WINDOWS ON THE LEGAL MIND: THE EVOCATION OF RAPE IN LEGAL WRITINGS*

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[*This paper questions the traditional view of rape contained in some leading textbooks on the criminal law. In the standard account, women are depicted as especially unreliable and potentially malicious. Women are therefore given to complaining falsely of rape. The paper contends that this traditional view depends on the repression of a now substantial body of evidence of women's experiences of the crime. This evidence tells a different story. It reveals that the predisposition of our legal and social culture to regard women as duplicitous and incredible actually contributes to a reluctance on the part of raped women to pursue their legal rights and so to have their stories heard.*]

> A little still she strove, and much repented,
> And whispering 'I will ne'er consent' — consented.[1]

Prevailing conventions in legal textbook writing call for studied neutrality. Neither the author nor (usually) his opinions should intrude on the text. He should be seen to operate at a respectful distance from his material or, better still, not seen at all. The author's task is to synthesize the current law systematically and with an economy of language: textbooks should offer 'windows to the substantive area of law that they purport to cover.'[2]

Metaphysically, the approach adopted by legal textbook writers may be described in terms of correspondence theory.[3] This is the traditional philosophical idea that 'human thought mirrors or corresponds to the objective order of reality, which exists apart from human thought and with which the human subject can have contact. Human thinkers', in this view, 'can accurately apprehend the structure and relations of the world as given'.[4] In legal writing, a commitment to correspondence theory is implicit in the guiding

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1 Lord Byron, *Don Juan* Canto I, Stanza CXVII.

2 Coombs, M.I., 'Crime in the Stacks, or a Tale of a Text: A Feminist Response to a Criminal Law Textbook' (1988) 38 *Journal of Legal Education* 117, 119.

3 Perhaps the most famous exponent of correspondence theory is the Austrian philosopher, Ludwig Wittgenstein, but see also Frege, G., 'On Sense and Meaning' in Geach, P. and Black, M. (eds and trans), *Translations from the Philosophical Writings of Gottlob Frege* (3rd ed. 1980) 62-5. To the early Wittgenstein, there was a direct correspondence between language and the world thus described: 'A proposition is a picture of reality. A proposition is a model of the reality as we imagine it.': Wittgenstein, L., *Tractatus Logico-Philosophicus* (Pears, D. F. and McGuiness, B. F. (trans.)) (1961) 4.01. According to Saul Kripke, Wittgenstein then believed that '[t]o each sentence there corresponds a (possible) fact. If such a fact obtains, the sentence is true; if not, false': Kripke, S., *Wittgenstein on Rules and Private Language* (1982) 71.

4 Conway, G. D., *Wittgenstein on Foundations* (1989) 9.

assumption of a direct, unmediated relationship between the legal propositions offered by the author and the nature of the law itself, which is itself conceived as relatively free of values.

In this dominant tradition, the textbook writer is not principally an interpreter of law, someone whose ideas shape the presentation of the material. Nor is the law itself regarded as a medium of values. Rather, the author's task is more descriptive than interpretive; the author adopts an ostensibly neutral stance and so renders the law as a set of commonsensical and logical rules for the organization of society.[5] The task of the author is to hold up a mirror to law's reality, and law's reality is generally taken to be a given thing.[6]

A central purpose of this paper is to question the correspondence theory implicit in some prominent legal interpretations of rape by indicating some quite different ways in which the crime (and the associated law) might be depicted. In particular, the endeavour is to give voice to feminist accounts of rape, accounts which accord priority to women's experiences. A variety of statistical and qualitative data will be used to reveal the viewpoints of women confronted with rape and rape laws. These are the repressed or marginalized stories of rape.

When these stories are told, it becomes apparent that the legal 'reality' which textbook writers purport to describe, simply and objectively, is itself composed of meanings which are more complex and ambiguous than the writers allow. We see that the legal writers rely on unfounded but nevertheless dominant interpretations of social life, to the exclusion of those which emphasize women's experiences. In this way, the textbooks perpetuate a traditional view of sexual relations and are therefore better viewed as partisan products of legal culture. They are not simply repositories of legal knowledge but rather evocations of particular ways of thinking. They are windows on the legal mind.

The view that textbooks are influential is not a common one among legal scholars who are more inclined to disparage them as intellectually pedestrian. But as this paper will show, textbooks are important because they shape and reinforce lawyers' thinking about law. By providing the key tools of legal pedagogy, they not only reflect the current legal outlook but serve also to constitute it and preserve it. They define and analyse law for each new generation of lawyers. They tell us what lawyers are thinking and they tell lawyers what to think.[7] While affecting an appearance of neutrality —

5 The law might be scrutinized critically for signs of internal inconsistency, for poorness of logic or for vaguenss. Several of the textbook writers analysed here in fact do just this. But the overriding purpose of such criticisms is not to highlight the values underpinning the law. Rather the purpose is more positivistic: to ensure that the law remains certain, predictable, logical and autonomous of its social context.

6 See Sugarman, D., 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition' in Twining, W. (ed.), *Legal Theory and Common Law* (1986) 26.

7 Sugarman makes this point well in his analysis of the role of texbooks in the reproduction of legal knowledge: *ibid*. See also Brown, D., Neal, D., Farrier, D. and Weisbrot, D., *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (1990) ch. 1.

of telling it as it is — textbooks offer rationalizations and justifications which usually support the way law is, rather than how it might otherwise be. Thus textbook writers take sides.[8] Their propensity is to describe, explain and justify existing law, rather than to engage in deep critique. Their partisanship is to be found in the supporting reasons they give for law being as it is.[9]

The present concern is the portrayal of rape offered by a number of leading expositors of criminal law. It is in this area of academic legal writing that the analyst of legal culture can not only learn much about what lawyers think of relations between the sexes but indeed what lawyers think of women who engage with the law and how the law should deal with them. As Barbara Babcock has observed:

> [R]ape is one of the most seriously regarded and heavily punished crimes in our society. It is committed peculiarly against women . . . . *the administration of the rape laws by the criminal justice system reveals the interplay of social attitudes and rules of law.* The deeply ambivalent attitudes of our society toward women clearly emerge from a study of the cases and lore about rape.[10]

We will find that legal perceptions of this crime, and so of women, are both clearly pronounced and poorly informed. They take little account of the considerable empirical and theoretical literature (much of it by non-lawyers) on the meaning of the crime to women.[11] This paper considers why certain academic lawyers think as they do about rape and the influence of their way of thinking on the law itself.[12] It examines the divorce between the textbook perception of rape and women's experiences of the crime (and of the law) and explores the implications for women of law's intellectual isolationism.

The paper comes in three parts. The first part considers legal perceptions of rape. The second part shows how the available empirical evidence on rape can help bring to the surface women's understandings of the crime. The final part explores the reasons for the divide between the legal perceptions of rape and the meaning of rape to women.

8 Perhaps the most famous critical feminist reading of assumptions implicit in an American case-book is that of Mary Joe Frug, 'Re-reading Contracts: A Feminist Analysis of a Contracts Casebook' (1985) 34 *American University Law Review* 1065.

9 The role of textbooks in legal education is increasingly coming under the critical eye of feminist and critical legal writers. See *e.g.* Graycar, R. and Morgan, J., *The Hidden Gender of Law* (1990) 16; Naffine, N., *Law and the Sexes: Explorations in Feminist Jurisprudence* (1990) ch. 2; Bottomley, S., Gunningham, N. and Parker, S., *Law in Context* (1990) ch. 5; Brown *et al.*, *op. cit.* n. 7, ch. 1.

10 Babcock, B., 'Materials on Rape, The Law School Curriculum and the Legal Rights of Woman' (20-1 October, 1972) quoted in Erickson, N.S. and Taub, N., 'Final Report: "Sex Bias in the Teaching of Criminal Law" ' (1990) 42 *Rutgers Law Review* 309, 339 (emphasis in original).

11 Julie Taylor has recently noted a similar tendency in American text and case-books employed in the teaching of rape at American Law Schools: Taylor, J., 'Rape and Women's Credibility: Problems of Recantations and False Accusations Echoed in the Case of Cathleen Crowell Webb and Gary Dotson' (1987) 10 *Harvard Women's Law Journal* 59.

12 This paper is about the dominant text-book tradition, particularly as it operates in criminal law. Recently there have been some dramatic departures from this tradition in the form of at least two major textbooks, one English, the other Australian, which reject the dominant method and adopt, instead, a self-consciously interdisciplinary approach to criminal law. See Lacey, N., Wells, C. and Meure, D., *Reconstructing Criminal Law: Critical Perspectives on Crime and the Criminal Process* (1990), and Brown *et al.*, *op. cit.* n. 7.

The particular criminal law books considered in this paper were selected because they are influential. The authors are highly respected 'household names' in the criminal legal literature, which is why they are worthy of such sustained attention.

1. *LEGAL PERCEPTIONS OF RAPE: SOME CURRENT WRITINGS*

In their thinking on rape, some leading Australian and English textbook writers still bear the mark of Sir Matthew Hale, Lord Chief Justice of the King's Bench from 1671 to 1676.[13] In his *History of the Pleas of the Crown*,[14] Lord Hale spoke eloquently of women's unreliability when it came to accusations of rape. His analysis of the crime was to become 'the beginning of wisdom'[15] on the subject.

(a) *Brett, Waller and Williams* Criminal Law: Text and Cases

In their most recent 1989 edition of the Australian criminal law text, *Criminal Law*,[16] Brett, Waller and Williams cite Hale's views with approval and at length:

> It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho' never so innocent . . . .
>
> I only mention these instances, that we may be the more cautious upon trials of offences of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offence many times transporting the judge and jury with so much indignation, that they are over-hastily carried to the conviction of the person accused thereof by the confident testimony, sometimes of malicious and false witnesses.[17]

While Brett, Waller and Williams distance themselves from Hale's sentiments on capital punishment, the rest of his pronouncement, they say, 'remains as true now as when it was written'.[18] Though over three centuries have passed since Hale's utterance on rape,[19] his good sense is contrasted favourably with the contemporary views of advocates for reform. And yet it is difficult to think of another profession which is so loath to relinquish or question social understandings acquired in the seventeenth century.

Following a brief discussion of recent legislative changes designed to secure greater immunity for the victim from cross-examination about her sexual past, Brett and colleagues observe that 'Reform of the law of rape in all its aspects is overdue and to be welcomed'.[20] This statement, however, is quickly modified. Reform of the adjectival law of rape, they say, 'carries

13 One exception is to be found in the introduction to the analysis of sexual offences by Edwards, E.J., Harding, R. W. and Campbell, I. G., *The Criminal Codes* (1992).

14 Sir Matthew Hale, *The History of the Pleas of the Crown* (1736) Vol. I, 626-36.

15 Temkin, J., *Rape and the Legal Process* (1987) 134.

16 Brett, P., Waller P. L. and Williams, C. R., *Criminal Law: Text and Cases* (6th ed. 1989).

17 Hale, *op. cit.* n. 14, 635-6.

18 Brett *et al.*, *op cit.* n. 16, 82.

19 Hale's *Pleas of the Crown* were published posthumously in 1736 — some sixty years after his death.

20 Brett *et al.*, *op. cit.* n. 16, 82.

21 *Ibid.*

dangers'.[21] For 'many of the more strident voices for reform', in their 'desire to vindicate the victim', overlook the rights of the accused to put the prosecution to the test.[22] One must assume that here they are speaking of the feminist literature on rape.

And yet feminists have never suggested that defence counsel should be prevented from putting to the victim questions relevant to the specific incident in issue. Feminists are intensely aware of the seriousness of the charge of rape and of the need of the defence to be able to function effectively in an adversary setting.[23] Consistently, the feminist case for procedural reform has been confined to the point that victims of rape should not be subjected to questions about their past and present sexual practices which are not probative of the particular facts in issue, but serve only to prejudice the jury against the victim by invoking damaging sexual stereotypes.[24]

Feminists believe that victims of rape should be afforded the same dignity and consideration as other types of witness for the prosecution,[25] and not subjected to insult and sexual innuendo of a general nature.[26] As Andrew Ligertwood has remarked recently, 'judges have been all too prepared to permit the accused to cross-examine the victim generally about her sexual reputation, disposition and past, including isolated acts of intercourse with other men'.[27] It is the willingness of judges to permit these sorts of questions (which would be disallowed in other sorts of trials)[28] which has precipitated

22 *Ibid.*

23 Though many feminists would question whether the adversary system is the ideal way of arriving at justice. However, within the present system, feminists are not insensitive to the rights of the accused.

24 At common law, many aspects of the victim's sexuality have been deemed relevant to a determination of consent in rape. As noted by Ligertwood, A., *Australian Evidence* (1988) 104: 'Sexual experience which on ordinary principles of relevance is sought to be adduced in this way includes evidence of the victim's sexual relationship with the accused, evidence that the victim is a prostitute or commonly engages in sexual activities with a large number of men, and evidence of the victim's reputation for engaging in casual acts of sexual intercourse'. This has given the defence considerable scope to subject rape victims to extensive, intimate and humiliating questions. Feminists have consistently questioned the common law view that the sexual past of a victim is relevant to the issue of consent in the specific case before the court.

25 In all trials, witnesses are supposed to be protected from attacks in the witness box 'intended to insult or annoy' and which may result in a trial of the complainant and her character rather than of the acts of the accused. See Victorian Law Reform Commission, *Rape and Allied Offences: Procedure and Evidence*, Report No 13 (March 1988) 48. And yet, at common law, the accused has been entitled not only to bring in evidence of the victim's sexual reputation to establish consent (both in cross-examination and examination-in-chief) but also to adduce such evidence (in cross-examination) to establish the victim's general reliability. It seems that a sexually experienced woman has been regarded as a dishonest woman. As Ligertwood notes, under this rule, judges have been willing to allow a wide range of sexual questions, whether they be vexatious, indecent or offensive: Ligertwood, *op. cit.* n. 24, 104.

26 There is a considerable literature which documents the treatment of victims of sexual assault in court. For a recent detailed British study of the treatment of victims at the Old Bailey in London see Adler, Z., *Rape on Trial* (1987). For a vivid illustration of the type of questions which have been deemed acceptable see Boyle, C., 'Sexual Assault and the Feminist Judge' (1985) 1 *Canadian Journal of Women and the Law* 93, 96.

27 Ligertwood, *op. cit.* n. 24, 104.

28 There are several general rules of evidence which the courts might have employed to place victims of sexual assault on an equal footing with other types of prosecution witness (and so afford them similar protection from hostile and insulting questions). The application of these rules to sexual assault cases might have rendered unnecessary the passage of special legislation

feminist demands for specific laws of evidence designed to shield the rape victim in court (sometimes referred to as 'rape shield laws'). Recent changes to adjectival law described (and approved) by the authors in fact concede the feminist case: they endeavour to ensure that victims of sexual assault are not treated in an overtly discriminatory manner. They impose an obligation on defence counsel to keep to the point in issue which is not the general sexual reputation of the victim but (as is usually the case) whether or not she consented to the particular act of intercourse.[29]

Brett and colleagues do not specify exactly what it is in the feminist literature to which they object. They confine themselves to a brief comment about the 'strident voices' of those who would override the presumption of innocence.[30] What they do make clear is that their concerns about the legal position of the man accused of rape are generated by the dangers posed by women who are 'malicious and false witnesses'.[31] For it is precisely at this stage in their discussion that they invoke Hale.[32] Brett, Waller and Williams offer no supporting evidence for their view that men accused of rape are especially vulnerable to malicious women and why such men therefore need a greater opportunity than other types of defendants to discredit the complainant.[33] No evidence is offered, for example, of the frequency of false complaints. Nor are statistics proffered suggesting a high level of rape reports or a high level of conviction of men for rape.[34] The sole support for their statement is the opinion of Hale.

Vindictive women also feature later in their analysis when they consider rape in marriage. Brett and colleagues note the abolition in most jurisdictions of the common law immunity of husbands from prosecution for rape by their wives.[35] They deem the abolition to be 'in principle correct' but

protecting the victims of sexual assault from questions about their chastity. One is the rule that imputations by the accused about the bad character of the prosecution witnesses will expose the accused to similar questions. (See *e.g.* Evidence Act 1929 (S.A.) s. 18). A second entails the right of the judge to disallow vexatious, scandalous and insulting questions (see Evidence Act 1929 (S.A.) ss 22, 25). A third is perhaps the most basic rule of the law of evidence, that lawyers for both sides are only allowed to adduce evidence which is sufficiently relevant to the facts in issue or the creditworthiness of witnesses.

29 See Evidence Act 1929 (S.A.) s. 34i; Crimes Act (N.S.W.) ss 409B, 409C; Evidence Act 1906 (W.A.) s. 36A-BC; Evidence Act 1958 (Vic.) s. 37A; Evidence Act 1910 (Tas.) s. 102A; Criminal Law (Sexual Offences) Act 1978 (Qld); Sexual Offences (Evidence and Procedure) Act (N.T.) s. 4.

30 Seldom do legal scholars make such judgmental criticisms. And yet it seems to be a common and an acceptable practice to make pejorative comments about feminists.

31 Brett *et al.*, *op. cit.* n. 16, 82.

32 *Ibid.*

33 This point has also been made by Kim Pedler in her Honours Thesis entitled 'An Inquiry into the Need to Include Gender-Based Topics and Issues in the Criminal Law Curriculum' (University of Adelaide, 1991). This thesis contains an interesting feminist analysis of the treatment of the crime of rape in a number of texts employed in Australian schools of law. Feminists in England and America have also commented on the meagre empirical support offered in criminal texts when they are dealing with rape and the nature of complainants. See Temkin, J., *Rape and the Legal Process* (1987) 83, and Taylor, *op. cit.* n. 11.

34 These statistics will be examined later in the paper when the social and legal 'facts' of rape will be contrasted with the textbook view.

35 The marital immunity from charges of rape has been removed in all Australian States except Queenland. In the recent decision of *The Queen v. L.* (1992) 103 A.L.R. 577, the High Court made it clear that had the common law ever supported the spousal immunity, it did so no longer.

then allude to 'the real danger' of 'malicious wives [who] may seek to punish or blackmail husbands by unfounded charges of rape'.[36] This danger, they feel, can be offset by the 'careful and proper use of prosecutorial discretion'.[37] The Crown, it seems, should exercise greater caution when it comes to the wife as complainant. The authors feel confident that a jury would display similar scepticism and would convict a husband only in the face of 'considerable evidence supporting the wife's allegation'.[38]

Again, no evidence is supplied of the special risks incurred by husbands who can now be charged with rape; nor of the consequent need for a particularly sceptical prosecution and jury. For example, the authors do not consider whether the limited abolition of the marital immunity[39] in South Australia in 1976 resulted in a spate of prosecutions by vindictive wives. In fact, it did not. Nor has the abolition of the immunity had the effect anticipated by the authors in the other jurisdictions where it has been lifted. The South Australian Police Department's own study of rapes reported to police from July 1980 to June 1984 reveals that there were only 25 reported cases of rape in marriage in this four year period, and 21 of these 25 complainants were separated from their husbands.[40] In other words, in four years there were only four reports of rape by women who still cohabited with their husbands. In Victoria, the spousal immunity for rape was abolished in 1985. A study of rape prosecutions for 1989 reveals that only three such incidents were reported to the D.P.P. and in two of the cases the spouses were estranged at the time of the rape.[41] These figures suggest that it would be more appropriate for Brett and colleagues to direct their concerns to the wives who fail to report rape, rather than to the wives who do.[42]

(b) *Glanville Williams*, Textbook of Criminal Law

In his analysis of the law of rape, the eminent English Professor of Law, Glanville Williams, devotes much of his time to the complainant and her

36 Brett *et al.*, *op. cit.* n. 16, 88.
37 *Ibid.*
38 *Ibid.* 88-9.
39 See Criminal Law Consolidation Act 1935 (S.A.) s. 73(5). The abolition of the immunity was limited to circumstances where 'the alleged offence consisted of, was preceded or accompanied by, or was associated with —
(a) assault occasioning actual bodily harm, or threat of such an assault, on the spouse;
(b) an act of gross indecency, or threat of such an act, against the spouse;
(b) an act calculated seriously and substantially to humiliate the spouse, or threat of such an act; or
(d) threat of the commission of a criminal act against any person.'
Not surprisingly, critics of the legislation have questioned the possibility of a rape which does not involve these circumstances.
40 Weekley, K. J. C., *Rape: A Four Year Study of Victims* (1986) 39.
41 Victorian Law Reform Commission, *Rape: Reform of Law and Procedure*, Interim Report No. 42 (July 1991) 65.
42 An indication of the extent of marital rape comes from a London self-report study of 2000 women. They were approached at a variety of places including bus queues, colleges and high streets. Of the 1236 women who responded, 214 had been raped and 60 of these women had been raped by their husbands. See Temkin, *op. cit.* n. 15, 11.

reliability.[43] To Williams, 'The facts of life make consent to sexual intercourse a hazy concept' and so 'poses grave problems of proof and justice'.[44] Williams is himself vague about what he means by 'the facts of life', though his ensuing discussion throws some light on the matter. He suggests that in sexual relations, men may not be in a position to know what women really want, that women are given to changing their minds — and that they do so after the event. All of this makes heterosexual men particularly vulnerable to women.[45]

Williams develops the theme of women's mendacity at some length. He explains 'That some women enjoy fantasises of being raped' and that 'they may, to some extent, welcome a masterful advance while putting up a token resistance'. He finds the verse of Byron illuminating:

> A little still she strove, and much repented,
> And whispering 'I will ne'er consent' — consented.[46]

Williams tells us that young girls lie about rape to placate their parents. Or they lie out of shame that they have engaged in sexual relations and may even convince themselves that the lie is true. Women who are jilted may lie out of spite. Or women may lie 'for obscure psychological reasons'.[47] To Williams, women are dissimulators who can neither be trusted nor understood. They are Freud's 'dark continent'.[48]

Williams offers supporting footnotes for these propositions, but from some eccentric sources. For example, he offers us the wisdom of Lilian Wyles from her 1952 publication, *A Woman at Scotland Yard*.[49] 'Taken as a whole' says Wyles 'there are not a large number of cases of genuine rape, though there are many spurious and doubtful complaints alleging that offence'.[50] Glanville Williams then qualifies, but does not contradict, this statement with the observation that 'this opinion was expressed before the present explosion of violence'.[51] We are left to make of this what we will. On rape and seduction fantasies in women he cites a 1945 publication entitled the *Psychology of Women*.[52] And yet there is no equivalent volume cited on rape and seduction fantasies by men — despite the proliferation of a pictorial literature which suggests that they may well be common.[53]

Also absent from Williams's analysis are any recent statistical data on rape: on the frequency of reports, on current police views of the extent of

43 Williams, G., *Textbook of Criminal Law* (2nd ed. 1983).
44 *Ibid.* 238.
45 *Ibid.*
46 *Ibid.*
47 *Ibid.*
48 Freud also spoke of 'the riddle of the nature of femininity' in Freud, S., 'Femininity' in Strachey, J. (trans.), *Sigmund Freud, New Introductory Lectures on Psychoanalysis* (1964).
49 Wyles, L., *A Woman at Scotland Yard* (1952).
50 *Ibid.* 121.
51 Williams, *op. cit.* n. 43, 238.
52 Deutsch, H., *The Psychology of Women* (1945).
53 As Jennifer Temkin, *op. cit.* n. 15, 83 observes: 'It seems strange . . . that Professor Williams fails to mention male rape fantasies or to suggest that these might be considered in assessing whether the defendant was prepared to override the victim's wishes.'

fabrication or on the frequency of convictions and acquittals. Nor is there any discussion of the testing procedures a complainant must undergo at the hands of the police doctor, the police investigators, the prosecution and then the defence counsel.[54]

Having told us why men need special protections from women who cry rape, Williams goes on to describe what the law has done to adjust for these dangers. He observes that 'As some kind of precaution the trial judge [in England] is required to warn the jury, on any charge of sexual offence, of the danger of convicting on the uncorroborated evidence of one witness'.[55] In view of his preceding discussion, the corroboration warning is implicitly cast in a favourable light. Williams does not consider the spate of legislative changes in other jurisdictions designed to eliminate the warning,[56] nor does he refer to the considerable body of writing questioning the ethics and fairness of this procedure.[57]

(c) *Brent Fisse*, Howard's Criminal Law

In the newest 1990 edition of Colin Howard's textbook on the criminal law of Australia, now written under the hand of Brent Fisse, the theme is reiterated. We are told that:

> Rape is at once one of the most difficult offences to administer reasonably and one of the most difficult to define in a manner which facilitates reasonable administration. This is because it combines in high degree the qualities of ease of accusation and difficulty of denial.[58]

In this modern-day version of Hale, the suggestion that rape is easy to allege and hard to disprove has dropped the qualifying statement contained in the original that rape is also hard to prove. Hale himself seemed to recognize that the visual similarity of 'non-violent' rape and consenting intercourse made rape difficult to establish as well as to deny. True, the malicious victim could rename the act rape but the rapist could equally call rape consenting intercourse. It is the contemporary writers who have concentrated their attentions on the lying complainant and ignored the other reading of the crime.

Later in his text, Fisse echoes the views of Williams when he examines what he calls 'the realities of sexual courtship'.[59] We are told that 'Outward reluctance to consent may be no more than a concession to modesty or a deliberate incitement to D (the defendant) to persuade a little harder. The approach to and consummation of sexual intercouse is not usually made an

54 Police attitudes to the rape victim will be examined later in the paper.
55 Williams, *op. cit.* n. 43, 239.
56 See *e.g.* Evidence Act 1929 (S.A.) s. 34i(5) (an Amendment of 1984); Evidence Act 1906 (W.A.) s. 36BE (an Amendment of 1985); Crimes Act 1900 (N.S.W.) s. 405C (an Amendment of 1981); Crimes Act 1958 (Vic.) s. 61 (an Amendment of 1980). Similar legislation has also been passed in the United States. See also Temkin, *op. cit.* n. 15, 133-54 for a review of American and Australian amendments in this area.
57 See the extensive references in Temkin, *op. cit.* n. 15.
58 Fisse, B., *Howard's Criminal Law* (5th ed. 1990) 169.
59 *Ibid.* 178.
60 *Ibid.*

occasion for detached self-analysis.'[60] As a consequence, says Fisse, the law has evolved various mechanisms to test the honesty and consistency of the complainant of rape. He goes on to discuss the various evidentiary protections which have developed to protect the man accused of rape from false witnesses. Now informed of 'the realities' of sexual relations between men and women, we are in a position to see the inherent logic and fairness of these rules.

What is curious about Fisse's treatment of rape, particularly when compared with Williams and his arcane sources, is that Fisse does provide us with a range of contemporary feminist readings on rape in his supporting footnotes. The incongruity is that the writers therein take a very different view of rape from that advanced by Fisse. Whereas Fisse stresses the dangers of the false witness, the feminist writings emphasize the difficulties experienced by the rape victim.[61] Fisse's text and footnotes therefore demonstrate a sort of split personality.

(d) *Sex in the Textbooks*

Neither Williams (with his 'facts of life') nor Fisse (with his talk of the 'realities of sexual courtship') actually inquire into the nature of modern-day relations between the sexes which perhaps should include a discussion of changing sexual mores (less stigma now attaches to the sexually active woman) as well as the impact of the AIDs virus. Williams, in particular, holds to a view of relations between men and women which may owe more to Victorian notions of sexuality than to a knowledge of modern sexual practices. In this view from another time, the masterful man exerts an erotic power and women derive erotic pleasure from having their will overborne. This is a Romantic notion, in the literary sense, which is associated not only with the work of Byron but also with Pope (with *The Rape of the Lock*), Coleridge, the Brontes, George Elliot and Keats.

Williams and Fisse both offer a singular, simplistic, reductive and masculine depiction of sexuality, which does not take account of current feminist debates in the area. The French feminists, for example, suggest that women's sexuality may well be polymorphous and complex.[62] That is, women experience sexual pleasure in many different ways. It cannot be reduced to the simple story of sexuality contained in the legal texts: where the man imposes his will and she passively submits (with secret delight).[63]

61 *E.g.*, he refers to the feminist legal writing of Olsen, F., 'Statutory Rape: A Feminist Critique of Rights Analysis' (1984) 63 *Texas Law Review* 387, and Boyle, *op. cit.* n. 26. Olsen states, at 424, that 'Women in our society do not have enough power to resist coercive male initiatives in sex.'

62 See *e.g.* Irigaray, L., 'And the One Does Not Stir Without the Other' (1981) 7:1 *Signs: Journal of Women in Culture and Society* 60; Irigaray, L., *This Sex Which is Not One* (1985); Kristeva, J., *Desire in Language* (1982); Moi, T., *Sexual/Textual Politics: Feminist Literary Theory* (1985); Cornell, D., 'The Doubly-Prized World: Myth, Allegory and the Feminine' (1990) 75 *Cornell Law Review* 644; Whitford, M., *Luce Irigaray: Philosophy in the Feminine* (1991).

63 As Lois Pineau remarks in her feminist analysis of sexuality and rape, 'the way to achieve sexual pleasure . . . decidedly does not involve overriding the other person's express reservations and providing them with just any kind of sexual stimulus': Pineau, L., 'Date Rape: A Feminist Analysis' (1989) 8 *Law and Philosophy* 217.

This is not to deny that some women may, at times, feel obliged to tolerate sex in which he applies pressure and she mutely succumbs.[64] It may also be true that women sometimes fit the stereotype offered by the legal writers. The problem with the traditional analysis of rape, however, is that it gives no hint of the complicated and contested nature of sexuality in which men and women act for a variety of motives.

Williams and Fisse are therefore unconvincing when they assert with confidence, but without further explanation, that modern-day sex that is sought and desired by both parties can be characterized as an inarticulate activity comprised of 'masterful advances' from him accompanied by a show of 'outward reluctance' from her.[65] And if they are wrong in this, then they lose much of their reason for thinking, as they seem to, that there is a need for special evidentiary rules to protect the man in the ambiguous situation, 'to diminish the possibility of injustice' for the masterful man who is only doing what women really want.

The three books considered here are regarded as scholarly, authoritative texts which expound the law accurately and judiciously. They are employed currently in Australian and English schools of law. And yet this brief reading has found that the empirical support offered for their central propositions, particularly those to do with the reliability of women as complainants of rape (and the consequent need for rape laws to assume a certain form) is scant; some of that which is offered, as in the case of Williams, is selective and outdated; or, as in the case of Fisse, the evidence positively contradicts the propositions in the text. It is clear then that the 'reality' which these writers seek to describe is itself a product of their own assumptions about the nature of sexual relations. Far from providing an objective description of a reality which exists independently of their own values, the authors have offered a reading of law which favours a traditional masculine perspective.

2. *THE SHIFTING 'REALITY' OF RAPE: A MATTER OF CREDIBILITY*

Three assertions about rape are central to the legal writing considered above. We are told that men are vulnerable to malicious women who accuse them falsely of rape and that, as a consequence, the law has developed

64 As bell hooks observes, we live in a society which equates aspects of masculinity with violence and therefore women may feel that to receive the love of a masculine man, they must accept a degree of violence: 'They may accept violence in intimate relationships because they do not wish to give up that care. They see enduring abuse as the price they must pay. They know they can live without abuse; they do not think that they can live without the care': hooks, b., *Feminist Theory: From Margin to Center* (1984) 124.

65 Indeed to accept this view of heterosexual relations uncritically — as characterized by dominance and submission — is to concede a central role for coercion in sexuality, but to fail to inquire into the conditions of that coercion which might induce a woman to accept sex on these terms. Such an inquiry would not only consider the sort of physical coercion described by hooks (*ibid.*) but it might also consider coercion at the unconscious level. For example, the popular 'romantic' literature of Mills and Boon represents a more insidious sort of masculine coercion. In this literary genre, women are told consistently that romantic heterosexuality entails a powerful man imposing himself on a reticent woman who is ultimately seduced. Catharine MacKinnon (see below) has also examined the ways in which male conceptions of coercive sexuality may intrude on the female consciousness. This failure of the legal writers to consider the nature of coercion in heterosexuality is perhaps surprising given that they are dealing with an area of law whose specific purpose is to ensure real choice in sexual relations.

special protections. We are told also that rape is a crime easy to allege and that it is difficult to deny. These latter propositions are worrisome to the authors given the perceived likelihood of some women exercising their malicious tendencies through false accusations of rape. The authors themselves furnish little evidence in support of these assertions. Are they true?

If we turn now to the available empirical evidence on rape and its reportage we find that these three assertions themselves determine the official 'reality' of rape. That is to say, the very predisposition to disbelieve women shapes and conditions the official 'facts' of rape. For rape to be officially seen and entered into the statistics, it must be something which makes sense to those who exercise control over the official story. Or put another way, raped women can only be heard and believed when they are regarded as credible.

(a) *Are women prone to lie about rape?*

In a recent analysis of rape and the problem of the false complaint, Julie Taylor[66] provides evidence that official rape statistics are indeed conditioned by the attitudes of law enforcers. She observes that it is difficult for a woman complaining of rape to establish her credibility if those to whom she complains are already disinclined to believe her. And if she is not believed, her story becomes, officially, a fabrication. Taylor's theory is supported by American statistics on unfounded rapes. When American police held the sort of attitudes to women advanced by the contemporary legal writers described here, a high level of 'false' reports was discovered. With the increasing sensitivity of police officers to the plight of the rape victim, levels of unfounded complaints dropped commensurately.

In the mid-1970s, for example, about half of the rapes reported to the Philadelphia Police were treated as unfounded.[67] In 1980, police in Seattle believed that three-fifths of reported rapes were false. However, when New York City began to employ policewomen to interview rape victims, the rate of unfounded complaints dropped from 15% to 2%, the same rate as other violent crimes.[68] In Philadelphia, the presence of a policewoman at the interview of the victim had a similarly striking effect on the statistics. According to Taylor, it 'increased the probability that the complaint would be recorded, that the victim would be believed, and that the case would be labelled a rape rather than a non-offence charge'.[69]

Though the supporting evidence is not extensive, there is reason to think that Australian police have undergone a similar major change of attitude to rape and its fabrication. In 1976, the Law Reform Commission of Victoria conducted a survey of complaints of rape made to four Victorian police

66 Taylor, *op. cit.* n. 11.
67 *Ibid.* 87.
68 The New York Sex Crimes Analysis Unit examined all allegations made to it over a two year period. In 1987, Adler was to describe this research as 'the only methodologically sound study' of false complaints. See Adler, Z., *Rape on Trial* (1987) 25.
69 Taylor, *op. cit.* n. 11, 97.

districts from January 1974 to November 1975. It revealed that 50% of reported rapes (or 68 out of 135) were not accepted by the police and that in half of those cases regarded as unacceptable, the complainant herself agreed to withdraw the charge.[70] In the 1970s, Western Australian police also reported high levels of false complaints: 'of the cases reported to the police from 1975 to March 1980, only 57% were treated as genuine.'[71]

More recent Australian police statistics, however, have revealed quite low levels of unfounded complaints.[72] It seems likely that the change has been brought about by altered police attitudes to the complainant of rape. In 1979 the South Australian Police established a Rape Enquiry Unit (now known as the Sexual Assault Unit) made up of 'specially trained women police officers who provide the victim with emotional and physical help'.[73] These policewomen have been the subject of favourable comment from health and welfare agencies who have remarked on their 'sensitivity . . . and their thoroughness in providing information to survivors'.[74] In 1986, the South Australian Police Department published the results of its own analysis of 1096 rapes reported over four years: from July 1980 to June 1984. In its view, 'very few (only 1.4%) of the reported rapes are actually false reports, that is, the offence is not substantiated'.[75]

In 1988, the Police Complaints Authority of Victoria published its own figures on false reports for the period 1986 to 1987.[76] Though higher than the South Australian statistics (at 7%), the Victorian figures also indicate that it is only a small minority of complainants whose reports are now thought to be false.

In view of the provenance of these Australian statistics, they are probably conservative, if anything. Though it appears that police are now more receptive to the stories of women who complain of rape,[77] the police are nevertheless obliged to subject all reports of any crime to careful scrutiny. For one of their specific tasks is to ensure that allegations of crime have some basis in fact and are not frivolous. While feminist analysts of rape are at times accused of manipulating the statistics to favour the victim, the police are usually immune from this style of criticism. And according to recent police sources, the vast majority of rape complaints are 'genuine'. In other words, women complaining of rape are now mainly believed.

70 *Report on Rape Prosecutions*, 1976, Appendix C.

71 Both studies are cited in Warner, K., 'An Obstacle to Reform: "False" Complaints of Rape' (1981) 6 *Legal Service Bulletin* 137, 138.

72 Weekley, *op. cit.* n. 40.

73 *Ibid.* 3.

74 Carmody, M., *Strategies for Change: A Review of Services Provided for Adult Victims of Rape and Sexual Assault in South Australia* (1991) 26.

75 Weekley, *op. cit.* n. 40, 44.

76 Police Complaints Authority of Victoria, *Sexual Assault Victims and the Police* (April 1988).

77 In the 1991 Victorian study of victims conducted for the Victorian Law Reform Commission, 'Most victims felt that the person taking their statement had been sympathetic', Report No. 42 (July 1991) Appendix 5, 123.

(b) *Is Rape Easy to Allege?*

Whether allegations of rape are believed depends on a number of factors. We have seen that police attitudes seem to make a clear difference. Until recently, police were of the opinion that about half of reported rapes were false. Accordingly, about half of rape allegations would have proceeded no further. (In the 1970s, for example, Tasmanian police officers were instructed that only 'one in every two complaints will be a justified complaint'.[78]) Another factor influencing the ability of a victim to convince with her story of rape is her appearance and whether she is viewed as 'rapable'.

The Ideal Victim

Complainants who depart from dominant conceptions of female beauty are apparently less credible as victims than the young, the slim and the white. American research has revealed that 'poor women, women of color, prostitutes, and those dependent on alcohol and drugs' are more likely to be disbelieved by the police. A study of police in Philadelphia has shown also that obese women find it difficult to establish their credibility: 'two out of every three obese victims had their rape complaints classified as unfounded'.[79]

The conventionally attractive woman, however, encounters her own particular problems. In court, she is susceptible to allegations of dressing in a way to incite the accused and of transmitting mixed signals. She may even be accused of contributory negligence, a legal concept which has no formal place in the criminal law, but which is implicit in much typical cross-examination by defence counsel about the victim's role in the incident. The message for women is that if they wish to secure their legal rights to physical security, they are obliged to conceal their sexuality. This is a social policy made explicit in Muslim countries but which is nevertheless implicit in the Western idea that overtly attractive or sexual women must expect the unwanted attentions and interventions of Western men.

The Law as a Disincentive

The common law itself has made permissible certain practices, largely confined to the rape trial, which may also have served to discourage the prosecution of rape. For example, the trial judge was required to warn the jury of the dangers of convicting a person accused of sexual assault on the uncorroborated evidence of the complainant.[80] A second common law rule (elaborated above) permitted cross-examination of the complainant about her previous sexual history in order to establish whether she was a woman to be trusted.[81] A third rule made permissible questions about whether or

78 Warner, K., *op. cit.* n. 71, 137.
79 Taylor, *op. cit.* n. 11, 92.
80 See Ligertwood, *op. cit.* n. 24, 122-5.
81 *Ibid.* 104.

not the victim had made a 'recent complaint' to a third party,[82] though questions about the consistency of her story could not be put to other types of witnesses giving examination-in-chief.[83]

Each of these rules brought into issue the credibility of the complainant of rape. Two of these rules[84] were predicated on the assumption that the crime was somehow too easy to allege, and that the complainant should therefore be questioned more vigorously than other types of witness and her testimony subjected to greater critical scrutiny. As the Victorian Law Reform Commission recently observed of the corroboration warning: 'Implicit in the rule was the belief that allegations of sexual assault are peculiarly likely to be false'.[85]

In recent years, there have been a number of legislative endeavours around the country to change the relevant laws in all of these areas. Controls have been placed on the prosecution in its questioning of the complainant about her sexual past. Legislatures have removed the requirement that the judge advise the jury of the dangers of uncorroborated testimony. In some states, the recent complaint rule has been eliminated or modified.[86] Each of these reforms has sought to achieve greater parity between complainants of rape and other types of witnesses, and so improve the experience of the victim in court. The high degree of scepticism directed at the complainant of rape is no longer thought to be warranted.[87] The new rules may be viewed therefore as a clear refutation of the old saw that rape is too easy to allege and too difficult to refute. Such reforms say that the law has been weighted too heavily against the victim of rape. It is no longer acceptable to view the complainant of rape as one who is especially prone to mendacity.

Victim Attitudes: How do Victims feel About Reporting?

Rape is believed to be a crime with an unusually large dark figure. Though, by definition, it is impossible to say exactly how large that figure is, we do have a range of estimates in the main derived from interviews of

82 The 'recent complaint' rule — which admits evidence of a recent complaint — may now only be used to support a woman's credibility, to lend weight to her story, and is therefore arguably an advantage to the woman who complains promptly. However, it is only recently that the High Court has made it clear that, concomitantly, inferences cannot be drawn from failure to complain with alacrity. The rule therefore benefitted some and disadvantaged others. Moreover the origins of the rule are clearly sexist. 'In medieval times where a woman alleged rape, failure to raise immediately the "hue and cry" was taken as evidence of consent, so that it was necessary for evidence of complaint to be given': see Ligertwood, *op. cit.* n. 24, 309.

83 *Ibid.* 308; Victorian Law Reform Commission, *supra* n. 25, 42.

84 See above for a description of the basis of the recent complaint rule.

85 Victorian Law Reform Commission, *supra* n. 25, 39.

86 For one State's review of the law and the relevant issues arising in this area see Victorian Law Reform Commission, *supra* n. 25. Note also that the Victorian Law Reform Commission was given a further reference on rape in 1991 (see Report Nos 42 and 43).

87 A similar change of attitude to women who complain of rape is to be discerned among the members of the Australian High Court. In the recent decision of *Longman v. R.* (1989) 168 C.L.R. 79 the Court considered the rationale underpinning the corroboration warning. The sexism implicit in the warning (in particular the assumption that women are prone to lie) was openly criticized as 'unsatisfactory'. The Court made it clear that it was no longer appropriate or justifiable to treat women as a suspect class of witness.

householders. The United States National Crime Survey of 1979 revealed that 50% of rapes were unreported.[88] An earlier study of 10,000 American households found that the rape rate was almost four times higher than the official rate.[89] Still another American study, this time of nearly a 1,000 women living in San Fransciso, revealed a rate of unreported rapes of over 90%.[90] In Britain, the Home Office British Crime Survey estimated that 74% of sexual assaults in England and Wales did not come to official attention and the figure was even higher for Scotland (93%).[91] New Zealand evidence suggests that 80% of rapes are unreported.[92] In Australia, a major self-report study conducted by the Australian Bureau of Statistics and the Australian Institute of Criminology in 1975 found that 72% of victims had failed to report the offence.[93]

A substantial literature documents the reasons why victims do not report rape. They include fear of an unsympathetic reception from police and the inability to deal with the necessary rigours of police questioning. Victims may feel that they will be cheapened by the experience of going public; they may fear the ordeal of a trial; and they may fear retaliation from the assailant.[94] For those victims who feel sufficiently robust to report the crime, there are further disincentives to proceeding with the matter which persist right up to and including the trial. Indeed, the clear attrition of cases from first report to completion of court hearing suggests that, as a consequence, many complainants fall by the wayside.[95] The testing demands placed on complainants assume a number of forms: repeated and detailed interviews by police and by the prosecutors; an intrusive medical examination; a substantial delay between the time of the incident and the time of the trial, during which resolve must not weaken even though memory may well be fading; the ongoing fear of retaliation and perhaps threats or even violence from the accused. There is also the ordeal of the trial itself.[96]

Official statistics reveal an increase in reported rapes. In South Australia, for example, reports increased from 235 rapes of females in 1981 to 676

88 United States Department of Justice, *Criminal Victimization in the United States 1979* (1981) cited in Temkin, *op. cit.* n. 15, 9.

89 Ennis, *Criminal Victimization in the United States: A Report of a National Survey* (1967) cited in Temkin, *op. cit.* n. 15, 9.

90 'Of the 930 women, 44 per cent claimed at least one completed or attempted rape, but out of 780 incidents of rape and attempted rape only 66 or 8 per cent were reported to the police': Temkin, *op. cit.* n. 15, 9.

91 Home Office, *The British Crime Survey*, Research Study No. 76 (1983) 9; Scottish Office, *The British Crime Survey: Scotland*, Social Research Study (1984) 15. Both are cited in Temkin, *op.cit.* n. 15, 10.

92 Young, W., *Rape Study — A Discussion of Law and Practice* (1983).

93 Australian Bureau of Statistics, *General Social Survey of Crime Victims* (1975) 64.

94 See Victorian Law Reform Commission, *Rape: Reform of Law and Procedure*, Interim Report No. 42 (July 1991). Appendix 5 of the Report specifically deals with 'Victim and Service Provider Perspectives'. See also Temkin, *op. cit.* n. 15, 11 and Taylor, *op. cit.* n. 11, 59.

95 See Victorian Law Reform Commission study of rape prosecutions in Victoria during the 1988-1989 period: *supra* n. 94, Appendix 2.

96 The Victorian Law Reform Commission study of 'Victim and Service Provider Perspectives' (*supra* n. 94, Appendix 5) documents victims' attitudes to the investigation process, the medical examination, statement-taking and the court process.

reports in 1990.[97] These statistics are open to at least two interpretations.[98] They may mean that the crime is on the increase, but they are also consistent with the proposition that victims are now more willing to report the crime. It may well be that a more receptive police force, improved social and medical services for victims, and a less threatening courtroom are achieving the desired effect of encouraging victims to come forward.[99] In their interpretation of rape trends, the South Australian Police have recently supported this view of the statistics.[100]

Though much has improved for the victim of rape, many of the obstacles to proceeding with a complaint remain. These obstacles are well documented in the considerable body of evidence compiled by feminists from a number of disciplines (including law), by criminologists and by law reform bodies. This evidence makes it clear that the textbook writers are wrong: rape is not a crime which is easy to allege.

(c) *Is Rape difficult to Deny?*

There are at least two replies to Hale's proposition that rape is difficult to deny. One entails a brief analysis of legal doctrine. The other requires a review of the statistics on what defendants actually do in response to a charge of rape.

The Presumption of Consent

The nub of the crime of rape is whether or not the victim consented. There is no crime if there is found to be consent on the part of the victim, or (in the common law states) if the defendant believed he[101] had obtained consent, even though he had not.[102] Recent Victorian statistics reveal that

97 Office of Crime Statistics, *Crime and Justice in South Australia* (1990) Table 2.9.

98 A third likely contributing factor is the extension of the definition of rape in 1985. Section 5 of the Criminal Law Consolidation Act 1935 (S.A.) defines 'sexual intercourse' to include 'any activity (whether of a heterosexual or homosexual nature) consisting of or involving —

(a) penetration of the vagina or anus of a person of the body of another person or by any object;

(b) fellatio; or

(c) cunnilingus.'

99 See Carmody, *op. cit.* n. 74 for a description of South Australian services for rape victims.

100 South Australian Police Department, *Annual Report 1990-1991* 93.

101 Though rape laws now tend to be gender neutral, the ovewhelming majority of persons accused of rape are male.

102 Though (in one form or another) the requirement of absence of consent is a consistent feature of Australian rape laws, there is considerable variation in the mental element. At common law, the mental element of rape was an intention by the defendant to have intercourse with the victim knowing that she was not consenting or reckless as to that possibility: *Wozniak* (1977) 16 S.A.S.R. 67, 71. That belief did not have to be reasonable: *D.P.P. v. Morgan* [1976] A.C. 182. However, the common law states (South Australia, Victoria and New South Wales) have each adopted a different statutory definition of the mental element of rape.

In Victoria, s. 38(2) of the Crimes Act (as amended by the Crimes (Rape) Act 1991) states that: 'A person commits rape if —

(a) he or she intentionally sexually penetrates another person without that person's consent while being aware that the person is not consenting or might not be consenting'. Perhaps a slight departure from the common law is implicit in the new requirement that where relevant the judge should direct the jury that 'in considering the accused's alleged belief that the

in the large majority of rape prosecutions, in one way or another, consent is the central issue.[103]

In the traditional view, espoused in the texts, the law of rape harbours particular problems for the accused because of the centrality of consent. In this conventional account, the problem for men engaged in sexual relations is that the woman calls the tune. At any moment, she can say what was really consenting intercourse was really rape and he is hard put to deny it. Moreover, it is hard for him to know exactly what she is thinking. The trouble for him, it seems, is that rape is unlike most other crimes because the same physical action can be defined either as pleasurable and lawful or violent and unlawful, at the whim of the victim. She therefore controls the definition of the incident (and may do so maliciously) because it is she who can say there was no consent.

But this is just one account of the crime. There is another reading which suggests precisely the opposite. And it is this other reading which the textbook writers also recognize though, curiously, it does not shake their view that rape is a charge easily made and difficult to deny. This different interpretation of the law of rape is that there is in fact an unofficial but nevertheless real presumption of consent which necessarily favours the accused, not the complainant. The effect of this presumption is to allow a man to proceed safely with heterosexual sex on the assumption that the woman is consenting — unless she engages in some form of struggle and so eliminates any possible ambiguity. As Brent Fisse puts it:

> although in theory D is not entitled to make any presumption of consent, the fact that P must prove non-consent as part of his case means in practice that if V consciously submits with passive acquiescence, subject only to a mental reservation, D should be acquitted unless V's acquiescence is explicable in the context as arising from fear of the consequences of resistance.[104]

complainant was consenting to the sexual act, it must take into account whether the belief was reasonable in all the relevant circumstances': Crimes Act 1958 (Vic.) s. 37(c).

South Australia, by contrast, is still committed to subjectivism. Section 48 of the Criminal Law Consolidation Act 1935 (S.A.) provides that: 'A person who has sexual intercourse with another person without the consent of that other person —

(a) knowing that that other person does not consent to sexual intercourse with him; or

(b) being recklessly indifferent as to whether that other person consents to sexual intercourse with him, shall ... be guilty of the felony of rape'.

The New South Wales position has been complicated by the adoption of a graded sequence of offences of sexual assault: see Brown *et al.*, *op. cit.* n. 7 for a detailed analysis of the rape laws in that state.

In the code states (Queensland, Western Australia and Tasmania), a specific intent to have intercourse without consent does not form a part of the offence of rape. However a defendant may argue the defence of reasonable mistake of fact that the victim was consenting: see Edwards, E. J., Harding, R. W. and Campbell, I. G., *The Criminal Codes* (4th ed. 1992) ch. 12.

There are also significant variations from state to state in the definition of 'sexual intercourse' for the purposes of the law of rape.

103 The Victorian Law Reform Commission found in its study of 51 rape prosecutions in 1989 that half of the defendants (51%) relied exclusively on the claim that intercourse was consensual. A further 17% relied on a mixed defence: that the defendant believed that the complainant was consenting and that she was in fact consenting. Only 6% relied exclusively on a mistaken belief in consent. Overall, in about three quarters of cases (74%), in one way or another, the dispute turned on consent. See Victorian Law Reform Commission, *supra* n. 94, 87.

104 Fisse, *op. cit.* n. 58.

The trouble for women is that discerning the meaning of acquiescence is not as simple as this statement suggests. Professor Fisse implies that the woman's meaning can merely be read from the context of the incident in question. But it is likely that the context of an alleged rape will not supply the clarity that Fisse is looking for. Like the fact of the woman's passivity, the surrounding facts of the incident will also be susceptible to more than one reading and it is likely that the more persuasive reading will favour the accused. The reason is this. As a matter of convention, men have been expected to take the initiative in sexual matters while women have been expected to display reticence or passivity. This of course blurs the distinction between the woman who freezes out of fear and the woman who is unwilling to show too much sexual enthusiasm. The legal writers seem to think that this places the man in jeopardy.

But, perhaps more so, it allows the man to take advantage of these conventions to infer consent when the victim does nothing or even puts up what is perceived to be only a show of resistance. It also means that the passive rape may well be construed as too similar to normal consenting sexual relations to be either susceptible to prosecution or convincing to a jury. To some feminists, the similarity between consenting sexual intercourse and rape is that a woman's own sexuality is subordinate in both. His sexuality and his pleasure are expected to define the interaction and her true feelings about its desirability or pleasurability are expected to be subordinate if not invisible. In sex as in rape, it is his view of the transaction which defines it.[105]

Professor Catharine MacKinnon goes further. She makes the controversial claim that there is little real difference between normal sexual relations and rape.[106] In our patriarchal society, where men exercise power over women, men determine what is sexual and they have come to define it in a way which is coercive, even violent. For men, dominance and submission are erotic. Coercion supplies the eroticism of sex. It follows that both rape and 'consenting' heterosexual sex share a vital element of coercion. It is therefore difficult to tell rape from ordinary sexual intercourse because they

105 Carol Smart, for example, suggests that '[s]exuality is comprehended as the pleasure of the Phallus, and by extension the pleasures of penetration and intercourse — for men ... Female pleasure is assumed either to coincide with the male definition or to be beyond understanding .... The idea that what pleases women might be different to men's pleasure presents a mystery in a phallocentric culture': Smart, C., *Feminism and the Power of Law* (1989) 28.

106 This is by no means the view of all feminists. Carol Smart, for one, disagrees: Smart, *op.cit.* n. 105, 44. So does another legal feminist, Lynne Henderson, who offers a dramatically different view of rape and why it is clearly distinguishable from consenting intercourse: Henderson, L., 'Review Essay: What Makes Rape a Crime?' (1987-8) 3 *Berkeley Women's Law Journal* 226. She says:

> Having realized at the time I was raped that there was a difference between sex and rape, I simply cannot support such theories ... for me, *as a woman*, the difference between rape and lovemaking, between rape and undesired sex, is phenomenologically real.

Henderson's view contrasts with that of Kelly, who believes that there is a continuum from sex to rape: Kelly, L., 'The Continuum of Sexual Violence', in Hanmer, J. and Maynard, M. (eds), *Women, Violence and Social Control* (1987).

are not really different.[107] For male sexuality is coercive and coercion is sexual.[108] The problem for women is that when rape 'looks like sex', as it is likely to do because it is in fact a lot like it, rape 'is not regarded as a crime.'[109]

MacKinnon draws similar conclusions to those of Fisse about the legal implications of the passive rape. Both lawyers regard 'normal' sex as consistent with some element of coercion (recall Fisse's reference to a woman's 'deliberate incitement to D [the defendant] to persuade a little harder'); both lawyers realize therefore that the rape without resistance contains an ambiguity which the law will resolve in the man's favour. As Fisse says, he is not at fault if he proceeds and she simply submits, unless the context makes her feelings clear. When context fails to make clear her feelings, the law presumes consent.

But as MacKinnon maintains (and Fisse implicitly concedes), in a society in which coercion, dominance and submission are so much a part of normal sexuality, submission out of fear cannot be clearly read from context.[110] This is particularly so where the parties are known to each other and the encounter preceding the rape was a voluntary one, as is often the case. Though in the view of the victim, her submission was out of terror (he was larger, they were alone, what could she do?), he can always point to powerful social mores which indicate why it might be read otherwise. These are mores which render her silence ambiguous. As rape is usually a matter of competing stories about consent,[111] conventional sexual mores mean that his view is sufficient to raise a reasonable doubt about her story.

This interpretation of the law of rape has recently gained the support of another legal commentator. To Vicki Waye, 'Logically the absence of positive assent from the victim ought to prove the element [of non-consent]'. But because of the Crown's negative burden — of proving beyond reasonable doubt that there was no consent — 'it seems that the Crown has not only to show lack of assent but also manifest refusal or resistance. Even then, a victim's stated refusal may not amount to dissent if the refusal

107 According to Frances Olsen, 'MacKinnon does not say that all intercourse is rape ... [However] she does question the effort by some to draw a neat, sharp line between what is rape — and what is not': Olsen, F., 'Feminist Theory in Grand Style' (1989) 89 *Columbia Law Review* 1147, 1157.

108 MacKinnon's analysis of rape as a sexual act is clearly at variance with that of Susan Brownmiller who has argued that rape should be viewed as violence, not sex, because this is the way to have rape taken seriously: Brownmiller, S., *Against Our Will* (1975). For an analysis of these two diverging feminist accounts of rape see Vega, J., 'Coercion and Consent: Classic Liberal Concepts in Texts on Sexual Violence' (1988) 16 *International Journal of the Sociology of Law* 75.

109 For Catharine MacKinnon, '[p]erhaps the wrong of rape has proved so difficult to define because the unquestionable starting point has been that rape is defined as distinct from sexual intercourse, while for women it is difficult to distinguish the two under conditions of male dominance': MacKinnon, C., *Toward a Feminist Theory of the State* (1989) 174.

110 The Victorian Law Reform Commission study reveals that even injuries to the victim do not prevent a man accused of rape from saying that she consented, though admittedly he is less likely to persuade a jury in these circumstances. 'In seven cases, the defence asserted that the injuries suffered by the complainant were consistent with vigorous consenting sex'. Victorian Law Reform Commission, *supra* n. 94, 92.

111 See Victorian statistics on the role of consent in the rape trial: Victorian Law Reform Commission, *supra* n. 94.

appears sufficiently ambiguous'. Accordingly, 'failure to dissent will often be resolved in the defendant's favour'.[112]

A woman threatened with rape therefore faces a double-bind. On the one hand, she may prefer to submit to rape rather than risk injury or even her life. South Australian police evidence on victims' responses to the threat of rape tells us that the majority of victims reporting to the police do not engage in physical struggle, often for precisely these reasons.[113] But it follows that if the victim fails positively to communicate her fears (if those fears remain what Fisse calls only a mental reservation), then it may be difficult in law to establish that this was a rape, whatever the context.

There is reason to believe that the unofficial presumption of consent serves to filter out of the criminal justice system just those sorts of rapes — the ambiguous or the passive rapes — which cause the textbook writers so much concern. Their anxieties would seem therefore to have little grounding in reality. The reason for thinking that the grey rapes are filtered out of the system is the results yielded by a simple comparison of two sets of statistics: the type of rapes which come to the attention of the police and the type of rapes which get to trial. We know that at least in South Australia the large majority of rapes reported to the police do not entail a struggle. We also know from Victorian statistics, that the majority (58%) of rapes in that state which end up in a trial do involve a struggle.[114] We can therefore infer that for a rape to be perceived as a rape worth proceeding with, whether by the victim, by the police or by the prosecution, then it is more likely to be a sharply focussed or black-and-white rape as it is in the Victorian courts. The typical triable rape is the one in which she says he forced her and she struggled (and there is physical evidence to support it) and he says the opposite: no force was applied and she failed to resist, or if she did resist, it was only token.[115] The triable rape is therefore the untypical rape.[116]

Rapes in the grey areas, the passive rapes which seem to rouse the concern of the legal writers, are much less likely to find their way into a court of law. Rather, these rapes without active resistance are more likely to be filtered out of the criminal justice system. In the light of the statistics on the extent of unreported rape, indeed it seems likely that most of these rapes never even enter the system.[117]

112 Waye, V., 'Rape and the Unconscionable Bargain' (1992) 16 *Criminal Law Journal* 94.

113 In the South Australian study of 964 women reporting rape, 518 merely submitted and a further 134 offered only verbal resistance: see Weekley, *op. cit.* n. 40, 20-1.

114 Victorian Law Reform Commission, *supra* n. 94, 70.

115 Victorian Law Reform Commission, *Rape: Reform of Law and Procedure*, Report No. 43 (September 1991) 13.

116 Indeed this is the specific thesis advanced by the American law professor, Susan Estrich, in her book, *Real Rape* (1987). She characterizes the classic, credible rape as the rape between strangers. The difficult rapes, from the point of view of the complainant wishing to establish her credibility, are those where there is some prior relationship and the rape is not overtly violent.

117 The Victorian Real Rape Law Coalition Phone-In found that 'of 179 sexual assault victims who had not reported to the police, only 17% had been attacked by a stranger': Victorian Law Reform Commission, *supra* n. 94, 65. In other words, the large majority of unreported rapes are not the sort of classic rapes described by Estrich, *op. cit.* n. 116, in which the victim is attacked violently by a stranger.

The informal presumption of consent is strengthened further when the parties already know each other, as many do.[118] It is a standard defence tactic to point to prior relations with the accused by way of inference that the complainant was consenting this time, or at least that the accused had every reason to believe that she was, whatever she said at the time. Rules about the cross-examination of the victim about her prior sexual history tend to support this inference. In a number of jurisdictions, questions about the victim's prior relations with the accused are regarded as sufficiently probative of the facts in issue to be admissible. Accordingly, such questions escape the protection of rape shield laws.[119]

Concerns about the sufficiency of the consent standard in rape, particularly when there is a relationship of trust between the parties, have led to recent suggestions for its modification. In the United States, Beverly Balos and Mary Louise Fellows have argued for an extension to rape of the confidential relationship doctrine.[120] This is a doctrine which governs 'economic transactions where the situation indicates that the victim was unable to protect herself or himself.' One of the criteria which determine such a relationship 'is whether the other party was in a position to dominate — a situation the courts then label a confidential relationship'. When applied to the law of rape, the doctrine of confidential relationship would raise 'a rebuttable presumption' that the transaction 'was the product of undue influence' whenever the parties had established a relationship of trust. This would put a greater, rather than a lesser, onus on the man who has already established a relationship with the other party to ensure that she wanted sexual intercourse.

In Australia, Vicki Waye has also questioned the adequacy of the consent standard in rape.[121] She observes that consent acquired by fraud — other than as to the nature of the act or the identity of the parties — has generally been regarded as consent for the purposes of the law of rape. To Waye, this limited notion of consent is inconsistent with 'the stated raison d'etre of rape law: to protect personal dignity and sexual autonomy.'[122]

The Victorian Parliament recently passed legislation which endeavours to lift the standard of consent in rape.[123] By implication, this legislation serves also both to acknowledge, and to endeavour to eliminate, the informal

118 The South Australian Police study found that 57.8% of the victims 'were acquainted with or related to their attackers': Weekley, *op. cit.* n. 40, 11. The Victorian Law Reform Commission study found that 75.5% of victims knew their assailant: Victorian Law Reform Commission, *supra* n. 94, 66. The figures for unreported rapes are even higher.

119 In Tasmania, Western Australia and Victoria rape shield laws cover evidence of a sexual relationship between the accused and the victim. This is not the case in the other jurisdictions: see Evidence Act 1929 (S.A.) s. 34i; Crimes Act (N.S.W.) ss 409B, 409C; Evidence Act 1906 (W.A.) s. 36A-BC; Evidence Act 1958 (Vic.) s. 37A; Evidence Act 1910 (Tas.) s. 102A; Criminal Law (Sexual Offences) Act 1978 (Qld); Sexual Offences (Evidence and Procedure) Act (N.T.) s. 4.

120 Balos, B. and Fellows, M. L., 'Guilty of the Crime of Trust: Nonstranger Rape' (1991) 75 *Minnesota Law Review* 599.

121 Waye, *op. cit.* n. 112.

122 *Ibid.* 98.

123 Crimes (Rape) Act 1991 (Vic.).

presumption of consent. Firstly it states that '"consent" means free agreement.'[124] It then obliges the judge to direct the jury in relevant cases that 'the fact that a person did not say or do anything to indicate free agreement to a sexual act is normally enough to show that the act took place without that person's free agreement'.[125] The Victorian Act states also that a prior sexual relationship between the parties should not lead to an inference of consent. Thus the Victorian Legislature has found it necessary to reverse the implied presumption of consent by declaring that silence should now positively indicate to the jury the absence of consent and this is just as true whether or not the parties have previously engaged in sexual relations.[126]

It could be said that the Victorian reforms alleviate the problem of the incredible complainant by employing a consent standard which should give women real choice in our sexual relations.[127] They remain however a legal solution to a problem which is deeply social. The social problem is that relations between the sexes are unequal. Men not only have far greater economic and political power than women, but they also control the major sites of the reproduction of knowledge. The legal solution is to enhance the notion of consent but without changing the background conditions of inequality (which could well require social revolution, not piecemeal reform).

Moreover the particular legal solution chosen is to strengthen a legal notion, the consent or assent of the individual, which is most closely associated with the liberal fiction that society is comprised of social equals. To stress 'consent' in law is necessarily to prefigure a legal person who operates autonomously, who decides freely how to live.[128] It therefore becomes meaningful to confer on that individual rights based on individual choice and volition. But a strengthened consent standard does not (and cannot) achieve the social equality necessary to make choices truly free. The legal idea of consent could therefore be described as a legal fiction (that of social autonomy and equality) which disguises a real imbalance of power.

By implication, Catharine MacKinnon would seem to reject solutions such as those provided by the Victorian Parliament which endeavour to strengthen the concept of consent for the victim.[129] MacKinnon feels that in a society where heterosexuality is defined by men in such a way that it is inherently coercive, where it entails the domination of women, the idea of

124 Crimes Act 1958 (Vic.) s. 36.

125 *Ibid.* s. 37.

126 As the Victorian Law Reform Commission indicated in the report which proposed this legislation, 'The use of the phrase "does not freely agree" is intended to make it absolutely clear that consent involves free agreement, not merely submission on the part of the other person': Victorian Law Reform Commission, *supra* n. 115, 6.

127 As the purpose section of the new Act makes clear, its aim, *inter alia*, is to 'reaffirm the fundamental right of a person not to engage in sexual activity': Crimes (Rape) Act 1991 (Vic.) s. 1(b).

128 See Naffine, N., *Law and the Sexes: Explorations in Feminist Jurisprudence* (1990) for an account of the abstract legal individual.

129 In fact she would seem to despair of any legal solution to rape while sexual relations remain as they are and while the law remains esentially patriarchal.

a woman's free agreement to heterosexual sex may make little sense. Though MacKinnon finds meaning in liberal notions of freedom and autonomy in the male, she cannot find them in the female. So while men continue to dominate women through a coercive sexuality of their own making (where sexuality remains coercive and coercion sexual), adjusting the consent standard of law can have little real effect.[130]

And yet an invigorated notion of consent in sexual relations, one which draws on classical liberal notions of freedom and autonomy, could possibly provide a tool for reconceptualizing rape.[131] In other areas of the law, concerted efforts have been made to place unequal parties on an equal footing, to ensure that neither party extinguishes the will of the other — that there is a true meeting of minds. Until the passage of the Victorian legislation, with its notion of 'free agreement', this was not true of the law of rape. As Fisse tells us, where the act is inarticulate, where the minds do not meet, she is deemed to have consented. The invocation of a truly liberal standard of agreement could render this approach unsatisfactory.

(Is Rape Difficult to Deny?) What Do Men do when Charged with rape?

The vulnerability of men to charges of rape must also be questioned in the light of some simple statistics which indicate that a man who rapes incurs only a slight risk of being tried for the crime and found guilty. To invoke some recent South Australian figures: in 1990, 676 rapes of females were reported or became known to the South Australian Police. In that year there were 206 reported rapes of a female for which persons were apprehended by police. Ninety four people were charged in the Supreme and District Criminal Courts with the crime of rape of a female. Of these, a *nolle prosequi* was entered for 45 defendants and 15 pleaded guilty to rape or another charge. Thirty three defendants actually pleaded not guilty and of these 21 were acquitted. Only six of the defendants who contested were then found guilty of the crime of rape (while a further six were found guilty of a lesser or other charge).[132]

A further measure of the perceived difficulty of denying rape is the willingness of the accused to put the prosecution to the test. In 1990, only

130 Notwithstanding her powerful rethoric, MacKinnon's own practice is in fact to engage with and to change specific pieces of legislation in an effort to improve the legal position of women. She waits for neither conditions of social equality, nor a non-patriarchal law, before engaging in legal change. For example, MacKinnon lobbied successfully for the recognition of sexual harassment as illegal sex discrimination. In light of the legal pragmatism of such a severe critic of law, it seems only right (and indeed commendable) that the Victorian Parliament should feel similarly moved to pursue legal reforms for women in a spirit of optimistic and enlightened pragmatism.

131 It may also be regarded as a pragmatic intermediate solution to the problem of defining the crime of rape in such a way that non-consent is meaningful from the point of view of women. For an analysis of the implications of pragmatism for feminism, see Rodan, M. J., 'The Pragmatist and the Feminist' (1990) 63 *Southern California Law Review* 1699. The long-term, ideal solution is to establish true equality between the sexes so that notions of consent do not harbour problems of ambiguity generated by the powerlessness of one of the parties.

132 Office of Crime Statistics, *op. cit.* n. 97. It should be noted that some of the rapes reported in 1990 may have proceeded to trial in the following year.

14% (13 of the 94) of persons charged in South Australian superior courts with rape of a female pleaded guilty as charged. By contrast, 60% (56 of the 94) charged with robbery with extortion and 72% (165 of the 230) charged with break and enter pleaded to the charge.[133] In other words, men charged with rape are much more likely than other types of defendant to demand their day in court. The Victorian Law Reform Commission has produced similar results. It found that, when compared with other types of defendant, a relatively small proportion of people accused of rape offences plead guilty:

> Of all of the accused committed to the County Court in 1989, 79% entered a plea of guilty to the most serious offence on which they were presented. By contrast, the guilty plea rate for those accused committed on rape charges in 1988-1989 was only 41%.[134]

One particular statistic has been used to support the suggestion that rape is difficult to deny. This is the rate of acquittals. For example the Victorian Law Reform Commission found the acquittal rate for rape was 'substantially lower than for County Court criminal trials as a whole'. However, as the Commission itself conceded, this finding must be viewed in the light of the fact that a relatively large proportion of men charged with rape are willing to risk a trial. (In other words, fewer rape cases are filtered out of the trial process by the accused's own admission of guilt and so, it should follow, that more weak cases are tried.) When jury acquittals are measured as a proportion of those who are presented to the County Court, the acquittal rate for rape (19%) is nearly twice that for all County Court cases (10%).[135]

3. *WHY THE GAP?*

This paper has disclosed a large gap between the thinking of some leading academic lawyers on the nature of rape and what the empirical evidence reveals about women's experiences of the crime. Contrary to what the lawyers say, rape is neither easy to allege nor especially difficult to deny. It remains to consider why the academic lawyers are so insulated from these insights from other disciplines (from criminology, sociology, and feminists writing in a number of disciplines).

A partial explanation lies in the textbook tradition in legal scholarship. One might assume that in an area of knowledge such as law where the subject matter is constantly changing, textbooks would have but a brief life. And yet the opposite is true. Law textbooks display a great tenacity and longevity. They manage not only to survive the writing life of the author but even to assume new forms well after the author has been laid to rest. Younger, fitter authors assume the mantle of the great textbook writer.

The important effect of this legal way of writing is that much stays the same. The structure, form and categories of the early book are likely to be preserved. So may the style of thinking about law. New ways of looking at

133 *Ibid.*
134 Victorian Law Reform Commission, *supra* n. 94, 49.
135 *Ibid.* 51.

law may become fresh paragraphs or footnotes, but the analytical framework remains largely in place. The legal textbook tradition is therefore inherently conservative. Old ways of seeing law are preserved and become the current way. The students of the books become the teachers.[136]

The self-renewing style of legal textbooks is of its nature highly resistant to new forms of knowledge emanating from non-legal sources. Legal textbooks help to construct a sort of legal carapace. They help to resist invasion from foreign sources and so ensure continuity of thought from one generation of legal thinkers to the next. The shell of the last writer is shrugged on by the new and the legal tortoise inches forward with only some minor deviations in its course. Legal textbooks are therefore likely to remain impervious to newer intellectual approaches which are commanding attention in the legal journals and in the writings of related disciplines.

In 1987, the Pearce Report on Australian Legal Education made a similar point about the nature of law taught in law schools.[137] It observed the tendency of law schools not to examine the law in context, a tendency which would seem to owe much to the textbook tradition. For the overriding convention in textbook writing has been for the author to confine (usually) himself to doctrine and not to extend analysis to the social context of that doctrine. As we have seen, those who rewrite the older books keep to this tradition.

Other analysts of legal pedagogy have also remarked on the tendency of law schools not to examine law in context.[138] Rather the legal habit is to establish a distance between lawyers' law and the insights into law acquired from other disciplines — insights into the political, philosophical and social bases of law. These insights have generally been defined as beyond the academic lawyer's range of interest. Academic lawyers therefore have tended not to concern themselves with, say, the empirical study of law in action, which is thought to be the province of sociologists or criminologists. The intellectual cost has been borne by the lawyers. For the effect of this divorce between the study of law and outsider legal scholarship has been to limit and impoverish lawyers' own understanding of how the laws they analyse actually work.

Legal positivism has supported this practice of intellectual isolationism. As H.L.A. Hart observed frankly in *The Concept of Law*, positivism makes sense of the lawyers' preference to study law on its own, as an autonomous body of knowledge. A commitment to positivism means that 'the analysis or study of meanings of legal concepts is an important study to be distinguished from . . . historical enquiries, sociological inquiries and the critical appraisal

136 For a view of why Australian legal curricula are resistant to change see Le Brun, M. J., 'Curriculum Planning and Development in Law in Australia: why is innovation so rare?' (1991) 9:2 *Law in Context* 27.

137 Pearce, D. C., Campbell, E. and Harding, D., *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (1987) ('The Pearce Report').

138 See *e.g.* Cotterrell, R., *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (1989) ch. 8.

of law in terms of moral, social aims, functions *etc.*'[139] It is as a consequence of this style of thinking that legal philosophers such as Hart (and also Ronald Dworkin) have explicitly addressed their writings exclusively to a legal audience. They neither draw from the legal insights of those from without the legal academy nor endeavour to influence the thinking of outsiders about the law itself.[140]

This paper has explored the implications of such intellectual insularity for academic lawyers' understandings of the law of rape. It has shown that traditional legal thinking about the nature of rape and how the law should best deal with it depends on outmoded and contested images of women and their relations with men. These images necessarily dissolve when one examines the evidence of rape garnered by scholars often from outside the discipline of law. This material on who reports rape and why, on who gets prosecuted and who does not, helps us to understand the plight of the women involved. In so doing, it also discloses an interesting relationship between the traditional view of rape and what becomes the official account of the crime — both in the criminal statistics and in the legal texts. The willingness to hear and believe (women) determines what is heard and believed.

We find that rape is very much a matter of competing stories and that the traditional view of rape does much to render the woman's story incredible, to silence and repress her view of the incident. It is in her account, however, that the injury resides for she is the one who has suffered harm. The erasure of her account therefore erases our appreciation of her suffering although it does not erase the suffering itself. While academic lawyers continue to analyse legal doctrine in a manner which excludes the insights of other disciplines (particularly the feminisms, criminology and the social sciences), as well as the critical insights of feminist lawyers, they will be poorly placed to understand the true complexity of the crimes they wish to dissect and analyse and more particularly what those crimes mean to the women affected. They will therefore be poorly placed to perform their scholarly tasks in an informed and critical manner.

For to know what is right and wrong about the law of an (anti-)social practice, one needs at least a rudimentary knowledge of how that practice actually works for all the people involved, not just one set of protagonists. It is weak scholarship to develop an understanding of doctrine and procedure on the basis of unstated and unfounded assumptions about the very people whom the law is seeking to protect.

139 Hart, H. L. A., *The Concept of Law* (1961) 253. See also Kelsen, H., *The General Theory of Law and State* (Wedberg, A. (trans.)) (1961). Positivism is inextricably connected with the idea of a legal science whose subject of study is the law itself.

140 See Cotterrell, R., *op. cit.* n. 138, and Kerruish, V., *Jurisprudence as Ideology* (1991) for a discussion of the jurisprudential tendency to address legal philosophy exclusively to a legal audience.