BILL C-49: A VICTORY FOR INTEREST GROUP POLITICS

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I intend, in this essay, to address the origins of Bill C-49[1] and then turn to an analysis of its adoption as an amendment to the *Criminal Code*.[2] My aim is to show how both the public debate about Bill C-49 and its enactment illustrate the power of interest group politics in Canada. I will also make some observations about the meaning of Bill C-49. My purpose in making these observations will be to demonstrate how Bill C-49 is an expression of the ideology of the interest group which created and supported it. I will conclude with some thoughts on whether this is a sound way to make criminal law.

The Content of Bill C-49

Before looking in detail at where Bill C-49 came from, it is essential to have a clear idea of what it does. The legislation contains two types of provisions, which I differentiate simply as procedural and substantive.

a. Procedural

The purpose of the procedural elements of Bill C-49 is to establish a new "rape-shield" law to replace the one which was struck down by the Supreme Court of Canada in *R.* v. *Seaboyer*.[3] Indeed, the language of the new provision is largely based on the Court's judgments.

There are flaws in these aspects of Bill C-49, but it is not within my purpose to comment on them. I would only note the apparent impossibility of inducing Canadian journalists to abandon convenient, but misleading, tags like "rape-shield." The phrase "rape-shield" literally suggests that a law of this nature seeks to protect rapists. If we must have a bit of journalistic shorthand to describe this sort of law, it should be called a "rape *victim* shield" law.

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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.

[3][1991] 2 S.C.R. 577 [hereinafter *Seaboyer*]. The Court declared the existing s. 276 of the *Criminal Code* to be of no force or effect. Bill C-49 creates a fresh s. 276 as well as new sections 276.1, 276.2, 276.3, 276.4 and 276.5.

b. Substantive

Bill C-49 makes fundamental changes in the law with respect to the meaning and significance of consent in sexual assault prosecutions. The legislation creates two new *Criminal Code* sections:

> s. 273.1(1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.
> (2) No consent is obtained, for the purposes of sections 271, 272 and 273, where
> (a) the agreement is expressed by the words or conduct of a person other than the complainant;
> (b) the complainant is incapable of consenting to the activity;
> (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
> (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
> (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.
> (3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.
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> s. 273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the 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.

While the presence or absence of consent has always been a central, perhaps *the* central, issue in rape or sexual assault prosecutions, the *Criminal Code* had not previously defined its meaning or its scope. Why, in 1992, was it felt necessary to do this? It must be assumed that Parliament enacted these provisions because it believed there were reasons which required the addition of such a definition to the *Criminal Code*.

More to the point, the approach in Bill C-49 is evidently one which seeks to narrow the effective ambit of consent. A "Background Information" paper prepared by the Justice Department to explain the Bill to reporters when it was given First Reading in December 1991 made this clear:

> An accused person will not be able to use the defence of mistaken belief in consent if the mistake resulted from his or her self-induced intoxication, recklessness, or wilful blindness or where the accused took no reasonable steps to ascertain the complainant's consent.

I will later offer some detailed criticism of Bill C-49's approach to consent, but for

now it must, once again, be assumed that Parliament believed these specific changes in the law governing consent to be necessary and desirable. That is, Parliament, or at least the Justice Department, must have believed that accused persons who were drunk, or reckless or wilfully blind, or who had not taken reasonable steps to ensure that the eventual complainant was consenting were relying on the existing law to avoid conviction.

But was this in fact the case? Was the law about consent so loose that large numbers of sexual assaults were going unpunished? Did the urgent public interest in protecting women and children against sexual assault require these changes in the law?

Another feature of the changes requires comment. Underlying the narrowing of the ambit of consent is a basic questioning of the legitimacy of what had hitherto appeared to be consensual sexual behaviour. Reading the new sections, one cannot avoid wondering whether the person who drafted them was fully convinced that most sexual, or at least, heterosexual, acts are indeed consensual. The impression is created that far more sexual behaviour than we might have been prepared to imagine is non-consensual. Once again it must be assumed that Parliament was moved by a belief that substantial numbers of non-consensual sexual acts were occurring and that this situation should be addressed by the criminal law.

How did Parliament come to think these things? An analysis of the origins of Bill C-49 will address these questions.

The Genesis of Bill C-49

I do not wish to write a history of sexual assault in Canada. Nonetheless, a useful starting point is Bill C-127,[4] which became law on 4 January 1983. The result of Bill C-127 was that the crimes of rape, attempted rape and indecent assault against a male or a female were replaced with the new offences of sexual assault and aggravated sexual assault. It must be stressed that there is a fundamental difference between the prohibited conduct involved in rape and in sexual assault. Rape meant forced, that is, non-consensual intercourse; sexual assault includes what would have amounted to rape, but also extends to other assaults of a sexual nature. Changes in the procedure to be followed in trying sexual assault charges were also made.

The import of the 1983 reforms is well-known and does not require further

[4] *An Act to amend the Criminal Code in Relation to Sexual Offences and Other Offences Against the Person*, S.C. 1980-81-82-83, c. 125.

discussion here.[5] Still, two of the underlying policy goals which motivated the 1983 amendments must be noted. First, the amendments were designed to achieve the "degenderization" of sexual assault.[6] The old offence of rape could only be committed by a man against a women; the new offence of sexual assault could, in theory, be committed by a person of either sex against a person of either sex. Second, a clear purpose of the amendments was to proscribe sexual assaults because they were seen to be acts of violence, not merely because they were sexual acts.[7] To put the matter slightly differently and more directly, the new offence sought to punish violence, not sexuality.

Were the 1983 reforms successful? Were major problems left unaddressed?

The Department of Justice began a national research programme in 1985 to evaluate the effect of the 1983 reforms. The programme was completed in 1991. An "Overview" report described it thus: "... the Canadian evaluation initiative was substantial."[8] The broad conclusion of this study was that the 1983 reforms had at least been successful in achieving an increase in reporting rates. This was a central aim of the reforms. As the "Overview" noted, "... national data confirm that there has been a general trend to higher rates of reporting sexual crimes since the introduction of Bill C-127."[9]

Another aim was to bring about improvements in the way victims of sexual assault were treated by persons in the criminal justice system. The Justice Department's Report is more equivocal on this point, but there is a sense that, while more remained to be done, positive change had occurred.[10]

The multi-volume Justice Department Report also sought to lay to rest a number of persistent myths. The myths about sexual assault arose largely from an absence of information. One of them was that sexual assaults, once there has been a conviction, result in light or inconsequential punishments. A full volume was devoted to this question. The clear conclusion emerging from this volume is that the widespread perception of excessive leniency in sentencing in sexual assault

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[5]For a semi-official general survey, see Department of Justice, *The New Sexual Assault Offences: Emerging Legal Issues* (*Sexual Assault Legislation in Canada: An Evaluation, Report No.2*) by G. Ruebsaat (Ottawa: Supply & Services Canada, 1985).

[6]*Ibid.* at 23.

[7]*Ibid.* at 13. See also Department of Justice, *Overview* (*Sexual Assault Legislation in Canada: An Evaluation, Report No. 5*) (Ottawa: Supply & Services, 1990) at 11-13.

[8]*Overview, ibid.* at 17.

[9]*Ibid.* at 61.

[10]*Ibid.* at 63-64.

cases is inaccurate.[11]

My point, however, is not to investigate whether the 1983 reforms were or were not effective. It is to note that a major official study based on the research of a number of consultants was carried out. This study definitely pointed to shortcomings. The shortcomings had to do largely with the way the criminal justice system dealt with both the aggressors and the victims in sexual assault cases.

There is, however, absolutely nothing in the official study which suggests the need for a major substantive reform of the crime of sexual assault. There is no hint that the law should redirect itself from a concern with acts of violence, albeit of a sexual nature, towards a policy of questioning the legitimacy of consensual sexuality. There is not a word to suggest that the existing provisions concerning consent were in any way, let alone fundamentally, flawed.

All of this is to say there was nothing in the 1991 Report which raised any of the concerns Bill C-49 apparently sought to address. If the issues relating to consent had become so serious by December 1991 as to require a legislative remedy, why is it that none of them was even mentioned in a major official study completed in the same year?

I must confess to being personally unaware of actual cases which give rise to these concerns. It is true that in a much criticized 1980 decision, *R.* v. *Pappajohn*,[12] the Supreme Court of Canada accepted that an honest, if mistaken, belief that the victim had consented *might* be raised as a defence to a charge of rape. What often gets forgotten about *Pappajohn* is that the accused was convicted. A few years later, in *Sansregret* v. *R.*,[13] the Supreme Court substantially restricted the availability of the "honest belief" defence.

As we will see, Bill C-49, at least in the eyes of many of its supporters, purported to give legislative effect to the notion "no means no." As was further argued by its supporters, the Bill was supposed to ensure that men charged with sexual assault would not be able to escape conviction by arguing, "I thought she meant yes." But where are the cases in which this was actually happening? There is scant evidence to support the contention that significant numbers of assailants, or even any, were in fact being acquitted in Canada on this basis.

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[11]Department of Justice, *Sentencing Patterns in Cases of Sexual Assault*, (*Sexual Assault Legislation in Canada: An Evaluation, Report No. 3*) by J.V. Roberts (Ottawa: Supply & Services, 1990).

[12](1980), 14 C.R. (3d) 243 (S.C.C.) [hereinafter *Pappajohn*].

[13](1985), 45 C.R. (3d) 193 (S.C.C.).

Indeed, none of the issues concerning consent which Bill C-49 purported to address has ever been the object of systematic empirical research in Canada. In a letter to the Hon. Kim Campbell, Minister of Justice, dated 12 March 1992, the Canadian Civil Liberties Association (C.C.L.A.) raised precisely this matter. Of the proposed changes to the meaning of consent the C.C.L.A. observed, "To what extent, therefore, is such a change in the law necessary to provide adequate protections for the victims of sexual assault?" The C.C.L.A. admonished the Minister: "... before making such changes in our criminal law, it would be wise to investigate more thoroughly than has apparently been done the community's actual experience with these sexual assault cases."

Bill C-49 did not arise as a response to concerns raised by the Justice Department's review of the existing *Criminal Code*, nor was it prompted by concrete, observed shortcomings in the law. Its true origins must be found in changing fashions in feminist ideology.

As I have already noted, a major goal of the 1983 reforms was to proscribe sexual assault primarily because it was seen as an act of violence. Lorenne Clark and Debra Lewis, two prominent Canadian feminists, expressed an extreme version of this view in their 1977 book, *Rape: The Price of Coercive Sexuality*:

> So far as women are concerned, their sexual organs are no less, and no different a part of their person than their heads, eyes and limbs ... Since sexual organs are just part of the body, an attack on the sexual organs is as threatening to life and health as an unprovoked attack on any of the other bodily parts ... The same standards which apply to assaults against other parts of the body should also apply to attacks against the sexual organs.[14]

Clark and Lewis were themselves simply repeating the point of view set out in Susan Brownmiller's influential 1975 book, *Against Our Will: Men, Women and Rape*.[15]

But ideas began to change. The perception that the problem was violence began to give way to another approach which suggested that perhaps sexuality itself was the problem. We owe this new approach to American law professor Catharine MacKinnon. In her writing, the legitimacy and even the possibility of women consenting to heterosexual acts came to be questioned.

MacKinnon has attempted to displace the focus on violence as the defining aspect of rape with the assertion that coercion, if not quite universal, is the norm

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[14](Toronto: Women's Press, 1977) at 167-68. Logically, of course, this paragraph argues against the very existence of a separate offence of sexual assault, since on the authors' view of things, common assault should suffice.

[15](New York: Simon & Schuster, 1975).

in sexual relations between men and women. This point of view is set out most starkly in her two articles, "Feminism, Marxism, Method and the State: An Agenda for Theory"[16] and "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence."[17]

MacKinnon's argument in these articles is clear enough. Sexual relations between men and women are about power, pure and simple. The essence of heterosexual relations is " ... male sexual dominance and female sexual submission."[18] She refers to " ... women as sexual object for man, the use of women's sexuality by men."[19] In another work, MacKinnon dismissed the possible existence of an independent female sexuality: "Sex feeling good may mean that one is enjoying one's subordination."[20] She has argued for a "new paradigm,"[21] one that, in the words of a commentator sympathetic to her views, would treat "... sexual coercion as the norm and mutual connection as the exception."[22]

This view of the inherently oppressive nature of heterosexuality has obvious implications for the law concerning rape or sexual assault. It must be evident that Catharine MacKinnon would have profound reservations about the possibility of a woman ever freely consenting to a sexual act with a man. This is precisely her point of view. In 1992, she was quoted in a newspaper story as saying: "In the context of unequal power [between the sexes], one needs to think about the meaning of consent – whether it is a meaningful concept at all. I'm saying we need to think about it. *I think it's very questionable* [emphasis added]."[23] The implications for the function of a notion of consent seem clear. If the existence of consent is problematic, then logically the law should assume its absence and require the man accused of rape or sexual assault to prove that the consent of the woman was indeed given. MacKinnon herself has advocated this approach.[24]

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[16](1982) 7 *Signs* 515.

[17](1983) 8 *Signs* 635.

[18]*Supra*, note 16 at 533.

[19]*Ibid.* at 530-31.

[20]*Feminism Unmodified: Discourses on Law and Life* (Cambridge: Harvard University Press, 1987) at 218.

[21]*Ibid.* at 6.

[22]C.A. Littleton, "Feminist Jurisprudence: The Difference Method Makes" (1989) 41 Stanford L. Rev. 751 at 777.

[23]T. Tyler, "U.S. feminist applauds Canada's rape-law plan" *The Toronto Star* (17 February 1992) A-3. An admiring, to put it mildly, journalistic portrait of MacKinnon is F. Strebeigh, "Defining Law on the Feminist Frontier" *The New York Times Magazine* (6 October 1991) 28.

[24]*Supra*, note 17 at 653-55.

My contention is that Bill C-49 did not arise as a response to concrete social reality in Canada, but as a manifestation of the extent to which feminist thought in Canada has adopted the ideas of Catharine MacKinnon. The events leading up to the introduction of the Bill in the House of Commons on 12 December 1991 lend support to this contention.

After the Supreme Court of Canada's decision in *Seaboyer*, Justice Minister Campbell initiated a process of consultation designed to lead to new legislation. During this process, the Minister held five meetings with what she described as "national women's groups."[25] Prominent among these groups was LEAF, the Women's Legal Education and Action Fund. LEAF was formed after the *Canadian Charter of Rights and Freedoms*[26] became part of the Constitution. Its central goal was to use litigation, largely based on the *Charter*, as a means of advancing feminist goals. LEAF was the single major beneficiary of the Government of Canada's Court Challenges Programme.[27] It intervened before the Supreme Court of Canada in such appeals as *R.* v. *Morgentaler*,[28] *Andrews* v. *Law Society of British Columbia*[29] and, appropriately enough, *Seaboyer*.

One member of the LEAF committee which took part in the consultations with Kim Campbell was Catharine MacKinnon. At these meetings, the idea of simply making minor changes in the law concerning sexual assault was rejected. "But, seizing the moment, the feminists pressed the minister for much more broad-ranging revisions of the rape law."[30] This direction was based, at least in part, on the approach which LEAF had decided to adopt. Its newsletter, *Leaf Lines*, stated in January of 1992, "As a result of LEAF's legal opinion, the women's organizations recommended to the Department of Justice that it rewrite the law of sexual assault as a whole."[31]

Where the specific wording of Bill C-49 came from is not clear. Gwendolyn Landolt, an anti-feminist and Vice-President of REAL Women, has claimed that Sheila McIntyre, a Queen's University law professor, feminist and active member of LEAF, offered to draft the Bill at the consultation held with national women's

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[25]Kim Campbell, Letter to the Editor, *The Lawyers Weekly* (29 May 1992) 5.

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

[27]See the discussion in R. Knopff and F.L. Morton, *The Supreme Court as the Vanguard of the Intelligentsia* (Calgary: University of Calgary, Research Unit for Socio-Legal Studies, 1992).

[28][1988] 1 S.C.R. 30.

[29][1989] 1 S.C.R. 143.

[30]"An assault on the law, not to say common sense" *The [Toronto] Globe and Mail* (19 May 1992) A-14.

[31]"Women's Groups Meet With Justice Minister" (1992) 4:4 *Leaf Lines* 4.

groups on 23 October 1991.[32] Kim Campbell denied this was true and asserted that the Bill had been drafted by officials in the Justice Department.[33] While the Bill as actually introduced in the House of Commons may well have been the result of technical work by the Justice Department, it seems obvious that Professor Sheila McIntyre played a role in its creation.[34] Throughout the early part of 1992 she was the leading public spokesperson on behalf of the Bill, regularly defending its provisions and attacking its critics. Much more telling, however, is the fact that McIntyre, speaking on behalf of LEAF, and Judy Rebick, President of the National Action Committee on the Status of Women, held a press conference on 20 November 1992 at which they publicly announced details of the Bill, *three weeks before it was introduced in Parliament.* If we ask the question, was Bill C-49 the Government of Canada's bill or LEAF's bill, the very fact of this unprecedented press conference strongly suggests an answer. And, if there could have been any remaining doubt at this point, Rebick dispelled it by adding: "We were delighted and surprised to find there has been a convergence between women's groups and the minister."[35] Rebick's statement confirmed that the views of LEAF, largely without change and largely without opposition, had become the views of the Department of Justice.

The Public Debate on Bill C-49

The public debate, or more accurately, the absence of public debate surrounding the passage of Bill C-49 is as clear a manifestation as one could wish of the power of interest groups in contemporary Canadian politics. LEAF and its allies got almost everything they wanted. Only a handful of critical voices was raised.

Within Parliament itself there was no debate. The opposition parties proclaimed their support for the Bill as soon as it was introduced. Opposition critics were, if anything, more staunch in their support of the Bill than the government. Liberal Justice Critic Russell MacLellan called it "basically a sound

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[32]C.G. Landolt, Letter to the Editor, *The Lawyers Weekly* (20 March 1992) 5.

[33]*Supra*, note 25.

[34]Given Sheila McIntyre's important role in the story of Bill C-49, it is useful to gain some insight into her thought. I quote from an article by McIntyre:

> Anti-feminism, however, has not readily been seen as a form of sexual harassment even though its expression and damaging effects have much in common with predatory and environmental harassment. This may be because we tend to conceptualise anti-feminism primarily as ideological hostility to a political perspective without registering that it does personal and professional harm to individual women as women in a context of institutional gender inequality. (Canadian Association of University Teachers Bulletin, March 1989.)

[35]D. Vienneau, "Proposed rape law's message: No means no" *The Toronto Star* (21 November 1991) A-1.

piece of legislation" and added, "I'm at a loss to see how we could do it any better." The N.D.P.'s Dawn Black said she had "difficulty understanding" the criminal lawyers who criticized the Bill.[36] At one point a *Globe and Mail* editorial wondered why no criticism of Bill C-49 was being raised by Members of Parliament.[37] The Bill sailed through its three readings with all-party support.

The only public criticism of Bill C-49 came from outside Parliament. Lawyers, especially criminal lawyers, spearheaded this criticism. The Ontario Criminal Lawyers' Association (C.L.A.) was particularly outspoken. Marlys Edwardh presented the Association's main brief to the House of Commons Justice Committee. She, in common with all the lawyers who spoke against the original Bill, saw it as shifting the burden of proof to the accused. She also observed that the most "frightening statement" made by supporters of the Bill was that it would educate men about sexual assault. "I'm not sure that we want to put people in jail to educate them," was her response.[38] In saying this, Edwardh was simply recognising that for the last several decades Canadian criminal law has been moving in the direction of restraint. M.P. Barbara Greene called the Association's views on the Bill "appalling."[39] Other lawyers also spoke out. Brian Greenspan, President of the C.L.A., and Michelle Fuerst, chair of the criminal justice section of the Canadian Bar Association (Ontario), expressed public reservations.[40] The C.C.L.A., as we have noted, raised serious questions about the Bill. Gwendolyn Landolt appeared before the Justice Committee to attack it.[41] Professor Donald Stuart of Queen's University, a leading academic authority on criminal law, had fundamental concerns.[42] *The Globe and Mail* published a critical editorial. And Toronto lawyer Clayton Ruby wrote a *Globe* article about the Bill in which he denounced it as "unfair."[43]

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[36]G. York, "Lawyers oppose proposed rape law" *The Globe and Mail* (15 May 1992) A-3. See also D. Vienneau, "Beware mixing drink, sex, top defence lawyer warns" *The Toronto Star* (13 December 1991) A-15.

[37]*Supra*, note 30.

[38]*Supra*, note 36.

[39]*Ibid.*

[40]C. Schmitz, "Criminal lawyers fear consent concept in new sex assault bill" *The Lawyers Weekly* (17 January 1992) 1.

[41]G. York, "Sexual assault legislation attacked" *The Globe and Mail* (20 May 1992) A-6.

[42]Letter from Don Stuart to Kim Campbell (25 May 1992). Stuart had difficulty in being allowed to address his concerns to Parliament. He was finally able to speak to a Legislative Committee on 2 June 1992; see Canada, *House of Commons Legislative Committee on Bill C-49 Criminal Code (amdt. – Sexual Assault)*, 3rd Sess., 34 Parl., 1991-92.

[43]"Fifth Column" *The Globe and Mail* (19 May 1992) A-16.

On 2 June 1992, Kim Campbell announced she was prepared to make certain amendments to the bill.[44] But, to amplify a point already made, it is essential to understand that these amendments came about as a result of the criticisms advanced by lawyers. Members of Parliament remained silent throughout. No M.P. had been prepared to face the public wrath of LEAF and its friends.

To the extent that there was a *public* debate about C-49, it had all the characteristics one normally associates with interest group politics – disinformation, poor reporting and nastiness. Every imaginable myth about sexual assault was presented as if it were incontrovertible fact. Repeated reference was made to "inadequate sentences."[45] A newspaper source was quoted as saying, "... unconscious or semi-conscious women are sexually assaulted much more than Canadians believe."[46]

An article which appeared in *The Globe and Mail* in June 1992, just prior to the passage of the amended Bill, is a striking compendium of the most popular myths.[47] The writer, Marian Botsford Fraser, did not bother to offer any sources for her assertions.

> Canadian prostitutes are raped on average 10 times a year. Black women, aboriginal women, elderly women, poor women, refugee women and women with disabilities are disproportionately likely to be victims of rape. Only 10% of sexual assaults are reported.

It is impossible to substantiate any of these assertions for the simple reason that the comprehensive national data which would be required to do so do not exist. To begin with, there are no figures that distinguish between "rape," which I assume is used here in its traditional meaning, and "sexual assault." We do not know how many sexual assaults are, indeed, rapes. Further, there are no national statistics which focus on the specific characteristics of victims of sexual assaults. Even if such statistics existed, we have no way of testing the writer's assertions since she does not tell us what she means, for example, by "elderly women," "poor women" or "women with disabilities." Not, of course, that any of this would have made any difference.

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[44]G. York and J. Sallot, "Campbell agrees to amend bill on sexual assault" *The Globe and Mail* (3 June 1992) A-4.

[45]J. Sallot, "Political battle looms over sex-assault bill" *The Globe and Mail* (13 December 1991) A-6.

[46]Vienneau, *supra*, note 36.

[47]"For a better society – and better sex" *The Globe and Mail* (5 June 1992) A-19. To be fair to journalists, I should add that they are not the only source of myths about sexual assault. For a judicial retailing of many of the myths, see the dissenting judgment of Justice L'Heureux-Dube in *Seaboyer*.

Much of the reporting about Bill C-49 was as sympathetic as the statements of opposition Members. This is how Geoffrey York, writing in *The Globe and Mail*, attempted to explain the existing Canadian law on sexual assault:

> Under current laws, an accused rapist can argue that he honestly believed that a woman consented to sexual intercourse. He can also argue that he was drunk or he obtained consent from a third party such as a husband or pimp.[48]

Leave aside the fact that York apparently did not understand that there was no offence of rape in Canadian criminal law. The assertions he made are not only inaccurate, they are profoundly misleading. Anyone accused of any offence can *argue* anything he or she pleases. The issue, of course, is: Will a court accept that the argument raises a valid defence? The second sentence suggests that all a man accused of sexual assault had to do was stroll into court and say "I was drunk" or "Her husband said it was O.K.," and an obliging judge, no doubt also male, would immediately acquit him.

However, the most consistently misleading aspect of reporting about the Bill was the habit of referring to it as the " no means no bill," as if "no means no" were not already a central characteristic of the law about sexual assault.

Nastiness, in my view, inheres in interest group politics. The essence of interest group politics is this: A group of people form themselves into an organization which then claims to speak on behalf of a particular segment of the population, a segment defined according to sex, or race, or sexual orientation, or some other ascriptive criterion. The political proposals put forward by the organization are then, by definition, a statement of the interests of that segment of the population which the organization claims to represent. Criticism of any such proposals can thus be characterised not simply as disagreement with the organization or its ideas, but as an attack on the segment of the population which the organization says it represents.

Judy Rebick pronounced 12 December 1991, the day Bill C-49 was given first reading, "a historic day for women."[49] Critics of the Bill were regularly vilified. LEAF called them "starkly misogynist." A Quebec spokesperson said opposition to the Bill was "destructive." When Gwendolyn Landolt raised questions before the House of Commons Justice Committee she got into a shouting match with Members of Parliament Barbara Greene and Dawn Black. Greene claimed Landolt was "fighting for an extreme minority of men."[50] A report of a public meeting about the Bill held in Toronto noted, "A man who addressed the forum

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[48]York, *supra*, note 36.

[49]*Supra*, note 45.

[50]*Supra*, note 41.

was booed when he said he felt the proposed legislation would violate the civil liberties of men."[51] LEAF held a meeting in Ottawa to urge Canadian women to fight for Bill C-49. Sheila McIntyre told the meeting, "If women don't support this Bill and the defence bar controls the debate, then the defence bar is going to water it down until no self-respecting woman would want to be a part of it."[52] When the Justice Minister announced amendments to the Bill, McIntyre pronounced herself "very disturbed."[53] Yet, on the Bill's passage it was reported that "women's groups see it as a landmark victory."[54]

Conclusion

It is undoubtedly apparent that I am not enthusiastic about Bill C-49. I intend to comment briefly on three concerns: i) what it says about relations, sexual and otherwise, between men and women; ii) the legal implications of Bill C-49; and, finally, iii) whether it represents a legitimate use of the power of the state in a society which defines itself constitutionally as "free and democratic."

I have, I hope, established the role which Catharine MacKinnon and her ideas played in the creation and enactment of Bill C-49. The effects of both are evident in the wording of the Bill, especially in two sections – 273.1(2)(c) and 273.2(b). The former vitiates any consent given because of the accused's abuse of a "position of trust, power or authority." The latter requires the accused, before he can raise as a defence his belief that the complainant consented, to show that he took "reasonable steps, in the circumstances known to [him] at the time, to ascertain that the complainant was consenting." Both sections were amended from their original versions. Section 273.1(2)(c) originally spoke only of the abuse of a position of "trust or authority." "Power" was added when amendments were made on 2 June 1992. The original s. 273.2(b) was, beyond doubt, the most controversial aspect of C-49. As first presented, it had the word "all" in front of "reasonable steps." Kim Campbell agreed to delete the "all."

Catharine MacKinnon's view is that most, if not quite all, "sexual activity"[55] between men and women arises from abuse of power. Section 273.1(2)(c) does not go this far. It does suggest, however, that a man and woman should be social, economic or political equals before they engage in any sexual activity. Put another

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[51]S. Campbell, "Women urged to fight for changes to sexual assault laws" *The Globe and Mail* (30 March 1992) A-6.

[52]"Women urged to fight for 'No means no' law" *The Toronto Star* (17 February 1992) A-3.

[53]*Supra*, note 44.

[54]S. Fine, "Sexual assault bill wins approval" *The Globe and Mail* (16 June 1992) A-12.

[55]This is the phrase used in Bill C-49.

way, the section appears to question the legitimacy of sexual activity which takes place across class or occupational boundaries.

Catharine MacKinnon also regards consent as "very questionable" and has suggested that a man accused of sexual assault or rape should only be able to raise it as an affirmative defence, that is, he would have the burden of proving that the complainant gave her consent. We can assume that whoever drafted Bill C-49 was aware of s. 11(d) of the *Charter*. This section places the presumption of innocence in criminal proceedings on a constitutional footing. It must have been evident that adopting the MacKinnon perspective without any qualification would simply have meant that the legislation would have been struck down by the first court to deal with it. So a compromise was reached. The accused would not have to prove he had the complainant's consent. He would only have to prove he took "all reasonable steps" to ensure that she was consenting. And then the "all" was removed. Whatever one thinks about the result as a piece of legislation, it still bears the unmistakeable imprint of Catharine MacKinnon.

Is MacKinnon's view of relations between men and women sound? Is it one we should enshrine in our law? My answer to both questions is *No*, not so much because of what MacKinnon thinks about men, but because of what she thinks about women. To MacKinnon, sexual relations between men and women are a zero-sum game – the man wins, the woman loses. The sexual role of women, she has said, is simply to be sexual objects for men. This perspective denies the existence of an autonomous, independent female sexuality. It precludes the possibility of women having an innate and unique sexuality. It is the mirror-image of Victorian views on women. The sexuality of women existed for no reason other than the gratification of men. I cannot avoid expressing my amazement at the fact someone who calls herself a feminist should advocate a point of view which is so condescending towards women. I am, frankly, speechless at the spectacle of the leading Canadian feminist organizations not simply espousing that point of view, but demanding it become part of our law.

Is Bill C-49 a good law? I don't think so. It is poorly thought out and poorly drafted – from two different perspectives. First, its constitutionality is doubtful. Despite the amendments which were made, it will still be a straightforward matter for a defence lawyer to convince a court that the new law goes an unacceptable distance in shifting the burden of proof to the accused. Second, and more to the point, the approach which Bill C-49 takes to sexually violent behaviour against women is fundamentally flawed. The approach is flawed because it fails to recognize two basic failings in the 1983 reforms. Remember that these reforms sprang from the then fashionable feminist view that the essential evil with sexual assault lay in its violent aspect and that its sexual aspect was, if not inconsequential, at least secondary. This was the justification for jettisoning the crime of rape. This was a mistake, one that still awaits rectification. It is as if we

had decided to eliminate the crime of murder, arguing that the offence of assault will do since murders are nothing more than serious assaults. This is true, but it neglects the special heinousness of murder. Our criminal law should, once again, recognize the special heinousness of rape. This is not, to go to the next problem with Bill C-49, to say we should abandon the offence of sexual assault. We should not. But we should differentiate between negligent sexual assault and intentional sexual assault. Such a hierarchy of sexual offences – rape, intentional sexual assault, negligent sexual assault – is not only more coherent and rational, it concretely addresses the seriousness of the offences from the perspective of the women who are their victims.

And what, finally, does Bill C-49 say about the way the power of the state is being deployed in Canada in the 1990s? It is consistent with our enthusiasm for subjecting all social relations to legal regulation that the state should seek to establish rules governing how men and women are to enter into "sexual activity." The model adopted in Bill C-49 will be familiar to anyone who has attended law school. It is the old "offer and acceptance" paradigm, much loved by the writers of treatises on contract law. Bill C-49 contemplates that two people will enter into a process of negotiation at the end of which agreement may be reached to engage in sexual activity. How strange that the model the state now seeks to impose on men and women should be one drawn from the experience of commercial transactions.

I have left the most important question to the end. Will Bill C-49 achieve the objective which its proponents and supporters claimed for it? Will it provide Canadian women with stronger protection against sexual assaults? In trying to answer these questions we confront the sorriest aspect of Bill C-49. I had, naively I must admit, come to believe that we as a society had made progress on some fronts. In particular, I thought we had come to understand that harsh criminal law was neither a moral nor an effective way of dealing with crime. Of course society should punish criminals, but I imagined we had grasped that draconian laws simply do not address the conditions which cause crime. But I guess not. Clayton Ruby's observation about C-49 is absolutely correct: "The cheap and ineffective way [to do something about sexual assault] is to pass blindly tougher laws in an attempt to put more sexual assaulters in jail."[56]

Catharine MacKinnon and Sheila McIntyre are both entitled to hold whatever ideas they like, as is LEAF. All are free to attempt to propagate their ideas. What is disturbing is the ease with which these ideas were translated into law, and not just any law, but criminal law. With only a few voices raised in protest, the ideas of Catharine MacKinnon have become part of our law and Canadians whose behaviour does not conform to her theory of relations between men and women

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[56] *Supra*, note 43.

may find themselves in jail.

When the legislature in a democracy creates criminal law, it should seek to address concrete social reality. It should not respond to changing ideological fashions. The enactment of Bill C-49 does not speak well of the state of our democracy, or of our criminal law.