BILL C-49 AND THE POLITICS OF CONSTITUTIONALIZED FAULT

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The decision of the Supreme Court of Canada in *R.* v. *Seaboyer*[1] was released on 22 August 1991. Less than one year later, on 15 August 1992 the reform effort, catalyzed by *Seaboyer*, culminated in the enactment of a package of amendments[2] to the sexual assault provisions of the *Criminal Code*.[3] The consultative process which preceded the reform of the sexual assault provisions was remarkable both for its intensity and inclusivity. The *Seaboyer* decision provoked virtually unanimous outrage from equality seeking groups in general and from women's groups in particular. In response, the Minister of Justice promised to act swiftly to bring in new and constitutionally sound legislation which would reflect the concerns of those most affected by sexual assault, Canadian women. The result was a consultative process which was informed by opinions from a large and diverse group of national and provincial women's organizations.[4]

This input led to the realization that the mere codification of the *Seaboyer* evidentiary guidelines would fail to address significant concerns over the criminal justice response to sexual assault. Codifying *Seaboyer* would have meant the codification of judicial discretion over the types of sexual history evidence admissible at trial. Such a result, given the sorry judicial history with respect to sexual assault,[5] and the announced political objective of encouraging women to feel safe both in reporting to, and relying on, the criminal justice system, was unacceptable. Accordingly, the focus of the reform effort became the substantive definition of sexual assault, and in particular, the legal construction of consent. Bill C-49, introduced in Parliament on 12 December 1991, reflects the existence of a political will to craft a new approach to the law of sexual assault.

The reform of the sexual assault provisions was driven by two primary goals. The first goal, a political one, was to answer the critique advanced by women's

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[1]*R.* v. *Seaboyer* (1991), 7 C.R. (4th) 117 (S.C.C.) [hereinafter *Seaboyer*].

[2]*An Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38 [hereinafter Bill C-49].

[3]R.S.C. 1985, c. C-46.

[4]I participated in the process as the representative of the Canadian Advisory Council on the Status of Women.

[5]See generally, E.A. Sheehy, "Canadian Judges and the Law of Rape: Should the *Charter* Insulate Bias?" (1989) 21 Ottawa L. Rev. 741; M.L. Nightingale, "Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases" (1991) 23 Ottawa L. Rev. 71; L. Vandervort, "Mistake of Law and Sexual Assault: Consent and *Mens Rea*" (1987-88) 2 C.J.W.L. 233, and; T.B. Dawson, "Sexual Assault Law and Past Sexual Conduct of the Primary Witness: The Construction of Relevance" (1987-88) 2 C.J.W.L. 310.

groups, which intensified as a result of *Seaboyer*, that the criminal justice response to sexual assault failed to protect women's liberty, security or equality interests.[6] The second goal, a legal one, was to ensure that the amendments were crafted to withstand an almost certain *Charter*[7] challenge. Indeed, speaking before the Parliamentary sub-committee examining Bill C-49, the Minister of Justice, Kim Campbell, stated: "I'm trying to make sure the Bill is as *Charter*-proof as possible."[8]

What the reform process has made clear, and what I wish to address in this commentary, is the apparent conflict between the two goals – on the one hand, the progressive political agenda which seeks to respond to the real experiences of Canadian women and on the other, the demands of the *Charter*. There is, in my view, a significant risk that the amendments will be successfully challenged as a violation of s. 7 of the *Charter*. Even if upheld as a justifiable limitation under s. 1, such a challenge would send a powerful message to those groups who see in the criminal law an important avenue for change. The spectre of a potential *Charter* challenge has loomed at every moment of the reform process, most often as a threat to the progressive agenda of the legislation. My particular concern is with the evolving doctrine of constitutionalized fault. In what follows, I will provide a brief introduction to the jurisprudence on constitutionalized culpability, consider its impact, both substantive and political, on the reform process, and evaluate the potential it provides for a successful *Charter* challenge. At the very least, this analysis should give pause to those who place their faith in the *Charter's* potential to improve the lives of the disadvantaged, and more particularly, as an ally in the quest for equality and security for Canadian women.

Constitutionalized Fault: An Overview

The conceptual foundations for the doctrine of constitutionalized fault can be found in three significant decisions of the Supreme Court of Canada. In 1985, the Court declared that the combination of absolute liability and imprisonment

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[6]During second reading of the Bill the Minister of Justice and Attorney-General of Canada, the Hon. Kim Campbell, admitted: "The input I have received from Canadian women has been very troubling. They have very little confidence in the Canadian justice system as it deals with sexual assault. ... As Minister of Justice, I acknowledge this reality." Canada, *House of Commons Debates* (8 April 1992) at 9505.

[7]*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[8]This comment was made by the Minister in response to a question from a member of the committee. Canada, *House of Commons Legislative Committee on Bill C-49 Criminal Code (amdt. – Sexual Assault)*, 3rd. Sess., 34th Parl. 1991-92 at 6:65.

infringed s. 7 of the *Charter*.[9] Two years later in *R.* v. *Vaillancourt*,[10] a majority of the Court extended its analysis into the area of true crimes. Justice Lamer, as he then was, concluded that the *Motor Vehicle Reference* had elevated *mens rea* from a presumed element to a constitutionally required element. At issue in *Vaillancourt* was a subsection of the constructive murder provision, long the subject of both academic and judicial critique, which did not require subjectively measured *mens rea* with respect to the prohibited consequence of death. Justice Lamer wrote as follows:

> [T]here are, though very few in number, certain crimes where, because of the special nature of the stigma attached to a conviction therefor or the available penalties, the principles of fundamental justice require a *mens rea* reflecting the particular nature of that crime. ... The punishment for murder is the most severe in our society and the stigma that attaches to a conviction for murder is similarly extreme. ... It is thus clear that there must be some special mental element with respect to the death before a culpable homicide can be treated as a murder. ... I am presently of the view that it is a principle of fundamental justice that a conviction for murder cannot rest on anything less than proof beyond a reasonable doubt of subjective foresight.[11]

Although Justice Lamer ultimately chose to rest his conclusion on the provisions' failure to meet a minimum standard of objective foreseeability, the *dicta* in *Vaillancourt* made clear his preference for subjectivism.[12] It also introduced, unprepared and unexamined, the enigmatic notion of stigma into the constitutional lexicon. The decision in *Vaillancourt* suggested that a small group of offences, those attended by some degree of stigma, would require as a matter of constitutional imperative, subjectively measured *mens rea*.

Three years later, the decision in *R.* v. *Martineau*[13] confirmed that subjectivism, as a normative standard for the allocation of blame, is at the theoretical heart of the Court's stance on constitutional culpability. At issue in *Martineau* was the remainder of the constructive murder provision. Relying on his reasons in *Vaillancourt*, Chief Justice Lamer repeated his conclusion that the principles of fundamental justice require that a conviction for murder rest on proof beyond a reasonable doubt of subjective foresight of death. The constructive murder provision, in failing to require subjective foresight of the prohibited result,

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[9]*Reference Re Section 94(2) of the Motor Vehicle Act R.S.B.C. 1979* (1985), 48 C.R. (3d) 289 (S.C.C.) [hereinafter *Motor Vehicle Reference*].

[10](1987), 60 C.R. (3d) 289 (S.C.C.) [hereinafter *Vaillancourt*].

[11]*Ibid.* at 325-26.

[12]A subjective theory of *mens rea* measures culpability with reference to the actor's actual knowledge or awareness. The determinative question is what the actor herself or himself knew or intended, and not what the reasonable person would have known or intended.

[13](1990), 79 C.R. (3d) 129 (S.C.C.) [hereinafter *Martineau*].

violated s. 7 of the *Charter*. The Chief Justice also reiterated his views on the centrality of the criterion of stigma. He wrote that the crucial consideration on an assessment of the constitutional requirement of *mens rea* is the, "continuing serious social stigma which will be imposed upon conviction."[14] *Martineau* has left unanswered many questions about the implications of constitutionalized fault. What crimes will be sufficiently "stigmatized" to require a minimum degree of *mens rea*? Is the minimum *mens rea* subjective foresight and if so, is it required for each and every element of the *actus reus*? The answers to these questions may well determine the constitutionality of the new sexual assault provisions.[15]

Sexual assault is an area of the criminal law in which the political nature of the allocation of blame has been convincingly demonstrated by feminist and critical scholars. The doctrine of *mens rea*, understood in law as neutral and objective, has been unmasked as partial, and as privileging a particular (male) viewpoint. The implications of this critique seem to have gone unnoticed in the context of the developing jurisprudence on constitutionalized fault. In my view, the development of constitutionalized principles of fault, in the three decisions discussed above, has been characterized by a failure to address either the socio-political assumptions of present substantive criminal law doctrine, or the normative implications of constitutionalizing a certain concept of culpability. In addition, the constitutional nature of the process has potentially foreclosed a multidimensional or contextual approach to fault. The risks of this failure have been made obvious by the reform of the sexual assault provisions, to which I will now turn.

The New Legislation

Bill C-49 is comprised of three parts: a preamble; new provisions on consent; and an evidentiary package establishing substantive and procedural guidelines for the admission of sexual history evidence. The sections on consent address the nature of the fault requirement in sexual assault. It is in these provisions that the impact of constitutionalization becomes most apparent.

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[14]The discussion of stigma occurs primarily in one of the companion cases to *Martineau* which was both argued and released at the same time; *R.* v. *Logan* (1990), 79 C.R. (3d) 169 at 178 (S.C.C.) [hereinafter *Logan*].

[15]On 24 September 1992, the Supreme Court of Canada released its decision in *R.* v. *DeSousa* (1992), 15 C.R. (4th) 66 (S.C.C.) [hereinafter *DeSousa*]. In *DeSousa* the Court considered the constitutional validity of s. 269 of the *Criminal Code*, the offence of unlawfully causing bodily harm. A five person bench unanimously concluded that s. 269 was not one of the few offences which by reason of either stigma or penalty required subjectively assessed fault. The decision in *DeSousa* is an indication of the Court's discomfort with the most far-reaching implications of the *Martineau* doctrine. However, in my view, the constitutional risks to Bill C-49 remain. If the *Martineau* doctrine is to have any effect outside of the homicide provisions of the Code, the Court will need to identify other stigmatized offences. Sexual assault is a most likely candidate.

The new provisions regarding consent do two things: they specifically define consent, and they address the mistaken belief defence. Section 273.1(1) defines consent as "the voluntary agreement of the complainant to engage in the sexual activity in question." Subsection (2), popularly referred to as the "no means no" provision, enumerates the situations in which no consent is obtained as a matter of law.[16] The purpose of these definitions is to make mistakes about consent in the circumstances described, mistakes of law which do not exonerate. Section 273.2 addresses the mistaken belief in consent defence and is set out in full below:

> 273.2 It is not a defence to a charge under s. 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where
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> (a) the accused's belief arose from the accused's
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> (i) self-induced intoxication, or
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> (ii) recklessness or wilful blindness; or
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> (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

The intent of the section is twofold. Subsection (a) clarifies the existing law on the mistaken belief defence; that is, i) sexual assault is a general intent offence in which the "defence" of intoxication does not apply,[17] and, ii) a mistake which is either reckless or wilfully blind is no defence. Subsection (b) changes the current law. It overrules the result in *R.* v. *Pappajohn*[18] that a mistaken belief in consent need only be honestly held to afford a complete defence. Subsection (b) provides that, in order to rely on an honest mistake, an accused must take reasonable steps,[19] in the circumstances known to him at the time, to ascertain if consent exists. In other words, subsection (b) relocates the culpability in sexual

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[16]For a discussion of the significance of the distinction between mistakes of law and mistakes of fact in the context of rape, see Vandervort, *supra*, note 5.

[17]*R.* v. *Bernard*, [1988] 2 S.C.R. 833.

[18][1980] 2 S.C.R. 120.

[19]It should be noted that the original bill presented to Parliament required the taking of "all" reasonable steps. At the clause by clause stage of the Parliamentary Committee hearing, the Committee adopted a resolution to amend the provision by deleting the word "all." This amendment was proposed by officials from the Department of Justice and, in her presentation to the Committee, the Justice Minister indicated that she was in agreement with the recommendation. Concerns about "*Charter*-proofing" the Bill had a significant impact on this amendment. It was argued that the requirement of "all" reasonable steps created "an extremely high standard which goes far beyond what is permitted by the *Charter*." (Canadian Bar Association Brief, *supra*, note 8 at 5A:46). Don Stuart argued: "the section requires *all* reasonable steps to be taken and that this would be a much more restricted defence than the requirement of having taken due diligence. All the Crown would have to do would be to point to another possible step. A reasonable standard is not one of perfection." (*supra*, note 8 at 6A:25-26). Professor Stuart also recommended the replacement of s. 273.2 with a provision creating an offence of negligent sexual assault (maximum penalty five years' imprisonment) where the accused has a belief in consent but does not take reasonable steps to ascertain whether the complainant is consenting.

assault. It explicitly shifts the focus, in a limited number of cases, away from the self-conscious wrongdoing of the accused. The new focus is on the culpability inherent in the accused's failure to take reasonable steps to determine if the act he is about to engage in is in fact mutual and consensual. The provision creates a form of objective liability in that the accused is held up to a standard of reasonable conduct which is assessed on the basis of the circumstances known to the accused at the time of the assault. The provision does not require that the belief in consent itself be reasonable, but rather that the accused make a reasonable effort to ascertain if consent in fact exists.

The Impact of Constitutionalized Fault: *Charter*-Proofing the Bill

Robert Samek, in an early critical essay on the *Charter*, refers to what he calls the "meta phenomenon," a phenomenon which, in my view, aptly describes the way in which "*Charter*-proofing" has become an important element in the social reform agenda:

> The meta phenomenon is the human propensity to displace "primary" with "secondary" concerns, that is, concerns about ends with concerns about means. The latter come to be perceived as primary, and distort the former in their own image. The new primary concerns are in turn displaced by the new secondary concerns about the means to be adopted to achieve the new ends, leading to another shift in the focus of consciousness. The new secondary concerns come to be perceived as primary, and so on. The progression is not linear but global. If we think of the total number of primary concerns of a man, a society, an ideology, as a sort of gravitational field, it will be distorted continuously by the pull of a growing mass of secondary concerns. The result is an increasing loss of balance, a relentless slide to the peripheral.[20]

The question of the appropriate criminal justice response to the pervasiveness of sexual assault, arguably a *primary* concern,[21] has been displaced by the attention given the *secondary* question of protecting constitutionally guaranteed rights. This concern is then transformed into a discussion about the meaning of s. 7 of the *Charter*, which becomes in turn an analysis of the significant case law and judicial pronouncements. The initial *primary* focus is reconstructed into a technical, legal assessment of whether particular provisions are likely to withstand judicial scrutiny

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[20]R.A. Samek, "Untrenching Fundamental Rights" (1982) 27 McGill L.J. 755 at 763.

[21]Samek would, I imagine, argue that the injection of the law and the choice to invoke the criminal justice system in response to sexual assault is in itself a peripheralizing move which distracts from prior primary concerns of education, tolerance and mutual respect. The law itself has a way of refocusing the debate in its own image, changing both the nature and structure of the dialogue. Critical legal scholars describe this process as reification. See, for example; M. Tushnet, "An Essay on Rights" (1984) 62 Texas L. Rev. 1363 at 1382-84, and P. Gabel, "Reification in Legal Reasoning" (1980) 3 Research in Law and Sociology 25.

on constitutional grounds.

In my opinion, constitutionalized fault has distorted the reform process far more than it has improved it. The threat of a *Charter* challenge has been felt at both the substantive and political levels. The substantive provisions of the Bill have been measured against a jurisprudence of constitutionalized fault, the rhetoric of which is unquestioned. The normative authority of that jurisprudence focuses the analysis of the provisions on constitutional defensibility and away from questions of social policy and the appropriate role of the criminal law. Second, and more generally, the entire legislative process is now guided by the political authority of the *Charter*. The simple threat of unconstitutionality carries disproportionate critical weight, capable of overwhelming more broadly focused policy concerns. Similar critical weight is accorded claims that a provision is "*Charter*-proof."[22]

The provision which appears to create the most constitutional difficulty is s. 273.2(b), the reasonable steps requirement. The approach adopted in *Martineau* would seem to suggest a two stage analysis. First, is sexual assault one of the few crimes which require as a constitutional matter a minimum degree of *mens rea*? Second, if so, what level of *mens rea* is constitutionally required?[23] I will begin with the second stage of the analysis which, since *Martineau* is unabashedly subjectivist, is arguably the more straightforward. In *Vaillancourt* and *Martineau*, Chief Justice Lamer focused on death and the intent with respect to the death as the distinguishing elements in the crime of murder. His argument, accepted by the

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[22]For example, the committee debate over the deletion of the word "all" in subsection 273.2(b) focused almost entirely on the constitutionality of the provision. Once the committee was convinced that the change would leave the provision less constitutionally vulnerable, the debate was over. The question of the deterrent and educative impact of a more strongly worded section was overwhelmed by *Charter* analysis.

[23]In *R.* v. *Edgar* (1992), 10 C.R. (4th) 67 (Prov. Ct), Barnett J. attempts to apply the *Martineau* analysis in a sexual assault case. The case, which is horrifyingly instructive of the implications of the doctrine of constitutionalized fault, involved an accused who claimed that he mistakenly had intercourse with the wrong woman, who was asleep on the same bed as himself and his sexual partner. The victim did not awaken until after penetration had occurred. The accused testified that he did not care whether the woman responded to him and had not made efforts to find out who she was. At trial, the Crown conceded that the accused did not have actual knowledge of the fact that the woman was not consenting, but that he was recklessly indifferent concerning consent. Barnett J. wrote as follows at 76:

> In my opinion the social stigma which must follow a conviction for sexual assault can only be characterized as extreme, and rightly so. I therefore believe that when it is alleged that a man committed a crime by sexually violating a woman, the Crown must prove he had some subjective knowledge of the fact that consent was absent. This is a constitutional requirement. The law has changed. I believe that the decisions in *Vaillancourt*, *Martineau*, and *Logan* lead inexorably to this conclusion. ... I therefore dismiss the charge against Edgar. His wrongful acts were not accompanied by a degree of moral blameworthiness requiring that he be censured as a person guilty of a particularly opprobrious crime.

Court, was that the *mens rea* for this distinguishing element should be subjectively measured. In sexual assault, the circumstance of non-consent determines the criminality of the conduct. In other words, it is the victim's lack of consent which renders sexual behaviour criminal. The application of the *Martineau* doctrine would therefore suggest that *mens rea* with respect to this distinctive element should be subjectively measured.

The first stage of the *Martineau* analysis requires the categorization of the offence of sexual assault as stigmatized or non-stigmatized. The determinative factors are primarily the "continuing serious social stigma associated with a conviction" and secondarily "the penalties available."[24] Attempting this characterization for the offence of sexual assault graphically illustrates the ambiguity, contingency and ultimately value-laden nature of the *stigma* criterion. Statistics suggest that sexual assault pervades Canadian society.[25] Statistically, sexual assault is a *normal* occurrence. In addition, the failure of the criminal justice system to respond appropriately to sexual assault would seem to suggest that, at least until recently, sexual assault was not seen as particularly serious. Indeed, its social invisibility suggests that it was viewed as *normal*. Clearly, for a Court to endorse this normalized and thus unstigmatized vision of sexual assault would be to confirm the feminist critique of patriarchy. And yet, the legal implications of the conclusion that sexual assault is a stigmatized crime are almost as unacceptable as its normalization. The recognition, at the first stage of the analysis that a conviction for sexual assault does stigmatize the offender is a Pyrrhic victory for women, for it is apparently the simultaneous recognition that fault should therefore be narrowly and individually assessed.

The trap created by the legal analysis in *Martineau* was recognized by the Women's Legal Education and Action Fund (L.E.A.F.) in their brief to the parliamentary sub-committee:

> It is evident that the courts have not yet devised a reliable list of criteria for determining when a crime fits into the "special stigma" category. ... It is important to stress that an intuitive assessment of the social stigma attached to sexual assault is not an adequate basis for making this important determination. Rather, the decision should involve an examination of the nature of the offence, the social

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[24]*Martineau*, *supra*, note 13 at 177.

[25]See J. Brickman and J. Briere, "Incidence of Rape and Sexual Assault in an Urban Canadian Population" (1985) 7 Int'l J. of Women's Studies 195; "Sexual Offences Against Children" in *Report of the Committee on Sexual Offences Against Children and Youth* (Ottawa: Supply and Services, 1984) at 175-233, 351-65 (Badgley Report); Solicitor General of Canada, "Female Victims of Crime" in *Canadian Urban Victimization Survey* (Ottawa: 1985) 1; Solicitor General of Canada, "Reported and Unreported Crimes" in *Canadian Urban Victimization Survey* (Ottawa: 1984) 1. It is also worthwhile to note that social scientists uniformly agree on the impossibility of accurately measuring the real number of sexual assaults in our society. They all agree, however, that police figures may be multiplied from five to twenty times to compensate for under-reporting.

> problem being addressed by the offence, the degree to which a subjective test would hinder adequate responses to that social problem, the penalties and the social attitude to the behaviour criminalized by the offence. ... There would be several appalling ironies which would flow from a Parliamentary (or judicial) consensus that sexual assault constitutionally carries a "special stigma." If the law could not require reasonable steps to be taken on the basis of the stigma associated with sexual assault, this would mean that so much stigma is associated with this crime that Parliament would be paralysed in addressing the social harms caused by sexual assault. This would surely convey a message of societal tolerance rather than abhorrence.[26]

The passage eloquently testifies to the formalistic, convoluted and abstract analysis mandated by constitutionalizing fault. Essentially, L.E.A.F. is reduced to arguing that the constitutional analysis should be result dependent. That is, the utility and desirability of a regime of subjective *mens rea* should be taken into account in the initial determination of stigma. The fact that current jurisprudence on constitutionalized culpability leads to the adoption of such a position testifies to its inadequacy. The brief continues by saying that "Parliament should not be deprived of legislative weapons against such social problems by the attachment of a highly subjective, and in this case highly hypocritical, label like "special stigma" to the crime of sexual assault."[27]

Although a finding that s. 273.2(b) violates s. 7 of the *Charter* does not end the analysis, relying on a s. 1 justification to save the provision would present a number of pragmatic and political difficulties. Essentially, the Court would be asked to uphold the infringement of "a principle of fundamental justice," thereby risking the conviction of a "moral innocent."[28] The decision in *Seaboyer* gives scant hope to those who would attempt to martial a s. 15 equality argument to counterbalance the s. 7 claims of the accused. Presumably, the argument in justification of a different culpability standard for sexual assault would rely on claims similar to those presented to, and ignored by, the *Seaboyer* court – that is, sexual assault is a crime which systematically threatens the liberty and security interests of a disadvantaged group and therefore the legal response to sexual assault raises equality claims about access to justice for an entire segment of the Canadian population.[29]

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[26]Brief of the Women's Legal Education and Action Fund (L.E.A.F.) to the Parliamentary Committee on Bill C-49, 19 May 1992, *supra*, note 8 at 2A:40-42.

[27]*Ibid.* at 2A:43.

[28]*Motor Vehicle Reference*, *supra* note 9 at 319.

[29]The equality dimensions of the crime of sexual assault are made obvious by statistics which demonstrate that while women and children are overwhelmingly the victims of sexual violence, it is men who are the perpetrators. In the Canadian Centre for Justice Statistics, "Crime by Offence - 1990" in *Uniform Crime Reporting Survey* (Ottawa: Statistics Canada, 1990) it was reported that 98.1% of adults charged with sexual assault are male.

More generally, a need to rely on s. 1 to *save* a *Charter* violation sends an important political message. It confirms the present construction of culpability and implicitly marginalizes a more contextual, multidimensional approach to fault. An approach to culpability which takes into account the claims of victims to sexual autonomy and bodily integrity is reconstructed by the law as the justifiable infringement of a guaranteed constitutional right. Given the normative authority of constitutional doctrine, such a reconstruction may be counterproductive in the long run since it confirms, without explicit recognition, the liberal paradigm of orthodox criminal law doctrine.

In my view, the entire process of reform of the sexual assault laws has been distorted by the *Charter*. It is a disturbing irony that a reform initiative which was catalyzed by a decision confirming the worst fears of many critics and feminists about the impact of the *Charter*,[30] is now threatened by the constitutionalization of fault. Despite the fact that the legislation was supported by groups from across the country as well as by all-party agreement in the House, there is still a significant risk that it will be, at least in part, successfully challenged. A successful challenge would confirm that the subjectivist commitment of the Supreme Court of Canada has profound political implications, limiting Parliament's power both to use the criminal law as a vehicle for social reform and to reconstruct the criminal law in a way which protects the security and autonomy interests of disempowered groups. The privileging of subjectivism reflects the liberal legalism of the *Charter* in powerful combination with the liberal ideology of orthodox criminal law. The real risk that significant reform of the law of sexual assault may be either prevented or merely tolerated as a justified violation of a constitutional guarantee, demonstrates that the jurisprudence of constitutionalized culpability, presented as universal, objective and abstract, is in fact the affirmation of a very particular and necessarily limited political agenda.

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[30]Sheehy, *supra*, note 5 at 744-45, writes (pre-*Seaboyer*):

> If the Supreme Court of Canada strikes down or varies this legislation ... the criticisms and apprehensions of both critical and feminist legal scholars will have borne fruit. Critical legal scholars have argued that the *Charter* invites judges to reassert judicial sovereignty over issues legislated by Parliament; feminist legal scholars have warned that judges, both male and female, may be unable to detach themselves sufficiently from the framework of our patriarchal society to render *Charter* interpretations which are also fair to women.

See also Dawson, *supra*, note 5 and C. Boyle and M. MacCrimmon, "*R.* v. *Seaboyer*: A Lost Cause?" (1991) 7 C.R. (4th) 225.