LEGAL DISCOURSE ON RAPE

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To the best of my knowledge and belief, this work is original, except as acknowledged in the text, and has not been submitted, either in part or in whole, for a degree at this or any other university.

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SYNOPSIS

This thesis is the product of fifteen months fieldwork attending sexual assault trials in the Supreme Court of an Australian state capital. I examine rape as an object of legal knowledge by foregrounding a particular way of perceiving the relationship between language, meaning and power. I approach this complexity synthetically, by analytically separating out different directions from which the meanings realisable within a rape trial derive their explanatory force. My objective is not to present "the full story", the 'true' account of rape, but to critique this positivistic notion by demonstrating the partiality and particularity of the knowledge constructed in court. This analysis demonstrates not how little of a woman's account in court is from an experiential self but how much of it reflects a legal 'self'.

My methodology is predicated on the presupposition that a relationship exists between methods of objectification and the subject proclaimed objective; between the legal institution and rape as an object of knowledge (Foucault 1979, 1980, 1981). I argue that the epistemological particularity and regulation of sexual offences (Foucault 1972), together with the cultural assumptions tacitly associated with this form of knowledge (Bourdieu 1987, 1991:105-170, 1992) make a legal understanding of sexual offences the logical conclusion; the 'facts' of rape only become obvious from a legal point of view.

This constitutive power of language stems not from legal language itself but from the ability of the legal institution to have its definitions recognised and sanctioned. Rape is by definition, a crime predicated on gender differentiation; it is

the contradiction of a man's definition of events by a woman. I am concerned with the ways in which competing interpretations of events justify their point of view by appealing to taken-for-granted understandings about law and about sexual and social relations. I argue that legal categories and practices systematically produce a gender-specific view about the nature of sexual offences which not only excludes the concerns of women from the politics of representation but also prejudices their interests within political processes. The cultural legitimation of this practice directly engages those most affected by legal power relations in reproducing the conditions upon which their position of powerlessness relies.

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This research would not have been possible without access to office facilities and the practical assistance of Colleen Solly and Sharon Lewis. At a going rate of $4.00 a page, trial transcripts are priced outside of all but essential markets and perhaps explains why little research has been done on actual trials in this area. Chris Hone

was subject librarian when I began my candidature and I appreciate the interest she has maintained throughout its completion.

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This thesis critically examines the legal construction of rape as an object of knowledge. I am concerned with the social practices and relations that intersect within one arena, the criminal trial, to generate discourse on rape.[1] By locating this discourse within its context of production and legitimation I examine the ways in which the institutional order is encoded in and through social interaction and, consequently, in the meanings constituted. The legal system selectively extracts or shapes those features of a rape experience that serve to refract and legitimate its self definition. This process results in the production and reproduction of a knowledge about rape that largely excludes the concerns of women, or those subjected to rape, from the formal processes of representation. It privileges instead a knowledge disadvantaging those whose experiences it is intended to explain. Rape trials do not evince contemporary rape experience as much as their historical, legal constitution.

Substantively, I consider the politics of rape interpretations, as a means of foregrounding the contextual and contested character of sexual allegations, to argue that a gender based asymmetry is symbolically and materially institutionalised in legal discourse.[2] The intention is not to positivistically fill the gaps of legal exclusion with the 'complete' and 'authentic' account of what rape is about but rather, to create spaces by indicating the distinctive partiality or perspectivism of this knowledge. This analysis questions the validity of such notions as 'the full story' by problematising the meaning of an essentialising subjectivity. But equally, it problematises the relativistic reduction of all meaning to perspective by arguing that tacit assumptions are able to obscure asymmetry ingrained within expressions of justification.

My proposition is that rape is an area of knowledge where the practices and relations instituted within the legal system decide and, in doing so, define what is 'true' and, therefore, 'real' about allegations of rape. These definitions are accepted as legitimate, objective knowledge, in situations where the singular authority for these claims resides within their locus of production. This is a process which circumscribes by inclusion, the subjectivities of rape and sexual relations as part of social relations in general.[3]

These legal classifications produce a mode of subjection that generates a dual process of constitution; a person is subject to legal regulation, and the same person can subject herself to regulation by the knowledge produced and propagated by legal relations (Foucault 1982:417). This constitutive potential is the insidious nature of institutionalised knowledges, as this duality directly engages those subordinated in their own process of subordination. It is legal discourse that decides the relevant issues about rape and legal practitioners ask the questions to extract the knowledge to substantiate these categories which, in turn, legitimates their claims of objectivity and validity. When these categories and definitions are stabilised in text, they transcend their relations and practices of production to become a fixed, objective referent. It is this process that allows the essentialist claims of legal knowledge to remain stable in form while constantly responding to the challenges of historical and political specificity. Within each trial, the structural dimensions of an institutionalised legal authority are able to synthesise with the practices of individual life histories in legitimating and reproducing particular definitions of objective knowledge about sexual assault. In effect, this results in a legitimated self-referentiality that allows the legal institution[4] to accomplish a constitutive hegemony unrivalled by other forms of power.

The hegemony of legal knowledge stems from its representational and procedural legitimacy. Legal authority is accepted as a legitimate exercise of power because of a belief in the system's ability to ensure uniformity and equality within its decisions. Its arbitration is perceived to be impartial, apolitical and detached from personal prejudice or bias. Yet, in practice, legal authority is always fluid and legal integrity, a vacuitous signification, as both respond to the accomodation of immediate demands of social and political necessity. This instability is manifested particularly within trial relations where opinion or point of view is able to acquire the legitimacy of legal truth. It is this contradictory cohabitation of a stable, objective representation and multiplex individuated realisations that allows the flaws of legal integrity to be rationalised by way of a particular problematic, for example, the maveric judge, or the outdated policy. This process of rationalisation permits the arbitrary exercise of power by legal practices, to be both endorsed and obscured by what is perceived to be the integrity of the legal system.

Each trial brings the actions and intentions of individuals into conflict with collective political issues and is a contestation of the boundaries legally and, thus, socially constraining definitions of sexuality. I am concerned with what Thomas (1991) describes as the "politics of value", the ways in which competing interpretations of events draw upon cultural assumptions to invest their perspective with such notions as truth, credibility, rationality, objectivity, to legitimate and authorise their point of view. In particular, I examine how these processes have the potential to acquire structuring, material dimensions within social relations (Bourdieu 1991:75).

This thesis deals with two fundamental perspectival examples, that of law and of gender. It examines the ways in which gender is residually entangled within the discourse of law and how the authority of legal discourse is itself redundant within the categories of social perception and interpretation, making the 'social' and the

'legal' inseparably engaged and mutually constitutive.[5] While neither position can be extrapolated from their inter-relationship, each perspective has the potential to justify their point of view by appealing to taken-for-granted understandings, about law and about sexual and social relations.

My intention is to examine the ways in which knowledges and forms of knowledge integrate cultural evaluations of worth into the meanings they construct and how these values representationally obscure the asymmetry effected by this process. My method is to analytically foreground the different dimensions of interpretive possibilities that converge within a trial to constitute knowledge about sexual offences. I consider meaning to be a multivocal, unstable phenomenon yet discourse, as a mode of construction, imposes a chronology upon lived events by virtue of the impetus generated by a narrative structure. It imposes a linear development upon hermeneutic relationships which occur or at least have the potential to occur simultaneously within the proceedings of a trial. There is no singular relationship between the reality of these trials and their representation. But a 'true' account is *authorised* by the relations and practices made possible by legal discourse. This legal version is recognised and able to effect the life circumstances of the individuals involved; some men go to jail, others walk away from the charge. My objective is to examine the nature of this legitimate, legal account of rape by examining ways in which meaning is attributed to its discursive representation. My strategy is to approach legal discourse synthetically, by separating out analytical aspects critically generated by trial relations. This allows me to consider these relations from multiple angles, to compile disengaged explanations for meanings that in practice converge.

In summary, this analysis is predicated on the assumption that the State, through its auxiliary, the legal institution, plays a critical role in the constitution, authorisation and reproduction of the dominance of men as a social group by

privileging within knowledge about rape, a male perspective as a universal form of knowledge (Mackinnon 1983; 1989:157-170). Following Foucault (1979a, 1980, 1981:140-4, 1982), I argue that the State, through its legal institution, exercises a form of governmentality that encompasses the body politic and politicises the individual body. Juridical relations rule and regulate the population and these relations simultaneously generate self regulation through propagating particular subjectivities. These are legitimate, legal practices made possible by the potential institutionalised power relations have to automatically and objectively encode their practices with cultural and social values (Bourdieu 1987, 1990a:59-75, 1991:105-62). These objective power relations unproblematically produce an experiential knowledge about rape that is agreeable with a state/male definition of the crime.

I begin by considering the broad epistemological parameters that constitutes rape as an object of legal knowledge. These generic parameters of discourse establish legal knowledge as definitive of the classifications of sexual offences, while simultaneously relegating knowledge about what legitimately counts as sexual assault to a particular area, that of the judiciary. In chapter one I examine how institutional relations automatically impose a set of objective power relations on all those they engage with which includes the right to translate individual experience into institutional terms, into a legal juridical problem (Bourdieu 1991:90). For those alleging sexual assault, this entails the laundering of experience of all that can not be dealt with in legal terms, and all that can be excluded strategically by adversarial ploys. This authority is recognised as a legal right, even obligation. Thus the institutional appropriation of the experiences of those sexually assaulted, is misrecognised.

Recognition and misrecognition, are dual sides of a singular concept introduced by Bourdieu to reference a way in which power is exercised when direct coercion or domination is culturally unacceptable (1991:164). It describes a mode of power that

relies upon compliance, the acceptance of particular power relations, such as those legally authorised, from within their discursive frame. Analytically, it details the way in which conceptual practices are deployed in the legitimation of power relations. In particular, it foregrounds the redundancy of the structural features of power relations within categories of knowledge, as the means by which those subordinated are directly engaged in their own process of subordination.

As an object of legal knowledge rape is invested with the social and symbolic values representationally associated with law as a system of authority. This allows what are, in essence, social categories and classifications to be accepted as objective definitions. In the second chapter, I examine the ways in which cultural and normative assumptions are unproblematically invested in legal categories and principles. This process includes within interaction, knowledge and processes tacitly realised and rarely problematised as they grow out of taken-for-granted habits and ways of evaluating situations. In relation to trial proceedings, this knowledge is generated and legitimated by legal "experience", by the ways in which sexual offences have been perceived and prosecuted in the past. These past understandings have the potential to naturally incorporate into social relations ways of tacitly conveying within a sense of status or gender, a measure of their worth. This makes the notion of relativistic perspectives inherently problematic as asymmetry becomes encoded within the tacit representations of linguistic constructions.

Sexual offences are largely unwitnessed events, with little, if any, legal material proof of a crime. An incident of rape acquires its criminality from notions about abnormal or deviant sexuality. Within a trial, the crime derives its meaning inferentially, from the relation explaining the circumstances within which sexual intercourse occurs. Knowledge, in this sense, relies upon a common position for interpretation as its success depends upon congruence; it requires the listener to make the same associations and connections as the author. The hegemony of a

particular understanding of rape is only possible to the extent that it reflects, to some degree, actual life situations and beliefs (Bourdieu 1987:839,848; 1991:127). Trial relations produce a particular kind of knowledge about rape which effectively excludes any knowledge that contests legal definitions. In the third chapter I use the criminal classification to examine the systematic way this regulation combines with legal prohibition to make knowledge about rape dependent upon particular subject positions.[6]

In the fourth chapter I consider these subjectivities more closely by foregrounding the constitutive potential of legal power relations. Criminal law is predicated upon a separation between subjective knowledge and objective knowledge and these forms of knowledge are attributed different values when deciding legal issues of 'fact'. This section focuses on trial relations to examine the nature of the relationship between lay and legal knowledge generated by a jury trial. These jury trials actively engage legal agents in constructing the limits of what is to be common-sensically construed about these incidents, through proffering to jurors the evaluative frames of empathic understanding required to discern the integrity of the 'facts'. What is privileged within this environment, as no more than the individualistic speculation of defence strategy, gains a factuality that objectifies inferences into a reality sanctioned by law. That is, things said about the parameters of sexual assault, in the name of evidentiary procedures, gain an existence as common-sense knowledge, because they are said with legal authority, within this environment, where the truth about such issues is decided. This is an exercise of power that is distinctive to sexual offences, with their reliance upon inferential knowledge to establish the reality of experience. It has the capacity to bring into existence, into common-sense knowledge, that which has yet to attain an objective, collective existence (Bourdieu 1991:236). It allows legal authority to empower common-sense decisions about a multitude of practices and behaviours within

everyday life, as it generates the knowledge legal discourse relies upon to sustain its essentialising claims.

I conclude by considering how the knowledge about rape generated by trial relations reflects its processes of production; how the 'facts' of rape only become self evident from a legal point of view. Legal regulation discursively constitutes an internal integrity within legal knowledge. Each trial derives its meaning from its realisation as a text; it is brought into contact with other texts, about other trials or legal principles, to become part of a legal system (Culler 1988:148). Its integrity is evaluated by precedents, by how this present-day performance is represented as sustaining the values of the past 'objectified' in print. This self reliance and referentiality encapsulates legal truth claims within a hermeneutic circle that has the potential to accomodate and propagate infinite generalities about sexual offences from what is substantiated as a singular crime.

I preface this substantive analysis with a brief outline of the theoretical premises these potential avenues of meaning presuppose, to clearly articulate my understanding of the relationship between language, meaning and power.[7] Methodologically, my discourse draws its authority largely from the work of Foucault and Bourdieu. In very distinctive aproaches, they both emphasise the ability of language to become enmeshed within power relations, not only because of its taken-for-granted nature but because of its ability to effect material or actual consequences from what are non-material representations. While I acknowledge that all discursive positions, both orthodox and radical, potentially, referentially, contain the logic commented upon, I am distinguishing legitimated orthodoxy as exercising a particularly insidious form of power, because of its reliance upon complicity as an essential condition of its existence.

I take language, as discourse, to be a primary medium through which meanings are constructed, communicated and reproduced, but approach the constitutive qualities of language from the ways in which power relations are able to 'naturally' encode verbal forms. I emphasise, however, that although I regard discourse as analytically providing access to meanings and their processes of dissemination, this thesis deals with discursive issues that have real, actualised consequences. I privilege the critical role language plays in the production and reproduction of power relations because of its taken-for-granted nature, particularly in relation to the categories of knowledge relied upon for perception and interpretation. But I fully recognise, and hopefully convey, the material, actual consequences of discursive constructions, especially when institutionalised.

Although my analysis examines the ways in which law, as an institutionalised knowledge constructs its object, it raises questions about the ways in which any discourse that deals with knowledge about an experiential reality in terms of truth or facticity, including anthropology's ethnographic method, constitutes its exegesis by foregrounding particular issues while selectively problematising its own methods of arriving at these notions of truth. In particular, following Bourdieu (1977:3-34, 1990:25-51, 1991:229-251) and Smith (1987:15-44, 1989, 1990:24, 1990a:85-92) I examine the generalising categories the legal institution uses unproblematically to generate and legitimate within its discourse a gendered viewpoint of these crimes. I argue that the investment of power relations within legally dictated categories of knowledge delimit representations of sexual offences and thus the qualities of those individuals experientially engaged, to definitions substantiating a male interpretation of sexual assault.

Legal discourse takes into consideration only those interpretations which accord with its perspective. Its favoured strategy is to use its self definitions to propagate a slippage, between the suggestion that the crime of rape may be characterised by

essentialising criteria and the specification that to be a crime, the experience must contain these criteria. This allows institutional proceedings to be predicated on the belief that the experience of rape is containable within legal specifications of objective knowledge about this crime while simultaneously regarding this objective knowledge as the experiential expressions of those involved. It also results in the reproduction of a particular categorical form to accomodate differentiated experiences. The movement is one of absorption and, thus, homogenisation, as the distinctiveness of the individual experience is neglected, negated by the privileging of a general classification within a closed context of truth. The knowledge about rape becomes more distanced from contemporary specificity and closer, more compatible, with a legally constituted object of knowledge. In this way, legal relations and practices constitute a concordance between the legal and the social which naturalises as it obscures the bias and prejudice of this knowledge about rape.

In effect, this results in the interpretation of behaviour by inclusive criteria which are correspondingly regarded as the natural expression of the women involved. Hermeneutically, this form of regulation prohibits those aspects of subjectivity that contest legal representation. It creates a field of discourse with an internal frame of reference which allows legal discourse in practice to privilege a uniform mode of perception and interpretation. This process privileges immediacy by naturalising as unproblematic, the categories of knowledge from which this sense-making is made. Yet it also takes the parameters of meaning out of immediacy, into an individuated interpretation that has already been generalised in some ways, by past legal decisions on issues of relevance about sexual offences. It backgrounds questions about whose categories and classifications are being utilised and how these definitions are organised, as it foregrounds a Schutzian emphasis on the subjectivity of the knower. This process challenges the analytical notion of shared, consensual representations constituted out of circumstances-in-common, and raises the

question of who's commonalities are being anonymously, arbitrarily deployed as essentialising characteristics.

I also privilege language because it is an integral component of the legal system. Law is distinctive in being primarily a language-based institution and its implementation is largely dependent upon social interaction. Substantively, a criminal trial is constructed out of legal processes and relations which are accredited with transforming the orality of individuals into what is accepted as the objectivity of text. Language is the primary constitutive element of these proceedings; it is the medium of expression for inter- and intra-court relations and it is the medium through which meanings are produced, circulated and reproduced, about sexual and social relations and about the legal institution.

The legal system proceeds as if language is an autonomous object, and ignores its potential to embody and signify objective relations. This allows the legitimated power of law to be exercised primarily through language, with its potential to effect real consequences upon people. Most significantly, these effects of power are experienced by women, who statistically and symbolically are representative of those alleging sexual offences.[8] While recognising clearly the inclusion within this category of both children and youths or men I argue in chapter two that, by incorporation, all who allege sexual assault are feminised and throughout this thesis, I refer to all alleging and experiencing sexual assault as women. These trials are predicated upon gender differentiation, and these positions of victim and defendant are explicitly gendered by legal discourse and methods. Yet, equally, legal practices naturally privilege an asexual, universal mode of interpretation. Within arbitration gender discourses are either systematically suppressed or obscured within legal specifications (Foucault 1979, 1982). I examine the ways in which language and gender relations collude to prefigure rape interpretations in ways that legitimate their deployment as modes of subjection. I argue that the punitive, repressive

consequences of legal power are clearly recognised. What is not recognised is th productive nature of legal power relations, with their ability to influence the possibilities and constraints of social processes in particular ways.

Discourses are always addressed to some particular point of view that authorises a distinctive way of 'seeing' the nature of events, and meanings are equally positioned. While Foucault directs attention to the sites from which statements of power/knowledge are made, he neglects to ask who occupies these positions and provides, as Fraser says, no means of evaluating power (1989:17-66). Power has the potential to be both ubiquitous and differentiated and its effects within social relations are marked by specificity. A rape allegation is, in essence, the contradiction of a man's definition of events by a woman. These are conflicting, gendered interpretations of an experience and yet, Foucault provides no means of accessing the values that specify and legitimate the asymmetry encoded within what is analytically reducible to the relativistic truths of perspectivism. Either tacitly or explicitly, interpretations are always justified, irrespective of their fragmented identity and, as Fraser (1989:161-83) indicates, there is always inequality involved in interpretive justification. It is this justification, as it encodes power relations with notions of values and historically-specific cultural assumptions that enables the power exercised by legal relations to remain unchallenged as a legitimated authority.

The constitutive power of legal relations stems not from legal language itself but from the ability of the legal institution to have its statements recognised and sanctioned (Bourdieu 1991:75). Part of the oppressive inequity women experience when proceeding with a rape allegation flows from the ways in which a woman's interpretatation of events is legally and socially evaluated. Knowledge about legitimacy, morality, rationality or even objectivity in relation to a particular, identifiable source, is knowledge that shapes discursive parameters in specific ways (Bourdieu 1991:107). These social markers are differentiations about gender and

status tacitly affiliated with notions about power, that have the potential to render relations asymmetrical as all are already prestructured by assumptions about values and differences. They are social/symbolic significations that acquire the reality of material actualisations, importing an objective dimension to relations that originate within subjective, normative spheres. Rape itself, is a clear example of this, as are the ways in which evidentiary methods set up women's credibility about sexual relations as the critical issue in arbitration.

These cultural and social assumptions and values are most pronounced when encoded within the sense-making conventions of institutional knowledges and within a trial, all statements are made by positions, not by personalities. These positions of judge, victim/complainant/women, defendant/accused/men, witness, barrister, juror, are all tacitly weighted with notions about truth and integrity and gender that accrues credibility to their statements even before they are made. This enables what are analytically structural features of subordination to be both realised within and contingent upon the interpersonal relation, as part of experiential knowledge. Constitutively, these processes actively engage those subordinated in their own processes of subordination; they dialectically link those objectified with those methodologically engaged in the task of objectification.

Analytically, this accomplishment is the consequence of a conceptualisation of strategy as discourse which is inclusive of, yet irreducible to the calculated strategising of counsel that underpins the administration of criminal law.[9] Discursive strategies emerge out of the dialectical engagement of the occasion with each individual life circumstance; out of the ways in which the range of possibilities realisable within a situation coincide with the way things are thought about by those involved. It is the source of the arbitrary individualism that pervades the prosecution of these offences and a primary medium through which legal definitions effect their hegemony.

This combination of discursive and pragmatic strategies explains how certain kinds of behaviour can contribute to the realisation of particular consequences without being rationally, or even consciously, directed towards them. It explains, for example, how those prosecuting rape trials can reproduce the gendered discourse that makes rape conceivable and why the gender of the judiciary is inconsequential to power exercised by trial relations. Or it explains why evidentiary reform, such as the prohibition of a woman's sexual history, is ineffectual within trial proceedings. It also explains how women contribute to their own oppression through belief in the legitimacy of the power exercised by the legal institution. This is not to argue that calculated action within this adversarial arena is inconsequential; but, more specifically, to argue that the exercise of power by legal practices is irreducible to intentionality.

Finally, I privilege language because of the nature of these crimes. There is an overarching problematic constituted pragmatically in the prosecution of sexual offences, concerning the relationship between meaning, context and truth. Procedurally, these trials are premised upon, and put forward, a notion of rape as an interpretation-free 'fact'. This is predicated upon the assumption that there is a set of objective 'facts' underpinning the reality of these crimes which is accessible, ahistorically verifiable and, therefore, procedurally recoverable. This approach to interpretation constructs rape as a discrete unit that is both immediately knowable and representable. As a discrete unit it is constrained to and, thus, privileges what is understood to be its material expression, the act of sexual intercourse. This dislocates it from its social circumstances and deflects questions away from its conditions of existence on to its mode of realisation. Yet rape, as a criminal category, is recognised as being procedurally compounded by the incorporation of a double subjectivity into the elements of the crime. The act of rape acquires its criminal identity from the circumstances in which it occurs; the woman is required

to identify the sexual intercourse as unwarranted and convey this non-consent to the man in a manner he will find unambiguous. It becomes the contextualisation of events that distinguishes the penetration of rape from consenting sexual intercourse and the factuality of these events varies according to how they are thought about.

This emphasis introduces an instability to meaning as the 'truth' of an incident becomes contingent upon the relations in which and from which it emerges. It problematises what is taken as knowledge, by focusing on the social relations involved in its production, and the ways in which these relations are embedded in its exegesis. The analytical focus shifts from what knowledge is, its truth content, to how such claims of truth are made possible. In particular, it questions the cultural constructions of phenomenology by moving beyond immediacy into considering whose classifications and categories are at work in formulating cultural sense. The critical issue becomes not so much the subjectivity of the experience but the ways in which this subjectivity is organised, to structure its sense-making capacities in particular ways (Smith 1990a:99-100; cf. Schutz 1967).

Throughout this thesis I argue that the gendered viewpoint of legal discourse is enshrined within legal categories, principles and practices, within legal knowledge itself and, therefore, within its relations. What women contest within each trial is the legal right to name their experiences and events, even their 'natural natures'. Legal definitions are accepted as truth in situations when the singular authority for this claim of truth resides within its locus of production (Bourdieu 1991:172). These theoretical categories are superimposed upon a woman's experience, to extract the criteria required to substantiate and validate this institutional definition of truth. They are descriptive classifications that acquire a prescriptive reality when institutionalised and are thus capable of contributing to their own verification by substantialising that which they intend. In this way, the power exercised by the legal institution is able to transcend the constraints of the interpersonal relation to ally

with the institution, and therefore the position, the legitimated authority to 'name', and thus, to constitute the categories individuals think with and about. This legal knowledge is accepted as impartial and apolitical, an objective knowledge about the nature and character of sexual offences. The objective of my substantive analysis is to indicate its partiality and its prejudice by examining the ways in which its truth claims are effected.

NOTES

1 This thesis is the product of fifteen months fieldwork within the Supreme Court of a state capital, most of which was spent attending sexual assault trials.

2 I use the terms rape, sexual assault and sexual offence, interchangeably. Although quantitively, rape trials predominated, my exposure was to all categories of sexual offence. I agree with Kelly's (1998) proposition that all sexual offences are part of a continuum, and my comments about the power relations exercised by the legal system in the prosecution of rape trials, are equally valid to all categories of sexual offences.

3 I take relations between men and women and what is encompassed within the analytical category 'social' relations, to stem from the same cultural assumptions and values; the former is the latter in a local context, rather than merely a constituent of that collective cultural enterprise, 'society' (Bourdieu 1990:135).

4 It is difficult to write without contributing to the reification of an institution such as law by personifying it into an entity capable of effecting an agency that seems to stem from the institution itself rather than from its constitutive practices, thus contributing to the means by which its form of power is exercised. For the sake of grammatical expediency, in this and subsequent chapters, I occasionally use without relational qualification, phrases such as 'the legal institution', 'the legal system' or 'the institution of law' but my usage is intended to include the practices and relations institutionally contained.

5 See Gluckman 1955, 1965, 1972; Nader 1965; Moore 1978; Gulliver 1978; Roberts 1979 for an overview of the development of the relationship between law and anthropology as a sub-genre within anthropology; and Humphries 1985; and Starr and Collier 1989 for the problematisation of 'law' and 'social' as separate fields for analysis. I emphasise that my focus lies on how an instituted knowledge, such as law, constructs its object. In effect, this thesis critiques the constitution of legal anthropology as a sub-genre within anthropology by examining not law as an object of study, but the effects produced on knowledge about rape as an object observed, by a legal way of 'seeing' (Bourdieu 1990a:60).

6 My understanding of this concept 'regulation' is taken from Bourdieu (1990:37-40, 102-111; 1990a 59-75) who counters deterministic notions of stereotypic behaviour re-enacted with the transformation of "that which is done regularly into a rule, that which must be done" (1987:846-7). These are habits and actions that occur in a regular fashion and are regulated without being the product of obedience to rules (1990a:65). His emphasis stems from his notion of *habitus* and the ability of power to work particularly through the body. This process invests routine habits and practices with normative notions which influence assumptions in ways that can be predicatable yet also fluid. While inextricably linked with the interests it serves, such regulation is a consequence of both discursive and intentional strategies and is unaccountable for wholly in terms of either agency or predictablity (cf. Goffman 1961; Blau 1964; Barth 1966).

7 Analytical approaches to the use of language within legal situations include an emphasis on literary deconstruction (Goodrich 1981, 1984); rules and roles (Carlen 1976; O'Barr 1982; O'Barr, Kramarae & Schulz 1984; Conley & O'Barr 1990); phenomenological constructivism (Danet 1980d); discourse (Humphries 1985). With the exception of Humphries who takes as her starting point, the irreducibility of 'law' and 'social' to separate fields or abstract universals, these approaches disconnect language from its social relations and processes of production to focus instead upon discrete units of behaviour. Although Goodrich takes legal language as "social practice", he assumes this practice and its "organisational background", is embodied in its text. Like legal practitioners, he finds nothing problematic about equating one medium with the realisation and realities of the other. Danet and O'Barr search for the constitutive properties of language which are taken to be independent of those relationally engaged. They look for signs of power within linguistic forms - the questions structure or intonation - as if power relations are reducible to grammaticality. Both O'Barr and Danet endorse a constructivist approach (Berger & Luckmann 1966) to language as a critique of legal positivism. But any examination of the ambiguity of meaning (Danet 1980) is within the analytical frame of negotiation which privileges the calculated manoeuvres of immediacy. They both take knowledge, its categories and classifications, as givens, "tools" to be meaningfully manipulated and consciously acquired. The inequity of legal relations is perceived as professional hegemony. Power itself is an embodied property and professional authority stems from notions of roles enacted and rules enforced.

8 Out of 29 sexual assault trials, two dealt with homosexual rape. One was downgraded into indecent assault, the other was dismissed because the 'victim' was pronounced an "unsound" witness. I examine both of these issues in chapter three.

9 To be contrasted with the strategising of transactionalists in the early 70's, with its extrapolation of what were analytically identified as systemic qualities from the calculated action of individuals and groups. Bourdieu's concept of position collapses the distinction between analytical notions of social structure and the interactional behaviour of social relations as it engages what was relegated to explanations about structural relations within the interpersonal relation. The individual is the 'social' at a local level.

THE COMMON DENOMINATOR

Rape acquires its existence as an object of knowledge from its categorisation as a crime. State legislation assigns the legal institution, responsibility for deciding the truth about the nature and character of sexual offences. This enactment appoints the legal system arbitrator of rape definitions, and legitimates legal knowledge as the primary interpretive medium for rape experiences. All knowledge about rape must flow from legal specification if it is to be considered 'genuine' and this knowledge has the authority to over-ride other forms of knowledge, as all interpretations of sexual offences must ultimately rely upon legal practices for verification and validation.

It is common practice for analysis of rape to take its legal exposition as largely given and unproblematic (Adler 1987; La Free 1989; Bourque 1989; Lees 1989).[1] This approach obscures the fact that rape interpretations are politically constructed and highly contested in their inclusiveness of particularity. It is a focus that evades questions about who it is that has the right to establish authoritative definitions of rape; and that this is itself a political issue. By extension, this obfuscation takes the authorised discourse for interpretating rape for granted, as apolitical, impartial and appropriate. It disregards the question of whether the interpretations of this form of discourse are inclined in favour of particular groups and thus works to the disadvantage of those they intend to explain. That is, the social and institutional processes of rape interpretation are never problematised.

In essence, a rape allegation represents an attempt by a woman to impose her meaning on a situation, in contradiction to a man's interpretation, and the

fundamental issue contested is the right to identify the nature and character of the experience. The epistemological parameters of discourse[2] unproblematically relegate knowledge about rape to the judiciary and establish legal knowledge as definitive of its classification (Foucault 1972). Procedurally, the prosecution of a sexual offence relies upon an *a priori* category to describe the practices which accomplish rape as a social and criminal phenomenon. These are the elements legislatively stipulated as the indicators of rape and they provide the parameters to which all legitimate, that is, legal knowledge about rape must comply. This classification is definitionally assumed to be capable of referencing all instances of rape. It is assumed also, to provide an objective and uniform interpretive framework for adjucation of the crime. The legal elements represent that which essentialises the experience of rape and they are simultaneously accorded a stable signification that is independent of actualisation. As the legitimated discourse, this legal knowledge representionally claims to speak for those oppressed by rape, while it constitutes the organizational focus for all interpretive knowledge about rape.

THE ELEMENTS OF RAPE

Rape is the label legally associated with a specific set of meanings. The crime is detailed in the 1976 Amendment of section 48 of the Criminal Law Consolidation Act:

> 48(1) A person who has sexual intercourse with another person without the consent of that other person -
> (a) knowing that other person does not consent to sexual intercourse with him; or
> (b) recklessly indifferent as to whether that other person consents to sexual intercourse with him,
> shall be guilty of rape and liable to be imprisoned for life.[3]

These three elements constitute the offence as the sum total of its parts. Each ingredient must be proven in its own right, as it is the combination that transforms

an act of sexual intercourse into a crime. The elements are assumed to be able to accomodate subjectivity uniformly, as if all rape experiences attested their unambiguous integrity. But substantively, these elements are dependent upon circumstance for their realisation. This makes them inherently unstable in relation to interpretation and legally regarded as problematic in their definitional character.

The first element introduces the singular physical act that is required as proof of the crime, and the only component potentially, empirically verifiable. Sexual intercourse is broadly defined by law to include vaginal, oral and anal penetration. The slightest proof of penetration is sufficient to prove an act of rape, and within a trial, this "moment of penetration" is designated "the moment of truth":

D ... the moment of truth is the moment of penetration. There was consent when the penis went into the vagina ... that is the moment when the law says [a woman must dissent] ... But some women may protest - may struggle ... with perseverance men may find they have won her over ... There's no suggestion that he had any struggle inserting the penis into her vagina [Cu 90].[4]

This present-day legal re-embodiment by a defence counsel of an age-old, gender-biased discourse on the nature of female sexuality, succinctly encapsulates the ambiguity realisable within what appears to obtain its meaning empirically. The elements are depicted as verifiable in their actions, as they rely upon a physical resistance to unwarranted sexual intercourse to obscure the polyvocality that makes the meaning of consenting sexual intercourse inherently unstable.

Rape is legally formulated as an object of knowledge that draws both its rationalisation and substantiation from an opposition to 'normal' heterosexual intercourse. These polarised conceptualisations appear to exist as independent discourses, with rape designated as deviant by comparison to what is constructed as 'normal' sexual intercourse. This emphasis privileges a notion of rape as essentially different from 'normal' sexual intercourse, deriving its categorisation as a crime by its distance from what is accepted as conventional sexual relations. But

conceptually, these polarised definitions are mutually constitutive; each gains its existence by way of comparison with, and opposition to, the other. It is this process of differentiation that constitutes the sexual aberrations associated with rape. It is by privileging deviancy as the definitive characteristic of rape that the parameters for 'normal' sexual relations are implicitly established. This semantic redundancy is explicitly acknowledge in court, by defence counsel particularly:

D This is one of those examples ... that is consistent with the allegation of rape and consistent equally with consent, with the suggestion of consensual sexual intercourse ... There is no difference between describing the acts of sexual intercourse and the acts of rape [Wi 12; 29].

These statements problematise the circumstances in which sexual intercourse become rape, by implicitly arguing for the empirical cohabitation of both within the singular set of circumstances. Representationally, they establish the act itself as the critical focus for proof of the crime, as if rape is reducible to its physical manifestation, while conceptually arguing for the substantiation of these acts by perception and interpretation. This dual representation is a consequence of their dichotomous inter-relationship.

Binary oppositions obscure their constitutive co-existence by naturally privileging one classification to the advantage or exclusion of the other. But, as Derrida (1976) argues, all dichotomies invariably incorporate the logic they renounce, thus making that which is advanced as 'normal' or dominant dependent for its realisation upon that which is displaced. Dichotomous thought relies upon a totalising logic for its conditions of existence which entails the ability to specify the nature of linguistic signification, to detail what seems appropriate in relation to what. This is how a hegemonic representation is propagated. But simultaneously, its practices play with the limits of these relations, with the relations realisable within confirmed oppositions. This occurs when the real, or even that which is put forward as the ideal confronts its actualisation within experience, to be momentarily fractured as the logic of the former is deployed to encapsulate and subordinate the

differentiated challenges of the the latter over issues of integrity. This amounts methodologically, to what is identified as postmodern fragmentation, the struggles over differentiated interpretations, yet within what is essentially, a limited frame of thought as all positions are ultimately encapsulated within a particular mode of rationalisation. To analytically privilege either focus, as extricable from that by which it gains its identity, is to confirm and propagate that which is contested while obscuring its reproduction. Like positivism and perspectivism, rape and consenting sexual intercourse are mutually co-existent in practice, as each gains its conditions of existence from the other's conditions of possibility. There is no concept of rape without the clear extremity of consenting sexual relations to counter its representation. This is why there is no legal space for middle positions in relation to sexual offences, no recognition of the continuum from consent to coercion that Kelly (1988) found when working with women who had been raped. Each time a woman alleges rape, the legal system subjects her claim to a procedure of comparative evaluation premised on a differentiation between deviant and 'normal' sexual relations.

As a descriptive category deviancy relies upon the regulation of its substantiation which allows it to remain ever responsive to political exigencies.[5] The act of sexual intercourse acquires its deviant signification from its circumstance; it is from how it is represented that the particular social relation acquires its meaning. This approach places the analytical emphasis on the regulators, those with the authority and position to detail what needs to be considered and why, to decide the nature and character of events. It is this joint conceptual occupancy of a singular signification that actively engages legal practices in the constitution of knowledge about sexual relations.

Rape is a crime that relies upon inter-subjectivity for its substantiation. The legal definition of rape is sexual intercourse without consent; the man was aware of and

ignored the woman's right of choice. In general terms, the act of intercourse needs to be evaluated unambigously and objectively as rape, to both observer and experiencer. More precisely, it needs to be seen as rape to her and recognised by him that it is rape to her. Yet this gender differentiation is predicated upon the conceptualisation of her mode of interpretation as an object-in-common. This definition posits an equality between male and female perceptions which obscures the fact that the crime gains its existence from a contestation over gendered expressions. Conceptually, non-consent relies upon a gender-neutral interpretation to converge both a subjective state and the materialisation of this state. Within trials, legal direction on consent usually takes the following form:

P Consent simply means a free and voluntary engagement in the act of intercourse ... Therefore submission out of violence is not consent ... [Ha 9-10].

J ...physical resistance is not an ingredient which must be proven ... submission is not consent ... consent is something freely given [Wi 21;32].

D Sex must be freely and voluntarily given. Otherwise that's rape [MJ 2].

These asexual statements privilege a uniform notion of consent as they talk of sexual relations encompassing sex "freely and voluntarily given". This egalitarian signification is qualified by the second element of the crime, to establish male perception of female subjectivity as critical. This element is premised on an act of interpretation on his part. It is his knowledge of her subjective state, his interpretation of what she conveys that is significant and it is from his position, a man intending to have sexual intercourse, that the crime requires and acquires knowledge. His double subjectivity which forms the core of this crime is posited context-free in its signification, embodying its meaning within its objectification as a conceptual classification. It proffers itself as gender-free knowledge, accessible to all from the interpretation of accounts.

Subjectivity, as de Lauretis (1986:4-5) points out, is not a fixed position from which one interacts with the world; it is an effect of interaction, a consequence of

social practices and it is always gender specific. Yet both positions occupied by the 'victim' and accused are glossed as one, as if the gender of the participant-observer is irrelevant, as are the circumstances constituting his position of interpretation. This decontextualisation of his position is confirmed by the emphasis, proof of the crime places on an unbiased gender validation; says a judge:

> J The critical time is when the intercourse takes place ... It would not be rape unless at the time of intercourse the woman is not consenting to intercourse ... It would not be rape if he did not know she was not consenting ... So you see, ... you will have to consider the state of mind of this girl and also the state of mind of the accused ... [Ha 28-9].

This establishes as primary focus, the woman and her expression of non-consent to the act of sexual intercourse, backgrounding with this emphasis both the relations and the circumstances within which this sexual intercourse occurs. It is her state of mind that must be conveyed unambiguously to him, thus apportioning proof of the crime to what is to be unequivocally construed as her non-consent. This definition implicitly argues that there is nothing inherently criminal within the act of intercourse or indeed, the actor. It is a woman's perception of the circumstances that assigns this quality. Thus, redundant within every rape allegation is the legal premise that there is nothing substantialising this act of intercourse as rape outside of the woman's state of mind.

Comprehensively, the elements of the crime qualify the "moment of truth" with the "conditions of consent", thus constituting as intrinsic to the definitions of criminality, the contextualisation of the act of sexual intercourse [Cu 90; Ha 29]. Collectively, these elements argue that the truth about the nature of an act of sexual intercourse cannot be appreciated without knowledge of the circumstances in which it takes place, echoing Austin's (1962) proclaimation of the need to situate actions and statements within the context of their occasion, as this is where the truth of such statements is to be found. This approach attributes the locus of meaning as inherent within the context itself. It is premised upon a notion of context as issue related, as if there are particular circumstantial strands causally linked to decisions

about sexual offences. It assumes a singular representation of relevance, as if what is relevant to decide the nature of an action or incident is impartial, egalitarian, gender-neutral, and all observers, like all experiencers, would designate the nature of the significant circumstances in the same way. It attributes the interpretive power to the incident itself, thus presenting the position of the interpreter as value-free and gender-neutral. But, above all, it renders meaning and interpretation exclusively within the present, privileging the accomodation of a subjectivity realised through enactment, while retaining as apolitical, impartial and objective, the mechanism shaping interpretation. It takes for granted as unproblematic, the classifictions and categorisations that sort out what is appropriate and relevant to the situation and why, and who has the authority to formulate these conclusions.

THE JURIDICAL FIELD

The definition of rape as a crime automatically generates an assemblage of locations and services into collating information about this sexual offence. A formal complaint to police introduces institutional intervention and initiates a set of practices which extend beyond their actual occasion and institution of realisation as the knowledge accumulated becomes procedurally subordinated to accomplishing the common goal of prosecuting a charge (Smith 1990a:212). This future orientation structures the knowledge collected about rape and influences what is to be considered as knowledge. In essence, it subordinates a woman's experiential knowledge to an institutional interpretation of the elements of the crime, as juridical relations translate her account into an allegation to be 'tested' in court. This process of intervention is legally taken-for-granted as unproblematic.

The accomodation of legal elements within institutional relations blurs the boundaries of institutional distinctiveness. In practice, it generates a network or

field of positions within institutional locations, whose inherent practices become representationally and procedurally contested by the introduction of the crime, rape, as the objective-in-common.[6]

As an analytical concept, fields are constituted out of relational positions which includes institutional identities but it considers these agents from their relation with those they engage rather than merely the role they enact (Bourdieu 1983, 1991:107; cf. O'Barr 1982).[7] This approach invests interaction with tacit assumptions about institutional relations. It includes within the analysis of social relations, differentiations and evaluations rarely problematised as they grow out of taken-for-granted habits and ways of evaluating situations acquired within the particularities of life histories. This form of knowledge explains why people behave in particular ways, within a court of law, with police or within gender relations and indicates why defence barristers always refer to police-accused questioning as "the interrogation" and prosecutors use the label "interview". And when the police officer says:

Q Do you have any objections in accompanying us ... You don't have to accompany us. You know that don't you ... I want you to understand that you're not under arrest and you accompanying us is purely on a voluntary basis ... You're not under arrest and are free to leave here at any time.

and the man walks away, we are not surprised that he is immediately apprehended, to be told:

> As you know we're police officers. I'm arresting you for the allegation ... [So 33].

Irrespective of the verbal form, police relations are clear to most people when questioned about a crime, because of how the position and the nature of the relation it engages is perceived, as this following man comprehensively explains:

W Then they approached me and they pushed me in the car ... Well they arrested me and they placed me inside the car ... They invited me to enter into the car and I entered the car ... They told me to get into the car. I got into the car [Do 25].

Police statements flow from the position the police occupy within knowledge about law and order, and this encodes their directives with individuated notions which are usually similar in many ways, about the nature of police authority.

Fields emerge out of particular configurations generated by conflict over an object-in-common. Within the juridical field, organisationally the contestation is over who has the right to specify the nature of what women experience as sexual assault. Analytically, these are symbolic struggles which are material in their consequences. But procedurally, they are expressed within debate over context, over what is relevant or admissable to the prosecution of the charge.

All institutions engaged in the task of prosecuting and legitimating a rape charge are required to acknowledge and accomodate the legal elements within their own sense-making conventions. The police and sexual assault medical centres are automatically involved in legitimating rape allegations. These discourses differ, from each other and from legal discourse, in how they approach rape as an issue-in-common. For example, the questioning by the police of a woman about an allegation of sexual assault, differs markedly from how the medical examiner will approach the same issues, or the ways in which these issues will be dealt with by the defence counsel in court. These episodes are all regulated by institutional conventions, about the interview, about the issues of the allegation and about legal proof. The evaluation of such manifestations, however, is neither uniform nor static and these institutional relations are marked by struggles over issues of hierarchy. Not all the knowledge acquired in the police or medical interview is recorded, and what is documented is not necessarily the knowledge that will be presented in court. Nor will the knowledge, for example, medically documented to support a rape allegation necessarily be used for that same purpose in court. This knowledge realises its 'true' meaning, its status as objective knowledge within a trial when 'tested' by legal methods and procedures.

Relations vary, according to, first, who the events engage and secondly, cultural notions of hierarchy, and these values inform on the extent and nature of relations possible (Bourdieu 1983). When engaged with the judiciary, police authority is circumscribed and subordinate. The knowledge gathered by the police to charge a man with rape is not necessarily the legally relevant knowledge to prove the allegation, and this asymmetry is always residual within the way relations between the police and the judiciary are conducted.

Each form of discourse is procedurally subordinate to legal discourse in relation to juridical issues and the appropriation of these knowledges by legal practices makes their meaning and their status situationally specific in both form and content. On each occasion of confrontation, with police, with medical authorities and legal practitioners, combinations of meanings and values pervade experiential knowledge to decide issues of legitimation in relation to the status of the experience. Knowledge about rape becomes the terrain over which and through which definitional battles are fought, as the legal system co-ordinates as it subordinates, those it relies upon to orchestrate its actions.

Ultimately though, what counts as knowledge, or relevance, or fact about a rape experience, acquires its legitimacy and authority as knowledge only within a court of law. It is the identification of sexual assault as a legal issue that designates legal knowledge as procedurally superior to other forms of knowledge about sexual assault and, consequently, makes the criminal trial the environment within which other knowledges are themselves legitimated.

THE APPROPRIATION OF EXPERIENCE

A complaint to police instigates the institutional appropriation of the experience identified as rape, as each location distinctively fashions subjectivity into their understanding of the criteria legally prescribed as essentialising the crime. Collectively and individualistically, juridical relations simultaneously inform and impose form on experiential knowledge as it is transformed into a legally admissable account. These procedures are represented and recognised as essential, by those effecting these practices and by those affected by them. They are rationalised pragmatically, as no more than the organisation of lay knowledge into forms amenable for legal evaluation. Procedurally, this knowledge is recognised as knowledge admissable and appropriate for the prosecution of a charge; experientially, it is recognised as knowledge capable of substantiating the definition. Thus it is misrecognised as the appropriation of subjectivity by the juridical field (Bourdieu 1977:21, 1991:164).

The elements of rape co-ordinate the nature of the information sought by the institutions engaged, as they structure how the experience is described. Yet they also establish the parameters of this crime as amorphous and arbitrary, wherein what is to be effective as knowledge is dependent upon what is identified and accepted as the circumstances in which the incident occurred. This oscillation between objective and subjective understandings establishes contextualisation as the critical domain for the interpretation of meaning, as each allegation contests antagonistic definitions of relevant and appropriate knowledge for decisions about the nature and character of the experience. Truth becomes contingent on context, and context emerges out of the relations of position, the struggles between competing locations to impose their perspective.

The juridical field is organised interactionally by the evaluation of an allegation of sexual assault. This focus delegates specific roles to positions which makes the distribution of authority seem apposite. For example, the state police have the responsibility of gathering the evidence to charge a person with a crime but it is the courts, perceived as politically and socially impartial, that assess or 'test' the integrity of police allegations. The knowledge produced in these locations fulfils an immediate objective and potentially contributes to the realisation of the objectives of the field itself. This dual relationship is not necessarily mutually inclusive, and relevance becomes a situationally specific concept, contingent on how the facts of the incident are to be coherently understood rather than on what the facts are perceived to be (Smith 1990:133, 1990a:149). This approach argues against a uniform notion of 'reality' to endorse an interpretation of meaning as arising out of the relations involved in deciding how 'reality' is to be understood. Consequently, it relinquishes the right to decide the truth of experience into the hands of those with the authority to decide on its representation.

A trial's constitutive material is largely the oral corroboration of the documented statements of witnesses. It draws its substance from texts, as documents are the communicative medium within the field. Legal practices are predicated upon an unambiguous and stable relationship between word and signification. The meaning of a document is identified as being inherent within the language itself and able to stand independently of its situational exposition. This approach implicitly argues that statements declare their own meaning, and are comparable with a "descriptive truth". This is Austin's (1962) analytical explanation for what he identified as objective truth, that which is premised upon the assumption of a direct referential relationship between language and reality. This correlation allows meaning, as the descriptive truth, to be marked by permanence, able to transcend its evolution and the subjectivity of interpretation to always obtain.

The privileging of a positivistic relationship between print and meaning, supports and is validated by, the legal presupposition that there is a correct, true version of what happened. This is perceived to be a singular reality to which the objective facts of the experience is reducible. These are the facts that are identified as issue orientated and therefore capable of transcending their situational exposition to resurface within any and every account. They are causally connected via inferential linkages to the incident itself, to accredit the witness with authorship. It becomes her personal account, and by extension, her responsibility to ensure that all relevant knowledge is documented. For her testimony within a trial is legitimated by what is obtained in these locations.

All documentation alters the nature of what is recounted, as the actual process of recording discourse incorporates and accomodates particular features derived from the situation in which this occurs (Smith 1974, 1990:61-82, 1990a:99-100; Handelman & Leyton 1978).[8] All knowledge must address the elements of the crime, but each location is marked by a particular point of view about what counts as knowledge or relevance. This means that whatever is actually said on these occasions is never reducible to what is recorded, as individual intentionality is always subjected to the regularising conventions of the location (Foucault 1977). Yet, during a trial, what is presented as a woman's testimony is presented as her account, flowing naturally from her experiential knowledge. It has a history of production that is not privileged but is, instead, linguistically and procedurally obscured.

The overarching logic of the legal system is premised on establishing guilt or innocence. These decisions are morally endowed to explicitly constitute truth as the medium for evaluating statements. Legal truth justifies its authority by the integrity of its evidence. Statements are assumed to represent a witness's truth and by inclusion, each witness is held responsible for the truth of their account. This focus

draws its legitimacy primarily from a notion of referential or descriptive truth, and allows the relationship between truth, the printed word and a witness's veracity to be explicitly spelt out in court:

D Now you've made statements before and you've signed a declaration ... and your statement was typed up by the police ... you signed that statement. And you understood that when you signed that statement that it was very important that that statement and declaration be true ... Can the witness be shown her declaration? ... Look at the document in front of you ... you'll see your signature [where it says this statement is] "true to the best of my knowledge and I make it knowing that if [I lie] I'm liable for perjury". ... You know that when you signed that document it was extremely important that that statement be accurate. ... And you signed that statement as being accurate ...
D So you signed the statement as accurate knowing it was not accurate.
W Well. When they gave me something to sign I signed it.
D So your evidence on oath is that this statement is not accurate, not fully accurate [Wi 23].

With this moral compilation the defence counsel later argues:

D ... she signed that declaration as being true and accurate and it wasn't. ... It's an example of her declaration being different from what her evidence was ... And her declaration's supposed to be a true and accurate account ... It's directly in conflict with what she's told you ... [Wi 15].

This approach privileges the written word as the superior medium for statements of truth, to concomitantly evaluate all unrecorded knowledge as untrue. Any knowledge originating during the trial is considered historically and procedurally illegitimate; devoid of a textual reality it substantively does not exist. By attributing a singular interpretation to the truth of a statement, this discourse verifies legal procedures for recovering truth while reifying the legal conclusions about truth as being of the highest quality. Simultaneously, this approach to knowledge presupposes as self evident, a uniform, apolitical interpretation of relevance that draws its definitional strength from the incident itself, thus obscuring the relations subsumed within its constitution. It privileges as self evident, a familiar, even democratic approach to the police as an institution. It backgrounds as unproblematic, the differentiated life circumstances constituting the relations institutions presuppose. The social relations involved in producing this documentation allocate positions, unproblematically dividing all participants into

those who ask the questions, such as the police or doctor, and those whose task it is to answer, as this following woman so clearly explains:

D Are you sure you hit him.
W Yeah I'm positive I hit him. I mean I didn't want the guy to touch me. And that was it. It's not open market ya know.
D You didn't try and grab him.
W No.
What! Don't look at me like that! ... No. I'm pretty sure I went like that [gestures].
D ... you gave a statement to the police ... on the night ... you signed that statement [as a true record].
W Um - And it said I "grabbed". But it was worded wrong. ...
Yeah. I know what you're trying to say. ...
Yeah. That was worded wrongly ...
D And you read it and adopted it as being a true and accurate statement.
W I - I did not read it. I skimmed through it and did not take it out. It was my fault.
D Before signing it was it explained to you it was supposed to be [true and accurate].
W No. We were just rung up and he said will we come down.
D You agree that there's an inconsistency ...
W No.
D But on the face of it there's an inconsistency.
W I'm not going to comment ...
D [that statement is] a fabrication.
D You couldn't be more wrong. Look ... [Judge tells her sharply to restrain her comments to answers only].
W I'm sorry. ...
D [did you tell the police about the mistake when you remembered it].
W Can't remember.
D And you certainly didn't ask for it to be inserted [so your statement is not true] ... Answer yes or no.
W ... Well there's more to it than yes or no.
J I direct you to answer it yes or no.
W No [Sp 23-4].

These practices construct a singular notion of truth that is independent of the processes involved in its production, privileging only the referential truth of the language itself. What is understood as 'true', or 'accurate' by the lay person, the police officer and the attorney, stems from divergent conceptual bases which are homogeneously glossed in court as uniform. This approach to knowledge suspends the circumstances of its exposition and thus the relations entailed, to overshadow questions about the integrity of these procedures by the reification of legal truth.

In this following segment, Tina has accused Jim, a fellow RAAF member, of cunnilingus and her initial complaint is to the immediate authorities. Her veracity on this occasion becomes indicative of her credibility on every occasion, thus privileging a relational equality that is circumstantially absurd:

D ... Immediately before lunch I was asking you some questions about time ... And I think you'd agree - or you'd say now that you don't know what the time was [when the incident happened]. ... But it is the case that on other occasion you have given a specific time. ...You were interviewed - or you gave a statement to the RAAF police at [the base] on the 17 March ... And I think you agree that you told those police that you were awoken at 0103 hours ... Why did you say [that precise time]. ...

W Because I was pressured to give a time.

D ... you chose a very specific time - three past one.

W I was - I was being sarcastic.

D By that time you have made a very serious charge. When you gave the statement you were fully aware that you were making a very serious allegation. And do you say that you sarcastically gave a time. You simply picked a time. Made it up. ... Can you only say to the court [you gave that time] because you were being sarcastic. You knew the charge was serious. And you knew that the military police were taking it seriously.

W They were not.

D So you were treating it lightly at that stage were you.

W Well I was never offered any help - Yes I was. ...

D You gave a number of statements to the military police didn't you ... I think you made a statement to Sergeant Brown of the military police. And you read that statement over before typing up. And you signed it as correct. ...

W Well - As far as I'm concerned that statement was made under duress. I was sat in the middle of the room and walked around.

D You signed that statement [as being a true account]... You *now* say you were in effect forced to say that. ... I think you - er - eventually had to see a doctor about this matter. And was that doctor Smith - at the RAAF base. ... You told him about the incident that you said occurred. ...

W He just told me that men don't do that type of thing. I must have been imagining it.

In re-examination, the prosecutor asks:

P Why were you being sarcastic.

W Because I wasn't getting help from anyone ... [the doctor told me that] "Men don't do that type of thing". So I knew I wasn't getting anywhere.

P And why did you give them a time.

W Well. I reported it. And they said "Give me a time". And so I gave them a time.

P ... where was that statement taken.
W In an office.
P How many officers were present.
W Two men and a woman.
P Where were you seated.
W In the middle of a room.
P At a desk.
W No. On a chair.
P ... what did the male military police do.
W Sergeant Brown - He walked around me ... I got up and [started to walk out] ... He said if I didn't come back and sit down I'd be charged.
P And it was at that time you made that statement.
W That's right. Yeah [Co 21-39] (Italics added).

To respond when harassed by an act which appears to be the only avenue available, that is, to fabricate as a resistance to coercive intimidation, is irrelevant to evaluations of the document's truth and her truth. For this is a meaning that suspends ulterior value judgements by suspending the circumstances in which it is recorded, clearing the space to construct a singular notion of truth, to be identified as legal truth.

Language itself becomes problematic, as the transition from lay expression to situational interpretation makes credibility legally contestible in a multitude of ways. What seems innocuous in one context becomes critical in another, and truth becomes enmeshed within adversarial ingenuity and opportunism. Such calculated strategising is facilitated by the emphasis legal practices place on the referentiality of language. What is recorded within documents is assumed to be fixed in its meaning unambiguously, awaiting recovery within the trial. This focus obscures the different conceptual bases language can accomodate, as the meanings of the lay person, as understood by the police officer, is introduced into court. Once documented this differentiation is relationally distanced, foregrounding an immediacy that makes the past conceptually unqualifiable in its self-evidency:

D Now - You've - er - known an occasion when Sara carried a knife when she was out.
W Well I didn't really see it but I heard it ...
D But you agree - [you believed she had a knife].

W I heard [she had a knife] ...
D Well did you ever say that you knew [Sara carried a knife with her].
W That I knew. Well I never knew an occasion myself. ... On this occasion that I heard Sara had a knife. I didn't see the knife myself. I just heard that she has a knife on one night. ...
D Well. Why did you say "I knew on one occasion she had a knife ..."
W I knew - Well [I heard about it].
D And you believed it.
W I dunno. I suppose that I did know.
D ... You must've believed what you were told. Do you agree with that.
W Yeah.
D And when do you understand [to be the occasion Sara carried a knife.
W That was on the night of the rape.
D So someone you believed told you on the night of the rape [Sara had a knife] [Ha 56].

Each position subjects what is detailed to an interpretive process that is highly individualistic yet also regulated in some ways, that makes the meaning of descriptors such as 'known' as opposed to 'heard' significant or indistinctive, even inconsequential, until a particular conceptual base privileges its own way of 'seeing' as the singular medium for interpretation. What is unproblematic to the police officer recording this statement, becomes highly questionable within a court of law because of the latter's right to subordinate the practices of police to what is presented as a more rigorous mode of operation.

DOCUMENTARY PROCEDURES

A formal complaint of rape triggers the institutional appropriation of the experience, and the procedures involved can occasionally be glimpsed in court, within the form and content of what is said. This process officially begins with the preliminary complaint made to the police. This account is not intended as a comprehensive documentation, merely "a rushed and condensed version" to provide the information required by the police to generate a charge [Ha 33-4]. Thus from the beginning of formalising the verification of an experience as rape, the elements of the crime validate the selection of the detail required. They set out what

Bourdieu describes as the "anticipated categories" within which this experience is to be located (1991:129). The detail sought is that which will substantiate these legal categories, and is exclusively knowledge that is legally acceptable as admissable within a trial, as distinct from that which informs on the experience.

A woman's next formal account is likely to be to a medical person at one of the Sexual Assault Referral Centres located within a public hospital. This is a medico entrusted with the woman's physical and emotional welfare. She is also responsible for collecting the forensic material with the potential to substantiate a charge of rape. These are medical practices governed by legal notions of evidentiary value as the specificity of the medical interview is subordinated by legal definitions and requirements. This process allows the empirical to procedurally outweigh the emotional in terms of significance while privileging a unitary self-evidency about notions of relevance and intentionality. One medico's practice is to allow the woman:

W ... to direct the conversation. As accurately as I can I record things that pertain to my examination". ...
D It wasn't mentioned. ... [Does that imply] that if it had [been mentioned] you would have made a note [MJ 13].

These comments reflect the expositional contingency of statements that are legally represented as personal evocations. Over and above most points of articulation are the regularising conventions of the location which compress intentionality into a particular formulation (Foucault 1977). But equally, all intentionality is subordinate to the conventions of the field, which facilitates the potential for these texts to assume a life of their own, irrespective of the author's intentions (Foucault 1977; Derrida 1976). It is this broader formation that displaces institutional objectives to substitute as superior, the pragmatics of immediacy. In this way, the assimilation of forensic science into medical practices gives rise to the prostitution of medical discourse within a trial. Pragmatically, this discourse is deployed to legitimate a

very particularised recounting of sexual abuse, legitimating its pornographic objectification within its scientific facade (Smart 1989:90):[9]

D She made a complaint of vaginal rape, didn't she.
W That's correct.
D You examined the whole of her body.
W That's correct.
D And she was naked.
W Yes.
D You didn't see any finger marks.
W Nothing.
D No bruising.
W No.
D No scratches.
W No.
D Nowhere.
W No.
D Particularly one place you doctors at the Sexual Referral Clinic look for is marks inside the knees and inside the thighs, isn't it, when there is an allegation of vaginal rape.
W That is the position where bruising could occur.
D Or reddening, finger marks.
W Yes.
D You receive some training in regard to examinations, don't you.
W Yes we do.
D And also particularly in regard to females, the inside of the thighs can be particularly susceptible to finger marks and bruising, can't they.
W I don't know whether I would say particularly susceptible, it would depend on the individual situation, what actually happened, what actually was done, how the woman was held first, and secondly it would depend on individual factors in the woman herself.
D Inside of the thighs would redden without a great deal of pressure, or finger marks would be present.
W I would have to say no to that, I don't think often is the right word, I would say that it is possible, in my experience not often.
D You saw absolutely nothing on this woman's body, did you.
W Nothing at all [Cu 79-81].

In this way medical discourse and its nondiscursive practices refined in the interest of the rape 'victim' acquires an existence within defence strategy, as it is deployed to discredit the woman's allegation of non-consensual sexual intercourse. It is the medical documentation of this woman's experience of rape that enables the defence counsel to inferentially substantiate his denigration of her allegations.

The police occupy the investigative position within the juridical field and it is their documention that frames the information sought to collaborate the elements of the crime. A few days after the incident a formal declaration of the allegations is recorded by the police. This statement appears in narrative form as if the woman freely wrote out her account. It contains no indication of how it was solicited or organised, or what has been reworked or rephrased. There is no documentary record of its process of production. There is no process as legally it is her account.

The details of the declaration will always include a lot about the relationship between the woman and the accused; it will include precise details about her consumption of alcohol; and will meticulously particularise places and actions and the time of day. This is the nature of the detail required in court and the police seek only the specific substantiation of the elements of the crime:[10]

W Look. He [the accused] said these things all along. It was like two specific things [go back to his place, have sex] When we were doing the report, he said a lot more stuff, but the police weren't interested. They wanted to know the basics.... [Sp 17].

These "basics" represent her experiential account from which the 'particulars' of the specific charges are extracted. The defendant's account is a response to her claims, a recording of his replies to police questions extracted from her declaration of allegations. In this way documentation constitutes an objectified "world-in-common", as the descriptive categories and classifications organise the social relations they prescribe (Smith 1990:61).

Implicit within these practices is not only the subordination of all locations to the purposes of the legal system, but also, the superiority of legal knowledge. For example, the integrity of information acquired by the police is routinely acknowledged in court as being procedurally inferior to that acquired within a trial:

D You spoke to him at 8.35 a.m.
W That's correct ...

D This is about 8.40 a.m. When did you make the notes of that conversation.
W I made them later in the afternoon.
D What time.
W About half past three.
D About seven hours later.
W That's correct.
D So you wouldn't be completely accurate of what he said when you wrote the notes seven hours late, would you.
W Those notes were written while that conversation was still relatively fresh in my memory.
D It wouldn't be word for word seven hours later, would it.
W Probably not to the absolute word. No [Cu].

This passage subtly constructs a slight warping through interpretation, suggesting a shift from the witness's truth, that is, from what his statements were at 8.35 a.m. to what the policeman remembers his statements to be seven hours later. This temporal division dissipates the integrity of what is recorded in his name, thus opening the space for doubts and inconsistencies. Simultaneously, it legitimates the accuracy of legal words with their simultaneous transcription, while validating the integrity of legal practices in subordinating the language and discourse of the police to this more accurate truth.

These documents constitute the substantive parameters of what is subsequently said in court. They are socially constructed "documented realities" that aim for particular readings in contexts other than those in which they were produced (Smith 1974, 1990a:212). They constitute the system of which the trial represents the culminating process, and as such, emerge out of divergent processes of production, with both immediate endpoints as well as the endpoint of the system itself. Yet in every instance, the processes of production are backgrounded, as irrelevant to the nature of the truth they contain, thus allowing space to privilege, referentially, the truth of the language itself.

MEANING AND CONTEXTUALISATION

A formal complaint of rape introduces the sense-making conventions of a range of institutions into the documentation of this experience. This intervention skews rape representation in particular ways, as each institutional interpretation of the requisite knowledge for substantiating this offence reflects its distinctive way of seeing and explaining events and relations. But the knowledge accumulated does not automatically flow into court, as each positional interpretation of such notions as relevance and admissability is legally 'tested' for its integrity. All knowledge accumulated is ultimately subjected to the sense-making conventions of the legal institution and this occurs within the context of a trial.

The legal system operates on the belief that its authority lies in its procedural integrity; it is objective, apolitically neutral and equitable in its deliberations. A trial spells out this status ritualistically. Symbolically and pragmatically, the legal system sets itself apart as an arena of specialised knowledge into which lay persons must be inducted. It is manifested as an environment in which everyday knowledge is both the validation of community involvement in legal adjudication, and the deficiency to be compensated by legal knowledge within the trial. This induction is done ritualistically, commencing with a *rite de passage* wherein a cross-section of the community is secreted away from the population generally for the duration of jury duty. What is conceptually privileged within this symbolic demarcation, is the authority and thus superiority of objective knowledge, that is, a knowledge detached from the irrationality and arbitrariness of individual interest and prejudice. It is the ritualistic construction of anonymity, reifying in practice the neutrality and impersonality and thus the impartiality of all engaged within this task (Bourdieu 1987:830).[11]

A trial is constituted as a closed environment, spatially, performatively, conceptually. Each courtroom has spatially circumscribed interactional spheres. The Bench, the judge's domain, is structurally set above the rest of the room, demarcating an area into which few encroach, as communication throughout a trial is mediated by his personal staff.[12] Visually, interactionally, a judge is perceived to be above and beyond individual representation. He remains detached from the individual participants of the trial, while simultaneously constituting the institutionalised focus of authority.

Counsel are located mid-centre of the room, flanked by the jury within a formal enclosure on one side and the accused in the dock on the other. A witness box occupies an area between the Bench and the dock, within clear sight of all performers. These locations construct an interactional enclosure, a performative arena from which the public gallery is set apart.

This spatial representation of law is physically punctuated by ritualisation which underscores both the solemnity of this order of experience and the embodiment of the institution within the individual performers. All key players are wigged and gowned, to erase any semblance of personalised individualism about what is said and done.[13] Everyone rises when the judge enters or leaves; all are requested to punctuate their entrance into this arena with a deferring bow.[14] Verbal exchanges ritualistically utilise distinctive elements of tradition; formal anonymous modes of address are used between judge and counsel, such as 'my learned friend' 'learned counsel', 'if your honour pleases'. Expressions such as "May it please the court" or "May I approach the witness", depersonalise procedures by establishing a formal distance between those who practice law and those it is practised upon. Symbolically these stylised practices demarcate this arena from the everyday. They remove any trace of the arbitrariness of individualism or personalisation from what is to be construed as the legal system. They place criminal matters in the hands of

specialists, those who argue in the name of knowledge and claim detachment from any personal bias or prejudice (Bourdieu 1991:177). What is suppressed within such ritualisation is the adversarial character of this system, and the unspoken relationship between the need to win and statements of truth.

A jury trial is a highly regulated presentation of information. It is procedurally directed towards deciding the truth of a situation by evaluating the integrity of the allegations. Substantively, knowledge is derived from the compilation of arguments and images by legal rules and methods. These procedures allow for the continual redefinition of interpretations of the situation, as knowledge is accumulated, contradicted and reformulated in examination and re-examination. With new information, the facts are reconstructed; as more information is revealed these facts become more 'accurate'. So although the actual events remain the same, the account of the events changes (Smith 1990:110). As each successive account interacts with its predecessors to elicit the 'full story', it backgrounds with its revelations, the processes by which this truth is obtained.

The chronology of a trial has a distinctive organisational frame that imposes a particular sequence on how information is introduced. In broad terms, a trial is opened and closed by formal counsel address. The Crown opens a trial with a thumb-nail narrative of its case. This is constructed out of an evidentiary contextualisation of the elements of the crime, detailing their experiential substantiation. A similar introduction can pre-empt the enfolding of the defence case. As primary witness for the Crown, the person alleging the assault is the first witness, and those who follow are intended to corroborate her testimony. The accused has the choice of publically defending these allegations or entrusting this task exclusively to his counsel. The trial concludes with summary addresses by both counsel while the judge has the final say. His summing up details what are construed to be the relevant matters of law applicable to the details of the incident

and an outline of the Crown and defence case. Thus, within a trial the detailing of events and their circumstantialisation is canvassed many times, within a range of relations.

Procedurally, a trial is governed by rules and methods intended to impose a uniformity on all trials as a measure of fairness and impartiality. This regulation is designed, as one judge explains, to allow the jury to "only hear relevant things" [Wi 26]. Therefore, each trial is always more than a recounting of conflicting explanations; socially, it reflects the knowledge legally considered relevant to decide the nature of these events.

A trial has ritualised conventions of interaction which designate who may speak, to whom, in what order, about what. All information is revealed in court by interrogation which consigns the management of knowledge beyond the control of the witness, the person with the story to tell, into the hands of legal practitioners, those with the authority to ask the questions. The evidence-in-chief of a witness is organised as a narrative in which the mode of questioning allows space for the personalisation of detail. This account is then open to challenge and reformulation by the defence counsel which has the potential to be further 'clarified' by the prosecutor in a subsequent re-examination. Cross-examination is usually characterised by compilation, wherein questions stringently control the disclosure of information and its potential for realisable meaning. Frequently, these question forms are able to function as statements of truth, as they constitute the 'appropriate' queries and provide the 'obvious' solutions, to speculation about the relationship between responsibility, agency and guilt.

Within every rape trial, there is usually a collection of facts with which both the prosecution and defence appear to agree. But in essence, these facts are unstable, as the meaning of all events and actions is legitimated by appeals to context. While

the same act can assume a different meaning within a different set of circumstances, such actions also acquire their truth and their 'factuality' from their circumstantialisation. No decision can be made about the character of a fact until a decision is also made about the nature of its circumstance (Derrida 1991; Fish 1982:711). There is nothing stable within this process, as meaning, fact, relevance, context are all contestable issues. This instability of truth is cogently explained by this following judge when discussing the truth of medical evidence:

J The truth of it maybe a matter that ultimately you will have to debate with the jury. But the doctor can only tell you what he believes the facts to be. Whether that turns out to be the facts or not is something which in practice, every case in which an expert is called is quite often an impassioned address to me and the jury [C1 310].

This postmodernist integration of rhetorical persuasion with decisions of truth means that arguments are never resolved by appealing to the facts, for the facts, as Fish points out, only emerge in the context of some point of view (1982:715). Arguments are over the right to specify what the facts are by debating how the facts are to be understood as a coherent account of what happened. Thus appeals are never to the facts at issue but always to a broader context (Culler 1988:148).

This approach to truth includes in this notion of context the presuppositions and stipulative definitions that a point of view entails as the basis for inferential conclusions. This broader context can include appeals to an institutionalised discourse such as law, or to discourses less easily constrained, such as gender, or both discourses can co-exist within the same statements. In this way, what appears to be a fact within one context acquires a different identity altogether within another frame of thought, and makes the notion of context inherently unstable. I introduce this following segment by schematically outlining what both counsel agree upon as the uncontentious issues within the trial:

> Around 10 p.m. on a Friday night Sara joins her friends at a hotel. There she happens to meet her estranged *de facto* husband, Lou, and an argument ensues. Around 1.00 a.m. Sara leaves by herself to go to another hotel, where

> she again encounters Lou. Again they argue, this time culminating in Sara being physically assaulted. Lou has since pleaded guilty to this assault. Sara returns home and is in bed when Lou arrives at her house around 4.30 a.m. Sexual intercourse occurs. Sara's friend, Tess arrives around 10 p.m. the next morning. As Sara greets her at the front door, Lou exits out through the back window. He returns immediately and has an argument with Tess. When Lou leaves this time, Sara rings the police and charges him with rape.

This skeletal scenario forms the basis of both prosecution and defence cases. Sara alleges Lou has violently raped, humiliated and threatened her in her home for around five hours, an extension of the assault in the hotel. Lou's explanation is that he and Sara 'made up' after their 'domestic' in the hotel, had sexual intercourse and went to sleep for five hours. Each version contextualises these facts to produce a coherent description of the incident which simultaneously negates the validity of the alternative version. Sara designates rape as the measuring stick against which these accounts are to be evaluated. Lou labels it as 'another domestic', more precisely, an 'Aboriginal domestic' and, therefore, consensual irrespective of the assault, or even because of the assault (Bell 1991). Because of the adversarial nature of the judicial system, each side strives to present a version of events most advantageous to their own position. This is not the 'whole truth'. Nor is it necessarily the 'fairest' account. It consists of those portions of each version argued to be legally relevant and admissable.

'Relevance' is a concept that posits a causal connection and a natural boundedness to knowledge about rape, as if this knowledge is incident-specific. What Sara says when she initially makes a complaint, and what she is asked about when she records her declaration is not necessarily what is required by the court to prove this offence. What is relevant to the police to charge Lou with this offence, is not necessarily what is perceived by the judge nor either counsel to be relevant to the trial. Relevance is a situationally specific concept, wherein contextualisation of detail reflects the immediate institutional needs while accomodating the demands of the field to which it is structurally subordinate. Within each location what is

considered relevant changes, yet the knowledge produced is ascribed to be Sara's account of what happened to her. She is the author of these documents, and the end product has the potential to be attributed exclusively to her. The processes involved in the production of what Sara says is obscured within appeals to judicial integrity.

Bourdieu describes a field as a network of social positions, wherein the value and meaning of each position is defined relationally (1983: 1991:167). When Sara initially reports her experience, what is considered relevant to the police substantiates her statements. This situational notion of relevance does not automatically flow into court. The police privilege guilt as their basic operating premise and arrest Lou because they believe they have sufficient information to charge him with this rape. Yet Lou, once charged by the police, is presumed innocent until the Crown can prove its case. This contradiction in institutional conceptual positions allows the debate about relevance to shift its focus from the incident to the system and thus its representations, as arguments engage in weighing the prejudicial nature of detail against its probative value. This displaces arguments about the meaning of these incidents into a larger arena, to be resolved within disputes about the nature of the legal system (Culler 1988:147-8).

Sara's trial opens in the absence of the jury with legal argument over what should be excluded from her statements, firstly, because of its prejudicial nature; and secondly, because of its relevance to this charge. Her history of this incident detailed in police statements includes reference to Lou's heroin habit. At a particular stage of the assault Lou threatens Sara with what he claims is an AIDS infected syringe. The needle is never produced but Sara uses her knowledge of Lou's past practices to accept his claims as plausible. Her interpretation of this incident receives support from police statements which allege Lou is picked up the next day with a syringe in his pocket; the medical report notes needle marks on his

arms; and Lou is recorded as replying when asked about his addiction: "It was yesterday I suppose that I last used heroin".

Relevance is the primary argument used by defence to validate a ruling of prejudice. At no point in her statement does Sara establish a direct causal relationship between her compliance to the acts of rape and the needle threat. Says defence:

D ... it comes up in her statement ... There is by that time in her statement ... vaginal intercourse ... oral intercourse twice. And then she starts talking about the topic of AIDS and the needle. Nowhere does she say that that threat had any effect on complying or anything else. ... It is not alleged as I read the declaration that that threat had any effect on her behaviour. ... [Ha 2-3].

Both the form and content of this statement are attributed to Sara, allowing the literal interpretation of the meaning of these statements to absorb her intentionality. She is responsible for ensuring that the essential legal element of causality is established. Such instrumental logic appeals to the superiority of legal knowledge while simultaneously ascribing to this knowledge a natural self evidency. The prosecutor's reply re-emphasizes the relationship between context and meaning, while equally legitimating his claim with the validation of legal knowledge:

P ... the Crown acknowledges that there maybe ... some prejudicial effect in leading evidence that this man has recent marks on his arms and Sara knew he was a recent user ...[but these factors] are highly probative in rebutting this issue of consent ... they provide quite a deal of explanation as to why she stayed in the house and did not leave the house ... [This prejudicial potential] can be cured by a ruling as to the correct way that it should be used [Ha 5-6].

Decisions appealing to prejudicial knowledge privilege a moral certitude as they speak to, and for, an egalitarian community unified in its interpretive life circumstances, about a subject the speaker is claiming detachment from. This ability to decide what counts as prejudice by deciding what use is most likely to be made of information by jurors, conceptually makes legal practitioners cognisant with community sense-making conventions while able to stand apart from this mode of

thought. They claim to be both within and outside of tacit, inferential knowledge, and support this claim by appealing to an authority that is independent of any personal expression. There is no space for Sara within these negotiations, as the broader issues of justice are used to determine what is relevant about these incidents to decide the truth of her allegations. It is the institution that responds, for this is a matter of law, not fact. Says the judge:

J ... I have no hesitation in ruling that the prejudicial effect of the evidence outweighs the probative value ... I would like to add, that I don't think the exclusion of the evidence seriously weakens the Crown case [Ha 6].

As part of Sara's experiential reality is severed from its context the concern becomes how to elicit this laundered account without impugning her credibility or assailing his negotiated integrity. But when she's asked:

P Did you make any attempt ... to leave the house.
W No. ...
W Because He's just grab me by the hair. I just got him worse ... [made him] kick me - punch me worser. ...
W Lou had total control over me ...
W I wasn't allowed to go anywhere. ...
W I was imprisoned. That' s how I felt [Ha 31-2].

the jury never really know why she felt like this, outside of the violence she's told them about. The defence claim of consensual sexual intercourse is premised upon the rationalisation that there are insufficient injuries to warrant Sara's claims of prolonged abuse and terrorisation. The fear she felt is inappropriate for what the jury are encouraged to think she ought to have felt in these circumstances. Thus, logically, counsel argues that Sara's lack of physical re-action appears illogical, allowing consent to be construed as the more plausible explanation within this particular context.

THE CONTEXTUALISATION OF AN AUTHOR

The attribution of guilt or innocence ascribes responsibility; there needs to be an identity to attribute blame to. In this impersonal, anonymous environment, truth is constituted out of witnesses' testimony, and decisions about guilt are equally decisions about personal integrity and veracity. This personalised credibility is the primary focus strategically constructed out of the prosecution of sexual offences. Ideologically, criminal law articulates engagement with 'public interest', but its practices deal with an individual's life circumstances, and the decisions made within a trial are always decisions about those identified as authorising the truth of what is heard. More specifically though, these decisions are about the veracity of those alleging the complaint, as legal practices construct women's credibility as the primary problematic in relation to sexual offences. Sara's testimony in court has a history of appropriation that is not privileged during the trial, where her account of her experience is further organised by evidentiary rules and procedures. These are all practices in which Sara, as experiencer of this rape, is minimally positioned to engage in. But the end result is unproblematically accredited to her directly, as her personal narrative. This construction of authorship has dual strands of realisation: firstly, the form in which information is elicited within this arena establishes Sara as author; secondly, Sara personally identifies herself as author by her substantialisation of the form imposed upon her.

This dual occupancy is realisable because of the distictive position Sara occupies within court. Her participation is multifaceted. Sara is experiencer of this incident - she has been raped. She is also the complainant, the primary observer of this crime. She is required to be both the object of this 'case' and a participant in it; she is required to describe behaviour "attached to herself and detached from herself" (Smith 1974:265). Yet what is significant from the subjective perspective of the

experiencer is presumed to be similarly appreciated by the observer (Smith 1974, 1990:69-70; Bourdieu 1990:82).

This conflation stems from the assumption that at the core of experiential reality there is a collection of objective facts that are indisputably identifiable as rape. These are the facts that although embedded within subjectivity during actualisation, are recoverable by legal methods and evidentiary procedures. Knowledge of this crime is constructed as flowing exclusively from the incident itself, as value free and self-evident to observer as it is to experiencer; to him as it is to her and, thus also, to the judge and to jurors. During a trial, both observer and experiencer are assumed to be gender neutral as if both occupy the same space and ask the same questions. But pre-eminent within these undifferentiated positions of interpretation is the objectivity of the observer, as an *a priori* knowledge and therefore purer than the experiential exegesis. This emphasis puts forward subjectivity as the basis of a personal differentiation premised upon distinctive life circumstances, which is procedurally subordinated within a trial by reducing communication to that which is common to all. It is the elements of the crime that co-ordinate the field and likewise; it is the factual basis of these elements that co-ordinates community interpretation of experience.

In sexual assault trials, the experiencer/observer has the privileged role of interpretation, thus counter-posing to the witness's testimony, the truth of the experiential reality. It is this incorporation of both perspectives within the role of observer/witness to one's own experience which allows experientiality to permeate the descriptions of events. The language deployed to construct responses renders an account distinctive to its author and is, therefore, of its author.

As one of two primary witnesses to the rapes, Sara's role as observer is foregrounded. All events and movement are located in relation to her. This

schematically confirms her role as observer and specifies the type of knowledge required of her, while simultaneously constituting her as author of this account. It constructs Sara as the observer all jurors would be if they were in the same position as her, thus blandly discounting the gender basis of this crime. The form of her account appears no more than the medium designed to facilitate the flow of information, as Sara recounts the factual details of what are presented as the critical and relevant aspects of her experience. Her account confirms a direct correlation between an objective reality and how reality is experientially perceived, thus obscuring the base from which she acquires this knowledge. Equally though, this obfuscation naturalises the categories and classifications by which her experience is organised, skillfully converging as it subordinates, her life experience within the elements of the crime.

Sara's testimony begins by biographically establishing a sense of who she is. Women are invariably identified in court by a gendered identity (Smart 1990:7). Sara is introduced as aged 25, the mother of three children, two of which are by her *de facto* husband, Lou. Her socio-economic status is alluded to by reference to her utilisation of a government aboriginal housing program. Sara describes her domestic situation with Lou as an 'on and off' relationship, thus volunteering herself the descriptive components that seem to naturally accomodate her circumstances within the sociological classification of 'domestic violence'. It is the seemingly insignificant statement such as this that makes the conceptual parameters of a description ambiguous, as the circumstances of what is heard in court becomes so easily imbued with the meanings of other locations. So the initial impetus for the competing definition of this incident comes from Sara, in response to the prosecutor's question. His leading questions allow Sara the latitude to state her account and thus lay claim personally to the contextualisation of content. The qualification of answers provides a sense of the person through inter-relating the

detail required with opinion, sometimes emotion. This enables her to maintain her role as observer while validating her authority with experiential detail:

P Now during the course of your time at the hotel ... did you see Lou at the hotel.

W Somebody came in and said that Lou was in the front bar of the hotel and it kinda put the wind up me. So I just sat at the table with my friends, drinking, and tried not to let it worry me [Ha 13].

Here Sara gets a chance to contextualise her description of an occasion with her view of the relationship at this stage. She talks in terms of the feelings actions invoke and the feelings that inform on her own actions.

This freedom in expression while giving evidence-in-chief contrasts sharply with the delimitations of cross-examination. To occupy the position of witness is to be accorded very specific and limited rights, as questions constitute the medium through which information is elicited and knowledge constructed. This relegates the regulation of content and its organisation into a coherent account largely outside the control of witnesses. The question itself constrains the potential for thematic elaboration as its form is utilised as the medium through which description is conveyed. Questions can appear as direct statements of fact, requiring no more than agreement or negation, while neither response discounts the substance of what has been put forward for contemplation (Danet 1980c). It is speculation, proposed to be absorbed or rejected but always evaluated as part of the sense-making practices of jurors.

In this way what is uncontested, for example, Sara and Lou met and argued in a hotel, can accomodate a different interpretation because of the circumstances detailing its eventuality:

D See - I suggest that what you did at the Hotel was pull out a knife and wave it in front of Lou.

D You started having an argument with Lou at the Hotel about his ex-girlfriend.

D You saw a couple of girls at the Hotel that you thought were his ex-girlfriends.

D You told him that he should punch Annie out.
D Isn't it the case that he refused to do that and you pulled out a knife.
D You dispute any discussion about Annie ... about his girlfriends [Ha 45].

This explanation does not reflect Sara's meaning but it accommodates her action and introduces a contradiction of intention. Her denials are inconsequential when compared with the introduction of an alternative explanation for the incidents she defines as rape. Thus, not only are the facts unstable but equally unstable is their form. Yet while questions may regulate, even constitute knowledge, procedurally they are causally disconnected from the content obtained; what is to be considered as 'evidence', that is, the witness's testimony, is the responses only. The truth of Sara's account is seen to 'emerge' from the institutional process itself. This version has the potential to be attributed to Sara as her version that she denies, for it incorporates issues she has introduced, the uncontested meeting at the pub, thus confirming the notion that her credibility is the critical issue to be judged in this trial.

Sara identifies herself as author by her own language. Her choice of descriptors constitutes a distinctive meaning which authenticates this account as hers. She uses the word 'dragged' to describe how she was forcibly conveyed out of the house, along the footpath to a car, and then back into the house and the bedroom:

P ... when you say dragged - does that mean that some part [of your body was on the ground].
W No. I was dragged by the hair to the bedroom.
P Can you just explain that clearly.
W He had me by the hair and he was scruffing me back into the house.
P What do you mean by scruffing.
W Grabbing at the clothes I had on.
... No. I was just letting my body go limp, hoping that some neighbour [would notice me and call the police].

At this stage, the prosecutor abandons his attempts at clarification, to return to the surety of action :

P You went into the bedroom.
W No. I was dragged into the bedroom [Ha 25-6].

Sara's choice of words conveys an experience which includes the action but is not reducible to action alone. The words she challenges and redefines are words selected either implicitly or explicitly to infer consent and are the choice of both prosecutor and defence. These are words whose referential meaning neutralises the conditions under which something occurs and attributes value to the action alone, as if 'grammaticality' constitutes all that is neccessary and sufficient for the production of meaning (Bourdieu 1991:30):

P Did you leave the bedroom.
W No.
Lou escorted me by the hair [Ha 20].

D Did you do that as you were being taken to the toilet.
W I wasn't taken to the toilet. I was dragged by the hair [Ha 50].

P Where did you say you went.
W I never went with him. I was dragged [Ha 37].

P I've already suggested to you that the first act of intercourse took place ...
W I don't agree that it was intercourse, but I agree that it was rape.
P You say that the first penetration took place on the bed [Ha 60].

This is a struggle over context at the level of statement. It represents an explicit confrontation over nuances that exist as no more than inferences, yet have the potential to support and confirm an alternative interpretation to rape. This alternative account emerges as the sum total of its constitutional parts while remaining insignificant, potentially inconsequential within its isolated units.

THE COHERENT ACCOUNT

In principle, contextualisation is infinitely expandable, limited only, as Culler points out, "by lawyers' resourcefulness, their client's recources, and the patience of the judge" (1988 147-8). There is always one more piece of evidence that will reveal the 'full story'. The aim of every defence wherein consent is the major issue

is to 'normalise' the rape in relation to the nature of the social relationship. This requires that any suggestion of aberration about the encounter be reformulated as 'normal'. It is the relationship between rape and consenting sexual relations that enables the details supporting a rape to be explained in other, more socially acceptable ways. This is why in rape trials, the fight is not over the facts but how to contextualise the facts; it is not the deed but the explanation of the circumstances within which it happens that decides the nature of the sexual relation. For it is the peripheral issues that sort out how the formal definition of rape is to be interpreted and makes the relationship between meaning and context problematic.

This focus on circumstance takes the interpretation of sexual offences into the realms of common-sense knowledge for definitions of truth, to privilege not the facts but the circumstances of the facts as the primary interpretive medium. This emphasis privileges the categories and classifications upon which interpretations depend, to inextricably integrate the regulation of institutional knowledge within the regulation of what is represented as social knowledge. Systematically, it takes interpretation out of immediacy by drawing upon the regularities already tacitly known, to replenish their objective relations with the subjectivities of the present day. It is the contexualisation of actions within a scenario consistent with the particular understanding of social relations, that decides what the facts are and how they are to be understood. This is why Lou's counsel begins his cross-examination of Sara with the statement:

D I'm going to return to the events before and after, because those events are important to determine what happened in the house [Ha 2].

What is addressed within a trial, is the individual's life experience worked into a generalising account, about the nature of the actions and the relations involved. In turn, this generalisation is used to verify the integrity of the situation, hermetically excluding from reflection the authority for this form.

Initially, Sara's account unfolds chronologically as she is 'led' through 'her evidence'. The prosecutor's questions construct a temporal and spatial framework from within which her story logically emerges. Sara is pivotal to this unfolding narrative, detailing what is accepted as her account of the significant events prior to the sexual assaults; what happened to her during the incident; who was where, doing what and what her reactions were. These pragmatic questions naturally impose a sequence which sets up what is to be seen as the appropriate relation between actions and the events surrounding these actions. This conceptual relatedness establishes the linkages between particular actions and consequences that spell out a subtext, in this case rape, that complies with the logic of what has been put forward (Smith 1990:141).

Sara's testimony flows naturally through the circumstances jurors need to know to identify the essential elements of rape. There is no indication that her account is specifically constructed to prove these elements. They are seen to emerge naturally from the narrative itself. While it is obvious that form is imposed on her account, this is accepted as an essential component of legal adjudication, no more than the legal translation of lay descriptions. At this stage, the questions appear to do no more than direct Sara's narrative and the content appears to emerge out of the incidents themselves. Sara is accepted as she is represented, as author of this version of events.

As this is a rape trial there is already a script designating the "anticipated categories" of understanding, about the nature of the crime and the nature of the legal system. In sexual assault trials, the person alleging the offence is formally in court as the complainant or prosecutrix, the key witness for the prosecution. This role is rarely privileged in court as preference is given to 'victim' or 'alleged victim' as the identity she is required to authenticate.[15] The use of social labels such as defendant/accused, witness, judge or jury substitutes a social role for the person,

which facilitates the transposition of what amounts to the detailing of an individual's life experience into the social generalisations that these classifications rely upon. But most significantly, these social labels affect a personal distance which complements the anonymity of legal practices. They are intended to objectify, to distance the jury from the witness, the witness from the counsel, and the witness from her own experience.

The jurors need a 'victim' and a rapist, but above all, they need a crime they can identify as rape. These broad classifications are foregrounded within the opening address by the Crown, as the "anticipated categories" for interpreting this experience. The elements of the crime are both emphasised and substantively contextualised, creating an expectation about what should be heard in Sara's account against which what she says is to be evaluated for its truth content. This process of comparison and evaluation requires some work on the part of the jurors, as contextualisation draws on inference to causally interrelate and construct a coherent account. Both Sara and Lou deploy violence as the explanatory thread that integrates these events into a coherent account. But both contextualise this violence within different parameters. They appeal to broader, more general classifications to locate their individual experience within wider patterns of social explanations.

Sara begins her account with her definition of the status of their relationship and her position within it as exemplified by this incident. She claims distance from Lou and indirectly cites prolonged violence as the cause of their separation. Her definition of his behaviour as violent receives support from her account of his rapid escalation from verbal abuse to violent assault during the confrontation in the hotel, and his subsequent acknowledgement of this assault. The assault in her home becomes an extension of this behaviour, indicative of his attitude towards their relationship. In her account this episode is characterised by humiliation,

intimidation, enforced submission. Her status is that of 'victim'; she is subjected to prolonged abasement and subordination by his physical and emotional abuse.

There are some empirical factors that have the potential to buttress her credibility. Photographs are introduced, showing Sara's injuries the morning after the assaults. Her torn nightwear is produced, to be displayed, and passed around for individual examination. The medical testimony is inconsequential but at least consistent with what is depicted in the photos. Sara verifies the subjective elements of the crime by confirming her expressions of non-consent to sexual intercourse. She is formally required to negate a free and voluntary involvement in the incidents she describes.

To support an interpretation of domestic violence defence shifts the focus away from the incidents to the relationship between Sara and Lou after these incidents. For these events to be identified as 'a domestic', violence has to normalised as part of a contractual relationship between Sara and Lou. Secondly, this has to been seen as an ongoing relationship, of which violence is an accepted part. But primarily, Sara's status as 'victim' requires contradiction, for agency is vital for the attribution of both responsibility and blame. Sara is constructed as being both autonomous and self-determining, in control of her own environment and all those within it. This reconstruction is paralleled by a redefinition of her relationship with Lou, privileging emotional volatility. These lines of inference merge to constitute Sara as the active agent, the initiator of the violence in these episodes, while Lou is the passive agent, forced into reacting by her actions.

D ... when you went into the front bar ... you found Lou with his arm around Janet. ...
D You saw Lou with Janet ... You said, "Are you fucking your mate's woman while he's in jail". ...
D You got into a fight with Lou in the front bar of the hotel. ...
D See - I suggest that after you started fighting between yourselves ... it started by you saying something about Janet. ...

D In the front bar of the hotel you started pulling at Lou's hair, didn't you. ...
D While you were in the front bar you took out the knife and you stabbed Lou, didn't you. ...
D You stabbed him in the hip in the front bar, didn't you [Ha 49-50].

Once again, Sara is the focal point from which all action and causation flows. This list of accusations puts forward her actions for normative evaluation, while constructing these actions as inferentially influential in grasping what these allegations are about. These speculations are about character, the nature of the woman and thus, the relationship. Sara is responsible for the confrontation and its escalation into assault, which accords Lou right of reply, within the context of an egalitarian contract:

D ...why was it necessary to drag your *de facto* into the men's toilet? Why did you do that.
W Because she grabbed me hair and spoilt me night out. ...
W Well she was violent at me the whole night. ...
W Waved a knife [in my face].
D Any other reason ...
W Well she accused me ... [said I] had me arm around another girl ... put me on show in front of a big mob. - So I was intoxicated and lost me head a bit [Ha 65-6].

Lou's explanations mobilise categories of gender, race, contract. His assault is in response to her provocation and her agency, and on his account this is a normal part of a regular cycle. At the house reconciliation flows naturally to contextualise this incident with his version of its history.

W ... I asked her why she was accusing me all the time and she said, "Why do you bash me up".[Ha 48]...
W ... this is not the first time that this has happened - that I've bashed her and had sex with her [Ha 73].

Lou's claims for truth draw strength from two sources. Firstly, the empirical support that should be forthcoming if Sara's account is to be believed. Most particularly, argues defence counsel, there are not enough injuries to support the physical abuse she is laying claim to.

D ... Do you think that those photos are in fact of 5 - 7 hours of continuous physical assault? Or are they more likely to be the short but none the less brutal assault of the hotel? ... As painful, as serious as they are - are they the result of a protracted brutalisation? Is it not more likely that the evidence of

your eyes is more consistent with the evidence of the accused - that that was caused by the assault at the hotel. ... [Ha 5].

This appeal implicitly posits an *a priori* assumption about what is the appropriate level of injury, given the description of the rapes. The defence counsel puts forward a conceptualisation that is uniform, accessible and agreeable to all, to argue that Sara's injuries are insufficient for the violence she is alleging, but sufficient for the assault Lou is acknowledging, as if there is some objective criteria naturally implicit within individuals that monitors such occasions, without questioning how these assumptions arise, to be authorised, to take root as agreed facts. Thus his appeals deflect reflection on the locations where such suggestions are regularly made, to be substantiated experientially by one woman's life circumstance, thus confirming the validity of the evaluative criteria, while authorising its right to define the truth of another woman's injuries.

Each of these competing explanations is premised upon a particular point of view, contingent upon categories of reception for its conditions of existence. Lou does not need to prove his version of this incident directly. Instead this is achieved by extending the parameters of the circumstances explaining the events. He confirms the coherence of his account by demonstrating the illogicality of hers. Smith uses the term "contrast structures" to describe how the form of what is said can influence interpretation by playing with contradictions (1990:33-45). This is a strategy that relies upon tacit knowledge, upon the juxtaposition of inappropriate images in relation to a particular conceptualisation. In this next segment, the first questions set out what is to be considered as the anticipated response of a woman who has been raped. These statements establish the context within which what follows is to be compared:

D It was - er - your idea to call the police because it had been such a horrible experience at your house. - Is that your evidence? ...
D That he'd raped you several times and he'd been most [violent] ...
D Ok - Threatening to kill you and threatening to do other things as well. ...
D He's been back to your home a lot of times since last year. ...

D He's been back a lot of times when you have not reported him to the police. ...

D He was ringing you up quite a lot at home wasn't he. And you were ringing him. ...

D He was living at Packham wasn't he? You were ringing him at Packham. ...

D There was a phone on at Packham and you were ringing him there. ...

D He would catch a train down. ....

D He slept there didn't he? ...

D Not only did he sleep there but you let him have intercourse. ...

D You deny sleeping with him do you? ...

D You deny him staying there overnight. ...

D You deny him staying there at any time after 4 August [Ha 72-3].

This building block assault relies upon established categories and classifications to discern and appreciate this contradiction. Procedurally, it deploys an accumulation of images to construct and confirm a reality wherein proof on one component - Sara saw Lou once under any kind of condition - becomes proof of the total description. The contradiction between what her response to him should be after rape and the ongoing relationship Lou claims it to be is confirmed by a dated two minute video segment, depicting Sara and Lou arriving at her mother's house some months after the incident. These are incidents occuring after the rape which become instrumental in deciding if it was rape. They implicitly rely upon fixed ideas of what rape is about; how women respond and what a rapist is like. These regulated images are represented as singular, uniform in their characteristics, and therefore, clearly discernible to all, as if this task is inseparable from the gender of the participants and the gendered nature of the relationship involved. But, above all, they privilege the notion of aberration, the sexual deviant distanced from 'normal' social relations. With the defence expansion of the circumstances within which this incident is to be interpreted, the prosecutor dialectically now claims the right to put "the full story". He attempts to introduce numerous statements constituting a police documentation detailing incidents of harrassment and assault that have occurred since the rape in August:

P ... defence have sought to paint a picture of [a consensual relationship] ... If the jury are confronted with detail from one side, then fairness dictates they ought to get detail from the other side ... [Ha 89].

But fairness is outweighed by form; material cannot be introduced in re-examination which has not been put in cross-examination:

J ... some of the things said were pretty meaty and dangerous ... hasn't had the chance to cross-examine at all ... They're such meaty matters it seems to be unfair to the accused [Ha 92].

Sara's statements get laundered of all but the date, the occasion, her practical response. She admits now what she denied yesterday, that she has seen Lou after the rape. But the circumstances of these meetings remains ambiguous, embodied only in Lou's content.

Prosecution and defence compile competing versions of how the incident alleged to be rape is to be contextualised. These versions have the potential to do no more than persuade, as ultimately the jurors construct their own version of what happened, in which they privilege and associate their own compilation of images. The judge confirms these sense-making practices in his final address to the jury, with his distinctive juxtaposition of image and interpretation:

J ... bearing in mind what happened at the hotel ... really brutal assault of Sara, you will have to consider that not very long afterwards she willingly engaged in prolonged sexual encounters ... took his penis in her injured mouth and willingly knelt on the floor - not withstanding her injured knees ... As men and women of the world, you will know that people do many strange things. - But do you think the defence version is a credible version on the circumstances [Ha 34]?

CONCLUSION

Rape interpretations are politically constructed and highly contested in their inclusiveness of particularity, but the social and institutional processes involved in deciding rape definitions are largely taken for granted. Decision-making is legislatively consigned to the juridical field which has the authority to impose a set of objective power relations on all who seek its legitimation. These relations are

premised upon the appropriation of the right to specify the nature and character of sexual offences. This right to impose conceptual definitions is contested institutionally, over issues of relevance and admissability. But it is accepted as a legitimate exercise of power, by those these definitions are imposed upon. These power/knowledge relations acquire a materiality when institutionalised, which is expressed within both the objective relations these locational positions pre-ordain, and the conceptual boundaries their classifications impose. These power-effects are materialised within personal relationships yet they are irreducible to personal expression, as they remain embodied instead, within the practices and procedures such relations presuppose.

Pre-eminent within this field of locational positions is the institution of law, as the legitimated discourse on sexual offences. The legal system has the authority to instigate its own definitions and classifications, together with the practices to substantiate their existence. This conceptually and procedurally makes all interpretations of rape subordinate to legal decisions, and allows the legal system to be unrivalled in its constitutive ability. This appropriation of institutional authority is obscured by the integrity allied with legal knowledge. This accords the legal system the right to specify the nature of the 'natural' characteristics and conceptual categories associated with sexual offences, and allows these definitions to be embodied with the integrity of law. Strategically, the prosecution of sexual offences, constructs women's credibility as the 'natural' focus for testing the integrity of sexual allegations, and it is this investment of institutional authority that I use in the next chapter, to contextualise a more extensive examination of the explanatory forces of law as an institution.

NOTES

[1] Estrich (1987) is an exception to this with her critique of the propagation of exclusions by legal knowledge. An underdeveloped criticism comes from Russell (1975) and Kelly (1988) who worked as counsellors in Rape Crisis Centres. They both examine the homogenising effects of legal categories because of their inability to accomodate individual distinctiveness but neither reflect upon the consequences of this regulation nor what makes it possible. Adler and Lees have the distinction of writing about rape and law from trial attendance. Sexual assault trials usually allow the women involved the choice of a closed court when giving her evidence which makes access to her oral testimony a matter of judicial discretion and her consent, a secondary curtesy. A closed court restricts public admission and excludes the woman from recounting events in front of school classes on legal excursions or the 'raincoat' brigade of men who frequent sexual prosecutions for the legitimated pornography it freely provides. But it also makes the production of this knowledge privileged and usually accessible only within the objectivity of texts. These trials rely on performance to persuade and the critical effects of this on knowledge is absent in print. 'Rhetorical persuasion' is a significant medium through which a woman's debasement is conducted and it has the potential to transform what in writing, appears bland, even inconsequential, into harrowing humiliation.

[2] My understanding of discourse includes a general sense which refers to the calculated, linguistic expressions of interpersonal relations; and an analytical sense, which indicates the ways in which these expressions are structured in particular ways, independent of individual action or intention. It is this latter sense of discourse that formulates the constraints and possibilities about what it is possible to say and think about legal issues. In turn, these legal parameters constrain and shape what it is possible to say and think about sexual assault.

[3] Fieldwork was carried out between November 1990 and March 1992. All reference to laws pertain to that period.

[4] The following and subsequent transcript material from trials is a combination of my own shorthand transcription supplemented, in some instances, by access to transcripts through either the generosity of individual judges or counsel. It includes notational reference to witness, prosecutor, defence counsel and judge. When transcribing court proceedings, my rudimentary skills fell far short of the level required to detail paralinguistic forms, although a dash (-) is used to indicate a pause or silence; the convention of (...) is used to indicate where passages have been deleted, and my paraphrasing is circumscribed by brackets [ ]. All personal and locational names have been changed within these texts.

[5] Deviance is predicated upon difference and relies upon definitions of behavioural transgression to circumscribe the limits of social enclosure (Foucault 1965). As a descriptive category it is recognised as being inherent within the social response to the actions of a person rather than within the behaviour itself (Durkheim 1933, 1938; Erikson 1966; Cohen 1971; Ben-Yehuda 1985). Its status is deemed to be the consequence of social negotiations and its expression is historically circumscribed (Cohen 1971; Douglas 1970) and culturally specific (Douglas 1970; Sanday 1986, 1990). But within each cultural spectrum the classification is used unproblematically. The transactionalist emphasis on negotiated interpretations obscures the privileging of particular assumptions within contested meaning, which allows a perspectival interest to appear as a consensual, collective objective. It is this process that allows male definitions of sexual deviance - extreme physical assault - to iconically decide the integrity of women's claims about rape within a court of law. I take 'deviance' to be an object of knowledge constituted out of social and political interests and the critical issue in relation to rape, is whose interests are served by using this term to connote marginalisation and aberration with rape.

[6] Bourdieu approaches field via the constitutive potential of language which generates relationships expressed within the objectives and interests of agency but is irreducible to this level of personal intention or even the direct interaction among agents and institutions. This contrasts with the conceptualisation exemplified by Transactionalism that included unintended consequences but whose primary motivation stemmed from agency, interests and objectives (Kapferer 1971; Swartz, Turner and Tuden 1966; Swartz 1968). Transactionalism conceived of power 'from the top down', as a property accumulated and negotiated by calculated action and expressed through either direct coercion or the consensus of legitimacy. Bourdieu conceives of power as generated by the relations engaged within a field of forces when force means the imposition of a point of view as a universal knowledge. Fields, he argues, are propagated primarily by a logic that constitutes a particular discursive object. His notion of strategy is neither the product of an unconscious programmatic nor the product of a rational calculation. It is knowledge that stems from Bourdieu's definition

of *habitus* as "society written into the body" which makes it the consequence of a practical sense, a 'feel' for the particular terrain and, as such, presupposes an integral capacity for improvisation within the constraints of the occasion (1990a:63). This makes field relations both fluid and systematic; historically structured yet also specific to the occasion.

[7] Bourdieu's conceptual cluster of *habitus*, strategy and symbolic power provides a means of counteracting what he terms the "privileging of substances" (1990a). This is a phrase he uses to critique the methodological practice of taking the theoretical category to be a priori, as if it had a reality independent of an actual classification which is accredited with agency and prescriptive potential. The institutional role is an example and is exemplified in O'Barr's (1982, 1984) attempts to explain the relationship between language and power by isolating 'empirical' markers of specific cultural, class or gender identities, as indicators of 'powerful' or 'powerless' positions in court. His approach conceives of power as a property of linguistic forms and acquirable by calculated manipulation. It grows out of an understanding of 'role' as programmatic, that compilation of statuses and practices most clearly enunciated by Goffman (1961) and utilised within transactional analysis (Barth 1966; Blau 1965; Kapferer 1970) as the means by which power as a possession, could be intentionally acquired and strategically wielded by individuals or groups. This method privileges a 'closed' interactionist emphasis with 'scripted' performances and propagates a building block approach to the relationship between structural dimensions of instituted situations and the social relations these make possible. Bourdieu's definition of symbolic power locates the 'power' not within status or the 'symbolic system' - the ritualistic enactment of a role - but within and through a given relation between those who exercise power and those who submit to it (1991:170). Ideas about status emerge out of a collective understanding about the position involved, which is substantiated primarily by the common-sense knowledge acquired through the life circumstances of *habitus*. The 'power' of a judge resides not merely within the institution of which he is agent, but within a belief in the need for a legal system which pre-dates any ritualised statement a judge proclaims. Part of this knowledge involves recognition of the particular institution or position and how the indicators of power are made concrete through symbols, like robes, uniforms and ritualised forms of interaction. Knowledge of this position is inscribed within legal relations and is systematically reproduced each time legal relations are engaged, independent of the intentions of those involved.

[8] Smith (1990:68-74) makes the point that the official account creates an administrative continuity out of reports and records that has its own internal temporal structure which differs from experiential temporality. This "organisational time" is able to support bureaucratic claims of objectivity precisely by its representation of continuity.

[9] Smart (1989) expands on this interpretation, particularly in relation to the anti-pornography debate. Soothill and Walby (1991) appproach similar issues by analysing media representations of sexual offences in the United Kingdom.

[10] The police do not necessarily act, as Wilson (1978) and La Free (1987) claim, as a gigantic filter or informal gatekeeper in rape complaints by only investigating those allegations that meet "their stringent legal requirements and views about what is and what is not the truth" (Wilson 1978:20). The prosecution of allegations has more to do with the fact that the police cannot be institutionally separated out as autonomous from the juridical field but rather, need to be critiqued within their relationally-subordinate position to the legal institution.

[11] Hirst (1985) looks at how discursive power relations are inscribed in their institutional or situational spatial forms. This way of perceiving the organisation of space is Foucault's (1972) "enunciative modalities", the attachment of social discourses to particular sites and roles that both constrain and contribute to a discourse's efficacy. This creates a functional relationship between the structural ordering of space and discourse as a schema of rationalisation which allows space to be governed by the expressive relations of ritualised performance. This symbolic representation of discursive power relations is integral to the practices involved and is redundant within the expression, 'justice not only must be done; it must be seen to be done'.

[12] Currently all Supreme Court judges in this state are male.

[13] The story is told that when some family court judges in one state exchanged their robes for civilian clothes to personalise what is a depersonalising experience, their statements were taken as individual opinion rather than judicial rulings, and subsequently resulted in personal bombings.

[14] A man attending a notorious trial, who repeatedly marked his entrance and departure in court with genuflexion and a sign of the cross, was ejected by security staff for the suspicion his actions aroused.

[15] Caputi (1988) argues that 'victim' presupposes a class of women victimised by the crime and are thereby exonorated of any responsibility. But it also constructs by exclusion a class of women whose behaviour or

character makes the same actions acceptable. This creates the space for the incident to derive its criminality from her provocation. Mackinnon (1983:95) makes the point that it is precisely because women are dichotomously subdivided into 'good' and 'bad' women that the space of the 'victim' is constructed.

DISCOURSE ON DISTURBED WOMEN

This chapter examines more directly, the relationship between legal knowledge and understandings about sexual offences, to consider its engagement within power relations. Legal power is able to exercise its authority from 'above' and 'below'. It relies upon a totalising representation of prohibition, injunction and sanction to regulate a population within legitimated zones. It also relies upon the propagation of individualising techniques, to provide the particular categories of knowledge together with the practices they organise, to regulate a correspondence between, or at least, a compatibility with these legitimated zones and how sexual relations are thought about generally. This dual process of subjection is made possible by the cultural interpretation of the relationship between the legal institution and the population it rules. Legal arbitration is recognised as a legitimate delegation of power because of the ways in which the legal institution is perceived. Thus, the techniques of subjection exercised within this power relation are misrecognised. This section considers, therefore, the ways in which the meanings and values associated with the institution itself have the potential to influence the nature of interpretation by the power relations they make possible and propagate.

The legal institution is the singular state apparatus authorised to impose form and regulation upon the life circumstances of the population in general (Bourdieu 1987; Smart 1989; Douzinas 1991). In return, the state population anticipates a politically neutral and autonomous legal system, procedurally capable of impartially and justly resolving antagonistic disputes. The institution relies upon a discursive construction of power as authority to rule its citizens by prohibition and sanction (Foucault 1980:109-133, 1982). Power in this sense draws its meaning from Weber's (1947) distinction of

two understandings of power. Weber differentiated between a representation of power as an oppressive domination, which is characterised by the objectives of one person or group over-riding the intentions of another; and power as a legitimated domination, wherein the authority of an individual or group is consensually recognised, accepted and obeyed. Juridical power relies upon a legitimated authority. Its effects are accomplished not by overt oppression or coercion, but by presupposing a contractually agreed-upon delegation of authority. The legitimation of its mode of domination is premised upon the recognition and acceptance of the institution's right to rule, by those upon whom its prohibitions are imposed.

Bourdieu (1991:170) argues that this form of power is exercised through complicity, rather than the consensus Weber unproblematically presupposed, as its conditions of existence are irreducible to either notions of false consciousness or social mores. Weber identified legitimated power as a property of the institution itself, to be enacted by its representatives within their respective roles. This approach perceives legal practice to be no more than a ritualised representation of a power institutionally enshrined and, thus, confined in its effects to the interactional relationship. Moreover, this is a static notion of power, uniformly exercised and enduringly unvariable. In contrast, Bourdieu argues that legal authority resides, and is defined within and through a given relation, between those legitimated to rule in the area of law and those who accord with this direction.[1] Its power effects are unencumbered by any locational or temporal parameter, as these are determined by the extent and composition of those engaged within the particular legal problematic.

This is a representation of power that draws upon particular conceptualisations that have the potential to both attest to and obscure its power relations. Juridical power is objectified as a purely negative entity whose mode of operation relies upon regulation and repression, around boundaries either tacitly complied with or legally enforced. Either way, its logic and forces are totalising, imposing a mode of domination that

contractually obtains between the institution and individual. It has a singular, inherent rationality that morally vindicates its existence, constituted out of its formal delimitation, the area of law, and its centralised location, the legal institution.

The justification for this form of legal regulation is predicated on the existence of a 'public' or 'the community'. "Public interest" is acknowledged as the institution's rationalisation and the existence of this nominalisation is a precondition for the rule of law. The 'community' is perceived as a factual reality and accorded a social efficacy that makes it a force to confer or contend with, as these following statements indicate when judges remind jurors of their obligation to this population:

J You have obviously a responsibility to the community, to see to it, so far as is possible, that persons are proved to be guilty of crime are convicted. ... it's obvious that in cases of serious crime ... the community looks to the jury to be fearless in the exercise of its functions and responsibilities [Mo 2].

J The community or, at any rate, all right-thinking people in the community, deplore sexual abuse of children. All right-thinking members of the community want people who are guilty of that caught and dealt with, but it wants them caught and dealt with if, and only if, guilt is proved beyond reasonable doubt [Ca 3].

A judge acts as legal spokesperson for this population of "right-thinking people"; he speaks for them and his statements are addressed to them, as rulings made on their behalf. The legal point of view expressed within legal judgements is perceived to be capable of transcending the individual perspective to contain within an institutional interpretation an accordance with a community perspective. Power, in this sense, is represented as being within the relational position itself, expressing and renewing with each pronouncement, the meanings and values allied with its authority. It is this position, the juridical relation and what it represents, that allows the objective dimensions of institutional relations to inform on what are social/symbolic interactions and to actively influence the forms these interactions may assume.

Discourse provides access to the conceptual material from which meanings are made and circulated. In its most general sense, discourse establishes the broad generic parameters of what it is possible to say and think about particular issues. It is when a discourse's primary locus of production is institutionalised that a specificity becomes consolidated, to substantiate discursive constructions with the sense-making conventions of the institution (Bourdieu 1991:67-76, 1987). This process embodies linguistic categories with institutional relations, to make meaning reflective not of the person but of the position the person is in (Bourdieu 1991:75). This allies the power institutionally enacted with the position institutionally endorsed, allowing both the person and the institution to operate as one. Included in this reproduction is the represention of the cultural and social evaluation of these relations, and thus, the justification of the conditions they rely upon.

Discourses are able to reflect within the expressions of interpersonal communication, taken-for-granted understandings about the values associated with knowledges and relations. These tacit representations constitute particular ways of understanding interpersonal situations that have the potential to prefigure ways of interacting. Courtroom proceedings may be taken-for-granted as appropriate but there is also no space within this environment for disagreement to be voiced. The ritualised regulations and interactional procedures are incontestible and always backgrounded by actual penalties to ensure their perpetual sacrosanctity. When the judge says to a witness, "I direct you to answer it [the question] yes or no" the witness replies "No", having no choice but to realise the proper way for a legal witness to respond to legal questions and to a judge. Power exercised in this way, within a relation, is a force or a mode of action which does not act directly upon the person but acts instead upon their actions, shaping them in particular, predictable ways (Foucault 1982:427; Bourdieu 1991:167).[2]

This compliance with juridical authority absorbs within the action the recognition and acceptance of legal constructions as the legitimate medium for legal prohibition, allowing acquiescence to naturalise the conventions relevant for the reproduction of legal relations and practices. Thus legal legitimation stems, not as Weber (1947) suggests, from *a priori* norms of a transactional relationship, but from the values propagated by legal practices to validate the institution's claims. 'Consensus' becomes a result of legitimated power, rather than part of its basic nature.

The legal system is perceived in certain ways which grow out of past responses to what has been historically 'naturalised' as legal practices. These understandings are manifested within courtroom relations, enabling them to reproduce and replenish the meanings of the past within present-day interpretations. Language has this ability to bring the past into the immediate situation, thus creating a background of taken-for-granted assumptions about legal arbitration that is already part of the meaning realisable within every trial (Bourdieu 1991:170; Smart 1989:9).

This is an authority that comes to language "from the outside", from the justification and evaluation of the legal position within its appropriate field of operation rather than from the institutional conventions enacted within the language itself, to make the position individuals occupy, inseparable from the institution it represents (Bourdieu 1991:107; cf. O'Barr 1982; O'Barr, Kramarae & Schulz 1984). Power is identified as legitimate if it is associated with the law and legal reasoning. A judge has the authority to sentence people in a court of law because of presuppositions about the values he embodies as agent of this institution. His statements are perceived as legal rulings deriving their authority and meaning from the institution as distinct from the individual. It is because his decisions are recognised as statements of 'law' rather than personal utterances that they are capable of enforcing consequences which cannot be ignored.

THE LEGAL FIELD OF INFLUENCE

The legal institution claims the right to specify the nature of knowledge about legal issues and its discourse is recognised as appropriate and acceptable for the issues involved. What is not recognised is that the authority to define the specifications of knowledge entails the right to formulate and regulate what is thinkable and unthinkable within the limits of the political objective. This allies with legal authority, the power to constitute the categories which make a social world possible by making it thinkable (Bourdieu 1991:127-135; Foucault 1979). For example, rape-in-marriage is a recent addition to criminal law which attempts to legally challenge the notions of women as property or possession that have been tacitly associated with the marriage contract. Prior to this legislation such challenges had no legitimated recognition. Rape-in-marriage existed as a personal problem and its private status made a generalised, social definition of it unrealisable (MacKinnon 1979:278; Kelly: 1988:141).

The representation of legal power as legitimated authority is premised on the restriction of the institution's field of influence to legal issues and legal practices. Foucault (1980: 1981:92-7) details a conceptualisation of power that has no single point of origin, but is to be found where ever it operates. He argues that discourse allows power to permeate the everyday, to be potentially everywhere yet constrainable within no one place or locus of authority. Power exercised in this way is sensitive to localised and fragmentary rationalities, as it constitutes the perspectives of postmodernist heterogeneity. Power is neither an institution nor a structure to be located and appropriated but a name to be attributed to a complex of relations. It is an ambiguous power that, temporally and spacially, is relatively autonomous yet able to colonise a range of problematics with similar resonances, as it operates within knowledge about social relations (Foucault 1979:78-108, 146-166). It is this approach to power that enables legal discourse to colonise non-legal fields and cross-fertilise, to

propagate and disseminate the practices of law within everyday relations. Legal discourse on rape-in-marriage draws upon discourses on gender relations, patriarchy, matrimonial rights and obligations to produce a legal definition of parameters applicable to social relations and, in turn, these discourses are drawn into engaging with legal knowledge, acquiring the authority of the law to buttress their social claims. All discourses are similarly multivocal and able to entertain a range of interests within their representations. It is this multiplicity of meanings and the relations their practices propagate, that constitute the foundations upon which totalising definitions depend.

Foucault argues that it is no longer possible to analytically assume a monolithic entity such as the State, or its legal delegation, is capable of absorbing the totality of power relations (1980:109-133, 1982:422). These representations of power can only operate on the basis of pre-existing power relations, as their hegemonic practices rely upon the discursive propagation of their claims among a multitude of sites. Constructs such as 'law' or 'the State' exercise what Foucault describes as a "combination of individualising techniques and of totalisation procedures" (1982:421). It is the juridical representation of power as repressive authority that obscures the 'productive' nature of the power effected by legal practices. For it is when such multifaceted resonances of discourse become institutionalised that their effects acquire a regularity and regulation, which allows discourse to absorb and reproduce within its social relations the objective relations of governmentality.

This power operates as a positive force, to promote and cultivate a particular subjectivity within the conditions of its own choosing. It endows individuals with a certain definition of experiential knowledge about sexual offences, whilst relying upon these definitions to simultaneously constitute individual subjection. Power in this sense, is neither an institution nor a force to be confronted; it is a complex of relations immanent within all relations yet constrainable within none. It takes the legal into the

everyday, to organise the knowledge 'the law' requires to legitimately rule over whatever can be constructed as legal issues about sexual relations.

The representation of legal regulation as a legitimate exercise of power requires the recognition of power as illegitimate to validate this delegation of authority (Fraser 1989). The 'community' is compiled, as the judge explained, of "right-thinking people", thus setting out, as self-evident, the division to effect the exclusions discursive regulation relies upon. Power is illegal if it is exercised outside of the institution of law. Illegal power is power which transgresses legal boundaries. These divisions represent what Foucault calls the "dividing practices", the creation of objects of knowledge through difference (Foucault 1982:417). As an organisational frame for thought, 'difference' propagates homogeneity through suppressing heterogeneity. It constrains interpretation within a universal opposition which conceptually neglects and negates recognition of differences within classifications, while naturalising the privileged comparison of one category against another (de Lauretis 1987; Derrida 1976).

These differentiations presuppose a set of shared normative boundaries allied with social relations, from which discrepancy, the anomaly of difference can be judged, as criminal, or deviant, or amoral, or improper (Foucault 1979:139-40, 193). It presupposes, as Foucault demonstrates, an *a priori* normality that integrates decisions about criminality with decisions on social conventions, allowing knowledge about rape to become enmeshed within knowledge about consensual sexual intercourse in the search for the integrity of its truth. It naturalises the need for normative evaluation in the legal arbitration of sexual offences by allowing behavioural transgressions to become isomorphic with the transgressions of the law (Foucault 1979:179). In this way moral judgements are able to residually underpin legal judgements, as legal discourse dialectically engages in the propagation and reproduction of the non-legal knowledge it needs to verify its legal claims.

It is this redundancy of legal representations within semantic and normative classifications that autonomously reproduces institutional relations, irrespective of the intentions involved. All those who practice law appropriate the institution's representation. But the power exercised through legal practice is irreducible to its personal embodiment. These categories of perception from which meaning is constructed are also able to reflect the nature of the relations in which and from which they emerge. This makes the analytical issue of reproduction irreducible to either the micro-level of individual intentionality or the macro-level of institutional structures, as both are actively implemented within each others effects. A judge's authority is inseparable from his pronouncements and each and every judicial pronouncement actively reproduce the institutional authority he absorbs.

In this way, legal power is reproduced and reinforced in social relations. Its efficacy exists and is propagated within its relational nature, thus enabling it to remain autonomous of its substantive realisations (Foucault 1979, 1980a, 1982:426-8; Bourdieu 1991:76). This approach to meaning and interpretation interlocks relations of communication with relations of power, as what are perceived to be culturally relevant patterns of perception privilege a particular value system as the natural order of affairs. It introduces into the analysis of discursive relations some notion of specificity, to consider who has the right to manufacture and impose the meanings that define the nature and character of particular issues (Bourdieu 1991). From this perspective, the explanatory force of the ideas proposed stems not from their truth value but from the values of those with the power to decide how this truth is to be understood. Simultaneously, these classifications contribute to the maintenance of the order of governmentality from which they derive their authority, as they reproduce the social inequalities effected by these forms of knowledge.

THE MISRECOGNITION OF LEGAL POWER

The legal institution is able to exercise its specific power only to the extent that its authority is recognised and taken-for-granted as legitimate; that is, to the extent that the authority of its classifications and categories of knowledge are never questioned, to reveal its arbitrariness and, thus, the inequalities legal practices manifest. This representational obfuscation enables the legal system to transform what are no more than social classifications into legal classifications, to be presented unproblematically in court as neutral, objective categories of knowledge. These categories are experienced as totalising hierarchies, as they unproblematically contribute to the production of schemata compatible with, or even corresponding to pre-existing ways of interpreting situations (Bourdieu 1987:839). Their definitions are accorded a natural integrity, so that the social value, for example, truth and credibility, comes to be identified with the personal value - women lie about sexual relations.

This is a conceptualisation of discourse as 'active' and able to effect real consequences within life situations (Bourdieu 1987, 1991:127-9). Discourse has the power to act upon reality, by acting upon its representations, as the legal classification transforms the woman concerned. It transforms the representations others have of her and the attitudes they adopt towards her just as it transforms the representations she has of herself. As with all social representations, these categories are simultaneously descriptive and prescriptive, for they take the life circumstances of arbitrary individuals and generate a class generalisation which is then used to interpret the life circumstances of arbitrary individuals. This mode of subordination is dually constituted as it endows the woman with a certain kind of subjectivity which is able to simultaneously operate its own subjection. In this way, the definitions and conflicts of individual life situations isomorphically resonate with the logic of current points of political conflict (Bourdieu 1990:134). An example is the complaint of rape. The immediate response of someone sexually assaulted is legally prescribed, circumscribed

with a factuality that operates as an injuction, spelling out what a raped woman is expected to do if she has been raped. In a language claiming neutrality, legal discourse draws upon a knowledge of rape constructed around a particular normative regulation, to put forward its point of view as an objective fact:

J It is most likely that if you have been raped, then you will want to tell someone about it immediately [Mu 24].

D If someone has been raped and they see someone they feel comfortable with, they are likely to complain to them and complain to them in terms they will understand ...[Ha 8].

J It may also be of significance that she made a complaint of rape at the earliest reasonable possibility ... She raised the hue and cry ... She made a complaint at the first opportunity ... That is what you would expect to happen [Mu 78-84].

The authority for this category of knowledge is derived from the incidents of rape that reach the courts. The institution constitutes this arbitrary classification which is then substantiated by its own practices, thus legitimating its instigation as a category of knowledge. It is the legal institution that defines the category and then evaluates the experiences of women to distil the information to support its classification. This, in turn, legitimates its use as an evaluative category in future rape trials, as indicative of what rape is about.

This is legal knowledge masquerading as sociological knowledge, proferring an emotive response with an empirical base as a uniform characteristic of those subjected to rape. The prescription denies the individuality of women's experience, through circumscribing and thus containing the nature of experiential objectification. This definition is predicated on an assumption that women respond to rape in a singular fashion. It posits a universalised 'woman' as the homogeneous entity against which the particular person is comparatively, empirically evaluated for 'genuineness'. If the woman allows time to elapse before she 'complains', then a gap emerges requiring explanation, for her atypical behaviour makes an allegation of rape improbable. This shift from how 'the law' says a woman who has been raped responds, to how a woman who has been raped actually responds, is what Bourdieu (1991:129) describes as the

power of constitutive naming, for her conceptual expectation slides from the existence of the descriptive category to the existence of the category described. In this way, the legal edict contributes to the construction of an image of what a 'real' rape victim is like by sketching the scenario that 'real' rape plays out, as this defence address clearly illustrates:

> D How would you expect Penny to have acted if indeed she was a victim of a rape? ... How would you expect her to behave ... doing everything she could to get him off her ... wriggling as much as she could ... trying everything she could to scream ... doing everything she can to stop what is happening to her ... when he's gone ... Penny - who's horrified [lies there a bit] and then does nothing! ... How would you expect her to behave? She may well have taken a moment [to recover] but wouldn't you expect - the first thing she would do - would be to go and see her mother. ... Her evidence doesn't quite fit ... You would expect [her to complain immediately]. You've got to be a bit uneasy ... because if she had consensual sexual intercourse she had nothing to report to her mum ... no urgency. Isn't that something you would expect of a woman who had been the victim of a rape? ... She didn't complain about it to the police after ... She blurted it out in an argument with her boyfriend ... He says something about one of her friends and she's trying to think of something she can retaliate ... How does she save face with Munt? "I was raped" ... She's stuck with that ... The police are called ... she has to maintain that allegation ... [Wi 12-14].

The ritualised refrain of "How would you expect her to behave" appeals to an *a priori* objective category that gains its integrity and truth from its distance from the anticipated behaviour of a woman after consensual sexual intercourse, as if both behavioural responses are predictable and uniform events. The response of a 16 year old girl at a car park with five "lads" should coincide with that of the woman in her suburban home after her ex-*de facto* has sexually assaulted her [MJ 37]. Penny tells her mother several hours later that she "didn't want to talk about it". When Sara*'s de facto* rapes her, she doesn't report it to the police until 3 months later. Another woman initially "didn't say anything because I didn't want everyone to know what happened" [Co 16]. When a RAAF workmate rapes Tina it takes her 24 hours to decide "what to do about something like that".

Legal knowledge of rape comes from the knowledge of its own history, by the use of previous criminal trials as authorities to articulate the categories into which the current experiences are accomodated. It is knowledge extracted from a very selective

source, constituted exclusively from reported rapes that have been prosecuted.[3] Yet the principles extracted from these past legal experiences of rape are construed as general principles applicable to all experiences of rape, and from this it can be extrapolated that they also reflect what is potentially realisable within every rape trial. The authority for these definitions is 'the law', discursively constructed as an historical subject to be accredited with both agency and liability, and is thus able to justify its decisions without actually accounting for anything.

In prosecuting sexual offences, legal techniques systematically elaborate a gender division that naturalises the definitions of difference they introduce. Lauretis reminds us that gender is a term used for the representation of a relation, to also designate inclusion within a particular class or group (1987:4-5). It is a classification that again introduces into the interpretation of sexual offences, the relation between one socially-constituted position and another, a position within one group, in relation to another pre-constituted group (Bourdieu 1991). Gender represents not only an individual but also a social relation embodied with taken-for-granted preconceptions, as the gender identification of a person draws upon a multitude of sites and discourses to signify its representation. This is a more insidious form of division, so institutionalised that it is able to penetrate most relational classifications, yet not formally acknowledged as an institutional rationalisation. For example, the label 'rape-in-marriage', like 'domestic violence', obscures the actual nature of this crime by implying, as de Lauretis points out, that both spouses equally engage in sexually assaulting the other (1987:34). She argues that such terminology is able to deny the social basis of sexual violence by subtly universalising the category within claims of objective neutrality .

In prosecuting sexual offences, the legal system relies upon a range of regulatory practices to naturally 'en-gender' oppositions as measures of difference or criteria of exclusion, all within the moral framework of truth. This allows the gender bias of sexual prosecution to be built into the practices and methods by which knowledge is

obtained during a trial, as an obvious and essential procedure for deciding the truth about sexual allegations.

The dynamics of the juridical field generate a focus on women's credibility, as the elements of the crime reduce questions of truth to questions about interpretation. Strategically the issue to be determined is not whether the man is a rapist nor even did he rape the woman, but was the woman raped; she is the subject of an anonymous action. The gender differentiation of the crime naturally constructs the woman's testimony as the critical evidence to be tested, even though legal procedures do not discriminate between how men and women perceive sexual relations. Thus, the possibility does not arise that neither the woman nor the man is lying, that what is rape to her is consensual sex to him. This approach to judicial proof via personal credibility is buttressed by the adversarial nature of this justice which pushes interpretations of what occurred into the moral dichotomy of truth and falsity, to ally with the personal truth, the integrity of legal truth.

Legal practice constitutes credibility as an innate definitive characteristic of women alleging sexual assault, in contrast with its circumstantial confinement with men. Male dishonesty is constructed as stimulated by, and causally linked to the circumstances within which they find themselves and remains independent of their natural selves. Proof of one woman's unreliability is taken to be proof of a generalised claim about women and credibility, as the individual woman is equated with a general classification, a class. This legal definition is then used hermetically to justify the legal construction of those alleging sexual assault as an inherently dangerous witness. This allows women as a class, to be pronounced procedurally dangerous because incredibility about sexual relations is part of their 'natural' natures.

This is a socially constructed difference between men and women that is institutionally accorded the integrity of a natural quality which, once introduced, to be

legitimately institutionalised, becomes ritualised into prosecutionary proceedings. In this way, legal practices are able to assign properties of a 'social' nature as if they are properties of a 'natural' nature (Bourdieu 1991:118). By normatively evaluating men and women differently legal practice circumscribes the differentiation it instigates, according it an *a priori* existence that legitimates its claims of objectivity with the authority of common sense.

THE INHERENT DANGERS OF SEXUAL ALLEGATIONS

In prosecuting sexual offences, certain moral positions 'emerge' out of evidentiary procedures for the participants to occupy. These positions are not necessarily intentionally constituted but rather, emanate from the way a particular bias or mode of seeing is able to inform on how issues are thought about. As a consequence, the legal system is able to classify those alleging sexual assault as a special category of witness and, in doing so, constructs women as a special category of witness in relation to credibility. By exclusion, this attaches to those accused of sexual assault, who are usually men, particular notions about credibility. So what is said in court by participants is already legally endowed with particular kinds of meaning about truth and honesty.

Sex offences span a legal spectrum which includes unlawful sexual intercourse and indecent assault as crimes distinct from but also affiliated with rape. All are crimes against the person, characterised by the perpetration of acts either without the consent of the person, or against persons who are legally accredited with not having the power to consent to sexual relations.

There is a class of individuals legally regarded as being incapable of consenting to sexual relations. It includes children under the age of 17 years and those under the age

of 18 years identified as mentally incapable of understanding the nature and consequences of sexual relations. This legislation allies the responsibilities of guardianship with either a social position or a legal position. It explicitly creates a division between those socially powerless in respect of sexual relations and those in a relation of authority to this powerless population. It is the age of the person which has the potential to constitute the criminality of the action. In unlawful sexual intercourse, an act of sexual intercourse with a person below the age of consent is legally sufficient to constitute a crime.

Rape or unlawful sexual intercourse are by definition crimes of domination, subordination, submission, coercion and, as such, constitute the space of 'victim' for the person who experiences these crimes (Taussig 1987).[4] Yet the person who occupies the space of 'victim' is also required by law to adopt the position of complainant, the person alleging the commission of the crime. Procedurally, this joint occupancy by the single person is regarded as problematic, capable of constituting the credibility of those alleging sexual offences as an issue distinct from the general area of witness credibility that is debated in most criminal trials.

The legal system categorises all those claiming sexual assault as part of a "class of persons" whose evidence is rendered problematic [Do 27-28]. These are individuals whose lack of credibility is not necessarily obvious to, nor appreciated by those outside the law. For it is a lack of credibility that emerges out of the "experience" of the courts.

Scutt (1992:442) points out that included in this "class of persons" whose evidence is legally regarded as inherently problematic, are the accomplices to crimes, those who have participated with others in a criminal act. Their truthfulness is rendered questionable because of a perceived vested interest in the distortion of truth. In the

company of criminal accomplices are children, generally, and women specifically, in relation to sexual offences.

A jury trial manifests a division of labour; the judge is responsible for decisions of law, the jury is allocated decisions of fact. As part of his duty a judge is obliged to direct the jury on the way in which what is distinguished as non-legal forms of knowledge can be used within legal procedures. An example is the use jurors can make of a complaint of rape by a woman. Her allegation has no credibility as truth or proof of the experience she describes as rape, but it can be taken as conduct consistent with what the law says a raped woman is likely to do.

The legal direction on how to use knowledge, privileges a conscious approach to rationalisation in relation to decisions frequently arrived at unreflexively. It singles out particular areas of focus and particular ways of processing information as the prerequisites for legal adjudication, thus procedurally defining the institution's distinctiveness in relation to what is represented as the decision-making practices of everyday life.

Legal discourse privileges the institution's objectivity and apolitical impartiality as the basis of democratic justice. The rigorous regulation of legal administration by rules and methods is intended to minimalise the potential for arbitrary individualism. While circumstantially, each crime of rape may vary considerably the legal measures applicable to rape are perceived as constant, ensuring equality before the law. Such laws exist at the level of materiality but also at the level of discourse. It is this latter dimension which renders the former vulnerable to arbitrary interpretation, enabling the legal system to actualise an inequality through its practices.

The explicit construction of gendered positions represent the possibilities realisable within any trial on sexual offences. This inequality has the potential to originate from

two directions. It is manifested by evidentiary procedures as institutional practices are able to autonomously reproduce the unreliability attributed to those alleging sexual assault. Or it can be generated by the arbitrary individualism accomodated within the discrepancy between 'law' as representation and 'law' when practiced. The explicit gendering of positions does not necessarily materialise within every trial. It emerged in two thirds of all trials I attended, introduced by the judge, or by defence counsel, or by both parties in consortium. In the remaining trials, the assault on the credibility of those alleging sexual assault was individualised, emerging unproblematically as part of the process of 'testing' the particular person's evidence in cross examination.

Legally, a judge is obliged to draw attention to the potential unsafeness of the evidence of children. Section 12(3)(b) of the Evidence Act states:

> a person who has been accused of an offence and has denied the offence on oath cannot be convicted of an offence on the basis of the child's evidence unless it is corroborated in a material particular by other evidence implicating the accused.

A child's truth becomes credible only when it is corroborated by independent sources, that is, when the element of credibility is withdrawn from the child and attached to the material circumstances surrounding the child. In court, corrobation is defined as evidence from a source independent of the witness, which tends to materially support that person's claim, firstly, that a crime has been committed and, secondly, that the accused is responsible for its commission:

J The question is - are you satisfied beyond reasonable doubt that it did occur ... credibility is the critical issue in this case. It so often is in sex cases ... you must scrutinize the evidence of this case with special care. In particular, you must [scrutinize with special care] the evidence of the alleged victim ...the real question for you - Are you satisfied beyond reasonable doubt that what is alleged did occur? [Co 52;57].

Prior to 1984, it was mandatory for a judge to warn the jury of the dangers of convicting upon the uncorroborated evidence of all those alleging sexual assault. Again, it was the enactment of the crime itself that required independent substantialisation, apart from the person's claim to its perpetration. The reality of the

crime was legally considered unsustainable by the person's allegation because of the current institutional belief in the inherent unsafeness of accusations made about sexual relations, by someone who is also identified as the 'victim' of the crime. The explicit discrimination inherent in this legal dictum compelled the 1984 revision of the need for judges to warn jurors about the unsafeness of the uncorroborated evidence of those alleging sexual offences. Section 34i(5) of the Evidence Act currently states:

> In proceedings in which a person is charged with a sexual offence, the judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated evidence of the alleged victim of the offence.

While this ruling did not go so far as to revoke the need for jurors to be warned about the unreliability of the uncorroborated evidence of a child, in sexual offences generally, it became a matter for the discretion of the individual judge as to whether the circumstances of the particular case required some comment on the credibility of those alleging the offence, not as a dictum of law, but as a means of drawing jurors' attention to the fact that this question is an issue for them to decide. This revisionary direction separates the person from the position, the judge from the institution he acts and speaks for, to allow the individual to advise without instructing, in circumstances he legally decides are dangerous:

> It must be clear to the jury, either from a specific direction or at least from the general tenor of the summing up, that they are free to reject the judge's suggested approach to the evidence of the alleged victim or any views which he might express on such questions of fact. He must not convey the impression that the caution or warning is given as a matter of law. Subject to those considerations, he may give the jury a warning in the conventional terms or in any other terms which commend themselves to him (Pahuja 1987:125).

The revision of the Act extracts the generalised rule, that which is applicable to all cases, from its legal injunction, the explicit expression of the nomination embodied with the authority of the institution. But it reinstates this generalisation within the more individualised expressions of the particular judge. Statements made in the name of individual discretion are simultaneously statements made in the name of the institution. The discourse of the individual becomes enmeshed within the discursive

frame of the institution, to allow judicial 'discretion' to conceptually operate as legal 'doublespeak', as it conceals individual arbitrariness within the integrity of the law.

A jury trial concludes with the judge's summing up of the case which includes direction on points of law. It is the practice of some judges, prior to delivering their closing remarks, to confer with counsel in the absence of the jury, as to the appropriateness of what he intends saying. In this unlawful sexual intercourse trial the judge reads to counsel what he intends to say about corroboration, and the following debate emerges:

J ... in a case such as this which at the end of the day turns on the accused's ...[word against the complainant's] the allegation is easily made but difficult to refute ... It would be dangerous to convict on the evidence of the person who makes the allegation ... if there is nothing to confirm or support this evidence. ... The courts have much experience in dealing with these matters ... The warning that I have given is a product of that experience.

The judge then elaborates on his intention to introduce for juror's consideration three possible alternative explanations of how such charges could arise:

J Firstly, there is the possibility that the complainant may have fabricated or imagined the events ... It may be motivated by some improper motive ... It's possibly activated by malice ... the desire to take some revenge ...
Secondly, it is difficult for an accused to obtain evidence to support a denial ...
Thirdly, it is difficult to refute ... It is often unsatisfactory to accept the word of one person against the other ... unless you are thoroughly satisfied that the evidence is reliable ...

The prosecutor objects to the tenor of this warning, as it comes across as "The Law" rather than as a suggestion:

P ... your honour has done what the section prohibits you to do.
J ... the way it is - the girl's story against her father's denial ... her story has some inconsistencies ... It's a case that seems to call for a bit of a warning ...
P [What you've said] goes further than the section allows. What your honour's effectively given is an old fashioned full blown corroboration directive ... "It would be dangerous to convict and The Law says it would be dangerous to convict ..."
J ... I didn't use the word - The Law.
P ... You used "experience in the courts" and that sort of thing ... Conceived as a whole, ... the warning is a matter of law and not a suggestion to a view that they might like to take ... The tenor of the direction is that they must accept your direction ...
J ... It's really just saying that it's a matter of common sense ... [Wh 2-4]

This proferred section of the judge's address is marked by its impersonality. There is no author to any of these directives outside of "the courts" to which the judge directly attributes responsibility for what he says. Agency is linked with the institution and its history of which the judge is the legitimated representative. The representations of this institution privilege impersonality as an indicator of its objectivity. Yet what is said in the name of individual discretion is simultaneously said with the authority of a legal ruling. It is the status of the position that transposes what is put forward as a response to circumstantial demands of the individual case into a generalisable legal direction to become relevant to all such similar circumstances. And these similar circumstances are elaborated as the uncorroborated evidence of those alleging sexual assault.

Yet these are statements that can be legitimated on the grounds of "common sense", tacit representations by which the everyday is organised. This is a 'common sense' that is realisable not only at the level of content, that which is construed as relevant to these particular circumstances, but also by how this knowledge simultaneously organises, while being premised upon, a particular way of seeing the issues.

At the level of explicit meaning this section of the address constitutes a warning predicated on the assumption that, firstly, there are two equal positions relevant to this issue; the word of the person allegating sexual abuse is opposed to, and therefore, equatable with, the word of the person denying this allegation. Secondly, these positions need to be located within the evaluative context of "easy to make" and "difficult to refute". This second contextualisation takes the equality glossed in the first identification and establishes an imbalance that needs to be redressed in the name of "fairness" and "common sense".

Legal discourse rationalises its inequalities by appealing to its own representational values. A definitive characteristic of sexual offences is the conditions under which they

occur. They frequently occur when only the person accused and the person abused are present and are largely unwitnessed crimes. With little else to materially substantiate their existence, their credibility as criminal classifications rests primarily upon the accusations made, as is frequently spelt out in court:

D This is a sex case. An allegation of nonconsensual sexual conduct is an easy allegation to make. It is very difficult to refute because at times of sexual conduct ...[no one else is there] ... and so traditionally, juries have had to be very, very careful [Co 41].

D Now it's usually the case that sexual offences are committed in private. And it may be that his honour may say something to you ... about the special care that ought to be taken against what is alleged to have taken place in the absence of witnesses [Ha 1-2].

D The law has always been wary of allegations of sexual assault because they are easy to make. They usually occur in situations where there are no eye witnesses and they're difficult to refute [KJ 50-1].

These are neutered statements made by defence counsel, setting out the subject positions in which those who make an allegation of sexual abuse are evaluatively opposed to those against whom allegations are made. The evaluation focuses on the level of statement. The accusation itself and the natural justification for this differential weighting of positions is the circumstances of the act; there are no witnesses, because this is a sexual offence.

These pragmatic warnings are direct appeals to substantive qualities of the institution, to its fairness as exemplified by the right of an accused person to a fair trial and the presumption of innocence, and to a common sense grounded in rationality. They set up an evaluative division as the 'obvious' and 'natural' starting point, as this is an imbalance flowing from those experientially involved in the offence and is, therefore, independent of any legal constitution.

All counsel validate their propositions with legal authority, thus attributing a factuality to their claim that sexual offences are easy to allege because they are unwitnessed. This conceptual association simultaneously trivialises the formal position

of complainant within a trial and the status of those alleging sexual assault, by privileging the circumstances of the act over the nature of the act itself. It argues from an assumption of equality that denies the powerlessness affiliated with the perpetration of the crime while similtaneously providing a rationale that undermines any position of power subsequent to the enactment of this crime. This trivialisation is explicitly weighed against its consequences, the difficulty of denying such claims, thus implicitly constructing the accused as the potential 'victim' of this allegation of a crime.

These statements establish as natural a set of meanings and values to be construed as 'issue related' that flow from the woman involved, to background as unproblematic, the integrity of the man accused. They focus on the circumstances of the crime as compelling the need to question specifically the credibility of those who allege sexual assault, thus deflecting questions about the authorship of what are no more than arbitrary constructions of knowledge.

THE INCREDIBILITY OF WOMEN

The prosecution of sexual offences sets up gender positions for an accused person and the person accusing to occupy, as the legal warning about the inherent dangers of sexual offences is implicitly gendered with particularity. The accused, in my experience, were all men. Men are accused by women, children and some youths, of sexual offences. These legal statements pragmatically proclaiming the ease with which sexual allegations are made directly challenge the credibility of a particular group, in relation to a particular sphere:

> D The law's said for centuries ... you really have to look at the evidence of a woman ... [who complains of rape] ... and scrutinise it very carefully before you convict, because history has shown that [women] ...have told a false story ... an allegation of rape is very easy to fabricate. And what can the accused do ... stories are fabricated for all sorts of reasons ... That's the experience of the law for centuries ...the dangers of fabrication are dangerous precisely because they're sexual in nature ...[MJ 3].[5]

In this arena where prosecution procedures establish personal credibility as the critical issue, legal practice sets up morally-weighted gender positions for the participants to occupy. It explicitly singles out the evidence of those alleging sexual assault as problematic in relation to credibility, thus naturalising within this discourse, the interchangeability of all who complain about sexual offences. By procedurally rendering this position problematic women, children and youths become homologous by inclusion. Concurrently though, these practices also constitute by exclusion (Foucault 1979; 1982:429). They implicitly construct the position of the accused, men, as unproblematic in relation to credibility about sexual relations.

The overall form of these statements is a warning. It is premised on explicit appeals to fairness but simultaneously, it implicitly constitutes a discourse about the irrationality of women, children, youths, in opposition to the rationality of law which, by exclusion, becomes the rationality of men:

J The law requires that a jury approach the evidence of a child with caution. Experience shows that children do have and I suppose we all know that, vivid imaginations and they fantasize and sometimes fantasize about sex and sometimes fantasize about sex with people who are close to them in the family relationship, and children are probably less able than adults to distinguish between facts and fiction, more inclined to confuse fiction with events that have actually happened.
Moreover, children can be manipulated by adults because of their age, they often do not have the same sense of responsibility about lies, the same sense of responsibility about the terrible consequences that can follow from the telling of lies. So, for these reasons, the law requires me to give you the warning which I now do give you, that it is dangerous to convict upon the evidence of a child unless that evidence is corroborated [Mo 34].

Addresses are delivered directly to the jury, a composition of 12 individuals who have to be accomodated within the subject position of listener. This judge begins from the explicit position of "The Law" but establishes "experience" itself as the subject drawn upon for the subsequent detailing of the natural qualities of children. This "experience" is occupied firstly by the judge himself but also in consensus with and, therefore, as part of, a "we" that includes the jury and, thus, the community, from the status of adult in relation to child. From this position of commonality the judge then presents a

natural progression, beginning with a statement on children and imagination with which most people would agree. He moves from imagination to fantasy, from fantasy as a general subject to its specific relationship with law, fabricating allegations of sex with people who are relationally immediate to the child. He concludes by returning to the position of experiential commonality, thus encapsulating what is presented as a legal injunction - children fantasize about sex with family members - within the realms of common sense knowledge.

This passage encapsulates what Bourdieu describes as the "takeover of form" through which "takeovers of force" are instigated, as the juxtaposition of simple words and multiple points of view blur the boundaries between the person and the position and thus the justification of this authority to describe (1991:213). In this address the inherent dangers of those alleging sexual offences are more obliquely described by appeals to the psychologising of the child. The unsafeness of children stems from their immaturity, their lack of, and in fact, avoidance of reality, their inability to associate consequences with their actions and a preoccupation with sex, directed particularly towards those most immediate in their world. These are construed as innate, developmental qualities, common to all children and therefore known by all who have children.

Women extend naturally out of and, indeed, can be construed as identifiable with, this group. They too, have a difficulty in coping with sexual reality that is marked by avoidance, the fabrications of fantasy. They too, have an unnatural yet naturalised, preoccupation with sexual relations, privileging the passivity and powerlessness of children while actively projecting a deluded reality. These are no longer developmental qualities but they are inherent in the person as delusion, vindictiveness, fear, vengeance, all in the name of credibility:[6]

J I must give you a special warning ... I am speaking of young girls because it is a case in which a young girl is concerned.

> The things of which I speak have happened in the case of mature women too. Experience shows us that there is a great danger in convicting on the uncorroborated evidence of young girls in sexual cases. I am speaking of sexual cases. An allegation of a sexual nature is easily made and hard to contradict. A young girl can make up a story with details around it that sounds very well. If nothing like it happened, the man accused cannot say much more than 'It did not happen'. Bear that in mind. If nothing happened there is not much more a man can say, for the girl will make up a story of detail and he can only say 'That did not happen' ... experience shows us there is that danger and over the years there have been cases in the various court, not only in the State but elsewhere, in which it has been shown that young girls have made up allegations of a sexual nature against a man which are not true. I am speaking in general. You will judge Amy as you see fit but I am speaking of the need to examine her evidence with that rigorous and special scrutiny of which [defence counsel] spoke. It is something that has happened with mature women too.
>
> Years ago there was a respectable British businessman who got in a railway train in the station not far from London and got into what we called dog boxes all by himself. At the next station an apparently respectable looking woman got in. There was a long haul to the next station. After a while she banged her head on the side of the carriage so that it bled, scratched her face and disarranged her dress. She pulled the communication cord. The guard came running. She said 'He tried to rape me'.
>
> The man protested, he was caught off balance and it sounded a bit feeble. The police were called and they felt it their duty to charge the man. He came before a magistrate and was released on bail pending his trial. He was a nervous sort of man and it preyed on his mind. He took his own life. Shortly after that the same thing happened with the same woman elsewhere, and further investigations showed she was mentally unstable and had been doing this sort of thing around southern England for a while. You see the danger, therefore. That danger turned into the loss of a man's life. A stronger man would not have done that.
>
> In this case it is a young girl. Young girls, you probably will agree, sometimes think about sexual matters even when they are of a youngish age and talk about it amongst their companions and friends at school. So sometimes for some reason sometimes known, sometimes not, and sometimes out of hatred or vengeance or dislike or to try to get themselves out of trouble they do make up false stories of sexual attack by men. Bear that in mind. It is dangerous to convict on the evidence of a young girl in a sexual case unless there is corroboration. ...
>
> You are not forbidden to convict on the uncorroborated evidence of a young girl. If after careful examination of her evidence in the most rigorous and stringent way, and heeding the warning I have given, you are satisfied that Amy has on all matters spoken the truth then you are entitled to convict on such evidence. ...
>
> I forgot to mention to you, in the course of giving a warning about children, that sometimes young children dream about sexual matters. You will take that into account and wonder whether any of it is imagination ... perhaps it was just dreaming on Amy's part. She spoke of having one eye open when she was asleep.
>
> You will remember the special warning I gave you that experience showing that young girls do fabricate, invent, make up stories of sexual conduct imposed on them or in which they have been forced to take part ... You must subject Amy's evidence to the most searching scrutiny [Sc 11-14;17;29].

With this warning the judge explicitly completes the link between the credibility of women and the credibility of children and locates it in the context of all who accuse

men of sexual assault. Jurors hear about psychology and they hear particularly about motive. They hear about irresponsibility which reaches the limits of delusion and irrationality. The jury hears from a judge about women fantasizing about sexual passivity and about women acting out this fantasy as a deluded reality. And jurors are warned, immediately prior to deciding this trial, of the terrible consequences that women's lies and irrationality have reeked on men.

In this address the judge relates an anecdote that begins with "I must give you a special warning" and ends with "the loss of a man's life". His remarks address the specificity of the trial - "a young girl" - who is rapidly equated with "mature women", and both are subsequently encompassed within all who allege sexual abuse. The designated gender of this interchangeable position is female, gendered by its opposition to the accused as male. All who embody this position are perceived as female and the qualities of irrationality allied with women constitute the limits of what can be mobilised within any trial that deals with sexual crimes. In the two homosexual rapes I observed, defence strategy pivoted around fabrication and fantasy. One man was accused of being immature, even emotionally disturbed, inventing an allegation of rape to escape an unwanted environment. The other, legally a child, was constructed as socially and morally destitute, imagining rape in his drunken stupor.

In this way, legal practitioners are able to make authoritive statements in the name of 'law', about a whole range of sociological and psychological issues. These statements constitute a discourse on the femaleness of those alleging sexual abuse that regenerates and reproduces the nineteenth century discourse Foucault (1981) details on the inherent pathological nature of women in relation to sexuality. Legal discourse constructs an irrationality among women that is simultaneously innate while affiliated with the area of sexual relations, as evidentiary procedures shape the way in which women alleging sexual assault are thought about. Such discourse though, requires a potential for congruence between what is put forward and how this is understood for

its statements to be accepted as common sense. For discursive positions are inherently unstable, susceptible to challenge and contradiction, according to the particularities of the occasion, thus rendering each occasion vulnerable to the arbitrariness of individuals.

The occupants of the position of victim/complainant embody a lack of credibility rooted in a psychology of irrationality which is accessible to a common sense understanding. The judge's discourse is accorded the objectivity and impartiality attributed to legal authority. His statements bring the institutional experience of the past into play as a guide for the evaluation of the present, utilising past legal classifications to legitimate the present-day situation while simultaneously constituting the parameters of how this present event is to be evaluated. While the legislation revises how the uncorroborated evidence of women alleging sexual assault is formally, legally considered, in legal practice the ways of thinking about it in many instances are from the past, about which there is a common sense.

By inclusion, these statements also set out who is unproblematic in relation to credibility. By singling out those who allege sexual offences as unsafe, the space is created for the definition of who is safe. Discourses rely on their ability to privilege and marginalise, to suppress or constitute by presupposition rather than by the explicit statement. It is women's behaviour that is seen as problematic in need of explanation; legal practitioners have no theories about why men lie about rape. But men become allied with particular understandings by way of exclusion from and opposition to what is said about women. It is the emotionality of women that is privileged in all these warnings as constituting the inherent unreliabily of women, imparting a rationality to men that mirrors the institution's definition of self as it genders its statements of reason and truth.

THE CREDIBILITY OF MEN

In prosecuting sexual offences, legal practices explicitly construct a particular conceptualisation about men and credibility that is different from the notions of credibility affiliated with women. Women's credibility is allied with the individual person, as an innate, natural quality. Thus, a sense of the woman is critical for deciding the truth of the crime:

P From 2.30 p.m. on Tuesday until last Thursday ... you had the opportunity to study her and see Sara relate her account ... You've seen her. What did you think? Did you think her appearance in the witness box was contrived or put on? Did you think her answers were calculated? ... Or [did you think] she related to you a true and believable account of what this man did to her? [Ha 17].

The unsafeness of what women say about sexual matters is legally identified as arising from a fundamental flaw in their character. This inherent unreliability about sexual relations explicitly sets the parameters for how a woman's credibility, generally, is to be assessed. In cross-examination, Sara is forced to retract her initial denials of any further contact with her *de facto* husband after the incidents of rape. She attempts to explain that which she appears to find largely inexplicable:

D Why before the video was shown did you deny it.
W Because - - um - because - the children - only because of my children I suppose ... Because I know what - - that because of what Lou has done to me my children still love their father [Ha 82].

Sara's dishonesty about events after the rapes are instrumental in deciding the truth of the rapes, for her credibility is independent of the circumstantial explanation, as this segment of the defence address clearly spells out:

D That is the evidence of the witness the Crown says you can rely on in convicting the accused on the account of rape. You can be satisfied beyond reasonable doubt that what she is saying about these events is true. And then you can proceed with confidence to convict him. I say this - That the events after the 4th August cast some doubt in your minds ... on whether anything like what she says happened [did happen] ... But the fact that she's so willing to lie so brazenly and so comprehensively dispells any doubts of her veracity ... You can gain some assistance from those other areas of evidence in your deliberations about whether she is telling the truth ... And when you look ... you couldn't possibly be satisfied that she is telling the truth beyond reasonable doubt ... She's lied brazenly and comprehensively about those matters. How

then - if she's lied - can you believe what she says about those central events [Ha 2]?

These statements are marked by an indignity that is attributed to Sara's dishonesty rather than the moral space this barrister occupies. The fact that his client's whole story in court is discredited is irrelevant as his dishonesty stems from the circumstances she has placed him in. Truth is an intrinsic quality of Sara's statements which become indicative of her nature regarding truth. By contrast Lou's mendacity is construed as emerging out of the particular circumstances in which the lies are told. This leaves his character intact, indeed, only situationally dishonest, without being inherently flawed.

Discourses have the potential to engage a range of subject positions as they rely on establishing the limits of what can be said about a particular area of knowledge, by whom and from what position. They rely upon congruence, the engagement of the listener to confirm their existence, thus establishing this dual position of author and subject-listener as pre-emptive of understanding. In the following trial, defence counsel mounts a joint argument with his client about the nature of credibility, that is contingent upon the assumption of a common position outside of self to persuade. As such it constitutes more than what one man thinks. Schematically, I summarise the trial from the woman's perspective:

> Binlow is the best mate of Penny's boyfriend Munt. On the night of the offence Binlow and Munt attend a "gang bang" on a boat at the local port. At some stage of the evening Binlow seeks Munt out, ascertains his intentions of staying on, then tells Munt that he has to work the next day and is going home.
> Instead, Binlow goes to Penny's house where he lies to gain admission into her bedroom. He rapes Penny, then threatens her by threatening violence against Munt. She says:
> "He said to me not to tell anybody because [he would shoot me with his spear gun and assault Munt] And nobody would believe me anyway - because he's got a good job and I was just an ordinary person".
> Sometime the next day, Penny tells her mother but not Munt that Binlow has raped her:
> "My mum asked me what I was going to do and I said nothing - because he threatened me. ... I didn't want Munt to get hurt. ... Well it was his best friend" [Wi 16].
> The mateship between the men continues until about seven months later when Penny, in the heat of an argument with Munt, tells him that his best mate has raped her. Munt's confrontation with Binlow culminates in Penny calling the police and laying a charge of rape.

In court Binlow admits to deceiving Munt on the boat, lying to Penny's mother to gain admission to Penny's room, and agrees to the proposition that he is "manipulative" by nature. He also lies to the police when charged with this offence and he has no choice but to admit this in court. His counsel establishes the circumstances within which this public lapse of credibility is to be evaluated:

D Do you agree that [what you said in your record of interview] ... is different from [what you say now].
W Yes.
D Why is that.
W As I said - I was scared - very nervous - And I was worried that I was going to be married in a week's time. I was worried at work. I really wanted to say - No it didn't happen - And be convinced I didn't do anything [Wi 76].

In his final address to the jury, the defence counsel grounds the emotional frame Binlow provides firmly within the circumstances causing his untruthful response:

> Now Binlow gave evidence ... and its been suggested to him from time to time he ought to have acted differently if he was innocent. ... it's very easy to sit here and think back and say - "Well - Why didn't you ..." He should have just waltzed into [the police station] ... When you consider that record of interview ... consider the circumstances ... He's never been through anything like that before ... Imagine how he felt ... He was getting married five days after that ... how he cheated on his fiancé. He's facing an allegation of rape ... a very serious charge ... very easy for us to sit back now ... suggest to him at the end of the interview when he was arrested, that he then change his story ... come clean ... Sit back and think of what he's been through. He's told you he's told lies in that record of interview ... [Imagine you've] just spent time with the officers ... you should have held your hand up - "Now you've arrested me its all lies" ... It's an option for him [to say]... "What I've just told you is all wrong" ... It's a very difficult position to be in ... Binlow found himself between the devil and the deep blue sea ...[Wi 10-11].

Cross examination elicits from Binlow comment on the nature of credibility from one man's perspective. The prosecutor is questioning him about Penny's fears of Munt and Binlow's fear of both of them:

P You believed that she wasn't going to tell Munt about [the rape] because she'd get bashed.
W Maybe it was in the back of my mind.
P Yes - But obviously you were a bit concerned she might tell him ...
W ... if Munt did have a go at me I'd just deny it.
P Exactly - You'd deny it.
You'd lie.
Just like you did [to the police]...
W [Maybe].

P And I suggest to you that you believed that the time you spoke to him ... [Munt] believed you over anything said by Penny - That was your belief - He'd believe you over her.
W [He doesn't understand the question]
P You believed ... that whatever explanation you gave to Munt about what happened ... would be believed and accepted by him.
W I told him the truth.
P I'm just asking what you believed ... because of the relationship you had with him.
You believed that he'd accept you being his mate - over his woman.
W Yeah - He probably would - over his girlfriend.[Wi 88-9]

Penny's lack of credibility stems from being a woman, but also from being a particular kind of woman, in Binlow's opinion:

P You see - I suggest ...[you said] "If you tell anybody I'll shoot you with my spear gun. And nobody would believe you anyway because I've got a good job and you're only an ordinary person".
That's your impression - that she wasn't an ordinary person - You thought of her being a bit rough.
W Slightly.
J Does that mean that she is an ordinary person or less than an ordinary person.
W [He doesn't understand the question]
P Well - Is this a better way to describe it - you found her a bit easy.
W Not really - Well - From what I could see she was a bit easy ...[Wi 111]

The third influence allied with Penny's lack of credibility is environment; not only does she not have credibility within her 'domestic' sphere, Binlow assumes she has no credibility within the public sphere where issues such as this are decided:

P You believed that when you left that house she wasn't going to tell.
And even if she did tell - it was going to be her word against yours.
And you thought that nobody would believe her - didn't you - if she made any allegations.
W ... I didn't think anything at all about it.
P And that's what you thought when you spoke ... [to Munt]
A I just didn't think Penny would say anything at all ...
P ... and you also believed that nobody was going to believe her.
W I just didn't think she'd say anything about it [Wi 112-5].

The prosecutor uses these arguments to construct an image of contextual causation for this man's deceit and dishonesty, as did the defence, and both combine to constitute him as a man of a particular character who responds to certain circumstances dishonestly:

P The reason why the accused lied ... he thought nobody was going to accept Penny ... The accused deceived Ms Brown to gain entry into the house ... lied to Munt ...He'd lied in his record of interview ... And I suggest that he's lied in this court to you ... Why? The strongest motive for lying ... because of his fear

> of Munt ... wife ... going to jail. And he made a grave error of judgement - and didn't believe anyone would take Penny seriously [Wi 8-9].

THE CHARACTER AT ISSUE

In prosecuting sexual offences, the legal system draws upon a particular sociological discourse about the character of men who rape, by legally identifying rape as a biologically-based crime.[7] This discourse is most succinctly expressed in sentencing remarks where judges frequently refer to "carnal desires" or "carnal pursuits" as they reproach men for being "less restrained about what ought to have been a proper thing" and advise them to "to be a little bit more in control in the future". Rape is alluded to as a biologically-determined act perpetrated by either the normal bloke out of control or his counter-part, the aberrant sexual deviant. This discourse removes rape from the sphere of 'normal' hetero-sexuality and thus out of the realms of everyday social relations, as neither classification reflects upon men categorically. It is by defining rape out of the province of normality into the realms of deviancy that differentiation between male and female notions about sexual practices is able to remain legally, logically unproblematic.

Deviancy is legally constructed as marginal behaviour, separate and distinct from that of most men. It is Foucault who argues that to be identified as deviant is to allege that the flaw lies within the individual (1978). This approach justifies the search for the "author of the crime", in order to integrate the act into the character of the person, to causally connect the crime with the criminal (Foucault 1978; 1979:170). In this manner, the legal institution individualises offences and offending, to construct the crime as an individual aberration rather than part of any social relation (Foucault 1979:170; Scutt 1992:199). Rape is constructed as essentially the actions of the aberrant individual, biologically determined, but rationablisable by way of 'out of control' responses to sexual provocation. This discourse deposits its resolution within

the modification of specific behaviour, leaving men both personally and generically, unrelated to sexual offending. Conversely, it is by drawing upon a biological/deviant discourse that debate on the nature of men's character is justified, to formally verify who it is that rapes. This allows the act to be separated from the actor which then becomes the product of a particular kind of man.

In linking credibility with circumstance the character of the accused becomes separated and, thus, independent from whatever can be construed from his actions. In this following trial the lie appears trivial but raises considerable speculation about comparisons between the worth of a man who tells lies and the circumstances within which lies are told. Again I summarise events from the woman's account:

> Doys, a police guard at a State prison, has an agreement with his wife whereby periodically they each maintain a separate social life. One Saturday night when his wife is at work, Doys goes to a prominent suburban disco where he joins a group of five women for a few hours. He tells one of the women that he is separated from his wife. He accepts a ride home with another. When later charged with raping this woman on route to his home Doys denies the allegation, claiming "I'm a happily married man". Doys is introduced to the court by the location of his wife in the public gallery.

The defence counsel challenges the relevance to the charge of rape, of a statement in which Doy's claims to be separated from his wife. It is also prejudicial, he argues, as it potentially allows the Crown to impugn the character of people who tell lies. As with most legal argument this discussion takes place in the absence of the jury:

D Has your honour got the statement? ... the conversation about his marriage. I object ... [on the grounds of the prejudice associated with a man masquerading as single when married]
J Prejudice! In this day and age.
D ... he tells lies about the fact that he's married... [the Crown prosecutor will argue that] He's told a lie about this - therefore he lies about other things ...
J This [disco]- Is that a place of assignation?
P Yes ... In the police interview ... he said "I can't understand why this lady has made this charge ... I'm a married man and quite happily so ..." [it's important to know] whether he was in the disco saying "I'm a married; man" [or] ... "No. I'm not a married man any longer" ...
D ... it's not a question of his marital status [but he told a lie]
J What lie?
D ... that he was married and he was [saying he wasn't]. Well that is evidence that will come out in all sorts of ways ... Now we have a lie at the disco about the fact that he's married ... doesn't push this case forward one centimetre ...

How does that helps us determine if a rape took place ... He told a lie ... He's on a rape charge!

P ... [It's relevant because his line of defence is] "He's a happily married man and why should he do this thing".

J ... a storm in a tea cup. It's something that the accused has said. It was a small piece of evidence ... I don't think ... it can work any prejudice and I will allow the evidence [Da 35-6].

In his address to the jury, the legal direction and the personal opinion merge to allow the judge to speak with the authority of the institution, about issues that rely upon reflexivity for their truth:

J You've got to be very careful ... a man in that environment - saying that he was separated from his wife ... It doesn't at all follow that if he did make that claim in the night club ... that he has gone so far to commit perjury ... It would be wrong to give any weight to it ... on that question of separation [Da 81].

This speculation over the possibilities realisable from knowledge about this lie appeals to a broader context to attribute significance to the incident. Discourse on the nature of 'normal' male predacity is utilised to confirm the association of criminality with a particular type of person, thus enabling the counter-argument of good character to circulate, to clarify who it is that rapes.

The defence strategy of putting the character of the accused at issue is predicated upon the legal presupposition that sexual offences are the acts of deviant individuals and, as such, are but one manifestation of a deviant character that would be obvious to all. Testimonial is introduced into court to buttress the credibility of the person accused of sexual allegations, the most private of crimes, by affirming his integrity within the public sphere.[8] The senior management staff from the prison speak highly of Doys' employment record and his collegiality, as issues relevant in deciding the truth about the rape allegation. Covertly, this strategy argues that a "normal bloke", evidenced by his normal social relations, is unlikely to be responsible for sexual offences. The frame of the question is:

D Would a person of good character commit a crime of rape [MJ 12]

J Is a man of good character likely to do what is alleged against the accused" [KJ 7]

These statements explicitly privilege a direct relationship between the individual person and the acts designated as criminal, to argue that a sense of the person is essential in evaluating the crime:

D He's put character at issue ... There's always a first time [for a good character to commit a crime] ... In this particular case the question of character is vitally important. Her description of the bloke who raped her is more [bizarre] ... He's not just a normal bloke who got a bit carried away [Da 71].

The judge is legally bound to endorse this position but how he contextualises the issues is a matter of his choice. Of Doys the judge says:

J The accused called witnesses to prove his good character ... There are no challenges to those witnesses. You may feel the accused is a man who bears a very good character ... Of course, there are people who [have good character who] lapse into common offences at times ... But you are entitled to reflect upon the good character ... whether a man of that character is likely to come to court and tell lies .. entitled - not bound - [to think that that's a very strange] thing for a man of that character to descend to, attacking a woman in that way [Da 79].

A second consequence of placing character at issue is to establish a direct correlation between character and truth. The accused is "a person of good character telling the truth", to be implicitly compared with the type of character who tells lies, which, in sexual offences is legally identified as the person alleging sexual asault.

In prosecuting sexual offences, Foucault's correlation of the crime with the criminal is simultaneously disconnected and reassembled, as discourse on deviant sexuality and 'normal' heterosexual relations plays with the limits of aberration found within the particular life situation. By focusing on the character of the accused, rape is disassociated from the actions of a man of character and realigned with the deviant individual. This allows the 'rapist' to be constructed by comparison to a man of character, as each identity validates the existence of the other. Equally, though, with the attribution of responsibility to circumstantial causation, it allows rape to be committed by a man of good character, who can emerge from a guilty verdict with that character still intact. In the sentencing of Binlow, defence submissions for mitigation including verbal reports from his employer, a government official:

D ... I had discussions with his immediate supervisor ... [who] describes him as an excellent employee ... They very much regretted the fact that he was not going to be able to continue working ... They will not be able to keep the position open to him ... But they have made it very clear ... they will certainly not hold any conviction against him ... And they will do everything to re-employ him ... [Wi 36]

CONCLUSION

In prosecuting sexual offences, the legal system instigates sexually differentiated categories which are accepted as instituted differences, biological in origin and therefore factual in form. A rape trial constructs qualities definitive of a uniform, universal category of women while individuating men accused of this crime, as arbitrary transgressors or categorically deviant. The legal system has the means and the methods of extending that which references the biographical instance to encompass the collective, as it transforms its institutional definitions into a generalised knowledge. These acts of social constitution are effects of political force, when 'force' is defined as the tacit recognition of an essentialising self-knowledge as a universal understanding (Bourdieu 1990:85). These legal 'forms' - of women as unreliable or 'victims' as unstable - are recognised as classifications of objective knowledge. They are unproblematically accepted by lay and legal persons, as appropriate and relevant to the issues involved, which legitimates their authority and the institution's right to define. There is no direct coercion or confrontation involved in power exercised in this way. Its 'force' is exercised symbolically; only its consequences are real.

Meanings are produced in and through language but these social constructions acquire their legitimacy from their authority. The definition of a sexual experience as rape requires not only the recognition of the woman's understanding of the situation as different from that of the man but these differentiated constructions require, also, a

subject capable of perceiving this difference as significant (Bourdieu 1991:237). The efficacy of power exercised relationally, through communicative exchanges, stems from its ability to naturalise asymmetry in the constructions of knowledge, by presenting as representationally neutral, its particular point of view.

The decision to proceed with a rape prosecution entails the tacit acceptance of the juridical construction of the issues involved. The legal institution has the authority to draw upon its own methods and practices to treat its constructions as realities endowed with a social efficacy. This obscures its reliance upon a hermeneutic logic to naturalise the definitions it constitutes. The knowledge and practices propagated by legal regulation have a dual constituency, correlating legal prohibition with the subject positions required to appreciate these classifications. In this way, the specific structural features of subordination are reflected within the individual, to be experienced and observed as personal characteristics, and to be reproduced within the life experiences they organise. This allows what, in the past, has been analytically separated out as 'social structure' or 'society' to encode interactional relations, to make these structural dimensions inseparable from their local realisation (Bourdieu 1991:67).

The institution of a distinctive identity for those alleging sexual assault, its nature and characteristics, is equally the definition of a conceptual boundary (Bourdieu 1990:118). Its specifications set out the exclusions and oppositions that substantiate by difference the characteristics of men. These legal statements draw upon non-legal discourses psychologising women's sexuality in order to legitimate their claims about the unreliablity of those occupying the position of victim/complainant (Edwards 1981:174).[9] It is this multivocality of language that subverts efforts to redress the inequity women experience in prosecution procedures, as it allows the meanings of today to resonate with past interpretations. This reproduction of form is propagated by both the constitutive self referentiality of this "interpretive community" and the

adversarial nature of this objective knowledge, as discursive strategies converge productively with calculated techniques in a relationship of mutual constituency (Fish 1980).

The legal institution has the right to decide what the contestable issues are about sexual assault and what the appropriate solutions should be. As a criminal category, rape appears objectively neutral and stable. Yet the crime's relationship with experience is problematic. Each trial challenges the definitional boundaries of legal interpretations with the distinctiveness of individual life situations. Rape as practice, has a meaning that is constantly reworked and selectively amended as it is reproduced within the parameters of the criminal classification. In the next chapter, I raise the incontestable issues about rape interpretations, by considering how the regulation of rape definitions effected by legal practice is able to generate and reproduce particular ideas and issues about sexual assault. The constitution of division or difference constrains thought within universal oppositions. Conceptually, these dichotomisations exclude differences among rape experiences by privileging the evaluation of difference from a particular representation of rape. These processes propagate a concordance between legal interpretations of sexual offences and experiential knowledge of these crimes, within a context of truth. This implicitly introduces a form of normative regulation into legal proceedings which allows the distinction between truth and falsity to inform on the evaluation of individual behaviour, as it organises self knowledge around a normative conceptualisation of truth.

NOTES

1 Bourdieu recognises that this contractual relationship is predicated on more than discursive representations as he is well aware that there is always "a set of agents and institutions" which guarantee that a judge's sentence will be executed (1991:109). He includes in this "authority that comes to language from the outside ... the properties of the institutions which authorise him" (1991:109,111). He states that the performative utterances of

a judge succeed because they occur in "a situation in which no one can refuse or ignore the point of view, the vision, which they impose (1987:838). But he also clearly states that the institution itself, does correspond, "at least apparently, to real needs and interests" (1987:840).

2 See Harris (1989, 1984) for an analysis of the limited scope trials afford witness resistance. Because Foucault's discourse operates at the level of a generalised power/resistance, his analytics cannot accomodate the effects of institutionalised practices (1980; 1981). Hartock (1988) makes the point that as soon as a localised resistance gains official recognition it becomes dissipated by its entrapment within what amounts to a network of power relations. Merry (1990) argues that the creative possibilities of communicative exchanges provide a medium through which dominant discourses such as law can be challenged. She found that when resolving neighbourhood disputes within a legal context those with a command of legal "codes" were able to more successfully contest issues; they learnt "to use legal categories with more sophistication" in voicing their complaint. This she refers to as "mastering legal discourse" (180) and the power exercised and reproduced by such appropriation is "the paradox of legal entitlement" (181). This process cannot always be turned to the individual's advantage and the contingency of its application makes it difficult to reduce power/resistance to a formulaic probability (*e.g.* Fairclough 1990, 1992). The prosecution of a sexual assault, as an example of a criminal trial, is a strictly regulated forum wherein any expression of linguistic anarchy is rapidly suppressed by verbal or actual sanction. It provides little scope to adapt and "creatively" manipulate the structural constraints of this form of arbitration and its repression is hegemonic.

3 Statistically, the sexual offences prosecuted represent a small percentage of reported crimes, which Rape Crisis Centre workers argue represent 10% of the offending that occurs (*Advertiser* 30-9-1992). In 1990 259 sexual offences were prosecuted in the Supreme and District courts, of which 99 offenders were found guilty. In the year 1990-1991 2,420 sexual offences were reported to the police.

4 Taussig uses "space" as a metaphor for the space of transformation, wherein reality is potentially "up for grabs" as power/knowledge relations play with the relationship between reality and its representations. The use of such labels as 'victim' depersonalises the individual experience while simultaneously re-embodying its diversity with a uniform and homogeneous identity. Bumiller (1991) explores the symbolic nature of rape trials from the perspective the social roles of 'defendant' and 'victim' come to embody. Her notion of role is ahistorical with its overtones of apolitical, static representations into which all distinctiveness is unproblematically absorbed. Mikhailovich (1990) argues that it is only from Freud's influence onwards that 'victim' is gendered, to be picked up in the 70's to be used, particularly by the Women's Movement, as a descriptor for women experiencing forms of sexual violence. However, its connotations argue for a representation of women who have been raped as passive in their victimisation, as its revolutionary appropriation is subverted by patriarchal colonisation (Winkler 1991; Roberts 1989). The major transformation effected by rape prosecutions is the construction of the accused as victim of women's irrationality about sexual relations.

5 The origins of these warnings about women and sexual allegations is attributed to Matthew Hale, the 17th century jurist whose formulations of the Common Law of England underpin Australian Criminal Law. In 1680 Hale said:

> It is true, rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered that it is an accusation easily to be made and hard to be proved; and even harder to be defended by the party accused, though ever so innocent (Cited in Bohmer 1991).

One person's opinion becomes privileged as a generalisation, to be substantiated by the practices that confirm its objectification. The legitimation of this legal dictum is found within trial verdicts. All defendants proven not guilty validate the reproduction of such warnings.

6 I quote this lengthy anecdote, not only because of its recent notoriety, as it is accredited with being partially responsible for the recent controversies involving judges and statements about sexual offences; but also because I gather, from comments by barristers, that it has a long history of representation with sexual assault trials. It was recounted in each of the five trials I attended that this judge presided over, able to accomodate unlawful sexual intercourse or rape allegations with minimal variation. It represents one judge's practice which was, until recently, uncritically accepted as impartial and unprejudicial adjudication. It is only with the rape-in-marriage controversy that its notoriety is publically proclaimed, attesting yet again, to the power of constitutive naming this institution is capable of.

7 This discourse emerged in the 70's, with Amir's (1971) psychologising of the rapist. Brownmiller (1975) is also among those who explain rape in terms of biology as her definitions reference a sexual coercion stemming from physical strength. To privilege rape as sexual violence draws upon notions of innate physical characteristics as does constructions of rape as uncontrolled sexuality, that is, a sexuality that is uncivilised and therefore 'unnatural' in its 'naturalness'. This discourse makes rape essentially the product of uncontrollable sexual

aggression and distanced from the feminist argument that rape is a deliberate and calculated expression of domination or power (Schwendinger 1983; Estrich 1987; Bourque 1989; Smart 1989; MacKinnon 1987, 1989). It is this biological rationalisation of a 'natural' male predacity that allows the questions to be asked in court about 'contributory negligence' or 'victim precipitation'. This discourse allies responsibility for the crime with the woman, with her sexual provocation or through being 'out of place'. Neither definition of rape as sexual violence or sexual aberration deals with the crime as a social product and the nature of the power relations enabling rape to existence are never addressed. Winkler's (1991) definition of her experience of rape as "social murder" deploys a different set of meanings altogether.

8 'Public' and 'private', like 'domestic', are intended as cultural classifications and, therefore, historically specific representations, rather than designations of material spheres.

9 Edwards (1981) analyses the mutual constituency of medical and legal discourse which naturalises, particularly, the qualities elaborated by Foucault (1981) as the "hysterisation of women's bodies" which are reproduced objectively as inherent qualities within the prosecution of sexual offences. Her arguments focus on the redundancy of meaning without directly engaging with its processes of production and reproduction.

REGULATING THE FACTS ABOUT RAPE

In the last chapter I examined the institutionalised nature of the power relations exercised by legal discourse, to argue that the universal representations of legal authority rely upon a multitude of non-legal discourses and practices to effect their claims about sexual offences. In this section, I focus directly on the criminal category itself, to consider the techniques of dissemination that dialectically inter-relate these positions of positivistic knowledge and differentiated interpretations, to enable an encompassing, seemingly unchanging understanding of rape to prevail.

As a criminal category, the legal institution is legitimately able to stipulate and constrain knowledge about rape. Legal conventions and practices invest these generic classifications with the institution's authority, thus reproducing within the social relations legal knowledge orientates, the power relations its discourse relies upon. This hermeneutically generates a field of discourse with an internal frame of reference which accords legal knowledge the institutional autonomy to validate its own decisions by reference to its own knowledge.

A critical factor in the reproduction of these power relations is the regulation of the knowledge required by legal discourse to propagate its claims about sexual offences. Legal practices accord rape a universal referentiality that imposes a narrow interpretation upon what is experienced as an individuated crime. Positivistically, legal discourse subordinates highly differentiated perspectives of rape to its definition of a generalised understanding, selectively subsuming experiential knowledge within a particular categorisation of the crime. This discursive strategy autonomously produces regularities within knowledge about rape; by prohibiting and excluding those aspects of

subjectivity that contest legal representation, the legal system propagates a particular way of thinking about sexual offences.

Conceptually, this amounts to the regulation of knowledge by processes of differentiation that are predicated on a shared, common-sense understanding of what 'normal' social or sexual relations presuppose. Bourdieu defines regulation as the means by which that which is done regularly or habitually, is transformed into that which must be done, which allows it to operate with the injunction of a rule (1987:846).[1] Within a jury trial, legal practitioners have the potential to transform what are no more than recurrent patterns of experiential behaviour into behaviour legally prescribed. These habits of circumstance are inscribed with the values accorded statements of law, allowing legal authority to penetrate normative knowledge, as legal sanctions and cultural conventions coalesce.

Legal discourse relies upon dichotomised differentiations to circumscribe the representations of normality from which the deviant, or anomalous, or immoral, or inappropriate can be constituted (Foucault 1979). This introduces the clarity and predictability of objectivity into the evaluation of crimes inferentially constructed (Bourdieu 1987:848). Inference is a form of knowledge that relies upon a common subject position for interpretation as it requires from the listener, the ability to make and appreciate the author's associations and connections. Within trial proceedings, appeals are constantly made to the tacit, normative understandings about women and sexuality that is engrained within similar life experiences, thus integrating into legal arbitration, a knowledge about gender relations that is generically and socially unconstrained.

In prosecuting sexual offences legal discourse clearly spells out the nature and character of the crime and the criminal. These statements detail very particular experiential descriptions which are taken-for-granted as shared knowledge of what

sexual assault is about. As abstract definitions institutionally authorised, these definitions are able to mediate and structure understandings of everyday experience. They orientate the perception and interpretation of personal experience by the definitions legally intended to contain such explanations, thus propagating subordination in the guise of self knowledge (Bourdieu 1987, 1991).

REPRESENTATIONS OF RAPE

Rape interpretations are highly contested in their inclusiveness of particularity and as an object of knowledge, rape is a "site of struggle" (Foucault 1982:419; Seidel 1989:223). As an objective classification, rape is unproblematically accorded a referentiality that is independent of context or circumstance. It presents a uniform, singular conceptualisation that is capable of both transcending and encompassing the particularities of individual experience. But the meaning of rape is never reducible to its linguistic representation. As a discursive construction, rape acquires a multivocality that enables meanings to be re-worked, even re-created as it is being reproduced within everyday practices and relations. Discourses are fluid and constantly open to contestation and reformulation. Their significations have the capacity to absorb connotations without alienating whatever is put forward as the original denotation. This creates a residual plurality which enables a discourse to respond to immediate demands without modifying its form of referentiality. It allows reproduction to absorb the differentiations of political exigencies within a seemingly unchanging representation; and it allows a hegemonic representation to pervade discourses advocating revision and reform.

Conflict over what counts as representation about sexual offences occurs between different forms of knowledge,[2] but also within the juridical field itself. Legislation sets out the elements of the crime but these elements are always a source of disputation

when ever the criminal classification confronts its experiential expression. Within each trial, established boundaries are constantly subjected to challenge and opposition as the process of inclusion is contested by the specificity of the particular experience. It is within such particularisation that the lines of discourse about what is rape and what is consenting sexual intercourse are constantly reworked and rationalised as the parameters of sexual relations are produced and reproduced within each trial.

The primary terrain contested is the area of 'common sense', the tacit knowledge that informs on how inferences are to be understood. Common sense draws its rationalisation and support from an egalitarian equality that obscures reflection on who's common sense it is and to whose advantage it pertains. Each legal argument for the recognition of what is reasonable or plausible appeals to a common position, a common point of view for its authority. These statements draw upon discursive knowledge outside of the juridical field and procedurally embody this knowledge with the authority allied with the legal institution. But legal practices do more than covertly draw upon the common values of tacit knowledge. Within each particular trial, what is to be taken-for-granted as the natural order of affairs about sexual relations is generated and reformulated by prosecution procedures.

Legal practices actively propagate an experiential empathy that privileges particular images as representative of rape. The constructed object of clarification is consenting sexual intercourse and the integrity of the rape experience is seen to emerge out of a process of comparative evaluation. To be able to argue, as legal practitioners frequently do, about the 'genuineness' of the rape experience, by comparing it to an objective representation of the crime and the criminal, relies upon an *a priori* knowledge about sexual relations that can be collectively drawn upon. It requires regulation to reproduce and propagate these 'shared' representations as they derive their meaning from the subjectivities of social relations. Such knowledge presupposes a clear demarcation between rape and consenting sexual intercourse and it is within

each trial that legal practices renew and rework this dichotomous division, as the basis for legitimating women's accounts of rape.

By drawing substantively upon the sociological construction of rape as sexual deviance legal discourse is able to privilege physical violence as the manifestation of sexual aberration. Men[3] accused of rape largely see the crime in physical terms and unproblematically backgrounded by this emphasis, is their presupposition that accords men right-of-access to women's sexuality, that is, the circumstances under which this act of intercourse occurs. Women talk about rape in terms of relations, of which the act is part.[4] This is why men can convincingly and legitimately say in court, "I didn't rape her" about an incident women experience as rape.

For women, rape references a social relation in which one person's will is subordinated to the intention of another through the experience of an unwarranted act of sexual intercourse. This act of intercourse achieves its significance as an expression of the perpetrator's intention, to have sexual intercourse with a person who does not want it. The oppressive force of rape emerges out of the relation and its fundamental mode of domination originates within its ability to represent particular forms of social interaction as natural.

Men, and the legal system, attribute a force and violence to rape that is realised within the act of sexual intercourse itself. Collaboratively, they ally the power expressed by this crime with a physical property, that which is inherent within the individual man. This physical power of violence and force is identified with the actions of a particular type of person, the sexual deviant, who behaviourally distances himself from the 'normal bloke'.[5] This emphasis enables rape to be individualised and marginalised as the transgression of the aberrant minority, in opposition to the majority of men as a social class. But simultaneously, it allows many aspects of this 'deviancy' to remain residual, even coterminous within definitions of 'normal' sexuality. It

enables behaviour evaluated as deviant to resemble acceptable sexual activity, and it permits a rapist to justify his behaviour by appealing to what are represented as acceptable, appropriate motives.[6]

This dichotomisation propagates a particular way of thinking about rape that draws upon images of sexual deviancy to inform on the present-day experience with notions from the past. This imagery is present not only in every trial but potentially within every experience of rape. For there is a correlation between how the crime is thought about and how it is responded to. This allows the images of imagination and rationalisation to fuse with the realities of experience, as the particular conceptualisations from the past become actively engaged in the interpretation and construction of the present. This process enables rape to appear unified in form throughout time and change, while its content is derived, selectively from the present. This particular way of thinking about rape emerges out of prosecution practices, in which the legal system actively propagates the production and reproduction of what are, in essence, uncontestable ways of understanding what is to be taken-for-granted about sexual relations and sexual offences.

KNOWLEDGE ABOUT RAPE

Rape exists as an object of knowledge for a range of institutional contexts but the legal system occupies the position of arbitrator to decisions about the nature and character of the 'genuine' rape. What is said within the legal arena has the institutional authority to subordinate any competing discourse about the nature of the crime. Other discourses can critique, contradict, even oppose legal definitions but the ability to institutionalise its own knowledge enables the legal system to provide a materiality to its decisions and definitions to which other forms of knowledge are not only subordinate, but also constructed as actually or potentially irrelevant.

Aligned with the legal institution is a notion of objectivity which sets legal knowledge apart from other forms of knowledge. This exclusivity is justified by claims of impartiality and superiority, as this following address by a judge to a jury about child sexual abuse explicitly details:

> J ... a great deal is written about the subject and one reads a lot about it in the newspapers and one sees a lot about it on television and its very easy to form prejudices or preconceptions, preconceived ideas or notions about the subject, and, of course, there are no shortage of people with theories about it, plenty of people will come forward with all sorts of theories about child sexual abuse and the attitude of the law to it and so on.
> What you must remember is that we are not concerned in this court with theories or general conceptualisations about child sexual abuse, we are concerned with particular allegations against a particular man of having committed certain acts upon a particular girl and it is our responsibility, and your responsibility as the jurors, to focus your attention exclusively upon the evidence in this case in order to decide whether it is proved that this particular man committed these alleged crimes against this particular girl. So I would ask you to put aside any general ideas or preconceptions that you might have about this subject and focus ... [Mo 4- 6]

This instruction moves from the anonymity of "one reads ... one sees" to an encompassing "we" that unites the judge with the jurors and all with the institution, to privilege immediacy as the locus of the 'relevant' knowledge required to decide the issues involved in child sexual abuse. The judge posits a *tabula rasa* as the most appropriate conceptual starting point for jurors and privileges legal procedure as the most appropriate regulator of objective knowledge. These statements argue for the disjunction of generalised, theoretical knowledge, in favour of the experiential occasion, as if knowledge about such situations emerges out of the events themselves, when subjected to legal regulation. Equally, this logic backgrounds reflection on the means of interpretation to privilege instead, the empirical verification of "certain acts", as if knowledge about such issues exists autonomously, as *a priori* common sense.

As a crime, rape is required to appear uniform in its application to all realisations. The elements are legally assumed to represent the distilled essence of the experience. They are posited as residual within the crime itself and independent of any contextual explanation. This circumstantial autonomy allows rape to appear legally consistent,

substantively immutable when confronted with the differentiation of experiences over time. But simultaneously, the criminal category is able to establish commonalities within the form of conceptualisations associated with rape, because of the autonomy of legal knowledge and its reliance upon self referentiality.

The legal institution draws upon its own knowledge to validate its integrity and, procedurally, it strives to reify an autonomy from other forms of knowledge. This self reliance is complimented by the adversarial nature of criminal law which inextricably ties questions of truth in with strategies of success. It is this mixture of intentional and unintentional strategising that engages legal practitioners in the regulation of knowledge about sexual relations. Legal practices privilege particular representations of rape as emerging naturally from the elements of the crime, to allow rape to be perceived uniformly, conspicuous in its definitive characteristics.

Rape as a crime, generally, non-legally, embodies images with distinctive resonances.[7] Impressionistically, its representations evoke strangers, physical violence and above all, a life threatening fear. Such images emerge out of a distillation of what are taken to be the 'facts' of rape. These 'facts' predict the most likely circumstances in which rape occurs and privilege the use of physical violence to specify the nature of the assault. They classify as deviant the sexual acts women are forced to engage in. And they designate who gets raped by the nature of the relationship posited between the woman and the man. These 'facts' are extracted from the specificity of the elements of the crime. It is from such 'factuality' that content is derived, to embody and legitimate these legal elements, as they consequently prescribe the criteria to differentiate between rape and 'normal' sexual intercourse.

These 'facts' reflect what is sociologically described as the 'classic' or 'traditional' rape and legally defined in some instances as 'aggravated' rape (Kelly 1988; Bohmer 1991). They are relational classifications that acquire their existence by way of

contrast with rapes that are perceived as 'simple' compared with this specification of complexity. They are representations that privilege the imageic characteristics most people associate with rape; violence and vicious attacks by strangers in dark corners.

Explicitly, such notions of rape polarise the crime against understandings of 'normal' sexual relations, to conceptually allow the classification to draw its aberration by way of opposition to what ever is to be construed as 'normal'. The deviancy of the rapist is substantiated inferentially, by the extrapolation of aberration from a particular specification of normality. This constitutes as a distinctive, objective reality, the deviant sexual activity of the aberrant individual, which is contrasted with the 'normal' sexual activity of the 'normal bloke'.

Rape is legally depicted as a surrepititious crime, "a stealthy planned attack" occurring under "cautious premeditated conditions"[Co 47; MJ 58]:

D ... a couple of facts which come out in evidence, which are so thoroughly inconsistent with Ted being a rapist ... First of all - How did he get in her place that night? ... He drives there ... Where does he park? Right out the front. What does he do when he goes inside? Leaves all the doors open. Perhaps knocks the door off its tracks. Hardly surreptitious ...[C2 8].

D You can't say it's a stealthy planned attack. He's outside the room with his belt undone ... with a stubbie in his hand. Is that the plan of a secret rapist? [Co 47].

These are conceptualisations that acquire their reality as aberrations by opposition to what is to be construed as typical. This discourse argues that a rapist is so far removed from the 'normal bloke' that he has no 'normal' characteristics. Any behaviour that qualifies as 'normal' counters conceptualisations of rape, and enables statements to be made typifying what are presented as the behavioural characteristics of a rapist:

D ... a kind sexual assailant - he covers his victim with a quilt before he leaves [KJ 57].
D ... she left the bedroom ... a rapist would keep her there [Cu 88].
D If he had raped her, would he go boasting about it? [MJ 5]

These representations of the deviant embodying such 'normal' actions and emotions deliberately rely upon a natural incongruence for their truth and integrity. Rapists are strangers, unfamiliar people to be polarised against the known 'normal blokes' found in ordinary social situations:

D ... the other matters which you might find disturbing ... at the hotel he's given his name, address and identification. Now the police have never had it so good ... investigating and tracking down the phantom rapist ...[is this] consistent with a person who's planning to perpetuate a very violent crime? [Da 72]

Implicitly, these statements argue that any man a woman meets socially cannot be a rapist. And if violence is legally found to have occurred, then potentially, probably, it becomes a violence of her choice, for as she accompanied him willingly, he must be a 'normal bloke', he cannot be a rapist.

This logic not only proffers a uniform image of what a rapist is like, it also argues that all observers would view this object of knowledge in the same way. It is a conceptualisation of deviancy that transcends any and every individual representation to describe the nature of all men who rape as, simultaneously, it prescribes the characteristics that men require to be classified 'rapist'. These are the aberrations that make the actions of the rapist distinctive and distinguishable from the 'normal bloke'. They delimit the range of male behaviour considered to be socially unacceptable to the most extreme experiences of physical violence occurring between strangers.

Rape 'victims' are equally as obvious as rapists. This sociological object has a stigmata associated with it that transcends any specificity of occupancy or occasion to constitute a particular representation of the legitimate rape 'victim'. Not only is their immediate response circumscribed but their behaviour, generally, is predictable in its atypicality:

J You normally expect someone who has been raped ... to complain [Wi 27].

D There's no distress ... She's not crying ... She appeared normal [MJ 10;50].

D You weren't hysterical at the hospital ... Your clothes were in a neat appearance ... There was nothing in her appearance that suggested she had been raped [Cu 38;72].

D His behaviour was odd for even someone who'd been sexually assaulted [KJ 51].

J He did react in a most exaggerated way ... It just seemed to me to be a very very exaggerated response [KJ 63].

These statements reflect the 'catch 22' nature of the legal attitude towards emotion wherein too little or too much trauma is inappppropriate, as if there is some measurement of 'appropriateness' inherent within each incident that sorts all trauma into either category. This normative scale is also put forward as being inherent within each individual, enabling them to 'assess' the truth of a response by its degree of affect. Physical injury is similarly subjected to this 'objective' evaluation. Injuries have the potential to iconographically allow both the immediacy and the subjectivity of the incident to be transcended and their legal appreciation is always explicitly spelt out, even if only to comment on the significance to be attributed to their absence:

D I asked about bruises ... I didn't ask those questions ... with a view to saying to you now, why isn't Tina injured, because an encounter of this kind doesn't lead to injuries ... I asked about [injuries] because if there had been something like that you would be in an easier position ... There is independent evidence ... a bruise ... which helps us to make up our minds [Co 41].

These ideas combine, interact and lead to particular understandings, arguing implicitly that rape is easy to discern, rapists are easy to identify. These impressionistic notions privilege a scenario that is distinctive in all aspects of its realisation and severed from the ordinary routines of gender relations. It draws upon constructions of a deviant stranger to posit a particular notion of the relation between a woman and a rapist, to distinguish him from the 'normal bloke' with whom women interact every day in ordinary social relations.

These notions are semantically redundant within all conceptualisations of rape. Their residue creates the potential for such images to permeate any experience of the crime with a materiality that can contradict reality, as it simultaneously substitutes its own corporeality. For they establish a correlation between how the crime is thought

about and the reactions or reponses it evokes, as a means by which its integrity can be identified. This dual conceptualisation compounds the interpretation of experience, as this woman explains when questioned about her 'inappropriate' response when raped:

D ... did you scream.
W No.
D Why not.
W I didn't want to scream or use any violence because I didn't know what he was like - whether he would hurt me. [Co 38]

Another woman is challenged over what defence construes as her lack of physical resistance:

W I was resisting the whole time.
D Were you resisting with all your might.
W Yes.
D But you succumbed to the strength of his pulling or pushing, call it what you will.
W Yes. I think fear had a lot to do with it too.
D What do you mean by that.
W Well if I had have known it was him, I could have beaten him I reckon, but it was the fear of not knowing, it could have been anyone that I didn't want to mess around with [C1 73].

Actions are governed by perception which informs the definition of the situation. After the event she can see it is a 'normal bloke', someone she knows; during the event it is a rapist. The prosecutor's address to the jury spells out this conflict between tacit knowledge and reality:

> ... you might think that a person doing what Hannah told you would do it under cover of darkness ... He does have a disability. He's not strong. The person doesn't know who he is. And is in terror. He's in a better position ... The mere presence of a male at night in darkness ... would be certain to ensure her submission ... regardless of his build if its dark he's got the whole presence of rape to make him terrifying [C2 12].

The "whole presence of rape" is a malleable conceptualisation that is enduringly responsive to immediate demands. Perceived as a property of the crime itself it appears to persist over time, irrespective of social or political change, as indicative of what rape is all about.

In 1984, at the initiative of the Women's Adviser to the Premier, Ngaire Naffin conducted an inquiry into the substantive laws of rape in this state. One of Naffin's objectives was the assessment and evaluation of the current statutory formulation with

a view to bringing state legislation into line with interstate and overseas changes to rape laws. She solicited the opinions of a range of political and legal organisations and individuals directly and peripherally involved in issues relating to rape. These included the Attorney-General's Department, the Police Department, a Sexual Assault Referral Centre, the Rape Crisis Centre, members of the judiciary and legal profession and rape 'victims'. Her recommendations endorsed a graduated structure of sexual assault similar to that currently existing in New South Wales, partly in recognition of the fact that the crime of rape can assume many forms.

Naffin argues from within the legitimated discourse for a focus on physical violence as the appropriate medium for grading rapes in a scale of seriousness. Yet she cites the demystification of rape, that is, the recognition within the juridical field of its complexity and diversity, as an outcome of a graded structure of crime known as sexual assault. Such a structure, she argues:

> ... could serve to break down the dominant stereotype of rape as a brutal and violent crime enacted by strangers. It could emphasise that there are more subtle forms of intimidation. It could show that rape is a crime achieved by a variety of types of duress, and that a victim does not have to sustain injuries to feel violated, or that her life has been threatened (1984:56).

Naffin's recommendations specify the "circumstances of aggravation" to identify "the most abhorrent rapes" (57). She alludes to "the peculiar vulnerability of the victim" arising from their "personal characteristics" or from the "circumstances" of the rape, as the primary criteria of aggravation. These "personal characteristics" include what is culturally constructed as the legitimated age-span of female sexuality, when the person is

(i) ... under the age of 17 or over 65;

while "circumstances" designate an unsolicited invasion of the private sphere, to constitute an episode marked by the public violence of a stranger, and inferentially contrasted with the ambiguous nature of private violence between non-strangers:

(ii) when the sexual penetration was preceded, accompanied or followed by, or was associated with, or facilitated by, one or more of the following;
(a) the abduction of that other person

(b) the accused forceably gaining access to any place where the victim was lawfully present (1984; 57).

Implicitly, it is these last two points which set up a stranger, the deviant individual as the most likely person to commit such crimes.

Her second general criteria of aggravation comments on the degradation physically imposed upon women sexually assaulted, such as an act of "gross indecency" or acts "calculated substantially to humiliate or threaten". Such criteria can be independent of, or coupled with specifications of "violence", which Naffin lists as explicitly physical and evidenced by the act itself:

(c) an attempt or threat by any means to choke, suffocate or strangle that other person;
(d) an attempt or threat by any means to render that other person insensible, unconscious or incapable of resistance;
(g) the intimidation of the victim with an offensive weapon;
(h) the assault of any person (1984; 57).

These criteria constitute what Naffin recommends as the primary level of sexual assault. The second level is constituted by allegations of sexual penetration without consent, that is, when none of the above criteria are present (1984; 59-60).

Implicitly, Naffin reproduces the form of tacit representations of rape. She polarises the 'classic', or 'aggravated' rape involving strangers, life threatening violence and the accompanying injuries of physical resistance, against the "common, ordinary garden variety" of rape, thus enabling the former to continue to be used as the means by which the 'genuiness' of the latter category is evaluated (ABC: *Without Consent* 23 July 1992). She re-embodies these polarised forms with recommendations for revisionary content, as a means of counteracting what she recognises as a fundamental contradiction in the evaluation of rape claims, that rape has a stereotypic conceptualisation which legally and socially, imposes a narrow interpretation upon what is an individuated crime. Her reconstituted forms posit strangers and struggles, and above all, explicit acts of violence, as what "real rape" is all about (Estrich 1987).

Naffin's recommendations for an explicit scale of seriousness regarding a crime labelled sexual assault were not formally implemented, yet they operate informally to evaluate the legitimacy of crimes of rape. She found that most locations she contacted advocated no name change for the crime. She says:

> The principal reason for keeping the term 'rape' ... is that for most people it conjures up a particularly horrible crime. To discard this word is to water down the special character of rape (1984; 64).

This "special character of rape" is a signification that privileges a universal referentiality as if all experiences of rape are materially comparable, embodying a form which is immediately recognisable to all individuals as rape.

Rape is assumed, therefore, to have the same meaning, the same conceptual referentiality, to the law, to the population at large, to men and women, to all men and all women. It is a definition that subordinates particularity to the general conceptualisation, subsuming the individual experience within an encompassing categorisation of the crime. It is a field of discourse, therefore, with an internal frame of reference. It is to legal specifications of the elements constituting rape that any knowledge of rape must ultimately refer. But legal knowledge requires no guidance from outside itself and indeed formally avoids other knowledges, as an indicator of its objectivity and impartiality. This confirms the referential nature of the classification 'rape', as independent of both context and circumstance, and the social relations out of which such contexts are constituted. This institutional autonomy enables the legal system to validate its decisions by reference to its own knowledge, thus producing an autonomy that allies with its decisions a hegemony unrivalled by other sources of power.

THE CRIME OF RAPE

Rape exists as a criminal classification into which all actual experiences of rape can be subsumed, as its elements represent the characteristics definitive of all experiences of rape. This legal accomodation of experience is conceptualised as unproblematic within both lay and legal forums. In practice though, all elements of the crime are constantly subjected to contradiction, contestation, even reformulation, as the specificity of the individual experience mobilises discourse about the parameters of the normality and thus also, the deviancy of heterosexual relations.

Proof of sexual intercourse

It is generally acknowledged in court that discrepancies can exist between lay and legal definitions of what constitutes sexual intercourse. Lay definitions privilege the phallic experience. Judges frequently inform jurors that:

J The ordinary concept of sexual intercourse, as it is understood in the ordinary use of the English language, has been extended by an Act of Parliament to include some other acts and that can lead to confusion [Mo 8].

The statutory definition of sexual intercourse includes penile-vaginal intercourse, both oral and anal penetration and penetration by object or instrument. This categorisation is legally recognised as departing from the 'ordinary meaning' or 'general understanding' of sexual intercourse. The discrepancy between lay and legal meanings has many levels of realisation within each particular trial, as the specificity of detail imposes a limitation on interpretation which seems to be constrained only by the ingenuity of the individuals involved.

Binlow admits to penile-vaginal intercourse in February with which Penny agrees as the basis of her allegation of rape. But he claims two "head jobs" on two different occasions to buttress his defence of consent. When confronted by Penny's boyfriend

Munt, demanding to know why he had raped her, Binlow admits to having sex with her, referring to intercourse in February. When asked by the prosecutor how he knew to which of the three episodes of sexual intercourse Munt was referring, Binlow replies:

W ... I told him [Munt] what happened. And said what was in my statement.
P Yeah - So all he told you was that there was an allegation ... Well, how did you know that he was referring to 2 February 1990.
W I only had one sexual intercourse.
He was talking about rape [Wi 93-4].

To Binlow oral sex is not intercourse and cannot be rape. Hannah, who has been anally raped, tells the court:

W I am sure I was raped now I know what rape means exactly [C2].

The prosecutor later qualifies Hannah's explanation:

P She wasn't to know that the law regards the insertion of a finger every one bit as [significant as the insertion of a penis] ... Most people who aren't involved in the law wouldn't be expected to know that [C2 12].

Ted, the accused in this case, tells the police:

A All I want to say is that I want a medical examination because I didn't have sex with her ... It will prove I didn't fuck her. I tried but I didn't fuck her, I can tell you that [C1 183].

The police ask Ted:

Q What do you mean by "didn't fuck her".
A Well I didn't.
Q What did you mean by the word "fuck".
A I didn't penetrate Hannah with my penis.
Q And ejaculate.
A I did not penetrate Hannah with my penis at all [C1 286].

Ted's definition of sexual intercourse excludes either anal penetration and, or as well as, penetration by object. Yet Hannah knew she had been raped, while equally as unsure of the legal definition of the crime as Ted is.

Relation and action

It requires knowledge about the meaning of the term 'rape' to transform an act of consenting sexual intercourse into a crime. Hannah is uncertain about what constitutes sexual intercourse yet sure her experience is rape. Her ambiguity enables the defence counsel to exploit this conflicting definition of what rape is about, the physical act of sexual intercourse or the relation of which that act is a part.

Hannah is awoken one night by an incident of anal rape which ends with her awakening response of rejection. Shortly after she describes this experience to Jane, her house companion. Her direct speech is included in her police declaration:

> ... he just tried to rape me ... He was fucking me up the arse ...[C1 92].

She has a singular impression of rape, that of penile-vaginal intercourse, into which her experience is not readily accommodated. The ambiguity of her phrase "tried to rape me" reflects her uncertainty in naming her experience as rape because of her lack of knowledge about what is legally defined as sexual intercourse. This phrase allows the defence counsel to extrapolate an uncertainty about the experience itself, by appealing to the more general claims made within this arena about the credibility of women alleging sexual assault. He uses the encompassing term 'rape' to subvert her particular form of rape by invoking its totalising conceptualisation. This allows him to exploit her non-legal knowledge by conflating her uncertainty about rape as a crime with an uncertainly about her rape experience. His line of questioning directly assails both her experiential definition and its reality, subsuming both within the issue of her credibility and rationality:

D Could you tell me what you meant when you used the words that appear there "he just tried to rape me".

W At that stage I just couldn't believe that something like that could happen let alone to me and I wasn't really sure. There was a stigma attached to rape at that stage. I had never been around it or experienced it before.

D Is it the case that you were trying to convey to Jane that you weren't sure you had been raped.

W No. I knew I had been raped but I just, as I said, I couldn't believe that it would happen to me.

D If you knew that you had been raped why not just say "I have just been raped". Why did you use the word "tried".

W I was under the impression that a rape usually meant pentration of the vagina or something. I wasn't sure what the circumstances would be about anything else.

D You didn't think that rape meant penetration of any other part of the body.

W Well, I wasn't sure. I just wasn't sure at that stage.

D I put it to you that what you had in fact done was *without being aware of it* admit to the fact that you had not been raped.

W In the next sentence I said that he was fucking me up the arse. ...

D I now put it to you that you are not sure whether or not you were definitely raped or whether or not there was an attempt to rape you.

W No. I am sure I was raped now that I know what rape means exactly [C1 91-3] (my italics).

Rape is tacitly understood as a uniform classification and this is the conceptualisation the defence counsel's arguments rely upon. Implicitly, his statements presuppose a crime that is easily discernible, obvious to all observers and unwarranting Hannah's experiential confusion.

That Hannah is a woman who can admit her own unreliability "without being aware of it" is a theme further developed in this trial when her male companion is called upon to endorse her identification of her experience as rape. Hannah initially tells Jane and then goes to ring her boyfriend. The barrister requires three formulations of these questions seeking additional, male confirmation of Hannah's experience, before he finds a legally acceptable way of expressing what is procedurally objectionable. These aborted formulations are all put in the presence of jurors, thus, explicitly expressing what is stategically residual. Once again, the defence counsel is able to draw upon the implicit contradiction between a uniform conceptualisation of rape as tacit knowledge and Hannah's experience, to undermine her credibility:

D ... By the time you had this conversation with Hannah, did you answer in your own mind, first of all, that she was raped. ... [objection]

D By the time you had had the conversation with Hannah had anything - had you formed the impression that she had been raped. ...[objection]

D Could you tell the court the state of your mind in relation to whether or not in relation to the question of whether Hannah had been raped.

W At the time I had assumed that she had been attacked. Hannah hadn't told me what had happened so, therefore, I couldn't in my own mind formulate what had happened, because I didn't know. She told me that she believed she had been attacked when she rang on the phone, almost raped, on the phone, and so therefore I believed her. [C1 128].

"States of mind" a witness can give testimony on, thus legally providing the medium to exploit what is, in essence, totally unsubstantialisable information. Hannah knows it is rape because she identifies such personal violation with rape. She did not consent to any sexual activity in this situation but for Ted, her consent was irrelevant. "Rape is, first of all", explains a woman in Russell and de Van (1984), "the negation of being". For this woman, as for Hannah, "rape does not consist of a physical act", that which legal practices focus on, but "the intention of the rapist" (1984:112-3). Hannah responds to a totalising image of rape, anticipating physical extremes which, when unrealised, result in confusion and absurdity. Her response is to an emotion of which the action is part, as distinct from the extremity of the act itself.

RAPE IS A SERIOUS CRIME

Legally, rape subsumes a range of activities that are formally and informally evaluated by criteria that are rarely explicitly articulated, as their composition is taken-for-granted. Structurally, the crime is classified as a serious crime, categorised alongside murder and grievous bodily harm as crimes against the person. Rape is required to reflect this level of seriousness in its action, in the physical violence and threats of the rapist and in the woman's response to this assault.

By allying the "special character of rape" with physical violence and struggles with strangers, these qualities are equated with the 'seriousness' of rape which becomes a measure of the 'genuineness' of the crime itself. The less 'serious' a crime is, the more removed it discursively becomes from the notions of deviancy identified with rape, towards its polarised reflection, consenting sexual intercourse. There are only two positions recognised within legal discourse about heterosexual relations and if a womans's experience cannot be subsumed within rape then, by exclusion, it must be consent, if it happened at all. For the credibility problematised in prosecuting sexual

offences includes credibility about what rape is; what happens to the person must be credible as rape.

Tina knows her assailant, Jim, informally, as both are members of the RAAF. She is also awoken but by cunnilingus and her awakening response brings an end to the experience. In her final address the prosecutor describes the nature of the incident eventually identified by Tina as rape, by contrasting her experience with what is generally assumed to constitute rape:

> P It is an attack which is insidious in its nature ... [it was] probably a very gentle type of attack in the circumstances ... She's woken by a tugging on her leg ... not enough to wake her fully ... She feels a strange sensation on her vagina [which she identifies:] That's a tongue. And there's a fondling on her breasts. All of those things don't suggest any violence ... She hears a voice saying "I just want to lay here and cuddle you all night". It makes it all the more difficult for the person [experiencing these things] to come to terms with. It makes it all the more confusing for her. What do you do about something like that? It's not something you go and tell everybody about ... Somebody comes in to her room and you might think, assaults her in a very personal and private way ... It also shows something about the accused ... shows a very misguided or immature display of affection by the accused ... I suggest to you that even on the accused's own story, his behaviour is immature and insensitive ... What he's looking for is a bit of affection. And he's off there to see if he could get any further with her ... And he does find her ... he goes just a little bit too far. He does want to stay there ... he goes about it in a most immature way [Co 37]

There is a curious juxtaposition of images in this passage as she details an attack that is gentle; a violence that is not brute force. The physical descriptors selected, tugging, fondling, cuddling, are not evocative of rape. A "misguided display of affection" is constituted as assault. This is a violation that is attributed to immaturity and insensitivity. It is "affection" carried "just a little bit too far". To the jury, if they concede it happened, it is not rape.

This is a discourse on sexual relations, in which "affection" on his part becomes rape on hers because in his attempts to "get any further with her" he goes "just a little bit too far". Rape is construed as "going too far". The attitude on his part, his intention as read from his actions, is construed as sex not rape. And these intentions

are not inappropriate, merely "immature". Yet what is "affection" to him, is rape to her.

This personal interlude is premised, on his account, upon the assumption of unrestricted access to her sexuality. There is a prior relationship between these two people that entails two or three conversations but no social or sexual intimacy. She is a recent arrival at a base where new women, he says, are "conspicuous" because of their "short supply". He acknowledges some preliminary attempts to "chat her up". She considers he has been "pestering" her. But, as yet, there is nothing in the relationship from either account to premise an assumption of sexual freedom upon, except his taken-for-granted right to determine the level of intimacy in this or any relationship.

The defence counsel opens his address by reframing the context:

> D My friend has spoken about ... too much enthusiasm ... there were no injuries or bruises. It was a gentle encounter, she says. ... We are talking about rape. Not some pass at a party ... This case isn't about that ... It's about rape ... one of the most serious [crimes] ... Bear that in mind. It was a gentle encounter [says the prosecutor] The charge is rape [Co 40].

This explicitly focuses the actions of the incident within a uniform category of a serious crime. The actions imposed on her were not serious yet her allegation, the charge itself, is. This appeal detaches rape from the discourse and arena of sexual relations and re-aligns it with the deviant individual who is above all else, violent. The defence counsel trivialises the Crown's explanation by reconstituting the gulf between rape and sexual relations, between the rapist as the deviant and the 'normal bloke', distancing deviant sexuality from 'normal' heterosexual intercourse. The judge compounds the relationship between these two discourses by confirming the Crown's interpretation, that rape is male sexual appetite out-of-control:

> J It maybe ... he was inspired to chance his arm a little further ... May he not have intended to have consensual sexual intercourse with this woman in her bed? .... [that scenario] wasn't put to him by the prosecutor, who rather gently pursued the matter ... But again - That's a question that's crossed my mind ... and if that

> is your view - that may be a matter for you to reflect upon what's been put to you by the defence - that this is still rape [Co 56].

Tina's explanation of what happened to her jars discordantly with conceptualisations of rape as the act of the sexual deviant. Tina herself was equally confused and took until the next day to decide to report this incident. This brought her before the base doctor who, upon hearing her description of what happened to her responded, as she has said, with:

> He just told me that men don't do that type of thing. I must have been imagining it [Co 37].

His comment dismisses Tina's experience totally; if "men don't do that type of thing" and what happened to her is not rape, then it has no conceptual reality outside of her own knowledge.

The legal status of tacit knowledge

Part of the constitution of any act is knowing what it is. It is from understandings of social relations that aspects of collective knowledge are organised. But knowledge of these relations is frequently confined within that which is taken-for-granted. Legal procedures can only accomodate that which exists at the level of explicit knowledge, and even this knowledge is required to be knowledge of a particular kind.

Throughout a trial the legal system constantly affirms and reaffirms its authority as the legitimated arbitrator on sexual discourse by the type of knowledge its practices require. In rape trials the 'victim', as witness for the prosecution, is called upon to explicitly articulate the details required to substantiate their claim that they were raped. This includes detailing the acts constituting sexual intercourse. Homosexual rape has a short history within this arena and the lines of confrontation are much more arbitrary and less predictable than with heterosexual rape. For rape, as a criminal classification, emerges out of a legal history categorising heterosexuality as the 'normal' sexual

relation from which the deviancy of rape is constituted. Of the two homosexual trials I observed, both defences were based on fabrications allied with claims of immaturity and revenge. The acts of sexual intercourse were marked as illusion and, therefore, easily accomodated within discourse on confusion about masculine identity. Like all discourse, this claim has the potential to reflect a particular version of reality and its juxtaposition within this context, where accusations are made about relations that are culturally inconceivable to these males, allows it to be embodied within and echo the confusion experienced by both men when called upon to objectify their own experience as witnesses for the Crown.

Sean is a 16 year old who is asked in cross-examination how he knew it was a penis in his mouth. He was awoken from an intoxicated sleep and the penis was withdrawn immediately. The defence counsel questions how he can be sure it was a penis. Sean replies that he "assumed" it was. He cannot justify this explanation outside of repeating "I assumed it was a penis". Nor can he explain what he means by "assumed". In his evidence Sean has articulated the specificity required by law to constitute the element of sexual intercourse:

P Yes - And when you awoke - What was your father doing?
W Putting his penis in my mouth. ...
P And what position was your father in - relative to you?
W Leaning over my face.
P And how far was his penis in your mouth?
W About an inch.
P And did you notice anything else happening to you?
W Ben was sucking my penis. ...
Once I woke up that was the end of that [Wa 7].

As Sean physically responds with rejection he notices there is a third person at the end of his bed. A short time later he rings the police emergency number. A recording of this exchange is played as evidence of his "prompt" complaint. We, in court, hear him talking. He sounds extremely distressed. His breathing is very heavy; his voice very shaky. He says to the officer:

... I just had three poofters suck me off in bed..
Q You're serious.
A I'm fucking serious buddy.

Q Don't swear at me.
A Sorry.
Q Do you know them?
A One of them is my father. ...
Q Alright mate. We'll get someone there as quick as possible.
A Thanks mate.

When the police arrive Sean tells them:

> I woke up with my father with his penis in my mouth and Ben sucking my penis [Wa 10].

Yet when asked in court how he knew it was a penis in his mouth, he can only reply that he "assumed" it was a penis, agitated by what to him is the self-obviousness of the experience.

Re-examination attempts to elicit empirical support for why Sean was so sure it was a penis in his mouth; upon what was his assumption based:

P Now - um - You say a penis in your mouth - What was the texture of the thing that was in your mouth - You understand the question?
W No.
P Right - Well - You know what metal feels like in your mouth - And skin feels like in your mouth - And plastic feels like in your mouth - What did the thing in your mouth feel like?
W Don't remember.
P Can you remember whether it felt metallic?
W It just felt hard.
P What about the shape of the thing that was in your mouth. Can you tell us anything about its shape?
W Well I assumed it was round.
P Well - Did it feel round - You know what a flat ruler feels like [what did this feel like]?
W Well I assumed it was round.
P Was it consistent with the size of a penis - what was in your mouth?
W Yeah. ...
P And the thing that was in your mouth - Can you tell us whether from its feel - from its texture - it was or was not consistent with a penis. Do you understand the question I'm asking you?
W Yeah. But to me it was a penis.
P Well it's pretty important to know exactly why you know it was a penis.
W Because I felt it.
P Well maybe - Why do you know it was a penis. How do you know it wasn't a biro?
W Well I assumed it was.
P Well why?
W Because this never happened to me before and I don't see any reason why they're gonna come up and stick anything else in my mouth [Wa 14-17].

But Sean's common sense is insufficient to substantiate a claim of rape, as even the most obvious must be empirically validated. This segment challenges and contradicts

appeals to tacit knowledge, that common position from which that which is self-evident is observable, as knowable to all as it is to anyone. It raises the question of whose common sense is to be construed as common, common to whom and common under what circumstances. This is more clearly spelt out in the following trial in which the egalitarianism of common sense is more openly constituted as the contested terrain.

The arbitrariness of inference.

At the end of the Crown case on a charge of rape the defence submits that the Crown has not proved *fellatio* because, given the etymology of the word, "some sucking or licking" is required by law. There are two references in the evidence of Roger, a man of 20 years, alleging sexual assault by a fellow worker and respected friend, Ken aged 50. Roger has described one afternoon when he drank two bottles of champagne with Ken and became unwell. Roger remembers Ken assisting him to his bed; he says:

W I just lay down on the bed with the clothes I had on.
P What happened then
W The next thing I knew I was on my back and the accused was leaning over me at the end of the bed. And he had his arm across my leg with one hand around my penis. And his mouth was coming down on to my penis [KJ 16]

Roger's second answer to the prosecutor's question repeats this stark description:

P Roger - Before lunch we had got to the stage you had gone to sleep ... tell the court what happened when you woke up.
W When I woke up I found the accused lying on the edge of the bed ... with one hand on my leg and another around my penis. And then he said, "Fuck you", and then came down with his mouth on my penis [KJ 18].

The defence counsel argues that there is in this description, "nothing to suggest an act of *fellatio*" as the crime requires deliberate action:

D The most obvious inference from the evidence is as soon as he put his mouth on his penis the act stopped ... that act does not involve sucking or licking. There is nothing more than a touch with closed lips on any section of the penis ... At the very least the Crown to prove *fellatio* must prove some sucking or licking. There is no charge of rape [KJ 97].

The Crown argues that Roger's phraseology infers a natural and obvious meaning to his words. The "common sense" interpretation of "coming down" is oral stimulation of the genitals. The judge disagrees. On his reading:

J ... the evidence was simply that the accused kissed the victim's penis ... I'm not linking it to this case at all, but if the victim's penis had been kissed, would you call that *fellatio* [KJ 99]?

He argues that Roger said "put it on my penis" not "put it around"; it could therefore be "anywhere" on the penis. The prosecutor restores the contextualisation of the act:

P At the very least it is open to the jury to infer from the evidence that the victim's penis was placed in the mouth of the accused ... It's one of the common sense inferences that can be drawn when a person says [he was coming down on me] ... When you put that in the context of the rest of the evidence ... that there was ejaculation [therefore] stimulation ... [it's a matter for the jury as deciders of fact] whether or not that actual penetration occurred [KJ 102].

The judge disagrees. There is no case to answer on the charge of rape but he puts forward the alternatives of attempted rape and indecent assault. The prosecutor argues that the former is open to the jury as a possible inference; Roger became conscious, realised what was happening and halted it by his protest:

J ... what he is saying is that he became conscious - the accused was bringing his mouth down towards the penis - and, in fact, put it [on the penis]. Alright - And that's as far as the victim ... gives evidence. He then ... said "No". And tried to sit up. And then passed out. Well do you say that the "No" and the try to sit up was sufficient to complete the act?

P ... he certainly interfered with what was happening. He tried to stop [what was happening].

J Yes he definitely tried to stop [what was happening]. It was such a feeble effort ...[KJ 105]

The same act has a brief existence as attempted rape for the defence construes this definition as a bid by the Crown to have it "both ways". The act ruled incomplete in constituting an act of *fellatio* is now construed as a completed act and cannot be redefined as an aborted rape. The ruling makes this act complete in itself, independent of Roger's subsequent actions, as it is these actions, his passing out and becoming unconscious, which makes what happens next inadmissable, even as an inference:

J There is no evidence on the Crown case that there was any intention to suck or lick ... And there is certainly no evidence of that having happened ...

P He's got his penis in one hand - his mouth coming towards the victim - [the jury] would be entitled to infer [that *fellatio* is a possibility].

D [There is] no evidence to interpret on top - It's "on the penis".

P ... It's "coming down". - And he puts his mouth on the penis ... [to stop there] is to infer that there's no intention to go on and do the things one usually does in sexual situations.
D I question what one usually does in sexual activity.
P In homosexual situations.
J I'm against you ... I think the act was completed ...[that] narrows it to indecent assault [KJ 107].

Thus, the act has an existence independent of the context from which its definition as a crime is derived. This process becomes realisable by the explicit privileging of the act itself as constitutive of rape, irrespective of the circumstances within which it occurs. By contrast, Roger experiences the act as rape because of the relation within which it occurs, and the power enacted by that relation.

Within this arena there is no reality to any conceptualisation without enunciation. This one deed begins as a contextualised incident defined by Roger as rape. It commences its legal life as rape, to be briefly amended to attempted rape before it settles into indecent assault. This transformation is a process that occurs independent of Roger and what happened to him. It is Roger's words, fixed in their referentiality in print, that constitute reality for this environment. Roger's lack of ablility to enunciate, to name what for him, like Sean, is the unnameable because it is the unthinkable, renders his knowledge of his experience invalid, even, as with Sean, illusory.

THE 'FACTS' OF RAPE

A statement requires acceptance to effect generalisable consequences, subsuming within this expression of its legitimation details of who it is that utters it, to whom it is addressed and with whose opinion it accords (Bourdieu 1991:76). Inference is a form of knowledge that relies upon a common position for interpretation. It deals with causal associations that are rarely explained as their referential relationship is taken-for-granted as commonly understood. As a mode of interpretation its success depends

upon congruence; it requires of its audience the ability to make the same associations and connections as the author.

The common-sense knowledge about rape generated during a trial is institutionalised. The inferential knowledge produced and reproduced by evidentiary procedures acquires a factual reality because of its locus of production. For example, the incredibility of women alleging sexual assault has no empirical foundation outside of legal knowledge. It is in this way that the knowledge produced by legal practices and methods is able to formulate and reformulate the parameters within which rape and female sexuality is conceptualised more generally, non-legally.

These parameters rely upon the classification of deviancy to simultaneously define the legally and socially acceptable limits to expressions of heterosexual relations. This opposition is epitomised in the legal dichotomisation of consent/non-consent, which naturally compartmentalises all sexual relations clearly into either camp. Conceptually, this polarisation imposes a universalised interpretation upon sexual behaviour, aligning definitions of rape with the unambiguous expression of non-consent. Rape is construed as clearly discernible to all, interpreted uniformly by both men and women, by all men and all women, even while the potential for differentiation in the expression of this emotion is formally acknowledged.

Proof of non-consent

The issue of consent within rape presupposes a gender-free knowledge, as legal procedures simultaneously argue that the criminality of the act depends upon a woman's state of mind. The implicit legal problem is to ascertain whose point of view explains what really happened, as if what happened exists objectively, to be decided, and this task of determination can be separated from the gender of the participants.

There are only so many permutations realisable as a defence to rape charges. Strategies can include the total denial of the woman's allegation or, if sexual intercourse is medically verified, mistaken identity is the usual claim when strangers are involved. But the most common appeal is the redefinition of a woman's allegation of rape as consenting sexual intercourse.[8] Barristers have a strategic interest in establishing and reproducing conceptual parallels between consenting sexual intercourse and rape while simultaneously interpreting both as being poles apart. For while the act of sexual intercourse has to be construed as consensual on a defence case, the actor of the alleged crime, the rapist has to be constructed by the Crown as radically distinguishable from this 'normal bloke' engaged in 'normal' heterosexual relations.

Generally, legal direction on how expressions of consent are to be understood are uncompounded:

P Now consent means a free and voluntary engagement ... It's not consent if there's been threats made ... as a matter of common sense and as a matter of law a woman does not have to fight to the bitter end. If she submits out of fear [that's not consent] [Mu 5].

These instructions unproblematically apportion meaning within qualitative, relative terms; "free and voluntary engagement", "threats" and "fear" depend on circumstances and individual perception for their substantiation. Legal statements present them as unambiguous neutral concepts, discernible by 'common sense'. Yet simultaneously, such statements can also acknowledge and constitute an environment of equivocality, as this judge explains:

J It should be said that there is no special way in which a female may be said to be a consenting party ... It is not consent ... without the female's will accompanying the act [Mu 78].

"Female's will" is a conceptualisation that encapsulates a multitude of discourses about the nature of women's sexuality. A woman's verbal refusal of intercourse does not necessarily signify lack of consent. Smart (1989:41) details how consent has been

"psychologised" as a state of mind that can be attributed to any woman and, therefore, to every woman. The more clearly non-consent can be construed as submission the further away it moves from notions of deviancy. For submission by the passive woman is already part of 'normal' heterosexual relations and the potential for a woman's rejection of sexual intercourse to be construed as ambiguous is always realisable.

The explicit co-mingling of violence with consensual heterosexuality makes the alignment of violence with rape highly problematic. The role of violence in 'normal' consenting sexual relations has been normalised, so that when a rape actually occurs, it is, as Edwards says, "frequently defined away" (1981: 108-9). The discursive lines between rape and consenting sexuality are blurred, to make not only the definition of pleasure itself problematic but also the relationship between consent and pleasure (Smart 1990:14). If there is the slightest possibility of pleasure on the part of the woman then male responsibility, for the sexual activity and for its violence, is discharged.

Rape is allied by 'the law' and by men with a discourse on sexuality rather than with relations of power. By linking the 'truth' of rape with an act of sexuality rather than with the powerlessness experienced within the relation of which this act is a part, the potential to incorporate notions of pleasure remains feasible. This draws support from discourses proclaiming that if an action is sexual it must be natural, inherent within all individuals and distinct from that which is socially and culturally acquired.

Legal explanations of consent are backgrounded against a particular conflation of violence, resistance and injuries. For while a judge may state,

J A woman is not expected to fight against a man to the bitter end. There is all the difference in the world [between submission and consent] [MJ 24].

a woman is expected to fight, to physically resist and to provide evidence to support claims of resistance, albeit stopping short of what ever the "bitter end" may be. For

the domination and coercion of rape is exclusively aligned with physical action. If the sexual intercourse is not consensual then the person must have resisted, physically, against the physical force and violence of the perpetrator. Both rape and its resistance, non-consent, are conceptualised as expressions of physical deeds, as this defence counsel clearly, authoritively explains to jurors:

D You can be raped without any marks on your body. Well, that's true. You can have a knife at your throat [or be told] "Unless you open your legs I'll belt you" ... But she didn't give you evidence about force ... not one mark on her skin and she has fair skin. But she does say there was some force administered. But there's not a mark to support ... [Cu 58].

While consent explicitly masquerades as a neutral signifier, surreptitiously it is embodied with a gendered content. For these are appeals to a discourse on violence allied with male assault. Referentially, they relate to the sustaining of injuries as a consequence of physical action and reaction, as if rape is no more than an expression of male physical aggression. This discourse appeals to, as it posits, an equal power base between the two parties in terms of physical potential, to constitute physical aggression as an innate quality of all. Its point of view denies the enculturation of women into passivity as, unproblematically, it rejects women's experience of rape as a power entrenched within and emerging out of social relations. This discourse naturalises the claim that any signs of physical aggression in any context, is indicative of how a woman would respond to rape.

Bernice, a 16 year old girl, "slaps" the face of a youth who calls her a "slut". Yet when raped she freezes into immobility as her initial impetus to struggle rapidly disappears. The defence counsel argues:

D She doesn't want to pose herself as a girl who would go and punch him in the face. And if she's that sort of girl, what sort of struggle would she put up in the toilet [MJ 5].

Note the replacement of the female descriptor "slap" with "punch him in the face", this being what males do in situations of physical assault. His statements conceptually

reduce rape to no more than an act of physical aggression between two comparable assailants:

D He wasn't lying on your hands in any way.
Your hands were free during this entire incident ... Your hands were free weren't they?
You didn't try and scratch him.
You didn't try and punch him [Wi 31]

It is this privileging of aggression that trivialises the meaning of rape for women as no more than a purely physical act. The violence of rape or the force involved exists at no more than an egalitarian level of physical assault. Non-consent is constrained within this conceptualisation of force and expressions of resistance are required to subsume the qualities of the dominant aggressor. Women are not required to "fight to the bitter end" but they are required to fight, physically, like men, if they are going to allege rape.

Resistance and non-consent

Descriptors such as violence, fight, force, threat are multivocal and their meaning is never reducible to their linguistic signification. It is the fight and aggression of males of equal status, but it is also the force and fight of a woman against a rapist attempting to rape her. So there is a *degree* of resistance required. This is the qualitative level with which a woman's actions are compared for appropriateness. To argue that her injuries are inadequate or inappropriate presupposes an objective normative measure against which the injured woman can be compared, to evaluate the truth of her claims. And while it is not explicitly stated in court that currently, a woman is expected to protect her sexuality with her life there are resonances that rape should still be viewed by women as a 'fate worse than death'. Hence to be raped not only is the woman required to have injuries, she must have sufficient injuries to justify a claim of rape. This appeals to a construction of violence outside of the normal expression of male physical aggression, to notions of the sanctity and honour allied with the preservation of chastity and its protection as a commodity. This residual injunction is buttressed by

the significance of who it is that is alleging rape. Jurors have to accept her reaction of resistance as plausible for such a person, as the question is "not whether what she did was the best action, but what she did was understandable" [C2 13]. While only the 'genuine rape victim' is marked by injuries, even 'severe' injuries warrant a cautious interpretation as they do not conclusively signify a lack of consent. Covertly, notions of 'natural' male sexual aggression incorporate as the implicit counter point of the 'victim', the 'passive' woman who submits after resistance thus fusing inextricably the lines between eventual compliance and tacit consent.

Nor is it simply a question of sufficient injuries, they must be the right kind of injuries, particularly if the allegation includes vaginal intercourse. The injuries must be in the right place and medical discourse constituted in the interest of those alleging sexual assault, replenishes present-day notions that sexual offences always include extreme physical violence:

D You examined her pants, knickers, pantyhose and the leg-ins.
W That's correct.
D No damage done to those whatsoever when you examined them, was there.
W Not that I can recall, no, not that I recorded.
D And that's something you look for.
W Yes.
D You haven't reported any damage to clothing at all, have you.
W No [Cu 84].

For the ultimate question, obscenely, explicitly expressed under the euphemism of the "technicalities" of rape is, if it was non-consent, how "did he get in":

D How did he get in between your legs.
W I don't know. ...
D Would you agree that it would be difficult to get between your legs.
W Yes.
D You never claimed that he forced your legs apart.
W No.
D Well he would have had to some how because he wouldn'tve been able to get in would he [MJ 46].

This common and particularly humiliating defence strategy epitomises the objectification women experience as witnesses for the Crown. This is an objectification tacitly regarded agreed upon, as it is inherent within a woman's decision to formally identify her experience as a crime. To accept legal arbitration is to accept

also legal practices as the appropriate medium of validation, thus confirming by compliance, the legitimacy of the procedures involved. Thus, she misrecognises that the trial process will re-affirm, even confirm, what she has already experienced in rape, a total depersonalisation that subordinates all subjectivity to a utilitarian objectification for the exercise of power. It is a defence strategy that draws its justification from the notion that a woman can't be raped unless she wants to. If she doesn't want to engage in sexual intercourse all it requires is a physical act, that of keeping her knees together. If she does that then it must require physical force to gain "admission". Therefore injuries become the iconography of the 'genuine' rape. These statements presuppose that not only should she bear the signs of her non-consent, so too should he:

D ... wouldn't she scream - howl out? ... Wouldn't she have marks on her body? ... Wouldn't Ted have marks on his body? ... He walks out, staggering and smiling [C2 29].

D I would like it to be an agreed fact that [the police doctor] examined the accused and found no scratches or bruises on him [Cu 1].

These are all appeals to tacit knowledge, legitimated scientifically, that construct as critical the act of sexual intercourse itself, backgrounding by this official focus, its circumstantial occurrence. It is physical action that identifies what is sexually deviant by its distance from the actions of the 'normal bloke'. Injuries are legally accorded the potential to iconographically demarcate this division.

These arguments proffer a uniform and static response to rape that complies with the homogeneous sociological classification of 'victim'. This label depersonalises experience by claims of unanimity, positing a circumscribed response to an immediate definition of the situation as rape, which denigrates the integrity of individuated resistance. To say that a woman who reacts to sexual assault by 'freezing' does not resist is to deny that for this woman at this particular point in time, 'freezing' seemed to be the most appropriate way to respond, as Winkler explains: "one must understand, in this case," her case, "not challenging the rapist was a mechanism of self-defence ... My self-defence was rape-defined" (1991:13).

The language of consent

All discourse on rape simultaneously deals with issues of 'normal' heterosexual relations and the relationship between these two sides of the same coin is implicit in every trial, in the choice of language used to detail the nature of the crime and the circumstances of its occasion. To describe the act of rape as sexual intercourse is a "technique of neutralisation" that immediately invokes a 'normal' frame of reference in the evaluation of deviancy (Edwards 1981:167). This dual occupancy of a single representation is constantly drawn upon, expanded, even reworked throughout the cross-examination of the woman, particularly, and in the testimony of the accused.

The obligatory foreplay is relied upon to normalise the act itself; so much is said about "fondling" or "playing" with anatomical zones. This blunts the attribution of deviancy to what follows. But it also establishes pleasure as a parallel emotion to be considered, in the evaluation of the incident as rape.

Equally significant is the use of the vernacular to establish as semantically redundant, the ethos of innate, masculine predacity. These statements emerge casually, as the appropriate form of expression for describing sexual relations, backgrounding with its naturalness, its privileging of a male point of view:

D The accused thought he was onto a good thing [Co 39].

J He chanced his arm by going to his boyfriend's girlfriend ... He scored [Wi 23;37].

W I gave her the word - How about it. Then I just made a move [Wi 69070].

D He says he went round there ...[he says] I was prepared to say to her mum at the door ["I want to leave a message for Munt"] That's how I was going to get in to see her. I was going to talk her into sexual intercourse ... It's his idea ... He says in his evidence - She's a little bit concerned about Munt - He's got to talk her into it [Wi 9-10].

Such expressions tacitly inform legal discourse, encapsulating the actions of others within a familiar, masculine common sense.

The consenting woman

Every rape trial achieves its realisation by opposition to what is to be understood as 'normal' sexual intercourse, and each defence account generates discourse on male notions about female sexuality. In this following trial, there is little about the experience Tracy describes as rape that can be labelled deviant except for the fundamental fact of a man wanting to have sexual intercourse with a person who does not want it (Smart 1990:14). My summary of the preliminary circumstances of the incident includes detail from both points of view, to clearly establish the relationship Munt's interpretation of this situation is premised upon:

> One Friday night, Tracy sets out with three friends to socialise around the local hotels. At the fourth and final hotel, she becomes aware of Munt, who is known to one of the two males in this group. Munt accompanies the group in a taxi home and follows them inside. No one challenges his presence, as all assume someone else has invited him. Munt claims in court that he was openly included within the group at the hotel and invited back to the house for a meal. Of the three friends, the two men are intoxicated. One retires with his wife, leaving the other to bed down on the lounge while Tracy has the spare bedroom. Munt's presence is uncommented upon and he remains seated in the lounge. He claims Tracy brought him down a pillow before she retired.

This is all jurors hear about the circumstances of the relationship between the two principals. Tracy has noticed Munt being around her companions for a couple of hours. Munt claims he was part of this socialising group although he can't recall any conversation with Tracy. She only remembers telling him to smoke his marihuana outside the house.

Tracy awakes, she says, to a presence, a naked Munt "lying on me". She says, "Who is it", to which Munt gives his name. She says "What the hell do you think

you're doing" to which he replies, "I like you" or she thinks, something like that. From then on Tracy "stopped moving"; she says "I just froze and was crying. I was too scared to do anything" [Mu 10-11]. After intercourse Munt says "Do you want me to leave" and, still crying, she says "Yes".

Tracy's choice of non-action which to her is the best action to take in the circumstances, is construed by the defence as consent. Her "signals" of non-consent, he argues, have the potential to be interpreted as confusing or ambiguous. This is a woman who admits in court to "blacking out" a lot of what happened, a response considered so unusual by the judge that he seeks the confirmation of the doctor from the Sexual Assault Referral Clinic as to whether this phenomenon was medically recognised, as common to raped women. For it has "come out" in cross-examination that between Tracy saying "Who is it" and Munt saying "Do you want me to leave" she has said in her declaration to the police something about him getting her pregnant.

The organisational frame of a trial accords a particular sequence to the introduction, accumulation, contradiction and reformulation of information. The evidence-in-chief of a witness is usually organised to constitute an explicit time line while cross-examination is unconstrained by such a narrative convention. These questions juxtapose images one against the other to allow a natural contradiction to emerge as part of the witness's testimony and truth.. The introduction of Tracy's comment about pregnancy connotes the normality of this sexual episode. This reference becomes jarringly incongruent when adjoined with the previous topic, Tracy's response to Munt's assault. Her lack of physical resistance to his movements becomes problematic when co-operation is proferred by defence as the only viable explanation:

D You weren't giving him any assistance?
W No.
D There was no body movement on your part ...?
W No.
D You didn't grab your pants at any stage and try to keep them up?
W No. ...
D Can you remember whether you moved your legs apart?

W No.
D Certainly your legs were apart. He was lying in between [Mu 29-30].

These are appeals to what are construed to be the familiar routines of heterosexual intercourse within which her claims of resistance as a non-consenting participant are subsumed, constituting a sequence and context that allows the actions of her account to be embodied with his meaning:

D See - It was obvious that he wanted to have intercourse with you. He tells you who he is ... You ask him what he wants. Then there follows a discussion about you possibly getting pregnant. He then says he likes you ... you had sexual intercourse quite voluntarily.
W I was too scared to do anything.
D Did he threaten you? Did he have any weapon in his hand?
W No.
D He was lying on top of you telling you he liked you.
W I wasn't on the pill.
D You were considering having sexual intercourse.
W Because I was scared.
D Scared of what?
W That I would get pregnant.
Because I wasn't on anything.
Because I didn't know the guy ... I didn't like the guy.
D While this was occurring Steve and Annette were in the next room. Is that right?
W Yes.
D I put it to you that you were not crying while you were having sexual intercourse with Munt.
W I was crying ...
D ... I put it to you that you had sexual intercourse with Munt [consensually].
W No.
D Not at any stage did he force you to have sexual intercourse [Mu 33:35].

This is not rape, in the defence opinion, because there is no force. There are no threats of violence, no weapons or physical assault, no evidence of these male conceptualisations of force and resistance that are legally allied with definitions of what rape is about. It is posited as plausible that a woman without any conversation would consent to sexual intercourse with a man she'd met a few hours earlier. The "evidence", says the prosecutor ,

P ... is that Tracy had said just a handful of words to the accused ... There is no evidence that they had a long chat ... There is no evidence at all that Tracy and Munt even spoke to each other ... other than [her saying] "If you want to smoke that go outside" ... Now that can hardly be taken as a friendly overture ... Why on earth would this young girl have consented to having sexual intercourse? She's afraid of becoming pregnant ... See - There's no evidence at all. Nothing to contradict the evidence that she hadn't consented ... There's nothing at all to say that she did consent ... The only evidence is she did not consent [Mu 66].

This argument is premised upon non-consent constituting the basic assumption from which consent is required. With defence this conceptual position is inverted, reflecting in law and like 'law', the masculine assumption that consent is the basic starting premise of sexual relations:

D ... this pregnancy comment appears ... It appears from nowhere. It's not mentioned in the prosecution's examination and it's not mentioned when I asked her to be clear ... It's one of these items that are small and of little significance ... First of all, you weren't told about it . She kept that from you ... She said, "Oh I just remembered" ... She came into this court and she told you, "This is what happened to me and this is what was said" ... I didn't badger her about that ... Doesn't that cast some doubt ... Is there bits that she just doesn't conveniently - doesn't want to remember? ... [she says] she attempted to black some parts of this out ... Oh what a black out!...
It's my submission that "couldn't remember" is not good enough. Just not good enough ... She gives a pretty clear description of the matter ... Aren't we talking matters of consent? ... She's not telling you everything ... We've got a frozen and panicked - fearful woman who's discussing contraception ... It's not impossible but is it likely? ... [I know] she doesn't have to yell or scream or struggle but the fact remains that she didn't yell ... She's got friends in the next room ... no threat ... no weapon ... no evidence of any threat at any stage being made to her. She's got help five feet away. She lies there. She does nothing ... She asks him "What in the hell do you think you're doing ... Then it comes out later there's a discussion about getting pregnant - That's what she was scared of ... The Crown wants you to think about fear ... [but it's fear of pregnancy] That's why she didn't yell and it's why she didn't struggle ... She's pressed on what makes her scared and it's the thought of getting pregnant ... [she claims] she's either panicked [or] frozen ... Yet she's still got the presence of mind - she's discussed contraception with her would be rapist ... But was it without consent? How did she convey that non-consent to Munt? ... You know that Munt told the police that [when he left the room] she wasn't crying ... You should have some real concerns about her evidence ... [Mu 72-4].

The defence address combines the reference to pregnancy with Tracy's response to the assault to blur any difference between male and female social conventions regarding sexual relations. This reference fuses both the masculine equation of sexuality with biological instinct and the feminine interpretation of sexuality as part of a social relationship, to constitute within the notion of "discussion about contraception" the "ordinary" loving couple. The focus foregrounds the inherent incredibility of her claims of rape, backgrounding as an 'agreed fact' his assumption of the right to have sexual intercourse with any 'accessible' woman. Even the trauma associated with rape is denied in its appropriation as a measure of her deviousness. This address by defence is framed within the constraints of reasonable doubt; which is the more 'reasonable' scenario, her account of rape or his account of consensual sexual intercourse.

Explicitly, legal principles may stipulate that physical resistance is no longer construed as a definitive quality of rape but by male standards this is the only reasonable response anticipated.

There is, within this discourse about rape, a privileging of what a woman is required to do to indicate non-consent, which is implicitly premised upon the assumption that without a particular manifestation of non-consent, men have the right of access to sexual intercourse with any woman designated as 'accessible'. There is a blanket assumption of open access and availability which exists until what can be construed universally as unambiguous non-consent is conveyed. Explicitly, 'the law' states that "any woman including a prostitute is entitled to say no" but the question is never raised about what any man is entitled to do, as this is tacitly understood, implicit within discourse about the naturalness of masculine sexual aggression [MJ 42].

THE 'FICTIONS' OF RAPE

Men accused of rape legitimate their actions by discourse about women and their relationships with men. What is introduced into court to make sense of his behaviour reveals explanations about the nature of heterosexual relations, from a particular point of view. To successfully defend an allegation of rape it is legally considered essential to provide an acceptable narrative about her character. Jurors need to know what kind of woman this is, to decide whether she would consent to sexual intercourse in the circumstances described and also to discover her reason for proclaiming an act of consensual sexual intercourse, rape. This amounts to a moral inversion of Foucault's correlation between the crime and criminal, to constitute as critical in the prosecution of sexual allegations, the 'natural' natures of women in order to justify the actions of men.

The woman's character is required to embody the attribution of responsibility for the incidents as well as a motive for 'falsely' alleging rape. Innuendo and inference are used to personally discredit, as legal practices draw upon and enmesh tacit knowledge within legal authority, to 'factualise' the conceptualisations from which common understandings are derived. These 'common-sense' notions inform the assumptions upon which knowledge about the credibility of women and sexual relations is premised. It is this hermeneutic reproduction of its own representations that allows legal practices to merge the specific history of the individual woman with women as a social group, enabling what is said about the individual to signify the population, and the signification of the population to explicate the individual experience. With explanations about men, this process is inverted. As the woman is responsible for the sexual episode the origins of rape are discovered within the particular circumstances, of which she is a part. Criminality can be attributed to the individual aberration rather than to men as a social group.

Non-consent is legally posited as a universal against which heterosexual behaviour can be comparatively evaluated. This approach draws support from discourse on how rape is to be understood. Both streams of thought privilege the masculine premise of equating force with physical violence. When asked by the police if he had sexual intercourse with Tracy, Munt replies:

> All I've got to say - If I did it wouldn't have been by force [Mu 58].

Binlow claims:

> If you look at the facts as a whole I still can't believe I'm here. ... I had not done anything. I had planted in the idea that I had not raped her in my mind ... I didn't think I had anything to worry about ... It wasn't rape. I didn't force her. ... If I had raped her why didn't she scream - call out [Wi 114-5].

Michael is asked in cross-examination:

P Did you expect to have sex with her.
W Oh I had a fair idea but I wouldn't force anyone into anything like that if they didn't want to [MJ 39].

Non-consent requires a resistance which is defined in terms of male aggression; a woman is expected to fight back in ways similar to those in which men respond to physical assault. So, in a situation where a woman is about to be raped, what is considered 'reasonable' is the behaviour of a 'reasonable' *man*.

This aligns the emotional basis of rape, the fear and trauma allied with its tacit conceptualisation solely with the act itself as distinct from the relation and thus, also, the circumstances that constitute this act as one of domination and oppression. Equally, this focus on the act denies the substantive asymmetrical power of the relation itself; it is a man against a woman. But more precisely, from her perspective it is a woman against a rapist. In an instant, the qualities allied with this construction of deviancy, become recognisable within the 'normal bloke' and the confusion that flows from attempts to accomodate the reality of who it is with the tacit knowledge of what he is, compounds and confuses the materialisation of her response.

If she doesn't resist in a masculine way, then consent can be presumed. There are no grey areas in this legal dichotomisation of female sexuality. Assumptions of consent implicitly posit sexual accessability as a basic right of men within sexual relations; it becomes the woman's responsibility to redefine the basis of this 'natural' order of events.

Yet, while potentially this discourse designates all women as sexually accessible, the statements of defence in these trials constitute particular kinds of behaviour within women as signalling accessibility. These emerge out of constructions of women as active agents in the initation of sexual relations, as an extension of what is construed as the basic starting point of equal partners. This discourse also draws heavily upon 'biology' by resonating with statements about responsibility, how the woman herself is instrumental in directing or propelling the incident towards what is no more than a 'natural' conclusion. But implicitly, this masculine sexual aggressiveness is, in these

cases, premised on male assumptions about these women as individuals. This is not to claim that there are distinctive sociological qualities causally associated with women who are more likely to be raped. But qualities are rationalised to allow it to be construed as a 'reasonable' possibility that such a woman would consent, firstly, to sexual intercourse in the circumstances detailed, and, secondly, that such a woman would have the motivation to falsely allege rape. For these two attitudes are required of the one person.

The plausibility of Binlow's account of consenting sexual intercourse requires as a 'reasonable' possibility the conceptualisation of a woman willing to engage in the particular sexual exchange he details. This also requires a 'reasonable' rationalisation of his conduct, for Binlow's behaviour has to appear equally as persuasive as Penny's, in an environment where persuasion is still required to be morally endowed. Penny admits to a volatile relationship with her boyfriend Munt:

W Oh we had our fights but we were pretty happy.
He used to hit me but I hit him too.
P You'd give as good as you took.
W Yes [Wi 17].

And her mother supports her definition:

W They had a good relationship. They had their ups and downs like everybody else ... She gives what she takes [Wi 47].

When Binlow is asked by the police about Penny he replies:

A She's Munt's girlfriend or so-called girlfriend when he's not bashing hell out of her [Wi 55].

Binlow acknowledges that he is Munt's best friend and when Munt confronts him with Penny's allegation:

> I asked him why he had done it ... I thought he was my mate ... I asked him why he had done it to Penny ...

he replies:

> I'll tell you I done it but I didn't rape her. But to anyone else I'd deny that I touched her. I didn't think you would care [Wi 49-50].

The prosecutor takes up Binlow's attitude as an issue, implicitly endorsing in the process Binlow's opinion that Penny is Munt's possession; her sexuality is his property, to do with as he sees fit:

P What do you mean by the comment "I didn't think you would care."
W Well he bashed her up all the time and they were always arguing.
P *You never asked him* if you could have sex with her.
W No. ...
P And he came across the road to you.
And he was saying - *Why did you do it to me.*
So he seemed concerned with why his mate had done this - rather than his girlfriend. ...
W I don't think Munt was concerned about Penny being raped ... He was more concerned about me having sex with her [Wi 86; 92]. [Emphasis added]

Yet, even when collaboratively identified as Munt's personal property, Penny has an autonomy out of which responsibility for this act of intercourse evolves, as Binlow explains when recalling the impetus for his actions:

P And - um - [when visiting Munt] You would see on most occasions Penny there and you would talk to her, have a general chat to her.
W Yes.
P And I take it she would [chat back].
W Oh there was always something. I got the feeling ... that she wanted me [Wi 79].

But primarily, Binlow's rationalisations privilege a natural predacity. When asked in court why he went to Penny's house rather than home he replies:

W I was probably feeling like an intercourse - my wife being up in Gawler.
P You thought - I'll just pop around to Penny's [Wi 102].

It is this discourse on the unproblematic representation of masculine sexual aggression that enables the lines between rape and consenting sex to blur and operate as flip sides of the same coin, privileging as appropriate, a particular way of 'seeing' sexual and social relations.

The criminality and deviancy of rape are continually evaluated normatively, by comparison with what is represented as consenting sexual relations. This is a moralising process that both defence and prosecution engage in, as this following segment from the cross-examination of Binlow indicates. The prosecutor attempts to inferentially verify Penny's non-consent by juxtaposing Binlow's behaviour against

images from a normal heterosexual relationship. Binlow ruptures this dichotomisation by redefining what is put forward as a social, sexual relationship as one exclusively associated with sex. He implicitly draws upon his prior proferred definition of Penny's mother as a prostitute to 'normalise' his rationalisation, as he has already mentioned that casual sex with the mother is a long-standing relationship. That Penny and her mother are aboriginal is never mentioned. Binlow takes this semantic redundancy for granted, as implicit within his definition of Penny as "not a nice person", "a bit easy", "a bit rough":

P So you're obviously saying you can't recall her embracing you with her hands, as if she enjoyed it.
And there was no kissing was there.
W There may have been a kiss.
P There was no kissing on her lips.
W No.
P And there was no fondling of her breasts.
W There may have been a small fondle there. ...
P And I suggest to you that before you put your hand over her mouth you said - I want to fuck you.
That's it! I want to fuck you.
W Well - The way that you're saying it [with a downward inflection].
P I'm only [asking why didn't you say] Well look Jen - Do you mind if we make love?
Why not?
W She's not a nice girl - reasonably harsh.
P An ordinary person.
Somebody who wouldn't be believed over somebody with a high class job. ...
And nothing seemed to be said before you had intercourse.
W Well it was only three minutes [Wi 107-8].

Penny's volatile relationship with Munt is drawn upon, to be embodied with Binlow's fear. She is accused of fabricating rape, firstly, in retaliation to Munt's casual abuse which, once expressed, is maintained as a buffer to Munt's violence. These explanations and rationalisations presuppose an audience able to form the causal associations and normative evaluations that make Binlow's account 'plausible' and Penny's actions 'reasonable' within the detailed circumstance. They are explanations that background questions about Binlow's moral character to foreground as unproblematic, the objective use of women's sexuality. They construct an inherent sexuality that informs on the women's character while naturally retaining the objectivity of commodification, thus simplifying the slide to prostitution and malice.

Women's sexuality

Sexuality is inextricably linked with the character of both men and women but evaluated differently. Penny is commodified as a 'like mother, like daughter' whore, while Binlow's promiscuity goes unnoticed as the natural virility of men. If commented on at all, his actions are seen as a response to circumstances she inititates, the natural consequence of her actions.

The formal questioning of women about their sexual history is no longer legally permissable and it is left to the trial judge to determine the relevance of such information.[9] 'Relevance' is a concept that propogates gender neutrality. A woman's sexual experience always seeps in, directly through judicial discretion, and indirectly, by inference and compilation. Both processes draw upon and reformulate established discourse about sexuality to encapsulate the specificity of this present-day reality within common-sense knowledge. Legally, tacitly, there is assumed to be a strong correlation between a woman's past sexual experience and her consent to sexual intercourse on this specific occasion. The rationale underlying the relevance of such evidence is premised on the age-old assumption that a woman's willingness to engage in sexual intercourse on any occasion predisposes her to consent on every occasion.

In this following trial I summarise Bernice's account as the point of departure for the explanations about the nature of her sexuality that are put forward during the trial:

> Bernice is 16 years old, living in the family home of her 18 year old friend Andrea. On a Friday night they visit the Royal Show where they meet a friend of Bernice's, Paul, who is with four males. Andrew, Mark and Peter are around Bernice's age. Gordon is 28 years old. Bernice has met Peter once before. Andrea knows Mark. The "lads", as they are labelled by defence, invite Bernice and Andrea for "a drink", which develops into buying a bottle and heading for a prominent beach car park. Some alcohol is consumed before Andrea decides to

> go for a solitary walk along the beach. Bernice becomes worried about her absence and sets out to look for her. Mark, who has made a few 'passes' at Bernice, tags along. When outside a public toilet block, he grabs Bernice's arm and drags her into the ladies toilet where he rapes her. He returns to the car to join his mates, telling them he had sexual intercourse with Bernice. She returns about five minutes later to see Andrea coming up from the beach. Bernice says nothing about the rape until she is driven home. Walking towards the house with Gordon and Andrea, Bernice says she has been raped.

Bernice's character is elicited by the constant evaluation of moral issues that are implicitly or explicitly posed. This is a process of accumulation from which there is never a singular interpretation as there are no empirical factors, only supposition, assumption, inference. Circumstantial details are backgrounded, like the fact that she is menstruating, against the foregrounding of issues about morality. It is a process whereby impressions are formed and then constantly revised and reformulated. Decisions have to be made about who to believe which means reasons must be found for why one person is more credible than another.

It is in this process that the initial starting point of credibility is vital. It is easier to accept the words of someone believable in the first instance compared with someone against whom suspicion has been formally, legally allied. For what are largely dealt with in this construction of character are statements whose truth value resides solely or largely with the attributed author. There is rarely empirical support for an impression or opinion outside of the ways in which jurors have been encouraged to consider it. Impressions and inferences operate as signs, in which injuries function iconographically and rape itself has a stigmatic manifestation which thus simplifies the responsibility of deciding the issue of who is raped and who is lying.

Bernice is introduced by her sociological classification, the "person description" that automatically confirms a "sense of identification" (Maynard 1984:79). The term "street kid" is used by the defence to construct her as a runaway juvenile, and it is from her responses to questioning about this subject that jurors learn that she knows little about most of these "lads", having first spent time with them at the show. Cross-

examination begins with a direct assault on Bernice's credibility, generally, as a rape 'victim', by defaming the integrity of her resistance. This argument is premised on the assumption of what should have happened if things had occurred as Bernice has described, as if there is a static scenario into which the distinctiveness of this episode is uniformly absorbed:

D May the witness see [photographs]? You see there - an earing in your left ear - Were you wearing that earing that night.
W Yes.
D Did it come off?
W No.
D Your ear wasn't hurt or damaged?
W No.
D And you were wearing a chain around your neck. That wasn't damaged?
W No [MJ 40].

The emphasis is relentlessly on empirical verification of her claims of assault and resistance:

D You told the doctor ... he pulled out lumps of hair.
W I said he held my hair [not that he pulled out lumps].
D He pulled your hair and you said lots of hair came out. Did any hair come out?
W Yes - lots.
D And you were wearing your jumper at the time?
W Yes.
D Have a look at your jumper and see if you can see any hair.
W No.
D And you gave your cardigan to the woman police officer did you say?
W Yes.
D Have a look in the paper bag? See any hair?
W No.
D You remember saying to the doctor "He then pulled my head and lots of hair came out"?
W I dunno. I felt it coming out.
D Lots of hair.
W Just a few strands.
D Not lots.
W Lots to me [MJ 45-6].

There is a shifting within this passage from a lawyer's assumption, that is, if Mark pulled her hair it could fall out, to an empirical fact, that is, if Mark pulled her hair it would fall out. The experience of the occasion is subordinated to its description for the evaluation of its truth. The subjective "lots" is contrasted with the lack of empirical evidence, and this contradiction is constructed as a guide to her veracity as

an objective witness. For the starting point for every trial on sexual assault is always "there are very many reasons for a complaint of rape".

Bernice lacks the iconography of rape. Her injuries can be explained in other ways, such as she was a "staggering drunk", and the injuries she does have are 'insufficient' to confirm this experience as rape. Nor are they in the 'right place'. Most particularly she has no marks around her knees or thighs. Deductively, the defence argues that there was no force. She allowed him to "get in". Consent can be assumed in the absence of irrefutible evidence of non-consent.

This menstruating juvenile glossed as a woman who lies about rape also agrees to sexual intercourse on the floor of a public toilet. She does more than agree, she initiates an encounter to which Mark does no more than follow her lead. To accept this episode as 'reasonable' Bernice is required to embody an indiscriminate sexuality that takes this incident outside of the realms of 'normal' heterosexual relations and rape as polarised oppositions, into an unexpressed but implicitly recognisable scenario of the 'easy lay'. the amoral woman:

D Now before you went over to the wall Peter called you a slut ... [he said] I fucked her - She's a slut. ... Peter is your friend?
W Yes.
D A pretty rough character isn't he?
W I don't know.
D In fact all those character's are pretty rough.
W I don't know.
D ... Peter ... at the car he called you a slut?
W Yes.
D It was obvious that the accused had told the boys you'd had intercourse. ...
D See Peter - he's a street kid.
W I don't know.
D Well he hangs around with street kids?
W Yes.
D Were you with some Aborigines in Main Street [one night when there was trouble]?
W No.
D And were you abused in Main Street ...?
W No. ...
D Well, at the show Paul asked you to come for a drive?
And you've known Paul well ... he said "Will you let Mark fuck you"?
And I suggest he did and you said maybe.
Well in the car you were sitting on Michael's knee.

You were kissing him in the car going to Glenelg.
You were kissing and cuddling.
Arms around each other.
Big long kisses in the car.
And I suggest you also had your hand around his penis.

Bernice's denials of this graphic, pornographic accumulation are irrelevant as it is the questions that define the nature of the world she is legally required to occupy. Whatever she claims, it cannot be rape because she lacks the legitimating iconography:

D You told us he sucked your breast hard.
W Yes.
D I suggest it was in a normal manner.
W No.
D There was no injury to your breast was there [MJ 52]?

D What part of your body was he pulling?
W My arm. ...
D Do you remember the doctor pointing out that you had a bruise on your arm?
W Yes.
D Did Mark cause that?
W Yes.
D Wasn't there before?
W No.
D I suggest it was and it was an old bruise. ...

D And I also suggest that when you were walking to the toilet you were a bit clumsy ... you staggered ... Mark had his arm around you and you were agreeing to it.
W No.
... you stumbled and he grabbed you. You were pretty drunk.

D When you were at the hospital the doctor asked you if you were sore ... [and you said] "Oh yes ... sore on the shoulders".
No marks on the shoulders. No bruising.
Then [you said] "Mark pulled out lots of hair and my head was sore" ... the doctor had a look. There was no reddening. And I suggest he never grabbed your hair.
W He did.
D Well there's none on your cardigan today.

W My wrists were sore.
D You didn't complain about it.
You never told the woman police officer your wrists were sore [MJ 52-8].

Injuries provide the iconography but rape itself produces stigmata that are recognisable in their consequences. Bernice greets Andrea on her return from the beach appearing "normal", bearing no signs of having been raped minutes before. The questions inform by exclusion, stipulating what should have occurred by referencing what went on:

D At any rate she [Bernice] appeared normal.
W Fairly normal.
D Well in your statement you said [she appeared normal].

> Her appearance was normal; her clothes [looked normal] her hair neat and tidy. And she certainly didn't appear to be upset.
> You described her appearance as being normal except that she was pleased to be seeing you.]
> At any rate, you didn't hear any screaming did you [MJ 8].

If raped there is an immediate reaction, the person complains. Bernice said nothing to Andrea at the car park, and later, at home, is too late. The inference is not subtle here; Peter calls out "She's a slut"; Bernice says "I've been raped". These two statements appear juxtaposed with a distinctive sequence, as if one naturally follows from the other, with a causal connection provided by the 'law' itself, that women fabricate charges of rape:

D Well you knew the other boys knew about it.
W No.
D You had an idea.
W Well - yes.
D Well when you came back the accused was in the car.
W Yes.
D And they were giggling.
W Don't know.
D And it was then that Peter called you a slut.
W No.
D And back at [Andrea's house] Peter called you a slut.
W Yes. ...
D It wasn't until Andrea asked you a specific question [that you said you'd been raped].
W No. I said it on the way [to the house]. I said it to Andrea and Gordon.
D Well I suggest you said it after Peter called you a slut.
W No I said it before then. ...
D And I suggest you were mad at Mark. All the boys were laughing at you being an easy screw.
W No [MJ 48].

When challenged as to why she didn't complain to Andrea at the car park Bernice replies:

> I just didn't want to talk to anyone. My only concern was to get home straight away [MJ 8].

The particularities of this episode conflict with legitimated knowledge about rape to allow the latter to undermine the credibility of the former by its lack of compatibility.

Male discourse on women

The accused is introduced by acknowledging that his father was a policeman until 1974, and is now a boat builder, as if this detail of the father tells jurors what they need to know about the son. Mark is currently unemployed, the graduate of an elite special school for those with learning difficulties. His testimony supports the knowledge compiled in the cross-examination of Bernice, so while this content is familiar, its contextualisation is fresh, in this expanded, sequential version of what he says happened. He agrees that his companions on this night are all 'rough', into alcohol, and heroin is also mentioned, thus impugning Bernice's character while equivocally retaining his own integrity. He admits to boozing in the afternoon but not at the Show. He implies that Bernice did, claiming he "could smell alcohol on her" although he agrees he did not see her drinking. The jurors hear a lot about what Bernice did sexually *en route* to the toilet, to which he physically responded. And to the question "Was Bernice drunk" he replies:

W By then she was. ...
I wasn't no [MJ 30].

Of course, the morality of "screwing" a drunken juvenile, which is his version of what happened, is never questioned at all. Suddenly outside the toilet she's sober enough to say "Wait here. I'm going to check if anybody's in there." "And then she came out", he says, "and took me by the hand." Fantasy like, she orchestrates all the action inside, down to her putting his penis in her vagina. Afterwards he walks outside to a waiting Peter. The defence counsel asks:

D Did you tell him what you'd been doing?
W Yes I did.
D What - Were you boasting to Peter were you?
W Yes I was. ...
D Did you tell the other lads what you'd been doing?
W Yes I did.

And Gordon, the solitary adult in this collection of juveniles, says to Mark:

W "Is it my turn now". And I said "I don't care".
D So Gordon started to pay attention to Bernice.
W That's correct, yes [MJ 30-32].

For, as Gordon explains, "what's finished now gets passed on to me"[MJ 47]. When asked if he raped Bernice Mark's response is "No, no. I did not."

His story flows out so easily, as unproblematic. Cross-examination attempts to disrupt this imagery by refurbishing the context in which actions occur. The prosecutor introduces the conventions of 'normal' heterosexual relations to jar his credibility:

P How was she behaving at the Royal Show?
W Oh I never spoke to her there.
P No?
W Not at all.
W No.
P Were you thinking of having sex with her at the Show?
W Well - not with her - with someone.
P [you felt like having sex].
W Well I wouldn'ta minded but I wasn't really looking.

Implicitly though, these conventions enlist the prosecution into confirming, as appropriate, the defence interpretation of male predacity and the commodification of women:

P You knew she wasn't with a male?
W Yes that's correct.

Outside the showgrounds the generality and 'common sense' of Mark's ambitions are confirmed. The prosecutor imposes a natural progression based on biological drive that makes rape the inevitable conclusion if she refuses intercourse but also her fault if she was raped, for starting the impetus by not stopping it:

P So it was when you were outside the show that you started to chat her up.
W Yes.
P ... So you'd seen her. You thought I'd like [to have sex with her].
W Oh - Not particularly sex or anything like that. Sort of a female partner.
P Well what do you mean by female partner?
W Oh - just a female partner - not too sure....
P At this stage you were kissing her.
You were obviously attracted to her.
W Yes.
P And you obviously wanted to have sexual intercourse didn't you.
W Well yes I would've wanted it yes.

When confronted with the implication of what he admits Mark articulates his distinction between sexual intercourse and rape as force, a concept which is taken-for-granted as universal and gender-free in its constituent definition:

P Didn't you expect to have sex with her?
W Oh I had a fair idea but I wouldn't force anyone into anything like that if they didn't want to.

His opinion about this girl is derived from her sexuality; his interpretation of her attitude towards sexuality defines the nature of her self:

P Did you think she was a slut?
W Well - Yeah - I thought maybe - Yeah.
P A bit of an easy lay.
W Oh yeah.
P And isn't it the case that when she refused your advances you raped her?
W No. No.

Rape has a different meaning to Mark as it involves force; all he did was 'work out a yes'.[10] From this point on all attempts to recontextualise the incident by appealing to universal notions of 'reasonableness' have to accomodate Mark's explicit enunciation of the type of woman involved. His definition of her character is advanced unproblematically, to legitimate his responses and the interpretation shifts as new information reformulates the focus. Presuppositions about sexuality are glossed as gender-free while tacitly privileging masculine values. The prosecutor attempts to transpose this egalitarian convergence by drawing upon gendered imagery to explain this masculine occasion:

P Well you can remember telling your mate [outside the toilet] you screwed her ... did Bernice do anything?
W Oh no.
P [what was she doing]?
W Oh standing there ...
Oh she seemed alright when I told Pete we had sex.
P Were you affectionate toward each other ... [after intercourse]?
W No so much then ... Well after we had sex I turned off.
P You had what you wanted and that was that.
W That's correct.
P Did you wonder about how she might feel?
W Well I didn't really worry about it.
P Why not?
P Oh I dunno. I just didn't worry.
P You weren't concerned about her or her views.
W No.
P What about when you went back to the car park [and Pete called her a slut] Did you say or do anything?

W No.
P Why not?
W Because I suppose he was one of me mates.
P And she was just an easy lay.
W That's correct [MJ 39-41].

In re-examination defence asks:

D My friend used the expression that you screwed Bernice [what did you mean]?
W Oh we just had sex.
D Prior to going to the car park and toilet had you formed the impression that she was an easy lay ... [don't tell me what was said but] had you been told something about her?
W Yes. By Paul.
D And where did Paul tell you something about her.
W At the show [MJ 43].

Mark's account of the evening is supported by his mates and the ethos of masculine aggression is expounded as a 'natural' quality, as sexual promiscuity in men doesn't make them 'male sluts' but signifies virility, the mark of aggressive sexuality. As Gordon says, "If it comes my way I wouldn't say no" [MJ 28].

Peter openly moralises about Bernice's immorality:

W Yeah - When - um - Gordon and Bernice was in the car I turned around ... Well I thought she just had sex with one of me mates ... she's gonna have sex with the other one.
Well Andrea, Gordon and Bernice got out of the car and walked over to the corner ... I said Fuck her! I did!
D Did you fuck her.
W No I didn't.
D [why did you say it].
W Well on the way there I drank a little bit more ... I thought she was a slut so I said it [MJ 52].

There is a logic being presented here as the reasonable way to consider this situation, reasonable from the point of view of these 'lads'. It is a logic that over-rides any right Bernice has to define what went on, as it tacitly complies with legal definitions of women's consent.

This is a case in which the accused places his character at issue. "You may think he is amoral", says his counsel, " and he's stupid to boast, but he's not guilty of rape" [MJ 13]. And of course, Mark is "a person of good character telling the truth", and would "a person of previous good character commit a crime of rape".

Rape has a different meaning here to many of the participants. The "lads" may not view this as the sexual intercourse of a consenting relationship but neither was it rape, because rape requires force, the force of what is never asked, because it is already tacitly known. To neither Bernice nor Mark was it a matter of sex. On his part it was the use of sex for an alternative objective, if no more than to do what he wanted to do with Bernice.

The prosecutor appeals to Bernice's age and immaturity as the basis for a recklessness that leads to "errors in judgement", and she argues for Bernice's right, irrespective of her "immaturity and stupidity" to "draw a line, which every woman has the right to do" [MJ 14].

At this point reference needs to be made to the composition of this particular jury. It is all male, aged between 25 and 35 years, known to the court staff as "the football team." The prosecutor relies on the 'uncontrollable biological drive' as the motive for why Mark refused her rejection of his 'advances' which contains the counter male argument that she 'led him on' and, therefore, is responsible for this 'out of control' sexuality she is calling rape. This jury did not want to hear about any "line" women have the "right to draw".

The defence counsel succinctly summarises what is accepted as the most reasonable account of the episode:

D I mean this is not a case of wooing someone with flowers ... These are young people ... [she thinks] Now he's dumped me and is letting his friends get on with me. A bit of a blow to her ego ... a motive for a claim of rape [MJ 8].

In the eyes of the jury he is not a rapist and the defence has an audience when he argues:

> You might - This is not a court of morals - You might think that at least two or three of these young men have got the morals of alley cats. Doesn't mean they're rapists - when they thought, she's been an easy screw. ... [Mark] was

> told by Paul at the showgrounds and he said "Yes [she screws anyone]" ... Why didn't I ask Bernice about her previous sexual history? I'm not allowed to ... you can't in a case of rape delve into a woman or even a man's prior sex behaviour ... because the law says even a prostitute has the right to say no [MJ 42].

CONCLUSION

In prosecuting sexual offences knowledge about rape is generated from the individual life experience, as legal practices extrapolate the qualities required to substantiate legal classification. The legal institution proceeds on the belief that the experience of rape is containable within the elements of the criminal classification. Procedurally, it presupposes rape as an *a priori* category of knowledge and evidentiary methods concentrate exclusively on verifying the practices required to manifest this definition of rape as a phenomenon. This results in the interpretion of behaviour, especially the behaviour of women, by specific, inclusive criteria which are simultaneously regarded as natural expressions of the actions and emotions of the women involved. This hermeneutic regulation constitutes a field of discourse with an internal frame of reference. It subordinates individuated differences to an encompassing representation which allows the legal institution to validate its decisions by reference to its own knowledge, thus legitimating the reproduction of the definitions legally detailed.

This self-reliance and referentiality enables legal practices to privilege a uniform mode of perception and interpretation which accords rape the same meaning to all experiencers and all observers, backgrounding with this emphasis, the gender differentiation the crime is premised upon. This is knowledge about rape of a particular kind which propagates an homogenising correlation between how the crime is thought about and the reactions it evokes. To argue in a court of law about the appropriateness of a woman's response to rape, or to instruct jurors to decide the

integrity of a woman's experience from her lack of physical damage, or to claim that her injuries are inappropriate for her experiential allegation, attributes a universality to affect and experience which reduces the interpretation of these issues to what amounts to an objective evalution premised upon normative criteria. These are procedures that invoke decisions about the nature and character of an incident by deciding the meaning of the social relation. The definition of aberration is arrived at inferentially, by extrapolating notions of deviance from a particular representation of normality.

In privileging impressionistic notions of deviancy, legal discourse resets and reproduces the boundary lines between normality and aberration that enable it to argue that rape is easy to discern, rapists, easy to identify, 'victims' unmistakeable. Legal practitioners have a vested interest in perpetuating these stereotypic representations of what rape is about and their strategies to arrive at the truth of an allegation confirm this. It is by reproducing this discourse on rape and sexual aberration, that the legal institution is able to take the present-day representation into the past for its validation and authorisation, thus confirming the integrity of its knowledge and practices.

Legal discourse relies upon normative regulation, synthesising legal sanctions with non-legal, tacit conventions to propagate the knowledge it requires to construct its totalising representations. Yet legal arbitration emphasises its empirical definition of truth thus backgrounding the critical role tacit knowledge plays in deciding what counts as truth.

Criminal law claims as one of its conditions of existence, the separation of knowledge into two domains, law and fact. This differentiation subsumes and sustains a dichotomization between legal knowledge and lay knowledge. Lay knowledge is taken to be the knowledge of common sense and experience, a collective knowledge that is at once both shared and differentiated by individual life circumstances. This experiential knowledge is tacitly accepted as existing *a priori* and independent of any

process of realization. It is an area of knowledge perceived to be relatively autonomous from legal regulation yet it is the knowledge these criminal proceedings rely upon to unproblematically implement their sanctions and mechanisms of control. These norms of regulation are contested in each trial, as the definition and interpretation of what is to be accepted as the normal scenario from which abnormality can be extrapolated, has the potential to circumscribe how situations are understood. The normative contextualisation of incidents is buried within practices legitimately consigned to the legal system which are recognised as procedurally essential to arrive at the truth of the allegation. Thus, the distinctive kind of knowledge arising from these practices is misrecognised.

Legal discourse actively engages in the propagation of particular representations of what is to be accepted as common-sense knowledge about sexual allegations. Evidentiary methods propagate regularities within knowledge about sexual offences which has the potential to gain an existence as common-sense knowledge because of its engagement within the legal arbitration of the truth about these issues. This is a productive interrelationship between legal knowledge and lay knowledge which enables the legal institution to circumscribe the nature of the common-sense knowledge it needs to prove its claims of truth. This direct application of legal practices in the production and propagation of tacit knowledge about sexual assault is more critically examined in the next section, which considers the explanatory powers arising from the relations within the trial itself.

NOTES

1 I take Bourdieu's understanding of 'rule' to be the product of *habitus*, invariably flexible within a situation's conventions and irreducible to determinism or obedience to explicit regulation. He argues for an understandings

of regulation as an inherent part of social relations to critique the prescriptive potential accorded 'rule' as part of a 'meta' language used to describe and evaluate behaviour (1991).

2 Kelly (1988) offers a comprehensive overview of rape as an object of progressively psychological, sociological and political knowledge. Allen (1990) gives an historical account of the changing conceptualisation of sexual offences in Australia. Dworkin (1982) explores the etymology of rape as a way of detailing its multivocality.

3 I use the generic category 'men' or 'women', to refer to the understandings I derived from discourse arising from the trials and from discussions with trial participants and court staff. I do not claim that the understandings subsumed within these gender perspectives are universal representations but I do claim that any position expressed has the potential to discursively and tacitly engage a broader audience apart from the individual opinion. When an accused man, in defence of his actions explains "From what I could see she was a bit easy"; or "If I had raped her why didn't she scream - call out?", these are statements about social descriminations by specific individuals that are rarely reducible to biographical circumstance as their meaning lies not within experiential referentiality but within the gendered logic they draw their authority from.

4 Roberts (1989:127) makes the point that rape has the effect of changing not the woman herself, her personality, but her understanding of herself in relation to the world. Winkler (1991:14) describes rape as "the experience of social death".

5 Allen (1990) details how, in the nineteenth century, rape was identified as sexual in character rather than as a form of violence. The actions of the rapist was not understood in psychological terms at all, which made sexual assaults part of a range of 'normal' sexual options available to men generally.

6 It is because rapists are able to construct a vocabularly of rationalisation from male experiences and attitudes about women and sexuality that their point of view has the potential to unite such disparate positions as police officer, judge, barrister and juror, with the man accused. Scully and Marolla (1984, 1985) and Scully (1988) point out that these motivational definitions are usually dominated by the psychological and medical discourses. This influences the nature of the research documentated and statistically verified and informs on the 'typifications' of legal knowledge. Such imageic representations are frequently allied with identifiable populations (for example, barristers frequently described rape to me as a lower-class crime; and most of the charges prosecuted involved individuals living in low socio-economic conditions) rather than via a *habitus* capable of uniting diverse populations within a common way of thinking about women and sexual relations.

7 Media coverage plays a significant role in reproducing the legal 'view' about these crimes. See Appendix 1 for a brief analysis of this point. See Benedict (1992); Soothhill and Walby (1991) and Hamlin (1988) for extended analysis of media coverage of sexual offences and the regulation of common-sense understandings of these crimes.

8 Lees (1989) found in Britain that some lawyers admit that rape prosecutions subject the woman to a ruthless character assassination which Lees describes as "judicial rape". A few law firms are beginning to acknowledge the fraudulence of these proceedings by refusing to defend men who insist the woman consented. They object, firstly, to the way in which rape cases are uncommonly harrowing for women. Secondly, many of their clients are victims of male violence which, they say, presents a conflict of professional interests as the whole conduct of a rape defence is frequently based on a series of "stereotypes" which condone by lack of dissent, the legal and social endorsement of sexual and domestic violence.

9 Edwards (1981:70) points out the double edge of the law relating to rape. This crime exists to protect women but trial procedures accentuate the control or regulation of women's sexuality by the way in which the exploitation of a women's sexual history differentiates exactly who is entitled to this protection. In assessing the effect of legal reform on rape prosecution in western legal systems, Adler (1987:141) commented that the judges in South Australia have found ways of neutralising the impact of legislative reform by ensuring that almost any sexual history evidence gets in. Both Adler, who collected her primary material in Britain in 1978-9, and Lees (1989) who attended trials in Britain in 1989, found that legislative amendment was inconsequential as the inferential detailment of a woman's sexual promiscuity is an integral part of a defence strategy. Adler singles out judicial "discretion" and the adversarial nature of criminal trials as major reasons why the reform is ineffective but never she problematises the way this practice of constructing the identity of women who allege rape is essential to the legal view the crime (Foucault 1978).

10 See Sanday 1990 and Wilson 1978 for elaboration of this male ethos about women and sexual relations.

THE JUDGES OF THE FACTS

I have argued that in prosecuting sexual assault the legal institution cultivates the particular subjectivities it requires to legitimate its definitions of experiential knowledge. These are circumscribed representations that rely upon regulation to propagate and perpetuate a particular way of thinking about these offences. Legal practitioners are able to restrain interpretations to the conventions legally constituted, by polarising the integrity of differentiated perspectives against the issues and values institutionally invested. The overarching frame for this subordination is truth, infusing conceptual regulation with moral values, as decisions about 'reasonable' or 'normal' behaviour become critical in deciding the criminality of events. These normative conventions are assumed to exist *a priori* as the shared values of a common-sense knowledge, to be legitimately drawn upon by the legal system. This is the lay, experiential knowledge jury trials integrate into legal arbitration. Equally though, this is a tacit knowledge constituted by legal relations, as judges and barristers formulate the everyday relations required to legitimate their legal claims.

Criminal law ideologically disengages its decisions from individuals and personalities to privilege a distinction between normative interpretation and legal adjudication. Legal truth is perceived to be premised upon substantive verification, not normative decisions. Indeed, legal knowledge is explicitly polarised against subjectivities, as detail that can be objectified and rendered independent of the arbitrary bias and prejudice of experiential knowledge. It is privileged as a neutral, impartial and apolitical knowledge, constitutive of the objective factual basis of the law. As evidence, this knowledge is seen to emerge out of the events themselves, from the legal procedures and methods, thus rendering it independent of the agents involved.

Legal integrity is predicated on the system's ability to take decision-making out of the realm of subjectivities and personalities into facts. The institution acts on the belief that its rules and methods can lead to the "clinical" and objective evaluation of experience by verifying its factual basis. But with sexual offences there is rarely any empirical substantialisation of the crime, and what physical evidence there is can always be rationalised away. These are crimes that rely upon common knowledge, the evaluation of what is legally defined as the "intrinsic likelihood" of conflicting accounts about a particular incident. With sexual assault this is where the realities of facts lie, within the jury's ability to empathetically appreciate the credibility of the events described. This is common sense.

A jury trial actively engages the legal institution in the constitution and reproduction of what is to be accepted and recognised as common-sense knowledge.[1] In prosecuting sexual offences, legal practitioners contextualise events to make explicit particular aspects of the crimes. These descriptive classifications are always normatively endowed, unproblematically taking legal adjudication into the realms of everyday tacit knowledge. These social circumscriptions of barristers and judges are accepted as legitimate because of their locus of production. It is their institutional authorisation that enables individuals to unproblematically impose a particular way of thinking about sexual offences by providing the normative schemata from which the particular experiential reality is constructed. Thus, the arbitrary nature of the power exercised by this collusion is misrecognised.

This procedure has the capacity to bring into existence, into common-sense knowledge, that which has yet to attain an objective, collective existence (Bourdieu 1991:105-6). In essence, it amounts to an act of naming the normality against which deviance is to be decided, to be re-plenished with the particular circumstances of each trial. This generates from each life experience, a common sense officially imposed and

legitimately authorised, to be put forward as the explicit consensus of the collectivity. In this way, legal practitioners dialectically engage in the constitution of the common-sense knowledge that advances their particular definition of truth while, simultaneously, allowing the legal institution to be privileged as autonomous and distanced from this field of knowledge.

COMMON SENSE

Common sense, says Geertz (1983), is "what the mind filled with presuppositions ... concludes" (84). He details what he calls "its stylistic features, the marks of attitude that give common sense its peculiar stamp" (85). Common sense, he explains, represents matters "as being what they are". It deals with and draws upon "intrinsic aspects of reality", aspects that are taken to be "inherent in the situation" (86). Common sense is that which is taken to be plausible, pragmatically feasible. As a mode of interpretation, this form of knowledge draws upon personal experience to validate what is specified in terms of viability. It therefore simultaneously sets up and relies upon the constitution and recognition of sameness out of difference. Geertz uses the term "thinness" to refer to the tendency of common sense to represent matters as being precisely what they seem to be. "Thinness" privileges the obvious, that which is self evident, favouring the literal over subtlety. Common sense is *ad hoc*, informal knowledge, applied and relevant to the immediate context. It can be riddled with inconsistency and contradiction, which makes it difficult to appropriate. Yet common sense is also construed as accessible, the knowledge that any rational person can grasp and utilise. It is perceived as accessible to all and therefore as stemming from all and is thus apolitical. The tacit dichotomised opposition of common-sense knowledge is the intellectual, the expert authoritative opinion against which the common sense of life experience is pitted (Geertz 1983:75-91). Within a jury trial, this opposition is

maintained as a mark of superiority, but collapses into collaboration, when lay knowledge is filtered through legal regulation.

As a system of interpretive logic, common sense is premised upon an egalitarian homogeneity. It propagates equality by accomodating and absorbing within a generalised view of reality, the distinctiveness of a particular frame of reference. Conceptually, common sense is generally substantiated by experiential knowledge or personal knowledge rather than by empirical validation. Yet its logic assumes a similar level of credibility and legitimacy as empirical knowledge. This is because its proffered basis within commonality resonates with inferences about accessibility. These following definitions of drunkenness privilege different evaluative criteria which stem from common assumptions about the effects of alcohol:

W Yes he had some ... [alcohol] I wouldn't say he couldn't walk. He wasn't sober and not really drunk either.
P Could you smell any alcohol on him?
W No.
P So what was it that made you think he was drunk?
W Just the way he looked. You could tell that he had some and he just looked affected [MJ 25].

P When Tracy returned to your home with you how would you describe her state of sobriety?
W What's sobriety mean?
P Did Tracy appear to be intoxicated by alcohol when she came home to the unit?
W No.
P And what if anything, makes you now say that Tracy was not intoxicated?
W Because she knew what she was doing [Mu 41-2].

W I wasn't too good.
[Munt] looked alright to me. He wasn't nearly as bad. ...
Oh he wasn't slurring his words, wasn't staggering, seemed to know what he was doing from what I saw. ...
D ... you were extremely intoxicated.
W Yes.
D And your memory of the events ... is clouded by [alcohol].
W Oh with things that were said I agree. I still got a good recollection of things that happened.
D [You said] Tracy looked alright ... [what was] her degree of intoxication?
W Oh well. That's the first time I met Tracy. Some people [can be drunk and you can't tell].
D You being so intoxicated yourself you [couldn't tell if she was drunk or not].
W I don't agree with that. No. I look at people ... [often others] drive me home. I make sure that they're not drunk if they're gonna drive me home [Mu 49].

J The accused had no difficulty in undressing ... removing his pants, getting into bed, performing, getting out of bed, getting dressed ... recalling a great deal of detail of [the night] ... They are all very important straws in the wind as to what was his state of intoxication [Mu 82].

It is this pragmatism of common sense that accords a materiality to inferential impressions, transposing what is no more than opinion into the realms of objectivity and factual reality.

THE SEPARATION BETWEEN FACTS AND LAW

The use of a jury system within criminal trials is conceptualised as ensuring the integrity and impartiality of the judicial system (Scutt 1980:93). Jurors are perceived as representatives of the community, and their selective integration within legal procedures is regarded as safeguarding legal decisions from institutional autocracy. This is accomplished by the division of knowledge within jury trials into particular domains .

The inclusion of a jury within the process of legal adjudication is premised upon the postulation of a division between 'law' and 'facts', as if both naturally constitute separate domains of knowledge. The 'facts' are taken to be the descriptions of events and activities detailing an incident and, as such, delimit the parameters of what is to be considered. The directions on law flow exclusively from legal knowledge. They are the rules and procedures constructed as relevant to issues arising within a trial that require legal interpretation for 'proper' appreciation. Their relevance stems primarily from the general area of criminal law, to incorporate such conceptualisations as the "standard of proof" and the "presumption of innocence". These issues are recognised as pertinent to all criminal trials. With sexual offences, however, the legal system considers it discreet to address particular attention towards the credibility of those alleging sexual assault and, by extension, the need to seek at least informal corroboration of the evidence of witnesses who are also 'victims' of such crimes. The

execution of these legal rulings is subject to individualisation by the particular judge in relation to the particular incident.

The separation of knowledge into different domains reflects the enduring quality of 'law' in contrast to the transitory nature of 'facts'. Facts are marked by immediacy and legally construed as emerging out of the events themselves. Yet they are vulnerable to individual arbitrariness in interpretation and recapitulation. Within the trial context, the facts are conceptualised as either whole or incomplete. Positivistically, the legal system is premised on the assumption that with any incident, there is one true acccount of what happened. Legal arbitration lays claim to the methods for establishing this truth and it is the excavation of the 'full story' that orients the trial process. The complete version is evaluated normatively, in terms of truth or falsity. This posits an homogeneous value base to all accounts, one premised on a singular conceptualisations of truth. Thus truth, like common sense, is also egalitarian and apolitical. It is allied with the materiality of the occasion, to be polarised against the incomplete truth of subjectivities.

In contrast to facts, legal knowledge is endurable, immutable over time or life histories. Its principles may be amenable to interpretation, as it is the trial judge who decides their relevance to each particular trial. But neither principles nor specific decisions on relevance are perceived as reducible to the arbitrary decisions of individuals. Rather, such interpretations follow on from the individualisation of general principles which both emerge out of, and conform with, a line of relevant principles extending from the past. This process reflects the legal substantialisation of experience, the embodiment of the present with the authority and integrity of 'tradition' and 'experience'. This makes the past appear isomorphic with the present, while simultaneously ensuring the integrity of the future within present day realisations.

Thus, proclamations made in the name of the legal institution transcend the individual to exercise a power that flows from institutional legitimation. This authority encompasses equally, those spoken to by 'law', as well as those 'the law' speaks for (Bourdieu 1987). For its efficacy relies upon accord, the tacit acceptance of the pronouncements of individuals as institutional knowledge.

LEGAL KNOWLEDGE AND LAY KNOWLEDGE

In a jury trial, the legal institution ritualistically and procedurally proclaims itself an arena of specialised knowledge. It is an environment in which everyday knowledge is both the validation of community involvement in the juridical field, and the deficiency to be compensated by legal knowledge within the trial. This is a social organisation that constitutes through performance a goal oriented community, a population with a division of labour centred around a decisive task. This division of labour privileges explicitly the differentiated areas of expertise. As participants in this judicial process, the jurors' responsibility, is two fold; they have:

J a responsibility to the community, to see to it, so far as is possible, that persons that are proved to be guilty are convicted ...

and a responsibility to the accused:

J to ensure that he is convicted only if you are convinced beyond reasonable doubt that he's guilty of the offence [Mo 2-3].

They are advised that both duties can be "discharged" in the same way, by giving the accused a "fair and impartial" trial. Thus a "fair and impartial" decision about the truth of what occurred is proffered as realisable within a jury trial.

"Fair and impartial" are absolute terms, uncritically allied within this environment, with conceptualisations of justice and the legal process. The qualities flow from the presumption of innocence of any person once charged with a crime. The 'truth' of an

accusation is decided on the basis of the Crown proving the charge, not on the accused person proving his innocence, as this status is already legally pre-ordained.

The legal process strives to constitute the unbiased objectivity of the disinterested third party that epitomises the institution's representation of self. Jurors are advised to reach their verdict impartially, which is explicitly construed as utilising only "the evidence admitted at the trial" [Do]. Conversely, an unfair trial occurs when jurors do not "act exclusively on what they hear in court", that is, when the jury's decision-making processes are contaminated by influences extraneous to the knowledge acquired through trial procedures [Do]. Within this logic the impartiality of a trial is potentially polluted by either conscious or unconscious thought. 'Fairness', 'impartiality', conceptually require the explicit separation between what is to be construed as information and the effect or influences of information. A "fair, impartial" trial is premised on the assumption that jurors are able to reject the effect of all knowledge obtained external to the particular trial. This includes both rational and tacit conceptualisations. While it is recognised that jurors may utilise knowledge acquired outside of court to form impressions about issues arising within the trial, the legal system concludes that this impressionistic knowledge is marginalised and thus neutralised, by procedural regulation.

Legal adjudication is premised upon particular assumptions about how thought processes work. Knowledge is constructed as operating in a very distinctive way, one that privileges the rationality of conscious and calculated action. It constitutes an objectivity that is detachable and, therefore, distinguishable from subjectivity. Rationality is allied with such objectivity, thus implicity attributing irrationality to subjective thought. This privileges within legal conceptualisations the values allied with the institution's representation of self; rationality, objectivity are what fair, impartial thought requires. Truth becomes associated with a detached impersonal way of deciding issues.

The knowledge brought into court by each juror is only ever questioned in particular ways. What remains tacit is the historical awareness each juror has of the subjects discussed, their distinctive mnemonic frames of interpretation acquired over the years which constitute personal knowledge of the issues involved. These tacit representations provide taken-for-granted understandings that form individually differentiated frames of interpretation, each with distinctive attitudes demarcating boundaries of relevance and exclusion. It is this differentiation and distinctiveness that are glossed within conceptualisations of 'community'.

Jury selection marks the beginning of a criminal trial, with the public balloting of twelve jurors from what is construed as an arbitrary cross-section of the community. Each counsel is entitled to challenge up to three candidates without giving reasons. Decisions on acceptability are informally accredited by attorneys to a legal folk-lore generated by the socio-economic detail extrapolated from name, address and occupation. Or challenges are based on an intuitive response to personal representation. For example, "farmers or businessmen resent the time jury duty takes and are therefore hostile to all involved"; "teachers or social workers are a disaster in the jury room"; "he looked like he would sympathise with the accused"; "she looked like the girl's grandma".

Collectively, all jurors are questioned about acquaintance with the participants in the trial, as any private relationship subverts the impersonality upon which the integrity of the jury system and, thus, the legal institution is based. They are collectively solicited to indicate any bias or prejudice that may impair the impartiality required of this body. One judge went so far as to inquire whether the nature of the trial, child sexual abuse, had the potential to be problematic for jurors, to which a woman responded and was subsequently exempted.

There is the explicit privileging of a *tabula rasa* approach to adjudication, in which the knowledge required to decide the issues will be presented in court; all else is superfluous knowledge, which contaminates the integrity of the system. In child sexual abuse trials particularly, but also frequently in rape trials, judge and counsel directly address the detached separation conceptually required between lay knowledge generally, and the knowledge essential for the legal process. Specifically privileged is a distinction between normative interpretation and a legal frame of reference. For there is much said in these trials about the arena being a court of law, not a court of morals, by both counsel and judge:

J You may find the charge in some way offending your own moral code ... All I'm asking you to do is simply listen to the evidence ... This is a court of law, not a court of morals ... The accused is entitled to be tried only on the evidence against him ... I proffer you some suggestions on how to deal with the evidence ... this is not a court of morals ... that is said correctly ... I request you to take a dispassionate view of the facts ... [any feelings] of concern ... distaste ... you must put to one side. It is quite natural in a case like this that you should feel concern [for the girl. That is] not to be taken into account ... you must have concern only for the evidence ... [Wh 4;25]

D This is the sort of trial that raises all sorts of emotive issues ... protective feelings about children ... The emotive stage is not enough ... It is crucial ... that your standards have to be maintained absolutely rigorously ... Otherwise, our system of justice goes out the window [Wh 19].

Jurors are urged to "simply listen to the evidence", to "take a dispassionate view of the facts", and "have concern only for the evidence". Evidence is explicitly polarised against subjectivities. It is nominalised and, thus, objectified as a reality capable of constituting neutrality and assuming responsibility for agency. Counsel frequently solicit jurors with:

> Does the evidence persuade you ...
> Does the evidence require a verdict of guilty [Co 49].

attributing to evidence, an existence independent of the person and, also, independent of the personal account. This constitution of agency detaches decisions from individuals and attributes responsibility for them to the system itself. Decisions flow from the legal process rather than from the persons orchestrating its execution. This renders the integrity of "evidence" integral to the judicial system. It simultaneously

reflects law's proferred representation, that of impartiality and neutrality, while constituting the medium through which this representation is realised.

A secondary consequence of such warnings about normative evaluation, is to redress the 'natural' imbalance of power inherent in these offences, particularly in child sexual abuse wherein a child's truth challenges that of her father or an adult. Such warnings intend to deflate the powerlessness of children and the emotionality of the issue of child abuse, by openly instructing juries that in the eyes of the 'law' all stand as equal.

This focus on equality flows from a reflection of the legal definition of self as neutral, impersonal and therefore apolitical in its adjudication of issues. Not only must "justice be done"; it must also "be seen to be done". This requires an explicit congruence between practice and purpose. The equity of the system is embodied particularly within the presumption of innocence, but it also encompasses all who participate in the legal process. Jurors are therefore conceptualised as socially equal, as if all equally contribute to and participate in the decision-making process. Similarly, this egalitarian emphasis embraces the "community" which is perceived as a Durkheimian cohesive body, integrated by a uniform system of values. These normative assumptions are always glossed as homogeneous, thus deployable as an enforceable frame for interpretation in the name of common sense.

COMMON SENSE AND THE JURY

Jurors are the "deciders of facts". This domain of knowledge is presented as their exclusive province, one which they are qualified to judge:

J You are the judges of the facts and that's very important, of course, because our whole system of criminal justice is based upon jury trial in serious cases, and that is because it is considered that a jury, 12 people drawn from the

> community at large, bringing to bear on the case their own experiences of life and their own common sense, are the best tribunal for determining guilt or innocence in serious cases [Mo 5].

Who considers it appropriate is never questioned; there is no author assuming responsibility for these conclusions apart from the system itself. What is explicit however, is the attribution of responsibility to jurors, for the decisive verdict of the court .

The knowledge required for this task is common sense and the knowledge acquired through experience. It is the application of everyday skills in deciding questions of truth:

> J You will bring your own knowledge of human nature and your own experience of life and your common sense ... You've been brought here ... as 12 people coming from different walks of life ... there is a considerable body of experience ... 12 people experienced in judging your fellow man in a less formal way .. But this experience and that judgement that you have built up over a period of time ... apply that experience and that common sense to the task at hand ... [listen to the] witnesses' evidence, examine it and determine its intrinsic likelihood [Wh 21].

The approach is quantitive; 12 people constitute a sufficiently broad cross-section of experience to accomodate what a jury is likely to hear. This "body of experience" privileges difference, the distinctive life histories of 12 individuals, while simultaneously positing a unitary interpretation with the accounts detailed. Evidence has an "intrinsic likelihood" which renders it accessible and obvious to all.

Common sense constitutes an appeal to a common position, premised on the assumption that what is said in court has a discursive, conceptual reality outside of legal knowledge. Jurors are called upon to common-sensically evaluate the contextualisation of the incidents generating the charges of sexual assault. These are the events that contain and encapsulate the action to identify it as rape or sexual assault. As jurors they are required to evaluate the integrity of the actions and reactions of individuals, and how these modes of communication would be grasped by observers, if they were there to observe, from the same position as the witness (Smith

1990:70). These perceptions and conceptualisations are all assumed to be within the grasp of the community generally, homogeneously, egalitarianly.

Common-sense evaluation relies upon the tacit recognition of similarity within experiential realms of difference, to attribute credibility to another person's reality. It is implicitly premised on empathetic identification, as this judge explains:

J These are matters for you to reflect upon when putting yourself into the mind of a girl of that age [Ca 17].

Jurors are expected to be able to crawl inside some one else's mind and evaluate the integrity of their actions by comparison with what is known personally about how people behave in such situations. This expectation presupposes that the situations described in these trials resonate with some personal meaning: they must somehow encompass areas of experiential reality common to most people. Equally it attributes a degree of homogeneity about experiential reality, wherein the distinctive world view constituted by a particular life history also has roots within a commonality identified as 'normal' or 'ordinary'

In this following trial, the prosecutor elicits an indication of what normality was like for one particular child. Cathy is 16 years old when she appears in court to testify to eight years of sexual abuse by her father. The prosecutor asks:

P Did he say anything about fathers and this sort of thing?
W He said it's what all fathers do.
P What did you think about that?
W I just believed him.
P Did you say anything to your mother?
W No.
P And why was that?
W Because I believed everything he told me [Wh 12].

P Now on the occasion ... did he ever say anything about telling anybody ...?
W He just said I wasn't allowed to tell anybody.
P Was it ever suggested that anything might happen if you did tell anybody?
W I don't think so.
P Did you ever tell anybody?
W No.
P ... why not?
W [He] had said all father's did it, so I thought it was normal ....
P Did you think of anything that would happen to you?

W I don't know ....
P [Was there ever] anything said?
W ... he said if I told anybody I'd go into a girl's home and everyone would hurt me.
I didn't want to go into a girl's home for one and I didn't want my mum to hate me.
P And why did you think she would hate you?
W Because dad said she would. ...
He used to tell me that I couldn't say anything because he'd get into trouble ...
He said a few times that he'd go to jail ... He said once that there was a person who went to jail ... other people cut off his ears ...
Yeah. I was scared that if he went to jail it would happen to him ...
He used to tell me all the time ... I couldn't say anything because he would go to jail .. I was scared ... I used to remember what he said about all father's doing it to their girls and I used to wonder, if that was the truth, why would he have to go to jail [Wh 12-23].

How does a child evaluate this? What common-sense frame of interpretation is available to her? To what past experience does she appeal and thus jurors appeal, to evaluate whether it is 'normal' for Cathy to hold such an opinion?

Newby (1980) makes the point that Australian society "has extremely strong taboos against talking about sexual matters openly" (117). Child sexual abuse, as an object of knowledge, has a brief history, and the dissemination of 'information' in this state is still very much in the preliminary stages.[2] What is known generally, publicly, is acquired from specific resources such as the media, which proffer a very selective representation of knowledge about the area. Detailed knowledge is restricted to those directly involved in dealing with the issues, including the social workers and teachers considered to be "disasters in the jury room".

Jurors are encouraged to utilise common sense to discern the "intrinsic likelihood" of what occurred, to inferentially constitute the factuality of events that are represented in court by no more than words:

J Don't be afraid to draw from the evidence inferences from your common sense [Do 24].

Such logic relies upon the conceptual schema known as typification, that consequence of the legal regulation of knowledge about these crimes: rapists are particular types of persons; children sexually abused respond in particular ways. These constructions are

introduced into trial proceedings as if they had a pre-existing reality validating their evocation in court. Their fundamental objective is to distinguish the aberration from whatever is to be common-sensically construed as 'normal'.

Yet simultaneously, juries are instructed to disengage their experiential knowledge from the task at hand:

> J ... focus your attention exclusively upon the evidence in this case ... put aside any general ideas or preconceptions that you might have about this subject [Mo 4].

This interpretive emphasis is attributed to the particular event itself, with its individual actors and scenarios, as if knowledge of such things as rape or child sexual abuse emerges naturally out of the detailing of events within this distinctive forum. Cotemporaneously though, evidentiary regulation focuses on the accomodation of experience within elements of the crime, backgrounding with this emphasis the conflictual significations these elements are capable of. This procedurally establishes legal knowledge as definitive of the classifications of these experiences while simultaneously relegating knowledge about what legitimately counts as sexual assault within a particular field, that of the judiciary. It is the dialectical relationship between these contradictory sources of knowledge about these crimes that engages the legal system into actively constituting and propagating common-sense knowledge about the particular area.

Unlawful sexual intercourse is a crime where the child, Cathy, has no power of consent and the execution of the act is sufficient to constitute criminality. Yet the defence counsel argues a conceptualisation of normality that claims if these incidents really happened then this is how she would respond; that is, she would take a particular action to avoid the occasion. This approach obscures the relation of which this action is part, privileging instead, the equity experienced by all who engage with the legal process. Because Cathy does not behave 'normally', her behaviour is not reasonable for a person purporting to be in such circumstances. Simultaneously, by spelling out

what a person sexually assaulted would do, the 'victim's' responsibility for her own crime is elaborated. More precisely, by detailing what a normal person would do, then if the girl does not comply with this legal, common-sensical prescription, this assault did not happen.

The explicit privileging within this environment of what is no more than the individualistic speculation of defence strategy, accords a factuality to these inferences that objectifies them into a reality sanctioned by law. This is a process that constitutes the limits of what is to be common-sensically construed about these incidents, through proffering to jurors the evaluative frames of empathetic understanding required to discern the integrity of the 'facts'.

THE COMMON SENSE OF CHILD SEXUAL ABUSE

The construction of responsibility is part of the definition of the knowledge about child sexual abuse. There are two lines of defence strategy that run parallel and merge, to mutually support while constituting each other. Firstly, 'it didn't happen'. Cathy is constantly told, as the question form is a declarative statement, "This didn't happen", "None of that happened", "It didn't happen". The rationale is that if it was happening, her reponsibility for it not happening is 'clear'. If it happened this is what she would have done:

D Did you have some idea that what was happening to you was not really a proper thing, a form of sexual abuse?
W No. He said all fathers did that to their girls.
D Can you remember when he said that? He was talking about [what]?
W No - No - No. I can't remember.
D Alright. But you certainly had in your mind an idea that it was wrong ...
W Yes.
D So you knew back then that it wasn't right. ...?
Certainly it was in your mind at Harmon Bay; [yet you didn't think of] speaking to your mum about it?
W Yes.
D Why not?
W I was scared.

D [Of what] Back at Harmon Bay he didn't make any really serious threats ...?
W No.
D How old were you at Harmon Bay?
W Nine - eight or nine [Wh 27]

There is a conflation of "she knew", "it was in your mind" and what is posited as the natural, responsible consequence of this mental state, "speaking to your mum". This constitutes a causality premised on a particular form of evaluation; "it was wrong ... it wasn't right ... not really a proper thing ... really very improper". These are normative descriptors of what constitutes a crime, in which allied with the child is the attribution of responsibility for firstly, recognition of its aberration from 'proper' standards of behaviour, and secondly, the execution of the action to redress this impropriety.

A time line is constructed throughout this cross-examination; "you knew back then ... you're getting older ... by that stage". This collapses the incidents into a chronology that reflects her current age and, therefore, maturity and, thus, allies immediacy with her responsibility for what she says occurred years ago. This atemporal delegation of responsibility to Cathy transposes the deviancy of the events from its legal, relational representation, that of sexual intercourse with a child, to constitute as naturally deviant, the act itself. Its aberrant signification becomes intrinsically recognisable to all, regardless of age and circumstance.

What is privileged in these comparative evaluations is rational action devoid of emotion, thus, Cathy's fear has no substantive basis. This is a rationalist appeal that denies the relationship, her world view and circumstances, by privileging the literalness, Geertz's (1983:87) "thinness", of what is said:

D By this stage you're getting older and you realised that what he was doing was really very improper, you understood that?
W Yes. ...
D Did he ever repeat the suggestion that [you would be sent to a girl's home]?
W No. He only said that the once.
D You didn't believe that did you?
W Well I didn't know that wasn't right. ...
D By that stage you were at risk. Did you ever consider staying out?
W Some nights I couldn't come home ... [from school]
D Did you ever consider screaming out ...?
W No.

D And you didn't do that because you were scared?
W Yes.
D What about your mum ... [did you consider telling her]?
W I was too scared to tell her ... I didn't know what dad was going to do. I didn't know whether she'd believe me or not.
D Didn't you know whether she'd believe you or not?
W No.
D What about doing something yourself ... Did you ever consider resistance, pulling away from him?
W I used to try and punch him away but he was too strong. .... [although it worked once]
D Did it ever occur to you that you could do that [punch him] more often to stop these attacks ... You knew that it worked why didn't you try it on subsequent occasions?
W I used to but he was too strong for me.
D Again I suggest to you that none of these incidents happened.
W They did.
D Ok. I'll give you a chance to comment on that ... Did you ever scream out or cry or yell out ...?
W No. Not really [Wh 34-7].

The evaluation of Cathy's credibility is explicitly linked with the comparison of her responses against what the defence counsel identifies as the natural response of a person within such situations. These 'normal' reactions endorse a pragmatic reply to what are construed as "attacks". Such reactions are presented as obvious and, therefore, accessible to Cathy, as they are to all. Thus, in the guise of defence strategy, these arbitrary representations privilege normative evaluations embedded within a moral certainty that demands a rational explanation for what is posited consistently, repetitively, as deviations from common-sense knowledge.

Within a trial where questions covertly and coercively constitute the medium through which reality is constructed, arguments are developed by dialectically working with the taken-for-granted conceptualisations of the audience. What is said in court, that is, the interaction between the various performers, is always addressed to a third party, the jury (Drew 1985). Aggregation is deployed to connotatively embody a single refrain within variable signification. Its effect is to render that which is unknown, familiar to jurors, converging the authority of law with the accessibility of common sense:

D By this stage you knew didn't you, you knew very well that sex between father and daughter, that it should not occur and it was a terrible thing.
W Yes.

D Why didn't you do something about stopping it?
W I almost told one of my teachers a couple of times but I just couldn't say anything. ...
D After it happened on the first time didn't it put you on the alert for the second time?
W [Yes].
D Why didn't you say "No. I don't want to go"?
W I can remember saying [I don't want to go] but mum told me to go because I couldn't be by my self.
D Did you consider defying your mum and saying "No. I don't want to go"?
W No. ...
D Why did you go with him to Melbourne on those occasions?
D Because he asked me to.
D Well you knew didn't you that this was going to be another experience ... In fact, everything you had experienced in your life until then clearly pointed to that. Did you try to avoid [going to Melbourne with him]?
W [I had to go] otherwise dad would have to be by himself. So I went. ...
D After the first time you knew that would happen [if you went again why] didn't you say "No. I don't want to go and I won't go?
W I said I didn't want to go to mum. And she said not to be silly. And I went.
D Couldn't think of anything else to say?
W No.
D How old were you then?
W Thirteen. ...
D Did you ever contemplate [refusing to go]?
W I did refuse to go once. But mum said I had to go so I went [Wh 41-42].

It is the repetition of phrases and particular suggestions, within Cathy's varying life experiences, that constitutes an expectancy about what her response to these incidents should be. Rationality dismisses the emotional base of her experience and the proof of her account is allied with her physical responses to events.

The attribution of agency is vital to the interpretation of meaning and truth about sexual allegations because it subsumes responsibility for the crime. This is entailed in both lay and legal understandings. Yet what appears clear cut is often ambiguous. For there is within the legal process, the covert constitution of what a person would do if such an event happened, as part of the definition of the truth of the experience. To allow such questions to be asked as the 'proper testing' of the child's experience attributes a reality to their signification that allies itself with knowledge about child sexual abuse rather than legal procedures. That is, things said about the parameters of child sexual abuse, in the name of evidentiary procedures, gain an existence as common-sense knowledge, because they are said with legal authority, within this environment, where the truth about such issues is decided.

In his address to the jury, the defence counsel schematically and sequentially sets out the areas to be inferentially evaluated. These are the areas wherein the 'facts' of Cathy's experiences lie, because as with most sexual offences, there is no corroboration for her allegations, apart from her own account. The address summarises the criteria that render her account questionable, while simultaneously proffering by exclusion, what is to be construed as common-sense knowledge about child sexual assault. That is, his decriptions and rationalisations of the implausibility of her account prescribe what is to be considered as plausible for behaviour in such circumstances.

A preliminary focus of defence argument is Cathy's lack of virginity:

D ... the medical evidence [tells us], to use the colloquial term, she's not a virgin ... The accused can't explain that to you ... how it is that Cathy ... is no longer a virgin ... It is a feature of human behaviour that girls who engage in sexual behaviour don't tell their parents ... Is it ridiculous to suggest that a 15 year old girl might be sexually experienced in this day and age? ... [the mother said] she had no boyfriend. Well, no boyfriend [only means a regular sort of boyfriend] ... Perhaps she had sex on a fairly casual sort of basis. Who can tell [Wh 14-15]?

There is no authority for this offensive speculation outside of his right, indeed his duty, to advance the defence case as 'persuasively' as possible. This reflects the adversarial core of the legal system, which has nothing to do with truth but with winning. Such smutty innuendo is not put as 'the accused believes' but as "a feature of human behaviour"; this is presented as sociological knowledge which has the acceptance of common sense.

The defence counsel argues for a distinctive representation and attribution of deviancy with perpetrators of this crime:

D The real peculiarity is that the accused was so brazen in his attacks on her ... he wasn't being careful about it ...

This argument denies the gross imbalance of power inherent in the relationship between adult and child, parent and child, which naturalises the authority parents have

to constitute the parameters of normality and, thus, life experience for a child. It negates Cathy's social position, that of a female child, with a world view that has been introduced early enough in her life to be unquestioned and therefore is unquestionable.

By extension, the defence counsel's attribution of significance to the fact that Cathy's mother was "completely unaware" of any abnormality in the child's relationship with her father, endorses the notion that the perpetrators of such crimes are conspicuous in their aberrations. The deviancy of the crimes is constructed as flowing from the actions of the individual rather than from the relation within which such actions occur.

The central argument of this address though, is Cathy's responsibility for her own abuse:

D ... her failure to resist ... She didn't work out any plan to avoid her father at the dangerous times ... She doesn't avail herself to distance herself from her father ... Why didn't she enlist her mother's aid in avoiding those occasions like the plague ...[Wh 15-17]?

The defence counsel reconstitutes the time line of Cathy's account by referring sequentially to various incidents occuring over an eight year span. He takes each event as an image to be embodied with a particular signification. So although the incidents vary as they span Cathy's eight years, each incident resonates with the same refrain, that of her responsibility for the actions she is claiming.

But this responsibility is unrelated to her in age, her social position as a child, or the circumstances of her life. Instead, it is a projected and, therefore, expected reponse to a rational definition of the situation. This blurs the fact that she is a young child when the normality of this pattern of behaviour is established, and renders her ageless, indeed sexless and child/daughter only in relation to the specific charges. It is from this very selective perspective that the legal process defines the parameters of knowledge about

child sexual abuse, constituting while simultaneously drawing upon what is to be construed as common-sense knowledge about the issues involved.

THE CIRCUMSCRIBERS OF THE FACTS

In sexual assault trials, jurors are usually presented with diametrically opposed versions of an incident. They are explicitly directed, however, to constrain their natural tendency to evaluate accounts as either true or false. Such decision-making conventions negate the principles of law. They undermine legal integrity by reducing adjudication and, thus, truth, to what amounts to *ad hoc* normative values. Instead the system demands substantive verification of the truth of an allegation, the proving of the Crown case, beyond reasonable doubt.

The standard of proof required within criminal trials is that of "beyond reasonable doubt". This normative qualification allies a measure of certainty with guilt, which is not explicitly directed towards who is telling the truth but towards whether all scenarios inconsistent with the accused's innocence have been negated by the Crown. The truth is to be decided on the basis of the Crown objectively substantialising its allegations, not by an accused person proving his innocence. This legal principle takes decision-making out of the realms of common-sense practices, where truth is allied with personal integrity and credibility:

> J Your function is to determine whether the Crown has proven its case ... [there are] two opposing bodies of evidence ... [this is] not a contest between [the two versions] ... It would be perfectly natural for you to say to yourselves ... "Who's telling the truth" ... It is not entirely the correct approach ...It does not have proper regard for the onus of proof [Wh 27].

There is a singular truth, allied with issues, not with the personal account. This principle privileges the process of relying upon specific empirical verification of issues and allegations to reach a conclusion about truth and guilt. It allows jurors to attribute responsibility for decisions made to the evidence itself, rather than to the individuals

involved. By establishing an explicit focus on 'deciders of fact' in contrast with the everyday rationalisations of 'who to believe' the legal system in practice, reflects its ideological disengagement from individuals and personalities.

But jurors are also advised that a criminal trial approaches the decision-making process:

J ... on the basis of hearing what is to be said on both sides of the question, with a view that that is the best way of elucidating the issues and arriving at the truth of the matter [Mo 4-5].

"Both sides of the question" contradicts the established principle that evidence emerges out of the events themselves, as independent of subjectivities. This phrase introduces the notion of competing and contradictory versions, wherein truth is allied with the evaluation of the integrity of each personal account. It implicitly privileges authorship, as if the versions elicited represent the person's experience.

The factual basis of experience is defined by opposition to subjective knowledge. Facts are impartial, clinical, objective, to be contrasted with the bias and prejudice of subjective knowledge which pollutes this pseudo-scientific process. To judge the facticity of an account of sexual assault is, however, inseparable from judging the credibility of those recounting the events, as these incidents deal largely, often exclusively, with how actions are to be interpreted. Allegations are substantiated by inferences drawn from circumstantial and behavioural clues. Thus, what is construed as verification or even corroboration of an allegation, acquires its meaning and, therefore, its materiality in court, from how jurors decide it is to be interpreted.

While explicit directions to a jury deflect away from allying credibility and, therefore, truth with the author of an account, directions also ally the credibility of the evidence inextricably with the person giving the account:

J Part of the process, and a very important part of the process of deciding what are the facts in the case is the evaluation of the witness who gave evidence and that, you might think, will be the most important part of your deliberations,

> deciding what weight you will attach to the evidence that was put before you by the various witnesses ... It's very important to have regard to the impressions which those witnesses made upon you as to whether they were telling the truth, as to whether they were relating things that they actually experienced or whether they might have been telling a false story, a fabricated story or whether they were accurate in their recollections, whether they seemed to have some bias one way or the other in the case ... that process of evaluation of witnesses ... [is] your responsiblity and its one which the jury is peculiarly qualified to perform, because you have experience of people, experience of a world, all sorts of people in the course of your lives and you're expected to bring that combined experience to bear in judging what weight is to be attached to the various witnesses in the case [Mo 5-6].

Jurors are the "triers of the facts" and in this capacity, individuals are formally required to act as "judges", "of human nature, of the behaviour of normal people and of situations which are in the experience of ordinary persons or are capable of being understood by them" (Foucault 1979:304; Runjanjic & Kontinnen 1991:368). This does not mean that jurors are expected to have direct, experiential knowledge of all that they hear in court. For "jurors are constantly expected to judge of situations, and of the behaviour of people in situations which are outside their experience" (Runjanjic & Kontinnen 1991:368). What is considered within their empathetic compass is the capacity "to judge the reactions and behaviour of people" according to the normative definition of what would or could be expected as a reasonable or normal way to behave within the given circumstances (368). Yet it is also recognised by law that:

> ... some human situations or relations, or the attitudes or behaviour of some categories of persons ... may be so special and so outside the experience of jurors, that the knowledge of experts should be made available to courts and juries called upon to judge behaviour in such situations (Runjanjic & Kontinnen 1991:368-9).

This procedure requires a dual process of validation. Firstly, what are defined as the 'abnormal' circumstances require acknowledgement from and acceptance by the "relevant field of knowledge", that is, legitimation as "an organised branch of knowledge", as evidenced by "methodical studies of behaviour" within the designated area (368). Secondly, the relevant facts must be proven to the satisfaction of the trial judge as constituting the situation or the experience involved as "so special and so outside" ordinary knowledge that the knowledge of the expert is required to ensure a fair trial. It is only when both criteria are verified by law that the introduction of 'expert' testimony into court has the potential to be justified.

The focus of such testimony is to assist in the comprehension of what could reasonably be expected of any ordinary person, who finds him or herself in a comparable situation. That is, the knowledge is introduced to assist in the evaluation generally, of what would constitute behaviour reasonable within the given circumstances. The focus is not on whether the specific response of the person involved is reasonable, but whether the particular person's response can be considered comparable with a 'normal' response to expect from those who find themselves in such situations. For example, the literature on the "battered women syndrome" indicates that

> ... women who have suffered habitual domestic violence are typically affected psychologically to the extent that their reactions and responses differ from those which might be expected by persons who lack the advantage of an acquaintance with the results of those studies (Runjanjic & Kontinnen 1991:366).

Thus, the knowledge anticipated to flow from expert testimony is awareness of insights not "shared or shared fully by ordinary jurors" (369).

The legal dilemma associated with the definition of experience or life situations as 'out of the ordinary' flows from the role of the jury in maintaining the integrity of the legal system in relation to decisions of criminality:

> The admission of expert evidence of patterns of behaviour of normal human beings even in abnormal situations or relations is fraught with danger for the integrity of the trial process. The risk that by degrees, trials, especially criminal trials, will become battle grounds for experts and that the capacity of juries and courts to discharge their fact-finding functions will be thereby impaired, is to be taken seriously (Runjanjic & Kontinnen 1991:369).

What logically flows from this explanation is that what does get said in court is to be interpreted as being apprehendable within 'ordinary' experience unless mediated by evidence to counter this. Equally, it relegates the definitions of what is to be understood as 'out of the ordinary' or 'abnormal' within the juridical field, as fundamentally the discretion of law. For while the psychological or sociolocial professions may engage prolifically in the production of evaluative criteria for the

categorisation of experience and behaviour, their knowledges are subordinate to legitimation by law, in order to gain validation within this field.

Hence, the definition of 'normality' is a contested terrain, both within the field of knowledges generally, and within the juridical field itself. This makes the circumscription of the information introduced into court for consideration in deciding what happened, critical for deciding how the events are to be understood.

Information is revealed in court in response to questions. But only what the respondent says is considered as evidence. This emphasis obscures the potential questions have to generate a definite structuring process within the acquisition of information (Drew 1985; Smith 1990:78, 1990a 99-100). They can organise events into a particular order, constructing contradictions and privileging particular values and meanings. But the particular images or inferences drawn from such information appear natural to the events themselves and self evident in the answers. Such imageic representations can be attributed unproblematically to the answer and the individual author, as if both are autonomous from the context of exchange.

Legal practitioners implicitly draw upon tacit knowledge and common values to hypothesise experiences jurors are assumed to be able to interpret and, therefore, identify with. This symbolic exercise of power is only effective, as Bourdieu explains, if it corresponds with that which is historically and, thus, discursively and relationally already present, that is, the pre-existing power relations and the discourses they rely upon and make possible (Bourdieu 1987, 1991:172). In this way, the circumscription of knowledge within a trial, and who contributes to its circumscription, has the potential to constrain and control the attribution of meaning to the incidents involved.

In this following trial, the judge plays an explicitly instrumental role in deciding what values are to be construed as 'normal'. This particular trial is a retrial and the

previous judge felt no compulsion to so directly intervene to establish his perception of 'normal' social conventions as the appropiate frame of reference for the 'testing' of these incidents.[3] Such interventionist questioning authoritatively proffers a personal value system as an absolute. For these are questions that impose a distinctively personal normative frame upon the evaluation of the truth of these circumstances. This is a personal contribution by the judge, to the knowledge circumscribed as relevant for deciding the issues involved. He consistently, repetitively spells out the nature of the relationship between reasonableness and truth.

My synopsis of this trial, like all reconstructed accounts, is a selective compilation, designed to privilege particular issues as significant and critical to the attribution of meaning:

> Stacy is 15 years old when she leaves school; 16 when she moves away from home to live with her boyfriend in a large country town. She is 17 years old when she has her first child. Her second child is born twelve months later, shortly before her boyfriend leaves her. A few months after his departure she begins a relationship with the accused, Kelly, then a 28 year old father of four. Stacy gives birth to his first child 12 months later; his second child around 18 months after that. By the time she is 21 years old she has four children under the age of five years, a factor that somehow becomes irrelevant to the claims made about her in court two years later.
> Stacy's relationship with Kelly began in 1987. He started to "loose his temper" she says, from 1988 onwards, when he began "to yell and scream and carry on and threaten to do things to me" [K1]. In April 1989 Kelly punches her. Stacy takes out a restraint order but revokes it two days later, in response to Kelly's persistent acclamations of remorse. In October 1990, she again obtains a restraint order when Kelly hits her. She finally revokes this in December because he "threatened to kill himself if I didn't take it off".
> It is shortly after this, she says, that Kelly introduces the sadistic acts of mutilation and extreme debasement into their sexual relationship, which eventually substantiate several charges of rape and assault. In April 1991, Stacy retreats to the Women's Shelter where her scars are noticed and medically documented. A few weeks later, while investigating Kelly's latest overdose attempt, the police come across polaroid photographs recording Stacy's mulilation and debasement. The abuse is empirically documented. It is, therefore, the interpretation of the origin of these acts that is contested. Kelly denies both involvement in, and knowledge of, any sadistic events. He attributes responsibility to Stacy's extreme promiscuity and erratic social life, implicating a lesbian relationship as the most likely context for the occasioning of these deeds.

This is an outline of a life occurrence to be appreciated and evaluated by common sense. The apprehension of any event or behaviour is contingent upon

contextualisation, the compilation of images that privileges particular inferences or contradictions as natural, inherent within the incident described. The following segments are selected to focus on how the questions deployed by both judge and counsel, circumscribe what is to be construed as 'normal' or 'abnormal' and therefore relevant information for consideration.

THE CIRCUMSCRIBERS OF COMMON SENSE

Within a trial, legal practitioners have the potential to usurp the power ostensibly attributed to the jury. They have the authority to impose and, thus, privilege, individualistic normative standards to shape the way in which a witness's account is to be considered. This is done explicitly by evidentiary procedures and principles and, implicitly, by practitioners actively engaging in the constitution and propagation of what is to be construed as common sense.

Sexual offences require a 'victim' and a perpetrator and with rape, legal procedures set up the inversion of the occupation of these positions. Legal caution about women alleging sexual offences formally introduces the possibility that men are the 'victims' and women, or those who allege sexual assault, are the perpetrators of a crime. For this transposition to be substantiated, the status of 'victim' requires inversion, by the allocation of agency and its corresponding quality of responsibility, to the woman.

Stacy has detailed a particular image of a man and a relationship to explain, firstly, why he was able to do what he did to her and, secondly, why she told no one about it. This image includes both irrational physical violence and the symbolic violence constituted by Kelly's threats about overdosing. These representations of Kelly are punctuated by Stacy's perception of a lack of choice in particular areas of the

relationship. She speaks of guilt and shame and fear about why it happened, retrospectively interpreting her lack of physical resistance as allowing it to happen.

Major focal points of her account are privileged by all practitioners as requiring encompassment within common experience and knowledge. For example, the violence she complains of is no more than "bad temper" which she asked for, on her account:

D Well surely if a man's got a bad temper it must be a risk ... you're running a risk of being hit [K1 102].

And she gave as good as she got:

D I guess, er, as in *any* relationship, you might've lost your temper too from time to time [K1 103]. [Emphasis added]

When combined these legal speculations on the nature of domestic violence produce the following explanation for any violence she is alleging.

D There would've been occasions when you both lost your tempers and argued.
But you argued ... *like you said to us earlier - everybody does*. And there were times when those arguments got heated.
You never had any medical treatment.
You were never hospitalised.
The police were never called to break it up [K1 17]. [Emphasis added]

Obliquely, the defence counsel attributes his suggestion, 'everybody loses their temper and argues' to Stacy, citing her as author of this account of mundane violence. Her monosyllabic responses are irrelevant, as what is construed as the pertinent information is contained within the questions. Violence is 'normalised', rendered compatible with what is the 'reasonable' level for cohabitation. In this way the defence counsel has the potential to transpose her experience of it into the jury's lifestyle.

Cross-examination constitutes an apparent illogicality about her actions by juxtaposing events. There is a compilation of images to constitute as natural, the 'contradictions' that need resolving in order to legitimate her responses to what she is alleging. These are contradictions that acquire their signification through implicit polarisation; slaps and punches immediately result in a restraint order; cuts on the breast are private, hidden, secret. Within this logic, masculine physical aggression is

comparable and therefore, equatable, with sadistic mutilation. Both are construed as 'violence', to which there is an obvious and appropriate reaction:

D In fact, the first time, I think, if I'm correct, there was any violence, according to your evidence, was in April 1989.
W Yes.
D That's when he slapped you.
W He punched me.
D He punched you.
W Yes.
D Punched you once.
W Yes.
D You went to the police.
W Yes.
D You went straight to the police.
W Yes.
D And you wanted the restraint order taken out.
W Yes. ...
D Then you say in October 1990 he slapped you
W Yes.
D Once.
W Yes.
D You went straight to the police.
W Yes.
D You took out a restraint order.
W Yes [K2 20].

D You've told the court that in December 1990 onwards that this man sitting there raped you, he molested, he mutilated you.
W Yes.
D And you let that happen without telling anyone until you went to the Women's Shelter in April 1990.
W Yes.
D You sat through these things because you were frightened of him.
W Yes.
D You were frightened of this man. What would he do to you. What were you frightened of.
W He threatened to hurt me.
D But he was hurting you.
W I know he was.
D You never told anyone.
W I was too frightened to tell anyone.
D You weren't too frightened in October 1990 when he slapped you.
W That was different.
D What was different about it?
W A slap is different from being cut to pieces.
W I appreciate that. It's hardly threatening compared to what happened after. And yet you went straight to the police didn't you.
W Yes. ...
D After these cuts in December 1990 why didn't you go to the police and show them the cuts and say "Look what this man's done to me"?
W Because I was frightened of what Kelly would do to me if I did.
D Didn't you think that the police would protect you?
W• If Kelly wanted to get to me he could, police or no police.
D So you were just overbourne by this man.
W What do you mean?

D There was no way you could get away from him.
W No there wasn't.
D You were just in constant fear.
W Yes I was.
D And the police weren't able to protect you, that's what you thought.
W Yes.
D You thought you had to put up with it because you had no choice.
W That's right.
J Because he would kill you if you did anything.
W Yes he threatened to do that. Yes.
D Do you have any tattoos on you [K2 8]?

Tattoos he suggests, do not sit well with the fear she is claiming, and are in need of explanation, to accomodate what amounts to an act of rebellion, which is what the tattoo represents to Stacy, within this all-encompassing terror. The implicit logic of these questions privileges a singular, masculine definition of violence, attributing incongruity to the multi-faceted dimensions of her differentiation between physical violence and sexual violence. Expressions of defiance and provocation jar with what the jury are encouraged to think fear is all about. Nor is her method of coping with fear classifiable as a 'normal' response. It is from this contextualisation of "constant fear" caused by sadistic mutilation that her tattoo acquires its significance:

D Why did you put the tattoo there?
W Because I wanted it there.
D Is that the only reason?
W And I wanted to show Kelly that I wasn't scared of him anymore.
D In fact, your answer ... on the last occasion was "To make him piss off and leave me alone".
W Yes.
D Weren't you frightened for your life?
W Yes I was. But I couldn't show him that I was frightened.
D You couldn't show him you were frightened.
W No.
D You would prefer to sit through all this mutilation and humiliation rather than show him you were frightened.
W If I showed him I was frightened he would have done worse.
D I don't follow you on that.
W *It sounds straightforward to me.* If I showed any fright from him he would do worse. He threatened to do worse to me [K2 15]. [Emphasis added]

"Straightforward" reflects her distinctive frame of reference which to her has a self-evidency that is initially, apparently, beyond the realms of defence counsel's comprehension. It is marked by a complexity that is constantly assaulted by the positivism demanded by legal 'facts':

J Why didn't you go to the Women's Shelter earlier, when he cut you?
W I was too frightened to, too ashamed to.

J It wasn't fear.
W Yes it was fear too.
J You said you weren't frightened of him in the shelter.
W No. While I was in there, no.
J You could have gone in there in December 1990.
W Maybe I could have, I don't know.
J Why didn't you?
W I was too frightened to.
J It wasn't shame. It was fear.
W It was both [K2 13].

What is her world view, her sense of limits about the world and the relationships she encounters? What aspects of her life circumstances can these representatives from this city-size country town empathise with? The jury know the acts occurred, or at least most of them did, because they are photographed, that is, empirically documented. How do they conclude that Kelly didn't do it, that Stacy participated voluntarily? How do they interpret 'voluntarily' in this talk of Women's Shelters and overdoses and displays of determination in the midst of abject fear. What common sense informs the evaluation of this human complexity, compelled to masquerade as 'normality'?

Cross-examination has the potential to exclude or marginalise issues arising from Stacy's evidence. There is no violence in this defence account of her responses to his threats about overdosing; nothing about the emotional or physical outbursts that she's talked about. It's all about his unrequited love for her. The defence dichotomisation allies rationality, the calculator in control, and thus power with Stacy. Kelly is depicted as emotional, irrational, weak, qualities usually allied with women:

D It was after the birth of Matthew in June 1990 that you became very determined that he was not going to come around and see you.
W Yes.
D You kept on repeatedly telling him you didn't love him.
W Yes.
D You repeatedly told him you didn't want to see him.
W Yes.
D You didn't want anything to do with him.
W Yes.
D He kept on saying "Look. I love you and I'll do whatever you want".
W Yes.
D And according to your evidence, he started taking overdoses.
W Yes.
D In front of you.
W He had done. Yes.
D Said he'd kill himself if he couldn't continue living with you.
W Yes.

D Don't just agree with me. I mean, are they the sort of things he said to you.
W Yes.
D He had to have you.
W Yes.
D He'd take his life if you wouldn't accept him.
W Yes.
D Collapsed down there in front of you.
W Sometimes.
D On his knees.
W Sometimes.
D Crying.
W Sometimes.
D Pathetic mess.
W Yes.
D This man, who is what, grovelling at your knees asking you to take him in.
W Yes.
D And you're saying at the same time you were so frightened that you sat there and let him mutilate you.
W Yes [K2 18].

The content of this passage renders the identity of the 'victim' problematic. By focusing on a particular aspect of the relationship within which she maintains some semblance of independence, her proffered status in relation to the incidents, that of total submission through fear, seems irrational and illogical.

It is the juxtaposition of images that allows her credibility to be implicitly, conceptually impugned. Stacy's decisive rejection of the relationship becomes the signification that embodies the passivity of her reactions to the rapes and mutilations. Her responses to much of this is the monosyllabic affirmative, with rarely any expansion. The questions control the flow of information, unobtrusively regulating the knowledge tendered for consideration. They juxtapose to marry images that inferentially contradict her credibility and status as 'victim'. They juxtapose to constitute, particularly causation, attributing a causal relationship to actions that designate one actor as instigator, the other as reactor, whose actions become no more than the inevitable consequence to what someone else has initiated. The causality privileged here is her responsibility for his overdosing:

D You didn't try and stop him.
So you sat there and watched.
... he took you to a spot and attempted suicide because you would not live with him [K1 144-5].

Guilt is something she has already experienced in these events and the attribution of responsibility and guilt to those alleging sexual assault is an acceptable avenue for the legal 'testing' of the veracity of their account:

D You were that strong in your determination to reject him that apparently he had no other recourse but to take these tablets.
A He didn't have to. I didn't force them down his throat.
D You would not agree for a moment that you were going to live with him would you.
W No I wouldn't.
D You were strong. You were determined.
W I was determined. Yes.
D Weren't you frightened of him?
W Yes I was frightened of him.
D On the one hand you are so frightened that you put up with these mutilations. But on the other hand you are not too frightened to say to Kelly "I don't love you any more and I want you out of my life" [K2 9].

There is a natural contradiction emerging from the juxtaposition of "determined" and "frightened" that constitutes an incredibility that is attributed to her personally rather than to the contradictions compiled.

At this point reference needs to be made to the distinctive contribution performance makes to the circumscription of information, in contrast with the impersonality of print. There is a tone informing such questioning, a calculated performance deploying pauses, emphasis, silence and directed towards an audience. For example, Stacy is charged with making a false complaint when she revokes the second restraint order and pleads guilty in court:

D I suppose you say he *made* you plead guilty.
Scared of him. In a court room. I mean, there were other people there. Police were there. ... There were a lot of people. [couldn't you say] "Hold on. I'm under duress here your honour"?
Couldn't you?
No one was stopping you.
You were *scared*. [he laughs] Scared of *what*! [K1 19] [Emphasis added].

The deployment of such personal qualities as sarcasm, denigration or ridicule by practitioners of this impersonal institution is subsumed under the umbrella of 'persuasive' rhetoric. Such performances are rationalised ideologically, by recourse to the presumption of innocence, never pragmatically, by recourse to the adversarial nature of this justice.

The second contributor to the circumscription of the nature of the information elicited in court is the judge. By recourse to the 'proper testing' of Stacy's evidence, the judge introduces and, thus privileges, a 'normal' frame of reference to contrast with her most abnormal experience, thus challenging the "intrinsic likelihood" of her account. The judge's questions are premised on an assumption that people do not act as this woman describes. This intervention and contribution occur early in the woman's evidence. They make explicit the chasm between what she says goes on and what he implies should go on.

In this passage, the prosecutor begins by picking up the judge's enquiry; would the accused "stay the night". The judge uses the frame of a particular kind of relationship to consolidate not merely the difference, but the discrepancy between what she is saying and what he infers should be the case; that is, the kinds of things that would have occurred if Kelly did stay as frequently as she says he did:

P At that stage ... could you give us some idea how often on average, he would stay all night in a particular week?
W Probably four or five times a week he would stay the night, the whole night.
J Did he eat meals at your place?
W Sometimes he did.
J Did he have clothes there?
W No [K2 10].

A byproduct of the introduction of this content is to deflect any deviancy away from the occasions when Kelly called. This domestic detail normalises the relationship. It also introduces the familiarity of life patterns with which the jurors can identify, thus further disqualifying the attribution of aberration to Kelly's visits.

Such interventionist questioning by a judge carries with it the authority of his position and naturally acquires this signification. Because a judge is considered to be neutral, impartial, with no personal interest in either party, any contribution to the examination of any witness has major significance:

W He said he wanted to have sex.

J What did he actually say?
W He said he wanted to make love to me.
J What did he actually say?
W Just that he wanted to make love to me.
J "I want to make love to you".
W Yes. ...
P When the accused attended on this evening, ... what did he do when he came in?
W He wanted sex.
J What did he say?
W He wanted to make love.
J He just walked in the front door and said "I want to make love".
W Yes.
J That's it. That's the conversation.
W Yes. ...
J So from the time he walked in the door until he'd have sex with you all he'd said was "I want to make love to you".
W Yes.
P Was there any conversation whilst he was having intercourse on this occasion about the topic of --
J About anything.
W No.
J Not a word said.
W No.
J So what's happened now is he's walked in, said "I want to make love" and then you had sex and not a word spoken by anybody.
W No [K2 12].

There is a Geertz's "thinness" about this judge's interpretation that demands a positivistic response. There is no tone to all of this; transcription does not include his impatient tone of incredulity that rapidly merges with exasperation to openly convey his disbelief about Stacy's answers. A consequence of this persistent intervention is the imposition of yet another organisational frame upon how this woman recounts her experience. The judge's normative schema is adopted out of anticipation, by both prosecutor and witness, who begin to include particular information in their detailment of events. In this way, the judge shapes the direction and content of the information revealed. This process reflects a distinctive feature of symbolic power, that it can only be exercised through the complicity of those relationally engaged. The efficacy of legal authority resides within the extent to which it attains recognition, that is, the extent to which the arbitrary individualism of its practices remains unrecognised (Bourdieu 1987;845).

In this next segment both witness and prosecutor attempt to pre-empt the judge by incorporating his direction. But even then Stacy can't win; the judge doesn't want to know what she said; he wants to know why she didn't say something else. This reflects the *ad hoc* nature of common sense; its "unmethodicalness" that makes it simultaneously accessible but difficult to appropriate. Its "patentness", says Geertz, is "in the eye of the beholder" (1983:90). But he also defines common sense as knowledge that "it proffers you to know" (88), thus indirectly attributing an advantage to those able to regulate either the form or content of what is said:

P What did he do then?
W And then we talked for a while.
P What did you talk about then?
W He talked about his wife.
P What did he say about her?
W He said that he would still leave her.
P And did you say anything?
W I told him I didn't believe him, that it had gone on too long and he hadn't left her.
P At that stage did you want him to actually leave his wife and move in with you?
W No.
P Did you indicate that to him?
W Yes. Many times.
J But on this particular night, you see, he said, "I'm going to leave my wife", and you said "I don't believe you, it's gone on too long". Did you ever say "Look. Forget about it. I don't want you to leave your wife"?
W I tried to.
J How do you mean - you tried to?
W I tried to bring it up but he just wouldn't listen. He kept saying he was going to leave her. ...
W Then he said --
J Pause there for a moment. In that half an hour he said "I'm going to leave my wife and come and live with you" and you said "I don't believe it, it's gone on too long". What else did you talk about for half an hour?
W He talked about leaving his wife and moving in with me.
J For half an hour he said that.
W Yes.
J Just kept on saying the same thing - "I'm going to leave my wife".
W He kept repeating himself "I'm going to leave my wife and live with you".
J You kept on saying you didn't believe it.
W I didn't believe it.
J You kept on saying that.
W Yes.
J For half an hour.
W Yes.
P Was there any other variations on that conversation during that period of time?
W No.
J Did you have a cup of coffee or -
W No.
P Then what happened at the end of that half an hour.
W He said he was going.

P And then what happened?
W He left.
J So he's only been inside the house for the most - 40 minutes.
W Yes [K2 18].

There is an exactness demanded by this judge. What he wants is a sequence of action and dialogue. He has no interest in what she believes, only in what was said, what was done, for how long, detail that can be verified, objectified and thus rendered independent of the arbitrariness of subjectivity. For example, Stacy agrees with the judge's approximation of time, a "half an hour". This is taken literally by the judge who then acredits this literalness to her as author, to which he legitimately respond with demands for detail:

J He walked in and had a cup of coffee you say.
W Yes.
J Nothing said.
W No.
J Then he said - "I want to have a look at the cuts".
W Yes.
J Had a look at the cuts.
W Yes.
J Didn't say a word.
W Yes.
J And he left.
W Yes.
J The only words spoken were "I want to have a look at the cuts.
W Yes. ...
J What happened in the intervening two or three weeks?
W Kelly kept coming around as usual, most nights.
J What, every night did he?
W Most nights, yes.
J Did he stay?
W No.
J When he came round it was the same routine. He could come in and say "I want to make love".
W Yes. Basically, yes.
J Have intercourse with you and leave.
W Yes.
J Did you watch television or have cups of coffee or have a talk?
W He came there to have sex.
J That's all that happened.
W Yes.
J No conversation. No cups of coffee.
W There was conversation but it was based around sex.
J What conversations about sex were there in this two or three weeks?
W He would basically come there and say he wants sex.
J Did he say "I want sex" or "I want to make love" or what did he say?
W All different things. Sometimes he would want to make love. Sometimes he would want sex.
J He would just walk in and say that.
W Yes, he would.
J There would be no normal conversation from then on.

W No [K2 19].

Her understanding is "He came there to have sex" and all else appears trivial, insignificant, even absurd with her definitions of what "having sex" means to Kelly. Yet the judge requires details of "cups of coffee" and "conversation", to which he allies the label "normal". It is this frame for interpretation that subsequently attempts to absorb and accomodate all her distinctiveness within a uniform social category, one that acquires its marked features from the experience and values put forward by the judge.

THE ACCOUNTABILITY OF THE JURY

A basic premise of the legal system is that interpretation is a uniform process, irrespective of the identity of the interpreter or the locus of interpretation. But this presupposition remains no more than an assumption, as juries are never required to validate their conclusions. Their decision-making processes are beyond exposition, and rigorously safeguarded as such. While legal practitioners speculate within the logic of the system, for example; to accept 'xyz' the jury must have believed 'abc', stories also abound about the erratic, often whimsical nature of what influences jury decisions. Callinan (1984) uses the term "disturbing" to describe her own experience of jury duty within a rape trial (166).

A major area of Callinan's concern flowed from "the energy with which some jurors supplied fantastical scenarios in the style of soap opera about possible connections between the accused and the prosecutrix" (166). She refers to four jurors who concocted a "secret long standing affair" despite the fact that the accused did not assert any such relationship. "Revenge" motives proliferated, ranging from blackmail, the guilt of an erring wife, to a lover's tiff (167). Other jurors were willing "to draw the most outrageous conclusions" from the woman's separation from her

husband(167). Such speculation receives encouragement, even initiation, from the warnings delivered naturally, authoritatively, as part of legal proceedings, about the unreliability of those alleging sexual assault.

With a criminal trial, the matter at dispute is not strictly a matter of fact. It is rather a matter of how the facts are to be understood as a coherent course of action (Smith 1990:149). Callinan's examples confirm that non-legal notions of facts include personal accounts of why things happen, a factor well known to legal practitioners. Legally, speculation about motives is legitimated on the grounds of advancing the accused's version of events as persuasively as possible. There needs to be a motive to explain away the woman and the charge.

With Stacy, the defence counsel offers a choice; self mutilation explains the empirical:

D You haven't, at any stage in your life, been in the habit of self mutilating yourself [K2 7].

Lesbianism adds the acceptable level of deviancy:

D Are you sure you are not mucking around with a friend?
W I'm positive.
D Maybe a girlfriend [K2 9]?

Post natal depression contributes the irrationality and instability of hormones:

D Did you get depressed after the birth of your fourth child?
W No. ...
D You never got depressed after the birth of Matthew in 1990.
W No.
D You never suffered an extensive depression.
W No [K2 24].

Marginalised women generally are suspect:

D Are you sure this isn't something you made up at the Women's Shelter [K1 44]?

And a recent innovation utilises the compensation of 'victims' of crimes to rationalise why lying women come to court:

D During 1991, April/May, that period in 1991, did you receive any advice about the Victims of Crime legislation?
W No.
D Had you heard of it?

W No.
D No-one told you that it was possible to recover up to $50,000 in damages as a Victim of Crime.
W No. ...
D When you made these allegations to the police accusing Kelly of committing these offences you were not aware that you could obtain up to $50,000 in damages.
W No.
D None of those people advised you of that.
W No one.
D Your lawyer didn't advise you about that.
W No.
D Police didn't mention it.
W No.
D No one in the Women's Shelter told you.
W No.
D Never saw any posters anywhere.
W No.
D Didn't see any posters in the police station.
W No.
D Totally unaware of the fact that if you could establish, for example, that Kelly inflicted these wounds upon you, that you could then recover some money.
W I didn't know anything about it.
D First time you heard about it was towards the end of last year.
W Yes.
D In fact, the first time you heard about it was when you were cross-examined about it last year in this court.
W Yes [K2 47].

Strategies such as this raise Norris' (1990) interesting point about the inseparability of the professional from the personal. To what extent is this common sense the defence counsel's common sense, reflective of the values he favours?

The relationship between common sense, the 'community' and the administration of criminal law is dialectic. The legislation on compensation for victims of crimes is introduced; greed becomes a substantialisable motive to deploy in rape trials; people speculate about the avarice of those alleging sexual assault. These factors are conceptually separated in print, implying a direct, even intentional causal relationship. But an equal premise of common sense is accessibility which entails acceptability. What is said in court requires an audience to interpret and, thus, attribute the intended meanings to the knowledge of common sense.

Callinan's second area of concern relates to the lack of knowledge about the sociological composition of juries and their process of decision-making. She refers to

one juror who had herself been raped and, consequently, became the 'authority' on the subject, able to argue against the credibility of the woman on the grounds that "raped women don't act like that". Another juror, says Callinan, believed that the authorities had "planted" this woman in their midst to 'guide' their deliberations. Yet another claimed the allegation was a fabrication because "her own husband would be impotent with the amount of alcohol the accused claimed to have drunk" (168).

These are appeals to experiential empathy that render the ideological foundations of the system absurd. Yet they constitute one person's knowledge about serving on a rape trial jury. Fundamentally though, the legal system does not need to know how its procedures are understood and applied by the deciders of the facts. For this knowledge is superfluous to its efficacy.

CONCLUSION

Sexual assault trials require definitions of sexual aberration to decide on issues of criminality. The crime derives its meaning from how actions are to be understood, from inferences drawn from circumstantial and behavioural situations. Its meaning and reality is constructed in court, from how jurors decide the events are to be interpreted. The introduction or imposition of what is to be deployed as a normative frame for the evaluation of experience has the effect of constituting the 'ordinary' from which the inferences of common sense flow. This is an exercise of symbolic power that is distinctive to sexual offences, with their reliance upon inferential knowledge to establish the reality of experience.

Legal arbitration allies its integrity with empirical definitions of truth thus backgrounding the critical role tacit knowledge plays in what counts as truth about sexual offences. Yet those with the authority to decide how events are to be

contextualised have the power to decide how these events are to be understood. For this circumscription of knowledge informs on decisions about the facts which, in turn, dialectically synthesises with the understandings of jurors, to circumscribe the reality of the events. It is the self referentiality of legal knowledge that enables discursive [1]practices to capitalise on adversarial strategising, thus actively engaging legal practitioners in propagating and reproducing legal definitions of knowledge about these crimes. Equally, it allows legal authority to empower common-sense decisions about a multitude of practices and behaviours within everyday life, generating the micro knowledges legal discourse relies upon to sustain its hegemonic claims.

The legitimatation of this legal delegation of power is predicated on institutional claims to take decision-making out of the realms of arbitrary subjectivities and personalities into the factual and objective evaluation of experience. The legal institution has its own methods, its own specialised language, its own evaluative procedures for determining its efficacy and, therefore, the persuasiveness of its truth. The system allies its integrity with its procedural truth, the practices and processes by which material truth is arrived at. This impersonal, impartial, emphasis backgrounds questions of position and thus relations of power as conceptually, ethically, irrelevant in deciding matters of truth. For its conventions inscribe its practices and its products with an apolitical, egalitarian, objectivity, thus constituting, while reformulating and reproducing, legal definitions of order within the chaos of common sense.

It is to this autonomous, self reflective knowledge of law that I now turn, to consider how legal conventions of prohibition, regulation and division are able to establish their effects of truth in this discourse which is, in itself, neither truth nor false. This last chapter foregrounds the self reliance of legal knowledge, by examining the ways in which prosecution procedures for deciding the truth of sexual allegations, reflect and reproduce the institution's representations in the processes they involve.

NOTES

1 Gluckman (1958) was the first to raise the question of a relationship between judicial statements, the actual basis of judicial decisions and the tacit understandings and practices of everyday life. But he regarded these everyday understandings as the *a priori* constituents of the 'social' from which judges selected particular norms to privilege. While it is recognised that legal practices rely heavily upon 'non-legal' knowledge when prosecuting sexual offences (Scutt 1980; Temkin 1987; Adler 1987; Caputi 1988; Bourque 1989) this relationship is still conceptualised as 'one-way', as if, as Bennett and Feldman (1981) claim, there were "implicit models of social reality" that exist, independent of relations, as neutral knowledge (162). The productive nature of legal power relations with its potential to create its specific subjectivities is not recognised, as such lines of questioning are unproblematically accepted as relevant to legal procedures.

2 For example, Operation Keeper, a community awareness programme run by the Police Department in 1992.

3 This indicates how the substantive content of the law is vulnerable, as Bourdieu (1987:827) says, to the "specific power relations between professionals, with their unequal ability to marshal the available judicial resources through the exploration and exploitation of 'possible rules' and to use them effectively, as symbolic weapons, to win their case". When asked by lawyers and court staff about the trials I had been attending the first question was always "Who was the prosecutor/defence/judge"?

LEGAL TRUTHS

Throughout this thesis I have examined how effects of truth are produced in legal discourse which is in itself neither true nor false (Foucault 1980:118). My starting premise is the assumption that knowledge is constituted within distinctive institutional locations (Bourdieu 1991:42; 1987; Smith 1990:78, 1990a:85-92). These institutions have particular ways of conceptualising what counts as knowledge within their individual field (Foucault 1972). This is knowledge that ingrains the nature of the institution within the objects it constructs, to legitimate and reproduce the institution's self definition within an objective frame (Bourdieu 1991:66-7, 1992:76-86).

In prosecuting sexual offences legal practices construct as natural, differentiating qualities organised around normative conclusions. These divisions establish the boundaries and conditions for decisions about the truth of sexual allegations. They also make normative discriminations implicit within evaluation of the ways in which individuals conduct their relations. These legal specifications of knowledge about sexual assault enable everyday practices and institutional relations to resonate with similar issues and values, as each provides the conditions for the existence of the other. Thus, conceptualisations such as rationality or truth are never reducible to the particular organisational schemata, they are also part of the medium through which these conceptualisations are realised. In this way, what is legitimated as the factuality of a rape experience is constructed within a definite institutional context and its composition reflects this locus of production. As a criminal offence, the facts of a sexual assault are constituted within the juridical field. A trial represents

the testing of the integrity of this definition because it elaborates clearly the nature of legal truths.

'Law' is a singular uniform term that can encompass both the legal system as an institution and the administrative processes of this institution. There are specific procedures and practices that define exchanges as 'legal' and there are also specific values associated with conceptualisations of 'law'. These are the rituals that symbolically enunciate the institutions representation of itself.

The legal system claims to operate on the basis of an abstract rationality that is procedurally capable of deciding issues of objective truth. Its claims of truth are legitimated by its reification of objective knowledge, that is, knowledge that is unpolluted by subjectivity. This differentiation between objective, factual knowledge and subjective knowledge is a distinction the legal institution is premised upon, for it draws its authority and legitimation from its ability to discern the objective basis of experience.

It is by opposition to lay and subjective knowledge that the legal institution defines the nature of itself. Subjective knowledge is construed as the language of interpretation, filtered through the reflection and emotions of experience. It is knowledge that is linked to the individual rather than the experience itself, and is thus marked by its arbitrariness, its transcience and thus its inability to be conclusively verified or even agreed upon. 'Facts', by way of contrast, are knowable to all, appear the same to all, are the same on all occasions (Smith 1990:69-70). Objective knowledge acquires its identity through its ability to engage individuals in relations of equivalence, as its existence is contingent upon such premises as universality and commonality. This makes the status of the knower of facts irrelevant as all are interchangeable and, therefore, equatable.

'Law' presents itself as an internally consistent system whose judgements are allied with the institution as distinct from the individual practitioner. Thus, like objective knowledge, it is perceived as a knowledge that is independent of relations. Objective knowledge is taken to reflect a reality and, as such, stands independent of any contamination by interpretation. It is construed as a universal knowledge, a knowledge common to all and accessible to all. It has an existence independent of either experiencer or observer. This is, therefore, a truth that is uncorrupted, unpolluted by the bias and prejudice of arbitrary individualism. Legal decisions on truth or guilt are perceived to be rule governed, as distinct from the value-based decisions of opinion. Thus, legal judgements acquire their objectivity via regulation by evidentiary rules and procedures.

This is a claim to truth via objective knowledge which draws parallels with, and strengths from, the discourse of science. Like scientific truth, legal truth claims affiliation with such qualitities as objectivity, even 'falsifiability'. These are appeals to the empirical basis of scientific truth. They detach legal knowledge from the realm of 'authorship' into what Foucault (1977:126) describes as the anonymity and redemonstrable truth of science. Legal truth, like scientific truth is independent of the person and, therefore, is perceived to be impervious to the arbitrariness of individual subjectivities. It is instead, a truth that is allied with the processes and methods of a particular institution and, therefore, a particular institutional integrity.

Yet, while 'law' claims affinity with science, in the "clinical" nature of its practices and its truth, it also differentiates itself from science by its exclusionary methods and procedures. Thus, 'law' is held to be like science yet separate, even superior to science, potentially capable of evaluating the truths of science (Smart 1989:9).

This polarises the truth of 'law' against the untruths or partial truths of other discourses, an opposition which is substantiated by the differentiation between what is constructed as subjective knowledge and objective knowledge. This is expressed within a predominant metaphor of 'law', the tainted or polluted testimony. The evidence from which the facts and truth are extrapolated, requires the separation out of the polluted knowledge of subjectivity. Thus, the regulation of knowledge via evidentiary rules and procedures is vital for 'law's' definition of self.

THE CONSTITUTION OF LEGAL EVIDENCE

A trial has particular regulatory practices designed to distinguish it from other forms of communication, especially that of ordinary conversation and decision-making procedures. These processes of separation and exclusion simultaneously define the legal nature of its character. Thus, there are specific methods and practices to define exchanges within a trial as 'legal' and there are also specific values associated with conceptualisations of 'legal'.

Legal rules define on the basis of exclusion. They prescribe the nature of involvement, as subject to rules and procedures, and they pre-ordain participatory roles to regulate contributions. Within this arena, the mode of communication is pre-set and the nature of the relationships between those involved is pre-determined. Regulation prohibits the use of a range of communication conventions usually utilised in deciding matters of truth and fact in everyday situations. What counts in this location, as knowledge for consideration or 'evidence', is the selective testimony of witnesses. This testimony reflects the institutional representation of what constitutes a fact and what sources of information are reliable. These are the values that are imposed on the form and content of the accounts elicited by questions. In this way legal impartiality and its representation as an autonomous

body of objective knowledge are both confirmed and constituted by the self-referentiality of its contents.

A trial is presented as a procedurally regulated transfer of information and, as such, substantially constrains what a witness can say within particular parameters. It is conceptually organised towards a predetermined end point, that of truth or falsity, which materially translates into decisions of guilt or innocence. For once institutionalised, the efficacy of discourse has the potential to transcend its discursive parameters (Seidel 1989:223; Bourdieu 1987:828-9). 'Law' may be a "fiction", as Silby and Sarat (1989:150) indicate, but laws are "real". Within this cognitive and normative schema, conventions mark the particular occasion as distinctive to its institutional context. Rules and procedures are there to sort a singular conceptualisation of truth from that which is false. Thus, a trial is also highly regulated in relation to the nature of exchanges and interaction, which ritualistically naturalises the materialisation of the qualities allied with the institution.

This is an environment wherein practitioners have learned to identify certain categories of knowledge as 'evidence' and to present these constructions as acquiring and warranting this identity from their own intrinsic qualities. What counts as 'evidence', the truth about an allegation of rape, are qualities reflective of this locus of production. The 'evidence' of sexual allegations acquires its qualities by way of appeals to the nature of scientific truth, to be contrasted and opposed to lay conceptualisations about decisions of truth or falsity.

'Evidence' is an encompassing concept that has the potential to subsume all knowledge within the same normative framework of objectivity, while simultaneously qualifying this uniformity with hierarchical scales of evaluation. This is a process that relies upon the subsequent qualification of the 'purest' classification, that of empirical and thus, impartial, objective evidence. Within this

arena, there is no comment on subjective states; what is admissable is that which is constructed as having an objective basis.

Legal notions of evidence are premised upon the implicit assumption that information exists *a priori* to events, rather than is constituted within the event itself. Evidence is no more than the 'recapturing' of this knowledge from its subjective obfuscation. as this judge explains:

J These questions call for a factual response. If you can give it, give it. If you can't, say you can't. But best not to comment and give opinions. Just listen carefully to the questions. And it doesn't help if you become emotional about it; it doesn't get us anywhere [Da 47].

Judicial evidence is broadly divided into testimonial, circumstantial and real evidence, that is, that which is empirical and materially verifiable. Testimony is restricted to what the witness perceives through direct sensory input, as the basis of what one is qualified to testify to the truth of.

The rules of evidence centre upon the regulation of content from two persectives. Firstly, only relevant knowledge is admissable; and secondly, this relevant knowledge must be reliable. These relative concepts of 'relevance' and 'reliability' are regarded unproblematically as universals within the particular circumstances. This privileges a distinctive conceptual base to 'evidence', thus obscuring the potential for terms like 'fact' or 'evidence' to have different conceptual roots. For example, for a police officer,

J ... evidence in almost all matters is a whole series of circumstance that lead one to a particular conclusion".

This includes a multitude of sources, many of which are non-verifiable and thus non-repeatable. These sources draw their validity from experience and professional knowledge, thus filtering schemas of interpretation through a professional position. This contrasts with legal evidence wherein credibility and reliability is allied only with knowledge that is empirically substantiated. Like science, the legal system

demands a direct causality between what is acceptable as evidence and its factuality. This removes any trace of subjectivity from the purest form of legal knowledge and thus allies truth with the knowledge itself.

Legal evidence is discussed in terms of weight, with appeals to the metaphoric 'scales of justice'. An example is legal status of a complaint of rape; or the inadmissability of hearsay as secondhand knowledge.

The soliciting of evidence is informed by what are to be considered as the "contestable circumstances" of rape. These are formulated as the 'elements' of the crime, which, in sexual offences rely heavily upon inferences contextually constructed. Evidence of sexual assault is largely circumstantial, and facts are constructed by drawing upon the inferential potential of what is said in court. This surreptitiously draws upon opinion, the jurors' ability to infer particular conclusions from various incidents and propositions, to constitute the factuality of what occurred. This is an evaluative process premised upon understandings of "the intrinsic likelihood" of the events described.

"Intrinsic likelihood" is a phrase that is frequently used in sexual assault trials, along with its conceptual companion, "the basic salient facts". Such conceptualisations are posited as existing prior to any definition of the nature of the experience, as if notions of saliency or intrinsic properties emerge out of experience itself. Implicitly these notions argue that all definitions of saliency would be the same for every experience and appear the same for every observer. They will be accorded the same significance by experiencer and observer, thus confirming significance as a property of the act itself, rather than flowing from the person.

"Intrinsic likelihood" draws its legitimation from notions of plausibility and possibility. Thus, it circuitously appeals to and confirms the legal conceptualisation

of reasonable doubt. The overarching evaluative framework of every criminal trial is a manifestation of Gluckman's (1963) "reasonable man".[1] This is the egalitarian, normative conceptualisation of objective standards of human conduct, against which any individual's actions are compared, to evaluate their credibility. Jurors are urged to decide if an account is "reasonably possible"; to evaluate "any reasonable explanation of the facts"; "to consider if there is any reasonable scenario that might be consistent with intercourse". The legal interpretation of these common-sense words is explained along the following lines:

> J Those words 'beyond reasonable doubt' - are ordinary English words and no amount of explanation can tell you any more than that. If you have a reasonable doubt you acquit. If you are satisfied beyond reasonable doubt, you convict. If you have no doubts about the accused's guilt, then you convict. If you have a doubt which you as reasonable people are prepared to entertain, you should acquit, find him not guilty.
> Let me put it in another way. If you think there is a reasonable possibility of the accused not being guilty, then he is entitled to be found not guilty. When all is said and done, reasonable doubt is a matter of common sense and I leave it to you [Cu 95].

In rape trials, 'reasonable' refers exclusively to the accused's state of mind rather than the factors allowing him to form an opinion about consent. Jurors are called upon to consider whether the man 'honestly' believes that the woman is consenting to sexual intercourse. The presence or absence of reasonable grounds for such a belief is not a matter for jury concern (Graycar 1990:335). Therefore 'reasonableness' becomes a relative connotation, arbitrarily re-embodied within each trial, according to each set of circumstances, yet able to draw upon common-sense understandings of women and sexuality for legitimation.

"Intrinsic likelihood", like "reasonable doubt", invokes the 'ordinary' person to embody the particular individual and, thus, attributes an objective, normative schema to rationalisations that are inextricably engaged with subjectivity. Legal truths are constructed as being value free outside of their reflection of what are understood to be 'community values'. Rosen (1989:41) makes the point that judges don't have to get it right all the time; they simply cannot get it wrong too often.

But he neglects to ask, "wrong by whom"? The legal system is perceived, and perceives itself to be outside of any allegiance to particular social or political positions. It draws upon concepts of impartiality and neutrality to constitute and legitimate its authority to adjudicate for others.

The "basic salient facts" are those aspects of a sexual assault which are 'memorable'. Incidents are regarded as having fixed events and actions. These will surface with every account, in every context, and are construed as that which is obvious to every observer. They are specified retrospectively, by recourse to the elements of the crime and, therefore, coincide with what the law wants 'victims' of sexual assault to remember. They are constructed as a universal conceptualisation which draws its validity from a particular relationship between experience and account. The facts of an experience are linked with the act and not the observer and, therefore, while the latter becomes interchangeable the facts remain stable.

This is a process that relies upon language being regarded as primarily referential in nature:

> D How many times did she say "I don't remember". She just reported it in September [this is the end of June]... because if she is recounting to us what occurred she would remember at least the basic salient facts. But you see, she's told different stories ... and she doesn't know what she's said and when she's said it ... So to protect herself she says "I don't know" ... If you are raped the basic salient facts [stay in your mind] Is it the old "I don't remember" - the protection of the witness who doesn't know what they've said and when they've said it and doesn't want to trip themselves up [MJ 6]?

There are only two positions in this argument. The first is truth, in which case the "basic salient facts" would be known. These are, of course, the facts the law requires a 'victim' to know and remember about rape, not what the person raped remembers about it. The second position is the deductive polarisation of the first. If a 'victim' doesn't remember the "basic salient facts", what the law requires her to remember, then she could not have been raped and, hence, she is unsure of the lies she has told. If she can't remember then it is via the status of 'victim' and

eyewitness to the experience that her credibility is challenged, because, as is also frequently said in court:

> You were there. We weren't [MJ 45];
> ... it can't be difficult for you to remember if those events occurred [HA 81];
> ... on a matter like that they could not have been wrong [Co 43].

This is the self referentiality of 'law', that relies on its past experience of rape trials to validate what are the "basic salient facts" of every and any rape experience. What is never questioned in rape trials about the meaningfulness of these "basic salient facts" is meaningful to whom, for memory is allied exclusively with legal relevance. To not remember is to lie, because the dichotomisation of truth is always unequivocably identified as untruth, which buttresses the legal 'facts' about the propensity those alleging sexual assault have to lie and fabricate.

To utilise "the basic salient facts" as an objective, evaluative framework, requires a particular conceptualisation of knowledge and memory. It draws upon the notion that there is only one version of what happened and therefore relies upon a singular conceptualisation of truth. This is perceived as being allied with the events and is therefore recountable on each and every occasion. Thus, any and every record of a witness's account of what happened would include these "basic salient facts". This is premised on the assumption that memory remains the same, unaltered by time and circumstance.

Roberts (1989) and Kelly (1988) both worked as councellors in British Rape Crisis Centres and found that women's memories of their experience varied dramatically, in what they remembered and in what they privileged or emphasized. Kelly attributes this fluctuation to a woman's ability to accomodate her experience, beginning with how she chooses to interpret the situation. This process of assimilation can be influenced by what Kelly describes as "dominant meanings", those tacit representations the legal system dialectically engages with that tend to

privilege certain feelings and reactions and minimalise others (1988:144). Thus, a woman's initial response to and memory of a rape is not necessarily what is retained or important later on. Nor is her perception of the experience static, as this following woman explains:

D Did you say that to her, to the woman police officer in giving your statement, "I lay down and he put a blanket or quilt over me"?
W Yes. I must have. Because I was telling the truth when I said my statement. Obviously I've blacked things out of my mind since then [CU 59]. ...
D You didn't tell the woman police officer that did you?
W Didn't I?
D Did you?
W I don't know ... When I gave my statement it was a week after it happened. It is now a year. I can't remember. I'm sorry [Cu 66].

This unstable character of a rape 'victim's' memory is presented as problematic by the legal profession. For the assumption is that when a woman described what happens, she will recount the "basic salient facts", on every occasion. This privileges the notion that descriptive accounts are tied to the events themselves; this is where the account flows from. This perspective excludes consideration of how such an account is produced; one simply tells all, to every person, within every situation:

D You didn't say anything to [the doctor] about going back to Adam's place to smoke marihuana.
W No,.
D But you did tell the woman police officer that.
W A week later when I went to do my statement, yes I told them. ...
D You didn't tell the doctor that you smoked marihuana that morning. Any reason?
W Because I was scared because it is illegal.
D You told the woman police officer.
W Because it was a major issue. If it wasn't for me having the pipe, I wouldn't have felt sick and blacked out. So I had to tell the whole truth [Cu 71-2].

"Relevance" is linked with the events themselves rather than with what the person considers at the time to be relevant, or even prominent in their thoughts. There is only the "whole" truth, the "essential details" of an experience. This is what the legal system elaborates and thus constitutes as being the essence of any sexual assault.

The whole truth.

Once a word is in print it becomes a fixed, objective referent. The critical point is, if it is not recorded, not only is it invalid, it has no reality and the detail becomes labelled a 'recent invention'. This sets up the equation of the printed word with truth, as the objective representation of experience, and allows the 'full story' to be opposed to what is said elsewhere. These procedures rely particularly upon the notion of author, and this is facilitated by the way in which the legal system defines objectivity and facts. Facts refer to, and support an objective reality and are thus characterised by their ability to be verified. They rely upon such factors as sequence, time, position, movement, to constitute that which is testable and, therefore verifiable, thus privileging these components as what is memorable about the experience and, therefore, constitutive of the "basic salient facts". This establishes empirical detail as the primary focus for the evaluation of the truth of an account. It sets up relations of equivalence wherein what he sees, she sees also, because the focus is on the action not the observer. All observers thus become interchangeable. As the key observers in sexual offences are also the experiencers, the credibility of the crime becomes contingent upon the credibility to those alleging its existence.

These following segments are from the cross-examination of Stacy in the retrial of Kenny. Thus, the detail required from her on this occasion is already recorded in transcript, as well as her statements to police and medical staff. All of this is attributed to her exclusively, as author. What she said in October is systematically compared with what she now says in February, about such material detail as the sequence of events and actions. These are all checklist mistakes; who did what when, and under what conditions; was he dressed or undressed, sitting or standing.

What is privileged in these segments is the legal evaluation of memory and its relationship with truth which allows for only one interpretation of error and inconsistency:

D Did you make all that up last time?
W No I didn't make it up. Like I said, it is hard to remember.
J What is hard to remember, what happened or what you have said in evidence?
W Both.
D It is hard to remember because you were lying the first time and you are lying this time and you cannot remember the lies you made up.
W No I am not lying. I am trying to remember as best I can [K2 318-9].

D Why did you tell the jury that?
W I must have thought that is what happened. I didn't lie. I was trying to remember everything that happened.
D Now you are saying it didn't happen.
W Yes. It didn't happen like that.
D It must have been an untruth.
W It wasn't a lie.
D It wasn't true.
W It wasn't true. I thought it was at the time.
D But it is not true now. Is that what you are saying?
W Yes.
D You know the difference between a lie and the truth [K2 319]?

This consistency of memory is equated with the integrity of the legal system and thus the institution itself. This justifies the involvement of the bench in what is the defence testing of her 'truth'. For inconsistency, the legal lie, compromises the reliability of law by undermining its 'falsifiable' quality that draws its authority and legitimation from science.

D The version you're telling the jury now is the true version, is that right?
W Yes.
D And the version you told the jury last time was not the true version.
W No.
D If the jury on the last occasion had gone ahead to the end of the trial, found Kelly guilty, they would have been doing it on a whole lot of mistaken evidence from you, is that right?
W Not a whole lot of mistaken evidence, a few mistakes.
D A few mistakes.
W That don't mean anything anyway.
J That is not for you to say [K2 337].

D I suggest to you that you are trying to remember a total pack of lies and that is why you are making mistakes.
W You can suggest what you like. I know I am telling the truth.
D You can't remember the truth can you.
W I can't remember things that don't mean anything. I remember what he did to me and the crimes he committed [K2 347].

D If the trial had completed and the jury had gone ahead and found Kelly guilty ... it would have been on your wrong evidence.
W He would have got what he deserved.
J Would have been on your incorrect evidence. That was the question.
W Yes [K2 363].

There is a direct causality articulated here, between memory and truth, and "the fair trial". This reflects Bourdieu's (1991:105) power of naming, the authority to evaluatively label conceptualisation within this narrow dichotomous world. What becomes significant as 'inconsistencies' is contingent upon arbitrary individualism, whatever the practitioners choose to define.

Text and performance.

A trial is constituted as the medium for 'testing' allegations. The text of a trial, the transcript, has a dual identity. It is the 'evidence', the truth statements of those involved, to be 'tested' by the processes of law. It is also constitutes the 'record' of the events occurring within the trial. This is perceived as the transformation of a performance from its spoken manifestation to a written account. This perspective reflects what Fabian calls the "naive empiricist's belief" that literal translations of performances are "objective representations of reality" (89). Language is perceived to be primarily referential, the medium through which information is transmited. Information is equated with the content of language and thus the meanings realised in the performance of a trial are perceived to be preserved within the written form.

Fabian describes 'performance' as essentially "the giving of form to" communicative exchanges. (1990:11). It is an expression of what he terms "social praxis", the making, fashioning, creating of the form to be given to experiences (13):

> Text and performance are aspects of a process; they may relate to each other as phases (when production is considered) or as layers that can be discerned (when communicative events are analysed), but they do not relate as tokens or representations to events. A text is not a representation, much less a symbol or icon, of a communicative event, it *is* that event in its textual realisation (Fabian 1990:9).

This posits a dialectical, processual relationship between text and performance, that makes interpretation of one inseparable from the other. Yet a text has the potential, as Ong (1982:46) says, to separate "the knower from the known" thus establishing the conditions for objectivity, in "the sense of personal disengagement or distancing"(43;46). Writing takes knowledge out of the arena of personal constitution, involving actors and performances and social positions, into the objectivity of referentiality. The meaning of the words is frozen, detached from the negotiability of context. Meaning and authorship become fluid variables, to be manipulated in attributing whatever interpretation to whosoever is targeted by the reader. It is from such post-modernist manifestations as this, that the postivistic integrity of the legal system is drawn.

Transcripts are legally conceptualised as being verbatim; they 'capture' meaning, word for word. This premise entails the assumption that a transcript is correct unless it is formally challenged and corrected in court. Walker's study on court reporters points out that for transcribers, verbatim is a "daily *ad hoc* problem", involving the arbitrary determination of what a word for word record is (1990:213).

A trial is punctuated by comments reflecting and privileging the documentary nature of these proceedings; says the judge:

> Every word spoken during these proceedings is not only noted but becomes part of the transcript [Ca].

This ongoing, simultaneous recording of the live performance signifies the objectivity allied with the administration of the legal system. It is perceived to substantiate 'law's' claim to impartiality, by drawing upon the referentiality of language to re-constitute within performance, the spoken word as objective truth. This is perceived as the witness's truth. It privileges the notion of author and, thus, responsibility, which ignores the processes through which a witness's testimony is elicited. Thus, the evidence is the witness's answers, never the questions that shape and constrain these responses.

What is recorded is what is construed as the performance of the trial. All responses must be verbal; gestures or nods are confirmed by explanation. Physical descriptors require exactness; approximations have to be argued over and agreed upon. The transcript records interjections but rarely the grounds for complaint; legal argument may be briefly summarised while decisions are transcribed in full. All that is considered decisive within a trial is required to be explicitly stated and recorded. But the paralinguistics of communication are discarded, as procedurally and methodologically irrelevant to meaning and interpretation.

Transcripts record no emotion; no trauma, no tears, no pauses. There is never any indication of her distress or his sarcasm, nor any of those other extralinguistic cues that add to comprehension in a live event; people

> pause for breath, reflect, or effect; they shout or whisper; they miss and make repairs; they convey irony, mockery, parody, and other modes through intonation (Fabian 1990:89).

The transcript privileges the referential nature of language and equates the form of words with meaning. The signification of language is seen to reside within the word itself and each text is regarded as synonymous with the actual performance. Thus

transcripts are, in Fabian's words, "pieces of objectively stored reality" (Fabian 1990:88). It is by reducing knowledge to its linguistic referents the institution reproduces in practice its representation.

Sequence and temporality.

Once a woman's account is articulated the potential to non-equate experience with this account is exploited by definitions of what is realistic and possible. Her account of what happened is examined and evaluated for its plausibility as her words are taken and compared with empirical verification.

Sequence is critical for establishing plausibility, causality, responsibility and thus critical for truth. This relationship is frequently, obliquely commented on in court:

D Now ... I'm going to ask a few questions about [the incident]. I want you to be as clear as possible to the sequence of events, the order in which things happened [Wi 26].

D Now I want to take you through the sequence of events that occurred ... questions about what you say was said and when the various comments were said ... it's very important that you be as clear as you can [Mu 26].

Comments such as these are premised upon the conflation of the experiential time of practice with the time frame established in recounting experience.

Practice, says Bourdieu, is inseparable from temporality, not only because it is played out in time but also because it plays strategically with time (1990:81). Practice "unfolds in time" and its temporal structure, that is, "its rhythm, its tempo and above all its directionality", is constitutive of its meaning. To modify temporality, to slow it down, expand or accelerate its movement is to modify meaning. Practice is largely devoid of any contemplation and it is therefore marked

by such qualities as irreversibility. It is reflection that produces both sequence and synchronisation, the reconstruction after the experience.

This following passage is a collapsing of part of the defence counsel's questioning of Tracy to focus on his constitution of the facts of her state of intoxication on the night she is raped. A critical feature of the legal constitution of the factual basis of experience is its ability to collapse time, to ignore the occasion of these incidents, two years ago, and thus question with the expectations of a recent occurrence. This often moral position draws its validation from the legal authority to define the constitution of 'critical events', that which is expected to remain 'memorable', "essentially the same":

D You'd earlier dropped your son off to child care for the weekend ... You had made arrangements to stay overnight because you were concerned about drinking and driving ... you got to the E Hotel at about five past six ... Now at E Hotel you met up with Sam and Greg ... And you started drinking at that stage ... And you had a couple of drinks at the E Hotel ... And you're not sure of times but you think you were there about an hour ... The best you can say is about an hour ... You had nothing to eat during that time ... How many drinks did you have? ... Could it possibly be three?

W Could have been. Two or three. ...

D Now at the C Hotel you recommenced drinking didn't you ... Now if you'd arrived at the E Hotel at five past six, would you say it's a fair comment you arrived at the C Hotel about half past seven?

W Not sure.

D You're not able to say ... How long were you in the taxi? ...Are you able to say how long you were at the C Hotel?

W Not sure.

D ... your evidence is that you were at the C Hotel about an hour, hour and a half.

W About that.

D During that time you were drinking ... again a couple of drinks ... could have been two or three.

W [We were dancing].

D ... a fifty-fifty split of standing around and dancing. Is that fair? ...

W Can't remember.

D And again there's a group decision to go to the L Hotel ... Are you able to give the court any time you arrived? ... And again it's fair to say that the taxi trip wasn't too long ... Are you able to say about how long you were at the L Hotel?

W An hour. ...

D Now you'd agree with me ... you started drinking alcohol [at the E Hotel and throughout the night] you drank fairly steadily ... You had two, possibly three in your first hour ... you kept drinking ... for an hour and a half or so ... Is it the case you'd get off the dance floor and have a drink? ... you drank a number of drinks.
W Not that many.
D Your evidence is that it was only two or three ... So it's two or three at the E Hotel; two, maybe three at the C Hotel; two, three at the L Hotel. Is that your evidence?
W About that.
D So that's all that you drank during the course of the evening.
W Wasn't counting.
D Well that's right isn't it. You weren't keeping an exact count.
W I wasn't drinking that much.
D [You intended to drink; that's] one of the reasons you didn't drive.
W I don't drink a lot.
D You drank for an hour at the E Hotel; an hour and a half at the C Hotel; one hour at the L Hotel ... You agree with me that that adds up to just over three and a half hours ... [and you were out] from six o'clock until three o'clock in the morning ... That's nine hours ... There's a couple of taxi trips ... They didn't take very long ... So your evidence accounts for four hours ... You agree with that ... So you say that accounts for five hours of steady drinking. ...
W As I said I wasn't keeping an eye on the time. So I don't know.
D So your evidence is you drank steadily.
W Yes.
D And you were intoxicated when you got back to the flat.
W No [Mu 15-19].

It is contemplation which enables verification to occur, and thus translates practice into the recountable and reversible. It is knowledge that substitutes a linear, homogeneous, continuous time for practical time. It is reconstruction that allows for the privileging of a chronology constituted out of what are identified as "the basic salient facts".

Practice responds to the overall assessment of a present that incorporates the probabilities of an impending future. This is the conflation of 'who it is', that is, the bloke down the road, with 'what he is', a rapist, which allows the "fear of not knowing" to override reason and reality, as Hannah explains:

W Well if I'd have known it was him, I could have beaten him I reckon. But it was the fear of not knowing. It could have been anyone that I didn't want to mess around with [C1 73].

Interpretation is done, as Bourdieu says, "on the spot", "in the heat of the moment", with a sense of urgency which excludes evaluation of such detached properties as distance, reflection, perspective (1990:82). Hence this woman has no detailed memory of how she resisted:

D Well if you were sitting upright, you must have some recollection as to the direction that your body was moving in. ...
W Yes. No. My body was definitely - I wanted to get out of there but I just, ya know. I just can't remember little things, trying to say where my hand - or whether I was level with his body or whatever. I just couldn't remember. Sorry [C1 71].

Discourse itself imposes a successive linear progression on relationships the mind potentially perceives simultaneously. It attributes an equality to components that have the potential to be evaluated impressionistically, and thus accorded variable significance. For practical time is constituted out of episodes of "incommensurable duration" as each incident is marked by its own time frame, depending on the nature and circumstance of action and re-action (1990:84). Thus, practice has the potential to apprehend simultaneously the elements and events subsequently reproduced sequentially:

D Well. When you say about the same time, was it in fact a different time?
W About the same time, to the best of my knowledge.
D So, almost concurrently. There may have been a fraction of time ...
W No. It all basically happened at the same time [C2 30].
D ... Just looking at that passage that I have read to you and that you have read, is there anything there, first of all, that you don't agree with?
W No. The things sort of seem - different, at different times to when they happened. It seems - I don't know. But no. Everything that is written there is true as to what happened.
D Are you satisfied with the order in which you have put these events?
W Maybe not, no.
D Are you in a position to say what ...?
W Everything written in my statement is true but if anything is sort of out of place, I really can't be specific.
D So you are satisfied, that what you have said there is true but you are not sure about the order in which the events -

W Yes. Well. It seems - It all just happened so quickly. It's hard to put it into a sequence [C1 65].

D Now do you agree that that's what you told the police ... You seem to have it in some sort of order ... The sequence of events was a pain, a voice, then pushing away.
W I can't remember it happening in a set sequence.
J It was all so surprising and happening at once.
W Yes [C2 32].

In reorganising temporality, objective knowledge reveals relationships, even contradictions that would be experientially unnoticed, thus allowing the cumulation and juxtaposition of relations that are experientially insignificant, even unrealised. This allows contradictions to be set up by reference to, and comparison with, other relations from what are to be understood as analogous situations:

D You will have difficulty, very significant difficulty trying to visualise how this act of intercourse took place ... hand over the mouth ... stopping her from making any sort of sound ... think of the description she gives of what Winslow was doing at the time ... He pulls her pants down ... consider that ... Try and visualise in your mind ... She's got no idea which hand he was using ... He's able to do all sorts of things with his hand ... get her pants down ... with her wriggling as hard as she can ... Picture in your mind ... You might think they could move a bit ... The hand might get loose ... There is the opportunity to scream ... He's able to get his shorts down ... All that is just a little bit unlikely ... [Wi 14].

This pornographic appeal to experience personalises the basis for evaluating her truth as, simultaneously, in the name of legal truth, the objectifications of pornography are sanctioned and rationalised. This passage draws its strength from a truth grounded in an unquestioned notion of plausibility and rationality. Like the knowledges of science, this appeal is premised upon the right to impose a totality, a boundedness to what has occurred, thus restricting through definition, the scope and nature of the elements involved. Like science, the legal system separates out the elements, demarcating zones around events that happen unreflectively and thus alters temporality:

D I asked you how is it you gave a detailed description of the bedroom. How did you explain that?

W I didn't memorise what was in there. I looked around the room because I knew I was going to have to identify it.
D You made a conscious decision to do that.
W Well - Yeah. I must have. I was in a state of shock but I knew if I was going to the police I was going to have to identify this house. I was trying to get my thoughts together and just be sensible.
D You were thinking clearly enough then, weren't you.
W No. I couldn't say I was thinking clearly at all.
D You made a decision to memorise what was in the bedroom.
W That doesn't mean I was thinking clearly. It meant I thought of one good thing to do [Cu 49].

What is done instinctively is reduced to calculated action by the need to establish chronology. If she makes a conscious decision she must have been rational and therefore, not irrational with fear and trauma.

The difference between objective knowledge and practice is fundamentally the difference between the observer and the experiencer. It is the former that asks the questions that the latter never asks, because, as Bourdieu says, it is the "essence" of practice to exclude such questions (190:82-3). For it is the reflection within particular parameters of totalisation that sets up and make possible relations which are not realisable in practice. In sexual assault trials there is primarily space for the witness-observer, whose credibility is contingent upon her dual status as witness-experiencer. This conflated role is legitimated by claims that "You were there. We weren't". Thus what is expected and anticipated from a victim-witness, is her observations which are equated with what we would observe if we were there, observing her experiences. Practice has the ability to distinguish properties that are pertinent from those that are not. 'Pertinence' however, is a quality that stems from one's sense of limits acquired through *habitus*, and is not extractable therefore from analysis of the relationships involved. It is the spectator or observer who is assumed to be able to see practice objectively, from the outside looking in.

The production of inconsistencies.

Within a trial the dialectic between the printed word and oral performance establishes a focus on credibility by privileging memory as an indicator of truth. This conclusion is premised upon the assumption that once a story is recorded or a statement made, this account is fixed and static, as the true version of what occurred. Legal texts convince, as Geertz points out (1983), through the power of their factual substantiability. This entails the production of what is to be accepted as reliable and consistent, objective knowledge, and therefore, the 'production' of the inconsistent and unreliable witness.

Inconsistency is not necessarily a 'natural' product of a witness's testimony; it is more likely to be the consequence of how that testimony is formulated and textualised. Questions are framed to organise how an account of an incident is to be understood. Yet what is said in court, in response to questions, is taken to correspond to expressions of experience. What is privileged in any 'victim's' evidence is an account that can be checked against the actuality to which it refers. Hence, the focus is on eliciting and constructing verifiable features, so that the "proper testing" of these feature can demonstrate their veracity. In this way the legal system establishes the facts of rape by inscribing experience with concrete, verifiable and, therefore, testable details.

Cross-examination is the 'testing' of a witness's truth. Witnesses are challenged about the accuracy of their evidence; about their ability to recall; about the veracity, credibility or consistency of their evidence and, therefore, about their competence as witnesses. The objective of the defence is to find ways to demonstrate uncertainty, unreliability or inconsistency and, therefore, the untruthfulness of the testimony. "Almost any witness", says a judge imprudently, "can be deemed contradictory, as

the ingenuity of the law has no bounds". So the knowledge sought within this arena is that which is 'testable'.

Truth is perceived as the product of this process and only secondly, by inclusion, as the quality of the person. Yet inconsistencies are created as the natural product of the unreliable witness. Jurors are explicitly directed to assess the reliability of a witness by comparing what she says with what was said on other occasions and other evidence in the trial.

J It is important to have regard to the cross-examination, how a witness, any particular witness, withstood the test of cross-examination and it's important also to have regard to any inconsistencies in their evidence, any discrepancies, any prior inconsistent statements which come out in the course of the evidence and any motives, of course, which any witness might have for telling a false story [Mo 6].

This sets up both the person and memory as indicators of truth, with procedures drawn from scientific comparison. These directions privilege the referentiality of language and deny the power relations inherent in the production of accounts;

J Discrepancies, of course, can be seen in different lights and you have to decide what you think of the discrepancies in this case ... some discrepancies are to be expected when people recount what happened. Human memory is fallible and people, when they recount incidents on different occasions, will sometimes get the details wrong or express them in different ways. That fact that there are discrepancies in the various versions which are given by witnesses does not necessarily mean that the version given is false ... On the other hand it is also true that if a person is recounting something that actually happened, that person, that witness, is more likely to be consistent in the story told, at least in its essential respects, than if that witness has made the whole thing up, because it is not easy to make up a story and stick to every essential detail all along the line [Mo 30-1].

Such direction appeals to the reliability of scientific comparison, advising jurors to measure what a witness says now with what she said before, and what others also say. It is contingent upon a singular notion of truth, one allied with the experience rather than the experiencer.

'Witness', like 'victim', is a nominalisation that obscures the particularity of the person involved within homogeneity. The reliability of a witness becomes a quality allied with the position and, thus, by inclusion, the person involved. This process is facilitated by the privileging of precision in the constitution of legal facts which contrasts with the inexact way language is generally used. With children the tendency to use subjective language to accomodate emotion within the action is pronounced. This renders their evidence automatically unstable, according to the legal specifications of reliability:

D Now. Were you woken up that evening?
W Just a little bit.
D A little bit you say. I'm not sure what you mean by that.
W I was still awake a little bit. ...
D And you saw him come in ... So you weren't asleep.
W I was. I was still awake a little bit [Sc 62].

Attempts are made to compress this child's thoughts into a binary straightjacket; she's either awake or asleep, as "little bits" can't be objectively verified. Her situation then, of course, becomes:

D How do you know that you were awake? How do you know you weren't dreaming?
W I dunno [Sc 63].

This dichotomous polarisation reflects the basic nature of legal truth, from which a child's conceptual language is world's apart:

D Well. Did she come in ...[the room]?
W Just a little bit. She was standing by the door.
D Could you see her?
W Yes. I could see the shadow of her.
D The shadow of her. Could you see any of her apart from the shadow?
W No [Sc 72].

What is required by law is verifiable detail, the empirical, the material, particularly the sequence and order of events. Print makes this privileging possible, as language is perceived as fact-orientated, no more than referential and, therefore, verifiable.

In these following segments from Stacy's retrial, the relationship between memory, truth and legal justice are clearly spelt out. It is the judge who frames the parameters of knowledge, attributes this content to Stacy, and then challenges her over her lack of specificity. This is Bourdieu's boundedness (1990:84). The judge's sequence of events, established by his questions follows Stacy through cross-examination. The focus of this 'testing' is on pragmatics; in what order did these events happen, by posing as incidental to the proceedings, the sadistic events themselves:

J I want to get the sequence of events quite clear in my mind. What happened on the night was he sewed all the chains on, is that right?
W Yes.
J Then you stood up.
W Yes.
J And he took photos of you with the chains on that he had sewn on while you were sitting on the lounge ... *you have told us* that he completed the sewing, stood you up and spent about half an hour taking photos of you. How did the chains come to be in a different position?
W I am not sure. I don't recall.
J You have no explanation at all.
W No.
J Photograph number six was the last photograph taken of you while you had chains attached.
W Yes.
J They are in a different position, aren't they.
W Yes.
J You have no explanation as to how that came about.
W I don't remember how.
J You have no explanation.
W No [K2 107]. (Emphasis added).

This is what the judge queried and thus contributed, in Stacy's evidence-in-chief. Her agreement with the question content is equated with authorship of this information, as if all meaning resides at the surface, referential level of words.

In this following segment the judge appropriates the role of defence advocate, and then attributes his own questions to the defence counsel as author. Defence begins by accrediting Stacy as author of this sequence of events:

D It is your evidence that he sewed all the chains on and then he took photographs of you.
W Yes.
J What the question is - is how did some of the sewing come undone or to be taken off or as appears in the photographs?
W Kelly would have done it.
J Kelly would have done it.
W Yes.
J How?
W He would have undone them and taken the needle out. ...
J You mean to say that you're telling us now that while all this photographic session was in progress he was sewing in different places and undoing it in places. *Is that what you're trying to say now*?
W Not while he was taking the photographs.
J You have got the photographs there and it is the alterations in the way the chains are attached to you that [defence] is asking you how that came about.
W Well he would have taken photographs and then stopped and altered the chains into different places and taken more.
J You haven't told us that before, have you.
W I don't know.
J Your evidence is quite clear that he sewed all the chains into position and then took photographs. That is all you have said up until now. Now you are telling us that during the photographic session he resewed some and undid some and so on.
W Yes.
J When I first drew your attenion to that back on Monday, when those photographs were first tendered, you say you had no idea how those alterations came about.
W I didn't at the time.
J You have remembered since Monday have you.
W I've only just understood what you're talking about now.
J Come on. Is that your explanation?
W Yes.
J You didn't understand my question.
W I didn't understand what you were talking about.
J On Monday you acknowledged that you could see the chains had been altered in position. Didn't you?
W Yes I did.
J I asked you how that happened and you said you had no idea. You couldn't explain it - on Monday.
W Yes.
J Since Monday you have recalled how it happened.
W Yes.
J Your memory has come back.
W Yes [K2 311]. (Emphasis added).

For this judge, in this trial, there is no differentiation between her understanding and memory; "understand" is equated with "couldn't explain" and "recall", and all are interchangeable.

There are two trials, one is October 1991 which was aborted prematurely resulting in a retrial the following February. This next passage is an extra-ordinary joint collaboration between judge and defence in the cause of a fair and impartial trial for the accused. Memory is reified as fixed, static, as the judge imposes a singular interpretation to her words, one which emphasizes a direct causality between consistency and justice:

D How could you be mistaken about that factor as well?
W I was confused.
J Listen to this. The same day [defence] asked you those questions about driving to ... In your last appearance in court was this question asked "Well he drove you there, what, just the once?" and did you answer "No. Probably would have been two or three different times. He didn't stay with me. He went to see his family"?
W I am not sure.
J If you said that last time you were in court what did it mean, that he drove you there two or three times when he went over to see his family?
W I am not sure I said that.
J If you did say that it was wrong, was it?
W It was a mistake.
J A mistake.
W Yes.
D You were confused, is that your answer?
W Yes I was.
D In your confusion you made this mistake of giving sworn evidence to the jury.
W Yes.
D You are that confused that you are able to say in answer "Yes he did drive me over there. He didn't stay there with me."
W Yes.
D What are you confused about, did he stay with you in ....?
W Never.
D In that answer you say "Yes. I agree he drove me there. But no, we never stayed there together".
W Yes.
D Where is the confusion?
W I was confused.
J What about?
W About the question.

J What! The direct question "Did he ever drive to ..." and you answered, you were confused.
W It is hard to remember back then. Things like that that are irrelevant. I mean they don't mean anything.
D They mean anything if it is your evidence that this man never took you anywhere. That was the evidence you gave in this court wasn't it?
W Yes. ...
J Are you saying then that you might have remembered last October but you now have forgotten.
W Yes.
J You have forgotten whether he ever drove you to ....
W I can't recall he ever did.
J That lapse of memory has occurred between October last year and now.
W Yes [K2 286-8].

There is always a reason supplied, a direct causality between thought and action that privileges a calculated, instrumental rationality. This renders truth independent of subjectivities, as existing in the context and, therefore, recoverable with the right procedures.

Legal knowledge relies upon a particular kind of exclusion. Its meaning is static in nature, thus facilitating a correlation between memory and events. This meaning has a testable quality; it's empirical in detail. It is a focus that obscures and excludes a whole host of factors such as emotion, trauma or pain, and their relationship to perception and, thus, memory. It privileges the observer above the experiencer while simultaneously drawing upon the experiencer to validate the observer's observations. In this following segment, the issue is whether Kelly was dressed or undressed when he mutilated Stacy. Judge and defence again work as a team:

D The version you gave to the jury on the last occasion is wrong.[the first trial in October]
W Yes.
D You made a mistake.
W Yes.
D You were mistaken about whether the man was dressed or undressed at the time that he did these things to you.
How did you come to make such a mistake?
W I don't know.

D You are talking from memory of what happened aren't you?
W Yes.
D I mean, it is your evidence that you sat through this and you saw him sitting there.
W Yes.
D But you made that mistake.
W Yes.
D Then you have come along and you have rectified to the second jury that mistake you made.
W Yes.
D You can see all this in your mind, can't you.
W Yes.
D Could you see Kelly sitting there naked when you gave your evidence the first time?
W I can't remember everything.
D What caused you to remember now? Where are we, four months down the track. What caused you to remember now?
W Because I've had time to think about it.
D You've had time to think about it. You thought about your past answer did you.
W Yes.
D You remember telling the court last time that he was dressed while he cut you.
W No I don't remember saying that.
D You must have thought about it prior to giving your evidence last time.
W Yes.
D I mean, you are relating incidents that happened to you aren't you.
W Yes.
D I suggest that the difference between two versions comes about because you're not telling the truth.
W You can suggest that.
D You're not giving us evidence from your mind, something that you recall. You made the whole lot up - didn't you?
W No.
D Now some months later you can't remember lies - Can you.
W That's not true. ...
J When did you first realise that you had given a false, mistaken account to the jury last time? When did you first realise that?
W After the court was over.
J You didn't tell anybody.
W No.
D You gave evidence for something like three days I think, on the last occasion. And after that you remembered; "Oh, I made a mistake when I told the jury in examination-in-chief that Kelly was dressed when he cut TRUE LOVE into my breasts".
W I remembered days later.
D Just something that came back to you. Your memory is that good that you can actually remember questions and answers over a three day period.
W Yes.

D But it is not that good that you can actually, or to prevent you from telling the jury that a man who is cutting you was dressed as opposed to naked.
W I can't remember everything.
D This is not everything. This is 20 minutes of excruciating pain.
W That's right. I was in a lot of pain. ...
D That memory was a mistake.
W Yes.
D So this is the true version.
W Yes.
D The last version was a mistaken version.
W A mistake.
D You're quite sure you've got the true version this time?
W Yes.
D You won't be ringing anyone up afterwards and saying "I'm sorry. He was dressed. I'm wrong" [K2 278-81].

This is the power of definition and compilation. Stacy agrees with the meaning she construes from the individual question yet the total construction, that is the textualisation of this individual meaning, is not of her choice. Hence the specific questions are such that they can accomodate her meaning but also the interpretation the defence counsel intends to ally with them. Because his specific questions can encompass or accomodate her experience she agrees with it. But in doing so, her agreement is also attributable to whatever meaning defence can make of it.

This is the nature of legal truth. It is empirical, verifiable, and therefore impartial and objective. It thus transcends time and occasion, and the individuals involved. Stacy's truth in the first trial is repeatable within the second. This attitude denies the role questions play in the framing of knowledge, the causality it sets up and the boundaries it established. Thus it denies totally the relations involved in its production, to privilege the material circumstance.

THE DECIDERS OF TRUTH

A trial by jury has a defined form that culminates with a decision about the truth of the allegations. This is the extent of the 'partnership' between law and the community. What comes after a trial, Appeal Courts, are the jurisdiction of law. Thus, statements such as this following directive from a judge's summing up have a definitive life span:

> J The decision on the facts is yours and not mine or counsels. You can disregard, indeed you should disregard, any opinions which I may express, or more correctly, may seem to express on the facts. I shall try not to express an opinion, but you may get the impression that I have. Well, disregard it, because it is entirely for you as to what you may think of the facts that have been put before you. The same goes for what counsel have said as well. We try in our respective ways to help you to make a decision on the facts as you see them. You have seen the witnesses. You will already have formed your opinions about them. It is for you to say who you believe, what you believe, the inferences to be drawn, and the verdict which you bring in ... The suggestions made by counsel are intended to assist you in your deliberations but not, of course, as I have said, to tell you what to do. They are put forward for you to take into account. No one can take from the jury the function of making a decision in the case [Cu 86].

Except of course, unless this decision is 'incorrectly' arrived at.

A jury trial is premised upon the differentiation between lay and legal knowledge, with the utilisation of the latter deployed to ensure the proper use of non-legal, decision-making practices. What underpins this whole process is the assumption, often explicitly stated, that there is a correct use for the knowledge jurors are presented with in court. This implies a singular proper use of knowledge, to be compared with its misuse, and it is the duty of the trial judge to ensure that this former procedure is carried out.

The legal institution lays claim to a singular representation, to a unified body of knowledge that draws its authority from the texts of the past. This sense of the past is always within the present, as a linear progression from then until now. It is

implicit within the internal composition of the discourse itself, in the rules and practices that qualify who can speak, about what, in what form, with what effect. It is present in each occasion of its expression, in legal procedures and rituals. It is also manifested within precedents, the past decisions of the institution. These inform the application of the law in the present, as the deciders of today reconcile their decisions with those made in the past.

The jury trial is perceived to produce a ruling, a decision about an allegation, and it produces a text of the procedures and practices through which a decision is reached. Both text and performance serve different purposes. While each trial concludes with a final decision, the transcript has the potential to realise an independent existence at the conclusion of the trial. The transcript resides exclusively within the domain of legal knowledge and has the potential to transcend time and space by engagement within performances of the Appeal Courts.

Judicial decisions are made by recourse to the authority of the past, to prior decisions made in what are construed to be analogous situations. This process creates the impression that the legal principles of the past are co-terminous with the present and thus also the future. This is the source of law's claim to stability and endurance. It also validates claims of an objectivity and impartiality that transcends the individual and resides within the institution itself. For such decisions are perceived as flowing logically from the past, from the principles extracted and laid down as guidelines by the "tradition" and the "experience of the courts". This ostensibly takes the decisions of law out of the realm of arbitrary individualistic interpretation into the neutrality and impartiality of anonymous principles.

Yet this process is perceived to be vulnerable to human error; the fallibility of individuals has the potential to prejudice the integrity of the system. The avenue of redress is the Appeal Courts. These are exclusively legal arenas designed to

counteract the 'unfair trial'. Thus their legitimation is the metaphor of justice, the weighing between the competing interests of the community's demand for justice and the rights of any accused person to a fair trial. Appeal Courts confirm the institution's role as the guardian of the administration of the system and thus of individual democratic rights.

A Court of Criminal Appeal recognises two grounds for disputation; errors of sentence and errors of law and thus conviction. With errors of conviction, the Appeal Court suspends the jury decision to assess primarily the performance of the trial judge in relation to matters of law. By inclusion these claims automatically challenge the "soundness" of the jury decision. Thus, Appeal Courts provide an avenue through which the system itself has the potential to override the rights of a jury to decide questions of guilt or innocence. This authority is legitimated on the grounds that the jury decision is flawed; it is logically, conceptually "unsound". This reflects again the pseudo science of 'law', resonating with images of incorrect variables or elements being conceptually misconstrued or wrongly applied.

Appeal courts are exclusively legal arenas and represent the highest level of legal knowledge, that which is least contaminated by influences extraneous to the law. Texts have the potential, as Smith (1990:61-82) demonstrates, to create an objectified world in common. Appeal Courts add one more layer of objectification onto experience since decisions are made and opinions are formed solely by reference to the transcript of the trial. Appeals are argued on the basis of how words are to be construed and they represent the compilation *par excellence* within this field. Statements or actions which derive their meaning from circumstance are presented in isolation or in a selective recontextualisation. There is also a cumulative definition of behaviour wherein qualities and incidents are dis-associated from their explanation and re-assembled to present a different impression. In this

way there is a compilation of items, each minor in itself, into a persuasive image and all are rationalised by recourse to legal knowledge.

Appeal judges are required to formally substantiate and, thus, document their conclusions. These rationalisations establish the precedents and, therefore, set the parameters for future legal decisions. These are the principles enunciated as capable of transcending the particularity of the present-day incident to become relevant to all future situations in which a commonality in form can be established. In this way, decisions made about the interpretation of the specificity of Stacy's experience are deployed to inform the basis upon which decisions are made about all women's experience. Thus, any legal ruling is rendered independent of individual or collective responsibility by recourse to 'authorities', that is, past legal decisions, as the basis upon which rulings are made. Yet, it is the trial judge who takes the precedents established by Appeal Courts and interprets how the principles are to be understood in relation to a particular trial. Procedurally, this ensures the self-referentiality of legal knowledge, thus, confirming its institutional authority. But, simultaneously, these procedures also render this knowledge susceptible to the arbitrary individualism of judicial discretion, as decisions on the constitution of 'analogous' are tailored to satisfy the demands of the immediate occasion.

The rhetoric of legal persuasion.

This following trial in which the accused was found guilty by a majority verdict, comes before the Court of Criminal Appeal on grounds stemming largely from misdirection on matters of law. Within any trial there are several interpretations of 'what really happened'. There is the account of the person alleging sexual assault, in this trial, Jessica, and the account of the person accused, Adam. Then there is the re-compiliation of their accounts constituted in cross-examination. There is also the

contextualisation of these versions of truth in the addresses delivered to the jury. And there is the interpretation of the divergent accounts included in the judge's summing up of the facts of the Crown and defence case. Particular incidents are privileged in all accounts, as being significant in deciding questions of truth, while other aspects are backgrounded, as less consequential. Appeal Courts clarify this procedure, in their constitution and reproduction of 'principles' from the various representations of what went on. Thus, they clarify what knowledge is significant in the construction of their particular truth about this allegation of rape.

An appeal has the effect of suspending the jury decision, the truth of the trial. Jessica is once again the 'alleged victim' or complainant, while Adam assumes the liminal status of appellant. I introduce Jessica's account first, as this constitutes the framework from which all interpretation is derived. My compilation is taken largely from her evidence-in-chief to approximate her detailing of what happened.

Jessica, a 20 year old New Zealander, leaves work on a Friday evening around 11.00pm to meet two women friends at a hotel nightclub. At the disco the three women dance together. They are joined briefly on two occasions by a stranger, Adam. Around 3.00am at closing time, Jessica coincidently meets Adam in the car park. He is with his mate Garth, also a New Zealander. Homesick, Jessica decides to accompany these two men to Adam's house for a chat and a pipe of marihuana. Recognising herself to be near the legal limit of intoxication, she decides not to drive and allows Garth to do so, as Adam she thinks, is "quite drunk".

At the house, it is Jessica only who smokes a pipe prepared by Garth. When she rapidly becomes unwell, Adam suggests she rest on his bed. Jessica accompanies him to his bedroom where, upon lying down, she says she "went out to it". She awakens to find herself no longer fully clothed and being sexually molested by both Adam and Garth. Her initial verbal protestations are met with "Relax. You might

enjoy it". Physical resistance draws the comment from Garth, "We've got a frisky one here". Jessica manages to separate the men spatially by appealing to Adam for protection from Garth. She attempts at some stage to leave the locked house on the pretext of going to the toilet, but is restrained by Garth. Around 5.30 in the morning, Jessica comes to the conclusion that rape is "inevitable":

> "I just knew it wasn't worth fighting, so I just lay there and just had to let it happen. I just pretended I wasn't there ... I decided it was better to get raped by one than to be raped by two, so I just gave up" [Cu 23].

She agrees in cross-examination that at this stage she may have said to Adam "Go for it".:

D Did you say to him 'Go for it"?
W No I didn't.
D I suggest you did.
W Actually I don't know. Sorry. Yes. Maybe I could have. Because that is what I was thinking. I don't care. Do it. Get it over and done with.
D You may have said 'Go for it'.
W I could have, possibly [Cu 68].

Two minutes later, after sexual intercourse, she tells Adam "I just want to get out of here". He hands her her clothes, walks her to the front door, where they both discover that her car is gone, as has Garth. Jessica runs off down the road and tells a woman out walking "I've just been raped and my car's been stolen".

The official medical examination at nine o'clock that same morning, it is noted by both defence counsel and the appeal judges, is "unable to detect any sign of reddening, bruising, scratching or other overt marks indicating a struggle". Nor was there any apparent damage to any of Jessica's clothing. Hence Jessica's credibility rests totally upon an empiricism constituted out of inferential interpretation.

Adam's responses to police questions elaborate his initial interpretation of what happened. His version demarcates the parameters of what are to be the contestible

issues in deciding questions of truth, and they largely, implicitly, draw upon decisions about responsibility to constitute the ambiguity of how the facts are to be understood.

Adam tells the police that he "did have sexual intercourse with her but not without her consent". He met Jessica the previous night around 1.30,

> "danced with her once and after the Tavern shut at three o'clock Garth and I accidently met and talked outside for half an hour ... We went back to my place. She had a cup of tea ... We talked".

Then Jessica said that "she had to work and she would need a rest". She climbs into his bed with her clothes on. Adam then "went to bed as well ... to get some sleep":

Q ... Was your going to bed with Jessica something that you did by yourself or after an invite from Jessica?
A I did it by myself. It is my bed.
Q Why did you remove your clothing?
A I always do.

He claims that without discussion, Jessica suddenly removes some of her clothing and responds to Adam's "foreplay". When Garth enters the room, climbs onto the bed and begins "groping" her she becomes "upset", "crying and saying 'No. No'". Adam verbally ejects him and tries to "calm her down". Shortly after this, Jessica leaves the room, ostensibly to go to the toilet. Adam finds her, he claims, on the couch talking and smoking with Garth. Without a word he goes back to bed. Jessica re-enters his room and bed, and invites him back to her place, "away from Garth". He tells her she is "welcome to leave", but without him. To the question "What happened after she came back into the bedroom with you" he replies:

W A few seconds later she said 'Okay. Go for it', to me. I then proceeded to have sexual intercourse with her.

Within the trial he expands this scenario to include his responsible concern about contraception. In court, he claims that, in the midst of this predominently nonverbal encounter:

She just spread her legs and she said 'Okay. Go for it'. I said to her 'Are you on the pill?' She said 'Yes', so I proceeded [115].

The police query the original scenario:

Q Why did she say 'Okay. Go for it'? Had you asked her for sexual intercourse?
A No. I never asked but she knew that that is what I wanted.
Q Did you force her into having sexual intercourse with you?
A No.
Q Did she give you any indication at all that she did not wish to have sexual intercourse with you?
A I thought she wanted to back at her place as she said previously ...
I would not have had sexual intercourse with Jessica if I didn't think she wanted to [Cu 92-100].

Rape laws focus on the male offender's belief about consent rather than on the question of whether the 'victim' did in fact consent, thus relegating definitions of this concept beyond the realms of objective, that is, absolute knowledge. There is no clear cut, factual basis to 'non-consent'. It is his view of her actions which prevails. This is the source of the embodiment of the signification of 'reasonableness', and this male perspective is extended to encompass all interpretation. This is why defence can privilege such incidents as the following as significant:

D You say you were going to run off out the back door naked from the waist down.
W Yes.
D Without the keys to your car. Without your handbag.
D And would you say she'd run out the back door naked from the waist down ... What's the likelihood, the probability of that [Cu 51]?

"Naked from the waist down" is a sexually suggestive phrase uncritically deployed to trivialise by gendering her definition of the situation. It incongruously juxtaposes a moral evaluation against what would be construed as pornographic objectification in other locations.

This is a defence in which Adam claims Jessica consented to sexual intercourse

or, at best, if she was not consenting he did not realise it. It draws its legitimation from the responsibility the double subjectivity of rape places on the woman to unambiguously convey non-consent to the man, which he must then ignore or remain indifferent to. The critical focus is Adam's state of mind and thus, by inclusion, how Jessica conveys her state of mind to him.

With crimes of rape, there are two approaches to questions of proof; one is categorised as "the moment of truth":

D ... the moment of truth is the moment of penetration. There was consent when the penis went into the vagina ... that is the moment when the law says [a woman must dissent] But some women may protest, may struggle ... [with perseverance men] may find they have won over ... There is no suggestion that he had any struggle inserting the penis into her vagina ...[Cu 90].

This detaches the proof of rape from the circumstances in which is happens and reduces it to an action independent of any relation:

W ... I just let him do what he wanted to do. I was like a stuffed dummy. ... I just relaxed every muscle in my body and just let him do it.
D So at the time he put his penis into your vagina you weren't resisting, correct?
W No.
D You weren't telling him not to, is that correct? ... You just lay there and let him have intercourse with you.
W Yes.
D Without resisting.
W Yes.
D And without telling him not to [Cu 86].

This defence argument recontextualising and thus reproducing the signification 'working out a yes', contradicts the legal position that bruises and battering are not pre-requisites for those alleging rape. It privileges, instead, a narrow perspective of what rape is about, one premised upon definitions of physical force and resistance.

The second line of proof privileges the circumstances in which this 'definitive act' happens. This is the totality of inferential truth, which can be read from construction of a narrative and explanation about the attribution of blame. The

defence counsel's re-interpretation of Jessica's account begins by stating the moral nature of this incident:

D This is a case where sexual promiscuity has occurred after they had booze and marihuana [Cu 86]

He then proceeds to qualify this bland egalitarian distribution of responsibility with deliberated causality. The critical focus in deciding the issue of criminality is Adam's understanding of Jessica's actions. These following interpretations of Jessica's behaviour are presented as common sense; as plainly realised or understood by anyone and therefore obvious to Jessica:

> Why go back into the bedroom? ... He'd already made a pass at her ... She's not that naive ... Why did she go back after he'd made a pass at her? She's 21. No girl's that stupid. ... Jessica came back to bed. Why? She must've known ... [since he'd been] making overtures to her that he would follow up. And what about his state of mind? ... [he's thinking] Maybe I've got a chance with her ... [That's not rape] because rape is knowing she wasn't consenting or being recklesly indifferent [to whether she was consenting. Adam was asked] "Did she say anything to you" ... [she said] "Let's go to her place away from Garth" ... Now, she agreed she might've said that ... Wouldn't that put in the accused's mind ... that she was in fact willing to have intercourse with him? ... she says, "Drive me home and lets go to bed at my place" ... He must have thought that things were looking up ... his prospects of success were pretty high ... Well, if a man who's had some drink is told to "Go for it", is it unreasonable for him to think that she's consenting? ... This is not a court of morals. You can't criticize the accused for smoking marihuana. Or the accused for making a pass at this girl and having intercourse [Cu 83-92].

Within this selective, gender biased scenario of calculated action and re-action, Jessica's explanation of the "moment of truth" is illogical, when evaluated pragmatically:

> She said she finally acquiesced ... she would rather be raped by one than by two ... That is completely illogical ... because if the accused was going to rape her what is to stop Garth coming in after ... More likely than not [he'd say] 'Any cunt can get away with it. What's to stop me?' [Cu 86].

The issue of intoxication, however, is elaborated egalitarianly:

> When people have been taking drugs and drinking a woman's signals to the man are different. Her sexual arousal might be different ... The man might not

recognise the signals of non-consent ... that whole episode you must consider against the background of alcohol ... partial intoxication is important in this case ... It may confuse or distort her perception of what has happened ... what has occurred [Cu 90;94].

His confusion is balanced by her confusion, thus obscuring the fact that responsibility for any confusion rests with her, for failing to communicate within his mode of interpretation. Thus, the 'intoxicated' woman may not recognise the 'truth' of her own experience. Accompanying these populist explanations of sexuality is the common-sense definitions of what rapists are like:

D And then, you see, there wasn't any suggestion you didn't know the identity of this man you say raped you. You're able to describe him to the police, weren't you? ... He had given you the name of Adam ... And you gave a description of Adam to the police ... He's easily identified, isn't he? He's got a birth mark on the side of his chin, hasn't he? ... You were able to take, on the way to the police station, this woman ... past the house ...[Cu 33].

Which summarises as:

D ... rapists try to get away ... try to conceal their identity. But she knows him ... There's no question that he is the person if he committed rape ...[Cu 85].

In this way, the legal constitution of common sense informs on definitions and evaluations of rape.

The prosecutor's interpretation of Adam's account of what happened, attempts to deploy a gendered normative evaluation of Adam's views about women and sexuality, to problematise his credibility:

P Do you often meet women at hotels and then take them back to your home and end up in bed with them?
W No I do not [Cu 117].

When questioned about Garth's presence in his bedroom, Adam says:

W I didn't know whether she told him to come in or not. That's what crossed my mind. I didn't know whether she said something to him or not. ...
P Did you think you were on a bit of an easy score here this night?
W I wouldn't put it that way, no.

P You just met this woman some hours beforehand, taken her home. You had broken up with your girlfriend. And she ended up in your bed with you.
W That's correct.
P Did you consider that you were going to have sexual intercourse that night with her?
W Not until it actually happened. No. ...
P Did you think she might have been a bit of a tart by that stage?
W Not really. Most tarts would have been in a threesome. ...
P You told the police that you never asked her for sexual intercourse, but you said to them "She knew that's what I wanted". On what do you base that comment?
W She was - We were cuddling and comforting each other in my bed and I was playing with her vagina and breasts and obviously sexual intercourse comes after that [Cu 129].

This is tacit common sense, the unthought about knowledge that informs how Adam interprets Jessica's actions. It is against this perspective that Jessica's expressions of non-consent are contextualised, for a distinctely gendered evaluation of their truth. Her explanations are polarised against conceptualisations of resistance and the legal requirements of non-consent:

> The first thing is that in this case there are no injuries to either the accused or Jessica. There are no scratch marks or bruises. Nobody's blood splattered ... Well thankfully, ... we are sufficiently civilised ... a woman does not have to come into court bloody and battered ... women do not have to put their lives in danger ... Our law states that you don't have to physically resist somebody ... That's just not required ... to prove that they've been raped ... submission is not and never will be a consent to sexual intercourse ... a woman does not have to come into court bloody and battered ... women do not have to put their lives in danger ... Our law categorically states that you don't have to physically resist somebody ... That's just not required ... to prove that they have been raped ... [Cu 79].

The prosecutor explicitly addresses a gender biased interpretation of Jessica's actions, contextualising what are constructed as the 'myths' about rape with Jessica's expression of resistance:

> ... [don't think like this] Oh well. She asked for it. She deserved it. Nobody deserves to be raped. ... But it is imperative in a case like this that you don't find yourself [thinking] "Oh well. The girl was a hitchhiker. What did she expect?" "She was dressed to the nines." "Oh she went home with a complete stanger. She had it coming." ... She was intelligent ... She knew she was in diabolical straights. She took a very appropriate path and she hasn't come out bruised and battered [Cu 79-82].

In his summing up the trial judge limits his account of the 'facts' of each case to re-reading the passages of evidence relating to the specific incident. It is only in his sentencing of Adam that he explicitly expresses his impressions and opinion about this rape:

> For some time, despite her entreaties and some resistance, you badgered her. Eventually she gave in and allowed you to have sexual intercourse with her but the jury must have found that it was against her will which you have worn down. Although it gave you absolutely no excuse to do what you did, the fact is that the victim did come willingly to your home and this probably encouraged you to think she would be at least a compliant partner. However, you should have realised by her demeanour and actions long before it got to intercourse that she didn't want it. I shall though, sentence you on the basis that you were simply recklessly indifferent as to whether she was consenting or not [Cu 104].

'Contributory negligence', that castigated concept of the late 70's, is both replenished and revitalised within this 'unbiased' recontextualisation.

This is the context in which the jury verdict of guilty is pronounced "unsafe and unsatisfactory" as it "could not be supported by the evidence" (Curtis 1991:215). Adam's claim is made on his behalf by counsel, which denies the role practitioners play in the constitution of the truth of what happened. This claim is premised on the assumption that a satisfactory or safe jury verdict can patently be supported by evidence.

In the Appeal Court this is constructed as a trial that troubled jurors. Reference is made in the preamble to the six hours of deliberation required by the jury to reach a majority verdict. This length of time for a two day trial causes legal concern, and is explicitly linked with a jury request for re-readings of what Jessica has said, to the police and in court. Thus combined, causality is construed as "the jury was therefore clearly concerned about any inconsistencies in her statement" and this

construction is extended beyond the issue of Jessica's credibility to encompass deficiencies within the trial judge's summing up (218).

The flaw is located within the lay appreciation and application of what are construed as legal concepts or procedures. The judge's directions on how the evidence and thus the facts are to be understood is inadequate; " after merely expressing the general legal concepts" the judge in his summing up to the jury, "did not adequately explain to the jury how the concepts arose for consideration in relation to the particular facts" (218).

> All of these matters were placed before the jury virtually on a narrative basis and without further detailed comment as to their importance or relevance to the issues for consideration (217).

Such open-ended direction relinquishes the interpretation and application of the law to the jurors:

> The jury was left to its own devices to apply the legal concepts to the detailed evidence ... At the very least, there was a need, in reasonable degree, to identify the quite positive and important evidence bearing on the signals of [Jessica] and the importance of considering whether the Crown had negatived the reasonable possibility of misinterpretation by the appellant of those signals due to his state of intoxication (219).

"Signals" infers a conveyance of information between two parties by a mutually recognisable sign. It connotes pre-arranged, universal signs, accessible to all and agreed upon by all. This term homogenises the interpretive process, implicitly embodying the signification of 'reasonableness' with the perspective privileged in evidentiary rules, the accused's point of view.

The critical factor is intoxication. In general terms, this legal principle accomodates the degree to which intoxication accounts for or contribute to, "conduct from which the appellant inferred consent", and this is addressed by the trial judge, who is quoted as saying (223):

J What is relevant to your consideration is this; alcohol or marihuana may colour a person's perception of what he or she is doing, or what is going on around him or her ... The accused may not have received the signals ... it may be that the accused's senses are dulled ... he didn't realise from Jessica's responses that she didn't consent [Cu 97-8].

But this direction, claims the appellant through his counsel, lacks specificity in relation to the constitution of 'facts'. This allegation is supported by the appropriate authority, a trial remarkably similar in circumstance and thus entirely appropriate in principle:[2]

> The defence of the applicants was based entirely on inferences to be drawn from evidence led by the prosecution. Such evidence left such inferences well open to be drawn by the jury, but the strength of the cumulative effect thereof could readily be missed by persons inexperienced in the sifting and weighing of evidence (Wilkes and Briant 1965: cited in Curtis 1991:220).

What jurors potentially missed, the Appeal judges reason, was the importance of the cumulative effect of inferences. Thus authority for the present comes from the past; says the judge "I am driven to the conclusion", as he cites the pertinent authorities, to confirm as problematic, both directions of intoxication and thus, by inclusion, lay apprehension of legal issues (222):

> [His honour] took the view that the comments and references that he had made to the appellant's case, while canvassing the Crown case, as an entirety, were adequate to present to the jury a full picture of the factual issues joined between the parties. No doubt to a trained intellect accustomed to adjudicating upon issues of fact, this would be sufficient to raise the relevant considerations for determination (Veverka 1970: cited in Curtis 1991:221).

Thus the self referentiality of legal knowledge uses principles from the past to constitute the principles of the present, which simultaneously confirms both the legitimacy of tradition and the authority of the future, as residing within the anonymity of text.

What is potentially unappreciated, even unrealised by jurors, because of this legal flaw, is Adam's interpretation of Jessica's attitude from her actions. That is, claim the judges, how her behaviour:

> might have been perceived by a man affected by the consumption of alcohol and marihuana (223).

Thus, what is privileged by Appeal judges as influencing his interpretation, simultaneously addresses issues of responsibility and blame in relation to sexual offences. While his state of intoxication affects his perception of her "signals", hers affects her reliability as a witness, "particularly in the light of her vagueness as to certain important events" (223); "she professes some confusion as to the sequence of some events and certain gaps in her memory" (220). It is in this light that evaluation is made of

> her perceptions and interpretations of the conduct of the appellant in particular and the true nature, comprehension and effect of any signals which she may have given to him (220).

This innocent phrase, "the true nature", confirms as taken-for-granted knowledge, that for any and every allegation, there is a true interpretation, a singular truth to be found, by recourse to the appropriate procedures.

The Appeal judges finds that there is "the need, carefully, to analyse the net impact of her narrative in the setting of the evidence as a whole", thus positing a natural boundary around the parameters of this experience (221). Jessica's critical flaws are firstly the "inconsistencies of the various accounts". Secondly, "the inferences naturally arising from certain conduct on her part" (212). Mention is made of Jessica leaving Adam's room. Adam finds her smoking and talking on the couch with Garth. Once again her state of undress, "naked from the waist down" is cited as significant. She leaves Garth and returns to the bedroom of her own accord where, the judges summarise, "after being grabbed and held by the appellant, [Jessica] decided to lie back on the bed and submit to intercourse" (223). Submission is apparently, unproblematically, legally comparable with "a free and voluntary engagement in sexual intercourse".

The major line of defence has been the 'predatory male', the legally endorsed male rationalisation that informs what is apolitically described as 'contributory negligence'. The Appeal defines what is reasonable and, thus, normal for Adam to expect, given what is privileged as the circumstances of these incidents in the contextualisation of the facts. To accept this requires the negation of most of Jessica's claims; that she lost consciousness, that she was molested by Adam and Garth. Her resistance and its various forms are accredited no validity, neither are her claims of locked doors and struggles as her frame of mind is uncompromisingly pronounced 'unreliable', the product of irresponsible intoxication.

CONCLUSION

Facts, says Smith, have a "dual mode of being"; they exist at the level of statement and they exist substantively as events (1990:68). Yet the statement is not in itself a fact until it is socially, legitimately linked to its substantive reality. Equally this experience or event requires the concomitant legitimated statement, to validate its actuality so that as such it is known to all. With the legal system it is the rhetoric of impartiality that persuades through the power of its factual substantiability. Legal texts are required to convince, and in the name of truth, elaborate the conditions under which this truth and, thus, their authority to decide issues of truth, can be validated.

NOTES

1 Gluckman's "reasonable man" is not intended as a sterotypic role but as an idea of a standard of reasonable behaviour. Nader (1965:3) describes this concept as so general that its application in a non-western society has a "ring of truth". It is only when its specific implications within western usage are

examined that its cultural specificity becomes clear. An extention of her argument is the use of the concept to obscure bias within its universal appearance; it is only when its connotations are worked through specific events and incidents that its prejudice becomes clear.

2 Bourdieu points out that a judge is always more than an executor of the system as he (Bourdieu refers only to male judges) enjoys a "partial autonomy". His decisions are based on a logic and a system of values in accordance with those of the texts he interprets but are never reducible to static reproduction. There are never two completely identical cases. This accords a degree of arbitrariness to legal decisions which is always rationalised by way of particularities - "the learned judge erred" - thus allowing the system to self correct itself while keeping its integrity intact (1987:826).

CONCLUSION

In this thesis I have examined rape as an object of legal knowledge by foregrounding a particular way of perceiving the relationship between language, meaning and power. I have approached this complexity synthetically, by analytically separating out different directions from which the meanings realisable within a rape trial derived their explanatory force. My objective was not to present "the full story", the 'true' account of rape, but to critique this positivistic notion by demonstrating the partiality and particularity of the knowledge constructed in court.

The schematic organisation is predicated on the presupposition that a relationship exists between methods of objectification and the subject proclaimed objective; between the legal institution and rape as an object of knowledge (Foucault 1979, 1980, 1981). I have argued that the knowledge produced by prosecution practices largely excludes the concerns of those it claims to represent from the political processes of representation. This exclusion of women, or those sexually assaulted, stems fundamentally from both the epistemological particularity of these experiences and the cultural assumptions tacitly attributed to this form of knowledge. It is the criminal classification that presents a legal understanding of these sexual incidents as the logical conclusion. It makes the 'facts' of rape self-evident only from within a legal way of thinking about the issues and makes the issues themselves only obvious from a legal point of view (Foucault 1972). This constitutive power of language stems not from legal language itself but from the ability of this institution to have its definitions recognised and sanctioned (Bourdieu 1991).

Foucault methodologically focuses on the means by which power operates, particularly through its relationship with knowledge. But he neglects questioning the ways in which power is still administered by identifiable sources, with particular interests and objectives. His discourse problematises phenomenological subjectivity by making meaning irreducible to intentions and agency but contingent instead, upon its sense-making practices. This qualification leads to an emphasis on the instability of truth claims. It introduces a sense of exclusion or prohibition into interpretive practices, as certain discourses are articulated and heard while others are systematically suppressed or ignored.

By approaching truth claims from the conditions that enable a particular subjectivity to be possible Foucault directly links interpersonal relations to the reproduction of power relations. He stimulates questions about whose view of truth is being put forward and heard, about what sort of issues but he leaves no space for the subject positions occupying these different points of view. His methods cannot account for why some truths are more prevalent than others or why some positions or social groups are systematically excluded from the politics of representation. Because he reduces subjectivity to an undifferentiated exercise of power, Foucault ignores the ways in which knowledges and forms of knowledge invest their definitions with cultural and social assumptions about values. He obscures the asymmetry built into particular points of view, by virtue of their authority and the means by which their claims are justified.

In examining the explanatory potential realisable within sexual assault trials I have argued, not how little of a woman's account in court is from an experiential self but how much of it reflects a legal 'self'. These legal relations generate a systematic way of thinking about sex offences that makes the notion of a woman's essentialising subjectivity inherently problematic. Her understanding of an assault is constituted out of relations and forces that are not materially part of her experience but they become

so by virtue of inclusion, by the classification of the experience as a crime (Smith 1989:52). Her subjectivity outside court is already shaped into particular ways of thinking about the nature of legal and social relations. These legal specifications produce both the conditions of subordination and the subject positions from which this process will be acknowledged and experienced as personal knowledge. This hermeneutic encapsulation is methodologically regarded as unproblematic because the relations and practices it grows out of are themselves only ever selectively unproblematised (Bourdieu 1990:25-41, 1990a:60-61; Smith 1990:24, 1990a:85-92).

Rape used to be called, says Foucault, "a crime of opinion" and these trial proceedings demonstrate how easy it is to change the social reality of something by changing how it is thought about (Foucault 1978:278, Bourdieu 1991:128). The meaning attributed to a sexual incident is only contingently linked to its representation and this problematises, also, the notion of objective knowledge, as representative of an 'other's' experiential reality. It indicates the extent to which an interpretive position implicitly structures understanding *within* its production processes.

Like anthropology, law claims the means and the methods to produce an objective account of experiential reality, when 'objective' connotes a factuality that can be evaluated in terms of truth and 'truth' itself still tacitly connotes completeness, the "full story". Legal practitioners proceed on the belief that they have the ability to both emphathise and analyse another's life history; to empathetically appreciate the nuances of cultural and normative assumptions yet disengaged themselves from their own tacit opinions and prejudices (Bourdieu 1977:3-9, 1990:59-75). Representationally, the institution claims to be both 'within' and 'without' of cultural and social conventions and it is this apolitical, impartial detachment that legitimates the legal system acting *on* social relations. Like anthropologists, barristers and judges take their own position as professionals to be free of the values they hold as individuals, as if objectivity resides within the categories and methods themselves.

Methodologically these presuppositions allow legal practitioners to assume conceptual empathy by denying historical specificity - by denying the different conceptual bases perceptions are made from. Said's (1978) text made irrecoverable the conditions colonial power relations relied upon. But his privileging of the 'West' as dominating the power dichotomy deflects examination of the asymmetry invested *within* its domain (Taussig 1992:51; Okely & Callaway 1992). These trials demonstrate how easy it is for the legal institution, through its discourse and the relations this makes possible, to unify an unbounded population into a collective way of 'seeing' sexual assault. Systematically, legal procedures subject the disparate life circumstances of individuals to generalising classifications, to produce the "native categories", about gender specificity and common-sense knowledge, with which anthropologists engage.

THE 'REAL' EFFECTS OF SYMBOLIC POWER

Concepts such as domination, hegemony, inequality and hierarchy form the basis from which legal power becomes possible but the realisation of these forms is representationally obscure. Their opacity stems from 'law's' ability to discursively engage others in confirming its particular way of 'seeing' sexual allegations.

The legal system has the relations and the practices to cultivate the particular subjectivities required to legitimate its definitions of knowledge about rape. Its procedural integrity is allied with an ability to discern the factual basis of criminal events. These trials selectively set out schematic areas and issues to be inferentially evaluated, as indicative of where the 'facts' of the offence lie. What is privileged in any woman's evidence of a sexual assault is an account that can be checked against the events to which it refers, as if there is an empirical way of evaluating subordination.

For women who decide to prosecute a sexual assault the trial must be the penultimate objectification, what Roberts (1989:54) labels the "second rape", as legal methods of depersonalisation subordinate each woman's subjectivity to the meticulous detailing of time, sequence, action and reaction as a measure of its integrity. Yet I have argued that women consent to this objectification when they decide to take their 'case' to court. I have examined the ways in which those most directly affected by legal power relations have no choice but to participate in reproducing the conditions upon which their position of powerlessness relies, if they want to legitimate their definition of the experience as rape.

The distinctive nature of a violence or force exercised symbolically is its ability to actively engage individuals in their own subordination. Representationally, the efficacy of legal power stems from the legitimation of the institution's structural relations. It is from the position of these relations that legal methods and practices can be seen to be socially accepted. The system is recognised as accomplishing objectives generally agreed upon, even if this agreement is only tacit or inferred from the lack of concerted dissent (Bourdieu 1987:840). The violence enforced by these methods and relations is the imposition of a systematic way of attributing meaning to particular objects of knowledge, in this instance sexual assault. This legal viewpoint operates as a universal knowledge, apolitically and objectively referencing the particulars of the sexual offence. Its arbitrary partiality is displaced by a belief in the neutral objectivity of legal knowledge and this cultural representation of worth is the basis of misrecognition.

When a woman decides to publically object to an incident of sexual assault, she has no choice but to contest her claims in the legitimated terms, as distinct from the terms she chooses or the discourse that provides her with the greatest explanatory force (Foucault 1970, 1972). This choice of discourse is in itself, both an effect and exercise of power relations and her engagement with its reproduction is an essential condition

of proceeding with the task of legitimating her experience as rape (Bourdieu 1987:831). She is compelled to present her account in the language of law, the institution in which criminal decisions are made. Even the experiential issues compiling her account are beyond her control as legal discourse determines the nature of the relevant knowledge required. What *is* included in her statements is the detail that will enable jurors to decide whether her experience fits the criminal category or not. The testimony she gives in court is never reducible to her description of the incident. It is her experience fashioned into a juridical account of rape, or 'normal' heterosexual intercourse, as each are redundant within each other's conditions of existence and possibility.

The indicators of rape are derived from legal discourse; how women describe their experience is organised by legal concepts. The elements of the crime impose an interpretive frame, naturally and pragmatically. Their conceptual schema co-ordinates the detail accumulated by all those relationally engaged, while obscuring the fact that the interpretation of this detail will be accomplished by this same schematic logic. Legal elements organise the knowledge collected by solicitors, police and medical practitioners and this knowledge is then 'tested' in court for its ability to substantiate the elements of the crime. Legal values decide the character of this knowledge and even what counts as knowledge which is subsequently examined throughout the trial for its legal integrity. Smith describes the effect of this process as peculiarly circular, for although questions of truth and accuracy arise in court about the content of this knowledge, its interpretive form is never questioned, as a method of providing a comprehensive account of sexual assault (1990a:140). The taken-for-grantedness of this legal form enables its processes of production to remain equally as unproblematic. Implicit in these proceedings is the attribution of particular qualities, to legal arbitration and to legal knowledge as it unproblematically incorporates both a woman's and a man's interpretation of a sexual incident within a 'factual' frame.

INSTITUTED DIFFERENCES

Sexual offences are unlike most criminal classifications in that they are fundamentally political by definition, a factor which is introduced selectively into the apolitical neutrality of criminal proceedings. Trials are predicated on there being a singular reality to these incidents, emerging out of the issues rather than the personal account. This "full story" is evaluated normatively as true or false, which makes decisions of guilt or innocence equally decisions about a personal truth, about his interpretation or hers. These men on trial unanimously denied their sexual activity was rape. They qualified their denial with their understandings of what rape entailed, articulating indignantly about the lack of screams or 'force' as they echoed the sentiments of their counsel. Yet the women uncompromisingly defended their identification of the experience as rape. Every allegation where consent is the critical issue is always gendered and all sexual assault trials resonate with this political specificity. But the only gender identity legitimated within this sphere is biological in form and therefore natural in nature.

This inclusive demarcation indicates the constitutive power these trials generate. What are, in essence, social constructions, acquire a factual reality in this context that materially influences the ways in which a prosecution proceeds (Bourdieu 1990a:63). These definitions have the potential to weight the adversarial positions of participants as they generate certain arguments in defence of a man's account which are inconceivable if applied against him. This is why judges can warn jurors that intoxication may impair the perceptions of men but it affects the credibility of women; and barristers freely argue that while her promiscuity reflects upon her mendacity his valorises his predacity. There is no psychologising about why men lie about sexual allegations. The legal construction of the rapist as an aberrant individual distances men as a social group from the realms of relevant knowledge.

It is the gender specificity of the allegation that sanctions the strategic preoccupation of these trials with the moral character of women. This gendered focus allows evidentiary methods to combine with defence tactics in constructing her propensity for sexual licence as a measure of her morality. Together they make promiscuity and veracity legally incompatible, as far as women are concerned. This process reflects Bourdieu's notion of discourse as "active" and able to produce its own effects by its own relations and practices (1987:839). Legal knowledge formulates the nature of subjectivity about these experiences and the criminal elements co-ordinate the subject positions from which a 'legal' subjectivity seems appropriate.

DISCOURSE, AGENCY AND STRATEGY

I have argued that it is both the cohesiveness and contingency of power exercised relationally which formulates this concerted assault on the nature and character of those alleging sexual assault. The discourse impugning women is entrenched 'objectively' and anonymously, within legal texts, rules and methods, that is, within a legal way of thinking about the issues involved in sexual offences. Its intervention into trial proceedings is always variable, qualified by both the limits of the potential debate and the manner of its delivery. The rationalisation of its incorporation is particular to each trial and arbitrary in its application. The judge may introduce these 'facts' as an 'informal' legal directive; or they can conspicuously underpin the direction of a defence. But in all trials, they remain implicit within the divisions legal discourse automatically produces. This combination of intention and the unintended consequence enables the meaning of these situations to be both malleable and uniform, responsive to revaluation but always shaping understanding within the constraints of a pre-determined form.

The deceptive nature of power exercised relationally allows its effects to be manifested within personal relations but these effects are irreducible to the personal expression. Meaning is never wholly containable within interaction or within intentional agency. Discourse is able to reflect within the expressions of interpersonal communication, taken-for-granted understandings about the issues and about the values associated with knowledges and relations. These effects of power are both a consequence and a constituent of the practices these relations presuppose.

Institutional relations are formulated, as Bourdieu explains, out of a specific discursive logic or set of assumptions which is unconstrained by spatial or temporal boundaries (1991:172-90). This logic is an implicit representation, constituted out of past rationalities and cultural values that organise the nature of relationships and the evaluation of their worth. Included in a legal logic is the distinctive way women, or those alleging sexual assault are thought about, as part of the legal way of 'seeing' the issues 'relevant' to these crimes. This means that any attempt at reform, to redress the inequity women experience in trial proceedings needs to address, also, the ways in which this viewpoint infiltrates and integrates the prosecution of sexual offences. This 'logical' way of constructing the integrity and morality of women as the critical issue within these trials, constantly brings past assumptions and the relations they make possible into the present day, into the trial and into evidentiary reform. These legal presuppositions are expressed explictly in calculated strategies and they emerge inferentially, as the 'logical' conclusion to the way trial proceedings unfold. It is this combination of intentional and discursive strategies that makes legal reform of the particular policy or Evidentiary Act ineffective, even inconsequential.[1] The law clearly states that a woman's sexual history is now inadmissable; that it is no longer necessary to seek the corroboration of the evidence of a witness who is also 'victim' of a crime of rape. Yet, the procedures these rules have made possible and relevant in the past still persist, legally and legitimately. They persist within the legal point of view; they are tacitly generated out of legal principles and 'authorities', to be expressed within

legal practices and relations, as part of the way legal knowledge constructs the issues relevant to the prosecution of sexual offences.

It is this dialectical relationship between unintentional and intentional strategising that creates the space for the arbitrary nature of legal authority. It makes the structural dimensions of legal relations contingent upon the particular occasion for their manifestation. These tacit expressions - of status, gender, credibility, rationality, morality - are differentially engaged within each trial and within each hearing of each trial. This makes the knowledge and the meanings realisable within an account of rape, vulnerable to the normative values and opinions of judges and barristers. It allows personal impression and opinion to shape the ways in which issues and individuals are thought about, as the slide from the personal attitude to the impersonal institution statement is accomplished by appropriation.

This investment of opinions and dispositions with legal values is what Bourdieu describes as a "takeover of form", the means by which coercion is applied when physical methods are socially censured (1991:213). In a legal context, the word 'arena' connotes gladiatorial adversaries, the championing of opposing forces when 'force' entails presenting a particular viewpoint as an impartial interpretation (Bourdieu 1991:213). This, also, is an exercise of symbolic violence, as an arbitrary or partial knowledge is imposed as a universal understanding.

The opposing forces formalised in rape prosecution is the individual man against the State/community but this nominalisation is attributed a gender specificity by virtue of the focus these proceedings construct. The gendered nature of these conflicting viewpoints is always explicit, in the evidentiary methods or in the nature of the evidence itself. This differentiation becomes a strategy to be exploited, to be reworked and revalued within the particular issues each individual biography contests. Somewhere in all of this, the State gets displaced as the prosecuting agent, to be

replaced with the positions identified in the trial. The common denominator for all concerned is an allegation of social transgression, which translates, with sexual offences, into gendered interpretations of the meaning of a sexual incident. It is this gender specificity of the allegation that renders natural and appropriate, the inversion of normal prosecution procedures, to place the accuser on trial to defend the integrity of her charge.

SELECTIVE SUBJECTIVITIES

This thesis problematises the relationship between experiential reality and its represention by arguing, not that this reality is unknowable or no more than a discursive construction; but that its knowledge can never be interpretation-free. Yet I have emphasized that what is legally put forward as an objective representation of knowledge about rape also presupposes some degree of congruence, a similar way of thinking about the nature of the incident and the issues involved (Bourdieu 1987:839, 1991:127). Legal specifications are generally seen to be in agreement with the way sexual offences are thought about. I have argued that these procedures of prosecution do more than merely draw upon an *a priori* consensual knowledge; they actively engage in the production of this collective common sense. This process indicates the positive nature of the power exercised by legal relations that discursively takes the 'legal' into the 'social' to actively constitute the subject positions its definitions require. Included in this propagation is a systematic regulation that excludes all knowledge contesting these claims.

A sexual assault trial is predicated on the assumption that an objective account of these incidents exists, as a knowledge that is independent of the descriptions through which it is known. This chain of questioning assumes a world divisible into real facts and representations of real facts, as if, as Taussig says, the means of representation

were a mere instrument and not a source of experience (1987:35). It is this reduction of meaning to linguistic referentiality that foregrounds the legal perspective of these crimes as uniform, apolitical and, above all, gender-neutral thus backgrounding their predication upon gender dissent. Their 'objectivity' is found within the elements of the crime which make knowledge about rape uniform in its relationship with understanding. This emphasis takes-for-granted its conflation of a knowledge independent of interpretation yet also contingent upon the subject positions from which the particular interpretation can be heard or read. It is predicated upon the notion of knowledge inherent within the issues and events themselves thus obscuring the relations out of which its definitions merge.

It is this positivistic privileging of language as referential and the tacit appreciation of this knowledge that deflects reflection on the partiality of legal meaning and the contingency of its truth. Any woman who goes to court with an allegation of rape, has no choice but to constitute her account from the discourses legitimated within this context. Not all the meanings women use to interpret their experience as rape are recognised, as relevant knowledge, or as knowledge. The admissable knowledge is that which reflects legal understandings of the issues involved and verifies legal values and logic in its definitions of the crime.

In court, the gap between a woman's experience of rape and the legal representation of the crime is manifested, not so much within the actual categories of interpretation but within the plurality of meanings these concepts can provide. This disjunction stems from the equivocality of the legal elements which enables emphasis to be placed on both the act of intercourse and its circumstantialisation as a measure of the relation's heterosexual 'normality'. This makes the factual basis of the crime contingent upon a double subjectivity. It allies its integrity with a gendered opinion, and links the truth of rape inseparably with a man's point of view about sexual and social relations. The gap lies within the privileging of a universal knowledge for the

understanding of a crime which is predicated on the man's interpretation of a woman's state of mind about an activity he has initiated.

The contingency of this perspective relies upon the ability of language to naturally invest interpersonal relations with these structuring aspects of power relations, as part of experiential knowledge. The emphasis on the objectivity of legal knowledge imposes an egalitarian uniformity on the social relations engaged within the crime and within the trial. It obscures the different conceptual bases generating this knowledge and the ways in which particular social position are asymmetrically evaluated (Bourdieu 1991:118). Women, men, judges, police, are all appraised differently in terms of rationality, morality, subjectivity, which invests their statements with cultural notions about status and worth. Within interaction, these social categories are further qualified as decisions are made about the individual woman, by the particular judge. This implicit privileging is expressed within the multivocality of such concepts as 'force' and 'resistance' that allows barristers to encourage jurors to predetermine the integrity of a woman's account by evaluating her compatibility with the 'appropriate' response to rape. This, also, is the power of constitutive naming, as the slide from what the category claims is a possible response to a sexual assault to regarding the category's claims about responsive behaviour as inherently probable, sets up expectations about the woman's integrity and her intentions. These are what Bourdieu (1991:127) describes as the "anticipated categories", the substantiation of categories of knowledge with ideas and imageic iconography that fuse the real and the imagined into being one and the same (Taussig 1987).

THE CONTINGENCY OF 'CONTEXT'

Juridical 'facts' about rape are the products of juridical constructions and their fundamental form flows from the definition of the experience as a crime within an

adversarial system of justice. In court this knowledge includes everything that can be argued from the point of view of legal pertinence and everything that cannot be strategically discounted. This, also, is where the discrepancies lie, between her account and a subjectivity derived from an opportunistic truth. There is never any reference to the adversarial nature of this justice and its effect upon the conclusions reached, as if status within this profession is subordinate to professional integrity. Yet both are engaged in a common objective, to buttress the self reliance and referentiality of 'the law'.

It is this opportunistic truth that perpetuates the discursive strategy of a dissimilarity between rape and consensual sexual relations. It makes it difficult to articulate differences *among* these definitions of subjectivity and very simple to emphasize behaviour different *from* a privileged representation of what rape is about. This process indicates the constitutive potential of categories and classifications to shape perception and interpretation in particular, predictable ways that either absorb or exclude issues of distinctiveness. It demonstrates how easy it is to generate these generalising categories from the individual biography when the constitutive power resides exclusively with those who frame and ask the questions.

The adversarial nature of criminal law provides barristers with a tactical interest in the relationship between experiential reality and its representation. Legal practitioners are well aware that the interpretation of these relational incidents changes according to how they are thought about. Yet the contextualisation of these crimes is always legally constructed as issue related. This approach naturalises notions of what is relevant about sexual offences as impartial and apolitical knowledge and as common-sense. It obscures the systematic yet arbitrary compilation of incidents, assumptions and values every jury decision is predicated on. It obscures, also, the ways in which 'context' is already structured by ways of thinking about 'law' and about rape. In effect, this process makes a woman's account of rape contingent upon its circumscription, upon

the way in which the circumstances of the sexual intercourse is described. It makes the credibility of her interpretation of a crime contingent upon the circumscribers, those with the authority to impose a boundedness to what has occurred.

Questions have the potential to naturally exclude or marginalise issues. This allows the questioner - the judges and barristers - to unproblematically impose a particular way of thinking about the issues by providing *within* the question, the normative framework within which the particular issues and incidents are to be considered. The equivocality of the criminal elements enables her account of rape to invariably accomodate both consensual and criminal sexuality within the same set of events. By merely modifying their circumstances these events can acquire a different meaning. This makes the meaning of her experience inherently unstable and establishes as the critical focus, not what the 'facts' are but how these 'facts' are to be understood as rape or consensual sexual intercourse (Smith 1990a:133). This perspectival ambiguity makes knowledge itself inherently unstable, even malleable, as interpretation and perception become contingent upon the conditions that make these definitions possible and acceptable, as self knowledge. It makes the meaning of a woman's experience of rape inextricable from the relations involved in deciding how the offence is to be understood.

These trials have a conclusion which is never in itself, conclusive, because the trial account, the legal transcript, achieves its identity as a trial record and also as a legal text. As a text it has a relatively autonomous life which brings it into an endless relationship with other texts of other trials. It looses its distinctive historical character as it detaches its meaning from the relations and processes out of which it has emerged to acquire instead, a fixed material form (Smith 1990a:154-168). This allows the knowledge constructed throughout the trial to transcend the transitory nature of performance, to remain both uniform and malleable, as it responds to future interpretations. These texts maintain a relationship with other texts and other trials, as

precedents. They authorise the legal directives of future trials and take the present-day representations of these crimes into the past for their legitimation. This sets up a line of impartial, impersonal authority that stems from past legal history, displacing the authorship of these ideas, by proclaiming them to be part of the experience itself. It is this process that reproduces anonymously and autonomously a gender-biased perspective as the legal 'view' of rape and perpetually excludes women from receiving an equitable or just hearing on sexual allegations within this system of law.

NOTES

1 Police and barristers who were prepared to speculate about the integrity of trial proceedings from a woman's perspective unanimously and unhesitantly claimed they would opt for what they described as `personal justice' if a wife or daughter was involved. They were emphatic in their rejection of legal arbitration as both a just process and the route to a just conclusion, when the `victim' was personally affiliated, that is, no longer objectified.

APPENDIX 1

MEDIA DISCOURSE ON RAPE

While criminologists, academics, bureaucrats and the judiciary contest definitions of what rape is about the reporting of rape incidents by the media avoids such existential quandaries by privileging only that which is, to quote a journalist, of "public interest". The coverage of rape trials by the main local daily newspaper in this State's capital city, over a period of five years, incorporates particular representations to depict rape as a distinctive type of crime, one complementary to the legal definition of rape. These crimes are constructed as crimes of sexual deviance, evidenced by 'out of control' male sexuality. This approach concurs with legal associations of rape discourse on biology and the motivations cited in newspaper reports constantly authorise this interpretation. The sentencing remarks of judges are frequently quoted, attributing the aberration of the crime and the criminal to unrestrained male sexuality, as they talk about the "unlawful gratification of sexual urges" (11 June 1992) and describe a rapist as "incapable of controlling his sexual instincts" (29 September 1990). This leaves the character of the man fundamentally sound as this judge clearly explains:

> ... I can only think that your present offending, which seems to be so out of character, stems from some otherwise hidden aberration in your makeup over which sadly you lost control (3 September 1992).

Court reporters gain their information about sexual offences from very selective sources; from the opening address of the prosecutor, the sentencing remarks of the judge or from talking with the barristers involved. Their knowledge about these crimes is largely derived from legal sources and after the legal system has instigated prosecution procedures. Their

reporting reflects legal attitudes to the crime, to women and to sexual relations and they reproduce as 'factual' detail, legal views about the issues relevant to sexual assault.

The selection of 'newsworthy' trials is dictated by specific criteria, such as the sensational: ***SERIAL RAPIST TERRORISES CITY'S NORTH*** (9 December 1992); the public personae: ***POLICE AIDES JAILED FOR RAPE*** (23 March 1992); or the bizarre: ***BOY OF 10 FACES FOUR CHARGES OF RAPE*** (8 November 1990); which accounts for why only two trials out of the 29 I observed were reported. Most rapes are "ordinary" and of interest to neither the paper's editor nor its audience. Reports take the form of a narrative, constructed out of detail from the woman's account. It tacitly constructs 'contributory negligence' by always describing what the "victim" was doing when she was "grabbed", or "dragged off":

> ... a 16-year-old school girl was allegedly abducted and raped last Friday after she and another girl, also 16, accepted a lift from two or three men driving a van ... (21 April 1992).

It attributes a particular meaning to 'non-consent' as it details how she "struggled", "fought" and "screamed", and the threats and physical violence her resistance invoked:

> ... police fear the knife-wielding attacker may kill. At least three women have had their hands slashed trying to fight off the man, whom the police describe as a "professional rapist" ... (9 December 1992).

The integrity of this action is verified by referencing its empirical proof:

> A doctor's examination had found bruises to the arms and legs consistent with the allegations (14 February 1989).

Such detail constitutes the woman, her precipitation, her reaction and resistance, as the focal points for discussion about rape, thus reflecting legal practices in form and content. It becomes a 'natural' extension of the media coverage on rape trials, to publically address

issues of women and safety, women and self-defence, thus confirming women as responsible for the perpetration and avoidance of this crime.

Rape is clearly debated as a 'woman's problem'. The only causal relationship established, even privileged, is circumstantial, from her perspective; her choices placed her in the situation where rape is not only possible but potential;

> A police spokesman said a woman in her late 20s allegedly had been picked up while hitchhiking in Elizabeth, in April, by two men who drove her to Gawler where she had been repeatedly raped (13 January 1989).
>
> He had 'snapped' after he had twice been slapped by his wife (21 June 1990);
>
> Police have warned people not to walk alone in the parklands at night after a 20-year-old woman was wounded during an attempted rape early yesterday (2 April 1990).
>
> ... A police spokesman said last night police agreed women should enjoy the same freedoms as men, and that they should be able to move about at night in safety. "We totally support that and obviously we don't say it is their fault", he said. "But it would be irresponsible of us not to warn people of the dangers they might face, and how they might take precautions" (2 June 1990).
>
> ... the woman was jogging near the high school about 5.30 a.m. on August 21 when she was grabbed by a man armed with a knife (12 September 1988)

Such statements re-affirm and reproduce discourse on the boundaries of legitimate behaviour for women as it demarcates the 'unsafe' spatial, social and temporal zones. These notions project a pattern to rape, as if it is a predictable crime, avoidable if these situations are avoided. This discourse has the effect of allowing women to distance themselves from rape, by contrasting their lifestyle to the habits of those women raped. But equally, rape is reported as an arbitrary, unspecifiable threat and therefore, something to be feared precisely because it is undifferentiated:

> St Kilda detectives said there was no motive for the attack, and the group may have kidnapped the woman as "a bit of fun to go with their drugs" (8 July 1992).

> ... Rape Crisis Centre spokesperson ... said: "When people say that women should stay at home rather than go out into the street at night, they don't realise that it could also be unsafe for them to be home by themselves" (29 May (1990).

Regardless of strategy, rape is presented as statistically inevitable:

> Co-ordinator of administration of the Rape Crisis Centre says Research conducted through our own phone-ins and other surveys suggests one in four girls under 16 can explect to be a victim of a sexual assault and one in nine boys (3 May 1990).

Perpetrators of this crime are categorised as the individualistic extreme, such as the "serial rapist"; or the crime is biologically circumscribed as distinct from the man's 'character':

> In setting the non-parole period he said the man had been a hard worker and had done some years of community work with St John Ambulance and apart from the "dreadful" sexual abuse of his children had been of good conduct since 1979 (16 December 1988).
>
> There was much good in the man's character and that the man had received a good character reference from his employer (26 July 1989).
>
> ... [the accused] was not a violent man (29 June 1990).

Rape is always reported in emotive terms; it is described as the "ever-present fear" (20 September 1988); "the most hideous crime one can suffer" (3 February 1989); wherein women are either "terrorised into submission" (5 June 1992) or physically subordinated: "rape victim unconscious for six hours after being bashed" (18 June 1988). Its coverage contributes, as Sheffield (1989) points out, to a form of "sexual terrorism", legitimately encompassing all that can be constructed as inclusive of a very equivocable categorisation, as this judge explains: "the community will not tolerate the violent abuse of innocent women" (5 June 1992).

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*Trial transcripts are the property of the parties involved - the legal institution, the Attorney-General's Department and the defendant - and the access of court records is subject to judicial discretion.

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