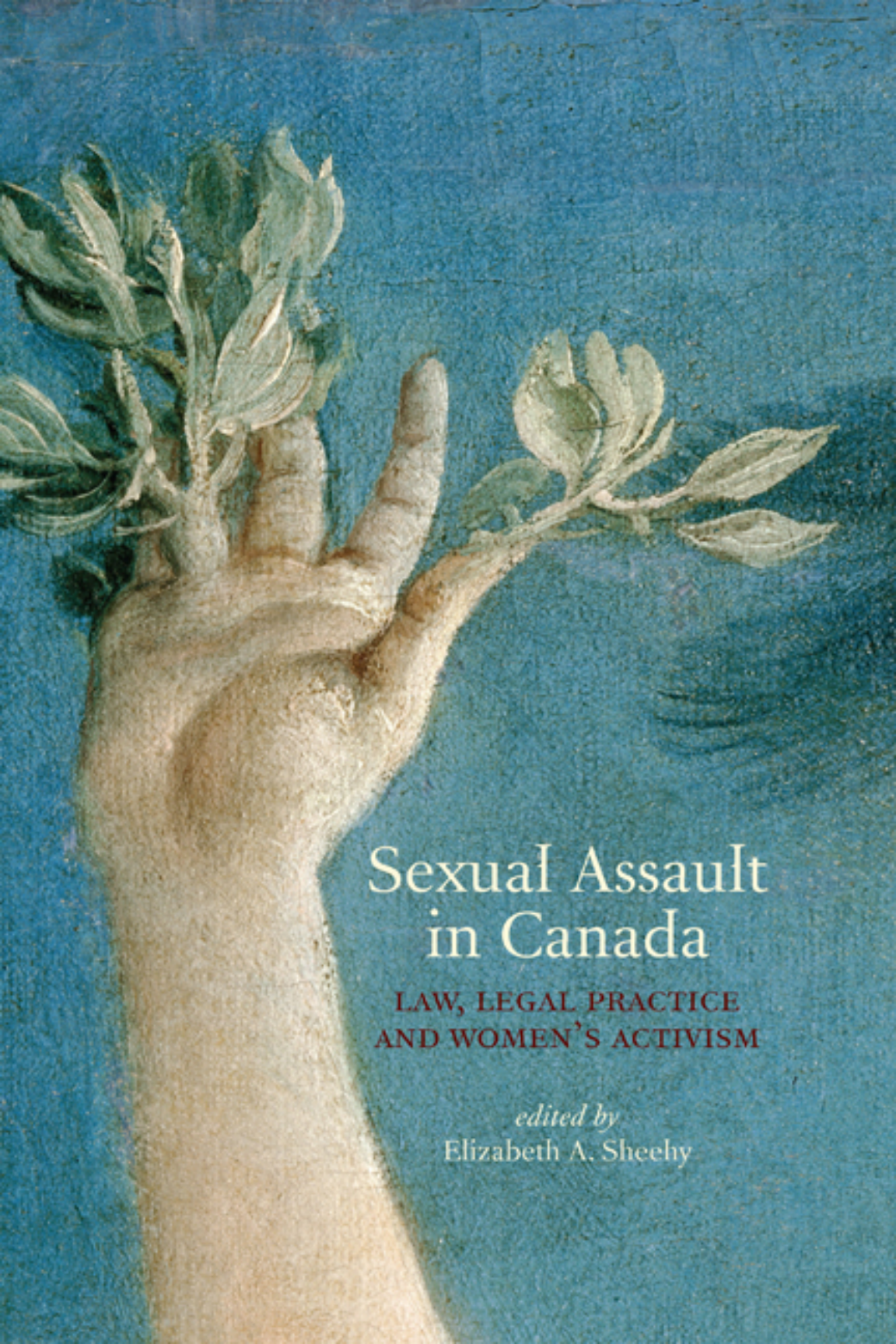

Sexual Assault in Canada

LAW, LEGAL PRACTICE AND WOMEN'S ACTIVISM

edited by
Elizabeth A. Sheehy

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Elizabeth A Sheehy, editor

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This book is dedicated to all the Jane Does and the feminists who advocate for and with them: may you find validation, strength and inspiration among these pages to continue the struggle to end sexual assault.

Part 1

FOREWORD
Still Punished for Being Female

The Honourable Claire L'Heureux-Dubé

International Women's Day is a time to remember past struggles, contemplate present realizations, and envision a path to a better future. I could not imagine a better day than March 9th, International Women's Day, to hold the "Sexual Assault Law: Practice and Activism in a Post-*Jane Doe* Era" conference at the University of Ottawa in 2009. I was very grateful to participate in this conference, graciously organized by Elizabeth Sheehy, a professor in the Faculty of Law at the University of Ottawa and a dedicated, long-time advocate for women's rights. The conference was exceptional: I had previously never seen so many people gathered together in one place to work for change around the law and practice of sexual assault. The conference presented me with an unprecedented opportunity to share with a great pool of minds and hearts our thoughts on a topic that is and always will be very close to my heart.

On the occasion of this conference, I was reminded of past struggles. I was not legally a person when I was born. I was born in 1927, two years before the "Persons Case."[1] Women in Canada then were not allowed to participate in politics; we were not permitted to be members of the Senate or Parliament. It was then commonly understood that higher education and the professions were places for men, not women. We were left penniless on divorce.[2]

Yes, there has been progress towards equality in many respects. On International Women's Day, we should and do celebrate our successes. However, while progress has been made, our struggles continue. Our struggles will not cease until women are treated with dignity, until we are treated with the same respect and consideration as any other member of society. Respect, consideration, and dignity are fundamental to the attainment of equality. Equality is a fundamental human right guaranteed to every human being internationally as well as by the *Canadian*

1 *Edwards v Canada (Attorney General)*, [1930] AC 124 (PC).
2 See *Murdoch v Murdoch*, [1975] 1 SCR 723.

Charter of Rights and Freedoms [*Charter*].[3] The right to equality is an entitlement of everyone based on the sole fact that he or she was born.

Since being declared persons under the law by the Privy Council, women in Canada have undertaken important struggles. We have successfully fought, and continue to agitate for, equal pay for work of equal value. We continue to fight for inclusion in the workplace. Although men continue to sexually harass, we have avenues of legal recourse when we face sexual harassment at work.

However, one aspect of women's inequality where little progress has been made in Canada is violence against women. Violence against women, including sexual violence, remains commonplace and condoned here and around the world. The title of this foreword, "Still Punished for Being Female," is a phrase I have borrowed from the Op-Ed columnist of the *New York Times*, Bob Herbert,[4] who wrote about "bride burnings, honour killings, female infanticide, sex trafficking, mass rape as a weapon of war and many other forms of hideous violence against women," as documented in a report released in 2007 by the United Nations.[5] He states:

> We can start by recognizing the systemic subordination and brutalization of women and girls around the world is in fact occurring. What we are talking about here is the war against women all over the planet. In many parts of the world, men beat, torture, rape, and kill women with impunity.

Mr. Herbert concludes that we need to do something about the systemic, worldwide subjugation of women that takes place through deployment of violence against us. His imperative for action is precisely the reflection I want to engage, with particular emphasis on the role of the judicial system in dealing with violence against women in our society.

In Canada we do not commonly burn brides or generally practice genital mutilation (although there have been recent instances of both). However, cases of trafficking in women, juvenile prostitution, sexual assault and even murder of women in prostitution, spouses, ex-spouses, and

3 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

4 Bob Herbert, "Punished for Being Female" *New York Times* (2 November 2006) online: <http://www.mijd.org/pn/modules.php?op=modload&name=News&file=article&sid=120> (retrieved May 24, 2010).

5 For the full report, see General Assembly of the United Nations, Secretary General's *Study on Violence Against Women* (2007), online: <http://www.un.org/womenwatch/daw/vaw/violenceagainstwomenstudydoc.pdf>.

girlfriends, as well as domestic violence, are the everyday menu of our criminal courts.

It is progress that our laws were rid of their most blatant gender bias at the time that equality provisions of our *Charter* came into force. Requirements that women complainants in sexual assault prosecutions obtain corroborating evidence as well as the doctrine of recent complaint have been removed from the *Criminal Code*.[6] Past sexual conduct of women who have been raped has been ruled generally irrelevant in law.[7] The forced production of complainants' medical records is generally not permitted.[8] The consent and the mistaken belief in consent defences have been clarified and narrowed in the *Criminal Code*.[9]

However, more remains to be done to remove the myths and stereotypes about women that still impregnate the minds as well as the practices of lawyers and judges and other members of Canadian society. Women's struggle to attain equality through autonomy and bodily integrity continues. The concept of "NO means NO" is still a problem even after the *Ewanchuk* decision.[10] Speculative myths, stereotypes, and sexist assumptions about women who have been sexually assaulted have too often hindered the search for truth and imposed harsh and unnecessary burdens on complainants in prosecutions of sexual offences.[11]

The most injurious myth is that women and children are not credible in this area of criminal law.[12] Women may be generally viewed as credible, but they are still not seen as credible in cases of sexual assault. Recent examples abound. Notoriously, in the 2003 Kobe Bryant trial in the US, rape shield laws were completely disregarded in order to discredit the complainant's credibility.

We have to recognize that there are no quick solutions for elimination of violence against women. Because the problem defies easy solutions, we need sustained efforts by civil society, governments, and ded-

6 RSC 1985, c 46 [hereafter *Code*].

7 *R v Seaboyer*, [1991] 2 SCR 577.

8 *R v O'Connor*, [1995] 4 SCR 411.

9 *Code* ss 273.1, 273.2.

10 [1999] 1 SCR 330.

11 See, eg, *R v Mills*, [1999] 3 SCR 668 at 741: "Speculative myths, stereotypes and generalized assumptions about sexual assault victims … have too often in the past hindered the search for the truth and imposed harsh and irrelevant burdens on complainants in prosecutions of sexual offences."

12 The same perception does not apply in other criminal activities such as theft, burglary, and even murder.

icated men and women to pursue gender equality and to eradicate gendered violence, including sexual violence against women. Although much has been done, and important progress has been achieved in the past century, there is still a need for the judicial system to examine the way it deals with crimes of violence against women. All these myths and stereotypes and more were the basis of the majority judgment in the court of appeal in *Ewanchuk* in Alberta in 1998. That was 1998, not 1798 or 1898. We still have a long way to go.

Change is crucial in order to ensure that such crimes will be reported, that the system is fair for both accused and complainant, that complainants are treated with respect at all stages of the process, and that the psychological trauma suffered by victims of male violence is recognized and taken into account by our legal responses to sexual assault.

The system must recognize that victims of violence against women fear that they will not be believed. They often blame themselves and suffer a sense of defilement, depression, anxiety, and split personality, as well as problems with physical and emotional intimacy. While physical injuries will often heal, psychological scars may last forever. Only when all actors in the judicial process recognize the need to revamp attitudes and practices will legislative reform efforts produce the kind of justice for victims of violence against women that international convention and national legislation have mandated.

On International Women's Day, at the Jane Doe conference, I asked attendees, how do we go about envisioning and implementing the full equality of women in Canada? I turned my mind to education, which is one of the main elements in the pursuit of that objective. At all levels, in schools, even in kindergarten, respect for the dignity of women as human beings should be taught; it cannot start too soon. Colleges, professional colleges, universities, and law schools in particular, as well as all the actors in the judicial system, such as police, prosecutors, and judges, should all have gender sensitivity training.

Justice system actors need to be able to recognize the hidden gender of laws, and to understand the reality of women's lives. Officials need to comprehend women's reluctance to report sexual assault and domestic violence. System actors need to forge a clearer role for the judicial system to help reduce women's fear that they will suffer further at the hands of the criminal law. Defence counsel and Crown prosecutors should object to the tendering of irrelevant evidence in sexual assault prosecutions, such as evidence of what the complainant was wearing or how she habitually dressed. Sentencing judges need to consider whether women and children are protected or endangered as a consequence

of their dispositions. People who make decisions in the justice process should hear women's stories and visit sexual assault centres, women's shelters, and jails. It is crucial to realize the consequences of violence on society as a whole in terms of human suffering, physical and mental ill health, and the lost opportunities for women's talent to enrich society.

In sum, International Women's Day is a yearly occasion on which we can recall women's social, economic, and legal successes and struggles in the last century. We have come to be recognized as persons entitled to the same respect and to be treated with the same dignity as any other member of society under the law. This day also provides a pause to take stock of the present as well as an opportunity to look at the road to the future necessary to ensure that women enjoy the full protection of the law in all aspects of their lives.

To tread a path to a better future, all actors in the judicial system must be able to walk in the shoes of women, must come to understand the real lives of women. Officials must not fantasize that women dream of being raped, that they are in a constant state of consent,[13] or that they are not credible. The activism behind the litigation effort and the court's judgment in *Jane Doe v Metropolitan Toronto (Municipality) of Police*[14] have done a great deal to achieve this goal of showing police, lawyers, judges, and other players women's lived realities. This collection of essays, in its diversity, proposes a substantive reflection on the issues that sexual assault law, practice, and activism raise, as well as strategies for change on the road to the future. I welcome this publication and salute the incredible work of Elizabeth Sheehy in convening the conference and ensuring that the revised and edited contributions of the presenters will have a lasting influence in pursuing the goal of full equality for women, so that one day we will no longer be punished or punishable for simply being female.

13 Chief Justice Fraser of the Alberta Court of Appeal in her dissent in *R v Ewanchuk*, 1998 ABCA 52

14 (1998), 39 OR (3d) 487 (Ont Ct (Gen Div)).

Introduction

Elizabeth A Sheehy

This edited collection assesses sexual assault law, legal practice, and activism in Canada as of 2009. It represents both a celebration and a review of where Jane Doe's brave advocacy has taken us in the more than ten years that have passed since she won her case against the Toronto Police in 1998 in her litigation, *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police*.[1]

Jane Doe initiated her legal action after the first wave of feminist-inspired reform to the law of rape, which took place in 1981-82-83.[2] Before her case went to trial, Canadian criminal law governing sexual assault underwent another wholesale reform in 1992,[3] again led by women's activism and informed by feminist thought.[4] Additional, narrower reforms were enacted in 1995[5] in response to public outcry about the "extreme intoxication" defence used to exculpate a man who brutally raped a woman in a wheelchair,[6] and in 1997[7] as a result of the widespread disclosure of women's personal records to defence lawyers in rape trials. While Jane Doe's legal arguments and the judgments rendered in her case show the impact of feminist intervention in the law governing sexual assault, they also reveal starkly that the law in practice — as implemented by police, prosecutors, and defence counsel — has quite successfully resisted women's just demands for equal protection of the law.

1 *Jane Doe v Metropolitan Toronto (Municipality) Commissioners of Police* (1998), 39 OR (3d) 487 (Ont Ct (Gen Div)) [*Jane Doe*].

2 *An Act to Amend the Criminal Code (sexual offences),* SC 1980-81-82-83 C 125, s 6.

3 *An Act to Amend the Criminal Code (sexual assault*), SC 1992 C 38, s 2.

4 Sheila McIntyre, "Redefining Reformism: The Consultations That Shaped Bill C-49" in Julian M Roberts & Renate V Mohr, eds, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 293 [Roberts & Mohr].

5 *An Act to Amend the Criminal Code (self-induced intoxication)*, SC 1995, C 32, s 1.

6 *R v Daviault*, [1994] 3 SCR 63.

7 *An Act to Amend the Criminal Code (production and disclosure of personal records)*, SC 1997, C 30, s 1.

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