The formative power of law in rape cases
Ashton Bamfield

Law is provided a privileged status within our society, thus the discourses it produces are taken as ‘truth’. However, law is a dangerous discourse, presenting itself as autonomous when, beneath the façade, hegemonic masculinity is central to the way it is ‘formulated, enforced, and interpreted’ (Frohmann and Mertz 1995, 829). It is through the under-currents of patriarchy, and by appealing to ‘common sense’ values, that the law is able to discredit women’s sexuality. Feminist theorist, Carol Smart, argues that ‘Law is a particularly powerful discourse because of its claim to truth which in turn enables it to silence women (who encounter law) and feminists (who challenge law)’ (Smart 1995b, 71). Smart further claims that, ‘The legal form through which women’s accounts of rape are strained constitutes a very precise disqualification of women and women’s sexuality’ (1989, 26).

In law, specifically in the trial of rape, the law has the power to construct women in accordance with hegemonic masculinity. It renders women consumable and imposes its ‘script’ upon them, therefore disqualifying their sexuality and rendering it void:

On hearing the client’s story, the solicitor sifts it through a sieve of legal knowledge and formulations. Most of the story will be chaff as far as the lawyer is concerned, no matter how significant the rejected elements are to the client. Having extracted what law defines as relevant, it is translated into a foreign language ... This is the routine daily practice of law in which alternative accounts of events are disqualified. The legal version becomes the only valid one (Smart 1995b, 74).

Thus the law constructs the women it encounters to fit within its mechanisms; creating the woman of ‘legal discourse’; it denies women their agency in the telling of their harrowing experiences, often creating at the end of the trial a ‘truth’ that is completely different to the ‘truth’ of the survivor. As Margaret Thornton points out:

It is the fickle Jezebel who has come to be stereotypically associated with woman within the legal discourse pertaining to rape, in simplistic contradistinction to the ‘woman of virtue’ who is either virginal and asexual, or whose sexuality is
properly contained within a secure, necessarily heterosexual relationship (Thornton 1991, 25).

One must further make clear that law does not simply apply itself to previously gendered subjects, ‘but actually brings into being both gendered subject positions as well as ... subjectivities or identities to which the individual becomes tied or associated’ (Smart 1995a, 192). Thus the law should be viewed as a gendering strategy (ibid), which has the power not only to judge women by the benchmark of men – women within the law, but also to judge them against other types of women- the woman of legal discourse:

Woman therefore represents a dualism, as well as being one side of a prior binary distinction. Thus in legal discourse the prostitute is constructed as the bad woman, but at the same time she epitomizes Woman in contradistinction to Man because she is what any woman could be and because she represents a deviousness and licentiousness arising from her (supposedly naturally given) bodily form, while the man remains innocuous (Ibid, 194).

The power of law is therefore a formidable one, enabling its ‘truth’ to override the ‘truth’ of women’s own experience and identity, casting doubt over their sexuality; not solely through the biological distinction that they are women and regarded as lesser than men, but through assigning them into the category of ‘bad woman’, as they have not performed their prescribed gender. These symbolic relations are pivotal in the verdict of a rape trial, and the way a woman manifests herself within a court of law can be the deciding factor in whether her ‘truth’ is accepted or disqualified; gender peformativity is paramount in the eyes of the law (Butler, 1999).

Smart points out that ‘[t]he whole rape trial is a process of disqualification (of women) and celebration (of phallocentrism)’, celebrating the ‘deep-seated notions of natural male sexual need and female sexual capriciousness’ (1989, 35). She accepts that ‘not all women are disqualified and some men are convicted and punished’, but notes that ‘these instances never challenge the basic ritual which reaffirms the phallocentric view of sex’ (ibid).

The [rape] trial is truly Kafkaesque for the woman who has experienced terror and/or humiliation but who is treated like a bystander to the events she apparently
willed upon herself and for which she is seen as seeking unjustified and malevolent revenge (Smart 1989, 34).

Consequently, law has the ability to turn the victim into the prime suspect; what has the woman done in order to provoke the natural urges of man, how has she made herself rapeable? Was it through the clothes she wore, the way she carried herself, the way she danced, her ‘slutty’ behaviour? The answer is that it is in whatever way the law so wishes it to be, because the power of legal discourse is so great. Thus the woman’s body is saturated with sex throughout the rape trial:

Her story is reconstructed into a standard form of sexual fantasy or even pornography in which she becomes the slut who turns men on and indicates her availability through every fibre of her clothing and demeanour. The only difference between the rape story and the standard fantasy is that in the former she complains (Smart 1995b, 83).

The sexualising of women’s bodies throughout the rape trial puts off a large number of women from reporting rape; it is a further violation to her dignity. Her body is punished through the act of rape, followed by the further punishment of cross-examination, which she must endure throughout the trial. ‘It is not just that they must repeat the violation in words, nor that they may be judged to be lying, but that the woman’s story gives pleasure in the way that pornography gives pleasure’ (Smart 1989, 39).

Thus the rape trial sexualises women’s bodies whilst normalising men’s sexually aggressive behaviour, deeming it instinctual and natural, which places the gaze of the court on the victim, the woman, the irrational woman, the rapeable woman.

Women who say no do not always mean no. It is not just a question of saying no, it is a question of how she says it, how she shows and makes it clear. If she doesn’t want it she only has to keep her legs shut and she would not get it without force and there will be marks of force being used (Bresler [1988], quoted in Thornton, 1991, 25).
This leads me to the vital issue of consent, which is the legal focus when concerning a rape trial; this sets rape conceptually apart from all other criminal acts, as the *mens rea* (the guilty mind) is always contested (Thornton 1991). And although rape is determined in the public sphere, it is cast back into the private sphere, being in most cases a concealed act involving only the accused and the victim. When the man’s word of consensual sex is set against the woman’s accusation of un-consensual sex, the stakes invariably fall favourably towards the man; the ‘rational man’ who opposes the ‘irrational woman’:

The partisanship of the liberal state towards masculinist norms is underpinned by the public/private dualism which, in turn, is a metaphor for male and female. Men’s association with governance of the state and the formal positions of power within civil society signifies their superior reason, culture and rationality... culture always trumps nature (ibid., 22).

Moreover, it can be seen that what constitutes consent is equivocal; with the covert blurring of the boundaries between submission and consent, ‘the prevailing definition of sexual intercourse within hegemonic masculinity is sadomasochistic, since coercion is so often redefined as consensual’ (Mackinnon [1989] in Thornton 1991, 26).

A firm boundary needs to be established and realised between these two very different forms of sexual intercourse; not only on the part of men, but on the part of women themselves; as dominant discourses can be seen to have normalised coercion. Smart, highlights the dangers of the blurred boundary between coercion and consent:

If we find it difficult to attach responsibility to men in sexual matters, how much more difficult is it to attribute blame to him in a criminal trial. For the woman jurist who has been pressured into sex but who has not called this rape, how difficult is it for her to identify another women’s submission as rape? (1989, 42)

It has to be asked whether the law, as a site of struggle embedded within its overtly masculinist traditions and other serious issues which I have highlighted, is the appropriate place for this to take place, or whether another space of resistance, such as education, would be more effective:
The seeds of invidiousness springing from women’s assumed irrationality and unrestrained sexuality have been sown so long ago within the ideologically fertile ground of subordinated femininity that pruning a few twigs does little to attack the roots. The strait-jackets of legal form allow little scope for imaginative and creative solutions (Thornton 1991, 28).

Therefore without tackling the issues on the ground—society’s ideologies and ‘common sense’ understandings of rape, law reform is likely to have little effect. The law is not an objective force; it is upheld through the individuals who impose it. These individuals are themselves shaped by hegemonic masculinity and gender constructions, their agency affected by the patriarchal structures at force within our society; therefore the law is never free from society, it is never objective. ‘Law is not simply law, by which I mean it is not a set of tools or rules which we can bend into a more favourable shape’ (Smart 1995a, 198).

‘Simply rewriting law is not enough’, according to Frohmann and Mertz (1995, 833). One must remember that policy and practice do not always go hand in hand, legislative change should not be viewed as victory, and although it can be seen as a step in the right direction, it is the practices of law officials and the ideologies of society that can amount to real changes for women. Changes to legislation should be viewed with scepticism, as often these are nothing more than token gestures, as was the case, I believe, with rape shield laws. Women’s sexual history, in policy, is not allowed to be brought into the court room; however, the reality is that it still plays a major role within rape trials (ibid). ‘Reforms do not address the deep structures and symbolic constructions through which people make sense of a rape’ (ibid, 833). We must de-construct law’s ‘truths’ and provide an alternative discourse, ‘a feminist discourse which might attempt to construct rape differently, one which will deconstruct the biological/sexed woman’ (Smart 1995b, 87). For, it can be seen that ‘the more we focus on law as the problem and solution, the more we are drawn into a paradox’ (ibid, 87).

However, producing an alternative discourse, opposed to supporting the sources of victimization, which the law imposes on us and which we often readily accept, is a dangerous manoeuvre. Amongst feminists there is a tangible fear that if women were to abandon their victim status, and provide alternative accounts of rape, the law would all too quickly snatch back the token protection, which it affords to rape survivors (ibid, 87). Consequently a solution to the present paradox of liberal-legalism is not easily arrived at: one could even go
as far as to say that there is no solution, and that issues surrounding law reform, when concerning rape, will be on the feminist agenda perpetually. This does not mean that feminists should deny their responsibility and wholly abandon law reform:

Law provides an important way of giving meaning to the world and of organizing social institutions and processes. Whilst law occupies this position, from which it can define women’s sexuality in such an oppressive form, it cannot be ignored. It must be challenged most fundamentally, but we should not make the mistake that law can provide the solution to the oppression that it celebrates and sustains (Smart 1989, 49).

Hence it can be seen that although we must not abandon law as a site of struggle, we must occupy other spaces; conceptual spaces, educational spaces, we must not be completely consumed by law. Considerable efforts need to be placed on ‘tracing how women have resisted and negotiated constructions of gender’ (Smart 1995a, 198), which will bring about an insurrection of subjugated knowledge, for the longer this knowledge remains silenced, the longer those with ‘unintelligible genders’ will suffer (Carline 2005). Gender constructions must not be allowed to prevail unchallenged.

In conclusion, it is clear that the power of law is monumental. It is a discourse so powerful that few are positioned above it in the hierarchy of knowledge. Law has the ability to choose our ‘truths’; its silences those whom it sees fit; those with ‘unintelligible genders’, those with ‘unchaste’ sexuality, those who do not fit within its narrow definition of ‘undeserving victim’. It labels women as rapeable, denying them the justice they deserve – the law is violent. It is constrained by hegemonic masculinity, reinforcing the gender divisions within our society, whilst also bringing into being gender constructions and identities to which we become tied.

It is evident that the relationship between law and feminism is equivocal. To abandon law as a site of resistance is dangerous; yet colluding with it is also ripe with risk. As Michael Foucault stated: ‘It is not that everything is bad, but that everything is dangerous … If everything is dangerous, then we always have something to do’ (quoted in Smart 1995b, 87). Feminists will always be at war with law, and the issue of rape will remain on the feminist agenda for there is no clear-cut solution. The paradox of liberal-legalism will always be
present. However, if everything is dangerous, then one would suggest that feminists need to move into uncharted terrain, occupying spaces that are not constrained by the ‘straitjackets of liberalism and biologism, which law invites us to wear in order to hear us’ (Smart 1995b, 87). Feminists must not allow the fear of being silenced to force them into colluding with the law. We must not assign ourselves so easily into the categories that the law expects from us. The law expects women to assign themselves into the victim category; however if feminists can challenge the notion that woman (especially a raped woman) equals eternal victim, this will in effect challenge the notion of unintelligible women, which will help to deconstruct the gender constructions which the law brings into being, reinforces and expects us to submit to.

References


