

The Peter A. Allard School of Law

Allard Research Commons

Faculty Publications (Emeriti)

Allard Faculty Publications

2000

What Makes 'Model' Sexual Offenses - A Canadian Perspective

Christine Boyle

Allard School of Law at the University of British Columbia, boyle@allard.ubc.ca

Follow this and additional works at: https://commons.allard.ubc.ca/emeritus_pubs



Part of the [Constitutional Law Commons](#), [Criminal Law Commons](#), [Human Rights Law Commons](#), and the [Sexuality and the Law Commons](#)

Citation Details

Christine Boyle, "What Makes "Model" Sexual Offenses - A Canadian Perspective" (2000) 4:1 Buff L Rev 487-514.

This Article is brought to you for free and open access by the Allard Faculty Publications at Allard Research Commons. It has been accepted for inclusion in Faculty Publications (Emeriti) by an authorized administrator of Allard Research Commons.

What Makes “Model” Sexual Offenses? A Canadian Perspective

Christine Boyle*

It is as true as the proposition in Euclid, that the criminal law of Canada is above that of any nation or State on the face of the earth.¹

No treatise (for that is what the Code is) has so advanced thought about its subject, not even Wigmore's. The reporters and their associates have restored intellectual respectability to the substantive criminal law, in general and in detail.²

What does it mean to “model” sexual offenses? A Canadian perspective may be of some interest to those considering reform of this area of law since, during the last two decades of the twentieth century, Canadians have seen a dramatic flurry of both judicial and legislative activity relating to all aspects of the criminal law of sexual assault: substantive, procedural, evidentiary, and sentencing.³ The political context for debate over these issues is one in which there are strongly-held views about law and order, gender and intersecting forms of inequality, the appropriate criminalization of behaviors primarily committed by members of more privileged groups against members of

* Faculty of Law, University of British Columbia.

1. Don Stuart, *Canadian Criminal Law: A Treatise* 2 (3d ed. 1995) (quoting J.C. Hopkins, *Life and Work of Sir John Thompson* (1985)).

2. Herbert L. Packer, *The Model Penal Code and Beyond*, 63 *Colum. L. Rev.* 594 (1963).

3. What were formerly the offenses of rape and indecent assault were transformed into a range of sexual assault offenses in 1983. See *The Criminal Code Amendment Act*, ch. 125 1980-81-82-83 S.C. 3649 [Statutes of Canada] (Can.). For the current law, see the *Criminal Code*, R.S.C. 1985, ch. C-46 (1985), amended by *An Act to Amend the Criminal Code (sexual assault)*, ch. 38, 1992 S.C. 991. References to sexual assault in Canadian law, therefore, include rape as defined in the *Model Penal Code and Commentaries (Official Draft and Revised Comments 1980)*.

more disadvantaged groups, the role of judicial discretion, and indeed the social value of punishment. While the writer does not, of course, seriously mean to suggest that Canadian laws provide a model for the United States, Canadian efforts at law reform may be helpful in a discussion of how the Model Penal Code (M.P.C.) should address sexual violence.

However, a basic question is whether the concept of "model" offenses is one that withstands scrutiny at all, any more than a claim to superiority for Canadian criminal law. When I started to think about this paper I thought of discussing criteria for modelness and applying them to some sample issues. I set out to identify such criteria. I was confident that model sexual offenses would of course have to reflect consistency with constitutional norms. Less confidently I thought that it would be worth exploring what would make a model orientation to law reform in this field and what would promote the legitimacy of new model offenses. There are some obvious ideals for codification, such as consistency and clarity. One could turn as well for guidance to the framers of the M.P.C. itself, who, for example, sought criteria for legitimacy in criticisms of the existing law. The M.P.C. was thus to be effective, practicable, humane, and scientific, and consistent with "[c]ivilized social thought," which regarded penal law as the ultimate weapon.⁴ It would claim the virtue of rationality.⁵

4. See Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 *Harv. L. Rev.* 1097, 1105-06 (1952).

5. For instance, the Introductory Note to section 213 states that:

With respect to the crime of rape itself, the Model Code seeks to introduce a *rational* grading scheme by dividing the offenses into three felony levels, reserving the most serious category for those instances of aggression resulting in serious bodily injury or for certain cases of imposition *where there is no voluntary social and sexual relationship between the parties*.

Model Penal Code art. 213 introductory note (Official Draft and Revised Comments 1980) (emphasis added). In my view this is a good example of the danger of hubris in asserting the virtue of rationality for one's own opinions. Why would it be rational to see raping a woman one knows as less serious than raping a stranger? Why would another view that the two rapes are equally serious or indeed that the breach of trust makes raping a person one knows more serious be irrational? For instance, sections 718.2(a) (ii) and (iii) of the Act to Amend the

To some extent its very modelness would lie in the fact that it was a code, rather than mere law reform proposals.⁶

Wechsler, however, recognized the fact that there are varying political views and social conditions as a difficulty.⁷ Having struggled unsuccessfully to find criteria which I could use to argue that my ideas for sexual offenses are more model than those in the M.P.C., I find this difficulty to be, not completely, but largely, insurmountable.

Of course, the best candidate for a standard of modelness is consistency with constitutional norms, accompanied by broader "legality" concerns, having to do, for instance, with fair notice. It is here that I may be able to come closest to my original objective.

In both Canada and the United States, there are clusters of rights which provide the constitutional backdrop for any statement of criminal law. In general terms, these rights have to do with constraints on the way legislators can frame the law. For instance, offenses must be drafted with sufficient clarity, and must be consistent with the right to equality. Thus, I think that "children should be seen and not heard" would be an unconstitutional offense in both jurisdictions. Constitutional rights also create constraints on the way the courts can try accused persons. For instance, trial processes must be both fair and egalitarian. Thus, I think that an assumption that women are less credible witnesses than men would contribute to

Criminal Code list as aggravating factors in sentencing that the offender abused his spouse or child and that he abused a position of trust in relation to the victim. A further example lies in the M.P.C.'s focus on objective manifestations of aggression by the accused. See Model Penal Code § 213.1 (Official Draft and Revised Comments 1980). Why would it be rational to treat as non-criminal non-violent but nevertheless non-consensual behavior? Is it not just as rational to criminalize non-consensual sexual contact and view silence as non-consent? The view that rape of a voluntary social companion is less serious was based on the argument that the presence of this factor reduces confidence in the conclusion of aggression and is relevant to the degree of injury inflicted. See *id.* Thus a class of people, essentially women who socialize or have sex with men are treated as less credible and less injured. But wherein lies the claim to rationality in the proposition that men are less likely to rape the women they know?

6. Wechsler, *supra* note 4, at 1131.

7. *Id.* at 1132.

both an unfair and an inegalitarian trial.⁸

The first step in any modeling of sexual offenses should therefore be the identification of all relevant constitutional rights. A significant one in Canada is that offenses must not punish the morally innocent. However, here I want to focus on a norm which may not be so obvious. The Canadian version of the Fourteenth Amendment can be found in section 15(1) of the Canadian Charter of Rights and Freedoms, which states:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.⁹

I have argued that, in Canada, equality rights tend to be neglected at this stage of identification of relevant rights, and so fear that neglect in the framing of new offenses in the United States also. There is not such a pervasive understanding that laws relating to sexual violence must be egalitarian as there is, for instance, that they must be clear and fair to accused persons. For several decades now in both jurisdictions, criminal law in general and the law relating to sexual violence in particular has been subject to criticism for reflecting a pervasive distrust of women and children, and for facilitating male sexual access to them irrespective of their wishes. Such criticism focused on both substantive and procedural/evidentiary law. For instance, the attention drawn to the limitations of our pivotal concept of consent reflected findings to the effect that "no" can mean "maybe."¹⁰ Particular criticism

8. See generally John Henry Wigmore, *The Science of Judicial Proof as Given by Logic, Psychology, and General Experience, and Illustrated in Judicial Trials* 334 (3d ed. 1937) (discussing ideas about credibility).

9. Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, R.S.C. being Schedule B to the Canada Act 1982 (U.K.) c.11, § 15(1) (1985) (Can.).

10. See *The Queen v. Letendre* (1991) 5 C.R. (4th) 159 (B.C.S.C.) [Canada: Criminal Reports].

was directed at the "defense" of mistaken belief in consent, which, in Canada, used to permit those wishing to have sexual contact with others to act on subjective and self-interested misconceptions about the wishes of others and indeed, even allowed them to substitute their own normative views of when sexual contact is permissible for legal norms. Further criticisms were directed at the high level of sexual assault complaints deemed "unfounded" by police, evidence rules codifying differential treatment of complainants, such as the rules about corroboration, recent complaint and sexual history, and discriminatory generalizations about relative credibility which influenced fact determination in this field.¹¹ While there are some differences in legal doctrine, such concerns would be familiar to drafters of any new model offenses in the United States.

Since the equality guarantees of the Charter came into force in 1985, much critical analysis of the law has tended to focus on how it falls short of offering women and children the equal protection and benefit of the law, as well as on its lack of attention to the targeting of sexual assault of people who experience intersecting inequalities, such as people with disabilities and Aboriginal women.¹²

The Canadian Parliament has, in recent years, consistently tried to model attention to equality as well as other constitutional values in criminal law reform. For instance, the Preamble to the most recent reform of the substantive and evidentiary laws relating to sexual assault states:

Whereas the Parliament of Canada is gravely concerned about the incidence of sexual violence and abuse in Canadian society and, in particular, the prevalence of

11. See generally Christine Boyle & Marilyn MacCrimmon, *The Constitutionality of Bill C-49: Analysing Sexual Assault Law as If Equality Really Mattered*, 41 *Crim. L.Q.* 198 (1998).

12. For an overview see, Jennifer Scott & Sheila McIntyre, *Women's Legal Education and Action Fund (LEAF): Submissions to Standing Committee on Justice and Legal Affairs: Review of Bill C-46 [An Act to amend the Criminal Code (production of records in sexual offence proceedings)]* (1997).

sexual assault against women and children; . .

Whereas the Parliament of Canada intends to promote and help to ensure the full protection of the rights guaranteed under sections 7 [fundamental justice] and 15 [equality] of the *Canadian Charter of Rights and Freedoms*; . . .¹³

This makes clear that Parliament was attempting to promote and protect a number of constitutional values, primarily the cluster of rights which together make up the accused's right to a fair trial, including the right to full answer and defense, and the right to equality of those groups most affected by sexual violence.

In contrast, the judicial response to claims that sexual assault law falls short of constitutional equality norms has been mixed. There has, indeed, been some recognition of the need for analysis of the co-existing constitutional rights (including equality) of all persons whose status and interests are affected by criminal trials. The following is a frequently quoted example from the Supreme Court of Canada:

It cannot be forgotten that a sexual assault is very different from other assaults. It is true that it, like all the other forms of assault, is an act of violence. Yet it is something more than a simple act of violence. Sexual assault is in the vast majority of cases gender based. It is an assault on human dignity and constitutes a denial of any concept of equality for women.¹⁴

The Supreme Court has built in an equality analysis in deciding whether other offenses meet constitutional standards. A distinctive feature of the Charter, in comparison to the United States, is section 1, which guarantees the rights and freedoms set out in the Charter

13. An Act to Amend the Criminal Code (sexual assault), ch. 38, 1992 S.C. 991.

14. *The Queen v. Osolin* (1993) 26 C.R. (4th) 1, 23 (S.C.C.) [reporting decision of the Supreme Court of Canada].

"subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Equality, while not fully recognized as a constitutional right, co-existing with freedom of expression, was an aspect of section 1 analysis in challenges to the obscenity and hate crimes offenses. Cases such as *The Queen v. Keegstra*¹⁵ and *The Queen v. Butler*¹⁶ demonstrate some judicially recognized linkage between the status of certain groups in society and the legitimacy of crimes respectful of their interests.¹⁷

On the other hand, a majority of the Supreme Court of Canada has decided in a number of important cases, such as those having to do with pre-trial production of the personal records of complainants, not to consider equality as a relevant constitutional value.¹⁸

Thus, Canadian courts pay unreliable attention to the equality implications of sexual assault law. This poses a difficulty in suggesting how equality plays a role in model offenses. Even with constitutional values, there are

15. [1990] 3 S.C.R. 697 [Decisions of the Supreme Court of Canada] (upholding the law criminalizing incitement to hatred against identifiable groups).

16. [1992] 1 S.C.R. 452 (upholding the law criminalizing obscenity).

17. A further example can be found in the fact that the Supreme Court has used an equality analysis in developing the rules of evidence. In *The Queen v. Salituro* [1991] 3 S.C.R. 654, a spouse who would have been incompetent to testify for the prosecution at common law was permitted to testify when the accused and his wife were separated without any reasonable possibility of reconciliation. The Court emphasized that the common law rule which excluded evidence against the accused was inconsistent with equality rights. "The rule reflects a view of the role of women which is no longer compatible with the importance now given to sexual equality." *Id.* at 671.

18. For example, in *The Queen v. O'Connor* (1995) 44 C.R. (4th) 1 (S.C.C.), the 5/4 majority, on this issue, characterized the issue of when accused persons should have access to records in the hands of third parties as requiring a balancing of the constitutional right to privacy on the one hand and to full answer and defense on the other. The dissenting judges included the right to equality without discrimination as an explicit part of their constitutional analysis, stating, for example, that "[r]outine insistence on the exposure of complainants' personal backgrounds has the potential to reflect a built-in bias in the criminal justice system against those most vulnerable to repeat victimization." *Id.* at 59 (La Forest, L'Heureux-Dubé, JJ, dissenting). But see *The Queen v. Mills* [1999] 3 S.C.R. 668 (adopting an equality analysis of this issue).

varying political views, both about the question of whether sexual assault is an equality issue and about the implications of agreement on that point. My view is that any law on sexual violence which was not grounded in an understanding that sexual assault is the practice of inequality and that any legal response to it needs to be consistent with the right to equality as well as other constitutional values would not be model. Not only does an egalitarian law avoid the danger of the law condoning the practice of targeting certain vulnerable groups for sexual violence, attention to equality as well as other constitutional values promotes the most valuable form of consistency.

The problem of varying political views, even at the level of relevant constitutional norms, is even more obvious with respect to the choice of a general orientation to the use of criminal law to further social policy. Such an orientation inevitably underlies any codification. Views are expressed in many different ways; for instance that the criminal law should be used with restraint¹⁹ and as a last resort, or alternatively, that society should turn to it readily to promote law and order. With respect to sexual violence, there may be particular ideas, such as that it is pointless and wrong to criminalize "natural," "trivial," or commonplace behavior; that the criminal law cannot diverge too significantly from general social norms, or even, conceivably, that the criminal law should facilitate male sexual access to women irrespective of their wishes, perhaps associated with concerns about labeling men as criminals on the word of women. Alternatively, some may take the view that the criminal law has an important role to play in labeling, deterring, and denouncing crimes of privilege, such as crimes of sexual violence against members of disadvantaged groups. On a more complex level, some (and indeed some of the same people) may take

19. This is a frequent note in criminal law reform papers in Canada. See, e.g., Government of Canada, *The Criminal Law in Canadian Society* 59 (1982) (noting that "the nature and extent of the response of the criminal justice system should be governed by considerations of economy, necessity and restraint.").

the view that a fundamental concern in framing sexual offenses is to minimize, to the extent that this can be done, the risk of the law being misused to oppress people of color. Here Canadians working in this field have been very interested in American analysis. For example, the work of Kimberle Crenshaw has been influential.²⁰ She has argued that feminist theory (in this case about the criminal law of rape) emanating from a white context obscures the multidimensionality of black women's lives. To "criticize rape law as reflecting male control over female sexuality is for black women an oversimplified account."²¹ The protection of white female sexuality was, for blacks, often the pretext for racial terror, so that some may "fear that anti-rape agendas may undermine anti-racist objectives."²²

My own view is that criminal law, as the embodiment of state power at its most brutal, should be used with restraint. This view is reinforced by fear of the danger that criminal law may be used in a discriminatory fashion against particular stigmatized groups. At the same time, I think that there should be some rough equity in the costs and benefits of using criminal sanctions to further social policy. Particular groups, such as women and children, should only have to bear their fair share of any costs flowing from either criminalization or non-criminalization. There is no consensus on such views in Canada. Indeed, there is what seems to be growing support for increasing, and more punitive, use of criminal sanctions as part of what might be called a "law and order" movement.

I cannot think of any process for rationally determining what particular orientation would produce "model" sexual offenses. It is impossible to escape some choice of political orientation. Even if one, for example, turned to "science" as a basis for modeling sexual offenses

20. See, e.g., Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 139, 157-60 (1989).

21. *Id.* at 157. However, I would argue that rape law is about women's accessibility to men, and the gradations of accessibility among women.

22. *Id.* at 160.

in terms of what is knowable about the efficacy of criminal sanctions, that still involves a perspective about the appropriate role of the criminal law, and thus what standards to test it against. For instance, does it have any symbolic, denunciatory role? Perhaps the only way in which sexual offenses could be "model" is in the open articulation of this choice of perspective.

I found it difficult to find much open articulation of a general orientation to the use of criminal law in the M.P.C. and its Commentaries. There does seem to be some commitment to restraint or economy, illustrated positively in the rejection of criminalizing sexual relations between gay and lesbian people,²³ and negatively in the treatment of some homosexual rapes as less serious than heterosexual rapes.²⁴ In my view, the proposals reflect a strong sense of confidence in an intuitive ability to grade degrees of gravity and to frame substantive standards for determining culpability. However, such confidence is probably a necessary part of actually making any concrete proposals with respect to the use of the criminal law.

A specific aspect of the question of general orientation is the question of legitimacy. A model code should reflect some sense of its own claim to legitimacy since it has not emerged from any democratic process. This is particularly challenging with respect to crimes largely committed by members of relatively privileged groups against members of relatively disadvantaged groups, such as sexual violence. Here there are likely to be differing orientations to the use of criminal sanctions in general and to the detailed formulation of offenses.

How does one capture a sufficient sense of public support for behavioral norms reflected in a code, while also acknowledging the harms (from both criminalization and non-criminalization) experienced by groups lacking the power to make their views of what needs to be criminalized the dominant one? In Canada, I am concerned that, fuelled

23. See Model Penal Code § 213.2 cmt. at 357-76 (Official Draft and Revised Comments 1980).

24. See *id.* § 213.1 cmt. at 338.

in part by a growing law and order perspective, it is becoming increasingly easy politically to criminalize the activities of members of such groups. To what standard would one appeal for legitimacy in a context in which it would be easier to prosecute women who complain to police of sexual assault and who defend themselves from sexual assault than to prosecute sexual assaulters?

Some attention to the problem of legitimacy in the Commentaries to the M.P.C. can be found in the discussion of the gradations of "consensual" intercourse with children:

Extension of penal sanctions to this case [of late adolescence] raises all of the problems generally associated with use of the criminal law to enforce a majoritarian norm, that even on an abstract level, does not command the uniform support of society and that in any event is often belied by common social practice.²⁵

Lack of consensus and the likely widespread unenforceable criminalizing of commonplace behavior create a danger of illegitimacy, both of "model" offenses and the laws adopting them. The concept of legitimacy in itself, however, has dominant forms. Offenses reflecting the dominant absence of a norm, or of a norm tilted toward dominant interests, will of course be illegitimate from minority perspectives. Political processes deal with such issues by counting heads (subject to constitutional constraints), but should a model code, offering itself for political adoption, anticipate the result of head counting, or should it seek legitimacy at some more idealistic level?

It seems to me the legitimacy of a model penal code process in itself needs more than a critical perspective on, and clear articulation of, what it is relying on for its appeal—whether consensus (we will only propose what no one will object to), majority support (we will rock the boat as little as possible), or protection of minority interests (we will confront the neglect of, for instance, women who are at distinctive risk of sexual violence and of being seen as

25. *Id.* cmt. at 328.

distinctively lacking credibility).

However, at a minimum, there should be a clear articulation of what framers of a model code are appealing to for legitimacy. To what does the M.P.C. appeal? There are a number of clues in the Commentaries. First, the clearest articulation can be found in the discussion of whether consensual homosexual relations should be criminal. The criminal law should focus on the most serious harms for reasons of economy and practical limits on enforcement. Some offenses would create a risk of arbitrary enforcement, thus raising concerns about "fairness and horizontal equity."²⁶ Second, in the discussion of reform in different states, facile appeals for popularity are rejected, in favor of "balance":

It is, after all, both politically rewarding and relatively easy to take a public stand by passing a law against plainly offensive and unpopular conduct. Although the point is valid with respect to any crime, it deserves special emphasis here that definition of the crime of rape calls for a balanced judgment on the many difficult issues that must be resolved.²⁷

I find this an interesting comment, following as it does a discussion of "current perceptions of rape," which reflects significant attention to feminist concerns. One could be forgiven for reaching the conclusion that feminist concerns are dominant and a measure of what would be popular, rather than a minority critique. One way of seeking legitimacy while not addressing the problem of crimes against distinctively victimized and marginalized groups in society would be to aim to satisfy dominant concerns while adopting a posture of embattled and principled constraint.

Of course, any legitimate model offenses should be balanced, but a claim to balance should not mask a political perspective antagonistic to the equality interests of vulnerable groups. A second clue to the nature of the claim

26. *Id.* § 213.2 cmt. at 371.

27. *Id.* § 213.1 cmt. at 286.

to legitimacy can be found in the discussion of the Michigan reforms, which are criticized as over-broad, as carelessly drafted, and as criminalizing trivial and innocent behavior.²⁸ Furthermore, there are instances where the Michigan law is bizarre, and plainly unacceptable. Thus:

The statute also adopts what seems plainly an unacceptable standard to authorize up to a 15-year sentence for the offense of sexual contact. The definition of "sexual contact" includes any touching of the victim's or the actor's intimate parts or the clothing covering the immediate area "if that intentional touching *can reasonably be construed* as being for the purpose of sexual arousal or gratification."²⁹

The Michigan law in this respect bears some resemblance to the Canadian law of sexual assault, the lowest level of which is punishable by a maximum ten year sentence. The "sexual" element is determined by an objective standard, albeit one in which the intent of the assaulter may be a factor. A "sexual" and thus, a more serious, assault is one committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated.³⁰

Some unexpressed standard of legitimacy is being used to reject as plainly unacceptable a serious sentence for sexual touching. Any non-consensual touching can be reasonably seen as a serious interference with bodily integrity. It is inconsistent with respect for sexual autonomy and in this context, where specific groups in society are distinctively targeted for sexual use irrespective of their wishes, inconsistent with equality. The common law has traditionally seen the touching of men as non-trivial. Thus in *The Queen v. Ewanchuk* it was stated:

Having control over who touches one's body, and how, lies at the core of human dignity and autonomy. The inclusion of assault and sexual assault in the Code expresses society's

28. See *id.* cmt. at 295.

29. *Id.* cmt. at 298.

30. See *The Queen v. Chase* [1987] 2 S.C.R.293.

determination to protect the security of the person from any non-consensual contact or threats of force. The common law has recognized for centuries that the individual's right to physical integrity is a fundamental principle, "every man's person being sacred, and no other having the right to meddle with it in any the slightest manner."³¹

The view that any non-consensual sexual touching can be seen as serious is an acceptable one if only on the ground that when someone touches a person irrespective of their wishes, there is no way of knowing when the invasion of bodily integrity will stop short of death. A woman who has faced death but been fortunate enough only to be grabbed by the breasts may not, in hindsight, share the view that treating her experience as a serious offense is somehow illegitimate.

Further, she might also take the view that the law should be indifferent as to whether the grabbing was for sexual arousal or reasonably construed as sexual. Should it make any difference if it were reasonably construed as for the purpose of humiliation? It would be consistent with the M.P.C.'s position on objective manifestation of aggression to support the removal of such a standard as irrationally benefiting accused persons.

Here my concern is not so much that there are differences of opinion about the appropriate reach of the law and how it should be expressed, but that there are standards of legitimacy at work here which need to be much more fully developed for a new model code. For instance, the problem is that the framers of, and commentators on, the M.P.C. see some forms of non-consensual sexual contact as trivial. Many people may well agree. Others, such as myself, may not. But I find it challenging to find reasons to label proposals based on my views as model.

There are jurisprudential suggestions as to what to do for the best in a situation of conflict. An approach that is grounded in equality is "looking to the bottom" as

31. (1999) 22 C.R. (5th) 1, 17 (S.C.C.) (citations omitted).

suggested by Mari J. Matsuda.³² Ann Scales describes this approach as including the rejection of epistemological privilege:

When the law must chose between realities, the principle of equality requires that we look to see whose dignity is most at stake, whose point of view has historically been silenced and is in danger of being silenced again, and that, in the ordinary case, we chose that point of view as our interpretation.³³

Thus, for those prepared to give up epistemological privilege, we can say what the (model) answer is in any given case, at least the best answer for the moment. However, theory is perhaps the most contested ground of all. It seems unlikely that the framers of a new model code could agree on a legitimacy-conferring theory on which to ground their work.

Is it possible to turn to process to find some degree of legitimacy then, to get beyond the minimum of articulation of standards of legitimacy? In my view, some degree of legitimacy can be found in an inclusive process. An example can be found in the process which produced "An Act to amend the Criminal Code (sexual assault)."³⁴ This process was remarkable for the consultations by the Ministry of Justice with women's groups, such as the Women's Legal Education and Action Fund (LEAF), the National Association of Women and the Law (NAWL), the National Association of Immigrant and Visible Minority Women (NOIVM), the Canadian Association of Sexual Assault Centres (CASAC), and the Native Women's Association of Canada (NWAC). Thus the Department of Justice had the benefit of the advice of activists, front-line workers, and individuals knowledgeable about the reality of, and legal practices surrounding, sexual assault. It has

32. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323, 324 (1987).

33. Ann Scales, *Feminist Legal Method: Not So Scary*, 2 UCLA Women's L.J. 1, 27 (1992).

34. Ch. 38, 1992 S.C. 991 (Can.).

been described by one of the participants, Sheila McIntyre, as translating principles of "accountability to, inclusion of, and genuine power sharing among the broad women's community into feminist legal practice."³⁵ I think it is also fair to say that this process was somewhat successful in developing legal doctrines responsive to diverse social realities.

For example, it was these consultations which laid the foundation for the new Canadian provision that, while hardly surprising to observers in the United States, an honest mistake as to consent is not a defense where "the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the accused was consenting."³⁶ Further, the consultations were also helpful in focusing at least some attention on layers of disadvantage among women. Thus a provision dealing with consent, that it is not obtained where "the agreement is expressed by the words or conduct of a person other than the complainant,"³⁷ addresses a concern that some sponsored immigrant women are vulnerable to having consent expressed by others on their behalf.

I would argue that an inclusive consultation process is vital to the legitimacy of any new model penal code.

Against this background—albeit a rather inconclusive one with respect to what makes "model" sexual offenses—I now go on to address a range of issues arising out of a Canadian reading section 213 of the M.P.C. Significant differences can be seen between provisions of the M.P.C. and current Canadian law. In considering these differences I ask what attention to constitutional equality norms could bring to the framing of sexual offenses. Given my tentativeness in identifying other standards against which to test any claim to legitimacy of "model" approaches

35. See Sheila McIntyre, *Redefining Reformism: The Consultations That Shaped Bill C-49*, in Julian V. Roberts & Renate M. Mohr, *Confronting Sexual Assault: A Decade of Legal and Social Change* 293, 294 (1994).

36. An Act to Amend the Criminal Code (sexual assault), ch. 38, 1992 S.C. § 273.2(b) (Can.).

37. *Id.* §. 273.1(2)(a).

to these issues, I fall back on attention to constitutional norms as the guide about which I can be most confident.

1. SHOULD "MODEL" OFFENSES BE NEUTRAL?

Section 213.1 of the M.P.C. is sex-specific, criminalizing only male sexual violence, in the form of "rape" and "gross sexual imposition," against women other than wives. On their face, these offenses are race-neutral. Other offenses, such as "deviate sexual intercourse" in section 213.2 are neutral. Since the early eighties, Canadian "sexual assault" offenses have been neutral. Does neutral drafting contribute to "model" sexual offenses?

In this particular context, this issue overlaps with the question of the legal significance, if any, to be attached to penetration, but it can be discussed on a broader level, having to do with codification and law reform in general. This paper begins with the obvious point that model offenses must be constitutional, and, with respect to the constitutions of both the United States and Canada, this includes egalitarian. From a Canadian perspective, the United States' interpretation of equality offers little guidance on how to model sexual offenses in terms of neutrality.³⁸ In general it would appear that the similarly situated approach points toward the neutral drafting of offenses to apply to everyone who can be harmed in similar ways. However, with respect to sexual offenses, it could be argued that men and women (and certainly adults and children) are not the same and therefore do not have to be treated the same way in law. It is difficult for arguments about whether difference, or indeed sameness, contribute to the social subordination of disadvantaged groups to gain a foothold.³⁹

38. Laurence Tribe notes that equality "can be denied when government classifies so as to distinguish . . . between persons who should be regarded as similarly situated in terms of the relevant equal protection principles." Laurence H. Tribe, *American Constitutional Law* 1438 (2d ed. 1988).

39. For a short description of Canadian equality jurisprudence, with its

The question of whether offenses should be neutralized to become more "model" is a complex one, as recognized in the Commentaries.⁴⁰ There are significant arguments for sex-specificity in the drafting of offenses governing quite sex-specific behavior. The sex-specific offenses in the M.P.C. could be seen as a traditional recognition of the biological differences between men and women associated with male fears of the penetration of their women by other men.⁴¹ As well, they could be seen as a progressive recognition of the distinctively gendered harm of rape and its social significance in terms of its role in the social subordination of women. Specificity avoids the problem of neutrality—that of masking and facilitating dominant interpretations. One well-known Canadian example is that of the court which held that touching a woman's breast could not be sexual assault, as that would mean touching other secondary sexual characteristics, such as a man's beard, would be too.⁴² Thus a new code might well continue to model the recognition of gendered harms (and indeed begin to model the harms of racialization, for example in the form of hate crimes) as well as gendered justifications/excuses.

There are of course also significant arguments in favor of neutral drafting. Sex is an increasingly inefficient proxy for more functional forms of classification. Even if one accepts that women are a political group—albeit highly diverse, but having sexual subordination in common at some level—male and female as categories are bound to be somewhat fuzzy as well as both over and under inclusive. Neutrality diminishes the need to capture shifting social realities in a single legislative moment—to predict all the

relative focus on disadvantage, see Robert J. Sharpe & Katherine Swinton, *The Charter of Rights and Freedoms* ch. 15 (1998).

40. See Model Penal Code § 213.1 cmt. at 334-39 (Official Draft and Revised Comments 1980).

41. This view seems supported by the marital immunity and the lesser protection offered "voluntary social companions."

42. See *The Queen v. Chase* (1984) 13 C.C.C. (3d) 187 [Canadian Criminal Cases] (N.B.C.A.) [New Brunswick Court of Appeal], rev'd, 37 C.C.C. (3d) 97 (S.C.C.).

ways in which rape-like sexual violence can be used as reminders to certain groups that they are there for sexual use by others.

The approach that I would see as model is to ensure that as many social realities are understood before drafting, through an inclusive consultation process, and then to draft neutral offenses. In other words, attention to equality, in the sense that the interests of certain types of victim are not marginalized and ignored, and a claim to legitimacy can be found in the process of becoming informed about diverse social contexts, rather than in drafting offenses to apply in sex-specific ways. However, given that there are serious arguments for and against both neutrality and specificity, I doubt that one approach can be seen as more "model" than the others.

2. SHOULD THERE BE ANY SORT OF RELATIONSHIP IMMUNITY?

Section 213.1 of the M.P.C. confers immunity from criminal responsibility on husbands who rape their wives (or commit the offense of gross sexual imposition), unless there is a decree of judicial separation. Indeed the immunity extends to those men who live with a woman "as man and wife, regardless of the legal status of their relationship."⁴³ As well, it uses the relationship between the offender and the victim to grade offenses. Thus, rape is a felony in the second degree if the victim was a "voluntary social companion of the actor upon the occasion of the crime" or had "previously permitted him sexual liberties."⁴⁴ Pure stranger rape is therefore seen as more serious, a felony of the first degree.

Canada removed husbands' immunity in the early eighties⁴⁵ and never had any sort of substantive rule that it was less serious to rape one's friends, companions, lovers, or ex-lovers. Such ideas may of course have influenced

43. Model Penal Code § 213.6(2) (Official Draft and Revised Comments 1980).

44. *Id.*

45. See *supra* note 3.

reporting, prosecutorial discretion, and sentencing. As well, we do have a continuing debate about an evidentiary form of such immunities or partial immunities.⁴⁶

Is it possible to find a model approach to the protection of wives, lovers, friends, etc., from sexual violence? This issue relates to the sexual autonomy and sexual accessibility of women in relationships, and thus it may be useful to turn to a norm of equality for guidance. Women who are in, or have been in (given the term "previously" in the M.P.C.), relationships with men, are vulnerable to being seen as distinctively sexually accessible, and therefore, to being denied the full protection and benefit of the law. If either the substantive or the evidentiary law attaches significance to the relationship, then the law is in danger of promoting the creation of categories of women to whom some men have privileged access, irrespective of the wishes of the women themselves.⁴⁷

3. WHAT IS THE APPROPRIATE SCOPE OF CRIMINALIZED BEHAVIOR?

Sexual violence raises many issues requiring the setting of boundaries on the scope of criminalized behavior. Two sample issues will be mentioned here.

First, to what extent and at what level should non-violent, non-consensual sexual contact be criminalized? Given the ongoing difficulties with the meaning of consent, the M.P.C. attempts to minimize, with respect to rape, the difficulties of consent as a boundary by focusing largely on the behavior of the accused. Thus the offense of rape criminalizes various forms of compulsion to submit, and the impairment of capacity. As well, sexual intercourse with unconscious women and children under ten is included. Attention to the behavior of the complainant is not completely avoided, however, since the offense of gross sexual imposition criminalizes compulsion by threats "that

46. See, e.g., Boyle & MacCrimmon, *supra* note 11, at 219-37.

47. See generally Christine Boyle, *Sexual Assault in Abusive Relationships: Common Sense about Sexual History*, 19 *Dalhousie L.J.* 223 (1996).

would prevent resistance by a woman of ordinary resolution."⁴⁸

This structure creates the possibility that non-forceful, yet non-consensual sexual contact is not included. This could occur in two ways. First, there may be non-consensual contact in the absence of anything that could qualify as coercion.⁴⁹ Second, the interpretation of both "threats" and the "ordinary resolution" standard, could have the same effect. Consider, for example, the scenario where the accused said "I won't hurt you." What to me seems very frightening could be seen as not a threat and if it were a threat, then resistible by a woman of ordinary resolution. There is, of course, the possibility of conviction, under section 213.4, of sexual assault. This would make the "knowingly offensive sexual contact with another" a misdemeanor. This criminalizes sexual touching in a fairly weak manner, since the pivotal concept is knowledge of offensiveness. Thus, it seems to suggest a form of rebuttable touchableness, that people can be touched until they make the offensiveness of the touching known.

In Canada, it is becoming increasingly clear that non-forceful, non-consensual sexual contact is criminal, and that the default position is non-consent. It is an offense to touch another person sexually without that person's consent.⁵⁰ Consent means "the voluntary agreement of the complainant to engage in the sexual activity in question."⁵¹ Further, no "consent is obtained . . . where . . . the complainant expresses, by words or conduct, a lack of agreement to engage in the activity."⁵² Thus, colloquially, "no means no." Further, the Supreme Court of Canada has

48. Model Penal Code § 213.1(2)(a) (Official Draft and Revised Comments 1980).

49. This could be accompanied, plausibly, by lack of knowledge of offensiveness and thus not be caught by the sexual assault offense in section 213.4.

50. See An Act to Amend the Criminal Code (sexual assault), ch. 38, 1992 S.C. §§ 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm), 273 (aggravated sexual assault) (Can.).

51. *Id.* § 273.1(1).

52. *Id.* § 273.1(2)(d).

held, albeit in a very brief judgement, that passivity is not consent. Thus, in *The Queen v. M.(M.L.)*,⁵³ the Supreme Court of Canada said that in the circumstances of that case, the court below “was in error in holding that a victim is required to offer some minimal word or gesture of objection and that lack of resistance must be equated with consent.”⁵⁴ The most recent decision of the Court can be found in *The Queen v. Ewanchuk*.⁵⁵ In this case, the majority of the Court referred to the touching of the passive person in its analysis of mens rea, stating that “a belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and provides no defense.”⁵⁶

So, how should model offenses criminalize non-forceful, non-consensual sexual contact? To criminalize it in a way that does not turn on the perspective of the accused requires a focus on the concept of consent. The issue can be illustrated by positing a trial in which the Crown has proved beyond a reasonable doubt that the complainant was passive, she said neither yes nor no to sexual intercourse or any other form of sexual contact. Has the Crown proved non-consent? I would suggest that in Canada, the answer is yes but that under the M.P.C., the answer would be no, or at best, the accused would have committed a misdemeanor where there were some other facts suggesting knowledge of offensiveness.

Again, here it would be useful to turn to the norm of equality for guidance. It seems to me that being treated by the law as if you are in a perpetual state of willingness to have sexual contact which has to be withdrawn by something that will make the offensiveness known to make you entitled to sexual autonomy is a signal of very low status in any society. As well, any legal rule which requires resistance or any form of negative reaction to trigger the right to sexual autonomy seems to signal that the safety of the target group is not a high priority. Thus,

53. (1994) 30 C.R. (4th) 153 (S.C.C.).

54. *Id.* at 155.

55. (1999) 22 C.R. (5th) 1 (S.C.C.).

56. *Id.* at 23 (citation omitted).

in my view, it would be consistent with the equality rights of the primary targets of sexual assault, women and children, to place the risk of non-consent on persons wishing to have sexual contact with others.

Second, to what extent should fraudulent sexual contact be criminalized? The M.P.C. does propose the criminalization of some, narrow forms of fraudulent sexual assault. Section 213.1(2)(c) includes as gross sexual imposition the situation where the accused "knows that she is unaware that a sexual act is being committed upon her or that she submits because she mistakenly supposes that he is her husband."⁵⁷ This is a felony in the third degree because "there is no prospect of physical danger."⁵⁸ Several concerns can be raised about this. To me, it is intuitively wrong to treat fraudulent rape as less serious. I doubt that I would say of a friend going for a medical examination that if she were in danger of being sexually assaulted in some fraudulent manner that she was in no physical danger. One would not normally say that because a person was not the victim of two offenses—sexual assault and assault causing bodily injury—that the former form of assault did not put them in physical danger. Second, the narrow definition offers hardly any realistic protection from fraudulent sexual assault to women. Patricia J. Falk, in her article, *Rape by Fraud and Rape by Coercion*,⁵⁹ offers many examples of "commercial-like fraud (i.e. sexual scams),"⁶⁰ and "property-like offenses (i.e. sexual theft and extortion),"⁶¹ which I think a rational codifier would include in a new model code as being as serious as other forms of sexual assault as well as other financial offenses.

The Canadian Criminal Code does not take a position on the scope of this type of sexual assault, referring only to fraud in stating that "no consent is obtained where the

57. See Model Penal Code § 213.1(2)(c) (Official Draft and Revised Comments 1980); see also id. § 213.3 (seduction under false promise of marriage).

58. Id. § 213.1 cmt. at 331.

59. 64 Brook. L. Rev. 39 (1998).

60. Id. at 50.

61. Id.

complainant submits or does not resist by reason of . . . (c) fraud."⁶² The Supreme Court of Canada has recently taken a much more expansive view of the meaning of fraud in *The Queen v. Cuerrier*,⁶³ a case dealing with an accused who had unprotected sex with two complainants without telling them that he was HIV positive and who was charged with aggravated assault.

In *Cuerrier*, the Court revisited the old English case of *The Queen v. Clarence*,⁶⁴ in which it was held that a husband's failure to tell his wife that he had gonorrhoea did not vitiate her consent to sexual intercourse. This case had been approved in *Bolduc v. The Queen*,⁶⁵ in which it was held that the complainant consented to a medical examination attended by a voyeur she had been told was an intern. A broader view of fraud was adopted for cases where there is a significant risk of bodily harm:

[I]t is no longer necessary when examining whether consent in assault or sexual assault cases was vitiated by fraud related to consider whether the fraud related to the nature and quality of the act. A principled approach consistent with the plain language of the section and an appropriate approach to consent in sexual assault matters is preferable. To that end, I see no reason why . . . the principles which have historically been applied in relation to fraud in criminal law cannot be used.⁶⁶

Thus, "it should now be taken that for the accused to conceal or fail to disclose that he is HIV-positive can constitute fraud which may vitiate consent to sexual intercourse."⁶⁷

The majority here appeals for legitimacy to principle and appropriateness. However, in my view, the appeal is to

62. An Act to Amend the Criminal Code (sexual assault), ch. 38, 1992 S.C. S. 265(3) (Can.).

63. (1998) 18 C.R. (5th) 1 (S.C.C.).

64. (1888) 22 Q.B.D. 23 (England: Queen's Bench Div.).

65. [1967] S.C.R. 677.

66. *Cuerrier* [1998] C.R. (5th) at 47.

67. *Id.* at 50.

prompt complaint is not rationally linked to a lack of credibility. As well, to Canadian eyes, with increasing experience of the prosecution of "historical" sexual assault cases, limitation periods on serious criminal offenses look very unusual, in spite of concerns about the prosecution of stale cases. There are no limitations on the prosecution of sexual assault as an indictable offense, the Canadian equivalent of a felony. Indeed, limitation periods have given rise to constitutional challenges in the civil context.⁷⁶

3. Lastly, the M.P.C. has a strong corroboration rule, in that corroboration is required for conviction of a felony. As well, there must be a warning to the jury to evaluate the testimony of a complainant "with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private."⁷⁷ The Commentaries, however, raise concerns about this, pointing out that this is an area of "special sensitivity."⁷⁸

Canada has neither corroboration rule, although there used to be a requirement of a warning. Section 274 states:

Where an accused is charged with [sexual assault] no corroboration is required for a conviction and a judge shall not instruct a jury that it is unsafe to find the accused guilty in the absence of corroboration.⁷⁹

Evidentiary rules (or in this case their substantive equivalents) trigger what is possibly the clearest illustration of the importance of the modeling of egalitarian sexual offenses. It is here where signals of low social status, in the undervaluing of the sexual autonomy of

275 (Can.). However, it is still possible for the Crown to lead evidence of the complainant's prompt complaint, in response, for instance, to a defense allegation of recent fabrication.

76. See *K.M. v. H.M.*, [1992] 3 S.C.R. 6.

77. Model Penal Code § 213.6(5) (Official Draft and Revised Comments 1980).

78. *Id.* cmt. at 422; see also *id.* cmt. at 425 (discussing criticisms of the New York law as reflecting an "official policy of suspicion.").

79. An Act to Amend the Criminal Code (sexual assault), ch. 38, 1992 S.C. § 274.

sexually active women and women in relationships, as well as in the assumption of a distinctive lack of credibility, can be most easily found.

Thus, I would argue that fine-tuning the substantive protection of the law to the sexual history of the complainant is not consistent with equality. In Canada, where the weaker evidentiary version of the sexual history rule is somewhat controversial, there still seems general agreement that it is illegitimate to reason directly from a complainant's sexual experience to consent or lack of credibility. Further, rules which signal a particular skepticism of the groups primarily targeted for sexual assault, here women and children, that limit the protection of the law to people who complain quickly and can be corroborated, are subject to criticism as inegalitarian.

CONCLUSION

In my view, the challenge of justifying standards against which draft sexual offenses can be tested to see if they can be held up as models is a difficult one. Discussed above are some weak standards which seem unlikely to be controversial—the articulation of a general orientation and both conscious and critical attention to the problem of legitimacy. It may be that an inclusive consultation process would fall into that category too. However, any actual standard of legitimacy, such as “looking to the bottom” is likely to give rise to debates similar to ones about actual competing draft offenses. However, although the very meaning of equality and its applicability as a standard against which to test sexual offenses may be similarly debatable, in my view it is a crucial standard against which to test the “modelness” of the sexual offenses in any new model penal code.

a more egalitarian valuing of physical and financial security. One member of the Court, Madame Justice L'Heureux-Dubé, would have held that fraud was any dishonesty which induced another to consent to an act, whether or not that act was dangerous.⁶⁸ In my view, this goes further in the direction of equality in terms of valuing both sexual and financial autonomy. People should be able to make decisions about what to do with both their bodies and their money uninfluenced by fraudulent factors, if they would have made different decisions had they known the truth.

4. WHAT ARE APPROPRIATE CONTROLS OF THE FACT DETERMINATION PROCESS?

The M.P.C. does not generally purport to regulate the fact determination process, but nevertheless, some provisions with links to evidentiary rules are included with respect to sexual offenses. There are three types of evidentiary rules which have attracted much analysis and criticism in the common law world: those relating to corroboration, what would be called recent complaint in Canada, and sexual history. The M.P.C. contains very strong, that is, pro-accused, versions of these rules. Here again it may be possible to turn to equality as a standard for model offenses.

1. Section 213.6(3) of the M.P.C. contains a substantive version of a sexual history rule in that it is a defense to certain offenses to prove that the complainant had "engaged promiscuously in sexual relations with others."⁶⁹ Thus, a prison guard charged with having sexual intercourse with a person in custody would be acquitted on proving the complainant promiscuous.⁷⁰ (It should be noted, however, that this defense does not apply to rape or gross sexual imposition.). So while bad girls can't be coerced into sex, they lack protection from the use of power

68. *Id.* at 15-24 (L'Heureux-Dubé, J., dissenting).

69. Model Penal Code § 213.6(3) (Official Draft and Revised Comments 1980).

70. See *id.* § 213.3(1)(c).

or authority. More broadly, the fact that the complainant had previously permitted the accused sexual liberties would reduce rape to a felony in the second degree.⁷¹ The marital immunity is an even stronger substantive rule taking sexual history into account.

In contrast, Canada sets some limitations on the use of sexual history evidence, including sexual history with the accused. Section 276(1) of the Criminal Code states:

In [sexual assault] proceedings . . . evidence that the complainant has engaged in sexual activity, whether with the accused or any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

is more likely to have consented. . .; or is less worthy of belief.⁷²

2. Section 213.6(4) of the M.P.C. contains an extremely strong, substantive version of the recent complaint rule (a weak evidentiary version being that the lack of a prompt complaint may undermine credibility in the absence of explanation).⁷³ It basically suggests a limitation period of three months for sexual offenses.⁷⁴

In Canada, the recent complaint rule has been "abrogated,"⁷⁵ given the recognition that the lack of a

71. See id. § 213.1(1).

72. The constitutionality of Canadian sexual history rules are presently being challenged before the Supreme Court of Canada in *The Queen v. Darrach*, [1998] S.C.C.A. No. 184 (Q.L.), after being upheld by the Ontario Court of Appeal (1998) 122 C.C.C. (3d) 225.

73. See Model Penal Code. § 213.6(4) (prompt complaint) (Official Draft and Revised Comments 1980).

74. See id.:

[n]o prosecution may be instituted or maintained under this Article unless the alleged offense was brought to the notice of public authority within [3] months of its occurrence or, where the alleged victim was less than [16] years old or otherwise incompetent to make complaint, within [3] months after a parent, guardian, or other competent person specially interested in the victim learns of the offense.

75. An Act to Amend the Criminal Code (sexual assault), ch. 38, 1992 S.C. §