FLAWED, FALLACIOUS BUT FEMINIST: WHEN ONE OUT OF THREE IS ENOUGH

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Criminal legislation should be fair, unbiased and well-reasoned. There is an argument to be made that this standard exceeds the capability of the federal legislative body, as evidenced by such monumental statutory disasters as the wiretap provisions, the breathalyzer provisions, and the previous sexual assault provisions in the *Criminal Code*.[1] Opponents of this view will find little comfort or support in the new sexual assault amendments. The new provisions are unfair, biased in the extreme, and so illogical as to be embarrassing. They are a classic example of what happens when priority replaces equality, when ideology replaces logic, when wish replaces thought.

Section 1 of *An Act to amend the Criminal Code (sexual assault)*[2] amended the *Criminal Code* provisions respecting sexual assault in two areas. First, the element of consent was codified in considerable detail. Second, the Act amends the law relating to evidence of previous sexual activity in consequence of the Supreme Court of Canada's decision in *R.* v. *Seaboyer*.[3]

Consent

The new s. 273.1(1) of the *Criminal Code* now provides a definition of consent as "the voluntary agreement of the complainant to engage in the sexual activity in question." It goes on to exclude from that definition:

(a) a third-party's agreement;
(b) an agreement by a complainant incapable of consenting;
(c) an agreement induced by abuse of a position of trust, power or authority;
(d) a lack of agreement expressed by words or conduct;
(e) a retraction of the agreement to engage in sexual activity.[4]

Then, out of fear of an unforeseen loophole, the section also provides that the foregoing do not limit the circumstances in which no consent is obtained.

These provisions are uncontroversial because they essentially codify the

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

[2]S.C. 1992, c. 38 (proclaimed in force 15 August 1992).

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

[4]*Supra*, note 1 at s. 273.1(2).

obvious and undisputed. Initial drafts of these provisions were controversial, but they were amended after spirited opposition pointed out their unfairness and lack of logic. For example, previously, the complainant's incapability to consent (s. 273.1(2)(b)), focused expressly upon intoxication and other unspecified "conditions," as opposed to requiring the trier of fact to simply consider all relevant matters in assessing whether the complainant was capable of, and in fact did, consent. Furthermore, s. 273.1(2)(c) was phrased solely in the passive voice in terms of the complainant's reason for engaging in the conduct, as opposed to the accused's conduct. This subsection still contains no requirement that the accused "deliberately," or with any culpable mental state, misuse his or her position with respect to the obtaining of consent, but at least the present wording of "the accused induces the complainant" would clearly imply such a requirement.

Another flawed provision is s. 273.2 which provides:

> 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.

It is fair to point out that this section originally required the accused to take "*all* reasonable steps." It is not clear how much difference the dropping of the "all" really makes. What remains wrong with the provision, and what any fair-minded person of either sex would immediately perceive, is its invidious asymmetry. This asymmetry perpetrates the assumption that only the male in a sexual encounter bears responsibility to ensure that the other party is consenting, and only he should be held responsible for any resulting dispute as to consent.

A sexual encounter and its aftermath, unlike a real estate closing, may involve ambiguity, ambivalence, second-thoughts, disappointments, and failed expectations, not to mention the variable memory over time that human beings have regarding emotional events. But only the male is to endure the risks associated with these realities. Section 273.2(b), according to government propaganda, was the "no means no" provision. Nowhere, as far as I am aware, is it challenged that "no" means "no," except in the nightmares of radical feminists and on some college campuses where a few students may so profess because they seize an opportunity to verbalize in an anti-social fashion. The slogan assumes that a "no" has been stated. Further, this slogan looks at the word "no" in isolation, as if a sexual encounter is a one-question, one-word transaction. A sexual encounter is not a true or false, short answer quiz. Rather, in real life it is more like a long essay question, and at times a very hard one at that. The legislation really goes much further than "no means no," and in effect provides: everything except an express

"yes" means "no," and even "yes" means "no" when accompanied by a subsequent retraction.

Several thousand years ago Aristotle claimed women were lacking in what he called the "deliberative" faculty. Why would women possibly wish to return to a view of themselves as anything less than fully responsible agents who, along with their companion sex, suffer the risks and unfairness of reality in all its aspects?[5]

A philosophy of fairness and equality would have also added a subsection (c) that would go a long way towards eliminating the anti-male cast of the legislation:

> (c) the complainant took reasonable steps, in the circumstances known to the complainant at the time, to convey to the accused that the complainant was not consenting.

Of course, there is neither room, nor need, for such a provision in a framework which irrefutably presumes that the female will always behave impeccably, without fault, and never be tentative, ambiguous or mistaken. Under the current scheme, the female's behaviour is completely irrelevant because only the conduct of the male is to be judged. That response to a historical context that viewed the matter equally asymmetrically the other way, and arguably judged only the female, is nevertheless just as wrong as its predecessor. The new sexual assault amendments simply change who is being unfair to whom, and leaves the essential unfairness unaltered. This legislation is not fair, principled, nor an accurate measure of reality.

Rape-Shield

In *Seaboyer*, the majority of the Supreme Court found that the prior rape-shield provision in s. 276 of the *Criminal Code*, which restricted the right of an accused on a trial for a sexual offence to cross-examine and adduce evidence of a complainant's sexual conduct on other occasions, violated ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms*[6] and was not saved by s. 1.

Professor R.J. Delisle, in an excellent article,[7] has analyzed the new sexual assault legislation and shown that it essentially tracks the Supreme Court's judgment in *Seaboyer*. In other words, with *Seaboyer*, the provisions are unnecessary (aside from minor procedural modifications) because Canada's

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[5]The reference to Aristotle and the accompanying thought originate in J.B. Elshtain, "Battered Reason" (5 October 1992) 207 *The New Republic* 25 at 29.

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

[7]"Potential Charter Challenges To The New Rape Shield Law" (1992) 13 C.R. (4th) 390.

common law now has the same effect. But the provisions adopt one simply astounding feature that originated in *Seaboyer*. Professor Delisle refers to it as "a major modification."[8] It might better be called an "unheard of, completely unfair and illogical, gigantic leap overboard."

The change is this: Previous rape-shield legislation forbade the introduction of the complainant's sexual activity "with any person other than the accused." As Professor Delisle shows, the authorities and articles relied on by the Supreme Court of Canada in *Seaboyer* all have such a formulation.[9] But, without any comment or explanation, the Supreme Court in *Seaboyer* and new s. 276 both modify this *to include other sexual activity even with the accused*! What a rewriting of reality; now, even other *ex hypothesi* consensual sexual activity with *the very person charged* is presumptively inadmissible to decide a claim by the accused that the complainant consented on the occasion in question! This is truly logic "mugged" by ideology.

Those concerned with getting this part of the legislation struck down as violating the *Charter* (and giving the Supreme Court of Canada a chance to correct its error) will find Professor Delisle's article invaluable. Even those who might need some persuading that other consensual sexual activity with the accused is clearly relevant to whether there was consent on the occasion in question, will find Professor Delisle's analysis, examples and quotations clear and persuasive.

What must be pointed out for my purposes is simply that this legislation was generated by a mindset that cannot see as *relevant* (not determinative, of course), to an issue of consent, any difference between the complainant's consenting to sexual acts with other persons, and her consenting to sexual acts with the same accused on other occasions. This mindset is the one that sees a sexual event as a true or false test, a black and white judgment, each occasion of sex existing in a vacuum, unaccompanied by the participants' histories and surrounding events and contexts.

Conclusion

Stepping back, what becomes clear is that, with regard to males and females, equality has long since vanished in the rear-view mirror, to be replaced by preference as a destination. The following quote, from Elshtain, illustrates the ideological underpinning of such lopsided legislation:

> Fairness itself comes to seem a paltry thing in contrast to empowerment, as can

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[8] *Ibid.* at 394.

[9] *Ibid.*

> be seen increasingly in academic feminist discourse. At one conference I attended, several women vehemently insisted that it would be best to jettison the notion of "equality" altogether. We want "nothing of equality," one participant exclaimed. We want nothing of this "male standard." What she aimed to put in the place of political fights about equality was a "celebration of the female will to power." This seemed a tad murky at best and not a little disquieting, considering how the will to power has worked itself out, politically, in the past. But the spectre that is haunting feminism, the spectre of difference constructed as a principle designed to trump all other principles, pops up everywhere these days.[10]

For those that prefer their criticism in more muted terms, Eve Drobot's eloquent review of Amy Friedman's, *Nothing Sacred: A Conversation With Feminism*, concludes with the following:

> Where feminists once wanted to liberate, they now want to legislate. Where feminists once wanted to raise consciousness, they now want to proscribe language. Where women once wanted to celebrate heterosexuality, they now want to identify it as a metaphor for violence. The movement Friedman writes about might call itself feminism, but she has persuaded me it's nothing more than punitive Puritanism.[11]

This Act is very much in that spirit. It goes beyond reasoned and fair provisions that would represent a legitimate legislative response to the real problem of violence in the sexual context. It goes beyond an appropriate and credible response by the criminal justice system. In doing so, this legislation will leave real problems unattended, while the problems created by the legislation itself will divert attention and effort in the years ahead. On a personal note, it also leaves male "small-l" liberals at an uncomfortable loss, wanting to support equality, but unable to find that concept even in the running.

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[10] *Supra*, note 5 at 25.

[11] "An Impassioned Plea for Sanity" *The [Toronto] Globe and Mail* (7 November 1992) C-10.