CANADIAN JUDGES AND THE LAW OF RAPE: SHOULD THE CHARTER INSULATE BIAS?

*Elizabeth Sheehy**

> Women who say no do not always mean no. It is not just a question of saying no, it is a question of how she says it, how she shows and makes it clear. If she doesn't want it she has only to keep her legs shut and she would not get it without force and there would be marks of force being used.
>
> Judge David Wild
> Cambridge Crown Court, 1982[1]

> Unless you have no worldly experience at all, you'll agree that women occasionally resist at first but later give in to either persuasion or their own instincts.
>
> Judge Frank Allen
> Manitoba Provincial Court, 1984[2]

Rape and fear of rape have a constant and pervasive impact upon the lives of women.[3] The laws which prohibit rape, and the legal process by which this crime either is or is not punished, reinforce relations of dominance between men and women, shape attitudes and ideologies regarding male and female sexuality, and colour women's

---

* Faculty of Law, University of Ottawa. I gratefully acknowledge and appreciate the contributions of the following women to this article: my Ottawa professorial colleagues, Susan Boyd and Brettel Dawson (Carleton University Department of Law) and Jennie Abell, Martha Jackman and Sanda Rodgers (University of Ottawa, Common Law) for their valuable insights and support for earlier drafts; my Toronto colleagues, Shelley Gavigan and Elizabeth Pickett (Osgoode Hall Law School) for their very thoughtful contributions to later drafts; my national colleague, Donna Greschner (University of Saskatchewan, Department of Law) and my international colleague, and visitor of Ottawa Law Faculty for the spring of 1989, Regina Graycar (University of New South Wales, Faculty of Law) for their perseverance and commitment in reading and commenting on multiple versions of this piece; and finally, Jill C. Abramczyk (LL.B. Ottawa, 1990) for her research assistance and her meticulous attention to my footnotes.

[1] P. Patullo, JUDGING WOMEN: A STUDY OF ATTITUDES THAT RULE OUR SYSTEM (London: National Council for Civil Liberties, 1983) at 20-21.

[2] "Woman Assaulted by Boyfriend to File Complaint Against Judge", *The Globe and Mail* (27 March 1989) A8.

[3] For a recent study which documents the impact of this fear on the lives of women, *see* M. T. Gordon and S. Riger, THE FEMALE FEAR (New York: The Free Press, 1989). *See also* L. MacLeod, THE CITY FOR WOMEN: NO SAFE PLACE (Ottawa: Secretary of State, 1989).

experience of rape and of their own credibility as actors in the criminal justice system. Canadian legislators have come some distance in responding to women's demands for an effective legal response to rape, as evidenced by the 1982 rape law reforms to the *Criminal Code* of Canada.[4]

Initial legislative steps toward addressing the injury of rape to women have been seriously jeopardized by recent legal challenges to the constitutionality of the legislation which rely on the Canadian *Charter of Rights and Freedoms*.[5] These cases are being pursued on a widespread scale in criminal trials across Canada, and they have been aimed at both substantive and procedural provisions.[6]

Many of these *Charter* challenges have concentrated on sections 276 and 277 of the *Criminal Code*,[7] the sections which place legislative, non-discretionary limits on the type of evidence which may be introduced at trial with respect to a rape victim's past sexual history and character. Challenges to sections 276 and 277 have been pursued in several provinces, have received the support of liberal lobby groups such as the Canadian Civil Liberties Association,[8] and have been at least partially successful in several cases.[9]

The resulting confusion about the legal status of sections 276 and 277 poses a serious threat to the integrity of the entire package of rape law reforms. Police, Crown attorneys and judges across Canada must

---

[4] *The Criminal Law Amendment Act*, S.C. 1980-81-82, c. 125.

[5] Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[6] For a summary of these challenges, *see* G. Brodsky and S. Day, CHARTER EQUALITY RIGHTS FOR WOMEN: ONE STEP FORWARD OR TWO STEPS BACK? (Ottawa: Canadian Advisory Council on the Status of Women, 1989) at 58-59 and 104-05.

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

> S. 276(1) — In proceedings in respect of [sexual offences], no evidence shall be adduced by or on behalf of the accused concerning the sexual activity of the complainant with any person other than the accused unless
> (a) it is evidence that rebuts evidence of the complainant's sexual activity or absence thereof that was previously adduced by the prosecution;
> (b) it is evidence of specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge; or
> (c) it is evidence of sexual activity that took place on the same occasion as the sexual activity that forms the subject-matter of the charge, where that evidence relates to the consent that the accused alleges he believed was given by the complainant.
>
> s. 277 - In proceedings in respect of a [sexual] offence, evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the crediblity of the complainant.

[8] This Association has been granted intervenor status in the case of *Re Seaboyer and the Queen, Re Gayme and the Queen* (1987) 61 O.R. (2d) 290, 58 C.R. (3d) 289 (C.A.) [hereinafter *Re Seaboyer*; *Re Gayme* cited to O.R.].

[9] *See Re Seaboyer*; *Re Gayme*, *ibid.* and *R.* v. *Wald*, [1989] 3 W.W.R. 324, 65 A.L.R. (2d) 114 (C.A.) [hereinafter *Wald* cited to W.W.R.].

inevitably utilize different criteria in assessing the admissibility of sexual history and character evidence, and thus the strength of a particular case for the purpose of prosecution. Rape crisis centres and counsellors have been forced to tell victims that there are no guarantees about what evidence can be used to discredit them if they decide to report and prosecute the crime.[10]

In this article, I argue that sections 276 and 277 must survive these constitutional challenges. This matter is of such urgency to Canadian women that both Parliament and the Supreme Court of Canada should facilitate the speedy resolution of the constitutionality of this legislation: the former by pronouncing clearly on the intent behind the legislation; and the latter by upholding the validity of sections 276 and 277 in key cases pending before the Court which should be heard and decided in an expeditious fashion.

I begin my analysis of the current status of sections 276 and 277 with an examination of a recent decision of the Alberta Court of Appeal, *R.* v. *Wald*.[11] This decision struck down section 276 as invalid legislation because the judges perceived that it conflicted with an accused's section 7 and subsection 11(d) *Charter* rights[12] to a "fair" hearing. *Wald* will undoubtedly be appealed to the Supreme Court of Canada, and may in fact be heard together with another significant case on the same legal issue, in *Re Seaboyer and the Queen, Re Gayme and the Queen.*[13]

I argue that *Wald* was wrongly decided on every legal issue, and I use *Wald* as the starting point for a more wide-ranging critique of the legal doctrines. The concept of "relevance" as used in *Wald* and other cases is so indeterminate and dependent upon unsubstantiated cultural beliefs that it must be rejected as likely to produce erroneous verdicts. The defence of honest, but unreasonable mistake of fact with respect to consent relied upon by the court in *Wald* as necessitating the invalidation of section 276 should itself be repudiated by our courts because it legitimizes intolerable levels of physical coercion in sexual relations between men and women. The section 7 and subsection 11(d) *Charter* rights of the accused which were said to be in jeopardy in *Wald* cannot be characterized as compromised when viewed in the specific context of the treatment of offences of sexual violence as compared to other offences. Further, cases such as *Wald* in fact involve

---

[10] P. McGillicuddy, telephone interview, June 16, 1989.

[11] *Wald, supra*, note 9.

[12] *Charter*.

"s.7 - Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

"s.11(d) - Any person charged with an offence has the right . . . to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

[13] *Supra*, note 8.

conflicts of *Charter* interests, since women can assert sections 7 and 15 rights[14] to security of the person and equal protection of the law in defence of the validity of sections 276 and 277. By virtue of section 28 of the *Charter*,[15] women's section 15 rights ought to prevail over those of the accused. And, given that Parliament has already spoken clearly and deliberately on this question when it redefined "relevance" in section 276, and given that this legislation resulted from women's use of the democratic process, it is imperative that our courts defer to Parliament by invoking section 1 of the *Charter*[16] to preserve sections 276 and 277 even if a *Charter* violation is identified.

If the Supreme Court of Canada strikes down or varies this legislation when it pronounces upon *Wald* and *Re Seaboyer; Re Gayme*, the criticisms and apprehensions of both critical and feminist legal scholars will have borne fruit. Critical legal scholars have argued that the *Charter* invites judges to reassert judicial sovereignty over issues legislated by Parliament;[17] feminist legal scholars have warned that judges, both male and female, may be unable to detach themselves sufficiently from the framework of our patriarchal[18] society to render

---

[14] *Charter*.

s.15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination . . . based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[15] *Charter*.

s.28 Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

[16] *Charter*.

s.1 The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[17] *See generally*, T. G. Ison, *The Sovereignty of the Judiciary* (1985-86) 10 ADELAIDE L. REV. 1; H.J. Glasbeek and M. Mandel, *The Legalization of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms* (1984) 2 SOCIALIST STUDIES 84: J. Fudge, *The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to Further Feminist Struggles* (1987) 25 OSGOODE HALL L.J. 485; J. Fudge, *The Effect of Entrenching a Bill of Rights Upon Political Discourse: Feminist Demands and Sexual Violence in Canada* (York University, Toronto, 1989) forthcoming in the INTERNATIONAL JOURNAL OF THE SOCIOLOGY OF LAW; A. Petter, *The Politics of the Charter* (1986) 8 SUP. CT. L. REV. 473; A. Petter, *Backwards March: The Political Wrongs of Charter Rights* (University of Victoria, B.C., 1988) [unpublished], revised and printed as *Immaculate Deception: The Charter's Hidden Agenda* (1987) 45 THE ADVOCATE 857.

[18] By "patriarchal", I mean to designate a society in which men dominate the major social, economic and political institutions, which themselves have *decision-making* power over the lives of women as individuals and as a group. *See* G. Lerner, THE CREATION OF PATRIARCHY (New York: Oxford University Press, 1986) at 239. The belief systems generated by such institutions reproduce relations of dominance, and are employed by most decision-makers within these institutions, regardless of the individual's sex, race, or class. Thus the fact that the judge who rendered the opinion in the *Wald* case, Madam Justice Hetherington, is a woman should hardly be surprising.

Charter interpretations which are also fair to women.[19] The contradictions inherent in the *Charter* would be made apparent if the legislation is not upheld, for it is arguable that women in countries such as Australia, which do not have a *Charter* or a *Bill of Rights*, may have better access to "equality" than do Canadian women, given that Australian rape shield laws cannot be struck down or altered by the judiciary on this basis.[20]

Most important, the consequences of judicial invalidation of sections 276 and 277 would be disastrous for both present and future victims of rape. The only recourse left at that point would be to lobby Parliament to utilize the section 33 override power in the *Charter*[21] to reenact this legislation which is so important to those women who courageously attempt to prosecute sexual offences committed against them. The analysis which follows is dedicated to avoiding the need for such drastic action.

I. THE CASE

In *Wald*, three men were convicted for their individual roles in a gang rape. The rape was particularly vicious and coercive: in addition to the physical presence of the three accused,[22] strangulation, a gun and a meat cleaver were used. The victim also sustained physical injuries as a result. On appeal the convicted men argued that sections 246.6 and 246.7 (now sections 276 and 277, respectively) should be declared invalid as infringing their constitutional rights to a fair trial (section 7) and their right to be presumed innocent until proven guilty

---

[19] *See, e.g.*, the efforts by C. Boyle in *Sexual Assault and the Feminist Judge* (1985) 1:1 C.J.W.L. 93 at 101-06 to create the possibility of judicial decision-making regarding sexual assaults which takes women into account.

[20] This observation was made by a visiting scholar, Professor R. Graycar of the University of New South Wales, Faculty of Law. On the other hand, it must be conceded that there is nothing other than political considerations to prevent such a government from simply repealing rape shield laws.

[21] *Charter*.

> s.33 (1) Parliament or the legislature of a province may expressly declare . . . that the Act or a provision thereof shall operate notwithstanding a provision included in s.2 or sections 7 to 15 of this Charter.

[22] It should be remarked that judges do not seem to recognize the impact of the "mere" physical presence of multiple assailants: on a victim's ability to express non-consent and resistance (*R.* v. *Laybourn, Bulmer and Illingworth*, [1987] 1 S.C.R. 782, 33 C.C.C. (3d) 385) [hereinafter *Laybourn* cited to S.C.R.]; on the need for evidence of additional "active" conduct on the part of the accused to make them parties to the offence (*Dunlop and Sylvester* v. *The Queen*, [1979] 2 S.C.R. 881, 47 C.C.C. (2d) 93; *R.* v. *Clarkson and others*, [1971] 3 All E.R. 344 (Court Martial Appeal Court); *R.* v. *Salajko* (1970), 1 O.R. 824, [1970] 1 C.C.C. 352 (Ont. C.A.)); *but see R.* v. *Black and six others*, [1970] 4 C.C.C. 251, 10 C.R. 17 (B.C.C.A.) (male victim) and on the accused's state of mind with respect to the question of consent (*see* Laybourn).

(subsection 11(d)). On the facts, they argued that they had been prejudiced by the trial Judge's exclusion of proposed evidence, pursuant to sections 276 and 277, to the effect that:

> . . . her reputation is that she is easy and the word that they would use to describe it in everyday language, to put it bluntly, is slut. And one or more of them will say that she also has a reputation for having been easy in terms of consenting to sex with more than one man at the same time. . ..[23]

The accused also argued that they should have been permitted to introduce expert evidence to suggest that the two-day blackout experienced by the victim several days *after* she had survived and reported this life-threatening assault, had either been feigned or was the product of mental illness.

Madam Justice Hetherington, for the majority, ruled that section 277 did not infringe the *Charter*. This section precludes the use of reputation evidence to either challenge or support the credibility of the victim. The Justice concluded that such evidence is too unreliable to have any probative value, and that sexuality is completely unrelated to truth-telling in any event.[24]

Hetherington J. accepted the arguments of the accused regarding section 276, however, and ruled that the section was invalid because it required the exclusion of evidence which might be "relevant". While the Justice repudiated the notion that prior consensual sexual experiences of a victim make it any more likely that she consented to sex with an accused as a general matter,[25] she identified two situations where she thought the evidence might be "relevant". The first such situation was where the evidence suggested a disposition to consent to sexual activity of a "very distinctive kind" or in "very distinctive circumstances".[26] The second situation was where the accused had personal knowledge that the victim had consented to sexual activity with other men on occasions other than that at issue, such that he might have been mistaken in his belief that she consented to sex with him.[27] Both of these exceptions were sketched very broadly, with no further explanation, detail or examples to confine their scope.

Hetherington J. asserted that the exclusion of evidence in these two situations denied an accused the right to a "fair" hearing, as guaranteed by section 7 and subsection 11(d). In so ruling, she gave no considered analysis to the content and implications of these *Charter* rights. She simply stated: "Surely no balancing of the interests of the

---

[23] *Wald*, *supra*, note 9 at 357.

[24] *Ibid.* at 356.

[25] *Ibid.* at 349.

[26] *Ibid.* "Such evidence should be admitted in circumstances roughly analogous to those in which similar fact evidence is admitted."

[27] *Ibid.*

complainant and the accused can be fair if it may prevent an accused from introducing relevant and otherwise admissible evidence, the probative value of which exceeds its prejudicial effect."[28]

Madam Justice Hetherington gave similarly short shrift to the argument that section 1 of the *Charter*, which provides that rights are subject to "such reasonable limits" as can be "demonstrably justified in a free and democratic society",[29] should be invoked to save section 276: "Although the objective of s.[276] is certainly important, it is not, in my view, of sufficient importance to warrant overriding the constitutionally protected right of an accused to a fair hearing . . . ."[30] This result was a foregone conclusion, the contest having been identified as between an accused's right to a fair trial and the victim's interest in avoiding embarrassment.[31]

After finding a *Charter* violation, Hetherington J. went on to consider possible remedies. She rejected the constitutional exemption approach used by the Ontario Court of Appeal in *Re Seaboyer*; *Re Gayme*[32] of rendering a provision inoperative only in particular fact situations where there is an actual constitutional conflict. Hetherington J. declined to use this approach, in part because she did not think that the exceptions she identified as "relevant" would be rare.[33] She instead ruled section 276 invalid on its face. As reassurance that her ruling will not return rape victims to the judicial wilderness which preceded legislative intervention, Hetherington J. proposed the adoption of criteria set out in 1977 by Professor Vivian Berger in a law review article[34] which the Justice suggested represented "modern" views. Professor Berger's article not only lists the two exceptions adopted by Hetherington J., but also recommends that evidence of sexual conduct tending to prove motive, and sexual conduct evidence "offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act or acts charged"[35] be designated as "relevant" and admissible by judges.

---

[29] *Charter*, s. 1.

[30] *Wald*, *supra*, note 9 at 351.

[31] *Ibid.* Quoting from the judgment of Madam Justice McLachlin (as she was then) in *R.* v. *LeGallant* (1985), 47 C.R. (3d) 170 at 180, 18 C.R.R. 362 at 371 (B.C.S.C.). Madam Justice Hetherington had earlier mentioned the government's interest in increasing the rate at which women reported their victimization (*Wald*, *supra*, note 9 at 351), but she failed to directly address this objective in her analysis.

[32] *Supra*, note 9.

[33] Madam Justice Hetherington also stated that the persuasive burden of proof regarding a constitutional exemption would be onerous for the accused, and that s.246.6 would have prevented the accused from describing the proposed evidence in an effort to sway the judge at the *voir dire*.

[34] *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom* (1977) 77 COLUMBIA L. REV. 1.

[35] *Ibid.* at 99.

Madam Justice Hetherington then turned to the question of whether these particular accused had been prejudiced in their defence by the exclusion of the proffered evidence. She decided that, even using the adopted guidelines, the evidence would have been excluded because the accused were simply alleging character or reputation evidence that went to the victim's credibility rather than to consent, which was the matter at issue. However, elsewhere in her judgment, she suggested that the evidence might have been admissible had a sufficient evidentiary basis been laid to show either a pattern of strikingly similar sexual activity, or the accused's personal knowledge of the victim's reputation as prone to consent.[36]

Hetherington J. nonetheless ordered a new trial on the basis that the accused had been disadvantaged by the exclusion of the proposed expert evidence regarding memory loss. She disagreed with the trial Judge's conclusion that the evidence be excluded because it was sufficiently grounded in experience on the part of the "expert", unqualified, and not beyond the ordinary understanding of the jurors such that expert advice was necessary. Hetherington J. decided that these weaknesses in the evidence should go to weight, not admissibility. Because this evidence might have helped the jury in assessing the credibility of the victim, she decided that a new trial was required so that the evidence could be heard. The ancillary result, of course, is that the victim will have to undergo the ordeal of a trial a second time. The accused will also have another opportunity at the new trial to establish the "relevance" and admissibility of the woman's past sexual experience by creating the evidential basis identified as lacking by Madam Justice Hetherington.

Justice Harradence concurred, in a confused and contradictory judgment. While basically accepting the reasoning of the majority opinion, he went a step closer towards making the victim an open target for defence counsel. Justice Harradence acknowledged that evidence of reputation was in no way probative with respect to the *actus reus* element of non-consent,[37] but he stated that evidence of sexual reputation ought to be admissible to assist the accused in setting up a *mens rea* defence of mistake of fact regarding consent, even where the accused had no actual knowledge of that alleged reputation:

> The fact that the complainant has a reputation for participating in a specific type of sexual conduct can strengthen the accused's testimony that he honestly believed she was consenting notwithstanding the fact that the accused was not aware of the complainant's propensity. Such evidence

---

[36] *Wald*, *supra*, note 9. Madam Justice Hetherington did not describe any clear limits on this use of evidence: "If Gerk knew that the complainant had the reputation described. . .evidence of that reputation would make his belief that she consented more reasonable and therefore more credible." (at p. 357).

[37] *Ibid.* at 336.

> enhances the credibility of the accused's assertion that he honestly but mistakenly believed that the complainant was consenting.[38]

He stated that such evidence should be admissible to establish the "air of reality" evidentiary threshold required under *R.* v. *Pappajohn*[39] before an accused will actually be permitted to introduce the defence of mistake.

Justice Harradence's ruling would seem to permit the use of the victim's past sexual experience *whenever* defence witnesses come forward to testify as to a victim's "reputation", with no logical limits being placed thereon. He asserted that rape victims will not be returned to their vulnerable position under the common law because judges who make determinations regarding admissibility will be guided by "changing societal beliefs and values. One change which must be recognized by the common law is that women who choose to engage in sexual encounters outside of steady relationships are not made less credible for that reason."[40] This statement demonstrates that not only does Justice Harradence misapprehend that evidence of reputation will be in fact be used to answer the question of *actus reus* where the accused was in fact unaware of that so-called "reputation"; it also indicates a misguided self-confidence in his capacity to reflect "changing societal beliefs".

This article now turns to a more detailed critique of the implications of the *Wald* decision. I examine, in turn, the issues of "relevance", the mistake of fact defence, the interpretation of sections 7 and 15 of the *Charter*, and the invocation of section 1 of the *Charter*.

II. "RELEVANCE"

The *Wald* decision utilizes abstraction, undocumented and indeterminate "criteria", and distorted notions of female sexuality in interpreting the concept of "relevance" in relation to offences of sexual assault. For these reasons, I argue that the construction of "relevance" in *Wald* should be rejected unequivocably by Canadian courts.

---

[38] *Ibid.* at 337.

[39] [1980] 2 S.C.R. 120, 111 D.L.R. (3d) 1 [hereinafter *Pappajohn* cited to S.C.R.].

[40] *Wald*, *supra*, note 9 at 339.

A. "Relevance" Relies on Abstraction and De-contextualization

In her judgment in *Wald*, Madam Justice Hetherington has used the methodological tool of abstraction[41] in such a way that the absurdity and factual irrelevance of the accused's arguments is obscured. Abstraction is used by common lawyers to remove the legal question posed from its social, political and economic context, and from the lived events which give rise to the case. Thus, in *Wald*, the question was framed as the theoretical violation of an accused's right to introduce evidence to support "consent in fact" and "mistake regarding consent" defences. No recognition was accorded by Madam Justice Hetherington to the fact that accused men who used this degree of violence, that is, strangulation, a gun and a meat cleaver, could not possibly argue a consent defence, regardless of the victim's sexual experience. A mistake of fact defence would also be completely untenable on these facts.

It is true that *Charter* jurisprudence tolerates the consideration of challenges to legislation where a potential violation has not in fact had an impact on the trial of the accused.[42] However, one wonders what the incentive was for Hetherington J. to pronounce upon theoretical *Charter* violations, particularly when, in the event, she decided the question of a new trial on other grounds. What is most remarkable is that nowhere in this judgment can one find a clear and concrete statement relating the law to the facts and pronouncing on the unreality of the accused's proposed defence theory. The abstraction of the issue of "relevance" in *Wald* conjures up a troubling and deceptive picture of the real interests which are at stake in this case. The interests of ascertaining the truth of what happened, and of protecting women's physical integrity, have been minimized. In addition, the abstraction creates the erroneous impression that these men have been precluded from presenting a potentially valid defence.

The use of the concept of "relevance" in sexual assault cases is also misleadingly portrayed in *Wald* as simply a uniform application of a universal principle. The failure of Hetherington J. to put "relevance" into context and to consider the *actual* use of evidence in a victim's past history in rape cases, versus its use in other cases, has obscured the truly anomalous implementation of the concept of "relevance' in sexual assault prosecutions.

---

[41] For a discussion regarding the tools of legal method and their impact upon feminists' use of law, *see* M.J. Mossman, *Feminism and Legal Method: The Difference it Makes* (1986) 3 AUSTRALIAN J. OF LAW AND SOCIETY 30. *See also* L.M. Finlay, *"Breaking Women's Silence in Law — What Language Can We Use? The Dilemma of the Gendered Nature of Legal Reasoning"*. (Paper prepared for the Notre Dame L. Rev. Symposium, Feb., 1989) [unpublished].

[42] *R.* v. *Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200.

It may be true that the law of evidence "neutrally" permits the introduction of personal, embarrassing information regarding witnesses and sometimes victims in other criminal trials; it may also be that evidence of a victim's propensity for certain violent conduct has occasionally been used successfully by defence counsel to reduce the culpability of the accused.[43] However, for no other offence is it introduced so consistently as a basic feature of the defence,[44] and for no other offence is this sort of evidence used to harass and intimidate the victim.[45] In addition, victim history evidence is used in the context of sexual assault cases to argue that *no crime occurred* because the victim consented. And, finally, for no other offence does the accused have such a good chance of securing an acquittal if he succeeds in getting victim history evidence before a trier of fact.[46]

For example, in a recent article which surveyed the use of character evidence of victims and third parties in the prosecution of offences other than rape, Rosemary Pattenden notes that character evidence regarding the victim is sometimes used to argue self-defence and provocation.[47] Only one example was produced of a case in which such evidence was used, as it is in sexual assault trials, to argue "no crime".[48] This case involved a youth of sixteen years who had consumed some alcohol and was in an extremely distraught condition when he reported a physical assault and attempted robbery upon himself by three adult men. The House of Lords ruled on appeal that the accused should have been permitted to introduce testimony by the police surgeon to the effect that the boy's hysteria might have been caused by the alcohol, which in turn might have supported the accused's defence that the youth had misinterpreted their efforts to assist

---

[43] *R.* v. *Scopeletti* (1986), 34 O.R. (2d) 524, 63 C.C.C. (2d) 481 (C.A.).

[44] *See* the statistics quoted in J. Temkin, RAPE AND THE LEGAL PROCESS (London: Sweet and Maxwell, 1987) at 119-33.

[45] *See, e.g.*, comments made by defence counsel at a conference and reported as follows: C. Schmitz, "'Whack' Sex Assault Complainant at Preliminary Inquiry", *The Lawyer's Weekly* (27 May 1988) 22.

[46] The acquittal rate is clearly linked to perceptions of the victim herself and of whether she "deserved" what she got: *see* A. Cann, L. Calhoun and J. Selby, *Attributing Responsibility to the Victim of Rape: Influence of Information Regarding Past Sexual Experience* (1979) 32 HUMAN RELATIONS 57; G.D. Lafree, B.F. Reskin and C.A. Visher, *Jurors' Responses to Victims Behavior and Legal Issues in Sexual Assault Trials* (1985) 32:4 SOCIAL PROBLEMS 389. The acquittal rate for offences of sexual violence is much higher than other offences, including very serious (and therefore complex, from a prosecutorial point of view) crimes such as homicide: *see* L. Clark and D. Lewis, RAPE: THE PRICE OF COERCIVE SEXUALITY (Toronto: The Women's Press, 1977) at 55-60; G. Chambers and A. Millar, *Proving Sexual Assault: Prosecuting the Offenders or Persecuting the Victim*, in P. Carlen and A. Worrall, eds, GENDER, CRIME AND JUSTICE (Milton Keynes, England: Open University Press, 1987) at 63. Temkin, *supra*, note 44 at 8-16.

[47] R. Pattenden, *The Character of Victims and Third Parties in Criminal Proceedings Other than Rape Trials*, [1986] CRIM. L. REV. 367 at 368-69.

[48] *Toohey* v. *Metropolitan Police Commissioner*, [1965] A.C. 595 (H.L.).

him and that he had essentially imagined the assault and the attempted robbery.

This case may well suggest another category of cases where a victim's past conduct is used, in practice, to argue that no crime occurred: physical and sexual assaults on children where there is no unambiguous physical evidence of the assault. If this is indeed the case, I would suggest that it lends further support to the position that reliance on the "relevance" criterion to admit evidence of the victim's sexual experience is in fact anomalous. It suggests that only in cases involving female and child victims can defence counsel rely on a whole set of cultural beliefs regarding the credibility and reliability of a certain class of victims in order to secure an acquittal based on a theory of "no crime". As Judge Sutcliffe of the Old Bailey court in London, United Kingdom, said in 1982: "It is well known that women in particular and small boys are liable to be untruthful and invent stories."[49]

The victim's past history has clearly been used in rape trials in a most unique fashion. Those who wish to argue that Parliament's action of redefining the legal standard of "relevance" under section 276 has stripped the accused of the ability to utilize evidence which might be admissible for any other offence, are speaking at a purely theoretical level, for such evidence would be of no practical use for other offences. However, the more significant reasons to reject *Wald* and to uphold the Parliamentary redefinition of "relevance" are that the criteria used in *Wald* are essentially unsubstantiated, indeterminate and reflective of patriarchal myths about women's sexuality.

B. "Relevance" is Unsubstantiated and Indeterminate

Madam Justice Hetherington uses the concept of "relevance" in a manner which obscures its complex nature, and which implies that "relevance" has an independent and objectively verifiable meaning. She confidently asserts that evidence of sexual history is generally irrelevant to the question of consent: "Such evidence would indicate at most a disposition to consent to sexual activity with a chosen partner".[50] What this immediately suggests is that there is no single, consistent version of "relevance", since Hetherington J. is declaring "no relevance" where most of her brethren have, and some continue, to find "relevance".

---

[49] Patullo, *supra*, note 1 at 18.
[50] *Wald*, *supra*, note 9 at 348.

In spite of her general assertion, Madam Justice Hetherington creates two exceptions which are necessarily quite expansive. Her first exception would permit defence counsel to argue that the sexual acts which form the subject matter of the charge bear strikingly similar features in relation to the victim's past, voluntary sexual conduct. The Justice spared us the details of the kinds of circumstances that might meet the criteria of "strikingly similar". I will assert below that any effort to do so will inevitably resonate with pornographic imagery.

Her second exception refers to situations where the accused has "personal knowledge" regarding the fact that the victim "had previously consented to sexual activity".[51] This exception would seemingly be invoked by knowledge of *any* sexual activity on the part of the victim, regardless of its similarity to the conduct at issue. In addition, it seems to permit introduction of second-hand information, such as gossip and innuendo, about the victim's sexual habits as relevant to the accused's alleged belief that she consented. It is not clear whether Hetherington J. specifically adopted the other exceptions set out in Professor Berger's article,[52] but the critique which follows would also apply to these examples.

The legal test of "relevance" is whether a reasonable trier of fact could find the proffered evidence helpful as tending to shed light on some matter at issue in the case. As applied to evidence concerning a rape victim's past sexual experience, the argument is that the fact that the woman consented to prior sexual relations with other men may permit us to draw some inferences about whether the sex act at issue in the trial was consensual or coerced. This construction of "relevance" is problematic in several respects.

The concept of "relevance" is an empty one. To the extent that we can obtain "truth" through the social sciences, the concept of "relevance" can be filled by factual and statistical information about probabilities. In the area of rape law, *no* effort has been made to substantiate these beliefs through study.[53] "Relevance" in this context is instead informed by *beliefs* which the dominant culture labels as "truth".

---

[51] *Ibid.* at 349.

[52] *Supra*, note 34.

[53] This is not to suggest that there would not be intractable problems with any efforts to study and predict human sexual behaviour.

Legal scholars in Canada,[54] the United States,[55] England[56] and Australia,[57] have criticized the judicial tendency to simply assert that a victim's past sexual experience is "relevant" and to admit it into evidence. By way of contrast, rarely is evidence regarding the past conduct of the accused admitted, even when it was sexually violent conduct which resulted in a criminal conviction and would therefore be much more probative of the matter at issue between the accused and the victim. This form of "past act" evidence is viewed as too prejudicial to the "right" of the accused to be presumed innocent until proven guilty, and as an unreliable indicator of the accused's subsequent behaviour. One legal commentator in the United Kingdom has argued against the use of specific "past act" evidence regarding *all* witnesses in criminal trials on the basis that even several specific acts may be too unrepresentative to draw inferences regarding other alleged acts.[58]

A rape victim's prior consensual, non-criminal sexual activity is even less likely to carry high predictive value than are the prior rape convictions of an accused. As Zsusannah Adler notes:

> [A]ll similar fact evidence depends on assumptions as to the likelihood of particular and often peculiar acts to be repeated. There is no sufficient basis of knowledge of sexual mores either at the bar or at the bench to permit facile drawing of relevant inferences.[59]

Many jurists, including Madam Justice Hetherington in her judgment, assert that consensual sex with a chosen partner tells us absolutely nothing about a woman's predisposition to engage in consensual sexual relations with anyone else. The fact that she has prior sexual

---

[54] J. Allen, *Constitutional Challenges to Criminal Code Sections 246.6 and 246.7 — Accused not Entitled to Irrelevant Evidence* (LL.B. University of Ottawa, 1987) [unpublished paper on file with the author]; C. Boyle, SEXUAL ASSAULT (Toronto: Carswell, 1984) at 136-40; B. Dawson, *Sexual Assault Law and Past Sexual Conduct of the Primary Witness: The Construction of Relevance* (1987-88) 2:2 C.J.W.L. 310; C. Boyle, *Section 142 of the Criminal Code: A Trojan Horse?* [1981] 23 CRIM. L.Q. 253.

[55] *See, e.g.*, R. Tong, WOMEN, SEX AND THE LAW (New Jersey: Rowman and Allanheld, 1984) at 106-09; S. Estrich, REAL RAPE (Cambridge: Harvard University Press, 1987) at 50-53; S. Estrich, *Rape* (1986) 95 YALE L.J. 1087.

[56] *See, e.g.*, Temkin, *supra*, note 44; J. Temkin, *Evidence in Sexual Assault Cases: The Scottish Proposal and Alternatives* (1984) 47 MODERN L. REV. 625; J. Temkin, *Regulating Sexual History Evidence — The Limits of Discretionary Legislation* (1984) 33 INTERNATIONAL AND COMPARATIVE L.Q. 942; Z. Adler, *The Relevance of Sexual History Evidence in Rape: Problems of Subjective Interpretation* [1985] CRIM. L. REV. 769; Z. Adler, *Rape: The Intention of Parliament and the Practice of the Courts* (1982) 45 MODERN L. REV. 664.

[57] *See, e.g.*, J.A. Scutt, *Admissibility of Sexual History Evidence and Allegations in Rape Cases* (1979) 53 AUSTRALIAN L.J. 817

[58] Pattenden, *supra*, note 47 at 376.

[59] Adler, *supra*, note 56 at 352.

experience could take us to a myriad of conclusions, including the inference that such a woman is to be believed because a woman who has engaged in consensual sexual relations has no motive to fabricate a rape, is in a better position to refuse unwanted intercourse, and is better able to distinguish between sex and rape.[60]

There is likewise no inherent logic to the proposition that a woman's sexual inexperience tends towards the inference that she did not consent to the sex act. One could as easily speculate that the woman finally decided she was ready for sexual expression. Again, we have no factual or logical basis for pursuing either inference. The only reason that some will perhaps find the inference of non-consent compelling in my second example, is that it resonates with cultural beliefs, not truths, that chastity is a valuable commodity for women, and that women who have "held out" are likely to be more choosy than women who have already "spent" their value.[61]

The exceptions to section 276 proposed by Madam Justice Hetherington evidently employ a concept of "relevance" which is utterly lacking in factual or statistical foundation. Her exceptions give legal recognition no only to general, untested beliefs, but also to men's gossip and speculation about particular women. These exceptions rely so heavily upon subjective interpretation that they are both inappropriately broad and essentially indeterminate. No reasonable trier of fact would find evidence of sexual history at all helpful, although many who operate unconscious of their surrounding belief systems might *suppose* that it is helpful. The trier is, after all, trying to ascertain questions of fact, which involve truth, but which can only become fraught with untruth once unsubstantiated cultural beliefs are factored in as "relevant" evidence.[62]

C. "Relevance" Reinforces Myths about Female Sexuality

The beliefs which give life to our notions of "relevance" are reflective of a patriarchal culture. The indeterminate exceptions posed by the *Wald* case constitute an open invitation to the "pornographic

---

[60] For an argument that this distinction is impossible to make in the context of a patriarchal society, *see* C.A. MacKinnon, *Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence* (1983) 8:4 SIGNS: J. OF WOMEN IN CULTURE AND SOCIETY 635 at 652-53.

[61] Clark and Lewis, *supra*, note 46 at 115-20. *See also* statements made by Justice Marshall in *R.* v. *Oquataq* (1985), 18 C.C.C. (3d) 440 at 450 (N.W.T.S.C.).

[62] *See* Cann, et al. and Lafree, et al., *supra*, note 46.

imagination" with which we have all been culturally endowed.[63] The beliefs which spring from this collective imagination are not only without empirical foundation: they also systematically deny control and credibility to those who do not belong to the dominant culture. Even more problematic is the fact that these beliefs are insidious because they are taken for granted and are therefore almost irresistible to the trier of fact who has absorbed our culture.[64] Seen in this context, the legal construct of "relevance" actually projects an unarticulated political agenda which involves the reinforcing of mythologies about rape and women's sexuality.

In fact, the examples used by defence counsel, academics, and judges to illustrate situations where sexual history evidence is said to be highly "relevant", resemble the "pornographic vignettes"[65] de-

---

[63] S. Griffin, PORNOGRAPHY AND SILENCE: CULTURE'S REVENGE AGAINST NATURE (New York: Harper and Row, 1981). Griffin describes the pornographic mind as "a mind in which we all participate. It is the mind which dominates our culture. A mind which speaks to us through philosophy and literature, through religious doctrine and art, through film, through advertisement, in the commments and gestures, in our habits, through history and our ideas of history, and in the random acts of violence which surround our lives" (at 2-3). She argues that the pornographic imagination has its origins in fear of bodily knowledge and loss of control. What this imagination constructs is a world which is essentially false, but manageable and controllable. For instance, common pornographic themes include objectification and degradation of others, with those persons' manifest enjoyment, dichotomization of "good" and "bad", "virgin" and "whore", sexual expression which is uncontrollable, animalistic and therefore without responsibility, among others. The "pornographic vignettes" described by Dr C. Smart invariably incorporate such themes. *See* C. Smart, *Law's Truth/Women's Experience*, forthcoming in a collection of essays from the 1987 Australian Law and Society Conference, R. Graycar, ed., DISSENTING OPINIONS: FEMINIST EXPLORATIONS IN LAW AND SOCIETY (Sydney, Australia: Allen and Unwin, 1989). *See also* C. Smart, FEMINISM AND THE POWER OF LAW (London, England: Routledge, 1989), espec. Chapter 2, *Rape: Law and the Disqualification of Women's Sexuality*, 26-49; S.G. Cole, PORNOGRAPHY AND THE SEX CRISIS (Toronto: Amanita Enterprises, 1989) at 25-26, 32-36, 41-43 and 49-52; C.A. MacKinnon, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (Cambridge: Harvard University Press, 1987) at 148-50, 158-62 and 172-74.

[64] For instance, studies suggest that rape mythology is so pervasive that there are no significant differences in attitudes towards women and sexuality between convicted rapists and other men. *See, e.g.*, R. Wyres, WOMEN, MEN AND RAPE (Oxford: Perry Publications, 1986) discussed in E. Fishwick, *Sexual Assault and Criminal Justice: A Comparative Perspective on Legislation, Policing and Research*, in M. Findlay and R. Hogg, eds, UNDERSTANDING CRIME AND CRIMINAL JUSTICE (Sydney: The Law Book Company, 1988) 167-88 at 180. A shocking example of the pervasiveness of this rape mythology is found in a jury address by an American defence counsel in which the lawyer said "I think all of you are married, I am. And if I had to have sexual intercourse only when my wife said yes the first time, I think I'd join the church. . . . So it is expected, and a man expects there is going to be a no, at least before things get going. And I think the law is written in such a way as to take that into consideration." From J. Rowland, RAPE: THE ULTIMATE VIOLATION (London: Pluto Press, 1986) at 106-08.

[65] Smart, *Law's Truth*, *supra*, note 63.

scribed so graphically by Dr Carol Smart in her work on the rape trial. She argues that:

> The more an account of rape has resonances with the standard pornographic genre, the less it will be regarded as rape. There are a number of narrative conventions within pornography. One. . .is the woman who is ready for sexual adventure, will take on lots of men, and even surprises men with how willing and forward she is. They, typically, think themselves extremely lucky and take their pleasure. . .. This is not simply the stuff of soft pornography but also of the down market newspapers. These accounts are common currency. They are the imagined substance of other people's sex lives. The point is that the wide currency of the fantasy makes it plausible.[66]

These hypotheticals play upon internalized assumptions about what women really want and male desires for specific sexual scenarios. They also play upon other fears, such as racism and homophobia. They evoke highly emotive reactions which bear no relationship to "truth", and they bring out the worst in us.

Consider the hypotheticals produced by the tired imagination of Professor D. W. Elliot and published in a United Kingdom legal journal:

> D. a senior boy pupil, was kept behind after school by the schoolteacher C., and on their being interrupted by the school caretaker, C. screamed and cried "Rape". D. must be allowed to prove that she had before had consensual relations with another pupil after school. Or, C. met D. in a pub and invited him home for a coffee. They had intercourse on her sofa, but their shouts and screams woke the neighbours. If D. says that their intercourse was consensual, and the quarrel was afterwards when C. asked for money, he must be allowed to show that she had picked up a stranger in a pub and had consensual intercourse with him before demanding money.[67]

> Alleged pack rape of a young complainant may be a consensual frolic which has gone wrong only in that, for the first time, the girl failed to reach home before her parents came home from work.[68]

The predominant themes in Professor Elliot's hypotheticals are of promiscuous, indiscriminate female sexuality, of treachery and extortion, and of women's willingness to lie and incriminate men in order to avoid responsibility for their own sexuality. These examples speak more to the author's own preoccupations than to any documented social reality. The rate of false reporting for rape is no higher than for

---

[66] *Ibid.* at 26-28.

[67] D.W. Elliott, *Rape Complainant's Sexual Experience with Third Persons* [1984] CRIM. L. REV. 4 at 7.

[68] *Ibid.* at 14.

any other offence.[69] Given the very high rate of non-reporting of sexual assault by victims themselves, and the rate at which police and Crown attorneys refuse to investigate and prosecute this offence,[70] the obsession with fabrication seems entirely misconceived.

Unfortunately, examples like Professor Elliot's are not restricted to academic musings. In *Re Gayme*,[71] a case involving a sexual assault on a fifteen-year-old girl in a high school basement, the accused proposed to introduce evidence of her "habitual attendance at the school (not the school of the complainant but that of the accused) to perform sexual acts with students and generally that [she] had been very free with sexual favours, sometimes at her own insistance."[72]

In *LeGallant*,[73] a trial involving a statutory sexual assault by a man in his thirties upon a thirteen-year-old boy, defence counsel not only argued that the legislative denial of a defence of consent for sexual assaults involving children amounts to a denial of equality rights under the *Charter*; he also protested the ban on the introduction of "sexual history" evidence using the following scenario:

> The defence. . .maintains that the complainant was the aggressor, seducing and then committing sexual acts on the person of the accused, who remained throughout the passive and unwilling partner. . .. The evidence which the accused seeks to adduce will show that approximately two years before the incident here in question the complainant, with his brother, went to the house of two or three men, where he engaged in homosexual activities with them. The men were subsequently convicted.[74]

What should be noted here is that this scenario has the quality of pure sexual fantasy: adult male seduced and rendered powerless by promiscuous child. It also plays upon homophobia in that we are invited to interpret this child as an experienced homosexual youth for whom most would have less sympathy than if the child were sexually

---

[69] The Winnipeg police record a false complaint rate of 5 percent — R. Gunn and C. Minch, SEXUAL ASSAULT: THE DILEMMA OF DISCLOSURE, THE QUESTION OF CONVICTION (Winnipeg: University of Manitoba Press, 1988), at 58-59. Statistics collected by the Victoria Police Complaints Authority, SEXUAL ASSAULT VICTIMS AND THE POLICE (Victoria, Australia, 1988) suggest that 7 percent of rape allegations are false. Discussed in R. Graycar and J. Morgan, THE HIDDEN GENDER OF LAW (Sydney: Federation Press, 1990), chapter 12. *See also* G. Chambers and A. Millar, INVESTIGATING SEXUAL ASSAULT (Edinburgh: Scottish Office Social Research Study, HMSO, 1983),wherein the authors "found the belief in false accusation to be common among Scottish police officers: when challenged, however, the officers could produce few concrete examples. If it arises because the police or the court have not believed a woman's story, it is a self-fulfilling prophecy." Discussed in S. Atkins and B. Hoggett, WOMEN AND THE LAW (Oxford: Basil Blackwell, 1984), at 75.

[70] Gunn and Minch, *ibid.* at 53-82.

[71] *Supra*, note 8.

[72] *Ibid.* at 295. Note how this casting of the evidence parallels the theme of porographic vignettes described by Dr Smart, *supra*, note 63.

[73] *Supra*, note 31.

[74] *Ibid.* at 175-76.

inexperienced and therefore, according to our homophobic cultural beliefs, presumptively heterosexual. The power of the belief system which this example evokes is even more evident when one considers the incongruity of the suggestion that conduct involving several adult men and an eleven-year-old child which resulted in criminal convictions should be proffered as the *child's* sexual history. Such evidence, abstracted from the context of a homophobic society, would be of dubious use to defence counsel, as it would only show prior victimization, and, worse yet from a defence perspective, the suggestion of exploitation of that fact by the accused.

Adoption of such hypotheticals and their underlying assumptions is not limited to advocates, for judges also employ them. The trial Judge in *LeGallant* labelled the proposed evidence as "relevant" even though she ultimately excluded it as too prejudicial.[75] Recently, an Ontario Judge of the Court of Appeal in *Re Seaboyer*[76] speculated that sexual history evidence might be "relevant" where "the complainant notoriously attended a certain place and regularly offered herself to anyone there without charge, that might go to an honest belief in consent if that were the defence".[77] A United Kingdom study of judicial treatment of defence counsel applications for the admission of sexual history evidence yields another example. In this case, the defendants were black and the victim was white. Counsel argued:

> I want to show that the complainant was not adverse to having sexual intercourse with coloured men. The jury should have no presumption of lack of consent because of the colour of the people involved here. Her sexual experience was almost entirely with coloured men." The judge responded: "I allowed the cross- examination. . .to show, in fairness to these defendants, that it is manifest that [the complainant] was not adverse to having sexual relations with coloured men.[78]

Given that blacks and other members of racial minorities are more likely to be disbelieved in court for all offences, and given that we live in a culture dominated by whites, it may be the case that triers of fact will more readily infer non-consent on the part of a white victim when the accused is black.[79] However, what should also be noted is that the proposed evidence itself reinforces racist interpretations of sexual relations and panders to the pornographic imagination. Again, we have no factual or statistical basis for the inference that a

---

[75] *Ibid.*

[76] *Supra*, note 8.

[77] *Ibid.* at 300.

[78] Unpublished research findings by Z. Adler cited in Temkin, *Regulating Sexual History Evidence*, *supra*, note 56 at 975. *See also* the theory of defence counsel in *R.* v. *Coombs* (1985), 23 C.C.C. (3d) 356 at 36061 (Nfld. S.C.).

[79] A. Davis, WOMEN, RACE AND CLASS (New York: Random House, 1981) at 172. *See also* Estrich, REAL RAPE, *supra*, note 55 at 32-37 and J. Wriggins, *Rape, Racism and the Law* (1983) 6 HARVARD WOMEN'S L.J. 103.

white woman who has chosen past sexual partners who happened to be black, is somewhat more likely to have consented to intercourse with the man she now accuses of rape, unless, of course, we factor in all sorts of cultural, racist beliefs. The subtext of the unarticulated beliefs must be as follows: white women would not ordinarily choose lovers who are black (read inferior); a white woman who has so chosen has become indiscriminate; such a woman's past sexual conduct tends to suggest either that she consented to this particular man, because he is black, and is covering her culturally inappropriate behaviour with a rape accusation, or that this man *believed* she consented to his advances, again simply because he believed she would consent to any black man.

As these examples illustrate, almost anything about a woman's sexual experience has the potential to be shaped into a "pattern" of "striking similarity", or a "mistake" argument, as I will argue in the following section. The exceptions posed by Hetherington J. are thus demonstrably indeterminate, and capable of producing vastly disparate results, depending on the beliefs and sophistication of particular judges and jurors. The content of the beliefs which inform the determination of "relevance" will often be based on negative stereotypes about members of subordinate groups in our culture. For these reasons, judicial tampering with Parliament's definition of "relevance" under sections 276 and 277 must cease.

III. "MISTAKE OF FACT"

The second exception to section 276 carved out by both the majority and concurring opinions in *Wald* is based on the "mistake of fact" defence. This defence can be raised by an accused who denies that he was aware of the fact that the victim did not consent to his actions, even if this belief was unreasonable in the circumstances. The defence was created in this form by the Supreme Court of Canada in 1980 in *R.* v. *Pappajohn*,[80] and codified, at least in some form, in 1982 by subsection 244(4) (now subsection 265(4)) of the *Criminal Code*.[81] In this section, I first argue that the rule in *Pappajohn* should be abandoned by our courts for a host of reasons. I then argue that even if mistake of fact is retained as a defence, the accused should not be entitled to rely upon the rumour and gossip which is said to constitute the victim's sexual experience with other men, in order to advance a mistake defence.

---

[80] *Supra*, note 39.

[81] S.C. 1980-81-82-83, c. 125, s. (19), as renumbered in R.S.C. 1985, c. C-46.

A. *Pappajohn should be Over-Ruled*

The Supreme Court of Canada should over-rule itself regarding the rule in *Pappajohn*, by holding that an accused's mistake regarding consent must also be "reasonable". First, the legal result in *Pappajohn* was not an inevitable conclusion based on inescapable precedent, as the doctrinal analysis performed by Professor Toni Pickard prior to the release of the *Pappajohn* decision illustrates.[82] The Court could have required that the accused's belief be reasonable, as many United States courts and legislatures have done,[83] and could have required that the accused bear the onus of proof, as several commentators have recommended.[84] The objective rider will be justifiable on the bases that it is consistent with other Canadian criminal law doctrine,[85] and the fact that the United Kingdom precedent on which *Pappajohn* relied in part, has been eroded by subsequent decisions.[86] A further justification for this interpretation may be found in the theory that offences of sexual violence present unique considerations requiring tailored rules for proof and defence.

Second, this doctrine is unworkable in application and invoked indiscriminately by defence counsel. Subsequent applications of *Pappajohn* by our judges have convoluted the legal doctrine and produced inconsistent, erratic results.[87] The only way to explain some of these cases is to acknowledge judicial evasion of the rule in *Pappajohn* in situations where it would have resulted in acquittals of manifestly violent men. In addition, numerous accused appear to be invoking this defence, even in situations where one would have thought that its availability would have been precluded, such as the violent gang rape at issue in *Wald*. This means that time and money is being dedicated

---

[82] T. Pickard, *Culpable Mistakes and Rape: Relating Mens Rea to the Crime* (1980) 30 U.T.L.J. 75.

[83] *See* C. Backhouse & L. Schoenroth, *A Comparative Study of Canadian and American Rape Law* (1984) 7 CAN.-U.S. L.J. 173. *See also* the Australian cases discussed in J.B. Blackwood, *The Mental Element in Rape in Criminal Codes* (1982) 56 AUSTRALIAN L.J. 474.

[84] *See, e.g.*, the joint submission reported in REPORT NO. 7, RAPE AND ALLIED OFFENCES: SUBSTANTIVE ASPECTS (Victoria, 1987) at 25, which is reproduced in Graycar & Morgan, *supra*, note 69, chapter 12.

[85] T. Pickard, *Culpable Mistakes and Rape: Harsh Words on Pappajohn* (1980) 30 U.T.L.J. 415. *See* the examples cited in Pickard, *supra*, note 82.

[86] *See, e.g., D.P.P.* v. *Pigg*, [1982] 1 W.L.R. 762 as discussed in J. Temkin, *The Limits of Reckless Rape* [1983] CRIM. L. REV. 5 at 8-9.

[87] *Sansregret* v. *R.*, [1985] 1 S.C.R. 570, 45 C.R. (3d) 193. For discussions of the interpretive difficulties presented by this case, *see* A. Manson, *Annotation* (1985), 45 C.R. (3d) 194; E. Colvin, PRINCIPLES OF CRIMINAL LAW (Toronto: Carswell, 1986) at 107.

to the stretching of the limits of this doctrine by lawyers, and to the adjudication of the defence by judges.[88]

Third, as formulated, this defence insulates and thus reinforces a very high degree of physical coerciveness in sexual behaviour, and provides little protection for women's physical integrity. This defence locates culpability solely in the accused's state of mind, and imposes no obligation on the man to inquire into the woman's desires in the circumstances. The majority opinion in *Pappajohn* on this issue, that of Chief Justice Dickson, expresses the notion that the willingness of female sexual partners is difficult to ascertain: "the facts of life not infrequently impede the drawing of a clean line between consensual and non-consensual intercourse".[89] His opinion implicitly endorses the idea that men are entitled to presume consent and to proceed until physically resisted: "if the woman in her own mind withholds consent but her conduct and other circumstances lend credence to belief on the part of the accused that she was consenting, it may be that it is unjust to convict".[90] It is clear from this judgment that something more than bare refusal or even physical resistance on the part of the victim is required if her behaviour is to have a deciding impact on the *legal* interpretation of the event, given that Justice Dickson viewed the following version of the events as raising a legitimate defence: "It was open to the jury to find only token resistance prior to the 'bondage' incident which the accused may not have perceived as withholding of consent."[91]

---

[88] It should be noted here that this defence has become a very popular refuge for men accused of rape, contrary to Justice Dickson's assurance in *Pappajohn*, *supra*, note 39 at 158 that such defence would rarely be used. *See, e.g.*, *R.* v. *White* (1986), 24 C.C.C. (3d) 1 (B.C.C.A.), *leave to appeal to S.C.C. refused* [1986] 1 S.C.R. xv; *R.* v. *Robertson*, [1987] 1 S.C.R. 918, 33 C.C.C. (3d) 481 [hereinafter *Robertson* cited to S.C.R.]; *Laybourn*, *supra*, note 10; *R.* v. *Trottier* (1981), 58 C.C.C. (2d) 289 (B.C.C.A.); *R.* v. *Deol* (1981), 58 C.C.C. (2d) 524 (Alta. C.A.); *R.* v. *Guthrie* (1985), 20 C.C.C. (3d) 73 (Ont. C.A.); *R.* v. *Frankland* (1985), 23 C.C.C. (3d) 385 (Ont. C.A.); *R.* v. *Cook* (1985), 46 C.R. (3d) 129 (B.C.C.A.). This observation has also been confirmed by crisis workers who regularly attend rape trials, such as P. McGillicuddy, *supra*, note 10.

[89] *Supra*, note 39 at 149, citing from C. Howard, CRIMINAL LAW, 3d ed. (Sydney: Law Book, 1982).

[90] *Ibid.* at 155.

[91] *Ibid.* at 164.

Pappajohn thus has serious implications for the legal interpretation of the offence of rape. The defence effectively reenacts the former common law and legislative requirement that the prosecutor demonstrate that the victim resisted the assault to the utmost.[92] Otherwise, given the assumptions which are evidently employed by judges, submission, and even verbal and physical refusal[93] may not be enough to bring the victim's non-consent home to the accused such that the *mens rea* requirement for guilt under *Pappajohn* is met. The standard it creates cannot distinguish between submission, consent to male advances, and mutually desired sexual interaction, focussing as it does solely on the accused's perception of the event. It is thus clearly possible, as *Pappajohn* and later cases illustrate, for an accused who has used a weapon or threats of violence,[94] who has accosted a perfect stranger, in open air,[95] or who has acted in concert with other men[96] to blithely assert, and possibly to succeed with,[97] a mistake of fact defence.

---

[92] C.B. Backhouse, *Nineteenth-Century Canadian Rape Law 1800-92* in D.H. Flaherty, ed., ESSAYS IN THE HISTORY OF CANADIAN LAW, vol. 2 (Toronto: Osgoode Society, 1983) 200 at 213-20; M.L. Nightingale, *A Historical Perspective of Consent in Canadian Rape Law* (LL.B. 1990) [unpublished paper on file with the author] at 57. For the impact of evidence of resistance on convictions, *see* S. Estrich (1987), *supra*, note 55 at 18-21. *See also* S. McLean & N. Burrows, eds, THE LEGAL RELEVANCE OF GENDER: SOME ASPECTS OF SEX-BASED DISCRIMINATION (Atlantic Highlands, N.J.: Humanities Press International, 1988) 195 at 201-03.

[93] For examples of defence efforts to exploit this requirement in cross-examination, *see* transcripts reproduced in Chambers & Millar, *supra*, note 46 at 65-67.

[94] *Sansregret*, *supra*, note 87.

[95] McLean & Burrows, *supra*, note 92 at 201.

[96] There is an alarming trend among accused men who have participated in gang rapes to assert this defence. *See Laybourn*, *supra*, note 22; *R.* v. *Bird* (1984), 40 C.R. (3d) 41, 12 C.C.C. (3d) 523 (Man. C.A.); *R.* v. *Wiseman* (1985), 22 C.C.C. (3d) 12 (Ont. Dist. Ct). *See also* S. Bishop, *Grappling with Sexual Assault* (Spring 1989) MCGILL NEWS at 17-19 and the discussion of a Crown prosecutor's refusal to prosecute a recent gang rape at McGill University on the ground of conflicting witness evidence, which suggests that the Crown anticipated either a consent or mistake defence.

[97] *See Sansregret*, *supra*, note 87; *Laybourn*, *supra*, note 22.

This legal standard also poses considerable dangers for women. It fails to recognize the pervasive threat of male violence[98] and ignores the possibility that non-resistance may be a strategy for self-respect in a situation which permits no escape,[99] and it may in fact be necessary for self-preservation.[100] The doctrine and its application in cases like *Pappajohn* also reinforce certain myths about women's sexuality and thus legitimizes coercive and violent behaviour.[101] For instance, the cultural belief noted by Dr Carol Smart that women's sexual pleasure is unfathomable and therefore must be defined by men's pleasure[102] is reflected by the judicial refusal to adopt a seemingly simple legal requirement that men ask, and accept at face value the response of women[103] with whom they would like to have sexual relations. The

---

[98] *See* R.L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory* (1987) 3 WISCONSIN WOMEN'S L.J. 81 where the author states:

> The danger, the violence, and the fear with which women live and which informs our self-definition are invisible, which is the second reason they are misunderstood. They are not a part of men's world, externally or internally. . . . Here's a "sex difference" I've noticed: When women see these newly reported high percentages, they are outraged at the violence, and when men see the same numbers they are outraged at what they perceive as "unethical" and wild inflation of statistics. I find this sex difference profoundly disturbing. . . . Why is my reaction so different? I attribute it to this: my reality — both internal and external — includes that violence, the pain it causes, and the fear it engenders. Not only have I lived it (and they haven't), but I talk to women (and they don't), and women talk to me (and not them). Like all women I know, I hear narratives of violence which are not heard by any man with the sometimes exception of male therapists. My male colleagues think my neighorhood is safe; they weren't told (I was) the details of a recent rape. I hear about the date rapes of students (more often, these days, attempted date rapes); my male colleagues do not. The story is always prefaced by, "Don't tell anyone, he'd lose his job" (which is hardly ever true) or "don't tell anyone, I'd be ashamed" (which is always true). I hear women's memories of early sexual abuse. "Don't tell anyone." I draw this simple inference: Women and men have wildly different "ignorant" intuitions about the amount of danger, violence and fear in women's lives because women live it and men don't and women tell other women and not men. The strategic implication is this: Women should start telling their stories, out loud, in public, in whatever voice, dialect or register fits the occasion. . . .

For a recent study of the pervasive nature of sexual violence in the lives of women, *see* R. Warsaw, I NEVER CALLED IT RAPE (New York: Harper & Row, 1988).

[99] MacKinnon, *supra*, note 60 at 650.

[100] *See* the studies discussed in McLean & Burrows, *supra*, note 92 at 201 and 208. *See also* the cases discussed in S. Estrich, *Rape*, *supra*, note 55 at 1105-21.

[101] *See* Temkin's discussion in RAPE AND THE LEGAL PROCESS, *supra*, note 44 at 82-86.

[102] *Law's Truth/Women's Experience*, *supra*, note 63 at 14.

[103] *See* Pickard, *supra*, note 82 at 81. *See also* Estrich, *supra*, note 55 at 1102-05, 1125-32, 1182-84.

notions that passivity expresses female sexuality,[104] and that "no" means "yes"[105] when spoken by women, are also given a certain amount of authority through the mistake of fact doctrine and judicial commentary.[106]

The fact situations in which our courts are prepared to recognize a mistake of fact argument provide further illustration of the power of the belief system which resonates with the "pornographic vignette". In *Pappajohn*, Mr Justice Dickson was joined by Mr Justice Estey in expressing a minority opinion on the second issue in the case. They would have held that that the accused had presented sufficient evidence to permit presentation of his mistake defence to the jury. Essentially, the accused told a story of "an amorous interlude involving no more than coy objection on her part and several acts of intercourse with her consent".[107] Thus we have the scenario of the initially hesitant, then wildly enthusiastic librarian — or, as here — real estate sales woman. Dickson and Estey JJ. would have sent this case back for retrial on the mistake of fact issue even though it was undisputed that the victim had escaped from the house bound and gagged, and the Justices were forced to acknowledge that consent and mistake defences would therefore have been unavailable for at least part of the attack.[108]

Mr Justice McIntyre, speaking for the majority in *Pappajohn* regarding the foreclosure of the mistake defence on the facts, nonetheless referred to several examples of the appropriate use of the defence which are profoundly troubling. He used the House of Lords' decision in *D.P.P.* v. *Morgan*[109] as a situation where the accuseds' story regarding their belief in consent had an "air of reality" because it was confirmed by the other co-accused. The story proposed by the three accused who gang-raped and suffocated the wife of a fourth man after dragging her out of her own bed in the middle of the night, was that the husband had told them that she liked it rough, and that her protests were feigned and should be disregarded. Permitting use of the defence in such circumstances strips the accused of responsibility in the matter, and invites male reliance on culturally fabricated beliefs as a substitute for women's accounts of their desires. While Mr Justice McIntyre saw an "air of reality" here, fortunately the House of Lords refused to order a new trial for the men on the basis that no reasonable jury could possibly have believed their story.[110]

---

[104] McLean & Burrows, *supra*, note 92 at 199.

[105] Estrich, *Rape*, *supra*, note 55 at 1127 and 1132.

[106] *See* comment by Judge David Wild at Cambridge Crown Court, 1982, cited in text, *supra*, note 1.

[107] *Pappajohn*, *supra*, note 39 at 124 *per* McIntyre J.

[108] *Ibid.* at 133-34. One wonders why this evidence of violence would not taint and dissipate any "air of reality" suggested by the testimony of the accused.

[109] [1976] A.C. 182. Note that this decision has been retreated from, to some extent, by the U.K. courts. *See*, *e.g.*, *Pigg*, *supra*, note 86.

[110] *Ibid.* at 235.

A second acceptable example offered by the majority judgment in *Pappajohn* is from the Ontario Court of Appeal case of *R.* v. *Plummer*.[111] The story told by the accused in that case was that he came home to the apartment which he shared with a room-mate to find a young woman who was naked and crying. He approached her and proceeded to have intercourse with this complete stranger; he argued that her lack of protest amounted to consent. In fact, this woman had just been raped by the accused's room-mate, and she therefore submitted to the second man out of fear. To permit the defence of mistake in these circumstances equates weeping submission with consent, and suggests that women are sexually available to anyone, anywhere, anytime. Yet, Mr Justice McIntyre stated that these facts would lend an "air of reality" to the accused's defence of mistake of fact.[112]

Finally, a recent decision of the Supreme Court of Canada provides another disturbing example. In *R.* v.*Laybourn, Bulmer and Illingworth*,[113] the victim was a prostitute who had negotiated for sex with one of the accused, only to be confronted by all three accused in the motel room. Her version of events was that she refused to have sex with them while the others were in the room and that she demanded a fee that they were unwilling to pay. They refused to leave and the woman said she submitted out of fear of the men; afterwards, they refused to pay her. Their version was that they negotiated a bargain with her and that she seemed "jumpy" at the time, but that no threats were made. Mr Justice McIntyre decided that there was sufficient evidence to put a mistake regarding lack of consent defence to the jury on the basis of the testimony of another occupant of the motel:

> He heard the woman complain about the presence of the two men in the room and he heard conversation including a male voice saying, "you are in a tough business baby and you have got to learn to take it". At first, her voice seemed normal, but as time passed it took on a whining, wheedling tone. There was discussion about price, the woman saying she wanted sixty dollars each and a male voice saying they would pay her twenty dollars.[114]

Far from supporting the accused's version of honest belief in consent, this testimony suggests the use of the physical presence of three men, and at least one relatively overt threat, to intimidate the woman into submission.[115] The evidence was instead read by the Supreme Court of Canada as lending reality to the defence, perhaps because the evidence plays into beliefs that prostitutes cannot *really* be raped, that

---

111 (1975), 24 C.C.C. (2d) 497, 31 C.R.N.S. 220 (Ont. C.A.).

112 *Pappajohn*, *supra*, note 39 at 133.

113 *Supra*, note 22.

114 *Ibid.* at 786.

115 The probable scenario is made clear by a transcript of another defence cross-examination that is reproduced in Chambers & Millar, *supra*, note 46 at 68.

consent is extensive, regardless of the numbers or identities of the individual men, and that women will use the threat of rape to extort money from men.

These examples indicate the involvement of legal doctrine in the perpetuation of male beliefs which undermine women's physical integrity. They also support the argument advanced by Professor Lucinda Vandervort that mistakes regarding consent are not really mistakes of fact deserving of acquittal, but are rather mistakes as to the legal status of culturally created "rape myths", and men's right to act upon them.[116] She argues that these errors are ones of law, and should not excuse the behaviour:

> If excuses that are ultimately based on lack of awareness that a sexual transaction is assaultive in law are not barred, social definitions of sexual assault (community norms based on myth rather than *legal norms* of conduct) will continue to be relied on as the basis for an honest and often purportedly reasonable belief that the alleged assaultive conduct was not wrongful. That is "rule by myth and custom" not "rule by law".[117]

Fourth, the rule in *Pappajohn* should be abandoned because it contributes to the subordination of women. It is not a neutral principle of criminal doctrine, but rather one that has an almost unique impact upon women. As Professor Jennifer Temkin has observed: "[N]o law can claim to protect sexual choice for what another person (usually the complainant's husband) has told the accused."[118] The mistake defence in this purely subjective form is not commonly available for other offences.[119] It is also likely to have a significant impact upon the legal classification of the offence by police and Crown prosecutors,[120] so that the true picture of the numbers of women who are denied legal redress based on this doctrine is obscured.

The rule in *Pappajohn* also has a deeper meaning in terms of gender oppression. It not only retracts legal protection, but it also defines the crime of rape from the point of view of men, thus systematically empowering men over women. Professor Catharine MacKinnon puts it in these terms:

> From whose standpoint, and in whose interest, is a law that allows one person's conditioned unconsciousness to contraindicate another's experi-

---

[116] L. Vandervort, *Mistake of Law and Sexual Assault: Consent and Mens Rea* (1987-88) 2:2 C.J.W.L. 233.

[117] *Ibid.* at 265 [italics in original].

[118] Temkin, *supra*, note 86 at 15.

[119] For instance, many mistakes will be classified as errors of law and others will be with respect to offences of absolute liability, strict liability, and negligence and will either be barred or tempered by an objective standard. *See* Vandervort, *supra*, note 116 at 279-85. *See also* the discussion of *D.P.P.* v. *Phekoo*, [1981] 1 W.L.R. 1117 in Temkin, *supra*, note 86 at 16.

[120] Vandervort, *supra*, note 116 at 236, n. 3 and 244-47.

> enced violation? This aspect of the rape law reflects the sex inequality of the society not only in conceiving a cognizable injury from the viewpoint of the reasonable rapist, but in affirmatively rewarding men with acquittals for not comprehending women's point of view in sexual encounters. . .. When the reality is split — a woman is raped but not by a rapist? — the law tends to conclude that a rape *did not happen*.[121]

This analysis of the *Pappajohn* principle highlights the fact that it can be challenged under the *Charter* on the basis that it fails to protect women's section 7 rights to "security of the person", and that it violates women's section 15 rights to "equality" under almost every interpretation of the meaning of the concept. These arguments will be developed more fully in the sections which follow.

B. Pappajohn should not be Extended

If *Pappajohn* is not repudiated, our courts should not extend its practical reach to situations such as that presented by the *Wald* case. The concern is that Madam Justice Hetherington's two tests for admissibility will create an enormous incentive for accused men and their lawyers to investigate and harass the woman, looking for any evidence of sexual activity in her past which the accused could argue he had heard about,[122] to litigate the issue endlessly, and to take the trier of fact down a path of inquiry which is known to impair intelligent decision-making.[123] *Wald* will result in greatly increased reliance on the mistake defence, for, as surreal as the arguments of the accused were in the cases of *Morgan*, *Plummer*, and *Laybourn*, at least the courts required some quasi-independent and contemporaneous evidence to support the use of the defence.

Hetherington J. would have been prepared to allow the accused to testify that they had heard rumours about the victim's past conduct which induced their belief that she consented. Justice Harradence would have required even less: he was prepared to permit other men to testify as to the victim's reputation for sexual conduct, even if the accused had never been the recipient of the gossip, on the basis that this evidence might nonetheless strengthen the credibility of the accused's assertion that he thought the victim was consenting.[124] The evidence here is clearly being used to undermine the credibility of the victim and to suggest that her behaviour was notoriously ambiguous, thus making her "open territory" for all men. Justice Harradence's proposed

---

[121] MacKinnon, *supra*, note 60 at 654 [italics in original].

[122] This concern has also been voiced by Estrich, *Real Rape*, *supra*, note 55 at 53. Madam Justice Hetherington failed to qualify the sort of past sexual conduct gossip that will found the defence by, for instance, that the conduct have been "very distinctive" in order to be "relevant" to the accused's belief.

[123] *See* Cann *et al.* and Lafree *et al.*, *supra*, note 46.

[124] *Supra*, note 11 at 337.

proposed exception is not new at all. It is the same set of cultural beliefs which section 276 was meant to eliminate. If this sort of rumour evidence can provide the evidential basis for an "air of reality", why not the manner of dress or self- presentation of the victim?[125] For these reasons, the mistake of fact exception to section 276 advanced by both opinions in *Wald* should be rejected.

There are a number of legal devices available to limit the encroachment of *Pappajohn* onto section 276. Our courts could recognize openly the policy concerns behind the "air of reality" test which is used to limit the practical availability of the defence,[126] and refuse to follow *Wald* on the basis that these compelling concerns would be defeated by any other ruling. The courts could also reconsider their interpretation of subsection 265(4) as having simply codified *Pappajohn*.[127] Puzzlement about the ambiguous wording of this section and the legislative intent behind it has been expressed by several legal academics.[128] The possibility that Parliament intended to modify the rule by adding in a "reasonableness" rider should be given serious thought, particularly in view of the fact that subsection 265(4) was included in a law reform package intended to increase the effectiveness of the legal response to rape. Section 276 is stated in absolute terms and was intended to remedy an ongoing prosecutorial problem. Therefore, a court could find that the scope and application of subsection 265(4) was intended to be circumscribed by section 276,[129] whose narrow drafting would be rendered ineffectual if *Pappajohn* were to be read as providing a further exception to the bar against sexual history evidence.

In conclusion, the Supreme Court of Canada should overrule itself on *Pappajohn* because the rule poses a serious threat to women's physical integrity. At the very least, its spread into the law of evidence must be contained by rejecting the *Wald* interpretation of the combined effect of subsection 265(4) and section 276.

IV. The Right to a "Fair" Hearing: Section 7

Madam Justice Hetherington held that by excluding "relevant" evidence as described above, section 276 infringed upon an accused's right to a fair hearing under section 7 and subsection 11(d) of the

---

[125] Temkin, *supra*, note 86 at 15.

[126] Boyle, *supra*, note 54 at 165; D. Stuart, Canadian Criminal Law: A Treatise, 2d ed. (Toronto: Carswell, 1987).

[127] Robertson, *supra*, note 88.

[128] Boyle, *supra*, note 54 at 79 and 86-88. *See also* G. Parker, *The "New" Sexual Offences* (1983), 31 C.R. (3d) 317; P. Nadin-Davis, *Making a Silk Purse? Sentencing: The "New" Sexual Offences* (1983), 32 C.R. (3d) 28.

[129] *See, e.g., Bird, supra*, note 96. *But see* the contrary opnion expressed by the court in *R.* v. *Brun* (1986), 28 C.C.C. (3d) 396 at 408-09 (N.B.Q.B.).

Charter. In this section, I focus solely on section 7, since this appears to be the implicit focus of the judgment. Subsection 11(d) might require a different response although the main elements of my critique would be the same.

In *Wald*, Hetherington J. reached the conclusion that section 276 violated "fair" hearing rights without actually elucidating the meaning of a "fair" trial. This Judge does not, of course, bear individual responsibility for the paucity of analysis: this particular *Charter* provision is even more bereft of concrete references to pre-existing legal concepts than other sections, and many judges appear to have interpreted this Parliamentary abdication of responsibility as giving the courts free reign to constitutionalize ideologies and practices.

Section 7 on its face guarantees "the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with principles of fundamental justice".[130] It says nothing about a right to a "fair" hearing, and it certainly provides no guidance as to what such a notion might encompass. Only the most earnest of black letter lawyers could assert that judges do not create the content of these "principles of fundamental justice", and therefore bear no responsibility for policy choices. Prior to the *Charter*, there was no pre-existing body of Canadian jurisprudence which catalogued and defined "principles of fundamental justice". Even if legal "rules" of this nature had already been developed, these too would have implicated judicial choice of some values and interests over others, for judges would still have to choose among the prior cases, in light of their understanding of what the constitutional document was meant to accomplish and the interests involved.

While these comments will be obvious to many readers, it is important to acknowledge that judges are currently (and only recently) engaged in the project of creating the content of the right to a "fair" hearing. It follows that the meaning to be assigned to "fairness" in this context is as politically charged, and as much a contested terrain as is the meaning of "equality".

Madam Justice Hetherington uses tautological reasoning in her assertion that an accused is denied a "fair" trial if he is precluded from introducing "relevant" evidence which is (apparently, self-evidently) more probative of the issue of consent than prejudicial to the victim. Mr Justice Grange's statement in *obiter dicta* in *Re Seaboyer* to the effect that the accused "might, by the exclusion of the proffered ["relevant"] evidence be denied the opportunity for full answer and defence"[131] in violation of section 7 is similarly circular, as is the argument that fair trial rights are violated when the accused is denied

---

[130] *Charter*.

[131] *Re Seaboyer*; *Re Gayme*, *supra*, note 8 at 300.

the opportunity to raise a reasonable doubt by the exclusion of "relevant" evidence.[132] None of these conclusory statements articulate a notion of "fairness" beyond the idea that a trial is "unfair" if the accused is restricted from introducing *any* evidence which might precipitate an acquittal.

In the context of a criminal trial, "fairness" must surely be a relative concept in order to have any meaning. We need to know what the stakes are for all parties[133] implicated in and affected by the criminal proceeding. We also need to be apprised of the parties' access to effective legal and other support (that is, media coverage, police protection, and so on) in the criminal process. We must assess both the substantive and practical biases of the applicable law, and we need to know who has the ability to control the meaning of the legal outcome.[134] In other words, when judges, lawyers, and academics declare that the accused in these circumstances is potentially being denied a "fair" trial, we need to ask, "as compared to whom?"

While Hetherington J. does state that "principles of fundamental justice require that a hearing be fair to both the Crown and the accused",[135] she neither expands upon what she means, nor does she actually apply it in reaching the outcome. This should be contrasted with the decision of the British Columbia Court of Appeal in *LeGallant* wherein Justice Hinkson decided that section 276 did not offend the accused's "fair" trial rights because the section evinces a redefinition of "fairness" as a balance between the interests of the state, the victim,

---

[132] *Brun*, *supra*, note 129 at 407-09.

[133] By using the word "parties" in the context of criminal prosecution, I am according status to the victim as one who has very material stakes in the outcome of the proceedings, namely, credibility, validation and personal safety. The beginnings of legal recognition of the victim's interests and status in criminal prosecutions can be gleaned from the new legislation which permits assessment of the impact of an offence upon a victim at the sentencing stage (s. 735 (1.1), R.S.C. 1988, c.30, s.7(2).), and from moves in jurisdictions such as Denmark and Norway to permit representation by counsel of the rape victim at trial. *See* Temkin, RAPE AND THE LEGAL PROCESS, , *supra*, note 44 at 162-90.

[134] *See supra*, note 60 at 652-53 where Professor Catharine MacKinnon stated that "women are violated every day by men who have no idea of the meaning of their acts to women. To them, it is sex. Therefore, to the law, it is sex. That is the single reality of what happened. When a rape prosecution is lost on a consent defense, the woman has not only failed to prove lack of consent, she is not considered to have been injured at all." For an illustration of the wide-reaching implications of the "legal" determination of "no crime" in rape trials, *see Bunker* v. *James and Downland Publications Ltd* (1980), 26 S.A.S.R. 286, wherein a man acquitted of rape successfully sued a newspaper in libel for their publication of the victim's commments (ie, "my rape ordeal") after an acquittal had been rendered.

[135] *Wald*, *supra*, note 9 at 345.

and the accused.[136] The various ways in which the accused might put his case for relative "unfairness" will now be considered.

The argument that the accused is deprived of historically established common law "rights" has little, if any, substance. The common law regarding the ability of defence counsel to ask particular questions of rape victims, to insist on a response, and to contradict that response has been fully described by other authors.[137] Several conclusions can be drawn from this history.

First, the practices of the common law rules of evidence could never have been framed as "rights". In fact, the development of the law regarding the admissibility of a victim's past sexual experience appears to be less related to "rights" and "fairness" than to the assertion of judicial authority over a practice of admitting evidence which Parliament had tried to curtail by legislative structuring of the exercise of discretion when it first enacted section 142 of the *Criminal Code* in 1976.[138] Section 142 expressed a preference against the admissibility of sexual history evidence and required judges to hold a *voir dire* before admitting such evidence. The Supreme Court of Canada responded by interpreting the legislation as *broadening* the common law, to the manifest disadvantage of the victim,[139] a response which Professor Boyle has observed, "displays a regrettable and unnecessary tit-for-tat approach to judicial law-making".[140] The judicial reaction to enactment of a section similar to section 142 in the United Kingdom was openly hostile: "I think it might be unfair, perhaps even more so in an older woman, to prevent cross-examination on sexual proclivities, but that is what Parliament wants. . .. This wretched section overturns many of our habits in criminal trials."[141]

Second, Parliament's further legislative response in 1982 of enacting sections 276 and 277 *added* to some the benefits previously enjoyed by an accused under the common law in respect of questioning the victim. While the amendments eliminate judges' powers to permit certain questions to be asked of the victim except in the three situations described by section 276, and to that extent accused men lost some room to manoeuvre in their defence tactics, the legislation quarantees

---

[136] *See R.* v. *LeGallant* (1986), 54 C.R. (3d) 46 at 58-60, 29 C.C.C. (3d) 291 at 302-04 (B.C.C.A.); *Wiseman*, *supra*, note 96, where the court reached the same conclusion. *See also Bird*, *supra*, note 96. Recent Supreme Court of Canada case law also gives some precedential authority to the notion that the state's interests may be factored into the initial assessment of whether a *Charter* violation exists. *See Corbett* v. *R.* (1988), 64 C.R. (3d) 1.

[137] *See* Boyle, *Sexual Assault*, *supra*, note 54 at 133-36; Allen, *supra*, note 54; Dawson, *supra*, note 54.

[138] R.S.C. 1970, c. C-34, *as am.* R.S.C. 1974-75-76, c. 93, s. 8.

[139] *Forsythe* v. *R.*, [1980] 2 S.C.R. 268. *See also* the judgment of Madam Justice Wilson in *R.* v. *Konkin* (1983), 34 C.R. (3d) 1 at 7-9.

[140] Boyle, *Section 142 of the Criminal Code*, *supra*, note 54 at 258-59.

[141] Judge B. Gibbens, *The Times* (10 February 1982) as quoted in Patullo, *supra*, note 1 at 19.

them the ability to question victims within the three exceptions without regard to judicial discretion or to the legal categorization of the evidence as "relevant".[142] It also permits the accused to introduce evidence to contradict the victim's responses.[143] It is therefore unconvincing to argue that the accused is deprived of the right to a fair trial in comparison to the situation which existed prior to enactment of section 276.

The argument that the accused is deprived of "fairness" in comparison to persons charged with offences other than sexual assault is also strained. First, as has already been pointed out, the only comparable situations where the accused can benefit by eliciting information about the victim's past conduct will usually involve homicide cases where the accused wants to demonstrate a pattern of provocation by the victim, or behaviour necessitating self- defence on the part of the accused. I have already argued that these cases do not provide an appropriate basis for comparison for two reasons. A victim's prior violent conduct is more probative and less likely to invoke distorted belief systems than is prior lawful, consensual sexual activity.[144] The other distinguishing feature is that rape victims' past sexual experience is used systematically in sexual assault cases to suggest that no crime occurred, thus effectively labelling a whole class of victims as perjurors, or as persons incapable of knowing what they want, and whose perceived violation need not therefore be redressed by the criminal law.

Second, the accused's argument that he or she is denied a "fair" hearing is considerably weakened by the available data on the processing of reports of rape. No one could doubt, from perusal of the available studies, that offences of sexual violence are vastly underreported.[145] And, in spite of the fact that there is no evidence to suggest that false reporting of rape is any more frequent than for other offences, the rate at which these offences are dropped from the criminal process as "unfounded" by the police is extraordinarily high,[146] as is the overall rate at which rape charges are filtered out of the system.[147]

---

[142] It should be noted here that s. 276(1) is already overly broad. For instance, the prosecution is not barred from introducing such evidence, nor is defence counsel prohibited from introducing the victim's prior sexual experience with the accused, even if it took place twenty years ago. Given that many sexual assaults are committed by accuseds against former wives and girlfriends, s. 276 will not be available to shield many victims as the law now stands.

[143] *See supra*, note 54. *See also* Madam Justice Wilson's decision in *Konkin*, *supra*, note 139.

[144] "The principle in *Scopelliti* [of introducing evidence of previous acts of violence by the deceased in a murder trial] does not apply to a case which does not involve violence." *R.* v. *LeGallant*, *supra*, note 136 at 59 (B.C.C.A.), *per* Hinkson J.A.

[145] *See* Temkin, *supra*, note 44 at 1-16.

[146] Gunn & Minch, *supra*, note 69 at 56.

[147] *Ibid.* at 79.

several countries report higher acquittal rates for offences of sexual violence over other offences,[148] and the sentencing of those who have the bad luck to be convicted of offences of sexual violence is at best erratic, and at worst, lenient.[149] Therefore, without in any way condoning the anomalous processing of the offence of rape, this research undermines the accused's claim to disadvantage in the context of a rape trial.

Third, the accused's "fairness" argument not only presumes that the evidence is objectively "relevant", but also that it can be used appropriately to ascertain the truth of what happened between the accused and the victim. One might be quite sceptical about the "fairness" of permitting the introduction of much victim history evidence, given the observation made by a well-known American defence lawyer that "the best defence in a murder case is the fact that the accused should have been killed regardless of how it happened".[150] Predictably, victim vilification as a defence has had considerable success in cases where the victim history evidence can be used to invoke negative cultural stereotypes.[151]

Defence counsel in rape cases have also used victim history evidence in an effort to suggest that the rape victim "got what she deserved".[152] The truth of what happened becomes concealed by antipathy towards the victim, and belief systems which locate the "fault" in the victim, regardless of the manner in which the offence occurred.[153] The fact that such evidence has a powerful emotional impact upon

---

[148] *See* sources cited in *supra*, note 46.

[149] P. Marshall, *Sexual Assault, the Charter and Sentencing Reform* (1988) 63 C.R. (3d) 216; Boyle, SEXUAL ASSAULT, *supra*, note 54 at 171-83; Temkin, *supra*, note 44 at 16-23.

[150] P. Foreman, quoted in Pattenden, *supra*, note 47 at 376.

[151] It has been used to turn homosexual and young female homicide victims into distasteful, aggressive nymphomaniacs, and to paint deceased victims of marital murder as "castrating", "nagging" wives whose murders are thereby given the legal label of "manslaughter". *See, e.g., R.* v. *Valley* (1986), 26 C.C.C. (3d) 207 (Ont. C.A.); *see People* v. *Chambers*, reported in *The New York Times* (16 April 1988) 33, discussed in J.L. Brown, *Blaming the Victim: The Admissibility of Sexual History in Homicides* (1987-88) FORDHAM URBAN L.J. 263. *See generally* S. Edwards, *Male Violence Against Women: Excusatory and Explanatory Ideologies in Law and Society* in S. Edwards, ed., GENDER, SEX AND THE LAW (London: Croon Helm, 1985) 183.

For efforts to use the past violence of battering husbands and fathers to explain and excuse the ultimate retaliation by *their* victims, *see R.* v. *Lavallee* (1988) 52 Man. R. (2d) 274 (C.A.); *R.* v. *Cadwallader*, [1966] 1 C.C.C. 380 (Sask. Q.B.).

[152] *See, e.g.*, the examples of questions proposed by defence counsel and reproduced in Boyle, SEXUAL ASSAULT, *supra*, note 54 at 135, notes 12 and 141, notes 28, 29.

[153] *See* references cited *supra*, note 46. *See also* studies cited by Boyle *ibid.* at 133 fn.1.

triers of fact and can result in erroneous verdicts has been well-documented and acknowledged even by judges.[154]

Fourth, and finally, the accused's claim to a "fair" hearing is undermined by the practice of using a victim's past sexual history in order to harass and intimidate her as a witness. Examples of cases where defence counsel fish for evidence to discredit the victim are available, as are situations where the strategy is to "whack" the victim with this sort of evidence in the hope that she withdraws her cooperation from the prosecution.[155] As Professor Brettel Dawson has written: "The right to a 'fair hearing' for the accused surely does not include the right to a biased or inaccurate hearing."[156]

In sum, the legal concept of a "fair" hearing as articulated in the *Wald* decision is incomplete and heavily weighted in favour of the accused because of the narrowness of vision. This is not an argument for a balancing of interests within section 7. Rather, it is an assertion of the need for a realistic and intelligent effort to understand "fairness" as related to the concrete realities of the criminal process and the lives of the women and men implicated, rather than theoretical deprivations of *Charter* rights. I conclude that if a court were to re-examine the concept of a "fair" hearing in its fullness, in the context of sexual assault prosecutions, it would overturn *Wald* and find no violation of section 7 or subsection 11(d) rights.

V. THE RIGHT TO "EQUALITY": SECTION 15

An important issue which was not addressed in the *Wald* case is the question of how the accused's section 7 rights are to be weighed against the section 7 rights to security of the person, and the section 15 right to equality guaranteed to individual female victims and to women as a group. In short, the judgment fails to account for the fact

---

[154] An American judge has labelled such an acquittal in his court as "a travesty of justice". Quoted in Temkin, *Regulating Sexual History*, *supra*, note 56 at 948. Note also the following comment by Mr Justice Marshall:

> The problem is that this assumption or probability, if you like, that a woman would on this occasion have consented, because she is sexually more active, denies both autonomy and dignity to women. This is repulsive to a society attempting to rectify a long-standing inequality of women. . . . What offends one's sense of justice most, I think, is that relating unchastity to a likelihood of consent is unfair and also, of course, not conclusive in any individual case. What one must realize, though, is that our test for judicial truth is based on probabilities. This is, of course, both fallible and flawed. It may also show, in a specific case, rank prejudice; but we use it.

R. v. *Oquatag*. *supra*, note 61 at 450.

[155] *See* "Whack the Sex Assault Complainant", *supra*, note 45. *See also* transcripts quoted in Chambers & Millar, *supra*, note 46 at 64-73.

[156] *Dawson*, *supra*, note 54 at 333.

that this case involves conflicting constitutional rights, and that choices must be made as to the priority to be assigned to the accused's trial process rights as compared with the victim's rights as a member of a historically subordinated group.

It has been argued by several authors that women's equality rights must include equal access to "security of the person", within the meaning of section 7, including personal autonomy regarding physical and sexual contact with others, and the right to insist upon effective enforcement of laws which protect women against unwanted contact.[157] Women have identified fear of rape, and the notoriously futile efforts of victims to get "justice" from the legal system as partially explanatory of women's relative inability to participate as full and equal partners in our democratic institutions.[158] In addition, the credibility of women as a group, and the self-confidence that goes with having one's perceptions of reality reflected and confirmed by the legal process, have been whittled away by the long-standing, suspicious treatment given by our judicial system to rape victims.[159] Many women's faith in the neutrality of our judges and in the possibility of an effective voice in Canada's democratic processes has been profoundly shaken.

Effective and enforceable criminal laws prohibiting rape, including the section 276 ban on resort to a victim's past sexual history, constitute

---

[157] *See* Boyle and Dawson, *supra*, note 54. *See also* M. Fassel *et al.*, an *Affidavit* submitted to the S.C.C. in the matter of *Gayme, Seaboyer* v. *R.* (1989).

[158] The authors of a recent report on the ways in which women alter their lives due to fear of rape state:

> Although each woman develops her own attitude toward rape based on her knowledge and experiences, female fear is one of the most commonly experienced aspects of women's everyday lives. It is not an idiosyncratic, private emotion, but a social fact with considerable impact on our society and on the quality of life in our cities. It is a rational phenomenon resulting not only from women's personal backgrounds but also from what women as a group have imbibed from history, religion, culture, social institutions, and everday social interactions.

Gordon & Riger, *supra*, note 3 at 47. *See generally* MacKinnon, *supra*, note 63 at 21-31.

[159] Wigmore, *e.g.*, in his highly influential text on the law of evidence, states:

> Modern psychiatrists have amply studied the behaviour of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by bad social environment, partly by temporary psychological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offences by men.
>
> No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental make-up have been examined and testified by a qualified physician.

EVIDENCE, vol. 3A (Boston: Little Brown and Company, 1970) para. 924a.

See also remarks by Lord Matthew Hale in PLEAS OF THE CROWN, vol. 1 at 635 and in PLEAS OF THE CROWN (1678) at 663.

a necessary feature of the federal government's obligation to provide women with equal access to and protection of the laws which prohibit assault. Professor Christine Boyle has argued that the first branch of rights enumerated in section 7, "life, liberty and security of the person", extends to situations where these interests are threatened by non-governmental actors. When read together with section 15, this constitutional guarantee requires positive action on the part of the government:[160]

> [D]ecisions not to enforce particular laws could be open to constitutional challenge, as well as decisions relating to the allocation of law enforcement resources. It might well be unconstitutional for law enforcement officials to formulate policies which had the effect of minimising enforcement of laws creating offences of which women were primarily the victims. On the contrary, when one takes into account the equality rights, *unequal* resources may have to be directed towards such offences in order to ensure an actual equal right to liberty and security of the person.[161]

The argument that section 15 requires the maintenance of "rape shield" laws such as section 276 and the retraction of the *Pappajohn* rule depends on the meaning to be assigned to "equality" as used in the *Charter*.[162] Canadian feminist legal scholars have made many thoughtful and creative contributions to the interpretive task,[163] including a recent intervention in the only "equality" case thus far to be decided by the Supreme Court of Canada.[164] All possible formulations

---

[160] *See, e.g.*, the lawsuit in *Doe* v. *Police Bd of Commissioners (Metropolitan Toronto)* (22 Feb. 1989), Toronto 21670/87 (Ont. H.C.), wherein a most courageous woman who survived a violent assault is suing the Metropolitan Toronto Police in tort for failure to warn and for breaching her s. 7 and s. 15 *Charter* rights to effective protection against sexual assault.

[161] Boyle, SEXUAL ASSAULT, *supra*, note 54 at 38-39 [emphasis in original].

[162] For an analysis and critique of the equality models used in the s. 15 cases thus far, *see generally* Brodsky & Day, *supra*, note 6.

[163] Eichler, *The Elusive Ideal — Defining Equality* [1988] 5 CAN. HUM. RTS. Y.B. 167; P. Hughes, *Feminist Equality and the Charter: A New World View* (1985) 5 WINDSOR Y.B. ACCESS JUST. 39; K. Lahey, *Feminist Theories of (In)equality* in K.E. Mahoney & S.L. Martin, eds., EQUALITY AND JUDICIAL NEUTRALITY (Toronto: Carswell, 1987) 71; L. Smith, *A New Paradigm for Equality Rights* in L. Smith, ed., RIGHTING THE BALANCE: CANADA'S NEW EQUALITY RIGHTS (Saskatoon: Canadian Human Rights Reporter Inc., 1986) 351; C.N. Sheppard, *Equality, Ideology and Oppression: Women and the Canadian Charter of Rights and Freedoms* (1986) 10 DALHOUSIE L.J. 195; D. Greschner, *Judicial Approaches to Equality and Critical Legal Studies* in Mahoney & Martin, *ibid.* at 59; H. Lessard, *The Idea of the "Private": A Discussion of State Action Doctrine and Separate Sphere Ideology* (1986) 10 DALHOUSIE L.J. 107.

[164] *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143, 91 N.R. 255 [hereinafter *Andrews* cited to S.C.R.]. *See also* the factum produced by the Women's Legal Education Action Fund, *supra*, note 157.

of "equality,"[165] except the most conservative interpretation which is satisfied by simple gender neturality,[166] would support Professor Boyle's argument, as will be demonstrated below. Section 15 must therefore be read as requiring the government to enact, maintain and enforce restrictive rules regarding the introduction of sexual history evidence, and to limit use of "mistake" as a defence to rape, in order to facilitate the enjoyment of women's section 7 *Charter* rights.

The two exceptions proposed by Hetherington J. are "gender neutral" on their face, but can be demonstrated as implemented in a fashion which expresses a particular animus towards women, or which perpetuates certain negative and patently untrue beliefs about women.[167] It would be possible to demonstrate that rules permitting the introduction of past acts by victims have an adverse effect[168] upon female victims as primary witnesses in rape prosecutions. It could also be shown that without restrictive rules, women will not have equal access to legal redress for wrongs perpetrated against them. A wider notion of equality which focusses on "an equal right to walk around and pursue all the common occupations of life and be free from attack"[169] can also be linked to the need to create a culture in which men recognise that sexual assault laws will be fully enforced against offenders, and where sexual assault is viewed as culturally unacceptable. Finally, if equality is viewed as the elimination of laws, policies and practices which perpetuate the subordination of women,[170] it is apparent that rules which permitted the introduction of sexual experience evidence were historically designed to protect men's property interests in their daughters and wives, and to shield men from "false" complaints.[171] These rules also reinforce a whole code of social and sexual behaviour for women.[172] The impact of sexual history evidence upon

---

[165] For an overview of discrimination theories, *see* J. McCalla Vickers, *Major Equality Issues of the 80's* [1983] CAN. HUM. RTS. Y.B. 47. *See also* the summary of feminist equality theories in E.A. Sheehy, PERSONAL AUTONOMY AND THE CRIMINAL LAW: EMERGING ISSUES FOR WOMEN (Ottawa: Canadian Advisory Council on the Status of Women, 1987) at 1-9.

[166] For critiques of gender neutrality as a strategy for achieving equality, *see* K. de Jong, *On Equality and Language* (1985) 1 C.J.W.L. 119; S.M. Shrofel, *Equality Rights and Law Reform in Saskatchewan: An Assessment of the Charter Compliance Process* (1985) 1 C.J.W.L. 108.

[167] *See, e.g.*, the comments reported in "Whack the Sex Assault Complainant", *supra*, note 45.

[168] For adverse effect theorists, *see*: W.W. Black, EMPLOYMENT EQUALITY: A SYSTEMIC APPROACH (Ottawa: Human Rights Research and Education Centre, U. of Ottawa, 1985); A.W. Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination* (1972) 71 MICH. L. REV. 59; B. Vizkelety, PROVING DISCRIMINATION IN CANADA (Toronto: Carswell, 1987).

[169] Boyle, SEXUAL ASSAULT, *supra*, note 54 at 38.

[170] MacKinnon, *supra*, note 63 at 40ff.

[171] Clark & Lewis, *supra*, note 46.

[172] Backhouse, *supra*, note 92; Clark & Lewis, *ibid.*

police and Crown decisions not to proceed with criminal prosecution,[173] and the silencing effect this may have for women who have been raped also supports the argument that section 276 is a necessary component of legal efforts to reverse women's subordination.

While the Supreme Court of Canada has not yet explicitly adopted any of these equality models, it has indicated a willingness to require more than gender neutrality, and to go beyond a superficial examination of legislation for language which overtly disadvantages particular groups.[174] As well, there are indications that the Court may be willing to use a model which contemplates differential treatment as a strategy for implementing substantive equality.[175]

Women can assert section 15 rights in support of the validity of section 276, and, by virtue of section 28 of the *Charter*, can claim priority for their rights *over* an accused's section 7 and subsection 11(d) rights. The resolution of conflicting *Charter* rights such as section 7, subsection 11(d) and section 15 has not yet been the subject of Supreme Court jurisprudence. However, section 28 stipulates that the rights set out in the *Charter* are guaranteed equally to men and women "notwithstanding" anything in the *Charter*. This section was the fruit of intense grass-roots lobbying by Canadian women to ensure that equality rights would not get lost or traded off in the interpretation process.[176] Several legal scholars have argued that courts should accord priority to this section in contests between equality and other rights, and should read it as constitutional authority for the ranking of section 15 rights over all other *Charter* interests.[177] Therefore, resort to section 1 would not be necessary, and section 276 would survive constitutional challenge by virtue of section 28.

In sum, it is important to reiterate that what is actually at issue in cases such as *Wald*, is a conflict not only between the competing section 7 and subsection 11(d) rights of the accused to a "fair" hearing and the victim to her section 7 security against physical and sexual attacks, but also the rights of women under sections 15 and 28 to the equal protection and benefit of the law. A failure to address and accord

---

[173] Chambers & Millar, *supra*, note 46 at 76-78.

[174] *Andrews*, *supra*, note 164.

[175] *Ibid. per* McIntyre J. at 8, 11, 13, 16.

[176] P. Kome, THE TAKING OF 28: WOMEN CHALLENGE THE CONSTITUTION (Toronto: The Women's Press, 1983); C. Hosek, *Women and the Constitutional Process* in K. Banting & R. Simeon, eds., AND NO ONE CHEERED (Toronto: Methuen, 1983) 280.

[177] K. de Jong, *Sexual Equality: Interpreting Section 28* in A. Bayefsky & M. Eberts, eds, EQUALITY RIGHTS AND THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS (Toronto: Carswell, 1985) 493; D. Greschner, THE FULL IMPLEMENTATION OF EQUALITY (Ottawa: Canadian Advisory Council on the Status of Women, 1985); M. McPhedran, *Section 28 — Was it Worth the Fight?* in THE STUDY DAY PAPERS (Toronto: Charter of Rights Educational Fund, 1983).

due weight to these interests in judicial considerations of the impact of the *Charter* on the rape shield laws and the mistake of fact doctrine will have serious implications not only for women, but also for the credibility of the judiciary as it implements the *Charter*.

VI. "JUSTIFIED IN A FREE AND DEMOCRATIC SOCIETY": SECTION 1

Madam Justice Hetherington's analysis of the question of whether section 276 should be upheld under section 1 in spite of its perceived conflict with the accused's section 7 and subsection 11(d) rights is inadequate. Her opinion provides almost no analysis of the content of the conflicting interests. Nor does she discuss the history of the impugned legislation, although the responsibility for this omission may lie with the Attorney General as designated defender of the legislation.[178] In this part, I argue that a proper application of section 1 would have resulted in the assumption of a posture of judicial deference toward section 276.

Madam Justice Hetherington's opinion followed the outlines of *R.* v. *Oakes*[179] by initially determining that section 246.6 (276) derived from a pressing and substantial government objective, that of addressing the under-reporting of sexual assaults by sparing the victim the embarrassment of irrelevant or prejudicial questions whose probative value is comparatively trifling.[180] She purported to consider the other branch of the "test" in *Oakes*,[181] which asks whether the means chosen to execute the objective are proportionate to its achievement. Without any analysis on this point, Hetherington J. simply adopted a statement made at the trial level in *LeGallant*: to the knowledge of Hetherington, J. "[t]he potential embarrassment of the complainant, however distasteful that may be, is not. . .a reason. . ."[182] "of sufficient importance to warrant overriding the constitutionally protected right of an accused to a fair hearing".[183] It should be noted at the outset that the trial decision

---

[178] *See, e.g.*, the analysis of the poor performance of the Attorneys General in defending legislation against s. 15 *Charter* challenges in Brodsky & Day, *supra*, note 6 at 62-66.

[179] *Supra*, note 42.

[180] *Supra*, note 9 at 351.

[181] For a sceptical vew regarding the helpfulness of the *Oakes* "test", *see* A. Petter & P.J. Monahan, *Developments in Constitutional Law, the 1985-86 Term* (1987) 9 SUP. CT. L. REV. 69, at Part II: *Questioning the "Wisdom"*.

[182] *LeGallant*, *supra*, note 31 at 180, quoted in *Wald*, *supra*, note 9 at 351.

[183] *Ibid.*

in *LeGallant* had already been overruled by the British Columbia Court of Appeal[184] when Justice Hetherington considered her opinion.[185]

The section 1 analysis in *Wald* should be rejected for several reasons. First, the objectives of this legislation have been construed far too narrowly. Parliament has redefined the legal meaning of "relevance" in this section in recognition of the fact that completely irrelevant information was regularly being used by defence lawyers, and that this evidence had a role in producing an incongruous acquittal rate far out of proportion to any reasonable estimate of false complaints. The objective went beyond saving "embarrassment" of victims: it was also intended to curtail efforts at witness intimidation and to reduce the incidence of acquittals influenced by bias and rendered in spite of compelling evidence of guilt.[186]

Section 276 was also part of a legislative package which, as the Supreme Court of Canada recognized in *Canadian Newspapers Co.* v. *Canada (A.G.)*,[187] had as its immediate aim increasing the rate of reporting for rape. To stop there is premature, for these reforms were achieved through years of scholarly research and analysis, as well as advocacy on the part of the women's movement in Canada.[188] The implicit objectives were that the law reforms would result in increased rates of conviction, increased reporting of the offence, decreased rates of commission of the offence, with resulting increased physical safety and autonomy for Canadian women. While recognizing that these objectives display a simplistic understanding of the role of the state, and particularly the criminal law, in reproducing relations of dominance and sexual violence,[189] it is important to acknowledge the long-term goals behind this reform. This inventory of the interests involved highlights the weakness of Madam Justice Hetherington's formulation of the contest as between "saving embarrassment" and ensuring that no innocent person is wrongly convicted.

Second, Hetherington J. has failed to consider the specific questions posed by the second branch in the *Oakes* test: are the measures

---

[184] *Supra*, note 136.

[185] *See also* the opinion of Grange J. in *Re Seaboyer*, *supra*, note 8 at 302, wherein he expressed the view that s.1 would not have saved the legislation, based on a statement made in *obiter dicta* in *Reference re s.94(2) of Motor Vehicles Act*, [1985] 2 S.C.R. 486 at 518, to the effect that violations of s.7 could rarely be tolerated under s.1, and then only in cases involving "exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like". Mr. Justice Grange failed to put this remark in context, assuming that sexual assault legislation could be ranked along with highway traffic legislation for the purposes of a s.1 analysis.

[186] *See generally* discussion in L. Snider, *Legal Reform and Social Control: the Dangers of Abolishing Rape* (1985) 13 INTERNATIONAL J. OF THE SOCIOLOGY OF LAW 337.

[187] [1988] 2 S.C.R. 122 [hereinafter *Canadian Newspapers Co.*].

[188] Hosek, *supra*, note 176.

[189] For critical comments on such instrumental interpretations of law, *see* L. Snider, *supra*, note 186 and J. Fudge, *supra*, note 17 at 29ff.

chosen rationally connected to the objectives? Do they impair the contested "rights" as little as possible? Are the effects proportionate to the objectives? In *Wald* and in other decisions on section 276, the judges have blithely asserted that section 246.6 is not properly tailored under the *Oakes* test because "relevant" evidence is excluded.[190] They have freely substituted their judgment of "relevance" by declaring constitutional exemptions in specific fact situations, or by declaring the entire provision inoperative. As the British Columbia Court of Appeal noted in *LeGallant*, these judicial interventions in essence operate to overturn the legislation and instead restore the old common law discretion of judges.[191]

What is clear, but ignored in these decisions, is that no common law system of discretion can possibly achieve the legislative objectives described above. The best we can hope for will be diverse interpretations of the circumstances in which certain evidence is "relevant" and constitutes a "constitutional exemption". These interpretations will vary from trial judge to trial judge across the country. The worst we might receive are expansive interpretations of "relevance" which will be detrimental to women both individually and collectively. This is of particular concern, given that the abysmal record of the Canadian judiciary under the common law, and under the modified common law regime of the old section 142 was the impetus for the revocation of judicial discretion by Parliament.

Furthermore, one cannot reasonably assert that this judicial record is a thing of the past. The contemporary judicial rulings on "relevance" in rape trials in other countries which retain some form of judicial discretion continue to display marked bias and a very undisciplined notion of "relevance".[192] In Canada, we have only to note recent

---

[190] *See Re Seaboyer*, *supra*, note 8 at 300, 305; *LeGallant*, *supra*, note 31 at 181 (B.C.S.C.); and *Wald*, *supra*, note 9 at 337-39. *See also R.* v. *Brun*, *supra*, note 129 at 411 and *R.* v. *Coombs*, *supra*, note 78 at 365. *But see Bird*, *supra*, note 96.

[191] *Supra*, note 136 at 59.

[192] Temkin, *Regulating Sexual History*, *supra*, note 56 at 964-68 discusses the South Australian experience and at 973-76 reports on a U.K. study of judicial discretion. R. Barrington, *Rape Law Reform* (1986) 9 WOMEN'S STUDIES INTERNATIONAL FORUM 57 at 60 cites the New Zealand experience with judicial discretion. *See also* results of a study of law reform efforts in New South Wales in Bureau of Crime Statistics and Research, INTERIM REPORT NO. 3, CRIMES (SEXUAL ASSAULT) AMENDMENT ACT, 1981, MONITORING AND EVALUATION: COURT PROCEDURES (New South Wales: Attorney General's Dept, 1987).

sentencing decisions[193] and highly inappropriate judicial comments[194] and behaviour in the context of offences of violence against women to demonstrate that discretion wielded by trial judges across the country is a completely inadequate tool for the protection of the interests of female victims of violence.

The objective of providing victims with certain knowledge of the limits of defence tactics as a way of promoting reporting will be severely compromised by any judicial interference with section 276. In fact, the Supreme Court of Canada, in the case of *Canadian Newspapers Company Ltd* v. *Canada (A.G.)*,[195] recognized the impact which judicial discretion regarding orders of non-publication of rape victims' names would have on the achievement of the legislative goal of increasing the reporting of sexual assault by women:

> Obviously, since fear of publication is one of the factors that influences the reporting of sexual assault, certainty with respect to non-publication at the time of deciding whether to report plays a vital role in that decision. Therefore, a discretionary provision under which the judge retains the power to decide whether to grant or refuse the ban on publication would be counterproductive, since it would deprive the victim of that certainty. Assuming that there would be a lesser impairment of freedom of the press if the impugned provision were limited to a discretionary power, it is clear, in my view, that such a measure would not, however, achieve Parliament's objective, but rather defeat it.[196]

It is just as clear that victims who are deciding whether to report sexual violence want to know whether they are likely to be believed by those who administer the criminal justice system, and whether their efforts to prosecute are likely to result in a conviction and appropriate sentence. Given what we know about the influence of evidence of prior sexual experience on the outcome of these issues, we must

---

[193] Marshall, *supra*, note 149.

[194] For examples reported nationally only in the last year, *see* K. Makin, "Conduct of Judges Rarely Censured by Peers, Observers Say" *The Globe and Mail* (4 March 1989) A-7; T. Weber, "Council to Review Judge's Remarks" *National* (April 1989) 7; A Rauhala, "Women Treated Unfairly in Court, Ottawa is Told" *The Globe and Mail* (27 March 1989) A-1, A-8; A. McIntosh, "Toronto Courtroom Sees Western-Style Meting Out of Justice" *The Globe and Mail* (25 February 1989) A-6; "Woman Assaulted by Boy Friend to File Complaint Against Judge", *supra*, note 2; "Fired For Unfairness to Women, Judge Accused of Assaulting Wife" *Ottawa Citizen* (4 January 1989) A-3; "Halifax Judge Suspended until He Faces Sentencing" *The Globe and Mail* (22 June 1989)A-5; 'Judge Convicted of Assaulting Wife" *The Citizen* (31 May 1989) A-5; "Mock Trial Targets Justice System — 6 Judges 'Guilty' of Light Sentences, Sexist Remarks in Rape Cases" *Toronto Star* (15 March 1988) A-2; A. Picard, "Judge's Sexual Assault Remarks Draw Fire" *The Globe and Mail* (11 August 1988) A-12. For discussion of judicial treatment of sexual history evidence since the passage of the 1982 rape law reforms, *see* Gunn & Minch, *supra*, note 69 at 115-16.

[195] *Supra*, note 187.

[196] *Ibid.* at 132.

assume that victims will be deterred by the knowledge that their past experience will be "open territory" at trial.

Judicial discretion will also provide ongoing incentive for defence counsel to create compelling scenarios to test judicial line-drawing and to harass victims. There is reason to believe that defence lawyers will be aggressive and perhaps manipulative in this regard, given the indications that they sometimes "cheat" by slipping in prohibited questions and innuendo regarding victims' sexual experience even under legislative regimes.[197] It is unrealistic to rely on Crown attorneys to act as zealous advocates on behalf of victims under a discretionary system, because Crown enforcement of the current non-discretionary provisions is uneven,[198] and because some of these Crowns, such as David Doherty (now a Provincial Court Judge), have taken the public position that sexual history evidence *is* "relevant" as a matter of "fact" and that its exclusion from evidence would violate constitutional norms.[199]

Third, Hetherington J. has failed to take a broad view in the application of section 1 by examining the practices of other "free and democratic" nations. Countries around the world have reformed the laws governing the prosecution of rape, and many have found it necessary to create strict rules for matters of evidence. In the United States, for instance, six states have legislated absolute bars to the introduction of *any* sexual history evidence.[200] The infinitely varied responses of other democratic governments should indicate that the "limit" of section 276 is "reasonable" in light of the pressing social problem[201] it seeks to address.

Fourth, and perhaps most importantly, the judges in *Wald* have failed to assume an appropriate posture of deference towards this legislation. Section 1 should have been invoked to save the impugned legislation. Unlike most of the other legislative materials over which

---

[197] Temkin, *Regulating Sexual History*, *supra*, note 56. In a major study of the effects of Michigan's sexual assault law reforms:

> The major change reported in the interviews with prosecutors, defense attorneys, and judges was the decline in the importance attached to the victim's prior sexual history. But even regarding this issue, the defense attorneys responded that they continued to investigate the victim's sexual history as a matter of course and to seek ways to use such information to discredit the victim.

Quoted in Estrich, REAL RAPE, *supra*, note 55 at 88. *See also* Chambers & Millar, *supra*, note 46 at 71.

[198] McGillicuddy, *supra*, note 10, has said that prosecutors intervene to object only "rarely". *See also* the statistics reported in New South Wales in INTERIM REPORT NO. 3, *supra*, note 192 at 3.

[199] *See, e.g.*, D. Doherty (now Judge Doherty), *'Sparing' the Complainant 'Spoils' the Trial* (1984) 410 C.R. (3d) 55. *See also* the observations of Chambers & Millar, *supra*, note 46 to the effect that Crown Attorneys sometimes introduce this evidence themselves.

[200] P. Searles & R.J. Berger, *The Current Status of Rape Reform Legislation: An Examination of the Statutes* (1987) 10 WOMEN'S RTS L. REPORTER 25 at 29.

[201] *Canadian Newspapers Co.*, *supra*, note 187.

judges now hold powers of review under the *Charter*, section 276 is of recent origin, it was designed to address an issue which was clearly identified by the government as an urgent concern, and its enactment marked an important victory of the democratic process over majoritarian interests, for women were not and are not significant holders of political power.[202] The point is that the competing interests have been resolved in the political process, against all odds, and section 276 already represents a compromise for that reason.[203] Professor Judy Fudge has commented: "In effect, when a defendant raises the issue that the impugned provision violates his constitutional rights he is asking the court to substitute its judgment for that of the legislature."[204] The courts are not in a position to assess the operation and impact of this legislation, and they will greatly impair the federal government's ability to do so[205] if they preempt the operation of section 276. Furthermore, if this legislation is struck down or altered, it will be a monumental task to lobby successfully for its reenactment via the section 33 override clause. Canadian legislators are now in a position

---

[202] *See, e.g.*, N. Morgan, WOMEN IN THE PUBLIC SERVICE (Ottawa: Canadian Advisory Council on the Status of Women, 1988); Canadian Advisory Council on the Status of Women, WOMEN IN POLITICS: BECOMING FULL PARTNERS IN THE POLITICAL PROCESS (Ottawa: Canadian Advisory Council on the Status of Women, 1987); J. Brodie, WOMEN AND POLITICS IN CANADA (Toronto: McGraw-Hill Ryerson 1985); Canadian Research Institute for the Advancement of Women, WOMEN'S INVOLVEMENT IN POLITICAL LIFE (Ottawa: Canadian Research Institute for the Advancement of Women, 1986); L. Desrochers, L'ACCES DES FEMMES AU POUVOIR POLITIQUE: OU EN SONT-ELLES? (Québec: Conseil du statut de la femme, 1988); S. Paquerot, FEMMES ET POUVOIR (Québec: Conseil du statut de la femme, 1983). For recent illustrations of women's relative powerlessness with respect to federal matters, *see* P. Koring, "Tories Break Tradition by Boycotting Meetings with Women's Lobby" *The Globe and Mail* (13 May 1989) A-3; E. Zweibel, COMMENTARY ON THE APRIL 27, 1989 BUDGET (Ottawa: Canadian Advisory Council on the Status of Women, 1989) [forthcoming].

[203] The drafting of the section in issue was being completed approximately at the same time as the drafting of the Constitution and I can only presume the committee in charge also had regard to the drafts of the Constitution and this legislation was not completed in a vacuum.

From *R.* v. *Wiseman*, *supra*, note 96 at 16.

I would reach a different conclusion regarding the impact of s.1 on the conflict which the rule in *Pappajohn* and s.265(4) pose for women's ss.7, 15 and 28 *Charter* rights. I would suggest that s.1 ought not to be invoked to save the unreasonable mistake of fact defence on the grounds that Parliament did not appear to have any clear objective in mind behind its enactment of s.265(4); it is not even clear whether the legislators intended to codify *Pappajohn*; the section was not introduced in order to rectify some wrong or inequality; it received almost no discussion (*see* Boyle, SEXUAL ASSAULT, *supra*, note 54 at 79); and it was anomalous in the context of a legislative package designed to *improve* the legal response to rape.

[204] *Supra*, note 17 at 26.

[205] For one example of the initial stages of federal assessment, *see* M.G. Stanley, *The Experience of the Rape Victim with the Criminal Justice System Prior to Bill C-127, Report No. 1* from Dept. of Justice, SEXUAL ASSAULT LEGISLATION IN CANADA: AN EVALUATION (Ottawa: Minister of Supply and Services, 1985).

to avoid political responsibility for the resolution of competing interests regarding monumental social issues by abdicating to the judicial interpretations of the *Charter*.[206] Canadian judges should not contribute to this phenomena by calling into question political decisions of this sort which have already been tested by and barely survived the political process.

VII. CONCLUSION

Rape continues to thrive as a socially created phenomenon. The statutory law governing the offence plays some role in constructing this crime as one that is perpetrated only by isolated individuals, and not one for which the conditions are culturally created, and which is widely tolerated:

> [R]ape continues to be viewed by most as a *private* experience which people believe can be prevented if victims and rapists learn to behave differently. Rape is rarely also viewed as a collective problem, a problem of society that results from years of inequity and reinforcement of myths and social lessons taught to both women and men by the way rape has been handled in the criminal justice system, medical facilities, media, schools, churches, and other important institutions in our society.[207]

Judicial contributions to the substantive and procedural law of rape have added significantly to the difficulties of prosecuting this offence. Specifically, judicial interpretation of the subjectivist mistake of fact defence and of the "relevance" of rape victim's past sexual experience have ensured that coercive and even violent conduct remains immune from criminal sanction. Parliament has been somewhat responsive to the concerns of women which these common law incursions have generated, and provisions such as sections 276 and 277 are the result.

Legal challenges to this legislation in cases such as *Wald* demand that judges confront squarely and openly the interests of *both* the

---

[206] M. Mandel, THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA (Toronto: Wall and Thompson, 1989) at 48-59.

One Member of Parliament commented recently on the stalled debates over other reforms to sexual assault legislation:

> The more we lie back on these things because of our fears of having our legislation invalidated, the less relevant our legislation is to the needs of Canadian society. It is a new kind of conservatism, if I can put it that way, to stand back and say let us not take risks to do what we think is right. . . .

Canada, MINUTES OF PROCEEDING AND EVIDENCE OF THE LEGISLATIVE COMMITTEE ON BILL C-13, CRIMINAL CODE AND CANADA EVIDENCE ACT (amdt.) (Ottawa: House of Commons, 33rd Parl., 2nd Sess., 1986-87) Issues 1-12 quoted in Fudge, *supra*, note 3 at 46.

[207] Gordon & Riger, *supra*, note 3 at 46.

accused and their victims as represented in the *Charter*. Judges who decide these cases must attempt to step outside of our patriarchal cultural belief system, and they must also make an effort to rid themselves of the unquestioned and self-aggrandizing assumption that judicial discretion is inherently superior to legislated rules. The legal rulings rendered on the constitutionality of sections 276 and 277 will be of real significance to the lives of Canadian women; they will also tell us something about the possibility of judicial neutrality as tested against this traditionally biased area of law.