LAST AMONG EQUALS: WOMEN'S EQUALITY, *R V BROWN*, AND THE EXTREME INTOXICATION DEFENCE

Kerri A Froc and Elizabeth Sheehy[1]

Introduction

The ss 7, 15 and 28 *Charter* rights of women and girls to physical, psychological and sexual integrity are directly at issue when their perpetrators stand trial for crimes of violence against them. However, these constitutional protections have never been given much purchase in the Supreme Court of Canada's sexual violence jurisprudence on s 7 *Charter* fair trial rights and criminal fault standards.[2] At best, courts have paid lip service to women's s 7 "interests" in privacy and equality and in encouraging their reporting of crimes, but have failed to incorporate them into the historically venerated principles of fundamental justice that protect accused persons.[3]

Yet a trilogy of recent cases on the defence of extreme intoxication, *R v Brown*,[4] *R v Sullivan*, and *R v Chan*,[5] jettisoned even this superficial consideration of women's rights in the context of accused men's s 7 constitutional challenge. In *Brown*, the Court considered the constitutionality of *Criminal Code* s 33.1, enacted in 1995 in response to the Supreme Court's 1994 decision in *R v Daviault*.[6] Section 33.1 sought to curtail the defence in cases of self-induced extreme intoxication for crimes of violence, in the interests of protecting the security of the person and equality rights of women and children, and ensuring men's accountability for violence.

---

[1] Associate Professor, Faculty of Law, University of New Brunswick; Professor Emerita, Faculty of Law, University of Ottawa. We would like to thank UNB law student, Emma Pandy-Szekeres for her research assistance in the writing of this article. Completing this article would not have been possible without the contribution of Professor Isabel Grant, Allard School of Law, University of British Columbia, who read innumerable drafts and provided valuable suggestions and advice. Any mistakes are, of course, our own.

[2] *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[3] *R v Mills*, [1999] 3 SCR 668, 29 DLR (4th) 161.

[4] *R v Brown*, 2022 SCC 18 [*Brown* 2022].

[5] *R v Sullivan*, 2022 SCC 19.

[6] [1994] 3 SCR 63, 118 DLR (4th) 469 [*Daviault*].

Penning a unanimous decision striking down the law as allowing the conviction of the "morally innocent," Justice Kasirer found s 33.1 violated ss 7 and 11(d). He declared that women's countervailing rights could not even be considered in the s 7 analysis because women's equality and human dignity "interests" were not compromised by state action, but rather by individual accused men.[7] Women's equal rights to trial fairness, equality and personal security, were to be treated as "societal interests" under s 1. But, consistent with prior s 7 jurisprudence, the Court found that the s 7 violation posed by s 33.1 could not be justified under s 1.

In resiling from even the modest recognition that women who have experienced men's violence have relevant rights worth considering as part of the core principles that lie at the heart of the criminal justice system under s 7, the Court has truly placed women last among equals. This development would be anathema to the women who fought tirelessly to entrench *Charter* s 28, which guarantees rights equally to "male and female persons" "notwithstanding" anything else in the *Charter*. One of s 28's most important purposes was protective: to ensure that women's rights are not devalued or sacrificed for the newly entrenched constitutional rights bestowed primarily for the benefit of men, who are the vast majority of criminal accused.

In this article, we first summarize *Brown* and its companion cases of *Chan* and *Sullivan*. Here we also provide context for this trilogy of cases by describing the 1994 decision in *Daviault* that was the impetus for s 33.1. Second, we analyze *Brown*, criticizing it for its likely impact on crimes of violence against women, for its assertion that no state action is involved when men invoke the extreme intoxication defence and the consequent devaluation of women's constitutional rights, and for the failure to account for the role of s 28 in the interpretive process. Third, we describe Parliament's response to the *Brown* decision: the rushed passage of Bill C-28, which amended *Criminal Code* s 33.1 one month after *Brown*, the refusal to consult feminist lawyers and organizations in a meaningful way, and the flawed legislation it produced. Fourth, the article turns to a discussion of what the Court and Parliament missed: an opportunity to consider a broader, equality-infused understanding of the principles of fundamental justice in s 7 and the justification analysis under s 1 using s 28 as an interpretive guide. Fifth and finally, we argue that this constitutional re-grounding could have supported a stronger version of s 33.1, in contrast to that found in Bill C-28. It is our hope that the perspective we offer may be of assistance to Parliament, when it engages in the review of the revised version of s 33.1 promised by the government at the time of Bill C-28's passage, and to judges, as an illustration of what an equality-infused approach to s 7 might look like.

Part I: *R v Brown, R v Sullivan,* and *R v Chan*

At issue in all three cases before the Supreme Court was the constitutionality of s 33.1 of the *Criminal Code*. This section was enacted in 1995 in response to *R v Daviault*, wherein the Supreme Court of Canada decided that a defence of extreme intoxication

[7] *Brown* 2022, *supra* note 4 at para 70.

must, as a matter of the rights guaranteed in ss 7 and 11(d) of the *Charter*, be available to a man accused of a brutal rape of a woman in her own home. The Court relied on the expert evidence accepted by the lower court finding that Henri Daviault, a chronic alcoholic, was in a state akin to automatism when he lifted a 65-year-old family friend from her wheelchair and sexually assaulted her on her bed, after he had consumed several beers and most of a bottle of brandy.[8]

The Court found that the common law rule that precluded Daviault from relying on his own intoxication to raise a reasonable doubt about whether he had the necessary intent and voluntariness to be found guilty of sexual assault, a "general intent" offence, was in violation of ss 7 and 11(d) and therefore unconstitutional. The overturning of his conviction caused a *Globe and Mail* journalist to accuse the Court of "having lost touch with reality".[9] The scientific community at large also criticized the decision, rejecting the contention that consumption of alcohol alone could lead to an automatistic state, as that term was understood medically.[10]

Given the public outrage spurred by the decision and its commitment to women's equality,[11] the federal government added s 33.1 to the *Code*, with the support and advice of the Canadian women's movement. Section 33.1's purpose was to promote the "equal participation of women and children in society" and their entitlement to "full protection of the rights guaranteed under ss 7, 11, 15 and 28".[12] Section 33.1 excluded the defence of extreme intoxication from being advanced in relation to general intent crimes of violence. It stated that self-induced intoxication resulting in the inability to form the general intent or voluntariness for a crime was not a defence where the accused "departed markedly" from the reasonable standard of care because their state of self-induced intoxication rendered "the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person."

Minister of Justice Allan Rock testified before the Standing Committee of Justice and Legal Affairs, when Bill C-72, amending the *Criminal Code* to add s 33.1, was at Committee stage. He denied that the bill was a "contradiction or reversal of *Daviault*":

> The bill responds to the court's invitation by *creating* a basis of criminal fault in the context of intoxication, and *for the first time* it would set out a

---

[8] *Daviault*, *supra* note 6.

[9] Sean Fine, "Has the Highest Court Lost Touch With Reality?" *The Globe and Mail* (8 October 1994) D2.

[10] See Bill C-72, *An Act to amend the Criminal Code (self-induced intoxication)*, 1st Sess, 35th Parl, 1995, Preamble (assented to 13 July 1995) (passed within a year of *Daviault*) [Preamble to Bill C-72]. See also Harold Kalant, "Intoxicated Automatism: Legal Concept vs. Scientific Evidence" (1996) 23:4 Contemporary Drug Problems 631 (the article was a submission to the Commons Committee examining Bill C-72 on 13 June 1995).

[11] Isabel Grant, "Second Chances: Bill C-72 and the Charter" (1995) 33:2 Osgoode Hall LJ 379 at 381.

[12] Preamble to Bill C-72, *supra* note 10.

> standard of care in the field of self-induced intoxication. People who voluntarily become so intoxicated they lose control of their behaviour…breach the standard of care generally recognized in Canadian society.
>
> The bill defines this breach as criminal fault sufficient for criminal liability. The fault would prevent the intoxication defence from being applicable, since the intoxication itself would be the basis of criminal fault for the offence.[13]

Thus, s 33.1 was intended to articulate a standard of criminal fault regarding extremely intoxicated offending, but to limit criminal liability to those cases involving violence or a threat of violence.

The Court heard *Brown*, *Chan* and *Sullivan* together to resolve a conflict in the jurisprudence regarding the constitutionality of s 33.1. *Brown* emanated from the Court of Appeal for Alberta, which had upheld the constitutionality of s 33.1, quashed Brown's trial acquittal, and substituted convictions for break and enter and aggravated assault. *Sullivan* and *Chan* emanated from the Court of Appeal for Ontario, which had struck down s 33.1 as unconstitutional and overturned their convictions, acquitting Sullivan of aggravated assault and assault with a weapon, and sending Chan back for re-trial on charges of manslaughter and aggravated assault.

The facts of *Brown* were that the accused had attended a house party and "snacked" on magic mushrooms from a shared sandwich bag throughout the evening; he also consumed between 6-7 mixed drinks and a number of beers, bringing his total consumption to 14-18 alcoholic drinks.[14] As a result, he entered a state of "substance intoxication delirium", removed all of his clothing, left his friend's house and broke into the home of a neighbour, a female university professor. When she came out of her bedroom to investigate the disturbance, Brown attacked her with a broom handle, leaving her with a broken hand and other injuries requiring surgery and intensive physiotherapy, an ongoing disability, and post-traumatic stress disorder. He was apprehended after breaking into another residence.[15] Despite Brown's consumption of copious amounts of alcohol, his trial judge accepted that the cause of his delirium was the mushrooms and acquitted him based on the extreme intoxication defence.[16]

In Chan's case, he attended a bar with a group of friends to drink beer and watch a hockey game. Some of the group, including Chan, retired to a friend's basement and acquired some magic mushrooms. The Crown's expert testified that Chan told him that he consumed four times the amount of magic mushrooms he had

---

[13] House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs, 35-1, No 98 (6 April 1995) at 98:4 [emphasis added].

[14] *R v Brown*, 2020 ABQB 166 at paras 38 and 74 [*Brown* 2020].

[15] *Ibid* at para 90.

[16] *Ibid* at para 87.

previously eaten[17] —two "doses"— and twice as many as his companions. He began hallucinating that he was God, with a plan to carry out. He left the party, broke into his father's home, and repeatedly stabbed his father with a butcher knife, causing his death. Then he attacked his father's female partner with the knife, stabbing her in the abdomen, the chest, the back and arms, and the eye, causing her the loss of her right eye as well as multiple injuries.

Sullivan was abusing a prescription anti-depressant—Wellbutrin. He had already experienced hallucinations on a prior occasion and maintained a belief that aliens had invaded Earth. He had a previous psychiatric and substance abuse history, and had tried to break into his mother's home several years earlier and threatened her; the trial judge also referred to a report that he had assaulted his mother eight months before the knife attack, although the report did not indicate that it was drug-related.[18] He swallowed 30-80 tablets in what he described as a suicide attempt,[19] then attacked his mother, stabbing her six times with a knife, and leaving her with serious injuries. She died more than two years later of what were said to be unrelated causes.

The Supreme Court delivered its substantive decision on s 33.1's constitutionality in *Brown*. It rejected former Justice Minister Rock's Committee testimony that s 33.1 established a new definition of criminal fault for extremely intoxicated violence, instead casting s 33.1 as establishing "conditions of liability." It began its constitutional analysis by deciding that women's constitutional rights could not be considered at the stage of determining whether the accused's s 7 rights were violated by s 33.1 because there was no state action that trenched upon women's rights—it was male individuals, not the state, who had done so.[20] Instead, women's "interests" could only be considered in the s 1 justification analysis.

The Court insisted that limiting consideration of women's ss 7, 15 and 28 rights to the s 1 analysis "does not 'relegate' the equality, security and dignity interests of women and children to second order importance."[21] It expressed agreement with the position that "s 1 should be seized upon by this Court to reinforce the accountability and protective objectives of s. 33.1 from the perspective of the particular vulnerability of women and children to the intoxicated violence."[22]

The Court found that s 33.1 violated s 7 by attaching criminal liability to violence or threats of violence committed while the accused was in a state of self-induced extreme intoxication, because the Crown need not prove *mens rea* for the

---

[17] *R v Chan*, 2018 ONSC 7158 at para 119 [*Chan* 2018].

[18] *R v Sullivan*, [2016] OJ No 6847 (QL) (ON SCJ) at para 43, 2016 CarswellOnt 21197 [*Sullivan* 2016].

[19] *Ibid* at paras 25, 60–62. The trial judge, however, found that there were "considerable problems with Mr. Sullivan's credibility and reliability" (*ibid* at para 68).

[20] *Brown* 2022, *supra* note 4 at para 70.

[21] *Ibid* at para 71.

[22] *Ibid*.

charged offence or the voluntariness of the underlying *actus reus*. According to the Court, s 33.1 failed to require proof of some minimum fault element on which to ground criminal liability: self-induced extreme intoxication is not itself a criminal offence and so could not provide the fault element. The Court also rejected the proposition that an extremely intoxicated person who becomes an automaton necessarily displays sufficient fault for criminal responsibility because someone could find themselves in such a state if they experienced an entirely unforeseeable reaction to a drug taken by prescription or in moderation. The Court concluded that, "On its face, not only does the text of s 33.1 fail to provide a constitutionally compliant fault for the underlying offence set out in its third paragraph, it creates what amounts to a crime of absolute liability."[23] Absolute liability combined with the possibility of imprisonment has long been held to violate s 7 of the *Charter*.[24]

The Court also ruled that s 33.1 violated the presumption of innocence in s 11(d) by relieving the Crown of the burden of proof beyond a reasonable doubt of the *actus reus* and *mens rea* elements of a given offence. The section improperly substituted the fact of self-induced intoxication leading to violence for these elements:

> While an accused who loses conscious control and assaults another person after a night of substance abuse is undoubtedly morally blameworthy, s. 33.1 faces obvious difficulties. It does not discern, for example, between the accused and morally blameless individuals who voluntarily consume legal intoxicants for personal or medical purposes. It therefore cannot be said that, "in all cases" under s. 33.1, the intention to become intoxicated can be substituted for the intention to commit a violent offence. Moreover, even in the case of the accused who voluntarily ingested an illegal drug like magic mushrooms, proof of self-induced intoxication does not lead inexorably to the conclusion that the accused intended to or voluntarily committed aggravated assault in all cases.[25]

Turning to the s 1 justification analysis, the Court's professed enthusiasm for using this section to reinforce women's rights faltered. The Court ruled that s 33.1's legislative objectives of protecting victims of violent crime, particularly vulnerable victims like women and children, and ensuring that those who commit violence while extremely intoxicated are held accountable for their actions were sufficiently pressing and substantial that they could justify over-riding important constitutional rights. It also found a rational connection between s 33.1 and the goals of protecting victims by deterring extremely intoxicated violence and holding offenders accountable for their actions.

Yet, s 33.1 did not impair the accused's rights minimally in pursuit of the legislative objectives. Justice Kasirer stated that there were alternate legislative

---

[23] *Ibid* at para 9.

[24] *Reference Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) 536.

[25] *Brown* 2022, *supra* note 4 at para 104.

responses that impaired rights to a lesser degree, namely a stand-alone offence of criminal intoxication or a new version of s 33.1 that incorporated a criminal negligence standard of fault requiring proof of foreseeability of loss of control by reason of the intoxicant ingested and proof of foreseeability of risk of non-trivial, non-transient harm to another. The Court noted that the first option could not fulfill Parliament's objective of accountability for offenders because the accused would not face the stigma of conviction for the violence committed or full liability in terms of sentence because such an offence would inevitably include a "drunkenness discount."[26] It suggested that a reformed s 33.1 that incorporated foreseeability of both loss of control and harm to another would meet the legislative objectives, while stating repeatedly that Parliament was entitled to deference in its response to the ruling.[27] The Court proposed that "Parliament may also wish to study and regulate according to the nature and properties of the intoxicant",[28] in order to create a legislative regime for a criminal law response to extremely intoxicated violence.

The Court also found that s 33.1 failed the proportionality test. Although the Court could identify multiple salutary effects of s 33.1, including the affirmation of women's equality rights, the denunciation of extremely intoxicated violence, and increasing public confidence in the criminal justice system, it also listed what it regarded as extremely serious deleterious effects: the risk of wrongful conviction where the accused does not have the requisite *mens rea* or *actus reus* for the crime charged, and the risk that the accused would be denied the presumption of innocence. The Court described these effects as violative of "sacrosanct" constitutional principles,[29] and added to the list of negative effects the potential for imposition of punishment that is disproportionate to the blameworthiness of the accused's act.

Weighing the salutary and deleterious effects against each other, the Court concluded that, "The limits imposed on the most fundamental *Charter* rights in our system of criminal justice outweigh societal benefits that are already in part realized, and which Parliament can advance through other means. The weight to be accorded to the principles of fundamental justice and the presumption of innocence cannot be ignored here."[30] The Court, therefore, reinstated Brown's acquittal, relieving him of all criminal consequences for his attack on the victim. In doing so, the Court declined to rule on whether alcohol alone could ever support an extreme intoxication defence, leaving that issue to be determined on the facts and evidentiary record in individual cases.[31] It affirmed both Sullivan's acquittal entered by the Court of Appeal for Ontario and that court's order to send Chan back for re-trial. Ultimately, the Crown declined

[26] *Ibid* at para 125.

[27] *Ibid* at paras 140, 142.

[28] *Ibid* at para 140.

[29] *Ibid* at para 159.

[30] *Ibid* at para 166.

[31] *Ibid* at paras 61–62.

to pursue Chan's prosecution based on the availability of the extreme intoxication defence.[32]

Part II: The Implications of *Brown*

A. Disproportionate impact on crimes of violence against women

Section 33.1 was in large part a legislative response to the concern that the extreme intoxication defence would be used by men for crimes of violence against women. The Court in *Brown* acknowledged, in its s 1 analysis, that "The evidence [before Parliament] highlighted the strong correlation between alcohol and drug use and violent offences, in particular against women, and brought to the fore of Parliament's attention the equality, dignity, and security rights of all victims of intoxicated violence with particular attention given to vulnerable groups, including women and children."[33]

An immediate consequence of *Brown* will likely be increased resort to the extreme intoxication defence by men accused of crimes of violence against women, with further effects on the reporting, investigation and prosecution of these crimes. The relationship between substance abuse and violence against women is documented in the literature, but we acknowledge that none of the data speaks directly to the question of "extreme intoxication," because this concept was created by judges, not medical experts. Although the incidence of alcohol abuse and violence against women has been studied extensively, studying the effects of the ingestion of countless other drugs that can produce a state akin to automatism is a complex proposition.[34]

From the evidence available, it appears that drug-induced psychosis presents at least a risk of violence to others because the symptoms can include delusions, anxiety, fear, hallucinations and paranoia, among others. For example, one study reporting on drug-induced psychosis and hospital admissions found that 77% of those admitted were men, and 43% of these admissions involved violence.[35] Some studies suggest that between 30 and 75% of sexual assault perpetrators had consumed alcohol at the time of the offence,[36] and others report that perpetrators mixed alcohol and other

---

[32] Betsy Powell, "He was found guilty in 2018 of fatally stabbing his father while on magic mushrooms. On Thursday, the charges were dropped" *The Toronto Star* (4 August 2022), online: <https://www.thestar.com/news/gta/2022/08/04/he-was-found-guilty-in-2018-of-fatally-stabbing-his-father-while-on-magic-mushrooms-on-thursday-the-charges-were-dropped.html>.

[33] *Brown* 2022, *supra* note 4 at para 111.

[34] Kathleen Crebbin et al, "First episode drug-induced psychosis: A medium term follow up study reveals a high-risk group" (2009) 44:9 Social Psychiatry and Psychiatric Epidemiology 710 at 711–12. See also Sharon M Boles & Karen Miotto, "Substance abuse and violence: A review of the literature" (2003) 8 Aggression and Violent Behaviour 155.

[35] Crebbin et al, *supra* note 34.

[36] Antonia Abbey, "Alcohol and Sexual Violence Perpetration" (December 2008, online (pdf): *National Online Resource Center on Violence Against Women*

drugs.[37] Men who abuse their intimate partners show similarly high consumption patterns of alcohol and drugs. One study found that 86% of men who battered women consumed alcohol and 14% consumed cocaine on the day of the incident,[38] and that 45% of family members disclosed that the batterer was intoxicated by drugs or alcohol on a daily basis.[39]

Judges, too, have acknowledged that intoxicated violence against women is pervasive. For example, one judge considering the constitutionality of s 33.1 stated, "The statistical data showing the extent to which women (and more particularly Aboriginal women) suffer from intoxicated violence is stunning."[40] "In Nunavut… the judges of this Court rarely see a case of violence against a woman… —where the offender is not intoxicated."[41]

The perpetration of violence by accused men in the state of extreme intoxication follows similar patterns to other intoxicated violence. Men offend primarily against women, and primarily against those whom they know or with whom they are in a relationship, as the prior assaults by Sullivan against his mother illustrate.[42] Aileen McColgan concludes, upon her review of UK automatism cases:

> [W]hat is striking about many of the cases in which (male) defendants plead the defences under discussion is precisely that their victims have been women intimates. Whether acting in an apparently motiveless manner while unconscious, asleep or otherwise impaired, the attacks perpetrated by these appellants appear consistent with the typical pattern of male violence against women.[43]

It should not be surprising, therefore, that the *Daviault* decision was quickly taken up by lawyers defending men accused of violence against women in the brief opening the case created between 1994 and 1995. While we acknowledge that reported decisions

---

<https://vawnet.org/sites/default/files/materials/files/2016-09/AR_AlcPerp.pdf> at 1 (citing multiple studies).

[37] Crebbin et al, *supra* note 34.

[38] Roger A Roffman et al, "The Men's Domestic Abuse Check-In. A Protocol for Reaching the Nonadjudicated and Untreated Man Who Batters and Who Abuses Substances" (2008) 14:5 Violence Against Women 589 at 590. See also William Fals-Stewart, James Golden & Julie A Schumacher, "Intimate partner violence and substance use: A longitudinal day-to-day examination" (2003) 28 Addictive Behaviours 1555.

[39] Roffman et al, *supra* note 38 at 590.

[40] *R v SN*, 2012 NUCJ 2 at para 48.

[41] *Ibid* at para 49. We recognize the social and economic factors that contribute to men committing intoxicated violence against Indigenous women in this context, including poverty, sexism, racism and colonization.

[42] *Sullivan* 2016, *supra* note 18.

[43] Aileen McColgan, "General Defences" in *Feminist Perspectives on Criminal Law*, Lois Bibbings & Donald Nicolson, eds (London: Routledge-Cavendish, 2000) 137 at 139–40 [case citations omitted].

and those described in the media cannot represent a complete account of all cases in the criminal courts because the vast majority are unreported, these decisions likely represent the tip of the iceberg—the visible part of a much bigger phenomenon. But even if not fully representative of the larger context of unreported cases, these reported decisions have particular precedential value for judges and inform defence lawyers' legal arguments.

Significantly, in the 12 months between the release of the *Daviault* decision and the coming into force of s 33.1, the defence was advanced at least 29 times in reported decisions. Twelve of these cases involved clear violence against women: six sexual assaults; five spousal assaults; and the murder of a woman in the sex trade. Another two involved attacks on women: one man brutally beat his mother; another attacked a woman in a nightclub. The majority of these claims were rejected for want of proof,[44] but of the six cases where the extreme intoxication defence ultimately succeeded, four were cases of violence against women, all spousal assaults.[45] Advocates on behalf of women who experience men's violence readily understood that extreme intoxication as a defence seamlessly colludes with narratives around violence against women that suggest that it is never men's fault, but rather women's fault or an agentless crime that is an inevitable feature of life.

A review of the reported cases after s 33.1 came into force in 1995 to 2021 further supports the prediction that extreme intoxication will be invoked

---

[44] *R v Belmore*, [1994] OJ No 2868 (Ont Ct J (Gen Div)); *R v Bjordal*, [1996] BCJ NO 2574 (CA), 1996 CanLII 8408 (BCCA) (sexual assault); *R v Broderick* (1995), 130 Nfld & PEIR 55, 1995 CanLII 3422 (PE SCAD); *R v Byers* (1995), 103 CCC (3d) 204, 1995 CanLII 10825 (SK PC); *R v DCP*, [1995] BCJ No 2108 (BC Youth Ct); *R v Compton* (unreported), cited in Gary Dimmock, "Drunk excuse works" *The Telegraph Journal* (10 November 1994) at A1 (sexual assault) (conviction substituted on appeal (19 November 1994) Doc. GSC 13982 (PEITD): Martha Drassinower & Don Stuart, "Nine Months of Judicial Application of The Daviault Defence" (1995) 39 CR (4th) 280); *R v Feeney*, 1995 CanLII 1016 (BC CA), [1995] BCJ No 208 (QL); *R v Frechette*, [1999] BCJ No 131 (CA) (convicted again in re-trial: Roger Stonebanks, "Killer guilty of murder", *Victoria Times Colonist* (16 February 2000) at B3); *R v GJI* (1995), 160 NBR (2d) 248, 1995 CanLII 6560 (NB CA) (sexual assault, strangulation, and serious assault on intimate partner); *R v Jacober* (unreported), cited in Bob Beaty, "Drunk defence used in local trial" *Calgary Herald* (6 October 1994) at B1; *R v Johnston* (1995), 171 NBR (2d) 294, 1995 CanLII 16933 (NB KB) (spousal assault); *R v JPL*, [1994] OJ No 2548 (CA) (sexual assault); *R v Judd*, 1995 CanLII 1358 (BC SC); *R v Kuntz* (discussed in *R v Misquadis*, *infra*) (Ont Ct Gen Div) (Feb 16, 1995 unreported) (attack on woman in a nightclub); *R v Levy*, [1996] NSJ No 1, 1996 CanLII 5558 (accused attacked his mother); *R v O'Flaherty,* [1995] OJ No 1005 (Prov Div)) (forcible entry of a woman's house); *R v Page* (unreported), cited in "Military court rejects drunkenness defence" *The Globe and Mail* (11 November 1994) A6 (sexual assault); *R v Stanford* now *HS*, [1995] OJ No 1428 (Prov Div)) (sexual assault); *R v Stark*, [1995] AJ No 152 (CA) (convicted at trial in 1993); *R c Thompson*, [1995] JQ No 2768 (QC); *R v Tom*, [1998] BCJ No 2215, 1998 CanLII 14996 (BC CA) (manslaughter of woman in sex trade); *R v Watt*, [1995] AJ No 455 (Prov Ct); *R v Wickstrom*, [1995] 64 BCAC 134, 1995 CanLII 2543 (BC CA).

[45] *R v Blair*, [1994] AJ No 807, new trial ordered on appeal [1995] AWLD 1043 (AB CA) (spousal assault); *R c Cadot*, [1995] JQ No 2760 (QC CQ); *R v Catcheway* (unreported), cited in "Court allows drunk defence" *The Windsor Star* (27 October 1995) A4 (man stabbed and choked his wife); *R v McShane*, [1996] OJ No 361 (QL) (Prov Div) (criminal harassment); *R v Misquadis*, [1995] OJ No 882 (QL) (Prov Div); *R v Theriault* (unreported), cited in Mike Shahin, "Cocaine high lets man beat assault charge" *The Ottawa Citizen* (18 November 1994) A1-A2 (assault on girlfriend).

disproportionately as a defence for men's violence against women. We searched the Lexis-Nexis and CanLII electronic databases using "s 33.1" & "*Criminal Code*," or "*Code criminel*." We excluded those cases where intoxicated persons who committed acts of violence avoided the application of s 33.1 because their offence was a specific intent offence or their extreme intoxication was not self-induced, making s 33.1 inapplicable,[46] or because they suffered a mental disorder within the meaning of s 16.[47] Although the Supreme Court of Canada[48] ruled that a s 16 defence is precluded where drugs are the sole cause of the accused's psychosis, the courts have yet to rule definitively on which defences the accused will have access to in cases where there may be multiple contributing factors such as mental disorders or brain injuries and the ingestion of intoxicants.

Within these parameters, we found 86 cases where s 33.1 was mentioned, either to consider its constitutionality, or as at least one reason for rejecting an intoxication defence. While very likely an undercount, since our numbers rely exclusively on electronic databases, it seems that extreme intoxication is raised with some regularity in cases involving intoxicated violence. Some of these cases involved detailed consideration of s 33.1 pursuant to constitutional challenge to its validity. In others, the court invoked s 33.1 to preclude the accused's intoxication defence, sometimes while also stating that the accused's evidence did not rise to the level of extreme intoxication required by *Daviault*. While one author reports that only four of these cases could have succeeded because most failed the *Daviault* proof standard,[49] this assertion does not account for the fact that under the s 33.1 legislative regime, defence lawyers could hardly be expected to invest in the resources required to substantiate the defence.

It is notable that most of the constitutional challenges to s 33.1 have been litigated at the expense of female victims. Sixteen of the 86 cases addressed the ss 7 and 11(d) constitutional challenges to s 33.1: seven were sexual assault cases, all committed by men (six against women and one against another man); five others involved attacks on female victims; two involved attacks on male victims; and in two constitutional challenges the accused had attacked both male and female victims.[50]

---

[46] *R v McKay*, 2011 ONCJ 318 (strangulation of wife); *R v Hallahan*, 2021 ONCJ 156.

[47] See for example *R c Tremblay*, [2013] QJ No 2605 (QC CQ) (attack on a woman in an institution using a pen to stab her head and neck).

[48] *R v Bouchard-Lebrun*, 2011 SCC 58.

[49] Florence Ashley, "Nuancing Feminist Perspectives on the Voluntary Intoxication Defence" (2020) 43:5 Manitoba LJ 65 at 76.

[50] *R v BJT*, 2000 SKQB 572 (sexual assault); *R v Brenton*, [1999] NWTJ No 113, 180 DLR (4th) 314 (sexual assault); *Brown* 2020, *supra* note 14 (attack on a woman in her home); *Chan* 2018, *supra* note 17 (homicide of father and attack on step-mother); *R v Cedeno*, 2005 ONCJ 91 (sexual assault); *R v Decaire*, [1998] OJ No 6339 (QL) (Ct Just Gen Div) (stabbing of young woman sleeping in her bed) (convicted of aggravated assault: CA No C31015 (Oct 29 1999)); *R v Dow*, 2010 QCCS 4276 (attacks on multiple victims, including his wife); *R v Dunn*, [1999] OJ No 5452 (QL); *R v Fleming*, [2010] OJ No 5988 (QL) (sexual assault); *R v Jensen*, [2000] OJ No 4870 (SC) (QL) (murder of female friend)*; R v McCaw*, 2018 ONSC 3464 (sexual assault); *R v Robb*, 2019 SKQB 295 (sexual assault) [*Robb*]; *SN*, *supra* note 40

This gendered pattern replicates Supreme Court litigation on the specific intent/general intent dichotomy, used to determine whether a crime affords a defence of intoxication.[51]

This pattern holds true in the UK as well, where McColgan reports that almost all the appellate cases on the intoxication defence have involved violence against women.[52] It is unclear whether these patterns of appellate litigation and constitutional challenge are simply coincidence, whether they are a reflection of the pervasiveness of sexual assault and other forms of male violence against women, or whether there is something about these crimes that dovetails more readily with lawyers' preconceptions of unjust convictions and constitutional understandings of "moral innocence".

Of the 86 cases where extreme intoxication was raised despite s 33.1, 35 cases involved sexual assault.[53] Another five cases involved men who attacked their current or former partners. Beyond these 40 cases of what is understood as violence against women—where women are attacked because they are women—are 23 additional cases where women were victimized by intoxicated men's violence, possibly randomly, either as the sole target or as another victim in addition to male victims.[54] Altogether,

---

(sexual assault); *R v Sullivan* 2016, *supra* note 18 (attack on his mother); *R v Vickberg*, [1998] BCJ No 10034 [*Vickberg*]; *R v Yag*, 2021 ABQB 90 (attack on woman in a park).

[51] The decisions all centered on rape and sexual assault: *R v Leary*, [1978] 1 SCR 29, 74 DLR (3d) 103; *R v Bernard*, [1988] 2 SCR 833, 1988 CanLII 22 (SCC); *R v Daviault*, *supra* note 6.

[52] McColgan, *supra* note 43 at 142.

[53] *R v Abdulkadir*, 2019 ABPC 244; *R v Allard*, 2011 BCSC 859; *R v AO*, 2011 QCCQ 13290; *R c Barkley*, JCPC 2001-12 (QCCQ); *BJT*, *supra* note 50; *Brenton*, *supra* note 50; *Cedeno*, *supra* note 50; *R v CGW*, 2011 BCSC 197; *R v Chciuk*, [1999] OJ No 3 (CA); *R v Cortes Rivera*, 2017 ABQB 593; *R c Denis*, 1997 CanLII 9152 (QCCQ); *R v Desjarlais*, 2010 BCPC 95; *R v DM*, 2013 ONCJ 589; *Fleming*, *supra* note 50; *R v Fornal*, 2010 ONCJ 64; *R c Gagnon*, 1997 CanLII 6604 (QCCQ); *R c Giammario*, [2011] JQ No 19831 (QCCQ); *R c GL*, [2003] JQ No 16107 (QCCQ); *R c Gonthier*, JCPC 2001-86 (QCCQ); *R v Gonzalez-Hernandez*, 2011 BCSC 392; *R c Hébert-Ledoux*, [2020] JQ No 1600 (QCCQ); *R v Huppie*, 2008 ABQB 539; *R v LGH*, 2017 BCPC 433; *R v Macklin*, 2000 ABCA 293; *McCaw*, *supra* note 50; *R v McRae*, 2010 BCSC 558; *R v Poslowsky*, [1997] BCJ No 2585 (SC); *Robb*, *supra* note 50; *R v Sechan*, 2004 ONCJ 147; *R v SH*, [2006] YJ No 89; *R v SJB*, [2002] AJ No 726 (CA); *SN*, *supra* note 40; *R v Teepell*, [2009] OJ No 3988 (CJ); *R v Toutsaint*, (2001) 20 TLWD 2036-017 Sask QB 550/99; *R v Zimmerlee*, [1997] BCJ No 3038 (PC).

[54] *R v Blaser*, 2015 SKPC 85 (assault on female police officer); *Brown* 2020, *supra* note 14 (aggravated assault on woman living alone); *Chan* 2018, *supra* note 17 (homicide of father and wounding of father's partner); *R c Charron*, [2021] QCCQ 7791 (aggravated assault of female neighbour); *R v Chaulk*, 2007 NSCA 84 (assaults on female and male neighbours); *R v Côté*, 2010 NBPC 20 (assault on woman living alone); *Decaire*, *supra* note 50 (attempt murder of young woman asleep in her bed); *R c Desjarlais*, 2016 ABPC 182 (assault of female neighbour); *R v Diba*, 2020 ONSC 6407 (stabbing of girlfriend in the middle of the night); *Dow*, *supra* note 50 (assault on wife followed by homicide and assaults on others); *R v Eddison*, 2021 BCCA 168 (assault on male and female police officers); *R c Faucher*, [2013] JQ No 4653 (QCCQ) (threats against former spouse); *R c Gaudreault*, [2007] JQ No 13568 (QCCQ) (threats against daughter and her boyfriend); *R v Goard*, 2014 ONSC 2215 (assault of male taxi driver and woman at bus stop); *R v JAW*, 2006 ABPC 178 (assault on nurse at hospital); *Jensen*, *supra* note 50 (homicide of female friend); *R c Lauzon*, [2018] JQ No 2062 (QCCQ) (aggravated assault of female partner); *R v McLeod*, 2008 QCCQ 5726 (uttering death threats against male and female police officers); *R v Peters*, 2014 BCSC 983 (murder of common law wife); *Sullivan*, *supra* note 47 (attack on mother); *R v Tilley*, [2012] NJ No

63 of 86 cases included female victims. Eighty of the 86 perpetrators were men and six were women.

These cases suggest that the claim that reliance on the defence of extreme intoxication will be rare after the *Brown* decision should be approached with caution. They demonstrate that the extreme intoxication defence is gendered: it is often relied upon by men to challenge their culpability for violence against women. It is reasonable to anticipate increased reliance on the extreme intoxication defence, with some violent men being fully exonerated and crimes of violence against women becoming even more difficult to prosecute.[55] Indeed, the three cases before the Supreme Court all resulted in the acquittal of men for very violent crimes against three women and one male victim.

The harms to women are not only posed by those accused persons who succeed with the defence, but also by the many who attempt the defence at the expense of complainants, prosecutorial resources, and the reputation of the justice system. There is a serious risk that women will be deterred from reporting male violence where the perpetrator was intoxicated, because women will not be in the position to assess the accused's potential defence. Further, the trauma caused to complainants by lengthened trials based on extreme intoxication defences being advanced (and potentially succeeding in error, necessitating appeals), the resulting diminished confidence of women in the justice system, as well as the wasted judicial and Crown resources, all must be considered as negative implications of the decision in *Brown*.

B. Devaluation of women's rights by refusing to acknowledge state action in how law responds to violence against women

Justice Kasirer refused to consider women's rights in adjudicating the s 7 claim in *Brown* because there was no "conflict" between men's rights as accused persons and women's rights as victims of gendered violence:

> Section 33.1 affects the substantive rights of the accused subject to prosecution by the state. The equality and dignity interests of women and children are certainly engaged as potential victims of crime — but in this context, by virtue of the accused's actions, not of some state action against them. … nothing in [s 33.1] limits, by the state's action, the rights of victims including the ss. 7, 15 and 28 *Charter* rights of women and children. These interests are appropriately understood as justification for the infringement by the state.[56]

414 (Prov Ct) (assault on former partner); *R c Wells*, 2013 CanLII 2932 (NLPC) (assault of female neighbour); *Yag*, *supra* note 50 (attack on woman in park).

[55] See also McColgan, who states that if intoxication were available as a defence for general intent crimes, it "would operate so as to render domestic violence unprosecutable in many cases" (*supra* note 43 at 143).

[56] *Brown* 2022, *supra* note 4 at para 70.

In light of his finding that women's rights lacked relevance in the s 7 analysis, Justice Kasirer focused solely on the accused in determining that s 33.1 violated the principles of fundamental justice.[57]

We begin by noting that the effects of sexual assault and intimate partner violence are serious enough to engage s 7.[58] Although there is no universal experience of sexual or intimate partner assault, courts and psychologists have recognized these crimes as, short of homicide, some of the most serious that can be committed. Women who have been sexually assaulted experience an "increased lifetime rate of attempted suicide",[59] as well as high rates of Post-Traumatic Stress Disorder (PTSD) ranging from 35-57%.[60] PTSD for women who have been raped may include persistent nightmares and sleep disturbances, intrusive thoughts and flashbacks, high rates of depression,[61] and mood or anxiety disorders.[62] Women also experience health impacts including bodily injury, reproductive health consequences, unwanted pregnancy, pelvic pain, alcohol and drug dependencies, and sexually transmitted diseases; financial losses including job loss, missed educational opportunities, medical and counselling costs; and social costs, such as lost relationships, isolation, and avoidance of public places and social interactions.[63] While the political costs of systemic men's violence are harder to quantify, men's use of trolling and online threats to rape and kill women, including journalists, public figures and politicians, hinder women's ability to participate in civil society and their freedom to express themselves.

We contend that the state is deeply implicated in men's violence against women, in turn making this form of violence particularly intractable. Men's violence against women, in addition to racist and colonial violence against all members of racialized and Indigenous communities,[64] is systemic in origin and effect. This violence against women is both rooted in women's experience of political, social and

---

[57] *Ibid* at para 11.

[58] *R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 385.

[59] JR Davidson et al, "The association of sexual assault and attempted suicide within the community" (1996) 53:6 Arch Gen Psychiatry 550. See also Emily R Dworkin, Christopher R DeCou & Skye Fitzpatrick, "Associations between sexual assault and suicidal thoughts and behaviour: A meta-analysis" (2020) 23:10 Psychology Trauma 1037.

[60] H Littleton & CR Breitkopf, "Coping with the experience of rape" (2006) 30 Psychology of Women Quarterly 106.

[61] *Ibid*.

[62] *Ibid*.

[63] Cameron Boyd, "The impacts of sexual assault on women" *Resource Sheet* (Australian Centre for the Study of Sexual Assault, 2011).

[64] We recognize other forms of systemic violence, such as police violence against members of Black and Indigenous communities in Canada. We also recognize the complexities of violence against women in communities that are subject to such state violence: Anne McGillivray & Brenda Comaskey, *Black Eyes All the Time: Intimate Violence, Aboriginal Women, and the Justice System* (Toronto: University of Toronto Press, 1999); Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43:6 Stanford L Rev 1241.

economic inequality and a cause of that inequality, on an individual and societal level. As James Ptacek argues: "Individual women are assaulted by individual men, but the ability of so many men to repeatedly assault, terrorize, and control so many women draws on institutional collusion and gender inequality."[65]

Historically, violence against women was a "private" matter both descriptively and normatively: it was assumed that not only was the state uninvolved in male violence occurring in intimate relationships, but that it *should not be* to avoid interfering in the personal and private sphere. Examples of the ways in which judge-made laws were complicit in male violence include the common law doctrine of "coverture", in which husband and wife were merged into one legal entity, such that, among other implications, a man was allowed to commit marital rape without criminal intervention until 1983, when the *Criminal Code* was amended; the rule of chastisement that granted men a right to beat their wives with "moderation"[66]; the "recent complaint" and corroboration requirements for the successful prosecution of sexual assault; and the use of sexual history to undermine the credibility of sexual assault complainants. Whereas men's fatal violence against their wives was treated as accidental killing through an excess of chastisement, women who killed their husbands were subjected to prosecution for "petit treason", a crime so heinous that its punishment was burning at the stake.[67]

Decades of feminist criticism has put the lie to both the descriptive and the normative perspective on the public/private dichotomy.[68] However, the criminal justice system remains deeply gendered; it absolves men of their violence as long as it is not so extreme as to stand out from the "norm." Men in the roles of police, prison guards, prosecutors and judges, for example, have used their power as state actors to illegally dominate women in sexual and physical ways,[69] to over-charge women who kill men,[70] and to minimize the impact of male violence in women's culpability and in

---

[65] James Ptacek, *Battered Women in the Courtroom: The Power of Judicial Responses* (Boston: Northeastern University Press, 1999) at 9.

[66] *Hawley v Ham*, unreported, heard in the Midland District Assizes in September 1826, according to the *Kingston Chronicle* (15 September 1826); Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth Century Canada* (Toronto: Women's Press, 1991) at 167–81.

[67] Shelley Gavigan, "Petit Treason in Eighteenth Century England: Women's Inequality before the Law" (1989) 3:2 CJWL 335.

[68] In the Canadian context, see e.g. Susan B Boyd, ed, *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997); Elizabeth Sheehy & Christine Boyle, "Justice L'Heureux-Dubé and Canadian Sexual Assault Law: Resisting the Privatization of Rape" in Elizabeth Sheehy, ed, *Adding Feminism to Law: The Contributions of Justice Claire L'Heureux-Dubé* (Toronto: Irwin Law, 2004) 247.

[69] Tracey Lindberg, Priscilla Campeau & Maria Campbell, "Indigenous Women and Sexual Assault in Canada" in Elizabeth A Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practices and Women's Activism* (Ottawa: University of Ottawa Press, 2012) 87; Elizabeth Sheehy & Michelle Psutka, "Strip-searching of women: Rights and wrongs" (2016) 94:2 Can Bar Rev 241.

[70] Elizabeth Sheehy, *Defending Battered Women on Trial: Lessons from the transcripts* (Vancouver: UBC Press, 2014) at 118.

sentencing when they respond with violence.[71] There is an overwhelming record of state malfeasance when it comes to responding to men's violence against women at every level of state (in)action in the criminal justice system, from the widespread unfounding of sexual assault complaints by police,[72] to probation officers' failures to enforce conditions imposed on violent men,[73] to judges who continue to deploy old and new discriminatory beliefs about women and sexual assault to absolve men of criminal responsibility.[74]

The state is thus implicated in increasing women's susceptibility to gendered violence and limiting their means to exit violent relationships. For example, a web of government policy, regulation and law enforcement practices undergirds the problem of male violence against women, from a lack of adequate shelter spaces for women and children,[75] to inadequate civil legal aid,[76] to refusals in provinces outside Quebec to extend pay equity to the private sector and to provide guaranteed basic income, thereby limiting financial resources supporting women's escape from violent men.[77]

---

[71] See e.g. *R v Naslund*, 2022 ABCA 6.

[72] Jodie Murphy-Oikonen et al, "Unfounded Sexual Assault: Women's Experiences of Not Being Believed by the Police" (2022) 37: 11-12 Journal of Interpersonal Violence NP8916.

[73] Aidan Macnab, "Judge decries futility of no-contact orders in preventing recurrence of domestic violence" (24 June 2020), online: *Canadian Lawyer* <https://www.canadianlawyermag.com/practice-areas/family/judge-decries-futility-of-no-contact-orders-in-preventing-recurrence-of-domestic-violence/330810>. In relation to Basil Borutski, who killed three former intimate partners, see Molly Hayes, "Killer had never been reprimanded by probation officer despite flouting court orders, inquest hears" *The Globe and Mail* (22 June 2022), online: <https://www.theglobeandmail.com/canada/article-basil-borutski-was-a-high-risk-offender-had-decades-long-history-of/>.

[74] For several examples see Kate Puddister & Danielle McNabb, "#MeToo: In Canada, rape myths continue to prevent justice for sexual assault survivors" *The Conversation* (5 March 2019), online: <https://theconversation.com/metoo-in-canada-rape-myths-continue-to-prevent-justice-for-sexual-assault-survivors-110568>.

[75] See the literature in Krystle Maki, PhD, "Housing, Homelessness and Violence Against Women: A Discussion Paper" (Ottawa: Women's Shelters Canada, 2017), online: <http://endvaw.ca/wp-content/uploads/2017/09/Housing-Homelessness-and-VAW-Discussion-Paper-Aug-2017.pdf>.

[76] See e.g. David P Ball, "Single mothers' lawsuit against province's legal aid system heads to B.C. Supreme Court" (23 August 2022) *CBC News*, online: <https://www.cbc.ca/news/canada/british-columbia/single-mothers-alliance-case-against-bc-legal-aid-system-hearings-1.6556695>; Report of the Standing Committee on Justice and Human Rights, Access To Justice Part 2: Legal Aid" (October 2017), 42nd Parl, 2nd Sess; United Nations Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined eighth and ninth periodic reports of Canada* (25 November 2016), paras 14–15.

[77] Anna Cameron & Lindsay M Tedds, "Gender-Based Violence, Economic Security, and the Potential of Basic Income: A Discussion Paper" (30 April 2021), online: <https://mpra.ub.uni-muenchen.de/107478/1/MPRA_paper_107478.pdf>. See also Janet Mosher et al, *Walking on Eggshells: Abused Women's Experiences of Ontario's Welfare System* (Toronto: Ontario Association of Interval and Transition Houses, 2004), online: <https://ssrn.com/abstract=1616106>.

The claim that the state is merely inattentive to or inefficient in remedying male violence is an ideological—rather than legal—position.[78] For example, European human rights law has recognized a state obligation to protect women from systemic intimate violence. International law makes no distinction between failure to act and action in determining state responsibility to prevent, protect citizens from, or punish recurring and systemic, non-state actor violence.[79] To suggest that acquittals of extremely intoxicated men accused of violence against women does not engage "state action" stands to heighten the risks posed to all women's liberty, security and equality rights.[80]

C. Failure to consider the role of Charter s 28

The Court failed to engage with s 28 in assessing the constitutional attack on s 33.1 pursuant to s 7. Section 28 of the *Charter* compels courts to engage a "sex equality lens" in *Charter* interpretation. As the Supreme Court has elsewhere stated, "principles of equality, guaranteed by both ss 15 and 28, are a significant influence on interpreting the scope of protection offered by s. 7."[81] Both ss 28 and 15 demand that courts eschew a formal equality approach and instead assess the impact of laws on women's substantive equality.[82] Despite no party raising s 28 substantively in the *Brown* case, courts are presumed to know the law.[83]

Froc has written extensively on the history behind s 28's entrenchment, demonstrating that its framers were a group of women led by those representing the National Association of Women and the Law and the Ad Hoc Committee of Canadian Women on the Constitution.[84] Rather than repeating that history here, we highlight the historical context most relevant to the issue of violence against women, and what that history demonstrates about s 28's role in relation to constitutional challenges to legislation that enhances women's equality.

---

[78] See Katie Keays, *Disqualification by design: Strategic inefficiencies in Canada's legal response to sexual assault* (Masters of Arts, Brock University, 2021) [unpublished] (employing Sara Ahmed's concept of "strategic inefficiency").

[79] Ronagh JA McQuigg, "The European Court of Human Rights and Domestic Violence: Volodina v. Russia" (2021) 10 Intl Human Rights L Rev 155; Bonita Meyersfeld, *Domestic Violence and International Law* (Oxford: Hart Publishing, 2010) at 205–07.

[80] Grant, *supra* note 11 at para 41.

[81] *New Brunswick (Minister of Health and Community Services) v G (J)*, [1999] 3 SCR 46 at para 112, 177 DLR (4th) 124.

[82] Beverley Baines, "Section 28 of the Canadian Charter of Rights and Freedoms: A Purposive Interpretation" (2005) 17 CJWL 45.

[83] *Ibid* at 57.

[84] Kerri A Froc, "The Untapped Power of Section 28 of the Canadian Charter of Rights and Freedoms" (PhD Thesis, Faculty of Law, Queen's University, 2015) [unpublished] [Froc, "Untapped Power"]; Kerri A Froc, "A Prayer for Original Meaning: A History of Section 15 and What It Should Mean for Equality" (2018) 38:1 NJCL 35; Kerri A Froc "Is Originalism Bad for Women? The Curious Case of Canada's 'Equal Rights Amendment'" (2015) 19:2 Rev Const Stud 237.

Section 28 was a late addition to the draft *Charter*, included in amendments made at third reading in April 1981 as a result of a focused and intense lobbying effort by the Ad Hoc women.[85] At the time, women's rights advocates were well aware of the role of the criminal justice system in the state's inadequate and gendered response to violence against women. At a February 14, 1981 conference convened to debate potential constitutional amendments, one of the Ad Hoc women's preoccupations was to foreclose risks that the new *Charter* rights could have the rebound effect of undermining rather than enhancing women's equality in criminal law, including in the context of rape trials and wife battering.[86] Among other potential problems they discussed was the prospect that s 7 might enable men to evade accountability for spousal violence.[87]

Part of s 28's purpose was interpretive, to clarify "any ambiguities" in s 15 or other provisions that might lead to women's being rights being undermined,[88] and to ensure "no matter what else was in the *Charter*, it would have a film over it of equality for men and women so that the legal rights, the voting rights, the fundamental freedoms, would all have to apply equally to men and women."[89] The text of s 28 also supports its function as an interpretative lens by referring to "rights and freedoms" (plural) in the text, denoting that s 28 was not meant simply to emphasize the right to sex equality in s 15, but to extend to all rights in the *Charter*. The gender equality lens of s 28, therefore, requires courts to ascertain whether, as interpreted or applied, purportedly universal rights and freedoms nevertheless embody gendered norms that contribute to the structuring of gender hierarchy, for instance, by ignoring women as civil rights holders, assuming a male norm, perpetuating women's devalued status, or privileging relations that conform to hierarchical gender difference.

Viewing the *Charter* through a "sex equality lens" requires courts to shift their conceptualization of gender as exclusively a matter of identity upon which neutral

---

[85] Hereinafter "Ad Hoc women".

[86] Micheline Carrier, "Women's Rights and 'National Interests" in Audrey Doerr & Micheline Carrier, eds, *Women and the Constitution* (Ottawa: Canadian Advisory Council on the Status of Women, 1981) 181 at 197–99. Linda Palmer Nye, an Ad Hoc woman, in her interview with Froc, also referenced the difficulty in obtaining rape convictions as one of the motivating factors behind s 28.

[87] See e.g. the audio recording of the Ad Hoc Conference, "Cassette #7, Track 3" (copies on file with the author from Beth Atcheson's personal files; copies also available at the University of Ottawa Archives and Special Collections, Ottawa, File No. CD-X-10-38) [audio recording of the Conference]. This particular excerpt concerned a debate over a resolution to add the right to privacy to s 7, something that was excluded from their proposed amendments because it could be perceived as protecting violence in the home from state intervention as a matter of a husband's privacy and family life.

[88] National Association of Women and the Law, "Women's Human Right to Equality: A Promise Unfulfilled" (Ottawa: National Association of Women and the Law, 1980) at 7.

[89] Interview of Tamra Thomson (December 11, 2013). See also Baines, *supra* note 82. Minister Responsible for the Status of Women, Judy Erola, *House of Commons Debates*, 32nd Parl 1st Sess No 11 (November 16, 1981) at 12777) (explaining s 15 as pertaining to "the specific definition of sexual discrimination for a very specific act," whereas s 28 is a "broad principle").

legal rules apply,[90] to understanding "gender" as a hierarchical structure[91] or a relationship of power.[92] It means considering how constitutional doctrine is gendered, that is, examining how "gender acts upon [constitutional] law: how it functions in the context of conferring [constitutional] meanings; how it informs the content, organization and apprehension of [constitutional and] legal knowledge; and how it serves to legitimate [constitutional] law and reinforce particular…outcomes," even as it operates to obscure its own role and make such outcomes seem natural or common sensical.[93]

Further, s 28 has an independent, protective function in terms of ensuring women's rights are equally valued, recognized and respected in relation to men's rights. This function is derived from s 28's opening clause, "notwithstanding anything else in this *Charter*." Section 28 was meant to ensure that other *Charter* provisions did not become a new source of women's inequality,[94] by requiring that women receive their full entitlement to equal rights without "anything" else in the *Charter* limiting or constraining this guarantee. The full force of s 28 is underlined by the fact that government is precluded from seeking to justify violations of s 28 under s 1 or using the s 33 "notwithstanding clause" to permit legislation violating women's equal rights to continue operating. For these reasons, s 28 was thought to be one of the strongest guarantees in the *Charter*.[95] Given this background, it is striking that the Supreme Court of Canada has yet to directly consider s 28's legal effect.[96]

If s 28 were given its due, sex equality and equal rights between the sexes would emerge as pre-eminent *Charter* values to be considered in constitutional cases involving gendered violence because how the state responds to men's violence perpetrated against women has a direct impact on women's equality, security and full participation in Canadian society. The Court's failure in *Brown* to draw upon s 28 to acknowledge the rights of complainants as engaged in the criminal proceedings has

---

[90] Joanne Conaghan in *Law and Gender* (Oxford: Oxford University Press, 2013) at 82, remarks that "a truly gendered analysis turns out to require a layer of investigation not generally considered to be part of the legal enquiry," thus demonstrating why the mandate of s 28 is critical to such an exercise as channelling interpretation in this direction.

[91] Iris Marion Young, *On Female Body Experience: "Throwing Like a Girl" and Other Essay*s (New York: Oxford University Press, 2005) at 22.

[92] Joan Wallach Scott, *Gender and the Politics of History*, revised ed (New York: Columbia University Press, 1999) at 48 ("[G]ender [is] a primary way of signifying relations of power…Hierarchical structures rely on generalized understandings of the so-called natural relationships between male and female").

[93] Conaghan, *supra* note 90 at 25.

[94] Andrew Szende, "Canadian Women Win the Fight for Equality" *The Toronto Star* (22 April 1981) A18 (quoting Ad Hocker Deborah Acheson).

[95] *Ibid* at 389 (citing testimony at the Special Joint Committee on the 1987 Constitutional Accord, concerning the draft Meech Lake Accord).

[96] Section 28 was ignored in two cases in which the Court justified s 15 sex equality violations under s 1: *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66; *Centrale des syndicats du Québec v Quebec (Attorney General)*, 2018 SCC 18.

further entrenched the effects of this state action by relieving perpetrators of the consequences of the harms they have caused, leaving women to bear these burdens exclusively.

Part III: Parliament's Legislative Response

The Court in *Brown* emphasized the need for Parliament to respond to its decision, remarking on the threat posed by the extreme intoxication defence to women and other vulnerable groups and repeating that the Court would defer to Parliament's wisdom in doing so. It provided two suggestions as to directions that response might take, as noted earlier.

The first was a new offence of criminal intoxication. Although the Court failed to discuss the mechanics of such an offence, this task is complex. It could be cast as an included offence for all crimes of violence, making conviction certain where the Crown has otherwise proven the offence but is unable to prove the *mens rea* or *actus reus* due to the accused's successful use of the extreme intoxication defence. Or it could be a stand-alone offence, which the Crown would have to charge in any case where a defence of extreme intoxication is likely to be raised. In the former case, it would be legislatively cumbersome; in the latter case, the legislators would need to determine what the elements are that the Crown would have to prove and whether such a crime would be feasible to prosecute.[97]

The difficulty, as noted by the Court, is that conviction for "criminal intoxication" would mask the crime actually committed and would be subject to a lesser sentence suggestive of a "drunkenness discount". A generic criminal intoxication offence would focus exclusively on intoxication as the criminal act, obscuring violence against women and failing to name and condemn the gendered wrong as experienced by women. The "rhetorical impact of terms used [in relation to sexual assault]… should not be ignored or discounted."[98]

A criminal intoxication offence would make it challenging to track the criminal law processing of sexual assault allegations, statistics that have informed various criminal law amendments aimed at eradicating sex discrimination and rape myths since the 1980s. A new included or lesser offence, as proposed by some authors,[99] may affect plea bargaining and charge filtering. The availability of such an included offence will encourage perpetrators who are intoxicated but not "extremely

---

[97] For a discussion of the difficulties posed by legislative models aimed at capturing extremely intoxicated offending, see Murdoch Watney, "Voluntary intoxication as a criminal defence: Legal principle or public policy?" (2017) 3 J S African L 547.

[98] Lucinda Vandervort, "Honest Beliefs, Credible Lies, and Culpable Awareness: Rhetoric, Inequality, and Mens Rea in Sexual Assault" (2004) 42:4 Osgoode Hall LJ 625 at 629.

[99] For discussions of this proposal, see Law Reform Commission of Canada, *Recodifying Criminal Law*, Report 30, vol 1 (1986); Gerry Ferguson, "The Intoxication Defence: Constitutionally Impaired and in Need of Rehabilitation" (2012) 57 SCLR (2d) 111.

intoxicated" to plead guilty to that offence rather than go to trial for sexual assault, resulting in cases with intoxicated accused being "filtered out by police officers or prosecutors."[100]

A final problem is that constitutional challenges would inevitably be levelled at either form of this new crime, on the basis that it targets those with substance abuse disorders, or that it contains an inadequate *mens rea* element.[101] Even if one of these alternatives could ultimately survive the constitutional challenge, the burden of this litigation, and the uncertainty in the interim, will continue to be borne disproportionately by women.

The second option mentioned by the Court was that of creating a new standard for criminal fault for extremely intoxicated violence. The Court, having previously rejected the argument that this was precisely what Parliament had done through enactment of s 33.1, suggested that Parliament could enact a fault standard based on whether a reasonable person ought to have foreseen that the intoxicant could have led to loss of self-control (i.e. a state akin to automatism) and whether harm to another that is neither trivial nor transitory was thereby foreseeable.

Again, however, the Court proposed this alternative without serious consideration of the technicalities or the implications. Requiring Crown proof of the foreseeability of both loss of voluntary control and the infliction of non-trivial, non-transitory harm poses intractable problems, as we discuss further below.

Despite the Court's repeated statements that it would defer to Parliament's legislative response to the declaration of invalidity of s 33.1, the Minister of Justice introduced an amendment to s 33.1 that adopted the language of the Court's decision,[102] arguably perpetuating the state's role in men's violence against women. It reads:

> 33.1 (1) A person who, by reason of self-induced extreme intoxication, lacks the general intent or voluntariness ordinarily required to commit an offence referred to in subsection (3), nonetheless commits the offence if
>
> (a) all the other elements of the offence are present; and

[100] Martha Shaffer, "*R v Daviault:* A Principled Approach to Drunkenness or a Lapse of Common Sense?" (1996) 3:2 Rev Const Stud 311 at 325–26; Morris Manning, QC & Peter Sankoff, *Manning, Mewett & Sankoff, Criminal Law*, 5th ed (Markham: LexisNexis, 2015) at 498 (which calls Shaffer's argument in this regard "convincing").

[101] *Ibid* at 499 ("it is unclear that this would be a panacea, and it might possess constitutional weaknesses of its own"). See also *Brown* 2020, *supra* note 14 at para 136.

[102] By contrast, the Supreme Court found constitutional, Parliament's legislative deviation from decisions striking down the "rape shield" law and establishing common law rules regarding third party record production in sexual assault in *R v Darrach*, 2000 SCC 46 and *R v Mills*, *supra* note 3.

> (b) before they were in a state of extreme intoxication, they departed markedly from the standard of care expected of a reasonable person in the circumstances with respect to the consumption of intoxicating substances
>
> (2) For the purposes of determining whether the person departed markedly from the standard of care, the court must consider the objective foreseeability of the risk that the consumption of the intoxicating substances could cause extreme intoxication and lead the person to harm another person. The court must, in making the determination, also consider all relevant circumstances, including anything that the person did to avoid the risk.[103]

The extreme intoxication defence will only be precluded if the Crown can prove, beyond a reasonable doubt, that the accused departed markedly from the behaviour of a reasonable person in their consumption, having regard to the foreseeability of both the state of extreme intoxication and the risk of causing non-trivial, non-transitory harm to another.

The federal government rushed this amendment through the legislative process in eight days, eschewing meaningful public consultation. This slipshod process stands in contrast to the consultations that led to major sexual assault reforms on two prior occasions, as well as the consultations that culminated in the original version of s 33.1.[104] In these instances, women's groups were brought together to discuss and debate alternatives with their trusted feminist lawyers to help translate their demands into legislative proposals. The women's groups were accountable to their membership for any positions adopted, and the feminist lawyers were accountable to the larger group. They were given time to study the options and the space in which to propose alternatives to the Department of Justice.

Compared to these earlier consultations, the 2022 process was a sham. It is true that the Department of Justice spoke to ten individuals and eighteen groups (seven of whom were listed as "victim services" or "women's rights advocates"). But the women's groups were not invited together so that they could hear each other's concerns and analyses, nor were they given any opportunity to view the government's chosen course of action ahead of the meetings or to consult with feminist lawyers about the ways forward. Some consultations appeared to be an afterthought, taking place only days before the final bill was introduced when it would have been too late to make

---

[103] *Criminal Code of Can*ada, SC 2022, c 11, s 33.1.

[104] The Department of Justice conducted extensive consultations with women's groups on Bill C- 49 (sexual assault, 1991), Bill C-72 (extreme intoxication, 1994-95), and Bill C-46 (private records, 1997). For description of several of these processes see Sheila McIntyre, "Redefining Reformism: The Consultations That Shaped Bill C-49" in Julian V Roberts & Renate M Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 293; Department of Justice, *Bill C-46: Records Applications Post-Mills, a Caselaw Review*, online: <https://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr06_vic2/p2.html#sec2.1> (documenting the research and consultations undertaken over a two year period).

any substantive changes. And certainly, the government produced no public record of groups consulted nor any record of what these consultations actually yielded in terms of comments.[105]

Women's groups raised concerns about whether the amendment could ever result in convictions where the extreme intoxication defence can be proven, and pointed out that the lack of a preamble that would articulate the legislative objective as being women's equality, which would be critical to the s 1 analysis in any future challenge, but such was dismissed as superfluous.[106] The Women's Legal Education and Action Fund was the only women's organization to appear with Ministers Lametti and Ien at the press conference to support Bill C-28 when it was introduced publicly.[107]

The government then fought off challenges and questions about the wisdom or effectiveness of the bill, closing down debate on the amendment in both the House of Commons and the Senate. The government asked for and received unanimous consent for the regular process for the passage of bills to be bypassed in the House of Commons. After the National Association of Women and the Law wrote an open letter to all Senators expressing concern about the Bill's limitations,[108] the Government Leader in the Senate, Marc Gold, adopted a different process than the one used in the Commons: he gave 24 hours notice of a motion to dispense with the ordinary procedural rules and allowing only one day's debate on the Bill after it passed in the Commons.[109] This motion passed, permitting a mere majority vote to pass Bill C-28, which the Senate ultimately did (67-8).[110] The law was thus passed without committee hearings, which commenced in the Commons Standing Committee on Justice and Human Rights in October 2022, months *after* the law was declared in force.

Not only was the consultation process a sham, but it failed to lead to well-crafted legislation fit for the purpose of responding to the rights of women to be free

---

[105] A copy of the consultation list of groups and individuals is on file with the authors, received from a source within the Senate. The list was composed in evident haste, as NAWL was listed as a "General Legal/Defence Bar" organization whereas women's groups are described as "Women's Rights Advocates." Including NAWL in the latter group would bring the number of women's organizations consulted to eight.

[106] See the question by Senator Dennis Glen Patterson and the response by Senator Marc Gold in *Debates of the Senate* Vol 153 No 58 (22 June 2022) at 1796. Such a concern was raised by women's representatives during a meeting Kerri Froc attended with a Department of Justice official on June 21, 2022.

[107] Dale Smith, "Hurried passage: Extreme intoxication bill passes with little scrutiny or debate" *CBA/ABC National* (27 June 2022), online: <https://www.nationalmagazine.ca/en-ca/articles/law/hot-topics-in-law/2022/hurried-passage>.

[108] Bill C-28: Letter to All Senators" (21 June 2022), online: *NAWL ANFD* <https://nawl.ca/bill-c-28-letter-to-senators/>.

[109] Senate of Canada, "Order and Notice Paper" Issue 59 (23 June 2022), online: <https://sencanada.ca/en/content/sen/chamber/441/orderpaper/059op_2022-06-23-e>.

[110] "Vote Details: Bill C-28" (23 June 2022), 44th Parl, 1st Sess, online: <https://sencanada.ca/en/in-the-chamber/votes/details/583006/44-1>.

from extremely intoxicated male violence. It is instructive that defence lawyers raised no concerns about the bill, a clear indication that it is toothless. In fact, Brown's own defence lawyer was candid, stating publicly that Bill C-28 will be "entirely ineffective".[111] The amended s 33.1 is highly unlikely to result in any accused being denied access to the extreme intoxication defence, except perhaps where an accused previously committed acts of violence while using or abusing the particular intoxicant in the same circumstances, but even then if there are other factors that the defence can use to differentiate (such as the fact that the combination of intoxicants may have been slightly different on that prior occasion), the foreseeability criteria in s 33.1 could still exclude its application.

Part IV: Using s 28 to Breathe New Life Into ss 7 and 1

Properly applied, s 28 would have required the Court to re-think its analysis in four ways in *Brown*. First, s 28 demands a re-interpretation of s 7's principles of fundamental justice so as to incorporate sex equality and women's equal rights to security of the person[112] and to fair trials into the principles of fundamental justice. Second, s 28 requires the Court to interpret "moral innocence" by considering whether it is compatible with violent acts committed in a state of self-induced extreme intoxication, that, individually and systemically, compromise women's liberty and security of the person. Section 7's scope must exclude *de facto* protection against state sanction for behaviours that deprive women of their equal right not to be deprived of liberty and security of the person.[113] Third, s 28 would have precluded the Court's characterization in *Brown* of women's rights as mere "societal interests" to be considered only under s 1. And fourth, s 28 would have demanded great deference in any s 1 analysis, even if a violation were found.

A. Equality and the principles of fundamental justice

Contrary to the demands of s 28, the Court's jurisprudence deploying what it calls a "balancing" approach to interpreting s 7 rights has produced a masculine construction of fundamental justice that embeds women's unequal access to it.[114] The Court's

---

[111] Sean Fine, "Liberals table bill responding to Supreme Court decision on extreme intoxication" *The Globe and Mail* (17 June 2022), online: <https://www.theglobeandmail.com/canada/article-supreme-court-extreme-intoxication/>.

[112] Kerri A Froc, "Constitutional Coalescence: Substantive Equality as a Principle of Fundamental Justice" (2010-2011) 42 Ottawa L Rev 411 [Froc, "Constitutional Coalescence"].

[113] See *B (R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, 122 DLR (4th) 1 (majority finding that state interference with parental behaviour that harms children is fundamentally unjust; concurring decision finding that such behaviour is outside the scope of the s 7 liberty interest).

[114] Froc maintains in Froc, "Untapped Power", *supra* note 84 that the "balancing" analysis between the rights of accused persons and those of complainants in *Darrach*, *supra* note 102 and *Mills*, *supra* note 3, meant that while the Court upheld the legislation, it essentially "read it down" in its guidance to lower courts in applying it. See also Steve Coughlan, "Complainants' Records After Mills: Same As it Ever Was" (2000) 33:5 Const Rev 300; Lise Gotell, "The Ideal Victim, the Hysterical Complainant, and the

version of balancing treats sex equality as discrete and separate from s 7 rights within the analysis of whether the deprivation of security of the person was in accordance with the principles of fundamental justice, rather than as a fundamental value that infuses all *Charter* rights.[115] This jurisprudence results in hierarchical interpretation, with men's fair trial rights constructed as foundational to Canadian society, juxtaposed against women's rights (or "interests") to equality, personal security, and privacy, which thereby recede into the background.

Thus, the right to a fair trial protected by the principles of fundamental justice has been interpreted almost exclusively from the perspective of male accused persons, which should alert the Court to pay particularly close attention to women's rights to equality, security of the person and trial fairness.[116] Section 28 requires that respect for human dignity and self-worth animating the principles of fundamental justice apply equally to women. Principles of fundamental justice thus require that fairness be assessed "with sensitivity to the context of the situation",[117] not exclusively from the accused's perspective. The *Daviault* defence, used overwhelmingly by men to excuse violence against women, has a disproportionate impact upon women's enjoyment of their equality right to be free from gendered violence and thus demands a gender-informed interpretation and application of the principles of fundamental justice.

Justice L'Heureux-Dubé (dissenting) deployed an inclusive "sex equality lens" in *R v Seaboyer* when she wrote that "section [28] would appear to mandate a constitutional inquiry that recognizes and accounts for the impact upon women of the narrow construction of ss 7 and 11 (d) advocated by the appellants."[118] She found that this mandate inhered in the very notion of "fundamental justice":

> [E]nsuring that trials and thus verdicts are based on fact and not on stereotype and myth, is not one belonging solely to any group or community but rather is an interest which adheres to the system itself; it maintains the integrity and legitimacy of the trial process.[119]

Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law" (2002) 40 Osgoode Hall LJ 251.

[115] Substantive equality has never been accepted as a principle of fundamental justice, though it would qualify: see Froc, "Constitutional Coalescence", *supra* note 112.

[116] See Terese Henning & Jill Hunter, "Finessing the Fair Trial for Complainants and the Accused: Mansions of Justice or Castles in the Air?" in Paul Roberts & Jill Hunter, eds, *Criminal Evidence and Human Rights: Reimagining Common Law Procedural Traditions* (Oxford: Hart Publishing, 2012) 347.

[117] *Ibid*; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9; *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38 at para 57.

[118] *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577 para 254, 83 DLR (4th) 193.

[119] *Ibid* at para 265. See also *Mills*, *supra* note 3 at para 21, and Justice L'Heureux-Dubé's dissent in *R v O'Connor*, [1995] 4 SCR 411 at para 129, 130 DLR (4th) 235 ("The eradication of discriminatory beliefs and practices in the conduct of [sexual assault] trials will enhance rather than detract from the fairness of such trials. Conversely, sexual assault trials that are fair will promote the equality of women and children").

More jurisprudential support for the inclusion of women's equal rights under the principles of fundamental justice is provided by *Doe v Metropolitan Toronto Municipality) Commissioners of Police*,[120] a case where the court found that police had violated a woman's s 7 right to security of the person by using her as "bait" to catch a serial rapist rather than protecting or warning her. Because the police exercised their discretion in a "*discriminatory* and negligent way",[121] their actions violated the principles of fundamental justice.

B. Re-reading "moral innocence"

What results from applying s 28's sex equality lens to the principle of fundamental justice that the "morally innocent shall not be punished"? Rosemary Cairns Way[122] maintains that an "equality-promoting" determination of culpability as constitutionally required under s 7's principles of fundamental justice is supported by Justice L'Heureux-Dubé's decision in *R v Martineau*.[123] Her dissenting opinion, which would have upheld the constructive murder provisions of the *Criminal Code*, recognized an "offence-specific, holistic, and contextualized assessment of fault"[124] and the role of collective rights, including equality, in assessing the degree of fault necessary for compliance with s 7.

Given that s 33.1 is predicated upon self-induced extreme intoxication, wherein an individual takes a risk in consuming or mixing intoxicants to the point where they lose voluntary control over their behaviour, we question whether the Court's assessment of s 33.1 as requiring the conviction of the "morally innocent" was accurate. We agree with Martha Shaffer, who argues that "the *Daviault* case raises questions about whether these concepts [of *mens rea* and *actus reus*] as we currently interpret them are synonymous with the norms of moral responsibility that should animate our criminal law."[125] Courts should consider the gendered context of who is asked—overwhelmingly women—to bear the consequences of the risks posed by these accused persons—overwhelmingly men. The characterization of such behaviour causing grave harm to women as "morally innocent" devalues women's rights to equality, security of the person and fair trials, and thus does not conform to the s 28 imperative.

To this end, the question of "moral innocence" must focus on whether it would violate our sense of justice that the accused bear the consequences of his violent

---

[120] (1998) 126 CCC (3d) 12 (ON SC), 160 DLR (4th) 697.

[121] *Ibid* at para 158 [emphasis added].

[122] Rosemary Cairns Way, "Culpability and the Equality Value: The Legacy of the *Martineau* Dissent" (2003) 15 CJWL 53.

[123] [1990] 2 SCR 633, 58 CCC (3d) 353.

[124] Way, *supra* note 122 at 69.

[125] Way, *supra* note 100 at 328.

actions, in a society that understands sex equality as a fundamental value. Gendering the underlying principles of dignity and the "rule of law" means that "innocence" should be critically interrogated against the backdrop of men's presumed moral innocence and women's presumed responsibility for violence (and especially, sexual violence) to ensure that its interpretation is not tainted by these embedded discriminatory tropes.[126] A contextualized understanding of moral fault surely includes recognizing intoxication is often implicated and indeed a catalyst or excuse for gendered violence, understood as a practice of inequality. At the very least, only a person in the accused's position who could not have foreseen that his consumption of intoxicants could lead to loss of voluntary control of his body should be cast as "morally innocent."

C. Avoiding the relegation of women's rights to s 1

Deeming women's rights to be mere "societal interests" under s 1, as the Supreme Court did in *Brown*, is premised on the idea that the violence men do to women is a matter of the private sphere: individual, not structural; erratic, unpredictable, unstoppable. Yet as we argued above, the state has always been and continues to be an actor in this violence, by authorizing certain forms of violence against women, by exempting from criminal law other forms, by blocking women from seeking remedies for male violence, by protecting men from accountability, or by creating toxic, hyper-masculine organs of the state whereby police, prison guards, and probation officers have authority over other men and women.

Whether through the legislature or the judiciary, a state that allows men to commit violent acts against women with impunity when they are in a state of self-induced extreme intoxication akin to automatism, abdicates its role in denouncing and deterring violent crime and reinforces men's impunity for violence against women. One court spelled out the discriminatory message sent by the extreme intoxication defence: "Canada will not excuse violence against women and children, except where perpetrators of violence have chosen to become extremely intoxicated."[127]

D. Deference is imperative

The Court has said that the criteria for s 1 justification require attention to the fact that "[t]he framers of the *Charter* signaled the special importance of [a] right not only by its broad, untrammeled language, but by exempting it from legislative override under s. 33's notwithstanding clause."[128] Although the Court was referring to s 3 voting rights, this applies equally to s 28, which was intentionally excluded from the ambit

[126] Lynne Henderson, "Getting to Know: Honoring Women in Law and in Fact" (1993) 2 Texas J Women & L 41.

[127] *Robb*, *supra* note 50 at para 49.

[128] *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68 at para 11.

of s 33, and is possibly the most "untrammeled" of the rights by virtue of its "notwithstanding anything" opening phrase.

Section 28's influence in the interpretation of justification under s 1 was acknowledged in *R v Red Hot Video*. The Court of Appeal for British Columbia cited s 28 as a factor to be considered in finding the *Criminal Code's* obscenity provisions as a justifiable s 2(b) violation: "If true equality between male and female persons is to be achieved it would be quite wrong in my opinion to ignore the threat to equality resulting from the exposure to male audiences of the violent and degrading material described above."[129] Several years later, Justice Sopinka for the Supreme Court cited *Red Hot Video* in *R v Butler*[130] to highlight the importance of the sex equality objective in justifying encroachment on other *Charter* rights. The *Charter* infringement was justified in *Butler* due to the "the importance of avoiding indifference to violence in so far as women are concerned"[131] via cultural messaging.

Where a law facilitates women's enjoyment of equal rights and furthers sex equality as a pre-eminent Canadian value (as expressed in s 28), courts should tread carefully in substituting its own view of alternatives that might impair rights less. Parliament had good reason, in light of the data and the case law patterns, to assess intoxicated and extremely intoxicated violence against women as a pressing social problem requiring a particular legislative response.

Part V: Parliament's Way Forward

What should Parliament have done, by way of response to the Court's decision in *Brown*, and drawing upon the previously neglected authority of s 28? First, it should have undertaken careful study and public consultation before drafting its legislation. Second, it should have taken seriously the information available that suggests that the Crown will be unable to prove the kind of criminal negligence offence envisioned by the Court, and created a public record regarding the impracticality of its options, including the futility of creating a government panel to study various intoxicants and their safe levels of ingestion (as suggested by the Court). Third, it would have rejected the Court's two options, and instead relied on judicial deference for amendments to s 33.1 that focused only on the foreseeability of loss of control, not violence, and that placed a burden of proof on the accused to demonstrate that their over-consumption of intoxicants did not fail, to a marked degree, the standard of care that a reasonable person would have exercised.

First, the government should have slowed down its process to draft what may be its last legislative effort to respond to extremely intoxicated violence. It needed to

---

[129] *R v Red Hot Video Ltd* (1985), 18 CCC (3d) 1 (BC CA), leave to appeal to the SCC refused (1985) 4 CR (3d) xxv at paras 31, 32.

[130] [1992] 1 SCR 452, 89 DLR (4th) 449.

[131] *Ibid* at para 23.

engage in a review of the scientific literature as well as consultation with experts who study the effects of various drugs and their combinations, whether with other drugs or alcohol. It needed to consult women's groups in a manner that would have allowed thoughtful and informed responses, without the pressure of a bill already drafted and rushed through both the House of Commons and the Senate. It also needed to survey alternate legislative models, whether suggested by academics or enacted in other jurisdictions, and it needed to consult with Crown prosecutors in order to develop a complete picture of the feasibility of various options.

Second, had it done so, it would have been confronted with evidence that shows, indisputably, that the Court's recommendations for law reform were completely ineffectual. An accused who consumes intoxicants to the extent of loss of control will not be able to verify with any exactitude which drugs or alcohol and the amounts in fact ingested. Rarely is there evidence in the body that can confirm the amounts of drugs consumed and rule out other possible drugs. Blood alcohol readings may be accurate, but determining their level at the time of the charged offence depends on the reliability of evidence from the accused about the time of consumption and from an expert toxicologist about metabolic rates of elimination as it relates to the time of the charged offence.[132]

The expert evidence and findings in the three cases before the Court illustrate the kinds of difficulties any Crown prosecutor would face under the Court's foreseeability standards. Even the first test, whether a reasonable person could foresee loss of voluntary control as a result of ingesting the substances, may be challenging. For example, the Crown in *Brown* could not prove that loss of control was foreseeable even though the accused had ingested 14-17 drinks and "snacked" on unspecified amounts of magic mushrooms over the course of an evening.[133]

This is because, when it comes to street drugs, unless a verified sample is available, it will be impossible for any expert to reliably report its potency and therefore its effects. Taking the example of magic mushrooms, which were at issue in both *Brown* and *Chan*, the expert evidence was that there are approximately 200 kinds of magic mushrooms[134] and, because they grow in the wild, "the amount of active ingredient [of psilocybin] can vary widely between samples." [135] In neither case was there evidence of the specific kind of mushroom at issue, its psilocybin concentration, or the dosage consumed.

---

[132] *R v St-Onge Lamoureux*, 2012 SCC 57.

[133] *Brown* 2022, *supra* note 4 at para 157. The Court extracted from the trial court decision the [unstated] proposition that, "While Mr. Brown ingested an illicit drug, the trial judge found, based on expert evidence, that his reaction to the drug was not reasonably foreseeable."

[134] *Chan* 2018, *supra* note 17 at para 120.

[135] *Brown* 2020, *supra* note 14 at para 58.

Even if those variables are known in a given case, the evidence was also that the effects will vary between individuals because psilocybin acts on the serotonin receptors. Other factors, such as an individual's personality, their expectations, and the stimuli they are confronted with, will also have a variable effect.[136] There are apparently no scientific studies to indicate "what dose of psilocybin tends to trigger toxic psychosis in the normal population"[137] or "what percentage of normal individuals would become psychotic after consuming them."[138] This difficulty in assessing the foreseeable impact of consumption will hold true for all street drugs, not just magic mushrooms, whether consumed alone or in combination with alcohol or other drugs: absent a verified sample of what the accused consumed and the amounts, it will not be possible to predict even loss of control.

The prospect of meeting the Court's proposed foreseeability standards may be easier for the Crown when drugs are prescribed and thus their composition verifiable. For example, Sullivan's behaviour might have met the first foreseeability test because the trial judge found that the possibility of psychosis as a result of overconsumption of the drug was a known side-effect and that Sullivan himself had previously experienced a psychotic episode while abusing Wellbutrin. On the other hand, a court may find that abuse of a prescription drug was not so excessive as to constitute a marked departure from the standard of care of the reasonable person.[139]

The further foreseeability hurdle, that the intoxicants present a risk of the accused causing non-trivial, non-transitory harm to another, seems formidable for street drugs given the variables involved in their composition. There appear to be no widescale studies on the impact of particular drugs and their role in producing violent behaviour, and such studies might present ethical challenges. It may even be difficult to prove that abuse of a prescription drug foreseeably produces violent behaviour resulting in bodily harm to another. The expert evidence in Sullivan's case, for example, noted only that "it is *possible* that Wellbutrin use could cause a normal person to develop similar conditions, including psychosis, hallucinations, delusions, homicidal ideation, hostility, agitation, and violence."[140]

Moreover, the Court's suggestion that Parliament study the effects of multiple drugs and their association with violent behaviour is fraught with ethical and practical challenges given the proliferation of drugs, their many altered forms and their varied impacts upon individuals. Even if, in the years ahead, the government were able to quantify safe uses for various drugs, we are still left with the proof problems

---

[136] *Chan* 2018, *supra* note 17 at para 120.

[137] *Ibid* at para 118.

[138] *Ibid* at para 114.

[139] *Vickberg*, *supra* note 50. The court would have found in this case that the accused's over-consumption was not so excessive as to amount to a "marked departure" for the purpose of a criminal negligence standard.

[140] *Sullivan* 2016, *supra* note 18 at para 58 [emphasis added].

catalogued above. For all of these reasons, Parliament should have rejected the Court's proffered solutions in *Brown* and carved its own path.

Third, armed with the evidence that foreseeability of violence causing bodily harm will be impossible to prove in the vast majority of cases, Parliament should have jettisoned this aspect of a criminal negligence test and focused solely on whether a reasonable person could have foreseen loss of voluntary control as the fault element, in combination with actually causing harm to another. Even then, given the proof dilemmas described above, the legislation ought to put some burden of proof on the accused, at least evidential or possibly persuasive, to show that a reasonable person could not have foreseen any possibility of loss of voluntary control in light of the accused's consumption of intoxicants.

We argue that a persuasive burden would have been justified because any lesser burden would make it difficult if not impossible for the Crown to prove that the manner or extent of the accused's consumption of intoxicants resulted in a foreseeable loss of self control, given the dire lack of clear evidence, lay or expert, on this issue, and the fact that it is evidence possessed exclusively by the accused or at least tainted by his own actions. In the case of other *Criminal Code* offences, persuasive burdens on accused persons to disprove criminal fault have been upheld under s 1. For example, in *R v Whyte*[141] a burden of proof on the accused to show that s/he did not intend to assume care and control of a vehicle when found drunk behind the wheel of a car, was upheld by the Court. The Court focused on the compelling public policy objective of preventing and deterring drunk driving[142] and the difficulty for the prosecutor in proving that a drunk person discovered passed out at the wheel of a car intended to have care and control of the vehicle.[143] Even more relevant is that a persuasive burden of proof on an accused wishing to assert "extreme intoxication" was upheld by the Court under s 1 in the *Daviault* decision because knowledge of what was consumed or ingested lies with the accused. Even an evidentiary presumption, whereby the accused would have to provide some evidence that he did not depart markedly from the conduct of a reasonable person in his consumption of intoxicants, would be preferable to the current wording.

Placing a burden of proof on an accused who has voluntarily abused alcohol, drugs or some combination to the point that he cannot account for his consumption, has lost voluntary control of himself and has either assaulted or threatened another person, is the only way to ensure that prosecution of the accused's crimes is not thwarted by proof requirements that cannot be met owing to the accused's own behaviour.

---

[141] [1988] 2 SCR 3, 51 DLR (4th) 481.

[142] *Ibid* at para 37.

[143] *Ibid* at para 47.

Conclusion

At the time of the entrenchment of the *Charter,* it could scarcely have been contemplated that the Supreme Court would change the long-standing common law rule forbidding men from relying on their self-induced intoxication as a defence to their violence against women. Given the power that was to be given to judges with the advent of the *Charter,* the women who fought for s 28's entrenchment sent a clear message to judges that there must be equality in the substance of the law.[144]

In light of the strong association between the abuse of intoxicants and violence against women, and the frequency with which men claim intoxication when they harm women, it is difficult to overstate the potential effects of an unleashed extreme intoxication defence. Not only may men's sexual assaults and spousal assaults become untouchable by the criminal justice system when they can show they were extremely intoxicated, but the killings of women will potentially be de-criminalized such that even manslaughter convictions for the slaying of women will be precluded if this defence can be proven.

Moreover, even if the defence is infrequently made out at the end of the day after relevant appeals, its availability will undermine women's equality. Women already curtail their liberties in relation to the potential for violence.[145] As complainants, they will be required to endure more prolonged trials concerning violence committed against them and potentially more acquittals at trial, with the resulting chilling effect on the reporting of sexual assault when men are intoxicated. Police and prosecutors will need to account for the extreme intoxication defence in their charging and prosecutorial decisions, such that it will be impossible to assess the full effects of this defence on holding men accountable in criminal law for violence against women.

Women have a right to live in free from the threat of extremely intoxicated male violence. Their lives and their ability to participate fully in public life—socially, economically, and politically—are restricted in demonstrable and material ways by men's violence, including their extremely intoxicated violence. Until women's constitutionally guaranteed equal rights not to be deprived of security of the person except in accordance with the principles of fundamental justice, to fair trials, and to equality are recognized as warranting *Charter* protection on a level equal with the rights of the men who abuse them, the goals of ss 28 and 15 will never be attained. Parliament is not only entitled, but mandated by s 28 to act so that these gendered burdens cease to be imposed on women and girls in Canada. What a pity that the Supreme Court of Canada failed to heed the message sent by the women of Canada

[144] Froc, "Untapped Power", *supra* note 84, citing NDP MP Pauline Jewett's speech to the Ad Hoc Conference of Canadian Women on the Constitution.

[145] Carl Keane, "Evaluating the Influence of Fear of Crime as an Environmental Mobility Restrictor on Women's Routine Activities" (1998) 30:1 Environment and Behavior 60.

years ago that it must protect—and not interfere with—Parliament's sex equality mandate.