

“DISRUPTING THE SURFACE OF ORDER AND INNOCENCE”:  
TOWARDS A THEORY OF SEXUALITY AND THE LAW

by

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This article draws from two strands of theory: postmodernism and postmodern feminism<sup>1</sup> to develop a theoretical analysis of the text of the law of sexuality. It seeks to apply some of the concepts used in those approaches to analyse the text of the law of rape, incest and prostitution, establishing a theoretical framework for the interpretation of relevant statutes and cases and, in doing so, it drafts the parameters of a theory of law and sexuality.

Aspects of the work of Foucault and Derrida are used from the first theoretical strand and concepts are drawn from Cixous and Irigaray<sup>2</sup> in the second strand. Additionally, the study builds on some aspects of the semiotic philosophy of Roland Barthes.

1. *Theoretical Framework*

It is the argument of this article that postmodernism's critique of notions of transcendent reason, absolute truth and justice and the uni-

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1 Postmodern feminism is used throughout this article to denote the work of a group of contemporary French feminist philosophers, most specifically Luce Irigaray and Helene Cixous. The work of these writers is sometimes referred to as *écriture féminine* although in respect of Irigaray, it is a label which has been attached to her but may not be used or accepted by her. See Margaret Whitford, *Luce Irigaray, Philosophy in the Feminine* (London: Routledge, 1991), 38.

2. These two philosophers, in particular, have used, challenged and developed postmodernist theory. See Claire Duchén, *Feminism in France*, (London: Routledge, 1988), for an analysis of the relationship between their work and that of Foucault, Lacan and Derrida. The quotation in the title of this article is taken from Duchén p.71.

fied subject, have much to offer the development of feminist theories of sexuality and the law but it is also argued that postmodern feminist thought is required to develop and analyse those insights. Arguably, many of the insights of post-modernism are a philosophical response to the crisis of the *male* subject, a response which could be characterised as the “feminisation”<sup>3</sup> of philosophy — a retreat from the certainties of absolute concepts, a de-centring of the subject.

Postmodernism has allowed feminists to challenge notions of gendered truth as part of gender power by subverting notions of absolute truth and this is a powerful tool in respect of the law, arguably one of the most sacrosanct of Enlightenment discourses<sup>4</sup>. However, it

3. As Braidotti suggests, male philosophers situate themselves within the tradition of philosophy as speaking subjects. It is the male subject who is in crisis and he is dealing with this by turning to a hitherto neglected aspect of himself — the previously repressed feminine but not to women. R. Braidotti, “Ethics revisited: women and/in philosophy”, in C. Pateman and E. Gross eds., *Feminist Challenges: Social and Political Theory* (Boston: Northeastern University Press, 1986), 60.
4. It is the argument of this article that Enlightenment thought with its fixed notions of transcendent reason, the unified subject and universal truth and justice is in one sense the precursor of and the focus for the critique and oppositional development of, postmodernism. It is also argued that not only does Enlightenment thought co-exist with postmodernism but also that much postmodernist thought is circumscribed and conditioned by the Enlightenment project. In this, the argument closely follows that of Foucault in “What is Enlightenment?” He argues that: “We must try to proceed with ourselves as beings who are historically determined to a certain extent by the Enlightenment.” “Was ist Aufklärung?”, trans. in *The Foucault Reader*, ed. P. Rabinow (Harmondsworth: Penguin, 1991), 43. It is important to consider the relationship of feminism to the Enlightenment project. Jane Flax argues that: “.. it is not unreasonable for persons who have been defined as incapable of self-emancipation to insist that concepts such as the autonomy of reason, objective truth, and beneficial progress through scientific discovery ought to include and be applicable to the capacities and experiences of women as well as men.” She concludes however, “.. despite an understandable attraction to the (apparently) logical orderly world of the Enlightenment, feminist theory more properly belongs in the terrain of postmodern philosophy. Feminist notions of the self, knowledge, and truth are too contradictory to those of the Enlightenment to be contained within its categories... Feminist theorists enter into and echo postmodernist discourses as we have begun to deconstruct notions of reason, knowledge, or the self and to reveal the effects of the gender arrangement that lay beneath their neu-

threatens to abort the developing foetus of another truth — the truth of the female Other<sup>5</sup> growing toward subjectivity — through the very relativising which facilitates these critiques.

It is necessary to disengage from an identification with the crisis of the *male* subject (presented as a crisis for the ungendered subject), in advance of the theoretical birth of the *female* subject<sup>6</sup> and postmodern feminism can provide a path for that disengagement.<sup>7</sup> Irigaray criticises philosophers who attempt to annex the feminine but also suggests that the crisis may create the conditions for the emergence of the feminine.<sup>8</sup>

Postmodernism provides some tools for the deconstruction of the gendered subject, gendered notions of truth and reason, tools which make it possible to show how these features are constructed by the dominant male discourse as expressed in the text of the law, although postmodernism presents those things as without gender. Postmodern feminism can dig beneath them to the level which reveals the nature and significance of that gendering.

### 1.1 *Disruption and Deconstruction*

What this study seeks to enact is a double disruption. First, the disruption of the law's surface of order and innocence to find the conflict beneath<sup>9</sup> the (ostensibly ungendered) notions of the unified sub-

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tral and universalising facades." Jane Flax, "Postmodernism and Gender Relations", in *Feminism/Postmodernism*, ed. Linda Nicholson (New York: Routledge, 1990), 42.

- 5 The concept of the "Other" is found particularly in the work of Helene Cixous and Luce Irigaray and is set out in detail below at pp.7-10.
- 6 Whitford, *supra* n.1, at 30 argues that the attempts of male philosophers to incorporate the feminine may be seen as a response to the increasing strength and pertinence of feminist discourse and criticism, an attempt to maintain their traditional position of discursive mastery.
- 7 Irigaray attempts to "theorise the conditions for a female subject which could not simply be incorporated back into the male imaginary as its other." Whitford, *supra* n.1, at 33. See also *Parler n'est jamais neutre*. (Paris: Minuit, 1985).
- 8 Whitford, *supra* n.1, at 31. See also *This Sex Which is Not One*. (Ithaca: Cornell University Press, 1985.)
- 9 This task, described by Duchon, *supra* n.2, as that of Roland Barthes whose work is discussed below p.11, is a focal point of the article.

ject, transcendent reason and universal truth, the conflict beneath surface propositions that the laws against rape and incest are there to protect the victims of sexual violence and the law of prostitution is there to protect the public against the visible excesses of a necessary evil and the innocent from being drawn into its web and secondly, a disruption of some of the concepts used for this deconstruction to show their gendered underpinnings and to unearth the roots of gender power within the law.

The study will consider how the law of rape, incest and prostitution forms part of a dominant male discourse which constructs the male speaking subject and the female Other around two binary opposites,<sup>10</sup> using particularly the notions of reason, consent and the logic of desire to construct the power of the subject and to negate the subjectivity of the constructed Other.

The body of the article will deconstruct the text of the law of rape, incest and prostitution — statutes and cases — to show how its constructions create the sexually expressed power of the male subject and concomitantly, the powerlessness of the female Other. The method of this analysis will be deconstructive, looking for elements in the law which

fall outside the logic of the text's avowed aims (exerting) a textual resistance to logocentric assumptions implicit in the text.<sup>11</sup>

It will look for elements in the text which question the presumptions of the text, considering the necessity with which the text is bound up with what it cannot say.

For Derrida, deconstruction is neither method nor critique.<sup>12</sup>

10 This notion is developed by Jacques Derrida. See, for example, J. Derrida, *Positions* (London: Athlone Press, 1981). It is further considered below.

11 An explanation of Jacques Derrida's notion of deconstruction by Elizabeth Grosz in her article "Contemporary Theories of Power and Sexuality", in *Feminist Knowledge: Critique and Construct*, ed. Sneja Gunew (London: Routledge, 1990), 94. Derrida "labels the mainstream of Western thinking logocentric due to its constant privileging of the logos, the word as metaphysical presence" — Toril Moi, *Textual/Sexual Politics* (London: Routledge, 1991), 179. The logos is seen as mirroring reality, while for Derrida "reality" is embedded in the text, seen through, it not separate from it.

12 J. Derrida "Letter to a Japanese Friend", in *A Derrida Reader Between the Blinds*, ed. P. Kamuf (Hemel Hempstead: Harvester Wheatsheaf, 1991), 271-276.

Here, however, deconstruction is used as a method in the sense that the insights of its approach are developed not for the purposes of persistently undermining essentialist notions but in order to reveal and distil what lies within the text, finding in the text that which it cannot say.<sup>13</sup>

### 1.2 *The Male Subject and the Female Other in the Dominant Male Discourse*

First, it is important to examine the concept of the male subject. It is argued that at the level of law and philosophy the subject is male. Luce Irigaray states:

even when aspiring to a universal, neutral state, this subject has always written in the masculine form, as man ... It is man who has been the subject of discourse whether in the field of theory, morality or politics.<sup>14</sup>

Irigaray goes on to argue that "any theory of the subject has always been appropriated by the 'masculine'".<sup>15</sup> She then sets out the relationship between this male subject and the female Other, stressing that the lack of subjectivity of the latter is essential to buttress and construct the subjectivity of the former:

Once imagine that the woman imagines and the subject loses its fixed obsessional character ... If there is ... no opaque matter which in theory does not know herself, then what pedestal remains for the ex-sistence of the "subject"?<sup>16</sup>

Cixous underscores this concept arguing that :

"There has to be some "Other". No master without slave".<sup>17</sup> While

13 Deconstruction is a Derridean notion which in the words of Claire Duchon, *supra* n.2, at 75, "questions the presuppositions, the assumptions on which a text is based, the starting point of any text is questioned as are those elements which effect the text without necessarily being visible in the text."

14 "Sexual Difference" in *French Feminist Thought*, ed. Toril Moi (Oxford: Basil Blackwell, 1987), 119.

15 *Speculum of the Other Woman* (New York: Cornell University Press, 1985), 133.

16 *Ibid.*

17 "Sorties: Out and Out: Attacks/Ways Out/Forays", in *The Newly-Born Woman*, Helene Cixous and Catherine Clement (Manchester: Manchester University Press, 1986), 71.

Irigaray goes further in arguing that woman is not only Other but is quite specifically man's Other: "his negative or mirror-image situated outside representation."<sup>18</sup>

The male subject speaks through a discourse — a concept developed by Michel Foucault<sup>19</sup> and indicating a particular way of seeing and expressing (aspects of) the world. For Foucault, there are many competing discourses. There is no fundamental or unmediated meaning, there is only relative meaning within the discourse.

The intention here is to explore one discourse — the discourse which will be called the dominant male discourse which is inhabited and defined by the male speaking subject. That discourse will be explored as it informs and expresses the law of sexuality and, specifically, as it constructs the male subject and the female Other within that law. The construction of the gendered Other within the discourse of the gendered subject extends beyond Foucauldian notions to look at structural issues suggested particularly by the work of Irigaray.<sup>20</sup> In her complex analysis of the gendering of discourse, Irigaray argues that in imaginary and symbolic terms, language can be seen as a territory, a house or a home:

men continually seek, construct, create for themselves houses everywhere.<sup>21</sup>

That house of language which for man even constitutes a substitute for his home in a body ... woman is used to construct it but (as a result?) it is not available to her.<sup>22</sup>

For Irigaray,

The "subject of philosophy"<sup>23</sup> is narcissistic, closed to the encounter with the Other, while the Other (woman) has not yet acceded to subjectivity.<sup>24</sup>

This study is concerned to analyse how the dominant male discourse constructs the subject and the Other within one specific text — the

18 *Speculum of the Other Woman*, *supra* n.15, at 135.

19 See particularly Michel Foucault, "Politics and the Study of Discourse", in *The Foucault Effect*, ed. G. Burchell, C. Gordon and P. Miller (London: Harvester Wheatsheaf, 1991).

20 See, for example, Irigaray, *Parler n'est jamais neutre* (Paris: Minuit, 1985).

21 *Ethique de la différence sexuelle* (1984) quoted in Whitford, *supra* n.1, at 43.

22 *Ibid.*

23 The male subject.

24 Whitford, *supra* n.1, at 33.

law — a text which at the symbolic level is part of the “home” of the male subject.

For Foucault, each discourse contains its own explanations and understandings which generate its power.<sup>25</sup> The dominant discourse is a discourse in the sense that it is a particular way of seeing the world but, it is argued that the meaning and power of this discourse is pervasive and expressed in the law of sexuality to exclude competing meanings and interpretations. While Foucault’s concept of power is fluid, momentary, “in play”<sup>26</sup> it is argued that power-knowledge leaves room for gender to be not merely a site of difference but also a site of power.<sup>27</sup> In this sense, the dominant male discourse is also a site of power.

It is true that Foucault is concerned to emphasise the productive and creative aspects of power and it is argued here that the dominant male discourse as expressed in the law is productive and creative in its capacity to construct the power of the male subject.

Further, for Foucault, there are three levels of analysis of power:

We must distinguish the relationships of power as strategic games between liberties — strategic games that result in the fact that some people try to determine the conduct of others — and the states of domination, which are what we ordinarily call power. And between the two, between the games of power and the states of domination, you have governmental technologies ... The analysis of these techniques is necessary, because it is often through this kind of technique that states of domination are established and maintain themselves. In my analysis of power, there are three levels: the strategic relationships, the techniques of government and levels of domination.<sup>28</sup>

This study is concerned to analyse power at all three levels: first, in the “strategic relationships” between the male subject and the female Other in relation to the rape, incest and prostitution encounters,

25 See “Truth and Power”, in *The Foucault Reader*, ed. Paul Rabinow (London: Penguin, 1991).

26 Foucault interviewed by Lucette Finas in *Michel Foucault: Power, Truth and Strategy*, ed. Morris and Patton (Sydney: Feral Publications, 1978), quoted in E. Grosz, *supra* n.11, at 87.

27 This argument is developed by Michele Barrett, “Concept of Difference”, *Feminist Review* 26 (1987), 35.

28 “The ethic of care for the self as a practice of freedom”, an interview with Michel Foucault in *The Final Foucault*, ed. J. Bernauer and D. Rasmussen (Cambridge, Massachusetts: MIT Press, 1988), 19.

secondly, in relation to “techniques of government” — the way in which the law is played out in respect of that construction in those aspects of the text and, thirdly, the way in which those techniques maintain “levels of domination.”

### 1.3 *Binary Opposites: the Role of Reason, Consent and the Logic of Desire*

It is important to explore this discourse which is inhabited and defined by the male speaking subject. It is necessary to analyse how this discourse sustains and underwrites gender power in the text of the law.

Derrida’s concept of *différance* allows notions of “male” and “female” as expressed in the law to be theorised in terms of his critique of binary oppositions.<sup>29</sup> At the root of this binary opposition between for example, man/woman, culture/nature is the value given to the first term at the expense of the second.

For the purposes of an analysis of the law of sexuality, one of the most powerful of these “opposites” is that of reason and emotion. Reason is attached to the male pole and emotion to the female. Reason is valued and emotion derided. The male is constructed as objective and logical and the female as emotional and subjective. This dichotomy is fundamental to a deconstruction of the law of sexuality.

As Lloyd<sup>30</sup> argues, reason (like law) does not simply reflect but also constitutes the terms and context of sexual difference. An analysis of the law of sexuality will unearth a series of paradoxes around the notion of reason, particularly as it informs the concept of consent. That analysis will consider how and to what extent reason and consent underpin the power of the dominant male discourse by legitimating sexual violence.

It is possible to explore within the law, the ambivalent relationship between reason and sexuality. It is argued by Foucault that:

The West has managed not only, or not so much, to annex sex to a field of rationality ... but to bring us almost entirely — our bodies our minds, our individuality, our history — under the sway of a logic of concupis-

29 See, for example, Derrida, *Positions* (London: Athlone Press, 1981).

30 G. Lloyd, “The Man of Reason”, quoted in Christine Di Stephano, “Dilemmas of Difference”, in *Feminism/Postmodernism*, *supra* n.11, at 71. This article includes an extended discussion of the notion of reason in this context.

cence and desire.<sup>31</sup>

It is important to see how that logic is played out in the law of sexuality.

It is necessary to go beyond a critique of reason which does not recognise the gendered nature of that concept and the implication for gender power of that which is repressed by the elevation of reason. It will be seen that the logic of desire as expressed in the law of sexuality can leave feminists seeking the application of "reason" in opposition to the use of its shadow: the will to power — the determination to control, to manipulate through a facilitating notion of consent in the law of sexuality.<sup>32</sup>

While the law of sexuality is focused at its surface on two purposes: first, dealing with a sub-group of men, namely sexual offenders and secondly, containing male sexuality, beneath that surface of innocence, it provides sustenance for a discourse predicated on a series of notions which do not proscribe sexual violence but, rather, sustain it.

In theorising what lies beneath that surface by analysing the construction of the male subject and the female Other through the text of the law, it is possible to see at one level of generality the male subject confronting the female Other but concretely, the individual male confronts the individual female and the power relations immanent in that relationship are inherent in the rape, incest or prostitution encounter. Such power relations are reflected in and constituted by the law which pertains to each.<sup>33</sup>

It will be argued that the construction of the female as Other is achieved by the denial of subjectivity to the individual female victim of the rape and incest encounter. A denial which powerfully constructs consent against her and which develops a series of mytholo-

31 Michel Foucault, *The History of Sexuality* (London: Peregrine, 1987), 78.

32 In a fascinating and complex analysis of rationality, Irigaray is concerned to unearth that which underlies the rational subject, the unrecognised control by unconscious desires. She develops a sophisticated theory of the relationship between rationality and the male imaginary. (See, for example, Irigaray, *This Sex Which is Not One* (Ithaca: Cornell University Press, 1985).) Whitford, *supra* n.1, at 53, argues: "Irigaray's critique of rationality is not a prescription for female irrationality; to say that rationality is male is to argue that it has a certain structure, that the subject of enunciation which subtends the rational discourse is repressed in a certain way, through the repression of the feminine."

33 See the discussion of Foucault's three levels of power *supra* at p.9.

gies about her. Roland Barthes defines mythology saying that it is generated from history —

It cannot possibly evolve from the nature of things.<sup>34</sup>

It points out and it notifies; it makes us understand something and it imposes it on us.<sup>35</sup>

In shifting the subject from the static to the eternal plane<sup>36</sup>, the myth constructs its own “truth” and denies the truth of the individual woman as it facilitates her creation as Other. Her truth is silenced. She is excluded.

It is possible to read from the law the beginnings of an alternative discourse. The discourse of the female Other. A discourse of silence and exclusion.<sup>37</sup>

It is now necessary to apply these concepts to the text of the law — to analyse how the law in relation to rape, incest and prostitution create the male subject and the female Other.

### 2.1 *The Construction of the Male Subject in Rape Law*

Section 1(1) of the Sexual Offences Act 1956 simply states that “it is an offence for a man to rape a woman”. The Prosecution must establish two factors to prove a case of rape: first, that the defendant did the criminal act (*actus reus*) namely that he had sexual intercourse with a woman who was not consenting at the time<sup>38</sup> and secondly, that he had the necessary state of mind or (*mens rea*) at the time because he either knew or was reckless as to whether the woman was consenting.<sup>39</sup>

34 Roland Barthes, *Mythologies* (London: Paladin, 1973), 118.

35 *Ibid.*, at 126.

36 Duchon, *supra* n.2, at 72.

37 This author like Kristeva (“Talking About Polylogue”, in *French Feminist Thought*, *supra* n.14, at 116, does not follow the direction of some French feminist theorists who argue for a separate language for women. She argues rather for the need to explore the nature and possibilities of the discourse of the female Other within the law, albeit that it is currently a discourse of silence and exclusion and it is argued, will remain so until the female Other accedes to subjectivity in the symbolic (in language) and, therefore also, in the text of the law.

38 Sexual Offences (Amendment) Act 1976, s.1(1)(a).

39 S.1(1)(b) *Ibid.*

For the purposes of rape law, sexual intercourse is defined as the penetration of *only* the vagina,<sup>40</sup> *only* by the penis. Rape can, therefore, only be committed by a man against a woman.

Substantive rape law both creates the offence of rape and constructs the male subject. The central issue which it raises is the notion and meaning of consent and in respect of the male subject that issue is this: to what extent did the defendant know or was he reckless as to whether the woman was not consenting?

This is an issue of *mens rea* — the mental state of the defendant<sup>41</sup> and the legal test which was established in the case of *Morgan* states that:

There can be no conviction for rape where a man *honestly*<sup>42</sup> believes that a woman consents to sexual intercourse and that his (the defendant's) belief did not have to be reasonable.<sup>43</sup>

Although following s.1(2) of the Sexual Offences (Amendment) Act 1976, the presence or absence of reasonable grounds for the belief must be considered along with other relevant matters, the *Morgan* test was further shored up in the case of *Satnam and Kewal SS*.<sup>44</sup> where the *Cunningham*<sup>45</sup> test for recklessness was approved as appropriate for rape. This is a subjective test requiring that the defendant knew there was a risk. In preferring this test and rejecting *Caldwell*,<sup>46</sup> the

40 See *R. v. Gaston* (1981) 73 Cr.App.R. 164, in which the Prosecution unsuccessfully tried to prove a charge of attempted rape *per anum*. It was held that such an offence did not exist and should have been charged as attempted buggery.

41 There is some debate as to whether this is simply a question of *mens rea* and therefore to be proved by the prosecution beyond reasonable doubt and the extent to which it is a defence and therefore to be proved on the balance of probabilities by the defence. Lord Hailsham states that the first is the correct position in his judgement in *D.P.P. v. Morgan* [1976] A.C. 215. Whether or not consent is *exclusively* an issue of *mens rea*, it clearly is an issue of *mens rea*.

42 Author's emphasis.

43 Summary of the principle in *Morgan* from J. Temkin, *Rape and the Legal Process* (London: Sweet and Maxwell, 1987). Temkin provides a very full discussion of this case and the points arising from it. See particularly pp.76-79.

44 *R. v Satnam S. and Kewal S.* [1983] 78 Cr App. Rep. 149.

45 [1981] 2 All E.R. 863 .

46 [1980] 71 Cr. App. Rep. 237, CA. This test requires that the risk be obvi-

Court gave up the possibility of extending the risk of non-consent to consider that risk from the point of view of the reasonable person and preventing the defendant's unreasonable failure to consider the risk from exonerating him.

It is possible to find three levels of unreason in the law's construction of consent in rape. First, the belief in consent only has to be honest, it does not have to be reasonable.<sup>47</sup> Even where that belief is mistaken it does not have to be reasonable.<sup>48</sup> Secondly, the standard for assessing whether there is a risk that the victim was not consenting is not that of the "reasonable man" but simply the defendant in the rape encounter. Thirdly, an unreasonable failure to consider risk is not relevant.

The male subject is constructed with the power to decide whether the woman is consenting even where she is not and even where no reasonable person would think she was. This is the male subject's right to licence whatever the response of the female Other. The defendant who honestly believes that all women want to be "raped" and are therefore, consenting, is arguably legally incapable of committing rape.

Further, the majority of victims know their attackers<sup>49</sup> and the "honest belief" test is likely to be a very powerful "truth" within the dominant discourse. Any gesture of friendship can be argued to create honest belief. And here the female Other is also created as mirroring/responding to/initiating or fostering male desire. The facilitating legal notion of consent enables rape to be proscribed and simultaneously sustained.

The paradox of rape law is that reason is part of the construction

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ous to the reasonable person not necessarily to the defendant. (*Elliott v. C.(a minor)* [1983] 2 All E.R. 1005).

47 *Morgan*, *supra* n.41.

48 It was held in the case of *Morgan* that any earlier authorities suggesting the contrary, notably *R. v. Tolson* (1889) 23 Q.B.D. 168 and *R. v. Prince* (1875) L.R. 2 C.C.R. 154 were not appropriate in the case of rape.

49 Lorna Smith's study of rape in two London boroughs established that 68% of victims knew their attackers, 39% knowing them well: *Concern About Rape* (Home Office Research Study No.106, HMSO, 1989), 23. Zsuzsanna Adler's study of rape trials at the Old Bailey gave a figure of 60% (Zsuzsanna Adler, *Rape on Trial* (London: Routledge and Kegan Paul, 1987), 47).

of the male speaking subject but in the sexual encounter, that subject is not obliged to be reasonable. The law seeks to establish not whether the defendant believed in the woman's consent at the level of the rational conscious subject but at the level of the unconscious "logic of desire".<sup>50</sup> What rape law cannot say is that through its exclusion of reason and its construction of consent, it permits the legalisation of rape.

The dominant male discourse is expressed within and created by the law of rape. The subject of that discourse is not simply the perpetrator on trial for rape — the subject is the male in encounter with the female. The subject is the male subject.

## 2.2 *Construction of the Female Other in Rape Law*

Although it is clear that the female Other is to a degree constructed *de facto* by the substantive law of rape as the Other to the male subject, she is most specifically constructed by the law of evidence in the rape trial which governs the way in which the offence may be proved. The issue here is this: was the woman consenting? If the Prosecution cannot establish that she was not consenting, they cannot establish the offence.

Three areas of the law of evidence construct the female Other: the corroboration warning, the admissibility of evidence in respect of previous sexual history and the existence in rape law alone of the defendant's impenetrable shield.

Only in sexual offences<sup>51</sup> is the judge required to warn the jury that:

It is unsafe to convict on the uncorroborated testimony of the complainant; but he has to point out that it is open to the jury to convict in the absence of corroboration, if satisfied that the testimony is true.<sup>52</sup>

50 The notion developed by Foucault. See *supra* n.22.

51 The government now propose to abolish the *mandatory* corroboration warning in rape trials. (Home Secretary's speech, Blackpool, 6 October 1993, to be implemented in the forthcoming Criminal Justice Bill and to become law in or about mid 1994.) However, a corroboration warning may still be given *in the judge's discretion*. The author is grateful to the Home Office for details of the nature and timing of this proposed legislation.

52 A.A.S. Zuckerman, *Principles of Criminal Evidence* (Oxford: Clarendon, 1989), 159.

If there is no evidence other than the victim's own testimony — and frequently there will only be forensic evidence showing that intercourse has taken place which is not denied where the defendant is using a consent defence — then the corroboration warning must be given.<sup>53</sup>

Many justifications have been given of this warning<sup>54</sup>. At the root of them in respect of rape<sup>55</sup> is the notion that the complainant in sexual matters may be falsely accusing the defendant as a result of a refusal to admit consent and accept responsibility for the sexual events which have occurred with the defendant.

This warning may be deconstructed around the notion of myth. The female Other is created in a series of mythological essences as she tells her story, as she denies consent: the temptress who asked for it; the vengeful woman who will not admit complicity; the virgin who cannot cope with her lost virginity. What is apparent is that the individual woman has no place. Her truth is silenced and excluded. The female Other is constructed as inherently untrustworthy. The myth explains the essence of that Other as untrustworthy and imposes that understanding.<sup>56</sup>

The case of *Chance*<sup>57</sup> in 1988 created the notion of the legitimate complainant, showing how in a case of intruder rape the victim's "truth" can be corroborated by external factors: the defendant was an intruder; he had committed other offences; the defendant does not dispute that the complainant was raped, merely that *he* raped her. These factors were held to place the complainant outside the boundaries of sexual neurosis *unless* the sexual nature of the case affects the

53 When government proposals are implemented it will no longer be mandatory for the judge to give the corroboration warning in rape trials. However, it will be within the discretion of the judge to give such warning as he (very occasionally she) thinks appropriate.

54 See particularly *R. v. Henry* and *R. v. Manning* [1968] 53 Cr.App. 150 at 153.

55 In other sexual offences where there may be no physical evidence of the sexual matters complained of and/or those matters are less socially acceptable than sexual intercourse between a male and a sexually mature female, the warning is more likely to relate to whether such incidents occurred as opposed to whether the complainant consented to them.

56 Barthes, *Mythologies*, *supra* n.34, at 118, quoted *supra* p.12.

57 *R. v. Chance* [1988] 3 All E.R. 225 at 229.

complainant's capacity to identify the assailant.<sup>58,59</sup> Even here, the response of the female Other to a sexual encounter is mythologised.

Further, the Court constructed a particular victim, quite different from the victim in the case before them<sup>60</sup>, someone whom the Court perceived as the most frequent victim of intruder rape where other offences are committed, namely: "a woman of mature or advanced years."<sup>61</sup>

In this scenario, the rape encounter is de-sexualised. The older woman will not be sexually desirable. The defendant's behaviour cannot be justified in terms of the logic of desire, a facilitating notion of consent is not required to legalise this rape.

What can be said following *Chance* is that the victim's truth where it is constructed by factors external to her, is neither inherent to her nor her truth story. She is still Other.

The second evidential factor which constructs the female Other is the defendant's possibility of cross-examining the victim in respect of her sexual history. Sections ss.2(1) and(2) of the Sexual Offences (Amendment) Act 1976 place some control on the exercise of this right in that the defendant must apply for the judge's leave and that may given:

If and only if (the judge) is satisfied that it would be unfair to the defendant to refuse to allow the evidence to be adduced or the question to be asked.<sup>62</sup>

However, research shows that where this application is made, it is very likely to be granted.<sup>63</sup> Where a successful application is made, it

58 *Ibid.*, at 232.

59 Further, it is still within the judge's discretion to give the warning even where the *Chance* factors do apply.

60 The defendant was convicted of raping a young nanny who had never met him but allowed him into her employers' premises because she believed his assurance that he was known to her employers. The judge at trial did not give the full corroboration warning in respect of sexual offences.

61 Judgement in *R. v. Chance* [1988] 3 All E.R. 225 at 229.

62. See Adler, *supra* n.49, at 89.

63 Adler's own study of Old Bailey rape trials, *supra* n.49, at 73 revealed that nearly 60% of defendants using the consent defence applied to put the complainant's previous sexual history in evidence — 75% of them were successful.

is then possible to set the victim against a mythological virgin — if she is a virgin, the defendant will not make the application.

Cross-examination as to previous sexual history has no evidential purpose if what is to be assumed is the behaviour of a freely consenting subject. Such a subject makes a free choice with each new partner on each occasion. What this evidential provision assumes is not a freely consenting subject but a mythologised Other who consents now because she has previously consented albeit with (an)other(s), who consents as the temptress, the whore, the non-virginal woman.

Finally, the female Other is constructed in the law of evidence by the well-established precedent confirmed, albeit *obiter*<sup>64</sup> in the case of *D.P.P. v. Selvey*<sup>65</sup> that where the defendant puts forward consent as a defence to rape, he may cast imputations on the character of the complainant which in the trial of *any other matter* would expose him to be cross-examined on his previous convictions.<sup>66</sup> The female Other is constructed without power in the face of the unique privileging of the rape defendant. Again, in this third area of evidence, she is silenced. There is no room for her truth.

### 3.1 Construction of the Male Subject in the Law of Incest

In disrupting the surface of order and innocence of this law, it is possible to show how the dominant male discourse constructs the power of male subject within the family.

Section 10 of the Sexual Offences Act 1956 forbids a man to have vaginal intercourse, irrespective of consent, with his grand-daughter, daughter, sister or mother. The great majority of incest is committed by fathers with their daughters.<sup>67</sup>

64 Not as a binding precedent but given the extent to which *Selvey* addresses this matter in respect of rape, its confirmation of earlier authorities and the position of the House of Lords as the highest appeal court, the case is effectively authority (*per curiam*) for the unique capacity of the rape defendant to attack the character of the complainant without exposing himself to having his previous convictions read out.

65 [1970] A.C. 304.

66 This is a provision of s.1(f)(ii) of the Criminal Evidence Act 1898.

67 The Home Office do not keep statistics on the relationship between the victim and the offender in incest matters. However, the *Criminal Law Review* in its commentary on *R. v. Winch* [1974] Crim.L.R. 487 confirms that "the vast majority of cases of incest which come before the Courts"

The law of incest constructs the power of the speaking male subject within the family in two ways: first, by what it fails to call incest and secondly, by the construction of consent within that law.

Only vaginal intercourse is forbidden by s.10<sup>68</sup> and no step or adoptive categories are included,<sup>69</sup> consequently creating a broad canvass for the male speaking subject in the family. Further, The defendant has to know or believe the girl/woman to be his daughter so that the offence is not committed where he believes she is the daughter of another relationship even where she is not.<sup>70</sup>

Although, under the excluded circumstances, it is possible for indecent assault to be charged under s.14 Sexual Offences Act 1956 or, indeed, rape, if intercourse has taken place and the victim can pass all the hurdles to establish a rape charge, no offence exists *per se* which acknowledges and proscribes the exercise of this sexual power — extended incestuous sex- within the family.

Section 10 explicitly excludes consent in defining the offence. However, consent plays a central role in the subtext of this law.

If the girl/woman does not consent to intercourse with a male relative in the forbidden degrees — usually her father<sup>71</sup> — a successful rape charge can only be brought if the victim can pass all the hurdles in respect of consent in rape.<sup>72</sup> Unlike indecent assault, a girl un-

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relate to sexual intercourse between fathers and “teenage daughters, frequently when they are below the age to consent to intercourse.”

68 By s.44 of the same Act — the Sexual Offences Act 1956 — proof of penetration is required although ejaculation is not. Intercourse *per anum* is buggery (*R. v. Gaston* [1981] 73 Cr.App.R. 161 and is, therefore, not incest.

69 Liz Kelly, *Surviving Sexual Violence* (Cambridge: Polity, 1988), quoted in N. Lacey, C. Wells and D. Meure, eds., *Reconstructing Criminal Law* (London: Weidenfeld and Nicolson, 1990), 355, notes from her study: “Where incestuous abuse was by adult relatives other than biological fathers, these men were always in some form of “social father” relation to the girl: step-father, mother’s boyfriend or the adult male in the household...”

70 *R. v. Carmichael* [1940] 1 K.B 630. In this case the defendant believed the girl/woman who was in fact his daughter to be the child of an adulterous relationship. The judgement states: “In our opinion, the question whether A. is B’s daughter is totally distinct from the question whether to B.’s knowledge she is his daughter”, at 637.

71 See *supra* n.67.

72 See discussion of rape above pp.12-18.

der the age of 16 in law can give her consent to vaginal intercourse<sup>73</sup> and, therefore, the father who has intercourse with his daughter, however young, will only be charged with rape if all the difficulties in respect of consent can be overcome.

A space is created for the power of the male speaking subject in the family by the notion of consent of the pre-pubescent child who is coerced by fear of her father, who cannot tell her mother and who has nowhere else to live.

In the case of *Attorney General's Reference No.1 of 1989*<sup>74</sup>, Lord Lane gave sentencing guide-lines for incest matters. He considered incest in the circumstances described and declared that the crime here fell "far short of rape".<sup>75</sup> Yet what could constitute the "consent" of such a victim in such circumstances? And how far could the defendant even honestly believe that she was consenting? He could not reasonably believe it. What is visible here is the law's failure to define rape to protect one its most vulnerable victims. What is visible is the extent to which rape and incest, through their contorted definitions of consent, construct the power of the male speaking subject and here, most specifically, the power of the male speaking subject within the family.

The second consent issue, is the operation of the other incest offence under s.11 of the Sexual Offences Act 1956. This offence may only be committed by the woman who is over sixteen in the incest encounter. It forbids her:

to permit a man whom she knows to be her grandfather, father, brother or son to have sexual intercourse with her by her consent.

It is possible for the man to be charged with incest and the woman not to be charged with the s.11 offence, thereby opening up a grey area where the woman is not actively consenting but neither is she permit-

73 In the case of *R. v. Satnam S. and Kewal S.*, *supra* n.44, the two defendants successfully appealed against a rape charge on the grounds that the trial judge had directed the jury that *Caldwell* recklessness applied. One of the defendants had also been charged with indecent assault and he was convicted of that offence on appeal because the thirteen year old victim was too young to consent to this although there is no age barrier for consent to intercourse.

74 *Re. Attorney General's Reference (No.1 of 1989)*, [1989] 3 All E.R. 571 quoted in Lacey, Wells and Mcure, *supra* n.69, at 356.

75 *Ibid.*, at 356.

ting by her consent. In other words she is not consenting and therefore she does not commit the s.11 offence but she cannot pass the pitfalls of a rape charge. The subtext is this: there is an area of non-consensual sex which the law will not call rape. This grey area is part of the space for the construction of the power of the male subject within the family.

### 3.2 *The Construction of the Female Other in Incest Law*

There are three ways in which incest law constructs the female Other. First, through its concern with only vaginal intercourse, only with close biological relatives, it constructs the female Other not as subject to be protected but as the potential bearer of defective progeny. The rationale for the offence as currently constructed<sup>76</sup>, is not the protection of the girl/woman but the thwarting of that potential.

Secondly, the female Other is constructed through the equation of puberty and consent. It has already been argued that the consent of the female Other is constructed to legitimate the incest encounter in so far as it will not be construed as rape, shaping the powerlessness of the female Other within the family.

The other aspect of consent is the way in which the female Other at the point of sexual maturity will be increasingly mythologised into the temptress, the instigator, her sexual maturity mirroring or reflecting male desire. In *Re. Attorney-General's Reference (No.1 of 1989)*<sup>77</sup>, Lord Lane states:

The older the girl, the greater the possibility that she may have been the willing or even instigating party to the liaison, a factor which will be reflected in the sentence.

As the girl reaches and passes sexual maturity, she not only "consents" as the pre-pubescent child "consents", her sexual desirability coming with her sexual maturity is constructed by this aspect of the dominant male discourse in mythologised essence to mirror male desire.

76 In reporting the case of *R. v. Winch* [1974] Crim.L.R. 487 states: "The gravamen of incest was that it might have a disastrous effect on children born to the parties."

77 *Re Attorney General's Reference (No 1 of 1989)*, *supra* n.74, quoted in Lacey, Wells and Meure, *supra* n.69, at 356.

A central aspect of the female Other's construction without subjectivity is not simply in her construction as without individuality but also as body without subjectivity. This is exemplified in the case of *R. v. Ballie-Smith*<sup>78</sup> where the defendant successfully appealed against an incest conviction. The defendant argued that he mistook the woman in his bed for his wife, not realising that it was his thirteen year old daughter. This issue had not been put to the jury and the Court of Appeal held that on that ground alone, the verdict was unsafe and unsatisfactory.<sup>79</sup>

How could a man have mistaken a thirteen year old body for that of his wife with whom he had had a long term sexual relationship? For the Court, for the law, the body in the bed is female, it has no subjectivity. Female bodies are interchangeable. The female Other is constructed as body without subjectivity.

#### 4.1 *Construction of the Female Other in the Law of Prostitution*

An analysis of the law of rape and incest has disrupted the innocence of the notion of the female as victim. In prostitution, she lacks even the dubious cover of that label. In prostitution, she is perpetrator. However, it is possible to create a series of connections between these three aspects of the law, thereby setting out the beginnings of a theory of law and sexuality.

The central issue which must be examined here is the relationship between the construction of the prostitute and the female Other *per se*.

The defining characteristic of the prostitute's construction is exclusion. Prostitution *per se* is not illegal but the law creates potential offences in respect of every aspect of the Prostitute's life. What is particular to this exclusion is that it is not so much her truth and her individuality which is undermined by the law — although they certainly are — but that the bulk of the offences create her exclusion by raising the spectre of an offence for almost everyone who comes into contact with her and upon whom she depends for her survival. She is, therefore, constructed as pariah — a legal leper who may infect all she meets.

78 [1977] 64 Cr.App.Rep 76 at 78.

79 The Court of Appeal also considered a second ground for the appeal, namely that his daughter, C. had retracted her statement implicating her father.

The prostitute as prostitute can only commit three prostitution-related offences: soliciting<sup>80</sup>, brothel-keeping<sup>81</sup> and "a common prostitute behaving in a riotous manner in a public place."<sup>82</sup> The other fourteen statutory offences are committed by those who come into contact with the Prostitute or encourage women into Prostitution.

It is possible to analyse the Prostitute's exclusion around the legal construction of four central aspects of her life: her work, her home, the necessities of her life and her personal relationships.

In relation to her work, the Prostitute may commit the offence of soliciting. This is by far the most frequently charged of the prostitution offences.<sup>83</sup> In order to commit the offence, a woman must have been cautioned for loitering or soliciting on two previous occasions. On the third occasion, she is given the status "common prostitute"<sup>84</sup> and can be convicted. Through this label, the dominant male discourse, constructs the Prostitute as separate from other women as object beneath contempt, undermining even her basic civil right to pass and re-pass on the highway and ensuring that any legal protection she may seek from violence towards her will be undermined by the Court's awareness of her status as common prostitute.<sup>85</sup>

It is not simply that her work will be fraught with the possibility of conviction, it is that she is constructed as Other beneath contempt. She is constructed by her status as outside the law.

While new legislation in 1985 created two street offences for clients namely kerb crawling<sup>86</sup> and persistent soliciting,<sup>87</sup> helping to

80 Street Offences Act 1959, s.1(1).

81 Sexual Offences Act 1956, s.33.

82 Under ss. 3 and 4 of the Vagrancy Act 1824. In the period 1980 to 1990, a maximum of 15 people were convicted of this offence in any one year (Home Office statistics prepared for the author).

83 There were 10,020 convictions for this offence in 1990. Figures provided for the author by the Home Office Research and Statistics Department.

84 A term originating with the Contagious Diseases Acts 1864-69. Despite objections to it, the Wolfenden Report (1957), *Homosexual Offences and Prostitution* Cmnd.247 HMSO (on Homosexuality and Prostitution), upheld its use in 1957 and it is still retained.

85 If the prostitute is a complainant in a criminal trial as a result of violence towards her, the fact she is "a common prostitute" will be made known to the court by revealing her previous convictions.

86 Sexual Offences Act 1985, s.1.

87 Sexual Offences Act 1985, s.2.

redress the balance of the law which previously placed the client within and the prostitute outside it, it also further circumscribes the working life of the prostitute.

Her work is also legally constructed around other parameters, most importantly the criminalisation of brothels under ss.33, 34 and 35 of the Sexual Offences Act 1956. A brothel is a premises where two or more prostitutes work.<sup>88</sup>

Section 33 creates the offence of keeping, managing, acting or assisting in the management of a brothel, s.34 makes it an offence for a lessor, landlord or agent of premises either to knowingly let out the premises as a brothel or to allow them to continue as such and by s.35, it is an offence for a tenant or occupier to knowingly permit premises to be used as a brothel. Not only is the Prostitute precluded from obtaining customers by street walking, she is also forbidden to work from or in a premises frequented by any other prostitute. It is clear that the criminalisation of brothels isolates the prostitute at work, leaves her without the physical protection that the presence of other women could provide and deprives her of any collective means of organising her working environment.

Further, it is also an offence for the tenant or occupier to knowingly permit premises to be used for *prostitution*,<sup>89</sup> that is for use by one prostitute. The prostitute is given just enough legal space to allow her to provide her sexual services because a landlord may let premises to one prostitute knowing they are to be used for prostitution and the tenant herself may work as a prostitute on the premises.<sup>90</sup>

The second aspect of the Prostitute's life which is circumscribed by the law is her home. The criminalisation of brothels ensures that she cannot share her home with another woman. Further, it was held in *Donovan v. Gavin*<sup>91</sup> that even separately let rooms may constitute a

88 It is more precisely defined in the note to s.22 of the Sexual Offences Act 1956 in *Butterworths Annotated Legislation Service* as a "premises kept for the purpose of people having illicit sexual intercourse..that is a house of resort for men and women for the purposes of prostitution ... Premises where one prostitute alone receives a number of men are not a brothel."

89 Sexual Offences Act 1956, s.36.

90 J.C. Smith and B. Hogan, *Criminal Law* (London: Butterworths, 1988, 6th ed.), 459. The more recent seventh edition does not deal with prostitution.

91 *Donovan v. Gavin* [1965] 2 Q.B. 648.

brothel if they are close enough together to create "a nest of prostitutes."<sup>92</sup> The premises offences also ensure that she will have difficulty in securing and retaining accommodation.<sup>93</sup> Even the legitimate landlord knowingly letting out to one prostitute can fall foul of s.30<sup>94</sup> which technically creates the offence of a man living off the earnings of prostitution but which extends to cover the landlord who overcharges the prostitute, knowing that she is a prostitute.<sup>95</sup>

In her personal relationships, the prostitute is legally circumscribed by her inability to live with another woman without incurring the possibility of this arrangement being construed as a brothel<sup>96</sup> or an offence under s.31 of the 1956 Act, namely a woman exercising control over a prostitute.

Section 30<sup>97</sup> creates the virtual certainty<sup>98</sup> that a man living with a prostitute who is husband, lover or even friend, can be convicted of the offence of living on the earnings of prostitution.

That same section as developed by case law<sup>99</sup> also circumscribes the small space for the prostitute's uncertain survival, creating the possibility of convictions for those making exorbitant charges for the prostitute's goods and services where they will further prostitution in some way even though they may not be exclusively referable to it.

The law constructs the prostitute as pariah. When she touches the lives of landlords, tenants, other prostitutes, the people who live with

92 *Ibid.*

93 The civil law prevents landlords from being able to successfully sue prostitutes for any rent owing on their accommodation.

94 Sexual Offences Act 1956.

95 *Thomas* [1957] 2 All E.R. 181.

96 Under ss.33, 34 and 35 of the Sexual Offences Act 1956.

97 Section 30 Sexual Offences Act 1956.

98 Sexual Offences Act 1956 s.30(2) states that where a man lives with a prostitute, he shall be presumed to be knowingly living on the earnings of prostitution, unless he proves the contrary. The burden of proof will not, therefore, be on the Prosecution to prove that he is guilty of this offence. The burden of proof will be on *him* to rebut the presumption. Similar provisions are made in respect of he who "is habitually in the company of a prostitute, or who exercises control, direction or influence over the prostitute's movements in a way which shows he is aiding, abetting or compelling her prostitution with others." (s. 30 (b))

99 Notably *R. v. Thomas* [1957] 2 All E.R. 181 and *R. v. Ferrugia* (1979) 69 Cr.App.Rep. 108 (C.A.).

her, even shop keepers, there arises, as a result of that connection, the possibility of conviction, however infrequently enforced these offences may be. She is provided with just enough space to ensure that the speaking male subject can buy her sexual services.

It is part of the surface of order and innocence that the law purports to separate prostitutes from other women in order to protect the latter. In this way the label "common Prostitute" is justified by the argument that it ensures that "decent women" are not charged with soliciting as they pass on the highway. The law creates seven different offences to prevent girls and women from "falling into prostitution."<sup>100</sup> Yet in the period 1980 to 1990, only 33 charges were made in respect of all seven offences.<sup>101</sup> It is essential to deconstruct the notion that the distinction between the Prostitute and other women is a moral distinction.

The whore/temptress as constructed by the law in the rape encounter is not the woman who is paid for her sexual services. She is the female Other who creates the possibility of consent to the male subject. Although this is a central distinction, it is the notion of the Prostitute Other which underpins these mythologies of the female. The prostitute as pariah assists in sustaining those mythologies.

Further, the Prostitute threatens the dominant discourse by deeply disrupting fundamental notions of difference. Prostitution dissociates female emotion from female sexuality. The prostitute offers what the male discourse purports to want — sex without emotion but she also threatens the discourse as the Female Other who is not subjugated by emotion. She comes to sex as without emotion and therefore *without difference*. She must be constructed as pariah *outside the law*, penalised and distinguished for her sexuality while the female Other is constructed *within the law*, with difference and therefore without subjectivity and sexuality.

100 All under the *Sexual Offences Act 1956*: detention of a female in a brothel (s.22) or other premises (s.24); a person who is responsible for a girl under 16 causing or encouraging her prostitution (s.28) procuring, permitting or causing the prostitution of a "mental defective" (ss.9, 27, 31); causing a woman to become a common prostitute (s.22).

101 Figures provided for the author by the Home Office Research and Statistics Department.

#### 4.2 *Construction of the Male Subject in the Law of Prostitution*

The male subject is constructed through a law which provides only enough space to ensure that he may buy sexual services while controlling and creating as pariah the woman who provides them. The legal possibility of this purchase with the simultaneous branding as outlaw and legal leper of the Other purchased, underwrites the subjectivity of the male subject. This construction is at the level of the speaking male subject, it is not confined to the client, for the client could be any male speaking subject and this construction is part of the power of the male subject at the highest level of generality. It also constructs the power of the male subject in the prostitution encounter.

However, the law also constructs one specific male subject who is related to and whose power flows from the construction of the Prostitute Other — the male pimp. He is constructed in a legal space which excludes the prostitute Other. He is constructed by her exclusion and by the criminalisation of brothels.

The legal workspace of the Prostitute is so constrained by the laws against soliciting<sup>102</sup> and the criminalisation of brothels<sup>103</sup> while prostitution *per se* is legal, that it constructs the power of the male pimp, creating its own necessary intermediary of and for the male subject. She cannot live and work with other prostitutes, she falls foul of soliciting legislation on the streets, so this male intermediary, finds her clients, controls her life and lives off her earnings. He may well have procured the woman to work for him as a prostitute in the first instance but, as it has been noted, he is very unlikely to have been charged to this effect.<sup>104</sup>

It is true that s.30 Sexual Offences Act 1956 creates the offence of “a man living on the earnings of prostitution.” If he does not live with the Prostitute or provide her with premises of which he is either landlord or tenant, the possibility of his being charged is tiny. It has already been noted that this offence has been extended by case law to cover many different people who touch the life of the prostitute. In the period 1980 to 1990, the highest number of men charged in any

102 See p.21 above for an analysis of s.1(1) of the Street Offences Act 1959.

103 See pp.23-25 above for a discussion of ss.33, 34, and 35 of the Sexual Offences Act.

104 *Supra.* at p.26 and n.100.

one year with this offence was 196.<sup>105</sup> It is likely that only a small number of these were pimps.

The law, therefore, constructs the male pimp with both power and freedom. The Prostitute is silenced in respect of his sexual violence: she sells her consent, she will not be believed in a rape trial. She is effectively silenced in the face of any physical violence he may use against her. Perhaps in the encounter between the Prostitute Other and the male pimp as speaking subject, it is possible to see the most extreme forms of the law's construction of the male subject and the female Other but such constructions do not exist in isolation. They form part of the law of sexuality's gender construction. They too disrupt the surface of order and innocence to show that the law of prostitution does not simply, if at all, protect decent women from prostitution or control the visible excesses of this aspect of male sexuality.

### *Conclusion*

The dominant male discourse as expressed in the law of sexuality constructs the male subject. In each area — rape, incest and prostitution, it creates and extends the power which underpins the sexuality of the male subject to facilitate the non-consensual taking of women in rape and incest and the buying of them on the subject's own terms in prostitution.

Further, the law constructs the female as Other not as freely consenting subject but as Other for the male subject in the space of unreason, for the logic of desire.

In these constructions, lie the paradox of the law of sexuality. It exists purportedly to defend and protect the "victims" of rape, incest and prostitution but even in so far as it does so, it reasserts, through its constructions, the power of the speaking male subject through and the exclusion of the woman as Other from, the dominant male discourse as it is expressed in and enshrined by that law.

105 This figure is 100 times smaller than the number of women charged with soliciting in the same period.