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Thinking Sexual Difference Through the Law of Rape

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Abstract 2013 marks 10 years since the Sexual Offences Act 2003 was passed. That Act made significant changes to the law of rape which appear now to have made very little difference to reporting, prosecution or conviction rates. This article argues that the Act has failed against its own measures because it remains enmeshed within a conceptual framework of sexual indifference in which woman continues to be constructed as man's (defective) other. This construction both constricts the frame in which women's sexuality can be thought and distorts the harm of rape for women. It also continues woman's historic alienation from her own nature and denies her entitlement to a becoming in line with her own sexuate identity. Using Luce Irigaray's critical and constructive frameworks, the article seeks to imagine how law might 'cognise' sexual difference and thus take the preliminary steps to a juridical environment in which women can more adequately understand and articulate the harm of rape.

Keywords Harm · Irigaray · Sexual difference · Sexual Offences Act 2003 · Rape

Introduction

2013 marks 10 years since the Sexual Offences Act 2003 ('the SOA') was passed. That Act made significant changes to the law of rape in England and Wales with the express intention of rectifying what the Home Office described as the 'archaic… incoherent …and discriminatory' elements of the law on sexual offences (Home Office 2002, p. 5). The changes made to the offence of rape specifically included reform to both the actus reus and mens rea components of the offence, and the

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creation of three new sections designed to clarify the meaning of consent.[1] These were accompanied by a significant number of policy recommendations to enhance procedures for the reporting, investigation and prosecution of rape and other serious sexual crimes (Home Office 2002, pp. 19–20). These recommendations were made in response to damning evidence of the failure of law and associated institutional policy to respond adequately to high rates of attrition and low rates of prosecution and conviction (Gregory and Lees 1996; Harris and Grace 1999; HMIC/HMCPSI 2002; Temkin 2002).

While the legislature may have succeeded in encouraging a small increase in the reporting of rape,[2] on other traditional measures of success this law has failed.[3] Prosecutions for rape remain at around 18 % of reported offences with conviction rates from jury trials at around 6 % of reported offences (CPS 2010/2011). Research produced after the SOA's passage continued to find evidence of systematic institutional failures at almost every point in the process. Police continued to investigate rape allegations inadequately (Kelly et al. 2005; HMIC/HMCPSI 2007; IPCC 2013; Williams 2012) while the Crown Prosecution Service was criticised for the haste with which it often dismissed cases that were perceived as weak (Kelly et al. 2005; Temkin and Krahé 2008). Supporting legislation like the Youth Justice and Criminal Evidence Act 1999, that sought to curtail the admission of sexual history evidence to limit the degradation of the complainant during the rape trial, were increasingly subverted by the Courts in practice (Kelly et al. 2006). Particularly damning was the government's own stocktake of the SOA in 2006 which concluded that there was little evidence to suggest that the SOA 'had made any significant impact, either in encouraging victims to report the crimes or in terms of securing more convictions' (Home Office 2006, p. 28).

As the SOA marks its 10th anniversary, this article considers reasons for its failure in light of the work of feminist philosopher Luce Irigaray. It argues that the SOA has failed against its own measures because it remains enmeshed within a conceptual framework of sexual indifference in which woman continues to be constructed as man's (defective) other. This construction both constricts the frame in which women's sexuality can be thought and distorts the harm of rape for women. It also continues woman's historic alienation from her own nature and

[1] Section 74 introduced a definition of consent while sections 75 and 76 detailed evidential and conclusive presumptions with respect to consent. In addition to these consent-based provisions section 1 introduced the 'reasonable belief' mens rea standard conclusively displacing the 'honest belief' standard so derided from *DPP v Morgan* [1975] 2 WLR 913. The SOA also introduced the inclusion of oral penetration within the actus reus of rape.

[2] In 2002/2003 there were 12,295 recorded offences of rape and in 2010/2011 there were 15,935. The biggest increase was amongst male complainants rising from 850 in 2002/2003 to 1310 in 2010/11 (Chaplin et al. 2011, p. 43).

[3] Cf. Larcombe (2011) criticising the use of conviction rates in rape prosecutions as an appropriate measure of 'success'. She argues that strategies associated with increasing conviction rates may in fact be in direct conflict with feminist aims in the area to fight rape myths and stereotypes which have infiltrated legal discourse about the virtuous raped woman. Larcombe points out that a focus on conviction rates inevitably leads to the selective prosecution of only a small number of reported rapes which fit within the 'real rape' template, and thus are more likely to accord with the myths and stereotypes of rape that jury members have been shown to draw upon when making decisions on evidence in a trial (Larcombe 2011, p. 32).

denies her entitlement to a becoming in line with her own sexuate identity.[4] This is particularly acute in the case of rape where woman confronts the brutality of her symbolic homelessness first through the encounter with her rapist, and second through her encounter with an institutional apparatus invested in that homelessness. Inspired by Irigaray's programme of civil rights for women, I argue that law has facilitative, protective and symbolic roles in inaugurating sexual difference and this is particularly and acutely necessary at the point of confrontation with that difference in rape.

In the first part of the article I introduce Irigaray's critique of phallocratic culture and her case for the elaboration of sexual difference in law. I then explore the SOA's sexual indifference through a discussion of the move to gender neutrality in section 1, its reliance on a particular notion of sexual autonomy and the operation of its consent provisions.

In the third part of the article, I elaborate Irigaray's constructive project and her vision for the radical refounding of culture guided by an ethics of sexual difference. Following her legal code for women, I argue that the law must move away from its primary role beholden to the protection of property, to the protection of humanity.[5] Related to this, I argue that the law must provide woman the space for her own voice through which she must be afforded the right to speak the harm of rape. This conceptual change has implications for how the law perceives the harm of rape and woman's sexuality, but also its role as the respectful mediator between the *two*: man and woman. This article is not an attempt to propose a new law of rape, as such. It is instead an exploration of the blind spots of the current legislative framework and an attempt to initiate a discussion into how law cognisant of sexual difference might change how we perceive and respond to the crime of rape.

Irigaray: Law, Culture and Sexual (in)Difference

In the early critical phase of her vast body of work Luce Irigaray revisits the seminal texts of philosophy and psychoanalysis and contests the defining concepts of enlightenment thought: idea, substance, subject, transcendental subjectivity and absolute knowledge (Irigaray 1985a). Through dialogic readings of the 'blind spots' of the texts of Freud, Plato, Lacan, Kant and others, she excavates and exposes the monosubjective character and tradition of Western history and culture arguing that the universal subject espoused by the canon is not universal, or neutral, but in fact masculine and has achieved its domination through the suppression and denial of the feminine. Irigaray's analysis illustrates how the feminine has been colonised by a male fantasy of an inverted other through which he can project himself as subject, while woman functions only as object for and between men. The masculine projection of the feminine is thus defined in accordance with male perceptions and

[4] Irigaray uses the adjective 'sexuate' to connote a broader description of what is involved in a culture of sexual difference. With respect to law, her proposal for sexuate identities involves the rights of all individuals to cultural self-expression as sexed beings.

[5] Irigaray's concept of humanity is very much tied to her understanding of human beings as sexuate. As such, sexual difference in her work *is* humanity.

experiences of the world and involves the elaboration of norms for keeping the feminine within certain boundaries. These boundaries are premised upon the negation of specific female bodies in history and their replacement with masculine constructions of the feminine as wife and mother. Women's bodies are materialised insofar as they serve the male world. This compels woman to cede to a universal that requires she 'renounc[e] her singular desires'; her relationship to her own nature (Irigaray 1996, p. 21).[6] The law that orders society is thus 'hom(m)osexual' in that it values, and is in service exclusively to, men's needs and desires, and exchanges among men (Irigaray 1985b, p. 171).

This 'phallocentrism' necessitates what Irigaray exposes as a representational economy in which woman's difference can only be conceptualised as a defective variation of the same. Woman exists in an 'economy of the same' in that equality is conceived as becoming equivalent to a man, however inclusion in phallocratic logic through equivalency with men does nothing to disrupt that logic; it remains the same. Thus, '[s]exual difference is a deviation from the problematics of sameness, it is, now and forever, determined within the project, the projection, the sphere of representations, of the same' (Irigaray 1985a, pp. 26–27). In such a symbolic order, woman has no entitlement to her own unique genealogy, culture or becoming and as such cannot enter into civil society as woman, for herself.

On this basis Irigaray is critical of the figure of the neutral 'equal' citizen as the aspiration of liberal democracy which, she argues, is a fiction which serves primarily to obscure the masculine as universal and justifies the continued denial of woman's entitlement to her own unique becoming in line with her own sexual difference. Women's liberation movements that base their goals on claims to equality with men are thus fundamentally flawed: '…claiming to be equal to a man is a serious ethical mistake because by so doing woman contributes to the erasure of natural and spiritual reality in an abstract universal that serves only one master: death' (Irigaray 1996, p. 27). Because patriarchy relies for its coherence on the denial of sexual difference it cannot be overcome by either reversal or reform. If women are to become subjects, argues Irigaray, it will most likely not be because they have first become accepted as men, or as sexually neutral citizens. What is required instead is a wholesale transformation of the civil law as *two*.

Irigaray's disruptive rereading of the texts that define the history of philosophy is both a challenge to their position of mastery but also necessary 'in order to pry out of them what they have borrowed that is feminine… to make them "render up" and give back what they owe the feminine' (Irigaray 1985b, p. 74). It is this process which leads Irigaray to the constructive phase of her work: the reconstruction of human life founded upon and guided by an ethics of sexual difference. The link

[6] When Irigaray speaks of a 'nature' appropriate to the feminine she is not referring to essential or pre-discursive characteristics of 'womanhood' that women need to return to; to define a woman's nature would be to engage in a phallocentric politics of representation. She is referring to an as yet unknowable morphology of the female sex informed by systems of language and representation unmediated by the phallus. As Elizabeth Grosz explains, 'her work is not a *true* description of women or femininity, a position that is superior to *false*, patriarchal conceptions. … Her aim is quite different: it is to devise a *strategic* and combative understanding, one whose function is to make explicit what has been excluded or left out of phallocentric images' (Grosz 1989, p. 110).

between nature and civil society can only come through sexual difference because '[i]t necessitates a law of persons appropriate to their natural reality, that is, to their sexed identity' (Irigaray 1996, p. 51). In Irigaray's reading sexual difference is not simply anatomical, it is morphological. This refers to the meaning of the body in its social and psychical context and an exploration of how the body comes to be coded, placed and experienced in a social network and its meaning in culture (Grosz 1989, pp. 111–112). Sexual difference is thus the 'living universal' that can rejoin spirit and nature, so bringing an end to the domination characteristic of contemporary culture and politics (Cheah and Grosz 1998, p. 10).

In *This Sex Which is Not One*, Irigaray muses upon what has come to be perhaps the central question of her work, that is, 'how can the double demand—for both equality and difference—be articulated?' (Irigaray 1985b, p. 81). The answer to that question in large part is her insistence on the need for a double universal. The double universal is the conduit for the full positive affirmation of two sexes and the reconfiguration of the subject beyond the 'one'.

> The sexes as we know them today have only one model, a singular and universal neutrality… But the idea that sexual difference entails the existence of at least two points of view, sets of interests, perspectives, two types of ideal, two modes of knowledge, is yet to be considered (Grosz 2006, p. 10).

In thinking through the possibility of the double universal in her constructive project Irigaray turns increasingly to the law. Irigaray is critical of law as an institution which remains mired in the *logos* of patriarchy and which has been established for and maintained by men-amongst-themselves (Irigaray 1993b, p. 4). Law is necessary, nonetheless, in order to initiate that 'full-scale rethink' of the civil system she envisages. Such a law must have the capacity to regulate the subjective and objective relations between (sexually) different persons thus facilitating a universal made up of two equal but different subjects.

In the following section I consider Irigaray's critique in light of the offence of rape in section 1 of the SOA. I will argue that the construction of woman by the statute as man's defective other involves the continued effacement and denial of woman's sexual difference. The continued denial of that difference means that the law is always already unable to appreciate the harm of rape or to provide a framework for adequate redress. I will then go on to consider Irigaray's constructive project in more detail and look at how elements of her programme of civil rights for women might change law's perception of and response to the crime of rape.

Rape in the Sexual Offences Act 2003: A Reiteration of the Same

Gender Neutrality

In seeking to address the myriad of problems with the law on sexual offences the government commissioned a review of existing law on sexual offences in 1999 to make recommendations for legal and policy reform. The SOA itself was preceded by a review consultation document entitled *Setting the Boundaries* ('the review')

which outlined the proposed changes to the SOA and associated rationale (Home Office 2000). With respect to the offence of rape specifically, the White Paper *Protecting the Public* expressed the hope that the improvements to the law would 'give victims of rape more confidence in the system and encourage them to report offences of rape' (Home Office 2002, p. 9). The review was guided in its recommendations by three key themes: protection, fairness and justice. In justifying its second theme of 'fairness' the review said:

> In looking at the present law, and considering proposals for reform, the review adopted a set of principles which reflected the requirements of the European Convention on Human Rights and the overarching commitment of the Government to equality and fairness. It was an important part of our task to recommend a law that was self-evidently fair to all sections of society, and which made no unnecessary distinctions on the basis of gender or sexual orientation. We saw this as a positive contribution to achieving a 'safe, just and tolerant society' (Home Office 2000, p. 3).

The review was thus very much guided by a traditional notion of legal equality which sought, as far as possible, to draw a Rawlsian veil over the citizenry and dispense justice without fear or favour. This commitment to fairness via the figure of the neutered liberal citizen manifested itself in a number of ways throughout the report with specific regard to the discussion of and recommendations for the reform of the law of rape. So while noting that the victims of sexual violence and coercion are mainly women, the review was careful to note that that 'the law needs to be framed on the basis that offenders and victims can be of either sex…' and so it recommended the creation of 'offences that are gender neutral in their application, unless there was good reason to do otherwise' (Home Office 2000, p. iv). The commitment to gender neutrality is seen in its starkest terms in the rape provision (section 1) of the SOA where the defendant is termed 'person (A)' and the victim 'person (B)'; the relevant enquiry being whether person A penetrated the relevant orifice of person B, without consent, with the requisite intention.

This move towards strict gender neutrality in the language of rape statutes throughout the western world has been the subject of much debate in legal and feminist circles. A familiar argument against is that gender neutrality in rape functions to disguise the reality of predominantly female victimisation (MacKinnon 1990, p. 12), and that it discourages or stymies a gendered analysis of law (Boyle 1985, p. 104). Patricia Novotny argues that gender neutrality has the effect of disguising the victimisation of women by assimilating their concerns as rape victims into a broader collective concern that may or may not fragment or disable dominant sexual paradigms of female passivity and male dominance (Novotny 2003, p. 751). Similarly, Ngaire Naffine is critical of the 'crude' reversal and reciprocity of sex rights and responsibilities in modern liberal rape law through gender neutral language which, she argues, fails to extinguish, but serves to mystify, women's unequal gendered reality (Naffine 1994, p. 25).[7]

[7] For a critical appraisal of these positions see Rumney (2007). Philip Rumney has argued passionately in defence of the move to gender neutrality in the law of rape in many western jurisdictions. In his analysis, gender neutrality in rape law extends the protection of the criminal law to all persons and 'reflects modern understandings of the nature, effects, and dynamics of nonconsensual penetrative sex acts, and is an

Following Irigaray, I argue that we must interpret the effacement of woman from section 1 of the SOA against a backdrop of a systemic historic effacement of woman as subject from law and culture in favour of an ostensibly universal subject. In section 1 of the SOA woman has no law specific to her through which her sexually differentiated self, and the damage to that self as the result of rape, can be expressed. In my argument, the need for a law respectful of sexual difference is of particular symbolic importance in a statute on rape; an offence in which the sex of the relevant parties is of central importance and which carries with it a particular social, cultural and historical meaning for women.

Women's behaviour is at the centre of socio-cultural scripts which determine whether a complainant is believed or not when she alleges rape, and therefore whether the law chooses to attribute 'truth' to her claim or not. The interpretation of this behaviour is linked back to historically invested notions of appropriate female sexuality as chaste and as the property of her father or husband. Non-traditional behaviour that calls these notions into question increases the rate of attrition and decreases the likelihood of successful prosecution (HMCPSI/HMIC 2002, 2007; Kelly et al. 2005), and continues to heavily influence juror deliberation (Ellison and Munro 2009; Finch and Munro 2006; Temkin and Krahé 2008). The historic construction of woman as weak, confused, emotional, but also sexually vociferous continues to undermine her claims to credibility before the law through its legacy in the popular ubiquity of rape myths like 'no means yes', and the pervasive belief that women frequently fabricate claims of rape to obviate their clear responsibility for their unruly bodies. In addition to these realities faced by women who enter the criminal justice system in the aftermath of rape, the fear of rape continues to limit many women's use of public and private space (Gordon and Riger 1991; Madriz 1997; Warr 1985).

The perpetuation of the sexual indifference of law under the guise of legal equality with its erasure of the sex of the victim is thus also an erasure of the gendered harm visited on the victim of rape. As Louise du Toit points out, 'The rape of women is so devastatingly effective, because it reminds women of something they have always known, namely the sex-specific fragility of their selfhood' (du Toit 2009, p. 5). In such a rendering of the victim of rape as a sexually neutral subject the harm of rape is conceptualised as simple equivalency; the harm to person B in one case, is the same as the harm to person B in another case, whether those victims are male or female. Woman is thus written into the law of rape not as woman but as male equivalent within an economy of the same.

These points are not raised to suggest that male or transgender victims of rape should be excluded from protection from the crime of rape; the unique experience of rape for a man is also elided by section 1. Nor is this argument addressed at

Footnote 7 continued
evidence-led means of appropriately labeling criminal conduct' (Rumney 2007, p. 481). Underpinning Rumney's position is his insistent dismissal of feminist arguments against gender neutrality in rape law based on what he labels 'theory' in favour of his own account which he terms 'reality'—'grounded in the wider legal and social science literature' (ibid.) Gender neutrality in his argument 'does not prevent the gendered analysis of rape' (ibid., p. 482), but is 'a means of appropriately labeling conduct that is similar in nature and effect.' (ibid., p. 484).

somehow ranking the harm of rape to men and women, respectively. It is about asserting that the harm is different because of women's disproportionate victimisation, the historical legacy of rape for women and because of sexual difference, and suggesting an historically contextual approach to law-making that is respectful of that difference.

In its discussion of who should be able to be prosecuted for rape the panel abandoned its presumption of gender neutrality when it recommended an exclusive male defendant.[8] This was in acknowledgement of the seriousness of penile penetrative assault:

> We felt rape was clearly understood by the public as an offence that was committed by men on women and on men. We felt that the offence of penile penetration was of a particularly personal kind, it carried risks of pregnancy and disease transmission and should properly be treated separately from other penetrative assaults. (Home Office 2000, p. 15).

In my argument the review overlooks similarly compelling reasons to maintain gendered language in the text of the statute. As Irigaray shows, the double universal is necessary for providing woman with a civic identity that a legacy of phallocentrism has denied her; it has symbolic importance but it is also facilitative. Similarly, law's role in the regulation of sexual conduct cannot be limited to merely one of 'appropriately labelling criminal conduct' (Rumney 2007, p. 481). One of these roles must be to protect the symbolic importance of the double universal and to safeguard woman's entitlement to her own sexuate identity. In failing to do this the SOA fails to provide a law appropriate to woman in her own particularity, further effacing woman's tenuous entitlement to her own becoming and an adequate expression of its disruption in the aftermath of rape.

Sexual Autonomy

One of Irigaray's most insistent criticisms of the operation of patriarchal law is its overwhelming focus on the protection of property and its characterisation of the individual in terms of his or her relationship to ownership. This obsession with property relations is at the expense of law that regulates relations between and amongst persons. Law, she argues, is 'defined from the standpoint of the accumulation and ownership of property, thus from a position of relative exteriority in relation to persons' (Irigaray 1996, p. 53). This has the effect of alienating subjectivity in possession, and prevents an elaboration of personhood in line with sexed belonging.

That the offence of rape has its origins in the property crime of theft is a fact that makes Irigaray's critique particularly pertinent. With its mediaeval genealogy in the Roman crime of 'raptus', a reference to the Latin term 'rapio' meaning to steal, abduct or 'carry-off' live prey, the offence was a matter of civil law with the male

[8] Cf: Rumney (2001), p. 896 and Temkin (2002), pp. 60–62 heavily criticising the review panel for failing to acknowledge incidences of female perpetrated rape, arguing that the panel was not 'equal enough' given its professed '…overarching commitment…to equality and fairness' (Home Office 2000, p. 3).

guardian as plaintiff in his position as the injured party. The crime was thus traditionally understood foremost as a property crime, framed wholly within a context of male ownership of female sexuality. With the abolition of the last overt vestige of this rationale in the marital rape exemption (*R v R* [1992] 1 AC 599), modern rape law has moved towards a characterisation of the harm of rape as a wrong against the 'sexual autonomy' of the victim. However, in a very real sense this notion remains mired within a propertied conception of personhood that fails to adequately capture the harm of rape by disassociating it from its psychic and subjective impact and encouraging the 'simple' rape/'real' rape dichotomy.

Underpinning the substantial changes in the SOA was an express commitment to better protecting the freedom of the individual to exercise autonomy in all matters sexual. It was in these terms that the review situated the 'wrong' of rape: 'We thought that rape and sexual assault are primarily crimes against the sexual autonomy of others. Every adult has the right and the responsibility to make decisions about their sexual conduct and to respect the rights of others' (Home Office 2002, p. 14). The debate surrounding the legislative framing of the crime of rape has often been couched in these terms of choice, freedom and autonomy, the key issue of contestation being the relative success or failure of the legislation to protect these entitlements.[9]

The conception of sexual autonomy that the review endorses is thus linked to a specific characterisation of the legal person, or what Ngaire Naffine has termed the 'naturalist' legal person (Naffine 2011, p. 18). This is the idea of the person as an 'enclosed, bounded and sovereign being' who exercises an inherent and naturally endowed right to physical self-governance of their own bodily property (ibid., pp. 18–19). The propertied conception of the individual implies a conception of self-ownership that demands the mind exercise control over the body and that the body has the capacity to fend off unwanted intrusion. 'Self-ownership, and hence autonomy, is lost when the flesh is no longer subject to one's own control or is surrendered to another' (Naffine 1998, p. 202).

As the conception of the wrong of rape as a crime against the property rights of certain men has been socially and legally challenged it has been replaced with this modern notion of sexual autonomy which we see in the language of the review above. This is characterised as a universal concept to which all persons are equally entitled under law, thus shifting the ownership of the female body from the male owner to the woman herself (du Toit 2009, p. 36). Sexual autonomy in this reading is the inherent right of the bounded legal person with sovereign control over their bodily property. The wrong of rape then is the invasion and appropriation of that property without consent. Or in other words, the idea that I own the property of my person and that my right to dispose of that property in the way in which I choose is violated when I am raped.

Feminists who have considered the operation of this conception of sexual autonomy in the law of rape have criticised its failure to adequately articulate the harm involved in rape. Nicola Lacey has argued that a consequence of conceiving the harm of rape as a violation of 'sexual autonomy' is the erasure of the embodied

[9] See for example Temkin (2002), p. 96.

or affective elements of rape. What is needed instead, she argues, is a law of rape which adequately captures a conception of sexual integrity informed by a relational notion of autonomy which more fully accounts for the real damage of rape, '…the way in which rape violates its victims' capacity to integrate psychic and bodily experiences' (Lacey 1998, p. 118).

Louise du Toit shares Lacey's wariness of the object, property and commodity models of sexual autonomy criticising its tendency to 'separate out self from body and sexual identity from sexualised body'. On this model, she says, 'rape leaves the true or mental self of the victim intact; it happens only to the inessential body which can be viewed as analogous to any piece of property.'

> If rape is viewed in this light, it becomes very hard to prove that rape is very damaging to the selfhood of the victim, and that a huge amount of harm is inflicted, because 'self' and 'body' are sharply and problematically distinguished (du Toit 2009, p. 41).

Thus, she argues, it is simply impossible within the current patriarchal symbolic order to understand the harm of rape as the violent erasure of women's sexual subjectivity because that order fundamentally and systematically denies and undermines women's sexual subjectivity (du Toit 2009, p. 33).

This erroneous construction of the harm of rape has a number of consequences and may also serve to explain the continued distinction in the popular and penal imaginary between 'simple' and 'real' rape (Estrich 1987). Such a distinction implies that there is a hierarchy of rapes and that 'simple' rape, rape unaccompanied by extreme violence or perpetrated by a known or former intimate, is really 'not that bad', the implicit denial being that rape is harmful in and of itself (du Toit 2009, p. 43). If rape is seen as a violation of sexual autonomy conceived as the person's freedom to withhold access to their bodily property, then a complainant who has previously granted access to her bodily property may see a diminution in the value attributed to that property the next time the question of access arises. So while the law might profess the need for fresh 'free agreement' (SOA section 74) in each instance of sexual activity, this is undermined by a concept of sexual autonomy linked inextricably to notions of property and associated ideas of depreciation, deflation and devaluation. Two quotes from prosecuting barristers asked in interviews about their views on the prosecution of rape in cases where the victim and defendant had had a previous relationship illustrate this point:

> If somebody has been having a sexual relationship with somebody before, whether it's because juries feel the same way as I do, that it's really not a terrible offence…
> I feel very strongly about this. I feel very strongly that it's a great waste of public money to prosecute the ex-husband [for] rape or the ex-boyfriend [for] rape unless there is extreme violence involved or it's part of a sort of campaign of harassment. I have had to prosecute an awful lot of cases where people have still been sort of seeing each other after having a relationship, where he wants it and she doesn't and it happens. Well she says it was a rape and probably, yes, it really was. But frankly does it matter? (Temkin 2000, p. 226)

The prosecutors quoted seem to accept as a strict legal matter that a rape in law has occurred, but that there is something about the circumstance of the rape, i.e. the existence of a prior relationship, which makes the harm to the victim somehow lesser than perhaps the classic 'real' rape scenario. If the wrong of rape is seen as a violation of your body property, if the property in your body has already been shared with that person or accessed by the person who then goes on to access your body on another occasion without permission, the value of your property is not being diminished in the same way as in the case where you are raped by someone who you have never encountered before. The value attached to that access has diminished, and so the use-value in your body has diminished, in which case your sexual autonomy has not been violated to the same degree it would have been in the stranger rape or 'real' rape scenario. This rationale thus renders invisible the harm of rape to the sexual subjectivity of the victim, annexing as it does the victim's body from her broader being.

Consent

While the SOA's conception of sexual autonomy involves the distortion of the harm of rape for woman it also fixes a specific conception of woman's sexuality. While a woman cannot be charged with rape under section 1, the statute still assumes a specific model of sexual equality that serves to limit woman's sexuality within the 'possessive' paradigm of normal heterosexual sex.

The review considered the approaches of different jurisdictions to the construction of their relevant statutes on rape, finally settling on maintaining the basic scaffolding of the offence in its Sexual Offences Act 1956 form. This meant reiterating a commitment to the concept of consent: 'We concluded consent was the essential issue in sexual offences, and that the offences of rape and sexual assault were essentially those of violating another person's freedom to *withhold sexual contact'* (Home Office 2000, p. 14 emphasis added).

The essence of the harm of rape according to the review then, is a harm against the autonomy and freedom of the rape victim. This is operationalised as a negative freedom; the freedom to 'say no'.[10] The review thus invokes an implicit construction of heterosexual sexual negotiations whereby woman (person B) consents or does not consent to sex, while man (person A) is the acquisitive penetrating party who ascertains consent. Feminists have long been critical of this extremely limited conception, or denial, of woman's sexual subjectivity in the law of rape, a denial that mirrors the act of rape itself. As du Toit explains, the only thing determining the line between 'normal' (heterosexual) sex and rape is the overt response of the victim to the defendant's (man's) actions. The default position this appears to presume then is that the person being penetrated wants sex, a presumption only rebutted if she communicates her lack of consent in such a way that the defendant cannot, in 'all the circumstances…reasonably believe' otherwise (SOA sections 1(1)(c) & 2). '[T]his type of rape law normalises male sexual agency

[10] For a more detailed discussion of the link between autonomy and consent in the SOA see Munro (2008).

as acquisitive, assertive, primary and active, even forceful, and female sexual agency as secondary, derivative, passive and responsive' (du Toit 2007, p. 61). Naffine has criticised this construction of sexual relations as stuck in an 'old dream of symmetry implicit in the traditional form of "erotic love": the dream is that one party (the man) possesses another (a woman), who wishes only to be possessed' (Naffine 1994, p. 25).

In this construction of woman as man's defective other, woman's sexuality is written into law as static fixity. The only movement envisaged is straightforward reversal. In seeking to clarify what it meant to consent the review recommended the inclusion of a definition of consent in statute. This is found in section 74 of the SOA and reads '… a person consents if he agrees by choice, and has the freedom and capacity to make that choice'. In discussing its proposal for the inclusion of a definition of consent the review noted that it wanted to avoid criticism like that offered by du Toit and Naffine of consent as something sought by the stronger party and given by the weaker. It noted that '[i]n today's world it is important to recognise that sexual partners are each responsible for their own actions and that there should be parity of status. In defining consent we are not seeking to *change* its meaning, rather to clarify the law so that it is clearly understood' (Home Office 2000, p. 17). This 'parity of status' presumably means that women 'should' also be able to act as the acquisitive party in (hetero)sexual negotiations. Naffine points out the Irigarayan critique of this logic when she notes that this view of sexual equality has changed 'neither the possessive form nor direction of sex… [but] ha[s] simply inverted this possessive relation without considering whether it is appropriate to regard the sex protected by such law as possession' (Naffine 1994, p. 25). In this way, the consent paradigm present in the SOA is still one very much enmeshed in an economy of the same in which sexual equality is conceived entirely through a phallocratic paradigm.

> The sex of rape is self identical, is at one with the sexuality of the initiator conceived as legal and sexual subject. It is never about two distinctive beings who are cherished in their distinctiveness… Nowhere is there a sense of sexual autonomy as mutuality, as mutual transformation. … In modern rape law…there is no sense of sexual difference, of sexual specificity: of men and women as two sexes and sexed beings. We must say, therefore, that the sex of our rape law does not actually recognise two sexes. In modern rape law, there is no such thing as sexual difference… (Naffine 1994, pp. 32–33)

Instilling woman with her own sexual subjectivity cannot be achieved by simply reversing the possessive paradigm. What is required is a space for woman to think her own sexuality; what it might mean for woman to say 'yes', as woman.

In the next two phases of her constructive project Irigaray posits the conditions necessary to develop a culture appropriate for women; a culture in which that 'yes' might be thought. She also looks to elaborate an intersubjective coexistence of two distinct beings (man and woman) living a life faithful to their own sexuate identity. The role of law informed by an ethics of sexual difference that emerges from Irigaray's work is one that seeks equality through the inauguration of sexual difference in law with the concomitant guarantee of the protection of space between

the two in law. In what follows I elaborate Irigaray's programme of civil rights for women.

Thinking Sexual Difference Through the Law of Rape

> Women's exploitation is based upon sexual difference; its solution will only come through sexual difference (Irigaray 1993b, p. 12).

In her later writing, influenced by work with women's groups and liberation movements, Irigaray began to believe that an equitable legal system for both sexes was necessary in order to facilitate and guard a 'framework of relations, horizontal and vertical, that respects difference' (Irigaray 1993b, p. 83). Her programme of sexuate rights is the most concrete exposition of her thinking on sexual difference (Irigaray 1993b, pp. 86–89, 1994, pp. 60–62, 1996, p. 132). In this legal code Irigaray envisages the preliminary steps for a radical refounding of culture grounded upon the double universal. The rights which it bestows gesture towards the realisation of a justice that promotes respect for each person in their own life, in their sexuate life and in their particular way of inhabiting the world. Irigaray is very clear that in order for justice to prevail for each person in their own singularity the process must be 'started from scratch'. This process must be 'pursued in isolation by each woman in turn since there is no legal recourse that is specific to woman' (Irigaray 1993b, p. 132). In this way Irigaray eschews a strictly negative concept of law in favour of an ideal in which law has facilitative, symbolic and protective functions with respect to the inauguration of sexual difference. 'By virtue of this law: Universal and particular are reconciled, but they are two. Each man and woman is a particular individual, but universal through their gender, two which must correspond an appropriate law, a law common to all men and to all women' (Irigaray 1996, p. 51).

In what follows I imagine how cognisance of the right to 'virginity' and to equivalent linguistic and symbolic systems of exchange, as imagined by Irigaray in her legal code for women, might reframe a consideration of the harm of rape and also woman's ability to speak that harm through the nomos of law.

Law's Duty to Safeguard the Virginity of Woman

Irigaray's legal code for women is a clear attempt to depart from law's focus on property rights and also to incorporate her earlier criticism of the hom(m)osexual monopoly on systems of exchange (Irigaray 1985b, pp. 170–191). Irigaray posits her legal code as a 'law of persons' which, she states, 'will enable us to overcome the splits and contradictions between subjectivity and objectivity concerning needs and demands that arise from a person's own will' (Irigaray 1996, p. 51). Legal objectivity is thus no longer dependant on a frame of reference external to the person, which then leaves open the possibility of 'subjectivities developing without alienation in possession…'.

> Respecting the law thus becomes, with this definition, a moral and ethical task. It regulates the spiritual behavior of every individual—man or woman—and

> regulates the organization of society… Law can thus function as a dialectical tool between subjective will in the self and for the self. Law constitutes an objectivity. Yet, if it accords with the reality of the person, it has a subjective aspect. It guarantees a subjectivity faithful to itself, one not defined by the object and not alienated in it. (Irigaray 1996, p. 52)

In privileging the regulation of human relations Irigaray eschews the strictly prohibitive force of law in favour of a facilitative and positive account as a frame through which women can pass from nature to civil life, from the personal to the community. In doing so she inaugurates in law a number of values essential to the needs of the person including dignity, identity and virginity. Irigaray reappropriates virginity from its dominant (phallocratic) physiological meaning to encompass the inalienable right of a woman to 'conserve and cultivate her own identity' (Irigaray 2005, p. 68), including her relationship to the divine and entitlement to her own self-affection.

Respect for virginity is thus ultimately facilitative of an ability to transform oneself, or to become oneself, from *inside*: 'The goal that is most valuable is to go on becoming infinitely. In order to become, it is essential to have a gender or an essence as horizon…. To become means fulfilling the wholeness of what we are capable of being' (Irigaray 1993c, p. 61). This is contrasted against woman's becoming within the phallocratic symbolic: 'She is constituted from outside in relation to a social function, instead of to a female identity and autonomy. Fenced in by these functions, how can a woman maintain a margin of singleness for herself, a nondeterminism that would allow her to become and remain herself?' (Irigaray 1993c, p. 72).

With reference to the historical legacy of the propertied conception of personhood on the victim of rape it is perhaps easier to understand Irigaray when she speaks of the alienation of subjectivity when it is anchored in a possessive paradigm, and the necessity of moving away from this conception in order to reconcile law with 'natural reality' (Irigaray 1996, p. 51). Irigaray's reappropriation of the concept of virginity is instructive here and her understanding of the law's role in protecting woman's virginity as the protection of the unique moral and physical inviolability of woman arguably provides a more adequate framework through which to think the harm of rape.

For Irigaray, the virginity of woman is an essential condition for autonomy. Because the body is objectified in the phallocratic symbolic it is still necessary to talk about autonomy in terms of property and possession. Irigaray uses the notion of virginity to try and support an understanding of autonomy which is an expression and elaboration of a particular natural and sexual belonging. The virginity of woman is also linked inextricably to the self-affection of feminine subjectivity. This process of self-affecting involves searching for one's becoming within oneself, as opposed to outside the self '…in objects, things, and their representations or mental reduplications' (Irigaray 2008, p. 221). An ability to affect oneself relies on access to a cache of signifiers appropriate to woman's natural reality. Irigaray suggests that such a signifier can be found in the morphology of the two lips, a model for the plurality of the feminine (Irigaray 1985b, pp. 205–219).

In returning subjectivity to woman herself, rather than conceiving her subjectivity (or lack thereof) in terms of its relation to an object (property) we can begin to see perhaps how the crime of rape involves a harm to woman that affects the whole of her being, and to be. In such a reading rape becomes a harm in and of itself, a violation of the inviolable, one in which a distinction between 'real' and 'simple' rape is rendered meaningless. The law must be required to safeguard and recognise virginity, '…if the word signifies safeguarding a space–time for what has yet to come' (Irigaray 2013, p. 62). This 'what has yet to come' is violated and retarded by the act of rape in its complete and fundamental disregard for the very humanity of the subject and the circumstance under which that violation occurs becomes irrelevant in an assessment of the nature of that harm, thus allowing perhaps a more accurate representation of the extent and impact of that harm.

Woman's Voice and Law's Logos

> If we don't find a language, if we don't find our body's language, it will have too few gestures to accompany our story (Irigaray 1985b, p. 214).

In further imagining how Irigaray's code of civil rights for women could influence the law's approach to the crime of rape I turn now to her work on feminine genealogy, divinity and language. Irigaray argues for the articulation of the female sex in discourse, history and culture and her legal code reflects these imperatives in the third and fourth sets of rights. When Irigaray speaks of a culture particular to the female sex she considers, amongst other things, female genealogies which she says have been neglected and erased by patriarchal traditions and replaced by male genealogical systems masquerading as universal. Woman, argues Irigaray, '…ought to be able to find herself, among other things, through the images of herself already deposited in history and the conditions of production of the work of man, and not on the basis of his work, his genealogy' (Irigaray 1993a, p. 11).

The historic erasure of the feminine is also evident in the 'deep economy of language' where patriarchal culture has reduced the value of the feminine to 'an abstract nonexistent reality'.

> Just as an actual woman is often confined to the sexual domain in the strict sense of the term, so the feminine grammatical gender itself is made to disappear as subjective expression, and vocabulary associated with women often consists of slightly denigrating, if not insulting, terms which define her as an object in relation to the male subject. This accounts for the fact that women find it so difficult to speak and be heard as women. They are excluded and denied by the patriarchal linguistic order. They cannot be women and speak in a sensible, coherent manner. (Irigaray 1993b, p. 20)

Irigaray suggests in her legal code that women should have the right to defend their traditions and religion against unilateral decisions made according to male law. She also suggests that systems of exchange, such as linguistic exchange, should be revised in order to guarantee the right to equivalent exchange for men and women (Irigaray 1993b, p. 89).

The alienation of woman from her own language and reference to the symbolic can, arguably, be seen with great clarity through research and survivor narratives chronicling women's experience of the rape trial. Alison Young's research attests to a fragmentation of women's bodies during the process of the rape trial. Referring illustratively to T S Eliot's 'The Waste Land', Young notes that in that poem women's bodies are both 'disarticulated' and 'discombobulated'; simultaneously sexual and violable. Through this imagery Young draws similarities with the criminal law of rape which she says is 'drenched with the same desire for the dissection of women's bodies…' (Young 1998, p. 444). Rape victims are often systematically stripped of their lived being-ness during the course of the trial, constructed instead as meaty, fleshy organisms that ebb and flow, and upon which desire and meaning is projected and interpreted. This imaginary of fragmentation and waste is also referred to by Irigaray when she speaks of the paucity of representations to which woman can refer in constituting themselves:

> the rejection, the exclusion of a female imaginary certainly puts woman in the position of experiencing herself only fragmentarily, in the little-structured margins of a dominant ideology, as waste, or excess, what is left of a mirror invested by the (masculine) 'subject' to reflect himself, to copy himself. (Irigaray 1985b, p. 30).

Kristin Bumiller has described this reduction of women to fragmented bodies in the courtroom during her analysis of two high profile rape trials in the United States.[11] Bumiller suggests that the process takes place first in the prosecution narration of events, where the female body is constructed as the scene or landscape for the interpretation of events. Through medical and scientific evidence of physical markers of the attack—including injuries and signs of resistance, and a description of contact with the defendant—'bits' of a complainant's body are 'visualized as they become relevant' (Bumiller 2008, p. 44). Bumiller describes this (de)construction of the complainant's body as a sustained process that erases her agency.

> The legal verification of rape in the courtroom diminishes her voice in contrast to the overwhelming presence of her body: she is voiceless form or mechanical woman. Without the victim's voice, the power of interpretation belongs to the law's vision of sexual crime. The legal filter of relevancy erases her own experience from a retelling of events that focuses on men's transgression against her body (Bumiller 2008, p. 46).

Bumiller's description of the silencing effects of this process echoes Young's conclusions on the way that different projections of bodily 'texts' reveal the law's inability to 'hear' the narrative of rape complainants or indeed, she alleges, its intentional exclusion of these voices (Young 1998, pp. 463–464).

[11] A particularly harrowing example of this type of courtroom dynamic in the UK context can be seen in the recent case of Michael and Hilary Brewer, found guilty of five counts of indecent assault (and not guilty on three further counts and one count of rape) on 8 February 2013. Their victim, Frances Andrade, committed suicide the day after giving evidence against her abusers describing the experience to a friend as 'liked being raped all over again' and as feeling 'fragmented' after her courtroom ordeal (Pidd and Ibbotson 2013).

Rape is a crime in which the victim experiences a profound deconstruction of the self. This is then exacerbated by an institutional apparatus that repeats this process on a discursive level. In compelling women to speak the harm of their rape through this phallocratic *logos* law demands the articulation of harm that has no name. The word of law is thus '…bound in a same that nullifies…difference [] and reduces…exchange to a tautology, an already programmed scenography, a monologue in two voices' (Irigaray 2002, pp. 46–47). In a very real way the rape trial requires that women submit and contribute to the development and maintenance of an artificial language that is not their own and which depersonalises them. As Irigaray point out, this does not equate with having 'equal rights' (Irigaray 1993b, p. 84).

Law's *logos* is part of an '…isomorphism with the masculine sex, [one which] privilege[s] unity, form of the self, of the visible, of the specularizable…' (Irigaray 1990, p. 82). This logic is created and maintained without reference to the female sex which cannot be described or represented in unitary terms. Thus, '[j]ust as the female genitals are "plural"… so women's language will be plural, autoerotic, diffuse, and undefinable within the familiar rules of (masculine) logic.' (Burke 1994, p. 38).

In imagining an outside to Aristotelian logic so prized by law Irigaray imagines a realm of an as yet unknowable; how woman would then constitute herself forms a horizon of possibilities. 'If the female imaginary were to deploy itself, if it could bring itself into play otherwise than as scraps, uncollected debris, would it represent itself, even so, in the form of one universe?' (Irigaray 1985a, b, p. 30). The first step to a realisation of sexual difference in law must be a recognition of this possibility of woman's voice and a respect for her history and genealogy and of her unique (sexuate) humanity. Such a frame of reference implicates a woman's ability to render her experience of rape intelligible within her own symbolic universe and in turn to counter her dismemberment during the process of the rape trial. In Drucilla Cornell's words, 'the legal system must be forced to hear women without translating their suffering into a harm already recognised as such within the system. If women cannot express their reality within the legal system, their reality disappears…' (Cornell 1993, pp. 82–83).

Providing a space for woman's voice would then involve the deconstruction or questioning of the hegemony of legal discourse, the consequences of which become plain when woman is forced to speak the harm of rape through the filter of legal (masculine) logic. If the law is required to provide this space and to respect equivalent modes of exchange for both sexes women will have the chance to articulate a bodily integrity essential for personhood and thus, perhaps, grasp and express the harm of rape.

Conclusion

Underlying much of Irigaray's work to date has been a fascination with the conditions for and the possibility of love between two. In *To Be Two,* Irigaray considers the limits of intersubjective coexistence and the spectre of rape: 'In love,

the gaze often remains fascination, enchantment, occasionally rape and possession. Why is it that the other who looks at me during or after loving can injure me? He looks at an object, not a subject. He is unfaithful to an intention, to an interiority, to a gaze which we can share' (Irigaray 2000, p. 42). Her thinking thus emphasises the crucial importance of a shared horizon of becoming grounded in a respect for difference. It is in this utopian vision that she sees the possibility for love between two in intersubjectivity.

That hers is a politics of the impossible should not distract from the force of this vision. As Rosi Braidotti observes, '…Irigaray is already looking onto a universe where the regime of phallogocentrism is over' (Braidotti 1994, p. 111). And as such 'if sexual difference ever emerged in our culture, we would cognize it, not re-cognize it.' (Deutscher 2002, p. 43). If therefore, sexual difference is impossible, its legal recognition must also be impossible. 'Nonetheless, [Irigaray] does imagine the possible constitution of sexual difference. She imagines how it might involve a paradoxical legal recognition of its own possibility. Sexual difference would not precede the time of its legal recognition. It would be instituted by it' (ibid.).

In a similar way we must also imagine a future in which men no longer rape women with impunity and where women can go to the law to seek protection, justice and recompense in the aftermath of rape without having their injury compounded by an institutional apparatus systematically blind to their reality. In such a vision law functions not as a power over but as respectful mediator between the two. The law is thus in service of the two with the protection of life as its priority.

In this article I have tried to show how Irigaray's critique of western history and philosophy exposes the 'blind spot' of the current law of rape in the SOA. That law purported to remedy the 'archaic and discriminatory' aspects of the previous law but remains, I argue, mired in the morass of sexual indifference in which woman continues to be constructed as man's (defective) other. This construction prevents law from seeing the harm of rape or from conceiving of woman's difference as anything other than a defective variation of the same. It effaces woman's specificity leaving her suspended in an ahistorical space in which the unique and gendered meaning of rape for women is also erased.

I suggested that Irigaray's constructive project in her later work is instructive in showing how a new horizon of sexual difference protected and facilitated by law might change how we perceive and respond to the crime of rape. Irigaray's legal code institutes rights which seek to give women access to a civic identity and thus equality, based on sexual difference. Her insistence on the need for law to be harnessed in the service of the protection of humanity, and not property, is particularly pertinent for a law which continues to conceive of rape's harm as a wrong against the property in the person. Such a conception obscures the damage of rape to the whole being, and to be, of the victim. Conceiving of rape as a violation of the virginity of the victim instils woman with a subjectivity grounded in her own inviolability, and thus more adequately captures rape's harm. Similarly, Irigaray's work on the need for woman to have access to her own language and reference to the symbolic exposed the difficulties faced by women during the rape trial. In attempting to speak the harm of rape through the filter of legal (masculine)

discourse, woman's alienation from her own nature is laid bare. If law is to evidence a commitment to objectivity in its approach to the crime of rape it must address the double demand of equality and sexual difference by first providing the space for and protection of an equivalent system of exchange for women. Only then can the preliminary steps be taken towards a juridical environment in which women can more adequately understand and articulate the harm of rape.

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