R. v. *McCRAW*: RAPE FANTASIES v. FEAR OF SEXUAL ASSAULT

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I. INTRODUCTION

Canadian women's lives are shaped in hundreds of ways, large and small, by the persistent threat of sexual assault. Women do not go out alone at night, hitchhike, live alone, take certain jobs, stay late at the office, or seek help from strangers. In other words, the fear of sexual assault inhibits their liberty of action and their freedom of choice. Yet in the recent case of *R.* v. *McCraw*,[1] when the Judge had a choice between protecting the interest of freedom from threats of sexual assault and a male's rape fantasy, the latter won the day.

In the case of *R.* v. *McCraw*, the accused, Stephen Joseph McCraw was charged with three counts of threatening pursuant to paragraph 243.4(1)(a) of the *Criminal Code*. The paragraph reads as follows:

> Everyone commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat
>
> (a) to cause death or serious bodily harm to any person. . . .[2]

The accused sent three typewritten letters to three different women, none of whom he knew personally. The communications were almost identical, setting out in graphic, explicit detail, the accused's desire to perform sodomy, cunnilingus, oral and vaginal intercourse and various other forms of sexual humiliation on the complainants. At the end of his description of the various sex acts he would perpetrate, the accused said in each letter, "I am going to fuck you even if I have to rape you."[3] It is clear from the context of the letters that the accused used the word "rape" and "fuck" as generic terms including all of the prior

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[1] (8 November 1988), (Ont. Dist. Ct) [unreported].

[2] R.S.C. 1985, c. C-46, s. 373. The threatening provision was found initially in R.S.C. 1970, c. C-34, s. 331 and then in R.S.C. 1985, c. C-46, s. 373 (which was not proclaimed until 12 Dec. 1988). Meanwhile, s. 54 of the *Criminal Law Amendment Act, 1985*, S.C. 1985, c. C-19 repealed s. 331 and s. 39 of the same *Act* replaced s. 331 with s. 243.4(1). R.S.C. 1985, c. 27 (1st Supp.), s. 38 replaced s. 243.4(1) with s. 264.1 and s. 53 of the same statute repealed R.S.C. 1985, c. C-46, s. 373 (the same day on which it was proclaimed).

[3] *McCraw*, *supra*, note 1 at 2.

described sex acts, not just vaginal intercourse. In other words, the threat of force or hostile contact applied to all of the sexual activity described in the letters.

The Court addressed two issues, whether or not the letters constituted a threat and whether the letters threatened serious bodily harm. Judge K.A. Flanigan of the District Court of Ontario acquitted the accused. He did so on the reasoning that the letters were not really threats, but if they were, they were not culpable threats under paragraph 243.4(1)(a) because rape does not necessarily involve serious bodily harm or even bodily harm.

II. THE THREAT ISSUE

Judge Flanigan found that the letters were not culpable threats on two grounds: first, in the accused's mind, the letters were more "adoring fantasies" than threats; and second, the threats were ambiguous and therefore did not necessarily involve the threat of serious bodily harm.

A. The Law

The purpose of the threatening offences is twofold: to protect victims against fear and intimidation, and to serve a preventative function, criminalizing conduct before tangible harm is done. The interest that these threatening laws protect is victims' liberty of action and freedom of choice.[4]

The current section in the *Criminal Code* was amended in 1961, 1980 and 1985 to its present form. Originally the offence was directed to the means of communicating the threat. The threat had to be in writing. Later, an offence was committed if the threat was communicated by letter, telegram, cable or radio.[5] Under the 1985 amendments, a new offence of uttering face to face verbal threats was created, yet written threats were still considered to be more serious. In *R.* v. *Nabis*, Beetz J. discussed the serious nature of written threats:

> Some have reasoned that a person who goes to the trouble of writing a threatening letter, for example, has already proceeded from words to deeds and thereby manifested his resolve. Also, the use of certain means may conceal the identity of the person making the threat or prevent the prospective victim from judging what steps he can take to ensure his safety. Lastly, it is possible that resort to any means other than the one which human beings most usually employ to communicate with each

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[4] Law Reform Commission of Canada, ASSAULT (Working Paper 38) (Ottawa: Supply and Services Canada, 1984) at 13.

[5] *R.* v. *LeBlanc*, [1988] C.C.L., No. 17, 7975, Doc. No. 40/88/CA, N.B.C.A., Sept. 13, 1988, reversing Doc. No. C/C1/20/87, N.B.Q.B., Feb. 10, 1988.

> other is likely to amplify the threat, something which Parliament would seek to prevent.[6]

In *R.* v. *Nabis*, the Supreme Court of Canada said that the *mens rea* requirement requires that the accused means the threats to be taken seriously[7] and in *R.* v. *Howlett* the Court added that the *mens rea* requirement developed under the earlier provisions equally applied subsection 243.4(1). Seaton J.A. said:

> I think that the necessary intention for this offence is to make the prohibited threat. If you have the intention it does not matter whether the accused person intended to carry out the threat.[8]

The Court in *R.* v. *Ross* decided that the definition of a threat was the same as the dictionary meaning; namely, that a threat is "[a] denunciation to a person of ill to befall him; *especially* a declaration of hostile determination or of loss, pain, punishment, or damage to be inflicted in retribution for or *conditionally* upon some source; a menace".[9]

To constitute a defence to a threatening charge, the Supreme Court of Canada in the case of *R.* v. *Natarelli* stated that:

> there must be reasonable justification or excuse not only for the demand but for the making of the threats or menaces by which the accused sought to compel compliance with the demand.[10]

The Court then addressed the relevance of any subjective belief of the accused.

> When it is proved that threats have been for the making of which there could be no justification or excuse, that the threats were made with the intent to gain something and were calculated to induce the person threatened to do something, the commission of the crime. . .is established, and it is unnecessary to inquire whether the person making the threats had a lawful right to the thing demanded or entertained an honest belief that he had such a right; that inquiry would be necessary only if the threats were such that there could be reasonable justification or excuse for making them.[11]

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[6] (1974), [1975] 2 S.C.R. 485 at 491-92, 18 C.C.C. (2d) 144 at 153-54 [hereinafter *Nabis* cited to S.C.R.].

[7] *Ibid.* at 492-93.

[8] (17 December 1987), Vancouver CA007446 (B.C.C.A.).

[9] (1986), 13 O.A.C. 340 at 342, 26 C.C.C. (3d) 413 at 415.

[10] [1967] S.C.R. 539 at 544-45, [1968] 1 C.C.C. 154 at 160 [hereinafter *Natarelli* cited to S.C.R.].

[11] *Ibid.* at 545.

B. Threats as Fantasies

Without referring to any case law, Judge Flanigan said that the letters in the *McCraw* case were more akin to "sexual fantasies" and "adoring fantasies" than threats. He must have come to these conclusions through his own subjective interpretation of the letters because no evidence of fantasies was entered into the record. Even if evidence existed as to the accused's motives, it was incorrect for Judge Flanigan to consider it. The law is clear that the motives of the accused in making the threats are irrelevant[12] except for the requirement that he intends his threats be taken seriously.[13] The fact that the accused proceeded from words to deeds by typing the letters and then sent them anonymously to the complainants, is strong evidence that he intended them to be taken seriously.[14]

Early in the judgment, Judge Flanigan says that "[t]here is no doubt that this is a threat and was perceived by each of the complainants so to be"[15] yet he later contradicts himself by saying that "[t]he tenor of the letters, while immature and disgusting, reveal more of an adoring fantasy than a threat to cause serious bodily harm".[16] Judge Flanigan's suggestion that the accused's subjective intent to have rape fantasies can mitigate or excuse the offence has no basis in law.

More serious than his faulty application of the law is the Judge's one-sided analysis of the case. It reveals a serious gender bias prejudicial to women which denies them both equal protection and equal benefit of the law. Equality rights rest on the moral and ethical principle that all persons should be treated by the law on a footing of equality, with equal concern and equal respect.[17] Equal concern and equal respect were not afforded to the complainants in *McCraw*.

One of the requirements of judicial decision-making is an ability to empathize with parties before the court. Detachment must be the posture from which judges render their final decisions, but it should only be assumed after the judges have exercised their ability to empathize with the parties to the lawsuit. If the judges subject themselves to what they imagine to be the complainant's mental state, they are better equipped to test the parties' competing claims.[18] Here, however, no empathy with the victims of the threats is apparent. Had their perception of the letters been considered by the Judge, it is highly unlikely he would have characterized them as "adoring fantasies".

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[12] *Supra*, note 8.
[13] *Supra*, note 6.
[14] *Ibid.*
[15] *Supra*, note 1 at 1.
[16] *Ibid.* at 5.
[17] *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513 at 524-25, 26 D.L.R. (4th) 728 at 739-40 (C.A.).
[18] National Judicial Education Program, JUDICIAL DISCRETION: DOES SEX MAKE A DIFFERENCE? (New York: NOW Legal Defense and Education Fund, 1981) at 9.

Not only was the Judge's empathy limited to the imagined mental state of the male accused, but his choice of the words, "adoring fantasy", is inappropriate. Both the words "adoring" and "fantasy" connote love, caring and pleasure, and completely disguise and misrepresent the ugly reality of sexual violence. Moreover, the idea that a threatened sexual assault could simultaneously be an adoring fantasy trivializes violence against women and blurs the distinction between voluntary, normal sexual relations and hostile, coerced violations of bodily integrity. Describing the threats as "adoring fantasies" implicitly suggests that threats of sexual assault are normal or acceptable. More than condemning and deterring sexual violence, the tone of the judgment legitimates sexual domination of women by men, eroding women's most basic right, that of inviolability of the person.

The gender bias evident in the judicial analysis of the threat is particularly serious when one considers that sexual assault is the most common crime against the person and it is increasing in reported incidence faster than any other violent crime.[19] It is also clear that only a fraction of sexual assaults that occur are reported.[20] Various studies have estimated that between four and forty percent of all sexual assaults are reported to the police[21] and of those reported, conviction rates are estimated to be the lowest of any crime against the person.[22] Furthermore, victims of sexual assault are overwhelmingly female and perpetrators are overwhelmingly male. For Judge Flanigan to overlook this context in the *McCraw* case is to lose sight of the guidance provided by the Supreme Court of Canada which says that justice requires a contextualized approach in decision-making.[23] There is no doubt that gender is a material fact in a sex-specific offence such as sexual assault, and that the subordinate place women have occupied in the entire social, political and legal fabric of society is relevant to

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[19] L. Clark & D. Lewis, RAPE: THE PRICE OF COERCIVE SEXUALITY (Toronto: Women's Press, 1977) at 61, report that the number of reported rapes in Canada increased by 174 percent between 1961 and 1971. From 1969 to 1973, reported rapes in Toronto increased by 76 percent. In Calgary, the Calgary Sexual Assault Centre reports that there were 42 percent more rapes in 1988 than there were in 1987. As of April 1989, the number of reported rapes has increased markedly over the 1988 statistics.

[20] Canadian Urban Victimization Survey, PATTERNS IN VIOLENT CRIME (Bulletin No. 8) (Ottawa: Solicitor General of Canada, 1987) at 5-7.

[21] A. Medea & K. Thompson, AGAINST RAPE (New York: Farrar, Straus & Giroux, 1974) at 135, *referred to* in C. Boyle, SEXUAL ASSAULT (Toronto: Carswell, 1984) at 151.

[22] B. Roberts, *No Safe Place: The War Against Women* (1983) 15 (No. 4) OUR GENERATION 7 at 10; Toronto Rape Crisis Centre, *Rape*, in C. Guberman & M. Wolfe, eds, NO SAFE PLACE: VIOLENCE AGAINST WOMEN AND CHILDREN (Toronto: The Women's Press, 1985) 61 at 70.

[23] *See, e.g., Law Society of British Columbia* v. *Andrews* (1989), 91 N.R. 255 (S.C.C.); *Action Travail des Femmes* v. *C.N.R. Co.*, [1987] 1 S.C.R. 1114, 40 D.L.R. (4th) 193; *E.(Mrs)* v. *Eve*, [1986] 2 S.C.R. 388, 31 D.L.R. (4th) 1.

sexual violence. A more sensitive, contextualized approach would have helped illuminate the systemic discrimination that exists in male/female sexual relationships and provided a principled basis for the decision.

When judges fail to take context into account, their judgments sometimes rest on unsupported suppositions and stereotypes. There are several persistent myths embedded in our culture about rape despite a dearth of empirical support and despite empirical evidence to the contrary. Two of the most common recurring themes are that a rape victim either elicits the rape by her own behaviour or lies about being raped.[24] Rapists, on the other hand, are thought not to be fully responsible for their acts since they are victims of "uncontrollable emotions and passions, unexplained urges, and fierce desires which can be considered impossible to control one they have been aroused".[25] Once aroused, the myth goes, rape is a natural and predictable result if the woman is not willing to satisfy the desire she has created. The combination of these biases, that women provoke sexual assaults and that men cannot control their sexual appetites, diminishes the fault of the rapist, or in this case, the perpetrator of the threats. The accused in the *McCraw* case is seen by the Judge as "immature", "disgusting" or as a "creep"[26] but not as a criminal. His "sexual fantasies" are forgiven while the victims' rights to freedom of movement, freedom from fear and freedom of choice are not even addressed.

C. Ambiguity

Judge Flanigan further supported his finding that the threats were not culpable on the ground that the Court cannot speculate on the meaning that the accused might have intended beyond the plain meaning of the words used. He said that the words "I'm going to fuck you even if I have to rape you" were ambiguous and did not expressly or by necessary implication refer to the causing of serious bodily harm.[27]

Judge Flanigan relied primarily on one case to support his analysis. The case was *R.* v. *Gingras*,[28] where the accused was charged under paragraph 243.4(1)(a) for threatening a Crown Attorney by telling him that he would "get him" and "let me get my hands on him". In acquitting the accused, the Court in *Gingras* held that the words uttered were undoubtedly threats implying injury but, because

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[24] J. Taylor, *Rape and Women's Credibility: Problems of Recantations and False Accusations Echoed in the Case of Cathleen Crowell Webb and Gary Dotson* (1987) 10 HARV. WOMEN'S L.J. 59. *See also* R.B. Dworkin, *The Resistance Standard in Rape Legislation* (1966) 18 STAN. L. REV. 680 at 682.

[25] W.V. McLaughlin, *The Sex Offender* (Dec. 1962) 29 THE POLICE CHIEF 26 at 28.

[26] *Supra*, note 1 at 9.

[27] *Ibid.* at 6.

[28] (12 May 1986), (Ont. Dist. Ct) [unreported].

they were ambiguous, the Court was not satisfied beyond a reasonable doubt that they necessarily involved the threat of serious bodily harm. Judge Flanigan equated the ambiguity of the threat in *Gingras* to the threats in *McCraw*.

He said that "the words in *Gingras* might mean I'm going to strike you, but not necessarily cause bodily harm, a separate concept".[29] He concluded that the word "rape" in the case before him was equally ambiguous and did not expressly or by necessary implication refer to the causing of serious bodily harm.

There are really two sub-issues on the question of ambiguity. The first is whether or not the threatening words themselves are ambiguous and the second is whether the harm that the words suggest is ambiguous. In *Gingras* the words "get him" and "let me get my hands on him" are arguably ambiguous on both levels.[30] We do not know exactly what "get him" means and even "let me get my hands on him", although more specific, still permits a number of inferences to be drawn on both the exact nature of the threat as well as the extent of the threatened bodily harm.

In the *McCraw* threats, however, the threatening words themselves are highly explicit. The letters describe how the accused will sodomize the complainants, force them to submit to and perform oral sex, how he will lick their bodies, have sexual intercourse with them and ejaculate in their faces. There is no inference that can be drawn from the words other than what they say. Even if one took the word "rape" out of context in the letters and interpreted it as including only non-consensual intercourse as Judge Flanigan did, the word does not lend itself to other inferences like the *Gingras* threats do. Non-consensual intercourse can have no meaning other than intrusive, bodily violation. The only question remaining is whether or not the words unambiguously involve the threat of serious bodily harm. This question overlaps with the question of whether rape is serious bodily harm and is discussed in the next section.

III. HARM

In the Judge's opinion, the requirement of threatening "serious bodily harm" in paragraph 243.4(1)(a) was not met. The Judge said that a threat to rape does not fall within the purview of the section because in law rape does not necessarily amount to serious bodily harm to the victim. In fact he went further, by saying that rape or

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[29] *Supra*, note 1 at 6.

[30] The writer, however, has some doubts about the correctness of *Gingras*. If the threats are viewed in the context in which they were made, it is difficult to draw any inference other than the obvious one — that they were threats to cause serious bodily harm.

sexual assault does not itself necessarily involve *any* kind of physical harm to the victim.[31]

This analysis flies in the face of the legal understanding of assault, sexual assault and women's experiences.[32]

Judge Flanigan's analysis seems to be informed by the pre-1983 law of rape. The *Criminal Code* definition of rape at that time was as follows:

> A male person commits rape when he has sexual intercourse with a female person who is not his wife,
> (a) without her consent, or
> (b) with her consent if the consent
> (i) is extorted by threats or fear of bodily harm,
> (ii) is obtained by personating her husband, or
> (iii) is obtained by false and fraudulent representations as to the nature and quality of the act.[33]

The gravamen or essence of the offence was the non-consent of the female partner. The element of "force" was added as an evidentiary requirement to corroborate non-consent. This led to the idea that the victim had to "resist to the utmost" in order to prove non-consent.[34] The force used to make the victim submit came to be seen as the harm in rape, rather than the rape itself. In other words, the focus shifted from the woman's state of mind as affected by the rapist's actions, to objective evidence of bruises, wounds or other indicia of force. More often than not, if no evidence of resistance could be adduced by the victim, consent was not disproved and the accused was acquitted. The harm of non-consensual intercourse by itself was all but forgotten because of the emphasis on the need for corroborative evidence of force in order to disprove consent.

Judge Flanigan's conclusion that the harm in the offence of rape occurs prior to the sex act indicates that he is influenced by this approach. He states:

> It seems to me that the threats of bodily harm, if they exist under the old concept of rape or the new concept of sexual assault. . .goes [*sic*] to the question of consent. It is independent of rape or sexual assault, so far as the sexual aspect of the act goes. The threat of bodily harm only goes to the question of consent. Rape or sexual assault does not of itself

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[31] *Supra*, note 1 at 9 (emphasis added).

[32] For women's views on rape, *see*, *e.g.*, T.W. McCahill, L.C. Meyer & A.M. Fischman, THE AFTERMATH OF RAPE (Lexington, Mass.: D.C. Heath & Co., 1979); Clark & Lewis, *supra*, note 19; S. Brownmiller, AGAINST OUR WILL: MEN, WOMEN AND RAPE (New York: Simon & Schuster, 1975); A. Burgess & L. Holmstrom, *Rape Trauma Syndrome* (1974) 131 AM. J. OF PSYCHIATRY 981.

[33] R.S.C. 1970, c. C-34, s. 143 [rep. 1980-81-82-83, c. 125, s. 6].

[34] J.A. Scutt, *The Standard of Consent in Rape* (1976) N.Z.L.J. 462.

> necessarily involve any kind of physical harm to the victim. Rape or sexual assault involves non-consensual intercourse as defined in the Criminal Code of Canada.[35]

Judge Flanigan is saying, in effect, that in some cases once the victim submits to threats or physical coercion, the harm or force ceases.

The long-established common law view differs. Here, any unwanted touching, no matter how slight, can be termed an application of force that is injurious. This approach to unwanted touching, even if slight, has a great deal of significance as far as sexual touchings are concerned because of the dignitary interest involved. In the case of *R. v. Burden*[36] for example, the British Columbia Court of Appeal held an accused guilty of indecent assault when he sat beside a complainant on a bus and put his hand on her thigh for a few seconds. The Court of Appeal said his actions constituted the application of force.[37] The Court relied on an ancient definition of battery:

> Battery seemeth to be, when any injury whatsoever, be it ever so small, is actually done to a person of a man in any angry or revengeful, or rude, or insolent manner. . . . For the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stages of it, every man's person being sacred, and no other having a right to meddle with it in any, the slightest, manner. . . .[38]

By saying that unwanted sexual touching or even forced sexual intercourse are not necessarily forms of violence in and of themselves, Judge Flanigan does not consider the victim's perspective. For women, "rape" or "non-consensual intercourse" under any circumstances constitutes a profound interference with their physical, emotional and psychological integrity as well as their sense of dignity and autonomy.[39] The *Criminal Code* amendments of 1983[40] recognize this reality.

Parliament's intention in amending the rape laws was to convey the message that "rape" or non-consensual sexual intercourse as well

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[35] *McCraw, supra*, note 1 at 8.

[36] (1981), 64 C.C.C. (2d) 68, 25 C.R. (3d) 283 (B.C.C.A.) [hereinafter *Burden* cited to C.R.].

[37] *Ibid.* at 286.

[38] *Ibid. Quoted from* Taschereau & H. Elzian, THE CRIMINAL CODE OF THE DOMINION OF CANADA (Toronto: Carswell, 1893) at 262. *See also R. v. Jones* (1963), 41 C.R. 359 (N.S.C.A.); *R. v. Beamish* (1965), [1966] 1 C.C.C. 64, 45 C.R. 264 (N.S.C.A.); *Bolduc v. R.*, [1967] S.C.R. 677, 63 D.L.R. (2d) 82; *Re Stillo and R.* (1980), 56 C.C.C. (2d) 178 (Ont. H.C.).

[39] *Supra*, note 32. Judge Flanigan's approach reflects the ideology in the pre-1983 doctrine of the husband's immunity. Until January, 1983, a husband could not be guilty of rape notwithstanding his wife's lack of consent to sexual intercourse. The law provided no protection or acknowledgement of a married woman's right to physical integrity or sexual autonomy. In fact, the immunity flatly denied any such rights. This law was clearly sex-biased as there was no legally supportable competing value to justify such gross limitations on women's rights.

[40] *The Criminal Code Amendment Act*, S.C. 1980-81-82-83, c. 125.

as other forms of sexual attack were not just sexual acts motivated by lust, but were primarily acts of violence or assault with sex as the weapon.[41]

Furthermore, the new sexual assault maximum sentences, when compared to maximum sentences for assault, indicate that sexual assaults are potentially twice as serious as non-sexual ones.[42] As the sexual element is the only distinction between them, it is impossible not to conclude that Parliament intended to convey the message that attacks on the sex organs are much more harmful and serious than attacks on other parts of the body.

The terminology of sexual offences also changed. The terms "rape" and "indecent assault" were replaced by the general term "sexual assault" and the offence was moved from the "Morals" section of the *Criminal Code* to the "Crimes Against the Person" section. These changes were also designed to emphasize the violent, assaultive nature of the crime rather than its sexual nature and to remove the stigma of rape from its victims.

Other amendments showed conceptual change regarding women's individual rights. Vaginal intercourse, previously essential for the crime of rape, became only one of the ways in which the offence of sexual assault could be committed. Parliament conceded that sexual outrages to the person can occur in many different ways, all of which violate the integrity of the person. Parliament thereby realized that it is equally abhorrent for a person to be forced to submit to oral or anal penetration, for example, as it is to vaginal intercourse.

Removal of the spousal immunity in section 278 of the *Criminal Code of Canada* recognized wives' interest in sexual autonomy over husbands' interest in sexual ownership. Furthermore, removal of the

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[41] Canada, *H.C. Debates*, (1st Sess., 32nd Parl.) vol. XVII at 20041 (4 Aug. 1982). During this debate, The Hon. Flora MacDonald stated that "[t]his legislation makes a clear statement. It calls a spade a spade. It says that sexual assault is primarily an act of violence, not of passion; an assault with sex as the weapon."

[42] *See, e.g.*, the following table that compares the maximum sentences for assault with those for sexual assault, taken from an unpublished paper by L.O. Wener, *An Examination of Sexual Assault Legislation* (April, 1985).

Assault	Max. Sentence	Sexual Assault	Max. Sentence
Assault s. 245	5 years	Sexual assault s. 246.1	10 years
Assault with a weapon or causing bodily harm	10 years	Sexual assault with a weapon, threat to a third party or with another person s. 246.3	14 years
Aggravated assault s. 245.2	14 years	Aggravated sexual assault s. 246.3	Life

evidentiary requirements of rules of corroboration,[43] recent complaint[44] and the ability to question the complainant about her prior sexual conduct[45] and sexual reputation[46] acknowledged the unfairness and the disproportionate adverse impact that the former law had had on women.

However, notwithstanding these and other requirements, Judge Flanigan relied on the old definition of rape and then conceptualized it as a sexual encounter rather than as an assault. This approach had two important effects. First, it limited the scope of the accused's threats to "non-consensual intercourse" (even though the accused threatened several other sexual attacks[47]) and second, it provided a conceptual framework that allowed the Judge to separate "assault" from the sexual element of sexual assault in order to determine harm.

The Judge's use of a definition of rape that is narrower than the accused's own words is arguably overly cautious, overly protective, as well as incorrect in law, but the conceptualization of rape as a sexual act rather than a violent one reveals a bigger problem.

To view rape as a sexual act is to empathize with the rapist. As the rapist sees it, rape is nothing other than an expression of sexual desire. The object of the encounter is merely sexual intercourse, albeit forced, which in itself is a source of pleasure.[48] Harm to the victim occurs only if she resists or the rapist inflicts wounds, maims or disfigures her.

To avoid gender bias, judges must go beyond the male perpetrator's perspective of the violence, particularly given the fact that "rape" is a gender specific crime against women. To separate "assault" from "sexual" for the purposes of measuring harm in a sexual assault case undermines women's sexual autonomy and their fundamental rights to bodily integrity. Judicial use of this form of analysis in sexual assault cases after the 1983 amendments defeats Parliament's intention. To go further and extend the approach to the threatening provisions is neither warranted nor justified.

Even if one agreed with Judge Flanigan's approach of separating "assault" from "sexual" for purposes of assessing harm, it can be argued that the threats in *McCraw* fit the requirements of being threats of serious bodily harm. One large Canadian study indicates that in 32 percent of rape cases, the victim was punched, slapped, kicked,

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[43] *Criminal Code*, R.S.C. 1985, c. C-46, s. 274, *as am.* S.C. 1987, c. 24, s. 11.

[44] *Criminal Code*, R.S.C. 1985, c. C-46, s. 275, *as am.* S.C. 1987, c. 24, s. 11.

[45] *Criminal Code*, R.S.C. 1985, c. C-46, s. 276, *as am.* S.C. 1987, c. 24, s. 12.

[46] *Criminal Code*, R.S.C. 1985, c. C-46, s. 277, *as am.* S.C. 1987, c. 24, s. 13.

[47] *See* discussion, *supra*, at xxx.

[48] Clark & Lewis, *supra*, note 19 at 161.

choked, wounded or rendered unconscious.[49] An American study reported that 84 percent of reported rapes included added violence.[50]

The degree of violence in most cases is relative to the amount of resistance put up by the victim.[51] As we do not know how much resistance the victims in the *McCraw* case would have put up had the accused carried out his threats, the degree of violence inherent in the threats of rape range from touching to murder. By threatening sexual assault the accused creates a risk of harm over and above the harm of the unwanted sexual touching. The victim may resist to the utmost of her capabilities, inviting further abuse, serious injury or even death, or she may be more prudent for her own personal safety and not resist. The potential lack of resistance on the part of the victim of a violent attack should not nullify the harm always inherent in the threat.[52]

Judge Flanigan's analysis seemingly requires the accused to expressly threaten death, near-death or some aggravated injury over and above threatening "rape" before the offence occurs. This gives to the accused the benefit of assuming no resistance and in effect renders the threatening section almost meaningless for women insofar as protection of their liberty of action and freedom of choice are concerned.

IV. Conclusion

In summary, the decision in *R.* v. *McCraw* should be overturned on appeal because it is wrong in law, but also, and more importantly, because it is wrong in perspective. The case perpetuates outdated, unfair stereotypes and views issues only from the dominant, male perspective. Unless corrected, this form of judicial decision-making contributes to sex-discriminatory practices and policies in law and society.

Attacks on women's sexual organs are assaultive regardless of whether additional harm to their bodies occurs during the sexual attack.[53] Threatening to use a woman's body against her will, therefore, is to threaten a profound physical attack, which society has an obligation to eliminate. To minimize serious violations of bodily security as "not harmful" or as not causing "serious bodily harm" simply because they involve sexual organs, is to obscure their assaultive nature as well as their potential risk to life.[54]

Unwarranted physical attacks and coercion by others are the most fundamental justifications for the imposition of legal sanctions. To

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[49] *Ibid.* at 67.

[50] R.J. McCaldon, *Rape* (1967) 9 Cdn. J. of Corrections 37, *referred to* in Clark & Lewis, *ibid.* at 68.

[51] P.H. Gebhard *et al.*, Sex Offenders (New York: Harper & Row, 1965) at 196, *referred to* in Boyle, *supra*, note 21 at 53-54.

[52] Burgess & Holmstrom, *supra*, note 32 at 983 and 985.

[53] Clark & Lewis, *supra*, note 19 at 169-70.

[54] *Supra*, note 51 and Burgess & Holstrom, *supra*, note 32.

deny women the exclusive ownership and control over their bodies, by minimizing the seriousness of sexual assault or threats of sexual assault merely because they have a sexual element, is contrary to any notion of equality or fairness. The judiciary must understand that the essence of sexual assault is violence and the crime must be taken seriously.

It is common knowledge in the legal profession that the law as represented by prior decisions is as much the product of the morality of those before the court and the judge's idea of fairness as it is of any set of abstract rules.[55]

Since the 1960's women have increasingly voiced concerns about the patriarchal society in which we live and how it works to their disadvantage. As a result, some changes have been made to laws in order to improve the position of women. The changes to rape laws are a prime example. However, some judicial opinions continue to appear in which the result and reasoning are indistinguishable from those decided long before the changes occurred, showing that legislative change alone cannot alleviate problems faced by victims of sexual assault. If courts fail to reject traditional sexist attitudes in their decisions, no one can say that women's rights exist.

While many factors may affect a judge's decision, the influence of gender stereotypes has not received the significant attention it deserves from the judiciary. Other jurisdictions have implemented national and state judicial education programmes on gender neutrality to alleviate gender biased decisions, but consistent treatment of the subject in Canadian judicial education programmes is non-existent. At the same time, scrutiny of judicial attitudes towards equality issues reveal widespread use by the judiciary of societally induced assumptions and untested beliefs.[56] The *McCraw* case should not be seen as an exceptional example of judicial attitudes but rather as a paradigm of a problem judges must address on a broad scale if they are to fulfill their mandate as neutral, impartial arbiters in legal disputes.

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[55] *Supra*, note 18 at 9.

[56] *See, e.g.*, K.E. Mahoney & S.L. Martin, eds, EQUALITY AND JUDICIAL NEUTRALITY (Toronto: Carswell, 1987); A. Sachs & J.H. Wilson, SEXISM AND THE LAW: A STUDY OF MALE BELIEFS AND LEGAL BIAS IN BRITAIN AND THE UNITED STATES (New York: The Free Press, 1978).