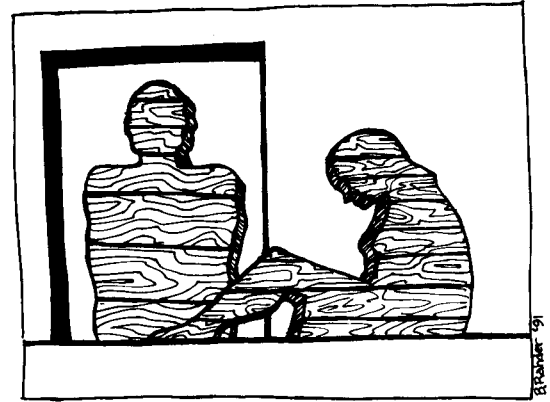


BEYOND THE KNOWLEDGE



Sexual Abuse Involving Breach of Trust

A Barrier to Equality in the Administration of Justice

BY PATRICIA MARSHALL

Sexual assault has the most devastating impact on its victims. Yet it is perhaps the crime least understood by the courts. At least one in four women will be a victim in Canada; the majority of victims will never report their assault to anyone.¹

Sexual assault by a stranger is often taken as the paradigm; equally crushing, however, is assault by a person in a position of trust or responsibility to the victim. When an offender uses his position of authority and power over the victim to perpetrate sexual abuse, the psychological impact of the breach of trust counted with the impact of the sexual violation can produce considerable long-term harm.

This article assesses the existing level of understanding of breach of trust in sexual abuse and assault cases. It also addresses the treatment of these crimes in the Canadian justice system and the consequent implications for women's equality and security of person.

In sexual abuse cases, the abuser works hard to protect himself from detection. He generally chooses victims who physically or psychologically offer little resistance, whose past behaviour diminishes their credibility, or who are reluctant to tell because an authority figure is involved.

Where breach of trust is not recognized as a significant factor in sexual assault cases, the equality rights of victims and potential victims, the vast majority of whom are female, are undermined. Abusers are protected; victims who report are treated unfairly and further harmed by lack of recognition or trivialization of the crime against them; and victims thinking of reporting are discouraged from doing so.²

Gender in the Definition of Crime³

Catharine MacKinnon's assessment that "rape is defined according to what men think violates women"⁴ provides an important perspective on the role of gender both in the definition of crime and in evidentiary (rules of evidence) issues.

Rape has traditionally been defined in male terms: vaginal penetration by an unauthorized penis of the virginal daughter or monogamous wife is seen as a violation of the relevant male's property. Unchaste women, or women seen as less than plausible, including those who didn't complain promptly, had their complaints dismissed because of rules of evidence and permitted lines of defence. In addition to supporting their "property interests," the advantage to men of this limited approach is it has ensured that most sexual violation experienced by women has not been criminalized.

In 1983, the rape law in Canada was repealed and new statutory provisions for sexual assault were introduced. The new law on sexual assault sorted the offences into three tiers and thus acknowledged the incremental seriousness of assault involving a number of offenders, use of a weapon, and additional bodily harm. Unfortunately, this focus on cuts, bruises and other visible harms of physical assault obscures the devastating impact of the less visible form of violence: the abuse of a power or trust relationship that so often accompanies a sexual assault.

The exercise of coercion (based on abuse of power) often saves the abuser from needing to use overt physical violence. In addition, compared to those sexual assailants who are strangers to their victims, a disproportionate number of middle-class offenders — those who are most likely to be in positions of trust

— are acquitted or receive trivial sentences. Defining violence and consent from this perspective, which excludes breach of trust, obscures these sexual offences and shields many perpetrators from the full sanction of the law.

The definition of rape and sexual assault seldom acknowledges women's and children's experience of the crime. The invisible violation is rarely taken into account. One example of this omission is found in recent proposals of the Law Reform Commission of Canada (LRCC)⁵ that move the focus even farther away from breach of trust and direct it more exclusively at the assaultive nature of the crime. In putting forward categories such as "sexual assault by touching or hurting" and "sexual assault by harming," the LRCC employs assault law definitions for "hurt" (to inflict physical pain) and "harm" (to impair bodily functions) that are less applicable to sexual assault involving breach of trust than the present Canadian law.

Gender in Evidence: Harm, Consent & Expert Testimony

In seventeenth-century Britain, Chief Justice Sir Matthew Hale described rape as a charge "easily to be made and hard to be proved, and harder to be defended by the party accused, tho' never so innocent."⁶ Recent research shows similar attitudes are still prevalent in a third to a quarter of the population of Ontario⁷ — the same population from which judges and juries are picked. And, while the gender bias in Sir Matthew's statement may be obvious to us now, his admonition still has its impact in the courts today in the area of evidence.

The 1983 *Criminal Code* amendments repealed requirements for evidence of recent complaint and for corroboration of the victim's testimony, and placed some limits on the introduction of a woman's sexual history. Yet the handling of evidence in sexual assault trials still sets up barriers to equality.

Admissibility and weight of evidence are often assessed through filters of distrust towards women and children complainants. Canadian judges continue to evince disbelief that a man whose public behaviour is much like their own could commit such heinous crimes.

Under the old rape law, cuts, bruises, and other physical injuries were impor-

tant because this damage was the criterion used to measure determined resistance, which was required to prove lack of consent. Under the reformed legislation, ironically enough, this kind of evidence continues to be important because the standards of ordinary assault are used to evaluate sexual assault cases. The abusive manipulation of a trust relationship, while it rarely leaves cuts or bruises, may cause the victim permanent dysfunction. The harms of patient-therapist sexual abuse, for example, are now well documented.⁸ Most victims experience a general dislocation of their lives, as well as symptoms ranging from impaired ability to trust, sleeplessness and anger, through to suicidal tendencies and hospitalization. Yet the courts often equate the absence of physical injuries with consensual sexual relationships. Not only do the courts consider breach of trust in sexual abuse less harmful than physical violence, but the absence of overt violence can be used to mitigate the offender's sentence.

Only when compliant behaviour is confused with consent can sexual assault be confused with consensual sex. Given women's experience of male power, there are situations where a man need not articulate a threat of harm for women to feel it exists. Still judges and juries have difficulty seeing that in these situations the woman is forced to comply.

The 1983 *Criminal Code* amendments have placed some limits on evidence of sexual assault victims' sexual history (although even this has been challenged⁹). Now, past sexual victimization is being introduced by the defence in sexual assault cases and presented as relevant to the victim's credibility on the issue of consent.¹⁰

Although, the law recognizes consent can be exacted by the exercise of authority, recognition of this in practice is inconsistent. In the case of sexually abused children, although understanding of the dynamics is often poor, most people can recognize a child's response to an abusing adult as compliant rather than consensual. Abuses of power and breach of trust cases where the victims are adult women, however, are not granted the same recognition. For example, in one recent case the courts determined that intercourse between a psychiatrist and his patient had taken place by "mutual agreement."¹¹ There was no appreciation of the imbalance of power

inherent in the therapist/client relationship.

The criminal and civil courts are not alone in their failure to appreciate that compliant behaviour exacted through force, coercion or the exercise of unequal power, is not consensual. Some quasi-judicial tribunal decisions show a similar problem in understanding. In *Robichaud*,¹² the hearing officer of the Canadian Human Rights Commission failed to see coercion in the acts of a supervisor who "requested" sex from a probationary employee and accompanied his demands with threats of job retaliation. The decision described Robichaud's "voluntary participation in sexual conduct" as "fully consenting." On appeal, fortunately, the hearing officer's decision was overturned.¹³

Disbelief of rape victims on the issue of consent is rampant. Even when the victim is believed, the accused can still offer the defence that he "honestly believed" she consented. If the defence succeeds, her lack of consent has been declared irrelevant. *R. v. Pappajohn*¹⁴ represents the current standard in Canadian law.

The impact on equality rights of this one evidentiary rule and its interpretation is staggering. Research confirms that many people do not even see rape as rape.¹⁵ Women's and children's rights to security of person and equal benefit and protection of law are seriously prejudiced when popular misconceptions are enshrined in the law.

Alcohol turns out to be a notably volatile element in trials. It is certainly a mitigating factor for the accused. Alcohol consumed by the accused is used to show absence of premeditation; consumed by the complainant, it diminishes her credibility.¹⁶

Expert evidence is central to judicial understanding of the severity of the crime, its impact on the victim and the prospects for rehabilitating the offender.

In reviewing sexual assault sentencing decisions, one is struck by the uncritical weight given to expert testimony from psychiatrists and psychologists on behalf of the defence. There is little evidence that judges have challenged its accuracy or scrutinized it for bias.

In the case, for example, of a man who had sexually abused his own daughter and a deaf child for a total of seven years, both the treating psychiatrist and the judge seemed to have great confidence in the

doctor's assessment that the accused was not "at risk for harming himself or others."¹⁷ Research has demonstrated that psychiatrists have limited ability to predict dangerousness. Knowledge of this research might considerably enhance the security interests of women and children.

A later tribunal hearing¹⁸ involving the same offender heard from a widely acclaimed expert with a history of longitudinal research on offenders and knowledge of specialized treatment programs for offenders. Basing his assessment on the offender's long history of genital-genital contact and both extra- and intra-familial abuse, this same expert set the statistical risk of the offender's committing further offences at 40 per cent. (Allowances were made for the treatment he had undergone.)

An expert's inability to recognize breach of trust in sexual abuse cases is sometimes compounded by inaccuracy. For example, one expert assessment details the abuse of *one* girl for *two* years when in fact, according to the sentencing decision, the abuse involved *three* girls over a period of *nine* years. Here, the expert exhibits a rationalization of, and high tolerance for, sexual abuse startlingly similar to those exhibited by offenders. He goes on to describe "the girl in question" — either a three or a six year old — as "encouraging and enjoying" the sexual activity. In spite of the offender's long history of abusing, the expert maintains that "there is no evidence that he has any pedophilic or other deviant sexual compulsions." The abuse of three- and six-year-old children is described as a "sexual relationship" which is "of an opportunistic nature and not the result of deviant or compulsive behaviour" with "no coercion on his part."

In this case, the judge did not accept the expert's opinion. He found the offender to be "in a position of trust" and declared that "conduct such as this will never, never be tolerated." Yet similar dubious evidence is not always rejected.

Euphemistic language used by experts helps minimize the offence and disguise the dangerousness of the offender. A man who committed sexual assault at knifepoint was categorized as having "a mild anti-social orientation."¹⁹

When seven to twelve per cent of male psychiatrists and psychologists admit "erotic contact" with patients,²⁰ and their self-regulating professions fail to deal

severely with such abuse, skepticism about this expert testimony may be justified.

Expert assessments of an offender's prospects for rehabilitation also tend to be unjustifiably optimistic. They reflect little appreciation that rehabilitation programs for sexual offenders are still in a very early stage of development and the success rates to date are not encouraging.

Character evidence is offered for the accused by experts and others, usually at the sentencing hearing. It is intended to, and often does, work to minimize the blame accorded the offender by stressing his otherwise impeccable behaviour. Sometimes the comments and the offence are hard to reconcile. In sentencing a medical doctor and minister for eleven years of abuse involving many children, the judge took into consideration the abuser's "exemplary contribution to the community."²¹

Since public behaviour is a poor index of the propensity to commit sexual abuse and is irrelevant to the actual offence, evidence on employment, education and good citizenship should be given minimal weight. In METRAC's review of sexual assault sentencing in Canada, it is evident that little recognition is given to the manipulative, deceptive behaviour deployed by the accused to succeed in abusing his victims.

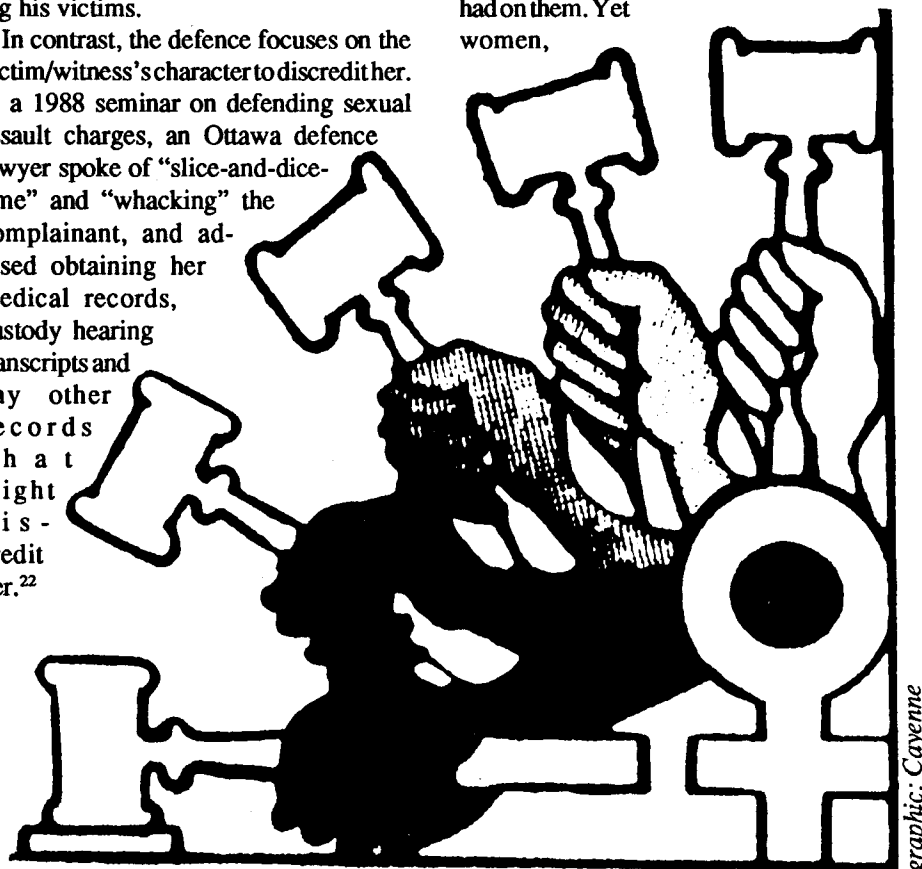
In contrast, the defence focuses on the victim/witness's character to discredit her. In a 1988 seminar on defending sexual assault charges, an Ottawa defence lawyer spoke of "slice-and-dice-time" and "whacking" the complainant, and advised obtaining her medical records, custody hearing transcripts and any other records that might discredit her.²²

If equality is to be advanced, it is essential to introduce expert testimony to support women's perception of the violence they experience and the reasonableness of their responses. When Madame Justice Wilson in *R. v. Lavallee*²³ admitted expert testimony on the battered woman syndrome, she brought a new perspective to the law on self defence.

Police have used their discretionary power to filter out "poor" cases and not proceed with complaints because they think the complainants would not make good witnesses. This has a negative impact on many women, in particular on those women with disabilities. Women and children with disabilities are often chosen for abuse because of their vulnerability. They are therefore at greater risk.²⁴ The criminal justice system then withdraws their "equal benefit and protection of the law" — also on the grounds of their disabilities.

In deciding who would or would not make a "good" witness, police also operate on the basis of a stereotype of "the blameless victim": the 15-year-old girl or the 85-year-old woman locked in her home crocheting the flag.

Women know from their experience the climate of sexual violence they live in and the impact the assault has had on them. Yet women,



graphic: Cayenne

the real experts, often have their evidence trivialized and devalued or are excluded entirely from access to the justice system by selection process.

Equality and the Administration of Justice

The challenge facing our system of criminal justice has been to balance the rights of the accused with those of society. In this two-party system, the obvious power imbalance in favour of society has traditionally been realigned through the assigning of fair trial rights to the accused.

Other interests must now be acknowledged besides those of the offender and the public at large. In all aspects of the administration of justice, the interests of the victim must be protected.

The United Nations' 1948 *Universal Declaration of Human Rights* contains a commitment to equality before the law and to equal protection of the law, as well as a right to life and security of the person, for all, including offenders and victims. The declaration inspired new concepts of equality and justice with greater appreciation of the victims' investment in the system and process. Over three decades later, Canada entrenched those equality and security rights in the *Canadian Charter of Rights and Freedoms*. The realization of those rights is still in its early evolution. For victims of sexual assault involving a breach of trust, that realization of rights is particularly slow.

A recent review²⁵ of Canadian sexual assault sentencing decisions found great disparities in the recognition, understanding, and weighting of breach of trust factors in sexual assault cases. Almost 200 of the 470 full-text decisions involved a breach of trust relationship, and in 44 per cent of those 200 cases, breach of trust is not recognized as an aggravating factor.

Those in positions of trust have a special responsibility to act in the interest of the other party. This includes parents and teachers, babysitters, camp leaders, people standing *in loco parentis*, professionals (at least in relation to their own clients, students and patients), as well as those with responsibility for public safety and those in authority positions in the workplace. But in case after case there is no mention at all that sexually abusing priests, teachers, doctors, parents and police were in a position of trust. Understanding this concept of breach of trust is essential to the support and advancement

of women and children's equality and security interests.

METRAC's database²⁶ indicates that, where the perpetrator is a birth, step- or foster parent, or the common-law partner of the victim's mother, the average sentence is approximately two years. When incest survivors describe their continuing ordeal or "sentence" after their abuse, as they try to come to terms with the abuse and its effects, they rarely speak in terms as short as two years.

The METRAC review does provide examples of the enlightened understanding evinced by certain sentencing judges. It also indicates some directions for change. For example, incest is often seen as an "unnatural act," a "crime against nature," or as an improper exercise of the father's property interest in the daughter. A significant reduction in disparity would result if incest were consistently recognized as a breach of parental trust (and named as an aggravating factor in sentencing). This would be the law's purpose to protect the security and equality rights of children.

Parole Boards

Perpetrators of sexual abuse through breach of trust are rarely convicted and, therefore, have little opportunity to appear before a parole board. The discretionary power of the police in charging, the narrow definition of the crime of sexual assault, the evidentiary rules and practices and the criminal burden of proof borne by the prosecution, all work against such an appearance. When they do appear, offenders are often categorized as non-violent and released on parole.

The present working definition of "violent offender" used by Corrections Canada and the National Parole Board of Canada, as well as by many police forces, often violates the security interests of women and children. They are further put at risk because the definition does not usually include sexual predators who regularly breach trust relationships.

Beyond the Courts

Even with knowledgeable adjudicators who are committed to equality and a *Charter*-driven revision of rules of evidence, the rigorous burden of proof beyond a reasonable doubt will often not be met, and offenders will be acquitted.

Society must ensure the presence of

safeguards beyond those that can be provided in the courts. This is particularly important now, since the goals of violence prevention and of equal access to justice are so far from being reached.

Police forces, school boards, government protection agencies, and other institutions are formally vested by society with responsibility to protect the interests of society at large and of certain populations within it. Along with their responsibilities, the institutions are accorded certain exclusive rights and privileges: for instance, the police have a virtual monopoly on the legal use of force. Society expects that these institutions and their members will place above their own interests the interests they are appointed to protect.

Other institutions, such as churches, enjoy a moral authority which is also accompanied by the expectation that they will give priority to the best interests of those they serve.

Individuals who have special status by virtue of their membership in an institution or profession have often enjoyed immunity from scrutiny and charging in instances where they have sexually abused. Police forces, school boards, children's aid societies, residential care facilities, and churches have often chosen the most expeditious and least embarrassing (to them) resolution of cases: removing the (alleged) abuser from the site by pressuring him to resign, or transferring him to another location. Churches have often whisked the abusing priest or brother into therapy and then shuttled him to another parish. In this, there is little evidence of thought given to the needs of his past victims or the danger to those he could victimize in the future.

METRAC has currently undertaken a preliminary review of quasi-judicial tribunals, self-regulating professions, government agencies and social institutions in Ontario²⁶ to explore their understanding of and response to actual and potential cases of sexual abuse. A first review of policies, procedures and practices shows that many institutions and agencies have failed in fulfilling their trust responsibilities concerning prevention, monitoring and investigation, disposition and resolution of allegations in sexual abuse cases over which they have jurisdiction. This poor response has been identified by METRAC as an institutional breach of trust.

The church has often demonstrated a resolute and deliberate overlooking of the pervasive nature of sexual abuse in its midst and has shown great insensitivity to the needs and devastation of its victims. This was epitomized earlier this year in the response of a bishop in Nova Scotia. Some church leaders, spurred on by a royal commission and a church-initiated inquiry, were finally beginning to acknowledge the inadequacy of the traditional "whisk and shuttle" approach. Yet this bishop publicly stated that not all the blame or the abuse of the boys lies with the priests, that some of the boys could have stopped the assaults. "Were they cooperating in the matter, or were they true victims?" he asked. (Later, he made a public apology for his remarks.)

Conclusion

The promotion of equality interests justifies a rebalancing of the rights and interests represented in and by the criminal justice system.

The equal benefit and protection of the law promised to women and children in the *Canadian Charter of Rights and Freedoms* are often not available to victims of sexual assault and are particularly remote for those victim-survivors of a sexual assault where a trust relationship has been breached.

Women live with fear and the knowledge that they have little personal security because of their vulnerability to assault, their past experiences of victimization and their well-founded distrust of the criminal justice system. When the crimes perpetrated against them are not recognized as crimes and are not treated seriously, when offenders do not meet with the appropriate punishment for their actions, the security interests of women and children are not supported.

Ignorance and discriminatory administrative practices must be eliminated, bias and ignorance challenged. The evidence of need for change is overwhelming and the change must be radical if equality under the criminal justice system is ever to be achieved.

¹ Julie Brickman and John Briere, "Incidence of Rape and Sexual Assault in an Urban Canadian Population", 7 *International Journal of Women's Studies* 195, 1985.

² A review of victimization surveys re-

veals that only 10-40 per cent of sexual assaults are ever reported. Sexual assaults by a stranger, which are the closest to our society's stereotype of rape (the stranger in a balaclava jumping out from behind a bush or climbing over a balcony), are understandably most reported. Although the necessary research on the subject has not yet been done, there is ample anecdotal evidence to confirm that breach of trust sexual assaults, the furthest away from these, are least reported.

³ See Pat Marshall & Maryellen Symons, *Shifting the Balance Towards Equality: A Comment on the Impact of Sexual Assault Codification in Women's Equality Rights in Canada* for a more extensive exploration of this topic.

⁴ Catharine A. MacKinnon, *Feminism Unmodified* (Cambridge, Mass.: Harvard University Press, 1987), p. 87.

⁵ Law Reform Commission of Canada, *Sex Crimes Recodified* (Ottawa: LRCC, 1989).

⁶ Sir Matthew Hale, *The History of the Pleas of the Crown I* (London: Professional Books, 1971), LVIII: *635.

⁷ "Sexual Assault: Measuring the Impact of the Launch Campaign," prepared for the Ontario Women's Directorate by Informa Research Co. Ltd., 1988. Of the men and women they surveyed across Ontario, 35 per cent believed that women agree to have sex and then later complain they were raped, and 30 per cent agree that the courts tend to believe women's false stories.

⁸ Kenneth S. Pope, "How Clients Are Harmed by Sexual Contact with Mental Health Professionals: The Syndrome and Its Prevalence", *Journal of Counselling and Development*, 67 (Dec. 1988) pp. 222-26.

⁹ *R. v. Wald* (1989), 47 CCC (3d) 315.

¹⁰ From information gathered by the author in a series of consultations across Canada in preparation for the SCC hearings in *R. v. Seaboyer*; *R. v. Gayme* (1987), 61 OR (2d) 290 (under appeal to SCC). METRAC is part of an intervenor coalition including the Women's Legal Action Fund (LEAF).

¹¹ *College of Physicians and Surgeons of Ontario v. Dr. Lal Andrew Boodoosingh*, May 8, 1990, Ont. SC (unreported).

¹² *Bonnie Robichaud v. Dennis Brennan* (Treasury Board), January 13, 1982, Human Rights Tribunal, Canadian Human Rights Commission.

¹³ *Bonnie Robichaud v. Dennis Brennan* (Treasury Board), February 21, 1983, Human Rights Review Tribunal, Canadian Human Rights Commission.

¹⁴ *Pappajohn v. R.* [1980] 4 W.W.R. 387 (S.C.C.)

¹⁵ Barbara Dominic and James V.P. Check, "The Impact of Highly Aggressive Cues on Perceptions of Stranger and Acquaintance Rape Scenarios", *Canadian Psychology*, 27, (1986), no. 2. In this study, half the participants fail to identify acquaintance rape as rape.

¹⁶ *R. v. Shortell*, Ont. Prov. Ct, 1987 (unreported).

¹⁷ *R. v. D. P.*, May 24, 1985, SCC (unreported).

¹⁸ Law Society of Upper Canada Admissions Committee, 1989.

¹⁹ *R. v. Dennis Earl White*, NS SC, January 24, 1989 (unreported).

²⁰ See, for example, K.S. Pope & J.C. Bouhoutsos (1986). *Sexual Intimacy Between Therapists and Patients* (New York: Praeger Press, 1986).

²¹ *R. v. Collins*, Nfld. CA, March 3, 1987 (unreported).

²² Cristin Schmitz, "Whack the Sexual assault Complainant", *Lawyers Weekly*, 22 (May 27, 1988).

²³ SCC, May 3, 1990 (unreported).

²⁴ Dick Sobsey and Connie Varnhagen, *Sexual Abuse and Exploitation of People with Disabilities: Final Report* (Edmonton: Developmental Disabilities Centre, University of Alberta, 1989).

²⁵ Maryellen Symons and Pat Marshall, *Part One: Review of Canadian Sentencing Decisions, Breach of Trust in Sexual Assault: Statement of the Problem* (Toronto: Ontario Women's Directorate, 1990).

²⁶ The development of METRAC's sentencing database has been assisted by many. Dr. John Hogarth and the Canada Law Book have provided sentencing decisions for the analysis.

²⁷ With funding from the Ontario Women's Directorate.

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