

Legal Responses to Violence

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Cet article aborde la question du traitement légal de la violence des hommes à l'égard des Canadiennes et nous donne un large éventail des interventions légales des mouvements des femmes du Canada depuis un siècle ainsi que certaines des conséquences.

Any history of the development and changes in the law as it relates to women and male violence is also a chronicle of the history of the women's movement and its relationship to law.¹ All of the legislation and policy that recognizes women's rights to be free of male violence has been put in place because of the political strength and persistence of the women's movement in our country. While this movement has always articulated women's issues and rights in the context of equality, the repatriation of Canada's constitution in 1982 from Great Britain (*Constitution Act*), and specifically, the enshrinement of women's equality rights in ss.15 and 28 of the *Canadian Charter of Rights and Freedoms*, for the first time created a specific legal tool by which to advance these claims.

In spite of our many legal advances, violence against women has not subsided in Canada because women's vulnerability to male violence and our ability to harness law are inextricably linked to women's social, economic, and political position in Canada, in relation to those who hold power. Thus, while law is an important tool in advancing women's equality rights, law alone cannot end this violence until all women's equality is fully realized.

Before I commence, I would like to define my terms. First, when I speak of feminists or the women's

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movement in Canada, I am speaking of women who accept and recognize the existence of women's subordination economically, socially, and politically, and who have a commitment to engage in struggle of one sort or another, to change women's inequality. This movement is aimed at achieving equality for all women, and recognizes that women do not experience uniformly the benefits or disadvantages of sex, but rather are differentially affected by white supremacy, class privilege, the heterosexual presumption, and the "norms" of ability.

Second, when I speak of women's equality, I am referring to the idea of substantive equality. The difference between formal and substantive equality is that while formal equality merely insists on equality of treatment (and only to the extent that the decision-maker agrees that the two groups are similarly situated), substantive equality looks to the end result.² Are women and men in a

given society equal recipients of the benefits and burdens of that society? Among women, are we equally credible when we speak in the justice system? Are we equally free of violent assault? Sometimes, the most productive route to substantive equality will be to use formal equality or equal treatment as a tool; at other times, the specific conditions of women's lives, including, for example, the threat and impact of male violence, or the racialized abuse experienced by African Canadian women, will require very particular rules or practices to move us toward equality.

Third, when I speak of law, I am using the term broadly, to refer to the law as drafted by legislators, as interpreted by judges in the common law or by jurors as finders of fact in trials, and as implemented by those who enforce the law and wield a great deal of discretion, such as police and prosecutors. Thus the women's movement has recognized that the achievement of reforms in statutes or even in constitutions does not guarantee that those laws will become a lived reality, for police can refuse to take reports or can discredit women's accounts of violence; prosecutors can decide which cases to pursue, based on their perhaps discriminatory beliefs or on their prediction that the case will fail in court due to the discriminatory beliefs of others; judges can effectively nullify a law through narrow interpretations, through the creation of common law defences that uphold male supremacy,³ through the use of constitutional doctrines, through rulings on the evidence, and through instructions to the jury; and, even if a conviction is imposed, a judge can

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undermine its symbolism by imposing a sentence that makes a mockery of the conviction.⁴ Because of all of these ways that law works, women's advocates must be prepared for a long-term process of both political struggle and legal engagement.

Women's legal history

In the nineteenth century, as part of the ongoing process of colonization, England imposed British common law, including criminal law, on the inhabitants of what is now called Canada. Criminal law, in this context, must be linked to other forms of law that confer legal status, rights, and obligations, given that criminal law acts as an enforcement mechanism for many legal relations and values.

From the Middle Ages through to the mid-nineteenth century, women in England experienced a massive curtailment of their role in public life, though the exclusion of women from the church, the destruction of hereditary offices of government and their replacement by appointed office, and the growth of the universities and professions, through which women's occupations in the public sphere were superseded by male control (Atkins and Hoggett; Sachs and Wilson). Judges played a major part in this process, by creating the common law doctrine of women's "legal disabilities": women and children were declared to be the legal property of their fathers, and girls, once married, became the legal property of their husbands. Women did not have separate legal identity from their fathers or husbands, such that they were severely restricted in their abil-

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ity to accumulate property and wealth, to assert control over their children and their own destiny, and to protect or claim their own physical integrity. Women's lack of legal status had public law implications as well: women could not vote in elections, participate in government or make policy, enter the professions, including law, or generally participate in public life (Sachs and Wilson).

These limits on women's legal status were reflected in the criminal law's stance on violence against women such that British law did not prohibit violence against women, but rather, at best, regulated its "excesses." Thus, the British law as stated by Bacon in the mid-eighteenth century was that "The husband hath, by law, power and dominion over his wife, and may keep her by force within the bounds of duty, and may beat her, but not in a violent manner" (qtd. in Strange 295). As a member of our Supreme Court, Justice Wilson, stated:

[T]he law historically sanctioned the abuse of women within marriage as an aspect of the husband's ownership of his wife and his "right" to chastise her. One need only recall the centuries-old law that a man is entitled to beat his wife with a stick "no thicker than his thumb." (*R. v. Lavallee* 872)

Similarly, rape was criminal only to the extent that either a father or a husband held a proprietary interest in the woman's sexuality: it was a crime against the father if the girl was chaste and unmarried; it was a crime against the husband if she was monogamous and married (Clark and Lewis).

Thus, in 1892 Canada's first *Criminal Code* only punished rape if it was committed by a man other than the woman's husband; penetration was required; and the prosecutor had to prove non-consent, usually by proving violent resistance by the girl or woman. Rape was also adjudicated according to three common law rules that were unique to this offence: a rule permitting the evidence that a woman had reported the offence "at the earliest reasonable opportunity" to rebut a presumption that the complaint was false; the use of women's past sexual history evidence to demonstrate their lack of credibility; and the requirement that the jury be warned that it is dangerous to convict based solely upon the uncorroborated testimony of a woman or child.⁵

Assault upon a woman could be prosecuted in the 1892 *Code* as any other assault. An offence of indecent assault against a wife occasioning

actual bodily harm was enacted in 1909 (Boyle) and remained in the *Criminal Code* until 1960 (McLeod 1989). It was punishable by two years imprisonment, which was then extremely low in comparison to punishments of execution and life imprisonment for many other offences.

Wife murder could be punished by the law prohibiting murder, but it was in no way parallel to husband murder, which was in law a form of "petit treason" (Gavigan). Additionally, numerous practices and doctrines made it difficult to say that wife murder was outright prohibited. The defence of provocation, for example, reduced murder to manslaughter on the basis that someone engorged by "passion" has lost self-control, and should thereby be treated more leniently by the criminal law. Of course women's behaviour, whether it be by infidelity, insubordination, or by desertion, was (and arguably still is) more easily characterized as provocative from the standpoint of the male legislators who enacted, the male police who enforced, and the male judges and jurors who interpreted the law.⁶

Some women would have had access to remedies in civil law for rape, seduction, or breach of promise to marry, although these remedies depended on access to money to pursue them, were interpreted as essentially aimed at compensating fathers and husbands for lost value in the sexual property of women, and were given generous interpretations for only chaste and "deserving" women (Backhouse 1986).

First-wave feminism

At the same time that this *Criminal Code* was adopted in Canada marking women's social subordination by its narrow prohibitions, the first wave of the feminist movement was already well underway, as women in the United Kingdom, Europe, the United States, and Canada fought for the extension of the promise of liberal democratic rights to them

(Mossman). Women variously made important gains in the political and legislative arenas, after long and arduous campaigns, for example, reversing women's common law disabilities with respect to holding and dispensing of property and concluding valid contracts by legislation as early as 1872 in Ontario and achiev-

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ing the right to vote in federal elections, for non-Aboriginal women, in 1918 (see Altschul and Carron; Abell).

In spite of these and many other gains, including the admission, by special legislation in 1892, to the bar of Canada's first woman lawyer in 1897 (Backhouse 1985), the judges of the common law countries for 60 years resisted and denied women's claims to be recognized as "persons" entitled to participate fully in public life, including the practice of law. So it was that rather than lead the way in advancing women's equality, and rather than even reflecting women's changing social position, the judges, almost to a man, in countless cases, acted as "dogged defenders of male supremacy" (Sachs and Wilson 48).

At long last, in 1929, the Privy Council decided the famous "Persons" (*Edwards v. A. G. Canada*) case in women's favour, ruling that in the absence of evidence of parliamentary intent to the contrary, women should

be presumed included within the legal understanding of "persons." This case constituted a sudden and dramatic reversal of six decades of legal precedent. It cannot be explained internally, but only by reference to the context of the changes that had already been wrought in the legal landscape, by legislation, through the women's movement (see Mossman; Sachs and Wilson).

Second-wave feminism

Although once the public sphere was opened to women and the theoretical possibility was created of women as lawyers, legislators, and judges exerting a more direct influence on the law regulating male violence against women, the formal equality of opportunity models did not yield immediate results in terms of women's access to law. While our first woman magistrate was appointed as early as 1916 (Harvey), it was not until 1926 that most provinces admitted women to the practice of law, and Québec did not do so until 1941. Women were not permitted to sit as jurors in Manitoba until 1952, and until 1971 in Québec (Harvey). By the 1950s, only four per cent of Ontario law students were women (Hagan and Kay 11) and by 1971, women were still greatly underrepresented in the profession at a rate of 38:1 (Hagan and Kay).

In 1970, when the Royal Commission on the Status of Women was appointed to inquire into the steps that should be taken by the federal government to ensure equal opportunities for women, violence against women was conceptualized as a formal equality issue. The Commission focused on the unfairness in the *Criminal Code* of limiting criminal responsibility for sexual offences to men as perpetrators, of not protecting boys and men from sexual offences, and of the different rules for rape depending on the female's age, marital status, and moral character (Royal Commission on the Status of Women).

Although these criticisms were rendered deeper and more complicated by the work of the women's movement in providing services for women who had been raped (crisis centres) and for women who were fleeing violent men (women's shelters), the law reforms subsequently passed in 1982⁷ essentially used the model of formal equality employed by the Royal Commission. The new offences were gender neutral such that assaults on boys and men are punishable, as are assaults committed by women upon males. Sexual assault became a three-tiered offence, with higher sentence ceilings as the offence involves more violence and/or injury. The structure parallels that used for non-sexual assault, implying the only difference is the sexual nature of the attack. The offence can be committed by a husband against a wife; it need not include penetration; and many of the evidentiary rules unique to rape were abolished in the *Criminal Code*. Finally, a number of specific reforms have been legislated that create new evidentiary rules for the testimony of children and abolish some of the common law rules for dealing with their evidence (Boyle).

In the area of wife assault, while one of its earliest forms had been sex-specific, a similar pattern of second-wave feminism to law reform can be discerned. An undifferentiated offence of a common assault was in the *Code* from 1960 on, but it was usually dealt with in the family rather than criminal law courts (Bonnycastle and Rigakos) and was often treated as a private matter, requiring the woman to initiate and carry the prosecution, rather than the public prosecutor. The women's movement attempted to introduce formal equality by forcing police, prosecutors, and judges to deal with wife assault as they would any other life-threatening harm. However, the demands made by the women's movement have tended to be translated by the state in punitive terms rather than as a way to protect women's lives and safety (Currie).

For example, in 1982, the Attorney General for Ontario wrote to prosecutors urging them to encourage police to lay charges of assault rather than leaving the burden of prosecution to individual women. He also suggested to prosecutors that such assaults be considered more serious than stranger assaults because

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"the victims are in a captive position socially or economically and accordingly the likelihood of a recurrence is far more substantial." In 1984 the same office designated resources to appoint 50 Crowns to deal with domestic assault matters. In 1982, the federal Solicitor General wrote to police chiefs across the country, urging them to aggressively charge in cases of spouse assault, and in 1983 guidelines were created for the RCMP and police and prosecutors in the Yukon and N.W.T. (McLeod 1989).

Some jurisdictions drafted guidelines requiring that charges be laid by police as a matter of course, to avoid discriminatory exercise of discretion (Ontario Provincial Police). Other jurisdictions adopted "no drop" guidelines for prosecutors, to curb their discretion such that they must continue with a prosecution and do not have the discretion to desist, even when the woman expresses a desire to withdraw the charges (Manitoba Department of Justice).⁸

At the same time, women in Canada became engaged in another political and legal struggle with respect to women's equality. When the government proposed to repatriate (or bring home) Canada's constitution and to attach a new bill of rights that would constitute the supreme law of the country permitting the courts to declare contrary legislation inoperative, women were not included in the negotiations over the terms of the new constitution, nor were their interests or analyses represented in the specific proposals. Women's groups across the country fought successfully for a voice in the drafting process (Hosek), and worked hard to give as full a scope as was possible to a concept of substantive, not mere formal, equality in the language of the new *Charter*, now sections 15 and 28.

With the passage of the equality guarantees in the *Charter*, feminists inside and outside of law began to reconfigure their ideas about equality and to conceptualize violence as both an expression of women's inequality and a barrier to substantive equality. That women's struggle for equality and freedom from violence was a long-term one was painfully illustrated by a notorious exchange in the House of Commons in 1982 when women Parliamentarians attempted to put the issue and statistics of wife battering on the legislative agenda and the House erupted in prolonged laughter and general derision (Bonnycastle and Rigakos). Although the next two days in the House saw resolutions and apologies by the male members, the obstacles to simple law reform as a strategy to end violence against women were illuminated rather clearly.

Third-wave feminism

The achievements of the second wave of feminists and the guarantee of at least formal equality under the *Charter* have permitted the third wave of feminists to bring critical analysis and new understandings of equality

to the issue of the legal treatment of violence against women.

As of the 1980s, women constituted 50 per cent of students in Ontario law schools; as of 1991, the ratio of men to women in the profession in Ontario was 2.63:1 (Hagan and Kay). Women have marked achievements in law, including three women jurists who have sat or sit at the highest level of court in Canada,⁹ two of whom have explicitly articulated feminist visions of law. At the level of government, in 1992 the Federal/Provincial/Territorial Attorney Generals made a public commitment to promoting gender equality within the criminal law, and stated that "legal theory, common law and statute law must be developed equally from both male and female perspectives." Three prominent women judges have been appointed to head very important public inquiries into the treatment of women in the legal profession, federally sentenced women offenders, and women convicted of killing allegedly violent mates (see Wilson; Arbour; Ratushny). In 1995, Status of Women Canada released its "Gender Plan" outlining the commitment of the federal government to adopting policy that advances women's equality (Status of Women Canada); in 1996, the Department of Justice appointed a Senior Advisor on Gender Equality who is to ensure that women's equality issues are integrated into all of the work, policy, litigation, and legislation of the department (Bernier). As well, between 1993 and 1997, the Department of Justice invested in ongoing consultations with the women's movement on violence against women.

What kinds of new insights and legal strategies around violence against women has the third wave brought us in Canada? Again I will deal with sexual assault and wife assault in turn. Both areas of law reform have revealed to us the serious limitations of a formal equality model.

First, our experience with sexual

assault indicates that the mere change in language has not shifted the underlying operative understandings of "rape." For example, although the new laws are broader in terms of definitions of prohibited conduct and protected groups of women, those who enforce and interpret these laws may still hold and wield the same beliefs and values that more explicitly underpinned the old laws. Feminist researchers such as Lorenne Clark and Debra Lewis had previously demonstrated that although the former legislation did not explicitly endorse the notion that women should be protected under the law against rape only to the extent that they constituted the sexual property of individual fathers or husbands, this was in fact the way that the law was interpreted by police, by Crown attorneys, and by judges. Many feminists assert that the new reforms have not disrupted these beliefs or the practices in which they manifested. For example, even ten years after the reforms, crisis centre workers reported that the legislative restrictions on women's sexual history were simply ignored by defence, Crown attorneys, and judges in sexual assault trials (Sheehy 1991). Feminist researchers found that the former understandings of "real rape" still underlay investigative and prosecutorial decisions, such that stereotypes continued to play a significant role (Muzychka) and the "unfounding" rate for sexual assault remains incongruously high (Roberts).

Second, the neutrality in the language describing the offence has been criticized, as it tends to hide the gendered nature of sexual assault, erroneously conveying the notion that "equality" has been achieved by suggesting that the law now recognizes that men can be raped too, and women can be sexually violent. Of course the gendered statistics have not changed in this regard,¹⁰ but we may have lost a critical and shared social understanding of the meaning of rape for women (Cohen and

Backhouse). For example, in one case, the issue of whether touching a woman's breast amounted to a sexual assault had to be litigated all the way to the highest court in the country, because lower court judges took the gender neutral approach literally, reasoning that breasts were secondary sex characteristics, like men's beards, and that since touching a man's beard was not a sexual assault, touching a woman's breast was likewise not a sexual assault.¹¹

Finally, women have discovered that the *Charter*, in the hands of the same judiciary, can be used once again to doggedly defend men's rights at the expense of women's security. Thus, using the *Charter* as a weapon, a significant feature of the law, a non-discretionary ban on women's sexual history evidence in all but four fairly narrow situations, was declared unconstitutional by the Supreme Court because it allegedly violated men's rights to fair trials (*R. v. Seaboyer*; *R. v. Gayme*). Women's equality rights were barely mentioned by the judges, so irrelevant were they seen to be by the Supreme Court of Canada. This put women in Canada back by almost two decades, and raised serious questions about whether the *Charter* would be used to roll back women's democratic gains (see Sheehy 1991).

The response of the Canadian public, and of course the women's movement, was one of disbelief and outrage with the decision of the Supreme Court. Such an outcry was raised that the Minister of Justice initiated a law reform process that ultimately was led by the women's movement and its lawyers. Feminists determined that any new law needed to name women's equality and women's rights as the legal and constitutional basis for the reform; that women's interests and perspectives needed to be incorporated into the law; that women's experiences of racism, disabilityism, and lesbophobia needed to be recognized in crafting the law; that the law had to be drafted so to specifically challenge

the underlying beliefs about women and rape; and that mechanisms to check discretion had to be built into the law.¹²

The newest sexual assault law was passed in 1992 (*An Act to Amend the Criminal Code* 1992). The preamble to the law sets out women's *Charter* rights as the impetus for the law, and specifies the particular problems that it is meant to solve as an interpretive aid for the judiciary. The law now defines consent as "voluntary agreement to engage in the activity," rather than leaving it to the judges, and specifies situations in which there can be no consent in law, such as where consent is expressed by a third party, where the woman was incapable of consenting, and where her agreement was achieved through reliance upon a position of trust or authority over the woman. It creates a new process and set of criteria by which to limit when sexual history evidence is admissible, and sets out certain prohibited uses of this evidence. Finally, it imposes a new and significant limit on men's defence of "mistaken belief" regarding consent, by requiring that men take "reasonable steps" to ascertain consent.

This law is only just beginning to receive judicial interpretations at the higher levels of court, so it is difficult to assess at this early point its impact (see Sheehy 1996). It is also being challenged again under the *Charter* by men (*R. v. Darrach*); it remains to be seen whether the statements of legislative purpose will inspire the judges to pay deference to the democratic process and uphold the law.

In 1994, the justices of the Supreme Court again used the *Charter* to widen men's immunity from criminal liability for sexual and other violence against women by recognizing a new defence of "extreme intoxication" (*R. v. Daviault*). Again, feminist criticism and the women's movement's outrage reached the public domain (Sheehy 1995a), and the Department of Justice, in consultation with women's groups, amended the *Criminal Code* in re-

sponse (*An Act to amend the Criminal Code* 1995; Sheehy 1995b).

In the meantime, another defence strategy has flourished, that of demanding access to women's personal records so as to dig for information that can be used to contradict her statements or to undermine her credibility (see MacCrimmon). Unfortunately, our Supreme Court has once more upheld men's rights at the expense of women's, based on the *Charter* (*R. v. O'Conner*; *R. v. Carosella*). Once more, a hue and cry has been raised, and broadly-based consultation within the women's movement and with the Department of Justice ensued. The result is another new law, Bill C-46 (*An Act to amend the Criminal Code* 1997), which puts limits on disclosure of women's records, creates the legal possibility of women having standing in court to defend their interests in the criminal process, and again frames the law in legal and constitutional terms pursuant to women's equality rights. This law is also under attack using the *Charter*, and it remains to be seen whether this democratic gain by the women's movement will be obliterated by the Supreme Court (*R. v. Mills*).

The difficulties with the specific legal strategies around wife assault have been identified by both researchers and the women's movement. First, gender neutral offences and policies have furthered the criminalization of women. Thus we see new practices of counter-charging women such that women who resist the violence of

their mates or who fight back can be charged as well.¹³ By way of further example, our *Criminal Code* s.753 creates a process by which a prosecutor can apply to have an offender convicted of a "serious personal injury offence" declared a dangerous offender such that the sentence will



Lilian Broca, "Shackled Lilith," graphite, acrylics, spackle on rag paper, 29" x 22", 1994. Photo: Weekes Photo

be an indeterminate one. Although sex offenders have been incarcerated under this section, it had never, until 1996 (*R. v. Currie*), been used to deal with persistently violent men who threatened and terrorized their former mates. However, it had been used, on two notorious occasions, to declare young women who primarily posed a danger to themselves as "dangerous offenders."¹⁴

Second, the resistance of police, prosecutors, and judges continues to shape women's responses to criminal law (see Rigakos), and police failure

to implement in any consistent fashion the various "zero tolerance" policies remains problematic. Third, mediation and diversion have been used to take these cases out of the criminal law system;¹⁵ while the women's movement has not insisted on increased punitive sentencing in response to wife battering, it has viewed the adjudication of criminal responsibility to be critical. Finally, as long as women's external realities of poverty and male violence persist, criminal law intervention may carry more risk than benefit for women. Thus, numbers of women have refused criminal justice intervention because the costs to women and sometimes to their mates and children, have been too high (Martin and Mosher). For example, some prosecutors and judges have proceeded with contempt charges against women who refuse to testify; some women have experienced retaliatory violence from their mates; and others have experienced abuse from the state (Snider 1994). New sentencing laws such as Bill C-41¹⁶ that require judges to consider specific aggravating factors such as abuse of a position of trust and responsibility and the fact that the offence was committed against the offender's spouse or child, may do little to address these structural issues because sentencing is inherently focused on the individual.

One of the more controversial responses to violence against women is a new substantive criminal offence, called criminal harassment "stalking." The impetus for this offence came not from the women's movement but from the federal government, following the lead of many states in the United States, and conceptualizing, drafting, and passing the new law in a record time of eight months (Cairns Way). Women's groups did not deny the significance and dangerousness of the behaviour of men, usually former partners, who terrorize women, but voiced many concerns: why create a new law when the old ones (assault, peace bonds) are not enforced? Women's groups

participated reluctantly, tentatively, and ultimately unsuccessfully in the reform, attempting to shape a law that at least would not increase women's inequality. The problems with the law are many, including the imagery and examples that informed it, which were of the dangerous "stranger," not the angry ex-husband or former boyfriend; the use of gender neutrality in its drafting, such that women who are trying to collect child support from their mates have been charged with stalking; and the use of traditional understandings of legal culpability such that only a man who consciously intends to create fear in the mind of the woman can be found guilty (Cairns Way).

In contrast, a substantive equality model, which would take account of the inequalities in which women currently find themselves and would be directed at ending the violence rather than reinforcing it, excusing it, or further isolating the woman, has been sought by the women's movement. The succeeding interventions were more formal and directive. For example, some police departments created protocols for dealing with violence against women, to ensure professional, prompt, and safety-conscious responses by police to calls from women asking for emergency assistance (British Columbia Ministry of the Attorney General). In several provinces, new initiatives are underway that attempt to create altogether new ways of dealing with wife assault, de-emphasizing the criminal law approach and focusing on stopping male violence. In Manitoba a new family violence court has been created, which speeds the process of prosecuting these offences, but also has developed specialized sentencing practices that are arguably more attuned to ending violence (mandatory counselling for male batterers is a regular feature of over 50 per cent of the sentences) and to ensuring the safety of the woman (Ursel and Brickey). In Saskatchewan new legislation was proclaimed in 1995 that creates an interdiscipli-

nary approach to wife assault (Turner): it provides for emergency intervention orders (EMOs), victim assistance orders (VAOs), and warrants of entry. EMOs can cover a range of actions including exclusive possession of the matrimonial home, removal of offender by police, and restraining orders. VAOs can provide monetary aid, temporary possession of property, restraining orders, and their breach can result in a criminal conviction.

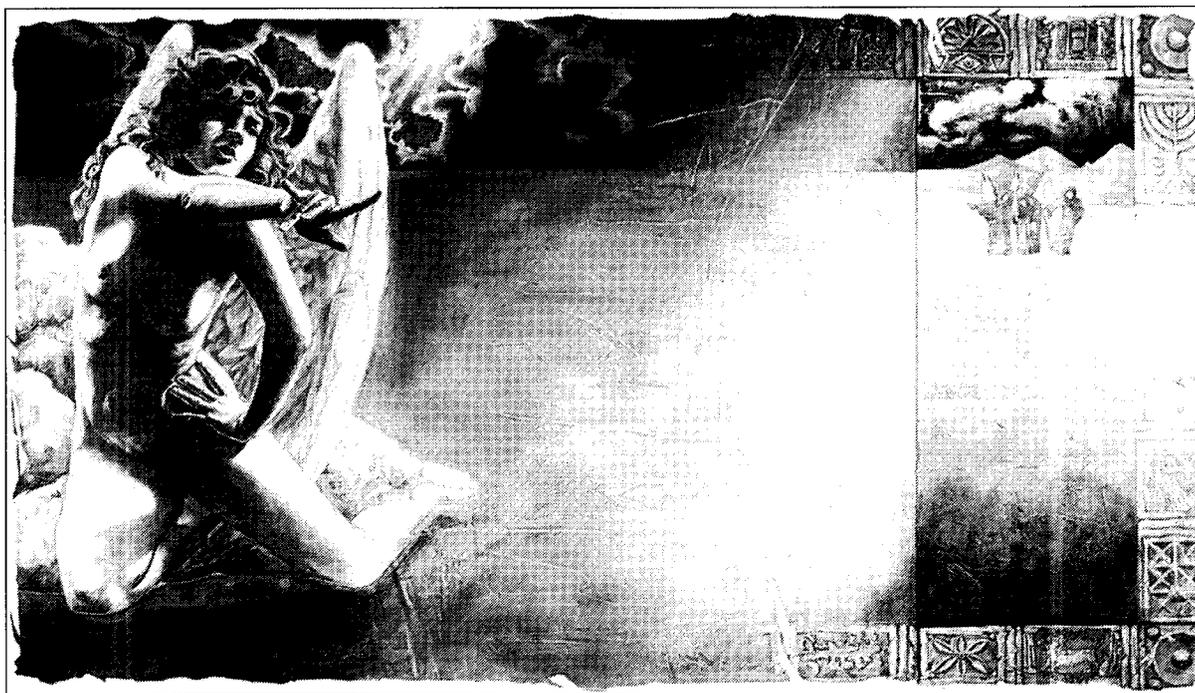
The notion of substantive equality has also brought with it the idea that women need access to the resources of the state if they are to challenge violence perpetrated against them and to defend their equality rights. Thus, two Ontario legal clinics have created policies whereby they provide legal services to women only, in the context of cases involving wife assault, as a way of meeting women's greatly underserved legal needs and avoiding conflicts of interests (Carey). This practice has been challenged by defence lawyers, but ultimately was upheld by the body governing the practice of law in Ontario. In the context of legal aid, women have sometimes succeeded in seeking funding to hire their own lawyers in the criminal process, given that Crown attorneys cannot and do not always act as their advocates.

Finally, legal responses to violence against women have been created outside of criminal law as well. The women's movement has created and sustained a support system of crisis centres and shelters, feminist models of counselling and support, and public education campaigns around the issues of male violence of women. Numerous initiatives have been put in place across the country. The federal government and provinces have enacted human rights codes and tribunals to adjudicate wrongs including sex discrimination, which has been held to include sexual harassment against women (*Brooks v. Canada Safeway Ltd.*). This behaviour may be verbal, but some claims pursued are actually cases of sexual

assault that have taken place in the workplace. The consequences of a human rights claim may be an order to apologize to and/or compensate a woman, or some other order aimed at rehabilitating the wrongdoer; if the claim is settled by the board without adjudication, however, any public educative value is lost as the terms are not disclosed publicly. The

punished (the money comes out of an allocated fund) (see Sheehy 1994). However, since many women who do not pursue criminal prosecution may seek compensation, these claims can provide much more public information about the extent and consequences of male violence, for example, the sexual abuse of children. As many more women have sought

that failed to protect them, such as Children's Aid Societies (Sheehy 1994). In all of these cases, some benefits in combatting violence against women are possible through public education and resultant changes to institutional practices of law enforcement. Certain other law reforms need to be put in place, however, including longer time lim-



Lilian Broca, "Lilith at the Red Sea," graphite, acrylics, spackle on rag paper, 22.25" x 42.75", 1995. Photo: Weekes Photo

human rights models in place in Canada have proven to be profoundly inadequate (Faraday; Young); however, there is currently tremendous energy being invested in the revisioning of these schemes so as to capitalize on and deal with issues of group rights and wrongs and their potential to provide justice to persons who cannot, for many reasons, pursue litigation in the criminal or civil courts.

The provinces have also created criminal injuries compensation legislation and boards, to provide some monetary compensation for those injured by the criminal acts of others. These schemes do not do much to address violence against women in a direct way, since the proceedings are not public, the decisions are not published, and the offender is not

compensation under these schemes, the response of the legal system has been to close this avenue down by: informing the alleged offender of his right to appear and contest the issue of whether a crime occurred; reducing compensation to the extent that the crime victim was at "fault" by invoking woman-blaming beliefs;¹⁷ imposing stricter proof requirements upon the claimants; and limiting the kinds of financial losses for which such women can claim.

In all provinces and territories, women can also sue their assailants in civil law for assault and battery; they can sue police in negligence for failing to enforce the law in a sex discriminatory way, in violation of women's equality rights under the *Charter* (*Jane Doe v. Metropolitan Toronto Police*); and they can sue institutions

its within which women can decide whether to pursue a civil suit, especially when childhood sexual abuse is the wrong, access to legal aid to pursue these cases, and judicial education, among other reforms.

Many provinces also have disciplinary boards that hear complaints of sexual assault against professionals such as doctors (Rodgers). Some law societies have begun to define professional behaviour and misbehaviour by reference to sex discrimination and sexual harassment (Certosimo). A few judges have been held to account publicly for both their "private" behaviour (e.g. convictions for wife assault) ("Judge convicted of assaulting wife") and for their courtroom behaviour, including sexual harassment of women lawyers, inappropriate and biased statements about

women, and voiced opinions on violence against women. Most have been reprimanded at best, many have been exonerated and their remarks "explained," but some have been disciplined more severely and have been removed from the bench.¹⁸

Conclusion

Violence against women must be conceptualized as an issue of substantive equality, and it will be crucially important to clarify and articulate that understanding as a long-term goal. Clarity about this goal should help steer away from legal responses that frame women as passive "victims," or that feed the "law and order" agenda. A women's movement that is vital and independent of government is critical to this task. Drawing upon the knowledge generated by the women's movement, we must draft legislation that presumes women's inequality, acknowledges context, and challenges power relations and beliefs, such that public debate and social change become possible.

A government committed to ending violence against women will take its leadership and advice from the women's movement since that is where it will find the expertise and the political commitment to women's equality. We must, simultaneously, de-emphasize law as the solution, and support the women's movement; which continues to put the pressure on the state and thereby creates the political conditions for further engagement with law.

We need new standards for judging our lawyers and judges as professionals, including questions of impartiality and bias, in light of their commitment to advancing equality rights and their behaviour in the prosecution and defence of male violence against women.

The placement of feminists in law as lawyers and policy makers is also crucial to provide inside expertise as well on legal strategies and responses, as is the inclusion of women within

government itself. Such women must be present in such numbers as to permit the pooling of ideas and experience and to withstand the inevitable backlash.

Mechanisms of enforcement need to be considered, giving women access to power to insist that law be followed. Statutory reviews of the operation of new legislation should be enacted as part of the statute, so as to permit ongoing monitoring and to provide women's groups with the tools with which to pursue further reform. Our hopes for our future include publicly available and enforceable guidelines for police, Crowns, and judges; legal standing for women in criminal proceedings apart from the prosecutor; access to money to hire our own lawyers; and the power to choose to avoid law altogether.

An earlier version of this speech was delivered in October 1996 in Ascuncion, Paraguay, to the "Seminario sobre violencia contra la Mujer," sponsored by the Canadian International Development Agency. The footnotes were added in May 1999.

Elizabeth Sheehy is a Professor who teaches Criminal Law and Procedure and Women at the University of Ottawa, Faculty of Law. Her most recent book, Canadian Feminist Literature on Law: An Annotated Bibliography (1980-98 en français; 1988-98 in English), with Josée Bouchard and Susan Boyd, is forthcoming as Volumes 11.1 and 11.2 of the Canadian Journal of Women and the Law/Revue femmes et droit.

¹For an overview and a specific discussion of feminist theorizing about rape law reform see Boyd and Sheehy.

²For concrete examples of this distinction see Shrofel.

³A developing defence of "rage" used predominately in femicide prosecutions is arguably one such example (see Côté).

Ontario Judge Mercier disagreed

with a jury's verdict in convicting a man of sexual assault against his ex-girlfriend; he gave Bernard Albert a suspended sentence with one day of probation.

⁵For a more nuanced discussion of the forms of the rape prohibition before and after this date see Backhouse 1983; Boyle.

⁶There is an abundant feminist literature on the use of this defence for wife murder; see Edwards.

⁷The *Criminal Law Amendment Act*. The reforms are thoroughly described in Boyle.

⁸More generally see McLeod 1993.

⁹Justice Bertha Wilson (retired); Justice Claire L'Heureux-Dubé; and Justice Beverley McLachlin.

¹⁰The fact that sexual assault remains a deeply gendered crime has even been acknowledged by the Supreme Court of Canada in *R. v. Osolin* (669).

¹¹*R. v. Chase* (1987), 37 C.C.C. (3d) 97 (S.C.C.) reversing (1984), 55 N.B.R. 97 (C.A.). The lower court decision is analyzed in Dawson.

¹²See McIntyre for a detailed account of the consultation process as well as the women's movement's various drafts and strategies.

¹³See, for example, *R. v. O'Leary* wherein Mrs. O'Leary refused to sign a bond requiring her to keep the peace in circumstances where her husband had pleaded guilty to assaulting her, counter-charges against her had been dismissed, yet she was willing to enter into a mutual bond on the condition that counselling be required of her husband.

¹⁴The women were Marlene Moore, who committed suicide in the Prison for Women in 1988 at the age of 28 (see Kershaw and Lasovich) and Lisa Neve (see Renke).

¹⁵There are conflicting views about whether this a positive or negative response in terms of responding to wife assault. Compare, for example, Snider 1998 with Stubbs.

¹⁶*An Act to Amend the Criminal Code*, S.C. 1995, c. 22.

¹⁷See, in the area of sexual assault, *Re Attorney General for Ontario and*

Criminal Injuries Compensation Board et al.; Re Jane Doe and Criminal Injuries Compensation Board reversing a decision of the Board. For a discussion of a woman's claim for wife assault see Wiegers.

¹⁸See Bourrie, who details the resignation of Judge Bienvenue of the Québec Superior Court; and "Controversial Judge Resigns" which details the resignation of Justice Sirois from Saskatchewan's Queen's Bench.

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GEORGINA

A Woman's Thing

It's a woman's thing
That needs doing
This dull, grey,
Summer's day.
A putting to an end
That which grows in flesh
Conceived in a moment
Of thoughtless lust

Minutes tick by
As mother and daughter
Prepare to journey
To a place where
The un-born die,
Un-wanted

This is a thing
Of pain
Too deep to linger
For long
The thought of the deed
Too brutal to dwell upon

Georgina Schaeff has written poetry and short stories since childhood.

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