

Ched Evans, Rape Myths and Medusa's Gaze: a story of mirrors and windows

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Ched Evans, Rape Myths and Medusa's Gaze: a story of mirrors and windows

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Introduction

A promising development in the study of crime and criminal justice in recent years has been work that engages notions of visibility and the gaze, and that understands crime and responses to it in terms of an asymmetrical relation between 'those who look' and 'those who are looked at' (Brown and Carrabine, 2017). Legal scholars and cultural criminologists have argued that by securing for itself the means to observe and display those in its field of view, the criminal justice state naturalises its own power and affirms its own subjectivity - conversely affirming the objectification and disempowerment of those against whom it exerts its force (Brown, 2014, p.180). The collection, recording and circulation of images such as the faces of suspects; the use in and around prisons of the chain gang and the orange jumpsuit; the design and layout of public space to allow for surveillance and supervision: all of these have been cited in the literature as visual signifiers of this arrangement (Carrabine, 2014, pp.140-2; Hayward, 2010).¹ In combination, they help to ensure that the state can maintain its occupation of a privileged vantage point, not only to exert power, but furthermore to ensure that it can avoid becoming in turn the *object* of observation. In this vein, critics have attributed political and cultural significance to devices such as the inscrutable surface of the police officer's mirrored sunglasses or the CCTV

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¹ On the use of racial difference as a marker of social exclusion, see Linnemann, Wall and Green 2014.

camera lens (Schept, 2014, p.199) through which the state can observe others whilst obstructing a clear view of its own actors and operations (Wright et al., 2015, p.106).²

In the more specific context of male sexual offending against women and the treatment of such offending by the criminal justice system that is the theme of this article, critical visual approaches tend to proceed on the basis of at least one of the following assumptions. The first of these is that, as a signifier of *sexual difference* and the asymmetricality of power, the viewing subject/viewed object relation is necessarily sexualised. The second is that this relation can be analogised to an unequal and potentially abusive sexual relation (Carney, 2010, p.32). The implications of that relation have been explored in the existing literature in various ways. For example, the fear of rape and sexual assault has been associated empirically in certain studies with the social and political dynamics of watching and being watched (Moore and Breeze, 2012; Quinn, 2002). Elsewhere it has been observed that the way that criminal justice humiliatingly 'exposes' and 'marks' the body of the offender often provides a source of fascination and even entertainment for the 'law-abiding majority' (Carney, 2010, p.32). The suggestion here is that criminal justice orchestrates 'spectacles' of punishment, and legitimises these as sources of prurient and prying (and implicitly *sexual*) enjoyment (Dymock, 2016; Biber, 2015, p.234; Young 1996, p.92).³ Indeed, Lois Wacquant (2009, pp. xi-xiii) likens criminal justice to pornography, and makes this analogy central to his conception of criminal justice processes: in terms of *purpose* (that crime control is

² At a different level altogether, it has been argued elsewhere that the procedures and language of the (ostensibly 'open') criminal trial can seem to some arcane and impenetrable (Biber, Doyle and Rossmannith, 2013).

³ As Young argues, giving an excuse to 'pry and peep' at otherwise private scenes, the criminal justice system might be said to share some of the aims of detective crime fiction, making 'voyeurism a duty'.

primarily something to be 'seen, scrutinized, ogled'), *aesthetic* ('repetitive, mechanical, uniform') and *effect* ('feed[ing] ... fantasies').

This article builds on the foundations of this work but also breaks new ground by offering an innovative and interdisciplinary critical analysis of constructions of rape and sexual violence in judicial rhetoric and in feminist-informed scholarship. It examines how those discourses make use of allusions to the visual (e.g. metaphors of sight, reflection, distortion and perspective) as devices for conceptually framing rape and sexual assault. The cultural and political implications of these allusions demand a close and critical study – a demand that this article sets out to answer. The article begins in section 1 therefore with a critique of the Court of Appeal ruling in *Evans*⁴ and its legitimisation of the 'forensic examination' of the details of a young female rape complainant's consensual sexual activity with men other than the defendant. Contextualising the Court's attempt therein to engage with notions of rape myth and victim blame, the article moves on to consider these issues in light of Ellison and Munro's (2009) metaphor of 'turning mirrors into windows'. The metaphor expresses Ellison and Munro's desire to bring about a change in the way rape and its actors are viewed: ensuring that the 'true facts' about the crime are no longer obscured by prejudice and myth.

Section 2 theorises the implications of that discussion with reference to the 'male gaze', a framework that affirms a gendered visual hierarchy, and is traceable in psychoanalysis to Freud's interpretation of the image of the beheaded Medusa (see pictured at the end of

⁴ *R v Evans (Chedwyn)* [2016] 4 WLR 169.

section 2, below). For Freud, Medusa's ghastly neck wound represents female sexual difference generally as the site of a 'wound', which is symbolically reproduced everywhere in our culture as an unconscious reminder both of male castration anxiety and also male phallic dominance. The male gaze thus has deeply conservative implications (entrenching female objectification as central to male subjectivity), and in section 3, I argue that the *Evans* ruling in favour of exposing the complainant's sexuality to scrutiny is evidence of its continued significance for criminal justice. Building on existing visibility theory literature (Young, 2014; Brown, 2014; Schept, 2014; Hayward, 2010, p.6), that final section sketches a way in which interdisciplinary critical scholarship might reclaim notions of the visual in order to challenge the criminal justice gaze and its objectifying tendencies.

1. Framing sexual violence: the Ched Evans case and Rape Myth Acceptance

Let us begin then by observing how judicial and legal-scholarly responses to rape and sexual assault draw on notions of visibility and a visual asymmetry between 'those who look' and 'those who are looked at'. As outlined above, this discussion will foreground a deeper theoretical analysis and critique in section 2, and some proposals for a positive reclamation of the visual in section 3.

a) Asymmetrical visibility in legal judgment: the second Ched Evans appeal

In *Evans*, the Court of Appeal overturned a well-known footballer's rape conviction and ordered a retrial on the basis that fresh evidence had come to light of consensual sexual activity between the complainant ('a woman (whom we shall call X)⁵) and two other men ('Mr Owens' and 'Mr Ripley'). The Court held that the fresh evidence bore a similarity to events as described by Evans in his own evidence that 'cannot reasonably be explained as a coincidence', and hence was relevant and admissible under the Youth Justice and Criminal Evidence Act 1999, s.41(3)(c)(i).⁶ The importance of this judgment for us here is not that it sets a new legal precedent, and indeed its significance on this measure is actually somewhat limited. For one thing, the judgment is contingent upon a very specific set of facts; for another, and despite its controversy, its ruling that evidence relating to sexual relations with people other than the defendant could be admissible at trial was not a departure from previous authority.⁷ The case *is* important however, and for two reasons that stem from the fact that it engages the question of the relevance of the complainant's own sexual behaviour. First, it affords valuable information about the judiciary's awareness of and sensitivity towards concerns about rape myths and victim blame, and provides a fresh opportunity to examine how the courts navigate this difficult terrain (considered more broadly in the following sub-section).⁸ Secondly and relatedly, it provides an opportunity to examine how legal discourse engages notions of the visual, and how visuality as a conceptual framework can assist our understanding of criminal justice responses to rape

⁵ *Evans*, para [1].

⁶ To quote s.41(3)(c)(i) of the Youth Justice and Criminal Evidence Act 1999 in full: '(3) This subsection applies if the evidence or question relates to a relevant issue in the case and ... (c) it is an issue of consent and the sexual behaviour of the complainant to which the evidence or question relates is alleged to have been, in any respect, so similar (i) to any sexual behaviour of the complainant which (according to evidence adduced or to be adduced by or on behalf of the accused) took place as part of the event which is the subject matter of the charge against the accused ... that the similarity cannot reasonably be explained as a coincidence.'

⁷ Note that s.41 in any case makes no distinction between evidence of sexual activity with the *defendant* and sexual activity with *third parties*. On this point see McKeown (2016, p.410).

⁸ For a review of responses to s 41 in light of rape myth acceptance, see Ellison (2010, p.208).

and sexual assault. Given the intertwining of these two reasons for according significance to *Evans*, this section addresses them together, focusing first on the framing of the facts of case and then moving on to consider the judicial reasoning.

Reading the judgment for clues about how its presentation of the facts sets up an engagement with notions of rape myths *and* visibility therefore, a number of factors are noteworthy. In the first place, we learn that one of the two men who came forward to give what finally turned out to be decisive evidence about a sexual encounter he had had with X (Mr Owens), was motivated to do so by his personal view that X did not conform to his image of a typical rape victim. For him, a woman who truly had been raped would (or should) not have been out clubbing and engaging in casual sex 'so soon after the rape', as X had done, and must therefore be lying and 'motivated by greed'.⁹ The testimony of consensual sex provided by those two men that the Court considered at length alongside that of the defendant, furthermore implicates readers of the judgment in a collective voyeurism. Indeed, the text of the judgment is dominated by graphic descriptions of X's sexual life: her apparent preference for casual and often drunken sexual encounters, to have sex 'on all-fours', to direct and initiate changes of sexual positions and to demand loudly that partners should 'fuck [her] harder'.¹⁰ It was these particular details that the Court decided were so similar to the defendant's own testimony that a retrial should be ordered, at which those details could be heard by a jury.

⁹ *Evans*, paras [25 – 6].

¹⁰ *Ibid*, paras [12, 13, 24, 33, 35, 39, 52, 56, 58, 71].

Two further features that intensify a visual reading are the fact that the legal developments unfolded in the intense glare of the media gaze, and that this gaze was itself mirrored by an act of voyeurism on the part of the defendant's friends. The judgment refers to two men who, knowing that Evans and another man (MacDonald, co-accused but acquitted at trial) were in the ground floor bedroom with X at the hotel, were seen attempting to watch the incident from outside, and to film it on their mobile phones. This attempt was thwarted at a certain point when the curtains were closed. The night porter too is described as having 'listened outside the door for two to three minutes [until] he concluded that a couple were having sex', although there is no suggestion in the judgment that in doing so he was motivated by anything but his professional duty as night porter, nor that he deviated from that duty.¹¹ Like the concealing of the complainant's identity by referring to her euphemistically as 'X' (co-incidentally the letter traditionally designating censored content) we might think of this blocking of the view as simultaneously veiling and drawing attention to the object or image that the sexual subject desires to see.

The impression we get of X and her role on the night in question is that she was essentially an image in the window and a shared object of fascination for various observing (and listening) males.¹² This impression is furthermore strangely echoed by X's passivity as a party in the criminal proceedings that followed. Although X did make a report to the police, she never actually alleged that she had been raped, nor even that she was incapable of consenting to intercourse. Rather, she maintained that she was simply too drunk to recall

¹¹ *Ibid*, para [8].

¹² For a broader legal theorisation of femininity in these terms, see Russell (2013, p.257) and also Quinn's (2002) analysis of 'girl-watching' in male-dominated workplaces, which serves 'hommo-sexually' to forge and reinforce male bonds of friendship, and for which women are 'simply a visual cue' (p.392).

anything about it at all.¹³ The evidence of non-consensual intercourse on which the prosecution case rested was *all volunteered by Evans and his co-accused* themselves when questioned by police;¹⁴ likewise the fresh evidence that focused on X's consensual sexual encounters with other men was a conversation between lawyers, former sexual partners and judges from which the complainant herself was conspicuously absent. In further contrast to the talkative Evans (who appeared on television with his partner to confess to and apologise for 'my act of infidelity'¹⁵), X herself made no public statement about the case at any point, despite the often vicious personal criticism directed at her on social media.¹⁶ X's silence and self-concealment reflects the crux of the prosecution argument in the appeal that details of X's behaviour during consensual sexual acts are not admissible as evidence and as such should not be revealed to a jury. These gestures of concealment confirm X's status as the object of public attention and surveillance, rather than a speaking, responsive subject in her own right (see Quinn, 2002).

The Court acknowledged the relevance of these different manifestations of voyeurism and concealment in its characterisation of the central legal issue in terms of the justifiability of 'indulg[ing] in a forensic examination of [X's] sexual behaviour with others'.¹⁷ As discussed in the following sub-section below, the Court did indeed decide that such 'indulgence' was justifiable, on the basis that the testimony from the two other men of their sexual activity

¹³ *Evans*, para [10].

¹⁴ *Ibid*, [11].

¹⁵ Interview available Online: <https://www.youtube.com/watch?v=PPAWkNrfRkg> [accessed 9 Jun 2017].

¹⁶ To take one example: of the 90 responses posted to the video of Evans' 'confession' on *Youtube* and referred to above, opinions divided, but more than half were dismissive of the truth of the rape allegation. Most significantly for present purposes, X is repeatedly referred to in the comments as a 'gold digger' and a 'whore', epithets that speak to Mr Owens' motivation for coming forward with his testimony of consensual sex with X to help the defence case.

¹⁷ *Evans* para [74].

with X would be relevant and admissible evidence at trial on the question of consent. The Court thus conferred a serious moral and legal purpose to a fixation on X's sexualised body that would otherwise be mere prurience or voyeurism. However, this serious purpose of ensuring that 'relevant' evidence is heard at trial does not overcome the troubling sexual politics necessarily engaged by the ruling. (Biber, 2015; Young, 2010). For example, does the *Evans* judgment imply that the exposure of X's sexuality is legitimated by her apparent lack of sexual restraint, innocence and modesty?¹⁸ Are we to think of the decision to allow for the scrutiny of those potentially damaging sexual details as in some sense X's '*just deserts*'? As we have seen, this sense of restoring a perceived moral balance certainly seems to have been effective in generating the crucial fresh evidence. The following sub-section examines this line of thought in more depth.

b) Visual metaphor in feminist writing on sexual offending

I have now outlined some ways in which *Evans* invites a visual reading: from the voyeurism of its actors, to the asymmetry between X and her antagonists during the case proceedings, to the legitimisation of the exposure and scrutiny of her sexuality by the Court of Appeal. These elements in combination, and their potential implications for gender, sexuality and criminal justice may be analysed further in light of relevant feminist scholarship. The latter can itself also be characterised in terms of visibility, and in three primary respects. The first

¹⁸ The association of deviance and blameworthiness with female sexuality can be traced to the nineteenth-century criminology of, for example, Cesare Lombroso, for whom 'strong passions and intensely erotic tendencies' and 'exaggerated sexuality so opposed to maternity' were in women characteristics of the 'born criminal more terrible than any man' (Lombroso and Ferrero, 1895/1959, p.151, 153).

of these is that feminist scholarship on rape myths tends to proceed by debunking the mythical (that is to say, false or misleading) *image* or *vision* of rape: that of the 'stranger in the bushes/alleyway' that implicitly discredits rape committed by friends, intimate partners or former partners, at home or some other familiar place, without physical injury (Ellison and Munro, 2013, p.299). The second is the critique of the way that women's morality and sexuality can become the subject of forensic *inspection*, and that this can be allowed to impact on how jurors and other legal actors assess female complainants. Complainants may be judged to have 'precipitat[ed] their own attack' by (say) becoming too intoxicated to ward off predictable male sexual advances (Finch and Munro, 2007; Gunby, Carline and Beynon, 2010; Hickman and Muehlenhard, 1999), or else to have failed to observe traditional sex-role expectations as gatekeepers of sexual morality (the initiator role being a masculine one) (LaPlante et al. 1980; Masters et al. 2013; Sakaluk et al. 2014). The third is that discussions of consent may implicitly give undue weight to visual or at least non-verbal '*signs*' of sexual willingness that might in some circumstances be allowed to undermine a complainant's own testimony (Rees, 2012).

For the *Evans* Court, it was the second of those aspects of visuality described above that presented the nub of the relevant legal problem. However, what characterises feminist rape myth scholarship more broadly is a concern about what the judging subject (be it the juror, judge, police officer, lawyer, member of the public, etc.) *sees* in a rape complainant and/or defendant. For example, Ellison and Munro (2009) pithily summarise their mock-jury research in the short title of their article – 'Turning Mirrors into Windows?' – effectively deploying a metaphor of visuality at the same time to amplify the two general claims of

rape-myth-busting scholarship. The first is that when people look at the issue of rape, what they 'see' is not a clear view of the relevant facts and evidence, but rather a montage of images composed of their own deeply ingrained prejudices, stereotypes and false beliefs *reflected back* to them. The second is that if tackled in the right way, these might nevertheless be removed or dispelled in order that the truth about rape may be properly seen.¹⁹

Beyond the obvious metaphorical association between *knowing* and *seeing* the world, a deeper and broader study of the cultural symbolism of the visual could (I suggest) usefully contribute to understanding popular attitudes, legal formulations and scholarly arguments regarding rape and sexual assault. In a now much-discussed article, Catharine MacKinnon (1983) uses two long footnotes to observe how popular *visual* metaphors for the acquisition of knowledge tend to reflect a male experience of sexuality. For example, a scholar makes 'a penetrating observation'; knowledge is gained by 'violating boundaries' and the pursuit of knowledge is a process of 'appropriation and objectification' (p. 636).²⁰ Thus according to the history of culture as MacKinnon paints it (p. 645), the biblical euphemism 'to know' is highly appropriate since it is expressive of the structuring of the 'known world' generally as subservient to male sexual subjectivity, exploration and discovery. *Genesis* after all reports only that 'Adam knew Eve', not the other way around.²¹ Susan Sontag (1977) similarly uses a gendered language of sexual possession and penetration to describe photography as

¹⁹ For a critical review of feminist rape-myth acceptance scholarship more generally, see Gurnham (2016) and Gurnham (2016a).

²⁰ For further development of this idea, see also Pugliese 2002 and Carrabine 2014, p.136.

²¹ John Donne (1976) famously and provocatively put the association to use in his poem *To his Mistress Going to Bed*: 'O my America! my new-found-land, / My kingdom, safeliest when with one man mann'd, / My Mine of precious stones, My Empire, / How blest am I in this discovering thee!' (Elegy 19, pp. 124-6).

‘something predatory’ that can ‘violate’, ‘possess’ people and ‘turn [them] into objects’ (p.14). Sontag implies what MacKinnon explicitly argues: that looking, knowing and fucking (to use MacKinnon’s expression, connoting penetrative heterosexual intercourse that may or may not be consensual) are all semiotically associated since each instance is characterised by a (male) subject who seeks to dominate the world and the objects (some of the latter being female persons) he finds in it.²²

To return to writings more directly about sexual offending, we similarly find popular perceptions and attitudes about rape characterised in visual terms. For example, Anderson (2010) portrays the ‘classic’ (that is, stranger) rape as a vision ‘conjure[d] up’ in the ‘American mind’ that necessarily involves a violent struggle and the spilling of an innocent female victim’s ‘red blood’ (p. 645). As Janet Halley (2008) puts it (albeit in a different context) – ‘our precommitments ensure that we’ll “see it because we believe it.”’ (p. 344). Critical analyses of the handling of sexual offences in and by the criminal justice process also often associate the processing by officials and legal actors of *visual* information with the prevalence of mythical thinking. For example, jurors are sometimes criticised for seeking visual signs of violence on and inside the complainant’s body and clothing that will prove that the incident in question involved real and serious resistance and struggle as opposed to mere ‘rough sex’ (Anderson 2010, pp.651-2; Ellison and Munro, 2009, p. 314-5; Carline and Easteal, 2014, pp. 184-5). Other research has also sought to demonstrate that decisions made by police to ‘no-crime’ reports of rape are often based on a stereotypical assessment of visual cues. These include CCTV evidence of friendliness before or after an incident that

²² As we shall see, the heterosexual character of the relations of power and domination described by Sontag and MacKinnon are also central to the notion of the male gaze, discussed later in this article.

may be taken to constitute evidence that a complaint was probably fabricated (Burton, 2013, p. 209). In addition, doubts about the realistic prospects of a conviction will dissuade many prosecutors from taking a case to trial if there is a lack of visible physical marks on the complainant's body (Carline and Easteal, 2014, pp. 179-180).

Gethin Rees (2012) similarly draws attention in his empirical research on the forensic medical examination of rape complainants to the significance that may be accorded at trial to bodily markings such as tattoos, body piercings and old scars. Whilst not necessarily significant in isolation, Rees worries that they may be 'deeply damaging if combined with other similar aspects of a client's lifestyle' because they 'create an impression to the court that the client is of "bad character" in an attempt [by defence counsel] to undermine their credibility in the eyes of the jury' (p.117). Although in jurors' minds such 'signs' may seem to indicate a path towards distinguishing rape and consensual sex, these are paths with a source not in the real world 'out there' but in the prejudicial attitudes of the jurors themselves. Assessing the extent to which Rees' worries have a basis in fact is difficult given the lack of an opportunity to scrutinise actual jury room discussions, but his approach further reinforces the appropriateness of Ellison and Munro's visual metaphor to describe the general aim of rape-myth-busting scholarship.

This association of perceived bad behaviour (that may become the object of scrutiny and moral judgement) and its potentially damaging *legal* consequences for women who allege they have been the victim of rape or sexual assault is explored more fully by feminist legal scholars in terms of the idea that we live in a 'just world'. As noted above, some

commentators have argued that rape and sexual assault are popularly believed to be ‘misfortunes’ that can befall a woman if she fails to check an initiating man’s assumption that access to her body is permitted, especially if that assumption arose because of implied encouragement from her. Others have argued that when female rape complainants are not believed, this disbelief can be attributed to the woman in question having previously and/or subsequently failed to observe a regime of sexual self-regulation and decorum. This focus on the agency and moral decision-making of victims rather than perpetrators in turn presupposes that on the whole life and society are just and fair, and that people generally get what they deserve – that the good are rewarded and the bad punished (Chapleau and Oswald, 2013; Franiuk et al., 2008). This ‘just-world view’ may be at the foundation of the belief that it is only ‘bad girls’ (that is, women who fail to conform to traditional feminine expectations of good behaviour) who get raped by bringing the violation on themselves (Abrams et al., 2003). These views and beliefs have been elsewhere identified in legal judgments on sexual offending (Ellison, 2010; Wallerstein, 2009) but the senior courts are rarely called upon to tackle them quite as directly as in the *Evans* case. It is worth considering here therefore how the implicit moralism of ‘just world’ thinking is discernible, not only in the consensual sex testimony for the defence, but also in the Court of Appeal judgment itself.

Hallet LJ’s speech indicates in the first place that the Court is well aware of the potentially damaging implications for the complainant of allowing the defendant to put to a jury the evidence of her consensual sex with other men. She cites the purpose of the relevant legislative provision as being to counter the ‘twin myths’ that ‘unchaste women are more

likely to consent to intercourse and in any case, are less worthy of belief'.²³ However, if with these words Hallet LJ acknowledges the cultural and moral context within which the question of admitting consensual sex evidence sits, it presently becomes clear that this is nevertheless insufficient to sway the Court's decision. On the subject of just how similar Evans' testimony and the consensual sex evidence really was, prosecution counsel attempted to argue that it 'is far from unusual' for a 'sexually active woman [to] enjoy sexual activity with other men' and that 'the words "fuck me harder" [are] common-place words used to indicate enthusiastic consent'.²⁴ If that is correct, then it arguably follows that any similarity between such aspects of X's sexual life and those of the alleged rape is indeed explainable as *just* coincidence and therefore that the evidence is inadmissible.²⁵ For the Court however, that argument is 'flaw[ed]' in a legal sense, because it wrongly focuses on whether the behaviour in question is 'unusual' and furthermore fails to acknowledge that the courts had already accepted that s. 41(3) 'does not necessitate that the similarity has to be in some rare or bizarre conduct'.²⁶ That approach may well be correct as a matter of law narrowly construed, but it is difficult to see how it takes due account of the risk of exposing X to prejudicial attitudes. The rather bald statement finally that the Court is 'satisfied that, on the facts, [the evidence] is sufficiently similar to come within the terms of s. 41(3)(c)(i)'²⁷ seems further to suggest a formal, decontextualised interpretation of the law.

²³ *Evans* Para [44].

²⁴ *Ibid*, Para [56].

²⁵ *Ibid*, Para [55].

²⁶ *Ibid*, Para [73]; the reference to precedent quotes (at para [51]) Lord Clyde in *R v A (No 2)* [2002] 1 AC 45 at para [135].

²⁷ *Ibid*, Para [72]. See above, n 7 and n 8 for more information about this statutory provision.

In previous published work I have suggested that rape myth-accepting (RMA) and victim-blaming attitudes may not be quite as wide or deep as sometimes alleged in feminist RMA scholarship (Gurnham 2016; Gurnham 2016a). In this particular case however, one reason to fear that allowing the consensual sex evidence to be admitted at trial would be particularly damaging to the complainant's credibility is that the evidence also serves to demonstrate her violation of traditional feminine norms. Presumably paraphrasing the defence account of the fresh evidence that they intended to put in front of the retrial jury, Hallet LJ's judgment makes it clear that, far from being a sexual 'gatekeeper', X was in fact very much the initiator – the role traditionally reserved for men. Regarding the testimony of Mr Ripley, we learn from the judgment that 'On at least three of those occasions when both had consumed a lot of alcohol, X propositioned him by saying if he took her home, she would give him a "good time."' ²⁸ Then, describing Mr Owens's testimony, we read that X not only initiated sex and directed it, but that her demands were issued repeatedly as orders: 'X was shouting "fuck me..." ... she continued to shout, "fuck me..." ... X continued to shout the same words.' ²⁹

It will likely never be known precisely how much significance the retrial jury attached to the freedom allowed to defence counsel to dissect X's sexual behaviour, except insofar as they did in fact acquit Evans of the crime for which he had previously been convicted. What is clear however is that in the Court of Appeal, defence counsel was successful in their argument that otherwise unremarkable aspects of X's private life ought not be concealed

²⁸ *Evans*, para [19], emphasis added.

²⁹ *Ibid*, Para [24], emphasis added.

from view, but made the object of scrutiny and judgement.³⁰ Those who would endorse the ‘just world’ view (described above) might say that, by her past and subsequent behaviour *X* showed herself to be no innocent, and that doing justice to the defendant requires a jury to know as much. Hallett LJ’s insistence that in inviting a second trial on the basis of the fresh evidence, ‘we have made no criticism of *X*’³¹ is surely only true in the narrowest and most obtusely literal fashion. Although it is indeed true that Hallett LJ never *actually* says that *X* is to be regarded as blameworthy on account of her drunkenness, promiscuity and sexual appetite, the judge’s words here feel like a rather disingenuous denial of the invitation to pass moral judgement that is implicit in defence counsel’s submission. The following section develops the analysis produced so far – specifically regarding the association observed here between visibility and such moral judgement – by moving into slightly deeper theoretical waters.

2. Theorising visibility and sexual violence: the male gaze

The discussion above has begun to sketch out some of the troubling implications of the asymmetrical visual relation between the looking subject and looked-at object in a legal context. I now develop on this by drawing on the ‘male gaze’: a conceptual apparatus that helpfully illuminates our inquiry into hegemonic and embedded ideas about gender and sexuality, but which is also oppressively conservative.

³⁰ For a comparable analysis in a different context, see Felman (1997).

³¹ *Evans*, Para [76].

There are various possible ways to theorise visibility and its application in the study of crime and criminal justice. For example, Foucault's (1995) discussion of the efficient production of compliance and docility in prisons utilising Bentham's panopticon has spawned a wealth of criminological literature identifying manifestations and effects of the surveillance state (Mathiesen, 1997; Smith, 2004; Stalcup and Hahn, 2016; Wacquant 2009). Other approaches employ Jean-Paul Sartre's (2003) proposed radical distinction between empowered viewing subjects and vulnerable viewed objects (Moore and Breeze 2012). For present purposes, I have hitherto already implicitly adopted a frame of reference in which the criminal justice state as a voyeuristic male subject feminises and objectifies those at its sharper end. It is a frame of reference already observed in the lurid descriptions by Wacquant (2009) of the criminal justice state as 'ogling' and 'virile' – a masculinist characterisation made explicit by Dymock (2016), for whom to speak of the state in such terms is demonstrably appropriate given that the consequences of criminalisation often involve scrutinising *female* sexuality.³²

At this point therefore, it is worth reflecting on where this frame of reference comes from and what it gives us in terms of a critical perspective. Freud (1922/1953, 1919/2003 and 1900/1990) (in)famously identified childhood castration anxiety – ie the guilty fear that one's moral and sexual transgressions might be punished by castration at the hands of paternal authority – as the driver of male moral and sexual development.³³ Laura Mulvey (1989) harnessed this insight in her own theory of visual culture, for which she coined the term the 'male gaze'. She argued that what men find so fascinating about the image of the

³² Emphasis added.

³³ There are many and various critiques of Freud on this point, but see in particular Bowlby (2006, p.44).

female body (on screen, in Mulvey's own specialism of film and visual culture studies) is that it represents a distant but crucial echo of that childhood fear. For Mulvey, the female body, and in particular its genital difference from the male, serves firstly to *remind* men of their forgotten fear of being subject to injurious castrating censure, and of disconcertingly glimpsing in childhood the 'evidence' of castration in the seemingly deficient genitals of a mother or sister. But at the same time it also serves to *reassure* men of their success at having avoided that fate and of their own continued phallic potency. Thus, the female body and its 'lack' is fantasised as the object of threat, possession, surveillance, investigation, etc. as a guarantor of male self-assurance and self-preservation (Mulvey 1989, p.21). This is undoubtedly a frame of reference in which the possibility for female sexual subjectivity is uncertain at best, but for Mulvey the misogyny that lurks in the male gaze is central to 'order and meaning' in our 'phallogentric' culture (p.14).

For an illustration of this framework in the context of our discussion of rape and sexual assault, consider what I have already observed above about what the *Evans* ruling implies for complainants whom jurors may consider less than innocent. The judgment confirms that criminal justice does sometimes demand (albeit 'rarely') indulgence in a 'forensic examination' of the sexuality of a complainant. It confirms that there are circumstances in which jurors may properly draw inferences from what a woman consented to do with other people and on occasions other than the one in question.³⁴ This is an analysis of criminal justice responses to sexual violence that has had some significant purchase in criminological

³⁴ Per Hallett LJ in *Evans* at para [74]: 'It may well be a rare case, as Lord Steyn envisaged in *R v A (No.2)* in which it will be appropriate to indulge in... forensic examination of [a complainant's] sexual behaviour with others. In our judgment this is potentially such a rare case.'

studies that identify a relationship of complicity between the prurient eye of the male voyeur and the gaze of criminal justice (Wacquant, 2009, Dymock, 2016). Such complicity is central to a psychoanalytical visual criminology since, firstly, the exposure and scrutiny of a woman's sexuality serve to displace male fear of state censure that would 'cut him off' from society. Secondly, the consequently shared objectification of feminine sexuality allows the 'son' of the Oedipal family (i.e. the individual male subject) to find a way to identify with the 'father' (the state) – an identification that also importantly reinforces and naturalises the gendering force of the state.

For a second illustration, consider Alison Young's (2009) analysis of rape and revenge in cinema. Young argues that what makes the graphic depictions of rape in films such as *The Accused*³⁵, *Blackrock*³⁶ and *Irreversible*³⁷ problematic is that they project an 'inevitable linking of vision, violence and sexual difference' (2009, p.72). Sexual *difference* is precisely what Freud (interpreting the image of the beheaded Medusa, e.g. Caravaggio's painting, below) saw gruesomely 'displayed on the body of the woman' (Young 2009, p.72) since for Freud (1922/1953) 'decapitation = castration' (p.273-4). By putting such a reading of the visualisation of sexual injury so bound up with sexual difference at the centre of her critique, Young draws on the same symbolic resonances of castration that had previously served Mulvey. At the same time however, if the psychoanalytical claim about a phallic privilege retains relevance now, then this needs to be understood symbolically and culturally, and not biologically in terms of the actual genital difference between men and women (Lacan 2006,

³⁵ Paramount Pictures, USA, 1988.

³⁶ Australian Film Finance Corporation, Aus, 1997.

³⁷ 120 Films, France, 2002.

pp.575-584). For instance, Moore and Breeze's (2012) research revealed that male public toilet users may (like women in other contexts) become 'conscious of being surveyed and, in turn, become self-surveying' (p.1188). The researchers' point is not to deny the significance of gender difference however. Rather, the gender hierarchy that dictates that 'women generally fulfil the role as object of male sexual interest' may in certain contexts be disconnected from biological genital difference. Thus the absence of women in (say) public toilets: 'may prompt men to worry that they, potentially, will be fitted out for this position [of sexual object]' (p.1189).

The utility of theorising visuality by way of the male gaze and its derivation from earlier psychoanalytic ideas is therefore that it provides a means by which the visual might be appreciated beyond the surface manifestations of the 'visible' (Carrabine, 2014, p.154). However, it is a conceptual framework that is also limited in the possibilities it can offer for fresh critical engagements, owing to its reification of gender inequality in the foundational motif of female sexual difference as the site of censorious injury. It is to the task of addressing and even overcoming that limitation that this article now finally turns.

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*Caravaggio, Medusa, c 1597, Oil on canvas mounted on wood; Uffizi, Florence.*³⁸

³⁸ Source: <http://www.ibiblio.org/wm/paint/auth/caravaggio/medusa.jpg>

3. Returning the criminal justice gaze?

The above analysis has used *Evans* as a focal point for exploring the capture of a legal subject within the criminal justice (male) gaze, and her consequent objectification by it. This final section now considers the potential for a critical reading that might positively challenge the resulting 'normative sexual hierarchy' (Moore and Breeze, 2012, p.1189) - not with any notion of reversing it, but perhaps at least to try to cause it to be 'disturbed' (Quinn, 2002, p.398). I suggest here that, even if the premises and assumptions of the phallic male gaze are accepted, positive steps may nevertheless be made in going beyond such a reading and challenging its conservative implications. This might be achieved by reorienting visibility in such a way that moves away from the Freudian theorisation of subjectivity with reference to the threat of castration for males and the 'evidence' of castration in females. Such a move is arguably effected in part by acknowledging that we speak of castration not in terms of biological sex but rather of metaphor and symbolism. A more satisfying approach however might be to try to break more decisively from the language of phallogocentrism and genitalia, and into an altogether different symbolic register. Although space does not permit more than some provisional suggestions here, I outline an approach that I hope could be of broad interest for critical engagements with legal discourse, which looks to the literary imagination and to reading law alongside themes that emerge from literature, specifically the Greek myth of Medusa.

a) *Re-reading Medusa: the object(ified) 'looks back'*

As discussed above, the image of the beheaded Medusa offers the theory of the male gaze its own 'myth of origin'. But there is certainly more to the Medusa *story* than that image and that might furthermore give a platform for developing the sorts of 'promising engagements' with law that I refer to above. Medusa resists being reduced to a mere decapitated head and a symbolic confirmation of castration anxiety and gender inequality thanks to her penetrating, petrifying gaze, and in the most forceful terms affirms Lacan's (1994) argument that objects '*look back*'. For Lacan, the object of the gaze is never *purely* an object since its object-status cannot be entirely fixed or finalised (Lacan, 1994, p. 109; Mitchell, 2002, pp. 175-6). A key role for interdisciplinary legal scholarship then is to harness this idea and thereby somehow to get the criminal justice gaze to notice and acknowledge *its* objects 'looking back'.

Medusa's backstory is that she had formerly been a beautiful maiden, made to take on her terrifying visage by the virgin warrior goddess Athena after learning that Poseidon had raped Medusa in the goddess's temple (Ovid, 2004).³⁹ Thereafter the sight of her face would turn to stone the bodies of men and beasts who looked at it. Some commentators have thus read the story as a protest against the objectifying male gaze in general, and as a feminist fantasy of furious and devastating rape-revenge (Silverman, 2016). This reading seems particularly plausible given that Medusa's gaze is nowhere recorded as being directed against other women. This allows us to think of Medusa as a fantasy also of the male gaze

³⁹ Book IV, lines 753-803. Note that Ovid uses the Roman IV names of Neptune for Poseidon and Minerva for Athena.

reversed (albeit temporarily): the objectifying effects of the male gaze parodied in her awesome powers of petrification, and the ubiquity of the male gaze likewise reflected in the survival of those powers beyond Medusa's own death.⁴⁰ At the same time however, to focus on Medusa's gaze thus is not to lose touch entirely with more traditional gender concerns. For example, there is firstly no evidence that Medusa had any power to direct her petrifying power strategically so it is difficult to think of her as 'empowered' by it particularly. Secondly, after her death the power of her face to petrify was harnessed and exploited by the heroic Perseus for his own ends. Furthermore, her death brings us back to Ellison and Munro's (2009) visual metaphor at the centre of this discussion: Perseus knew that so long as he *looked at Medusa only in the reflection of his polished shield*, her monstrous feminine gaze could not harm him (Ovid, 2004). If by their metaphor of 'turning mirrors into windows' Ellison and Munro intended to suggest that rape myths are a kind of 'shield' that protects masculine dominance, then the story of how Perseus killed Medusa seems perfectly to literalise that. Reading Ellison and Munro through the Medusa metaphor then, we may say that the aim of feminist RMA scholarship is to, so to speak, render Perseus' shield transparent somehow and thereby to force him to reckon with the rape victim's demand for justice.⁴¹

Reading Medusa with a focus on her eyes rather than her wound therefore does not turn Medusa straightforwardly into a feminist icon, but it does complicate and undermine the

⁴⁰ Indeed the power of Medusa is recorded by Ovid as accounting for several more deaths (even turning plants under the sea into coral), and then living on in the form of a symbol of protection reproduced on Athena's breastplate, on buildings, domestic objects and military equipment (Silverman, 2016, pp. 117, 121-2).

⁴¹ For scholarship in other disciplines on the political symbolism of Medusa's gaze, see Garber and Vickers, 2003; Vanda and Miriam, 2006; Gallagher, 1991; Bowers, 1990.

view that her image affirms only phallogocentrism and phallic dominance. Suggesting instead *resistance* to such a reduction and to objectification (Bowers, 1990), the story can be seen to be a more promising basis for imaginative critical engagements with law and the criminal justice gaze. In this respect the myth calls to mind certain other 'medusas' of criminal justice: Myra Hindley in her infamously defiant police mug-shot image of Myra Hindley (Young 2005; Gurnham, 2009, pp.124-6); the sadistic murderer Joanna Dennehy who resisted any suggestion of mental illness that might have helped her defence (Dymock, unpublished, pp.113-118); Sara Thornton, who seemed to announce her intentions by scrawling 'Bastard Thornton I hate you' on the bathroom mirror in lipstick before killing her husband (Young, 1996, p.31). These rather crude images or vignettes do not allow us to say anything about them as 'real' people or the extent to which they consciously or authentically defied prevailing conventions regarding female accused before the criminal justice gaze.⁴² As images or vignettes however, they remind us that the issue of law's power to objectify and the struggle to resist it is one that is necessarily played out at the level of representation. As Brown (2014) puts it: 'Regardless of its uncertain outcomes, including voyeuristic spectacle, egregious appropriations, and silent apathy, the act of representation remains a vital form of social engagement' (p.182). In the final part of this article below, I make some suggestions as to how interdisciplinary legal scholarship might find space for such a questioning in the context of criminal justice approaches to sexual offending.

b) Mirrors and Windows again: re-viewing X

⁴² Although this article does not advance a theory of agency as such, the argument that state objectification and the hegemony of the male gaze may be meaningfully critiqued and countered is consistent with sex-positive feminist theorisations of agency as a possibility; albeit a possibility dependent on empirical conditions and context (see Khan 2009).

In part 1(a) above, I referred to the Court's reference to the defendant's friends peering through the hotel window from outside to get a glimpse of the activity going on inside. With the room light on and darkness outside (thus facilitating a good view into the room from outside, but for those inside the room effectively turning the windows into mirrors). It is a detail that nicely emphasises the importance of visual perspective, and crucially the apparent difficulty of seeing X otherwise than as a reflection of male desire. That reference to the physical arrangement of the room, the lighting and the people in and outside of it also reflect the figurative limitation apparently accepted by the Court when they found in favour of exposing X's sexuality to forensic examination. Is it any wonder that the juridical imagination should be so limited if (as Mulvey insisted) we do indeed inhabit a culture in which fantasies of female objectification are central to 'order and meaning'?

Angela Carter (2016) exposes precisely this limitation in her twentieth century short story *The Bloody Chamber*. Like the *Evans* Court, Carter depicts female sexuality and sexual difference in terms entirely consistent with the imperatives of male fantasy outlined in section 2 (above) with respect to the displacement of castration anxiety. The young bride-narrator of Carter's story constantly perceives herself to be the object of her fabulously wealthy husband's 'carnal avarice', his gaze multiplied in his twelve bedroom mirrors (in which she watches herself figuratively 'impaled' by him on his huge bed), and 'strangely magnified by the monocle lodged in his left eye' (pp. 53, 61, 56). His macabre and murderous intentions are made clear by his wedding gift to her of a 'choker of rubies, two inches wide, like an extraordinarily precious slit throat' and his control of her exerted by his

uncanny surveillance while he is away from the marital home on business (p.60). However, unlike the *Evans* Court, Carter is also able to pull away the symbolic scaffolding of the male gaze and feminine castration in the final climax of the story. For in that final scene, we see the bride-narrator using the vantage point of a high window in the castle to extend her field of vision to the distant horizon from which rescue comes. The rescuer is her mother who, galloping into the fray just in time, recreates the image of the Medusa, 'crazy, magnificent ... the witness of a furious justice'. Her sudden appearance leaves the husband and would-be murderer standing 'stock-still' as if petrified with his phallic weapon (his grand-father's ceremonial sword, no less) 'raised over his head' before he is killed by the mother's 'single, irreproachable bullet' (pp. 78-9).

The point I want to bring out here is not that the mother's appearance in the guise of Medusa transforms femininity from object of male fantasy into subject of agency and power, only that it *undercuts the claim of the male gaze to be the sole and dominant point of view*. Abstracting from this somewhat, it is not that the roles of oppressor and oppressed are reversed then; indeed, I have not sought to claim that such a reversal is actually possible. The argument is rather that in specific contexts in which subjects and objects are constituted in discourse (illustrated here by the *Evans* judgment), there may be opportunities for acts of imaginative resistance to the oppressiveness of asymmetrical visibility. In the case of legal discourse, if the judicial imagination is unable even to countenance an interruption of the male gaze, this only lends further credence to Ellison and Munro's expressive metaphor of a mirror that *blocks* new perspectives, insights and visualisations.

The point of departure here from Ellison and Munro is that the task of ‘turning mirrors into windows’ is not (as they argued) important primarily in order to force the male subject to see through the glass of his existing prejudices, but rather to allow for alternative perspectives by which the object of the gaze can be glimpsed ‘*looking back*’. To make visible such an alternative perspective – eg for the *Evans* Court to be made to recognise some other view of X than as the seen object of male fantasy and voyeurism – is to begin the initial necessary steps to counter the sense that the criminal justice gaze must inevitably be identifiable with male desire and sexual subjectivity. As things stand however, the imaginative limitations under which the *Evans* Court operated means that the eyes of the men outside the window continue to reflect the gaze of the law, and determine that what is seen is either X as sexual object (while the curtains are open) or (with the curtains closed) nothing at all.

Before concluding finally, it may be wise to acknowledge a potential objection to the approach advocated here, namely that invoking the literary imagination in the way described above represents a potentially risky departure from the safety and rigour of doctrinal and empirical legal studies and legal theory. Some may ask whether it is only because *Medusa* is a myth and *The Bloody Chamber* a work of fiction that allows for such an interpretive license? If such a license is applied to legal reasoning and judgments, do we not risk becoming insensitive to the facts, to the nuances of legal method, or to the realities of gender violence and victimisation? At the broadest level, this is an objection to interdisciplinary approaches to legal studies generally. Regarding the argument made in this

article specifically however, I would make two brief responses. First, I have not sought to justify an abandonment of the 'real world' of empirical facts about sexual violence nor the seriousness of doctrinal legal method, but merely the embrace of a broader perspective that might helpfully contribute to an ongoing debate about 'visuality' in legal studies and criminology. Secondly, it must be in the interests of the pursuit of gender justice to address the conceptual framework within which sexual violence is constructed, and to seek ways imaginatively to unmoor criminal justice responses from voyeurism and objectification.

Conclusion

This article has sought to offer an original critical analysis of legal and scholarly constructions of rape and sexual assault. It began by observing how notions of 'looking subjects' and 'looked-at objects' inform both scholarly constructions of rape and popular perceptions of rape, and also criminal justice responses to it. A structure of asymmetrical visuality is identifiable in legal discourses on sexual violence, and I have attempted to show how, notwithstanding the arguably conservative implications of the male gaze, legal scholars might engage positively and imaginatively with the visual in the analysis of these. The article has advocated for participating in the sort of disciplinary boundary crossing that visuality studies necessarily invites, and in such a way that maintains some critical distance from Laura Mulvey's affirmation that sexual difference means the ubiquitous and inevitable rehearsal of male fantasies of female castration. I have sought to argue that a particularly productive method for legal scholars to read gender and visuality in legal narratives may be to embrace literary techniques for glimpsing the object of the gaze 'looking back'. As

emphasised above, the aim of this approach is not to reverse or deny law's power to construct subjectivities, but rather to offer some reasons why scholarly engagement with that process is important.

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Caravaggio, Medusa, c 1597, Oil on canvas mounted on wood; Uffizi, Florence.

79x80mm (300 x 300 DPI)