FARCE OR TRAGEDY?: JUDICIAL BACKLASH AND JUSTICE MCCLUNG

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Lately I have been thinking about backlash.[1] I confess that within my interior world the term backlash has the same connotations as earthquake and cyclone, conjuring up images of a natural force smashing through villages. From work which theorizes backlash, I have learned backlash is "itself a cultural construction — a moment in the long history of the relationship between personal identity and civil rights — the interwoven fabric of economic production and social reproduction."[2] Yet images of a naturally occurring aberration of diabolical strength persist. In recent times, a general perception has taken hold within feminist and social activist communities that we are living through a period of extensive and prolonged backlash against social justice and equality in Canada. In this essay, my focus is one particular manifestation of the wider phenomenon, namely the backlash within judicial legal discourse against feminist legal analysis and argument. The eruption of anger earlier this year on the part of Justice McClung of the Alberta Court of Appeal against Justice L'Heureux-Dubé of the Supreme Court of Canada provides a flashpoint.

The story of Justice McClung's outburst takes the shape of a three act drama. The backdrop is provided in the first act by the litigation in *R.* v. *Ewanchuk*,[3] a controversial sexual assault prosecution in which, it seemed, feminist legal analysis was deployed to challenge the imbrication of criminal law, conservative sexual ideologies, and power. The main action clearly belongs to the second act which revolves around Justice McClung's bitter criticism in a letter to the press[4] of Justice L'Heureux-Dubé's judgment in *Ewanchuk*. The third act concerns a series of counter-claims of bias against both Justice McClung and Justice L'Heureux-Dubé before the Canadian Judicial Council. However, the climax of the story as it is presented in the media remains Justice McClung's intemperate letter. The other parts simply build and then fade away from that astonishing moment of popular attention to judicial decisionmaking.

Backlash, as others have pointed out, shifts our attention to the resistance to change and away from the change itself.[5] Part of what is lost in this realignment of public consciousness is an understanding of the fragility and tentativeness of the supposed change.[6] Indeed, Justice McClung's outburst obscured the tenuous status of feminist analysis in legal discourse more deftly, perhaps, than other instances of backlash for, at the end of the day, it appeared he failed to capture either popular or legal support for his views. Certainly, after tracing the story of Justice McClung's letter through to the eventual reprimand from the Canadian Judicial Council, one might conclude that this particular battle was won by those struggling to gain legitimacy for feminist arguments and perspectives in sexual assault trials rather than by those who, like Justice McClung, are affronted by feminist legal interventions. The *Ewanchuk* case itself, as well as the decision of the

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[2] Ann Oakley and Juliet Mitchell, "Introduction" in Ann Oakley and Juliet Mitchell, eds., *Who's Afraid of Feminism. Seeing through the Backlash* (London: Hamish Hamilton 1997).

[3] [1999] 1 S.C.R. 330 [hereinafter *Ewanchuk*].

[4] *National Post* (February 26, 1999) A19.

[5] Olena Hankivsky, *Resistance to Change: Exploring the Dynamics of Backlash* (London, Ontario: Centre for Research on Violence Against Women and Children, 1996) at 6; Janice Newson, "'Backlash' against Feminism: A Disempowering Metaphor" (1991) 20 Resources for Feminist Research 93 at 93. Newson argues for eliminating the word 'backlash' altogether. *Ibid.*

[6] Hankivsky *supra* note 5; Ann Oakley, "A Brief History of Gender" in Oakley and Mitchell, eds., *supra* note 2, 29 at 54.

Canadian Judicial Council must be drawn more fully into the narrative in order to provide a different sense of where the drama lies.

The appeal in *Ewanchuk* centered on the trial judge's acquittal of an accused charged with sexual assault on the grounds that the complainant implicitly consented to the sexual activity in question. Justice McClung, in reasons for the majority at the Alberta Court of Appeal,[7] upheld the acquittal only to find himself unanimously overturned by the Supreme Court of Canada. The Supreme Court of Canada was united in result but not in approach. Justice Major wrote a set of reasons, joined by five of his colleagues, which elaborated on the ways in which the lower courts had misconstrued the doctrinal requirements regarding consent. Justice L'Heureux-Dubé, for herself and Justice Gonthier, wrote separate reasons in which she asserted that although she agreed generally with Justice Major: "[t]his case is not about consent since none was given. It is about myths and stereotypes."[8] Justice McLachlin endorsed both approaches in very short reasons, stating her agreement with Justice Major's analysis and with Justice L'Heureux-Dubé's argument "that stereotypical assumptions lie at the heart of what went wrong in this case."[9]

The encounter in *Ewanchuk* took place at a job interview in Ewanchuk's trailer in an Edmonton shopping centre parking lot in June.[10] The complainant, a 17 year old woman, became frightened when Ewanchuk, a man nearly twice her age and more than double her size, shut the trailer door which she had deliberately left open while they talked inside. Ewanchuk proceeded to make sexual advances; the complainant repeatedly asked him to stop. At each objection, Ewanchuk halted his activity briefly. As Ewanchuk's conduct intensified — ending with Ewanchuk lying on top of the complainant, grinding his pelvis against her, taking out his penis, and moving his hands inside her shorts — the complainant became frightened and immobile. She confessed to being worried that Ewanchuk would become violent if she showed vulnerability or refused to cooperate. Although she had tears in her eyes and, when asked by Ewanchuk directly, admitted that she was afraid, she tried to appear confident and said "no" at three separate points and "just please stop" at another. The scene ended with Ewanchuk desisting after the final "no," handing her $100 "for the massage," referring to the close friendly relations he had with another female employee, and directing her to tell no one about what had happened.

Justice Major for the majority directed his analysis at the legal errors in the trial judge's decision, in particular the baffling contradiction between the judge finding credible the complainant's testimony that she was fearful and that she expressly stated her lack of consent to Ewanchuk, and the judge concluding that the complainant implicitly consented to sex with Ewanchuk — in short, his finding that a clearly stated "no" implies "yes." Both the trial judge and Justice McClung for the majority at the Court of Appeal invoked the doctrine of implied consent to explain this contradiction. The trial judge went astray, Justice Major explained, because he overlooked the differences in the test of consent at the *actus reus* and the *mens rea* stages of analysis. Justice Major drew fine lines between subjective and objective tests, unambiguous mental states and ambiguous conduct, and reasonable and unreasonable mistakes. Importantly, he made it clear that nowhere in the multi-step analysis of a sexual assault trial is there room for the so-called doctrine of implied consent.[11] Justice Major's stance throughout his analysis was technical and economical, going only as far as required to correct the doctrinal errors in the courts below.

Justice L'Heureux-Dubé's concurring reasons placed the case on a very different footing. She opened with the assertion that the pervasiveness of violence against women is "as much a matter of equality as it is an offence against human dignity and a violation of human rights."[12] Both domestic and international human rights instruments, she argued, provide the normative context of the *Criminal Code* provisions on sexual assault.[13] For support, she referred to the explicit language in the preamble to the 1992 amendments linking Parliament's concern about sexual violence against women and children to the liberty, security, and equality rights of the Charter.[14] Only after having firmly characterized the case as one about women and children's human rights, did Justice L'Heureux-Dubé turn to the question of how the courts below went

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[7] *R* v. *Ewanchuk (S.B.)* (1998), 212 A.R. 81 (C.A.) [hereinafter *Ewanchuk*].

[8] *Ewanchuk*, *supra* note 3 at 369.

[9] *Ibid.* at 379.

[10] This summary of the facts is drawn from Justice Major's reasons, *ibid.* at 339-43 and from Fraser C.J.A.'s dissenting reasons at the Court of Appeal, *Ewanchuk*, *supra* note 7 at 92-95.

[11] *Ibid.* at 346-61.

[12] *Ibid.* at 362.

[13] *Ibid.* at 363-65.

[14] *Ibid.*

astray. The error of law, she wrote, is not so much the misapplication of legal rules regarding consent but Justice McClung's reliance on sexist myths and stereotypes which portray women who say no to sexual advances as "really saying 'yes,' 'try again,' or 'persuade me'"[15] and as "walking around this country in a state of consent to sexual activity."[16] In other words, Justice McClung's portrayal of women in his reasons fundamentally undermined women's constitutional and international entitlements to the dignity, respect, and protection accorded to individuals in liberal societies.

Justice L'Heureux-Dubé emphasized that Justice McClung's approval of the trial judge's conclusion that "no" means "yes" was explicitly rooted in mythical and denigrating assumptions about female sexuality and moral character. She quoted the opening statement in Justice McClung's reasons that "it must be pointed out that the complainant did not present herself to Ewanchuk or enter his trailer in a bonnet and crinolines;"[17] his observations, as if relevant to the issue of consent, that "she was the mother of a six-month old baby and that, along with her boyfriend, she shared an apartment with another couple;"[18] his characterization of the accused's behaviour as simply "clumsy passes" and "far less criminal than hormonal,"[19] and his closing suggestion that a woman in the complainant's situation would be better advised "not only to express an unequivocal 'no' but also fight her way out of such a situation" before turning to the courts.[20]

On February 26th, the day after the release of the Supreme Court of Canada judgment, a letter from Justice McClung appeared in the *National Post* characterizing Justice L'Heureux-Dubé's reasons as a "graceless slide into personal invective" and as "personal convictions...delivered again from her judicial chair."[21] His letter also suggested that the inordinately high rate of male suicide in Quebec might be attributed to Justice L'Heureux-Dubé's judicial decisions, a remark that seemed abhorrent and cruel in light of the suicide of Justice L'Heureux-Dubé's husband some years ago.[22] An interview followed in the *National Post* on February 27th in which he reiterated his opinion of the sexual and moral character of the complainant in *Ewanchuk* with a characteristic choice of imagery. "She was not lost on her way home from the nunnery," he explained to the reporter.[23] A week later Justice McClung issued a formal apology via a news wire service.[24] He was particularly remorseful about the reference to suicide and its unintended connection with Justice L'Heureux-Dubé's personal experience. By then, however, numerous complaints against Justice McClung had been placed before the Canadian Judicial Council concerning the February 26th letter, the February 27th *National Post* interview, and his reasons in both *Vriend* v. *Alberta*[25] and *Ewanchuk*. *Vriend* concerned a constitutional equality challenge to the omission of protection against sexual orientation discrimination in the Alberta human rights regime. In a foreshadowing of the *Ewanchuk* litigation, Justice McClung's reasons denying the equality claim were thoroughly reviewed and rejected by a unanimous Supreme Court of Canada. Unlike *Ewanchuk*, however, no one at the Supreme Court directly engaged the issue of bias — here homophobic bias — in Justice McClung's reasons. The Canadian Judicial Council also received a complaint lodged by REAL Women of Canada against Justice L'Heureux-Dubé alleging judicial misconduct and lack of impartiality and objectivity in her reasons in *Ewanchuk*.[26]

A panel of three judges, chaired by Chief Justice Constance Glube of the Nova Scotia Supreme Court, conducted the preliminary investigation of the 24 complaints against Justice McClung. The panel concluded, on May 19th that a formal consideration of whether Justice McClung should be removed from office was not warranted.[27] In a lengthy memorandum, the panel reprimanded Justice McClung for the *National Post* letter and interview, aspects of his judgments in both *Ewanchuk* and *Vriend*, and aspects of his formal apology as well as of his letter to the Council

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[15] *Ibid.* at 372.

[16] *Ibid.*, quoting from the dissenting reasons of Fraser C.J.A. at the Court of Appeal, *Ewanchuk*, *supra* note 7 at 102.

[17] *Ibid.* at 372 quoting from McClung J.A., *Ewanchuk*, *supra* note 7 at 87.

[18] *Ibid.* at 374 quoting from McClung J.A., *Ewanchuk*, *supra* note 7 at 87.

[19] *Ibid.* quoting from McClung J.A., *Ewanchuk*, *supra* note 7 at 91.

[20] *Ibid.*

[21] *National Post*, *supra* note 4.

[22] *Ibid.*

[23] Shawn Ohler, "Judge Reiterates Belief That Teen Wasn't Assaulted" *National Post* (27 February 1999) A1.

[24] *Globe and Mail* (2 March 1999) A4.

[25] (1996), 184 A.R. 351 (C.A.), rev'd [1998] 1 S.C.R. 493 [hereinafter *Vriend*]. All three members of the panel of the Alberta Court of Appeal wrote separate judgments, with McClung and O'Leary JJ.A. allowing the appeal and Hunt J.A. dissenting.

[26] Canadian Judicial Council, Council File 98-129, March 31, 1999.

[27] Canadian Judicial Council, Council File 98-128, May 19, 1999.

itself acknowledging the inappropriateness of his behaviour. The panel's decision was a parsing of Justice McClung's stubborn refusal, even in his regretful later statements, to concede that he did more than injudiciously lose patience when provoked by Justice L'Heureux-Dubé's view of sexual assault. The panel criticized his reasons in *Vriend*, observing that some of his comments "could be interpreted as an assertion that gay people are inherently immoral" and "could perpetuate a stereotype which has led to violence against the gay community."[28]

With respect to his reasons in *Ewanchuk*, the panel found that here, also, he had crossed "the boundary of appropriate judicial expression."[29] The panel emphasized the relevance of Justice L'Heureux-Dubé's analysis in *Ewanchuk*, characterizing it as "merely one expression of the criticism by the Supreme Court of Canada of your approach to this case and not a personal attack as you suggest."[30] However, the panel based its decision to dismiss the complaint against Justice McClung on a finding that his offending remarks, although "flippant, unnecessary, and unfortunate," displayed neither "an underlying homophobia" nor an "underlying bias against women."[31] In addition, the panel did not think that a gay or lesbian person or a woman who had been sexually assaulted would be unable to expect fair and impartial treatment from Justice McClung in the future.[32] In a separate decision, the Canadian Judicial Council also dismissed the complaint by REAL Women of Canada against Justice L'Heureux-Dubé, finding that although her reasons in *Ewanchuk* contained "strong language," she did not fail to interpret the law impartially and objectively.[33]

Very few of the Canadian Judicial Council's points — other than its final conclusions on both matters — were covered in the press. In particular, the questionable assertion that gay and lesbian litigants and female sexual assault complainants would feel assured of fairness in Justice McClung's courtroom did not receive much discussion. Instead, the main aspect of the Council's decision which caught the media's eye was the Council's criticism of Justice McClung, described as a "severe reprimand."[34] Thus, in spite of the dismissal of the complaints, it seemed as if Justice McClung was identified as the one using his "judicial chair" to pursue his personal politics and to launch vitriolic attacks on judges with whom he disagreed. In contrast, feminist analysis in legal argument and judicial decisionmaking was identified as legal analysis rather than polemic. One possible message of the drama was that it is acceptable to be both a feminist and a judge. Thus, somewhat ironically, Justice McClung's ill-advised fury gave an otherwise easily ignored concurrence at least a momentary impact on our perception of the jurisprudential mainstream.

But was this vindication of Justice L'Heureux-Dubé's analytic approach more symbolic than real? In actual terms, the status quo was maintained. Justice McClung was not subjected to a formal investigation, much less removed from office. His genuine remorse over the unintended reference to Justice L'Heureux-Dubé's personal experience of suicide permitted the notion that his behaviour was objectionable primarily because it was rude and boorish, not because it displayed a deeply rooted sexism and homophobia in the application of the law. In addition, recall that his use of damaging stereotypes about gays and lesbians in *Vriend* was politely overlooked by the Supreme Court, his sexist bias in *Ewanchuk* similarly overlooked by the majority at the Supreme Court, and his attack in the media on Justice L'Heureux-Dubé's integrity as a judge was treated by Chief Justice Glube's panel, in the end, with considerable circumspection. The contrast with, for example, judicial responses to Judge Corinne Sparks' reasons in *R. v. R.D.S.*[35] raises the worrisome issue of whether the concept of judicial bias too often penalizes egalitarian perspectives and casts them as personal idiosyncratic political views while excusing anti-egalitarian perspectives simply because they are often difficult to distinguish from what counts as common sense knowledge.[36]

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[28] *Ibid.*

[29] *Ibid.*

[30] *Ibid.*

[31] *Ibid.*

[32] *Ibid.*

[33] Canadian Judicial Council, Council File 98-129, *supra* note 26.

[34] Robert Fife, "McClung Reprimanded for Critical Remarks Made at L'Heureux-Dubé" *National Post* (22 May 1999) A4. See also, Graham Fraser, "McClung Scolded by Judicial Council" *Globe and Mail* (22 May 1999) A3.

[35] [1997] 3 S.C.R. 484.

[36] Christine Boyle, Brenna Bhandar, Constance Backhouse, Marilyn MacCrimmon, and Audrey Kobayashi, "*R. v. R.D.S.*: An Editor's Forum" (1998) 10 C.J.W.L. 159.

Judge Sparks — the only African Canadian woman appointed to the Bench at the time of *R.* v. *R.D.S.*[37] — commented on the racialized nature of relations between white police officers and African Canadians in the course of explaining why she preferred the testimony of an African Canadian youth to that of a white police officer. Her observations subjected her to a lengthy appeal process in which — in contrast to *Vriend* and *Ewanchuk* — both counsel and the appellate bench treated as centrally significant the issue of whether she was biased and lacked impartiality. Both the Nova Scotia Supreme Court and a majority at the Court of Appeal found that her implicit reliance on personal knowledge of racism in police relations did give rise to a reasonable apprehension of bias, although this finding was overturned at the Supreme Court of Canada in a six to three split. There are a number of possible explanations — strategic and substantive — for the differences in judicial responses to the issue of bias in the decisions of Justice McClung, Justice L'Heureux-Dubé and Judge Sparks, but the underlying and troubling conundrum remains, namely the legal system's inability to distinguish meaningfully between racism and anti-racism, or sexism and anti-sexism, or homophobia and anti-homophobia.

In addition, the flurry of media attention stirred by Justice McClung's letter left the impression that the courts — for better or worse — *are* incorporating feminist, anti-racist, and anti-heterosexist analyses into their decisionmaking. The editorial pages were filled with views for and against this bold stance. However, John McInnes and Christine Boyle have observed that, in the context of criminal law practice, the "mere suggestion that gender equality is relevant to the delineation of the rights of the accused, or to the assessment of the relevance of evidence, sets one apart as an hysterical crusader, rather than a responsible and thorough advocate."[38] The authors' observation is borne out by the experience of Judge Donna Hackett, a criminal trial judge at the Ontario Court of Justice. Judge Hackett has written that in her seven years on the bench, during which she presided over approximately 7000 cases, she has never had an equality rights issue raised by counsel. On canvassing six of her colleagues, Judge Hackett found that their experiences were the same, meaning that no equality issues had been raised in approximately 120,000 criminal cases in their collective thirty six years of service since the Charter equality provision came into force.[39] As Judge Hackett put it: "Can one, therefore, conclude that there have not been any equality issues in our criminal courts since equality rights came in force? ...I think not."[40] Additionally, McInnes and Boyle point out that equality arguments in criminal trials and appeals are advanced, for the most part, by intervenor groups in a few pivotal cases. Consequently, rather than "routine and central," equality arguments are often viewed as "peripheral and adjunctive" or "as esoteric wool-gathering by so called 'special interest' groups."[41]

Furthermore, the notion that Justice L'Heureux-Dubé "won," deflects attention from the fundamental differences at the Supreme Court level between Justice L'Heureux-Dubé's concurrence and the majority reasons. As noted earlier, Justice L'Heureux-Dubé treated the case as one directly engaging women and children's fundamental human rights. On her account, Justice McClung's reliance on demeaning stereotypes was not simply "incorrect" or an unfortunate carryover from a more conservative era, but the central feature of a social, political, and ideological regime within which women's physical security and autonomy is fundamentally compromised. Perhaps her most powerful message was that it is not so much the Ewanchuks of the world who maintain this regime but the Justice McClungs. In other words, it is *legal* doctrines, practices, and institutions which provide state sanction and force to the regime.

From the standpoint of Justice L'Heureux-Dubé's remedial human rights approach, a women and children's rights-enhancing interpretation of the *Criminal Code* provisions on sexual assault is pivotal and the conservative minimalism of Justice Major's decision falls far short of what is required. The 1992 amendments to the *Code* are particularly important to her remedial stance. They not only formally acknowledge the link to individual liberty and equality rights in the preamble but also attempt to reverse the premises of the established order by enumerating circumstances in which, as a matter of law, there is no consent and by shifting some responsibility to the initiator of sexual contact for determining the issue of consent. Justice L'Heureux-Dubé, unlike Justice Major and indeed with his explicit disapproval, insisted that

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[37] *Ibid.* at 199 per A. Kobayashi.

[38] John McInnes and Christine Boyle, "Judging Sexual Assault Law Against the Standard of Equality" (1995) 29 U.B.C. L. Rev. 341 at 344.

[39] Donna Hackett, "Finding and Following 'The Road Less Travelled:' Judicial Neutrality and the Protection and Enforcement of Equality Rights in Criminal Trial Courts" (1998) 10 C.J.W.L. 129 at 131.

[40] *Ibid.*

[41] McInnes and Boyle, *supra* note 38 at 345.

the amended *Code* provisions be given full consideration in the analysis of the *Ewanchuk* facts. I will now turn to a more detailed analysis of the differences between the approaches of Major J.'s majority reasons and those of L'Heureux-Dubé J.

One of the key provisions — and the point of sharpest disagreement between the majority and concurring reasons — is the "reasonable steps" provision in section 273.2(b) of the *Criminal Code.* Section 273.2(b) comes into play in cases in which there is no evidence that the complainant clearly communicated consent to the sexual activity and in which the accused argues the defence of honest but mistaken belief in consent. The defence is a complete answer to the *mens rea* portion of the Crown's position, namely that the accused knew that the complainant had not consented. The mistake defence was first articulated in *R.* v. *Pappajohn.*[42] *Pappajohn* also imposed an "air of reality" requirement, namely that the defence of mistake must consist of something more than the mere assertion by the accused of an honest belief that the complainant consented.[43] The *Pappajohn* formulation of the mistake defence has been the subject of criticism because it stands for the proposition, in substantive terms, "that an honest belief in consent will excuse even if it is unreasonable."[44]

The 1992 Criminal Code amendments introduced section 273.2 along with a number of other amendments. Subsection 273.2(a) forecloses mistake defences based on recklessness and wilful blindness; subsection (b) imposes a quasi-objective standard on the determination of *mens rea* by also foreclosing the mistake defence where the accused cannot show that, in the circumstances, reasonable steps were taken to ascertain consent. It is important to point out that this latter section is a very qualified over-ruling of *Pappajohn.* It does not require that the accused's beliefs are reasonable, but only that reasonable steps were taken to verify consent.[45] In addition, it is only a *quasi*-objective standard: the reasonableness of the "steps" is determined in reference to circumstances actually known to the accused. However, despite their modesty, the reforms signalled a significant shift in public awareness of how orthodox and facially neutral legal constructs are systemically linked to the persistence of sexual violence to women and children.[46] As McInnes and Boyle have written of the provision, "[i]ts effect should be to target those who behave dangerously by persisting with sexual acts where consent, as it is legally defined, is not present in the form of a voluntary agreement."[47]

The introduction of a quasi-objective standard for determining *mens rea* is not generally controversial.[48] However, in the context of sexual assault law, it inspires wild and fearsome speculation about the end of romance and the need for written contracts on casual dates.[49] The notion of implied consent employed by the lower courts in *Ewanchuk* is, perhaps, one manifestation of judicial resistance to the introduction of even a narrow and qualified requirement of objectively reasonable conduct in sexual relations. Implied consent doctrine neatly side-steps the quasi-objective standard in section 273.2(b) as well as the "air of reality" requirement by, in effect, allowing triers of fact to dismiss the charge for lack of *actus reus.* This particular gambit is now foreclosed by the Supreme Court's decision in *Ewanchuk.* Once the trial judge, in determining *actus reus*, finds that the complainant did not in fact consent, it is not open to find, at the same time, that the complainant implied consent. At that stage, Justice Major clarified, the only defence is to argue that, because of an honest but mistaken belief in consent, the accused lacked the requisite *mens rea.* In *Ewanchuk*, Justice Major was willing to canvass the plausibility of a mistake defence even though it had not been specifically argued. After a brief review of the

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[42] (1980), 14 C.R. (3d) 243 (S.C.C.) [hereinafter *Pappajohn*].

[43] The evidential "air of reality" requirement was subsequently codified in s. 265(4) of the *Criminal Code.* The extent and constitutionality of the "air of reality" requirement has been the subject of some academic debate. See Don Stuart, "Sexual Assault: Substantive Issues Before and After Bill C-49" (1993) 35 C.L.Q. 241 and Emily Steed, "Reality Check: The Sufficiency Threshold to the Air of Reality Test in Sexual Assault Cases" (1994) 36 C.L.Q. 448.

[44] Don Stuart, "The Pendulum Has Been Pushed Too Far" (1993) 42 U.N.B.L.J. 349 at 352.

[45] Rosemary Cairns-Way, "Bill C-49 and the Politics of Constitutionalized Fault" (1993) 42 U.N.B.L.J. 325 at 330.

[46] Steed, *supra* note 43. See also, Sheila McIntyre, "Redefining Reformism: The Consultations that Shaped Bill C-49" in Julian Roberts and Renate Mohr, eds., *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 293.

[47] McInnes and Boyle, *supra* note 38 at 360.

[48] *Ibid.* at 359.

[49] Don Stuart quotes a defence counsel on the subject of the 1992 amendments with respect to consent as follows:

> Its ridiculous...this isn't contract law. She says "Let's have sex." They are having full sexual intercourse. She suddenly says: "That's it. I'm revoking my agreement." Now how long does the male have to withdraw before it's sexual assault?....It just denies the biological nature of human beings.

Stuart, *supra* note 43 at 244.

facts, he found that such a defence had no "air of reality" on the facts as found. Consequently, he overturned the acquittal and did not order a retrial.

Justice L'Heureux-Dubé, however, found that it would be an error of law — in considering the plausibility of the mistake defence — not to apply the "reasonable steps" provision now clearly mandated by the amended *Criminal Code*. As she put it:[50]

> In *Pappajohn*, the majority held that this defence does not need to be based on reasonable grounds as long as it is honestly held. That approach has been modified by the enactment of section 273.2(b).... Therefore, that decision no longer states the law on the question of honest but mistaken belief.

Justice Major made it clear he thought she was wrong, stating that the reasonable steps analysis is only required if the "air of reality" standard is met.[51] The disagreement seems slight and Justice L'Heureux-Dubé's insistence that the "reasonable steps" provision must be applied now that "it is the law of the land"[52] could be characterized as functionally unnecessary and overly technical. Why go on to consider "reasonable steps" when there is "no air of reality"? Why add to the complexities which already encumber the judicial task of determining guilt?

The answer lies in how the judicial task is viewed — either as an integral feature of a systemic regime of unequal social and political relations or as the impartial application of neutral legal rules and doctrines which are definitionally separate from social and political relations. In addition, behind the disagreement lies a fundamental difference in the legal construction of heterosexual sexual relations. Justice Major's approach contemplates the possibility that the accused's mistaken beliefs have an "air of reality" even though the accused acted unreasonably in the circumstances. Justice L'Heureux-Dubé's insistence that "air of reality" and the reasonable steps requirement must be linked together provides no space for judicial sanction of a "reality" which is unreasonable in light of the accused's actual knowledge. As she pointed out, Parliament, to this extent, has superseded *Pappajohn*. Thus, Justice Major's analysis, although thankfully free of the grotesque stereotypes that populated Justice McClung's reasons, preserves the structures and interpretive spaces which those stereotypes have typically inhabited.

The fundamental split in "realities" underlying the majority and concurring reasons manifested itself at two other junctures. Justice L'Heureux-Dubé took issue also with Justice Major's interpretation of section 265(3), the provision deeming non-consent in the face of force, threats or fear of force, fraud, or the exercise of authority. Justice Major, she argued, "unduly restricts" the section to "instances where the complainant chooses "to participate in, or ostensibly consent to, the touching in question."[53] The wording of the provision, she pointed out, states its application to cases in which the "complainant submits or does not resist" and thus "should also apply to cases where the complainant is silent or passive in response to such situations."[54] Finally, in closing her reasons, Justice L'Heureux-Dubé observed that section 273.1(2) restricts the circumstances in which an accused can claim a mistaken belief in consent. In particular, she emphasized, subsection (d) stipulates that no consent is obtained where "the complainant expresses, by words or conduct, a lack of agreement...."[55] Thus, on the *Ewanchuk* facts, the complainant's verbalized non-consent precluded "the accused from claiming that he thought there was an agreement."[56]

At each of these junctures, although the shadings of disagreement between majority and concurrence appear to revolve around issues of emphasis and of full rather than judiciously minimal analysis, the projected social worlds are vastly different. Justice L'Heureux-Dubé projects a world in which the autonomy of the liberal citizen belies the liberal commitment to equality and is, in fact, differently constituted by the social and historical constructions of men and women and of gender and sexuality. Both the silences contemplated by section 265(3) and the words contemplated by section 273(2)(d) are coded differently against this backdrop, requiring explicit and conscientious attention to the unstated "realities" which shape the interpretive politics of legal and judicial analysis. Justice Major's majority reasons project a world in which law and politics remain neatly separated and the "realities" invoked by judges and lawyers — save for a few correctable errors — reflect perfectly the tale of equality and liberty contained in the founding narratives of liberalism.

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[50] *Ewanchuk*, *supra* note 3 at 378-79.

[51] *Ibid.*

[52] *Ibid.* at 377.

[53] *Ibid.* at 371, quoting Justice Major at 352.

[54] *Ibid.* at 371.

[55] *Ibid.* at 379.

[56] *Ibid.*

In conclusion, by portraying decisions such as *Ewanchuk* as "graceless slides into personal invective" or "totalitarian," the alarmist rhetoric of conservative backlash often obscures the conservative character of the judgments themselves. As noted earlier, the critical literature on backlash describes this overshadowing of substantive questions as a shift in focus from change itself to resistance to change. The pressing issue becomes to correct Justice McClung and express public disapproval of his blatantly inappropriate language rather than to examine critically the role of criminal law doctrine and practices in constructing a vision of sexual and political relations which ratifies the behaviour of Ewanchuk and condones Justice McClung's portrait of women's sexual and moral character. Although Justice Major's majority reasons importantly reject the doctrine of implied consent, at a fundamental level they authorize the background "realities" which differentially frame the silences and words on which sexual assault trials so often turn.

Also lost in the commotion, is the chance to explore more fully the range of complexity demanded by a commitment to fundamental justice which integrates both liberty and substantive equality into its account of the liberal citizen.[57] An analytic lens which expands beyond the sexist stereotypes of sexual assault law invites much needed inquiry into the structural and ideological dimensions of legal reasoning and of the judicial institution. Among the questions that might be pursued, for example, is the extent to which the privilege extended to Ewanchuk by Justice McClung's portrait of sexual relations is a form of racial as well as gender privilege. Would the familiar tropes of rape law — the well intentioned if clumsy male and the 'wise beyond her years' and manipulative female — have played differently in Justice McClung's account if the victim/perpetrator dyad had spanned a racialized as well as gendered social divide? And why do the homophobic overtones of Justice's McClung's reasons in *Vriend* and the sexism of his portrayal of women in *Ewanchuk* — so clearly connected in the vision of social relations underpinning his analysis — remain so disconnected in the watertight categories of liberal equality discourse? And is there a pattern in judicial willingness to sometimes politely overlook and other times vigorously pursue questions of judicial bias depending on whether the orthodoxies of the judicial vision of our social and political world are challenged or affirmed? Finally, as several critical theorists have queried, is a commitment to fundamental justice which integrates both liberty and equality values possible in a system that relies so centrally on punishment and savage methods of correction, and that demands conformity with a rigid and oversimplified account of state and citizen, victim and offender, complainant and accused?[58] The fact that these questions are so rarely asked, much less answered, is one of the costs of backlash. Justice L'Heureux-Dubé's patient exegesis of the shape and dimensions of sexist bias in a little supported concurrence opened up welcome space for public debate of these issues, no doubt at considerable personal cost. The challenge is to broaden that space until it includes all the voices consigned to the margins of our conversations about justice.❑

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[57] Boyle and McInnes, *supra* note 38.

[58] Laureen Snider, "Feminism, Punishment and the Potential of Empowerment" (1994) 9 Canadian Journal of Law And Society 75, Elizabeth Sheehy, "Equality Without Democratic Values? Why Feminists Oppose the Criminal Procedure Reforms" (1999) 19 Canadian Woman Studies 6, and Boyle and McInnes, *supra* note 38.