A Feminist Take on First Year Criminal Law
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Be thankful for one thing: as a feminist student in first year Criminal Law you will not be bored. Confused and shocked—sometimes, and rightly so. Angry—often! But bored? Never. That's because criminal law is all about inequality—in fact it is premised on inequality and power. Sadly, our jurisprudence is largely indifferent to this reality,[1] thus making the legal education of feminist advocates like you an urgent priority.

In my course, I use a two-volume casebook[2] developed with Professor Jennie Abell and more recently updated with our colleague Professor Natasha Bakht. I love these materials! I like to think that not a feminist issue escapes our reach. I take the position that to teach criminal law as if it were neutral, progressive, and inevitable is indefensible intellectually and dis-abling professionally for the next generation of lawyers. You must be able to prosecute corporations and defend Aboriginal and African-Canadian accused and women, draft new laws and develop criminal law policy, fight to right wrongful convictions, and demand accountability and transparency from police, corrections, immigration officials and other state bodies, all with intelligence and passion. Our future as a democracy depends on it.

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[1] Elizabeth Sheehy, "Equality and Supreme Court Criminal Jurisprudence: Never the Twain Shall Meet," in Sheila McIntyre and Sanda Rodgers, eds. *The Supreme Court of Canada and the Achievement of Social Justice: Commitment, Retrenchment or Retreat?* (Toronto: LexisNexus, 2010) forthcoming.

[2] Jennie Abell and Elizabeth Sheehy, *Criminal Law & Procedure: Cases, Context, Critique, 4th Ed* (Concord, ON: Captus Press, 2007)[hereafter Abell & Sheehy]; Jennie Abell, Elizabeth Sheehy, and Natasha Bakht, *Criminal Law & Procedure: Proof, Defences, and Beyond, 4th Ed* (Concord, ON: Captus Press, 2009). Another fine set of critical, feminist materials is by Toni Pickard, Phil Goldman and Rosemary Cairns-Way, eds. *Dimensions of Criminal Law, 3d Ed.* (Toronto: Emond Montgomery, 2002).

Throughout our two volumes of materials we examine the role of racism, misogyny, colonization, disability-ism, hetero-sexism and corporate power in shaping the substance and process of criminal law in Canada. We encourage students to ask the hard questions as they read the cases and the materials we use to contextualize those cases. Who stands to benefit and who to lose from the criminalization and the de-criminalization (through non-enforcement of the law or the available defences) of certain forms of conduct? What assumptions, values, and beliefs are embedded in criminal law decisions? Are they supported by evidence and if so, is the evidence sound or are there other truths that need to be explored? Can the faulty assumptions be exposed and the rule thereby undermined? How is discrimination embedded in language structures? Which legal and political strategies might be deployed to challenge the discriminatory impact of criminal law?

If you are among the majority of Canadian law students then you will not be taught Criminal Law by feminist professors using critical materials. You will therefore need to find allies among your classmates, to read additional materials in order not to lose your mind, and to strategize about whether and how you will raise feminist questions in your classes. After all, women have now comprised the majority of the law student population for at least five years, we constitute the fastest growing prison population in Canada,[3] and we are overwhelmingly at the receiving end of sexual assault,[4] battering and coercive control,[5] and intimate homicide.[6] You are entitled to an education that reflects these realities!

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[3] Laura Stone, "Number of women going to prison jumps 50%" Canwest News Service (10 May 2010).

[4] Men constitute 99% of offenders and women are 90% of those attacked; even Cory J. for the Supreme Court acknowledges that sexual assault is a sex equality issue: *R. v. Osolin*, [1993] 4 S.C.R. 872 at 877.

[5] Evan Stark, *Coercive Control* (Oxford: Oxford University Press, 2007) Chapter Three, The Proper Measure of Abuse.

[6] Fully 92% per cent of the perpetrators of the 230 domestic homicides committed in Ontario between 2002 and 2007 were men, while only 8% of the victims of intimate homicide were male. In contrast, 8% of perpetrators were female as were 92% of those murdered: *Sixth Annual Report of the Ontario Domestic Violence Death Review Committee* (Ontario: Office of the Chief Coroner, 2008). Note also that these data cannot be compared because the most common motivation for men's deadly attacks on their intimate partners is estrangement or threat thereof and sexual jealousy, whereas husband killing by women is most often instigated in self defence: Margo Wilson and Martin Daly, "Spousal Homicide Risk and Estrangement" (1993) 8 Violence and Victims 3.

Here, in a short survey, are a few of the many issues that feminists have identified in our criminal law. First is the definition of crime. Historically, the power to criminalize has been held exclusively by white men of wealth and power, and that remains more or less the case today. If you want to think about who has defined what is "criminal" and for which instrumental purposes, consider the use of criminal law to implement colonization in Canada and to strip Aboriginal peoples of their wealth, their lands, their culture, and their children. The *Indian Act* created a whole host of criminal offences specific to Aboriginal peoples, including the criminalization of legal, cultural, and spiritual practices such as the Potlatch and the Sun Dance, and sanctions for defiance of the "Pass System," for resisting removal of children into residential schools, and for employing lawyers in actions against the government. The legacy is, according to Justice Murray Sinclair, cultural genocide and "collective social depression."[7] You simply cannot begin to understand the current crisis of over-incarceration of Aboriginal people, and the futility of the Supreme Court's response in *R. v. Gladue*,[8] without knowing the roots of this oppression.

In the US, the mandatory sentencing laws for drug crimes,[9] combined with widespread racial profiling by police and laws that deprive convicted persons of the right to vote, sometimes permanently, have effectively disenfranchised hundreds of thousands of African-Americans—and it matters! The 2006 presidential election was lost by only 537 votes: if even 33 per cent of 200,000 disenfranchised African-American voters in Florida *alone* had voted in their pattern of 80% Democratic support, Al Gore would

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[7] His Honour Judge Murray Sinclair, "A Presentation to the Western Workshop of the Western Judicial Education Centre" in Abell & Sheehy, *supra* note 2 at 84, 88.

[8] [1999] 1 S.C.R. 688. As a sentencing decision that requires judges to consider systemic background factors for Aboriginal accused before sentencing them to prison, this case does too little, far too late. In fact, the incarceration rate for Aboriginal people has increased since *Gladue* was decided: Statistics Canada he astute feminist reader will also note that Jamie Gladue was a woman, that Aboriginal *women* are completely disappeared in this decision, that she pled guilty to the manslaughter of an abusive partner, and that while the decision sets new principles, she did not get the benefit of her own case. See eg Jean Lash, "Case Comment: *R. v. Gladue*" (2000) 20 Canadian Woman Studies 85.

[9] A law reform widely acknowledged in the US as a failure, to which we have now wholeheartedly subscribed through the passage of C-15 in 2010: see Elizabeth Sheehy, "The Discriminatory Effects of Bill C-15's Mandatory Minimum Sentences" (2010) 70(2) Criminal Reports (6th) 302.

have won by 69,500 votes.[10] If you want to dream big, read *A Feminist Review of Criminal Law*,[11] which dares to imagine what the criminal law would look like had women been its drafters. Constitutional challenges to modern "crimes" have targeted the *Safe Streets Act* (anti-squeegee law),[12] the prohibition against the possession of marijuana,[13] and the *Criminal Code*'s higher age of consent for anal intercourse, obviously directed at gay sexual practices.[14]

Not only is the content of the criminal law biased, but its enforcement by police is also skewed by racism, homophobia, and misogyny. While many white-collar and environmental crimes remain under-enforced, numerous wrongful convictions have been produced at least in part by systemic bias—for example Donald Marshall Jr., Wilson Nepoose, Aboriginal men, and mothers like Louise Reynolds, Brenda Waudby, and Sherry Sherrett, three female victims of Dr. Charles Smith's misguided "expert" testimony blaming them for the deaths of their children in Ontario.[15] Some lawyers have proven that their clients were victimized by discriminatory enforcement of the penal law, for example, Little Sister's gay and lesbian bookstore in Vancouver won against Canada Customs.[16]

So too did Jane Doe win against Toronto Police for sex discrimination in the investigation of rape and for failure to warn her of a serial rapist.[17] Unfortunately, her case is not usually taught in Criminal Law because it was a *Charter* and a negligence suit. But we teach it in Criminal Law and Procedure in order to expose graphically how rape myths continue to shape the police response to women's reports of rape,

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[10] See Ira Glasser, "Drug Busts=Jim Crow" *The Nation* (10 July 2006) 24.
[11] Christine Boyle et al., *A Feminist Review of Criminal Law* (Ottawa: Status of Women, 1985).
[12] *R. v. Banks* (2007), 84 O.R. (3d) 1 (C.A.).
[13] *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571.
[14] *R. v. C. (M.)* (1995), 23 O.R. (3d) 629 (C.A.).
[15] All discussed in Abell & Sheehy, *supra* note 2 at 133-135
[16] *Little Sisters Book and Art Emporium v. Canada*, [2000] 2 S.C.R. 1120. Sadly, Little Sister's remains without a remedy for ongoing discrimination:
[17] (1998), 39 O.R. (3d) 487 (Ont. Ct. (Gen. Div.)).

to show that rape is still "unfounded" by police at a far higher rate than any other crime,[18] to explain why rape is vastly under-reported by women, and to prepare students to read sexual assault cases with a critical eye. If Jane Doe does not usually come to speak to your law school class about her case, try to organize her visit yourselves—your legal education will be deeply enriched. Many students tell me that her talk was the highlight of their entire first year. Read her book![19] It will make you laugh, it will nourish your rebel spirit, and she gives a gripping account of this incredible legal saga.

We tackle many criminal procedure topics that are compelling for feminist students. For example, the law of arrest demonstrates that our courts have widened police powers to arrest without judicial warrant requirements, subjecting citizens to unchecked police authority; at the same time, police discretion not to arrest, especially in cases of wife assault, remains relatively immune from sanction, even when it results in intimate femicide.[20] Our law is only just beginning to respond to racial profiling by police in terms of their new common law powers to engage in "investigative detention,"[21] but criminal lawyers who "see" racism and are willing to confront it in their legal arguments remain at a premium.[22] Police search and seizure powers are abused through male strip searches of women,[23] the right to counsel is an illusion for most women and poor people charged with minor offences,[24] and

[18] Linda Light and Gisela Ruebsaat, "Police Classification of Sexual Assault Cases as Unfounded: An Exploratory Study" (Justice Institute of British Columbia, unpublished, March 2006).
[19] Jane Doe, *The Story of Jane Doe* (Toronto: Random House, 2003).
[20] *Mooney v. British Columbia*, 2004 BCCA 402; but see the US case, *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984) where Tracey Thurman settled her lawsuit for sex discriminatory failure to arrest her violent ex-partner, reproduced in Abell & Sheehy, *supra* note 2 at 462.
[21] See *R. v. Brown* (2003), 64 O.R. (3d) 161 (C.A.) and *R. v. Mann*, [2004] 3 S.C.R. 59 and the work of Professor David Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006).
[22] David Tanovich, "The Further Erasure of Race in *Charter* Cases" (2006) 38 C.R. (6th) 84.
[23] See The Honourable Louise Arbour, *Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Safety Canada, 1996) (women prisoners); *R. v. Hornick*, [2002] O.J. No. 1170 (Ct. Just.) (Women's bathhouse); *R. v. S.F.*, [2003] O.J. No. 92 (Ct. Just.) (teenage girls in police custody).
[24] See *R. v. Rain* (1998), 223 A.R. 359 (C.A.) for an example of how courts apply s. 7 of the *Charter* to claims for funded counsel.

neither bail decisions nor sentencing practices come anywhere close to protecting women and denouncing wife battering.[25]

Turning from criminal procedure to the elements of proof, the physical act (*actus reus*) and the mental element (*mens rea*), feminist students will have to work a bit harder to unpack the gender bias embedded in the doctrine. But do not doubt that it is there! For example, the law of omissions is deeply linked to notions of morality and obligation—you should expect that gender roles and the worthiness of the victim will come into play in these decisions.[26] When it comes to the doctrine of *mens rea*, our individualized notions of "real" crime mean that the criminal law is basically helpless in the face of corporate criminality.[27]

With respect to the *mens rea* for sexual assault, Professors Toni Pickard and Phil Goldman have argued that "the subjective standard in sexual assault generally protects patriarchal interests by validating and protecting male understandings of the world."[28] The cases that you will study when considering the defence of mistake of fact, a *mens rea* defence, are almost exclusively sexual assault cases where the accused man claims that he honestly but mistakenly believed that the woman consented, rendering him "morally innocent." Although criminal lawyers claim that the mistaken belief in consent defence is

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[25] For example, *R. v. Inwood* (1989), 32 O.A.C. 287 held that wife assault causing bodily harm should ordinarily result in incarceration of several months, but that only "wife battering," defined as repeated attacks upon a woman who is entrapped, warrants substantial incarceration. The Ontario Court of Appeal refused in *R. v. Edwards* (1996), 28 O.R. (3d) 54 to set a benchmark sentence for attempted murder of women who were in intimate relationship with the perpetrator. For a feminist critique see Isabel Grant and Debra Parkes, "Sentencing for Domestic Attempted Murders: 'Special Interest Pleading'?" (1997) 9 C.J.W.L. 196.

[26] Compare, for example, the decisions in *R. v. Instan*, [1893] Q.B. 450 (niece convicted of manslaughter for failing to care for her ailing aunt) and *R. v. Urbanovich* (1985), 19 C.C.C. (3d) 43 (Man. C.A.) (teenage mother convicted for failing to provide the necessaries of life to infant battered to death by violent partner, even though she sought medical aid 11 times in four months) with *R. v. Beardsley*, 113 N.W. 1128 (Mich. Sup. Ct. 1907) (husband not responsible for failing to save life of suicidal mistress) and more recently *R. v. Browne* (1997), 33 O.R. (3d) 775 (C.A.) (drug dealer not responsible for failing to sure timely medical aid for female partner in crime, even though he had promised to do so).

[27] For the failed criminal prosecutions of two drownings and numerous injuries caused when Ontario Power Generation released water from a dam onto sunbathers on the rocks in the riverbed below, see *R. v. Ontario Power Generation*, [2006] O.J. No. 4659 (Ct. Just.) and *R. v. Tammadge*, [2006] O.J. No. 5103 (Ct. Just.).

[28] *Dimensions of the Criminal Law* (Toronto: Emond Montgomery Publications, 1992) at 394.

simply an example of a neutral, principled and coherent doctrine with perhaps an unfortunate application to rape cases, feminists argue that the defence has taken the form it has *because* its almost exclusive origins and applications arise out of misogynistic beliefs and patriarchal values such that "sexual assault is only sexual assault in the eyes of the law if the man who is doing it thinks it is."[29]

You will probably have to read a number of awful cases, *R. v. Pappajohn*[30] (note that Bill C-49, a feminist law reform enacted in 1992,[31] reverses the main thrust of this case: an accused must now take reasonable steps to ascertain consent: *Code* s. 273.2(b)), *R. v. Sansregret*, *R. v. Esau*, *R. v. Osolin*, *R. v. Seaboyer*, etc.[32] Unfortunately you will read another whack of rape cases for the defence of intoxication[33] and automatism.[34] Try not to get discouraged—get mad instead! Read Justice L'Heureux-Dubé's full dissent in *Seaboyer*, where she uses the legal history of rape law reforms (undone repeatedly by the judiciary) and the social science evidence to demonstrate convincingly that "Sexual assault is not like any other crime." You should also read the work of Lucinda Vandervort, who argues persuasively that men's claimed mistakes are not factual errors of misperception, but rather legal errors as to the permissible norms for sexual force and coercion that should afford no defence at all because mistake of law is not a defence.[35] Take heart in the cases that feminists have litigated and won[36] Finally, if you really

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[29] Anne Derrick and Elizabeth Shilton, "Sex Equality? Equally and Sex Assault: In the Aftermath of *Seaboyer*" (1991) 11 Windsor Y.B. Access Just. 107 at 108.

[30] [1980] 2 S.C.R. 120.

[31] Sheila McIntyre, "Redefining Reformism: The Consultations That Shaped Bill C-49," in Julian V. Roberts and Renate M. Mohr, eds. *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 293. The reasonable steps requirement has had a mixed reception from judges: see Elizabeth Sheehy, "Judges and the Reasonable Steps Requirement: The Judicial Stance on Perpetration Against Unconscious Complainants" in Elizabeth Sheehy, ed. *Sexual Assault Law, Practice and Activism in a Post-Jane Doe Era* (Ottawa: University of Ottawa Press, 2010) (Volume II, forthcoming).

[32] The citations are, respectively, [1985] 1 S.C.R. 570; [1997] 2 S.C.R. 777; [1993] 4 S.C.R. 595; [1991] 2 S.C.R. 577.

[33] *R. v. Leary*, [1978] 1 S.C.R. 29; *R. v. Bernard*, [1988] 2 S.C.R. 833; *R. v. Daviault*, [1994] 3 S.C.R. 63.

[34] *R. v. Rabey* (1977), 17 O.R. (2d) 1 (C.A.), aff'd [1980] 2 S.C.R. 513; now see *R. v. Luedecke*, [2008] O.J. No. 4049 (C.A.), the "sexsomnia" case.

[35] "Mistake of Law and Sexual Assault: Consent and Mens Rea" (1987-88) 2 C.J.W.L. 233.

[36] *R. v. M.(M.L.)*, [1994] 2 S.C.R. 3; *R. v. Ewanchuk*, [1999] 1 S.C.R. 330; and *R. v. Darrach*, [2000] 2 S.C.R. 443, among others.

need a hit of sanity, search out and read the work of one or two of the many Canadian feminist authors on the topic.[37]

Another defence that leaps out for feminists in first year Criminal Law is the partial defence of provocation, used primarily by men to excuse homophobic violence by claiming "homosexual advance"[38] or "homosexual panic," but also to mitigate intimate femicide. The vast majority of wife murders are committed by men who will not accept a woman's separation from the marriage or her new relationship, often these men are batterers, and their crimes are usually predictable and preventable,[39] which ought to undercut the claim of "sudden provocation."[40] Although new forms of "provocation" are being claimed by racialized and immigrant men who kill their wives and daughters,[41] all forms of intimate femicide are really "honour killings"—they are about vindicating perceived wrongs to men's honour and property rights. For this reason, feminists have called for reforms to this patriarchal defence, even calling for its abolition.[42]

Perhaps not surprisingly, provocation is difficult to argue on behalf of women who kill. Yet self-defence is really the defence that battered women need to invoke when charged with homicide. That's because unlike provocation it is a complete defence resulting in acquittal if successful; it also more fairly

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[37] See for the example the many publications of Constance Backhouse, Natasha Bakht, Janine Benedet, Christine Boyle, Karen Busby, Lise Gotell, Isabel Grant, Sheila McIntyre, Melanie Randall, Sherene Razack, Rakhi Ruparelia, and me on sexual assault law in Canada.

[38] *D.P.P. v. Camplin*, [1978] 2 All E.R. 168 (H.L.); *R. v. Hill*, [1986] 1 S.C.R. 313. For a comment on some of the cases resolved by guilty plea see N. Kathleen Banks, "The 'Homosexual Panic' Defence in Canadian Criminal Law" (1997), 1 C.R. (5th) 371.

[39] Rosemary Gartner, Myrna Dawson and Maria Crawford, "Woman Killing: Intimate Femicide in Ontario 1974-1994" in Katherine M.J. McKenna and June Larkin, eds. *Violence against Women. New Canadian Perspectives* (Toronto: Ianna Publications, 2002) 123.

[40] See *R. v. Thibert*, (1995), [1996] 1 S.C.R. 37, where the accused had contemplated killing the deceased (wife's lover) and had stalked his wife, with a loaded gun, insisting on his "right" to speak to her alone; he took umbrage at the fact the deceased would not allow him to do so and stood up to him, saying go ahead and shoot me, big fellow.

[41] *R. v. Ly* (1987), 33 C.C.C. (3d) 31 (B.C.C.A.); *R. v. Humaid* (2006), 81 O.R. (3d) 456 (C.A.).

[42] Andrée Coté, Diana Majury and Elizabeth Sheehy, *Stop Excusing Violence Against Women!* (Ottawa: National Association of Women and the Law, 2000); Joanne St. Lewis and Sheila Galloway, *Reform of the Defence of Provocation* (Toronto: Ontario Women's Directorate, 1945).

represents the moral claim that sometimes it is rightful—not just excusable—to kill another. Although like provocation the historic roots of self-defence are premised on men's lives and confrontations, it has undergone some modern adjustment for male violence in women's lives through the introduction of "battered women's syndrome" (BWS) as evidence to support self-defence.[43] Don't swallow any of the "abuse excuse" hype: read the story behind *R. v. Whynot (Stafford)*,[44] or watch the made for tv movie *Life With Billy*.

The feminist student doesn't stop there, however. She asks whether BWS fairly represents the experiences of ALL women; she asks whether this strategy pathologizes women's reasonable responses; and she asks whether women will fail in self defence if they do not conform with some stereotype of a "real" BWS "victim." She also wants to know what has happened since *Lavallee*. Turns out, not as much as we hoped. Some women have secured acquittals[45] but the vast majority have instead pled guilty to manslaughter and used BWS in mitigation of their sentences.[46] The crucial issue remains whether battered women will get access to justice: are women equally able to have access to a trial on the merits whereby the accused is able to put to the jury the full context of her act and receive the benefit of judicial instruction that relates the context to the law?[47] Unfortunately, there is a dearth of feminist criminal lawyers out there available to defend women who kill violent male partners.

The feminist student will see many more issues that will interest and inflame her critical mind. So few defences appear to reflect women's realities! Necessity seems to have been crafted to preclude women

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[43] *R. v. Lavallee*, [1990] 1 S.C.R. 852.
[44] (1983), 61 N.S.R. (2d) 33 (S.C. (A.D.)); Brian Vallée, *Life With Billy* (New York: Shuster & Shuster, 1986).
[45] For a discussion of one such case see Elizabeth Sheehy, "Battered Women and Mandatory Minimum Sentencing" (2001) 39 *Osgoode Hall Law Journal* 529.
[46] Her Honour Lynn Ratushny*, Self-Defence Review: Final Report* (Ottawa: Minister of Justice, 1997).
[47] Holly Maguigan, "Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals" (1992) 140 U. Pa. L. Rev. 379.

and their doctors from its shelter when it comes to abortion.[48] And while it may be available for what the Supreme Court poetically refers to as the "lone alpinist" forced to break into a cabin to save their own life, it is not available for crimes committed to secure food, shelter and medications, as these are part of the slow grind of poverty—always cast as avoidable with some hard work and self-discipline![49] Aboriginal peoples fighting to hold on to their lands are also confronted with a harsh criminal law that will deny them defences of necessity, self-defence, and sometimes even colour of right, if judges do not accept Aboriginal beliefs as to ownership as sincerely held.[50]

I could go on and on—but I'll stop here. It's time for you to hit the books, hopefully armed to survive—even to enjoy Criminal Law and Procedure! Be sure to read the news daily—criminal law issues are at the forefront every single day. More importantly, be sure to support your colleagues—not just your feminist ones but also your African-Canadian classmates who raise racial profiling, the Aboriginal students who must suffer through the ignorant comments of their classmates, the gay students who want to challenge homophobia embedded in the cases, the students with disabilities who ask you to focus on discrimination as opposed to "handicap." Even if you cannot back them in class, do it out of class—align yourselves with those who have the courage of their convictions. You will need each other not just to get through law school but in the profession as well, if you are to re-make the law and its practice.

[48] Compare the *Morgentaler* prosecutions ([1976] 1 S.C.R. 616) with *R. v. Perka*, [1984] 2 S.C.R. 232, where the lone alpinist is conjured.
[49] Compare the heartbreaking decision in *R. v. Gourlay*, [1996] A.J. No. 197 (Prov. Ct.).
[50] See eg, *R. v. Stevenson* (1986), (1987), 42 Man. R. (2d) 133 (Q.B.).