

# Sexual Violence and “Fundamental Justice”

## *On the Failure of Equality Reforms to Criminal Proceedings*

BY MARGARET DENIKE

*Cet article commente les actions accomplies par le mouvement des femmes durant le dernier millénaire et constate qu'en dépit des nombreuses réformes et initiatives, le système judiciaire canadien a freiné nos efforts en vue d'en finir avec les agressions à caractère sexuel faites aux femmes, n'a pas facilité l'accès à une consultation confidentielle et à des services de soutien aux victimes et n'assure pas un traitement équitable à celles qui cherchent à amender les lois ou qui sont aux prises avec des procédures légales.*

The World March of Women gives us pause to reflect on the accomplishments of the women's movements of the past millennium, the fate of our equality initiatives, and the obstacles that remain to the achievement of social and institutional change. The millennium's turn invites an assessment of our varied, collective efforts to restructure relations of gender oppression and the contextual forces and situations that govern and infuse them. We now urge consideration of the strategies that have both advanced and failed us in working through the conditions necessary for eradicating institutionalized domination and oppression and granting the freedom of self-determination and the dignity of our autonomy and difference.

Through lobbying initiatives and court case intervention over the past two decades, equality advocates and intervenors have used the equality provisions (s.15) of the *Canadian Charter of Rights and Freedoms* to urge the courts to address the discriminatory treatment of women in criminal sexual assault trials, and to chip away at the time-honoured foundations of the rules of evidence that have sanctioned attacks against women's integrity, dignity and privacy. There has been no shortage of sophisticated substantive equality analysis, lobbying and educational strategies, and legislative initiatives to introduce reforms to procedure in this area; however, such work has had a notoriously poor reception by the courts. For some critics, this seems only to demonstrate the “imperviousness” of criminal law to equality claims (McInnes and Boyle 346), and the inability of “justice” to realize the dignity and integrity of women caught in its proceedings.

To address the failure of equality reforms to sexual assault proceedings, this paper picks up on the recent work of feminist legal theorists and activists to engage with the “principles of fundamental justice” that are typically at stake in rape cases. This weighty phrase inscribed in section 7 of the *Charter of Rights and Freedoms*<sup>1</sup> has enjoyed

wide circulation in sexual assault trials—a phrase that opens onto the ideology of historical and contemporary judicial reasoning about the rights that are fundamental to the “justice” it envisions.<sup>2</sup> How has “justice” managed to eclipse the dignity of women?

As defined by the courts, the “principles of fundamental justice” are elusive in their generality, although rather predictable in their deployment in sexual assault cases. The s.7 and 11d rights of the accused to a fair trial are commonly pitted against the rights of women, consistently to the detriment and expense of the latter.

Consider Supreme Court Justice Bertha Wilson's rhetorical treatment of this s.7 phrase in the first post-*Charter* decision to address its meaning:

What is “fundamental justice?” We know what “fundamental principles” are. They are the basic, bedrock principles that underpin a system. What would “fundamental principles of justice” mean? And would it mean something different from “principles of fundamental justice?” I'm not entirely sure. We've been left by the legislature with a conundrum. (qtd. in Bickenbach 172)

Wilson interrogates a concept that remains the basis for defining, adjudicating, balancing, and limiting a range of rights set out in the *Charter*. Her interrogation left us with an invitation to think through this concept from its ground (or groundlessness) up—to consider its current lack of substantive content, to speculate on its legislative formulation and the seeming arbitrariness of the meaning that is imported into it.

In the same decision Justice Antonio Lamer, for the majority, defined the principles of fundamental justice in terms that Wilson described as “unhelpful”: specifically, he circumscribes them in relation to the procedurally-oriented legal rights set out in sections 8 to 14 of the *Charter*.<sup>3</sup> His approach posits an adversarial system of justice that revolves around a relation between the indi-

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vidual/accused and the state. In line with preceding interpretations of this phrase, as it appears in the Canadian Bill of Rights, he focuses on procedural rights that protect the accused's dignity during the arrest and trial process, though he construes the definition in very general terms: the principles of fundamental justice, Lamer wrote, are to be found in the "basic tenets" of our legal system:

they represent principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the *Charter*, as essential elements of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and the rule of law.<sup>4</sup>

The dignity and worth that Lamer had in mind, however, is only that of an accused: dignity here is a matter of "his" right to be secure against the state's unreasonable search, arbitrary detention, or, say, to be granted a fair trial. Though the decision goes on to acknowledge that these principles should be understood to have both a substantive and a procedural content, it finds occasion to elaborate only on the latter. With few exceptions,<sup>5</sup> the substantive content of these principles has yet to be developed in a way that could address the human dignity compromised by a myriad of social relations of domination and oppression—beyond the singular one between the accused and the state.

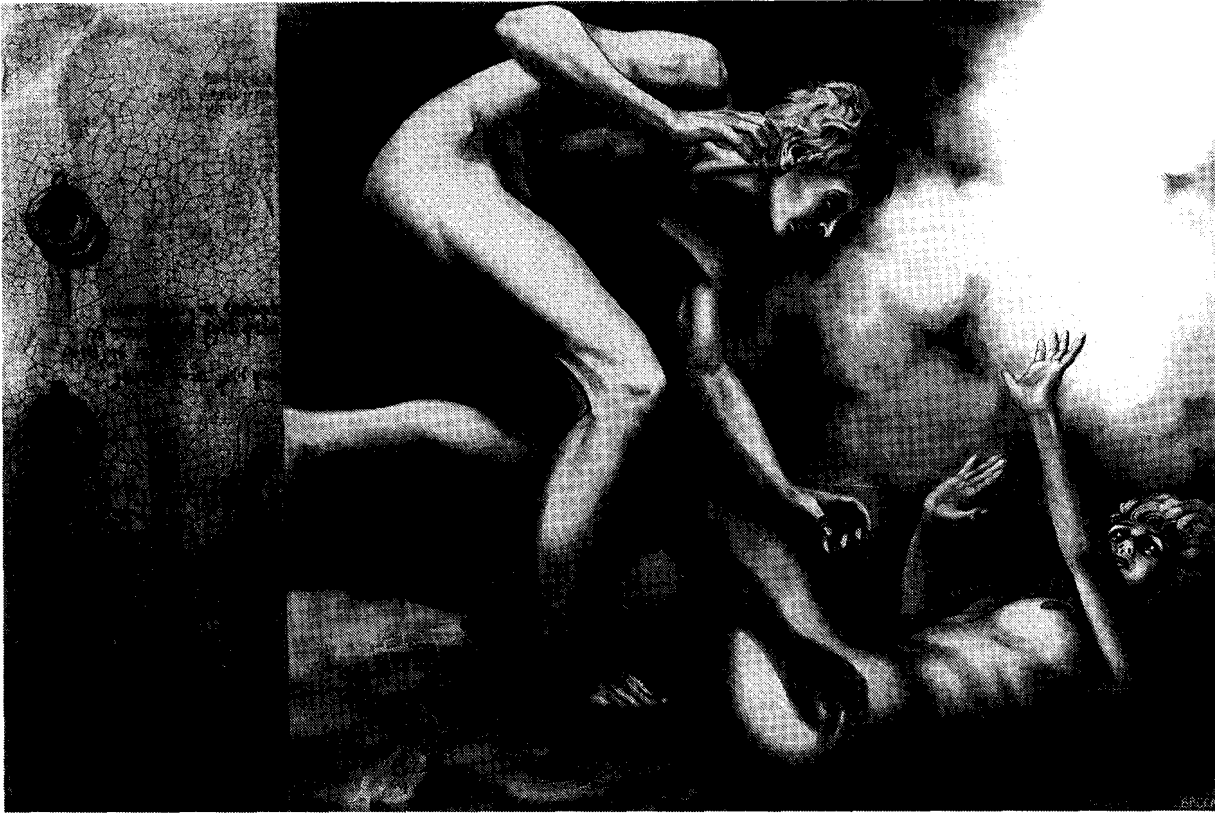
Sexual assault jurisprudence is a testament to how the notions of "justice" and "rights" that are favored and administered by the criminal courts have been caught in an ideological web that has restricted them from attaining a concrete realization of the very values of human dignity that their substantive content may encompass. Iris Marion Young and others (see Young; Cornell; Nedelsky and Scott; Bakan) have demonstrated, in a broader context, the extent to which "justice," like the "rights" that it protects, balances and distributes, is embroiled in a tradition of liberalism that thinks of power reductivity in terms of a singular, "dyadic" relation between the individual and the state. This tradition of political theory and practice includes the presumption that the state is a source of oppression, not amelioration; and that "power" (of the police or the judge) is a prohibitive, negative force "held over" the individual (accused), rather than as something productive that infuses and structures social relations. To address structural inequalities, as Young argues, it is necessary for us to move beyond the notions of "justice" that construe rights or power basically as commodities or possessions that individuals "have" and that are "distributed," or "balanced" among us. Rights, for Young, are of little use to us when they are construed as "things." They are best understood, less as something we "have," and more as something we "do"—something that refers "to social relationships that enable or constrain action" (25).

Ideally, "justice" is not about the distribution of goods or power, but about *restructuring the fundamental relations of domination and oppression that govern social relations*. It is, in Young's terms, "the degree to which a society contains and supports the institutional conditions" necessary for the realization of values such as the freedom to exercise our capacities, and to self-determination—values that themselves must assume the equal moral dignity and worth of all persons. If our notions and theories of "justice" are to have any chance of freeing us from the hold that the multiple and mobile, systemic inequalities have upon us, then we must account for these relations at a foundational level of theoretical formulation (Cornell 6). Whatever "justice" is, it will not grant the equal dignity and worth of all persons, if, from the outset of its theoretical fashioning, it does not *begin* with a contextualized understanding of the various relations through which social inequality in general, and sexual inequality in particular, thrives.

In the context of Canadian sexual assault trials, Elizabeth Sheehy (1991) and John McInnes and Christine Boyle have clearly linked the failure of equality litigation in criminal law to underlying assumptions about the need to remedy inequality between the state and the accused. This "unidimensional approach" to fundamental justice does not accommodate intersecting forms of inequality; it trivializes and marginalizes women's rights; and effectively relegates women to a subordinate status. As they demonstrate in their analysis of *R. v. Seaboyer*, the courts are left construing the "fundamental" rights of the accused and the dignity, equality, and privacy rights of complainants as discrete entities on a "constitutional playing field... that move inexorably toward collision" (McInnes and Boyle 355).

The effect of construing "competing" rights in this way is that one set of rights must inevitably "give way" to the other. In sexual assault trials, this has been to the clear disadvantage of complainants, whose "interests" have consistently failed to be a match for the "fundamental" rights of the accused (McInnes and Boyle 350-355; Sheehy 1991: 461). The rights of rape complainants (in the face of aggressive defence strategies) will be trumped (Sheehy 1991) by those of the accused (in the face of state prosecution) as long as "justice" is not freed from a singular dyadic focus for it to grasp the social and institutional relations and practices of domination that sustain systemic violence and discrimination, and that are reproduced in the credibility contests that characterize sexual assault trials.

Since equality claims have had only a "marginal... sporadic and unpredictable" effect on judges thinking, Radha Jhappan argues that we may be better off trying not to put our energy into developing s. 15 arguments, and instead, cast them more broadly as "justice" claims (98). Because feminists have not been offering up to the courts feminist interpretations of "the principles of fundamental justice," she says, criminal lawyers and judges are almost always able to restrict the phrase to principally male



Lillian Broca, "Adam Severs the Bond of Equality," Graphite, oils, spackle on rag paper, 30" x 48", 2000.  
Photo: Weekes Photo

assaulters of women" (100). Following the lead of Iris Marion Young, Christine Boyle, and Joel Bakan, she advocates reclaiming justice from "the traditional liberal, abstract universalist, rule—and process-oriented "malestream" interpretations, which have dominated in theory and law" (106), and re-interpreting the concept in ways that, alternatively, enable us to take domination and oppression into account (90). Claims for women's physical integrity, self-respect, self-determination and autonomy, Jhappan notes, are properly characterized, not as claims to equality, but as claims to justice. So why "squeeze all arguments into the equality box?" as she suggests LEAF's interventions have done, when "equality" *per se* is not quite what we really want, anyway? One significant reason not considered by Jhappan is that the primary funding criteria for feminist court case intervention, as set by the Court Challenges Program of Canada, for example, has been established and developed on the presumption that s. 15 is the one gateway to advancing equality through *Charter* litigation. To tap into the strategic potential "justice" claims, we cannot afford to parcel out equality, as if "equality" is *not* fundamental to "justice."<sup>6</sup>

**Overview of the problem:**  
**Sexual history**

The past century has witnessed a host of collective

initiatives to repeal the common law rules of rape that sanctioned and enforced the presumption that women could not be trusted to speak truthfully of sex as complainants in rape trials, that women who are sexually active were more likely than any others to lie, more likely to fabricate, fantasize, falsely remember, and misrepresent the sex she either did not have or that she is said to have wanted. In its many variations to a singular focus, the campaign against the discriminatory treatment of witnesses in sexual assault trials has been aimed particularly at the judicial tolerance of defence strategies to exploit myths and stereotypes of women and to subject complainants to tactics of cross-examination that are unique to rape trials and unparalleled in any other criminal proceedings.

In Canada, the feminist initiative is one of the most powerful and effective lobbies of the century, resulting notably in 1975-76 rape shield amendments (then s. 142 of the *Criminal Code*), which restricted questioning on a complainant's sexual history; and with the sweeping reforms in 1983 (Bill C-127), which involved reclassifying rape as sexual assault, repealing the doctrine of recent complaint (i.e., that only legitimate victims report rape at the earliest opportunity), introducing new rape shield to deny any use of a complainant's sexual history, and abolishing the corroboration requirement (whereby judges were to instruct juries not to convict solely on uncorroborated testimony) (Mohr and Roberts). Such work is

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evident as well in the 1992 reforms (Bill C-49; now sections 273 and 276 of the *Criminal Code of Canada*) which introduced the first positive definition of "consent" (to curb the myths that thrive in judicial discretion) and a new rape shield provision (to replace the earlier provision repealed as unconstitutional in *R. v. Seaboyer*). And most recently, it is evident in the reforms of 1997 (Bill C-46; now section 278 of the *Code*), which aimed to restrict the unwarranted use of a complainant's medical, psychiatric,

and counselling records and impose a higher threshold for establishing the relevance of these records to fact. The reformative legislation reflected extensive consultation with equality-seeking groups, whose arguments are inscribed in the Preamble of both Bills C-49 and C-46, apparent in Parliament's recognition of the prevalence of sexual violence against women and children; of the disadvantageous impact of violence on the rights of women and children to security of person, privacy and equality; and of the unfair practices and tactics of intimidation and cross-examination that have deterred us from reporting sexual

violence or seeking treatment, counselling or advise.

But the development of case law in the 1980s and 1990s is not a success story: every one of the legislative reforms introduced since the 1970s to inflect sexual assault jurisprudence with considerations of women's equality and human dignity have been subjected to constitutional challenges that have successively eroded these gains. And in each instance they've been made on the same grounds: they are said to compromise the fair trial rights of the accused (s. 11d of the *Charter*) and the "principles of fundamental justice" (s. 7 of the *Charter*) that inform these rights. The argument goes: in restricting the use of "relevant" evidence attesting to the complainant's credibility, rape shield legislation, like the more recent legislation to protect complainants against the disclosure of their personal records, impedes the trial's ability to "arrive at the truth" of the allegations, and it restricts the accused's fundamental right to fully answer to the allegations and defend himself against them.

The courts have been sympathetic to this argument: the 1976 rape shield provisions (s. 142 of the *Criminal Code*) were virtually emptied of their legal force when the Supreme Court interpreted them (*Forsythe v. the Queen* [1980])<sup>7</sup> to permit the cross examination of the complainant regarding her sexual history. The subsequent 1983 reforms, and namely the rape shield provisions (ss. 276 and 277)<sup>8</sup> were similarly challenged in *R. v. Seaboyer* (1991). Seaboyer's defence invoked the principles of

fundamental justice to argue that these provisions, in restricting evidence allegedly 'relevant' to his defence violated his fundamental right to a fair trial (under sections 7 and 11d of the *Charter*). The majority of the Supreme Court (per Lamer C. J. and La Forest, Sopinka, Cory, McLachlin, Stevenson and Iacobucci JJ) agreed, and struck down the entirety of s. 276, though it upheld s. 277. Addressing the question of whether rape shield provisions were consistent with the "principles of fundamental justice," the majority reasoned that

a law which prevents the trier of fact from getting at the truth by excluding relevant evidence in the absence of a clear ground of policy or law justifying the exclusion runs afoul of our fundamental conceptions of justice and what constitutes a fair trial. (*Seaboyer* 3)

Though the majority in *Seaboyer* acknowledged that certain myths and stereotypes of women's sexual proclivities may potentially prejudice the determination of "relevant" evidence, this recognition had no bearing on their decision to strike down s. 276. The very example used by the court to illustrate why the sexual history of *some* women (or "extortionists") may be relevant to establishing the "facts" shows how quick the court was to ignore its own consideration and uncritically embrace time-honored stereotypes about women's potential vindictiveness and inherent lack of credibility.<sup>9</sup> As L'Heureux-Dube expressed it, in her dissenting reasons in this case,

it seems odd to recognize the use of stereotype in the "test for judicial truth" but nevertheless conclude that the test for "truth" is met. If the only thing that renders a determination of relevancy understandable is underlying stereotype, it would seem contradictory to conclude then that "truth" has been found.<sup>10</sup>

The argument in this appeal, she goes on to say, represents a "serious misconstrual" of the phrase, "principles of fundamental justice," and ignores values and interests beyond those of the accused. The "truth" of the crime is not obtained by sexual history evidence excluded by s. 276; rather, such evidence is so prejudicial as to "distort" the trial process: "It operates as a catalyst for the invocation of stereotype about women and about rape" (*Seaboyer* 54).

In L'Heureux-Dube's dissent, we're reminded of the lesson taught elsewhere in postmodern theory, wherein "truth" is no longer taken for granted or recognizable in its singularity and ahistoricity; its meaning is arbitrary, mutable, and socially constructed, and is delimited in ways that reinforce and reproduce networks and relations of power. "Truth is not by nature free," as Michel Foucault puts it. "Its production is thoroughly imbued in relations of power" (1978: 60). Consider, for example, who does and does not have access to it; who gets to speak it with

credibility; who gets to decipher it and interpret it—and under what conditions, and at what cost? The parameters of determining what does and does not count as “true” when it comes to sex are structural to the systems of male domination and female subordination that shape the institutions we live by. What counts as credible speech in western cultures and institutions is circumscribed by a highly politicized hermeneutics of suspicion that has lent itself to a history of silencing and invalidation of anyone other than the “reasonable man.” The measure of truth has been used in context of sexual assault and sexual abuse, such that its victims “have no way of telling you what happened to them,” and “the silence of the silenced is filled by the speech of those who have it” (MacKinnon 121). If the “pursuit of truth” is fundamental to “justice,” then the deep-rooted sexual politics of this objective are crucial for us to consider in reformulating this concept. This is one reason for us to examine each and every principle deemed fundamental to “justice”—to unsettle the inherent biases historically inscribed within them.

In the year following the *Seaboyer* decision, and in consultation with equality lobbyists, parliament introduced new rape shield (and a sharpened definition of consent) under Bill C-49. It aimed to curb judicial discretion by providing a positive definition of consent and by re-introducing rape shield provisions. Again, the new provisions were subjected to constitutional challenge, the most recent of which (*R. v. Darrach*) was heard by the Supreme Court in February 2000, and the decision is expected to be released this fall. In this instance, “the principles of fundamental justice” were ushered in by defence counsel as a justification for repealing the most recent rape shield legislation on the basis that it failed to provide a fair hearing for the accused, that the legislation impeded the court’s ability to arrive at the truth by failing to provide the appropriate “balance” between the rights and interests of the accused and those of the complainant to privacy and security of person. For “justice” to come to terms with the *significance* of sexual difference to the truth it pursues and the rights it administers, it may look to how fully invested it is in perpetuating the myth that the non-credibility of *woman* is an immanent threat the rights of man.

### Records requests

The introduction of rape shield has given way to new and varied strategies for exploiting myths about women’s lack of credibility. The same dynamic described above holds true with the more recent practice of requesting the personal, therapeutic and counselling records of rape victims. In *R. v. O’Connor*, the British Columbia Court of Appeal implemented a two-stage procedure for determining the relevance of records held by third parties [1993]. The procedure was in turn accepted, though slightly modified, by the Supreme Court of Canada [1995].

Acknowledging the prejudicial effect of such records, the majority court devised what it saw as a “fair” scheme for balancing the privacy rights of complainants with the fair trial rights of the accused.<sup>11</sup> The court emphasized that the burden on the accused at the initial stage of the relevancy test should *not* be an onerous one.

This decision was recognized as “disastrous” to victims of sexual assault and counsellors who work with them (Busby 148). Subsequent applications under the *O’Connor* guidelines have confirmed that little, if any, foundation is required to expose highly confidential files to the court; a literal application of the “likely relevance” test—as derived from the very examples offered by the Supreme Court—“will almost invariably result, at least, in an order requiring that counselling records that may touch on the assault or any other abuse (that is, most counselling records) be disclosed to the judge” (Busby 157; Kelly 5; Feldthusen). We might add that it is precisely because of the tenacity of the archaic myths that infuse notions of credibility and culpability when it comes to sex, that *any* records are potentially *always* relevant for the typical “reasonable” judge. *R. v. Osolin* is the first case in point: the fact that the complainant expressed to her therapist a fear that her “attitude and behavior may have influenced the man to some extent” was sufficient for the majority of the Supreme Court to find her therapist’s notes had indeed met the test of “likely” relevancy.<sup>11</sup> The judicial practice of “balancing” of rights is always at risk of favoring an accused’s rights over women’s collective rights since the scales of justice are already tipped against her: the test turns on the presumption that rape complainants, and especially those who have sought any form of counselling, may or may not be deluded, falsely misrepresenting events, or otherwise unable to speak truthfully about their sexual experiences. Counselling and therapeutic records are thus assumed necessary to sort out the truth. This alone translates into a *defacto* presumption of the relevance of women’s therapeutic records, which, as Bruce Feldthusen has demonstrated, ensures that the accused will have little difficulty meeting even a “significant onus” (448). The bases for compelling the production of records *are* the very rape myths that violate the premise of the rape law reforms, and these shape the background assumptions that thrive in judicial discretion.

Furthermore, the “O’Connor Guidelines” have acted as a “red flag” for defence counsel to whom it might previously have never occurred to request personal records. The relevancy test effectively formalized and institutionalized the procedure for requesting and disclosing com-

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plainants" records. As a new variation on the long-standing tactics of intimidating witnesses in rape trials, it exploits the assumption that a woman "must be crazy" if she thinks she's been raped (Kelly). Perhaps, as Susan Estrich describes it, "credibility is increasingly the only game in town" (14), especially if, in light of rape shield reforms, it is increasingly difficult for the defence to argue that "no means yes, or that men are privileged to have sex with crying women, or even that stupidity as to consent should serve as a defense" (14).

In the wake of the *O'Connor* decision, Parliament responded much like it had after *Seaboyer*. With substantial input from women's equality organizations, it introduced "corrective" legislation (Bill C-46 [1997]; now section 278 of the *Criminal Code*) to compensate for the lack of equality considerations in *O'Connor* and to offer "additional protections" by expanding on the grounds that are "insufficient" for requesting complainants' personal records. Following a preamble that incorporates the analysis provided by L'Heureux-Dube's dissenting reasons, and that reiterates and builds upon the guiding principles of the 1992 (Bill C-49) legislative reforms, the progressive legislation acknowledged the detrimental effects on the victims of sexual abuse and on those who work with them, and requires recognition that both equality and privacy interests be recognized at each stage of the relevancy test. Yet, if we take the past decade of rape law as a marker of the vulnerability of such progressive legislation, it's not surprising that these "additional protections" were immediately challenged, and that two Provincial courts (Ontario and Alberta) declared Bill C-46 unconstitutional within weeks of having been made law.<sup>12</sup> In the name of the "fundamental justice," neither court hesitated to strike down the entirety of s.278 of the *Code*. However, on further appeal, the Supreme Court in *Mills*, overturned the Alberta court's ruling, leaving in place the revised relevancy tests, with their additional protections intact. This final decision deserves our consideration, as it is the first case among all of the challenges to rape shield legislation to be applauded by equality advocacy groups.

With respect to considering the substantive equality implications of "fundamental justice," the Supreme Court's decision in *Mills* (released November 1999) is remarkable. Rather than striking down the contested legislation, the majority (with Lamer in dissent) elaborates on and justifies Parliament's objectives. It expands on the equality analysis developed by L'Heureux-Dube in over a decade of *dissenting* reasons in which she has persisted in tackling the discriminatory myths that thrive in sexual assault trials. Particularly striking is the majority's consideration that the accused's right to a fair trial "is to be understood in light of other principles of fundamental justice embraced interests beyond those of the accused." In this view, the court takes note of how the pursuit of "fundamental justice" has proffered injustices against female complainants through the judicial toleration of invasions to her

privacy, dignity and security of person. It recognizes that speculative myths and stereotypes about sexual assault victims "have too often in the past hindered the search for truth and imposed harsh and irrelevant burdens on complainants in prosecutions of sexual offences" (par. 119). Indeed, the information contained in the therapeutic records of the complainant that were sought by the accused, would only "serve to distort the search for truth" as the determination of their relevance is based on nothing other than the currency of such myths. As such, it is not in "the interests of justice" for such evidence to be admitted in this case.

At issue in the *Mills* case was the constitutionality of Bill C-46, and specifically, whether its procedure for disclosing the therapeutic records, by differing significantly from those set out in *O'Connor* violates the "principles of fundamental justice." The defence took aim at the added proviso (in s. 278.5) that "the production of the record is necessary in the interests of justice," the determination of which includes a consideration of the prejudice to the personal dignity and privacy of the complainant [278.5 (2)(e)]; society's interest in encouraging the reporting of sexual offences [(2) (g)]; society's interest in encouraging the obtaining of treatment by complainants of sexual offences [(2) (h)]; and the integrity of the trial process [(2)(h)].<sup>13</sup> The defence argued that the addition of (2)f and 2(g) alter the constitutional balance established by the *O'Connor* majority, such that these "interests of justice" placed an additional and onerous burden on the accused for establishing the relevance of records. The high court ruled, however, that the "balance" was not altered by the inclusion of these factors (at par. 142). The requirement that the judge consider the integrity of the trial process, McLachlin wrote, "relates to whether the search for truth would be advanced by the production of the records in question or whether the material would introduce discriminatory biases and beliefs into the fact-finding process" (par. 142). To this she adds that the scheme created by Parliament allows judges to exercise wide discretion and consider a variety of factors in order to preserve both the complainant's privacy and equality rights *and* the accused's right to full answer and defence.

Although equality advocates and intervenors have argued for over a decade that "justice" must accommodate the equality and integrity of those other than the accused, it has taken this long for them to finally shape the rationale of the majority court in adjudicating the "balancing of rights" that are presumably at stake in sexual assault trials. The novelty of bringing equality analysis to "justice," however, betrays its tenuousness. After all, the lower courts, on a daily basis, continue to operate under a new regime that has formalized the production of third-party records, and it remains the case that the determination of their relevance and of the extent to which their disclosure is deemed "in the interest of justice" rises and falls on judicial discretion.

## Conclusion

The fate of Canadian sexual assault jurisprudence in the 1980s and 1990s is at once a tale of immense accomplishment and, sadly, immense failure. Accomplishment—in terms of the development and dissemination of contextualized theories and practices for achieving substantive equality; of the articulation and design of progressive and reformative policy and litigation based on research, consultation and collaboration; of the rethinking and reformulation of the nature and complexity of relations of power, of the shape and tone that rights might take to enable the realization social justice, sexual equality, and the dignity of difference that lies at the heart of this freedom. But it's a tale of failure in terms of a practical functioning of a system of "justice" that has failed to embrace these accomplishments or their transformative potential in social policy, and that has failed to shake the creation myths from its own foundation, to take seriously the indignities of sexual inequality that give life to all that is "fundamental" to it, in short, to grant the "moral space necessary for equivalent evaluation of our sexual difference as free and equal persons" (Cornell 15).

The story is one that tells of just how persistently and consistently the "truth of sex" still gets to be told by men *through* the ways that "justice" and "rights" have been tailored, and how the sexual politics of credibility keep women from gaining full access to them. The "fundamental justice" of concern to the majority of Canada's Supreme Court have harbored a traditional doctrine of the state as an oppressive, domineering and negative power. This historical, liberal vision has informed the presumption that the challenge of justice in this domain is reducible to *balancing* and *distributing* the competing rights of privacy, equality and due process. These rights, we might note, are articulated under the assumption that the greatest threat to human dignity is state interference and the possibility of vexacious prosecution. This view empties justice, and the rights that it embraces, of any recognition of the difference that sexual difference makes to their substance and design, much less to the history and systems of exclusion and subordination that they have facilitated. What we see at work is what Iris Marion Young has shown to be the "atomistic bias" and "dyadic modeling" of distributive justice: the assumption that power that, like wealth, is concentrated in the hands of a few (*Justice* 32); that power, and the freedoms it presumably suppresses, is reducible to a relation between the ruler and subject, the state and the accused (Young 31). This construction "misses the structural phenomena of domination" (31).

In the spirit of Iris Marion Young, Joel Bakan recognizes that the concept of rights developed in Canadian constitutional jurisprudence has rendered equality litigation ineffective as a tool for significantly challenging the causes and effects of social and sexual inequality (47). The basic tenets of liberal discourse are "manifest in the

traditional conception of rights as protecting individuals from public (state) interference in their private affairs but not requiring positive assistance by the state" (Bakan 48). This may explain why legislative reforms such as the corrective and progressive legislation of rape shield law and the measures to restrict the requests for personal records are so quick to be scrutinized by the courts for the burden they allegedly impose on the accused, yet so impossible to see for their viability in addressing, modifying or eradicating the structural inequalities at the heart of "justice." "Rights need not be "quasi absolute, debate stopping conclusions" defined pervasively in the image of a single and determinative moral "good" that serves to 'trump' other claims (Bakan, citing Nedelsky 62); they need to be reconceived within the logos of the judiciary to enable them to address the substantive inequalities at their source and "to accommodate demands for structural change" (Bakan 60). Yet one of our greatest obstacles to achieving such objectives of reconceptualizing rights and the models of justice that frame them — is precisely the reason we *need* to: "equality" as a social value and constitutional right has played "a more or less unarticulated role in the evolution of the jurisprudence," and as a result, "there is a dearth of precedent to guide those who in the future may wish to make equality based arguments" (McInnes and Boyle 346). This holds true for assessing the strategic potential of "justice" claims as well. Since equality has been relatively foreign to common law jurisprudence, and treated as an "interest" in opposition to the accused's "fundamental; freedoms, there is little foundation for the courts to recognize, much less arbitrate, the intricacies of the social inequality, its causes, effects and tools for eradication (Sheehy). It seems to be an accomplishment, after all, just for women to be believed. Constitutionally protected criminal justice proceedings, currently and historically constrained by an anti-state ideology and by the individualism of the "reasonable man"—and bereft of the precedent that might enable it to think otherwise, could only benefit by a structural understanding of power and domination as processes rather than as patterns of distribution. For without it, "justice" only perpetuates the existing forms of discrimination as they function in our society and in the legal system.

*Margaret Denike is an Assistant Professor and Coordinator of the Women's Studies Program at Nipissing University in North Bay, Ontario. She holds a PhD from the Program in Social and Political Thought at York University. She is the former president of the National Association of Women and the Law, and is currently a member of the Advisory Council to the Law Commission of Canada.*

<sup>1</sup>Section 7 of the *Charter* provides as follows: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

The phrase "principles of fundamental justice" also appears in s. 2(e) of the *Canadian Bill of Rights*, which guarantees "the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations."

<sup>2</sup>As per Lamer, C. J., the majority of Supreme Court's definition of these "principles," *Reference re Section 94 (2) of the Motor Vehicle Act* [1985] 2 S.C.R. 486, at 500.

<sup>3</sup>For the majority, Lamer writes: "The term 'principles of fundamental justice' is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right. Sections 8 to 14 address specific deprivations of the 'right' to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are therefore illustrative of the meaning, in criminal or penal law, of 'principles of fundamental justice' (*Motor Vehicle Act*, 499-500; qtd. in Bickenbach 170).

<sup>4</sup>see *Motor Vehicle Act* [1985], 501; Bickenbach 171.

<sup>5</sup>Notably *R. v. Morgentaler* [1988] 1 S.C.R. 30 and *R. v. Mills* [1999] 3 S.C.R. 668.

<sup>6</sup>Jhappan tends to attribute the failure of equality litigation to the strategies of intervenors, than to the courts that have ignored them. The effect is to undermine the extent to which advocates have already been working to expand the strategic potential of "justice" in a way that *doesn't* sacrifice equality. Such work is evident in LEAF's *Factum of the Intervenor* for *R. v. Seaboyer*, *R. v. O'Connor*, and *R. v. Mills*. We might rather draw on this analysis to cultivate the substantive content of a concept of justice *includes* the presumptions of the equal worth and dignity of *all* persons.

<sup>7</sup>*Forsythe v. The Queen*, 2 S.C.R. 268. According to the 1975-76 amendments, s. 142 of the *Criminal Code of Canada*, "no question shall be asked as to the sexual conduct of the complainant with a person other than the accused" unless written notice is first made to the prosecutor and a hearing *in camera* concluded that the exclusion would prevent a just determination of fact, including the credibility of the complainant. For an analysis of the Court's reading of this provision, see Los.

<sup>8</sup>According to section 276, "no evidence shall be adduced by or on behalf of the accused concerning the sexual activity of the complainant with any person other than the accused; and to section 277, "evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant" (1983, c. 125, s. 19; R.S. 1985, c. 19 [3d Supp.], ss. 12-13).

<sup>9</sup>To illustrate that s. 276 would "exclude evidence of critical relevance to the defence," McLachin, for the majority, used as a hypothetical example a revealing anecdote about a prostitute who agreed to sexual relations for a fee of twenty dollars, and afterwards, threatening to accuse the man of rape, she demanded an additional one

hundred dollars (*Seaboyer* 22).

<sup>10</sup>*Seaboyer*, p. 54. L'Heureux-Dube relies here on the arguments of Elizabeth Sheehy, "Canadian Judges and the Law of Rape: Should the Charter Insulate Bias?", 21 *Ottawa Law Review* (1989): 755.

<sup>10</sup>At the first stage, before records are disclosed to anyone, the accused applies to the judge to determine *in camera* whether the records in question are "likely relevant" to the issues at trial or to the competence of the complainant to testify; if the records are determined to be "likely relevant," they are turned over to the judge. At this second stage, the task is for the judge to "balance" the competing rights and (to privacy and to a fair trial) and interests at stake before deciding if they are to be further disclosed to the court and to the accused. For an analysis of the disclosure procedures, see Feldthusen; Busby; Kelly; Sampson.

<sup>11</sup>Justice Cory, for the majority, seems at first to consider that the complainant may only be expressing the guilt and shame born of "actions and events that were in no way her fault"; however, his ruling directly negates this consideration: "Feelings of guilt, shame and lowered self-esteem are often the result of the trauma of a sexual assault. If this is indeed the basis for her statement to the counsellor, then they could not in any way lend an air of reality to the accused's proposed defence of mistaken belief in the complainant's consent. *However, in the absence of cross-examination it is impossible to know what the result might have been*" (*R. v. Osolin*).

<sup>12</sup>*R. v. Lee* [(Q.L) 1997 O.J. No. 3796] Ont. C.A. Gen Div. (September 23, 1997); *R. v. Mills* (1997), 12 C.R. (5<sup>th</sup>) 138 and 163 (Alta Q.B.).

<sup>13</sup>Section. 278.5 of the *Criminal Code* now requires that the judge order the person in possession or control of the records to produce them for review by the judge if after an *in camera* hearing,

- a) the judge is satisfied that the application was made in accordance with ss 278.3(2) to (6);
- b) the accused has established that the record is likely relevant to an issue at trial or to the competence of a witness to testify; and
- c) the production of the record is necessary in the interests of justice.

Under Bill C-46, section 278.5 added to the *O'Connor* guidelines the "likely relevant" standard for judges to order the production of records, as well as the further requirement that the production be "necessary in the interests of justice". Addressing the incongruence between the guidelines established by the Supreme Court in *O'Connor* and progressive legislation of Bill C-46, the majority of the Supreme Court in *Mills* (Lamer, dissenting in part) acknowledged that this new standard is the result of a lengthy consultation process, "a notable example of the dialogue between the judicial and legislative branches of the government." (*R. v. Mills* 4).



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