also prove two correlating *mens rea* elements: that there was intent to have sexual intercourse (a matter usually not in issue) and that the accused knew that the complainant was not consenting.²⁸

In understanding what consent now means, the Legislature has removed the old legal requirement that a woman must resist to her utmost to demonstrate that the sexual intercourse was 'against her will'. Instead, an expressed definition of consent based on a communication model has been included in s 61HA(2):

A person **consents** to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse.²⁹

Furthermore, s 61HA(7) expressly removes the requirement for physical resistance:

A person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse.

The Legislature has also provided for certain procedural and evidentiary safeguards for sexual assault complainants — in particular, the old requirement for 'recent complaint' and the need for corroboration have been removed. Thus, where the issue of (absence or delay in) complaint is raised in a trial the trial judge must direct the jury that: this does not make the complaint false; there may be good reasons for an absence of, or delay in, making a complaint;³⁰ and that the jury should not use evidence of delay in complaining to evaluate the complainant's credibility 'unless there is sufficient evidence to justify such a warning.'³¹ The Legislature has also abolished the notorious mandatory corroboration warning.³²

While formally then these are the legal requirements for proving a sexual assault — together with the Legislature expressly removing a number of the old outmoded requirements such as recent complaint and corroboration — I will argue below that rape trials continue to be run around a series of older common law requirements which circumvent these legal reforms.

²⁶ Sexual intercourse being expansively defined in *Crimes Act 1900* (NSW) s 61H(1).

²⁷ Where consent is automatically negated by the matters set out in *Crimes Act 1900* (NSW) s 61HA(4)–(5) or may be negated by the matters set out in s 61HA(6).

²⁸ 'Knowledge' is deemed to be actual knowledge, recklessness (including both advertent and inadvertent) and that there were no reasonable grounds for believing that the person was consenting: *Crimes Act 1900* (NSW) s 61HA(3).

²⁹ In South Australia consent is also defined as 'freely and voluntarily agrees' (*Criminal Law Consolidation Act 1935* (SA) s 46(2)) and Victoria defines consent as 'free agreement' (*Crimes Act 1958* (Vic) s 36).

³⁰ *Criminal Procedure Act 1986* (NSW) s 294(2)(a)–(b).

³¹ *Criminal Procedure Act 1986* (NSW) s 294(2)(c).

³² See *Evidence Act 1995* (NSW) s 164 and *Criminal Procedure Act 1986* (NSW) s 294AA. There are a host of other procedural and evidentiary amendments that have been introduced into the *Criminal Procedure Act 1986* (NSW) including: 'rape shield' legislation providing for an absolute prohibition against the admission of sexual reputation evidence (s 293(2)) and protection for complainants against the admission of sexual experience evidence except for in certain specified circumstances (s 293(3)–(4)); provisions for alternative means of giving evidence (s 294B and, on re-trials see ss 306A–G); and a prohibition against an unrepresented accused cross-examining a complainant (see s 294A).

1.2 The Rape Schema

The old legal requirements I am referring to relate to: the location of the event; a focus on resistance (and, subsequently, the absence or presence of injuries); recent complaint; and the underlying assumption of the untrustworthiness of the complainant.³³ These legal requirements were developed when the law regulated quite different objectives (primarily marriage and property relations); their redeployment into the new crime of ‘rape’ during the seventeenth and eighteenth centuries, elides the patriarchal history in which they were produced.³⁴

To take one example, the old crime (dating from at least Roman laws, 100BC — 325 AD) of *raptus*, while often translated as rape, could involve abduction or elopement or indeed the stealing of non-living property.³⁵ The essence of the crime being movement, transportation or appropriation of property — that is, the *force* necessary to carry away a woman or thing to the detriment of the father’s, husband’s or owner’s property interests. In the modern crime of rape the notion of *force* is redeployed with respect to the overpowering of the woman’s will, giving rise to a requirement to ‘resist to the utmost’ and as a result to demonstrate physical injury.³⁶

These older requirements from the property and marriage laws were redeployed into the new crime of rape during the seventeenth and eighteenth centuries yet there was no analysis of whether they were even relevant to the new sexual crime of rape. Since the 1960s a series of ‘governmental discourses’³⁷ (sociologists, feminists, statisticians, medicine³⁸ etc) have contested

³³ I note that Susan Estrich in her early influential work, described similar characteristics in the social imagining of what she coined ‘real rape’: see Estrich Susan *Real Rape* Harvard University Press Cambridge 1987.

³⁴ For a discussion of the development of these legal requirements from their origins in marriage and property laws see Julia Quilter *Re-Inventing Rape: An Analysis of Legal, Medical, Feminist and Governmental Discourses* (PhD thesis, Monash University, 1999) see in particular chapters 2 (‘An historical story of the laws’) and 3 (‘the “perverse” female rape complainant’).

³⁵ See for instance: Westminster I 1275 (UK) 3 Edward I, Cap XIII; Westminster I 1275 (UK) 3 Edward I, Cap XIII; Westminster 1382 (UK) 6 Richard II, Cap VI; 1487 Act (UK) 3 Henry VII, Cap II; 1557 Act (UK) 4 & 5 Phillip and Mary, Cap VIII.

³⁶ While there were no new laws on the subject passed during the seventeenth and eighteenth centuries a number of important legal commentaries written during this time began to re-shape and re-define the offence. It is in these commentaries that the crime of ‘raptus’ comes to be understood as a sexual offence of having ‘carnall [sic] knowledge of a woman by force and against her will’: Coke Sir Edward *First Part of the Institutes of the Laws of England* Vol 1 (1628) Reprinted ed Garland Publishing New York 1979 at sect. 190. See also Hale Sir Matthew *Historia Placitorum Coronae* Vol 1 (1736) Glazebrook PR ed Professional Books London (1971) at ch LVII; and East Edward Hyde *Pleas of the Crown* vol 1 (1803) Glazebrook PR ed Professional Books Ltd Abingdon Oxon reprint (1987) at p 434. See also Quilter above note 34 at 124–138.

³⁷ ‘Governmentality’ is a term I take from the work of Michel Foucault. Foucault argues that governmental power involves tactics aimed at regulating populations (rather than individuals), around a ‘norm’ or average. This is chiefly accomplished through the provision of statistics. See Foucault Michel ‘Governmentality’ in Burchel Graham, Gordon Colin and Miller Peter eds *The Foucault Effect: Studies in Governmentality* University of Chicago Press Chicago 1991 p 87 at 96.

³⁸ There is an enormous amount of literature dating from the 1960s that contests the old visions of rape, see for instance: Everett Royce and Jimmerson Gordon ‘The Rape Victim: A Review of 117 Consecutive Cases’ (1977) 50 *Obstetrics and Gynecology* 88; Amir Menchamen *Patterns of Forcible Rape* University of Chicago Press Chicago 1971; Schiff Arthur ‘Statistical Features of Rape’ (1969) 14 *Journal of Forensic Sciences* 102; Russell Diana *The Politics of Rape: The Victim’s Perspective* Stein & Day New York 1975; Susan Brownmiller *Against Our Will: Men, Women and Rape* Penguin Books New York 1975; Russell Diana *Sexual Exploitation: Rape, Child Sexual Abuse and Workplace Harassment* SAGE California 1984; Estrich Susan *Real Rape* Harvard University Press Cambridge 1987; Clark Lorenne and Lewis Debra *Rape: the price of coercive sexuality* Women’s Press Toronto 1977; and Schwendinger Herman and Schwendinger Julia *Rape and Inequality* Sage California 1983. For a fuller

these visions, including significant law reforms (mentioned above) that have made these requirements redundant. The literature in the area is vast and convincing³⁹ yet such changes have had little effect in altering courtroom practices.

These requirements may be said to form what Dorothy Smith has called an ‘interpretative schema’:

An interpretative schema is used to assemble and provide coherence for an array of particulars as an account of what actually happened; the particulars, thus selected and assembled, will intend, and will be interpretable by, the schema used to assemble them. The effect is peculiarly circular, for although questions of truth and falsity, accuracy and inaccuracy about the particulars may certainly be raised, the schema itself is not called into question as a method of providing for the coherence of the collection of particulars as a whole.⁴⁰

The interpretative schema then leads to the inclusion of certain things and the exclusion of other material that does not conform to the requirements of the ‘schema’. The ‘schema’ in turn, structures how the ‘reader’ will ‘interpret’ the situation meaning that the institutional features (the schema) will itself be reproduced through the interpretation. The power of the schema to be re-consolidated lies in its ability to subsume the specificities of any particular event, in effect erasing other information relevant to the uniqueness of the situation through which the possibilities of another narrative might be created. As Smith says:

The institutional language is capable of subsuming and claiming an indefinite variety of actual sequences of action, transforming the indeterminate into the determinate, producing

account of this literature and the shift that occurs at this time see Quilter above note 34, chapter 4 (‘Re-envisioning rape: governmental resistances? (1960–1990)’).

³⁹ In addition to more recent law reform reports mentioned previously, see the early reports in NSW and Victoria such as: West D ‘Rape Offences’ Statistical Report 21 NSW Bureau of Crime Statistics and Research 1974; Bonney Roseanne *Crimes (Sexual Assault) Amendment Act 1981 Monitoring and Evaluation, Interim Report No 1 — Characteristics of the Complainant, the Defendant and the Offences* NSW Bureau of Crime Statistics and Research September 1985; Bonney Roseanne *Crimes (Sexual Assault) Amendment Act 1981 Monitoring and Evaluation, Interim Report No 2: Sexual Assault — Court Outcomes: Acquittals Convictions and Sentences* NSW Bureau of Crime Statistics and Research November 1985b; Bonney Roseanne *Crimes (Sexual Assault) Amendment Act 1981 Monitoring and Evaluation, Interim Report No 3: Court Procedures* NSW Bureau of Crime Statistics and Research January 1987; Law Reform Commission (Vic) *Rape and Allied Offences: Substantive Aspects* Discussion Paper No 2 August 1986; Law Reform Commission (Vic) *Rape and Allied Offences: Procedures and Evidence* Discussion Paper No 5 March 1987; Law Reform Commission (Vic) *Rape and Allied Offences: Substantive Aspects* Report No 7 June 1987; Law Reform Commission (Vic) *Rape and Allied Offences: Procedures and Evidence* Report No 13 March 1988; Law Reform Commission (Vic) *Rape: Reform of Law and Procedure* Report No 42 July 1991; Law Reform Commission (Vic) *Rape: Reform of Law and Procedure* Report No 43 Sept 1991; Law Reform Commission (Vic) *Rape: Reform of Law and Procedure, Supplementary Issues* Report No 46 July 1992; and Heenan Melanie and McKelvie Helen *The Crimes (Rape) Act 1991: An Evaluation Report* Rape Law Reform Evaluation Report No 2 Department of Justice Melbourne 1997.

⁴⁰ Smith Dorothy *Texts, Facts and Femininity: Exploring the Relations of Ruling* Routledge London 1990 at p 139. It is noted that in a sense the argument that follows goes beyond Smith’s argument, since Smith assumes that actors (such as judges, barristers etc in this context) are governed by ‘the text’ and will perform in compliance with the requirements of the text. By contrast, the argument that follows indicates that lawyers and judges tasked with interpreting and applying s 61HA of the *Crimes Act 1900* (NSW) in a sense either disregard s 61HA and/or are overwhelmed by the historical ‘interpretative schema’ that will be discussed below.

them as typical organizational events. Their distinctive local historical character disappears and information relevant to the selection of *alternative interpretative schema* is no longer available.⁴¹

In line with these arguments, I will argue that the particular ‘legal requirements’ form a schema through which rape trials are run. These requirements have a highly sedimented history. This means that even where legislative reforms are introduced they are in a sense ‘unreadable’ as they are circumvented and co-opted back into the ‘old story’, to the detriment of the female rape complainant. The schema or requirements enable certain information to be validated as relevant whilst other issues are deemed irrelevant. It should also be noted that those deemed relevant by the schema have no basis in the current legislative requirements for the offence and, indeed, in many respects are contrary to them. In turn, the requirements of the schema structure the judge/jurors⁴² interpretation into a ‘logical’ series of conclusions steps that might be represented in the following formula:

The location was (not) remote	+	
There was (no) physical injury	+	
She did (not) recently complain of rape	+	
She was (not) of ‘good fame’		= she is (un)believable; she had sex/she was raped.

The adversarial context in which rape trials are run means that both the prosecution and defence argue reverse sides of the same coin; what they both accept is the schema itself. This means that the ‘schema’ is left intact, in turn consolidating these visions of rape as ‘correct’ and to the exclusion of other narratives or visions.⁴³

In the next part of this article I analyse a rape trial, demonstrating how this schema is put into practice. In doing so, I draw attention to the way this schema constructs the legal category of rape, remembering the texts from which it emanates, in an attempt to disrupt its claims to cohesion and in order to begin to tell the story ‘differently’ — indeed, to allow current law reforms to be ‘heard’.

⁴¹ As above at 154, emphasis added.

⁴² A number of recent studies have demonstrated the tenacity of these requirements in affecting juror deliberations. In particular, studies with mock-jurors indicate jurors are poorly informed about issues such as: typical victim reactions to rape; the absence of physical injuries following a rape; and delayed reporting: see Ellison and Munro above note 12.

⁴³ This work has an overlap with that of Gregory Matoesia, however, he is more concerned with the linguistic devices and poetics of discourse in the social construction of rape’s legal facticity, than the schematic requirements that I argue come to construct the rape trial. See particularly, Matoesian Gregory *Law and the Language of Identity: discourse in the William Kennedy Smith rape trial* Oxford University Press Oxford & New York 2001 and *Reproducing Rape: Domination through Talk in the Courtroom* Polity Press Cambridge 1993.

2.0 THE LAW IN PRACTICE: AN ANALYSIS OF A RAPE TRIAL

In this part of the article I will focus on one trial in particular⁴⁴ to demonstrate the operation of the rape schema in the courtroom.⁴⁵ The case revolved around events occurring at a work Christmas party. The complainant [Kate Robson] and the defendant [Shayne Cusack] both worked together. She was a 19 year old sales secretary and director's assistant and he was a 30 year old Production Officer, under whom Robson worked. The prosecution alleged that the defendant had forced sexual intercourse with the complainant in an engineering room at the work Christmas party. The defendant pleaded not guilty. There were two trials: the first ended in a hung jury, while in the second, the defendant was found guilty. I focus here on the first trial.

2.1 *The Location of the Offence*

As discussed above, prior to the seventeenth century the commission of an offence (and the kind of punishments that were to result) depended on a series of acts being established — what I call above legal requirements. One of the oldest of these requirements was the location of the event. Under the laws of Moses whether a woman who was found lying with a man was to be punished with the man, depended on where the events took place:

If a damsel *that* is a virgin be betrothed unto an husband, and a man find her in the city, and lie with her. They ye shall bring them both out unto the gate of that city, and ye shall stone them with stones that they die; the damsel, because she cried not, *being* in the city; and the man, because he hath humbled his neighbour's wife: so thou shalt put away evil from among you. But if a man find a betrothed damsel in the field, and the man force her, and lie with her; then the man only that lay with her shall die.⁴⁶

In other words, if the location of the event was 'remote' (outside the city walls) she was not to be punished; if it was inside the city walls, she was guilty and to be punished with the man.

In the seventeenth and eighteenth centuries these old requirements were redeployed in order to test the complainant's credibility: is she true or false? The location of the event and whether the woman 'cried out' were utilised to determine whether the woman was telling the truth. Thus, the following legal commentators state:

...but the credibility of her testimony, and how far forth she is to be believed... is more or less credible according to the circumstances...if the place, wherein the fact was done, was

⁴⁴ In the research that informs this article, I watched a number of sexual assault trials. This trial was chosen as the focus for the article in part because it demonstrates many of the features we now know to be 'true' of rape: the offender and victim are usually known to each other; it does not occur in a remote or unknown location; and there were few physical injuries associated with the offence.

⁴⁵ In accordance with the access rights I was granted in relation to this trial and the transcript (to maintain the privacy of the complainant, accused or any other party related to the proceedings), the names used here are fictitious as are all others indicated in square brackets. After an initial citation in brackets, the fictitious names will be subsequently used in the body of the text.

⁴⁶ Deuteronomy: XXII, 23–25. *Holy Bible*, King James authorised version, 1611.

remote from people, inhabitants or passengers ... But on the other side...if the place, where the fact was supposed to be committed, were near to inhabitants or common recourse of passengers, and she made no outcry when the fact was supposed to be done, and when and where it was probable she might be heard by others; these and the like circumstances carry a strong presumption, that her testimony is false and feigned.⁴⁷

...if the place, where the fact was alleged to be committed, was where it was possible she might have been heard, and she made no outcry: these and the like circumstances carry a strong presumption, that her testimony is false and feigned.⁴⁸

And these rules have been laid down as guides to the discovery of the truth...if the place where the fact was done were remote from inhabitants or passengers; ... these and the like are concurring circumstances which give greater probability to her evidence. On the other hand ... if the place where the fact was supposed to be committed were near to persons by whom it was probable she might have been heard, and yet she made no outcry ... these and the like circumstances afford strong, though not conclusive presumptions that her testimony is feigned.⁴⁹

In other words, the vicinity in which the crime was said to occur has an incredibly tenacious history of determining whether the woman's story is to be believed. Like the Biblical laws, the remoteness of the location was indicative of the woman's guilt/innocence. The logic is that if the event took place in an area populated with people, the woman would 'cry out', subsequently being heard by passers-by who would then 'rescue her'. The twenty-first century manifestation of this is the myth of the 'stranger' rapist attacking in dark alleys or isolated places.

Yet all recent studies demonstrate that rape can occur *anywhere* and commonly occurs in the home by someone known to the complainant.⁵⁰ Furthermore, these studies demonstrate that the most common reaction to rape is to submit in fear rather than struggling or 'crying out'. In spite of the conclusive nature of these studies, the common law practices repeated in courtrooms (by both prosecution and defence), and to the exclusion of this other narrative, continue to emphasise the importance of location.⁵¹

In the Cusack trial, defence counsel consistently attempted to establish that the location of the sexual assault — the engineering room — was close to many other party goers.⁵² The location was said to be both near the men's toilets and that the external aspect of the room was close to

⁴⁷ Hale above note 36 at p 633.

⁴⁸ Blackstone Sir William *Commentaries on the Laws of England* Vol IV (1765) Garland Publishing New York 1978 p 214.

⁴⁹ East above note 36 at 445–6.

⁵⁰ See for instance ABS 2004 above note 3 at 28, 46–7 (offender known to victim), 28–30 (home most commonly reported location of sexual assault). Older studies also indicate a similar finding: see for instance Bonney 1985, 1985b and 1987 above note 39; VLRC 1991 and 1992 above note 39 and Heenan and McKelvie 1997 above note 39; and Brenda Brown's early statistical analysis in 1973 cited in Brownmiller above note 42 at 185.

⁵¹ It is also clear from work done with mock-juries that these myths continue to inform their deliberations: see note 37 above.

⁵² It is noted that this section on the 'location' of the event is closely related to the section on 'recent complaint' below (and also to that on resistance dealt with under 'physical injuries'). As is discussed below, the rhetorical force of the defence argument is compounded by the apparent 'failure' of the complainant to 'cry out' during the offence given that the location is said to be close to the other party goers — that is, it was not remote.

the marquee where the main part of the party was being held and that the corridor leading to the engineering room was crowded. In other words, to establish proximity. In order to establish this proximity, the defence first, led photographs and a video which depicted the proximity of the engineering room to the men's toilets and then evidence that these toilets were in frequent use and that the corridor leading to them was very crowded. For instance, the accused said that when the complainant and he had walked down to the photocopying room (the room adjoining the engineering room), they 'had to dodge the people' in the corridor and those waiting to use the men's toilets.⁵³

The defence cross-examined the complainant in the following terms:

Q. And isn't it the case that during the course of the evening there were many, many people indeed walking up and down or talking, standing still and talking in the corridor?

A. Yes.

Q. So that if at any point of time you wanted to walk along the corridor, say from the commencement where you walk in to using the toilet facilities, you wouldn't expect a free pedestrian flow, you would have to say excuse me to a few people, isn't that right?

A. No it wasn't that busy.⁵⁴

...

Q. See, isn't it the case that people were up and down the hallway?

A. No

Q. Congregating and exchanging conversation and drinking?

A. Not in the corridor, no.⁵⁵

The aim is obviously to establish that there were many people close to where the rape occurred: it was not remote and hence why did she not call out.

Defence counsel then argued that the engineering room was close to the main area where the party was being held. This was demonstrated by showing photographs to the complainant of the external aspect of the engineering room which depicted it as near to the marquee area (where the main part of the party was taking place). Furthermore, the photographs showed an exit door leading from the engineering room out to where the marquee was, a window from which the party could have been visualized and that there was a light (which was said to always be on at night) outside the room. Defence counsel then cross-examined the complainant as she looked at the photographs depicting these things:

Q. I think you've already agreed with me, but just for the sake of prudence, as you walk out of the door you can see how far you have to walk to the corner, it's only a couple of paces isn't it?

⁵³ Accused examination-in-chief, Transcript at 234–235.

⁵⁴ Complainant cross-examination, Transcript at 27.

⁵⁵ Complainant cross-examination, Transcript at 101.

A. Yes

Q. And then towards the centre of the building that's where a lot of activity was up right until the end of the evening?

A. Yes

Q. So you were literally so to speak within a few paces of gaining or obtaining, if you so chose to do, an exit from that room which would have led you out into the area where the fellow party goers were?

A. Yes⁵⁶

It is a small step now in this logic, to ask why she did not 'cry out' during the alleged events:

Q. Well I suppose at this stage things are getting pretty desperate in your mind? [at this point the complainant has said that she had been pushed onto her knees in the engineering room]

A. Yes.

Q. Did it occur to you to scream or something like that?

A. No.

Q. You knew there were a lot of people about?

A. Yes

Q. You knew you were just a wall away from the outside area?

A. Yes

Q. And just up from the marquee where all the other party goers were?

A. Yes⁵⁷

The defence cross-examination, having established the proximity of the location to the other people at the party and then the failure of the complainant to cry out, cites almost exactly the Biblical and eighteenth century laws cited above. It is a stock story or logic designed to make the complainant seem false.

The story that emerged from the prosecution was the inverse of this narrative with the prosecution attempting to establish that the location of the rape was deserted and was 'remote'. Thus, all four female witnesses gave testimony that they did not have to wait to use the amenities and that the corridors were not crowded, indeed, that they were literally empty. Much emphasis was also placed on the complainant never previously having been inside the engineering room. This was backed up by the other witnesses, who testified that they had either never been into the engineering room or that they barely knew what the room was. On this narrative, not only is the location secluded, and uninhabited but it was also 'foreign' to all the women who worked at the station who testified in the trial. Thus, the prosecution establishes that the engineering room *was* a

⁵⁶ Complainant cross-examination, Transcript at 96.

⁵⁷ Complainant cross-examination, Transcript at 79.

‘remote’ location and that there were no ‘inhabitants’ or people passing by — the implication is that the complaint is ‘true’.

Both arguments are locked within the adversarial paradigm which necessitates establishing the inverse of the others argument: the location was remote; no, the location was near. Both the prosecution and defence assume the value that location should play in discovering the true from the false rape. Yet all recent studies demonstrate that rape is something that can happen anywhere, anytime, and typically happens in the home.⁵⁸ The assumption that location is indicative of the true rape elides the exclusionary history of how this requirement developed and it is repeated simply as the truth. The prosecution and defence arguments *repeat* this narrative as if it simply were the truth, implying that it is ‘common sense’ that danger (to women) resides in certain (remote) locations but not in others, and that on this basis we can establish the true from the false woman. It is a stock-story which may be adapted to the particular events at hand regardless of the specificities of the case. Yet what is excluded by these assumptions or the focus on location?

A very different story seeps through the cracks of cross-examination from the complainant. This is a story about a social event — an end of year work Christmas party — at which friends mingle, have party conversation and generally interact socially. The narratives of ‘danger’ and particularly those associated with (remote) locations, told by prosecution and defence are far from the complainant’s mind. While defence counsel constantly attempts to imply that there must be a ‘logic’ to the complaint’s conversations and movements during the evening, what emerges is a picture of a social gathering and social ‘mingling’ that is relaxed and does not ‘code’ certain behavior with ‘danger’. Note for instance, the complainant’s answers to the following questions:

Q. Why? [did you turn around and walk with the accused]

A. We were talking. I did that with a lot of friends that night, I’d talked to a lot of people.

Q. What were you talking about?

A. I was walking outside at one stage, I’d been to the bar, somebody started talking to me and they were going to the bar, so I walked with them to the bar. It’s not something you consciously think about.⁵⁹

Q. You were quite happy to go along with him, turn in the other direction and engage in a conversation?

A. Yes. I didn’t suspect anything was going to happen.⁶⁰

Q. And did you say ‘Why are you going in here?’

A. No, we were talking, I just didn’t think to ask.⁶¹

⁵⁸ See above note 50.

⁵⁹ Complainant cross-examination, Transcript at 52.

⁶⁰ Complainant cross-examination, Transcript at 58.

⁶¹ Complainant cross-examination, Transcript at 66.

The prosecution does not attempt to build the case around the (often unconscious) codes of social interaction at parties. It does not attempt to focus on the party as an event with modes of behavior perhaps remote from other situations. The mood described in these few extracts from the cross-examination of the complainant, suggests that the participants were generally at ease with each other, unsuspecting of motives or behavior and by and large were ‘acting’ without consciously needing to think about any constraining factors. In other words, this is a Christmas party among colleagues. Instead, the parameters of the prosecution and defence case are confined to issues of the location of the engineering room which are deemed — because of their repeated history — relevant considerations. This produces a scene of judgment over the truth or falsity of the complainant on the basis of whether the location was far away and she cried out, or whether it was ‘close’ and she did not cry out. It is a stock narrative which strips the events of their specificity, and it is endlessly repeated as if it simply were the truth.

2.2 Physical Injury

... soon after the deed is done, [the woman should go] to the nearest vill and there show to trustworthy men the injury done to her, and any effusion of blood there may be and any tearing of her clothes.⁶²

She must go at once and while the deed is newly done, with the hue and cry, to the neighbouring townships and there show the injury done her to men of good repute, the blood and her clothing stained with blood, and her torn garments ...⁶³

[she should] shew ... circumstances and signs of injury ...⁶⁴

... if she showed circumstances and signs of the injury ...⁶⁵

... and therefore in a true charge, we should expect to find not only marks of violence about the pudendum, but also injuries of greater or less extent about the body and extremities.⁶⁶

61HA Consent in relation to sexual assault offences

...

(2) Meaning of consent

A person **consents** to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse.

...

⁶² Glanvil William *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvil* c. 1170 Hall George Derek Gordon (ed) Nelson London 1965 p 175.

⁶³ Bracton Henry *Bracton on the Laws and Customs of England* Vol 2 (1268) Thorne Samuel (trans) Harvard University Press Cambridge Mass 1968 p 415.

⁶⁴ Hale above note 36 at 633.

⁶⁵ East above note 36 at 445.

⁶⁶ Taylor Alfred Swaine *Medical Jurisprudence* (5th ed) John Churchill London 1854 at 648 — 649.

(7) A person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse.⁶⁷

As the above citations indicate, there is a long legal history of assuming that rape has identifiable physical signs. There is a long history of assuming that the 'true' rape may be demonstrated through evidence of physical injuries, or, more commonly that the absence of injuries indicated the falsity of the complaint. During the past three decades, however, there has been a shift in medico-legal and governmental texts, recognising that severe physical injuries from rape are atypical.⁶⁸ These findings have been complemented by legislative reforms which have shifted the emphasis of the crime from notions of force ('against the woman's will') towards a communicative model of 'consent', with many jurisdictions expressly defining consent as free and voluntary agreement and providing that a woman who does not physically resist an assault is not thereby taken to consent to intercourse. In spite of all these studies and reforms I will argue that the true rape continues to be constructed in courtrooms as an act that has physically identifiable signs. While this picture reflects a very bleak scenario for the rape complainant, I note that medical attitudes have begun to change as reflected by Dr Tiernan's attitudes in the Cusack case.

Dr Tiernan, a female obstetrician and gynaecological Registrar, called by the prosecution in the Cusack case, reflected a sensitive and progressive attitude to the complainant. For instance, Dr Tiernan in several places set out the role of the doctor in the following terms:

As I said before, we have to deal with these cases with quite a degree of compassion so we actually sit with the person for a long time and allow them to actually just relate the events, and the events actually come out in a very haphazard way, obviously because people are emotionally distressed, and then we clarify to try to get some sort of continuation, to make a record of the event...⁶⁹

I would like to say here that the main purpose of our examination is to make sure the patients are not injured in any way and to detail and gain necessary swabs for forensic evidence.⁷⁰

Dr Tiernan is neither skeptical of, nor antagonistic towards, the complainant; instead, she is a compassionate listener recognising the distress of the woman and attending to her medical needs while also collecting evidence for legal proceedings.

In relation to the medical evidence given at the trial, Dr Tiernan appeared to be quite hostile to defence counsel, insisting at all times that the medical examination was consistent with the complainant's story. For example, when asked in cross-examination:

Q. The area where you have indicated there is a bruise, that is the bruise to the hypothenar eminence, beneath the thumb of the left hand, that is not the wrist [ie where the complainant had said she was forcibly held], is it?

⁶⁷ *Crimes Act 1900* (NSW) s 61HA

⁶⁸ For instance see ABS Report (2004) above note 3 at 68. See also Bonney 1985 above note 39; LRCV No 42 above note 39; Heenan and McKelvie 1997 above note 39; and Amir above note 38.

⁶⁹ Dr Tiernan examination-in-chief, Transcript at 13.

⁷⁰ Dr Tiernan cross-examination, Transcript at 137.

Dr Tiernan responded:

A. That is correct. But I believe that that bruising is consistent with the details of the injury, the assault.⁷¹

In answer to the following question, ‘Would you expect doctor for there to be some damage to the wrists simpliciter, the actual wrists?’ — a question which was attempting to distinguish between the bruise found on the muscle part of the thumb and the lack of injuries on the wrist — Dr Tiernan answered:

A. There was actual bruising on the hand.⁷²

While Dr Tiernan was helpful to the prosecution case and displayed a very sympathetic attitude in the way she spoke of examining female rape complainants, the content of her testimony remained within the old assumptions about rape. That is, Dr Tiernan argues in the examples cited above that the complainant did display certain physical injuries that could be consistent with the charge of sexual assault. As mentioned above, the defence argues the reverse side of the coin. Namely, that the physical findings were inconsistent with the complainant’s story. In particular, the defence at length compared the (lack of) physical findings with the complainant’s story, in order to suggest that there was an inconsistency between complaint and physical examination subsequently ‘proving’ that the complainant’s story was actually false.

We can see defence practising these strategies in the cross-examination of the medical witness. Defence counsel spends a long time quoting from the transcript of the complainant’s account of the assault during the cross-examination of the doctor, emphasising the *physical* violence involved: how she had been ‘grabbed’ by the wrists, her struggling with the accused to get out of his grip, how she had been ‘flung ... around by my left wrist which was twisted up into my back and pushed’ into the adjacent room, how she had been forced face down on the bench, held there and raped.⁷³ After reading this narrative to Dr Tiernan, the defence asked a series of questions which assert that certain injuries would be *expected* to follow as a result of such actions. The intention is obviously to display the apparently ‘objective’ inconsistency between the physical findings and the expectations provoked by the questions. For instance:

Q. ...there are bones in the inner portion of the wrists that I’m indicating on my own wrists are there not?

A. Yes there are. Two to be exact.

Q. Are they easily broken by the application of such pressure?⁷⁴

⁷¹ Dr Tiernan cross-examination, Transcript at 136–137.

⁷² Dr Tiernan cross-examination, Transcript at 140.

⁷³ Dr Tiernan cross-examination, Transcript at 137–139.

⁷⁴ Dr Tiernan cross-examination, Transcript at 137.

Q. Would you not expect doctor for there to be some damage to her wrists simpliciter, the actual wrists?⁷⁵

Q. The manner in which she has described her arm being forced up into her back, could that cause damage to her shoulder?

...

Q. Well this young nineteen year old had good muscle control which could withstand being flung around like a rag doll?

A. There was no damage or injury to her shoulder.

Q. No, could acromioclavicular injury be caused in such a manner?

A. Yes, they are often caused by falling directly onto your shoulder or by throwing objects as well.

...

Q. What about rotator cuff injury doctor, what is a classic way such an injury is caused?

A. A twisting injury to the shoulder.

Q. A twisting injury to the shoulder. Damage is caused to the ligaments of the shoulder when that happens is that the case?

A. That is correct.

Q. And did she complain of an injury or soreness to her shoulder, either shoulder, in particular her left shoulder?

A. She did not.⁷⁶

Q. [After re-reading extracts from the transcript about the pressure to the wrists] What is required to break the bones, or at least to leave heavy bruising, what is required?⁷⁷

The 'logic' at work here is to emphasise the physical force utilised in the events as narrated by the complainant, in order to set up an expectation that severe physical injuries would be discovered by the doctor. These 'expectations' are then compared with the (lack of) physical findings actually documented. The hiatus between these 'expectations' and the findings — indeed, the 'normality' the doctor subsequently finds — is designed to draw upon the jury's 'common sense' — guided by 'science' — that the events as alleged could not, therefore, have occurred.

Ironically, this is aided by the Adult Sexual Assault Protocol — the legal document doctors must complete after examining a sexual assault victim. Ironically, since the Protocol was originally designed to overcome the common problem of doctors performing inadequate examinations and taking insufficient notes for legal proceedings. The Protocol involves the doctor filling out a standard booklet in relation to the physical examination, in which parts of the body can be

⁷⁵ Dr Tiernan cross-examination, Transcript at 140.

⁷⁶ Dr Tiernan cross-examination, Transcript at 140.

⁷⁷ Dr Tiernan cross-examination, Transcript at 144.

classified as either ‘normal’ or ‘abnormal’. Where a part of the body is found to be ‘abnormal’, all findings are to be detailed indicating the size, colour, exact location and the nature of all findings using the charts (being of the head and neck; body; hands and feet; and genitalia) provided.⁷⁸ The binary between normal and abnormal accentuates the *typical* finding of few to no injuries since the binary produces a simplistic classification which suggests there was ‘nothing’ wrong or ‘everything’ wrong: the complainant is either ‘normal’ (and hence no rape occurred) or abnormal (that is, raped). In turn, the Protocol provides the defence with a medically verified document that can be read out in court which designates the complainant, often in almost every area of the body examined, ‘normal’. In other words, reflecting how ‘reforms’ may be co-opted back into the old stock story or rape schema.

In the Cusack case, the defence constantly utilised the Protocol in this way. Before asking the series of questions cited above, defence quoted from the Doctor’s completed Protocol where she had found ‘normal’ mouth, throat and head. Defence counsel then continued reading from the document, ‘feet normal, legs normal, thorax anterior normal’⁷⁹, normal back examination (in spite of the complainant’s narrative of having her arm twisted into her back), ‘abdomen, the anterior and posterior and the buttocks all marked normal’⁸⁰. Turning to the genital examination, the doctor reinforces the ‘normality’ of the findings in the following sequence of questions to the doctor:

Q. And her actual vagina was there any complaint made by her as to soreness or tenderness?

A. I am sure there was but there was no actual injury to the area.

Q. If the subject had said she was terror stricken and that she had used her vaginal muscles, clenched them so as not to facilitate entry on the part of the alleged assailant, and there had been entry, would you expect there to be visible evidence of that trauma?

A. Not necessarily no.

Q. Is that area easily susceptible to redness, that is overt evidence of trauma caused by an erect penis attempting to enter uninvited?

A. Obviously bruising can occur in that area, as can lacerations, that is not invariably so in cases that you suggest where intercourse is uninvited.

Q. Did she tell you that her assailant held her head down by the application of force.

A. Yes.⁸¹

Defence then moves on to the findings of the head examination:

Q. Did you examine the scalp region or the upper part of her neck to see whether there was any bruising or red marks?

⁷⁸ Inquiries made to the Wollongong Sexual Assault Service indicate that this Protocol is to be revised in the near future.

⁷⁹ Dr Tiernan cross-examination, Transcript at 140.

⁸⁰ Dr Tiernan cross-examination, Transcript at 141.

⁸¹ Dr Tiernan cross-examination, Transcript at 140–141.

A. Yes I did and also the face which was against the desk.

Q. Yes indeed, and was there any visible evidence of redness or physical evidence of that having happened?

A. No there was not.

Q. And that is something you would have been looking for?

A. Yes that is why I would take the history so we would know what injuries to expect.⁸²

Finally, the clothing was found to be untoned, that is, 'normal'.

In this sequence, the defence emphasise the physical nature of the attack by citing the complainant's evidence from the transcript. He then forces a comparison between this narrative and the lack of physical findings. The 'expected' injuries from the 'history' are nowhere to be found, and the complainant does not 'display' the marks traditionally associated with a sexual assault but is instead 'normal'. The only (abnormal) findings were a small bruise on the left muscular pad of the thumb and three scratches on the inner right arm. The defence described these as 'trivial' and hardly reflecting the violence of an assault as described by the complainant. Indeed, defence counsel suggests in his final address to the jury, that these minor marks could have been obtained by another means (such as a sports injury) or inflicted by herself:

It was a terrible physical assault, which filled her with tears and terror ... wouldn't you think her arm would be very sore indeed — and we've seen the carpet where her head was held down, and yet no indentations or marks to her face ... surely she'd be sore all over. I call upon your application of common sense, wouldn't there be more evidence of injury if the story as Ms Robson relates were true? ... And at the end of the day we have three marks and a bruise ... Where did the scratches come from? She had not been asked whether they were from a sports injury, since we know she played netball. Or what of from herself?⁸³

Particularly in the defence case, the old assumption that physical injuries are indicative of whether a rape has or has not occurred, are reproduced at large in the courtroom practices. This is in spite of the fact that the absence of injury is actually the 'norm' for sexual assault, and furthermore unlike earlier laws, no law today in Australia requires a woman to 'resist to her utmost'. In fact, most statutes explicitly state that the woman does not have to physically resist in order to prove non-consent.⁸⁴

Once again, we see that the practices of the law reproduce the old common law assumptions of what a true rape is assumed to be. This is of particular significance given that studies have consistently demonstrated that the presence of physical injuries continues to be a

⁸² Dr Tiernan cross-examination, Transcript at 142, emphasis added.

⁸³ Defence Counsel, final address, Cusack trial.

⁸⁴ See *Crimes Act 1900* (NSW) s 61HA(7) and *Crimes Act 1958* (Vic) s 36.

significant determinant in jury decision-making.⁸⁵ It is often difficult to get a conviction for rape in the absence of evidence that the complainant has suffered physical injuries.⁸⁶

While recent rape law reforms have altered how we are meant to understand ‘consent’ together with the fact that studies demonstrate that women rarely sustain physical injuries after a sexual assault, juries are faced with a series of courtroom practises that continue to produce a story which focuses on the absence or presence of physical injury. It then seems hardly surprising that they respond in the way the ‘interpretative schema’ directs.

Furthermore, the focus on physical injuries once again confines the parameters of what evidence is viewed as *relevant* and subsequently what narratives are told in the courtroom. Yet nowhere in the trial did the complainant state that *physical injury*, as a result of the rape, was central to her experience of violation. I underline physical injuries, since the ‘pain’, ‘discomfort’ and ‘hurt’ the complainant described in answer to cross-examination questions about the rape⁸⁷, do not necessarily translate into physical injuries as identifiable by a doctor’s examination. No one knows how to ‘quantify’ individual ‘pain’ which may be any combination of psychological, physical or other. Nowhere in the court story is the complainant able to describe how she ‘felt’ after the events. As will be discussed below in the section on ‘recent complaint’, some information seeps through the cross-examination questions, suggesting that the complainant was in shock, embarrassed, upset, distressed and confused. Yet nowhere is she given the opportunity to tell this story. There is no account of the effects of these events on the complainant’s life, how she has changed jobs as a result of the rape and moved interstate. The nature of the interpretative schema, which focuses on the location of the event, physical injury and recent complaint, means that these other issues are sidelined and deemed to be (legally) ‘irrelevant’.

2.3 Recent Complaint

The focus on whether the woman ‘cried out’ was formalised into a requirement that she must directly ‘raise the hue and cry’. In the twelfth century for instance, Glanvil stated that in order for rape to be proved the woman:

...must go, soon after the deed is done [the rape], to the nearest vill and there show to trustworthy men the injury done to her, and any effusion of blood there may be and any tearing of her clothes. She should then do the same to the reeve of the county court...⁸⁸

A century later Bracton, elaborated on this requirement:

She must go at once and while the deed is newly done, with the hue and cry, to the neighbouring townships...⁸⁹

⁸⁵ See Bonney 1985b above note 39 at 22, 43; Ellison and Munoro above note 12.

⁸⁶ See Brereton David “‘Real Rape’ Law Reform and the role of Research: the Evolution of the Victorian *Crimes (Rape) Act 1991*” (1994) 27 *Australian and New Zealand Journal of Criminology* 74 and Heenan Melanie ‘Sex Crimes and the Criminal Justice System’ (1997) 9 *Australian Feminist Law Journal* 90 at 93–94.

⁸⁷ Complainant cross-examination, Transcript at 79–91.

⁸⁸ Glanvil above note 62 at XIV.6, p 175.

During the seventeenth and eighteenth centuries this requirement was redeployed in order to judge whether the complainant's story was believable. Thus, Hale assumes that one means of testing her credibility is whether she 'presently discovered the offence':

For instance ... if she presently discovered the offence and made pursuit after the offender ... these and the like are concurring evidences to give greater probability to her testimony ...

But on the other side, if she concealed the injury for any considerable time after she had opportunity to complain ... these and the like circumstances carry a strong presumption, that her testimony is false and feigned.⁹⁰

This requirement is repeated by later commentators:

... if she presently discovered the offence, and made search for the offender ... give greater probability to her evidence. But, on the other side ... if she concealed the injury for any considerable time after she had opportunity to complain ... these and the like circumstances carry a strong, but not conclusive, presumption that her testimony is false or feigned.⁹¹

And these rules have been laid down as some guides to the discovery of the truth; for instance ... if she presently discovered the offence, and made pursuit after the offender ... these and the like are concurring circumstances which give greater probability to her evidence. On the other hand ... if she concealed the injury for any considerable time after she had opportunity to complain; ... these and the like circumstances afford a strong, though not conclusive presumption that her testimony is feigned.⁹²

More recently, many jurisdictions have introduced warnings to be given to juries to combat these older requirements for 'recent complaint':

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...

(2) In circumstances to which this section applies, the Judge:

(a) must warn the jury that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false, and

(b) must inform the jury that there may be good reasons why a victim of a sexual assault may hesitate in making, or may refrain from making, a complaint about the assault, and

⁸⁹ Bracton above note 63 at 415.

⁹⁰ Hale above note 36 at 633.

⁹¹ Blackstone above note 48 at 213–214.

⁹² East above note 36 at 445–456.

(c) must not warn the jury that delay in complaining is relevant to the victim's credibility unless there is sufficient evidence to justify such a warning.⁹³

The need for the woman to 'presently discover the offence' became known as the doctrine of 'recent complaint'.⁹⁴ It was commonly used to demonstrate that the complaint was false because there was an absence of complaint. By contrast, recent studies and law reform work show that rape victims are more likely to delay in complaining of rape or simply not make a complaint at all.⁹⁵ Documentation of this pattern of behavior led to legislative reform in NSW⁹⁶, to the effect that where evidence of 'lack' of recent complaint is raised a judge must warn the jury that that absence or delay does not indicate that the allegation is false; must inform the jury that there may be good reasons why a victim of rape may not complain at all; and must not warn the jury that delay in complaining is relevant to the victim's credibility unless there is sufficient evidence to justify such a warning.⁹⁷

In other words, there is a substantial body of law (and other knowledges) emphasising that the notion of 'recent complaint' does not accord with women's experiences of sexual assault or current law reform intentions. In spite of these findings, the common law practices of running rape trials continue to assert that making a direct complaint of rape is behavior indicative of the 'true' rape victim.

In the Cusack trial, after the alleged rape the complainant went to the toilet where she had a drink of water, washed her face, wiped her underwear and tried to get herself 'back together and look like I hadn't been crying or anything'.⁹⁸ After approximately five minutes she heard someone outside the bathroom and realised she would need to leave. It was [Melissa Clark], a reporter at the TV station with whom the complainant played netball. Clark immediately asked what was wrong and took Robson next door to the News Room where Robson said she had been raped.⁹⁹

⁹³ *Criminal Procedure Act 1986* (NSW) s 294(2).

⁹⁴ The doctrine of 'recent complaint' has operated as an historical exception to the prohibition against leading evidence of prior inconsistent statements. Such evidence would usually be viewed as 'hearsay' and ruled inadmissible (subject to relevant exceptions). For an historical analysis of the law of corroboration in Australia see Backhouse Constance 'Skewering the Credibility of Women: A Reappraisal of Corroboration in Australian Legal History' (2000) 29 *Western Australian Law Review* 79. Dorne Boniface has analysed the complexity and number of sexual assault warnings in more recent times commenting that they run the risk of looking like their nineteenth century predecessor: Boniface Dorne 'The Common Sense of Jurors vs the Wisdom the Law: Judicial Directions and Warnings in Sexual Assault Trials' (2005) 28(1) *UNSW Law Journal* 261 at 270.

⁹⁵ See Cossins who demonstrates that the norm is to delay in reporting especially in relation to children: Cossins Anne 'Time out for *Longman*: Myths, Science and the Common Law' (2010) 34 *Melbourne University Law Review* 69. See also Alice Grey 'Not-So-Uniform Evidence Law: Reforming *Longman* Warnings' (2007) 19(2) *Current Issues in Criminal Justice* 172. This position, however, has been recognised for many years. For instance see: Woods' discussion in the commentary on the 1981 amendments which led to the introduction of s 405B(2) the precursor to s 294 of the *Criminal Procedure Act 1986*: Woods Gregory D *Sexual Assault Law Reform in NSW: A Commentary on the Crimes (Sexual Assault) Amendment Act 1981 and Cognate Act* Department of Attorney-General and Justice Sydney 1981 at 25–27; see also Heroines 1996 above note 19 at 199–221; Simon Bronitt 'The rules of recent complaint: Rape myths and the legal construction of the "reasonable" rape victim' in Easteal above note 19 at 41.

⁹⁶ Originally introduced in 1981 by the *Crimes (Sexual Assault) Amendment Act 1981* (NSW) s 405B(2).

⁹⁷ See s 294(2) of the *Criminal Procedure Act 1986* (NSW).

⁹⁸ Complainant examination-in-chief, Transcript at 19.

⁹⁹ Complainant examination-in-chief, Transcript at 19.

Sometime after, the complainant told two further friends, [Barbara Forrester] and [Katherine Lowrie], what had happened. The prosecution called each of these witnesses to establish that within half an hour of the alleged events the complainant had told three female friends that she had been raped. In other words, the prosecution argued there was significant evidence of ‘recent complaint’.

The story told by the defence is quite different. The defence reconstructs what may constitute a recent complaint suggesting that it is not telling *any* person but reporting to an ‘authority’ — ie either management (who were all male and friends of the defendant) or the police. Defence counsel here draw upon a neutral notion of ‘authority’ which clearly disguises the gendered ramifications of the arguments. ‘Management’ were not only all men but were friends of the defendant — one of whom gave evidence for the defence about the accused’s ‘good character’. The people that the complainant did tell were all female friends and were in junior positions — a receptionist, a junior production assistant and a journalist. The implication from the defence argument is that each of these women, without ‘authority’, could have been either implicated in the false allegation or were made pawns in the complainant’s story. They lack ‘trustworthiness’ (credibility) which the men in positions of authority are represented as having. The argument is little removed from Glanvil’s expectation in the twelfth century that the woman must complain to ‘trustworthy men’.

After reconstructing recent complaint in this way, the defence attempt to demonstrate that the complainant never intended to report to the authorities. The implication being that she did not intend to report the incident because there was no rape; she was merely caught up in a situation that became difficult to explain in any other way than by saying she was raped.

The defence makes this argument by suggesting that the complainant was simply going back to the party after the events and was trying to look as if nothing were wrong. Ironically, that is precisely what she was trying to do. However, such a pattern of behavior is constructed as inconsistent with the law’s perception of how a raped woman should act. When asked what she did in the toilet after the alleged events, the complainant responded:

A. And then I stayed in there trying to calm myself down so I looked like I hadn’t been crying so I could go back out to the party.

Q. Wasn’t the primary thing on your mind to report what had happened?

A. No, it wasn’t, I was very scared, I wasn’t going to tell anybody, but I couldn’t control my emotions when I first saw Melissa Clark.

Q. Well, I’m not asking you about that, before you even saw somebody, I’m talking now what’s going through your mind, you’ve just told us that you were going to refresh your face and try to put on an appearance of someone who hadn’t been crying. What was your intention, to mingle as much as you could with your friends and enjoy yourself, or what?

A. I didn’t have any intentions, I just wanted to leave.

...

Q. Did you think to yourself, ‘Well there’s a matter of principle involved here. I don’t care about the fellow’s feelings and I don’t care whether the police get him or what, I’m going to report this, so perhaps he won’t do it to any other ladies’, did that go through your mind?

A. No

Q. Did it go through your mind at all to report this matter before you saw Ms Melissa Clark?

A. No, it didn’t.¹⁰⁰

The rape is treated as an ‘objective’ event as if it should be dealt with as a ‘matter of principle’ in which certain patterns of behavior would follow — namely reporting to management. In constructing the narrative in this way the complainant’s behavior is produced as inappropriate, irrational, indeed, false.

Some time after the complainant had told her friends what had happened, she walked away from the party, by herself, to go to the hospital. Defence counsel constructs this behavior as once again inconsistent with the law’s expectation of a rape complainant:

Q. So you had actually walked down the hill from Johns St, by yourself didn’t you?

A. yes

Q. Is there any reason why you did that?

A. Yes, I was going to the hospital.

Q. By yourself?

A. Yes, at that point of time I was.

Q. Was it [X] Hospital that you intended to visit?

A. Yes.

Q. What about a taxi, didn’t someone ring you a taxi?

A. I don’t know, possibly.¹⁰¹

The behavior of the complainant and her friends is subjected to this analysis suggesting that their actions were irrational and false. For instance, [Forrester] came across the complainant walking down the hill when she was being driven from the party in a car with four other people. On seeing the complainant, Forrester got out of the car and spoke to Robson. Forrester and the complainant were then dropped off at [Y] nightclub, on [Thomas Avenue] — approximately five minutes walk from the Hospital. The defence used this sequence of events to suggest that the two of them were going to the nightclub not the hospital — once again no intention to report the incident. This claim was bolstered by the accused’s evidence in which he said he had asked the complainant — after the alleged incidents — whether she was going out to [Y] nightclub after the

¹⁰⁰ Complainant cross-examination, Transcript at 103.

¹⁰¹ Complainant cross-examination, Transcript at 106.

Christmas party had finished¹⁰²— a conversation denied by the complainant. The defence are obviously implying that since the complainant was going to a nightclub, ‘logically’ no rape had occurred. The problem with this ‘logic’ was that they did not go into the nightclub and did indeed, go to the hospital. It was only during re-examination that Forrester was able to ‘explain’ why they were dropped off at the nightclub. Forrester explained:

Q. The going to the nightclub business aspect of what took place, whose idea was that?

A. I only suggested that we say that to everyone in the car for the purpose of them not knowing why we were getting out at the hospital.¹⁰³

The defence reproduces the narrative ‘schema’ about the true rape complainant’s behavior. This story suggests that the true rape complainant would report the incident to management, go directly to the hospital and then to police. In other words, a story of rational and clear behavior involving full and open disclosure. The implication is that justice will follow such a pattern; there is nothing to hide since a terrible crime has been committed and the perpetrator must be brought to justice. By contrast, the prosecution offers the reverse narrative: she did complain, she told numerous female friends, she was upset, she went to the hospital, she did go to police.

Both prosecution and defence presume the importance of evidence of recent complaint — there is no questioning of this assumption that full and open disclosure is the pattern of behavior associated with the victim of sexual assault. As in the above discussion of the narratives about ‘location’ and the emphasis on physical injury, (at least) one other story is excluded by the parameters of this debate which could displace the assumptions made by both the Crown and defence cases — her story which is not able to be told through this narrative. This narrative emerges through fragments in the evidence given by the Crown witnesses — the traces that seep through the ‘cracks’ of cross-examination and re-examination. This is a story of shock, confusion, secrecy and above all behavior that has no precedent or typical pattern to follow. For instance, when the complainant was questioned about what her ‘intentions’ were in the bathroom after the alleged rape she simply responds:

A. I didn’t have any intentions, I just wanted to leave.¹⁰⁴

In answer to why she did not report to management, the complainant says:

A. I didn’t know what to do, this had never happened to me before, I didn’t know how to react. I was confused, I didn’t, I just...¹⁰⁵

¹⁰² Accused examination-in-chief, Transcript at 244.

¹⁰³ Forrester re-examination, Transcript at 195.

¹⁰⁴ Complainant cross-examination, Transcript at 102.

¹⁰⁵ Complainant cross-examination, Transcript at 102.

When Forrester is cross-examined about why she twice responded ‘Are you sure’ when the complainant told her about the rape (the implication being that the complainant was not to be believed), Forrester replies:

A. Because I was in shock, I didn’t really know what else to say.¹⁰⁶

Reporting to police or management is furthest from any of the women’s minds; they are attentive to what the complainant wants and that appears to most commonly be that ‘no one is to know’ and that she wants to go home. These responses were continually repeated from Forrester’s story about [Y nightclub] to why no one was going to report to management or police. When Clark was questioned why she did not report the crime she replies:

A. No, at first I offered her assistance to take her home because that is what she seemed to want to do first.¹⁰⁷

In answer to why she did not take her to the hospital, Clark again says:

A. No, first of all I just wanted to get her home to a relative or someone she was comfortable with.¹⁰⁸

The complainant’s desire for secrecy reflects shame, embarrassment and shock at what has occurred. In other words, a sequence of emotions and behaviours far removed from the legal narrative of a rational course of action and the apparent ‘victim’ status that is meant to be accorded to such a person. The way the women deal with the situation is read by the law as unreasonable and as a reflection of the falsity of the charge. Indeed, given the standard behavior expected by the practices of the law, their behavior is irrational and false; the women’s responses to the events are in effect unreadable by the law. Yet, all of the evidence we have today indicates that Robson and the other women, dealt with the rape in a very similar way to the behavior now recognised as typical of those sexually assaulted: namely, disorientation, shock, shame embarrassment and secrecy. It is just not the story endlessly repeated by practitioners within courtrooms.

3.0 THE LAWS IN PRACTICE: A DIALOGUE WITH CRITICAL THEORY

As discussed at the beginning of this article, it has been widely recognised that courtroom practices continue to undercut legislative reforms. The resilience of the legal profession, in particular, to legislative reform has shifted an emphasis on ‘law reform’ *per se* towards

¹⁰⁶ Forrester cross-examination, Transcript at 183.

¹⁰⁷ Clark cross-examination, Transcript at 205.

¹⁰⁸ Clark cross-examination, Transcript at 206–207.

multidimensional intervention¹⁰⁹ particularly pedagogical intervention.¹¹⁰ For instance, the push over the years to re-educate legal and judicial officers, particularly around issues of ‘gender bias’¹¹¹ together with emphasising the role of education prevention programs in schools around the issue of sexual assault are examples. It is argued, as Graycar suggests above, that in order to change the *practices* of the law we need to change the things legal subjects ‘know’ and how they perform that (embodied) knowledge.

Yet the law in NSW is hardly ambiguous: no where does it require proof of injuries; physical resistance; recent complaint; or for the location of the offence to be remote — to the contrary, the Legislature has expressly removed such requirements. The question we might ask then is, why is law reform so ineffective and what do these changes of policy direction towards re-education and other forms of intervention, indicate about the issue? In an attempt to answer this question I would like to suggest a ‘dialogue’ of sorts between critical theoretical accounts of the readability of the mark, intentionality, embodied knowledge *and* law reform — to think about how the insights of critical theory might at least account for this disconnect. In my view, a

¹⁰⁹ See for instance Daly 2011 note 7 who considers the range of responses to sexual assault both legal and outside the legal system. See also the National Council to Reduce Violence against Women and their Children *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* Department of Families, Community Services and Indigenous Affairs March 2009 which sets out six areas of action for the next 12 years as priorities being communities, relationships, service response, justice, behaviour change and systems integration. Earlier in 2008 Amnesty International released a report to guide the National Plan, *Setting the Standard: International Good Practice to Inform an Australian National Plan of Action to Eliminate Violence Against Women* which proposed the Australian national plan be cross-sectorial and cross-portfolios. See also Natalie Taylor ‘Juror attitudes and biases in sexual assault cases’ (2007) *Trends & Issues in crime and criminal justice* No. 344 makes it clear the influence of stereotypes and myths held by jurors and more generally in the community and the need for change in such attitudes.

¹¹⁰ Once again, there is a breadth of literature in the area but see for instance the ALRC Report 114 above note 4 at chapters 25–28, which make specific recommendations in relation to training and education for judicial officers, legal professionals, police and others involved in the provision of services for sexual assault victims (see Recs 26–3, 26–8, 27–7, 27–9 and 28–2) together with broader educative recommendations such as for educating juries through directions (see Rec 25–7), incorporation of objectives (Rec 25–8) and guiding principles (Rec 25–9). See also National Council to Reduce Violence Against Woman and their Children above note 109 calls for ‘enhanced community awareness and education programs ...to change violence-supportive attitudes’ at 49, 50–51 and 121. Ellison and Munro suggest introducing expert and judicial guidance to dispel myths of rape in ‘Jury deliberation and complainant credibility in rape trials’ in McGlynn and Munro above note 2 at 281. See also the articles by Ellison and Munro above note 12 and Ellison and Munro ‘Of normal sex and real rape: exploring the use of socio-sexual scripts in (mock) jury deliberation’ (2009) 18(3) *Social and Legal Studies* 1. Education strategies have also been used more broadly to prevent sexual assault particularly in schools. See in particular: Carmody Moira ‘Conceptualising the prevention of sexual assault and the role of education’ (2009) 10 *Australian Centre for the Study of Sexual Assault Issues* 1; Carmody Moira ‘Preventing Adult Sexual Violence Through Education?’ (2006) 18(2) *Current Issues in Criminal Justice* 342; Carmody Moira, Evans S, Krogh C, Flood M, Heenan M and Ovenden G *Framing Best Practice: National Standards for the Primary Prevention of Sexual Assault Through Education* National Sexual Assault Prevention Education Project for National Association of Services Against Sexual violence, University of Western Sydney (2009); Keel Monique ‘Working with adolescents in the education system to prevent sexual assault’ (2005) No 71 *Australian Institute of Family Studies* 36.

¹¹¹ In addition to the references above note 110, see Law Reform Commission (Vic) Final report above note 5, which places a strong emphasis in a series of recommendations upon education and training strategies for lawyers, judges, police and others involved in the provision of services to victims of sexual assault.

theoretical account of these problems may assist in how we continue working on reforming the criminal justice system.¹¹²

3.1 *Derrida and Iterability*

While the metalanguages are very different, it appears to me that the emphasis upon how the law is repeated in practice is similar to Derrida's account of the condition of 'readability' of the mark. Derrida argues in 'Signature Event Context'¹¹³ that the condition of readability of the mark is its *iterability* — its repeatability in which repetition is never self-same. In order for the mark to function, Derrida argues that it must be repeatable in such a way that it can break with its context with a certain absoluteness of absence.¹¹⁴ Subsequently, the mark is able to function in the 'radical absence'¹¹⁵ of the sender. It is not then, the 'intention' or the 'context' of the mark's production that governs the 'scene of utterance': the 'I say' cannot directly determine the 'doing'. As Derrida has said:

...a written sign carries with it a force that breaks with its context, that is, with the *collectivity of presences organizing the moment of its inscription*.¹¹⁶

In the case of rape law reform, we could argue that the 'collectivity of presences organising the moment of its inscription' (intentionality/context) is, at least in part, the 'values and politics of the women's movement'¹¹⁷. Following Derrida, this means that such 'intentions, the wanting-to-say-what-he [sic]-means'¹¹⁸ can never have a *guaranteed* uptake. This does not mean that intentionality is unimportant or has no effect, rather as Derrida has said:

... the category of intention will not disappear; it will have its place, but from that place it will no longer be able to govern the entire scene of utterance.¹¹⁹

Derrida's insights (coupled with Foucault's work on sexuality and power¹²⁰) led Judith Butler to argue, that truths/origins/grounds are 'ideals' 'forcibly materialized through time' by a series of

¹¹² In the section that follows, I discuss the work of Jaques Derrida, Michel Foucault and Pierre Bourdieu in particular. With the exception of Foucault (see 'La Folie encerclée' (1977) 32–33 *Change* 76 translated in Foucault Michel 'Confinement, Psychiatry, Prison' in Kritzman Lawrence D (ed) and Sheridan Alan et al (trans) *Michel Foucault: Politics, Philosophy, Culture. Interviews and Other Writings 1977–1984* Routledge New York & London 1988 p 178), these theorists have not discussed rape. I make reference to these theorists here, because they provide a useful account of the 'readability' of the mark and how subjects come to embody certain knowledges. This is not meant to be to the exclusion of feminist poststructuralist accounts of the marginalisation of women's experiences by legal discourse (see for instance the work of Carol Smart above note 23 and Lacey Nicola *Unspeakable Subjects: feminist essays in legal and social theory* Hart Publishing Oxford 1998).

¹¹³ Derrida Jacques *Limited Inc* Northwestern University Press Illinois 1993 p 1.

¹¹⁴ As above at 7.

¹¹⁵ As above at 8.

¹¹⁶ As above at 9, emphasis added.

¹¹⁷ Smart above note 23 at 164. For the moment I will assume that this can be unified in some meaningful way.

¹¹⁸ Derrida above note 113 at 9.

¹¹⁹ Derrida above note 113 at 18.

¹²⁰ See for instance Foucault Michel: *The History of Sexuality: Vol 1* (1978) Hurley Robert (trans) Penguin Books London 1988, *The Use of Pleasure: The History of Sexuality Vol 2* Hurley Robert (trans) Vintage Books New York 1984, *Herculine Barbin: Being*

repeated normative practices which institute a particular truth to the exclusion of others.¹²¹ Oversimplifying, this would suggest that a parliamentary intent to change this 'truth' fails to take into account that it is materialised through its practices or repetitions. If we accept that 'truths' are materialised in their repeated practices, what then may be said about the status of 'iterability'? What does it mean for Derrida to say that the mark can 'break with every given context' and produce new contexts?

Butler argued that *iterability* creates the space for instability, an excess, that may produce a rematerialisation re-directed against the normative law, producing a consequential subversion.¹²² In developing her early theory of performativity, Butler was interested in the possibilities of rearticulation and the excess produced by repetitions that can never be self-same. (Probably the classic example from her early work was the way the word 'queer' has moved from a word that wounds to a positive affirmation of non-heterosexual practices.)

While I would like to keep this possibility open (that is, the possibilities for rearticulation and of transformation), I think 'new contexts' and 'break with every context' cannot necessarily be coded as positive. This means that the transformative possibilities that may be associated with iterability also need to be questioned. In turn, this would suggest something about the constraints on law reform and the possibilities for re-education within the legal context.¹²³

If the structural force of the mark allows it to be meaningful despite the sender's intention or the given context in which it was produced, this assumes it functions with some kind of regularity — even if the use value to which it is put in other contexts is different. For instance, Derrida argues that a secret code left by two persons even after their death may still be writing to the extent that:

The possibility of repeating and thus identifying the mark is implicit in every code, marking it into a network that is communicable, transmittable, decipherable, iterable for a third, and hence for every possible user in general.¹²⁴

This suggests that while the use value may now be different to that of the two persons who left the code, it still functions as writing. The structural force that Derrida ascribes to the mark suggests a regularity in its repetitions, such that where it breaks from its given context and produces new contexts, this could also lead to a cross-pollination in which these other contexts re-produce something of the regularity of the mark. In this way new contexts may in fact be consolidating current relations rather than transforming them or producing a space of excess or instability. As Derrida says:

the Recently Discovered memoirs of a Nineteenth Century French Hermaphrodite McDougal Richard (trans) Pantheon Books New York 1980, *Power/Knowledge: Selected Interviews and Other Writings 1972–1977* Gordon Colin (ed) and Gordon Colin et al (trans) Pantheon Books New York 1980.

¹²¹ Butler Judith *Bodies that Matter: On the Discursive Limits of 'Sex'* Routledge New York 1993 at 1.

¹²² Butler above at 2.

¹²³ It would seem too that Butler has recognised in her more recent work these problems: see for instance Butler Judith *Excitable Speech: A Politics of the Performative* Routledge New York 1997, *Undoing Gender* Routledge New York 2004 and *Giving an Account of Oneself* Fordham University Press New York 2005.

¹²⁴ Derrida above note 113 at 8.

... a written syntagma can always be detached from the chain in which it is inserted or given without causing it to lose all possibility of functioning, if not all possibility of 'communicating,' precisely.¹²⁵

Iterability, therefore, is a form of general citationality, in which the mark may function in all sorts of different contexts with a regularity, to the extent that it is citing or repeating its sedimented historicity.

Applying these insights back to the context of law reform we could suggest that legislation can only be 'readable' to the extent that it cites and repeats past practices. In this way new laws are understood within their historicity, being practiced and repeated in ways that conform to it. Over-simplifying, lawyers and judges do not come to the 's 61HA text' afresh but rather make sense of its meaning within its history. The possibilities for change or transformation through such law reforms will depend upon the degree to which that history is sedimented. In a sense then, I am asking how much instability can/does the system allow and how much will be repeated in ways that consolidate current truths in the very process of contestation? Here the long sedimented history of the 'rape schema' I have documented above is particularly concerning — what that history suggests is the inflexibility of 'reading' and practicing the law as the reforms were meant to be understood and practiced. How then might change be possible?

3.2 The Legal Habitus and Field

In order to think about the possibilities for change, we must first ask who is doing this 'reading' and 'citing' and where are they doing it? It is here that Bourdieu's conceptualisation of the interaction between the *habitus* and the *field* is useful.

The field

The *field* or social context imposes a series of structuring forces upon interactions, 'a set of objective power relations [are] imposed on all those who enter this field'¹²⁶. Thus, the rape trial takes place in the 'field' of the courtroom, a highly ritualised and hierarchical social context.¹²⁷ Of particular relevance for an analysis of the rape trial, is the structuring effect of the adversarial process (discussed above), through which the State authorises the perpetration of a general level

¹²⁵ Derrida above at note 113 at 9.

¹²⁶ Bourdieu Pierre *Language and Symbolic Power* Raymond Gino and Adamson Matthew (trans) Harvard University Press Cambridge Mass 1991 at 230.

¹²⁷ While a full analysis of these issues is outside the scope of this article, at a basic level the placement of bodies effects this structuring notably with the judge at the head of the courtroom (the bench), the witness box below and to the side of the judge, followed by the jury box and facing the judge (divided by the 'pit') is the 'bar' for the barristers, with the dock for the accused behind the bench. This spacing encodes the authority primarily of the judge but also the barrister in so far as they are positioned as the prime focus of the gazes of judge, jury and witnesses. This hierarchy is once again reinforced by the graded grandeur of the 'costumes' worn by judge, barristers, associate and court-officers. These are in contrast to the civilian clothes of witnesses, jurors and the public who may watch the trial. The rules of court procedure determining who may speak, when and how, also contribute to the ritualised effect of trials.

of violence on the woman in the name of 'justice'.¹²⁸ One of the earliest and most extensive analyses of how law reform in NSW was being practised, the *Heroines of Fortitude* report, makes this point only too clearly, documenting that 65% of trials had to be stopped because of the complainant's distress¹²⁹, that 'complainants dry-retched, claimed to feel nauseous in the witness box, were unable to answer questions or had to take regular breaks.'¹³⁰

The habitus

Bourdieu described the *habitus* as 'embodied history, internalized as a second nature and so forgotten as history'.¹³¹ It is a series of dispositions that are learned and embodied in such a way that you only have to place a subject within a (known) context and they will 'automatically' produce/perform this history.¹³² We might then speak of a 'legal' (a solicitor or barrister's) 'habitus' which is disciplined into specific ways of knowing particularly, although not exclusively, through their disciplining in tertiary institutions and later through the practices of the law not least of which includes courtroom 'performances' in the often 'unwritten' methods for carrying out (particular types) of trials. As Threadgold says:

Part of what the body is is the history of the texts and places and networks of bodies where it has been before: the ways in which it has been materially marked, 'branded' by and in practice...¹³³

In the analysis above, I have demonstrated the way legal practitioners have embodied certain 'texts' and knowledges about rape. These knowledges operate to form a means of distinguishing between the supposedly 'true' and the 'false' complaint of rape. These texts come to form a 'schema' or 'stock' story, which has been sedimented over time by its repetitions across different fields of knowledge, to the point where the 'schema' operates to produce notions of 'truth' and 'falsity' and without reference to what the law actually is today. As Gordon Bearn has said in discussing Derrida's concept of 'dissemination', while 'every possible significance of the word — serious or non-serious — is put into play by every use of that word', it is through 'disciplining' that we learn to produce coherence and the ability for communication to function as common sensical.¹³⁴ It is the:

¹²⁸ This takes up Robert Cover's eloquent demonstration that the court-process is a site of (State ordained) violence, in which the judge's 'words' on a verdict of guilt, perform a legitimated violence on the body of the criminal who must 'passively' accept this violence. See Cover Robert 'Violence of the Word' (1986) 96 *Yale Law Journal* 1595; Cover Robert "'The Supreme Court 1982 Term". Foreword: Nomos and Narrative' (1983) 97 *Harvard Law Review* 1.

¹²⁹ *Heroines* above note 19 at 127–8.

¹³⁰ *Heroines* above note 19 at 101.

¹³¹ Bourdieu Pierre *The Logic of Practice* Nice Richard (trans) Stanford University Press Stanford 1990 at 56.

¹³² Above at 69.

¹³³ Threadgold Terry 'Critical Theory, Feminism, The Judiciary and Rape' (1993) 1 *The Australian Feminist Law Journal* 7 at 100–1.

¹³⁴ Bearn Gordon 'Derrida Dry, Iterating Iterability Analytically' 1995 25(3) *diacritics* 3 at 10.

...violence of our linguistic training which has closed our eyes (fortunately also imperfectly) to all but one of its disseminating significance...¹³⁵

It is this kind of ‘disciplining’ that produces particular understandings of what the ‘true’ rape is assumed to be and to the exclusion of others — making legislative reforms that might conflict with that ‘truth’ (almost) unreadable. As discussed above, defence and prosecuting lawyers have so embodied a series of knowledges or texts about the ‘true’ rape that their ‘eyes’ have been (quite literally) ‘closed’ to the way these requirements actively construct rape and do not conform to current legislative imaginings of the offence. We are going to need to undertake large-scale ‘unlearning’ or a different kind of ‘disciplining’ if we want to change these practices.

4.0 CONCLUSION

In this article I have argued that rape laws have long sedimented histories that produce a particular ‘truth’ of rape to the exclusion of other visions. While legislative intents have attempted to contest these old common law practices of running a rape trial, as Derrida has argued, intentions do not guarantee ‘uptake’. ‘Readability’ of the law is directly tied to its practices and the subjects disciplined into certain embodied histories of the law. The possibilities for transformation, for change, are highly limited where the ‘schema’ is so stable. In turn, this means that legislative reform is insufficient if micro-strategies are not in place for changing what legal practitioners, judicial officers and jurors in particular know and how they perform that embodied knowledge.¹³⁶

It seems to me that one trend that has emerged in the more recent literature may begin to do just this: the adducing of general expert evidence in rape cases.¹³⁷ For instance, such general expert evidence could be given about the fact that most complainant’s delay in reporting rape; that victims are more likely to freeze than resist an attacker; physical injuries are rare from a sexual assault; and that most rapes are committed by someone known to the victim and are more likely to occur in the home than in a remote location. This kind of general expert evidence may be an important counterpoint or disruption to the sedimented ‘rape schema’ I have documented in this article. The Consultation Paper prepared by the Office for Criminal Justice Reform (UK) recently proposed such a measure:

We propose that such general expert evidence should only be called in rape cases. This is because rape is a unique offence. The majority of rapes occur between acquaintances. Often, there is little outside evidence that supports the victim’s account given that such offences usually occur in private. In the majority of non-stranger rape cases the identity of the

¹³⁵ As above at 22.

¹³⁶ For an indication of the types of micro-strategies that are currently in place see above at notes 110 and 111.

¹³⁷ Something that has already begun to occur in relation to child sexual assault case: see above note 7. It is noted that Munro and Ellison’s studies with mock-jurors (see note 12) indicate that juror education (via expert evidence and/or judicial directions) can impact positively upon common ‘myths’ about rape.

attacker is not disputed and there will be no conclusive forensic or medical evidence. At the moment, the only evidence as to what allegedly occurred is being considered against a background of misperceptions and myths as to how 'proper' victims should behave which is going unchallenged.¹³⁸

Until legislative reforms really become 'readable' by practitioners, judges and jurors, perhaps they will listen to the expert who may be able to incorporate the narratives that are currently excluded by the master narrative of the rape schema. ●

¹³⁸ Office for Criminal Justice Reform above note 5 at 17. See also Munro and Ellison 2009b above note 12 who discuss this recommendation.