

# Tracking and Resisting Gains in Sexual

BY SHEILA MCINTYRE WITH CONTRIBUTIONS FROM CHRISTINE BOYLE,

*Cet article examine la vague de fond contre la réforme des lois inspirée par les féministes. L'auteure relie l'escalade de la violence faite aux femmes et la présence d'un courant dans la législation qui résiste à l'égalité, aux réactions qu'elle a perçues chez les femmes.*

Feminist efforts to expose, challenge, and eliminate direct, indirect, and systemic inequality in the substantive, evidentiary, and procedural laws proscribing sexual offences and in the enforcement and application of those laws have not only been consistently resisted by police, lawyers, judges, and juries, but have consistently generated backlash against those responsible for and/or supportive of such egalitarian change. Actual and imagined social, economic, political, and legal equality gains by women as a class—however unevenly distributed—have triggered a variety of types of backlash, including an escalation in actual or threatened violence against women accompanied by new equality-resistant strains of legal doctrine that effectively offset or bypass earlier reforms.

## **Three decades of feminist-inspired law reforms**

The first major product of post-war feminist legal activism was the *Report of the Royal Commission on the Status of Women*. Published in 1970, the *Report* did not even identify male violence against women as a significant women's issue, let alone as a reflection and determinant of women's subordinated social, political, economic, and legal status. Within the next decade, rape crisis centres and transition houses were being es-

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tablished by grassroots feminist activists across the country. On the basis of the questions front line workers asked of survivors of male sexual violence and the answers women gave, the myths and the webs of (hetero)sexist, racist, classist, and ablist stereotypes purporting to explain or serving to rationalize male sexual violence were exposed and challenged (Lakeman). Ground-breaking feminist research documenting sexism in almost all legal doctrines and in law enforcement practices was beginning to burgeon (Clark and Lewis; Backhouse and Cohen; MacLeod; Pickard; Boyle 1981). Increasing numbers of women enrolled in universities, including in law schools; some were radicalized, not least by studying the obvious sexism embedded in sexual offence laws. In this socio-political context, women protested and helped reduce sexually objectifying treatment of women in the media; the anti-pornography movement was born;

women students, women unionists and women lawyers called for, and gradually secured, prohibitions on, and remedies for, sexual harassment; and the first alarms indicating the pervasiveness of child sexual abuse were sounded.

Feminist efforts to reform criminal law have represented only one branch of this multi-faceted and long-term anti-violence agenda. Many feminists hoped that elimination of sexist bias in the law and in its administration would deter violence primarily by reducing men's reasonable expectation of immunity from sanction and women's reasonable expectations of unjust treatment and unjust outcomes upon reporting. Effective criminal laws effectively enforced were then and still are considered a necessary incident and indicator of state, and ultimately societal, recognition of women's full personhood and right to security of the person and to sexual autonomy.

As at the end of 1999, the socio-political context in which criminal law operates is one in which the sexual inequality which facilitates, institutionalizes, and rationalizes male sexual violence is worsening exponentially. An intensifying exploitation of women, women's productive and reproductive labour, women's bodies and women's body parts are currently the state-supported private order. Simultaneously, the dismantling of equality-enabling or -advancing public benefits, services, and institutions is the global market-dictated public order. In this context, the full humanity, citizenship and fundamental right to self-determination of even the most privileged of women remains far from estab-

# Backlash Against Equality Offence Law

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lished. In this oppressive context, small wonder that so many individual men do not recognize or respect the personhood and the personal as well as sexual autonomy of women as a class, especially the autonomy of the most systemically dispossessed of women—Aboriginal women, women of colour, poor women, women with disabilities, lesbians, immigrant and refugee women. Small wonder, too, that so many (primarily, but not only, male) defence counsel equate the constitutional right to a fair trial with an accused rapist's right to violate women's constitutional rights to security of the person, privacy and equality. And small wonder courts continue to acquit men who would rather make the mistake of raping a non-consenting woman than take reasonable steps to determine and abide by her sexual will.

## Where we began

In 1970, a number of beliefs, assumptions, and presumptions were formally or informally encoded in sexual offence law, police charging, and prosecutorial screening practices, accredited in legal education, deployed by defence counsel in plea bargaining and at trial, invoked openly by judges in their evidentiary rulings and their reasons or jury instructions and at play in jury deliberations.

•A (good) woman cannot be raped against her will, and will mount fierce resistance before yielding her virtue. She should have injuries to corroborate her claims of having been forced.

•A (good) wife cannot be raped at all, because she does or should will-

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ingly yield her body to her husband on demand or because she is matrimonial property or because she willingly chose the marital contract's exchange of sexual services for economic support.

•A bad woman is *de facto* rapeable because *de jure* unworthy of rape law's protection: she has no reputation or virtue to lose and no value as marriageable property; she is a temptress, a tease, a homebreaker. Bad womanhood is associated with the "inferior" races, with mental "defectiveness," with sexual inversion, with poverty. White, educated, mentally sound, heterosexual, middle class women possess a "natural" modesty.

•A (normal) woman will raise an immediate hue and cry after her rape; she will report her violation at the first reasonable opportunity and her distress, shame or terror will be plain to see.

•An unchaste woman is more likely to consent to sex with any and every man and to lie about it. Unchaste

women, being sexually indiscriminate, may be presumed to be consenting no matter their efforts to contradict that presumption.

•Reports of sexual abuse by women and children are inherently suspect: easily made and hard to dispel. They are uniquely inclined to lie about rape and sexual abuse so should not be believed absent independent corroboration. Their character and psychiatric makeup must be scrutinized for motives to fabricate rape charges or for signs of rape fantasies or delusions. They are uniquely suggestible, easy prey to disturbed or man-hating therapists.

•Absent overt resistance that is recognized as such by a sexual aggressor and by the trier of fact, silence can be taken as a yes; no may mean yes; drinking or dancing with, humouring, accepting a ride or working late with, faking sleep, rolling over in one's sleep, wearing particular clothes or few clothes or sex-appropriate clothes, being unescorted by a man—all may mean yes if a man who wants sex wants it to mean yes or can persuade a judge or jury that there is some air of reality to the logic by which his wish becomes her desire.

It is a testimony to the political effectiveness of the last 30 years of feminist activism that most women and many men—including criminal law professors, defence and Crown counsel, Justice Department lawyers, and judges—consciously acknowledge the above statements to be based on discriminatory stereotypes that are unfounded in fact, yet mythic in their tenacious hold upon the Anglo-American legal imagination. Most feminists and some men both in and outside of law also understand that

these “myths” help men individually and as a class to rationalize their sexual abuses or to distinguish their own “natural” sexual aggression or ordinary sexual opportunism from the really culpable and injurious kind practised by those aberrant, truly violent, genuinely scary men the criminal law is meant to isolate and jail. Finally, many feminists and some men also recognize that these “myths” help shore up racist, heterosexist, ablist, and classist stereotypes about the sexual mores and practices said to distinguish members of dominant groups of both sexes from women and men who are members of subordinated groups.

In face of so much continuing violence against women and children and in face of the *laissez-faire* posture of the state towards the violence and towards the systemically unequal conditions which generate, rationalize and perpetuate it, it is easy to discount some of the positive impacts of the public education and consciousness-raising effected by three decades of feminist struggle. The public is less likely to attribute an acquittal to the mythic lying or spiteful or delusional complainant, and more likely to conclude that the law simply doesn't work for rape victims. Women are more likely to claim the right to physical integrity, more likely to conceive of any and all sexual invasions whether committed by a date or a stranger, with or without penetration, as criminal. Women are prepared to charge more powerful and more high-ranking men; more likely to register and seek sanction against the double injury of sexual abuse enabled by abuse of trust, power or authority. Even knowing the degree to which the system does not work for any women and will likely not work for them, Aboriginal women choose to (attempt to) bring their teacher-priest-employer-Bishop to account (*O'Connor*); psychiatric patients and drug addicts choose to (attempt to) bring their doctors (*Norberg v. Wynrib*) and psychiatrists (*M. (A.) v. Ryan*) to account;

daughters choose to name and sue and prosecute their rapist fathers (*M. (K.) v. M. (H.)*) and step-fathers (*R. v. M. (M.L.)*); working class women (Robichaud; Janzen) choose to name their employers. Some win; none without years of litigation and indefensible violation at the hands of the legal system.

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The legal system itself has proved less responsive to three decades of feminist struggle. Unfortunately, it is testimony to the power of the powerful to name the world from their own point of view and in their own interest, that feminist efforts to decode the discriminatory logic and results of these rape myths and rationalizations, and to expunge them from criminal law and its application have, for the most part, failed. Whether based on principles of formal or substantive equality, the major feminist-inspired statutory reforms of 1983, 1992, and 1997 have, at best, eliminated the formal expression of rape myths and rationalizations, not their informal operation and substantively discriminatory impact on the enforcement of sexual assault law. At worst, the substantive equality principles and constitutional equality entitlements underpinning these reforms have been outright ignored, or merely discounted by every level of court. Given

the inequalities of power involved, rendering feminist reforms empty requires little more than concerted resistance from the dominant—in this context, individual male sexual abusers, defence and Crown counsel, criminal scholars, legislative drafters and judges. The caselaw is replete with evidence of such concerted resistance. Resistance has escalated to backlash whenever feminists have scored a political victory despite being out-numbered, out-ranked and out-resourced. These moments, perhaps, suggest there may be some Achilles' heels in the fabric of raced, classed, ablist and heterosexualized male supremacy.

#### **Resistance to 1983 reforms**

Virtually the entire package of sexual offence reforms codified in 1983 was premised on formal equality principles. The aspiration of the reforms was to rename and rewrite sexual offence law so that its enforcers would treat criminal injury of women—all women—in the same way and with the same seriousness as they treat criminal injuries to men, and according to the same charging practices, the same rules of evidence and the same jury instructions. The reforms collapsed the gender specific crimes of “rape,” “indecent assault on a male” and “indecent assault on a female” under the gender neutral label “sexual assault”; eliminated the marital rape exemption; completely or significantly abrogated rules of evidence (recent complaint, corroboration and sexual history rules) that treated testimony by sexual offence complainants more suspiciously than that of other crime victims and that treated “good girls” differently from “bad girls” (the rule allowing admission of “evidence” of general sexual reputation). Proponents of the reforms hoped that by de-sexing the law's language and reclassifying it as a crime of violence, not an offence against public morals and not a matter of uncontrolled lust, the sexual double standards embedded in the

law would disappear. There was not a little liberal idealism in this project: if reformers could just find the right words to displace entrenched misconceptions, dispel ignorance, expose irrational stereotypes, and appeal to liberal rationalism and fairness, bias in the legal system would be gradually exposed and repudiated. Such idealism proved misplaced. Even at the time, many feminists opposed this strategy (see Cohen and Backhouse; Heald; o; Osborne).

Although sexual assault reporting rates significantly increased following the 1983 reforms, police founding and charging rates have remained unchanged (Roberts and Grossman; Clark and Hepworth) and charging practices minimize the injury done thereby enabling plea bargains or sentences which further diminish the gravity of the crime.<sup>1</sup> Virtually all the evidentiary rules that were formally abrogated in 1983 (and that survived the *Seaboyer* decision), continue to operate informally in police and prosecutorial screening practices, at trial and, in the event of a conviction, in sentencing. In particular, evidence deemed corroborative (physical and/or genital injuries, a display of distress upon first reporting an assault, immediate complaint) significantly enhances the likelihood of a case being prosecuted and resulting in conviction; evidence of unchastity or of substance use or abuse prior to an assault or inconsistencies in the details reported significantly increase unconviction, non-prosecution and acquittal rates. These findings have been confirmed in cases of child sexual abuse, (Gunn and Linden) sexual assaults of adult women (Feldberg), and proceedings brought by adult survivors of child sexual abuse (Kelly *et al.*).

The 1983 reforms had outright prohibited the introduction of evidence of women's sexual history with anyone other than the accused except in four narrow circumstances. This near-blanket exemption (s. 276) was struck down by a majority of the Supreme Court of Canada in

the 1991 *Seaboyer* decision on the ground that in "rare" cases the exemption would deprive the defence of relevant evidence whose probative value outweighed its prejudicial effects. The consolation prize offered by the majority was their holding that sexual history evidence could no longer be admitted for the "irra-

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tionally" and "illegitimate" purpose of invoking the "twin myths" that a sexually active woman is more likely to have consented to or to lie about the sexual activity subject to prosecution. Unfortunately, in illustrating types of sexual history evidence that s. 276 had unconstitutionally excluded, the majority offered examples of what they considered "similar pattern" evidence or evidence of "motive to fabricate" which rely on twin myth logic or invite twin myth inferences. Examples such as the case of a prostitute in the habit of extorting extra payment from men by threatening to report them for rape or the case of a young girl who spitefully claims that her father sexually assaulted her to retaliate for his termination of her incestuous relationship with her brother [!] offer defence counsel ample opportunity to undermine the credibility of a woman or child complainant by equating non-virginity with dishonesty.

### **Resistance to 1992 reforms**

The *Seaboyer* decision, of course, spawned the second major overhaul of sexual offence law in a decade. Among other things, the 1992 reforms expressly codified the majority's prohibition on admission of sexual history evidence to support twin myth inferences. In addition, it codified detailed guidelines enumerating eight factors judges must consider before admitting sexual history evidence judicially determined not to depend on twin myth logic. A 1997 review of the impacts of the reforms shows that judges are following the guidelines in form only, not in substance. In numerous cases, judges simply recite the eight factors in s. 276(3) without any sort of analysis before admitting sexual history evidence. Where judges purport to apply, rather than merely recite, the guidelines, some 25-50 per cent of sexual history evidence sought to be admitted goes in. As well, judges frequently disregard the requirement that defence counsel provide "detailed particulars" of the nature and the relevance of the evidence sought to be adduced. Instead, vague assertions of relevance by defence counsel are found to satisfy s. 276.1(2) (Meredith *et al.*).

The internal contradictions in the reasoning of the *Seaboyer* majority have provided ample room for defence lawyers to use twin myth logic while purporting to forswear it. Not surprisingly, defence counsel have been successful in applications to admit sexual history evidence to support an alleged motive to fabricate. Particularly disturbing have been counsels' successes in securing admission of evidence of childhood sexual abuse or previous sexual assaults to discredit those reporting sexual violence by a later perpetrator. Some defence lawyers have successfully argued prior *non-consensual* sex is not even covered by s. 276,<sup>2</sup> on the basis that the evidence is "relevant" because past assaults raise the spectre of bias and prejudice against men as

a motive to fabricate. Others have argued that past abuse may affect the reliability of a woman's (or child's) evidence: they may be mistaken or deluded about the identity of the true perpetrator or so damaged that their perceptions are unreliable.

Defence counsel have also been successful in arguing that they seek to use a woman's sexual history not to support a *general* inference that she is more likely to have consented to sex with the accused and/or to lie about that sex, but to support a more *specific* inference. Thus, sexual history evidence has been admitted into trial to rebut an *unstated* inference that a schoolgirl would never have consented to group sex in a school yard (where "consent" was the defence to the schoolyard gang rape of a young girl with mental disabilities); or to rebut an *unstated* inference that a child would neither know nor be capable of making up the particulars of the prosecuted sexual contact (where the child's previous sexual abuse is used to support the defence of mistaken identity or mistaken incident). If such "specific" inferences are accepted as untainted by twin myth logic, the only prohibited use of sexual history evidence will be where "defence counsel explicitly state that the only use of the evidence [is] to promote the myths and stereotypes by the jury" (Meredit *et al.* 14).

Defence lawyers have achieved their most spectacular evasion of s. 276 with their expansive pursuit of pre-trial disclosure of complainants' personal records. Substantively, this tactic secures everything prohibited by *Seaboyer* and Bill C-49 by formalist means. By attaching a different generic label (*personal records* not *sexual history*), the defence can pursue the same discrediting and/or intimidating effects, invoke twin myth reasoning, and even secure sexual history information embedded in other records without satisfying either s. 276(3) or the general threshold for the admissibility of evidence. As Karen Busby's research demon-

strates, the reasons—if any—advanced for seeking pre-trial disclosure include testing for evidence of recent complaint, testing "credibility at large," looking for prior inconsistent statements and searching for motives to fabricate.

Although Bill C-49 was a direct response to the *Seaboyer* decision, its

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attempted correctives went far beyond the codification of guidelines for the admission of sexual history evidence.<sup>3</sup> The feminist strategy underlying the Bill was to amend the substantive law of sexual assault to define consent and non-consent so as to narrow the range of "evidence" legally capable of being "relevant" to the determination of innocence or guilt, and then to require judges to subject that narrowed residual pool of relevancy determinations to a broader range of constitutional considerations than had been applied by the *Seaboyer* majority. In *Seaboyer*, women's constitutional right under s. 15 of the *Charter* to formally and substantively equal treatment under criminal law were explicitly disregarded by the majority.<sup>4</sup> Both the Preamble and the text of Bill C-49 were designed to try to prevent the judges who applied the new law and/or who adjudicated constitutional challenges mounted against it from continuing to outright ignore s. 15

or to subordinate women's constitutional equality rights to accused men's fair trial rights.

The Bill defines consent for the first time, and in a way that recognizes women as sexual agents,<sup>5</sup> not as any man's sexual property, far less as a male sexual projection. Defined as "voluntary agreement," consent is something a woman *does*, and *freely chooses* to do, not something men *fantasize* or choose for her, far less unilaterally force on her. This approach should have eliminated any remaining vestige of the "resistance" standard of non-consent. Coupled with codification of a non-exhaustive list of circumstances in which law will deem no consent to exist, s. 273.1 was also intended to convert self-serving rape myths and rationalizations proffered as honest, but mistaken, beliefs in a woman's consent, into errors of law. Given s. 273.1(2)(d), for example, an accused who thinks that "No" means "Yes" has made a mistake of law, not of fact. More, as a matter of law, evidence of past sexual history advanced to ground an argument that "No" meant something else is simply immaterial. The Bill also prohibits resort to the mistake defence by any accused who did not take "reasonable steps" to ascertain whether a sexual partner ever consented to sexual activity.

To date, Bill C-49 has survived constitutional challenge to its most innovative provisions (*Darroch v. The Queen*). However, the Supreme Court has yet to pronounce on Parliament's rejection of *Seaboyer*. Whatever the Court decides, as noted above, sexual and other personal history evidence is flooding in at trial, contrary to the intent and the letter of the law. Meanwhile, the impact of the reforms is largely a matter of judicial interpretation of the new consent/non-consent and mistake provisions. Here, the record is ambiguous.

The good news is that the Supreme Court appears to have rejected the resistance standard of con-

sent, at least, in principle. The Court has clearly held that a failure to vigorously resist unwanted sexual touching is not required to prove that the sex in question was non-consensual. Where a teenage girl pretended to be asleep when abused by her stepfather,<sup>6</sup> and where another teenage girl clearly said “No” each of the three times a much older man touched her sexually (*R. v. Ewanchuk*), the Court has rejected defence arguments (and appellate court rulings) that consent was “implied” and/or that non-consent was not proved beyond a reasonable doubt.

The bad news is that both of these complainants *did* resist, albeit not so fiercely that only the pornographic imagination could deem them consenting. Nonetheless, both judgments would appear to establish that—at least with conscious complainants—an absence of affirmatively communicated consent establishes non-consent in law. Put differently, the Court has rejected defence efforts to (continue to) treat consent as the default position, that is to presume consent exists until non-consent is demonstrated, and demonstrated in a way persuasive to a sexual aggressor and/or to the trier of fact. The substantive importance of so elemental a legal acknowledgment of women’s personhood entirely depends on whether courts acquit accused men who (claim to) honestly believe silence, utter passivity, fearful acquiescence or explicit verbal rebuffs communicate consent.<sup>7</sup> Both individual complainants and women as a class understand that their rights to autonomy and security of the person are empty when a court accepts they were non-consenting but acquits their rapist on the basis that a doubt exists about whether he honestly believed forced sex to be consensual.

Although longstanding rape myths and rationalizations may well lend an “air of reality” to an accused’s asserted or implied belief in his entitlement to engage in sexual activity until decisively stopped, since 1992,

any such defence amounts to a mistake about the legal meaning of consent. Even without reference to the post-1992 constraints on access to the mistake defence, an honest mistake of law may not acquit (Vandervort). The 1992 amendment foreclosing access to the mistake defence to an accused who fails to take

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reasonable steps to ascertain consent prior to extracting non-consensual sex, codifies this legal principle. There remains no clear consensus within the legal community and no clear dicta from the Supreme Court of Canada about whether the reasonable steps requirement modifies the *mens rea*, the *actus reus* or is, somehow, free-floating and leaves the *mens rea* unaffected.

What is clear is that lower courts have taken an extremely lax approach to the mistake defence in circumstances where the complainant was drunk, asleep, had voluntarily consumed drugs or was involuntarily drugged by her assailant.<sup>8</sup>

Whether the Supreme Court’s latest decision on sexual assault overrules these unconscious complainant decisions is not clear. In *Ewanchuk*, the Court unanimously affirmed that there is no defence of “implied consent” to sexual assault in Canadian law; that in order to rely on the defence of honest mistake, an

accused must have believed that the complainant positively communicated consent to the sexual activity in question; that some mistakes such as the self-serving view that silence means consent amount to culpable mistakes of law not exculpatory mistakes of fact; and that continuing with sexual contact after someone has said no is, at a minimum, reckless conduct which is not excusable. On the facts of the case, the Court held there was no air of reality to the accused’s claim that he honestly believed the complainant consented despite her having said no each of the three times he touched her sexually.

Several sections of the *Ewanchuk* judgment undercut these apparently positive holdings. Having held that mistakes as to “no” meaning “yes” are mistakes of law, the judgment would seem unnecessarily to have considered whether there was an air of reality to Ewanchuk’s honest mistake claim. More, the opinion largely ignores the “reasonable steps” limitation on the availability of the mistake of fact defence, even had honest mistake been available to Ewanchuk. Because Ewanchuk took no steps to ascertain consent before sexually touching the complainant, the mistake defence should not have been available to him. In short, the Court has confused rather than clarified the relation of the new mistake provision to *mens rea*. Equally as confusing, the Court raised the hypothetical spectre of “ambiguous conduct” on the part of a complainant as going to her credibility about consent. This leaves open the possibility that a trial judge may accept as a legal principle that consent may not be implied and accept that a complainant did not positively communicate consent, while acquitting on the basis of doubts about the honesty of a complainant’s claim that the sex was unwanted.

**Some reckoning(s) with resistance**

Viewed in their best light, the last

30 years of struggle against direct, indirect and systemic bias in the operation of criminal sexual assault laws do appear to have eliminated formal codification of women's second class status. This struggle also appears to have reduced crude invocations by defence counsel and judges of prejudices against all women or against those women whose racial, economic, or social inequality renders them most vulnerable to the predations of more leveraged men. However, it must also be conceded that, at least within the four corners of criminal law, resistance to egalitarian change, indeed, resistance to the idea that constitutional equality rights have any bearing on the meaning of a fair trial, has been massive and relentless.

This disheartening history plainly affirms what feminists have known for some time in other contexts, but seem reluctant to concede on the subject of sexual violence: application of formal equality norms does not yield substantive egalitarian change. Mostly it yields rhetorical change not always for the better; or it yields technical evasions or new mechanisms to achieve the same substantive ends by different means. Gender neutral language and rules only obscure gender specific problems and, particularly the linkages between sexualized violence, systemic social inequality and the systemically unequal treatment of rape survivors in and by law. De-sexing legal language and rules does not de-sex the context in which sexual violence occurs, is (infrequently) reported and is legally processed; nor does it de-sex the "common sense" or subjective premises underlying relevancy determinations. Finally, the (hetero)sexist, racist, ablist and classist biases and stereotypes about "women" as a class or about particular constituencies of women that distort the fact finding process are not "irrational" biases curable with a little education once exposed to light. They are the predictable outcomes of systemically institutionalized relations of domination which rational-

ize expropriations in a variety of forms, including sexual.

It is not plain that reforms driven by substantive equality principles are faring much better when Bill C-49 can be sidestepped by pre-trial disclosure requests wrapped in the same old stereotypes about women's sexuality or complainants' suspect dispo-

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sitions, when sleeping women can still be found to have "voluntarily agreed" to sex, and courts have difficulty distinguishing errors of law from mistakes of fact. The difficult, if crucial, question is whether criminal law and (non-feminist) criminal law scholars and practitioners are distinctively resistant to change, or whether they simply reflect the intractability of rape myths and rationalizations in society at large.

**Reckoning with criminal law**

One possibility is that criminal law's norms are fundamentally inconsistent with substantive equality principles and impervious to substantive understandings. Criminal law focuses on the individual and, for the most part, measures fault by subjective measures. Regardless of the sheer pervasiveness of male sexual violence, its high prevalence wherever those who enjoy institutionalized power have ready access to the

systemically disempowered, and the high volume of predation reported by those sexual offenders who are convicted, criminal law's fundamental starting point is to presume the innocence of each individual accused. Unless the state proves beyond a shadow of a doubt that the individual accused knowingly or recklessly violated the sexual integrity of another, the presumption of innocence will not be displaced. In so quintessential a contest of credibility as a rape prosecution, it dictates a less openly acknowledged corollary: the presumption that the accuser is suspect—mistaken about identity, unreliable of memory, deluded or psychically brainwashed as to key events, wilfully lying or simply inherently shady of character and sexual disposition. Male supremacist, racist, heterosexist and classist ideologies about all women's or some "types" of women's mental (in)capacities and sexual proclivities dovetail neatly with these acknowledged and unacknowledged presumptions.

By contrast, much of the thrust of feminist activism and analysis of male sexual violence has been to de-privatize and de-individuate its genesis, its harms, its social causes and its social beneficiaries. Feminist analyses linking male violence, systemic inequality and biased codification and applications of law, therefore, render problematic the presumption of individual (male) innocence of sexual exploitation. While each sexual abuser may imagine he is operating alone, his power to abuse as well as its abuse are part of the social order keeping all women in our structurally debased place. No man on his own, without the overt or implicit collusion of others and without ideological and institutional backing gets into a position to successfully attack women and get away with it. The individual rapist, batterer or woman-killer is supported by the hierarchies that allow him the extra power and status to exercise abusive or exploitive control over his unequals and to enforce his desires, by the same hier-

archies that keep her vulnerable to attack because she is economically, politically and legally disempowered and socially devalued; by the social policy agenda that refuses to censure or restrain him but that responds to her with psychiatry or social work; by the policies and ideologies that treat her as damaged goods or as a temporarily injured accident victim who, with professional treatment, can go back to normal; by a social order where “normalcy” consists of women’s permanently unequal access to safety, money, power, status, political voice, credibility, the benefit and protection of most laws, in short to resources of all kinds to enable self-determination. Just as no man acts alone, no man, however non-violent, fails to benefit from the structural inequalities that facilitate rape, shore up men’s freedoms, erode women’s autonomy, inflate men’s assumptions of entitlement, devalue women’s humanity and discredit her word, and then codify male sexual presumptions as law’s view of consent and of innocent errors.

It may be that the individuated norms definitional to criminal law may yet be reconciled with the collectivized realities of systemic privilege and systemic dispossession that animate contemporary equality norms. This possibility is just highly improbable under conditions of worsening inequality. It may be, in other words, that we should consider pronouncing criminal law incorrigible under present conditions, and their counsel should resort to it, if at all, only under protest and for political ends that are realizable with or without securing a conviction.

### **Reckoning with criminal lawyers**

Recognizing the possible incompatibility of criminal law norms and substantive egalitarian norms should not be confused with the claim that the criminal law exists distinct and apart from society or must operate from distinctive norms or that its practitioners or adjudicators should

be exempt from, say, the equality imperatives of human rights and constitutional law. Women’s three decade struggle to expose, account for and end male sexual violence against women and children has always been a palpably lop-sided power struggle. One of the weapons stacked against egalitarian change has been the crimi-

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nal defence bar. Its leadership has predictably denounced every reform secured by feminist activism, but has been silent in face of peers who advocate or use intimidation tactics against complainants. Its practice, with far too few exceptions, has been to persist in knowingly trading on discriminatory logic and norms and to operate from the resistance standard of rules compliance—that is to violate, e.g. s. 276(1) and (2) or s. 278.2 and 278.3 of the *Criminal Code* unless forcefully resisted and stopped. Feminists need to think about expanding our legal activism to this heretofore untouchable front. Plainly, we need to contest the conflation of an accused’s right to a vigorous defence with the right to a wilfully discriminatory and/or rule-flouting defence. We need to caucus over several options. We might file multiple complaints with provincial law societies against both the most egregious practitioners and the most routinely discriminatory defence tac-

tics, minimally, to challenge the profession’s laissez faire approach to the boundaries of ethical criminal practice and to force an articulation of what practices, if any, warrant professional censure. We might lobby for revision of the rules of professional conduct to require compliance with the equality guarantees of the *Charter*. We might undertake to publicly name and censure individual defence lawyers we believe to be practising unethically and/or to be flouting public law.

### **Reckoning with judicial bias**

Periodically, the expression in sexual assault proceedings of overt judicial gender and/or race bias against complainants triggers complaints to judicial councils, typically by members of the public. The less overt but rather more routine operation of biased reasoning in judicial handling of records disclosure or sexual history applications, in failing to check abusive defence conduct toward complainant witnesses, or in jury instructions have been largely immune from open criticism or correction. While the Crown may appeal the verdict of an apparently biased judge, listing reasonable apprehension of bias as a ground for vacating an acquittal is an extreme rarity. In either event, a judicial or judicial council finding against the judge is almost unheard of. Each of former Justice Bertha Wilson, and current Justices McLachlin and L’Heureux Dubé has been the subject of complaints to the Canadian Judicial Council by the anti-feminist organization, REAL Women for commenting on gender bias in Canadian legal doctrine or in judging. The first Black woman judge in Nova Scotia, Judge Corinne Sparks, faced retaliation from Crown counsel when she adverted to anti-Black racism by white police in acquitting a black teenager of assaulting a white, male police officer. Not only did the Crown appeal on the basis of her advertence to systemic racism, it al-



leged *actual* race bias not just conduct giving rise to a reasonable apprehension of bias. Three (white, male) Supreme Court judges held that Judge Spark's remarks did raise a reasonable apprehension of bias; four (white male) judges considered her comments close to the line but not biased in law; and only the two white, women judges considered the remarks not just unobjectionable, but reflective of "an entirely appropriate recognition of the facts in evidence... and of the context within which [the] case arose—a context known to Judge Sparks and to any well-informed member of the community" (*R. v. R.D.S.*).

When the Crown appealed the *Ewanchuk* decision to the Supreme Court, it did not argue that Justice McClung's sexist reasons gave rise to a reasonable apprehension of bias. Nor did any of the men on the Supreme Court bench who had faulted Corinne Spark's judicial conduct say a word against McClung's explicit sexism. When Justice L'Heureux-Dubé did name and deplore his sexist stereotyping and the rape myths it invoked, McClung responded with a vicious personal attack to the applause of well-known defence counsel, Eddie Greenspan. REAL Women filed a complaint with the Canadian Judicial Council against Justice L'Heureux-Dubé. The CJC dismissed it as unfounded. Numerous people complained to the Alberta Judicial Council, which ultimately exonerated McClung.<sup>9</sup>

It might be comforting to project that this evidence of double standards in application of the reasonable person test of bias will diminish as gender and race sensitivity training for judges takes effect. But some judges are challenging such initiatives as an incursion on judicial independence. Given the formalism of the law on judicial independence (see *Reference Re Remuneration of Judges of the Provincial Court*) this challenge should be taken seriously. All equality seeking groups need to turn their minds to bias doctrine in

order to develop strategies to insulate women and male legal outsiders from biased applications of bias doctrine, while holding elite male judges to equality-respecting standards.

### Reckoning with backlash

Both at the public level and within

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## All equality seeking groups need to develop strategies to insulate women and male legal outsiders from biased applications of bias doctrine, while holding elite male judges to equality-respecting standards.

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the criminal defence bar, some feminist anti-violence initiatives have provoked responses beyond simple resistance; they have roused disproportionately explosive defensiveness and hostility. In 1989, on the campus of Queen's University, receipt of rape awareness literature in their residences moved several men to post huge posters in their windows blaring, for instance, "No means, down on your knees bitch" and "No means more beer." At Queen's law school, this backlash was for male eyes only: "No means fuck me 'til I bleed" sat undisturbed on the men's washroom walls for two months until removed in the wake of the Montréal massacre. The massacre itself triggered enormous male rage against and media disapproval of feminists' insistence on the linkages between Lépine's anti-feminism and misogyny and pandemic male violence against women. Every year, women-only "Take Back the Night" marches trigger feminist bashing.

The tabling of Bill C-49 unleashed a frenzy of social and legal scaremongering by criminal defence counsel. "We'll need breathalyzers and written contracts at our bedsides," they warned the general public. "This law ignores the presumption of innocence," they submitted to Department of Justice officials and the legislative committee reviewing the amendments. REAL women described Bill C-49 as the "Despise Men" amendment (Minutes of Proceedings and Evidence of Legislative Committee on Bill C-49). Professor Rob Martin described it as woman-hating.<sup>10</sup> Notwithstanding the sky-is-falling hyperboles of defence lawyers prior to its enactment, little really changed on the ground. And, in any event, some defence counsel adopted a far more effective intimidation tactic "Whacking" the complainant with so many or such invasive pre-trial disclosure requests that she drops charges.<sup>11</sup>

The aggressive pursuit of complainants' personal records appears to be a pointed retaliation for Bill C-49, even a show of legal force. The tactic may also have emerged because men historically largely immunized from criminal charges for their criminal sexual conduct, have seen that immunity erode. Bishop O'Connor was the priest, school principal and employer of the young Aboriginal women he raped and indecently assaulted. Mr. Beharriell was charged with assaulting his daughter's playmate at a time when he was a father substitute after the death of her father. Dr. Ryan was a psychiatrist sued for sexually abusing a patient. Mr. Carosella was a public school teacher reported by a student. Such men do not plea bargain: they pay defence counsel to reaffirm that the best defence is a good offence.

This offensive strategy operates on three levels. Women who report their violation will now be forewarned by police or Crown lawyers or by rape crisis counsellors or therapists that all of their personal records may be subject to disclosure to the accused.

Women seeking counselling from rape crisis centres, women's centres, family physicians or therapists may be warned by those services that what they say could be subject to a disclosure order. Women attempting to provide counselling services may cease to take notes or risk professional sanctions for not taking or for shredding their notes, or may undermine a patient's prosecution of her abuser by shredding their notes. In pursuit of all three goals, defence counsel, aided and abetted by a five judge majority of the Supreme Court of Canada, have gone after rape crisis centre records and the records of feminist therapists, with a vengeance (see *O'Connor* and *Carosella*).

Both defence counsel and the Supreme Court majority were finessed for a brief interval when Parliament effectively overruled *O'Connor* by enacting Bill C-46 in 1997. While it took five years before any constitutional challenge to Bill C-49 hit an appeal court; Bill C-46 was targeted across the country within weeks of its passage and struck down almost summarily within some ten weeks of its enactment (*R v. Mills*). Bill C-46 contains no fewer than three references to the *Charter's* equality guarantees. Nonetheless, the invalidating court did not so much as advert to s. 15. In this respect, it emulated Supreme Court majorities in *Seaboyer*, *Daviault*, *O'Connor* and *Beharriell*, and adjudicated the defendant's constitutional challenge as if the Constitution contained no s. 15 (Boyle 1994).

In a related development, efforts by adult survivors of childhood sexual abuse are being defended by means of an aggressive and co-ordinated attack on therapists said to be implanting their clients with false memories of abuse. In an eerie twist on the mistake of fact defence, defendants (and some courts) argue that although the complainant honestly believes she was abused (and, hence, comes across as a credible witness), she is merely the suggestible pawn of an evil, man-hating,

feminist therapist. Canadian defence counsel have enthusiastically embraced the pseudo science and neo mythmaking of the False Memory Syndrome Foundation while turning a blind eye to evidence of its flat out intimidation tactics and the number of charged and convicted abusers on its membership roster (Hoult; Salter). In *O'Connor*, a bare majority of the SCC gave judicial notice to false memory "syndrome" dogma without having heard any evidence that stated, much less tested False Memory Syndrome Foundation claims, that reviewed genuine research on the nature of memory and memory repression or that established a foundation for the view that therapists can, much less do, implant false memories in their clients.<sup>12</sup>

Throughout the decade when such eruptions of backlash occurred, the state was not neutral. The Mulroney government boycotted the National Advisory Committee on the Status of Women (NAC) meetings, defunded women's groups, and cut the Court Challenges program while throwing millions of dollars into useless research and feel-good policies aimed at strengthening families and healing family dysfunctions under the gender neutral rubric of the Family Violence Initiative. They insisted that women did not own the issue of male violence against women. They conditioned public funding for women's services on partnerships with private corporations or on service delivery by credentialed professionals rather than feminists. Having divorced wife abuse from sexual violence by housing responses to each under different ministries, they then read women out of policies purporting to respond to "Crime," gender neutral.

Instead of developing policies and programs to relieve women's social and material inequality as the most effective approach to ending male violence, successive conservative and liberal policy-makers opted for three gender neutral diversions: the

scapegoating of young offenders (rather than, say, more vigorously prosecuting adult men who abuse relations of trust, power, authority or, merely, intimacy); the promise of "Law and Order" through greater funding for policing and corrections while gutting funds for welfare, unemployment insurance, education, health services, and defying equal pay law, de-unionizing secure, well-paying women's jobs in the public sector, renegeing on affordable day care, and so on; and the prioritizing of victim's rights in lieu of women's or children's equality rights. Although no government has provided funding for rape crisis centre and transition house staff from across the country to meet on an annual basis, other vehicles enabling women to caucus nationally are being starved or axed one by one. The latest casualty, the annual Justice department consultations on violence against women have been discontinued on the basis that they are no more than special interest lobbying rather than genuine consultations.

Why particular feminists initiatives are simply resisted while others trigger major backlash warrants careful scrutiny. Out-numbered, out-ranked, and out-resourced as we are and are likely to remain, it makes sense to redouble those initiatives that appear to hit a nerve centre in the forces used against us.

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ity-driven reforms to criminal sexual assault laws.

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Lee Lakeman opened one of the first transition houses: The Woodstock Women's Emergency Shelter. After some five years there she moved west to join the collective at Vancouver Rape Relief and Women's Shelter where she has worked since 1978.

Elizabeth Sheehy is a law professor whose work focuses on male violence against women and equality issues.

<sup>1</sup>Police classify only about 3 per cent of sexual assaults as Level II assaults (sexual assault with a weapon or causing bodily harm) and one per cent as Level III (aggravated sexual assault causing wounds, maiming or disfigurement or endangering life), thereby ignoring significant degrees of violence or the use of a weapon in many cases. Sentencing judges tend not to articulate their sentencing principles and follow no consistent principles or practices. In the result, sentencing leaves ample room for subjective bias, including bias rooted in rape mythology. See Mohr.

<sup>2</sup>The guidelines authored by the *Seaboyer* majority only covered consensual sex. Bill C-49 explicitly rejected the language of the majority guidelines to cover all sexual history.

<sup>3</sup>It should be underlined that federal, provincial and territorial justice ministers concurred that, unless Parliament were willing to exercise its constitutional power to over-ride *Charter* guarantees, it was powerless to undo the damaging effects of the *Seaboyer* decision. A remarkable coalition of feminists legal activists con-

ceived and successfully persuaded Department of Justice lawyers to adopt a constitutionally defensible and equality-driven response to *Seaboyer*. See McIntyre.

<sup>4</sup>In the sub-section enumerating the statutory and constitutional provisions "relevant" to the case, McLachlin J. did not even list s. 15. Reference to s. 15 appears as an "interest" subsumed under s. 7, and as a passing phrase in the lengthy s. 1 analysis (at pp. 257 and 275 in DLR version).

<sup>5</sup>This agency remains gendered, however, modelled as it is on a paradigm where he asks and she chooses.

<sup>6</sup>*R. v. M.L.M.*, [1994] 2 SCR 3. Consent was not in issue at trial. Because the complainant had recanted under parental pressure, the defence was that no sexual contact of any kind had occurred. The trial judge accepted the testimony of the complainant and convicted. The accused appealed the judge's admission of inculpatory had written notes. On its own motion the Nova Scotia Court of Appeal reversed on the basis that the complainant had not actively resisted her step-father with the result that the Crown had not proved beyond a doubt that the had not consented.

<sup>7</sup>The accused's counsel may put the mistake defence to the finder of fact whether or not the accused testifies. An accused who knew the sex was non-consensual can secure an acquittal based on the mistake defence without even perjuring himself: his lawyer need use the examination and cross-examination of other witnesses to seed in the imagination of the judge or individual jury members hypothetical possibilities capable of supporting the plausibility that some men, including the accused, might have believed sex consensual under the hypothetical scenario(s) offered.

<sup>8</sup>See Elizabeth Sheehy's article in this volume.

<sup>9</sup>It should be noted that no such public furore followed McClung's homophobic and anti-minority tirade in the *Vriend* decision (1996),

132 DLR (4<sup>th</sup>) 595 (Alta. C.A.). Nor did any Supreme Court justice censure his comments despite a specific request that they do so from the Association of Canadian Human Rights Commissions.

<sup>10</sup>"Proposed sex assault Bill an expression of feminist hatred," *The Lawyers Weekly* 31 January 1992: 9: "What is really insidious about the 'every-heterosexual-act-is-a-rape nonsense is its denial of both the autonomy and the sexuality of women."

<sup>11</sup>The public sponsor of this tactic was lawyer Michael Edelson. See Schmitz. Marilyn MacCrimmon has argued that this new defence tactic reintroduces the medieval "trial by ordeal."

<sup>12</sup>The majority stated that therapy records may be relevant to reveal the use of therapy "which influenced the complainant's memory" and where there is a "close temporal connection" between the records' creation and the decision to press charges or where the decision to press charges followed a visit to "a particular therapist."

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