

The *Charter* and Criminal Law:

Violence against Women: Trading Equality for Autonomy?

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Introduction

Crimes of sexual violence are gendered crimes. They are gendered in respect of the population of offenders: almost all sexual assaults against adult victims are committed by men; about 85-90% of sexual crimes against children are committed by men as well. Most victims of sexual assault are women and girls.² This is true, more or less, in almost every country on earth.³

These demographics play a role in shaping what it means to live as a woman. The fear of sexual assault constrains women's lives in a way that it does not for most men. Women are warned not to do things that make them targets: walk alone, walk at night, wear the wrong clothes, get drunk.⁴ Women modify their behaviour to avoid sexual assault; they are blamed (and blame themselves) when they fail to behave responsibly.⁵ This advice is mostly futile because, most of the time, the assailant is someone that the woman knows and often someone that she trusts.

Very few Canadian women report sexual assaults to the police.⁶ Stays of proceedings and acquittals are more common for sexual assaults than for other offences.⁷ Holly Johnson has estimated that the ultimate accountability for sexual assaults in Canada is around 0.3%⁸ Women know that their words, their actions, their behaviours and sometimes their sexual histories will be scrutinized by the judge and the jury.

Sexual assault both reflects and reinforces women's social inequality to men. The act of committing sexual assault is not simply a crime that has been ascribed randomly to men as a sex. It is a reflection of the normalization of male sexual aggression – the idea that sex is something that men

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² A very good, if dated summary of the statistics and their limitations can be found online from the Canadian Research Institute for the Advancement of Women at <http://www.criaw-icref.ca/ViolenceagainstWomenandGirls> (accessed September 11, 2012). The most recent Statistics Canada data is collected in Shannon Brennan and Andrea Taylor-Butts, *Sexual Assault in Canada 2004 and 2007*, (Ottawa: Minister of Industry, 2008), available online at <http://www.statcan.gc.ca/pub/85f0033m/85f0033m2008019-eng.pdf>

³ Charlotte Watts and Cathy Zimmerman, "Violence Against Women: Global Scope and Magnitude" (2002) 359 *The Lancet* 1232-1237.

⁴ Andrea Dworkin, "I Want a 24-Hour Truce in Which there is No Rape" in *Letters From a War Zone* (Brooklyn: Lawrence Hill Books, 1993) 163-171

⁵ Lise Gotell, "Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women," (2008) 41.4 *Akron Law Review* symposium issue: "Rape, Affirmative Consent, and Sexual Autonomy," 865-888.

⁶ Brennan and Taylor-Butts, *supra* note 2 (estimating 10% of sexual assaults are reported to police).

⁷ *Ibid.*

⁸ H. Johnson, "Limits of a criminal justice response: Trends in police and court processing of sexual assault", *Sexual Assault Law, Practice and Activism in a Post-Jane Doe Era*, E. Sheehy, ed. (forthcoming 2012), available online at <http://www.ruor.uottawa.ca/fr/handle/10393/19876>

should seek out and impose on women, a sexuality that is aroused by conquest rather than mutuality. The pattern is at once horrible and banal; if 1 in 4 university-aged women report experiencing sexual assault,⁹ the number of offenders is not small. This is not exactly to men's benefit either – the accepted gender roles for men can be stultifying; the pornography peddled to boys and young men generates enormous profits for corporate interests while encouraging men to find pleasure in the objectification of women.¹⁰

The Supreme Court of Canada in the 1990s recognized that sexual assault law, and the criminal trial process in such cases, must be understood through the lens of the right to sex equality guaranteed by s. 15(1) of the *Charter*. Led by Justice L'Heureux-Dube,¹¹ but ultimately joined by other members of the court, the Supreme Court issued a series of decisions affirming that consent is to be measured according to the complainant's state of mind;¹² that a mistaken belief in consent requires evidence that consent was affirmatively communicated;¹³ that restrictions could be placed on access to private records in the hands of third parties;¹⁴ and that the right to make full answer and defence does not require abuse of the complainant or the reliance on myths and stereotypes about sexual assault.¹⁵ These decisions reflected and reinforced legislative amendments designed to counteract historical myths and stereotypes about women who complain of sexual assault.¹⁶

These were important jurisprudential advances that in turn contributed to shifting social understandings about sexual violence.¹⁷ In this paper, I consider the most recent substantive decision of the Supreme Court of Canada in the area of sexual assault, *R. v. J.A.*,¹⁸ to assess whether it continues to reflect the same commitment to understanding sexual assault as a practice of sex inequality. I argue that two forces, in particular, threaten to undermine this understanding. The first is the elision of women's equality with individual autonomy, and the concomitant impoverishment of the concept of autonomy into "choice." The second is the disappearance of gendered violence through its normalization.

⁹ *Ibid.* at 2-3.

¹⁰ Robert Jensen, *Getting Off: Pornography and the End of Masculinity* (Cambridge, South End Press, 2007) 79-95

¹¹ *R. v. Park* [1995] 2 S.C.R. 836 (L'Heureux-Dube J. concurring); *R. v. Seaboyer*, [1991] 2 S.C.R. 577 (L'Heureux-Dube J. dissenting)

¹² *R. v. Ewanchuk*, [1999] 1 S.C.R. 330

¹³ *Ibid.*

¹⁴ *R. v. Mills*, [1999] 3 S.C.R. 668

¹⁵ *R. v. Darrach*, [2000] 2 S.C.R. 443

¹⁶ Most notably these include the 1992 amendments incorporating a statutory definition of consent into the *Criminal Code*, the itemization of situations in which consent was not present, and the addition of a reasonable steps provision to the doctrine of mistaken belief in consent.

¹⁷ S. McIntyre, C. Boyle, L. Lakeman and E. Sheehy, "Tracking and Resisting Backlash Against Equality Gains in Sexual Assault Law" (2000) 20 *Canadian Women Studies* 3.

¹⁸ [2011] 2 S.C.R. 440