Rape Laws and Rape
The Contradictory Nature

BY DEBORAH PARNIS AND JANICE DU MONT

Les auteures recensent les façons dont la standardisation actuelle des pratiques de la collection d'évidences médico-légales continue de perpétuer les biais invoqués quand il s'agit de corroborer les agressions sexuelles.

Several changes were made to the *Criminal Code of Canada* in 1983 with respect to rape.[1] These substantive and procedural reforms were intended to eliminate biases that worked against women who had been sexually assaulted, impeding their ability to attain justice. Although an improvement on existing statutes, several scholars have documented how this reform legislation has not achieved the goal of equitable outcomes (Clark and Hepworth; Hinch), nor the elimination of a woman's "re-victimization" in the legal processing of rape, an issue recently highlighted by the *Jane Doe* v. *Toronto (Metropolitan) Commissioners of Police* (1998) court case. This evokes the question of why, despite some positive gains, have things not fundamentally changed in the post-assault institutional response to women who have been raped? Why are women continuing to have such difficulty attaining both justice and just treatment? In this review, we will examine the rape laws before and after the 1983 reforms and look at the ways in which the current standardized practices of medicolegal evidence collection may continue to perpetuate the biases associated with corroboration.

Pre-reform days: disrespect, disbelief, and double standards

Historically, feminists contended that negative stereotypes and false beliefs about raped women pervaded rape legislation. These myths, long embedded in the unique set of evidentiary and procedural rules which governed the processing of sexual assault cases (Boyle; see also Gunn and Minch 1992; Stanley), reflected a basic distrust of women and a fear of false allegations (Herman; Stanley).

Women who breached gender-role norms by engaging in sex outside the marriage were perceived as more likely to have agreed to intercourse with the assailant.

While common law had determined that "the testimony of a single competent witness was sufficient in law to support a verdict" (Stanley 49), a number of exceptions to this general precept were created over time.

> The law developed special rules for certain types of witnesses thought to be inherently unreliable to the extent that their testimony could not safely be subjected to the ordinary rigors of jury scrutiny. The classes of untrustworthy witnesses included; children of tender years, particularly when giving unsworn evidence; accomplices to the offence charged; and, victims of sexual offences, historically almost always women. (Stanley 49)

Among the rules for rape in particular were the:

Doctrine of recent complaint: the assaulted women had to report the rape at the first reasonable opportunity or it was inferred that the offence had never taken place. A "legitimate victim," it was argued, would report such a crime to the first person encountered (Torrey).

> [I]n the absence of a recent complaint, the trial judge was required to instruct the jury that an adverse inference could be drawn concerning the truthfulness of the complainant's testimony. (Richards and Fruchtman 305)

Sexual reputation: the woman's previous sexual history could be used to challenge her credibility and infer she had consented to the alleged sexual activities (Los). Women who breached gender-role norms, for example, by engaging in sex outside the marriage were perceived as more likely to have agreed to intercourse with the assailant (Bohmer) and to have accused the assailant of rape out of vindictiveness (Clark and Lewis); and the

Corroboration rule: the victim's version of events had to be corroborated by a witness or some other form of independent evidence, or the presiding judge was to instruct the jury not to convict the assailant

Processing of Corroboration

(Richards and Fruchtman; Stanley).

Furthermore, it was interpreted that the woman who had been raped had consented to the activity if she did not physically resist the assailant (Chislett), despite the obvious risk to her in struggling (Nuttall). Although issues of recent complaint, sexual reputation, and evidence of resistance were not formally characterized as "corroboration," all served as means of authenticating her story. Each provided proof of the reliability of either the woman's testimony or of her character. At the heart of the old rape laws then, was the requirement for evidence independent of the assaulted woman's testimony. In short, unlike victims of other crimes, women who testified about rape faced "unique barriers to belief" (Mack).

The 1983 reforms: everything new is old again

In 1983, in response to concerned formal and grassroots women's organizations, feminist lawyers, academics and health care professionals, the Government of Canada reformed the rape legislation (Ellis). It was hoped that these reforms would eliminate the biases rooted in rape myths from the legal processing of sexual assault cases, increase the conviction rate of sexual offenders, and eradicate the degradation of assaulted women within the criminal justice system. In addition to several substantive revisions, Bill C-127 repealed the rule of recent complaint, established limitations on the use of a woman's sexual history with persons other than the accused, and prohibited judges from instructing juries not to convict in the absence of evidence. It also specified that consent could not be inferred where a woman submitted or did not physically resist as a result of the threat of force, fraud, or the exercise of authority. In essence, the legal requirements for corroboration were formally abrogated.

Although in legal terms the requirements for corroboration were repealed, the judicial treatment of rape remains rooted in the need to present corroborative evidence.

It has become increasingly evident over time that the legal reforms of 1983 have not met many of the concerns of the critics of the old rape laws (Roberts and Mohr). Reporting and conviction rates remain abysmally low.[2] Moreover, some women who have become engaged with the criminal justice system continue to report experiences akin to a "second assault" (Feldberg; Martin and Powell; Torrey).

We argue that the reason these legislative reforms have been rendered largely ineffectual is because of the ongoing demand for corroboration independent of a raped woman's story. Although in legal terms the requirements for corroboration were repealed, the judicial treatment of rape remains rooted in the need to gather and present corroborative evidence. Mack conducted a review examining the legislative changes in Australia and the United States. She found that

> recent attempts to do away with corroboration rules shows the limited impact of law reform in this area and the tenacity of the legal system's distrust of women (and that) as men have lost the unwarranted protection previously given by the substantive and procedural law of rape, the underlying distrust of women and the myth that women lie about rape have reasserted themselves even more forcefully. (Mack 339)

In her study of 187 cases in Toronto, Du Mont found that one of the most significant factors affecting the legal resolution of sexual assaults reported in the mid-1990s was the corroborating evidence of a witness. "Cases with witness[es] were more than six times as likely than cases without witness[es] to be cleared by an arrest and charge" (129). In fact, in Canada, evidence that is corroborative in nature represents the critical thread running through the course of post-assault proceedings.

The standardized collection of medicolegal evidence

While evidence may be gathered from a number of sources, including the scene of the assault, the suspect and witnesses, many medical and legal professionals have argued that

the most crucial evidence is obtained from the woman who has been assaulted (Cabaniss, Scott, and Copeland; Kalemba). Forensic (especially physical) evidence collected from her "is the most accurate, and in the minds of some, the only valid means of proving that a sexual assault took place" (Kalemba 13). The primary method of collecting forensic evidence from the raped woman is through a medical evidentiary examination.

In Ontario, the standard forensic protocol used in hospitals is known as the Sexual Assault Evidence Kit (SAEK). Introduced by the Provincial Solicitor General in 1979, and subsequently revised in 1989, the SAEK was created to meet a variety of interests and purposes, including aiding in investigative and legal procedures, systematizing analysis procedures for forensic scientists, and standardizing collection practices for nurses and physicians who conduct the medical examinations (Kalemba). The impetus for the institution of a rape kit came from some feminists who lobbied against the existing haphazard methods of collecting evidence to enhance the quality of medical and emotional care for sexually assaulted women, as well as increase the likelihood that rapists would be convicted (Feldberg; Kalemba).

The SAEK is administered within 72 hours of an assault by trained Sexual Assault Nurse Examiners or nurse/physician teams at specialized hospital-based treatment centres across Ontario. It is designed to allow for the systematic documentation of genital and extragenital injuries, emotional state, medical history, as well as a woman's account of the assault. The medical forensic examination takes approximately four hours to administer. Upon completion of the examination, the kit is sealed and handed over to the police who may forward it (at their discretion) in whole, or in part, to the Centre for Forensic Sciences for analysis (Du Mont, Macdonald, and Badgley).

A fundamental contradiction exists between the current sexual assault legislation and the process of evidence collection from the body of the woman who has been assaulted. This contradiction may ultimately serve to undermine the objectives of the 1983 reforms. In the face of amendments which formally removed the corroboration requirements, medical evidence "provide(s) a way of reimposing the expectations of 'corroboration'" (Feldberg 107). An examination of the standardized procedures for collecting medicolegal evidence reflects how these institutionalized practices may perpetuate the old rules of corroboration. While the stated purpose of the SAEK is to gather evidence or the proof of assailant identity, of the use of force, and to establish when the assault occurred (Tucker, Ledray, and Werner), a critical review of its role within post-assault processing reveals the ways in which it functions to provide evidence that not only corroborates a woman's story, but in doing so, reestablishes the centrality of recent complaint, sexual reputation.

The doctrine of recent complaint concerned "the speed with which the victim of a sexual assault reports the offence to authorities or other persons" (Canadian Advisory Council on the Status of Women iii). Despite its abrogation, this doctrine is sustained not only through judicial decision-making (Richards and Fruchtman), but, in a more systemic way, through the institutionalized rules of forensic medical evidence collection. Standard procedures dictate that a woman who chooses to have a kit completed for investigative purposes must do so within 72 hours of the assault in order to optimize the quality of physical evidence (primarily semen and sperm) available for analysis. In fact, many practitioners recommend that the kit be completed within 24 hours of an assault in order to prevent the loss of physical findings (Ferris and Sandercock; Tucker, Ledray, and Werner).[3] Feldberg argues that this "up to 72 hours" restriction imposed by the SAEK recreates an expectation of immediate complaint.

Although the procedural reforms formally restricted legal activity surrounding the woman's sexual background, the collection of medical forensic evidence may serve as a means by which her previous sexual history is examined. For example, physicians/nurses/nurse examiners following the protocol of the SAEK are instructed to ask the woman if she had sexual intercourse within one week prior to the assault. Because some trace seminal fluids can survive in the vagina for up to one week, this information is requested so that forensic scientists can determine the source of any evident male secretions that may have originated from someone other than the perpetrator. In court, however, such evidence concerning past sexual partners can be used as a means of suggesting that the woman is unchaste or promiscuous, and therefore may have consented to the sexual activity with the perpetrator. In addition, Feldberg has found that sexual reputation evidence may be indirectly summoned through the legal querying of medical experts regarding the nature and extent of clinically-observed genital injuries. She notes that

> efforts to establish the kinds of factors that would influence the trauma [lead] to an inquiry about the complainant's "age," "her sexual history," "whether she was a virgin or whether she had had intercourse before," "whether she had given birth to a child once or a number of times," and whether she had, on the day, previously participated in a sexual encounter. (109)

In spite of the corroboration amendment, samples and specimens such as semen/acid phosphotase, finger nail scrapings, foreign materials, torn clothing, as well as documented injuries ultimately provide police, lawyers, judges and juries with evi-

dence that corroborates (or in some cases contradicts) a woman's account of the assault. The urine testing for drug and alcohol use by the victim may also serve as a means of determining her reliability in accurately recounting the assault and of rendering her character questionable.

Beyond the collection of specimens, the woman who has been assaulted is asked if she left marks on the assailant from biting, scratching, kicking, etc. This can be construed as corroborative evidence for although the question is intended to provide investigators with information to help identify an assailant, it also aids in establishing whether the woman resisted the assailant, supporting or refuting her testimony of non-consent. Similarly, the recording of the woman's "emotional status" by the medical examiner (required for the completion of the kit) is a means by which police and legal professional may authenticate her story. Despite the fact that the range of post-assault emotions is broad and there is no typical way to respond to having been raped (Botash, Braen, and Gilchrist; Ledray; Stormac, Du Mont, and Dunn), rape myths pervade the legal process, and pervasive assumptions dictate that a "genuine victim" would be visibly upset.

Conclusions

Despite the legal reforms that removed the doctrine of recent complaint, sexual reputation, and the corroboration rule, corroborative evidence as broadly defined remains an integral part of the standard practices of the post-assault institutional response, where a woman's testimony is not generally considered to be sufficient evidence for conviction, charge or even arrest and where, unlike other crimes, she must prove that an offence really occurred (Mack). If corroboration is rooted in an assumption of the woman's untrustworthiness, then the Sexual Assault Evidence Kit may be a tool complicit in validating her story.

We began this article by asking why women have not been able to attain justice with respect to rape. We have argued that the fundamental contradiction between the law and the institutional practices centred around the collection of forensic evidence from women who have been assaulted may constitute a significant impediment to overcoming the biases that have been traditionally embedded within the criminal justice system. Challenging the role of forensic evidence collection in the legal processing of rape, however, presents a profound quandary for the woman who has been raped, for while the law does not require corroboration, her chances of attaining a positive legal outcome without corroborative evidence may be largely negligible[4] (Du Mont; La Free; Los). Women are placed in a catch-22 situation.

The judicial culture is informed by the larger sociocultural context wherein women are still being systemically oppressed, and rape myths are pervasive. The most damaging myth is that women who have been raped lie. Consequently, the male-dominated legal system (Martin and Powell; Taylor) has been reluctant to prosecute on the assaulted woman's word alone (Gregory and Lees; Gunn and Linden; Stanley), with this stance being reinforced by a fear of convicting innocent men. Thus, despite changes in the formal laws, sexual assault professionals continue to collect evidence independent of a woman's testimony. We believe that this *emphasis* on corroborative evidence will persist until women are deemed as worthy of belief as men in our culture (Mack).

Some background sections of this paper were drawn from the second author's doctoral dissertation which was supervised by Lana Stormac at the University of Toronto and supported in part by the Social Sciences and Humanities Research Council of Canada and the Atkinson Foundation. We gratefully acknowledge Robin Badgley for his helpful comments on an earlier draft of this paper.

Deborah Parnis, PhD is an Assistant Professor in the Department of Sociology at Trent University in Ontario. Her research interests include the institutional responses to sexual assault, policy analysis, cultural regulation and the social production of scientific evidence.

Janice Du Mont, EdD is a Postdoctoral Fellow at the Centre for Research in Women's Health of the University of Toronto and the Sunnybrook and Women's College Health Sciences Centre. Her research interests include the examination of the medical and legal treatment of sexual assault and women abuse cases.

[1]We use the terms "rape" and "sexual assault" interchangeably.

[2]In a national survey of 12,300 Canadian women over age 18, 13,462 sexual assaults were disclosed; only 867 (6 per cent) of these incidents had been reported to the police (Statistics Canada). Conviction rates have ranged from 17 per cent to 29 per cent (Du Mont; Gunn and Linden; Gunn and Minch 1985–1986).

[3]The quality and quantity of physical evidence which can be obtained is time dependent, and related to whether an assaulted woman has bathed, showered, defacated, urinated, douched, and, in the case of oral assault, consumed food or liquid.

[4]Some have questioned whether it was ever reasonable to expect an informed legal decision without corroborative evidence.

References

Bohmer, C. "Acquaintance Rape and the Law." *Acquaintance Rape. The Hidden Crime.* Eds. A. Parrot and L. Bechhofer. New York: John Wiley, 1991.

Botash, A. S., G. R. Braen, and V. J. Gilchrist. "Acute Care for Sexual Assault Victims." *Patient Care* (August 1994): 112–137.

Boyle, C. "The Judicial Construc-

tion of Sexual Assault Offences." *Confronting Sexual Assault. A Decade of Legal and Social Change.* Eds. J. V. Roberts and R. M. Mohr. Toronto: University of Toronto Press, 1994.

Cabaniss, M. L., S. E. Scott, and L. Copeland. "Gathering Evidence for Rape Cases." *Contemporary Ob/Gyn* (March 1985): 160–174.

Canadian Advisory Council on the Status of Women. "Evidence of Recent Complaint and Reform of Canadian Sexual Assault Law: Still Searching for Epistemic Equality." Ottawa: 1993.

Chislett, L. "The Problem with the Justice System: A Simple Failure to Protect or the Total Silencing of Women's Experiences and Needs." Unpub., 1994.

Clark, S., and D. Hepworth. "Effects of Reform Legislation on the Processing of Sexual Assault Cases." *Confronting Sexual Assault. A Decade of Legal and Social Change.* Eds. J. V. Roberts and R. M. Mohr. Toronto: University of Toronto Press, 1994.

Clark, L., and D. Lewis. *Rape: The Price of Coercive Sexuality.* Toronto: Women's Press, 1977.

Doe v. *Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 39 O.R. (3d) 487 (C. A.).

Du Mont, J. "So Few Convictions. The Role of Victim-Related Characteristics in the Legal Processing of Sexual Assault Cases." Diss. University of Toronto (OISE), 1998.

Du Mont, J., S. Macdonald, and R. Badgley. "An Overview of the Sexual Assault Care and Treatment Centres of Ontario." May, 1997. (Available from The Ontario Network of Sexual Assault Care and Treatment Centres, c/o Women's College Hospital Toronto, Ontario.)

Ellis, M. "Re-defining Rape: Re-victimizing Women." *Resources for Feminist Research* 17 (1988): 96–99.

Feldberg, G. "Defining the Facts of Rape: The Uses of Medical Evidence in Sexual Assault Trials." *Canadian Journal of Women and the Law* 9 (1997): 89–114.

Ferris, L. E., and J. Sandercock. "The Sensitivity of Forensic Tests for Rape." *Medicine and Law* 17 (1998): 333–349.

Gregory, J., and S. Lees. "Attrition in Rape and Sexual Assault Cases." *The British Journal of Criminology* 36 (1996): 1–17.

Gunn, R., and R. Linden. "The Impact of Law Reform on the Processing of Sexual Assault Cases." *Canadian Review of Sociology and Anthropology* 34 (1997): 155–174.

Gunn, R., and C. Minch. "Unofficial and Official Responses to Sexual Assault." *Resources for Feminist Research* 14 (1985–1986): 47–49.

Gunn, R., and C. Minch. "Sexual Assault in Canada: A Social and Legal Analysis." *Critical Issues in Victimology. International Perspectives.* Ed. E. C. Viano. New York: Springer Publishing, 1992.

Herman, J. "Sexual Violence" [Work in progress, No. 83-05.] Wellesley, MA: Stone Centre for Developmental Services and Studies, 1984.

Hinch, R. "Inconsistencies and Contradictions in Canada's Sexual Assault Law." *Canadian Public Policy* 14 (1988): 282–294.

Kalemba, V. "An Examination of the Sexual Assault Evidence Kit: Police Investigations and Crown Prosecutions in Ontario." M.A. Thesis. University of Toronto, 1995.

LaFree, G. D. *Rape and Criminal Justice. The Social Construction of Sexual Assault.* Bellmont, CA: Wadsworth, 1989.

Ledray, L. "Sexual Assault Nurse Clinician: An Emerging Area of Nursing Expertise." *Sexual Assault Nurse Clinician* 4 (1993): 181–190.

Los, M. "The Struggle to Redefine Rape in the Early 1980s." *Confronting Sexual Assault. A Decade of Legal and Social Change.* Eds. J. V. Roberts and R. M. Mohr. Toronto: University of Toronto Press, 1994.

Mack, K. "Continuing Barriers to Wo-men's Credibility: A Feminist Perspective on the Proof Process." *Criminal Law Forum* 4 (1993): 327–352.

Martin, P. Y., and R. Powell. "Accounting for the 'Second Assault': Legal Organizations' Framing of Rape Victims." *Journal of the American Bar Foundation* 19 (1994): 853–890.

Nuttall, S. "Toronto Sexual Assault Research Study." Ottawa: Ministry of the Solicitor General Canada, 1989.

Richards, R. J., and E. Fruchtman. "Shaping the Law Concerning Sexual and Domestic Assault to Improve Victim Reporting: The Canadian Experience." *Criminal Law Forum* 2 (1991): 299–340.

Roberts, J. V., and R. M. Mohr. "Sexual Assault: Future Research Priorities." *Confronting Sexual Assault. A Decade of Legal and Social Change.* Eds. J. V. Roberts and R. M. Mohr. Toronto: University of Toronto Press, 1994.

Stanley, M. G. "The Experience of the Rape Victim With the Criminal Justice System Prior to Bill C-127. Sexual Assault Legislation in Canada: An Evaluation, Report No. 1." Ottawa: Department of Justice Canada, 1985.

Statistics Canada. "The Violence Against Women Survey: Survey Highlights." *The Daily* [Statistics Canada, Ottawa] 18 November 1993.

Stormac, L., J. Du Mont, and S. Dunn. "Violence in Known-Assailant Sexual Assaults." *Journal of Interpersonal Violence* 13 (1998): 398–412.

Taylor, J. "Rape and Women's Credibility: Problems of Recantations and False Accusations Echoed in the Case of Cathleen Croweil Webb and Gary Dotson." *Harvard Women's Law Journal* 10 (1987): 59–116.

Torrey, M. "When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions." *U.C. Davis Law Review* 24 (1991): 1013–1071.

Tucker, S., L. E. Ledray, and J. S. Werner. "Sexual Assault Evidence Collection." *Wisconsin Medical Journal* 89 (1990): 407–411.