FROM A WOMAN'S POINT OF VIEW

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Sexual assault is a crime men commit against women and children.[1] Sexual violence is an *act* men commit against women and children. The state, through its laws and through the way it has enforced those laws, has allowed men to define the crime they commit. In this context, the state has used individual men as enforcers of patriarchal assumptions and norms. Thus, the state functions as a "male defined protection racket."[2] It is difficult to overstate the way in which violence shapes the lives of women; until women define when that violence occurs, we will continue to live as subordinates in a male-defined state.[3]

Until amended in 1992, the Canadian *Criminal Code*[4] limited the circumstances under which evidence of a complainant's sexual history with a third person could be adduced by the accused,[5] and included an absolute ban on adducing evidence of her[6] sexual reputation for purposes of impugning or supporting her credibility.[7] These provisions were intended to replace the common law rules which had permitted the introduction of evidence of the complainant's sexual history in order to impugn her credibility, or to establish the

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[1]This is acknowledged in the preamble of *An Act to amend the Criminal Code (sexual assault)*, S.C. 1992, c. 38, which expresses Parliament's "grave concern" about "in particular, the prevalence of sexual assault against women and children."

[2]S.R. Peterson, "Coercion and Rape: The State as a Male Protection Racket" in M. Vetterling-Braggin, F.A. Elliston and J. English, eds, *Feminism and Philosophy* (Totowa, N.J.: Littlefield, Adams & Co., 1981) 360.

[3]I do not mean to suggest that this will be all it takes to end patriarchy, but that it is a necessary precondition. As long as men have the power to determine whether they have violated women, there is little hope that they will stop doing it; this applies not only to sexual assault under the *Criminal Code*, but to all manifestations of violence, including sexual harassment, pornography, silencing, and so on. Until we, as women, can define when sexual power is being exercised, it will not end.

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

[5]*Ibid.* at s. 276. This section has been called the "rape shield" law. That label is a misnomer because the purpose of the provision was not to shield women from rape; rather, one purpose was to protect a complainant from an invasion of her sexual life in the course of testifying in the trial of a person charged with sexually assaulting her. See comments on this point by Justice McLachlin in *Seaboyer*, *infra*, note 9 at 604 and by Justice L'Heureux-Dubé, *ibid.* at 648 (the latter refuses to use the term on the basis that this purpose is, "neither the only one, nor necessarily the most important.")

[6]Because far more men commit sexual assault against women than the reverse, I am going to refer to the accused as male and the complainant as female, even while recognizing that this does not capture sexual assault by men against men or against children necessarily; these latter manifestations of sexual assault are equally manifestations of patriarchal relations, which in this context are best reflected in gendered language.

[7]*Supra*, note 4 at s. 277.

likelihood that she had consented.[8]

Sections 276 and 277 of the *Criminal Code* were challenged in the *Seaboyer* case.[9] The Supreme Court of Canada upheld s. 277, but the majority of the Court struck down s. 276 as being overbroad, and therefore having the potential to contravene the accused's right under the *Canadian Charter of Rights and Freedoms*[10] to a full and fair trial.

After the *Seaboyer* case, Parliament enacted a new s. 276 in an attempt to meet the Court's concern that the previous provision did not permit the balancing between the probative value of the evidence sought to be adduced and the prejudicial effect of the evidence. Rather than listing circumstances under which evidence of the complainant's sexual history *could* be adduced, the new s. 276 addresses itself to excluding evidence sought to be adduced for the improper purposes of showing that the complainant was likely to have consented, or that she is less worthy of belief. Parliament also took the opportunity to make other changes to the sexual assault provisions, possibly the most important of which relate to the issue of *consent*. It is on these provisions that I wish to comment.

My comments are informed by my experience as a woman: I know that I am not immune from being assessed on the basis of the stereotypes held about women;[11] I know that I am not immune from the violence that is visited on women, of which sexual assault under the *Criminal Code* is only one manifestation; and I know that my life is significantly shaped by this knowledge. As stated by Justice L'Heureux-Dubé: "Perhaps more than any other crime, the fear and constant reality of sexual assault affects how women conduct their lives and how they define their relationship with the larger society. Sexual assault is not like any other crime."[12] As women, we live our lives dictated by the fear of violence, to the extent that we sometimes forget that we are acting as we do out of fear.[13]

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[8]That a woman who had been sexually active (the "unchaste woman") was more likely to lie and that she was more likely to have consented on the occasion at issue were described as outmoded "myths" by both Justice McLachlin, writing for the majority, and by Justice L'Heureux-Dubé, writing in dissent in the *Seaboyer* case, *infra*, note 9 at 604 and 667, respectively.

[9]*R.* v. *Seaboyer*, [1991] 2 S.C.R. 577 [hereinafter *Seaboyer*].

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

[11]Justice L'Heureux-Dubé explores and condemns these myths in relation to sexual assault and shows how they underlie the challenge to ss. 276 and 277 (*Supra*, note 9 at 651-54).

[12]*Ibid.* at 649.

[13]*Ibid.* at 657.

This is the way women are expected to live. Continuation of patriarchy *relies* on our living this way, on our restricting our lives, on believing we must depend, ironically, on individual men or male institutions to protect us.

I approach this legislation, then, with this question in mind: Does this legislation define sexual assault from the point of view of the aggressor, or the person to whom it will happen? In other words, given the reality of who rapes whom, is the perspective of this legislation that of the man or that of the woman? I ask these questions because rape or sexual assault has always been defined from the man's point of view: Does *he* think he had sex with her against her will? What happened in *his* mind, on the basis of his view of the way the world ought to work? This is a distortion of the reality of rape, and even the legal meaning of rape (which clearly have not been the same). The questions must be: Does she say that he had sex with her against her will? Was she injured by this act?[14] It remains a matter of evidence to decide the validity of the allegation, but how that decision is made, and on what basis, depends on where we start the assessment. I believe that, if interpreted appropriately,[15] the new sexual assault provisions relating to consent may go some distance in shifting the starting point of the inquiry from that of the aggressor's viewpoint to that of the person who has been invaded.

Under the old legislation, consent was not defined. Now there is a definition; subsection 273.1(1) defines consent as "the voluntary agreement of the complainant to engage in the sexual activity in question." Viewed in conjunction with the provision that there is no consent if the complainant has expressed a lack of agreement to "continue to engage in *the* activity" [emphasis added], this seems to require agreement each step of the way – to each form of sexual activity. Consent to touching a breast is not consent to oral sex. Because it is defined, consent becomes a question of law and not only of fact, and therefore, one would expect, more limited in availability[16] (this is quite apart from the new list of circumstances in which there can be *no* consent in subsection 273.1(2)).

Under the prior law, the defence of mistaken belief that the complainant consented could succeed even if the belief was unreasonable. This left the determination of consent almost entirely in the hands of the aggressor; he could

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[14]Catharine MacKinnon argues that "[t]he problem is that the injury of rape lies in the meaning of the act to its victim, but the standard for its criminality lies in the meaning of the act to the assailant. Rape is only an injury from women's point of view. It is only a crime from the male point of view, explicitly that of the accused," *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989) at 180.

[15]This is a big *if*, of course; Justice L'Heureux-Dubé acknowledges this in her dissent in *Seaboyer*, *supra*, note 9 at 660, 708.

[16]See I. Weiser, "Sexual Assault Legislation: The Balancing Act" (1993) 42 U.N.B.L.J. 213 at 219-20.

rely on any number of stereotypes and assumptions to explain his belief and anticipate that his explanation would conform to the judge's view of how women behave. There is, however, a new factual onus placed on the accused under the new legislation. Belief in consent is not a defence where, "the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting."[17]

This is not a perfect solution, since, for example, there is considerable scope for dispute over "in the circumstances known to the accused at the time," both in relation to the meaning of that phrase and in relation to the factual questions which inevitably will arise around it. Nevertheless, the point of this provision is that an accused must have tried to determine – taken positive action to find out – if the complainant was consenting. In other words, if in doubt, ask or, in the absence of a clear statement of agreement from the complainant, ask. It is hardly inappropriate to require that an accused go this small distance as opposed to overlaying his own interpretation on the complainant's behaviour or comments. Indeed, the requirement of "reasonable steps" is one that, in my view, still leaves too much power in the man's hands to determine the perspective from which one views rape; however, it is clear that this is a response to the apparent requirements of s. 7 of the *Charter*.[18] Rape has been misogynous in the law, as well as in practice. One manifestation of this has been the way the accused's "interpretation" of what the complainant did, wanted or communicated has been allowed to replace the complainant's own statement and understanding of what she did, wanted or communicated.

It has been a not uncommon experience for women to find that men simply do not care whether or not they are consenting to sexual activity; that men ignore their cries, their pushing away; that men may not have interest at all in what women are saying or doing. These circumstances are addressed by the provision which states that belief in consent is not a defence if the accused came to this belief through "recklessness or wilful blindness."[19] This is a demand that men treat women's wishes seriously, a demand that men *listen*. It tells men to pay attention.

But these qualifications do not apply under certain circumstances in which there simply is no consent. Subsection 273.1(2) sets out circumstances in which consent cannot be obtained. There are a number of these, all of which in some

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[17]*Supra*, note 4 at s. 273.2(b).

[18]I say this in light of the requirements about subjective and objective *mens rea* which have been imposed by the Supreme Court of Canada in a number of cases; see the discussion on this point in D. Klinck, "The *Charter* and Substantive Criminal 'Justice' " (1993) 42 U.N.B.L.J. 191. This inevitable tension raises the question of whether the criminal law is the correct forum for dealing with this issue.

[19]*Supra*, note 4 at s. 273.2(a)(ii).

way or other respond to the reality of sexual contact between men and women. The list is not intended to be exhaustive:

1. a third person expresses agreement to the sexual activity;
2. the woman is incapable of consenting;
3. the relationship in which the sexual activity occurs is one in which the accused holds a position of trust, power or authority;
4. the woman expresses, by words or conduct, a lack of agreement;
5. the woman changes her mind about wanting to continue with sexual activity.

The circumstances specified in the new provisions should be contrasted with subsection 265(3) to which the definition of *consent* in the new provisions is subject: under that section, there is no consent where force is used or threatened, where there is fraud, or where there is the exercise of authority. The new provision is a valuable change to this limited approach.

The first of the circumstances occurs when someone other than the complainant agrees to sexual activity between the complainant and the accused (a sharing of the control over "sexual access"). This could cover situations ranging from a pimp who claims that a prostitute wants to engage in sex, to a "boyfriend" who assures his friend that his "girlfriend" wants to have sex with the friend. In the latter case, for example, the accused will not be able to say that he thought the complainant had consented simply because his friend had told him that she was willing. This provision acknowledges that a woman always has the right to decide for herself whether she is going to engage in sexual activity and with whom. It recognizes that she is an independent person who is not someone else's sexual property to whom access can be granted at the "owner's" behest.[20]

There are also certain other situations in which it makes no sense to speak of consent. These may concern the characteristics of the complainant herself or the nature of the relationship in which the sexual activity occurs. The first involves the complainant's incapacity to consent. The incapacity may derive from a mental impairment which results in the complainant's being unable to understand the circumstances of sexual activity, or it may derive from a physical condition which makes it difficult or impossible for the complainant to indicate consent or lack of consent, or to leave a situation. This provision recognizes that the legal system itself owes a particular duty of care to people who are particularly vulnerable.

Certain relationships also preclude consent: there is no consent where the accused "induces the complainant to engage in the activity by abusing a position of trust, power or authority." This encompasses a variety of relationships, among

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[20]MacKinnon suggests that, "[t]o be property would be an improvement"; *supra*, note 14 at 172.

them professional relationships such as those between a doctor and patient or lawyer and client, for example. This wording is not ideal. It would have been preferable had there simply been no consent, "where the complainant and the accused were in a relationship in which the accused held a position of trust, power or authority, either at the time the sexual activity occurred or prior to its occurring."[21] My concern with the legislation as written is that there will be disputes over whether or not the professional actually has "abused" the relationship, or over whether or not the professional did in fact "induce" the complainant. It will be necessary for the courts to take a strong line on this. There ought to be "zero tolerance" for sexual activity under such circumstances: any engagement in sexual activity with a patient or client must be regarded as abuse.[22]

What is particularly offensive about sexual abuse in these relationships is that the professional encourages the patient's or client's trust, and, to some extent at least, a suspension of questioning by the patient or client. The knowledge held by doctors, and the fact that they can affect the course of a patient's life, make the relationship unequal – one in which the doctor holds power. A doctor's dealings with patients involve giving comfort to a patient. There must be no confusion that that is what is involved and the doctor is in the better position to ensure that the line is not crossed. Psychiatrists may be dealing with sexual dysfunction, or, in fact, with patients who have previously suffered abuse in different contexts and who need counselling or therapy in relation to that abuse. Similarly, a client who is in the course of separating from a spouse may be in an extremely vulnerable situation and may be seeking reassurance from her lawyer.[23] In addition, it is in the nature of the relationship, and crucial to the ability of the doctor or lawyer to act successfully, that clients and patients divulge much information about themselves. This increases their vulnerability and also makes it less likely that they will complain.[24] In short, as the *Final Report* says, "[v]ery rarely will the patient be on an *equal footing* with his or her doctor – the patient's need for something only a doctor can provide automatically introduces an element of vulnerability."[25]

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[21]*The Final Report of the Task Force on Sexual Abuse of Patients* issued by the Independent Task Force Commissioned by The College of Physicians and Surgeons of Ontario (25 November 1991) at 133 recommends that there be no sexual contact between a doctor and a former patient for two years and in the case of a psychotherapist, never [hereinafter *The Final Report*].

[22]*The Final Report* speaks about the severe harm which patients may suffer as a result of sexual abuse by doctors: see *ibid.* at 84ff.

[23]I give these examples because even in these obviously problematic cases, professionals may not consider the vulnerability of the patient or client; I am not suggesting that trust and power are not inherent in these relationships when other sorts of cases arise.

[24]I thank Elizabeth Hamilton for this insight, arising out a conversation on professional abuse which happened to occur while I was writing these comments.

[25]*Supra*, note 21, Legal Appendix at 2.

The same may be said of the lawyer-client relationship.

In these kinds of relationships, the lack of equality between the parties and the circumstances which almost inevitably accompany the very existence of the relationship, make it difficult to contemplate that the notion of *consent* has any meaning.

If sexual assault is to be seen from the woman's perspective, consent must be viewed as requiring a positive – as in deliberate – statement. This appears to follow from the definition of consent, but if there is any doubt, it should be eliminated by there being no consent when "the complainant expresses, by words or conduct, a lack of agreement to engage in the activity." Viewed in the context of the definition of consent, and the circumstances under which there is no defence of belief in consent, this means (again, if interpreted correctly) that the complainant must have positively agreed to the sexual activity. This is the provision which responds to the *"maybe"* means *"yes"* approach to determining consent. Lack of agreement is tantamount to *no* (or, in other words, "silence does *not* indicate consent"). As long as the complainant is saying or doing anything that constitutes something less than agreement to sexual activity, there is no consent. This ought to be obvious; it has not been. In particular, the closer the relationship between the complainant and the accused, the more likely that this will be an issue, since a range of activities has been, and no doubt still will be, presented as indicating a *coy* consent.

A woman must not only be free to make a choice on each occasion that she decides to engage in sex, but she must also remain free to change her mind about continuing to engage in a particular form of sexual activity, or to progressing to a more advanced stage. Under the new provisions, the requirement of consent is on-going. This, once again, addresses a realistic and common situation. It acknowledges that people change their minds, and that someone is prepared to consent to one kind of activity and not to another kind (i.e. to kissing and stroking, but not to intercourse). This provision does not require the complainant to *withdraw* her consent. The accused must be cognizant throughout that her consent continues.

While not perfect, and vulnerable to restrictive judicial interpretation, the new provisions are an advance from the still wide-spread assumptions about the right of men to sex, of the obligation of women to comply, and of the male-defined view of what sex is about. They will, if properly interpreted, force a change in behaviour. Men will have to put their minds to questions they have not had to put their minds to before, (at least not in the same way): "Does she really want to do this, am I listening hard enough or am I kidding myself?" The real message that should be read in these provisions is that sexual activity is not a guessing game; guessing could result in conviction for sexual assault.