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Myths and Misogyny: The Legal Response to Sexual Assault

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Abstract

Sexual assault is a persistent form of violence against women that is rooted in gender inequality. It violates the sexual integrity of the victim and can have lasting psychological and emotional effects on both victims and their families. Sexual assault is a significant social and cultural problem within Canadian society. This paper presents an examination of the problems with the legal response to sexual assault that are still prevalent within the Canadian justice system despite the many positive changes in law that have come about in the last three decades. It is divided into three main chapters. The first draws on literature from diverse disciplines to examine the ways in which rape myths continue to have a profound influence on the legal response to sexual assault. The second chapter looks specifically at the legal rules surrounding sexual history evidence and the production of third party records in sexual assault cases and the ways in which the application of these rules is fraught with complications and deficiencies that severely prejudice and harm victims of sexual assault. The third chapter presents an examination of the dubious tactics used by defence lawyers to undermine sexual assault complainants in the courtroom. Additionally, the physicality of the courtroom is assessed to demonstrate the ways in which the courtroom’s physical space and its rituals made the courtroom a frightening place for sexual assault victims.

Key Words

Sexual Assault, Rape, Sexual Assault Victims, Criminal Justice, Third Party Records, Rape Myths, Sexual History Evidence, Hostile Courtroom, Gendered Violence, Sexual Consent, Victim Blaming, Law Reform.
Dedication

For Kyle Parker, the Crown Attorney who inspired this work. I thank you for the inspiration and for the positive effect you have had on my life.
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Preface

“Every story tells a story that has already been told.”

As a victim/survivor of sexual assault, embarking on this project has been a personal journey through which I hoped to find some measure of healing through developing an understanding of the legal processes surrounding sexual assault.

As a child, I was sexually abused by my step-father over a continuous four-year period. As an adult, I was sexually assaulted by an intimate partner. The relationship between the two instances of abuse, by two different men, is perhaps inextricably linked. If not for the emotional and psychological harm caused by the childhood abuse, perhaps I would not have found myself in a financially, emotionally, and sexually abusive relationship as an adult. This is of course a supposition. We cannot know definitively what life events bring us to places of joy and sorrow, or how these events affect our choices along life’s path.

After many years of contemplating and struggling with the emotions surrounding my childhood sexual abuse, I realized that there had never been closure. In the deep recesses of my mind, the incidences of abuse had never really ended. Although my step-father had been charged, and there was a preliminary hearing (during which he looked directly at my Mother and I and pled not guilty), the case did not make it to trial. Rather, before the trial (in the late 1970’s), a body was found, burnt beyond recognition, in an abandoned warehouse in Dryden, Ontario. The body was identified as that of my step-father using the items of jewelry found on it: a chain with a pendant, a watch and two rings. However, there always remained some question about whether the body was his.

With regards to my more recent sexual assault, there was a form of closure. My former partner was charged, eventually pled guilty, and was sentenced, fined and placed on the National Sex Offender Registry for 20 years. (The Registry was established by the *Sex Offender Information Registration Act (SOIRA)*). He has also been placed on probation for a period of three years following his release from incarceration, during which time he is not allowed any contact with me. The period leading up to the final dissolution of the relationship and the trial was incredibly difficult. I was often asked, (mainly by his friends and family) in a critical and disbelieving fashion, “How could that be a sexual assault? He was your partner; it’s not like you hadn’t done it before!” What they had failed to understand is that, while the sexual assault may have been an act almost identical in its motions, it was utterly different in its essence. It was not a consensual, intimate act, but rather an act of aggression and violation.

In opening this preface, I have chosen to use both the words ‘victim’ and ‘survivor.’ In relation to sexual assault, the word ‘survivor’ has become preferable to ‘victim’ as ‘survivor’ is perceived as being empowering, while ‘victim’ connotes visions of helplessness. However, neither terms sit well with me. Both are lacking some essential essence which is difficult to describe. There is something in between the ideas of victim and survivor that is both, and yet neither. It is a liminal space that is difficult to label with any precision, and it is perhaps for this reason that any attempt to give the space a name produces emotional and intellectual turmoil. There are times when I would rather identify as victim. Identifying as victim removes the self-blame (however temporarily) that often creeps into my thoughts. At other times, I would rather identify as
a survivor, empowered and strong. Forgiveness however, is not a single act, but a matter of constant practice.
Chapter 1: Introduction

“Sexual violence is a pervasive, systemic method of creating and sustaining male dominance over women.”

Sexual assault is a persistent form of violence against women that is rooted in gender inequality. It violates the sexual integrity of the victim and can have lasting psychological and emotional effects on both victims and their families. Sexual assault is a significant social and cultural problem within Canadian society. For example, it is estimated that one in three Canadian women will experience sexual violence at some point during their adult life. Additionally, women are eleven times more likely than men to be victims of sexual assault. As Hodgson and Kelley observe, “sexual violence pervades a ‘sexual mystique’ that is rooted in traditional, historical, cultural and legislative responses.” For example, within a historical context, a man could not be charged with raping his wife as she was relegated as the property of the husband.

Although, over the past three and a half decades, there has been much legislative reform regarding the laws surrounding sexual violence, (e.g. since 1983 a husband can be charged with sexually assaulting his wife) problems persist with the legal response to sexual assault.

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The legal system has an essential role in eliminating the gender inequalities that reinforce sexual stereotypes and myths about sexual violence. This paper presents an examination of the problems with the legal response to sexual assault that remain prevalent within the justice system, despite the many positive changes in law that have come about in the last 34 years. For without an understanding of the issues and how they affect the victims/survivors of sexual assault, we cannot hope to find solutions.

In Chapter 2: Rape Myths, Patriarchal Fables and the Justice System, I draw on literature from diverse disciplines, including law, history, religion, criminology, media studies, women’s studies and sociology to examine rape myths with a view to demonstrating how these deeply embedded myths continue to have a profound influence on the legal response to sexual assault, despite the robust legislative framework surrounding sexual assault law that has developed in Canada over the past thirty-plus years. These myths and stereotypes continue to surface at all levels of the criminal justice system. They serve to discredit victims and filter cases out of the system, and thus present a significant barrier to access to justice for victims of sexual assault.

Chapter 3: Substantive Issues in the Law of Sexual Assault: The Maintenance of the Myths, looks specifically at the legal rules surrounding sexual history evidence and the production of third party records in sexual assault cases. In this chapter, I demonstrate that, despite the robust appearance of the law on the books, the application of the law is fraught with complications and deficiencies that severely prejudice and harm victims of sexual assault.

Chapter 4: Sexual Assault on Trial: Hostile Defence Tactics and the Intimidating Courtroom, presents an examination of the dubious tactics used by defence lawyers to
undermine sexual assault complainants in the courtroom. In this chapter, I also examine the physicality of the courtroom itself to demonstrate the ways in which both the courtroom’s physical space and its rituals make the courtroom a frightening place for sexual assault victims. Additionally, I question whether the adversarial system is appropriate for the trial of sexual assault cases.
Chapter 2: Rape Myths - Patriarchal Fables, Sexual Assault and the Justice System

“Western culture is...thoroughly misogynistic...And the ultimate source and sanction of misogyny is Judeo-Christianity, with its foundation myth of Eve, mere spare rib, yet the source of all sexual temptation, shame and sin; the scarlet woman justly scapegoated for the miseries of mankind.”

Introduction

It is no surprise that rape myths emanate from patriarchal systems in which the evolution of cultural beliefs has been strongly influenced by religion. The Bible depicts women as sources of temptation that entice unwary men into sin. Mary, the paragon of female virtue for Christians, miraculously conceived a child while remaining a virgin. Throughout history women have been blamed for, and have borne the burden of managing, the sexual urges of men. For example, until the latter half of the twentieth-century, women were consigned to private spaces where they could not “tempt” respectable men with their feminine charms. To protect men from their own sexual thoughts, women were (and in many cases still are) expected to disguise their femininity.

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7 The following selected examples of the misogynistic depiction of women are from the King James Bible: “Did not Solomon king of Israel sin by these things? Yet among many nations was there no king like him, who was beloved of his God, and God made him king over all Israel: nevertheless even him did outlandish women cause to sin.” (Nehemiah 13:26); “Lust not after her beauty in thine heart; neither let her take thee with her eyelids.” (Proverbs 6:25) “With her much fair speech she caused him to yield, with the flattering of her lips she forced him.” (Proverbs 7:21); For the lips of a strange woman drop as an honeycomb, and her mouth is smoother than oil; But her end is bitter as wormwood, sharp as a two-edged sword. Her feet go down to death; her steps take hold on hell. Lest thou shouldest [sic] ponder the path of her life, her ways are unmoveable, that thou canst not know them.” (Proverbs 5:3-6) “But I would have you know, that the head of every man is Christ; and the head of every woman is the man.” (1 Corinthians 11:3). “Neither was the man created for the woman; but the woman for the man.” (1 Corinthians 11:9) There are many such examples in the Bible; however, a thorough survey is beyond the scope of this paper.
by covering their bodies, thereby ridding themselves of even the smallest evidence of their own sexuality. A woman who dares digress from the patriarchal paradigm of female virtuosity is seen to be “asking for it.” Although there is a formal separation of church and state in Western countries, and many people are moving away from religion, these deep seated misogynistic beliefs that can be traced back thousands of years, continue to influence the Canadian legal system’s response to sexual assault, both directly and indirectly.

This chapter, drawing on the literature from diverse disciplines including law, history, religion, criminology, media studies, women’s studies, and sociology examines rape myths with a view to demonstrating how these deeply embedded myths continue to have a profound influence on legal responses to sexual assault, despite the robust legislative framework surrounding sexual assault law that has developed in Canada over the past thirty-plus years. These myths and stereotypes continue to surface at all levels of the criminal justice system. They serve to discredit victims and filter cases out of the system, and thus they present a significant barrier to access to justice for victims of sexual assault. Additionally, when the justice system sustains these myths, it serves to further entrench misogynistic ideals about the relations between men and women into the very fabric of society, thereby affirming the rape culture that the laws are intended to dismantle.

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Defining Sexual Assault and Rape

In 1983, the terms rape and indecent assault were replaced with a tripartite structure of sexual assault within *The Criminal Code of Canada*. This re-classification of acts of sexual violence as “assaults” draws attention to the physical and violent nature of the act and incorporates sexual offences beyond forced penile-vaginal intercourse (previously classified as rape). Moving from the term “rape” to “sexual assault” also rendered sexual offences to be more gender inclusive, as not all victims are female. The definition of sexual assault in the *Criminal Code* is broad and includes all unwanted sexual activity, such as unwanted sexual touching, kissing, and fondling as well as sexual penetration.

Consent is a key element of the offence of sexual assault, as sexual activity is only legal if both parties consent. Consent is defined in s. 273(1) of the *Criminal Code* as “the voluntary agreement of the complainant to engage in the sexual activity in question.”

The responsibility for ensuring that there is consent rests on the person who is initiating or pursuing sexual activity. For a sexual act to be legal, consent must be affirmatively communicated. In accordance with the *Criminal Code*, no consent is obtained where:

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9 *The Criminal Code of Canada* classifies sexual assault into three different levels:

**Level 1:** (s. 271 - Sexual Assault) Any form of sexual activity forced on another person (i.e., sexual activity without consent), or non-consensual bodily contact for a sexual purpose (e.g., kissing, touching, oral sex, vaginal or anal intercourse). Level 1 sexual assault involves minor physical injury or no injury to the victim. Conviction for a level 1 sexual assault is punishable by up to 10 years in prison.

**Level 2:** (s. 272 – Sexual Assault with a weapon, threats to a third party or causing bodily harm) A sexual assault in which the perpetrator uses or threatens to use a weapon, threatens the victim’s friends or family members, causes bodily harm to the victim, or commits the assault with another person (multiple assailants). Conviction for a level 2 sexual assault is punishable by up to 14 years in prison.

**Level 3:** (s. 273 - Aggravated sexual assault) A sexual assault that wounds, maims, or disfigures the victim, or endangers the victim’s life. Conviction for a level 3 sexual assault is punishable by up to life in prison.

10 *Criminal Code* RSC 1985, c C-46 s 273(1).
(a) the agreement is expressed by the words or conduct of a person other than the complainant;

(b) the complainant is incapable of consenting to the activity;

(c) the accused induces the complainant to engage in the activity by abusing a position or trust, power, or authority;

(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.\(^{11}\)

Additionally, no one can consent in advance to sexual activity in the future when they will be unconscious.\(^{12}\)

Other important changes to the Criminal Code in 1983 included restrictions placed on the admissibility of a victim’s prior sexual history (known as Rape Shield laws), and the elimination of immunity for sexual assault by a spouse. The substantive issues in the law of sexual assault are covered in more depth in Chapter 2 of this paper. For the purposes of this chapter, the term ‘rape’ is used to encompass all forms of sexual assault.

**Defining Rape Myths and Stereotypes**

The concept of rape myths was introduced in the 1970’s by both sociologists\(^{13}\) and feminists. In her groundbreaking work, Susan Brownmiller notes:

> The male myths of rape appear as cornerstones in most pseudoscientific inquiries into female sexuality; they are quoted by many so-called “experts” on the sex

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\(^{11}\) *Ibid.*, s 273 (2)


offender. They crop up in literature; they charge the cannons of the dirty jokesters. They deliberately obscure the true nature of rape.\textsuperscript{14}

Grubb and Turner observe that “rape myths vary among societies and cultures; however, they consistently follow a pattern whereby, they \textit{blame the victim for their rape, express a disbelief in claims of rape, exonerate the perpetrator and allude that only certain types of women are raped.}”\textsuperscript{15}

The construct of rape myths however, was not formally defined until 1980 by social scientist Martha Burt.\textsuperscript{16} Burt defined rape myths as “prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists [that create] a climate hostile to rape victims.”\textsuperscript{17} Burt also posited that “the hypothesized net effect of rape myths is to deny or reduce perceived injury or to blame the victims for their own victimization.”\textsuperscript{18} However, psychologists Lonsway and Fitzgerald, argue that this is inadequate as a formal definition as it fails to convey the meaning of the term “myth” and does not fully describe the ways in which the ‘false beliefs’ are prejudicial and towards whom.\textsuperscript{19} Lonsway and Fitzgerald define myths as ‘false or apocryphal beliefs that are widely held; they explain some important cultural phenomenon; and they serve to justify existing cultural arrangements.’\textsuperscript{20} Combining this definition of myths with cultural theories of rape, Lonsway and Fitzgerald have proposed a more robust definition of rape myths: “\textit{attitudes...}
and beliefs that are generally false but are widely and persistently held, and serve to deny and justify male sexual aggression against women.”

Former Supreme Court Justice Claire L’Heureux-Dubé defines myths and stereotypes as “irrational, nonscientific narratives used by human beings to explain what they do not fully understand.” L’Heureux-Dubé further asserts that “myths and stereotypes divorce the law from contemporary knowledge because they have more to do with fiction and generalization that with reality [and] they are therefore, incompatible with the truth seeking function of the legal system.” She provides several examples of myths and stereotypes that have been recognized and highlighted by the Supreme Court of Canada as having “skewed the law’s treatment of sexual assault claimants.”

- the rapist is always a stranger, never a friend or relative;
- women are less reliable and credible as witnesses if they have previous sexual relations;
- women are more likely to have consented to sexual advances if they have had sexual relations in the past; (These last two myths in combination have been dubbed the ‘twin myths’ – women who have previous sexual experience are more likely to have consented and are less credible.)
- a woman will always struggle to defend her honour;

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21 Ibid. (emphasis in original)
23 Ibid.
24 Ibid.
• women are “more emotional” than males so unless they become hysterical, nothing must have happened;
• women mean “yes” even when they say “no;”
• women deserve to be raped on account of their conduct, dress and demeanor; and
• women fantasize about rape and therefore fabricate reports of sexual activity even though nothing happened.26

These are but a few examples of the myths and stereotypes that pervade the legal system at all levels. There are many more. The legal processes used to respond to sexual assault are infused with these deep-rooted myths about the nature of sexuality and sexual relations between men and women. These misguided responses serve to “reify the very social dynamics that produce sexual violence.”27 As Pringle observes, “the conduct of trials and the words of judges convey ideas about love and justice which powerfully shape our perceptions of what is acceptable and reasonable in our intimate lives.”28

Rape Myths and Legal Fictions

We can draw comparisons between rape myths and legal fictions. Black’s Law Dictionary defines a legal fiction as “an assumption that something is true even though it may be untrue…a device by which a legal rule or institution is diverted from its original purpose to accomplish indirectly some other object.”29 In other words, “it is a supposition or postulation that something is true regardless of whether or not it is.”30 For

27 Elaine Craig, "The In hospitable Court" (2016) 66:2 The University of Toronto Law Journal 197 at 242.
29 Black’s Law Dictionary, 10th ed, sub verbo “legal fiction.”
example, the now defunct legal doctrine of coverture or *femme couverte* created the legal fiction that a husband and wife were one person in law; thus, a woman’s legal rights and obligations were subsumed by her husband. The doctrine is best described by English judge and jurist, Sir William Blackstone (1723-1780) in his *Commentaries on the Laws of England*:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs every thing [sic]; and is therefore called in our law-french a feme-covert . . . under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture…

The legal doctrine of coverture (and the legal fiction it created) was enshrined in the common law of England and many Commonwealth jurisdictions for centuries. This ‘covering’ of a wife’s legal identity by her husband served to subordinate women within marriage. Conversely, a *femme sole* (an unmarried woman) had the right to own property and enter into contracts in her own name. While an in-depth discussion of coverture and the legal fiction it created is outside the scope of this paper, this example serves not only to provide an illustration of a legal fiction, but also to demonstrate the ways in which legal fictions have been applied to subordinate women’s interests to those of men.

Additionally, the doctrine of coverture was instrumental in affirming a husband’s marital immunity to the charge of rape. In fact, the courts took the words of seventeenth-century jurist Sir Mathew Hale as axiomatic until the latter half of the twentieth century: “The husband cannot be guilty of rape committed by himself upon his lawful wife, for by their

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mutual matrimonial consent and contract the wife hath given herself in this kind unto the husband which she cannot retract.”

English philosopher John Stewart Mill (1806-1873), recognized the perilous position that married women occupied because they had no legal rights. In his *The Subjection of Women*, Mill noted that a husband can claim from his wife “the lowest degradation of a human being, that of being made the instrument of an animal function contrary to her inclinations…the vilest malefactor has some wretched woman tied to him against whom he can commit any atrocity…” Although wife rape was criminalized in Canada in 1983, there still appears to be confusion in the application of the law concerning sexual assault in intimate relationships. As Professor Melanie Randall observed, an analysis of several cases revealed a reassertion of “an assumption about an entitlement to sexual access within marriage, or, put differently, an immunity to criminal culpability for those who sexually transgress in the context of a spousal relationship.”

Thus, the now defunct doctrine of coverture and the legal fiction it created, continues to have an influence on the contemporary patriarchal ideologies that legitimate power relations between men and women.

In 1891, an anonymous English lawyer observed, “any one [sic] who applies his mind to the state of the law, even at the present day, as between men and women, will be astonished and horrified to find out how completely the female interest is sacrificed

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34 In 1977, South Australia was the first Commonwealth jurisdiction to remove the marital exemption from sexual offences. See *An Act to Amend the Criminal Law Consolidation Act*, 1935-1975. No. 83 of 1976, sect 7(a) (4-5) and South Australia, Criminal Law and Penal Methods Reform Commission, Special Report, Rape and Other Offences (March 1976) at 14.
whenever it happens to clash with that of the male.”\(^{36}\) When it comes to the application of sexual assault law, this statement remains true today. Although the Supreme Court of Canada has recognized that mythical assumptions about female sexuality and sexual assault serve to deny women’s sexual autonomy, rape myths continue to crop up at all levels of the justice system.\(^{37}\)

**The Myths**

Rape myths are multilayered and have many functions. They serve to deny and/or trivialize sexual violence perpetrated by men against women; they shift the blame from the rapist to the victim; they exonerate sexually aggressive men and they contribute to the oppression and social control of women. Rape myths and stereotypes “underlie and fuel sexual violence against women and inform negative societal reactions.”\(^{38}\) Karen Busby noted that “over the last three decades, the feminist anti-rape movement has helped us to understand sexual violence as a pervasive, systemic method of creating and sustaining male dominance over women which also exacerbates other manifestations of social inequality.”\(^{39}\) Yet, as Joanne Conaghan points out, “removing the doctrinal debris of a legally instituted gendered hierarchical order does not necessarily get rid of deeply ingrained social and cultural attitudes which law has long endorsed and which continue to

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\(^{36}\) Anonymous Lawyer, *The Law in Relation to Women* (London: Alexander Gardner, 1891) at 2. A pro-suffrage pamphlet from the Gerritsen Collection of Aletta H. Jacobs. The collection contains books, pamphlets and periodicals “reflecting the evolution of a feminist consciousness and the movement for women’s rights.” It purports to be “the greatest single source for the study of women’s history in the world, with materials spanning four centuries and 15 languages.” [http://gerritsen.chadwyck.com/marketing/about.jsp](http://gerritsen.chadwyck.com/marketing/about.jsp).

\(^{37}\) For an example of the Supreme Court of Canada’s acknowledgement of rape myths, see *R v Ewanchuk* [1999] 1 SCR 330. See also L’Heureux-Dubé at *supra* note 22.


infuse the criminal justice process, albeit in more covert, less accessible forms.”

How then, do we address these myths that continue to exert such power over the legal processes surrounding sexual assault? The first step, is to recognize and acknowledge the myths and understand the ways in which rape myths promote victim blaming and the stigmatization of sexual assault.

Payne, Lonsway and Fitzgerald have identified seven distinct categories under which rape myths fall:

1. she asked for it;
2. it wasn’t really rape;
3. he didn’t mean to;
4. she wanted it;
5. she lied;
6. rape is a trivial event; and
7. rape is a deviant event.

While these categories are useful for analyzing and observing the complexities of the interplay between similar myths and stereotypes, it is impossible to definitively assign each myth to one category. Many of the myths flow between categories and intersect with each other to create new myths that again defy categorization. Despite the multifaceted nature of rape myths and the difficulties inherent in assigning each to a single specific category, the category construct is a useful tool for delineating, sorting and deconstructing rape myths. Hence, I will use these categories as a means to discuss the

myths and stereotypes that each category represents, as well as the various mythical subtexts within each.

1. She Asked For It

This is perhaps the most pervasive of the seven categories. The myths and stereotypes in this category decree that victims are responsible through their own actions for their victimization; the woman’s behaviour is singled out, not that of the perpetrator. These actions come in many forms: walking alone late at night, dressing ‘provocatively,’ flirting, wearing make-up, going to bars alone, drinking alcohol, and leaving a drink unattended are but a few.\textsuperscript{42} Clothing is often used to cast doubt on the character of the victim. Take for example, the comments of former Alberta Court of Appeal Justice John McClung\textsuperscript{43} made in a foundational 1998 sexual assault case (\textit{R v Ewanchuk}): “it must be pointed out that the complainant did not present herself…in a bonnet and crinolines.”\textsuperscript{44}

Sterling analyzed three American trials in which clothing was used to discredit the victim. In one case, the complainant had been wearing a mini skirt and no underwear when she was sexually assaulted. Months later, the jury in the trial handed down a verdict of ‘not guilty,’ the jury foreman later stated that she had ‘asked for it.’\textsuperscript{45} In another instance, the victim was wearing a high-necked cocktail dress trimmed with bright colours, black panty hose and a black lace bra and panties. At trial, defence counsel made sure that the Victoria’s Secret tags on the clothing were visible in the photographs shown to the jury.\textsuperscript{46} Young and Sterling both contend that the focus in court

\begin{itemize}
\item Du Mont, \textit{supra} note 38 at 102-03.
\item McClung is the grandson of women’s rights activist Nellie McClung (1873-1951).
\item \textit{R v Ewanchuk}, 1998 ABCA 52.
\item Alinor C. Sterling, “Undressing the Victim: The Intersection of Evidentiary and Semiotic Meanings of Women’s Clothing in Rape Trials” (1995) 7:1 Yale Journal of Law and Feminism 87 at 89.
\item \textit{Ibid} at 87.
\end{itemize}
on a rape victim’s clothing infers that clothing and bodily appearance are preeminent sources of information that project a “semiotic message about the woman’s moral character.” However, the probative function of clothing is highly indeterminate, particularly when it is used to cast doubt on the character of the victim.

Behaviour that is morally suspicious, such as drug use, having had an abortion, and alcohol use, also casts shadows on a victim’s credibility. For example, Young observes that “a woman with a drinking problem does not need to be a prostitute to have a promiscuous image. She is considered promiscuous by the very fact that she is a drinker.” In other words, alcohol use by women insinuates dubious moral character. Additionally, as alcohol is equated with having a ‘good time,’ a woman who consumes alcohol is perceived as a ‘good time girl.’ In a 2005 study from the University of Nottingham in the United Kingdom, Finch and Munro “found that participants in a simulated trial and in focus groups tended to attribute responsibility for the ensuing sexual intercourse to the complainant when she had consumed alcohol.” In another article, Finch and Munro note “the existence of a double standard in the attribution of responsibility in contested sexual consent scenarios whereby intoxicated defendants tend to be held less responsible for subsequent sexual events than their sober counterparts while intoxicated complainants tend to be held more responsible.”

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48 Young, supra at 447.
49 Ibid at 451.
shown that American juries “have been much more likely to acquit the accused in a rape trial where evidence is led showing that the victim consumed alcohol or drugs prior to the rape.”

Australian studies show that the complainant’s “drinking in the period preceding the incident is frequently a major component of the defence’s case.” In addition, clothing and alcohol are often used simultaneously to “impugn the character of the victim and to imply consent.”

Shifting the blame from the rapist to the victim also serves to protect “individuals and society from confronting the reality and the extent of sexual assault.” Burt argues that “rape myths are the mechanism that people use to justify dismissing an incident of sexual assault from the category of ‘real’ rape.” Kathryn Ryan posits that rape myths “may be a part of a cognitive scheme that reflect the belief in a just world… [thus providing] comfort to women and men because they allow them to distance themselves and their own behaviour from the possibility of being victims or perpetrators of rape.” This ‘just world’ phenomenon is best described as “the predisposition to believe that the world is a just place where good things happen to good people and bad things happen only to those who deserve them.” To reinforce and protect this belief people search for evidence that the victim deserved to be victimized – that she asked for it.

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53 Young supra note 47 at 451.

54 Ibid.

55 Lonsway & Fitzgerald, supra note 17 at 136.


57 Kathryn M. Ryan, "The Relationship Between Rape Myths and Sexual Scripts: The Social Construction of Rape" (2011) 65 Sex Roles 774 at 775.

58 Lonsway & Fitzgerald supra note 17 at 136.
2. *It Wasn’t Really Rape*

Many commonly accepted rape myths narrowly define what counts as rape.\(^{59}\) Consequently, there is often confusion about what constitutes ‘real rape.’ For example, it was not really rape because there was no weapon involved; the victim did not sustain any physical injuries; the perpetrator was not a stranger; the accused was her partner; she didn’t raise the hue and cry; she didn’t fight back, and so on. Sexual assaults that do not fit the ‘real rape’ script may be categorically dismissed as groundless. Ryan defines rape scripts as “beliefs about the nature of rape (e.g., the location, weaponry, sex of perpetrators), the roles of the sexes in rape, boundaries of vulnerability to rape, and the disposition of the victims.”\(^{60}\) Further, the belief that a ‘real’ rape involves a sudden and extreme physical attack from a stranger may interfere with the ability to recognize a sexual assault that does not fit this paradigm (most sexual assaults do not).\(^{61}\) It may also be perceived that a partner who has consented to sexual acts in the past must have consented to the acts in question and that unwanted sex perpetrated by a partner *isn’t really rape*. Ryan argues that the real rape script, constructed around myths and stereotypes, is “an important part of the legal and criminal justice systems’ responses to an alleged rape.”\(^{62}\)

3. *He Didn’t Mean To*

It comes as no surprise that the myths in this category also serve to deny and trivialize sexual assault and to remove blame from the male perpetrator. Victim blaming

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\(^{60}\) Ryan *supra* note 57 at 775.


is subtler in this grouping of myths, but it is there nonetheless. Here we find assertions that sexual assault is not assault at all, but rather, miscommunicated romantic signals, that “men are guilty of incompetent message-decoding, rather than rape.” 63 It is this incompetent message decoding that leads a man to believe that a woman’s ‘no’ really means ‘yes,’ thus he is absolved of all guilt. Young argues that “rape trials are invested with the notion that a woman’s surface is replete with messages transmitted to men”64 that are often difficult for men to decipher; thus, if he gets it wrong, he didn’t mean to.

We can also place in this category the myth that sexual assault is a result of uncontrolled lust, not violence. Therefore, rape is erroneously perceived as the natural, but uncontrollable, and therefore non-culpable, response of men to the seductive powers of so-called “loose women.”65 A 2006 Australian survey revealed that “44 percent of males and 32 percent females believed that rape results from men not being able to control their need for sex…responsibility is therefore removed from men because it is not within their control.”66 Pringle argues that underlying the myth of uncontrolled lust “is a common idea about what a woman is and how to use one. This idea rests on a commonplace fantasy, a fantasy that women and their bodies are there for the expression of men’s needs…and judges and the law have played a decisive part in the construction of this fantasy.”67

Shannon Sampert noted several stories in the Winnipeg Free Press that suggested that the number of sexual assaults can be reduced if the perpetrators take medication to

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63 Young, supra note 47 at 448.
64 Ibid., at 446.
65 Busby, supra note 39 at 258.
66 Taylor, supra note 50 at 6.
67 Pringle, supra note 28 at 73.
control their testosterone levels, thereby controlling their lustful urges. However, reducing the violent behaviour of sexual offenders to mere chemistry “completely ignores the power dynamic inherent in sexual violence”\(^{68}\) and further excuses the behaviour the behaviour of men. That these articles appeared in a major newspaper in the last decade is evidence of how deeply ingrained in our society the myth of uncontrolled male lust is.

4. *She Wanted It*

This category intersects with the myth *she asked for it* in many ways. It could in fact, be argued that the two categories are different expressions of the same idea, as many of the same mythical subtexts exist within each: provocative clothing, flirting, going alone to a date’s home, drug and alcohol consumption, *etcetera*. There is however, a subtle difference. *She asked for it* acknowledges the unwanted act, but places the blame for the victimization squarely on the victim. Conversely, *she wanted it* is in many respects comparable to *it wasn’t really rape* because…*she wanted it*. Here again we see the allusion to miscommunicated messages and misunderstood romantic signals.

Also in this category is the myth that many women have an unconscious desire to be raped. One of this myth’s earliest origins can be traced back to Herodotus, a Greek historian in the fifth century B.C. who wrote: “Abducting young women is not, indeed a lawful act; but it is stupid after the event to make a fuss about it. The only sensible thing is to take no notice; for it is obvious that no young woman allows herself to be [raped] if she does not want to be.”\(^{69}\)

Thus, if a woman does not fight back, or does not raise the ‘hue and cry,’ she must be

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\(^{68}\) Sampert, *supra* note 38 at 306-307.

\(^{69}\) As quoted in Katie M. Edwards et al, "Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change" (2011) 65 Sex Roles 761 at 765.
allowing the sexual encounter in order to fulfill her own sexual desires. The absence of vaginal injury is also often used as evidence against women “as it is then assumed that if she was able to self-lubricate, she must have enjoyed the forced sex act.”

Edwards and her co-authors observe that “beliefs that women desire forced sex have been incorporated for centuries into mainstream cultural work in art, religion, law, literature, philosophy, psychology and film.” For example, the Marquis de Sade (1740-1814) wrote numerous erotic works in which he advocated the raping of women and insisted that women should choose to enjoy the experience. As recently as the mid-twentieth century, Freudian psychoanalytic theory was used to argue that “a woman’s need for sexual satisfaction may lead to the unconscious desire for forceful penetration, the coercion serving neatly to avoid the guilt feeling which might arise after willing participation.”

Today, the pornography industry, along with other sexually explicit media continues to reinforce and perpetuate the myth that women enjoy being sexually assaulted. A quick perusal of several internet pornography sites using the keyword searches ‘force,’ ‘assault,’ and ‘tie,’ reveals numerous such rape scenes.

5. She Lied

One of the most disturbing myths that falls neatly under this category is that if a woman has been proven in a criminal court to have been previously abused, it is perceived that “she has a disordered sexual perception that could lead to

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70 Ibid.
71 Ibid.
72 Yale University, "Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard" (1952) 62:1 The Yale Law Journal 55 at 67.
misinterpretations, overreactions and false criminal accusations.”\textsuperscript{74} Alternatively, if the victim made previous allegations of prior abuse that did not result in a conviction, defence counsel may use this to infer that the victim tends to lie.\textsuperscript{75} In 1992, section 276 of the Criminal Code, an exclusionary rule prohibiting any party from adducing evidence of past sexual activity, except under strict conditions and subject to judicial oversight, came into effect. Despite the introduction of the rape shield laws, such evidence is still “frequently used in one way or another in sexual violence proceedings.”\textsuperscript{76}

Another disturbing myth, that women routinely lie about sexual assault and that most charges of rape are unfounded, has also been proven erroneous. A 2009 review of international research on the false reporting of sexual assault suggests that false reporting happens in only two to eight percent of cases.\textsuperscript{77} There are many fables that intersect with the ‘women lie’ myth: women are fickle and spiteful; women are not particularly credible; women lie to protect their honour; women are vengeful and lie to avenge a perceived wrong; women lie about sexual assault to perpetrate blackmail; women have overactive imaginations, and so on. The myths surrounding the ‘women lie’ fallacy are as innumerable as they are nonsensical. According to Statistics Canada, only one in ten sexual assaults is reported to the police.\textsuperscript{78}

There are numerous disincentives for not reporting sexual violence including shame, self-blame, fear of one’s abuser, the possibility of not being believed, the social stigma about anything related to sex, and the

\textsuperscript{74} Busby, supra note 39 at 287.

\textsuperscript{75} Ibid.

\textsuperscript{76} Busby, supra note 39 at 288.


difficulties for victims that are inherent in the criminal justice process. These disincentives are also disincentives to falsely reporting an assault. Why make an accusation when only three in one thousand sexual assault complaints made to the police lead to conviction?79

Another myth that is an intrinsic part of the ‘she lied’ category is that of delayed disclosure or recent complaint. This myth revolves around the erroneous assumption that a woman who is sexually assaulted will disclose her violation at the first reasonable opportunity. Thus, at trial, a delay in disclosing an assault is often perceived as a discrediting factor. This idea however, is premised on a mistaken belief about how victims of sexual assault behave.80 The leading precedent on delayed disclosure is a case in which a child was sexually assaulted when she was five to six years old. She told no one about the events for two and a half years. At trial, defence counsel cross-examined the complainant on the lengthy delay in reporting, suggesting that she had fabricated the story.81 The issue was “whether to admit expert evidence attesting to the fact that in diagnosing cases of child sexual abuse, the timing of disclosure, standing alone, signifies nothing…disclosure depends upon the circumstances of the particular victim.”82 Justice Major for the majority stated:

The significance of the complainant’s failure to make a timely complaint must not be the subject of any presumptive adverse inference based upon now rejected stereotypical assumptions of how person…react to acts of sexual abuse. A trial judge should recognize and so instruct a jury that there is no inviolable rule on how people who are the victims of trauma like a sexual assault will behave. Some will make an immediate complaint, some will delay in disclosing the abuse, while some will never

82 Craig, supra note 80 at 560.
disclose the abuse. Reasons for delay are many and at least include embarrassment, fear, guilt, or a lack of understanding and knowledge. In assessing the credibility of a complainant, the timing of the complaint is simply one circumstance to consider in the factual mosaic of a particular case. A delay in disclosure, standing alone, will never give rise to an adverse inference against the credibility of the complainant.83

Despite the precedent set in DD, recent complaint continues to be an area of confusion in the law of evidence and is still used to damage a complainant’s credibility. Elaine Craig notes that “given the assumption that women tend to lie about rape, and the fact that credibility is the determining factor in most sexual assault trials, a lack of recent complaint presumably does serve as a de facto bar to prosecution.”84 For example, a 2006 study in Australia indicates that cases are more likely to be prosecuted if reported sooner rather than later.85 Additionally, there is concern that if the Crown relies on evidence of recent complaint to support the complainant’s credibility, “it will paradoxically reinforce the very social assumption it is intended to rebut – that victims who complain promptly are more credible.”86

6. Rape is A Trivial Event

According to Statistics Canada, most sexual offences in Canada are of a less severe nature.87 For example, data from 2004 and 2007 indicate “that most sexual assaults involve unwanted sexual touching (81%) rather than more severe sexual attacks (19%). Among the incidents that came to the attention of the police, the large majority (86%) were level 1, the least serious form of sexual assault.”88 Statistics such as these

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83 R v DD, supra note 81 at 63, 65.
84 Craig, supra note 80 at 555.
85 Taylor, supra note 50 at 2.
86 Ibid., at 559.
87 See footnote 9 for an explanation of the tripartite division of sexual assaults in The Criminal Code of Canada.
88 Brennan, supra note 78 at 5.
may lead to a false assumption that sexual assault is a trivial event, a mere fondle or a pat on the bum...what’s the big deal? However, trivializing sexual assault reinforces the idea that women’s bodies are perpetually available to men, whether it be for a fondle or a ‘fuck.’ Pringle sums it up nicely “the cool judgement of the men of the world is this: if women are not immediately available, they can be made so by a degree of gentle violence, and an acquiescence in fear and trembling can be counted as consent...gentle violence becomes foreplay.”

Payne and her colleagues identify a number of other subtexts that trivialize rape including: if a woman is willing to ‘make out’ with a guy, then it’s no big deal if he goes a little further and has intercourse; it’s just sex; rape is not as big a problem as some feminists would like people to believe; being raped is not as bad as being mugged and beaten; women tend to exaggerate how much rape affects them; if a woman is not a virgin, then it should not be a big deal if her date forces her to have sex; and, many so-called rape victims are actually women who had sex and ‘changed their minds’ afterwards. In short, “violence against women by men is normalized to the point that it is viewed as mundane.”

7. Rape is a Deviant Event

This myth fuels the erroneous belief that sexual assault is not a common occurrence. It is rather a deviant event perpetrated by a perverted, ugly, seedy or insane stranger – and that the stranger is the “other.” Journalist Helen Benedect observes a widely-held misconception in the United States “that most rapes are committed by black

89 Pringle, supra note 28 at 71.
90 Payne, supra note 41 at 49-50.
91 Sampert, supra note 38 at 313.
men against white women.””92 In Canada, this “other” may be “Aboriginal, an immigrant, some other visible minority, or a religious minority.””93 This myth is based upon the assumption “that “normal” white Canadian men do not sexually assault women.””94 In her examination of the ways in which Canadian newspaper report sexual assaults, Shannon Sampert observes that “stories were coded under this category if the assailant was described as a visible or religious minority, an immigrant, or someone who lives outside of Canada.””95 This dangerous xenophobic tendency towards classifying non-white assailants into the category of “other” serves to intensify racial biases and reinforce the “mistaken understanding that women can recognize their rapists because they are the “other.”””96 However, most sexual assaults are perpetrated by friends, family and acquaintances, not strangers.97 Additionally, Sampert notes that police ‘stranger danger’ warnings create a climate of fear that ensures a large degree of control over how and where women conduct their lives.98 The reality is that most perpetrators are known to the victims and most sexual assaults happen in a familiar place.

This category of myths intersects with all other categories. It suggests that because rape is a deviant, and therefore uncommon event, there must be a misunderstanding as to whether or not a sexual assault actually occurred – she must have asked for it; it wasn’t really rape; he didn’t mean to; she wanted it; she lied; rape is

93 Ibid., at 311.
94 Sampert, supra note 38 at 311.
95 Ibid.
96 Sampert, supra note 38 at 312.
97 Ibid.
98 Ibid at 324.
trivial. Author Kate Harding has taken this list of seven myths and created a flow chart that begins with someone reporting a sexual assault and proceeds as follows:

1. Did she ask for it? If no, go to 2. If yes, go to 8.
2. Was it really rape? If yes, go to 3. If no, go to 8.
3. Did he mean to do it? If yes, go to 4. If no, go to 8.
4. Did she want to have sex with him? If no, go to 5. If yes, go to 8.
5. Is she lying about whether she consented? If no, go to 6. If yes, go to 8.
6. Was it really such a big effing trauma? If yes, go to 7. If no, go to 8.
7. The kind of rape you are describing is very, very rare. Like, so rare that it’s practically nonexistent. Go back over steps 1 through 6 until you find your error and end up at 8.
8. Everything’s fine! No need to be upset!\textsuperscript{99}

Conclusion

The above flow chart reflects the social assumptions that underlie and reinforce rape myths and stereotypes. These persistent collective suppositions continue to inform credibility assessments and, as will be demonstrated in the following chapters, affect the handling of sexual assault cases at all levels of the justice system. They are reflective of the traditional common law definition of rape penned in the seventeenth-century by English jurist Sir Matthew Hale: “rape is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho [sic] never so innocent.”\textsuperscript{100}

These assumptions are often held at an unconscious level and have an effect not only on

\textsuperscript{99} Kate Harding, \textit{Asking For It: The Alarming Rise of Rape Culture-and What We Can Do About It} (Boston, MA: De Capo Press, 2015) at 23.

the legal process, but also on how men and women view their sexuality. Many men and women continue to have a great difficulty in distinguishing between sexual assault and sex.\textsuperscript{101} Inured within legal discourse is a formidable covert conviction “that a woman is both sexual and indifferent, functioning more as a signal to others than as an autonomous agent.”\textsuperscript{102} When these myths and stereotype are perpetuated in the legal system they are further reinforced in society…it is a vicious and unwavering circle. However, these myths cannot be perpetuated in the criminal justice system without police and judicial complicity. So far, despite the robust legislation that has developed around sexual assault law in Canada, myths and stereotypes continue to surface. Our current justice system reflects the astute observation of Geis: “Hale’s strictures on rape [would not] have lingered as long as they have were they not congruent with the views of the males who dominate the criminal justice system.”\textsuperscript{103}

\textsuperscript{101} Pringle, supra note 28 at 71.
\textsuperscript{102} Young, supra note 47 at 445.
\textsuperscript{103} Geis, supra note 100 at 44.
Chapter 3: Substantive Issues in the Law of Sexual Assault - The Maintenance of the Myths

“Perhaps it is the only crime in which the victim becomes the accused and, in reality, it is she who must prove her good reputation, her mental soundness, and her impeccable propriety.”

Freda Adler

Introduction

Sexual assault law in Canada has undergone significant progressive reforms since The Canadian Charter of Rights and Freedoms came into effect in 1982. Prior to introduction of the Act amending the Criminal Code in relation to sexual offences that followed the entrenchment of The Charter in the Canadian Constitution, the laws on sexual offences were drafted in gendered and unequal terms that were inconsistent with section 15(1) of the Charter. In 1983, in accordance with the Act, the narrowly defined

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106 An Act to amend the Criminal Code in relation to sexual offenses and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof, SC 1980-81-82, c 125.
107 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 and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. See also Benedet, Janine. “Sexual Assault Cases at the Alberta Court of Appeal: The Roots of Ewanchuk and the Unfinished Revolution” (2014) 52:1 Alta Law Rev at 130.
offences of rape\textsuperscript{108} and indecent assault\textsuperscript{109} were replaced with a gender-neutral hierarchy of sexual assault offences which build on the assault provisions of the \textit{Criminal Code}.\textsuperscript{110} Additionally, the marital exemption was removed.\textsuperscript{111} The reforms also made significant changes to evidentiary rules that had made the prosecution of sexual assaults incredibly challenging. The common-law doctrine of recent complaint was abolished, as was the requirement for corroboration.\textsuperscript{112} Sexual history evidence was made presumptively inadmissible subject to three specific exceptions,\textsuperscript{113} and evidence of sexual reputation for

\textsuperscript{108} In 1982, the \textit{Criminal Code} contained the following definition of rape in s. 143:
A male person commits rape when he has sexual intercourse with a female person who is not his wife,
(a) without her consent, or
(b) with her consent if the consent
   (i) is extorted by threats or fear of bodily harm
   (ii) is obtained by personating her husband, or
   (iii) is obtained by false and fraudulent representations as to the nature and quality of the act.
Candace Backhouse has created a useful online source of Canadian sexual assault legislation from 1900-2000, organized both by year and by offence. See http://www.constancebackhouse.ca/fileadmin/website/index.htm.
\textsuperscript{109} In 1982, the \textit{Criminal Code} contained the following offence of “indecent assault on a male” in s. 156:
Every male person who assaults another person with intent to commit buggery or who indecently assaults another male person is guilty of an indictable offence and is liable to imprisonment for ten years and to be whipped. 1953- R.S.C. 1970, c. C-34 1953-54, c. 51, s. 148.
\textsuperscript{106} See note 106.
Following are the three levels of sexual assault in the \textit{Criminal Code}:
s. 271. Sexual assault;
s. 272 (1). Sexual assault with a weapon, threats to a third party or causing bodily harm;
s. 273 (1). Aggravated sexual assault.
\textsuperscript{111} 1985 \textit{Criminal Code} s. 278. A husband or wife may be charged with an offence under section 271, 272 or 273 in respect of his or her spouse, whether or not the spouses were living together at the time the activity that forms the subject-matter of the charge occurred. R.S.C. 1985, c. C-46 1980-81-82-83, c.125, s. 19.
\textsuperscript{112} 1985 \textit{Criminal Code}:
s. 274. Where an accused is charged with an offence under section 155 (incest), 161 (gross indecency), 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault), no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.
s. 275. The rules relating to evidence of recent complaint in sexual assault cases are hereby abrogated. R.S.C. 1985, c. C-46 1980-81-82-83, c.125, s. 19.
\textsuperscript{113} 1985 \textit{Criminal Code} s.276. (1) In proceedings in respect of an offence under section 271, 272 or 273, 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
the purpose of challenging or supporting the credibility of the complainant was prohibited.\textsuperscript{114}

Despite these significant reforms, sexual assault continues to be the most underreported crime in Canada. According to Statistics Canada, less than five percent of sexual assaults in Canada are reported to the police, compared to 50 percent for break-ins and just under 31 percent for all criminal incidents combined.\textsuperscript{115} Additionally, once reported to the police, sexual offences are less likely than any other violent offences to be considered by police to be “founded” and are less likely to result in charges being laid against the suspect.\textsuperscript{116} A report published by the \textit{Globe and Mail} in February 2017 following a 20 month investigation revealed that one out of every five sexual assault allegations in Canada is dismissed by the police as being baseless and thus is categorized as “unfounded.”\textsuperscript{117} Of those cases that do make it to court, only four in every ten result in a conviction.\textsuperscript{118} “Even when there is a conviction obtained, conditional sentences are more likely to be entered into for sexual assaults than for any other violent crime.”\textsuperscript{119}

\textsuperscript{114} 1985 \textit{Criminal Code} s. 277. In proceedings in respect of an offence under section 271, 272 or 273, evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant. R.S.C. 1985, c. C-46 1980-81-82-83, c.125, s. 19. See also Benedet, \textit{supra} note 3 at 131.


\textsuperscript{117} Doolittle, Robyn. "Why Police Dismiss 1 in 5 Sexual Assault Claims as Baseless", \textit{The Globe and Mail} (February 3, 2017) at F2.

\textsuperscript{118} Alberta Solicitor General, \textit{supra} note 116 at 89.

In this chapter, I examine from a feminist perspective, the legal rules surrounding sexual history evidence and the production of third party records in sexual assault cases (that is, records relating to personal information about the victim that are in the possession of a third party such as counselling records, medical records, school records, residential school records, psychiatrist hospital/treatment records, and records from drug and alcohol treatment centers). I demonstrate that, despite the robust appearance of the law on the books, the application of the law is fraught with complications and deficiencies that severely prejudice and harm the victim, thereby providing inadequate protection and undermining sexual equality. Karen Busby notes that “while non-lawyers are more likely to recognize the contingencies and other flaws in law’s account of itself, they run the risk of being branded by legal professionals as uninformed, unfair, and even hysterical if they question the fairness of the process.”\(^{120}\) It is however, imperative that feminists, both inside and outside the legal profession, continue to examine and monitor the substantive issues in the law of sexual assault. Additionally, the individuals within the justice system (police, lawyers, and judges) must look outside of the insular realm of law to garner an understanding of how the application (or misapplication) of the law further victimizes the victims of sexual assault.\(^{121}\)

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\(^{120}\) Busby, *supra* note 119 at 260.

\(^{121}\) Both men and women, and children of both sexes can be, and are, sexually assaulted. However, as the majority of victims (also referred to as complainants) of sexual assault are female and the majority of perpetrators are male, I will use female pronouns when referring to victims/complainants and male pronouns when referring to defendants. Additionally, I use female pronouns when referring to victims because, as Karen Busby notes, “the rules specific to sexual violence prosecutions developed out of beliefs about women and girls.” Busby, *supra* note 119 at 261.
The Foundations of Criminal Law

Before examining the application of the law with regards to sexual history evidence and the production of third party records, it is necessary to briefly introduce the principles of criminal law and the three foundational rules that support these principles. These rules are often cited by critics of the procedures limiting the admission of complainants’ sexual history evidence and third party records. The two fundamental principles that underpin Canadian criminal procedural are that “criminal convictions are extremely serious and therefore should only be obtained if there is a very high degree of certainty that an offence was committed, [and that] the state, and especially the police, should be restrained from using coercive tactics during investigations.”\textsuperscript{122} The three foundational rules that support these principles are as follows: the person charged (the defendant) is innocent until proven guilty; the Crown must prove the offence ‘beyond a reasonable doubt; and, the defendant has the right to silence and the right to full answer and defence.\textsuperscript{123}

Gendered Notions of Privacy

At the heart of the issue surrounding the defendant’s access and ability to adduce evidence related to a complainant’s sexual history and her personal records is the precarious balancing of a victim’s privacy with the defendant’s right to full answer and defence. What must a woman reveal about herself in order to access justice for a wrong committed against her, and how do these revelations subject her to further victimization? Law professor Elizabeth Schneider notes the ways in which “concepts of privacy permit, encourage, and reinforce violence against women.”\textsuperscript{124} For example, historically, the

\textsuperscript{122} Ibid., at 260-61. 
\textsuperscript{123} Ibid., at 261. 
abuse of women in the family sphere was not addressed by the law as it was seen as a “protected as part of the private sphere of family life.” Indeed, Lise Gotell calls attention to the ways in which “the claim to privacy as a right is inescapably linked to the gendered history of the public/private distinction…that was born not of woman, but of man.” These “complicated, paradoxical and gendered legacies of privacy [continue to] influence judicial determinations of the admissibility of sexual history evidence and access to confidential records [and] overshadow decisions about which complainants will be accorded protection against invasive credibility probing and about how much we need to know about any complainant in order for her to meet the test of credibility.”

Unfortunately, when it comes to the courts, the privacy rights of complainants continue to be subordinated to the rights of the accused.

**Sexual History Evidence**

The 1983 amendments to the *Criminal Code* made sexual history evidence inadmissible subject to three specific exceptions:

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 the accused alleges he believed was given by the complainant.

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125 Ibid.  
127 Gotell, supra note 126 at 753.  
The amendments also made evidence of sexual reputation inadmissible “for the purpose of challenging or supporting the credibility of the complainant.”

However, in *R v Seaboyer* (1991), the Supreme Court struck down the 1983 *Criminal Code* amendments restricting sexual history evidence on the grounds that the restrictions were in violation of defendants’ constitutional legal rights. The Court determined that there may in fact, be additional situations in which the complainant’s sexual history could be relevant and admissible. Conversely, the Supreme Court held that section 277 of the *Criminal Code* which excludes sexual reputation evidence, does not infringe on the accused’s right to a fair trial.

McLachlin J., writing for the majority stated:

Section 277 excludes evidence of sexual reputation for the purpose of challenging or supporting the credibility of the plaintiff. The idea that a complainant’s credibility might be affected by whether she has had other sexual experience is today universally discredited. There is no logical or practical link between a woman’s sexual reputation and whether she is a truthful witness. It follows that the evidence excluded by s. 277 can serve no legitimate purpose in the trial. Section 277, by limiting the exclusion to a purpose which is clearly illegitimate, does not touch evidence which may be tendered for valid purposes, and hence does not infringe the right to a fair trial.

The *Seaboyer* decision regarding s. 276 and the admission of sexual history evidence was not so straightforward. The majority gave several examples of evidence of sexual conduct “which clearly should be received in the interest of a fair trial.”

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129 Ibid., at s. 277.
133 *Seaboyer*, *supra* note 130 at para 52.
134 Ibid., at para 54.
complainant was consenting to the sexual act” on the basis that the sexual acts were performed by the complainant at some other time or place. This reasoning is problematic in that it relies on the myth that if a woman says ‘yes’ at one time, she is automatically implying consent to future sexual acts. It also implicitly gives credence to the ‘twin myths’ that unchaste women are less worthy of belief and more likely than chaste women to consent to the acts giving rise to the charge.135 Other examples of sexual history evidence given by the majority that may be admissible include: “to explain the complainant’s physical condition; to prove bias or motive to fabricate; and to establish similar fact conduct on the part of the complainant.”136

In her partial dissent, then Supreme Court Justice Claire L’Heureux-Dubé asserted that the evidence excluded by s. 276 of the *Criminal Code* is “simply irrelevant.”137 She rightly observes that sexual history evidence:

has a significant distorting effect at trial…such evidence allows stereotype and myth to enter into the equation, sidetracks the search for the truth…[and] invites a result more in accord with stereotype than truth…many a defence lawyer knows the effect of such evidence and thus strives to get it admitted.138

To illustrate this point, L’Heureux-Dubé quotes a Member of Parliament (a former lawyer), who during a House of Commons debate on this area of law opined:

The myth is that a 'bad woman' is incapable of being raped. ... We have to deal with the myth that the credibility of a 'bad woman' is immediately in question. *I was never sure what that phrase meant. As a lawyer, all I knew was that it was of benefit to hurl as much dirt as possible in the direction of such a woman, hoping that some of it would stick and that the jury would disbelieve what she said.*139

135 *Busby*, *supra* note 119 at 280.
136 *Ibid.* See also: on the complainant’s physical condition, *Seaboyer*, *supra* note 130 at para 57; on bias or motive to fabricate, *Seaboyer* at para 56; on similar fact conduct, *Seaboyer* at para 58.
137 *Seaboyer*, *supra* note 130 at para 233.
138 *Seaboyer*, *supra* note 130 at paras 239 and 241.
In summary, Justice L’Heureux-Dubé states:

Sexual history evidence excluded by s. 276 of the Criminal Code is mostly irrelevant and, moreover, so prejudicial that its exclusion both at common law and under the Canadian Charter of Rights and Freedoms is mandated. Neither s. 7 nor s. 11(d), upon a principled inquiry, directs a different conclusion. However, even assuming that s. 276 is unconstitutional in its effect, it is easily justified under s. 1. In my view, once the constitutional questions are viewed within their larger context, the conclusions reached in these reasons are absolutely uncontentious.¹⁴⁰

That only one other Supreme Court Judge (Gonthier J.) concurred with L’Heureux-Dubé’s dissent is demonstrative of judicial resistance and the Supreme Court’s inability and/or refusal to fully recognize the extent to which the harms to the victim in sexual assaults cases can outweigh the benefit to the accused.

In response to public outrage and feminist lobbying following the Seaboyer decision, Parliament re-enacted the “rape shield provisions” (albeit, in a weakened form that accorded with the majority’s insistence on a broad scope for judicial discretion¹⁴¹) with the introduction of Bill C-49.¹⁴² The Act once again made it clear that sexual history evidence cannot be used to support the inference arising from the twin myths respecting credibility and consent.¹⁴³ It also sought to “limit the traditional uses of sexual history evidence by reframing the Criminal Code’s construction of consent and ‘mistaken belief in consent.’”¹⁴⁴ Thus, in addition to

¹⁴⁰ Ibid., at para 280.
¹⁴¹ Gotell, supra note 126 at 753.
¹⁴³ Busby, supra note 119 at 281. See Criminal Code s. 276 (1) …evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant
   a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge;
   or
   b) it less worthy of belief.
¹⁴⁴ Gotell, supra note 126 at 753.
redefining the rules surrounding the admission of sexual history evidence, the
reform saw the enactment of a statutory definition of consent as voluntary
agreement,\(^{145}\) the enumeration of situations of forced submission that do not
constitute consent,\(^{146}\) and limitations of the defence of mistaken belief in consent.\(^{147}\)

Defence lawyers were quick to challenge the constitutionally of the
amendment, arguing that it violated defendants’ right to full answer and defence.\(^{148}\)
The Supreme Court of Canada upheld the law in \(R v \text{Darrach (2000)}\),\(^{149}\) however,
the decision disappointingly failed to give any meaning to the prejudicial effects of
sexual history evidence or the ways in which this type of evidence reinforces
gender inequalities. The decision also stated that in cases where it is unclear
whether the evidence should be admitted, the judge should admit the evidence.\(^{150}\)
Busby observes that Gotell’s 2006 research on sexual history applications after
\(Darrach\) “reveals that lower court judges have taken their lead from the Supreme

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\(^{145}\) \textit{Criminal Code} s. 273.1 (1) consent is defined as “the voluntary agreement of the complainant to engage

\(^{146}\) \textit{Criminal Code} s. 273.1 (2) No consent is obtained, for the purposes of sections 271, 272, and 273 where
a) the agreement is expressed by the words or conduct of a person other than the complainant;
b) the complainant is incapable of consenting to the activity;
c) the accused induces the complainant to engage in the activity by abusing a position of trust, power
or authority;
d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a

\(^{147}\) \textit{Criminal Code} s. 273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused
believed that the complainant consented to the activity that forms the subject-matter of the charge, where
a) the accused’s belief arose from the accused’s
i. self-induced intoxication, or
ii. recklessness or wilful blindness; or
b) the accused did not take reasonable steps, in the circumstances known to the accused at the time,
to ascertain that the complainant was consenting. R.S.C., 1985, c. C-46, 1992, C.38 S.1.

See Gotell, \textit{supra} note 22 at 753.

\(^{148}\) Busby, \textit{supra} note 119 at 282

\(^{149}\) \(R v \text{Darrach}, [2000] 2 \text{SCR} 443\).

\(^{150}\) Busby, \textit{supra} note 119 at 282.
Court, because there is not a single case in which a lower court judge has seriously considered gendered inequality or the prejudicial effects of sexual history evidence.”¹⁵¹ Gotell’s research also reveals “that judges have permitted sexual history evidence in 53 percent of the cases in which defence counsel sought to have it admitted, belying the Court’s prediction in Seaboyer that the evidence would only be admitted in exceptional cases.”¹⁵²

The use of sexual history evidence is prevalent in cases regarding sexual abuse in intimate relationships. As mentioned previously, the marital exemption, whereby it was not possible for a husband to be charged for sexually assaulting his wife, was removed in 1983.¹⁵³ Despite the statutory restrictions on the use of sexual history evidence “defence lawyers continue to argue that sexual history must be admitted in the context of long-term relationships.”¹⁵⁴ Ruthy Lazar’s research illustrates this point. In conducting interviews with defence attorneys regarding the admission of sexual history evidence, Lazar observed that 12 of the 15 interviewed “asserted that they use, or seek to use, evidence of sexual history in cases of wife/partner rape.”¹⁵⁵


¹⁵² Busby, supra note 119 at 282. See also Seaboyer, supra note 130 at para 104 “The examples presented earlier suggest that while cases where such evidence will carry sufficient probative value will exist, they will be exceptional.”

¹⁵³ See note 111.

¹⁵⁴ Busby, supra note 119 at 282.

For example, in the case of *R v J.A.* (2011), in which the accused anally penetrated his partner with a dildo after he had choked her into unconsciousness, sexual history evidence was admitted without a *voir dire* on admissibility, to infer that because the victim had consented to sado-masochistic sexual activities with the accused before, she had likely consented to the activity set out in the charge. The appeal court set aside the conviction and dismissed the charges without commenting “on the propriety of ignoring the *Criminal Code* dictate that a *voir dire* must be held” prior to admitting sexual history evidence. In a landmark decision, the Supreme Court overturned the appeal court’s decision “on the basis that an unconscious person could not consent to sexual activity.” However, the Supreme Court failed to address the admittance of sexual history evidence without a *voir dire*.

Sexual history evidence has also been used questionably to demonstrate sexual inactivity. In *R v Antonelli* (2011), “the trial judge found a history of sexual inactivity admissible to allow the defence to argue that the complainant was more likely to have fabricated the allegations.” Karen Busby observes that in this case, “the defence sought, and succeeded, to admit evidence to create a new

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157 Busby, *supra* note 119 at 283.
158 Ibid.
159 *R v Antonelli,* [2011] 280 CCC (3d) 96 (Sup. Ct.).
160 Ibid., at para 17: Pursuant to s. 276(2), I find that the complainant's period of sexual abstinence, and her comments relating to this, are admissible because:

- the "sexual inactivity" occurred during a discrete period of time preceding the alleged offence and could be considered one instance of sexual inactivity
- the evidence is relevant to the applicant's cross-examination of the complainant on a point that he later wants to impeach her on through his own testimony, and
- the probative value is not substantially outweighed by the danger of prejudicial effects.

See also Busby, *supra* note 119 at 283.
sexual assault myth: Women who were previously chaste are more likely to fabricate complaints.”

Busby also notes a particularly troubling indirect use of sexual history evidence. Following the passage of Bill C-49 and increasingly after Darrach (2002), defence counsel have been seeking to admit evidence that the complainant has been sexually abused in the past and because of this abuse “she has a disordered sexual perception that could lead to misinterpretations, overreactions and false criminal accusations,” and therefore, her credibility is at issue. Additionally, sexual history evidence is used to discredit complainants who “fail to maintain an appropriate demeanor,” or who demonstrate anger towards the accused. For example, in R v Sanichar (2012), the Ontario Court of Appeal overturned the defendant’s conviction because of “the trial judges inadequate examination of credibility in light of the historical nature of the abuse and the defendant’s anger.” The complainant was a young teenager at the time the abuse had occurred. She had reported the abuse to the police, a school counselor, and a worker from the Children’s Aid Society. Additionally, the accused (the victim’s step-father) had faced prior charges for the assaults. As a young woman, the complainant wrote a letter to the defendant expressing her anger. In its decision, the Court inferred that the complainant’s dislike for the defendant that she expressed in the letter may have given reason for her to fabricate the complaints:

In the appellant's submission, the letter epitomizes the hatred the complainant bears towards him and that hatred provides the true motivation for what he

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161 Busby, supra note 119 at 284.
162 Ibid., at 287.
163 Ibid., at 285.
argues are the false charges against him. While the letter does refer to some allegations of physical and sexual abuse, it is more or less venomous in other respects as well.\textsuperscript{165}

This disturbing decision ignores the trauma experienced by sexual assault victims. Feelings of anger are a normal reaction to childhood sexual abuse.\textsuperscript{166} In this decision, the Court has taken what was likely a part of the victim’s healing experience and warped it in such a way that it was used to discredit her. Although the appeal court’s decision was overturned by the Supreme Court in 2013\textsuperscript{167}, “the decision is still evidence of the pervasive judicial attitude towards victim demeanor.”\textsuperscript{168} Despite the substantive provisions in the \textit{Criminal Code}, “defence lawyer’s direct and indirect uses of sexual history evidence remains a powerful tool to undermine the credibility of the Crown’s chief (and often the only) witness – the complainant.”\textsuperscript{169} Indeed, Janine Benedet asserts “the use of sexual history evidence is not wrong because it constitutes an invasion of privacy, but because it undermines sexual equality.”\textsuperscript{170}

\textbf{Access to Third Party Records}

The rise of the defence counsel practice of seeking disclosure of personal records in sexual assault cases began in the early 1990’s, coinciding with the amendments to the \textit{Criminal Code} restricting questioning about sexual history.\textsuperscript{171}

\begin{itemize}
\item \textsuperscript{165} \textit{R v Sanichar} at para 23.
\item \textsuperscript{166} Elizabeth A. Stanko, \textit{Intimate Intrusions: Women’s Experience of Male Violence} (New York: Routledge, 1985) at 29.
\item \textsuperscript{167} \textit{R v Sanichar}, 2013 SCC 4.
\item \textsuperscript{168} Busby, \textit{supra} note 119 at 286.
\item \textsuperscript{169} \textit{Ibid.}, at 288.
\end{itemize}
By the late 1990s, this defence tactic to circumvent sexual history evidence rules was being used regularly to discredit women and children’s claims of sexual violation.\textsuperscript{172} Employing this relatively new tactic, defence lawyers seek access to every imaginable personal record including counselling, therapy and psychiatric records, records from abortion and birth control clinics, child welfare agencies, adoption agencies, residential and public schools, drug and alcohol rehabilitation centers, medical doctors, military records, criminal injuries compensation boards, prisons and youth detention centers, social welfare agencies, victim/witness assistance programs, medical doctors, immigration offices, sexual assault crisis centers and personal diaries.\textsuperscript{173} These records are sought almost exclusively in sexual assault cases.\textsuperscript{174}

In 1995, the Supreme Court of Canada, in \textit{R v O’Connor}\textsuperscript{175} established a common-law test for the production and disclosure to the defence of third party records that were not already in the possession of the Crown. This decision precipitated a period of wide open access to complainants’ records on the basis that access was paramount to a defendant’s constitutional right to a fair trial.\textsuperscript{176} O’Connor, who had been a priest at a residential school, was charged with having committed sexual offences against four Indigenous women in the 1960’s while they

\textsuperscript{172} Lise Gotell, “Colonization through Disclosure: Confidential Records, Sexual Assault Complainants and Canadian Law” (2001) 10:3 Social & Legal Studies 316 at 319. See also Busby, \textit{supra} note 119 at 288.


\textsuperscript{174} Busby, \textit{supra} note 171 at 358.

\textsuperscript{175} \textit{R v O’Connor}, [1995] 4 SCR 411.

\textsuperscript{176} Gotell, \textit{supra} note 173 at 116. Busby, \textit{supra} note 119 at 289.
were students or recent graduates employed at the residential school. A judge ordered the women to authorize the release to O’Connor of an all-encompassing compilation of personal records, which included their residential school records. Lise Gotell observes that the residential school records “had been coercively obtained within the context of a residential school system that functioned as a highly effective instrument in the forced assimilation of Canadian aboriginal peoples.” In ordering production of these records, “the Court avoided having to consider whether records written by a defendant himself (as the records almost certainly were in O’Connor) are inherently unreliable.” In addition, the Court did not consider how records applications “would have a disproportionate impact on women who have been subject to extensive record keeping in contexts characterized by multiple inequalities such as prisons, psychiatric hospitals or the child welfare system.”

As the records went back over 30 years, many of them had been destroyed. Consequently, the trial judge ordered the proceedings stayed for failure to produce. The Supreme Court overturned the stay; however, it gave defence counsel wide access to the personal records of complainants held by third parties. In response to feminist pressures and mounting evidence of the flood of applications for third party records after O’Connor, Parliament enacted Bill C-46, An Act to Amend the Criminal Code (Production of Records in Sexual Offence Proceedings) in 1997.

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177 Gotell, supra note 172 at 321.
178 Busby, supra note 119 at 290.
179 Ibid.
180 Busby, supra note 119 at 288.
The Bill created a substantive legislative framework (encompassed in subsections 278.1-278.9 of the *Criminal Code*) that was designed to subject applications for production to a higher level of scrutiny.¹⁸²

The provisions established a rigorous two stage test for the production and disclosure of records. In the first stage, defence must make a written application to the trial judge that must specify how the record is ‘likely relevant’ to an issue at trial and how production of the record is ‘necessary in the interests of justice.’¹⁸³ In determining whether to order production of the record for viewing, the judge must consider the factors enumerated in s. 278.5 (2) of the *Criminal Code*.¹⁸⁴ If the records pass the first stage test, “these same factors are to guide the judge in deciding on whether the documents or edited portions are to be disclosed to the accused.”¹⁸⁵ Lise Gotell notes that “this two stage test is skewed in favour of production on the basis of the accused’s right to make full answer and defence.”¹⁸⁶

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¹⁸³ *Criminal Code* at ss 278.3 (3) and 278.5(1).
¹⁸⁴ *Criminal Code* R.S.C. 1985, c. C-46. S.C. 1997, c.30, s.1, s 278.5(2) In determining whether to order the production of the record or part of the record for review pursuant to subsection (1), the judge shall consider the salutary and deleterious effects of the determination on the accused’s right to make a full answer and defence and on the right to privacy and equality of the complainant or witness, as the case may be, and any other person to whom the record relates. In particular, the judge shall take the following factors into account:
   (a) the extent to which the record is necessary for the accused to make a full answer and defence;
   (b) the probative value of the record;
   (c) the nature and extent of the reasonable expectation of privacy with respect to the record;
   (d) whether production of the record is based on a discriminatory belief or bias;
   (e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;
   (f) society’s interest in encouraging the reporting of sexual offences;
   (g) society’s interest in encouraging the obtaining of treatment by complainants of sexual offences; and
   (h) the effect of the determination on the integrity of the trial process.
¹⁸⁵ Gotell, *supra* note 173 at 117.
¹⁸⁶ Gotell, *supra* note 172 at 324.
Within months of its passage, the Bill C-46 amendment was subject to numerous constitutional challenges and was struck down in several controversial lower court decisions. In *R v Mills* (1999), the Supreme Court upheld the constitutionality of the Act, thereby upholding the statutory test for access. However, Gotell observes that “a careful scrutiny of Mills…demonstrates how the meaning of the federal government’s disclosure legislation was seriously undermined in a decision that privileges defendant’s rights and emphasizes the importance of judicial discretion and authority in decisions about access.”

Busby notes the similarities in *R v Darrach* (2000) regarding Bill C-49, and *R v Mills* (1999) regarding Bill C-46. In both cases, the Supreme Court “gave lip service to the requirement that women’s equality and privacy rights should be balanced against the defendant’s right to a fair trial, but gave no meaningful content to the balancing act.” Additionally, in both cases the Court stated that if there was any doubt, that doubt should be resolved in favour of producing the records/sexual history evidence.

Prior to the Bill C-46 amendment, “one strategy adopted by some record keepers, particularly sexual assault counsellors, was to alter note-taking practices (remembering always that the defendant might read the record) and revise record retention polices.” Such was the case in *R v Carosella* (1997). “Under a

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188 *R v Mills* [1999] 3 SCR 668.
190 Gotell, *supra* note 172 at 316.
192 Ibid., at 291.
policy of destroying all records with police involvement, a sexual assault crisis
center had shredded files relating to a meeting in which a woman inquired into
procedures for laying a complaint of historical sexual assault."\textsuperscript{194} The Supreme
Court, with a bare majority, concluded that the charges should be stayed, arguing
that the “accused’s legal rights were irrevocably violated through the actions of the
center.”\textsuperscript{195} In her dissent, Justice L’Heureux-Dubé, with three other Justices
concurring,\textsuperscript{196} “was of the view that any loss was no more than a mere speculative
risk to the appellant’s rights…[and] if a proper inquiry into the need for the
documents had been held, these notes would not even have met the standard for
production to the trial judge.”\textsuperscript{197}

David Paciocco is critical of the dissenting opinion in \textit{Carosella}. He argues
that “the conduct of the Sexual Assault Crisis Center was outrageous…the crisis
center sought to destroy any evidence that could assist the defence and it sought to
frustrate the operations of the law.\textsuperscript{198} This was likely not the case at all. Rather,
the crisis center’s goal in destroying the records was to protect victims of sexual
assault, not to subvert the course of justice. In her dissent, Justice L’Heureux-Dubé
notes the detrimental effect that generous production orders have on victims and
those charged with helping them:

I must comment upon the fact that these agencies have even felt it necessary to
go to such lengths. From a quick perusal of lower court judgments, it would
appear as if a request for therapeutic records in cases of sexual assault is

\textsuperscript{194} Gotell, \textit{supra} note 172 at 325.
\textsuperscript{195} Ibid., at 326.
\textsuperscript{196} \textit{R v Carosella, supra} note 193. \textit{L’Heureux-Dubé J. (dissenting)} (La Forest, Gonthier and McLachlin
\textit{JJ. concurring}).
\textsuperscript{197} Ibid., at paras 111 and 112.
\textit{Criminal Reports} 4 199 at 199. At the time of writing, now Ontario Court of Appeal Justice Paciocco was
a Law Professor at the University of Ottawa.
becoming virtually automatic, with little regard to the actual relevancy of the
documents. We have now come to a situation where people trying to help
victims have resorted to foregoing the taking of notes or destroying them en
masse in order to prevent what they see as a grave injustice. It is extremely
likely that the therapeutical process for which these notes are actually created
is being harmed in their absence. 199

Additionally, in this decision, the majority failed to consider the probative value in light
of the nature of the records in question. For example, in Mills it was noted that
‘counselling or therapeutic records…can be highly subjective documents which attempt
merely to record an individual's emotions and psychological state. Often such records
have not been checked for accuracy by the subject of the records, nor have they been
recorded verbatim.’ 200 Interestingly, despite his critique of the dissenting opinion,
Paciocco recognizes “that these kinds of things can diminish the reliability and hence the
importance of the record.” 201

Several judges have commented on the difficulty of “assessing the
deleterious and salutary effects at the stage of production to a judge.” 202 For
example, in R v M. (H.A.) (1998), the judge held that “it is difficult for me to sort
out the various material…in the spirit of R v Stinchcombe…it is my view that the
file, as a whole, should be produced.” 203 In other words, the judge ordered all
records to be produced because they were too difficult for him to edit, and thus he
completely disregarded the substantive procedures set out in the Criminal Code. 204
Perhaps this is indicative of the necessity to provide judges with training on the

199 Carosella, supra note 193 at para 147.
200 R v Mills, supra note 188 at para 136.
201 Paciocco, supra note 189 at note 118.
202 Busby, supra note 171 at 384.
204 Busby, supra note 171 at 384.
production of records in sexual assault cases. However, in a 2011 *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, it was noted by Senator Angus that there is ‘great pushback’ from the bench on initiatives for specialized training relating to the production of records.\textsuperscript{205} The reasons for the ‘pushback’ are not clear in the report.

Even when records are not released, their content influences judicial assessments of credibility. For example, in *R v Hayward* (1997), the judge disqualified himself from trial after hearing an application for production and reviewing the material stating that “I would expect that the complainant and the accused, knowing that I had gone over all of those materials, would both have a most reasonable apprehension that I would thereby be biased.”\textsuperscript{206} In *R v Balabuck* (1996), the judge ordered a mistrial after reviewing records, stating that he was unable to disabuse himself of information he knew about the complainant and the defendant:

In this case, some of the material that I have reviewed reflects, rightly or wrongly, adversely upon the defendant and some of it likewise reflects adversely upon the complainant… I do not consider that justice will be seen to be done if I proceed with this trial.\textsuperscript{207}

This brings into question the appropriateness of the trial judge as the decision maker on the production of records.

**Conclusion**

It is evident that, despite the intentions of the 1992 and 1997 amendments to effectively balance sexual assault victims’ privacy rights with defendants’ rights to full

\textsuperscript{205} Senate, *Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs*, 41\textsuperscript{st} Parliament, 1\textsuperscript{st} session, No 3 (October 2011) at 3:47.
\textsuperscript{206} *R v Hayward*, [1997] OJ No 1081 (Gen Div) at para 5.
\textsuperscript{207} *R v Balabuck*, [1996] BCJ No 355 at paras 16 and 17. See also Busby, *supra* note 171 at 384.
answer and defense, the scales of justice continue to weigh heavily in favour of the accused. Courtroom controversies surrounding the use of sexual history evidence abound. Judges persist in granting defence access to complainants’ personal documents with little regard for the factors enumerated in section 278.5(2) of the Criminal Code, despite their obligation to follow the rules set down in this legislation. The Courts continue to give lip service to the rules encompassing sexual history evidence and access to third party records; however, this often amounts to no more than a duplicitous avowal of adherence to the law, with very little substance.

This is not surprising when deep seated ideals about the ‘truth-seeking’ function of justice continue not only to outweigh, but often to ignore, the equality rights of women. Even those who purport to be advocates of protecting sexual assault victims have difficulty recognizing the gendered and derogatory constructions that are inherent in the application of the law when it comes to the admission of sexual history evidence and the production of personal records in sexual assault cases. For example, in his Questionnaire for Judicial Appointment, recently appointed Ontario Court of Appeal Justice David M. Paciocco, stated “my research and advocacy has…been cited in support of a balanced approach to protecting the therapeutic and other private records of victims, including in sexual assault cases.” Yet, his critique of Bill C-46 does not appear to reflect this statement.

In 2012, the Standing Senate Committee on Legal and Constitutional Affairs conducted a Statutory Review on the Provisions and Operation of the Act to Amend the

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208 Criminal Code, supra note 184.
210 Paciocco, supra note 189.
Criminal Code (production of records in sexual offence proceedings.) The review concluded with 18 recommendations; however, while the recommendations address the specialized training on sexual offences and third party records production applications for prosecutors, there is no mention of specialized training for judges. There continues to be much reason to be skeptical about whether privacy and equality rights will be significantly factored into future judicial decisions respecting sexual history evidence or the production of personal records.

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Chapter 4: Sexual Assault on Trial - Hostile Defence Tactics and the Intimidating Courtroom

“Business as usual in the courtroom aids patriarchy, not justice.”

Introduction

The courtroom is a frightening place for many victims of sexual assault. It is here they are forced to reveal the most intimate details of their victimization in the presence of strangers, while in an institutionalized setting fraught with patriarchal rituals. It is not surprising then, that survivors of sexual assault report having little or no faith in courtroom processes and procedures. For example, in a study conducted in 2014, two-thirds of the participants expressed their lack of confidence in the court process. In this chapter, I will examine the reasons why sexual assault victims lack confidence in the court process. This examination will begin with a look at the dubious, and arguably unethical, advertising techniques used by some defence lawyers to attract clients that have been charged with sexual assault. These web advertisements, that play on rape myths to reinforce patriarchal power structures, are accessible to anyone who chooses to do an online search, including the 22 percent of victims who use the Internet to find sources of information about the criminal justice system. Advertisements such as these could conceivably frighten a victim before she ever enters the courtroom. Next, I will attempt to expose the institutionalized practices manifested through courtroom rituals that make the courtroom such a frightening place for sexual assault victims. Finally, I will

214 Melissa Lindsay, A Survey of Survivors of Sexual Violence in Three Canadian Cities (Ottawa: Department of Justice Canada, 2014) at 7.
215 Ibid., at 20.
demonstrate the ways in which the linguistic tactics and of the defence serve to re-victimize the victim by undermining her confidence and credibility.\footnote{216}

**Making it to the Courtroom**

Only a small percentage of sexual assault cases make it to the courtroom. According to Statistics Canada’s General Social Survey (GSS), as few as five percent of all sexual assaults in Canada were brought to the attention of the police in 2014.\footnote{217} In addition, a recent investigative report by the *Globe and Mail*, in which data was gathered from more than 870 police forces across Canada, revealed that one in five sexual assault claims are dismissed by police as being baseless.\footnote{218} Of those cases that do make it to court, only four in ten result in convictions.\footnote{219} Even when there is a conviction obtained, conditional sentences are more likely to be entered into for sexual assaults than for any other violent crime.\footnote{220}

Why do so few women report sexual assaults to the police? Respondents to the 2014 GSS reported many reasons, most which concerned the criminal justice process:

- police wouldn’t have considered the incident important enough – 43%;

\footnote{216 As sexual assault victims are predominantly women, and the perpetrators predominantly men, my pronoun usage reflects that reality. Similarly, as the justice system is still a male dominated field (although this is changing), and even female lawyers often mirror men’s ways of speaking, I refer to Crown and defence counsel using masculine pronouns.}
\footnote{217 Samuel Perreault, *Criminal Victimization in Canada, 2014* (Ottawa: Statistics Canada, November 2015) at 3. This proportion is not significantly different from that reported a decade earlier (8%). See Perreault at 25.}
- police would not have been effective – 26%;
- did not want the hassle of dealing with the police – 45%;
- offender would not have been convicted or adequately punished – 40%; and
- feared or did not want the hassle of dealing with the court process – 34%. ²²¹

It is evident from the Globe and Mail investigative report, and from the results of the GSS, that there are problems with police handling of sexual assault complaints, and with victims’ perceptions of the police. While police policies and processes with regards to sexual assault complaints are beyond the scope of this chapter, it is important to note that police “have a crucial role to play in any attempt to implement a strategy designed to close the gap between the official condemnation of male violence as enshrined in law and the realities of male violence as condoned in practice.” ²²² The police are the entry point for sexual assault cases into the criminal justice system and thereby, into the courtroom. Additionally, an important aspect of the problem of the sexual harm to victims of the criminal justice system processing of sexual assault cases involves defence attorneys’ response to, and discourse surrounding allegations of sexual assault.

**Problematic Defence Advertising**

As Professor David Luban notes, “lawyers are the primary administrators of the rule of law, the point of contact between citizens and their legal systems.” ²²³ As an administrator of the rule of law, “a lawyer has a duty to carry on the practice of

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²²¹ Perreault *supra* note 217 at 41.
law…honourably and with integrity.” It seems however, that when it comes to defending sexual assault cases, some defence attorneys sacrifice their integrity even before entering the courtroom with their dubious use of marketing techniques that play on rape myths to reinforce disparaging patriarchal narratives about the nature of sexual violence.

Elaine Craig studied the websites of Canadian criminal defence attorneys who advertise legal representation services to individuals accused of sexual offences and found that “a significant subset of lawyers who advertise legal representation services to individuals accused of sexual offences engage in commercial expression that may be inconsistent with the limits and guidelines specified in their professional codes of conduct.” Craig found that the most common themes about the offence of sexual assault on the websites examined in the study were: false allegations of sexual assault are common; sexual assault is prosecuted zealously; and sexual assault complainants are very likely to be believed by police and prosecutors. However, research has proven these contentions to be false. For example, Holly Johnson notes that out of every 1000 sexual assaults in Canada, only 33 are reported to the police; 29 are recorded as a crime; 12 have charges laid; six are prosecuted; and only three lead to conviction. Additionally, according to research from North America, the United Kingdom and Australia, between

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225 Craig, supra note 223 at 258 & 259.
226 Ibid., at 259.
two and eight percent of sexual assault complaints are false.\textsuperscript{228} Craig notes specific example of problematic marketing by lawyers with a view to demonstrating how advertising, which exists within the public domain “contributes to public and legal discourse, and in this context provides an overt sense of the continued problems with the legal system’s response to sexual harm.”\textsuperscript{229}

The website of Calgary lawyer Paul Gracia is a prime example of problematic advertising with regards to sexual assault.\textsuperscript{230} On his website, the link to the offence of ‘sexual and indecent acts’ features an image of a scantily clad woman, apparently unconscious, lying face down and spread eagle on a bed. Beside her, there is what appears to be an empty bottle of wine. The implication here is that women who drink are “asking for it.” Further, the use of this type image trivializes sexual violence and enforces “problematic social attitudes about sexuality and gender.”\textsuperscript{231} Additionally, Gracia promotes the fact of acquittal of clients who appear to be factually guilty. Consider the following example:

\begin{flushright}
\textsuperscript{228} Doolittle, \textit{supra} note 218.
\textsuperscript{229} Craig, \textit{supra} note 223 at 259.
\textsuperscript{230} Gracia Law, \url{http://gracialaw.ca/offences/}. This website was accessed on 21 April 2017. Web content changes. If this is the case, it may be possible to view the website as it was on a particular date using the \textit{Internet Archive: Wayback Machine} at \url{https://web.archive.org/}.
\textsuperscript{231} Craig, \textit{supra} note 223 at 265.
\end{flushright}
**Allegations:** My client was invited into the complainant’s apartment, where he forced himself upon her and allegedly sexually assaulted her in her kitchen. There was full penile penetration from behind, without a condom. The Crown was seeking three years [sic] incarceration.

**Result:** The matter went to trial at the Court of Queen’s Bench, after a preliminary inquiry. The judge found him “Not Guilty,” and acquitted him on the basis of reasonable doubt, stemming from exculpatory DNA evidence. No criminal conviction.232

This advertisement informs the reader that a man who had forced sexual intercourse with a woman was acquitted. It is framed in such a way that the reader is led to believe that Gracia was responsible for the acquittal. It also further trivializes sexual violence and “may be inconsistent with the lawyer’s duty to encourage public respect for the administration of justice,” especially when the acquittal is left with a vague explanation.233 Craig observes many such instances of questionable advertising by Canadian criminal defence attorneys with respect to defending those accused of sexual assault.234 While this dubious legal advertising is not directly related to the trial itself, it is perhaps indicative of the deep-seated misogynistic ideals and practices that many defence lawyers bring to the courtroom, often without conscious malice, but rather as a means to do battle in the adversarial arena.

**The Courtroom**

As previously noted, Statistics Canada’s *General Social Survey* also provides evidence of victims’ reluctance to report because of the courtroom process itself.235 The

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233 Craig, *supra* note 223 at 273.


235 See note 217.
courtroom is the ‘theatre of criminal justice’ in which the ritual of the trial takes place. Retired Ontario Superior Court Justice Marie Corbett describes it as a place of ‘social disease.’ The courtroom is a “space of ritualized hierarchy… [that renders] some participants more visible or more audible than others and facilitates certain hierarchal lines of engagement that distinguish between the learned legal profession and the laity.” In the courtroom, the victim is deprived of her identity. She becomes an object, referred to as ‘the witness’ or the ‘complainant.’ Conversely, the legal professionals in the courtroom retain their identities and are typically addressed as subjects: ‘My Learned Friend,’ My Lord, or ‘Your Honour.” Geitner also distinguishes judges and lawyers from others present in the courtroom: “it emphasizes their role as something set apart from the common throng – as members of a learned profession.” It is thus, that the object (the victim) becomes subordinate to the subjects (judge, Crown, defence) and is forced to submit to the unfamiliar rituals and linguistic scripts of the trial. Indeed, David Tait observes that “trials have been analyzed as ‘degradation rituals,’ ordeals in which victims are re-victimized and silenced.

Elaine Craig notes that “the hierarchal, spatial and aesthetic organization of the courtroom is compounded by the ritualized presentations of imperialism and colonial

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238 Craig, supra note 213 at 218.
239 Ibid., at 213.
power present in every criminal trial proceeding in Canada.”

This can be particularity unnerving for Aboriginal women, who are disproportionally the victims of sexual assault. For example, the Royal Coat of Arms, with its symbols of “the four founding nations of Canada: England, Scotland, France, and Ireland,” and its motto proclaiming colonial rule A Mari Usque Ad Mare (from sea to sea) is prominently displayed in many Canadian courtrooms. The presence of the monarchy is further manifested in the role of the Crown Attorney. Additionally, the display of official judicial portraits that often line the hallways and courtroom walls of Canadian courthouses, serve to express “the qualities and characteristics of the state” as inherently masculine, colonial and Caucasian.

The physical positioning of trial participants may also incite a sense of ‘dis-ease’ in victims who are testifying. The vulnerability associated with this role “is compounded by the inferior position of the complainant relative to other trial participants such as the lawyers and judges.” Judges typically sit behind an elevated bench at the front and center of the courtroom, thereby, allowing the judge to physically ‘look down’ upon the witness as he sits in judgement. When testifying, the victim, alone in the witness box, is at center stage in the ‘theatre of the courtroom.” Judges and lawyers ask questions that

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242 Craig, supra note 213 at 219.
243 Perreault, supra note 217 at 17. “Violent victimization rates were especially high among Aboriginal females. For example, they recorded a sexual assault rate of 115 incidents per 1,000 population, much higher than the rate of 35 per 1,000 recorded by their non-Aboriginal counterparts.”
244 Government of Canada. “The Coat of Arms”, Official Symbols of Canada. [http://canada.pch.gc.ca/eng/1444070816842#a2]. A Mari Usque Ad Mare “From Sea to Sea.” This phrase comes from the Latin translation of psalm 72:8 in the Bible “He shall have dominion also from sea to sea, and from the river unto the ends of the earth.” (Bible: King James Version).
245 Craig, supra note 213 at 219.
246 Ibid.
247 Ibid. Many more of these formal portraits are of men than of women.
248 Ibid., at 224.
249 Ibid., at 218.
she is obliged to answer. All eyes are on her as she reveals the intimate details of her victimization. Courtroom rituals do not allow for her to have a trusted individual beside her for support. She must remain in this incredibly vulnerable physical position until she is given permission to leave the witness stand. Thus, it is evident that there is a profound power differential in the courtroom that crushes that victim’s voice and does not allow her to tell her story in her own words.

**Telling the Story**

Over the past 40 years, researchers have developed a wealth of empirical research that has led to a more comprehensive understanding of the factors that influence the quality and quantity of evidence provided by witnesses to a crime. “One of the primary predictors of completeness and accuracy of eyewitness evidence is the way the witness is questioned…researchers agree that the ‘gold standard’ questions are open-ended questions that encourage the witness to freely recall events.”

(e.g. What happened?) As questions become more specific, the witness moves from providing information from memory (a recall task) to “making judgements about information provided by the interviewer” (a recognition task), and it is this information that can contaminate the witness’s memory. If an interviewer’s questions imply a particular answer, witnesses are more likely to respond with an answer that meets that expectation. This is why open questions

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251 Ibid.
252 Ibid.
(e.g. What happened next?) are preferable to closed (e.g. Were you wearing a bra?) and leading (e.g. You wanted to have sex, didn’t you) questions.  

In addition to the memory benefits of using open-ended questions, “enabling complainants to give comprehensive responses is also likely to improve their experience of the criminal justice process.” Studies suggest that “current courtroom questioning practices are unlikely to elicit the most complete and accurate information from complainants; nor are they likely to give the complainant a voice in the courtroom.” The rituals of courtroom questioning do not allow a victim to tell her story in a way that makes the most sense to her. Her narrative flow is constantly interrupted by counsel’s questions. This can lead to complications in the courtroom, not only with the telling of the story, but also with the ways in which the judge and/or jury comprehend and frame the story to make sense of it. Andrew Taslitz observes that humans think in terms of stories that they are familiar with. Jury research has shown that jurors apply their existing stories to witness testimony to assist them in determining who to believe. According to Taslitz:

Juries convert evidence into familiar stories, filling in gaps in the evidence where needed to craft a coherent tale. Whom jurors believe turns on the consistency of each witness’s testimony with the plausible stories that juries create based upon their preexisting stock. These stock stories come from experience and culture, tales learned from the Bible, children’s tales, television, radio, books, magazines, and movies.


255 Westera et al., supra note 250 at 17.


257 Taslitz, supra note 212 at 7.
Stories create our world of meaning; they are the lens through which we view all of life’s events. Many of these stories tend to channel the political and economic power that our society most values to men and to privilege male perceptions of reality.258

These patriarchal stories are evident in the scripts that are played out in sexual assault cases in the ‘theatre of justice.’ Patriarchal rape tales, “about why and when it happens, and to and by whom; gender-role stories about the sexes’ similarities and differences, motivations and needs, strengths and weaknesses;” stories presenting women as hypersexual, selfish liars are all too common in the courtroom.259 Gendered stories are not the only tales that prevail in sexual assault cases; race and class are also part of the story.

As mentioned previously, Aboriginal women suffer disproportionately high rates of sexual violence in Canada.260 Research has shown that Aboriginal women are “less likely to report a sexual assault committed by a White man if they fear their complaint would not be believed.”261 In those cases resulting in conviction that involve a sexual assault against a Native woman by a Native man, it is impossible to know if the conviction resulted “from the Native complainant being believed more frequently, or whether the Native accused was believed to be more capable of the offence with which he was charged.”262 Nightingale observes “many jurors do not believe any accused person to be innocent until proven guilty, and that an accused from a minority group is seen as even less likely to be innocent than others.”263 As these patriarchal tales of gender, race and class play out in the

258 Ibid., at 7-8.
259 Ibid., at 8.
260 See note 243.
262 Ibid., at 82.
263 Ibid.
courtroom, victim’s voices are constrained; their stories are dissected and distorted; and they are re-victimized by the very system that purports to protect them.

Moreover, defence lawyers often use manipulative tactics to undermine victims’ stories and scrutinize their sexual history in court. David Tanovich observes that many “defence lawyers have no hesitation in leaving their ethics at the courtroom door so as to exploit and perpetrate stereotypes about women and sexual assault in defence of their clients.” This is particularly evident during cross-examination.

“Whack” the Complainant

“The right to cross-examine a witness is considered a fundamental aspect of the adversarial legal process because it allows the evidence presented in the courtroom to be tested…for inaccuracies or inconsistencies that could render it unreliable.” However, in sexual assault cases discrediting the complainant “is a central strategy in the armoury of defence counsel, and this practice takes the form of maligning her behaviour, her dress and her character – all in a sexualized way.” Law Professor David Tanovich calls attention to the phrase “Whack the Complainant hard” that was coined by leading criminal defence lawyer Michael Edelson at a 1988 continuing legal education conference in Ottawa. In reference

265 Westera et al., supra note 250 at 18.
267 Tanovich, supra note 264 at 495. See also Andrew Seymour, “White Knight in a Black Robe”, The Ottawa Citizen (18 October 2010).
to the cross-examination of sexual assault complainants, Edelson advised his colleagues to:

Whack the complainant hard at the preliminary hearing...generally, if you destroy the complainant in a prosecution, you destroy the head. You cut off the head of the Crown’s case and the case is dead...and you’ve got to attack the complainant hard with all you’ve got so that he or she will say: “I’m not coming back in front of 12 good citizens to repeat this bullshit story that I’ve just told the judge.”

Although Edelson met with criticism from women’s groups after his comments, criminal defence attorneys seemingly embraced his advice. More recently, Paul Cooper, a senior member of the Toronto criminal defence bar advised young defence counsel that they must “kill the witness on cross in sexual assault cases.”

Equally troubling is the backlash that ensued after the release of former Supreme Court Justice Claire L’Heureux-Dubé’s 1999 decision in R v Ewanchuk. In Justice L’Heureux-Dubé’s decision, she was critical of the lower court’s judgement and the ways in which the myths surrounding sexual assault continue to influence judicial decisions.

Members of the Criminal Defence Bar quickly came to the defence of Justice McClung of the Alberta Court of Appeal, who had written a letter to the National Post attacking Justice L’Heureux-Dubé the day after his decision was reversed in Ewanchuk.

McClung’s decision had all the elements of a patriarchal tale. For example, he made assertions such as “it must be pointed out that the complainant did not present

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268 Tanovich, supra note 264 at 506. See also Mike Blanchfield, “Column: In Personam”, (January 26, 1996) 15:35 The Lawyer’s Weekly.


herself…in a bonnet and crinolines,”\textsuperscript{272} and “the sum of the evidence indicates that Ewanchuk’s advances to the complainant were far less criminal than hormonal…in a less litigious age going too far in the boyfriend’s car was better dealt with onsite – a well-chosen expletive, a slap in the face or, if necessary, a well-directed knee.”\textsuperscript{273} Constance Backhouse notes that the “strongest invective [against Justice L’Heureux-Dubé’s decision] came from Edward L. Greenspan, a Toronto defence lawyer notorious for his outspoken critiques of feminism.”\textsuperscript{274} Greenspan contributed to the patriarchal tale by proclaiming that “the feminist perspective has hijacked the Supreme Court of Canada,”\textsuperscript{275} “and that Justice L’Heureux-Dubé’s decision was nothing more than “a sermon of feminist theology disguised as a legal opinion.”\textsuperscript{276} As Tanovich points out, Greenspan’s narrative “no doubt sent a powerful message to defence lawyers about the need to keep up the war and to continue their ‘whacking.’”\textsuperscript{277} One of the ways in which defence lawyers attempt to ‘whack’ the complainant is by employing dubious tactics to evade the rules surrounding the admission of sexual history evidence and victims’ personal records held by third parties.

**Dubious Defence Tactics – Sexual History and Third Party Records**

As discussed in Chapter 3, sexual history and sexual reputation evidence was made inadmissible, subject to several exceptions, with the 1983 *Criminal Code* amendments.\textsuperscript{278} However, in *R v Seaboyer*\textsuperscript{279} (1991), the Supreme Court struck down the

\textsuperscript{274} Backhouse, *supra* note 271 at 174.
\textsuperscript{275} Edward L. Greenspan, “Judges Have no Right to be Bullies”, *National Post* (2 March 1999).
\textsuperscript{277} Tanovich, *supra* note 264 at 507.
\textsuperscript{278} 1985 *Criminal Code* R.S.C. 1985, c. C-46 s. 276 (1) (a) (b) (c).
1983 *Criminal Code* amendments restricting sexual history evidence on the grounds that the restrictions were in violation of defendants’ constitutional legal rights.\(^{280}\) In response to public outrage and feminist lobbying following the *Seaboyer* decision, Parliament re-enacted the “rape shield provisions” with the introduction of Bill C-49.\(^{281}\) Despite these legislative reforms, defence counsel continue to use complainants’ sexual history evidence indirectly by relying on “stereotypes held by judges and juries about the credibility of certain ‘kinds’ of women…what does information about a complainant’s work, dress, motherhood or marital status, (dis)ability, attitude and demeanor, or abuse history suggest about her credibility?”\(^{282}\)

For example, Craig notes a case at the Alberta Provincial Court where a complainant was “cross-examined extensively about whether she had smoked marijuana [the evening of the attack], whether she was flirting [with the accused] early that night, the precise number of beer she consumed the day and evening before the assault, and whether she was wearing a bra.”\(^{283}\) The inference here is that the ‘kind’ of woman who smokes drugs, drinks alcohol, flirts with men, and doesn’t wear a bra is the ‘kind’ of woman who not a credible witness, and therefor, she was most likely ‘asking for it.’ The trial judge in this case described the defence counsel’s cross-examination as “unnecessarily confrontational…and concluded that it was getting ‘out of hand’ and that ‘most of all [he] had a sense that she was truly being and felt insulted by the process.’”\(^{284}\)


\(^{282}\) Busby, *supra* note 220 at 284.

\(^{283}\) Craig, *supra* note 213 at 204.

\(^{284}\) *Ibid.*, at 204-205.
The accused was convicted; however, the “Alberta Court of Appeal overturned the conviction and ordered a new trial on the basis that the trial judge’s interventions created the perception of unfairness.”

Busby notes that most defence lawyers thought the ‘rape shield laws’ went too far in restricting their ability to represent clients in sexual assault trials. According to Busby, defence counsel lost little time in developing a tactic to circumvent the sexual history evidence rules: “if they could not intimidate or undermine complainants by dragging their sexual lives into court, they would seek access to any personal records about a complainant that might contain other embarrassing or discrediting information...” In 1995, the Supreme Court of Canada, in *R v O’Connor* established a common-law test for the production and disclosure to the defence of third party records that were not already in the possession of the Crown. This decision precipitated a period of wide open access to complainants’ records on the basis that access was paramount to a defendant’s constitutional right to a fair trial. In response to feminist pressures and mounting evidence of the flood of applications for third party records after *O’Connor*, Parliament enacted Bill C-46, *An Act to Amend the Criminal Code (Production of Records in Sexual Offence Proceedings)* in 1997. The Bill created a substantive legislative framework (encompassed in subsections 278.1-278.9 of the *Criminal Code*)
that was designed to subject applications for production to a higher level of scrutiny.\footnote{Gotell, supra note 289 at 116.}
Within months of its passage, the Bill C-46 amendment was subject to numerous constitutional challenges and was struck down in several controversial lower court decisions.\footnote{Busby, supra note 220 at 291.} In \textit{R v Mills} (1999)\footnote{\textit{R v Mills} [1999] 3 SCR 668.}, the Supreme Court upheld the constitutionality of the Act, thereby upholding the statutory test for access.\footnote{Busby, supra note 220 at 291.} Despite these legislative amendments to the \textit{Criminal Code}, “complainants remain vulnerable to defence practices of sexual history interrogation and confidential records disclosure.”\footnote{Gotell, supra note 280 at 773.}

\textbf{Questionable Questioning Tactics on Cross-Examination}

As David Taslitz observes, “the adversary system is aptly named…the system assumes that trials achieve truth through the clash of equally matched adversaries.”\footnote{Taslitz, supra note 212 at 81.} Thus the courtroom becomes an arena of linguistic combat and the victim is merely a pawn that is subject to brutalization and re-traumatization in the adversarial contest. The form of communication is formal, heavily scripted and rigid… “there are rules regulating who can speak, to whom and when.”\footnote{Craig, supra note 213 at 213.} Defence counsel skilfully manipulate the use of language to achieve their goal of winning the contest. “In putting forward the client’s perspective, the defence lawyer tells a story by leading the complainant through the defendant’s version of events…the complainant’s responses are virtually superfluous to the proceedings; the defence lawyer’s job is to put an alternative story to the factfinders to create reasonable doubt.”\footnote{Westera et al. supra note 250 at 18.}
Defence lawyers often use linguistic tactics to skillfully circumvent the rules prohibiting sexual history evidence. David Taslitz gives the example of a gang rape trial in which the victim, on direct examination, had testified that her assailants had not ejaculated. Consider the following from the cross-examination that ensued:

Defence: Would you explain to me why you think they didn’t?
Victim: I just do.
Defence: Do you know what that feels like?
Victim: Yes.
Defence: To have someone climax inside of you?
Prosecutor: Objection, your honour.
Judge: Objection sustained.
Defence: Your Honour, I’m not delving into this woman’s past sexual history.
Prosecutor: Objection to this speech your Honour.
Judge: The Court understands your reason, Counsel, and objection sustained.299

In this example, “although the objection was sustained, defence’s counsel’s questions sought to imply that the victim had an active sex life without directly so asking…by indirection, therefore, counsel sought a way around the rape shield laws.”300 Despite the sustained objection, the seed was planted in the collective mind of the jury that the victim was promiscuous as she knew what it felt like to have someone ejaculate inside her.

In another example, Taslitz uses the transcript from the William Kennedy rape trial in the United States to demonstrate how the defence counsel skillfully employs language to imply the fact that victim had consented:

Defence: Now you said that after you left the - uh – Kennedy home that you felt dirty. Is that correct?
Victim: I felt dirty before I left the home.
Defence: When you drove home you still had the same panties on.
Victim: Yes sir.
Defence: When you got to your house, you stayed there for several hours without removing those panties.

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299 Taslitz, supra note 212 at 85.
300 Ibid., at 85.
Victim: I’m not quite sure how long I was at my house, but I, but I – the underwear was still on me.
Defence: It was at least a couple of hours, wasn’t it?
Victim: I’m not sure.
Defence: And when you went to your mother’s house, you kept those same panties on, didn’t you?
Victim: Yes.
Defence: And when you went from your mother’s house to go pick up Johnny Butler, you still wore the same panties.
Victim: I was pretty terrorized, I – I – I’d never, I just, it’s like you’re – you’re just functioning, and – and to be at the sheriff’s office? And I was just, just…
Defence: Even though you – you – felt dirty, you felt awful, and what have you, you kept those same panties – on is that what you said, Miss Bowman?
Victim: I-I couldn’t think to, I, I didn’t know what to think.\(^\text{301}\)

Whether the victim left her panties on after the assault has nothing to do with consent. However, defence cleverly manipulates the cross-examination to imply that how long the victim left her panties on was relevant to whether she consented. The implication is that, had she not consented, she would have removed her panties at the first possible opportunity to rid herself of the source of her ‘pollution.’ The use of the word ‘panties’, rather than the more gender neutral ‘underwear’ is also significant. The word ‘panties’ suggests an item of clothing that is specifically female, personal, and intimate - an item of clothing that guards the female genitalia. Defence also insinuates that because she did not remove her panties as soon as possible after that assault, her source of ‘dirtiness’ did not come from being raped, but rather from her own shame at having had casual sex with a stranger.

Defence’s control over how long a victim may speak means that the lawyer does most of the talking.\(^\text{302}\) The lawyer’s domination of linguistic space aids his credibility and allows him to construct vivid detailed images of what he wants the judge/jury to

\(^{301}\text{Ibid.}, \text{at 82-83.}\)
\(^{302}\text{Ibid.}, \text{at 87.}\)
believe.\footnote{Ibid., at 87-88.} Additionally, the use of leading questions and insistence on particular answers, a common practice for defence counsel, allows the lawyer to “exert significant control over a sexual assault complainant’s testimony…there is very little opportunity for…[her] to seek clarification, express concerns, or contribute to the direction of the exchange.”\footnote{Craig, supra note 213 at 214.} Furthermore, forced choice questions – those that require a yes or no answer – limit the victim’s independent voice.\footnote{Taslitz, supra note 212 at 90.} In a Canadian practice guide for lawyers defending sexual assault cases, Michelle Fuerst advises defence counsel to “use leading questions to increase the likelihood of favourable responses” when questioning child witnesses.\footnote{Michelle K. Fuerst, Defending Sexual Offence Cases, 2nd ed. (Scarborough, ON: Carswell, 2000) at 49.} These ‘favourable responses’ that the defence seeks can serve to “distort the accuracy of the complainant’s testimony…[and] it can also be degrading for them.”\footnote{Craig, supra note 213 at 214.}

**Conclusion**

In this chapter, I have called attention to the institutionalized practices manifested through courtroom rituals that make the courtroom such a frightening place for sexual assault victims. I have also demonstrated the ways in which the linguistic tactics of the defence serve to undermine the confidence and credibility of victims of sexual assault. In order to access the purported protection of the justice system “a sexual assault complainant must recount the details of acts that may be experienced as intensely personal, almost unspeakable, while at the same time following a scripted form of dialogue which confines them to a particular highly schematized role.”\footnote{Ibid., at 215.} As Elaine
Craig points out the legal processes and courtroom practices used to respond to sexual assault, may in fact “reify the very social dynamics that produce both sexual violence itself and the impact of this gendered harm on its subjects.” When complainants seek protection from the criminal justice system, they become powerless in a system that continues their victimization through the application of patriarchal scripts and the ritualized undoing of the victim. It is evident that the application of the law continues to subordinate women to patriarchal discourse surrounding women’s sexuality. As the adversarial system necessitates the often-demeaning linguistic combat that occurs in the arena of the courtroom, we must question its suitability for trying sexual assault cases.

\footnote{Ibid., at 242.}
Chapter 5: The Way Forward

It is evident that, despite the many positive reforms in the laws surrounding sexual assault that have taken place in Canada over the past three and a half decades, many problems with the legal response to sexual assault remain. Foremost among these problems is the myriad of myths and stereotypes about sexual assault victims that are deeply ingrained in Western society, and thereby in the justice system. The justice system, which includes police, defence, prosecutors and the courts, like society in general, is affected by victim-blaming myths about sexual assault and those who work in it may regard complainants with skepticism, disbelief, or with victim-blaming attitudes. Indeed, many problems with the legal response to sexual assault are deeply rooted in these underlying misogynistic ideals that have plagued women since long before the beginnings of today’s major world religions.\(^{310}\) These ideals can lurk subconsciously in the minds of both men and women, and often emerge when confronted with notions of women’s sexuality.

The legal system – from the police through to the courts – should play a major role in dispelling these myths and stereotypes. Comments such as those made by Justice McClung in *R v Ewanchuk* – “it must be pointed out that the complainant did not present herself to Ewanchuk or enter his trailer in a bonnet and crinolines”\(^{311}\) – serve not only to reinforce rape myths, but also to shift the blame for an assault onto the victim and deny women fair treatment in sexual assault cases. As noted in Chapter Two, many rape

\(^{310}\) For a history on the origins of misogynistic thought, see Holland, *Misogyny: The World’s Oldest Prejudice* at supra note 8.

\(^{311}\) *R v Ewanchuk* supra note 44 at 4.
myths have been recognized and denounced by the Supreme Court of Canada, but despite this denunciation, the myths continue to infiltrate the legal system.

In a recent interview, Professor Holly Johnson observed that “we have an accumulating body of evidence that shows that we are doing an abysmal job in dealing with sexual violence in the law. Police very often do not lay charges. They hold women accountable, and not the perpetrators. Only half of those [cases] that go to court result in a conviction.”

Johnson’s comments were in response to the Statistics Canada’s 2014 General Social Survey which revealed that “self-reported sexual assault rates have remained the same, despite a decrease in other types of violent and non-violent crime.”

It is obvious that much more work needs to be done to improve Canadian sexual assault law at all levels of the justice system including the police, as they are the entry point for sexual assault complaints into the justice system.

**Police Handling of Sexual Assault Complaints**

A report published by the *Globe and Mail* in February 2017 following a 20-month investigation revealed that one out of every five sexual assault allegations in Canada is dismissed by the police as being baseless and thus is categorized as “unfounded.”

This report has sparked a reaction from numerous police forces nationwide who are now reviewing their practices with regards to sexual assault complaints. For example, Ontario’s London Police Service is now conducting “a sweeping review of how its officers handle sexual assault allegations, an audit that will include probing hundreds of

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312 See *supra* note 22
314 *Ibid.* See also *supra* note 217.
315 Doolittle *supra* note 117.
cases dating back to 2010 that were dismissed as unfounded.”\footnote{Robyn Doolittle, “Ontario’s London Police to Launch Review into Handling of Sex-Assault Cases”, \textit{The Globe and Mail} (February 5, 2017).} It is too soon to tell if these reviews will have a positive effect on police practices involving sexual assault complaints; however, it is notable that some police forces are adopting the “Philadelphia Model” as a means to improve the problems highlighted in \textit{The Globe and Mail} exposé.\footnote{Joe Pavia, “What is the ‘Philadelphia Model’ used to Review Sex Assaults?” \textit{CBC News} (April 23, 2017). http://www.cbc.ca/news/canada/kitchener-waterloo/unfounded-sex-assaults-waterloo-task-force-carol-tracy-philadelphia-1.4080309, \textit{CBC News} “Calgary Police to Adopt Philadelphia Model of Reviewing Sexual Assault Cases Deemed Unfounded”. (18 May 2017). \url{http://www.cbc.ca/news/canada/calgary/calgary-police-philadelphia-model-unfounded-sexual-assault-cases-1.4121982}.} The Philadelphia Model was created and implemented by the Women’s Law Project\footnote{Women’s Law Project. \url{http://www.womenslawproject.org/sexual-violence/}} in 2000, following an investigative report by the \textit{Philadelphia Inquirer} that revealed numerous problems with the way the Philadelphia Police were handling sexual assault complaints. Under the model, each year a team from the woman’s Law Project joins a team of advocates at the police station in Philadelphia to review all unfounded rape complaints along with a random sample of open cases. They “assess the thoroughness and outcome of each investigation, raise questions and provide feedback.”\footnote{Ibid.} This case review method, now recognized as a best practice in the United States, certainly has the potential to improve police handling of sexual assault complaints in Canada at the entry level, but what can be done to improve the court’s handling of these cases once they come to trial?

\textbf{Specialized Courts for Sexual Assault?}

An idea put forward by advocates of sexual assault law reform, particularly in the wake of the 2016 conclusion of the Ghomeshi trail, was that of the creation of specialized
sexual-assault courts. Specialized courts are not new in Canada. For example, many jurisdictions have specialized domestic violence courts. There are also specialized courts for First Nations, specialized courts for offenders with long term drug addictions, and specialized courts for those with mental health issues.\textsuperscript{320} These courts are presided over by judges who have specialized knowledge in their respective areas.

As observed in the preceding chapters, sexual assault law is complicated. For example, judges with little expertise in sexual assault law, often allow the production of third-party records without a thorough review of the factors enumerated in s.278.5 of the Criminal Code. For example, in the case of \textit{R v M (H.A.)} (mentioned in chapter 3) the judge, being disinclined to sort through the various material held that “it is my view that the file, as a whole, should be produced.”\textsuperscript{321} Judges have also disqualified themselves from cases after reviewing such records, noting that they could not disabuse themselves of the knowledge that they had gained when reviewing the records.\textsuperscript{322} Perhaps a partial solution is a specialized court system in which specific judges who will not be hearing the case at hand, review third party records in order to decide what shall be produced.

Lawyer, Clodage O’Connell notes another problem with the current system: “The accused in a sexual-assault trial has the right to a government-funded lawyer if they cannot afford to retain counsel. Complainants do not...if they do pay to retain a lawyer, their lawyer has no standing in court. Their lawyer can brief them on what to expect when they are put on the stand at trial, but once in the courtroom, the


\textsuperscript{321} \textit{R v M (H.A.)} \textit{supra} note 203.

\textsuperscript{322} See \textit{R v Hayward, supra} note 206 and \textit{R v Balabuck, supra} note 207.
complainant is very much on their own.” In some cases, the Crown attorney takes
the time to brief sexual assault complainants on what to expect in the courtroom;
however, this is not the norm. More often, Crown lawyers have very little time
available to provide complainants with any type of preparation or support. It has been
suggested that specialized sexual assault courts would provide complainants with legal
assistance to help guide and support them through the trial process.

Additionally, specialized courts would provide a stronger possibility of having
court personnel that are experienced in the unique characteristics of sexual violence
against women and the intricacies of sexual assault law, thereby, allowing for the more
sensitive and efficient processing of sexual assault cases. This would in turn reduce
the burden on both victims and the judicial system. Specialized courts also have the
potential to better address the needs of sexual assault complainants by ensuring easily
accessible psychosocial support to avoid re-traumatization. Additionally, these courts
could conceivable increase reliability and consistency by ensuring that judges and
prosecutors have sufficient training and broad experience.

Currently, the best known specialized court dealing with sexual assault is that
used in South Africa. In 2005 there were more than 60 specialist courts in South
Africa hearing sexual offence cases. South Africa has developed a blueprint that “sets
out the essential requirements for the Sexual Offences Courts and covers both personnel

323 O’Connell, supra note 320.
324 See Ministerial Advisory Task Team on the Adjudication of Sexual Offence Matters, Report on the Re-
Establishment of Sexual Offences Courts (Department of Justice and Constitutional Development: Republic
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requirements and equipment and location requirements.” 325 The South African courts were designed to tackle low rates of convictions for sexual offences and to “mitigate the hardships encountered by complainants in the ordinary courts…. they have been successful in both respects.” 326 This is certainly an area worthy of exploration in Canada.

While Canada has no experience with specialized courts for sexual offences, there is a body of knowledge from the use of specialized courts for other offences from which it may draw. We can also draw from the South African blueprint and lessons learned. The South African Department of Justice and Constitutional Development has published a detailed report on the establishment of sexual offence courts that may be a good starting point for exploring the viability of specialized sexual assault courts in Canada. 327 Whether or not specialized courts are created, it is worthwhile to examine the court procedures that have been implemented in other countries in hopes of finding potential methods for improving the legal response to sexual assault in Canada.

326 Ibid.
327 See supra note 324
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