THE PENDULUM HAS BEEN PUSHED TOO FAR

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I support Bill C-49's[1] efforts to make our *Criminal Code*[2] reflect the "no means no" philosophy and also to criminalize unreasonable behaviour in the sexual context. However, I believe that the pendulum has been pushed too far in parts of the "rape shield" protection and also in the way that negligent conduct has been criminalized in the same category as deliberate conduct. In these two areas the law is unjust and potentially unconstitutional.

The immediate impetus for Bill C-49 came from the majority decision of the Supreme Court of Canada in *R.* v. *Seaboyer*.[3] The Court struck down the blanket exclusion by the *Criminal Code* of evidence of prior sexual history of a complainant, subject to three specified exceptions, on the basis that it violated the accused's right to make full answer and defence under the *Canadian Charter of Rights and Freedoms*.[4] The decision produced an immediate outcry on the basis that women and children would be even less likely to pursue charges of sexual assault given that there would be unrestricted cross-examination of their prior sexual history. Such comments were quite unfair to the majority of the Supreme Court of Canada. Justice McLachlin, for the majority, had been quite alive to the dangers of leaving this crucial issue to unfettered judicial discretion and had crafted what she considered to be careful guidelines concerning the admissibility of such evidence. She has also extended the protection to such conduct *with the accused*. One of the reasons for the vehement reaction was that the majority took but a line to hold that, although victims might have equality rights, these had to give way to the accused's right to make full answer and defence.

The response from the then Minister of Justice, the Hon. Kim Campbell, was swift. She announced that Parliament would respond to protect women and children better. She called a meeting of regional and national women's groups and thereafter worked very closely with them in drafting and revising a Bill.[5] The

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

[2]R.S.C. 1985, c. C-46 [hereinafter *Criminal Code*].

[3](1991), 7 C.R. (4th) 117 (S.C.C.) [hereinafter *Seaboyer*].

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

[5]*Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 3rd Sess., 34 Parl. 1991-92 (22 June 1992) at 29:30-31. See also S. McIntyre, "Redefining Reformism: The Consultations that Shaped Bill C-49" in J. Roberts and R. Mohr, eds, *Sexual Assault: A Multi-Dimensional Study* (Toronto: University of Toronto Press, forthcoming).

coalition of some 60 women's groups reached unanimity at each point and agreed to oppose any attempt to water down the Bill. In this sense, the process was partisan. Voices of men, no doubt for the first time in the history of Canadian criminal law, were given very little weight.

Since Bill C-49 largely codifies the *Seaboyer* guidelines, it is ironic that it was so enthusiastically received by women's groups and politicians of every stripe. In an effort to reflect equality concerns for victims, s. 276(3) of the new statutory scheme declares that the trial judge must consider the interests of the victim on the same level as the accused's right to make full answer and defence. This attempts to influence the Supreme Court of Canada to change its earlier assessment of the proper balance. Nevertheless, s. 276(3)(h) gives judges even more discretion than they had under the old system in declaring that the judge can take into account "any other factor" that he or she "considers relevant." Bill C-49, like *Seaboyer*, declares that evidence of the complainant's sexual history should rarely be admitted, and that the same should apply to prior sexual history with the accused.

Prior Sexual History

Given that the accepted test of relevance in our law is a very low threshold test of whether the proposition in issue will become more likely because of the evidence,[6] evidence of prior sexual history of the complainant *is* normally relevant. I hasten to add, however, that for reasons given by both the majority and minority in *Seaboyer*, such evidence should indeed rarely be admitted. The myths and stereotypes surrounding such evidence will usually mean that the probative force will be substantially outweighed by the prejudicial effect on the fact-finding process (remembering, of course, that prejudice here does not just mean prejudice to the interests of the accused, but includes prejudice to the complainant). In the case of evidence of the complainant's prior sexual history with persons other than the accused, *Seaboyer* and Bill C-49 get the result about right. However, I share the concerns of my colleague, R.J. Delisle,[7] about the artificial restrictions on the uses to which such evidence can be put in cases where it is admissible, and also on its applicability to evidence of prior sexual history *with the accused*. Most writers, and rape shield provisions in other jurisdictions, recognize that the prior sexual history of the complainant with the accused should be treated quite differently. The risk of myths and stereotypes is far reduced when the issue is not whether somebody is trying to drag in prior sexual history to show that an "unchaste" woman is not to be believed or is more likely to have consented. In the case of prior sexual

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[6]*Morris* v. *R.* (1983), 36 C.R. (3d) 1 (S.C.C.).

[7]R.J. Delisle, "Potential *Charter* Challenges to the New Rape Shield Law" (1992) 13 C.R. (4th) 390.

history with the accused, when the man says the complainant consented and she says she did not, or where he says that he acted reasonably and she says he did not, it is surely part of the relevant context and essentially fair to admit evidence of the type of relationship they had. Of course, the admission of such evidence would not be determinative. Everybody should recognize that a woman has the right to say "no" even if she has said "yes" to this particular man before. One can then predict that the exclusion of evidence of prior consensual sexual conduct between the complainant and the accused will, in an appropriate case, lead to a successful *Charter* challenge to this aspect of Bill C-49.

Those who believe that the issue of the admissibility of evidence concerning the complainant's prior sexual history has been satisfactorily resolved by Bill C-49 may wish to confront concerns recently well expressed by Susan Estrich.[8] Professor Estrich starts by recognizing a new orthodoxy in her classes:

> I know many students, and even a few professors, who believe that the women are always right and the men are always wrong; that if she didn't consent fully and voluntarily, it is rape, no matter what she said or did, or what he did or did not realize. Everything about his past should be admitted, and nothing about hers. And that's what they want to hear in class.[9]

To Professor Estrich, this orthodoxy misses the point given the reality of ongoing debates about when women should be believed, what counts as consent, and what is reasonable when it comes to sex. She suggests that it is the criminalization of acquaintance rape that presents the most difficulty, not because we do not know what constitutes rape, but because we need to know about both the victim and the defendant in order to decide who is telling the truth. She puts the question as follows:

> Assume for a moment, I tell my students, that it was you, or your brother, or your boyfriend or your son, who was accused of rape by a casual date with a history of psychiatric problems, or by a woman he met in a bar who had a history of one-night stands. Would you exclude that evidence? What else can the man do to avoid a felony conviction and a ruined life? Where do you draw the line? But if you don't exclude the evidence, will some women as a result become unrapable, at least as a matter of law? That is, will women who have histories of mental instability or of "promiscuity" ever be able to convince juries who know those histories that they really were raped?[10]

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[8] "Teaching Rape Law" (1992) 102 Yale L.J. 509.

[9] *Ibid.* at 515.

[10] *Ibid.* at 518-19.

Consent

Bill C-49 also enacts a new consent provision under s. 273.1 applicable only to charges of sexual assault. The section aims to give courts better guidance regarding situations in which consent can be held to have not been genuine and therefore not consent in law. The provisions seem adequately drafted and a welcome assertion of the "no means no" philosophy. With the exception of s. 273.1(2)(c), (stating that there is no consent when it is induced by an abuse of trust, power or authority, which will require judicial interpretation), the provisions appear to merely restate common law principles which confirm that there must be true, actual consent by the complainant. "Consent" is rather enigmatically defined as the "voluntary agreement of the complainant." Judges may well derive more assistance from s. 273.1(2)(d), which declares that there is no consent where the complainant "expresses, by words or conduct, a lack of agreement to engage in the activity." This subsection clearly preserves the existing common law that consent can be express or implied. The women's coalition had suggested that consent be limited to unequivocal communications, but this was rejected. It would have surely produced unfairness to the accused. Given the wording of s. 273.1, there is no validity in the extravagant claims that in the future written consent will be needed in advance for any sexual conduct, that the onus of proof is reversed, or that it has criminalized seduction.

Mistaken Belief

While Bill C-49 does not remove a mistaken belief in consent defence to a charge of sexual assault, it substantially restricts it. Under s. 273.2, belief in consent is not a defence to any sexual assault charge where:

(a) the accused's belief arose from the accused's
  (i) self-induced intoxication, or
  (ii) recklessness or wilful blindness; or
(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 most significant change is the declaration in s. 273.2(b) that the accused will not have a mistaken belief defence where he did not take reasonable steps in the circumstances known to him to ascertain whether the complainant was consenting. This expressly reverses the substantive ruling in *R.* v. *Pappajohn*[11] that an honest belief in consent will excuse even if it was unreasonable. At the first reading stage of Bill C-49, the accused was to be required to take "all" reasonable steps. The "all" was dropped at the third reading. The Minister of Justice accepted arguments that the standard was too severe and risked a *Charter*

[11](1980), 14 C.R. (3d) 243 (S.C.C.) [hereinafter *Pappajohn*].

challenge in that it restricted the minimum *Charter* standard of due diligence. Bill C-49 does not, however, affect the further evidentiary ruling in *Pappajohn* (which was later reflected in s. 265(4) of the *Criminal Code*), that in order to succeed, the defence must have an "air of reality" in the sense that it must be based on evidence other than the accused's own testimony. That special rule has accounted for the fact that the mistaken belief in consent defence is rarely put to a jury. Since *Pappajohn* was decided, there have been only a few acquittals based on a mistaken belief in consent defence and only one decision in which a Court of Appeal has confirmed such an acquittal.[12]

My complaint against s. 273.2 is not that Parliament has now resorted to an objective standard for sexual assault. It was time for Parliament to declare criminal responsibility for objectively unreasonable sexual behaviour, because such behaviour is sufficiently culpable. It is also consistent with the acceptance of the objective standard in cases of other crimes, such as manslaughter, dangerous driving and criminal negligence offences. However, whenever resort is had to an objective standard, it should be recognized that this is an external standard and considerably extends the reach of the criminal law. Few judges or writers continue to insist that criminal responsibility always be based on a determination of subjective fault in the sense that the accused was actually aware of the prohibited risk. However, most still point to an important distinction in culpability between a deliberate risk-taker and one who is unreasonable in that he did not anticipate the risk, but ought to have. Surely there is a qualitative distinction between a man who deliberately rapes a woman knowing that she is not consenting, and one who engages in sexual intercourse where it was, in the circumstances, unreasonable for him to have understood that the woman was consenting. These different forms of culpability should be reflected in different forms of conviction and different penalties. This is how the Supreme Court, in its *Charter* ruling striking down constructive murder rules,[13] has distinguished between murder and manslaughter. Parliament, too, has previously moved cautiously in its efforts to create some criminality based on the objective standard. When it created an offence of arson by negligence in 1990, the new s. 436 of the *Criminal Code* specifically declared that the offence required proof of a marked departure from the standard of care that a reasonably prudent person would use, and reduced the penalty from a maximum of fourteen years in the normal arson case to one of five years imprisonment.

Section 273.2 is also too inflexible on the issue of self-induced intoxication. Given the nature of sexual activity, a man would have to be very drunk indeed before the trier of fact would accept that, because of his intoxication, he could not

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[12]I have been the editor-in-chief of the Criminal Reports since 1982. We receive written reasons from courts across the country at the rate of about 300 per month.

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

have been able to determine whether the alleged victim was consenting. A drunken rapist is usually also a deliberate rapist. But if the accused was very drunk, there might be rare cases where he could not be said to have known what he was doing. In such cases, a trier of fact might well wish to base culpability on a failure to measure up to the reasonable standard. However, s. 273.2(a)(i) precludes any such determination.

This writer presented a brief to both the House of Commons and the Senate Committees, suggesting that Bill C-49 be amended to create a separate new crime of negligent sexual assault with a lesser penalty of a maximum of five years imprisonment. The scheme would have had the advantage that the determination of culpability would be made by the trier of fact. This arrangement of criminal responsibility would also have had strategic advantages. Accused persons may well have been more likely to plead guilty to a lesser offence, thus sparing victims from having to testify. Given current sentencing patterns, a five year maximum seemed to offer adequate scope for punishment of a negligent offender for reasons of individual and general deterrence and retribution. Of course, the Crown Attorney would not have any obligation to accept a plea to the lesser offence. The response of the Minister, provided only at the last moment in the brief Senate Committee hearing, was that this was a matter that could be left to sentencing discretion. In my judgment, it is fundamental that the key determination of culpability as to whether an actor is deliberate or negligent should be made at trial, and not be left to the uncertain exercise of sentencing. A person charged with sexual assault is entitled to know whether the conviction is based on his or her having been deliberate or merely negligent. Since the matter has been left to sentencing, one can only hope that judges will be careful to provide adequate reasons so that a clear jurisprudence can be developed as to the importance of the type of culpability. In the case of jury trials, where the trial judge cannot know the factual basis for a jury conviction, the judge will have to embark on a separate inquiry as to the basis of culpability before sentencing.

Charter challenges based on the Supreme Court of Canada's assertion of a constitutional requirement of fault pursuant to the guarantee of principles of fundamental justice under s. 7 now seem far less likely to succeed against Bill C-49. In *R.* v. *DeSousa*,[14] a unanimous judgment of five justices held that while s. 7 still guards against absolute liability, absent very high stigma, any federal or provincial offence will be constitutional if it has a subjective or objective fault requirement. The Court further held, in *obiter*, that the fault need not relate to all the essential ingredients of the crime.

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[14](1992), 15 C.R. (4th) 66 (S.C.C.) [hereinafter *DeSousa*]. For a critical review see this writer, "The Supreme Court Drastically Reduces the Constitutional Requirement of Fault: A Triumph of Pragmatism and Law Enforcement Expediency," *supra*, at 88.

Despite *DeSousa*, there would appear to be at least four possible *Charter* challenges to Bill C-49's substantive regime. I have detailed these elsewhere[15] and will, here, merely provide the basic framework of the arguments:

1. The air of reality test violates the accused's right to make full answer and defence.

The requirement that the mistaken belief in consent defence be grounded on evidence other than the accused's testimony sets up an unfair corroboration rule. In the case of any other defence all the accused has to do is to point to an evidential base and can use any source of evidence to do so. The regime of Bill C-49 may make the special air of reality rule operate especially unfairly. Under s. 276.2(2) the complainant is not compellable at an admissibility hearing respecting evidence of prior sexual history. She may well not testify. Without such testimony, it may be impossible for the accused to point to independent evidence. Rather than striking down s. 276.2(2), the solution may be to modify the special judge-made rule.

2. Section 273.2's exclusion of any intoxication defence imposes absolute liability which threatens the liberty interest.

This argument would necessitate the Supreme Court re-visiting its complex, split decision in *R.* v. *Bernard*,[16] which found that denying a defence of voluntary intoxication to a general intent crime like sexual assault does not violate the *Charter*. However *Bernard* can also be read as a 5-2 holding that *extreme* intoxication is a defence to any crime, including sexual assault.

3. Sexual assault is one of those few offences requiring a minimum degree of *mens rea* in the form of subjective foresight.

The Supreme Court has thus far identified only a few offences (such as murder, attempted murder and theft) for the special requirement of subjective foresight and has placed considerable emphasis on the special nature of the stigma attached and the penalties. Although the criterion of stigma has often been criticized as an inadequate and unreliable test, it still seems to be a discriminating factor. If this is so, surely sexual assault is an offence calling for such special treatment?

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[15]See my earlier article, *supra*, note *.

[16](1988), 67 C.R. (3d) 113 (S.C.C.) [hereinafter *Bernard*].

4. Section 273.2 is unconstitutional because it violates the constitutional principle that those causing harm intentionally must be punished more severely than those causing harm unintentionally.

In *Martineau*, Justice Lamer (as he then was) rested the Supreme Court's ruling that there is a constitutional requirement of subjective foresight of death for murder in part on the principle that punishment must be proportional to the moral blameworthiness of the offender, and also on the principle that those causing harm intentionally must be punished more severely than those causing harm unintentionally. These principles, which were not referred to in *DeSousa*, appear sound and should be boldly asserted by all judges. If the *Martineau* principles have any remaining vitality the new sexual assault scheme, which clearly criminalized in the same prohibition someone who was deliberately aware of a risk and one who was acting merely unreasonably, should be struck down or at least read down.

Conclusion

In its understandable concern to better reflect the interests of sexual assault victims in criminal trials, Parliament has gone too far respecting parts of the rape shield protection and the manner in which it has criminalized unreasonable behaviour. It remains to be seen whether an independent judiciary, free of considerations of political expediency, will adjust the pendulum to ensure that trials are fair.