THE MYTH OF CONSENTING ADULTS: THE NEW SEXUAL ASSAULT PROVISIONS

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The Canadian government has recently (15 August 1992) passed Bill C-49[1] which revised the sexual assault provision of the *Criminal Code*.[2] This legislation is in response to the Supreme Court of Canada's 7-2 decision[3] to strike down s. 276 of the *Criminal Code*, which had limited the court in questioning victims of sexual assault as to past sexual history, and thus violated the accused's *Charter*[4] rights. As indicated in the rationale for this legislation, the new provisions in the sexual assault bill were drafted "... to promote and help to ensure the full protection of rights guaranteed under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms*"; "... to encourage the reporting of incidents of sexual violence or abuse..."; and to reinforce the idea that the Parliament of Canada believes that the admission of the complainant's sexual history as evidence "... should be subject to particular scrutiny, bearing in mind the inherently prejudicial character of such evidence."[5]

The most important feature of this legislation, however, is a definition of what constitutes "consent" in a sexual assault case. The *Criminal Code* now defines consent in s. 273.1(1) as "... the voluntary agreement of the complainant to engage in the sexual activity in question." As well, s. 273.1(2) states that no consent is obtained 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

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

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

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

[4]*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*].

[5]*Supra*, note 1. For example, the amended *Criminal Code*, in s. 276(2), now states that: "no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person ... ." That is, the complainant's past sexual history, whether or not it is with the accused, cannot be used in a trial to persuade the jury that the complainant consented, or that the complainant is not to be believed.

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.

Women's groups have interpreted these changes as a formal endorsement of the populist "no means no" phrase on sexual assault.[6] The Act cautions men and women to ensure that consent is received, and that consent is agreed upon prior to any sexual activity. At first blush these revisions look like an empowering tool for the victims of sexual assault. The Act will require a man to obtain consent from a woman prior to sexual activity, rather than assuming that the woman consents to the activity. The concept of consent as an agreement to be reached, rather than an assumption of interaction, reflects the sexual power imbalance between men and women. However, as useful as these new provisions may look, they are not without their problems.

The following will discuss of the new consent provisions within the context of both sociological and juridical feminist theory, with special attention to the implications these provisions have for women as victims in sexual assault cases.

Feminist Theory and Law

Feminist theorizing in jurisprudence has long emphasized the fundamental patriarchal structure of legal praxis, and the potential dangers such a structure has for women.[7] There are those who argue that the patriarchal structure of law may also obscure class and race differences.[8] The structure of criminal law, however, is systemically patriarchal.[9] This means that this structure is based on hierarchy, power, authority and absolute rules. Criminal law is based on rational, deductive

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[6]R. Currie, "Bill C-49 – The New Rape Law" (1992) 12:2 *Jurisfemme* 1; "New Sexual Assault Legislation a Step Forward" (1992) 4:4 *Leaf Lines* 1.

[7] See especially C.A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Cambridge: Harvard University Press, 1987); C.A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989); C. Smart, *Feminism and the Power of Law* (London: Routledge, 1989); Z. Eisenstein, *The Female Body and the Law* (Berkeley: University of California Press, 1988); N. Naffine, *Law and the Sexes - Explorations in Feminist Jurisprudence* (London: Allen & Unwin, 1990); S. Razack, *Canadian Feminism and the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality* (Toronto: Second Story Press, 1991).

[8]S. Razack, "Exploring the Omissions and Silences in Law Around Race" in J. Brockman and D. Chunn, eds, *Investigating Gender Bias: Law, Courts and the Legal Profession* (Toronto: Thompson, 1993); S. Razack, "Speaking for Ourselves: Feminist Jurisprudence and Minority Women" (1990-91) 4 C.J.W.L. 440; P. Williams, *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991).

[9]N. Naffine, *Female Crime: The Construction of Women in Criminology* (London: Allen and Unwin, 1987); C. Currie and E. Adelberg, *Too Few to Count* (Vancouver: Press Gang Publishers, 1993); see also (1989-1990) 3 C.J.W.L., an issue devoted to the theme of "Women and Crime."

logic, with great appeal to objective and impartial thought.[10]

Law identifies, according to Naffine, a legal person as "... a middle-class man who demonstrates ... a form of 'emphasised' middle-class masculinity."[11] Women, although marginally accepted in society and the workplace, have been specifically excluded from law's legal ideal of a person. It can be argued justifiably that not all *men* are equal within the eyes of the law; for example, lower socio-economic class men experience discrimination and do not have the same privileges as do their upper-class counterparts. However, lower class men may still command the same "enjoyment" of a definition of sexuality as do other men.

Law and "The Body"

Law reproduces the concept of "woman"[12] in a sexualized and subjugated form. In sexual assault cases a woman's body *becomes* evidence in court. The victim is required to repeatedly verbalize her experience. The trauma of rape or sexual assault is relived each time she is asked to relate her experience, despite recent attempts to "understand" this trauma in juridical terms.[13] Part of the problem with this procedure is that a woman's sexuality is continually defined in terms of the male experience of sex. A man's sexual pleasure "... is comprehended as the pleasure of the Phallus, and by extension the pleasures of penetration and intercourse... ."[14]

The Ethic of Care

More recent work in assessing the "feminizing" of law has been the application of the work of Carol Gilligan. Gilligan, a psychologist, in pointing out what she found as differences in the process of moral reasoning on the basis of sex, determined that the differences were due, in part, to what she termed the "ethic

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[10]For a more complete critique of how objectivity, rational thought and deductive logic work against women's needs in the legal system, see G.M. MacDonald, "The Contribution of Social Science Method to Uncovering Sexism in Law" in J. Brockman and D. Chunn, eds, *Investigating Gender Bias: Law, Courts and the Legal Profession* (Toronto: Thompson, 1993).

[11]Naffine, *supra*, note 7 at xi.

[12]For an interesting discussion on the concept of "woman" see D. Riley, *"Am I That Name?" Feminism and the Category of 'Women' in History* (Minneapolis: University of Minnesota Press, 1988).

[13]J.R. Castel, "Prosecutorial Uses of Rape Trauma Syndrome Evidence: A Critical Analysis" (1991) 7 J.L. & Social Pol'y 175.

[14]Smart, *supra*, note 7 at 28.

of care" component of female moral reasoning.[15] Feminist legal scholars have determined that the "ethic of care" constitutes a missing element in legal thought.

For Gilligan, the "ethic of care," is paradigmatically conceptualized as the female perspective on moral reasoning, or a "web." This is contrasted with that of a "ladder" or the male perspective. The idea of a ladder is premised upon autonomy, independence, separateness and logical, rational methods of decision-making. On the other hand, "the web is premised upon a conception of self as attached, interdependent, connected to other persons, and primarily relational."[16] The web is a more cooperative and relational form of decision-making in law and morality.

Gilligan's "ethic of care" involves a "different voice" of women which ties relationship and responsibility with the origins of aggression in the failure of connection. The central component of the ethic of care is "an awareness of the constitutive interconnection and interdependence of the self and other."[17]

Compared with and contrasted to the male "rights-based" approach whereby men are aware of and advocate for their individual rights, the ethic of care approach involves community rights and concern for others as well as for oneself. What is problematic about the "ethic of care" used in feminist legal theory is its potential to essentialize the experience of women as fundamentally more "caring" and nurturing than the ethic of men.

These various precepts and the problems of sexual assault laws are related by three concepts: i) What constitutes a definition of sexuality, ii) Whether or not the female body has an integrity within legal reasoning, and iii) To what extent the possible "ethic of care" may operate to include women's experience. All of these points surface when the question of whether or not a woman actually consented to sexual relations is raised. This issue has become the central point around which cases are often built. The new provisions on consent present a useful opportunity to analyze recent trends in the presentation of women's sexuality in legal discourse. It is to these new provisions, then, that our focus now turns.

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[15]C. Gilligan, *In A Different Voice: Psychological Theory and Women's Development* (Cambridge: Harvard University Press, 1982).

[16]R.F. Devlin, "Nomos and Thanatos (Part B). Feminism as Jurisgenerative Transformation, or Resistance through Partial Incorporation?" (1990) 13 Dalhousie L.J. 123 at 151.

[17]*Ibid.* at 156. An illustration for the use of the "ethic of care" is often the process of mediation in divorce cases.

Consent and Equality: Mutually Exclusive Concepts?

There is little doubt that the new sexual assault legislation is an improvement over the old. To have the onus of proving consent shifted to the alleged offender is, after all, the ideal for most feminist groups. In part, this is due to the fact that women's groups have lobbied the Canadian government for a considerable amount of time to render "agreement" to sexual assault a logical absurdity – one which furthers both the perception of male sexuality as uncontrollable and the perception of female sexuality as existing only for "access" by men.

Whether or not there was agreement has always been the question, so to speak, in criminal law pertaining to rape and sexual assault. The very concept of consent, however, implies an equality that simply does not exist. Consent is often constructed in criminal law as a contractual agreement, a form of compromise reached between two equal parties. What this reflects, of course, is the absurd assumption, both within criminal law and social context generally, that men and women are sexually equal in the social world.

There are two problems with this precept that we would like to address. The first is that of the presumption of equality. The second is that of consent. With regard to the first, the meaning of equality is entirely dependent upon its context.[18] Equality can mean sameness, or treating people under the law in the same way. In criminal law, for example, this can be the assurance that two people receive the same sanction for drunk driving in two different provinces or jurisdictions. In fact, this interpretation was an initial one for s. 15 of the *Charter*.

But this Aristotelian notion is often distorted by interpretation to mean differences: treating two groups differently in order to achieve some sort of equality. Pay equity legislation could be considered an example of this principle. That is, an employer is obliged to pay wage differentials between two groups in order to ensure parity.

What both these concepts miss, of course, is the idea that the two parties in question are very often *not* equal at the door of the courtroom. Unlike the two parties agreeing to a contract in the earlier example, an alleged offender of sexual assault and an alleged victim are simply not "the same" in a court of law. Part of this has to do, one can easily argue, with the gender differences of the parties. Indeed, one can argue that male victims are taken more seriously than female

[18]G.M. MacDonald, An Equality Analysis: Feminist Praxis and the Charter of Rights and Freedoms (Ph.D. Dissertation, University of New Brunswick, 1991) [unpublished]. See also (1991) 4 C.J.W.L., an issue devoted to the theme of "The Continuing Challenge of Equality."

victims, both by the media and by the courts.[19] One could also easily argue, as many have done, that the power differential between men and women is further replicated in the hierarchial manner in which sexual assault is presented in a court of law.

We think, however, that the issue here goes much deeper than this. We think it goes to the very concepts upon which law is based. We refer the reader here to a fascinating account of this thought.

In a recent publication, R.A. Duff questions the role of both *mens rea* and *actus reus* as having fixed theoretical and philosophical bases in the practice of determining guilt.[20] In other words, Duff argues that the concept of *mens rea* as well as the concept of *actus reus* are fundamentally based on an interpretive process that leads to competing frameworks within the courtroom. He argues that *mens rea* is based on intentionality and is subject to the interpretation of the behaviour of the alleged offender rather than an inference about their mental state. He also argues that there are two competing models of human agency, consequentialist and non-consequentialist, at work in the determination of guilt. The first is based on culpability – we hold someone responsible for an act when it is fair to do so. The second examines the standards of culpability which define the nature of the wrongdoing.

Donald Galloway, in a recent review, applauds Duff's unpacking of the interpretive nature of criminal law but critiques his accounting of the "role played by intention in the competing models of agency."[21] One of the more compelling examples given by Duff is an acceptance by the courts that an attempted criminal act is considered to be less serious than a "successful" crime. In other words, do attempted criminal acts differ substantially in intent from successfully completed criminal acts?

Galloway claims that Duff's arguments surrounding intention and agency are not fully developed, as they do not move beyond negligence on the one hand, yet

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[19]We have not researched this point carefully, but it occurs to us that the recent (within the past five years) spate of accusations of sexual molestation in training schools and orphanages across the country, have generated wide media attention for two reasons: many are horrified at the abuse of the young, whether they be female or male, but many more are titillated by the fact that these cases involved same-sex abuse. The only fact that has actually changed over time is public exposure. Many of the cases are 20 years or more old, and the perpetrators (no surprises here!) are white, heterosexual men.

[20]R.A. Duff, *Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law* (Oxford: Basil Blackwell, 1990).

[21]D. Galloway, "Criminal Liability and the Centrality of Intention" (1992) 5 Can. J. of Law & Jur. 143 at 145.

seem to have "a distinction without a difference" on the other. That is, the difference between the non-consequentialist, who recognizes the distinction between an intended action (acting in order to produce a result) and intentional action (acting despite the fact that a result will occur), and the consequentialist, who sees no difference between the two. Galloway uses this example to critique Duff as to the unexplained role of intention in his work.

We agree. Most of Duff's analysis on this point does not move beyond a liberal rationalist paradigm as an explanation of intention. Where Duff does shine, however, is in the most obvious example of his thesis, the crime of rape. He argues that an honest mistake of consent does not negate liability for rape.

We argue that responsibility for an action is what constitutes the reverse onus on consent in the new provisions. But do the provisions stand up to this test? Upon examining the wording of the new legislation, one can see that in s. 273.1 consent is not assumed, particularly if the victim is unable to provide consent, has been coerced to provide consent, or changes her mind and indicates so. So far, so good. But in section 273.2(b), we discover that it is not a defence to a charge if "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 question arises, what are "reasonable steps"? Is there a possibility that the accused can convince the court that reasonable steps may also include that which to someone else constitutes an abuse of power? This is more than mere semantic nitpicking. We have very recent evidence that consent is still an ambiguous term.

In a recent Nova Scotia case involving a police officer, Judge Felix Cacchione found that, despite the fact the officer had sexual relations with a woman in his police cruiser, there was no evidence that the woman did not consent.[22]

This example denies the true meaning of consent, which is to agree freely to an action. This case implies, for example, that one of these authors could have sexual intercourse with a student in her classroom, and that it would be considered an act between consenting adults. Taken in the context of where and how this action occurred, one can easily understand that as the action took place in the police officer's vehicle, it was an explicit exploitation of power as well as a breach of professional ethics. The police officer's cruiser is not only a public vehicle, it

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[22]*R.* v. *Levandier* (24 December 1992) [unreported]. According to B. Dorey, "Dartmouth Cop Acquitted of Sexual Assault" *The [Halifax] Chronicle Herald* (26 December 1992), the judge weighed the evidence of the complainant that she was afraid of the accused because he was "an armed, uniformed police officer" against the evidence of the accused that the women initiated the sexual contact.

is a symbol of law and order. As taxpayers we do not want to see a vehicle explicitly intended for the purpose of enforcing the law and maintaining order to be used as a personal bedchamber by a police officer.

This brings us back to consent. Was there no understanding in this case of the power relationship between men and women regarding sexual activity? Was there, similarly, no understanding of the abuse of power? This decision demonstrates how the spirit of the law can be subordinated to the letter of the law. Although the case was decided under the old legislation, it is a clear illustration that in the realm of equality and consent, women still have a long, long way to go.