THE WASTE LAND OF THE LAW, THE WORDLESS SONG OF THE RAPE VICTIM

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[In this article, the author uses the content of rape trial transcripts, her observations of rape trials, and discussions with legal personnel who have participated in rape trials, to describe and analyse the ways in which women are figured in the law of rape. Three techniques of figuration are discussed: firstly, a portrayal of women as both sexual and indifferent; secondly, a production of a narrative of responsibility and agency; and finally, a process of exclusion through which a woman's words are excised. The result is that in T S Eliot's 'The Waste Land' and in law the experience of the rape victim is the same: her story goes unheard.]

When you walked out of the dark laneway you didn't just go your way and he went his ... As you were walking in the street outside the area where the vacant land is, you were kissing each other ... You decided the grassed area was, well, about as good a spot as you were going to get to lie down together, because it was a bit soft ... There was fairly long grass in the area ... and you thought that's as good a spot as any to lie down and have a bit of a carry on ... You voluntarily had sex with him ... He got up and just left you like, if I could use the term, a shag on a rock — just left you, after sex ... Left you ... He got up and left you after he had had sex with you ... He didn't spend any time with you immediately after the sex act ... He just got up and left ... That insulted you ... You felt you had been abandoned ... You thought the best way to get back at him was to say that you had been raped ... You'd had consensual sex, it just didn't work out ... It didn't work out the way you wanted it to, and you felt humiliated and you felt bad about it ... You went home and showered ... You went home and you washed your clothes ... You know and everybody knows when you've been raped the one thing you do not do is have a shower or a bath ... You knew if you wanted to complain about a rape you had to have your clothes available for the police ... There's a simple reason why you showered and washed those clothes, or put them in water, or whatever you did ... You had had an incident where ... you'd been made to feel that dirty if you like and you wanted to wash it all out of your memory ... You were washing away humiliation ...[1]

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1 *R v N-T* (Transcript of Proceedings, Melbourne County Court, Crossley J, November 1996) 38–53.

Let me interrupt the narrative. There are many ways to read that which I have just written. What I have done is taken the propositional statements contained within the serial questions asked by a defence lawyer of a victim in a rape trial. The victim was walking to find a taxi rank after being at a nightclub in the outer suburbs of Melbourne. She was pushed by the defendant, who had also been at the club and who had been walking behind her, into a vacant lot, where she was raped by him. She sustained injuries such as bites in addition to the injury of the rape. She got into a taxi, telling the driver that she had been raped. Once home, she sat on the floor of the shower, under the flow of the water, fully dressed. She was persuaded to make a complaint to the police by her friend. The defendant was acquitted. What I am going to suggest is that the victim's responses to the questions are excised, such that — as you will have experienced — all that I can hear is the accusation of the law.

In T S Eliot's poem, 'The Waste Land',[2] its female characters are seen in a range of sexual guises and poses. In the typist's assignation with the clerk, he

> Endeavours to engage her in caresses
> Which still are unreproved, if undesired.
> Flushed and decided, he assaults at once;
> Exploring hands encounter no defence;
> His vanity requires no response,
> And makes a welcome of indifference.[3]

The typist's 'brain allows one half-formed thought to pass:/ "Well now that's done: and I'm glad it's over"'.[4] A similar emotional autism pervades the account offered by a nameless woman who says,

> By Richmond I raised my knees
> Supine on the floor of a narrow canoe.
> My feet are at Moorgate, and my heart
> Under my feet. After the event
> He wept. He promised 'a new start.'
> I made no comment. What should I resent?[5]

Eliot writes, in the accompanying notes to the poem, that 'all the women are one woman'.[6] So the unnamed woman blends into the typist, into the daughters of the Thames, into Madame Sosostris with her 'wicked pack of cards',[7] into Lil who looks 'so antique' after her abortion;[8] each of them in their turn echoes of Eliot's other women: Grishkin, who promises 'pneumatic bliss',[9] and gives off 'so rank a feline smell',[10] and Princess Volupine, with her 'meagre, blue-nailed

[2] T S Eliot, 'The Waste Land' in T S Eliot, *Collected Poems 1909–1962* (1963) 61. The line number of the poem appears in brackets.
[3] Ibid [237]–[242].
[4] Ibid [251]–[252].
[5] Ibid [294]–[299].
[6] Ibid 82.
[7] Ibid [46].
[8] Ibid [157].
[9] T S Eliot, 'Whispers of Immortality' in Eliot, above n 2, 55, [20].
[10] Ibid [27].

phthisic hand'.[11] These are Eliot's women — diseased, malodorous, sexual, indifferent, penetrable.[12] It will be my argument in this essay that in both 'The Waste Land' and in law we find a similar fascination-in-repulsion for woman, and a similar imagination of woman as desiring-yet-indifferent, superficial-yet-deeply penetrable.

As the earlier quotations from 'The Waste Land' indicate, Eliot describes both the sexual assault of women and the sexuality of women. His women's bodies are both disarticulated ('My feet are at Moorgate, and my heart/ Under my feet') and inescapably corporeal, with their raised knees, 'broken fingernails of dirty hands',[13] hair in 'fiery points'.[14] These women are there to be violated, the text sprawling in images of discombobulated bodies, of women indifferent to individual men yet committed to the seduction of men through the 'glitter of [their] jewels'[15] and 'strange synthetic perfumes'.[16] The criminal law of rape and sexual assault is drenched with the same desire for the dissection of women's bodies and with the same loving distaste for the processes of seduction. This essay details the ways in which women figure and are figured in the law of rape.[17] My argument is based on the reading of transcripts of rape trials, the observation of rape trials, and discussions with legal personnel who have taken part in rape trials.[18] Three techniques of figuration will be discussed: first, the imagination of woman as abject, oscillating between interior and exterior; second, the projection of narratives of responsibility and agency; finally, a process of exclusion and excision, through which the woman's words are excised and her story goes unheard.

I THE PROJECTION OF FEMININITY

It has sadly become a commonplace observation of feminist and other research on rape that trials, at best, focus upon the victim rather than the accused, and, at

[11] T S Eliot, 'Burbank with a Baedeker: Bleistein with a Cigar' in Eliot, above n 2, 42, [26].

[12] As has been described by feminists and literary critics, such as Ellman who writes, 'the text [of 'The Waste Land'] is fascinated by the femininity that it reviles, bewitched by this odorous and shoreless flesh': Maud Ellman, 'Eliot's Abjection' in John Fletcher and Andrew Benjamin (eds), *Abjection, Melancholia and Love: The Work of Julia Kristeva* (1990) 178, 185.

[13] Eliot, 'The Waste Land', above n 2, [303].

[14] Ibid [109].

[15] Ibid [84].

[16] Ibid [87].

[17] This article is concerned specifically with the Victorian law relating to rape, although its claims have general implications for rape law in other jurisdictions. For exemplary writing on rape law in a variety of jurisdictions, see generally Simon Bronitt, 'The Direction of Rape Law in Australia: Toward a Positive Consent Standard' (1994) 18 *Criminal Law Journal* 249; Helen Pringle, 'Acting Like a Man: Seduction and Rape in the Law' (1993) 2 *Griffith Law Review* 64; Robin West, 'A Comment on Consent, Sex, and Rape' (1996) 2 *Legal Theory* 233; Emily Sherwin, 'Infelicitous Sex' (1996) 2 *Legal Theory* 209; Peter Rush, 'On Being Legal: The Laws of Sexual Offences in Victoria' (1997) 9 *Australian Feminist Law Journal* 76.

[18] This research is related to a project entitled 'Negotiating Consent: A Comparative Study of the Limits of Consent', funded by an Australian Research Council Small Grant, and carried out by me with David Tait, Department of Criminology, The University of Melbourne. This part of the research has involved, to date, the observation of seven trials and the examination of six trial transcripts.

worst, re-enact the violence which has led to the victim's presence in court.[19] Numerous critical studies have elaborated the ways in which aspects of the victim's life may be marshalled by the defence in a rape trial to fulfil the requirement of casting doubt upon the prosecution's case.[20]

My intention here is not simply to add to these sociological accounts of trial practices, which begin from the notion that it is the content of trial evidence that must be criticised (thus attacking the necessity for questions such as those relating to sexual history or behaviour that could appear morally suspicious, such as having an abortion or using illicit drugs). The result of decades of feminist criticism of trial practices must surely be an acceptance of the significance of topics that signal to juries damaging insinuations about the character of the victim. My aim here is not to argue for the abandonment of such analyses, but rather to point out that ruling such topics inadmissible or restricting defence counsel access to such topics will not affect, in any substantial way, the conduct and experience of rape trials. This is so because inured within legal discourse is a far more formidable conviction that a woman is both sexual and indifferent, functioning more as a signal to others than as an autonomous agent. Such a conviction is embedded within the rhetorical practices of legal discourse. This section of the essay will, as exemplification, display two such instantiations of law's conviction of woman as indifferently sexual.

A *Woman('s) Surfaces*

That woman exists as sign is well-known.[21] That her signal quality exists through the projection of femininity from her bodily surfaces is also thoroughly described.[22] In 'The Waste Land',[23] Eliot's women engage in and discuss the

[19] See, eg, Zsuzsanna Adler, *Rape on Trial* (1987); Jenny Bargen, *Heroines of Fortitude: The Experiences of Women as Victims of Sexual Assault* (1996); Anne Edwards, *The Criminal Justice Response to Sexual Assault Victims* (1996); Anne Edwards and Melanie Heenan, 'Rape Trials in Victoria: Gender, Socio-Cultural Factors and Justice' (1994) 27 *Australian and New Zealand Journal of Criminology* 213; Jeanne Gregory and Sue Lees, 'Attrition in Rape and Sexual Assault Cases' (1996) 36 *British Journal of Criminology* 1; Melanie Heenan and Helen McKelvie, *The Crimes (Rape) Act 1991: An Evaluation Report No 2* (1997); Rae Kaspiew, 'Rape Lore: Legal Narrative and Sexual Violence' (1995) 20 *Melbourne University Law Review* 350; Sue Lees, *Carnal Knowledge: Rape on Trial* (1996); Sue Lees, *Ruling Passions: Sexual Violence, Reputation and the Law* (1996); Carol Smart, *Feminism and the Power of Law* (1989).

[20] For acute demonstrations of this, see the examples cited in Bargen, above n 19; Heenan and McKelvie, above n 19; Kaspiew, above n 19; Lees, *Ruling Passions*, above n 19.

[21] Paradigmatic texts within the literature on woman as sign include: Parveen Adams, 'Representation and Sexuality' (1978) 1 *m/f* 65; Parveen Adams, 'Versions of the Body' (1986) 11/12 *m/f* 27; Sandra Bartky, *Femininity and Domination: Studies in the Phenomenology of Oppression* (1990); Susan Bordo, *Unbearable Weight: Feminism, Western Culture and the Body* (1995); Judith Butler, *Bodies That Matter* (1993); Moira Gatens, *Imaginary Bodies* (1996); Frigga Haug, *Female Sexualization: A Collective Work of Memory* (1987); Luce Irigaray, *Speculum of the Other Woman* (1985); Denise Riley, *"Am I That Name?" Feminism and the Category of 'Women' in History* (1988).

[22] On signification through bodily surfaces and clothing, see especially: Bordo, above n 21; Rosalind Coward, *Female Desire* (1984); Haug, above n 21; Judith Williamson, *Consuming Passions: The Dynamics of Popular Culture* (1988); Janet Wolff, *Feminine Sentences: Essays on Women and Culture* (1990).

[23] Eliot, 'The Waste Land', above n 2.

processes of gilding their surfaces to project messages about their sexuality. In 'A Game of Chess', one woman (a transported Cleopatra) sits amid 'the glitter of her jewels'[24] and scented by 'her strange synthetic perfumes,/ Unguent, powdered or liquid',[25] while her hair under the brush 'spread out in fiery points/ Glowed into words, then would be savagely still'.[26] Another asks, 'What shall I do?/ I shall rush out as I am, and walk the street/ With my hair down, so.'[27] Lil's friend advises her, 'Now Albert's coming back, make yourself a bit smart./ He'll want to know what you done with that money he gave/ you/ To get yourself some teeth',[28] and '"You ought to be ashamed, I said, to look so antique.'[29] The typist in her home is surrounded by clean and dirty underwear: 'Out of the window perilously spread/ Her drying combinations touched by the sun's last rays,/ On the divan are piled (at night her bed)/ Stockings, slippers, camisoles, and stays.'[30] It is taken for granted that their projection as attractive is an essential task of everyday life for woman.

Rape trials are invested with the same notion that woman's surface is replete with messages transmitted to men, to law, to juries. In some trials, items of clothing come to perform crucial roles in substantive evidential terms. In one recent Victorian case, the victim was cross-examined about the exact location of her socks and shoes.[31] A police photograph showed the victim's shoes and socks strewn around the defendant's living room floor. The defence was trying to support her argument that the victim and the defendant took her shoes and socks off together as a prelude to taking off her leggings (thus inferring that consensual sex then took place). At the same time, the defence was attempting to give lie to the victim's story that she herself had removed her shoes and socks and placed them neatly together (as was her habit indoors), and that the defendant had pulled off her leggings without her consent to that, or to sex. The victim was cross-examined as follows:

> Q: He hadn't hurt you, had he?
> A: No.
> Q: What he did do, I suggest, was pulled your leggings and panties off with your assistance. What do you say about that?
> A: No, I hit him.
> Q: I'll ask you to explain if you can, you may not be able to, the presence of one sock one side of the room and the other sock the other side of the room.
> A: No, I can't explain that.
> Q: Wasn't it the case that he pulled your shoes off, then he took your socks off and threw them aside and then pulled your leggings off?
> A: My shoes were put neatly how I put them.
> Q: How do you explain the socks either side of the couch?

[24] Ibid [84].
[25] Ibid [87]–[88].
[26] Ibid [109]–[110].
[27] Ibid [131]–[133].
[28] Ibid [142]–[144].
[29] Ibid [156].
[30] Ibid [224]–[227].
[31] *R v O* (Unreported, Melbourne County Court, Walsh J, February 1997).

A: I don't know.[32]

Part of the defence argument in this case was that consensual sexual intercourse took place on a couch in the defendant's living room. It was an important component of the defence case that the victim's lower clothing was removed on the couch prior to this consensual sex. The prosecution, however, argued that an indecent assault took place on the couch (over the victim's clothing) prior to the victim being pushed into a bedroom where the rape occurred. A crucial component of the prosecution narrative is that the victim's lower clothing was removed in the bedroom. The victim's underwear was in fact discovered by police at the side of the bed in the bedroom. As the prosecution counsel commented after the case, 'I thought the knickers by the bed would win it'.[33] The jury, however, were not so convinced as to the evidential weight of the location of the victim's underwear, acquitting the defendant on all counts.[34]

Clothing thus occasionally functions in ways that explicitly relate to proof of elements of the offence, such as the occurrence of sexual intercourse.[35] The probative function of clothing is of course highly indeterminate. In *R v K*,[36] the victim's bra was admitted into evidence because semen was found inside it; this simply meant that the defence narrative had to explain why semen would be present: their solution was to claim that the victim had willingly masturbated the defendant with her breasts. In *R v N-T*,[37] the police investigating the victim's complaint found a pair of torn stockings at the scene; the defence explained that consensual sex had involved the victim removing her stockings. If any probative role can be suggested by the prosecution in relation to the victim's clothing, the defence, as seen in several of the cases examined, may be more likely to claim that consensual sex took place.

More common than this probative function, however, is the use of questioning by the defence about clothing to cast doubt on the character of the victim. Brown, Burman and Jamieson comment that evidence about clothing 'simultaneously impugns her character and suggests consent'.[38] The cases I have examined tend

[32] *R v O* (Transcript of Proceedings, Melbourne County Court, Walsh J, February 1997) 124.

[33] Interview with prosecution counsel in *R v O* (Unreported, Melbourne County Court, Walsh J, February 1997) (Melbourne, 22 April 1997).

[34] See also the case of *R v C* (Unreported, Melbourne County Court, Waldron CJ, February 1997), which featured lengthy questioning of all witnesses about the whereabouts of the lower half of the victim's bikini.

[35] Sterling analyses three American trials in which clothing played such a role, including one where evidence was led that the victim was wearing a mini-skirt and no underwear, and the jury foreman commented afterwards that the victim had 'asked for it': see Alinor Sterling, 'Undressing the Victim: The Intersection of Evidentiary and Semiotic Meanings of Women's Clothing in Rape Trials' (1995) 7 *Yale Journal of Law and Feminism* 87.

[36] (Unreported, Melbourne County Court, Gebhardt J, September 1996) 120.

[37] (Unreported, Melbourne County Court, Crossley J, November 1996) 13.

[38] Beverly Brown, Michelle Burman and Lynn Jamieson, *Sex Crimes on Trial* (1993) 155. Sterling comments, '[c]lothing's cultural significance is used to support a particular theory, as when a mini-skirt and a lack of underwear are used to argue consent': Sterling, above n 35, 89. Lees also notes, '[w]omen are blamed for ... actively provoking violence by wearing short skirts or low tops, fashions which are actively promoted by the fashion industry, and if not adopted by young women, ironically render them unattractive, "dogs", or lesbians': Lees, *Ruling Passions*, above n 19, 74.

not to engage in the stereotypical use of evidence as to dress in order to impugn character and suggest consent. That is, the heavy-handed cross-examination that has been identified and criticised by feminists over a number of years[39] appeared very seldom in the cases examined. The closest approximation to that occurred in *R v O*, where the victim was asked by the defence: 'Your leggings as I understand it are tight stretch material, are they not? They are figure hugging material?'[40] That said, every case examined did include some questioning as to what the victim was wearing at the time of the rape.[41]

This is attributable partly to the need to establish certain basic issues connected with the crime (the brute factual details of forcible clothing removal as an element of indecent assault or as a precursor to rape), and partly to the well-known animation of defence counsel, as described above, in seeking to impugn character and imply consent. However, it also relates to a discursive suspicion that these accused men are guilty of incompetent message-decoding, rather than rape. Clothing and bodily appearance are regarded as pre-eminent sources of information about the self. Rape trials retain faith in the notion that clothing is intended as a message about the woman wearing it; the recipient of the message being any man who happens to see it. A County Court judge commented:

> A woman who dresses in a particularly noticeable way and who goes to particular types of functions is taking a risk. I don't have a daughter, but if my daughter came up to me on a Saturday night and said that she was going to the pub in singlet and shorts .... I'd be telling her not to go like that because it would be misconstrued. There's a big risk with alcohol, seeing a woman dressed like that, that people would misinterpret what that means. [It doesn't mean that] a woman dressed like that is inviting to be attacked.[42]

The judge's comment attacks the use of evidence regarding clothing as communicating a semiotic message about the woman's moral character, but it accepts the notion that clothing projects a message to an audience. It is this process of projection-and-interpretation that interests me here. The woman is located as the sender of the message; the accused is located as the recipient who interprets the message. The problem can be constructed as a failure on the part of the sender (the woman who wears clothing inappropriate to the venue), or as a failure on the part of the recipient (the man who interprets a short skirt as meaning a willingness to have sex). Underlying this construction is an attribution of originary responsibility on the part of the woman (she who clothes herself should take

[39] See, eg, Brown, Burman and Jamieson, above n 38; Lees, *Ruling Passions*, above n 19.

[40] *R v O* (Transcript of Proceedings, Melbourne County Court, Walsh J, February 1997) 119.

[41] The defendant's clothing, of course, is never discussed. In *R v K* (Transcript of Proceedings, Melbourne County Court, Gebhardt J, September 1996) 74, 85, 102, the victim was asked if she owned leather bondage gear and wore G-strings, fish-net stockings and high heels (it transpired that her only leather garments were a jacket and skirt; she wore G-strings only to aerobics and never wore stockings or high heels). In *R v N-T* (Transcript of Proceedings, Melbourne County Court, Crossley J, November 1996) 91, the victim's babysitter was asked to estimate the length of the skirt worn by the victim to a nightclub. In *R v P* (Transcript of Proceedings, Melbourne County Court, Wodak J, April 1997) 44, the victim was asked what she did when the defendant unclasped her jeans and bodysuit.

[42] Interview with Melbourne County Court judge (Melbourne, 23 June 1997).

care), and a demand for competence in decoding on the part of the audience members (he who looks at women should learn what clothing signals).

The transcripts analysed showed that defendants and witnesses received messages from clothing worn by the victims. Two cases illustrate this particularly well. In *R v S*,[43] the defendant claimed that the victim had taken off her sweater in the car returning from the pub, so that she was sitting in the car wearing only her bra as upper garment. On reaching her apartment, she left the defendant in the lounge room, saying she was going to change, and returned wearing a see-through lingerie top. The victim's evidence was that she had not removed her sweater in the car; at her apartment, she did remove it (although without leaving the room or making any comment about it to the defendant), and was wearing a black cotton singlet underneath, which was not see-through. In the defendant's narrative we find a metonymic aphasia[44] (he classifies a singlet as lingerie), an invention (he imagines the victim sitting in the car wearing only her bra) and a fantasy (that the opaque cotton of the singlet is transparent, revealing the woman's body beneath).

In *R v C*,[45] we find an even more pronounced version of this dynamic whereby category mistake and fantasy intervene in the reception of a supposed projected message. The rape had taken place in barracks at a Victorian military base after a function at a pub located on the base. The function had a theme: a beach party. All attending were therefore dressed for the beach. As part of the activities at the function, there was a 'jelly wrestling pit', in which pairs of individuals would take turns at grappling in mock (and not so mock) combat. The victim had gone to the party wearing a white two-piece swimsuit, with a mauve cotton sundress over it. She also took a white shirt with her. She and a friend, at the suggestion of some of the men at the party, jelly wrestled each other in their swimsuits for about fifteen minutes. They were forced to stop as a result of the male spectators reaching into the pit and attempting to pull off the victim's top. Later, a fight developed between those men who had been watching the women wrestle, with the two women being called names, and soldiers complaining that they hadn't taken all their clothes off in the pit. (The two women were then told to leave by a male friend who was worried for their safety.)

[43] (Unreported, Melbourne County Court, Higgins J, April 1997).

[44] Aphasia describes a condition of linguistic category mistake, whereby the subject continually or repetitively uses words erroneously. For a thorough discussion, see Roman Jakobson, 'Two Aspects of Language and Two Types of Aphasic Disturbances' in Roman Jakobson, *Selected Writings: Word and Language* (1971) vol 2, 239. Whereas metaphor operates through the substitution of one thing for another (for example, 'time is money'), metonymy works through the association of one object with another, in which aspects of one are displaced by the contiguity brought about by comparison with the other. Thus, to describe a singlet as 'lingerie' displaces some of the signifying associations of 'singlet' (which might be 'sport', 'unisex garment', 'comfort', and so on) through contiguity with 'lingerie' (with its significations of 'naughtiness', 'sex', 'seduction', and so on). Note that for Lacan, desire is metonymic in character: the subject desires one object after another in an endless process, just as in metonymic signification one signifier will constantly refer to something else: Jacques Lacan, *Ecrits: A Selection* (Alan Sheridan trans, 1977) 175. In the rape trial, then, metonymy can ensure that any signifier concerning the woman's body, dress, behaviour or speech can represent her consent to sexual intercourse, or her desire for the man's desire.

[45] (Unreported, Melbourne County Court, Waldron CJ, February 1997).

After the rape, the victim awoke another soldier in the barracks. He was asked by the Crown what the victim was wearing at the party: 'a white bikini with like a see-through top over the top'.[46] When she arrived at his room, the victim 'had her dress on, but her bikini bottoms — bottoms weren't there'.[47] The victim asked him to find out if her bikini bottoms were in the room where the defendant was sleeping; he was asked by the defence if he did this by opening the door and shouting '"has anyone got [L's] knickers?" or words to that effect'.[48] In his record of interview with the police, the defendant described the victim as wearing 'white bra and pants' and engaging in a 'cat fight' with the other woman.[49] He also stated that the spectators were yelling phrases like 'get your top off' to the victim.[50]

In this case, the same type of metonymic aphasia can be discerned: swimwear becomes underwear. Despite the beach party theme of the function, the defendant and other men at the party seemed to react to the victim as though she was out in public wearing only her underwear. The jelly wrestling seemed to function as an invitation to imagine the victim's naked body beneath her bikini, and, when her opaque cotton sundress was described by a male witness, it had become transparent, as though her body was shining through the fabric.

My point is not that the victim's clothing sends messages that can be misinterpreted or misconstrued. That is the well-known argument which has been explored in numerous studies: to wear a mini-skirt is to invite attention at the least, rape at the most.[51] This notion animates some trial questioning, and acts as an *aide memoire* to women who assess their clothing in terms of appropriateness for the intended venue. If clothing did operate in such a straightforwardly semiotic way, women could indeed ensure that their dress would invite or incite male attention only when they wished it. What I think the cases of *R v C* and *R v S* demonstrate is that no message is ever simply launched by the woman's body to be decoded by the male audience. No matter what the woman's intentions may be, she is the projection of a projection: her bodily surface is a text to be interpreted by the one who imagines her as textual. The surfaces of her body are constituted as planes to be made plain.

What takes place during the trial process is both a transformation and substitution: singlets become lingerie, swimwear becomes underwear. The woman can then be seen as showing herself in her underwear to the man who sees her. The imaginary transparency of the clothing allows the woman's underwear to be seen beneath opaque clothing, or her body to be seen under its cloaking garments. The dynamic of projection therefore constructs the woman's surfaces as making what is inside or underneath appear to the man who is on the outside. It does not

46 (Transcript of Proceedings, Melbourne County Court, Waldron CJ, February 1997) 48.

47 Ibid.

48 Ibid 61.

49 Office of Public Prosecutions ('OPP') file on *R v C* (Unreported, Melbourne County Court, Waldron CJ, February 1997), in C's record of interview with the police.

50 Ibid.

51 See, eg, Brown, Burman and Jamieson, above n 38; Lees, *Ruling Passions*, above n 19; Sterling, above n 35.

matter that these women were 'appropriately' dressed for the events they were attending. Context does not determine the meaning of dress. These women were hermeneutically appropriate to their contexts, yet the address of their dress is transformed. They become screens. Their dress becomes a *point de capiton* or quilting point, in Lacan's terms, across which the woman's image is exchanged, through the projection of the man's projection, as fantasy.[52]

B *Opening Mouths*

Just as questioning about clothing and dress has become a touchstone for feminist criticism of rape trial practice, so it is well-known that the rape victim who consumed alcohol or drugs prior to being raped will be interrogated as to the effect had by those substances upon her consent to sexual intercourse. In Lees' study, for example, '[i]n all but one trial [examined] exaggerated or unfounded allegations of drink or drug use were made against the women [complainants]'.[53] Edwards and Heenan, examining a number of Victorian cases, found that '[the complainant's] drinking in the period preceding the incident is frequently a major component of the defence's case'.[54] Although less stereotypically used than dress to vilify the woman, evidence about the consumption of alcohol is thought to function in similar ways: to impugn her character and imply consent.[55] A study by LaFree, Reskin and Visher indicated that American juries have been much more likely to acquit the accused in a rape trial where evidence is led showing that the victim consumed alcohol or drugs prior to the rape.[56] The transcripts examined and the trials observed by me certainly indicated that defence counsel will scramble to lead evidence about alcohol and drugs.[57] In *R v P*,[58] the following

[52] Lacan uses the metaphor of the *point de capiton*, or quilting point — an upholstery button stitched on to a mattress to prevent a shapeless mass of stuffing from slipping about — to describe the way in which 'signified and signifier are knotted together': Jacques Lacan, *The Psychoses* (Russell Grigg trans, 1993) 268. The *point de capiton* thus refers to a point in the signifying chain in which the endless process of signification is halted and the (necessary) illusion of a fixed meaning is produced. See also the discussion of the term in Dylan Evans, *An Introductory Dictionary of Lacanian Psychoanalysis* (1996) 149. The psychoanalytic concept of projection describes a psychic defence mechanism through which an internal desire or emotion is displaced and located outside the subject. Here the man's desire is projected and exchanged for the notion of the woman's desire, as manifested through her clothing.

[53] Lees, *Ruling Passions*, above n 19, 67.

[54] Edwards and Heenan, above n 19, 227.

[55] Such a strategy is facilitated by socio-cultural assumptions about women and alcohol or drugs. Ettorre comments: '[A] woman with a drinking problem does not need to be a prostitute to have a promiscuous image. She is promiscuous by the very fact that she is a drinker': Elizabeth Ettorre, *Women and Substance Use* (1992) 38, with details on this sociological study of attitudes to women and alcohol in Britain.

[56] Gary LaFree, Barbara Reskin and Christy Visher, 'Jurors' Responses to Victims' Behaviour and Legal Issues in Sexual Assault Trials' (1995) 32 *Social Problems* 389.

[57] All but two cases examined involved the consumption of alcohol and/or drugs: *R v N-T* (Unreported, Melbourne County Court, Crossley J, November 1996) involved evidence about drinking spirits and cocktails; in *R v P* (Unreported, Melbourne County Court, Wodak J, April 1997), the victim had been given alcohol on two occasions by the accused and marijuana on one; in *R v O* (Unreported, Melbourne County Court, Walsh J, February 1997), the victim had drunk spirits, wine and beer, and was taking Valium; in *R v C* (Unreported, Melbourne County Court, Waldron CJ, February 1997), the victim was drinking spirits and claimed to be so drunk

exchange took place between defence counsel and the victim, who was sixteen at the time of the rape:

Q: P was drinking beer?
A: I don't know.
Q: You had a good time at the party, didn't you?
A: Yes I did.
Q: I also want to suggest to you that on one occasion P can remember getting you a beer?
A: I only remember drinking spirits, I don't remember drinking beer, I may have.
Q: When you left the party, you'd had a good time, is that right?
A: Yes I had.
Q: You were affected by alcohol, is that correct?
A: Yes.
Q: You say to the jury that you might have done things that night that you wouldn't have done on other occasions?
A: Yes.[59]

In this exchange the victim is encouraged to answer affirmatively to questions which are ostensibly limited in ambit, but which actually resonate in a much wider fashion: her confusion over what type of drinks she actually consumed; her having had a good time (with all its associations of 'good time girl'); the possibility that alcohol might loosen her inhibitions. It is clear how this type of questioning can be taken as insinuating that the victim is of poor character. The most aggressive example of this questioning is found in *R v O*:[60]

Q: What's the reason you take Valium? Suffer from panic attacks, don't you?
A: Yes.
Q: Do alcohol and Valium mix?
A: I've never been told it doesn't ... If you use alcohol and Valium you shouldn't drive.
Q: What were you drinking?
A: Half Moselle and half orange juice in a small glass.
Q: In a small glass. Have you ever told anyone it was a small glass before this court?
A: No.
Q: How many glasses had you consumed, four or five?
A: Yes.
Q: How many further? So you had about seven glasses prior to meeting the accused and his friends?
A: I still had the seventh glass with me.
Q: I see, you want to make the point, or suggest to the jury that you were not intoxicated, don't you?
A: I wasn't.
Q: Were you affected in any way by the consumption of alcohol and Valium?
A: No.

as to have passed out; in *R v S* (Unreported, Melbourne County Court, Higgins J, April 1997), the victim and accused were drinking beer and spirits.

58 (Unreported, Melbourne County Court, Wodak J, April 1997).

59 (Transcript of Proceedings, Melbourne County Court, Wodak J, April 1997) 40–1.

60 (Unreported, Melbourne County Court, Walsh J, February 1997).

Q: In any way?
A: No.
Q: Just your normal self?
A: I was a little bit happier.
...
Q: You started to chat with strangers?
A: Talk, yes.
...
Q: I suggest you kissed a man on the lips.[61]

In addition to using evidence about alcohol and drugs to make character insinuations about the victim, defence counsel are forced to make evidence about alcohol function in two contradictory ways at once. In *R v C*,[62] cross-examination of the victim began with questioning along the lines demarcated above; straightforwardly attempting to construct the woman as one who regularly drinks:

Q: On most occasions where soldiers gathered socially there was a tendency to drink a lot of alcohol?
A: Yes.
Q: Had you been to numerous functions of that kind?
A: A few.
Q: Again, I'm just asking and I don't mean this as any criticism, but had you found that since being in the Army you had tended to drink more than you had done previously?
A: Yes.[63]

Through disingenuous questioning about apparently innocuous issues, the victim is encouraged to represent herself as a serious drinker. However, since it was the victim's claim that she was so severely intoxicated as to have passed out, waking to find the accused penetrating her, the defence had later to ensure that the victim appeared to be a heavy drinker, but not one who was so drunk on that occasion as to be incapable of consenting.[64] This was done by asking questions structured to obtain an affirmative response without the victim realising that her positive answers meant she was reducing the chance of a conviction. In her desire to restrict the damage to the image of her moral character, she allowed the defence to imply that she was not so drunk as to be unconscious:

Q: You may have been affected by alcohol but you weren't blind drunk at that stage?
A: No.
Q: Far from being blind drunk you were affected but not badly affected?
A: Yes.
...
Q: You walked [to the barracks] with [your girlfriend] and you said you each helped each other?
A: Yes.

61 (Transcript of Proceedings, Melbourne County Court, Walsh J, February 1997) 62–9.
62 (Unreported, Melbourne County Court, Waldron CJ, February 1997).
63 (Transcript of Proceedings, Melbourne County Court, Waldron CJ, February 1997) 23.
64 *Crimes Act 1958* (Vic) s 36 provides that '[c]ircumstances in which a person does not freely agree to an act include the following: ... (d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing'.

Q: If I suggested to you that had you both been hopelessly drunk you wouldn't have been much help to each other?
A: Probably not.
...
Q: You were able to walk?
A: Just.
Q: You were able to carry a jug [of bourbon and Coke]?
A: Yes.
Q: You didn't spill a thing or not much?
A: I don't know.
Q: There was enough in the jug for you to share when you got to the room?
A: Yes.
...
Q: [When you awoke later] you would have partially slept off your intoxication?
A: I guess.[65]

I offer these excerpts partly to substantiate suspicions that evidence about alcohol can be used at trial as if it had a probative function in relation to consent, in the same way that evidence about dress can be used at that specific level. My main purpose, however, is to interrogate its imaginary function. The consumption of alcohol is conventionally thought to insinuate both dubious moral character and consent to sexual intercourse. That is to focus on the physical and cultural meanings attributed to alcohol: as a social stimulant and masseur of inhibitions. Alcohol and drugs, however, achieve these effects by their passing from the outside into the interior of the body: the woman puts the glass to her lips and drinks, or puts the Valium tablet in her mouth and swallows. Much has been written about the mouth as a projectile device. It is from the mouth that insults can issue, it is from the mouth that hate speech is uttered, it is from the mouth that accusations of rape can be made.[66] Our fascination with the speaking mouth derives from its constitution as a border between the inner self and the outer other. The mouth opens, the tongue moves, the voice sounds, words are uttered. Ingestion operates in reverse: the mouth opens, a thing is inserted, the tongue moves, the throat closes. The outer other is incorporated into the interior self. Clothing works to project the interior to the exterior, with defendants and witnesses interpreting clothing as transparent, mere borders between themselves on the outside of the woman and the corporeality concealed within the clothes. Questioning in rape trials about the consumption of alcohol betrays the fascination for the way that something outside can be taken in. Evidence about alcohol and drugs therefore draws attention to the opening of the mouth as a border point between two dichotomous conditions: interior and exterior.

[65] *R v C* (Transcript of Proceedings, Melbourne County Court, Waldron CJ, February 1997) 28–38.

[66] On law's oral fixation in cases involving verbal insults provoking men to murder their partners, see Danielle Tyson, *A Critical Inquiry into the Construction of the Female 'Speaking' Body in Legal Discourse* (Honours thesis, La Trobe University, 1996). On speech acts of hatred, see Judith Butler, *Excitable Speech* (1997). On orality and sexuality in law, see generally Peter Goodrich, 'The Laws of Love: Literature, History and the Governance of Kissing' (1998) 24 *New York University Review of Law and Social Change* (forthcoming).

In received interpretations of the function of arguments about dress in rape trials, the woman is seen as projecting a message to be decoded, sometimes inaccurately, by the male watcher. This view forgets the role of the man's projection of the woman's projection, his fantasy of her dress as a skin on the body which speaks of the layers beneath. In interpretations of the function of arguments about alcohol consumption in rape trials, the woman's drinking is seen as representing her willingness to be physically affected by the drink or drugs, making her consent to sex factually more likely. This forgets the communicative aspects of the act of consumption, the role of the mouth — as it eats and drinks, chews and swallows — as a site of exchange between the interior and the exterior. Yet, just as the acts of communication between the clothed woman and the male watcher always already founder in a moment of fantasy, so the woman who drinks from her glass or swallows the pill, while engaging in acts which may be entirely appropriate to their context, is never looked at as simply drinking from her glass or swallowing the pill, but as metonymically speaking her willingness to have sex. Context is thus always indeterminate; the cases reveal a struggle over the limits of context between defence, victim, prosecution and judge. To argue over the substantive meanings of clothing and alcohol consumption is therefore to accept context as determinate. My reading shows how fantasy reveals context as indeterminate and law as limited: the *images* of the clothed-yet-undressed woman or the drinking-and-thus-fucking woman are representations of the limits of law.

II NARRATIVES OF RESPONSIBILITY

My analysis of the fascination exercised by dress and consumption issues in trial discourse has attempted to show how context is negotiable and how the woman is figured as an aphasic fantasy. But trial questioning fulfils other functions. One of these is the establishment of a narrative of responsibility.[67] Critical attention to this issue has tended to focus on the accumulated substantive content of the narrative being generated. That is, the trial is considered to involve a contest between two stories — that of the prosecution and that of the defence, or alternatively the 'legal' and the 'non-legal' versions, with the jury being invited to choose which story they find most credible.[68] It is as if the construction of narrative works through a version of the legal process: the trial context is thought to govern the process of storytelling, so that two competing stories (one told by each lawyer) are presented to an audience (the jury) who will choose between them to provide the third story (the verdict), as shaped by law's narrative

[67] There is a considerable amount of literature on trial discourse as narrative: see, eg, Bernard Jackson, *Law, Fact and Narrative Coherence* (1988); Symposium, 'Legal Storytelling' (1989) 87 *Michigan Law Review* 2073; Kaspiew, above n 19.

[68] For example, Kaspiew contrasts 'the legal rape story' with 'the victim/survivor's story': Kaspiew, above n 19, 380–1. Note that neither story exists 'outside the law', but rather that the narratives vary in their interpretations of whether consent existed or not, or whether penetration occurred or not, such that a dichotomous pair of culpable/non-culpable narratives is produced. I am grateful to the second anonymous referee for drawing my attention to this point.

(provided by the judge's charge).[69] These two competing stories are thus never free-floating random narratives, but are shaped by the meta-discourse of legal process.[70] The context of the trial is allowed to unify the disparate tactics and exculpate the adversaries as performing institutionally dictated functions. Context should not be allowed to act as a cloak protecting lawyers from responsibility for the pain they perpetrate and perpetuate in court.[71]

Similarly, content tends to be highlighted as a problem in the generation of these adversarial narratives.[72] But if context and content were all that dictated the generation of narrative, then we could be sure that once certain procedures were agreed upon, once certain topics were accepted as permissible and other topics outlawed, then rape trials could proceed in ways that inflicted no further suffering upon the victim. However, I would argue that such suffering is produced as much through the process of law's storytelling itself, through the incremental implication of the victim into the defence narrative, as through the substantive detail of defence questioning. It is not enough for the victim to be vilified according to received ideas about dress or drink, she must also be made to rub up against the fantasy that informs the defence account, made to perform as a character in its narrative.

The *insinuation* strategies mentioned above operate from within the victim's own narrative. If the victim argues that she went to a nightclub with a friend for fun, or drank a certain number of beers, or wore a bikini because she was at a beach party, the strategy of insinuation works to coat that activity with moral opprobrium. The questions, however, do not take issue with those facets of the victim's narrative; instead, they seek to vary the evaluative emphasis that is placed on those narrative components. The victim will be asked questions in direct examination by the Crown, questions which allow her to elaborate her story within the legal frame. Insinuative questioning by the defence will pose questions to which her own answers may constitute the damaging information. Thus in *R v P*[73] the defence asks, 'When you left the party you'd had a good time, is that right?', and the victim answers, 'Yes, I had'.[74] This obviates the need for the defence to attempt any obvious strategies of character smearing with

69 One writer contrasts the functions of the defendant's evidence and the victim impact statement: Elaine Scarry, 'Speech Acts in Criminal Cases' in Peter Brooks and Paul Gewirtz (eds), *Law's Stories: Narrative and Rhetoric in the Law* (1996) 165.

70 For a narrative theory of the legal process in the trial, see Bernard Jackson, 'Narrative Theories and Legal Discourse' in Christopher Nash (ed), *Narrative in Culture: The Uses of Storytelling in the Sciences, Philosophy and Literature* (1990) 23.

71 For examples of critics who demand that lawyers acknowledge their role in the suffering of the rape victim, see Nina Puren, 'Bodies/Ethics/Violence: A Review of *Heroines of Fortitude: The Experiences of Women as Victims of Sexual Assault* and *The Crimes (Rape) Act 1991 (NSW): An Evaluation Report*' (1997) 9 *Australian Feminist Law Journal* 134; Peter Rush and Alison Young, 'A Crime of Consequence and a Failure of Legal Imagination: The Sexual Offences of the Model Criminal Code' (1997) 9 *Australian Feminist Law Journal* 100.

72 See, eg, Jackson, 'Narrative Theories and Legal Discourse', above n 70; Jackson, *Law, Fact and Narrative Coherence*, above n 67; Kaspiew, above n 19.

73 (Unreported, Melbourne County Court, Wodak J, April 1997).

74 (Transcript of Proceedings, Melbourne County Court, Wodak J, April 1997) 40.

questions such as 'Are you a good time girl?', which might well meet with objections from opposing counsel.

However, *implication* of the victim in the defence narrative works by challenging the very foundation of the victim's narrative. The defence counsel inserts into the cross-examination a series of questions which are designed for the victim to answer only briefly, usually in the form of 'yes' or 'no', or a short phrase. These questions are structured in two alternating forms: first, a prefacing phrase such as 'I suggest to you that' followed by the defence version of what happened; or second, the defence version of events followed by the suffix 'what do you say to that?' Juries are told, either in opening or closing addresses, or by the judge in the charge to the jury, that the evidence is constituted by the answer to the question, rather than the question itself. It is, of course, ludicrous to think that juries either ignore the question and focus on the answer (a notion that denies the self-proclaimed dialogism of trial discourse), or are unaffected by the barrage of suggestions that defence counsel lay out before them.[75] Some examples from the transcripts may serve to demonstrate the techniques.

In *R v N-T*,[76] the following exchange took place:

Q: I will tell you what I suggest happened to you. As you were walking in the street outside the area where the vacant land is, you were kissing each other?
A: I don't think so.
...
Q: And I suggest to you that you decided the grassed area was, well, about as good a spot as you were going to get to lie down together, because it was a bit soft, isn't that right?
A: No, that's not right.
Q: There was fairly long grass in the area ... and you thought that's as good a spot as any to lie down and have a bit of a carry on, isn't that right?
A: No, that's not right.
...
Q: And I suggest to you that you voluntarily had sex with him?
A: No, I didn't.
Q: And I suggest to you that what happened was he got up and left you like, if I could use the term, a shag on a rock, just left you, after sex. Left you, didn't he? Is that right?
A: I beg your pardon?
Q: He got up and just left you after he had had sex with you, didn't he?
A: What do you want me to say? That ...
Q: Isn't that right? He didn't spend any time with you immediately after the sex act, did he?
A: Well, I didn't — wouldn't hope so.
Q: But look, he just got up and left, didn't he?
A: That's right.
Q: And I suggest to you that that insulted you. Is that right?
A: No.

[75] In all the trials observed, statements to this effect were made before the jury by either or both counsel and the judge. Anecdotally, prosecutors spoke of the difficulties (they surmised) that jurors had with such a concept.

[76] (Unreported, Melbourne County Court, Crossley J, November 1996).

Q: And I suggest to you that you felt you had been abandoned and I suggest to you you thought that the best way to get back at him was to say that you had been raped. Isn't that right?
A: No, that's not right.[77]

There are a number of devices at work here. First, the use of 'And' at the outset of five of the questions creates a connection to the previous question and erases the answer given by the victim between questions.[78] The victim answers in the negative, yet the defence lawyer's 'And' flattens out her denial, and creates a narrative building block from one question to the next in his construction of an exculpatory explanation. Second, phrases such as 'I suggest to you that' and 'isn't that right' constitute affirmative frames in which the mini-narrative of the question is lent a positive evaluative aura. Third, the victim is encouraged to give only very brief answers, which merge and become numbly repetitive. In contrast, the jury hear brisk and authoritative explanations using commonsense terms and folkloric notions in which to situate the disputed events.

Other defence strategies include asking questions which contain multiple components of the defence narrative, and asking questions in two halves, one requiring a 'yes' , and the other requiring a 'no'. *R v N-T* exemplifies both in close proximity to each other:

Q: I'm putting it to you that there's a simple reason why you showered and washed those clothes, or put them in water, or whatever you did, you had had an incident where you'd been humiliated. Unfortunately, you'd been humiliated and you'd been made to feel that dirty if you like, and you wanted to wash it all out of your memory, so to speak. You were washing away humiliation is what I'm putting to you. What do you say to that?
A: No I wasn't.
Q: Did you at any time think I've been raped, I'd better not wash my clothes?
A: No I never thought anything like that.[79]

The first question lists several different acts: showering, washing clothes, putting them in water, 'having an incident' (a euphemism in this narrative for having sex), feeling dirty, wanting to forget feeling dirty. The questioner thus strings together several different phenomena which relate to different temporal points in the narrative and hooks them together with one unifying proposition ('you were washing away humiliation'). When the victim is asked 'What do you say to that?', the separation of this final unifying proposition into its own discrete sentence prompts the victim to respond to it alone, allowing the other listed behaviours to pass unchallenged.[80] The second question is split into two halves.

[77] (Transcript of Proceedings, Melbourne County Court, Crossley J, November 1996) 48–50.

[78] For a discussion of the use of the 'connective "and"' in courtroom questioning, see Peter Goodrich, *Languages of Law* (1990) 199.

[79] *R v N-T* (Transcript of Proceedings, Melbourne County Court, Crossley J, November 1996) 53.

[80] The victim's statement to police (DPP file on *R v N-T* (Unreported, Melbourne County Court, Crossley J, November 1996)) makes it clear that she did not 'shower' or 'wash her clothes' in any straightforward sense. Arriving home after the rape, she sat in the shower under the flow of the water: an image of intense pathos which the defence no doubt wanted to minimise for the jury and to convert into both an everyday image of 'doing the laundry' and a more aggressive image of 'a woman making sure that evidence is destroyed before making a false allegation'.

The victim is encouraged by the question's structure to answer its second half and forget the first. The question is a conditional proposition: *if* you have been raped, *then* you do not wash your clothes.[81] Her answer is made to follow from the question as if it is a denial of both the fact of having been raped and the realisation that she should not wash her clothes, by virtue of the word 'think' inserted in the question's first half, referring to 'being raped' as well as to 'washing clothes'. It prompts the victim to answer that she never thought anything like that, allowing the implication that she did not think she had been raped.

Victims occasionally attempt to challenge the implicative mode of questioning, by confronting the logic of the questions or demanding further logic or proof than the defence has offered. The following two excerpts show this being done unsuccessfully by one woman and successfully by another (successfully in that her case was the only one examined which resulted in a conviction). In *R v O*,[82] the defence counsel was repeatedly asserting that the victim consented to various acts with the defendant. Her response was to demand why, if this was so, the defendant fired a gun over her head in the bedroom. Her reward for raising this point of narrative logic was to be reprimanded in front of the jury for non-cooperation:

> Q: I suggest to you that you and he kissed and cuddled and you allowed him to touch you in various parts of your body without protest?
> A: And if I let him then why did he produce a gun?
> ...
> His Honour: No, just answer the question.
> A: If I wanted him to, then he didn't have had to use a gun ...
> His Honour: Just a moment, please excuse me. Excuse me, madam, would you be good enough to answer the question?
> A: That's true, he wouldn't have had to ... use a gun if he ... if I'd wanted him to ...
> His Honour: Do you want a short break? You've got to answer questions, you can't simply volunteer information, he's entitled to ask you questions.
> A: He wasn't the one that sat there and got shot near the (indistinct). [Witness distressed.]
> ...
> His Honour: No, you've got to listen to me, madam. If you are not distressed, you have got to grapple with his questions ... I think you had better have a short time but when you return to the witness box you must behave in a manner that's expected of all witnesses in this court.[83]

At this point the victim was sent out of the courtroom and the jury addressed by the judge:

> You are to judge these matters on the evidence. I do not wish to comment any further than that except to say that you must perform your task objectively ...

[81] Note that the question makes use of the same re-imagination noted in the above footnote: the injured woman fully dressed in the shower becomes the woman washing her clothes.

[82] (Unreported, Melbourne County Court, Walsh J, February 1997).

[83] (Transcript of Proceedings, Melbourne County Court, Walsh J, February 1997) 110–11.

> having regard to the evidence ... which you accept or reject, which is indeed entirely a matter for you.[84]

On the one hand, this exchange demonstrates the all-too-familiar asymmetry of power in legal discourse. As Goodrich has commented, 'linguistic authority is manifest in the imposed forms of dialogue and silence and in the irrefragable truth of legal definitions that variously annex, reformulate, appropriate or exclude competing usages'.[85] The excerpt also illustrates the power of law as a peculiarly monologic form of dialogue, in which the right to question is authorised at the expense of the right to answer. Legal discourse cannot bear to be questioned without an answer being given. Thus the situation is represented as a problem of an uncooperative witness rather than a question which, in endorsing an act of violence by the accused against the woman, repeated it. Further repetition of law's violence occurred as, after a short break, the victim was addressed by the judge in the absence of the jury: 'I know it's an ordeal for you, but it's going to be necessary for you to be more responsive in answering the questions. If I have to declare this a mistrial you'll have to come back on another occasion, do you follow?'[86] The defence counsel and judge in this case also engaged at several points in describing the victim in a derogatory fashion. For example, the defence counsel described the victim as 'confused and disoriented', to which the judge replied, '[i]t isn't the first time she has appeared to be not entirely *au fait* with matters'.[87] The victim was then admonished in the presence of the jury to 'maintain your concentration'.[88] An act of resistance to law's monologic dialogue thus led to the public shaming of the victim and the demolition of her attempted autonomy as a participant in the trial process.

Greater success in resisting the strategy of implication in the defence narrative is found in the case of *R v K*.[89] The victim had been abducted by her ex-boyfriend and taken to his house, where she was beaten by him, gagged, spat on, and subjected to a number of indecent assaults and acts of sexual penetration. The defence argument was that she consented to the sexual acts and to being beaten and humiliated because their conventional sexual practices during their relationship had been sado-masochistic in nature. The victim engages with the illogic of the questions, and pushes the defence counsel as to the substance of his allegations against her:

> Q: I suggest to you that you were very interested in sado-masochistic practices ... that's why the word 'slave' appears in one of your letters [to K] ...?
> A: I disagree with you.

[84] Ibid 111–12.

[85] Goodrich, *Languages of Law*, above n 78, 194. See also Kaspiew, above n 19, 379, who writes:

> The role of the judge as the controller of court proceedings ... 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 ... [S]tock stories [about rape] could not be perpetuated in the legal system without judicial complicity.

[86] *R v O* (Transcript of Proceedings, Melbourne County Court, Walsh J, February 1997) 112.

[87] Ibid 231.

[88] Ibid 232.

[89] (Unreported, Melbourne County Court, Gebhardt J, September 1996).

...
Q: I suggest to you ... that you used to go to places where you could buy magazines and clothes and videos related to sado-masochism ...?
A: No I didn't.
...
Q: I suggest to you that you, yourself, obtained sado-masochistic magazines and you produced them or were very interested in them?
A: I disagree. My house was actually searched for that kind of stuff and nothing — nothing was found.
...
Q: I suggest to you that you had a number of articles that related to sado-masochism but you — you kept them hidden?
A: I disagree, I would assume that they would find them if I did keep them hidden, if they searched.
...
Q: I suggest to you that you bought [articles] and took [them] to K's place. I suggest you bought this video and took it to K's place?
A: That is such a lie. That is such a lie. That is such a lie ... What video store did I get it? Where did I get it? Do I have a video card for this?
...
Q: I suggest to you that you bought him for his 21st birthday a set of handcuffs?
A: That's a lie.
...
Q: I suggest to you the reverse, that in fact the position is that your evidence about all this is a big lie?
A: No, you're wrong. You can suggest whatever you want; you're wrong and K's a big liar.
Q: Why then did you say these things in the letters to him that are plainly about sado-masochism?
A: Did I — did I mention any type of video; did I mention any type of book; that's such a lie.[90]

At times the technique of insinuation combines with the strategy of implication, as can be seen in another excerpt from *R v K*:

Q: What I suggest to you is that you commonly, both of you, commonly used to have a choker, a buckle or a belt or a choker around your neck for the purposes of heightening enjoyment during sex?
...
A: Wrong, I never did that. You're insinuating that — I don't know what the correct wording for it? What, what word was it that you used for those sex games?
Q: I said sado-masochism?
A: Correct, that's what you were insinuating.[91]

In the first example, we see the victim demand evidence to back up the story being told ('Do I have a video card for this?', 'did I mention any type of video?'). She also counterposes incontrovertible components from the prosecution narrative against the defence counsel's suggestion ('My house was actually

[90] (Transcript of Proceedings, Melbourne County Court, Gebhardt J, September 1996) 98–101.
[91] Ibid 119.

searched for that kind of stuff and nothing was found'). She also rejects the defence version of events in extremely strong terms, repeating the phrases 'that's a lie' and 'you're wrong' many times over. In the second excerpt, her two responses begin with the words 'wrong' and 'correct' respectively. This represents one of the main differences between her evidence and that given by other victims in the cases examined. The usual response from victims is 'yes' or 'no': defence counsel often ask questions which demand alternating 'yes' and 'no' answers. These function as simple rejections of a proposition, one opinion against another. They also allow the jury to hear, repeatedly and in alternation, 'yes, yes, no, no' and so on, with the effect that 'yes' and 'no' blur into that notorious commonplace: 'yes means no'. The victim in *R v K* takes a different tack, answering 'wrong' and 'correct' in place of 'yes' and 'no'. She thus draws attention to the hermeneutic processes underlying the defence construction of events, and simultaneously invests her own narrative with further weight. This victim's striking determination of response and resistance to both insinuation and implication will have contributed to the defendant being convicted by the jury.[92]

Implicative questioning is spread throughout the cross-examination. Each suggestive proposition accumulates until the defence has achieved a comprehensive narrative of the event complete with motivation for the complaint of rape. The jury hears this narrative in fragmented form, of course, since it is segmented in the form of propositional questions. As such, it is perhaps easy to overlook the effect of the complete defence narrative upon the jury (although it will be reiterated for them in the defence's closing argument). As the narrative with which this essay began demonstrates (from *R v N-T*), the accumulated narrative reads in a devastating fashion, laying waste to the victim's own story. The point can be made even more strongly by juxtaposing the accumulated narrative of the victim in *R v O*,[93] with the complete defence version:

> I didn't really want him to kiss me ... I told him to stop it ... He was trying to touch me on my breasts and on my vagina ... I was telling him to stop it ... He got angry ... He got up and he took his shirt off and he undid his pants and then he put on a porno video ... I was just saying go away because I was getting frightened by then ... He got really angry ... He said he was going to fuck me and I was going to make him come ... He pulled me up and he threw me into the bedroom. He slapped my face and then he pushed me onto the bed ... He got on top of me. He was — he was trying to take off my clothes — my pants and my knickers ... He ripped them off. He said that he was going to fuck me and if I didn't make him come he was going to do it anal ... He got on top of me and put his penis in my vagina ... [I was] scared and I wanted to go home ... He kept on repeating, 'You're going to make me come, bitch' ... he was trying to kiss me ... [I kept] moving my head so he couldn't ... [He was angry], crazy, he was really crazy.[94]

[92] The victim in this case had been described by the prosecution after the committal proceedings as 'an impressive witness. Cross-examination failed to move her from her evidence in chief' (OPP file on *R v K* (Unreported, Melbourne County Court, Gebhardt J, September 1996)).

[93] (Unreported, Melbourne County Court, Walsh J, February 1997).

[94] (Transcript of Proceedings, Melbourne County Court, Walsh J, February 1997) 33–8.

The defence narrative follows:

> While you were sitting on the couch, you and he were mutually kissing each other whilst cuddling ... He started touching you on your body over your clothes ... You did not tell him to stop ... You and he kissed and cuddled and you allowed him to touch you in various parts of your body without protest ... He ran his hands over your body and touched you on the breasts and on the vagina without protest from you ... Assisted by O in the course of this cuddling and touching, [you] removed your own shoes and socks ... Whilst on the couch you and he had sexual intercourse ... He inserted his fingers and then his penis in your vagina ... You had a brief moment, a minute or so, of sexual intercourse on that couch ... In the course of that you felt uncomfortable and wanted to go to the toilet ... You knew he was going to put a pornographic video on the television ... He asked you if you wanted to watch it, telling you what it was ... You weren't a bit concerned about your predicament ...[95]

The victim's narrative has been elicited by prosecution counsel through questioning that explicitly requires her to develop a coherent account of the sequence of events ('What did he do then? Then he ...' and so on). The defence demolition of the victim's narrative and its replacement with their counter-narrative occurs through the proposition of detailed elements of the narrative sequence, to which, as pointed out, the victim usually replies 'No' or 'I disagree' or 'That didn't happen'. The victim's response is, however, rendered immaterial in the most fundamental sense.[96] Her negative reply never halts the defence narrative; the questioner never concedes that any element of the counter-narrative has been displaced. Questions follow on as if the victim had agreed with the questioner, as if her 'no' was a 'yes'. The effect is that whatever 'no' she says she uttered during

[95] Ibid 109, 113–22.

[96] A recent High Court decision has underscored the erasure of the victim's response. At trial, the complainant had been asked under cross-examination whether her complaint was 'payback' against the defendant and her story was thus a lie (this was denied by the complainant). The defendant was then asked under cross-examination whether he could think of any reason why the complainant would lie (he said he could not). The prosecution's questioning of the defendant provided one of his grounds for appeal against conviction. His appeal was unsuccessful in the Victorian Court of Appeal, but succeeded in the High Court. The majority held that such questioning has the effect of reversing the onus of proof, and expressed doubt that 'the [judicial] directions [to the jury] were capable of neutralising the prejudicial effect of the ... questions of the cross-examination': *Palmer v The Queen* [1998] HCA 2 (Unreported, Brennan CJ, Gaudron, McHugh, Gummow and Kirby JJ, 20 January 1998) <http://www.austlii.edu.au/au/cases/cth/high_ct/1998/2.html> at 29 July 1998 (Copy on file with author) [13] ('*Palmer*'). The effect of this decision will be to permit defence counsel to continue to suggest to complainants that their complaints are fabricated, while preventing prosecution counsel from questioning defendants as to the (lack of) foundation for such a claim. Such questioning occurred in one case examined: *R v P* (Unreported, Melbourne County Court, Wodak J, April 1997). The prosecution asked: 'What motive — what reason can you give to this jury as to why this girl would make false allegations against you?' The defendant responded: 'That would be speculation on my behalf and I personally have no answer for that. It could be for a number of reasons. It could be for spite, it could be for financial gain — I would be speculating to answer that question': at 149. Such questioning now appears to be impermissible. For cases which antedate the High Court decision in *Palmer*, see, eg, *F* (1995) 83 A Crim R 502 (NSW); *R v G* [1994] 1 Qd R 540; *R v Rodriguez* (Unreported, Court of Appeal of Victoria, Hayne, Charles and Callaway JJA, 13 June 1997); *R v Costin* (Unreported, Court of Appeal of Victoria, Winneke P, Charles and Tadgell JJA, 7 August 1997). For an academic appraisal of *Palmer* that antedates the High Court decision, see Jeremy Gans, '"Why Should I Be Lying": The High Court in *Palmer v R* Confronts an Argument That May Benefit Sexual Assault Complainants' (1998) 19 *Sydney Law Review* 568.

the rape becomes for legal discourse as insignificant as her 'no' to defence questioning. A homology thus links the woman's evidence at trial ('No, I didn't want to') and the woman's non-consent during rape ('No, I don't want to'). More than this, her voice speaking these words of protest and rejection is silenced and her 'no' goes unheard.[97]

III THE WASTE LAND OF THE LAW, THE WORDLESS SONG OF THE RAPE VICTIM

In 'The Waste Land', as a woman sits amid her jewels and her perfumes, awaiting an assignation with a man, a picture is displayed above her mantelpiece:

> As though a window gave upon the sylvan scene
> The change of Philomel, by the barbarous king
> So rudely forc'd; yet there the nightingale
> Filled all the desert with inviolable voice
> And still she cried, and still the world pursues,
> 'Jug Jug' to dirty ears.[98]

Eliot here is scavenging the legend of Philomela, described in detail in Ovid's *Metamorphoses*.[99] Tereus was married to Procne, sister of Philomela, and travelled to Philomela's home to fetch her to visit her sister. When Philomela appeared, 'richly attired in gorgeous robes, but richer still in her own beauty', then 'a flame of desire was kindled in Tereus' heart when he saw her'.[100] Ovid tells us that 'her beauty, indeed, was excuse enough but he was further excited by his own passionate nature, for the people of his country are an emotional race'.[101] Philomela set off with Tereus to travel to her sister, and on the journey, Tereus raped Philomela: 'he told her of his guilty passion and, by sheer force, overcame the struggles of the lonely and defenceless girl, while she called vainly aloud to her father, to her sister, and above all, to the gods, for help'.[102]

After the rape, Philomela told Tereus: 'If I have the chance, I shall come forward before your people, and tell my story. I shall fill the forests with my voice, and win sympathy from the very rocks that witnessed my degradation'.[103] In anger and fear, Tereus seized his sword, with Philomela continuing to call upon her father. Tereus

> grasped her tongue with a pair of forceps and cut it out with his cruel sword. The remaining stump still quivered in her throat, while the tongue itself lay

[97] Perhaps this, as much as any substantive questioning requiring her to relive the physical and psychical experience of the attack, repeats the injury of the rape.

[98] Eliot, 'The Waste Land', above n 2, [98]–[103]. Later in the poem, the nightingale sings again: 'Twit twit twit/ Jug jug jug jug jug jug/ So rudely forc'd./ Tereu': [203]–[206]. Philomela's will to accuse is reduced to 'Tereu' and mellifluous non-sense.

[99] Ovid, *The Metamorphoses of Ovid* (Mary Innes trans, 1955) 146.

[100] Ibid 146–7.

[101] Ibid 148.

[102] Ibid 149.

[103] Ibid.

> pulsing and murmuring incoherently to the dark earth. It writhed convulsively ... and dying, tried to reach its mistress' feet.[104]

Tereus then returned to his wife, Philomela's sister. Unable to speak, Philomela wove a tapestry depicting the assault which she gave to her sister. Together they took revenge on Tereus by killing and cooking his son, whom they fed to Tereus. The gods then changed all three into birds: Tereus into a hawk, Procne into a swallow, and Philomela into a nightingale, which, as Eliot says, 'filled all the desert with inviolable voice'.[105]

In one rape trial, the victim was asked what she was feeling while the accused was committing indecent assault upon her.[106] She said: 'I was totally — I just felt I went into shock, I was just petrified, I didn't know what to do. There was a bird — I could hear a bird out the window and I focused on that. I just put my mind on that'.[107] The birdsong outside the room where sexual assault is taking place recalls the 'jug jug, twit twit' of Philomela the nightingale. Through the piercing moment of pain caused by reading this passage in the transcript, I saw that the rape victim attempts, through the prosecution, to become the word of the law. She attempts to transform the pathos of her victimisation into the logos of accusation: from the inarticulacy of 'I went into shock, I was just petrified, I didn't know what to do', the woman is attempting to speak her injury through and to the court of law. Legal discourse in rape trials, however, reduces the words of rape victims to inarticulate sound. At best, their 'language is purified as pain, conveying no semantic content but the feeling of some infinitely gentle, infinitely suffering thing'.[108] At worst, law repeats the actions of Tereus the 'barbarous king', cutting out the victim's tongue to prevent her accusation. In the waste land of the law, woman is insinuated to be the embodiment of the abject, and implicated in defence narratives of pleasure and revenge. In the waste land of the law, there is no-one to hear the nightingale as anything other than wordless song. 'And still she cried, ... "Jug Jug" to dirty ears.'[109] It is the accusation of Philomela that the sovereignty of law fears and will not hear. Closing its dirty ears, law is deaf to the accusations of rape, and silences woman, replacing her tongue with the pathos of wordless song, inarticulate sound, non-language, the pain of alterity.

[104] Ibid 149. Ovid writes further: 'Even after this atrocity, they say, though I can hardly bring myself to believe it, that the king in his guilty passion often took his pleasure with the body he had so mutilated'.

[105] Eliot, 'The Waste Land', above n 2, [101].

[106] *R v X* (Unreported, Melbourne County Court, Curtain J, March 1997).

[107] *R v X* (Transcript of Proceedings, Melbourne County Court, Curtain J, March 1997) 394.

[108] Ellman, above n 12, 187.

[109] Eliot, 'The Waste Land', above n 2, [102]–[103].