

**Exhibiting the Hymen:  
The Blank Page between  
Law and Literature**

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**April 30 2003**

There is a very real context which presses around the edges of the arguments I will be making here, and that is the extraordinary drop in rape convictions in Victoria over the last 10 years. Research released last November shows that rape conviction have dropped by nearly half since 1989. Currently, the rate of conviction for sexual assault is around 24% (down from nearly 48 % in 1989). There have been some tentative reasons offered for this drop which focus mainly on the increase in the number of acquaintance rape cases that are making it into the courtroom. These cases are notoriously difficult to prove, largely because of the deployment of the discourse of romance in these trials (particularly in the cross-examination of the complainant). In previous papers I have explored that way in which romance is used to recode resistance as consent, even in the context of very serious injuries.

My recent work focuses mainly on the disqualification of women's testimony in rape trials. What I am particularly interested in is the way in which legal officers like judges and barristers are able to enact this disqualification by deploying non-legal texts, such as literature. In this way, I've focused on the literature that the law of rape poses as part of its context (particularly romance) and the way in which this literature is deployed in chains of legal reasoning, in this way literally becoming a legal genre.

I am going to be looking at these issues in a slightly different way here. What I want to do is explore a very particular moment of disqualification which has been overlooked by feminist law reformers and that is a technique used to destroy the testimony of young girls during rape trials, one which revolves around the operation of a specific discourse of virginity. I then want to think about the way in which literature in this context might not operate so much as a moral corrective to law (which is what is often suggested in the law and literature movement), but rather I want to consider literature instead as a repository of legal concepts.

(i)

The feminist critique of rape has been a vast and impressive exercise of interpretative activity: it has gripped existing concepts, practices and discourses and subjected them to reinterpretation and transformation. It has been trenchant, assiduous and generative. It has created new legal definitions of rape and modified the evidentiary requirements that define its borders; it has developed new procedural mechanisms and codes of speech during trials; it has multiplied ethico-political interpretations of sexual violence and excavated previously unauthorised forms of social knowledge. Most specifically, it has created new evaluations of rape in the service of a particular form of life; that is, one which cultivates the capacity of women to maximise their own powers of speech and desire.

In the context of law, the chief target of feminist critique has been those legal tactics which construct female complainants as a particular class of subject: that is, as a subject who cannot produce trustworthy speech. Historically, these legal tactics have included the admission of evidence about a complainant's sexual history (generally to undermine her testimony) and the requirement that judges warn juries to be careful when convicting the accused on the uncorroborated evidence of a woman. Such matters have been the subject of substantial feminist reform at the level of both legislation and procedure. Recent research in Australia, however, shows that the force of these reforms is often vanquished by the practices of legal officers in the courts.

For example, legislation imposed to prevent the defence raising the sexual history of the complainant in cases where it is not relevant is often ignored by judges who are entitled to exercise their discretion when such matters arise. There is other evidence that some judges remain attached to now discredited understandings of consent and its communication and insist on informing juries that some women say 'no' when they really mean 'yes.' More generally, the notion that women as a class produce untruthful speech is cultivated by a continued defence predilection for constructing women as liars during cross-examination. (A magistrate interviewed for a recent report into the effectiveness of recent law reforms remarked that he thought this was a particularly troubling aspect of rape trials. He noted that witnesses in other kinds of trials might be pressed about their recall, or told that they might be mistaken, but are not so vehemently and relentlessly told that they must be lying).

Generally, the reasons offered to account for the failings of reform remain vague and undefined. Feminist legal scholarship tends to deploy terms like 'stereotype', 'judicial sexism' and 'myths of female sexuality' which are presented as ubiquitous yet amorphous obstacles to the project of reform, located somewhere in 'society' and more particularly in 'attitudes'. When the problem is formulated in this manner, then the conventional response is to argue that we must redress and refute these mistaken representations with more adequate information. Programs in which judges are taken through a course of gender awareness in order to expand their frame of reference when writing judgments are an obvious example of such a move.

This mode of critique relies on a specific model of the law, the subject and power. That is, the law is understood as a potentially neutral institution that is capable of being responsive to the call of groups historically disenfranchised by the law, such as women. Legal officers such as barristers and judges will respond adequately to this call when presented with sufficient facts about the conditions of their lives.

This view evades addressing the desire that inheres in every interpretation- in this context, it evades the specifically legal desire to manage and control forms of life- such as sexual difference- in particular ways. From this perspective, the legal production of a female subject who cannot produce legitimate testimony may not be the result of an error but rather the effect of a positive juridical activity. To understand this effect as correctable with the right information (such as judicial education) is to miss the magnitude of the cultural investment in precisely this figure of woman.

There is a striking congruence between this model of law reform and that used by feminists in the law and literature movement. Sharing the view that the sexist errors of law can be corrected with the importation of carefully chosen information, these feminists often suggest that it is *literature* which can most effectively be freighted with the facts that will prompt the law to change.

This view is exemplified in a recent collection of essays entitled *Beyond Portia: Women, Law and Literature in the United States*. This collection represents the principal ways in which the specifically American branch of law, literature and feminism considers the relation between law and literature, particularly in the context of the curriculum in law schools, where law/literature subjects are increasingly taught. First, it is politically valuable to bring literature into the ambit of the law school because it can highlight voices and experiences that 'might otherwise be invisible or

silent' (11). For example, as one contributor argues, 'literature can be used to focus on the poor, the aged, the handicapped, victims of racism, members of religious minorities, workers and the workplace, juveniles and criminals.' Here, literature performs a documentary function. It is to be the privileged genre that imports subjugated knowledges into the domain of law. This proposition, developed in a number of essays in this collection, raises a series of questions.

First, what model of literature is supposed by the notion that literature might be the bearer of socio-empirical facts about the lives of women? There are a range of non-literary texts, already circulating through the law, that might perform this function, including the genres of victim impact statement, crime-statistics, poverty indicators and other sociological narratives. The law, in fact, is not short of this kind of information. Why then might literature be the preferred mode of transmitting it?

The answer proposed in this collection cites a specific model of literature which grounds many of the arguments in the American law and literature field. One clue to how this model works is shown in an essay by Terry Foster, who writes that 'literature exposes us to alternative morals and values...it encourages empathy, taking us beyond our own experiences...it portrays different points of view and different reactions.' This moral-sympathetic model of literature-in-relation-to-law has its most striking precedent in the work of Martha Nussbaum, who argues that the 'literary judge' (a version of Adam Smith's judicious spectator) will function as a correctly empathetic arbiter of the complex and painful human events that come before the law. (the literary judge is literally the judge who reads literature, particularly novels). According to Nussbaum, the judge who reads literature will develop a range of attributes, including: a commitment to neutrality (4), a special concern for the disadvantaged cultivated by careful reading of social-realist novels; an attentiveness to context (6); the ability to identify with others, particularly the less fortunate (7). (I think this puts pressure on the Smith's concept of sympathy which to some extent is limited by the degree of identification or correspondance between the spectator and the subject in pain.) For Nussbaum, novel reading will promote these qualities in the literary judge. According to Nussbaum then, literature is a kind of ethical material which produces a subject who will abide by a strict code of interpretative conduct. One might ask here, but which literature? Does all literature perform this function, or is there closed canon of texts which have such an effect? For Nussbaum, there is a clear canon of viable materials (predominantly including Dickens, but also a range of other writers). For Foster and the writers in *Beyond Portia*, 'literature' appears to designate those texts – often critical-feminist texts- which reflect the conditions of women's lives, although the question of criteria here- and which women?- is worth asking. This engagement with literature precludes an investigation into the 'literature' which might be *congruent* with, for example, the disqualification of women's experiences, such as romance, which is frequently used to discredit women's testimony in rape trials.

The proponents of this critical project also presume a specific kind of moral subject in their arguments about the edifying qualities of realist literature. That is, they presume a subject who, when faced with a text which depicts a certain set of social conditions will a) read the text in the same way that they do (which relies on the conduit metaphor) and b) have a moral reaction that compels them to act in way which can be anticipated in advance (and not in any other way). Such a view of the subject is

troubled by the law's continued resistance to precisely the kind of stories that Nussbaum and Foster would like to be told. Their model of the edifying nature of literature and their moral and sentimental view of the subject has no way to account for this resistance.

In my view, this way of understanding the function of literature (as much as I want it to be true) attaches to it a political efficacy which I think is untenable. That is, introducing new stories into the law school and the courtroom cannot be the final move in a political strategy, because the problem for women who come before the law is not a lack of texts or stories but the direction of desire: that is, the specifically juridical will to power that animates some interpretations and not others, the juridical activity that captures some texts and not others.

From this perspective then, literature is not an inherently ethical material; rather, it is an energetic textual form which has particular effects depending on the strategy which captures it. On this view, the object of the feminist critic might be shifted from the moral subject who can be taught how to read literature correctly. Instead, we might focus on the way in which components of law-literature operate as charged elements in specific politico-legal strategies of sexual difference. The strategy that I want to examine here is one which is marked by the interminable production of the female subject as unreliable and unable to produce credible testimony in the context of rape. An exemplary moment in this strategy is the legal production of virginity.

(ii)

In feminist theorisations about rape, the question of virginity is remarkable for no longer being a question. The conventional feminist view holds that 'virginity' is an homogenous state, coded as a positive attribute by the law in the context of rape. For example, Catherine MacKinnon includes being a 'virgin' as one of the qualities which assists complainants in gaining convictions.<sup>1</sup> Barbara Toner argues that 'without certain aggravating features which provoke the horror and anger of the law, such as excessive brutality or the virgin victim, the seriousness of the crime becomes no crime at all.'<sup>2</sup> The assumption that virginity is an unproblematic state here is almost certainly connected to feminism's concern with the fate of sexually active woman in rape trials.<sup>3</sup> The law's ability to destroy the power of such women to testify to their suffering and injury- by literally suggesting that such women cannot *be* injured- has been an urgent target of feminist reform.<sup>4</sup> However, to assume that the disqualification of sexually active women leads to the idealisation of 'the virgin' is a dangerous non-sequitur. On the contrary, the problem here is not the opposition between 'virgins' and 'whores' but rather, the contingent and plastic sets of tactics

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<sup>1</sup> Catherine A. MacKinnon, *Toward a Feminist Theory of the State*, Harvard University Press: Cambridge, Massachusetts and London, England, 1989, 179.

<sup>2</sup> Barbara Toner, *The Facts of Rape*, Hutchison & Co.: London, 1977, 85.

<sup>3</sup> See in particular Carol Smart, *Feminism and the Power of Law*, Routledge: London/New York and *Law, Crime and Sexuality: Essays in Feminism*, Sage Publications: London, 1995; and Susan Estrich, *Real Rape*, Harvard University Press: Cambridge, Massachusetts and London, England, 1987.

<sup>4</sup> For a detailed discussion of the narrative and semiotic techniques used to perform such disqualification, see Alison Young, 'The Waste Land of the Law, the Wordless Song of the Rape Victim' *Melbourne University Law Review*, 22, 2, 1998.

that the law deploys against the constellation of positions occupied by the complainant (which as we will see, can not be reduced to a simple binary opposition).

Recent sexual assault trials in Australia highlight the fact that we should be suspicious of accepting patriarchal platitudes about the various sexual modalities of the female body. Rather than being a self-evident state, female virginity is in fact a site of struggle and contest. I want to show here that 'virginity' is not a stable referent, but rather a complex discursive formation, that includes expert testimony, anatomical illustration and description, medical commentary, legal concepts of probability, rules of evidence, diagnostic techniques, codes of common-sense and literary narratives. In this context, I am going to be looking particularly at the hymen, which in this formation functions to provide unambiguous knowledge about the sexual status of a woman; unambiguous, because the hymen is ostensibly a self-evident, material, physiological membrane, which provides incontrovertible evidence of a woman's sexual history.<sup>5</sup>

Paradoxically, however, despite the evidentiary force of its 'obviousness', the hymen requires expert interpretation. In a rape trial, the subject charged with pronouncing on the state of the hymen is the examining doctor. Strikingly, in the proliferation of statements that will circulate about the hymen during a rape trial, the woman who bears the hymen will be the only one whose statements are not considered authoritative. Indeed, the chief effect of this hymen-function is not only to control the circulation of women through the sexual economy and secure their status as undamaged property. More importantly, its role in the contemporary political organisation of sexual difference is to produce women as subjects incapable of producing legitimate speech in the context of rape, by materialising a sign which enables the law to circumvent (supplements) that speech.

Importantly, however, we will discover here that 'expert interpretation' does not succeed in uncovering 'the' hymen, but rather multiplying it. In fact, the signifier 'hymen' achieves its effects only through the force of a violent generalisation, a generalisation which subjugates and conceals a struggle between inscrutable and incalculable hymen texts. In this context, the meaningful object analysis is not the virgin body as a coherent amalgam (which we believe we understand in advance) but the complex relations between certain kinds of hymen and certain kinds of testimony.

(iii)

In 1894, a strange gynaecological incident was described in *The Medical Press and Circular* by Howard MacNaughton Jones, an eminent doctor.<sup>6</sup> It involved an alleged rape. A young girl claimed that a man had been assaulting her over a long period time, yet despite this claim, her examining doctor concluded that her hymen was 'intact'. The defence used this conclusion to argue that it would thus have been impossible for

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<sup>5</sup> For a fascinating discussion of the 18<sup>th</sup> century preoccupation with simulated virginity, see Tassie Gwilliam, 'Female Fraud: Counterfeit Maidenheads in the Eighteenth Century', *Journal of the History of Sexuality*, 6, 1-4, 1995-1996, 818-47.

<sup>6</sup> Howard MacNaughton-Jones, 'A Gynaecological Question of Importance in Forensic Medicine Relating to the Hymen', *The Medical Press and Circular*, CVII, Wednesday, March 21, 1894.

intercourse to have taken place, so the accused man must be innocent. It might have ended there, yet the girl in this case was aristocratic and had at her disposable considerable social power, so MacNaughton Jones himself was asked to examine her. He found that her hymen was indeed complete, yet exhibited extraordinary qualities:

[O]n a digital examination being made the hymen completely yields and folds back. Ultimately, without any force or difficulty, a fair-sized conical speculum is passed and also a comparatively large glass vaginal dilator, without the least injury. The opinion given was that frequent intercourse, partial or incomplete, may have well have taken place, *but that the chastity of the girl was not impugned* [italics in the original].

What is the nature of the hymen that was observed here? MacNaughton Jones' own framing of this incident shows that he is conscious of contesting the prevailing medico-legal understanding of what the hymen can do. Before discussing this case and a number of others, he reflects on the gravity of medico-legal examination, specifically in the context of rape. His concern here is not a proto-feminist one, unfurled in the service of the victim, but rather a deep anxiety about what effect mistaken interpretations of physiological evidence might have on the accused. 'Is it not true', he asks, 'that the gravest issues, even those of life and death, liberty, loss of character and reputation, more serious to some than the forfeiture of life itself, frequently hang upon the evidence of the gynaecologist? And is it not equally true that this evidence is occasionally founded upon a most superficial knowledge and cursory examination, whether clinical or pathological?' It is in this spirit that he presents his discussion of what he likes to name 'the folding hymen'; that is, in the spirit of providing the most adequate knowledge possible about what the hymen can do.

In the hegemonic model of virginity which clearly subtends the 'observations' of the first doctor in this case, the hymen is a fragile ring of skin around the vagina which breaks the first time it is penetrated, leaving a bloody sign of its ordeal. A hymen that has suffered in this way will present as a torn, split and tattered membrane, easily identified by the doctor's expert eye. Historically, the hymen that breaks in this way has operated as an important check on the circulation of women through the sexual economy. A hymen that must break the first time means that there will always be a sign of a woman's sexual activity and thus impropriety. Importantly, however, the hymen understood in this way has another very important (and less remarked) function. That is, if it *must* break on first penetration, then an *unbroken* hymen is evidence that the woman in question has never been penetrated. This is particularly important in light of legal anxieties about the dangerous fantasies of young girls, who might falsely accuse men of assaulting them, when in truth they have never had intercourse. What connects these distinct functions of the hymen together is their role in securing the general disqualification of women's speech about sex.

In this context, the identification of a hymen that is able to endure penetration without breaking cannot simply be an addition to the existing body of medical knowledge, a neutral expansion of the domain of observable facts. Instead, MacNaughton Jones' 'folding hymen' ruptures the patriarchal economy of virginity by disarticulating its conventional signifiers. Rather than the trackable, traceable, readable hegemonic hymen, (which transmits the truth of a woman's experience in spite of anything she herself might say about the matter), the folding hymen is remarkable for its mute durability, which in this context means a refusal to signify in the conventional manner. Certainly, the moral apparatus of virginity, which requires a physiological

supplement to replace and extinguish a woman's speech about sex, is in mortal danger in the face of the folding hymen.

Strikingly, this account of the folding hymen is not simply an amusing quirk in the history of medicine, an unlikely and implausible segue taken by an otherwise respectable medical mind. On the contrary, these observations are supported contemporary medical knowledge. Today, the hymen is understood as possessing a complex and varied structure. For example, the hymen presents diverse shapes, sizes and appearances, which all depend on each hymen's particular structure and degree of oestrogenisation. Some women present with no hymen at all. Importantly, there is frequent discussion in the literature of the hymen's flexibility, with more than one commentator arguing that the hymen can on occasion be so flexible that it breaks for the first time in childbirth.

In light of this variousness, what forensic value does the hymen have, from the perspective of contemporary medical opinion? One textbook puts it like this: 'A very flexible hymen will occasionally withstand intercourse. This, coupled with the fact that the hymen may be torn accidentally, makes the presence of the hymen unreliable as evidence for virginity.'<sup>7</sup> In this context, the hegemonic story of the hymen which imputes unitary qualities to it in advance and assumes that it must always break when penetrated has the status of a cultural fiction. It is a fiction, however, that plays a very important role in the political organisation of sexual difference, and has the force of a dominant interpretation- an interpretation which is able to subjugate alternative accounts despite the absence of a referent. In the case of the young girl described by MacNaughton-Jones, evidence of the ability of her hymen to withstand penetration without breaking had no force: the court ruled that such powers were impossible and that her unbroken hymen meant that she must never have been penetrated, so the accused man was acquitted, and she was left appearing as mistaken, a young girl subject to fantasies, or as a liar.

(iv)

Tragically, this contest between the hegemonic hymen and the folding hymen is not a matter of mere historical interest. Despite the weight of contemporary medical opinion which argues that the hymen is an unreliable sign of virginity, it is still nonetheless deployed in precisely this way during rape trials, particularly those involving very young girls. One striking example of the *agon* between these two hymens- and thus two models of virginity- can be identified in a recent Australian High Court judgment, *M v The Queen*.<sup>8</sup> This case involved the sexual assault of a 13 year old girl (called K in the judgment) by her father. His conviction at trial was

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<sup>7</sup> See H.A. Katchadourian, *Biological Aspects of Human Sexuality*, 4<sup>th</sup> Edition, Holt, Rinehart and Winston: Fort Worth, 1977, 1027. For other explicit statements of this view, see *Gynaecology Illustrated 3<sup>rd</sup> Edition*, above n17, 18: 'The appearances of the hymen are unreliable as medicolegal evidence, whether of virginity or childbirth.'; C.D. Clemente, *Anatomy: A Regional Atlas of the Human Body*, Urban Schwarzenberg: Los Angeles, 1975, 268: 'Generally, the hymen is ruptured at first copulation, however since its form and extent are quite variable, the establishment of virginity in this manner cannot be ascertained with certainty.'

<sup>8</sup> *M v The Queen* (1994) 181 CLR 487. My discussion of this case will focus primarily on the transcript of the trial proceedings in the District Court of New South Wales (April 6-8, 1992, 91/11/0925Gallen J.)

ultimately overturned by the High Court in 1994, principally because of the testimony of one of the doctors who examined the complainant. She claimed that because the girl's hymen appeared to be intact, it was unlikely she had been sexually assaulted. This observation was one of the grounds used in the majority judgment of the High Court to conclude that the accused man's conviction was 'unsafe and unsatisfactory.'

During the trial, this doctor described her observations in the following manner:

Dr Holloway: [The hymen] appeared to be of normal character, a little redundant and intact.... It was of a virginal nature.

Defence: Would you agree with me that what you found was inconsistent with rape?

Dr Holloway: It was inconsistent with rape.

Before commenting on Dr Holloway's remarks here, it is worth considering the rules which govern the presentation of expert medical evidence. The role of the examining doctor in the case of an alleged sexual assault is clearly defined. The doctor must gather data about the patient's history (about the incident in question, past medical events and so on); must conduct a clinical examination, collect relevant specimens of forensic evidence and correctly document these proceedings. The process of examination in particular is controlled by an important opposition. That is, the doctor's statement about such an examination must clearly distinguish between subjective and objective findings. According to this model, subjective findings are dependent on information provided by the patient (such as pain, nausea and headaches). Objective findings, according to the *Expert Evidence in Criminal Law* consist of 'factual observations such as lacerations or fractures.'"(526).

However, Dr Holloway's description of the hymen instantly troubles the security of this opposition. She begins by listing what could be defined as the 'objective' observations required by the discourse of clinical forensic medicine (such as noting the hymen's redundancy). However, her next statement reveals the eruption of a moral moment into the surface of her description of the hymen: that is, her ostensibly neutral 'observation' that K's hymen 'was of a virginal nature'. In the context of current medical knowledge, this statement is not an observation but an interpretation, one which implies that there is a 'general' nature which can be imputed to the hymen and deduced from its appearance- a view that we will see is unsupportable. In the context of a moral discourse about virginity, however, and one controlled by a hegemonic understanding of the hymen, such a statement is unremarkable, and here has the status of a straightforward description of an objective medical state. According to this understanding of virginity, there is a strict relation between signifier and signified. Here, the hymen is fragile, ephemeral and reactive, doomed to total destruction at the moment of first intercourse. Of course, on this view, the hymen that is 'intact' is the signifier of a body that has never been penetrated, since the hymen cannot survive this event.

What is edited out of the High Court judgment is the testimony of another doctor who examined the complainant and gave evidence at the trial, and who constructed a divergently different account of the hymen. In the passage below, she is asked to provide her own observations of the complainant's hymen:

Dr Fleming: I assessed that there was no direct evidence of sexual abuse, but I felt that the examination findings would certainly be totally consistent with the history given to me, that is, consistent with a finger penetration of her vagina, and some degree of penile penetration.

Crown: And when you say even with some degree of penile penetration, could you explain that a little more please?

Dr Fleming: In an adolescent with this particular type of hymen, and that is a relatively stretchy hymen, it is possible to have a finger or even a penis pass through without there being any residual physical evidence of this.

This passage poses a direct challenge to the story of virginity proposed by Dr Holloway. First, by suggesting that ‘there was no direct evidence of sexual abuse’, Dr Fleming appears to be in agreement with Dr Holloway about the appearance of the hymen. That is, neither doctor observed the tattered and torn remains of skin that characterise the injuries presented by a hymen that has split. However, Dr Fleming refrains from linking this appearance to a specific chain of moral significations, as Dr Holloway does when she argues that the complainant’s hymen was ‘virginal’ and ‘inconsistent with rape’. Instead, Dr Fleming connects this appearance (which is itself a text) not to the closed economy of virginity but, to an open field of possibilities, some of which include penetration. This passage shows the extent to which this open field of possibilities is contingent upon the way we pose the hymen.

For Dr Fleming, the hymen in question is clearly Mc Naughton Jones’ folding hymen. She describes it as ‘stretchy’ and able to invisibly accommodate the passage of an object. This power of stretching is so important to an adequate evaluation of this hymen that Dr Fleming devises a special technique to assess it:

The technique that I use to assess the stretchability of the hymen is to provide traction between the thumb and forefinger on the labia majora. What that does is gives [sic] an indirect clenching or pressure to the hymen and allows you to examine the hymen more accurately.

Here, the hymen is not reduced to its visual presentation, a process which reduces it to a two-dimensional textual surface which can then be ‘read’ for its status. Instead, the hymen here is not a *page* but a *power*, the dimensions of which cannot be determined by simply looking. Indeed, the development of a technique which can assess stretchability is contingent upon the assumption that the hymen is not a membrane which takes a stable and predictable form in the body of each woman, but rather is internally differentiated and unpredictable- a clear problem for the unifying forces that operate in the discourse of virginity.

Dr Fleming continues to develop this account of the folding hymen and its power to defy any final interpretation during her testimony. She refers the Court to the work of a famous gynaecologist, Sir Jack Dewhurst, who conducted an extensive investigation into the ability of doctors to accurately determine the sexual status of young girls from the appearance of their hymens. Dr Fleming tells the Court:

The result was that in 50% of cases, they [the doctors] were wrong. They assessed young women who were virgins as having been previously sexually active and vice-versa. Physical examination is not a reliable way of assessing whether a young woman has engaged in sexual activity.

In this passage, Dr Fleming disrupts two central components in the discursive formation of virginity. First, she transforms its epistemological dimension: those rules which govern what can be known about the hymen and by whom (governed chiefly

by rules of expert evidence and clinical forensic procedure). In the hegemonic formation, the doctor is figured as the master-reader of its status- the hymen offers itself up to the authoritative eye of medicine, which is accorded the privilege of truthfully deciphering it, and from which nothing escapes. Dr Fleming labors to disrupt this model. For her, the speaking position of the doctor is fatally undermined by the general illegibility of the hymen. A doctor cannot with certainty pronounce the hymen's status. The discourse of the folding hymen poses a different subject in the position of knower- not the subject who *sees* the hymen, but the subject who *bears* the hymen. After making these remarks, Dr Fleming engages in the following exchange with the defence:

Defence: What is a reliable way [of assessing whether or not a young woman has engaged in physical sexual activity]?

Dr Fleming: The history.

Defence: But of course, if a child is telling a lie, it's not very reliable at all, is it? It relies entirely on the child, doesn't it?

Dr Fleming: It relies on any person with regard to their history, whether it is the truth or otherwise.

Recall that the doctor's judgment must be deduced from the history of the complainant (their testimony), an examination and the collection of the forensic samples. For the defence, the testimony of the complainant (which alleges the rape) must for strategic purposes be dismissed in advance. Structurally then, it is the details of the examination which can be used to supplement and replace this testimony. But as Dr Fleming argues, the folding hymen does not emit the required signs. That is, it does not incontrovertibly signify that penetration either took place or did not take place. A folding hymen does not indicate that *nothing* happened (as Dr Fleming argued). It indicates only that *anything* could have happened. In this context, the only point of reference that we have for the hymen's status is the testimony of the woman who bears it. In this way, the only referent for the folding hymen is a text. This is not to suggest that this text may not be contested or disproved by other components of the evidence. However, it is to say the discursive arrangement which positions the doctor as *knower* and the complainant as *known* is overturned, and must be, if the inscrutable nature of the hymen identified by medical research is to be taken seriously.

Second, she disrupts the mathematical relations that obtain in the hegemonic formation of virginity: in particular, relations of possibility and probability. One of the defence's chief prongs of attack is to assert that it is 'highly probable' that the hymen in question should have broken during the assault. For example, he asks Dr Fleming 'the examination of a girl's vagina would normally confirm a sexual assault, wouldn't it?' But this is precisely the proposition that her testimony seeks to overturn: expert medical opinion is *frequently* unable to determine whether or not a girl has had intercourse. The defence persists by saying 'everything is possible in medicine, but the probabilities are that she hadn't [had intercourse], right?' But of course, the only discourse in which this question could be meaningful is the discourse of the hegemonic hymen, which Dr Fleming refuses to concede to. The defence ignores this refusal and continues to impose the coordinates of the hegemonic hymen over her testimony. In a move which reveals the non-dialogic nature of this hymen's operation, his final question to her is rhetorical: 'And the strong probabilities are, are they not, that no one had ever sexually penetrated K?'

The power of the hegemonic hymen to subjugate alternative hymen-texts is most clearly identifiable in its function as a mechanism of normalisation.<sup>9</sup> In *M*, this hymen establishes itself as the measure in a field of comparison. It is used to ascribe a truth value to the multiple appearances of the hymen, and requires that those who would claim to tell the truth must bear a hymen of a particular kind. Finally, it is used to abolish any possibility of a continuum of anatomical differences and instead institutes a binary of the normal/abnormal, with the abnormal being the repository of any hymen that does not bear the hegemonic insignia.

Consider the following staging of the hegemonic hymen, during the cross-examination of the complainant in *M*. In the passage that follows, the defence has just asked how many times her father had put his penis into her vagina and she has replied that she doesn't know and that she wasn't counting. The exchange continues:

Defence: You know, don't you, that are virgo intacta, don't you?

Complainant: Pardon?

Defence: You know you've been medically examined, don't you?

Complainant: Yes.

Defence: And you know that your hymen is intact, don't you?

Complainant: Yes.

Defence: Is that why you were reluctant to say how many times he penetrated you?

Complainant: I don't know, I didn't count.

Defence: See what I am suggesting to you is that the whole story is a tissue of lies?

Complainant: It's not.

Defence: If it had in fact happened, you'd be far from virgo intacta now.

In this exchange, the defence evaluates the complainant's body according to the measure of the hegemonic hymen. Her body and her testimony must be able to map onto the coordinates of this hymen, or risk being catapulted from the domain of credible subjects. Because the relation between this girl's hymen and her testimony exceeds this conventional template, this is precisely what happens. Difference cannot be accommodated within this normalising framework- the only position for it to occupy is that of the abnormal, the improbable, the unlikely or the impossible, which in the context of a criminal trial means that the different body is the lying body.

This exchange also illuminates the Derridean moment that inheres within the hegemonic economy of virginity, particularly the last statement by the defence: 'if it had in fact happened, you'd be far from virgo intacta now.' As Derrida argues in 'The First Session', in which (in a complex discussion of mimesis) the hymen is deployed as a figure of undecidability, the hymen marks 'between the future and the present and the present and the past, only a series of temporal differences, without any central present' (162). Certainly, the questions put by the barrister here reveal that the loss of virginity can never take place in the present, but as an event is rather deferrable and divisible. In a legal context, penetration will not be deemed to have occurred until it can be verified institutionally. It is only *after* this institutional verification- the laying of an expert text across the body- that virginity can be formally deemed to be lost which gives it a location then in kind of vibratory present-past. It cannot take place until after this moment. In this context, the event of losing one's virginity only ostensibly refers to the moment of intercourse itself (a moment which instantly

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<sup>9</sup> See Michel Foucault, *Discipline and Punish: The Birth of the Prison*, Alan Sheridan (trans.) Allen Lane: London, 183..

divides itself and throws forward to a future moment of verification); more precisely, it refers to the interpretation of a sign, a sign that may then authorise the losing of virginity in the past. In this way, the trace precedes the event that leaves it. *Unfortunately, however, the folding hymen does not disrupt this juridical logic, because the law will not permit the operation of its undecidability; its appearance is simply overcoded by the binary machine of the economy of virginity to mean that nothing has happened. The forensic hymen is a highly determinate figure.*

The excision of the text of the folding hymen continues most spectacularly at High Court level. In the majority judgment that overturned *M*'s conviction, Dr Fleming's evidence about the stretchiness of the hymen was not mentioned once- the judges note only the very last statement from her cross-examination in which she said that 'the hymen presented no physical evidence one way or another' for sexual assault. The fact that Dr Fleming's evidence contradicts Dr Holloway's (who the majority judges quote approvingly) must be cause for consideration. But no- the folding hymen disappears without a trace in the High Court judgment; it is given no existence and thus no efficacy.

Not only does *M* mark the vanquishing of the folding hymen; more dangerously, it marks the now extraordinary ascendancy of the hegemonic hymen in the Australian legal system, in spite of expert medical opinion to the contrary. *M* is now available for citation as precedent in rape trials in which the hymen is at issue. For example, in *RMM v The Queen*, the High Court's finding that the hymen of the complainant in *M* must have broken if her claims of sexual assault were true is referred to as one of the 'clear', 'factual' reasons that the court had at its disposal to overturn the accused man's conviction. All struggle, conflict, contradiction and opposition in the case of *M* has been eliminated, and the power of the hegemonic hymen to assert itself as the victorious interpretation not only undiminished but consolidated.

### The Blank Page

That the hymen supplements the text of a woman's speech is dramatically illustrated by the following event, which took place during the trial of *Glenn Roderick Holland v R*.<sup>10</sup> In this case, the accused was charged with the digital penetration of a 13 year old girl. He had claimed to be a professional photographer, and was going to help the complainant break into modelling. At issue in this case was the fact that despite the girl's claims of sexual assault, her hymen appeared to be intact. A large portion of the proceedings were thus preoccupied with discussions about the measurements of the girl's hymen, and the width of the accused's fingers. The defence claimed that her hymen, which measured 7mm, could not accommodate the 18mm circumference of the accused's fingers without rupturing. This was demonstrated to the jury by the accused man in the following manner. He held up a piece of paper, in which he had made a hole with a circumference of 7mm. He then tried to put his finger through the hole, and stopped. 'Why have you stopped it there?' asked his barrister. 'Well, if I go any further I will tear the paper', the accused replied. This piece of paper was then permitted to stand as exhibit one in the trial, without objection from the prosecution.

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<sup>10</sup> *Glenn Roderick Holland v R* (1993) 117 ALR 193. This event is taken from the transcript of the proceedings in the District Court of New South Wales (August 26- September 3, 1991: 89/11/1518, Downs J.)

Later, a judge on the appellate court described this incident as ‘graphically demonstrating the obvious.’

In what discourse is it possible to argue that the hymen has the qualities of paper? Under what conditions can one so effectively eliminate the powers of a living membrane, whose nature it is to stretch, as we have seen in *M*? I argue that the paper-hymen is the fetishised object of the hegemonic economy of virginity. It functions to metonymise the central relations of this discourse, by embodying a hymen which provides instant and verifiable proof of its own history. Strikingly, however, the paper-hymen contains the elements of its own undoing, because remarkably, *the only way in which one can find a hymen which provides such unambiguous knowledge is to make one out of paper*. That is, the exhibit which allegedly represents the essential qualities of the hymen must be, literally, a fabrication, a non-human structure of tree-pulp and water, rather than the inscrutable, incalculable, *human hymen* of non-signifying membrane, which in its muteness is able, tragically, to be wrested into the fabric of multiple interpretations, even those which contradict its own nature.

Unlike the exhibit constructed by the accused in this case, the hymen is not a blank page, a white, inflexible field surrounding a hole of stable dimensions: the hymen is instead a complex text, cross-hatched with relations and significances. The salient object of investigation at this point I think is not some putative real referent for the hymen (since that referent can only be another set of texts) but rather its tactical effectiveness within the political organisation of sexual difference. I would suggest that the text of the hegemonic hymen operates in an anachronistic strategy of sexual difference that nonetheless has overwhelming cultural efficacy. This strategy, which is specific to the juridical discourse on rape is used to supplement the testimony of injury: the blank page brandished against the mouth of the subject who is suffering, causing her to fall silent.

On the other hand, the complexity of the hymen-text means that it can be activated in an opposing strategy, one in which its supplementary relation to women’s testimony can be contested and overturned. In this context, we could connect the folding hymen to a strategy already established by feminist legal scholarship, in which women *as a class* are recognised as credible individuals in civic life, who in particular are able to produce trustworthy speech. If we reconsider the hymen in relation to this strategy, then the current connection between the hymen and the testimony that describes it needs to be disarticulated. I want to suggest here that an investigation of the hymen’s literary (as opposed to medical or legal) surface might provide clues for how this could be done. Here, I don’t want to pose literature as a corrective to law—chiefly because I am not going to suggest that there is a documentary text of the hymen which resides in literature which can be imported back to law. The reason I don’t want to say this is that in some ways, this text already exists, in the form of the contestatory speech of doctors like Dr Fleming. Instead, I want to suggest that literature might offer not documentary facts but rather a reservoir of concepts about ways of reading the hymen that could be mobilised into a pragmatic critical-legal strategy.

In Isak Dinisen’s short-story ‘The Blank Page’, a story-teller who is 200 years old sits outside the gates of the city, selling strange tales for a living.<sup>11</sup> During the time of the

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<sup>11</sup> Isak Dinisen, ‘The Blank Page’, *Last Tales*, University of Chicago Press: Chicago, 1955.

story, she relates the rules of ethical narration to an unseen audience. 'Be loyal to the story', her grandmother had told her. 'Where the story-teller is loyal, eternally and unswervingly loyal to the story, there, in the end, silence will speak. Where the story has been betrayed, silence is but emptiness. But we, the faithful, when we have spoken the last word, will hear the voice of silence.' In this textual world, the deepest tale is found not 'upon the perfectly printed page of the most precious book', but rather 'upon the blank page.'

What story could be offered to illuminate the blank page of ethical narration in this text? Perhaps unsurprisingly 'The Blank Page' is a tale about virginity. The central dramatic moment of this text takes place in a famous corridor inside a Carmelite convent in Portugal. The nuns there were charged with weaving the linen for the marriage-sheets of local princesses. As was the custom, the sheets would be hung over the balcony of the palace the morning after the wedding, with the proclamation 'We declare her to have been a virgin' in that strange folding back of the tense of virginity, which can only appear when the moment of its own fatality has already been passed over.

As a reward for the fineness of their work- the purity of the sheets being the result of an endless and detailed labor of production- the nuns were permitted to display these sheets in heavy gold frames in the convent gallery, each with a silver plaque beneath bearing the name of an honourable princess. Each sheet in this strange gallery is written with a set of conventional patriarchal significations: the smear of blood that heralds the just-ended virginity of the young bride. The stained and bloody sheets provoke fabulous interpretations from passing visitors: some see the zodiac signs of the Scorpion and the Lion, others find signs from the discourse of romance- the rose, the heart, the sword (103). But towards the end of the corridor is a sheet that draws all spectators to a stop: it is a frame with no name, 'and the linen within the frame is snow-white from corner to corner, a blank page.' (104) Here, we are told, 'the story-tellers themselves before it draw their veils over their faces and are dumb.' Of course, the white sheet here is an essential component in the series-structure of virginity represented by this strange corridor, that winds its way from literature to law (because it is not only a *literary* space but a *juridical* one). The white sheet subtends the proper image of the present-past virginity which decorates the other pages in this line. The moment of their inscription entails an instant citation of this other page, the blank one, which is simultaneously called up and negated in each sheet that is permitted to bear a proper name beneath it. These bloodied sheets gain their authority only by overwriting the white space of its blankness, which must nonetheless be present for the proper framing of their own legitimacy. We hang the sheets out the window *precisely to show*, *not* that they are bloodied, but that they are *not* blank. (not, I was virgin, but rather, look, I was not a non-virgin).

Importantly, the story-teller refrains from offering any judgment about the blank page. In contrast, common-sense interpretations of this story have held that the blank page is the simultaneously voluble yet silent mark of a princess who has fallen outside the borders of morality. Susan Gubar in "'The Blank Page' and Issues of Female Creativity' contests this conventional reading by noting that the lack of judgment about the blank page inside the narrative of this story permits other possible interpretations to circulate and remain in suspension:

Was this anonymous royal princess not a virgin on her wedding night? Did she, perhaps, run away from the marriage bed and thereby maintain her virginity intact? Did she, like Scherezade, spend her time in bed telling stories so as to escape the fate of her predecessors? Or again, maybe the snow-white sheet above the nameless plate tells the story of a young woman who met up with an impotent husband, or a woman who learned other erotic arts, or a woman who consecrated herself to the nun's vow of chastity but within marriage. Indeed, the interpretation of this sheet seems as impenetrable as the anonymous princess herself.

Gubar here productively proliferates the possible 'causes' of the white sheet, the blank page. However, her attempt to multiply the readings of this text nonetheless inscribe a specific model of the hymen: the hegemonic hymen, which breaks on first penetration. Within this economy, the hymen that leaves no trace is either *already* broken or has *never* been penetrated. What is illegible within this economy and excluded from Gubar's speculation (but not from Dinisen's story) is another kind of hymen altogether- the folding hymen, which can *endure* penetration without breaking and without leaving any sign of its ordeal. If we read the story of the blank page from the perspective of the folding hymen, then we could discover a story of a princess who could have done anything on her wedding night, but whose pleasures cannot finally be verified.

From this perspective, the blank page is not the white mark of a princess's shame, but rather an open field, inscribed by multiple texts and images, and defined by the suspension of judgment. Rather than imposing one reading and foreclosing the possibility of multiple connections between speech, actions and images, the blank page instead offers a white space in which the relation between bodies, events and discourses cannot disappear beneath the violence of generalisation.

Here, I would suggest that the blank page of literature provides a set of clues about the practices we might use to unfold the paper-hymen of law. If the state of the hymen cannot offer verifiable proof of the first time, then in the context of sexual assault trial it must not be constructed as the incontrovertible sign of that time, thus disqualifying those women who do not bear the correct hegemonic form. That is, the hymen must be unhitched from the evidentiary apparatus.

There is a number of moves that could be made here. *One, that the hymen be eliminated altogether from the evidentiary paradigm* (recalling the research which shows that doctors misread both broken and unbroken hymens). This move would rescue those women who currently bear folding hymens but also disadvantage those young women who have conventional hymens (by prohibiting the evidence of such damage from being relevant).

*Two, that evidence about the hymen always be accompanied by a judicial direction about its complex nature and its unreliability as evidence.*

This move could take the form of a definition of the hymen, as currently exists for the vagina.

Without these changes, the law will continue to enact an extraordinary violence on those women who bear the folding hymen, with the *unjust* legal fiction that the hegemonic hymen is the only hymen, rather than being only one of its many modalities. Instead, these moves might provoke a change in the political organisation of sexual difference, and enable the power-complex of the folding hymen to control

the interpretative field, precisely by removing the hymen from consideration altogether. And from here, we can speculate about one final effect that the folding hymen might produce.

The folding hymen potentially inaugurates an entirely new strategy in the history of virginity. As Derrida writes in a footnote in 'The Double Session', because 'the value of virginity is always overlaid with its opposite, it must ceaselessly be subjected to the operation of the hymen.' What does the folding hymen do to this proposition? Let's say that virginity can be described as the threshold before the first time. Within the political organisation of the patriarchal system, the first time for a woman is required to be intelligible. That is, the first time can only function in this strategy if it produces a sign- extraneous to a woman's own testimony- that might be wrested into an interpretation. To problematise the first time and its relation to women's bodies, to suggest that as an event it might be imperceptible, it to divest virginity of the limit which makes it meaningful. Without the wound of the hegemonic hymen to mark off one time from another, the virgin body from the non-virgin body, the apparatus of virginity cannot function. This binary opposition is only possible if an unequivocal differentiation between bodies can be made. Without the hegemonic hymen, which constitutes this mark, this differentiation, virginity is evacuated of classificatory efficacy. Instead, the folding hymen produces an economy in which the only verifiable sign of a woman's sexual status is the text of her own speech. The folding hymen ushers in the virgin's disappearance.