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Enforcing the Sexual Assault Laws: An Agenda for Action

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> The sex-class system cannot be undone when those whom it exploits and humiliates are unable to face it for what it is, for what is takes from them, for what it does to them. Feminism requires precisely what misogyny destroys in women: unimpeachable bravery in confronting male power.
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> (Andrea Dworkin, "Anti-feminism," 1983)

Canadian law pertaining to sexual offences was amended effective January 4, 1983. The terms "rape" and "indecent assault" have been replaced by "sexual assault," "aggravated sexual assault" and "sexual assault with a weapon, threats to a third party, or causing bodily harm." The requirements of corroboration and recent complaint have been eliminated. Persons of either sex may be charged with sexual assault of a spouse, and spouses are now competent and compellable witnesses against one another in all sexual assault cases. If a mistaken belief that the victim consented is relied on as a defence by the accused, and there is sufficient evidence to support such a defence, the trier of fact, judge or jury, is to consider whether there are "reasonable" grounds for the belief. This provision merely codifies existing law.

Whether the pattern of enforcement of the new sexual assault provisions will be significantly different from that of the previous provisions dealing with rape and indecent assault is an open question. If the reasons for decisions not to enforce the law remain the same as those relied on in decisions with respect to the previous prohibitions against rape, it will be necessary to conclude that the amendments have made no difference whatsoever to the disposition of the average case.

The social definition of sexual assault has a key role in each of the discretionary pre-trial decisions. The victim, key witnesses, the investigating officer and the prosecutor must all define the alleged offence as a "sexual assault" if there is to be a prosecution. Situations that are regarded as at all ambiguous under any of the social definitions applied by each decision-maker in turn are often not reported, are disposed of as "unfounded," or are rejected for prosecution. Sexual assault by the proverbial stranger who leaps out of the bushes with a weapon is therefore far more apt to proceed to trial than sexual assault by an acquaintance or family member. As well, each decision-maker is very strongly influenced by what she or he predicts will be the assessment of the case at subsequent decision-making points in the criminal justice process.[1] The bias that favours socially and economically-advantaged accused persons in the criminal jutice process in general is relevant here. Strong systemic pressures exist not to proceed with a case that may be difficult to win or that is apt to require a major investment of time and resources to prosecute. Each of these factors has most influence in low visibility decisions, decisions for which there is no effective public accountability. Because victims of assault are encouraged to conceal their identities and seek confidentiality, especially in cases involving assault other than by a stranger, most enforcement decisions are of low visibility. Systematic criticism of the "policy" underlying the exercise of discretionary power in enforcement decisions is all but impossible.[2]

To achieve equal enforcement of sexual assault laws, priority must be given to eliminating the present gulf between the legal and social definitions of sexual assault. As long as a distinction exists, the complainant's effective *legal* right to freedom from interference with his or her sexual integrity ("right" understood as an entitlement enforceable in a court of criminal jurisdiction) will continue to be defined only as a by-product of the *social* definition of sexual assault. Non-consent by the victim will remain insufficient to define the transaction as "assaultive" for the purposes of enforcement of the law as long as the assailant's conduct remains within the parameters of what those with discretionary power to invoke the law regard as "normal" sexual behaviour.

The first item on the agenda is therefore to alter the *social* definition of "sexual assault." The experience of persons who have been sexually assaulted, both those who filed a complaint and those who did not, will be of critical importance in the effort to change social attitudes. Victims of sexual assault have sought anonymity in a society that remains ready to blame or disbelieve the victim while excusing the assailant. Threat of stigma has proven to be very effective to silence victims. The silence must end. Silence is destructive of the mental health and emotional well-being of individual victims who, to maintain it, must continually pretend that their life experience and their life-world is other than they know it to be. Silence isolates victims from one another. It interferes with the development of a shared analysis of sexual assault that differs from that reflected in dominant social attitudes which invite each victim to assume responsibility

for having "caused" or "provoked" the assault. And it conceals the nature and magnitude of the problem of sexual assault from the community. Silence only serves to maintain the *status quo*.

Significant problems exist at present in the exercise of discretionary decision-making power by police and prosecutors. In designing a new approach to the use of these powers, lessons can be drawn from experience gained in other areas of law enforcement involving the enforcement of laws that incorporate norms other than those of the group with dominant social power.

The "corruption" issue is relevant as well. In the case of sexual assault, non-enforcement or class-biased enforcement of the law directly serve the individual self interest of those with power to enforce the law by preserving the myths that serve their own interests. There is considerable scope with respect to offences of sexual assault for both monetary payoffs for non-enforcement or the exchange of favours between members of the same social group. The low visibility of offences of sexual assault in all but the most flagrant cases provides a strong inducement to corruption.

With respect to the issues of legitimacy and corruption it is clear that a continuation of the latitude currently enjoyed by police and prosecutors in their exercise of discretionary powers will not lead to equal enforcement of the prohibition against sexual assault. To continue the current approach while purporting to enforce prohibitions against sexual assault is as ineffective as appointing Al Capone's blood brother to the local crime commission for the purpose of stamping out racketeering.

The following measures are therefore suggested. Police and prosecutors who deal with sexual assault cases should be subjected to psychological testing prior to appointment to screen out those individuals who are particularly hostile towards either women or minority groups. Special training should be provided to ensure that individuals selected have the knowledge and interpersonal skills required to perform their work effectively. Guidelines for the laying of charges and selection of cases for prosecution should be established in consultation with the community. Review mechanisms should be established to ensure that: 1) guidelines are followed in the absence of reasonable justification in particular cases; and 2) guidelines are periodically reviewed and revised. Job placement and work assignments should be made with a view to minimizing the problem of personal conflict of interest. Individuals should not be assigned to communities or jurisdictions where they have strong personal ties with a large number of individuals in the community. The performance criteria for police and prosecutors working with sexual assault cases should no longer emphasize the charge/conviction ratio because it invites informal dismissal of many cases that should be prosecuted. The practices of plea bargaining and diversion should be suspended with respect to offences of sexual assault for the foreseeable future as both of these practices interfere with the rapid development of judicially supervised sentencing policy and the clarification by the courts of the definition of sexual assault.

A sub-unit of the office of the special prosecutor could function as co-ordinator of innovation in the response of the criminal justice system as a whole to the sexual offender. The office of the prosecutor is naturally placed to perform such a role in that the prosecutor relies on police investigation and preparation of evidence, and must prepare recommendations on sentencing in individual cases. In an integrated system there would be information feedback loops from corrections and community parole and probation offices, and between police and prosecutors with respect to case preparation, expert evidence, and the adequacy of community intervention programs. Rational innovation is impossible without information based on prior experience.

Resources presently available in the correctional system for sex offenders are inadequate. Full enforcement of the sexual assault laws, which of course implies elimination of the existing class bias reflected in conviction rates, should generate considerable political pressure for allocation of more resources for the rehabilitation of sex offenders. Attitudes and social skills appropriate to a society in which sexual assault may be the norm need to be replaced with alternate attitudes and skills.

In the interim, pending implementation of a more effective approach to prosecution of sexual assault cases along the lines proposed above, it is suggested that individual victims give serious consideration to initiation of private prosecutions in those cases where, despite an apparently strong case, their complaint has been designated "unfounded." However, this approach will be available only to those victims who are fortunate enough to have the financial means to retain private counsel. For this reason it is suggested that special funds be established for the purpose of soliciting donations to meet the expenses of selected private prosecutions. Responsibility for administration of such funds should be undertaken by groups independent of government.

A further legal remedy would be a Charter application against provincial attorney generals, based on the first clause of Section 7 and the equal benefit and protection clause of Section 15 of the Charter, and made with reference to complaints of sexual assault rejected for prosecution as "unfounded" in the province in the last year (or similar period of time). The applicants named could include both victims and potential victims living in each community affected. All cases referred to should be screened with care to ensure that there is no question but that each case is sound in law. A motion for dismissal of the application on the ground that private prosecution is available to individual complainants can be met by the observation that this approach: 1) ignores the responsibility of government under Sections 7 and 15 of the Charter with respect to *potential* victims of persons known to be sex offenders and 2) is disingenuous precisely because the stress and the cost of private prosecution pose unsurmountable barriers for many victims.

And finally, political action may be taken in the form of petitions, lobbying and demonstrations. Much of the potential power of these approaches will be lost if victims from all sectors of society are not prepared to identify themselves as victims and participate in these forms of action.

Footnotes

1. See L.W. Potts, "The Police and Determinants of Rape Prosecution: Decision-Making in a Nearly Decompasable System," *Police Studies* 6, No. 4 (1983/84), pp. 37-49; and C.E. Silverberg, "Police Processing of Rape Complaints: Legal Constraint or Extra-Legal Bias," M.A. thesis, University of Toronto, 1983.
2. Joseph Goldstein, "Police Discretion not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice," Yale Law Journal 69 (1960), p. 543.

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