

# What Epistemology Would Serve Criminal Law Best in Finding the Truth about Rape?

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## 1 Introduction

Prompted by several judicial errors in Dutch criminal case law, philosophers, judges, legal scholars and behavioural scientists recently debated the nature of truth as produced in criminal law. The central question of this debate is whether the knowledge produced in criminal law investigation should meet the criteria for scientific truth. Behavioral scientists Wagenaar, Van Koppen and Israels (2009, p. 1447-1448) claim that judges should consider the indictment in a criminal case as the scientific hypothesis which they not only should try to verify in the trial but also try to falsify. Philosophers Mackor (2010; 2011) and Goldman (1999) support this claim. Applying the method of falsification to the indictment would consist of testing it by deducing its empirical consequences and measuring these against real world events.<sup>1</sup>

However, sometimes suspects face charges that clearly include normative elements, such as ‘inciting racial and religious hatred’ or ‘defamation of a person or a group of people’. The trial of politician Geert Wilders in Fall 2010 may exemplify how the judicial process of finding empirical evidence is sometimes interwoven with the process of classifying behaviour normatively. The task for judges involved in criminal inquiries seems to be more complex than acknowledged in the argument of the authors above, who defend the scientific method for such inquiries. By neglecting offences in which finding empirical evidence is intertwined with the normative classification of the offensive behaviour, these authors have an incomplete picture of judges’ tasks in criminal inquiries. In this article, this incomplete picture will be made more complete by addressing an example of such offences: the offence of rape in the context of a (heterosexual) relationship. The criminal inquiry of such an offence necessarily includes a classification of behaviour on the basis of cultural values concerning women’s right to sexual self-determination. Because of this, Popper’s scientific method cannot offer the right epistemological approach for such inquiries, as empiricism assumes the knowledge generated in the inquiry to be value-free. To strive for the production of value-free knowledge concerning rape would be nothing less than a mission impossible. A ‘critical epistemology’, that has its roots in feminist standpoint theory, offers a more useful guide as to how judges can find out the truth about rape allegations. A ‘critical epistemology’ acknowledges the interconnectedness of facts and values

1 Falsification is the core concept of Popper’s (1972) scientific method.

while at the same time it sticks to ‘fact finding’ as the purpose of the inquiry.<sup>2</sup> In this article, I will elaborate on why and how – in what respects – the critical epistemology compared to the ‘scientific’ epistemology offers the better alternative for criminal law investigations into rape. By resuming the current debate concerning the importance of scientific truth in criminal law investigations I will show that it only addresses one side of these investigations and overlooks the cultural values that are necessarily involved in many criminal law cases.

## 2 The recent debate concerning criminal law investigation

Philosopher of law Mackor (2010; 2011) claims that finding the truth, the purpose of science, is also an important purpose of criminal law. She defends the truth as the purpose of law against the idea of Dutch sociologist of law Huls (2006), invoking the work of Luhmann (1969), that the primary function of legal procedures is not truth finding but generating binding decisions that are accepted by the parties involved. Mackor does not deny that judges in their quest for truth are restricted by rules, such as those concerning unlawfully acquired evidence, and practical conditions, such as lack of time. However, she contends that admitting that criminal law is not the best procedure for finding the truth does not alter the fact that that truth finding is a purpose of criminal law.<sup>3</sup> Moreover, Mackor believes that with a more rigorous application of the requirements of science in criminal law investigation, its truth-finding function would be improved. This would imply that, in order for the facts as evidenced to be called true and to lead to a right decision, not only the criterion of correspondence should be met but also the criterion of coherence. According to correspondence theory a statement is true if agreement exists with reality or corresponds to the world. The criterion of coherence in positivist science means that in order to call the statement true, in addition to this correspondence, coherence to a system of other statements (a theory) is required (Kirkham, 1998, p. 470-475).

Legal scholar Kwakman (2010, p. 187) also defends a more rigorous application of correspondence and coherence in criminal law. At the same time, he asserts that criminal law investigation is essentially different from scientific research because it includes a normative function: judges have to attach normative values to behaviour and attribute responsibility to the persons involved in the behaviour under investigation. Although he considers this difference relevant, it does not really touch his conclusion that criminal law and science share the same truth finding purpose.<sup>4</sup> However, a closer look at the normative function of criminal law and

2 The label ‘critical epistemology’ is preferred above ‘feminist standpoint theory’ here because, as Lugones and Spelman (1983) claim, the latter term would suggest there is only one feminist standpoint and as such it suffers from a tendency to essentialism.

3 The same argument is made by Goldman 1999.

4 His reason for pointing at the ‘normative function’ of criminal law is asking attention for how difficult it must be for judges to apply the ‘scientific’ criteria of truth and not link criminal law’s truth-finding in a wrong way to this ‘normative function’. He asks us to understand that errors can be made in making this link; after all also scientific knowledge is only temporarily true, according to Poppers falsification theory as long as there is no evidence to refute it.

the extent to which in some offences the establishment of empirical evidence is interwoven with the normative classification of behaviour (of the facts) might lead to a different conclusion. In a judicial inquiry, judges have to answer three main questions concerning the offence the suspect is charged with.<sup>5</sup> Focused on rape as a criminal offence these are (1) can the behaviour the suspect is accused of be proven?; (2) would this behaviour qualify as rape?; and (3) could this behaviour be justified or excused (are there reasons to take away the criminal intent of the behaviour) in the given circumstances? As will be argued below, there is a normative element involved in the judicial inquiry concerning rape because of the criminal law's definition of rape itself. This definition is the frame through which judges look at the facts; for all the components of the definition of rape in the law books, empirical evidence has to be found

### 3 Feminist activism and the change of rape law

In this section, the changes that Dutch rape law underwent in the past decennia will be addressed, focusing at the changes in the meaning of 'coercion'. This analysis will illuminate how the facts that the judges have to establish before finding the suspect guilty of rape are dependent on our culture's dominant values concerning women's rights. Because of this bias, judges cannot answer the first and the second question of the judicial inquiry independently or objectively, as will be illustrated in the subsequent analysis of two rape law cases.

In the seventies and early eighties, feminist practices, such as 'consciousness-raising' and 'speaking-outs', have been vital in illuminating an inconvenient truth: the considerable extent to which rape and other forms of violence against women were committed by women's husbands or partners. Such violence was left unpunished by criminal law because of 'old' classifications while at the same time the incidence of intra-relational rape was kept more hidden than the individual right to self-determination would lead people to believe.

By judging their daily experiences anew in the light of the individual right to self-determination, women (encouraged by the women's movement) were mobilized into protest against the existing rape laws. Subsequently, lawyers translated these grievances in denouncing the idea that women had to be sexually available to men and advocated that criminal law would have to accommodate women's right to self-determination. In the Netherlands, this idea was for example adopted by the *Melai committee*, an expert committee formed by Dutch government in 1970 to advise the revision of what has traditionally been called 'the criminal provisions concerning serious offences against public morals'. In 1980, the *Melai committee* advised amending coercion in the rape section of the criminal code that would include clear cases of submission.

The rape article in the Dutch Criminal Code was finally amended in 1991. Whereas before 1991, rape within marriage did not exist and judges never needed to look at the facts taking place in the intimacy of a couples' bedroom, after 1991

5 Article 350 Dutch Criminal Code.

they (sometimes) had to look at these facts. In addition, whereas before 1991 only vaginal penetration could count as rape in case the woman involved was coerced, after 1991 other 'actions comprising or including sexual penetration of the body' could count as rape if this had taken place against the will of the woman or man involved. The inclusion of this component in the criminal category of rape created also the possibility for men to 'legally' count as victim of rape. A third modification of rape in criminal law existed in the expansion of the definition of coercion as component of rape: coercion by 'violence or the threat of violence' was expanded by 'coercion through another act or the threat of another act'. Overall, with the new definition of rape the focus shifted from the act's specific nature to the fact that the 'victim' did not participate voluntarily.

However, as far as the reformers of rape law had expected that these amendments would bring about a total correspondence of the concept of rape in criminal law with the concept of rape based on women's right to sexual self-determination, they were to be disappointed. With the example of two cases, it will be shown that evidentiary rules stand in the way of such correspondence. The first case that will be addressed is the Supreme Court's Ruling of 16 June 1987, the second case is one of the eight criminal cases regarding rape within a partner relationship that are analyzed in Zeegers (1999).<sup>6</sup>

Both cases focused on the expansion of the definition of coercion in the rape law section (mentioned above as the third modification of Dutch rape law). Before feminist's intervention, the meaning of coercion had been explicitly based on an understanding of consent and non-consent as mutually exclusive categories. In case clear signs of the use of violence or threats were found and no marriage existed between the suspect and the victim, this could be seen as invalidating consent to sexual intercourse. In the seventies and eighties, feminist activists and lawyers had pointed out that the 'old' classification of rape failed to acknowledge more subtle though not necessarily less harmful forms of coercion (Scutt 1977; Doomen 1979; Freeman 1981; Temkin 1982). The economic dependency of many women on their husbands or partners as well as their special responsibilities towards, and concerns for, their children made them vulnerable to these forms of coercion. As women had brought forward in 'consciousness-raising' groups and later on in research into the incidence of rape and other forms of violence in intimate relationships, they felt themselves coerced into sexual intercourse by these other forms of coercion, in addition to and often in combination with clear violence.<sup>7</sup>

As stated above, in 1991 the legal definition of coercion in Dutch law was broadened. It would include, for example, blackmail and imprisonment in the home. In England the *Olugboja case* (1981) opened up this possibility, threats with imprisonment, harm to a child or severe kinds of blackmail were mentioned as examples

6 Hoge Raad 16 juni 1987, *Nederlandse Jurisprudentie* 1988, 156 m.nt. GEM.

7 Consciousness-raising groups were 'women only groups' that functioned as a kind of free space for women to talk about their experiences in daily life and the political dimensions of these experiences. This practice was imported in the women's movement in the Netherlands, the United Kingdom and other West-European countries from the American women's movement.

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that could invalidate consent to sexual intercourse.<sup>8</sup> However, the expectation of correspondence, at least with respect to the forms of coercion women experienced as constitutive part of rape, turned out to be illusory. By elaborating on two Dutch cases concerning rape in intimate relationships, I will illustrate how evidentiary rules present obstacles to such correspondence.

The Supreme Court's Ruling of 16th June 1987 that concerned a woman accusing her extra-marital partner of rape predated the actual enactment of the new rape section in 1991. However, the government proposal that included the broadening of coercion in the rape section had at that point found itself already in the pre-legislative phase of advisement, and feminist activists regarded the case as a test-case with respect to this meaning of coercion. The woman told the judges she had been raped by her former partner, who had been having an extra-marital affair with her for years. When the man failed to leave his wife, as he had promised, she had ended the relationship and tried to keep her distance from him. He did not respect her wishes, however, and continued to treat her as his lover. The resulting relationship between the two could be described as one of "urging and giving way", sometimes leading to "coercion and submission". The day after the man had allegedly threatened her, seized her forcibly and raped her repeatedly, the woman pressed charges at the police station. The suspect was acquitted of the rape charge by the district court of Amsterdam. The Amsterdam court of appeal upheld the acquittal, arguing that it was not convinced the suspect understood that the victim did not want sexual intercourse.

The ruling of this court elicited controversy in the legal journals because of the suggestion behind the defence's argument that the suspect could not be expected to understand that his ex-partner did not want sexual intercourse, as he presumed an intimate relationship with the victim existed. However, a rather different idea about the nature of the relationship can be read between the lines of the Supreme Court's ruling. In this ruling it was acknowledged that violence or the threat of violence had been used by the suspect. However, the court of appeal had not, in the Supreme Court's view, misinterpreted 'coercion':

'Although a situation involving violence or the threat of violence generally indicates an intent that can cause involuntary acts, such intent need not exist under certain circumstances.'<sup>9</sup>

What is meant here is that the relationship is portrayed as a sado-masochist relationship. In addition to this interpretation of the incident in the Supreme Court's ruling, the debate in the legal journals focussed on two questions pertaining to the meaning of coercion in the rape section. First is the question whether it had to be proven that the sexual acts had taken place against the will of the victim.

8 In the *Olugboja case* the Court of Appeals suggested that 'submission [to sexual intercourse, NZ] obtained by threats other than violence might suffice for rape'. In addition, the Court thought the jury must decide in each case by looking at the relevant facts whether consent was given or not.

9 HR 16 juni 1987, NJ 1988, 156 m.nt. GEM, p. 671.

Whereas feminist legal scholars argued this would not be necessary, the authoritative legal scholars saw this question as confirmed by the ruling. Second is the question what exactly had to be established about the suspect's intent. The answer given in the ruling was 'carelessness', that is to say, the situation where the suspect knowingly accepts the risk that the victim is being forced to engage in sexual intercourse against her will.

In fact, with this ruling of the Supreme Court the amendment of the rape section in 1991, that was expected to offer a more inclusive definition of coercion, seemed to be narrowed down again before the legislation actually was accepted in parliament. Indeed, with this ruling the more narrow meaning of non-consent was affirmed by the Supreme Court. Because of this narrow meaning of non-consent, judges, who in specific cases might acknowledge the sexual subjugation of a woman by her dominant partner, still would not be able to establish a case of rape because of the lack of evidence of non-consent. This evidence would be missing as long as the alleged victim has not expressed resistance in her physical behaviour.

The second rape case to be addressed appeared before the Amsterdam court in June 1995 and concerned rape within a partner relationship.<sup>10</sup> The suspect in this case was accused of raping the victim repeatedly over a period of time. A striking aspect of this case was that the court acknowledged that the victim had been subjugated sexually as a result of the man's dominant and violent behaviour towards her. The alleged victim seemed to be totally under her partner's influence and not able to decide anything for herself. However, the court's verdict was that it could not establish coercion in the sense of section 242 of the Penal Code as there was no clear evidence of a direct causal relation between the suspect's violence and the sexual intercourse that took place between the two.

Does this mean that nothing had changed after the redefinition of coercion in the rape section in 1991? A difficulty is where exactly to draw the distinction between a submission that includes consent and one that does not. One can opt for a flexible and incremental approach and leave this question for judges (or the jury) to decide in each case, like the English court did in the *Olugboja case*. The advantage of such approach is that it allows sensitivity of judges to contextual and individual differences of the case under scrutiny. The behaviour of some victims of sexual violence does not exactly fit into the basic assumptions in legal systems of humans as rational and free persons. The woman in the Amsterdam court case, for example, was considered to be totally under her partner's influence. She even felt herself enforced to act upon the wishes her partner expressed in letters he sent to her during the time he was in prison. Her state of mind at that time can only be understood by looking at the situational and cultural circumstances of this woman: she had become totally financially and emotionally dependent on the suspect as well as fearing him at the same time. A flexible and incremental approach of criminal law in determining when submission includes consent and when it does not, would allow judges to take the specific situational and cultural circumstances of such a woman into account.

10 Court Amsterdam 2 June 1995.

However, the disadvantage of a flexible and incremental approach is that what is considered as vitiating consent could be dependent on the mood of judges or the juries. In the light of *lex certa*, a basic principle of criminal law, this would be unacceptable. This is the reason that the English Criminal Law Revision Committee (1984) already three years after *Olugboja* proposed to place new limitations on the scope of non-consent. The Committee deemed that *Olugboja* was likely to engender uncertainties. To what extent can judges pay attention to the contextual and personal differences involved in each case without affecting the certainty about the meaning of coercion that is necessary in the light of *lex certa*? With respect to the victim in the Amsterdam case, judges would have to take the possibility into account that the 'victim's capacity to act autonomously' could be distorted as a consequence of the abusive relationship. To be more precise: this capacity could be distorted to such extent that although she wanted to resist, this was impossible for her. The case of the Austrian Natascha Kampusch exemplifies that people are bound to develop distinctive characteristics in extreme circumstances. However, considering it is a criminal conviction they have to decide about, it is understandable that the length at which judges go in analyzing the dynamics of intimate relationships in order to detect signs of coercion by the suspect is not infinite. In order to find the suspect in this case guilty of rape, the judges would not only have to qualify the intimidating behaviour of the suspect under the given circumstances as coercing the woman into sexual intercourse, but also would have to judge that the suspect knowingly had taken the risk that this would be the case. As they were not convinced of the latter a conviction was impossible. The judges took recourse to calling the kind of dynamics between the suspect and the alleged victim 'morally wrong but not criminally apprehensible'.<sup>11</sup> The judges in the Amsterdam court case, departing from the broadened definition of coercion enacted in the rape law in 1991, seemed to recognise that the woman had experienced the behaviour of the suspect as subjugating her to his sexual wishes.<sup>12</sup> However, as the evidentiary rule for rape in criminal law requires that the suspect knowingly had accepted this risk and the judges were not convinced of this, the suspect was not convicted of rape.

A first conclusion to be drawn from this analysis is that there always will be incidents of sexual coercion that, although considered to be breaches of a woman's right to sexual self-determination, cannot be qualified as rape in criminal law, as evidentiary rules stand in its way. Because of such evidentiary rules criminal law's truth about rape is by definition different from society's truth about rape. A second conclusion regards the change in the meaning of coercion that gradually has taken shape in rape law. Whereas in the first rape case in 1987 the requirement of evidence of physical resistance by the victim was upheld by the Supreme

11 Other options than criminal law for correcting such injustices have to be found in such cases. Individual women or men in such situations could be offered adequate and accessible facilities for social and psychological empowerment. In addition, one would hope that with the growing economic and social independency of women in the last decennia less of them will turn out to be vulnerable for these kinds of interpersonal dynamics.

12 This is in line with Lindenberg's (2007) conclusion that since the nineties, decisions of the Dutch Supreme Court point into the direction of a broader concept of coercion.

Court, in the second rape case in 1995 judges did not explicitly require such evidence. Although in the latter case the judges were not convinced that the suspect could be held criminally accountable for raping the victim, by labelling the interaction between the suspect and the woman as subjugation, they seem to endorse a broader meaning of coercion than the Supreme Court in the 1987 rape case. The evidence problem seemed to concern the intent of the suspect and not so much the non-consent of the victim.<sup>13</sup> Such change in the legal meaning of coercion would not only reflect the legislative change in the rape article in criminal law but is also in line with the current culture's values concerning women's rights. In current Dutch law, as in Dutch society, the idea of women's right to sexual self-determination is widely accepted rather than the idea that women ought to be sexually available to their male partners. New values concerning sexual relations have replaced old ones, but this does not alter the fact that coercion in rape law as such remains to some extent value-laden. As a consequence, finding empirical evidence in the judicial inquiry is interwoven with normative classification.

#### 4 Feminist' philosophers' debate on epistemology

The conclusion that coercion in rape law is value-laden was drawn by feminist philosophers of science already in the 1980's. These philosophers' project was to challenge the existing 'scientific' knowledge claims concerning women's nature and women's interests because many of these claims had appeared to be male biased (Harding, 1986; Longino, 1987; Hawkesworth, 1989). In this context, they debated the question of what theory of knowledge would serve best this project. The analogy with the current debate about what theory of knowledge should be chosen for guiding criminal law inquiries, is that both debates compared criminal law's practice of knowledge production to scientific practices of knowledge production.

However, in the feminist philosophers' debate the idea that science is value-free was denounced whereas in the current Dutch debate this idea is implicitly accepted. The knowledge generated in both science and criminal law investigations was regarded by feminist philosophers as male biased and alternative epistemologies were proposed and discussed in order to solve this problem. Differences of opinion existed between these philosophers about the exact nature of the problem and how to solve it. Those clinging to an empiricist epistemology did believe that such male bias as materialized in the blind eye for the larger part of women's experiences with rape, for example, would be apprehensible by a more rigid adherence to and application of neutral procedures. These feminist empiricists regarded the old classifications in rape law as the last remainders of archaic ideas and considered the achievement of objective knowledge, of truth, as feasible and in any case to be pursued as an ideal.<sup>14</sup>

13 This requirement of intent concerns the question whether the suspect should have known that with his behaviour he took the risk of coercing the woman into sexual intercourse.

14 Popper's falsification theory shares this idea of empiricism but is more advanced in specifying that the truth is theory dependent.



Feminist standpoint theorists, on the other hand, criticized this ideal of objective, value-free, knowledge. Instead of making the assumption that the social world exists as independent of the human knower and therefore as totally objectively knowable, as the feminist empiricists did, they acknowledged that perception and cognition are theory dependent. However, although asserting that knowledge is only true within the boundaries of a theory, feminist standpoint theorists did not leave hold of the ideal of truth altogether. They only asked for an epistemology that creates a constant awareness of the boundaries of truth that are connected to the conditions in which knowledge is produced, for instance cultural biases in scientific theories or in criminal law concepts.

In sticking to the ideal of truth itself, the position of 'feminist standpoint theorists' differed from the position of 'postmodernists', who take a relativist stance toward the truth altogether. Such 'postmodernist' stance would not only oppose with criminal law's task to find out the truth about what exactly happened in the situation under inquiry, but also would undermine the position of the feminist criticism of rape law in the seventies itself. This criticism is built on the claim that accounts of rape within partner relationships were true social facts. As Hawkesworth (1989, p. 555) asserts, these accounts are not 'the arbitrary imposition of a purely fictive meaning' on a 'meaningless reality', but tacit, subjugated, forms of knowledge that were made explicit in feminist scholarship.

The position of feminist standpoint theorists' was also different from the position of 'feminist empiricists' who took these accounts as the 'objective truth' that could be held against the 'false dominant beliefs' about rape that had existed until the moment these were challenged by feminist' criticism. Feminist standpoint theorists emphasise instead the role of the social context in shaping understanding and regard such role as a fact of life. With respect to women's experiences of rape, the social context of feminism had been necessary to create a more complete knowledge of the forms and incidence of rape in society.

## 5 Conclusion: lessons to be drawn from the feminist philosophers' epistemological debate

On the basis of feminist standpoint theory, Hawkesworth (2006) developed a 'critical epistemological' approach to gathering criminal evidence. The *anti-foundationalist* understanding of evidence she developed would offer better guidelines for finding truth in rape cases than the 'scientific epistemology'. In this last section, I will argue why.

The basic assumption of Hawkesworth' anti-foundationalist understanding of evidence is that perception and cognition are both theory dependent. There is no position from which to know the truth about the incidents inquired independently of the practice of the criminal inquiry itself. A critical epistemology by interrogating existing categories of law and questioning how boundaries have been drawn between one phenomenon and another would guarantee such anti-foundationalist understanding of evidence (2006, p. 100-101).

From the analysis of Dutch rape law above, two conclusions have been drawn. First, total correspondence between what, according to the current values concerning women's rights, would be regarded as rape and what in criminal law counts as rape is impossible. Such correspondence is impossible because evidentiary rules in criminal law, necessary in the light of the Rule of Law, stand in its way. At first sight, this built-in restriction to truth finding seems to impair the ideal process of truth finding that a 'scientific' approach would require. However, acknowledging that criminal law is a restricted form of knowledge production would not necessarily lead to the repudiation of the empirical truth as the ideal for law, Mackor (2011) and Goldman (1999) would rightly reply.

The second conclusion derived from the analysis of Dutch rape law above is that the meaning of coercion in law, although it does not totally coincide with cultural values concerning women's rights of self-determination, is certainly influenced by such values. The idea in the past was that women by marrying gave up their right of sexual self-determination. This idea had historically been built into law, for example with the Hale-doctrine in the common law system, which read:

"The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife has given up herself in this kind unto her husband, which she cannot retract."<sup>15</sup>

According to Geis (1978) this idea was not questioned until the mid-1970s and even at that point only with respect to women who were divorced from their husband with his consent. Also rape of women in extra-marital relationships has been exempted long time from criminal apprehension because of this idea that women should be sexually available to their partners. In the last decennia rape law went through a process in which this idea was gradually replaced by the idea of women's rights of sexual self-determination. Judicial inquiries concerning rape in partner relationships, because of the broad definition of coercion and the suspect's intent as crucial element, belong to a category of inquiries that necessarily include normative qualification of the behaviour of the persons involved. Such judicial inquiries cannot be claimed to be totally value-free and as Popper's falsification approach is based on the idea of value-free knowledge it would not be the right approach for this category of cases. The ideal of a value-free truth would too easily prevent lawyers from acknowledging the cultural values that are built into law.

Exactly because the truth is so important we should avoid the pitfall of believing too easily in a value free production of knowledge. By applying a 'critical epistemology', as the basis of criminal law inquiry, 'truth finding' as purpose of criminal law could be combined with the unmasking and prevention of 'prejudiced knowledge'. In addition to the testing of hypotheses concerning the empirical facts, for

15 Sir Matthew Hale (1 November 1609-25 December 1676) was an influential English barrister, judge and jurist most noted for his treatise *Historia Placitorum Coronæ*, or *The History of the Pleas of the Crown*. This is an influential treatise on the criminal law of England published posthumously in 1736.

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example by finding evidence for the violence used or the blackmail applied, this epistemology would instigate judges to inquire the other, often tacit, theoretical assumptions that inform the criminal law investigation. For example, this approach would instigate them to critically reflect on the assumptions about what behaviour must be expected from human beings involved in a sexual relation in the light of each citizen's right to sexual self-determination. A 'critical epistemology' explicitly acknowledges how tacit assumptions can play a role in a criminal law inquiry and encourages the judges involved to question these assumptions by reflecting on the existing categories and boundaries of law. By stressing the importance of such critical reflection, a 'critical epistemology' compared to a 'scientific' epistemology offers the better alternative for criminal law investigations into rape.

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