

RAPE LORE: LEGAL NARRATIVE AND SEXUAL VIOLENCE

RAE KASPIEW*

[This article is an analysis of pre-court and court documentation generated by six sexual violence cases heard in Victorian courts in 1993. It uses feminist and legal narrative theoretical approaches to examine the 'stories' about sexual violence that emerge from the documentation. It argues that these stories reveal that the law's approach to sexual violence is dominated by masculinist mythologies. This prevents the legal system from adequately addressing women's experience of sexual violence.]

Lore, *n.* 1. the body of knowledge, esp of a traditional, anecdotal, or popular nature, on a particular subject.¹

I INTRODUCTION

A Background

In January 1993, comments by a South Australian Supreme Court judge that a man was entitled to use a measure of 'rougher than usual handling'² to persuade his wife to have intercourse re-ignited media debate on judicial sexism.³ Shortly after Bollen J's comments became public, a string of other intemperate judicial pronouncements — particularly in rape cases — came to light. They included O'Bryan J's finding that the trauma experienced by a rape victim/survivor was lessened because she was unconscious during the rape,⁴ and Bland J's comments that 'no can often mean yes'.⁵ While many argued that these examples were just the tip of the iceberg and that the legal system was deeply and inherently sexist,⁶ defenders of the judges and the system still persisted with a strategy of denial. The Victorian Bar Council, for example, claimed that there was 'no evidence at

* BA (Melb), Student of Law at the University of Melbourne. I wish to acknowledge the assistance of the Office of the Director of Public Prosecutions in providing access to the primary material for this article. Thanks are also due to Professor Jenny Morgan, Di Otto, Lisa Sarmas, Lorraine Carey and the anonymous referee of the *MULR*. However, the views expressed and any shortcomings in the article are my own.

¹ *Macquarie Dictionary* (Revised ed, 1985) 1024.

² *R v Johns* (Supreme Court of South Australia, Bollen J, 26 August 1992) 12-13.

³ A good summary of the how the media debate started, as well as subsequent developments, is provided in Claire Tedeschi, 'Taking the Bias Out of the Bench', *Age* (Melbourne), 6 August 1994. The controversy over Bollen J's comments followed considerable debate in 1991 over the Victorian Supreme Court's finding that the rape of a prostitute merited a lesser sentence than that of a 'chaste woman': *R v Hakopian* (Victorian Court of Criminal Appeal, 11 December 1991). See Meredith Carter and Beth Wilson, 'Rape: Good and Bad Women and Judges' (1992) 17 *Alternative Law Journal* 6.

⁴ *R v Stanbrook* (Supreme Court of Victoria, O'Bryan J, 10 November 1992) 27-8.

⁵ *R v [Donald]* (Morwell County Court, Bland J, 15 April 1993) 34-5.

⁶ See, eg, NSW Magistrate Pat O'Shane, quoted in Karen Middleton and Michael Magazanic, 'Rape Remarks a Backlash Against Women: Magistrate', *Age* (Melbourne), 14 May 1993.

all' to support media claims of endemic gender bias.⁷

A 'jury', the Senate Standing Committee on Legal and Constitutional Affairs, has already returned its verdict on the particular cases that inflamed media debate in 1991.⁸ Not surprisingly, it found that while publicity about some of the comments was exaggerated, a problem that was nevertheless 'wider than a handful of isolated instances' did exist.⁹ It concluded that gender bias was a 'real, significant but largely unconscious' systemic problem.¹⁰ The report clearly shows that the strategy of portraying the media debate as a 'storm in a teacup' beaten-up by ill-informed journalists, cannot be sustained.¹¹ And the media's continued scrutiny (albeit sporadic) of the judiciary and the legal system suggests the issue will not go away.¹²

The present debate occurs against the background of a complex feminist debate on law reform. Internationally and locally, the legal system has been the target of feminist criticism for decades,¹³ and it is this criticism which has set the scene for the current focus on legal sexism. Pressure from feminist groups has prompted legislative change in several areas, especially rape, domestic violence and family law.¹⁴

But, ironically, the efficacy of law reform as a tool in achieving feminist aims is increasingly being questioned within a diverse body of feminist theory. Mounting evidence that progressive change is frequently subverted by a persistently change-resistant, conservative system has raised complex strategic questions for feminists.¹⁵ The appropriateness of the law reform goals of the 'first-

⁷ Chris Jessup QC, Chairman, and Susan Crennan QC, Senior Vice-Chairman, Victorian Bar Council, 'Judges Condemned Without Evidence' (letter to the editor), *Age* (Melbourne), 13 September 1993. The letter said the evidence suggested that 'very few judges on very few occasions have made remarks which some regard as insensitive', and that misreporting was largely to blame for the controversy. But in a submission to the Senate Standing Committee on Legal and Constitutional Affairs, the Victorian Bar Council concluded that 'a small number of male magistrates, a small number of male judges and a significant minority of male barristers have made statements which demonstrate bias against women. Our survey and anecdotal evidence satisfy us that some of those judges are repeatedly guilty of such behaviour': quoted in the Report of the Senate Standing Committee on Legal and Constitutional Affairs (Cth), *Gender Bias and the Judiciary* (1994) 73.

⁸ Senate Standing Committee on Legal and Constitutional Affairs, above n 7.

⁹ *Ibid* xiv.

¹⁰ *Ibid*.

¹¹ Some judges are maintaining this strategy. King CJ of the Supreme Court of South Australia was quoted recently criticising the media for selective reporting and saying moves to address gender bias are an attack on the independence of the judiciary: John Kerin and Katherine Towers, 'Judge in Attack on Threat to Judiciary', *Weekend Australian* (Sydney), 15-16 October 1994.

¹² The description of a rape in which the woman was knocked unconscious, beaten, raped anally and vaginally and held captive for two and a half hours as 'not very grave' by a majority of the Victorian Court of Criminal Appeal has recently led to renewed media focus on the issue: see, eg, John Silvester, 'Rape victim attacks judges', *Sunday Age* (Melbourne), 18 September 1994.

¹³ A useful summary of feminism's engagement with law is provided in Ngairé Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (1990).

¹⁴ Developments in these areas are covered in Jocelyne Scutt, *Women and the Law* (1990) and Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (1990).

¹⁵ Carol Smart, for instance, deals with the issue generally in *Feminism and the Power of Law* (1989). A high profile example is the Canadian case *R v Seaboyer; R v Gayme* (1991) 83 DLR (4th) 193, in which so-called 'rape shield' provisions restricting admissibility of sexual history evidence and sexual reputation evidence, were struck down as unconstitutional by the Supreme Court of Canada. In Australia, the High Court's decision in *Longman v R* (1989) 168 CLR 79,

wave' of feminist agitation is increasingly being debated,¹⁶ as the impact of their (partial) fulfilment emerges.¹⁷

Overt examples of masculinist bias in the legal system have been highlighted in the recent media debate. This article aims to explore some of its less obvious manifestations by examining how court stories about rape, incest and sexual assault are formulated. By using some of the theoretical insights of postmodernist/legal narrative and feminist theorists in analysing the court and pre-court documentation generated by six Victorian rape/sexual assault/incest cases,¹⁸ I hope to show how the court process, and the discourse it generates, constructs and perpetuates the bias.

B Theoretical Themes

The theoretical starting point for this analysis of six Victorian cases is McBarnet's insight that the legal process does not and cannot uncover absolute truth or reality.¹⁹ Although this point may seem obvious from the perspective of a legal insider, its articulation is nonetheless crucial. This is because the legal system bears the mantle of a truth-finder in the perceptions of outsiders, an impression supported at times by law's own rhetoric.²⁰ McBarnet argues that a legal case,

which circumvented Western Australian legislation abolishing mandatory warnings about uncorroborated evidence in rape trials by emphasising a judge's general responsibility to give a warning where not to do so could lead to a miscarriage of justice, is seen as an example of persistent judicial regressiveness. See Kathy Mack, 'Continuing Barriers to Women's Credibility: A Feminist Perspective on the Proof Process' (1993) 4 *Criminal Law Forum* 327.

¹⁶ Naffine, above n 13, ch 1.

¹⁷ The concept of gender neutrality as a law reform goal, for example, is being questioned in some contexts. While it has been effective in achieving voting rights for women, in the context of rape law it conceals the gendered nature of the crime. See Ngaire Naffine, 'Possession: Erotic Love in the Law of Rape' (1994) 57 *Modern Law Review* 10, 34.

¹⁸ The primary material for this article comes from Director of Public Prosecutions files on six sexual violence cases. Three of the cases were the subject of media comment in 1993; *R v Stanbrook* (Supreme Court of Victoria, O'Bryan J, 10 November 1992), *R v [Donald]* (Morwell County Court, Bland J, 15 April 1993) and *R v [Morris]* (Melbourne County Court, Howse J, 7-18 March 1993). However, the features of the cases that gave rise to the media comments are not the prime focus of the article, as they have been dealt with by the Senate Standing Committee (above n 7). The comments are discussed where they are relevant to the broader purpose of the article, as outlined in the text above. The other three cases were selected from 1993 sexual violence cases. They are: *R v Newman* (Melbourne County Court, Ravech J, 9 March 1993); *R v [Bolton]* (Melbourne County Court, Stott J, 3 May 1993); *R v Ellis* (Melbourne County Court, trial before Howse J commenced on 15 June 1993 and was aborted on 21 June 1993 due to media stories on rape-related issues, the case started again before Walsh J on 5 October 1993). Square brackets [] indicate that the name has been changed — in one case because the offender was a child at the time of the offence and in two other incest cases so as not to identify the victim/survivors. Names of victim/survivors have been changed throughout to protect their identities. The six cases encompass a range of behaviours representing sexual violence against women. Although the law applies different labels to these crimes (such as 'aggravated rape', 'gross indecency', 'incest'), male sexual violence is the common element.

¹⁹ Doreen McBarnet, *Conviction: Law, the State and the Construction of Justice* (1981) 11.

²⁰ For example, truth finding is treated as an unproblematic goal in A Zuckerman, *The Principles Of Criminal Evidence* (1989) 7: 'When a court of law sets out to decide whether a disputed event took place as party A contends, or, on the contrary as party B argues, the court is concerned to find the truth about that event A critical exposition of the law of criminal evidence has to be conducted by reference to its general principles. Foremost amongst them is, naturally, the desire to discover the truth'. Similarly, Santow J of the Supreme Court of NSW described litigation as a process 'designed to reach the truth' through the adversary system, in 'A Message to Law

'far from being the truth, the whole truth and nothing but the truth' is a 'biased construct, manipulating and editing the raw material of the witnesses perceptions of an incident into not so much an exhaustively accurate version of what happened as one which is advantageous to one side'.²¹

McBarnet's findings are congruent with the emphasis in a more recently developed body of postmodern legal theory on law as a socio-political construct, both determined by and determining, wider socio-political discourses. The 'legal narrative' branch of this theoretical approach eschews traditional forms of legal analysis in favour of focusing on what is said in legal discourse, how it is said and who says it.²² Law's relation to 'reality' and 'truth' thus becomes problematic and its claim to 'neutrality' is dismantled.²³

This perspective undermines small 'l' liberal notions of law as impartial and absolute, by exposing law and the legal system as inherently partial and ideological. It challenges small 'l' liberalism's concept of neutral 'justice', portraying instead a flawed, shifting and at times contradictory system, laden with relative values and relative notions of fairness and justice.

Paradoxically, ammunition for this challenge can be found within rhetorical precepts supporting the liberal democratic legal system, such as the inherently relative notion of 'beyond reasonable doubt' and the admission of fallibility behind the maxim that it is 'better for ten guilty men [*sic*] to go free than for one innocent man [*sic*] to hang'. In exploring the cracks in liberalism's edifice of justice, feminist theorists have exposed a masculinist slant,²⁴ while race and class theorists have highlighted its bias toward those who are white and middle class.²⁵

Many feminist theorists argue that in rape law the dominant voice is that of patriarchy and the dominant perspective is inherently masculinist.²⁶ This means

Graduates' (1994) 68 *Australian Law Journal* 730. Again, the goal of establishing the 'true facts' is treated as unproblematic in this description of the process of police investigation into rape allegations: 'The inquiry as to true facts can only reveal two scenarios: either the commission of the most degrading, humiliating and soul destroying crime that can be committed against another human being, or a false report motivated by greed, fear or pressure from those within the victim's environment': Detective Inspector Danye Moloney, 'Sexual Assault: The Police Investigation Perspective' in Patricia Eastale (ed), *Without Consent: Confronting Adult Sexual Violence* (1993).

²¹ McBarnet, above n 19, 17.

²² See, eg, Symposium, 'Legal Storytelling' (1989) 87 *Michigan Law Review* 2073, which brings together the work of some key theorists in this area, including: Kim Lane Scheppele, 'Foreword: Telling Stories' (1989) 87 *Michigan Law Review* 2073; Richard Delgado, 'Storytelling for Oppositionists and Others: A Plea For Narrative' (1989) 87 *Michigan Law Review* 2411; Toni Massaro, 'Empathy, Legal Storytelling and the Rule of Law: New Words, Old Wounds?' (1989) 87 *Michigan Law Review* 2099.

²³ Recognition of these issues is central to postmodernism's theoretical strategy though it does of course pre-date postmodernism's development. A crucial question in postmodernism, flowing from this recognition, is the appropriateness of law reform as a goal given the fundamental challenge to law itself.

²⁴ See Smart, above n 15; Graycar and Morgan, above n 14; Scutt, above n 14.

²⁵ Patricia Williams, *The Alchemy of Race and Rights* (1991), and Delgado, above n 22.

²⁶ There is a diverse body of feminist theory encompassing a range of approaches and strategies. See Judith Vega's analysis of the differing approaches of Catharine MacKinnon and Susan Brownmiller, 'Coercion and Consent: Classic Liberal Concepts in Texts on Sexual Violence'

that rape laws (the traditional common law, as well as statute-based versions) protect not the interests of women who are raped but those of the rapists (who are overwhelmingly male), because they reflect patriarchal conceptions of sexuality, denying women subjectivity, autonomy and self-definition.²⁷

Dispensing with absolutist notions of justice and fairness, theorists who analyse law and the legal process in terms of discourse look to the stories that are told in law to identify how the system favours the interests of dominant socio-political groups and subordinates those of marginalised groups. By analysing legal 'stories', theorists such as Scheppele,²⁸ Estrich²⁹ and Delgado³⁰ have exposed the way in which the law often operates to privilege the stories of the powerful and silence those who are subordinate. But in identifying the alternative accounts or 'counter-stories' that lie behind the dominant accounts or 'stock stories',³¹ these theorists expose and validate the experiences and perspectives of those who are silenced — or disbelieved — by the system.³²

Legal narrative theorists such as Scheppele argue that one side of a case becomes a 'legally sanctioned reality', which serves to disqualify the reality experienced by the losing side.³³ Law deals not in an objective reality and identifiable facts, but in the subjective perceptions of the players — judges and juries are faced not with one account which is true and one which is not true, but with two competing 'stories'. Its rhetoric of objective fact-finding, truth discovery, scientific proof and conclusive evidence masks a series of choices faced by the decision-maker informed not by 'objective' considerations but by subjective factors, which, because they accord with the dominant ideology, are frequently considered neutral.³⁴

(1988) 16 *International Journal of the Sociology of Law* 75. But rape law as an instrument of male power is a common theme, whatever its treatment.

²⁷ Studies which show that the impact of 'progressive' rape law reform is minimal in practice include Zsuzanna Adler, *Rape on Trial* (1987) and Jenny Temkin, *Rape and the Legal Process* (1987). Susan Estrich, *Real Rape* (1987) and 'Palm Beach Stories' (1992) 11 *Law and Philosophy* 3, discusses how rape law reform produces shifts that often disadvantage women. Pheng Cheah, 'The Law of/as Rape — Post-structuralism and the Framing of the Legal Text' (1991) 8 *Law in Context* 117, examines the implications of rape law reform in a more theoretical way. See also Naffine, above n 17; Susan Edwards, *Female Sexuality and the Law* (1981) and Smart, above n 15.

²⁸ Scheppele, above n 22.

²⁹ Estrich, above n 27.

³⁰ Delgado, above n 22.

³¹ Delgado uses the notion of 'stock stories' to describe the narratives of dominant groups: 'The stories or narratives told by the ingroup remind it of its identity in relation to outgroups, and provide it with a form of shared reality in which its own superior position is seen as natural': *ibid* 2412.

³² Delgado further describes storytelling as a kind of therapy for outsiders. By telling their own stories, their own histories, he argues, members of outsider groups can gain healing and liberation. They can also challenge the 'stock' stories, told by 'insiders', that deride and denigrate them: *ibid* 2437, 2439.

³³ Scheppele, above n 22, 2079-80.

³⁴ A cogent exposition on the inherently ideological nature of legal discourse, and the rhetorical strategies used to conceal this, can be found in Michael Smith, 'Language, Law and Social Power: *Seaboyer*; *Gayme v R.* and a Critical Theory of Ideology' (1993) 51(1) *University of Toronto Faculty of Law Review* 118. Judith Grbich, 'The Body in Legal Theory' (1992) 11 *University of Tasmania Law Review* 26 discusses how post-structuralist theoretical approaches can counter small 'l' liberalism's constructions of knowledge and neutrality.

Scheppele develops the metaphor of 'perceptual fault lines' to characterise the competing perceptions that judges and juries are faced with. She argues that divergent accounts of events do not necessarily arise because someone is lying (although this may be the case). Rather, each player's response to an event — the story that they make of it — is influenced by their own background, experience and perceptions. Divergent stories occur because of divergent subjective responses, and the gaps between these stories are best described as 'perceptual fault lines'. Scheppele argues further that such fault lines are often greatest between the stories told by 'insiders' — players whose experiences and perceptions accord, for reasons of class, gender or race, with those who are doing the choosing — and those told by 'outsiders' — those whose experiences and perceptions are foreign to those of the decision maker.³⁵ In Delgado's terms, 'insider' stories are usually 'stock' stories — those which accord with the dominant ideology, while 'outsider' stories are 'counter-stories'; they challenge prevailing interpretations, presenting an alternative view of events, but one which the legal process all too often dismisses.³⁶

Applying this analysis to rape, women are the outsiders because rape law has for centuries reflected the patriarchal view of human relationships and sexuality, which defines woman as 'other', and that which is possessed. Rape law reflects a construction of sexuality which discounts women's subjectivity³⁷ and privileges the male perspective. This can be seen in the centrality of the notion of consent, which in Smart's words, 'is completely irrelevant to women's experience of sex'.³⁸ This is because, Smart argues, the consent/non-consent dichotomy is structured to place submission in the sphere of consent, thus sanctioning a coercive model of sexuality which rewards male aggression and ignores the implications of the structural power imbalance between men and women.³⁹ The way that rape is dealt with in law fails to acknowledge the spiritual, emotional and psychological aspects of the crime,⁴⁰ with victim/survivors⁴¹ being treated not as people but as 'female bodies' which are subject to further 'sexualisation in

³⁵ Scheppele, above n 22, 2082. In relation to rape, Scheppele writes that 'radically different perceptions exist in uneasy tension ... between men and women' in 'The Re-Vision of Rape Law' (1987) 54 *University of Chicago Law Review* 1095, 1108.

³⁶ Delgado, above n 22, 2411.

³⁷ See, eg, Naffine, above n 17; Estrich, above n 27; Edwards, above n 27.

³⁸ Smart, above n 15, 33.

³⁹ Ibid. See also Naffine, above n 17, 36.

⁴⁰ Among the after-effects experienced by victims of rape are depression, fear, anxiety, shame, phobias, suicidal actions, anorexia, alcohol and drug addiction and eating disorders, according to the following studies: Ann Burgess and Lynda Holmstrom, 'Rape Trauma Syndrome' in Duncan Chappell, Robley Geis and Gilbert Geis (eds), *Forcible Rape: the Crime, the Victim, and the Offender* (1977); S Girelli, P Resick, S Marhoefer-Dvorak and C Hutter, 'Subjective Distress and Violence During Rape: Their Effects on Long Term Fear' (1986) 1 *Victims and Violence* 35, cited in Patricia Easta, *Voices of the Survivors* (1994) 8.

⁴¹ The question of how to describe women who undergo the experience of rape is a complex one. The legal system's designation of them as complainant or prosecutrix is unsatisfactory from a feminist perspective because both terms situate them in the position of legal actor — a representation this article argues is false. While the term 'victim' reflects the position of the women at the time of the events in question, it also implies vulnerability and weakness. The term 'victim/survivor' will be used in this article to counteract this impression.

the process of establishing legal truths'.⁴²

In the context of the gendered crime of rape, the subordination of the collective interests of women is further consolidated by the primacy placed on the rights of the accused.⁴³ This has significant implications for the way court stories about rape are shaped, because it ensures that, as numerous rape victim/survivors and those who work with them have observed, it is the victim/survivor who goes on trial.⁴⁴ Because the burden of proof to show 'guilt beyond reasonable doubt' is on the prosecution, her story becomes the subject of stringent testing, not the least in cross-examination. It is her behaviour and character, rather than those of her attacker, that become the focus of minute examination. This highlights a central tension in the justice system's approach to sexual violence. The protection that the system offers the rights of the accused comes at the expense of the victim/survivor. While the goal of safeguarding these rights must remain a prime concern within the justice system as a whole, it should not be used as a justification for pillorying the victim/survivors of one class of crime. As feminist writings have reiterated time and time again, mugging victims are not blamed for carrying wallets yet it is a common defence tactic to blame victim/survivors for rape.⁴⁵

In this article, I intend to use the primary material, described above, to show that the law and the legal process operate to ensure that women's stories about their experiences of crimes of sexual violence are barely told — let alone heard or believed — in the legal process. The starting point of the cancellation of their reality is the masculinist definition of rape in law. The legal process then operates to construct an alternative reality, privileging the male point of view and drawing on masculinist notions of women and sexuality which pervade the wider socio-political milieu, fracturing and distorting women's stories until they are virtually unrecognisable. Through textual analysis of the documentation, I attempt to move beyond a narrow legal approach to expose the result of the discursive practices used in the legal process. The focus of this article is not the law itself, rather it is the stories that are told within the legal process.

The following discussion is divided into three main sections. The first section, 'Whose Stories?', examines how court stories are formulated and whose stories the system validates. The second section, 'Short Stories' demonstrates how the legal process determines the boundaries of the court story, decontextualising women's experiences in a manner adverse to their interests. The final section, 'Stock Stories', shows that 'rape myths' are still very influential in court proceedings, despite legislative attempts to downplay their importance.

⁴² Smart, above n 15, 20.

⁴³ Smith, above n 34; Estrich, above n 27.

⁴⁴ Poignant summaries of victim/survivors' impressions of their treatment by the legal system are included in Lynette Byrnes and Susan Kendall, 'Only a Witness' in Patricia Easteal (ed), *Without Consent: Confronting Adult Sexual Violence* (1992) 50: experiences of cross-examination were described as 'degrading', 'terrible', 'I was put through hell', 'I felt as if I were on trial', 'everything was in his favour, he was protected'.

⁴⁵ See, eg, Estrich, above n 27.

II WHOSE STORIES?

Victim/survivor (to police): I knew the less I fought I could probably prevent any further internal damage to me, than what I was already having done ... I was in a lot of pain from my vagina [because of an abortion three days earlier] — it was a burning sensation, I was devastated, I can't think of any words to adequately describe the way I felt.⁴⁶

Accused's Barrister (during trial): What I suggest is that you were feeling very, very miserable, and here was the man that you'd had the relationship with in the past who was offering a little bit of TLC as it's known, tender loving care.⁴⁷

A Sources

A crucial theme in legal narrative theory is the importance of having an opportunity to tell one's story in the legal process. It is through having this opportunity that 'outsiders' gain the chance to challenge 'insider' stories and perhaps, against big odds, to have their accounts validated by the law.⁴⁸ But when one examines the treatment of victim/survivors of sexual violence in the legal process, it becomes clear that the opportunity to describe their experiences in their own terms is largely denied to them. Law's masculinist account of rape is thus allowed to remain unchallenged.

The documentary starting point for a sexual violence case is the police statement made by the victim/survivor. This statement, and other statements made to police by witnesses and other parties, are the 'raw material' from which a legal case is formulated. As the quotation that begins this section illustrates, police statements are the closest thing in the legal process to an unmediated first person narrative. They do in fact appear to provide an opportunity for the victim/survivor to tell her story.

However, on closer examination, this appearance is misleading. It is the law, rather than the perceptions and reactions of the victim/survivor, that determines the shape of the police statement. The police officer overseeing the making of the statement also acts as editor, directing what information should be included to ensure the best chance of a conviction.⁴⁹ This means that the story in the

⁴⁶ DPP file on *R v Ellis* (Melbourne County Court, Walsh J, 5 October 1993), victim's police statement, 13 April 1992. Ellis pleaded not guilty to seven counts of rape. He was acquitted.

⁴⁷ *Ibid*, transcript, 659.

⁴⁸ Delgado, above n 22, 2411.

⁴⁹ The negative psychological impact of the lack of control over the statement-making process has been commented on in Victorian Law Reform Commission, *Rape: Reform of Law and Procedure*, Report No 43 (1991) 123. The Real Rape Law Coalition submission to the VLRC claims that 'many women report feelings of frustration and anger at being "gagged" in court, about not being allowed the opportunity to present their version of events, to tell it in their own words': *ibid*,

Appendix 7, 158. Similar feelings are reflected in this account of the process by one survivor: 'This was excruciatingly frustrating, as I didn't have faith in her [the policewoman taking the statement] I was to be bound to these words legally as if they were my own — yet they weren't. It was like getting someone else to write a personal letter. I wanted to write it myself, so they would definitely be my words and I could confidently swear by them': Louise Phillips,

statement reflects the pre-occupations of the law (as interpreted by the relevant police officer). This is the same law that distorts women's experiences through the prism of masculinist notions of women, rape and sexuality. The highly artificial narrative produced by this process is illustrated by the following excerpt:

I forgot to say earlier but Peter Ellis has been circumcised. Furthermore, I want to say that at no time have I ever given Peter Ellis permission to touch me or have sex with me. I have never indicated that I wanted to have a relationship with him. I only submitted to him because I was afraid of losing my job and he always intimidated me.⁵⁰

The underlying purpose of these peculiarly juxtaposed statements is transparent. The first is designed to provide an evidentiary basis for proving intercourse occurred. The subsequent statements lay the groundwork for rebutting a consent defence and seem highly unlikely to be a spontaneous narrative. Given that lack of consent is a given from the point of view of a rape victim/survivor, the statements are eloquent testimony to the external influences shaping the narrative.

The denial of an authentic voice to the victim/survivor is consolidated by the limited role that even the mediated narratives embodied in the police statements play in the legal process. Generally, police statements are not formally admitted into evidence in a trial. In a case where there is a 'not guilty' plea they merely provide the basis for the process by which the prosecution leads evidence from the victim/survivor in a rigid question and answer format (the implications of this will be more fully discussed below). The trier of fact — the jury — thus never has access to the narrative. Even though they are available to the judge where there is a guilty plea, they are not held to have much weight because they have not been subject to the evidentiary testing process,⁵¹ although they can be drawn upon as *prima facie* evidence in relation to the facts of the case.

As a result of law's influence in shaping the story told about the experience of sexual violence in court, female bodies become objectified and the experience of abuse is decontextualised. This can be seen in the narrative shaped from the experience of a teenage victim/survivor of incest.⁵² Her body became the site of minute verbal examination as her evidence was led in court:

Moving On: A Journey Through Sexual Assault (1994). See also Lyn Byrnes and Susan Kendall, 'Only a Witness' in Easteal, above n 20, 55.

⁵⁰ DPP file on *R v Ellis*, above n 46, victim's police statement, 13 April 1992.

⁵¹ Richard Fox, *Victorian Criminal Procedure* (1995) 7.6.2. The police statements form part of the depositional material and are available to the magistrate in a committal (7.6.1). They may be admitted as evidence in a trial if a witness has died or is unavailable, or if the facts in the statement are not contested (7.3.3).

⁵² DPP file on *R v [Bolton]* (Melbourne County Court, Stott J, 3 May 1993). [Bolton] pleaded not guilty to seven charges of indecent assault in relation to his two stepdaughters. At the time of the trial in 1993 they were 14 and 18 respectively. The events in question were alleged to have occurred in 1986 and 1989. Bolton was acquitted on all charges. Despite the acquittal, his stepdaughters will be referred to as 'victim/survivors' in this article because it reflects their 'self-believed reality', rather than the story the jury chose to accept. The same terminology will be applied to victim/survivors in other trials dealt with, regardless of whether the accused was convicted or acquitted.

[Q]: [T]here is the outside part of the vagina? [A]: Yes.

[Q]: Right, you're with me, its actually outside the body, covered with pubic hair? [A]: Yes.

[Q]: And there is an intermediary or middle part of the vagina? [A]: H'mm, yes.

[Q]: And then there's actually the internal part of the vagina? You understand? [A]: Yes.

[Q]: Inside you, the cavity. Now, when you say outside and inside, are we talking about the intermediary part between the lips or actually inside your body?

[A]: Inside, right inside.

[Q]: Internally? [A]: Yes.⁵³

The law's pre-occupation with the physical, rather than the spiritual, emotional and psychological aspects of the crime is reflected in the degree of specificity the victim/survivor was required to provide, even though the charge in this instance was indecent assault which did not turn on penetration.⁵⁴ The victim/survivor thus became the object, rather than the subject, of the court story built upon the police statement. Just as her story was subsumed by the legal process into its own narrative, her body became the object of public examination. The detailed anatomical questioning illustrates how synecdoche is a key feature of the discourse shaped by the examination, cross-examination and re-examination process. The whole picture is distorted as details become the focus of attention. The story told about [Susan's] experience of abuse at the hands of her stepfather is not about the misuse of power and abuse of trust but about the degrees of penetration. It is about the cavity, not the girl.

The Victorian Government's recent introduction of victim impact statements is seen by some as an initiative which will give crime victims a voice in the legal system. Under an amendment to the Sentencing Act, crime victims will now have the opportunity to make a statement to the court describing the impact of the crime upon their lives.⁵⁵ The statements will be voluntary, but if a victim chooses to make one, they will have to be available for cross-examination.⁵⁶ The Government and other supporters of the legislation claim it will strengthen cognisance of the rights of victims in the legal system, while simultaneously protecting those of the accused.⁵⁷ In relation to rape, however, these statements are unlikely to substantially counteract victim/survivors' voicelessness in the system. They will not address the fundamental issue of the inadequacy of the

⁵³ Ibid, transcript, 35-6.

⁵⁴ 'A person commits indecent assault if he or she assaults another person in indecent circumstances while being aware that the person is not consenting or might not be consenting': Crimes Act 1958 (Vic) s 39(2). Graphic anatomical detail was a common theme in other transcripts. In *R v Newman* (Melbourne County Court, Ravech J, 9 March 1993), for example, the way in which victim/survivors are made to recount minute detail about the violation of their bodies as if it is no different to any other evidentiary detail, was brought home by the judge persistently asking the teenage victim/survivor to repeat herself: [His Honour] (repeating victim/survivor): His fingers didn't go in very far. 'I had my period' and you added something after that which I didn't hear? [Victim/survivor]: They didn't go in very far. [Prosecutor]: She said she had a tampon in. [His Honour]: That is what I did not hear: transcript, 75.

⁵⁵ Sentencing (Victim Impact Statements) Act 1994 (Vic) s 95A.

⁵⁶ Ibid s 95D.

⁵⁷ Jan Wade, second reading speech, Victoria, *Parliamentary Debates*, Legislative Assembly, 31 March 1994, 778-9.

legal definition of rape, because they enter the system only after meeting that definition. Moreover, because they will be admitted only on the system's own terms, making the victim subject to cross-examination, they will merely provide greater opportunities for the victim/survivor's story to be distorted and decontextualised and for her ordeal in the witness box to be lengthened. The introduction of victim impact statements highlights the problems involved in attempting to achieve small-scale law reform which does not address fundamental problems in the system. As one opponent argues, they may 'compound the problems women experience as they find that their trauma and injury will now also be "judged" according to the male standards and sexist and racist attitudes demonstrated by members of the Victorian judiciary'.⁵⁸

B Choices

It is important to appreciate that the victim/survivor's police statement cannot be construed as her own unmediated narrative. However it is also true that the statements provide the best means available in the legal documentation of gaining insight, albeit distorted, into the victim/survivor's perceptions of her experience. The story told by the prosecution on the basis of the statement on behalf of the state (rather than the victim/survivor) in a contest comes head to head with a diametrically opposed story told by the defence. Using Scheppele's 'fault-line' metaphor, the gap between these stories generally has the dimensions of a chasm. But there are also a multitude of secondary narratives in which other legal storytellers — the judge, defence and prosecution barristers, expert and other witnesses, to name a few — form their own stories about the events which have given rise to the case. The gaps between these stories may well be fissures rather than chasms, but nonetheless they have significant legal consequences.

1 Chasms

Leaving aside the indefinable (for the purposes of this article) fault line that lies between the victim/survivor's own suppressed story and the court story told on her behalf,⁵⁹ the primary, most dramatic gap lies between the stories told by the prosecution and defence. When there is a not guilty plea, the jury is forced to make a choice that validates one story and cancels out the other. A contest pushes the defence and prosecution stories to opposite extremes. In McBarnet's words, it means 'one side taking the grey areas of "reality" and turning them into "black" the other side turning them into white'.⁶⁰ The ambiguity inherent in the requirement for guilt to be proven beyond reasonable doubt is thus overborne by the extremity of the choices faced by courts, which provide 'potent legitimisation

⁵⁸ Therese McCarthy, 'Victim Impact Statements — A Problematic Remedy', A Position Paper prepared by the Project for Legal Action Against Sexual Assault (1994) 3 *Australian Feminist Law Journal* 175, 181.

⁵⁹ This article is not claiming to expose an alternative 'truth' to that validated by the legal system, since one of its underlying premises is that there is no such thing as truth. Rather it is merely comparing how different 'accounts' are treated.

⁶⁰ McBarnet, above n 19.

for whichever version is accepted'.⁶¹

The experience of the woman whose quotation opens this section provides a stark illustration of this.⁶² The victim/survivor described to police an alleged violent rape by her employer. This was allegedly the last in a series of similar incidents. It was described by the defence barrister as a 'bit of tender loving care'. The jury in the case chose to accept the defence's version of events, thereby accepting the barrister's portrayal of the victim/survivor as a liar. The extremes embodied in the two stories provide an example of the dramatically contradictory tales produced by the adversary system, in which all hints of ambiguity are eliminated.

The scenario in the case raises a number of complex issues which the consent/non-consent dichotomy is powerless to address.⁶³ The gender-based power imbalance between the victim/survivor and the perpetrator was exacerbated by their employer/employee relationship, and the attendant economic issues this raises.⁶⁴ Furthermore, there was a greater imbalance in physical strength between the victim/survivor and the perpetrator than that usually found between men and women.⁶⁵ In addition, a number of factors in the victim/survivor's personal life indicated that she was going through a period of emotional and psychological stress, and had accepted 'favours' from the perpetrator.⁶⁶ If the issue of power,⁶⁷ instead of consent, was central to the question of establishing that rape had occurred, then the prosecution would have had a greater range of arguments to draw upon. Instead, the unambiguous 'blackness' of the defence of consent forced it to make grey into white, at the expense of credibility. The consent/non-consent dichotomy remained a strong feature of this case, even though some of the charges involved came under new provisions of the Crimes Act designed to overcome the dichotomy.⁶⁸ It appears that the Crown's presen-

⁶¹ Ibid 25.

⁶² DPP File on *R v Ellis*, above n 46.

⁶³ Discussion of the problems raised by the centrality of consent is included in Estrich, above n 27, 103; Smart, above n 15, 34; and Naffine, above n 17, 26-7.

⁶⁴ DPP File on *R v Ellis*, above n 46, additional statement to police by Rhonda Herd, 3 June 1992, 101. This is an explicit theme in the victim's police statement. She says 'Peter Ellis approached me again and told me that if I didn't have sex with him, I would lose my job. I knew it would be difficult to get another job.'

⁶⁵ Ibid. Ellis is described as 'a very big man. He would weigh I would say approximately 25-30 stone. I am not very good at estimating weights of large people but he is a very big man'. The impression of his intimidating physical presence is strengthened by the additional information that he has 'heaps of tattoos', is a member of a Road Rebels Motorcycle Club and has a violent temper.

⁶⁶ Ibid, transcript, 233. These factors included the break-up of her marriage, the break-up of a subsequent relationship and an abortion. The favours included use of a motor vehicle for six months with free petrol, \$500 funding for a modelling course and a \$1000 loan.

⁶⁷ For a detailed discussion of the criminal law's failure to accommodate power inequalities in its approach to rape, see Stephen Schulhofer, 'Taking Sexual Autonomy Seriously' (1992) 11 *Law and Philosophy* 35.

⁶⁸ Crimes Act 1958 (Vic) s 36, which defines 'consent' as free agreement which can be abrogated by: submission because of force or fear of force (s 36(a)); fear of any type of harm to themselves or someone else (s 36(b)); submission because of unlawful detainment (s 36(c)); incapacity through being asleep, unconscious or affected by drugs or alcohol (s 36(d)); incapacity to understand the sexual nature of the act (s 36(e)); deception in relation to the sexual nature or the act or the identity of the perpetrator (s 36(f)); mistaken belief that the act is for medical or hygienic

tation of the power-imbalance issues that could have abrogated the notion of free agreement was insufficient to persuade the jury to reject the defence's argument that consent was freely given.⁶⁹

2 *Fissures*

In contrast to the dichotomous choice posed by a 'not guilty' plea, there is also a range of more subtle choices faced by legal decision-makers at other junctures in the legal process. The multitude of 'secondary' narratives — and less obvious fault lines — generated by a case also create choices which have significant legal outcomes. The examples discussed below show how the stories that were accepted by the judges, or validated by the legal process, favoured the interests of the male defendants in contexts where alternative accounts by women were systematically discounted.

Paul Andrew Stanbrook's decision to plead guilty to charges of aggravated rape and attempted murder meant that the primary decision confronting O'Bryan J was the appropriate length for his jail sentence.⁷⁰ Among the significant considerations involved in the decision were the nature of Stanbrook's character and his prior criminal record, and the impact of his crimes upon his 16 year old victim/survivor.

There were a number of 'stories' told about Stanbrook's character. Two of the women who knew him best — his former wife and former de facto wife — made police statements in which they described long histories of violence in their lives with Stanbrook.⁷¹ According to his ex-wife, this violence was not confined to his attitude to her, but was more generalised: 'he appeared to get a real thrill out of frightening women'.⁷² But like so many instances of 'domestic' violence,

purposes (s 36(g)). It would seem that s 37 would also have been relevant. It requires the judge to direct the jury in relevant cases that: silence and passivity do not indicate consent (s 36(a)); consent is not implied because of the absence of physical resistance (s 36(b)(i)) or injury (s 36(b)(ii)); and that the reasonableness of the accused's belief in consent must be taken into account in all the relevant circumstances (s 36(c)). However, because the judge's charge is not reproduced in the transcript, it is unclear whether the warning was given. The defence argued that the warning was not relevant because the victim/survivor's argument was that her lack of consent was overt: (defence barrister to judge) 'We would say, Your Honour, that a relevant case is one which the evidence is to the contrary; she said everything and she kept saying no, so that's why we would say this isn't a relevant case for the operation of s 37(a): *R v Ellis*, above n 46, transcript, 869.

⁶⁹ DPP file on *R v Ellis*, above n 46, transcript, 233. In her opening address to the jury the Crown prosecutor said, 'there were numerous other occasions when [name] says that intercourse took place, always under the same circumstances. That she was not willing but that she submitted because of her fear of the loss of her job and because of the fear of what the accused might do if she caused him to become so angry at her repeated refusals'.

⁷⁰ *R v Stanbrook* (Supreme Court of Victoria, O'Bryan J, 10 November 1992). Stanbrook pleaded guilty to one count of aggravated rape and one count of attempted murder. He was sentenced to nine years jail on the first count and 11 years on the second count, to be served concurrently. This meant a total effective sentence of 11 years, with a nine year minimum. On appeal, the Victorian Court of Criminal Appeal (15 March 1993), affirmed the nine year sentence for count 1 but reduced the sentence for count 2 to eight years, because the original sentence was higher than was permitted by the Sentencing Act 1991 (Vic) s 10. However, it also altered the concurrency element, ordering three years of the count 2 sentence to be served cumulatively, creating a total effective sentence of 12 years with a non-parole period of 10 years.

⁷¹ DPP file on *R v Stanbrook*, above n 70, statements dated 2 December 1991.

⁷² *Ibid.*

Stanbrook's treatment of his wife and de facto wife had no legal consequences.⁷³ His criminal record only disclosed a string of relatively minor property offences. The women's accounts of Stanbrook's previous violence, including an incident involving rape at knife-point, were also dismissed by a psychiatrist retained by the defence to give evidence about Stanbrook's state of mind. The psychiatrist told the judge he did not even put some of the allegations to Stanbrook because they came from his ex-wife in the context of a 'bad marriage break-up'.⁷⁴ His attempt to explain Stanbrook's violence toward his legally-recognised victim was in keeping with his tendency to downplay the rapist's history of violence:

I believe he had failed to come to terms with the breakdown of his marriage and also the subsequent failure of his de facto relationship, and I think the pent-up anger in relation to those two women was displaced onto this poor unfortunate young woman.⁷⁵

The psychiatrist's account of Stanbrook and his previous relationships evokes 'stock' stories about 'vindictive' ex-wives and their sympathy-deserving husbands. His choice of language in court — 'those two women', contrasted with 'this poor unfortunate young woman' — reinforces this evocation. His written report contains a similar implicit dichotomy:

I believe the attack upon the apparently [*sic*] totally innocent young female victim represents displacement of anger which this man harboured against his former wife and former de facto spouse, especially the latter.⁷⁶

The written report also emphasises the absence of a formal (that is legal) record of personal violence:

he [Stanbrook] stated that he has no prior convictions for sexual or violent offending and that is reassuring in terms of the likelihood of his again behaving violently.⁷⁷

This conclusion is drawn even though the same psychiatrist in his report also acknowledges that Stanbrook admitted behaving violently toward his ex-wife and arguing frequently with his de facto wife.

The 'stock story' evoked in the psychiatrist's evidence was also echoed in the judge's account. The statements made by the ex-wife and ex-de facto were available to the judge, but because they had not been subject to the evidentiary testing process of examination and cross-examination, they did not become part of the officially sanctioned court story. O'Bryan J characterised Stanbrook as a man whose 'prior history ... didn't display violence ... [and] crimes of dishonesty are [of] a very different nature'.⁷⁸ Given the untested status of the statements, it

⁷³ For an overview of the law's reluctance to get involved in 'domestic' violence, see Scutt, above n 14, 446-59.

⁷⁴ DPP File on *R v Stanbrook*, above n 70, transcript, 14.

⁷⁵ *Ibid* 12.

⁷⁶ *Ibid*.

⁷⁷ *Ibid*, Psychiatrist's Report, 2.

⁷⁸ *Ibid* 16-17.

would have been inappropriate in legal terms for O'Bryan J to adopt their portrayal of Stanbrook. However, his decision to describe unambiguously Stanbrook's past as non-violent is unjustified. A more neutral description would have been appropriate. In his sentencing comments, he described Stanbrook as 'an itinerant worker in and out of gaol for offences of dishonesty and unlucky in love' and 'attach[ed] no weight to his [past] record'.⁷⁹ Similarly, he adopted the psychiatrist's view that anger toward his ex-wife and former de facto wife was an explanation for Stanbrook's violence: '[Y]ou selected your victim at random and behaved lustfully and aggressively to vent anger which you harboured against your former wife and former de facto spouse'.⁸⁰ The way some stories become 'facts' and others are discounted according to the operation of the rules of evidence thus meant that the account of Stanbrook's character and life experiences given by a purportedly objective expert (whose objectivity must be questionable given that he had been retained by the defence), who had merely examined him in jail, was privileged. Stories told by women who had known Stanbrook well over many years and had had first-hand experience of his violence were ignored. Significantly, the stories credited by the legal process and therefore the judge, accord with the dominant masculinist perspective on relationships between men and women. If law is viewed as 'language expressive of subjective life',⁸¹ the 'official' stories in this case reflect acceptance of the masculinist perspective as neutral, natural and legally appropriate. They also reflect construction of women's experiences as 'inexpert, unreasonable and merely gossip'.⁸²

In relation to the impact of the rape and attempted murder (which took the form of cutting her throat) upon the victim/survivor, O'Bryan J preferred to adopt the psychiatrist's 'story', even though its basis was tenuous and there were alternative accounts. His finding that the victim/survivor was not traumatised by the rape because she was unconscious at the time (this attracted statewide media attention and was later overturned on appeal⁸³) was grounded in comments made by the psychiatrist during the hearing. Discussing a victim impact statement made by a psychologist who had interviewed the victim/survivor, which he confessed he had read 'briefly and quickly', the psychiatrist told the judge:

I wouldn't have been surprised, put it that way, if she in fact was much more disturbed than she seems to be. I think that's partly attributable to the fact that of course she was rendered unconscious. She doesn't actually have a memory for a lot of it, and that has been a mixed blessing, on the one hand.⁸⁴

This suggests that, in his view, her apparent lack of trauma was merely an appearance. Later however, when asked by the judge whether the scar across her

⁷⁹ *Ibid*, transcript of sentence, 10 November 1992, 27.

⁸⁰ *Ibid* 26.

⁸¹ Grbich, above n 34, 45.

⁸² *Ibid* 27.

⁸³ *R v Stanbrook* (Court of Criminal Appeal, Marks, Southwell and Harper JJ, 16 March 1993).

⁸⁴ *R v Stanbrook*, above n 70, transcript of sentence, 16.

throat would 'mar her life forever',⁸⁵ the psychiatrist replied that 'the level of permanent psychiatric impairment ... may not be that high'.⁸⁶ The psychiatrist's views are again reflected in the judge's sentencing comments, which ignore the latent ambiguity in his statement on trauma and unconsciousness:

The aggravated rape was most serious, but having regard to the unusual circumstance that the victim/survivor was not traumatised by the event, indeed, was probably comatose at the time, a sentence significantly less than the maximum is deemed appropriate.⁸⁷

The image of the victim/survivor's suffering reflected in the victim impact statement stands in stark contrast to both the psychiatrist's and the judge's comments. According to the psychologist who examined the young woman, she was suffering from post-traumatic stress disorder.⁸⁸ Its effects included a loss of her desire to socialise, loss of ability to concentrate, increased aggression against her brothers and a fear for her safety. The report said that after watching the ABC documentary 'Without Consent' on television the victim/survivor was

increasingly concerned that there are so many rapists in the world, that she would be unable to protect herself in the future, no matter where she is. She said that she feels that she will never be safe, no matter where she is, not even if she has a boyfriend.⁸⁹

Again, O'Bryan J was faced with a choice between two stories. One was told by a male expert which was not even based upon firsthand knowledge of the victim/survivor, but on a brief reading of a report on her. The other was told by a female expert with first hand knowledge of the victim/survivor. The decision to emphasise the former story over the latter appears remarkable given the origin of the two stories. However, it is consistent with the perspective in the law that constructs masculinist accounts as objective and neutral and discounts other views.

O'Bryan J's finding in relation to the degree of trauma suffered by the victim/survivor was subsequently criticised by the Court of Criminal Appeal.⁹⁰ The leading appeal court judgment by Marks J says that O'Bryan J's finding in relation to trauma represents a 'mistaken view of the facts of sufficient magnitude to constitute a sentencing error'.⁹¹ He notes that there was a 'Victim Impact Statement before the court which suggested very much the contrary' and goes on to say that

⁸⁵ This question highlights O'Bryan J's concern, evinced throughout the proceedings, about the damage caused by the victim/survivor's physical scars as a result of the attack. His concern over this issue, and his apparent inability to comprehend the damage caused by the rape is indicative of 'law's continued privileging of presence, the concrete manifestation of visible signs of harm as worthy of retribution over the invisible and less definable nature of psychological harm': Maggie Troup, 'Rupturing the Veil: Feminism, Deconstruction and the Law' (1993) 1 *The Australian Feminist Law Journal* 63, 72. Grbich, above n 34, also discusses this issue.

⁸⁶ *R v Stanbrook*, above n 70, transcript, 16.

⁸⁷ *Ibid* 28.

⁸⁸ *Ibid*, Victim Impact Statement, 6.

⁸⁹ *Ibid* 4.

⁹⁰ *R v Stanbrook* (Court of Criminal Appeal), above n 83.

⁹¹ *Ibid* 4.

[t]hese are very difficult matters on which persons such as judges who have not had the experience and who cannot be thought to be fully empathetic with it, should pass judgment without hearing from the victim herself and other relevant evidence.⁹²

The latter comment is significant for two reasons. Firstly, it acknowledges the importance of giving victim/survivors an opportunity to tell their stories. Ironically, however, it also overlooks the fact that this victim/survivor, and other victim/survivors in similar circumstances, are given no opportunity to give an unmediated account of their experiences.⁹³ Secondly, it also recognises the gulf in experiences and perceptions between rape victim/survivors and those in the law who pass judgment on their ordeals, in the context of a system that is dominated by white, middle-to-upper class, Anglo-Saxon men.⁹⁴ Such acknowledgment provides a contrast with the ethos of 'impartiality' and 'objectivity' often used to defend the *status quo* in the face of calls for a more representative judiciary.⁹⁵

In relation to the original 'no trauma' finding in the Stanbrook case, the appeal process 'safety net' which defenders of the criminal justice system claim is an important means of eliminating bias,⁹⁶ can be seen to have operated with a degree of effectiveness. However, the point was only appellable because it could, in legal terms, be depicted as a view of the facts so mistaken as to constitute a sentencing error.⁹⁷ In other words, so blatant and obvious was O'Bryan J's bias in adopting the masculinist story that grounds to impeach it could be found even within the legal framework.⁹⁸ More subtle manifestations of bias, where 'mistakes of fact' cannot be found in the legal construction of choices of stories, are not susceptible to appeal. The system would not even recognise the portrayal

⁹² Ibid 5.

⁹³ To some extent, this will be changed by the recent introduction of Victim Impact Statements. However, see text accompanying nn 55 and 58 in relation to the shortcomings of the approach taken by the Victorian government.

⁹⁴ Senate Standing Committee on Legal and Constitutional Affairs (Cth), above n 7, 91-5.

⁹⁵ King CJ is quoted as saying that the call for representativeness is founded on ideas which 'are subversive of the principles of detachment and impartiality upon which the judicial system is built': King, above n 11.

⁹⁶ See, eg, John Phillips, 'The Law and Women: the Chief Justice Responds', *Age* (Melbourne), 13 October 1993. In response to an editorial on gender bias and the judiciary ('Give Women Real Justice', *Age* (Melbourne), 10 October 1993), Chief Justice Phillips wrote in part: 'You charge and convict "the men who control the law" of discrimination against women in that "women who are raped can no longer feel confident of always finding justice in the courts"'. The directions of judges to juries in rape cases and sentences imposed for rape in this state are subject to review by the Court of Criminal Appeal. I know of no current responsible criticism of any decision of that court in this connection'.

⁹⁷ *R v Stanbrook* (Court of Criminal Appeal), above n 83, 4

⁹⁸ Discussing the use of the term 'error in law' in relation to the appeal on Bollen J's comments, Threadgold writes:

Error in law here becomes a euphemism for profoundly embodied misogyny [Despite the appeal court decision], justice has probably not been done ... the force of controversial comments, the harm and damage that they do, has not been overthrown at all, and ... the construction of judges as legal subjects within their own discipline and through its intersections with the common-sense discourses of the community has not been addressed at all.

Terry Threadgold, 'Critical Theory, Feminisms, the Judiciary and Rape' (1993) 1 *The Australian Feminist Law Journal* 7, 20-1.

of Stanbrook as a man with a 'non-violent' past as false, let alone provide a means of correcting it.

The judge in another of 1993's notorious rape cases also faced a choice between two stories about male violence. In *R v [Donald]*,⁹⁹ a significant difference between the accounts of the accused and the victim/survivor concerned the use of violence. The victim/survivor said [Donald] had 'punched her on the jaw' with a clenched fist but he had denied this in his police interview.¹⁰⁰ Bland J, who had earlier expressed concern that [Donald] had undergone a police interview comprising '2000-odd' questions between 10 am and 2 pm,¹⁰¹ chose to accept his story on the violence. The basis for this was the 'extensive' police interview:

[W]hile there are some contradictions between what he told the police and what the girl says about the incident I would be inclined ... to accept his account, if only because his account was inquired into so intensely and over such a long period.¹⁰²

[Donald's] account was accepted, even though on the legal system's own terms it should have remained an unofficial story. In contrast, the victim/survivor's testimony had been subjected to scrutiny through the process of examination, cross-examination and re-examination in the committal hearing.

Rape is a disempowering experience and as the 'Sources' section of this discussion has shown, the disempowerment of victim/survivors of rape is consolidated by a legal process in which they are denied an opportunity to make their own authentic narrative. The subsequent discussion in the 'Choices' section demonstrates the reluctance of some legal decision-makers to listen to those parts of women's stories that are told in the legal process. The discussion of the primary material in this section illustrates a two-fold problem. It is not just a genuine opportunity to speak that women need, but a guarantee also that they will be heard.

III SHORT STORIES

Victim (to police): 'I don't know how often Dad would do this to me, but it seemed like nearly everyday. I know that it happened a lot ... I have had to do these things heaps of times this year. I cannot put a number on it, but it seemed like thousands of times to me, but it could be less'.¹⁰³

⁹⁹ *R v [Donald]* (Morwell County Court, Bland J, 15 April 1993) ('1st hearing'). [Donald] pleaded guilty to one count of rape and received a non-custodial sentence comprising a two year community-based order. He faced committal proceedings on two counts of rape in relation to two separate victim/survivors at Moe Magistrates Court on 25 January 1993. Proceedings in relation to the other victim/survivor did not make it past the committal stage.

¹⁰⁰ DPP file on *R v [Donald]*, police statement 15 June 1991 and police interview 3 September 1992.

¹⁰¹ *R v [Donald]*, above n 99, transcript 5.

¹⁰² *Ibid* 15-16.

¹⁰³ DPP file on *R v [Morris]* (Melbourne County Court, Howse J, 7-18 March 1993), police statement of victim/survivor 1, 4 June 1992, 3, 30. [Morris] pleaded not guilty to five counts of indecent assault, one count of indecent assault with aggravating circumstances, six counts of incest, one count of attempted incest, one count of procuring the commission of an act of gross

Howse J: [in discussion about the number of rape counts being heard in another unrelated case] ‘Mr Heath [the crown prosecutor] knew that I would complain bitterly about 17 counts on the presentment. I had that experience not very long ago [now referring to above case]; they were not counts of rape, but there were 42 counts of sexual dealings between a stepfather and his stepdaughter [*sic*]. Fortunately, in the end, commonsense prevailed — apart from legal requirements — and the number was reduced to 18, which was much easier to cope with than would have been 31 or so that related to that particular girl’.¹⁰⁴

Despite the inherent legally-directed shaping process discussed above, the police statements often present a comparatively wide-angled view of the event and include much circumstantial and ‘background’ information that never becomes part of the case. What becomes the court story reflects only parts of the narrative in the police statement. As the prosecution builds its case, legal imperatives, primarily the rules of evidence, determine the boundaries of the court story. Decisions are made as to where the court story begins and ends and how its characters are portrayed. As Scheppele notes, decisions about these boundaries have a significant influence on the legal outcome.¹⁰⁵ The cases discussed below illustrate how the legal editing process, shaped to protect the rights of accused in accordance with the primary values of the legal system, distorts the stories of victim/survivors.

The tensions involved in this legal editing process are encapsulated in the quotations that open this section. The virtual lifetime of abuse described by the 15 year old victim/survivor (‘Julia’) became, in the prosecution’s court story, 18 incidents that she was able to pin down to approximate dates in order to meet the law’s demand for specificity. Moreover, Julia was not her stepfather’s only victim. The DPP files also contain a police statement from her brother, detailing his experience of abuse at the hands of his stepfather, both together with, and separately from, his sister. There are also police statements from two of Julia’s friends describing how they too were abused by her stepfather. And Julia’s stepfather was not her only alleged abuser. Another police statement also reveals that she was abused by her stepfather’s brother, and was beaten by her stepfather when he found out. The court story that the prosecution eventually told about Julia’s experiences utilised some of the information from her friends as corroborative evidence, but their experiences never gave rise to separate charges. It appears that charges in relation to Julia’s brother were to be heard separately, but the outcome is unclear. Thus, in the prosecution court story that dealt with Julia’s experience, her stepfather’s long-term, consistent pattern of multi-victim abuse was conflated into 18 apparently isolated incidents.

The extent of [Morris’] abusive behaviour prior to the charges being laid was not the only elision that resulted from the editing process. Left out of the picture

indecency with a person under 16 and four counts of committing an indecent act with a child under 16. He was found guilty on all but one count of gross indecency and one count of incest. He was sentenced to 10 years jail with a minimum of eight years. This was reduced on appeal to eight years with a minimum of six (Court of Criminal Appeal, 23 November 1993).

¹⁰⁴ DPP file on *R v Ellis* (Melbourne County Court, Howse J, 15 June 1993), transcript 13.

¹⁰⁵ Scheppele, above n 22, 2085.

in the story that was told in court was the fact that he also faced charges of attempting to pervert the course of justice after he attempted to persuade Julia to withdraw the allegations. All the jury in the trial concerning Julia heard was that there was contact between [Morris], Julia and her mother, as a result of which Julia tried to withdraw the allegations, but then was persuaded not to by a policewoman. While police statements by Julia and a friend indicate that her stepfather and mother induced her to contact them via a third party,¹⁰⁶ the information that emerged in court implied that Julia contacted them without inducement, an implication that left ample room for adverse inferences to be drawn about her behaviour.¹⁰⁷

In this case, the court story bore very little resemblance to the 'reality' reflected in the police statements, with the editing process clearly favouring the accused by, at the most basic level, reducing the scope of possible legal consequences flowing from his behaviour. The story about [Morris'] offending was decontextualised in two main ways. Firstly, the presentation of 18 specific charges despite a lifetime of abuse and, secondly, the separation of the trials in relation to two main victim/survivors. The legal rationalisation for these two steps highlights the difficulty that the law, as it is presently constituted, has in coming to terms with cases that involve sexual abuse of children. It encapsulates the tensions inherent in the system's commitment to protecting the rights of accused and its responsibility to those whom law ostensibly protects.

The judge has the discretion to order 'severance' of the prosecution's presentation of charges against the accused in cases where there are multiple offences alleged and more than one victim/survivor or offender.¹⁰⁸ There are two bases for the exercise of this discretion. Firstly, where failure to sever would lead to an unduly long and complex trial.¹⁰⁹ Secondly, where evidence of more than one offence would fall within the definition of 'similar fact evidence' which should be excluded because it would unduly prejudice the accused's chances of a fair trial.¹¹⁰ The second rationale is discussed in the High Court case *Hoch v The Queen*,¹¹¹ a leading case on the admissibility of similar fact evidence. Admissibility of such evidence turns on whether its probative value is deemed to outweigh the chance that it will prejudice the mind of the jury against the accused.¹¹² The test for determining its probative value in cases where it is denied that the events in question ever took place, according to the majority in *Hoch*, is whether there is a rational view of the evidence which is inconsistent with the guilt of the accused.¹¹³ The possibility of 'joint concoction' provides such a

¹⁰⁶ DPP file on *R v [Morris]*, above n 103, statement by Julia, 28 August 1992, indicates that Julia called her mother after her mother asked Julia's friend to pass on some money for a phone call and a message to phone her.

¹⁰⁷ *Ibid.*, transcript, 111.

¹⁰⁸ Peter Gillies, *Law of Evidence in Australia* (1987) 418.

¹⁰⁹ Fox, above n 51, 8.2.8.

¹¹⁰ *Ibid.* Either or both of these bases could have been the rationale for severance in the [Morris] case.

¹¹¹ (1988) 165 CLR 292.

¹¹² *Ibid.* 300.

¹¹³ *Ibid.* 296.

rational explanation.¹¹⁴ Whether or not the possibility of joint concoction exists is a matter to be determined according to ‘common sense and experience’.¹¹⁵ The assumption underlying this chain of reasoning — that children (and women) tell lies about sexual violence — is at the centre of the feminist attack on the way the law deals with sexual violence. The law’s construction of women and children as liars has a long history and insidious influence.¹¹⁶ Yet empirical evidence indicates that victim/survivors of sexual violence, far from ‘concocting’ stories about sexual violence, are more likely to suppress their stories.¹¹⁷ Motivation for this suppression often comes from fear of being disbelieved by the legal system.¹¹⁸ In light of this material, the High Court’s construction of the possibility of joint concoction as ‘rational’ is ironic. The reasoning in *Hoch*, especially the circularity of its conviction that the possibility of ‘joint concoction’ can be assessed on the basis of ‘common sense and experience’ in the context of a legal history where the concoction story is a powerful stock story, indicates that the fear of reporting expressed by victim/survivors remains justified.

The legal system’s distillation of Julia’s experience of a lifetime of abuse into 18 specific charges highlights the difficulty the system has in dealing with issues raised by cases of ongoing sexual abuse of children. These issues primarily relate to the strict evidentiary requirements which the legal system imposes in criminal trials. These requirements underpin a fundamental value of the criminal justice system, namely, that there should be certainty in relation to the offences charged to prevent the possibility of an accused being tried more than once in relation to the same offence.¹¹⁹ In connection to incest, these requirements can be especially difficult to satisfy for a range of reasons. These concern the ability of children to provide details when their sense of time and capacity to recall is undeveloped.¹²⁰ The effects of this are compounded when one considers that incest has been shown to trigger a reaction in which memories are deliberately repressed, and that the abuse may have extended over years and go unreported for years, if it is reported at all.¹²¹ Yet these factors are not taken into account in

¹¹⁴ Ibid.

¹¹⁵ Ibid 297.

¹¹⁶ Mack, above n 15; Edwards, above n 27; Naffine, ‘Windows on the Legal Mind: The Evocation of Rape in Legal Writings’ (1992) 18 *MULR* 741. See also Lynne Hanson, ‘Sexual Assault and the Similar Fact Evidence Rule’ (1993) *University of British Columbia Law Review* 51, for a detailed argument on how the rule operates as a form of gender bias.

¹¹⁷ See, eg, NSW Sexual Assault Committee, *Sexual Assault Phone In Report* (1993) 25 which says that 66 per cent of the 860 callers had never reported the assault to police. Seventy-six per cent of sexual assaults on children under 16 were not reported.

¹¹⁸ Ibid. See also Eastale, above n 40; Linda Holmstrom and Wolbert Burgess, *The Victim of Rape: Institutional Reactions* (1978); Law Reform Commission of Victoria, above n 49, Appendix 5, 119 and Appendix 7, 145 (Real Rape Law Coalition Submission, ‘Sexual Assault: The Law v Women’s Experience’, 149 which estimates a reporting rate of one in ten).

¹¹⁹ Ian Heath, *Indictable Offences in Victoria* (1992) 18.

¹²⁰ Ibid 233-4. See also, R Kim Oates, ‘Children As Witnesses’ (1990) 64 *Australian Law Journal* 129 and ‘The Effects of Child Sexual Abuse’ (1992) 66 *Australian Law Journal* 186.

¹²¹ See, eg, Dustin Ordway, ‘Parent-Child Incest: Proof At Trial Without Testimony in Court by the Victim’ (1981) 15 *Journal of Law Reform* 131; Sharon Lowenstein, ‘Incest, Child Sexual Abuse

the High Court case which contains the legal rationalisation for the distillation that occurred in the [Morris] case. In *S v R*,¹²² the High Court ruled that a miscarriage of justice had occurred when the District Court of Western Australia found a man guilty of three counts of carnal knowledge of his daughter, on the basis of evidentiary defects. The case turned on the Crown's failure to produce sufficient evidence to identify the three incidents to which the charges related, when it had also lead evidence of an ongoing history of sexual abuse that started when the girl was nine or 10 and ended when she left home at 17.

While the judgments of those in the majority (Toohey, Dawson, Gaudron and McHugh JJ) all emphasised slightly different evidentiary issues, all agreed that the presentation of the case impaired the defendant's ability to counter the charges. Gaudron and McHugh JJ argued that the admission of evidence of multiple acts of carnal knowledge, and a deficiency in the way the jury was instructed to use that evidence, were the fundamental flaws in the trial. They concluded that even if the 'practical difficulties' created by the demand for greater specificity could not be overcome, meaning that the case could not be prosecuted, there was no justification for maintaining an uncertain criminal verdict stemming from the uncertainty attending the trial.¹²³ This acknowledgment of 'practical difficulties' is the only implied or overt recognition of the special issues involved in incest cases.

Given the differences in reasoning in each of the judgments, no clear picture of what is needed to satisfy the certainty requirement emerges from the case. But it is clear that the decision puts barriers in the way of incest victim/survivors seeking a response from the legal system which takes into account their whole story, rather than those parts which the legal system may sanction only after very high evidentiary requirements are met.

In failing to re-formulate rules of evidence which can more adequately accommodate the difficult issues which the crime of incest raises, the court is implicitly sanctioning the behaviour of perpetrators.

In Victoria, the legislature has moved some way toward addressing these unrealistically high evidentiary standards. In 1991, the Kirner Government amended the Crimes Act to introduce the crime of 'maintaining a sexual relationship with a child under the age of 16 to whom he or she is not married and who is under his or her care, supervision or authority'.¹²⁴ Evidentiary standards in relation to this offence were relaxed by a provision stating that 'it is not necessary to prove the dates or the exact circumstances of the alleged occasions'.¹²⁵ However, the 'care, supervision or authority' provision may mean that offenders such as neighbours and casual visitors to the child's home may not be covered. Moreover, the relaxation of the evidentiary standards does not override the judge's general discretion to warn against convicting on the basis of unsafe

and the Law: Representations on Behalf of Adult Survivors' (1990-91) 29 *Journal of Family Law* 791.

¹²² (1988) 168 CLR 266.

¹²³ *Ibid* 288.

¹²⁴ Crimes Act 1958 (Vic) s 47A.

¹²⁵ *Ibid* s 47A(3).

evidence,¹²⁶ which was emphasised in *Longman v R*.¹²⁷ Even with the amendment, the degree of specificity required remains uncertain and the obstacles posed by *S v R* have not been fully overcome. This is demonstrated by the fact that the charges framed in law did not reflect Julia's claim that she had 'had to do these things heaps of times this year',¹²⁸ even though the amendment was in operation at that time.¹²⁹

In *R v [Donald]*,¹³⁰ the 'legally sanctioned' rape story is a much shorter version of the story that emerges from the police statements. In the 'legal' story [Donald] pleaded guilty to one count of rape. The judge described it as 'the only time he had been in trouble'¹³¹ and said that [Donald's] ability to control himself 'lawfully and decently was at the time eroded' by alcohol.¹³² Thus, the rape in the legal story is depicted as a 'one-off event' which may not have happened had [Donald] not had too much to drink. But the police statements tell a different, longer story which shows [Donald's] behaviour in quite a different light. There are two rapes in this story. One formed the basis of the 'legal' rape story. It is about the events which gave rise to the charge to which [Donald] eventually pleaded guilty. It concerned an incident in which [Donald] went for a walk with a young woman who was casually known to him at a party after a debutante ball in country Victoria. The young woman told police that he forced her to have sex in a haystack after punching her on the jaw. The other alleged rape was discounted by the legal process. The charges it gave rise to never made it beyond the committal process. It concerns a second young woman. The alleged incident occurred during a year-end party which took place after a group of friends had had dinner at a Chinese restaurant. [Donald's] then-girlfriend told police he had forced her to have sex on a pile of hay bales.¹³³

The longer, 'non-legal' rape story suggests a pattern of behaviour on [Donald's] part of obtaining sex by force, acting on a set of cultural values which sanction aggressive male sexual behaviour as 'normal'.¹³⁴ This impression is supported by information that emerged in a subsequent hearing concerning a breach of the community-based order, that [Donald] considered the 'legal' rape incident had 'been blown out of all proportion ... [and had] pleaded guilty [only] because his solicitor had told him to'.¹³⁵ A 'poem' by [Donald] to his legally-recognised victim/survivor, pre-dating the rape and labelled as Exhibit A,

¹²⁶ Embodied in Victoria in the Crimes Act 1958 (Vic) s 61(2) and the Evidence Act 1958 (Vic) s 23(2)(b).

¹²⁷ (1989) 168 CLR 79.

¹²⁸ DPP file on *R v [Morris]*, above n 103, Julia's police statement, 4 June 1992, 30.

¹²⁹ The amendments came into force on 5 August 1991 (Government Gazette 28 of 24 July 1991, 2026) and applies to offences committed on or after that date (Heath, above n 119, 197).

¹³⁰ *R v [Donald]*, 1st hearing, above n 99.

¹³¹ *R v [Donald]* (Melbourne County Court, Bland J, 13 September 1994), hearing in relation to the breach of the community-based order, transcript, 46.

¹³² *R v [Donald]*, 1st hearing, above n 99, 64.

¹³³ DPP file on *R v [Donald]*, victim/survivor's police statement, 8 December 1989.

¹³⁴ Naffine, above n 17, 34.

¹³⁵ *R v [Donald]*, above n 131, evidence from community corrections officer for [Donald], transcript, 64.

further supports this impression: 'Roses are red, viles [sic] are blue, give me a head and I will blow all over you'. This clumsy mutation of the traditional quatrain clearly betrays a mentality in which women are seen merely as vessels for male sexual release.

As mentioned earlier, the shorter 'legal' story about [Donald] depicts him significantly differently. Even though Bland J had access to the information comprising the longer non-legal story,¹³⁶ the legal process allowed [Donald] to be characterised as a young buck,¹³⁷ whose 'ability to control himself'¹³⁸ had been affected by alcohol in relation to one isolated incident.¹³⁹ Aside from the wider cultural implications of this characterisation (which will be more fully discussed in the next section), it also had significant legal consequences because it influenced the length of his sentence.

The 'short stories' that the law formulated from the scenarios involved in the [Morris] and [Donald] cases both had the same effect; they altered the portrayal of the perpetrators' behaviour, reducing the scope of the legal consequences which could follow. The evidentiary rules which shortened the [Morris] story, and apparently cut out part of the [Donald] story, represent the boundaries that the law draws around the stories that can be told in court. In these cases these boundaries clearly operated to de-emphasise male sexual violence and to decontextualise the stories of the victim/survivors' involved, to their disadvantage. The discord between 'law's truth' and 'women's experience' highlights the disjunction between the protection which the criminal justice system offers those accused of breaking the law and those who are meant to be protected by it.¹⁴⁰

IV STOCK STORIES

Victim/survivor (to police): 'He then grabbed my left arm I think, near my wrist and pushed it near my head. He didn't hurt me when he did this but used force. I just layed [sic] there, I didn't know what to do I was just so scared. He then layed [sic] on top of me. ... I told him 'no, don't, just leave me alone,' but he did not say anything too [sic] me. ... I did not report what [Steven] did to me at the time as I was too scared and I thought people would not believe me, because nobody saw it happen.'¹⁴¹

Judge (during hearing): 'This is as simple a rape case as you could really imagine, where the relative ages of the offender at the time and the victim at the

¹³⁶ Bland J knew about both incidents, having read the transcript of the police interview in relation to both the original charges: *R v [Donald]*, 1st hearing, above n 99, transcript, 5.

¹³⁷ In a discussion about the amount of alcohol [Donald] had admitted consuming, His Honour said; 'Well, he said he had had 10 cans [of beer] and 2 bourbons — two what do you call them? Southern Comforts, he calls them If he had had that much liquor, in my opinion, young and all as he is and vigorous as he is, he would have been incapax': *R v [Donald]*, 1st hearing, above n 99, transcript, 13.

¹³⁸ *Ibid* 64.

¹³⁹ *R v Donald*, 1st hearing, above n 99, 46.

¹⁴⁰ Smart, above n 15.

¹⁴¹ DPP file on *R v [Donald]*, victim/survivor's police statement, 15 June 1992.

time were ... sixteen and fifteen years of age, and the only unusual factor is that the offence occurred in 1991 — quite a while ago.¹⁴²

The legal system's failure to allow women to tell unedited stories about their experiences of sexual violence creates a vacuum which the legal process fills with other stories that are about women and their relationships with men. In Delgado's terms these are 'stock' stories that have a long history in the legal discourse on rape and reflect masculinist perceptions which discount, denigrate and disqualify women's experiences.¹⁴³ These 'stock' stories are also known as 'rape myths', which have been dealt with in great detail in some of the literature on rape, including work done by Holmstrom and Burgess,¹⁴⁴ Estrich,¹⁴⁵ and, in Australia, by Naffine and Eastale.¹⁴⁶ At the core of many of these stock stories is the notion of what 'real' rape is; the statistically rare experience of stranger to stranger rape (the stranger the better, that is, white female, black male), accompanied by violence.¹⁴⁷ It is when a woman's experience of rape closely accords with the 'real rape' stock story that her story may (but not always) be adopted and validated by the legal system as an 'insider' story. Closely related to this stock story of what 'real rape' is, are a score of other stock stories about what is not 'real rape', and how women 'ask for it'. These stories draw on stereotypical masculinist notions of how women should behave, squarely setting-up women as 'outsiders'. They encompass the following populist myths: if there is no violence, it is not rape; women frequently make false complaints of rape; a woman who is sexually active, has a psychiatric disability or is affected by drink or drugs deserves to be raped; women who wear 'provocative' clothing (that is, what women's fashion magazines tell them is attractive) are asking to be raped; if a woman who is raped doesn't report the rape immediately, it didn't happen; women make false complaints of rape out of spite or to cover-up consensual sexual activity of which they are ashamed.¹⁴⁸ Numerous theorists have explained how these myths permeate rape law through rules such as corroboration and first complaint.¹⁴⁹

Locally and internationally, many jurisdictions have taken steps to remove these overtly sexist features of rape law.¹⁵⁰ But so deep is their influence in the

¹⁴² *R v [Donald]*, 1st hearing, above n 99, transcript, 61-2.

¹⁴³ Delgado, above n 22.

¹⁴⁴ Holmstrom and Burgess, above n 118. Their findings were used by L'Heureux-Dubé J of the Canadian Supreme Court in her influential dissenting opinion in *R v Seaboyer; R v Gayme* (1991) 83 DLR (4th) 193, 207.

¹⁴⁵ Estrich, above n 27.

¹⁴⁶ Naffine, above n 116; and Eastale, above n 40.

¹⁴⁷ Estrich, above n 27. Statistics from the NSW Sexual Assault Committee's report, above n 117, support this also. In only 14 per cent of cases was the perpetrator a complete stranger to the victim.

¹⁴⁸ Holmstrom and Burgess, above n 118; Estrich, above n 27; and Naffine, above n 17.

¹⁴⁹ Estrich, above n 27; Adler, above n 27; Smart, above n 15. See also Charlotte Mitra, 'Judicial Discourse in Father-Daughter Incest Appeal Cases' (1987) 15 *International Journal of the Sociology of Law* 121.

¹⁵⁰ For a state-by-state summary of the legislative changes see Louis Waller and Charles Williams, *Criminal Law: Text and Cases* (7th ed, 1993) 84.

legal system that they continue to be applied.¹⁵¹ The author of the powerful dissenting judgment in Canada's landmark *Seaboyer* case, L'Heureux-Dubé J, acknowledged that

[l]ike most stereotypes, they operate as a way, [h]owever flawed, of understanding the world and like most such constructs, operate at a level of consciousness that makes it difficult to root them out and confront them directly.¹⁵²

This is echoed in the finding in the Senate Committee's report on *Gender Bias and the Judiciary*, quoted above, that bias operates 'unconsciously' in the Australian legal system.

According to Estrich, not all women, and not all rapes, are treated equally.¹⁵³ She argues that the law dichotomises rape, creating one category of 'real rape' and another of 'simple rape'. 'Real rape' is sexual violence that the system will sanction as rape because it contains the elements such as violence, described above. 'Simple rape' is sexual violence which the system is reluctant to recognise as rape because it involves 'line blurring' elements that invoke archetypal male fears of being charged with rape.¹⁵⁴ This dichotomy, which is built into rape law and which is reflective of social perceptions of rape, leads to a 'sophisticated discrimination in the distrust of women victims'.¹⁵⁵ It enables defenders of the current operation of the legal system to use cases where 'real rape' is proved and leads to a long sentence to argue that the law does protect women, without acknowledging that that protection is heavily conditional.¹⁵⁶

The excerpts from *R v [Donald]* that open this section demonstrate how the dichotomy operates. In dealing with the case of a teenage boy who pleaded guilty to raping a slightly younger girl from his own circle of acquaintances, Bland J was clearly persuaded by the circumstances of the rape that it was definitely in the not-so-serious category. He described it as being 'at the very lowest end of criminality in relation [to the offence of rape]'.¹⁵⁷ And in comments that attracted nationwide condemnation, he also cast doubt on the sincerity of the victim/survivor's refusal to engage in intercourse:

And often, despite the criticism that has been directed at judges lately about violence and women, men acting violently to women during sexual intercourse, it does happen to the common experience [*sic*] of those who have been in the law as long as I have, anyway, that 'No' often means 'Yes'.¹⁵⁸

Bland J thus characterised the rape as virtually an example of consensual sex-

¹⁵¹ Estrich, above n 27; Mack, above n 15.

¹⁵² *R v Seaboyer*; *R v Gayme*, (1991) 83 DLR (4th) 193, 209.

¹⁵³ Estrich, above n 27, 29.

¹⁵⁴ 'The male fantasy is a nightmare of being caught in the classic, simple rape. A man engages in sex. Perhaps he's a bit aggressive about it. The woman says no but doesn't fight very much. Finally, she gives in. It's happened like this before, with other women, if not with her. But this time is different: she charges rape. There are no witnesses. It's a contest of credibility, and he is the accused "rapist": Estrich, above n 27, 6.

¹⁵⁵ *Ibid* 29.

¹⁵⁶ Scheppele, 'The Re-vision of Rape Law', above n 35, 1095, 1099.

¹⁵⁷ *R v [Donald]*, 1st hearing, above n 99, transcript, 34.

¹⁵⁸ *Ibid* 35.

ual activity that went wrong. Indeed, his comment that the only 'unusual' factor about the incident was that it had taken some time to come to trial¹⁵⁹ indicates subconscious reluctance to accept [Donald's] behaviour as unusual. This negates the victim/survivor's story about her fear during the incident and its subsequent negative impact on her.¹⁶⁰ Bland J's comments embody a 'stock' story about a 'simple rape'. They indicate acceptance of the use of coercive force in sexual relationships and deny the power of women to say no. They reflect the convicted rapist's own attitude that the 'incident had been blown out of all proportion'.¹⁶¹ In contrast, the 'counter-story' that emerges from the DPP file defines [Donald's] behaviour as violent, unacceptable and abnormal. It is an attempt by the two young women involved to have the law take heed of their right to say 'no', and to recognise that they did say 'no'. The legal outcome of the case indicates the law's reluctance to listen to such counter-stories. It dismissed one part of this counter-story and negated the impact of the other. While [Donald's] reluctant 'guilty plea' meant formal legal acceptance of the victim/survivor's story, Bland J's comments counteract this. The media debate over this case, however, indicates that Bland J's attitudes are not universally shared. The criticism which his pronouncements attracted in the media suggest there is a significant body of opinion in which the relevance of the 'stock story' he told is being questioned and rejected.¹⁶²

The [Donald] case shows that the real/simple rape dichotomy is one that has life in the minds of at least some of Australia's judges. It is also used by defence counsel as a powerful tool in the construction of their stories. In cases that have 'simple' rape story features, where the victim/survivor may have been drinking, or knew her attacker, for example, these features are continually emphasised to evoke the myths and thus create 'reasonable doubt'.¹⁶³ Similarly, behaviour that does not accord with the masculinist ideal of 'innocence' is used to discredit the character of the victim/survivor. Because the victim/survivor story in simple rape cases is inherently an 'outsider story', it is not difficult for the defence to make their actions 'look bizarre, strange, and not what the insider listening to the story

¹⁵⁹ Ibid 61-2.

¹⁶⁰ A report by the doctor who examined the victim/survivor said she remained angry, upset, ashamed, had nightmares and still needed counselling six months later: DPP file on *R v [Donald]*, 1st hearing, above n 99. Lynn Hecht Schafran, 'Writing About Rape: A Primer' (1993) 66 *St John's Law Review* 979, 984 cites studies which show that the trauma experienced by victim/survivors of 'non-stranger' rape is as traumatic as, if not more traumatic than, that experienced in stranger rape.

¹⁶¹ See above n 135.

¹⁶² Editorial, 'Back to School Judge Bland', *Age* (Melbourne), 7 May 1993.

¹⁶³ A study by the Victorian Law Reform Commission shows that the presence of injuries, on the other hand, indicates greater chances of conviction. Of the 52 rape prosecutions in Victoria in 1989, 64 per cent of the accused were acquitted in the 11 cases where there were no injuries. In the 23 cases where there were minor injuries, there was an acquittal rate of 30 per cent. In the 18 cases where there were injuries requiring hospital or medical treatment, there was a five per cent acquittal rate: Law Reform Commission of Victoria, above n 49, Appendix 3: 'Rape Prosecutions 1989: An Analysis', 96. See also David Brereton, 'Rape Prosecutions in Victoria', in Patricia Eastaie and Sandra McKillop (eds), *Women and the Law: Australian Institute of Criminology Conference Proceedings* (1991) 49.

would do under the circumstances'.¹⁶⁴ The following discussion of specific examples shows that stock stories have a powerful role which is made all the more potent because victim/survivors are denied the opportunity to contextualise their accounts.

In *R v Ellis*,¹⁶⁵ the defence counsel used a whole host of simple rape stock story features to undermine the prosecution's case. Its treatment of 'failure to complain' issues and sexual history evidence are illustrative of the way the invocation of 'rape myths', combined with the decontextualising impact of cross-examination, can destroy the prosecution's chance of obtaining a conviction.

The treatment of 'failure to complain' issues is emblematic of the strategies used by the defence barrister to evoke simple rape stock stories and to denigrate the victim/survivor. The victim/survivor had stayed in her job over a number of months during which her employer had allegedly raped her. This was the subject of detailed and persistent cross-examination. The defence barrister used the strictly-controlled and highly-artificial format of cross-examination to make her behaviour appear ludicrous.¹⁶⁶ The following exchange, dealing with an incident in which the victim/survivor's employer allegedly raped her anally for the first time, was one of many occasions on which the theme of why she remained in her job was hammered.

[Q] Would you say extremely painful? [A] It hurt a lot.

[Q] It hurt a lot and it was very unpleasant for you, you say. [A] Yes.

[Q] It was not done with your consent? [A] No.

[Q] This was a real development if you like in the relationship wasn't it? [A] Yes.

[Q] I mean if what you have told is the truth, he was then doing something to you which was very much different to what he had been doing before? [A] Yes.

[Q] But you went back to work? [A] Yes.

[Q] You didn't complain to the police? [A] No.

[Q] You kept going to work? [A] Yes, I did.

[Q] Even after he did that to you? [A] Yes, I did.

[Q] Because you wanted the job is that what you are saying to the jury? [A] Yes, that's right.

[Q] Surely, that is not the sort of job you would want by that time would it? [sic]. [A] Whether it was the sort of job or not, I needed to have a regular wage coming in.

[Q] But surely you must reach a point if what you have told us is true, where you say, look, no job is worth having if this is what I have got to go through, surely? [A] I did.

[Q] You are telling us that you were prepared to go back to work, presumably thinking that at any time he might do it to you again, is that right? [A] Yes.

[Q] You went back to work with the prospect of having to go through that again? [A] Yes.

¹⁶⁴ Scheppelle, above n 22, 2096.

¹⁶⁵ Above n 46.

¹⁶⁶ *Ibid*, transcript, 809. The defence barrister told the judge: 'We say there is an enormous amount about her evidence which is totally incredible in its literal sense; and that there is a lot about her behaviour which just simply wouldn't occur, as I have made the point several times in cross-examination, if she were being raped'.

[Q] I suggest to you that that is just nonsense and that the reason you went back to work was because you have [*sic*] engaged in consensual intercourse with him? [A] No, I had not.

[Q] That there would be just no way — nobody would want a job that much that they are prepared to be anally raped by their boss, they are prepared to face that prospect. I suggest to you nobody would want that sort of job and you didn't? [A] I needed to have the money coming in, so yes.¹⁶⁷

This exchange demonstrates the defence's strategy of repeatedly putting the same proposition to the victim/survivor, phrased slightly differently, to build up a verbal momentum which emphasises the proposition and de-emphasises the answers. The question and answer format only gave her scope for short answers, without opportunity to elaborate the full picture. Thus, her explanation that she stayed in the job because she needed money is made to appear a feeble excuse, when in fact economic coercion is a powerful tool, both in the victim/survivor's own social context and the broader socio-economic context. Because she was divorced, her sole means of support was the income she derived from her job. As a relatively young woman her already slim job prospects would not have been enhanced if she had left her position on bad terms with no reference.¹⁶⁸ More broadly, the events in question occurred when Australia was in the depths of recession and unemployment had reached double figures. The defence's simplistic characterisation of the victim/survivor's position ignores the very real power imbalance that exists between employer and employee, a power imbalance that in this situation would have been exacerbated by the defendant's size (he was some 20 stone), and the facts that he was a bikie and had a reputation for violence.¹⁶⁹

The boundaries drawn around the victim/survivor's story by the legal process also meant that a significant amount of her sexual history was deemed relevant to the case. Such was the construction of relevance that evidence of a consensual sexual history with her other employer was admitted, as was evidence in relation to consensual relationships with two other men.¹⁷⁰ The defence again used this evidence as an opportunity to denigrate the victim/survivor, evoking stock stories about 'loose women'. In relation to evidence about her relationship with her other employer, deemed relevant because this led to the defendant demanding sex, this aim was achieved by forcing the victim/survivor to describe the incident in detail.

[Q] You had intercourse on a brick pile, is that what you're telling the jury? [A] No it was actually in the back of his car.

[Q] What did you do first on the brick pile? (Inaudible response)

[Q] You're not reluctant to tell us this are you, [Miss Smith]? [A] It's not that I'm reluctant as that I'm embarrassed.

¹⁶⁷ *Ibid* 600-1.

¹⁶⁸ *Ibid*, victim's police statement, 13 April 1992.

¹⁶⁹ *Ibid*.

¹⁷⁰ The prosecution obtained permission to lead evidence in relation to these issues under the judicial discretion residing in s 37(a) of the Evidence Act 1958 (Vic). This section limits the admissibility of sexual history evidence to circumstances where it is deemed relevant to the facts in issue or is proper matter for cross-examination as to credit.

[Q] You're embarrassed to tell, well, unfortunately you have to say some things in courts that are embarrassing. You're on the brick pile, Adams has come out and what did you do there? [A] As I said before we were talking and then we starting kissing and then we had oral sex.

[Q] You sucked his penis, did you? [A] Yes, I did.

[Q] You sucked his penis on the brick pile opposite the office when there were two other men around, is that what you're telling the jury? [A] They're gone by that stage.¹⁷¹

The relevance of the entire incident is questionable, but the degree of detail the victim/survivor was forced to go into is contestable even from a narrow legal perspective. Given that the existence of the relationship was not contested, it is impossible to see what function, other than denigration of the victim/survivor, this degree of detail serves. The defence's repetition of the detail, and the ostensible (but unsustainable) rationalisation that 'unfortunately you have to say some things in courts that are embarrassing', clearly demonstrate that such denigration was the aim. That such cross-examination was permitted is evidence of the judge's complicity in this denigration. His superfluous characterisation of the incident as 'lust in the dust' is further evidence of this complicity.¹⁷²

The role of the judge as the controller of court proceedings was touched on in the previous paragraph. The importance of that role cannot be over-emphasised, because it is the judge who determines the appropriateness of particular lines of cross-examination and rules on questions of admissibility.¹⁷³ As Walsh J's 'lust in the dust' comment indicates, stock stories could not be perpetuated in the legal system without judicial complicity. Material emphasising this emerged in *R v Newman*,¹⁷⁴ when Ravech J augmented the defence's cross-examination by asking his own questions emphasising stock story elements.¹⁷⁵ The defence focused at length on the victim/survivor's consumption of alcohol and her personal circumstances to make both her, and her account of the incident, seem improbable. After the defence had brought out the fact that the victim/survivor was not living with her parents, Ravech J asked questions which elaborated and emphasised this information.

[His Honour] Was your father living with your mother? [A] No.

[HH] Just going back a little bit, that Henry drove you home (referring to information elicited in examination) where was home? [A] I was living with my step auntie.

¹⁷¹ DPP file on *R v Ellis*, above n 46, transcript, 407.

¹⁷² *Ibid*, transcript, 177. The comment was made during legal argument in relation to the admissibility of the evidence, in the absence of the jury.

¹⁷³ Fox, above n 51, 8.7.12 says: 'Examination of witnesses is principally conducted by counsel for either side, and the trial judge's role is essentially that of an umpire to rule upon admissibility of evidence and to determine other points of law arising during the trial The judge presiding at a criminal trial is under an obligation to ensure that the trial is conducted in accordance with the law and fairly.'

¹⁷⁴ *R v Newman* (Melbourne County Court, Ravech J, 9 March 1993). David Newman pleaded 'not guilty' to one count of oral rape and one count of digital rape of a 17 year old girl. He was acquitted.

¹⁷⁵ *Ibid*. Ravech J persistently asked his own questions throughout the trial, in part, it seems, to aid his note-taking. At the start of the trial he asked the prosecutor to 'slow down' because he was taking notes (transcript 74).

[HH] You were living with your step aunt, I see. Your father lived in one place and your mother lived in another place? [A]. My father was down on a holiday to Melbourne; he lives in Queensland.

[HH] He was only down temporarily? [A] Yes.

[HH] When you went home, it was back to your aunt's place? [A] Yes.¹⁷⁶

Similarly, when the defence counsel raised the question of alcohol, Ravech J asked a string of questions relating to alcohol consumption culminating with: 'So you had five or six vodkas and passiona in about half an hour? [A] M'mm'.¹⁷⁷ When the issue of the effect of this consumption was raised in cross-examination later, he played a similar augmenting role.

[Defence] (repeating a question in relation to disinhibition) Perhaps if I can explain it more to you; what I want to suggest to you is that by reason of the alcohol you had consumed, you were acting in a way which you weren't normally accustomed to act; that the alcohol was releasing you; releasing your inhibitions; do you know what I mean? [A] Yes.

[Q] Was that the situation? [A] To an extent it was, yes.

[HH] I think you have to tell her what you mean; which inhibitions you are talking about.

[Defence] Just in terms of ...

[HH] [Stop] pussy footing about, why don't you tell her what it is you are trying to put to her?¹⁷⁸

The operation of the 'real'/'simple' rape dichotomy in the legal system is one of the more insidious manifestations of bias. It is because of the operation of this dichotomy, and the attendant perpetuation of stock stories which denigrate women, that the counter-stories of victim/survivors such as those in the *[Donald]*, *Newman* and *Ellis* cases, remain suppressed. Stock stories such as those told by Bland J, and perpetuated in the courtrooms of Walsh and Ravech JJ, are representative of the masculinist perspective which dominates the legal system's response to rape. And while the legal response to rape retains its present form, which denies women the opportunity to speak and to define what rape is, and what it means, this perspective will remain unchallenged.

V CONCLUSION

This article has used the notion of law as storytelling to explore the law's treatment of women who suffer sexual violence. It has argued that what masquerades as 'point-of-viewlessness'¹⁷⁹ in the legal rape story reflects the masculine point of view and masculine subjectivity. Women's subjective experiences are irrelevant in the system of binary oppositions, such as consent/non-consent and real/simple rape, that dominate the legal story.¹⁸⁰

¹⁷⁶ Ibid, transcript, 79.

¹⁷⁷ Ibid 80.

¹⁷⁸ Ibid 109.

¹⁷⁹ Catharine MacKinnon, *Toward a Feminist Theory of the State* (1989) 237.

¹⁸⁰ Writing of law generally, Troup argues that the legal system is incapable of coming to terms with women's suffering and experiences because there is 'no room for understandings or conceptions

The framework of the story — the legal definition of rape — is based on male perspectives, and its narrative structure leaves no space for women's stories. Women are denied the opportunity to shape their own stories from their very first point of contact with the legal system. In the court process the mediated narrative that represents their story, the police statement, becomes even further distorted by the selectiveness required by the rules of evidence and the distorting mechanism of cross-examination.¹⁸¹ The victim/survivor's story in the legal process is thus more significant as an absence than a presence. She has a greater role as an object than a subject, with the space left by her absent story being filled with stories about her, not by her. To return to Scheppele's 'fault line' metaphor, a gulf exists between women's buried stories and the law's stories. A violent rape becomes, according to a defence barrister, 'tender loving care'; years of repeated sexual abuse becomes 18 incidents; an habitually violent rapist and near murderer becomes someone who is 'unlucky in love' and 'has not been in trouble before', and 'no' can often mean 'yes'.

The challenge then, is to change the legal framework and reshape the narrative structure so that women's stories are both told and heard. Translating this into a law reform strategy raises complex questions. As the experience to date has shown, tinkering at the edges is not enough. Changing the definition of rape¹⁸² and altering the rules of evidence¹⁸³ have not produced shifts which adequately address feminist concerns about rape law. What is needed, as commentators such as Smart, Naffine and Estrich¹⁸⁴ have argued, is a fundamental reassessment of what rape is and how the law should respond to it. In order to achieve this, women must be allowed to tell their stories about rape free from the distorting perspectives of law, and again, they must be heard. The groundwork for this has been laid by comparatively recent social developments, such as the growth of the support movement for rape victim/survivors over the last decade, and the wealth of feminist critiques on legal and social responses to rape. The ongoing media debate indicates that these developments are starting to have a wider social impact on attitudes to sexual violence. That debate suggests that there is some hope that a 'perceptual fault line' is opening up between the 'traditional' view of rape — as reflected in the attitudes of Bollen, Bland and O'Bryan JJ¹⁸⁵ — and a

which fall outside of the rigid dichotomous structures, modes of representation and discourse which the law has constructed': Troup, above n 85, 51.

¹⁸¹ While this article has highlighted these as particular features of the legal process that contribute to the elision of women's experience, it is contended that the problem is much broader. Threadgold writes: 'The fact that the laws and judgments and procedures might be based on fictions, legal men are also people and that their factual objective texts, the socially ratified and readable genres of the legal profession and its institutions, are riddled with unruly and unscientific fictional representations and constructions of the world and the people in it, constructions over which these legal men have no control because they do not even know that they are constructions, because they do not know how these constructions have made them as subjects — such things are never even entertained in these discourses and texts of control, justice, judgment and appeal': Threadgold, above n 98, 21.

¹⁸² Naffine, above n 17.

¹⁸³ Mack, above n 15.

¹⁸⁴ Smart, above n 15; Naffine, above n 17; Estrich, above n 27.

¹⁸⁵ According to Berns and Baron, media exposure and criticism of the comments has led to the 'delegitimation' of the voices of those judges: Sandra Berns and Paula Baron, 'Bloody Bones:

more relevant and appropriate contemporary view. That the mainstream media is prepared to allow rape victim/survivors space to tell their stories (in some cases to counteract the 'legal' stories about their experience) suggests that the fault line may be something more than a fissure.¹⁸⁶

A key element of the change strategy then, is located outside the law and is aimed at altering broader social attitudes to rape; to achieving widespread acceptance of the concept that 'no means no'. But this is a long-term tactic that must also be accompanied and supported by short-term, specific change located within the legal system. Women need a genuine opportunity in the legal process to explain their experiences of sexual violence. As the Real Rape Law Reform Coalition has argued, they need a real opportunity to give evidence,¹⁸⁷ but not one which will further contribute to the impression that the victim/survivor is on trial. We also need to challenge the validity of the techniques used in the name of protecting the rights of the accused.¹⁸⁸ This principle should not continue to serve as justification for the denigration of women. The 'Stock Stories' section of this article illustrates that judges cannot be relied upon to ensure that cross-examination proceeds fairly, and defence counsel will do whatever they need to do in order to secure an acquittal. This raises what must be a second key element of the short-term strategy: changing the (attitudes of the) judiciary. As the recommendations of the Senate Standing Committee on Legal and Constitutional Affairs indicate,¹⁸⁹ this goal has two dimensions; judicial education in gender awareness and working toward a more representative judiciary. Procedural change and judicial change are mutually dependant. The opportunity to tell a story is meaningless without a receptive listener.

A Legal Ghost Story and Entertainment in Two Voices to Speak as A Judge' (1994) 2 *Australian Feminist Law Journal* 125, 128. Yet as Threadgold argues, the pronouncements 'continue to have ethical consequences for the construction and fate of the selves of the others about which and for whom these men ostensibly make judgments': Threadgold, above n 98, 20.

¹⁸⁶ A rape victim whose experience was described by the Court of Criminal Appeal as 'not very grave' told her story to the *Sunday Age* because of her outrage over the judges' description of her ordeal: Silvester, above n 12. *HQ Magazine* carried a story by a rape victim describing the aftermath of her ordeal: Katherine Gollan, 'Afterwards', *HQ Magazine* (Sydney), November/December 1994, 98. 'Victim' stories have long been sought-after fodder for tabloid TV programs and mass circulation women's magazines. Their interest in them has been motivated by ratings and circulation considerations and their treatment of them has been sensationalist and often unethical. However, the recent treatment of the stories of victim/survivors of sexual violence by publications such as *The Age* has occurred in the context of a critique of gender bias in the legal system. The stories thus serve the purpose of supporting that critique and are not being used in the way that tabloid media outlets use them.

¹⁸⁷ Submission to the Victorian Law Reform Commission, above n 49, 174.

¹⁸⁸ Smith argues that the rhetoric surrounding the civil rights protection ideology of western liberal democratic legal systems conceals the fact that in relation to the gendered crime of rape the individual interests of men are put ahead of the collective interests of women: Smith, above n 34, 134.

¹⁸⁹ Senate Standing Committee on Legal and Constitutional Affairs (Cth), above n 7, 35, 56.