

Prepublication copy of a chapter to appear in Sexual Violence: Policies, Practices and Challenges, edited by D. Kelley and J. Hodgson. In Press: Greenwood Publishing, 2002.

**Re-Conceptualizing Sexual Assault
from an Intractable Social Problem to a Manageable
Process of Social Change**

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Introduction

Over the past three decades there has been a gradual evolution in how adult sexual assault and child sexual abuse have been defined by the law, and how they are seen professionally and by the general public. As a result of these changes in awareness there is now a growing consensus that male sexual violence is a social problem of considerable magnitude. Despite this awareness, however, effective reform and social change have been hard to accomplish.

Law Reform in Canada

In the late 1960s the women's movement called attention to the high frequency of male sexual violence and the low proportion of arrests, prosecutions and convictions. In Canada, this social movement was exemplified by the publication of Rape: The Price of Coercive of Sexuality (Clark and Lewis 1977), effectively documenting that under the existing rape law women were treated as "property," and that rape was a form of assault, not a "sexual" act. In 1983, Canada modified its criminal code, replacing the crime of rape with that of sexual assault (Department of Justice Canada 1983).

Under the impact of the new legislation, more women started to report sexual assaults, but the response of the criminal justice system remained virtually unchanged: a large proportion of the cases were still classified as unfounded by the police, were not charged by the prosecution and were not convicted by the courts (Department of Justice Canada 1990; Roberts 1990B). Clearly, the old problems remained despite the new legislation. Over the intervening years several "rape shield" laws were passed making it more difficult for the defense to raise questions about victims' past sexual history or gain access to her counseling records. These reforms were all challenged and their applications limited by the Supreme Court.

Thus, after nearly four decades of reform efforts, male sexual violence continues to remain largely outside of the effective jurisdiction of the criminal justice process. What has changed, however, is the level of awareness of the problem and a sense of urgency over the need for a solution. What is lacking, is a conceptualization of what specific changes are required and how to accomplish them.

An Action-Research Program

My research program on sexual assault began in 1983 in Halifax, Nova Scotia, when a sexual assault service for the city grew out of my community psychology class (Renner and Keith 1985). In the early years, the research focus was on the nature of the victim's experience and how best to provide support. Later, the focus shifted to the social, medical and legal context which often seemed to hinder rather help. The goal of the program was always "action-research" with the dual objectives of having policy and theory inform practice to provide the most useful service, and to have the practice inform policy and theory to have the best possible conceptualization (Renner 1995).

Back in 1983, I was among those who suspected that changing the terminology from "rape" to "sexual assault" would not make any difference to how victims were treated (Renner and Sahjpaal 1986; Sahjpaal and Renner 1988). The problem is not with the statutory definition of the offense, but rather with a fundamental flaw in the legal process. I believe the courts themselves are direct contributors to the very problem for which they are the intended solution. This redefinition of the issues points less to the need for legislative law reform, and more to the need to reform the way the existing laws are administered, i.e., the precedents and common law practices that form the "legal doctrine." As a result of our redefinition of the central issue, we have now called for a National Social Action Program. The justification for this perspective, based on the results of 15 years of action-research, is described in the sections which follow.

The Legal Doctrine

Although the focus of this chapter is on the legal system, it is important to keep in mind that sexual assault and abuse are primarily "social problems" with legal aspects. An issue becomes a social problem when it becomes so pervasive as to undermine the integrity of the political process. When this happens, the effect of the issue is felt by everyone, even those not directly involved in any specific manifestation. As a result, any treatment of the issue must accommodate psychological, social and political ramifications, and no simple "solution" is possible. Many changes must occur across the entire spectrum of the quality of civic life (Renner 2000).

A Social Justice Perspective

Social justice is a conceptual ideal of our democracy. Laws and legal procedures are intentionally created tools (means) to achieve social ideals (ends). Social science evaluation research is one of the methods available for measuring actual outcomes and for contrasting them with a theoretical ideal, to see if there are statistically "significant" differences. If there are, then some adjustments are needed either to the theory or to the practice to achieve greater concordance. In a less than perfectly understood world, with less than perfect practices, there will be differences. Once differences are clearly identified, modifications to theory or practice can be tried and the outcome reassessed. Such is the reiterative process of social progress, and

the role of social science in social change (Renner 1995). This is the philosophy of science on which action-research is based.

“Selectivity” and “Disparity” Within the Criminal Justice Process

Our initial research was based on two sets of data collected in Halifax, Nova Scotia from 1983 through 1992. The first was from the case records kept by the sexual assault service that grew out of my community psychology class. The case data file included 2,533 consecutive cases responded to by the sexual assault service. (For methodological details see Renner and Wackett 1987; Renner, Wackett and Ganderton 1988; Renner, Alksnis and Park 1997.) This descriptive information defined the actual nature of sexual assault and sexual abuse as a social reality.

The second set of data was obtained between 1989 and 1992 from the court records and included 1,074 consecutive court cases tried in the Halifax Law Courts. This data was composed of cases of sexual assault (n=354), and, for comparative purposes, cases of physical assault (n=513) and robbery (n=207). (For methodological details see Yurchesyn, Keith and Renner 1992; Renner and Yurchesyn 1994; Renner et al.1977.) This information defined the consequences of these offenses as a legal reality.

Selectivity. In 1993, Statistics Canada conducted a large national victimization survey and found that 94 percent of women who were sexually assaulted did not report the incidence to authorities. Of the 6 percent reported, only 40 percent resulted in charges being laid. Of those cases where charges were laid, two-thirds resulted in convictions, but only one-half of those convicted received a jail term. This final .008 of the assailants who received a jail term represent an exceedingly small proportion of the cases, given the seriousness of the offense and the fact that in 85% or more of the cases the offender is known to the victim, and thus easily identifiable (Gregory and Lees 1994; Roberts and Grossman 1994; Yurchesyn, Keith and Renner 1992).

The case data file from the sexual assault service when compared to the court records provided an extraordinary opportunity to evaluate what accounts for the small proportion of highly selected cases that pass through the criminal justice process.

In adult cases, those with violence and injury are disproportionately selected into the criminal justice process. According to the records of the crisis centre, in more than 90% of the cases the typical offender is a known acquaintance, and the assault involves the use of physical restraint without a weapon. In these instances, women submit to the physical force and the demand for sex, choosing not to be otherwise harmed or injured. However, in the cases which appeared before the courts, the opposite was true; only 18% of the cases were similar to the typical case from the sexual assault service in which there was neither injury, the use of a weapon, nor serious harm. In 82% of the court cases at least one of these features was present. Clearly, the "typical" incident of sexual assault does not receive an equal frequency of legal redress.

In cases of sexual abuse against children, the records of the sexual assault service indicate that 77% of the abuse is perpetrated by a family member and that in 80% of the cases the abuse takes place in the child's own home. Yet, in the court cases, it is abuse by strangers (5%) and acquaintances such as family friends and caretakers (58%) which disproportionately find their way into the criminal process, with the most frequent location outside the victim's own home (64%).

Only the cases officially reported receive media coverage. For child cases, this has the effect of minimizing public awareness of the overwhelming degree to which children are mostly at risk of sexual abuse in their own home by their own family members. For adult cases, it contributes to the myth that a "real" sexual assault involves violence and physical injury to the victim. As a result, many adult women who choose not to resist in order to avoid injury in a sexual assault feel self-blame and guilt, and are blamed by others (Renner, et al. 1988).

Disparity. Disparity refers to the differential ways cases are treated once they are selected into the criminal justice system. A fundamental assumption of the justice system is that punishment should be proportional to the seriousness of the offense (Canadian Sentencing Commission 1987). It is in the severity of the sentence given to those deemed to be guilty where the disparity between different types of sexual assault and between sexual assault other types of crimes can be evaluated to discover the implicit rationale of the courts (Roberts 1990). (For a detailed account of the statistical comparisons used to evaluate disparity see Yurchesyn, Keith and Renner 1992; Renner et al. 1997.)

Men convicted of sexual abuse against children received lighter sentences than men convicted of sexual assault against adult women. At the harsh end of the severity scale, only 13% of child offenders received a sentence of two years or more in contrast to 30% of offenders of sexual assault against an adult woman. At the lenient end of the scale, 61% of those convicted of child sexual abuse received less than one year in jail compared to 44% of those convicted for adult sexual assault.

For adult sexual assault cases, high levels of violence were related to both trial outcome and to the severity of the sentence. When verbal threats or physical force alone was used there was a 50% rate of conviction, and only 8% of those convicted received sentences of two years or more. In those cases where injury occurred or a weapon was used, the conviction rate increased to 66% and 35% received sentences of two years or more. These figures increased to 92% and 40% when the woman's life was endangered or serious physical harm resulted.

When comparing the outcome of sexual assault cases with other types of crimes, perpetrators of sexual assault are usually sentenced less severely than those convicted of robbery, even though there are similar amounts of violence and victim injury in both types of cases. At the lenient end of the scale, 80% of the sexual assault offenders received a sentence of less than two years in contrast to 47% of those convicted of robbery. However, those found guilty of sexual assault are generally sentenced more severely than are those found guilty of physical assault where 96% of the offenders received a sentence of less than two years. This more lenient sentence is

despite the fact that in physical assault cases there was a greater incidence of violence, more victim injury, and more frequent use of weapons.

“Discounting” the Severity of Male Sexual Violence

The selectivity and disparity found in our data form a pattern which reveals the implicit philosophy used by the court to assess the relative severity of male sexual violence. The pattern can be accounted for by three factors. The courts are most lenient when (1) there is a relationship between the victim and the offender, (2) there are no visible physical injuries, and (3) when the offender is not otherwise criminally dangerous (Renner, et al. 1997).

Relationship. Whenever there is a relationship between the victim and the accused some of the responsibility is shifted to the victim who is seen as the author of his or her own misfortune. This explains why physical assaults, most common between two men trying to assert domination, are punished the least. Robbery, on the other hand, is most likely at the hands of a stranger, and the court is very severe on what looks like random acts of violence, including physical assaults by a stranger. This explains why sexual assaults at the hands of strangers, and child abuse from outside the family circle (the atypical cases), are selected into the system, and once in, are treated harshly. However, the majority of actual incidents of sexual assault and child sexual abuse are at the hands of those to whom the adult has willingly exposed herself, usually in a social setting, and on whom the child is primarily dependent. These are the typical sexual assault and abuse cases, and yet these are the ones that have least credibility before the criminal justice system.

Harm. Whenever there is a lack of visible physical harm, or lack of a clear threat of physical harm, the court is more lenient. In cases of physical assault any resulting small injuries are taken as self-evident proof that a simple assault took place (the typical case), and the court holds both individuals accountable to some degree. However, if the victim is severely beaten, after domination has been established, the courts are harsh in their judgements (the atypical case). Likewise, armed robbery is treated very seriously and is seen as physically threatening to the victim. In contrast, in most sexual assaults the woman or child is seldom visibly injured. Most women, similar to robbery victims, choose not to be physically injured as well as sexually violated, and most children trust and obey the adult upon whom they are dependent. However, because of the analogy created between sexual and physical assault, the lack of visible physical harm is taken as evidence that no sexual assault took place (the typical case). Thus, if a victim of sexual assault acts like a robbery victim (take something but don't hurt me) she is treated like a victim of physical assault (held partially accountable), but only if she acts like a victim of physical assault (is beaten up) will the court treat her like a robbery victim (deal harshly with the offender). The simple reality is that a woman must be prepared to be physically harmed (which should never be required) if her case is to be treated as “serious” by the courts (Renner and Yurchesyn 1994).

Danger. When the offender is not otherwise criminally dangerous, the courts will be most lenient. Most robberies are an economic crime committed by “punks” who are seen as dangerous

to the community. In contrast, in most sexual crimes the offender is an “ordinary” man, one to whom an adult woman willingly exposed herself, such as a date or an acquaintance, and on whom the child is dependent, such as Uncle Joe. The primary factors accounting for discrepancies between child and adult cases, is that the child abuse offender often has a better reputation (e.g., a teacher, soccer coach) than the men charged with sexually assaulting women. Again, the effect is twofold, first acting to select which cases go to trial, and then playing an important role in the disposition of those already highly selected cases (Renner et al. 1997).

Social Justice, Equality and the Legal Doctrine

The combined effects of “relationship,” “harm,” and “danger” are to introduce two fundamental failures of social justice into the legal doctrine. Both discriminate against women and children and are forms of injustice.

Discounting Severity through Confounding. The net effect of these three factors is to discount the severity with which male sexual violence is treated. The legal system has confounded the criterion for leniency with the defining circumstances and situations in which women and children find themselves with respect to the men who sexually assault and abuse them: The existence of a relationship, the lack of visible physical harm, and the fact that the offender is not otherwise criminally dangerous is both the criterion for leniency and a description of the social position of women and children with respect to the men who abuse them. The legal doctrine, by definition, has established sexual offenses as “not serious.” These two concepts do not need to be hopelessly confounded as they now are. But, until they are separated women and children will experience selectivity and disparity at the hands of the legal process.

Denial of Women's and Children's Reality. Because the courts do not deal with sexual assault as it exists in reality, the cases that do reach the courtroom are unrepresentative and misleading. When the legal process that is intended to protect women and children from sexual assault and abuse does not do so through restricted access to justice and unequal treatment, the equity provisions of the Canadian Charter of Rights and Freedom and guarantees of due process and equal protection of the law in the United States are violated. The reluctance of women and children to use the system, revealed by the victimization survey cited previously and the experience of sexual assault services, documents a serious breakdown in our democratic process at an extreme civic price. The legal doctrine itself contributes to a huge social problem, affecting as many as one of every two women and one in four children by the time they are age 16, as being largely outside the jurisdiction of the legal process (Statistics Canada 1993).

The Dynamics of Discounting

My colleagues and I wanted to go beyond the sterile portrait of the issues that came from working with the statistical data from the court records and the sexual assault service. We wished to see how, in terms of the actual practices within the courtroom, male sexual violence was excused when there was a relationship, when there was not visible physical injury, and when the offender was not otherwise dangerous. How could the courts confound the typical experiences of

women and children with the standard for leniency? This was our motivation for obtaining a random sub-sample of 105 transcripts from the same data source that was used for the analysis of the court records.

Categorization of Courtroom Dynamics

The first step was to gain a qualitative insight by reading the material. For the students who were working with me this became, personally and psychologically, the most difficult task of the entire project because of the feelings of moral outrage and indignation aroused over what was happening. I, personally, came to understand more deeply the simply devastating emotional reaction to the criminal prosecution of their cases that I had seen in some of the women in working with the sexual assault center. We were not prepared for the fact that these were not just a few isolated exceptions, but a consistent pattern across all the court cases for both women and children.

It was our belief that the pattern we saw in the courtroom was no coincidence. We suspected there were a finite number of strategies and tactics being used. Our approach was to look for “runs of questions” which formed coherent “scenarios,” and to transcribe each of them. For example, a run of questions about how soon the victim told someone about the assault was named “Recency of Complaint.” In this way we were able to group scenarios that were similar into categories.

What we discovered was extraordinarily simple. Only twenty-four categories were required to describe what both the prosecuting and defense attorneys did in the course of a trial as shown in Table 1 (Park and Renner 1998; Parriag and Renner 1998). Each case could be divided into a collection of scenarios, like the one in Table 2, which fit neatly into one of the 16 categories of content, or one of 8 categories of social influence tactics. The 105 cases yielded approximately 3,500 scenarios which captured the content of sexual assault trials, and allowed us to count the frequency with which each occurred. The complete list of categories and definitions have been incorporated into a coding manual for both research use (Renner, Parriag and Park, 1997) and for applied use by local community groups (NSAP 1998). The courtroom dynamics which we discovered were slightly different, however, for both the content and the tactics, in terms of how they are used in the child and adult cases.

Table 1
Categorization Scheme

The questions asked of victims of sexual assault by the prosecution and the defense can be classified into two broad types of Content and Tactics. Each of the two types can be further subdivided into a total of 24 specific categories into which the examples can be categorized.

- I. Content
 - A. History
 - 1. Previous Sexual History
 - 2. Previous Non-Sexual History
 - 3. Previous Relationship with the Accused
 - B. Psychological
 - 4. Adjustment Before
 - 5. Adjustment After
 - 6. Feeling at the Time
 - C. Themes
 - 7. Injury
 - 8. Resistance
 - 9. Removed or Torn Clothing
 - 10. Violence/Intimidation
 - 11. Place/Situation
 - 12. Culpability/Character
 - 13. Recency of Complaint
 - 14. Initiation
 - 15. Honest Misunderstanding
 - 16. Communication of Consent
- II. Tactics of Social Influence
 - 17. Word Pictures
 - 18. Impeachment
 - 19. Over-Generalization
 - 20. Implied Fabrication
 - 21. Tactics/Style
 - 22. Credibility of Witness (Victim)
 - 23. Credibility of Accused
 - 24. Objections

Table 2
Sample Scenario and Data Sheet
for an Adult Case of Sexual Assault

Type	Lawyer	Category	Case ID	Victim Age
Theme	Defense	Removed/Torn Clothing	10088	Adult
<p>Defense: But your coat wasn't torn! Witness: No, it wasn't torn. Defense: These are your bra and panties you were wearing, correct! Witness: Yes. Defense: Your bra and panties, they were not damaged? Witness: No.</p>				

Content

Holding Children Responsibility for Sexuality. Counting the frequency with which the prosecution and the defense used each of the content categories made it possible to statistically describe what each lawyer did in comparison to the other. We discovered that they acted in a “complementary” way. Whenever the facts of the case permitted, the prosecution would emphasize the good adjustment of the child before the abuse and the bad adjustment after the abuse, that the accused removed the child’s clothing, that the child resisted, was of good character, reported the abuse quickly, and did not initiate contact with the accused. However, whenever possible, the defense would emphasize the opposite. Using Chi Square statistics to evaluate these differences in emphasis between the prosecution and defense, all were statistically significant at $p < .001$ (Park and Renner 1998). The net effect is to hold children responsible for their sexuality, when legally the exact opposite is the case. In fact, full and complete responsibility rests with the adult to refrain from all sexual activity with a child. Yet, overwhelmingly, both the prosecution and the defense introduce myths about the nature of adult sexuality which effectively hold children responsible for preventing their own sexual abuse from taking place (Park and Renner 1998; Renner and Park 1997).

Distorting the Reality of Sexual Assault. Many authors (e.g., Burt 1980; Lonsway and Fitzgerald 1994) over the past two decades have written about the commonly held “myths and stereotypes” about sexual assault, e.g., if the clothing was not torn, if the complaint was not recent, or if there was no physical harm, then it is not seen as a sexual assault. Our research has documented that a standard list of 16 such content items are consistently introduced into sexual assault trials by both the prosecution and the defense, depending on the circumstance of the case,

as was illustrated in Table 2. Similarly, if the woman needs counseling after the assault, the prosecution introduces this as evidence, if she does not, the defense claims the absence of the rape trauma syndrome is evidence against a sexual assault. The lawyers act-out a script in a complementary fashion based on a common set of 16 stereotypes (Parriag and Renner 1998), which we have reduced to the three broad issues of relationship, harm and danger (Renner et al. 1997). To be a credible victim, the woman must be a physical and emotional wreck, and show it.

But, the reality of women's experience is distorted even more through "word pictures" created by using the language of consensual sex of which the myths and stereotypes are composed. Both the prosecution and the defense use "sanitized" language in the courtroom that bears little resemblance to the fact that the woman's testimony and experience are about an assault. For example, the defense will string together a chronology of events, ending with "...and that is when you performed oral sex! Correct?" The emphasis on the word "that" refers to the chronology, but the victim's simple answer of "yes" implies a consensual sexual activity. Lost in the "sanitized" account for public consumption in the courtroom is her actual experience of "...that is when he lifted my head up by my hair and forced his penis into my mouth. He said suck my cock or I will scar your face." Unfortunately, the prosecution seldom creates a situation where the victim's account, as she experienced it, gets communicated in clear and unequivocal language (Bavelas and Coats 2000; Coates, Bavelas and Gibson 1994; Matoesian 1993).

Tactics

Developmental Level. An even more serious problem than holding children accountable for their "sexuality," is the strategy of using developmentally inappropriate questions which require mental skills not yet acquired by the child. Children are perfectly capable of remembering important events and giving accurate information about them, when asked age appropriate questions (e.g., Schuman, Bala and Lee 1999; Walker 1999). Children cannot answer questions they do not understand or which requires mental capacities they have not yet developed. A skilled defense attorney will ask a series of seemingly reasonable, yet developmentally inappropriate questions at the preliminary hearing and at the trial to encourage conflicting or inaccurate responses. Usually, these involve questions based on numerical values and facts about time and distance which require a cognitive level of development the child has not yet acquired. Any discrepancies will be noted, and used to question the credibility of the child as illustrated in Table 3.

The issue in this example is not one of the child "lying" or of children not being able to remember significant events that happened to them. Children have good memories, but they cannot describe them using higher order concepts of time and computation that they have not yet mastered. Young children do not expect to be misled or manipulated by adults. However, they will comply with requests from adults to give answers to such questions (Walker 1999). This courtroom strategy is itself a form of child abuse which serves to make the child appear to be an unreliable witness in the eyes of the court, when in fact it is the questions which are developmentally inappropriate.

Table 3
Sample Scenario and Data Sheet
for a Case of Child Sexual Abuse

Type	Lawyer	Category	Case ID	Victim Age
Strategy	Defense	Developmental Level (Tactic)	11562	Age 8
<p>Defense: And what can you tell us about how often these events happened?</p> <p>Child: How often did this happen? I can tell you that the last time when I was at the preliminary hearing I said it was about five times that he made me put my mouth on his penis, but it was really about 25 times.</p> <p>Defense: Well, which one is right? Did you lie at the preliminary or are you lying now?</p>				

Beyond Reason. As we have just seen for children, their developmental level provides an absolute standard for evaluating whether the questions asked were appropriate or not. What would provide a similar absolute standard for the questions asked of adults? How are defense lawyers able to systematically undermine the credibility of adult witness so that the courts discount the seriousness of the offense?

What is absolutely true about myths and stereotypes is that they are false beliefs that have no place in factual rational discussion. Yet, they constitute the bulk of the content of the trials, finding their way into the reasons lawyers use to argue their case. But, the standard of logic requires that rational arguments follow the rules of reasoning, and that they must be based on true, not false, statements (i.e., premises).

Because the false beliefs of myths and stereotypes are commonly mistaken as true, arguments based on such false premises may not always be easy to recognize. It is rare that the false premise is as obvious as it is in the following example:

All horses in this barn can be considered cows.
As we all know, cows give milk.
Thus, any particular horse in this barn can be milked.

No one would be misled by this argument. Clearly, the conclusion that a horse in the barn can be milked is false, even though the argument conforms to a correct formal structure dictated by the rules of logic:

All As are Bs
C is an A
Therefore, C is a B

However, propaganda, advertising and deliberate distortions of communication frequently incorporate false premises within arguments having a correct formal structure, which gives the appearance of a logical conclusion. In sexual assault trials, the false assumptions are based on myths and stereotypes about the nature of sexual assault which are incorporated into lawyers' arguments. For example, the assumption is frequently made that all women at a bar who are drinking and dancing are available for sex. When a sexual assault victim reports that she was drinking and dancing at a bar, she is seen as having consented to sex. This point can be illustrated by substituting "women" for "horse," "sexually available" for "cow" and "consent" for "milk" in our original example:

All women in this bar can be considered sexually available.
As we all know, sexually available women consent to sex.
Thus, this particular woman consented to sex.

The argument hinges on the assumption that a woman who goes to a bar to drink, meet men, and dance is sexually available and has implicitly consented to sex with any man from the night spot she continues to be with after leaving the bar. (For additional examples of using the standard of logic as a criterion, see Alksnis 2000; Renner, Alksnis and Parriag 1999). So prevalent are these basic logical errors regarding implied consent that in 1992 legislation (Bill C-49) was passed in Canada to make consent to sexual activity an explicit requirement, rather than an implied default based on some situational circumstance, such as drinking and dancing. This change in the law was required because judicial decisions frequently cited the stereotyped belief that consent could be reasonably (although sometimes mistakenly) assumed in many situations if there was no evidence of non consent (Sheehy 1996).

The Failure of Social Justice

The failures of social justice that have been described are not due to a lack of clarity of the law: sex between adults requires consent and any sexual contact with a child is absolutely prohibited. Instead, the system fails due to the influence of the social context on the legal doctrine. The myths, misconceptions, stereotypes and male prerogatives that result in the wide spread occurrence of sexual assault in the social world, are also reflected in the deliberations of Judges, lawyers and members of juries when they bring with them into the courtroom the same beliefs and attitudes. Thus, the popular culture becomes entwined in the legal doctrine in five ways which deny women and children due process and equal protection of the law in the United

States, and violate the equity provisions of the Charter of Rights and Freedom in Canada (see Table 4)

Table 4.
Social Justice Issues Requiring a
Redefinition of the Legal Doctrine

1. Confounding

The defining characteristic of the relationship of women and children to the men who sexually assault them are identical to the criterion for excusing offenders.

2. Re-victimization of Children

In cases of child sexual abuse, the court fails to respect the special legal status of children by holding them accountable for their sexuality.

3. A Developmental Standard

Adult agents of the court use their superior mental ability and authority to ask children developmentally inappropriate questions, thus becoming an accessory after the fact to the original abuse by knowingly destroying good evidence.

4. Denial of the Reality of Women Experience

In cases of adult sexual assault, the issues of relationship, harm and danger operate through selectivity and disparity to place male sexual violence effectively beyond the range of legal recourse.

5. The Standard of Logic

The courts treat the unreasonable as though it were reasonable, and the illogical as if it were logical thus re-victimizing women.

Both women and children are denied the full protection of the law when the criterion used for leniency is confounded with circumstances which define the normal social situations in which they are exposed to male sexual violence.

In addition to re-victimizing children by holding them responsible for their sexuality, the court allows the defense lawyer to do the very thing from which the trial is intended to protect the child. Namely, for an adult to use their superior mental ability to exploit or take advantage of a child. The use of developmentally inappropriate questions has the effect of destroying good

evidence children are otherwise capable of providing. In this way the legal process becomes an accessory after the fact to crime it is judging, which is itself a criminal offense (Renner and Park 1999). Yet, by asking simple, age appropriate questions, it is possible to separate information the child does not know or cannot recall from failures to answer because the child did not understand the question.

For adult women, selectivity and disparity based on misconceptions about the true nature of sexual assault, and the use of inappropriate “sanitized” language, deny justice by the denial of the reality of women’s experience. To compound the issue even more, the distortion of the rules of reason introduced into the legal process re-victimizes women thus failing the standard of fairness and justice. These two conditions give an unprecedented new meaning to Catch-22: Women who have been sexually assaulted are denied equal access to a justice system that fails to provide justice, and are then blamed for the injustice by not making use of the justice system.

The failure of the legal remedy for male sexual violence is part of the problem for which it is the intended solution. These considerations require us to redefine the legal precedents and common law practices, corrupted by popular misconceptions, which form the current legal doctrine.

Reforming the Legal Doctrine

Principles of Equity

When legal precedents and common law practices directly contribute to the problem for which they are the intended solution, there is a serious issue requiring legal reform. When the official treatment under the law differentially affects women and children to their disadvantage, there is a constitutional issue of inequality which requires interpretative clarification by the courts (L’Heureux-Dubé 2000). There is no excuse for delay, nor any need to wait for legislative law reform. The route is the appeal process that will set new precedents for future cases.

By redefining the central legal issues as a failure in the application of the law, the need for legislative changes are minimal, such as requiring by statute that questions asked of children to be developmental appropriate. One step in this direction is to end the competency examination for child testimony, a reform currently under consideration in Canada (Department of Justice 1999). As we have argued (Park and Renner 1998), it does not make any sense to place a competency “threshold” on the child, which does nothing to ensure reliable testimony. Rather, the threshold must be place on the questions asked of the child which will ensure that the information the child is capable of providing can be taken into account by the court. A second area requiring legislative action is to explicitly separate the criterion for defining the severity of sexual assault and abuse from the defining circumstances under which male sexual violence occurs.

Not a Conflict of Rights

The primary effect of the redefinition of the legal issues is to avoid a false dilemma of viewing law reform as an issue of victim versus offender rights. Offender rights are no different for sexual offenses than for any other offense, including the right to a fair trial and a full defense. However, this basic right of the accused does not extend to the abuse of children by the very legal processes provided for the protection of children from abuse, nor to the denial of access to justice for women. The ideal is to achieve fairness and social justice.

A National Social Action Program

The question is, how can the legal doctrine be redefined? Unfortunately, social change is not simply an academic exercise, and seldom is it achieved through the publication of research papers. The findings must somehow engage the social, political, and psychological mechanisms of change.

With this in mind we proposed a threefold national social action program available through the Internet (NSAP 1998). The grass-roots program can be carried out at minimal costs, does not require extensive national coordination, and should quickly gain the serious attention of the judicial process. The goal is to use the simple five-point summary of the legal issues (Table 4) to create a new vocabulary for redefining the central problem as a failure of social justice. A single, yet simple, conceptual framework unites the social, political and psychological aspects of male sexual violence.

Document the Outrageous.

At the social level, the primary issue is one of consciousness raising. When enough people are outraged over a social issue change is possible. One of the difficulties in raising public awareness is getting sustained media coverage of a conceptual issue. Only occasionally does a sensational case capture national attention. When it does, the focus is on the sordid details of the case or some unreasonable statements by an individual judge, thus particularizing the story; seldom is the short-lived coverage on systemic legal issues. On the other hand, local cases get extensive coverage by local papers. Our coding system offers local human rights groups a framework for observing these cases, documenting the outrageous processes that we have identified, and talking to the local media about these issues in the context of local cases. The coverage should be locally extensive, building a common conceptual frame of reference about a failure of social justice in many communities: Do not confound the criterion for leniency with the social status of women and children, respect the developmental level of children, and provide women equal access to justice.

These are very specific and reasonable requests with clear and measurable behavioral expectations. In these instances, it is specific people, who have names and who hold local offices of public trust, who can have their judgement processes respectfully questioned, and who can be called upon to do better. This is the power of local actions; they need not wait for legislation nor

the Supreme Court, they can start tomorrow with as few as one person sitting in the local courtroom with a clip board.

Challenge the Legal System

At the political level, local community groups have good potential access to the local prosecuting attorney's office. Local pressure can be effective to have a single prosecutor specialize in sexual assault cases (which some have already done), who will raise formal objections during the trial based on the research described here and who will appeal the case if the objections are not sustained. If the objections are sustained, then the defense will probably appeal. In either case, a wave of similar appeals should start to appear in many appeal districts across the country. This will have the immediate effect of arousing the interest of the judicial system because individual judges do not wish to have their decisions overturned. The use of the appeal process will attract the attention of legal scholars who will need to sort out what to do about these failures of social justice. Last, but by no means least, a number of cases in the appeal process will prolong the media coverage and give reporters something more substantial to write about than the usual details of the case which has only served to reinforce the myths and stereotypes.

Challenging the legal system should raise the level of the debate to the interpretative process of the law, where it properly belongs as a serious challenge to the current legal doctrine based on the equity requirements of social justice. One should not, however, underestimate the difficulty of this task. The office of the prosecution is overworked, not sensitive to the issues of sexual assault and abuse (Konradi 1997, 2000), and resistive to assume the role of protection of the legal rights of victims, whose primary role is a witness for the state (Murphy 2000). However, the office of the prosecution is sensitive to social pressure, in particularly local media coverage, so that the public documentation of the issues will actively support legal challenges, while the challenges will reinforce media coverage of the appropriate issue of social justice and the legal doctrine.

Support Victims

Psychologically, most victim-witnesses are unprepared for what will happen to them when they take their cases to court (Konradi 1997). In our work with the sexual assault service, many women were devastated by their experience, which is what made us focus our attention on the legal process. As we discovered, most sexual assault and child sexual abuse cases are scripts waiting to be played out in court and can be readily anticipated in terms of only 24 categories. There are very few surprises. Victims in general can be better prepared for what will happen. In individual cases, this will enable prosecuting attorneys to better protect women and children in general against the common traps. And, in test cases selected to become center pieces for legal appeal, the category system will help to ensure that the specific instances selected are strong examples of the issues to be legally challenged. While this is not much satisfaction for many individuals, it is better than, as one of our victim-witnesses put it, feeling "like meat on a rack."

For those who choose to fight, there is a plan around which third-party legal support can rally (Murphy 2000).

Conclusion

Our entire effort has been dictated by what is known as action-research. This is a very specific philosophy of science that argues: "To understand, do, and to do, understand" (Renner 1995). It puts equal responsibility on practice to be well informed by up to date policy and theory, and that policy and theory should constantly be accountable for its consequences and outcomes. Within such a framework of philosophy of knowledge, the failures of social justice we have documented need not be the occasion for defensive blaming and efforts to dilute responsibility by pointing to another level as primarily responsible. Rather, any identified shortcomings are opportunities for progress. Complex social problems, by definition, have multiple aspects and require intervention across many level. Fixing the legal doctrine will not end male sexual violence, but it is an essential step in progress toward that end.

References

- Alksnis, C. 2000. Fundamental justice is the issue: Extending full equality of the law to women and children. Journal of Social Distress and the Homeless: 10, In Press.
- Bavelas, J., and Coates, L. 2000. Is it sex or assault? Erotic vs. violent language in sexual assault trial judgements. Journal of Social Distress and the Homeless: 10, In Press.
- Burt, M. 1980. Cultural myths and support for rape. Journal of Personality and Social Psychology: 38, 217-230.
- Canadian Sentence Commission 1987. Sentencing Reform: A Canadian Approach. Ottawa: Department of Justice Canada.
- Clark, L., and Lewis, D.J. 1977. Rape: The Price of Coercive Sexuality. Toronto: The Women's Press.
- Coates, L., Bavelas, J., and Gibson, J. 1994. Anomalous language in sexual assault trial judgements. Discourse and Society: 5, 189-206.
- Department of Justice Canada. 1983. Sexual Assault: The New Law. Ottawa: Author
- Department of Justice Canada. 1990. Sexual Assault Legislation in Canada: An Evaluation, Report No. 5. Ottawa: Author.
- Gregory, J., and Lees, S. 1994. In search of gender justice: Sexual assault and the criminal justice system. Feminist Review: 48, 80-93.

- Konradi, A. 1997. Too little, too late: Prosecutor's pre-court preparation of rape survivors. Law and Society: 22, 1101-1154.
- Konradi, A. 2000. Pulling strings doesn't work in court: Moving beyond puppetry in the relationship between prosecutors and sexual assault survivors. Journal of Social Distress and the Homeless: 10, In Press.
- L'Heureux-Dubé, C. 2000. Beyond the Myths: Equality, Impartiality and Justice. Journal of Social Distress and the Homeless: 10, In Press.
- Lonsway, K. A., and Fitzgerald, L. F. (1994). Rape myths: In review. Psychology of Women Quarterly: 18, 133-164.
- Matoesian, G. 1993. Reproducing Rape: Domination through Talk in the Courtroom. Chicago: University of Chicago Press.
- Murphy, W. 2000. The victim advocacy and research group: Serving a growing need to provide crime victims and other third-parties with personal legal representation in criminal cases. Journal of Social Distress and the Homeless: 10, In Press.
- NSAP 1998. National Social Action Program. <http://www.carleton.ca/~erenner/nsap.html>
- Park, L., and Renner, K. E. 1998. The failure to acknowledge differences in developmental capabilities leads to unjust outcomes for child witnesses in sexual abuse cases. Canadian Journal of Community Mental Health: 17, 5-19.
- Parriag, A., and Renner, K. E. 1998. Do current criminal justice practices lead to unjust outcomes for adult victims of sexual assault? <http://www.carleton.ca/~erenner/nsap.html>, (Under editorial review).
- Renner, K. E. 1995. To understand do -- and to do, understand: The scholarship of community psychology. The Nova Scotia Psychologist: 10 (No. 4), 7-8.
- Renner, K. E. 2000. The civic price of sexual assault and sexual abuse. Journal of Social Distress and the Homeless: 10, In Press.
- Renner, K. E., Alksnis, C., and Park, L. 1997. The standard of social justice as a research process. Canadian Psychology: 38, 91-102.
- Renner, K. E., Alksnis, C., and Parriag, A. 1999. Is logic optional in the courtroom? An examination of adult sexual assault trials. <http://www.carleton.ca/~erenner/nsap.html>, (Under editorial review).
- Renner, K. E., and Keith, A. 1985. The establishment of a crisis intervention service for victims of sexual assault. Canadian Journal of Community Mental Health: 4, 113-123.

- Renner, E., and Park, L. 1997. "Discounting" the seriousness of child sexual abuse by the courts. Viva Voce: A National Newsletter About Child Victims and Witnesses: 2 (Sept.) 1-2.
- Renner, K. E., and Park, L. 1999. Contradictions in the Legal Doctrine Concerning Child Sexual Abuse. <http://www.carleton.ca/~erenner/nsap.html>, (Under editorial review).
- Renner, K. E., Parriag, A., and Park, L. 1997. Manual for the Categorization of Courtroom Dynamics. (Free electronic copy available from authors.) Ottawa: Department of Psychology, Carleton University.
- Renner, K. E., and Sahjpaul, S. 1986. The new sexual assault law: What has been its effect? Canadian Journal of Criminology: 28, 407-413.
- Renner, K. E., and Wackett, C. 1987. Sexual assault: Social and stranger rape. Canadian Journal of Community Mental Health: 6, 49-56.
- Renner, K. E., Wackett, C., and Ganderton, S. 1988. The social nature of sexual assault. Canadian Psychology: 29, 163-354.
- Renner, K. E., and Yurchesyn, K. 1994. Sexual Robbery: The missing concept in the search for an appropriate legal metaphor for sexual aggression. Canadian Journal of Behavioural Science: 1994, 26, 41-51.
- Roberts, J. 1990A. Sexual Assault Legislation in Canada: Sentencing Patterns in Cases of Sexual Assault, Report No. 3. Ottawa: Department of Justice Canada.
- Roberts, J. 1990B. Sexual Assault Legislation in Canada: An Analysis of National Statistics, Report No. 4. Ottawa: Department of Justice Canada.
- Roberts, J. V., and Grossman, M. G. 1994. Criminal Justice Processing of Sexual Assault Cases. Ottawa: Canadian Center for Justice Statistics.
- Sahjpaul, S., and Renner, K. E. 1988. The new sexual assault law: The victim's experience in court. American Journal of Community Psychology: 16, 503-513.
- Schuman, J. P., Bala, N., and Lee, K. 1999. Developmentally appropriate questions for child witnesses. Queen's Law Journal: 25, 251-302.
- Sheehy, E. 1996. Legalising justice for all women: Canadian women's struggle for democratic rape law reforms. The Australian Feminist Law Journal: 6, 87-113.
- Statistics Canada. 1993. The Violence Against Women Survey. Ottawa: Author.

Walker, A. G. 1999. Handbook on Questioning Children: A Linguistic Perspective, 2nd Ed. Washington, D. C.: American Bar Association.

Yurchesyn, K., Keith, A., and Renner, K. E. 1992. Contrasting perspectives on the nature of sexual assault provided by a service for sexual assault victims and by the law courts. Canadian Journal of Behavioural Science: 24, 71-85.

Endnote

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