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- Daviault, Drunkenness, and Discourse:
The Social Construction of the Drunkenness Defence as a Feminist Issue

© Karen Frieday
1998

Submitted to the Department of Criminology,
University of Ottawa,
in partial fulfillment of the requirements for the Degree of Master of Arts



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ACKNOWLEDGMENTS

I would like to sincerely thank my advisor, Michael Petrunik, for his support and guidance. Thank you to my readers, Maria Los and Ron Crelinsten.

A special thank you to my friends (Jill, Krista, Michele, Barry, Gazelle, Susannah, Rob, Andrea, Steve.....) who have supported (and tolerated) me throughout this process.

And, to my parents, for their enormous reserves of patience.

ABSTRACT

As part of an overall move towards protecting the public (especially those felt to be most vulnerable, e.g. women and children), legislation has recently been tabled which would forbid the use of a defence based on self-induced extreme intoxication producing a state akin to automatism (the drunkenness defence) in trials of general intent offences.

This legislation (Bill C-72, s. 33.1), is in direct conflict with the 1994 ruling of the Supreme Court of Canada in *Daviault* in which the majority found that to deny such a defence in general intent cases was in violation of the principles of fundamental justice enshrined in our Charter of Rights and Freedoms. The Supreme Court of Canada decided that the common-law precedents set by cases such as *Beard*, *Majewski*, and *Leary*, which did not allow evidence of extreme intoxication in general intent cases, had the effect of convicting individuals for crimes in which they were lacking the necessary *mens rea* or voluntariness.

The *Daviault* case brought to a head previous issues which had been raised regarding the illogicality of the specific/general intent split in offences: the level of *mens rea* at which general intent offences (especially for sexual assault) could be distinguished from specific intent offences; whether a lack of *mens rea* and/or *actus reus* brought about by severe intoxication was blameworthy for either type of offence; the problems of holding individuals culpable for such behaviour despite lack of intent; or whether culpability could apply to the initial drunkenness; etc.

Previously, the intoxication defence had been an exercise in legal and medical gymnastics in which the question was one of whether or not a man could be so drunk as to be void of the necessary intent or volition to commit a crime. It was only with *Daviault* did

feminists and other women become central claims-makers. Feminist claims and rhetoric used to construct the drunkenness defence are examined from a social constructionist perspective. Reference is made to legal and medical constructions as well.

It is proposed that Bill C-72 was tabled in response to feminist claims-making, in addition to the public, and media outcry raised by the Daviault case. Feminists concerned with issues of women and children's safety feared that the Supreme Court ruling would result in an increase in the use of the drunkenness defence, and that large numbers of offenders would be acquitted as a result of their own drunkenness. The drunkenness defence was defined by feminists as an equality issue, best resolved by "woman friendly" legislation (e.g. Bill C-72).

Bill C-72 purports to protect the interests of vulnerable segments of society - women and children who are often the victims of violence. This Bill holds that each member of society must conduct themselves with a level of social comportment that does not infringe on others' rights or freedoms. Individuals who commit violent acts while in a state of self-induced intoxication have not taken the proper and required level of care to prevent such acts, and therefore should be held culpable and accountable.

This legislation must be viewed as part of a trend towards the growing prominence of policy which holds the interests and protection of the public and potential victims paramount over those of offenders. This is exemplified by recent sexual offender registration and community notification laws which are all attempts to legislate greater public protection.

Finally, I discuss other options which have been proposed to deal with the "drunkenness defence".

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MacDuff: What three things does drink especially provoke?

Porter: Marry, sir, nose-painting, sleep, and urine. Lechery, sir, it provokes, and unprovokes: it provokes the desire, but it takes away the performance. Therefore much drink may be said to be an equivocator with lechery: it makes him, and it mars him; it sets him on, and it takes him off; it persuades him, and disheartens him; makes him stand to; in conclusion, equivocates him in a sleep, and giving him the lie, leaves him.

William Shakespeare: *The Tragedy of Macbeth* Act II, Scene III, p. 1320

INTRODUCTION

On May 30, 1989, a sexual assault occurred which was to have a profound impact on the law concerning the use of intoxication as a defence in Canada. In the province of Quebec, a man was accused of sexually assaulting a disabled woman while he was apparently severely intoxicated. The case of *R. v. Daviault* (1994), set off a process of claims-making by feminists which can be used as a case study of the construction of a social problem within a contemporary context. The transformation of what has become known as the “drunkenness defence” from a legal issue to a women’s and children’s issue is an example of a claims-making activity which can be mapped from *Daviault* to the implementation of new legislation in Canada.

The use of the drunkenness defence to excuse criminal behaviour is not a new phenomenon in Canadian society. Both British and Canadian common law provide numerous cases in which intoxication has been offered as a defence in mitigating violent acts (*R. v. Bernard*, *Leary v. The Queen*, *Director of Public Prosecutions v. Beard*, etc.). The recent resumption of interest in the drunkenness defence in Canada can be examined in its construction as an issue from a feminist perspective. There is nothing inherent in the drunkenness defence which makes it a feminist issue. In taking this issue on as their own, women’s groups have altered its meaning. The aim here is to show how such a transformation took place - and to examine its implications.

In the social problems marketplace, the intoxicated offender has frequently emerged as a subject for public debate. At various times, the drunken offender has been portrayed as morally degenerate, chronically ill, socially dysfunctional, and legally problematic (Gusfield

1981; 1986; 1996). In a society which holds ambivalent attitudes towards alcohol use in general, it is not surprising that the drunkenness defence has been the source of much ongoing debate. Traditionally, these debates have pitted legal principles and individual freedoms against moral responsibility and social policy. With the recent Supreme Court decision in *R. v. Daviault*, both the players involved and the focus of concern underwent a radical shift; the drunkenness defence was no longer only a question of legal principles to be decided amongst jurists and academics but also a women's issue.

This thesis uses a social constructionist perspective to analyse how the "drunkenness defence" came to be defined as a problem primarily of women and children's safety. My focus is not on the veracity of this claim, but on the use of rhetoric (the art of persuasion) to construct and typify the condition as newly problematic. I will examine the grounds, warrants and conclusions which have been drawn by interested parties in promoting the cause of the drunkenness defence, and map the transformation of an issue of nominal regard into one of potentially tragic consequences for women and children. Although questions have previously been raised about the defence of intoxication (*Leary v. The Queen*, 1978; *Director of Public Prosecutions v. Majewski*, 1976), women were neither participants in nor subjects of these debates. In the last twenty-odd years however, an increased sensitivity to women's issues as social problems can be related to claims-making activities. The drunkenness defence has been targeted by feminists as part of a larger campaign for women's equal right to live safely in society. Statements of claims by feminists have led, in large part, to the conclusions drawn up in Bill C-72 and enacted in 1995 legislation.

The importance of this research lies in how it provides a framework for future inquiries

into the process of criminalization and legislation that occurs through the efforts of interested claims-makers. It requires us to look at how deviance is defined as such and what values are being expressed through these definitions as being important to our society. This is an interpretive approach; social constructionism is not about the etiology of crime, rather, the focus is on the deviance designators and their claims-making activities (Conrad & Schneider, 1992:2-8).

The feminist construction of the drunkenness defence as injurious to women and children is one in a cycle of claims-making activities which depicts alcohol and sexual violence as problematic. It provides an example of the strength of authority and advocacy in examining what is considered immoral or harmful by the government and public within a specified time period. Social constructionism provides a framework for studying how transformations in attitudes are attempted through a process of claims-making and rhetorical argumentation.

In tracing this transformative process, Chapter 1 opens with an examination of alcohol, drunkenness, and violence. Chapter 2 proceeds with an explanation of the theoretical framework of social constructionism which was used to analyse the drunkenness defence. Social constructionism is an analytical tool which describes the process of claims-making and the use of rhetoric in promoting certain causes - drunken sexual violence in this particular example. A methodological inquiry into the types of material which were consulted in researching the construction of the drunkenness defence has also been undertaken.

Chapter 3 provides a legal historical analysis which traces the development of the law regarding the use of intoxication as a defence. Relevant cases and judicial decisions will be highlighted to emphasize the disjunction which exists between rules of law and social needs.

This chapter will also look at the case that became prominent in the new construction process - *R. v. Daviault*.

Chapter 4 continues with a look at the emergence of feminist participation in the case of *Daviault*. As claims-makers, women were sought out to participate in the construction of the issue and were pivotal in the direction taken on the drunkenness defence. Chapter 4 will discuss the ideological position and discourse of feminist groups and the emergence of such groups as a political force through prior claims-making activities related to sexual assault and Charter issues.

Chapter 5 endeavours to catalogue the grounds submitted by feminists to define the social problem arising from the *Daviault* decision as an equality issue. Feminist discourse (eg. Sheehy, 1995a; 1995b) portrays the *Daviault* case as an example of sexist, patriarchal decisions which directly, or indirectly, impact upon women's and children's safety. While the focus of this chapter is on sexual assault, the rhetoric is applicable to all violence against women as perpetrated by drunken offenders.

Chapter 6 continues by proposing the types of values which are expressed or implied to justify action on the defence of intoxication. Appeals to morality and the need for protection dominate the warrants in this chapter.

Chapter 7 examines the conclusions which have been drawn by feminist groups in response to *Daviault* and their recommended intervention. These differ minutely from the actual legislation which was passed in response to the outcry over the drunkenness defence's acceptance by the Supreme Court. The tabling of Bill C-72 which became law as s. 33.1 will be connected to the grounds and warrants which were identified by women's groups in

consultations with the Justice Department.

Chapter 8 continues with a discussion of alternative options which have been suggested and/or used in other jurisdictions. These alternatives reflect different constructions of the “problem” of intoxicated offending and other solutions to the difficulties as they are perceived. The policy which resulted in Canada from feminist claims-making was not the only remedy available in response to *Daviault*.

Chapter 9 is a discussion of the results and implications of feminist claims-making in *Daviault*. The relevance of this work will be examined and suggestions for future research submitted. My personal thoughts and conclusions will also be included in Chapter 9.

This thesis does not endeavour to fully cover all aspects of drunkenness and sexual assault as separate issues. Both are extremely complex issues which give rise to multiple constructions which far exceed the scope of this thesis. I have focused on what I consider to be the key messages sent out in response to *Daviault* and present my own interpretation of the issues raised.

Almost four hundred years after Shakespeare’s death, the association between drunkenness and lechery is still being made and disputed.

1ALCOHOL, DRUNKENNESS, AND VIOLENCE

Much has already been written on alcohol and violence (eg. Collins, 1981; Forrest & Gordon, 1990; Parker and Rebhun, 1995; Pernanen, 1991; Tiffany and Tiffany, 1990). Most of the literature attempts to delineate any relationship between the two elements. Theoretical positions vary in their focus on whether alcohol physiologically breaks down one's inhibitions, resulting in spontaneous violence (Greenberg, 1981:76), or, intoxicated violence is behaviour learned through various forms of social interactions and affected by contextual cues (MacAndrew and Edgerton, 1969; Pernanen, 1991).

The case of *R. v. Daviault* (1994), which put the drunkenness defence on trial, has brought renewed attention to issues of drunkenness and sexual violence. This thesis is not applied to deciding the causal, if any, relationship between these two variables. What interests me is how drunkenness and violence have been portrayed by groups interested in or controlling either element.

There are segments of society which find alcohol or drinking as inherently problematic or destructive. Different groups have focused on various aspects associated with drinking and have deemed these as problematic to individuals and often to society as a whole. The campaign against drinking and driving is an example of modern claims-making associated with alcohol use (Reinarman, 1988). Joseph Gusfield (1981) has written in detail on drunk driving as a narrowly defined problem with an emphasis on the drinking driver as the target for intervention. The drinking-driving problem has been constructed to focus on individual deviance (Reinarman, 1988:102), while obscuring the roles that alternative forms of

transportation, measures to improve automobile and road safety, and changes in policy with regard to the manufacture, sale and consumption of alcohol products may offer as “solutions” (Gusfield, 1981).

The construction of drinking and driving as harmful is only one incarnation of constructions of alcohol as controversial. Drinking and driving as a social issue is preceded by the Temperance and Prohibition movements of the late nineteenth and early twentieth centuries (Gusfield, 1986), and the medical model of alcoholism as a disease first promoted in the early 1940s (Conrad & Schneider, 1980). The “problem” of the drunkenness defence, as raised by *R. v. Daviault*, is only the most recent alcohol-related issue which has arisen through a combination of situational factors and claims-making activities. It combines two potent elements, alcohol and sexual violence against women.

Alcohol

Over the years, alcohol has been viewed as a corruptor of souls, religious symbol, party accompaniment, and inducer of hangovers. It is a paradox within a bottle which has been the source of heated public debate since first commonly used as a social lubricant. Drinking has been viewed as both sin and salvation: a contributor to both joy and sorrow. The bottle is opened in times of celebration and in times of loss; it buoys us yet can encumber as well.

Alcohol, in one form or another, is used for medicinal, religious, social, recreational, dietary and symbolic functions (Hanson, 1995; MacAndrew and Edgerton, 1969; Snyder and Lader, 1988). Such functions are shaped by both social and cultural customs, and each society has adapted its drinking practices accordingly. Alcohol’s medicinal and pain-killing properties have led to its recognition as a folk remedy across a variety of cultures. Alcohol is used to

reduce stress and diminish anxiety. Recent research supports alcohol use in moderation, showing that drinking can be beneficial to one's health in reducing the risk of cardiovascular disease (Stuttaford; 1989:31-33). In particular, a moderate amount of wine, especially red wine, is promoted as a healthy addition to the diet (Beatty, 1998), and is considered to enhance the taste of many kinds of food.

Alcohol has played a role in religious ceremonies throughout history (Hanson, 1995:1-18). Today, while some religions follow a tradition of alcohol avoidance (eg. Islam), the incorporation of alcohol is evident in both the Catholic and Jewish religions where alcohol plays a symbolic role in ceremonial rites. Alcohol use is widespread in many countries in connection with Catholic festivals which precede or follow Lent (Snyder and Layton, 1988). Alcohol also plays a significant role in secular events of many cultures, and is used to celebrate and note special occasions. It often accompanies rites of passage (from the mundane to significant) in Western societies.

Analyses of alcohol use often distinguish between work and leisure time. MacAndrew and Edgerton (1969) termed drinking occasions "time out" from the confines of an "accountability nexus" within which individuals normally work. At such times, "the state of drunkenness is a state of societally sanctioned freedom from the otherwise enforceable demands that persons comply with the conventional proprieties" (p. 89-90). The majority of drinking occurs at social gatherings in the company of friends or relatives, while drinking alcohol during hours of work is not considered an acceptable practice in North American societies (Cheung and Erickson, 1995: 23). Drinking customs dictate how, when, and where it is appropriate to drink.

Alcohol is one of the few legally available intoxicants, yet its use in Canada is subject to the myriad laws contained in provincial liquor control acts. Liquor restrictions are based on age and time and place of purchase and consumption. However, there is a corresponding amount of permissiveness towards one's personal consumption of alcohol which is not accorded to other intoxicants or drugs. Drinking is part of social life, a part that most individuals control and are free to enjoy. In Canada, alcohol consumption is widespread and diverse. Evidence indicates that 78% of Canadians over the age of fifteen are current drinkers, with consumption occurring "especially on social recreational occasions" (Health and Welfare Canada, 1989; Cheung and Erickson, 1995:22). Current drinkers in Canada are more likely to be male (86%) than female (77%), with the greatest numbers residing in Ontario and British Columbia (Health and Welfare Canada, 1989). The highest average number of drinks consumed per week (by current drinkers) were found in Ontario and Quebec (Cheung and Erickson, 1995:24). In the province of Ontario alone, 82% of the population have been classified as current drinkers (Adlaf, Ivis and Smart, 1994). Tables 1 to 3 show that alcohol consumption is relatively common and cuts across gender and social lines throughout Canada. Figure 1 compares the number of drinks consumed per week across age ranges and between men and women.

Alcohol has a place in society with recognizable functions and uses not entirely attributable to its chemical properties. The majority of drinking and drinking-related behaviour is confined to the acceptable limits prescribed by others. We may not always appreciate the antics of drunkards, but we usually do not consider them criminals.

TABLE 1

TYPES OF DRINKERS, AGE 15 AND OVER, BY SEX, CANADA, 1985

	General Social Survey		Health Promotion Survey	
	Men (%)	Women (%)	Men (%)	Women (%)
Never Drank	8	17	5	10
Former Drinker	7	6	9	11
Occasional Drinker*	11	24	n/a	n/a
Current Drinker**	74	53	86	77

* "Occasional Drinker" reports drinking less frequently than once per month.

** The General Social Survey considers "current drinking" to be drinking at least once a month. The Health Promotion Survey considers "current drinking" to be any consumption in the previous year.

Sources: Health Promotion Survey, Statistics Canada, 1985;
 General Social Survey, Statistics Canada, 1985.
 Both in: *Alcohol in Canada*, Health and Welfare Canada, 1989

TABLE 2

TYPES OF DRINKERS, AGE 15 AND OVER, BY REGION, CANADA, 1985.

	Canada %	Atlantic %	Quebec %	Ontario %	Prairies %	B. C. %
Never Drank	13	16	16	11	10	12
Former Drinker	6	10	7	5	8	5
Occasional Drinker*	18	20	16	18	19	15
Current Drinker**	63	53	61	66	63	67

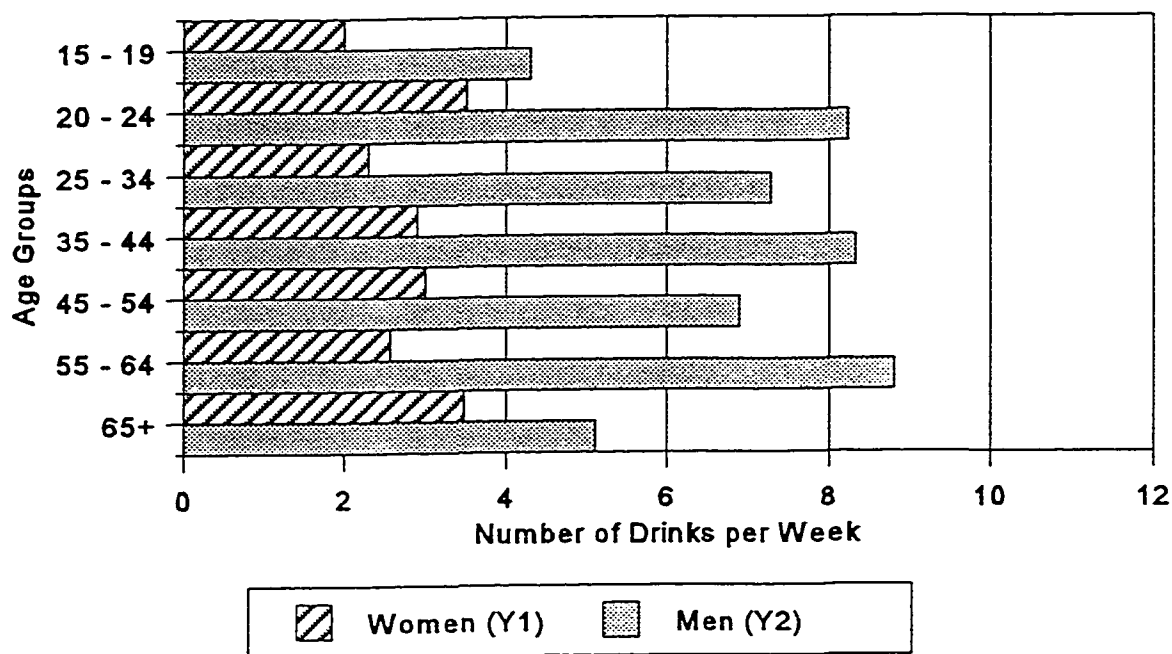
* "Occasional Drinker" reports drinking less frequently than once per month.

** The General Social Survey considers "current drinking" to be drinking at least once a month.

Sources: General Social Survey, Statistics Canada, 1985.
Alcohol in Canada, Health and Welfare Canada, 1989.

FIGURE 1

AVERAGE NUMBER OF DRINKS PER WEEK CONSUMED BY CURRENT DRINKERS,
CANADA, 1985.



Sources: Canada's Health Promotion Survey, 1985
Alcohol in Canada, Health and Welfare Canada, 1989

TABLE 3
ALCOHOL USE AMONG ADULTS AGED 18 YEARS AND OVER BY SELECTED
CHARACTERISTICS OF THE POPULATION, ONTARIO, 1994

	Current Drinkers	Daily drinkers	15+ drinks a week	5+ drinks in a single sitting weekly
Total	82.1%	5.0%	4.4%	8.4%
Gender:				
Male	84.7	7.2	7.5	13
Female	79.8	3.1	1.7	4.3
Age:				
18 - 29 years	86	1.7	7.8	12.7
30 - 39 years	85.1	3.5	4.1	9.2
40 - 49 years	84.1	7.6	2.9	6.5
50 - 64 years	78.2	6.2	1.7	4.9
65+ years	67	10.1	4	4.5
Marital Status:				
Never married	85.8	2.2	8.5	12.7
Married	80.5	5.7	2.3	6.3
Living with partner	90.6	8.6	7.7	10.9
Previously married	76.8	5.5	3.6	7.3
Region:				
Metro Toronto	79.1	3.7	4.1	5.6
Metro Outskirts	84.4	4.9	3.6	7.8
Eastern Ontario	82	5.1	5.9	11.2
Western Ontario	84.1	5.8	4.4	6.7
Northern Ontario	80.4	5.6	4	10.4

Education:	Current Drinkers	Daily Drinkers	15+ Drinks a week	5+ Drinks in a single sitting weekly
Less than high school	72.1	6.3	4.8	8.9
Completed high school	83.1	5.1	6.4	10.6
Some college/University	85.9	2.3	4.2	8.9
University degree	85.3	7.6	1.7	4
Income:				
<\$30,000	74.4	5.1	5.2	10
\$30,000 - \$49,000	82.4	3.6	4.9	11.4
\$50,000 - \$79,000	85.2	5	3.5	7.3
\$80,000+	91.7	6.5	5.2	8.5
Employment Status:				
Full time	87.1	5.1	4.4	8.9
Part time	87.2	4.5	1.8	7.9
Unemployed	77.8	4.7	5.9	10.9
Retired	71.5	8.5	2.8	4
Homemaker	64.7	3.6	1.6	4
Students	83.3	1.9	9.5	13.3
Other	71.3	5.4	6.2	6.7

From: Adlaf E.M., F.J. Ivis, and R.G. Smart, Alcohol and Other Drug Use Among Ontario Adults in 1994 and Changes Since 1977 (Toronto: Addiction Research Foundation, 1994).

The Malevolence Assumption

In North American society, drunken, obnoxious behaviour is becoming less tolerated in many settings. As Kinney and Leaton (1995:54) have stated:

Those who choose to drink are no longer seen as potentially endangering only themselves. Drinkers no longer are accepted as having a right to “let loose”, “to celebrate”, to “unwind”, or indiscriminately “to tie one on” or “get smashed” from time to time. Drinkers no longer are viewed as not accountable for things that occur while they are under the influence. Having come to recognize the impact of these individual decisions upon the public safety, society has significantly changed its attitudes as to what constitutes acceptable and unacceptable drinking. Though still not universally true, in more and more quarters individuals are not considered free to drink in a manner that endangers others. Increasingly, intoxicated behaviour is not overlooked, is far less tolerated, and is likely to be met with direct expressions of disapproval.

This reflects a recent trend in alcohol claims which are concerned less with drinking than with behaviour believed to be associated with drinking and drunkenness. There is a “malevolence assumption” in most claims regarding alcohol as socially problematic that is expressed in the statement: “alcohol is destructive and evil, and therefore one is likely to find destruction and evil where alcohol is found” (Hamilton and Collins, 1981:261).

Despite its widespread use and consumption, alcohol has been subject to research which begins with a view of alcohol use as troublesome and requiring intervention. It is the negative aspects of alcohol use which have become prominent in claims-making and social research. It is not drinking but drunkenness which is emphasized. The vast amount of drinking which occurs in North American society with little ill effect is overlooked, with stark portrayals of the dangerousness of drinking dominating social messages. What has been accentuated are the ills alcohol “is held to cause - or be related to: liver damage, cancer, road

accidents, teenage hooliganism, labour absenteeism”, among other ills (Anderson, 1989:12). Drinking to excess, however, especially when it is chronic, is viewed as potentially hazardous and needing some type of expert intervention. Drunkenness has been constructed as pathological behaviour, with the negative consequences of alcohol consumption framing discussion and research.

A number of authors have pointed out that it is such negative elements of alcohol consumption which have been focussed on, to the virtual exclusion of work on more common drinking practices and effects (Greenberg, 1981; Heath, 1989; Pernanen, 1991; Stuttaford; 1989). Emphasis in research and discourse remains on the after-effects of highly excessive intake. Sweeping generalizations are made which obscure the ubiquitous role of alcohol today. Of note from a social constructionist perspective is the politicization of alcohol problems which is often expressed through statistics and rhetoric about purported causes and effects of problem drinking.

If drinking has been subject to prohibitive claims, the combination of alcohol use and violence only amplifies the potential for negative claims-making activities. It can be stated with some certainty that there are few proponents of violence against women in a social context. And, while it is often acknowledged that there is no evidence for a causal relationship between alcohol and violence, just as often alcohol is blamed for violent behaviour. Thus, while it may generally be agreed that sexual assault is a heinous crime, the inclusion of alcohol may lead to an increase in contested meanings surrounding what constitutes “legitimate” or “excusable” sexual assault.

Violence

The violence discussed in this thesis is primarily sexual violence against women. While violence against women can take many forms (Canadian Panel on Violence Against Women, 1993), the *Daviault* case involved an allegedly intoxicated man who was accused of sexually assaulting a female acquaintance (*R. v. Daviault*, [1994] 3 S.C.R. 63). The United Nations Declaration on violence against women in 1993 includes sexual violence in its definition. It states that:

...any act of gender-based violence that result(s) in, or is likely to result, in physical sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty whether occurring in public or private life (cited in Canadian Panel on Violence Against Women, 1993:6).

The Canadian Panel on Violence Against Women further defines sexual violence as a type of physical violence and includes “any form of non-consensual sexual activity ranging from unwanted sexual touching to rape” (1993a: 7).

Ownership of the problem of sexual violence in the United States and Canada has shifted in the last twenty years to feminist activists. Feminist rhetoric has challenged traditional conceptions of sexual assault, and authority has been gained through claims to ownership by virtue of their standing as the victims of sexual assault. Grass-roots movements seeking to address both domestic violence and sexual assault gained momentum in the late 1970s and 1980s in Canadian society and contributed to changes in sexual assault legislation in 1983 (Los, 1994).

Daviault's case reminds us that feminism as a political force has continued to affect traditional views of sexual assault. Women have been identified as the victims of sexual

assault, and a greater sensitivity to the seriousness of this crime has resulted from feminist claims-making. Feminist claims about sexual assault will be examined in some detail throughout this thesis.

A New Direction

The recent Canadian experience with the “drunkenness defence” testifies to the continuing dilemma posed by what is known as alcohol-related violence and its consequences. What is striking about Canada’s experience with drunken violence is its transformation from a problem previously constructed as a legal and medical problem into a “women’s issue”. While the main issue is still one of how to legally control alcoholic violence, the forum and participants have changed quite dramatically in the last five years. The acts of drinking and assault may not have changed, but the focus has.

2METHODOLOGYAnalytical Framework: Social Constructionism

This thesis takes a social constructionist approach. Social constructionism is a perspective which moves away from viewing social problems as objective conditions which can be examined and validated in their own right. Instead, Spector and Kitsuse define social problems as “the activities of individuals or groups making assertions of grievances and claims with respect to some putative conditions” (1977:75). These claims are organized in accordance with interpretations of the objectives, values, and interests associated with particular problems. Social problems are socially constructed; conditions must first be brought to people’s attention in order to become a social problem. There occurs a “selective process from among a multiplicity of possible and potential realities” in which only some conditions are labelled problematic and requiring prescribed public intervention (Gusfield, 1981:3). The locus of inquiry is not to verify whether such conditions occur, but rather to analyse the context which shapes them and the groups involved in bringing a problem into social consciousness. This process of definition and activism in response to a perceived problem has been coined “claimsmaking” (Best, 1987, 1990; Conrad & Schneider, 1980, 1992; Spector & Kitsuse, 1977).

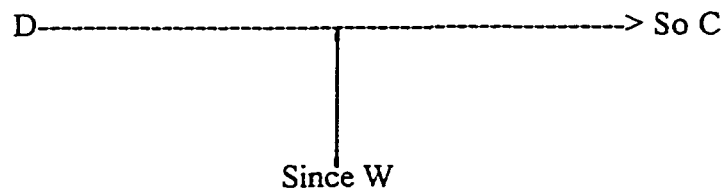
Claims-makers are involved in a form of communication - an interaction designed to inform and persuade others of the dimensions of an issue. The content of the claims is as important as the membership of the claims-making group and their ability to mobilize a response to their claims. How a claim is defined, what is stressed and emphasized, is crucial

in determining the success or failure of a claim. As a persuasive activity, claims-making is subject to rhetorical analysis because social problems are humanly constructed and share common features of process, if not content (Best, 1987:101).

Rhetorical Analysis

Claims-making involves the use of rhetoric to appeal to the interests of the public. It is a form of argument in which the type of language and rhetoric used is instrumental in the process of defining social problems. Claims-making activities are attempts to persuade others of the existence of a social problem which requires intervention and can be broken down in terms of the types of grounds, warrants and conclusions made by those involved (Best, 1990; Best, 1987:101; Toulmin, 1958). Toulmin's model will be used in analyzing the arguments used by claims-makers in relation to the case of *R. v. Daviault*. In particular, the rhetoric of feminists who eventually exerted significant influence on use of the "drunkenness defence" will be examined in terms of the grounds, warrants, and conclusions used.

Toulmin (1958) has illustrated the basic structure of arguments as:



Where D=data/grounds
C=Conclusions
W=Warrants

(also: Best, 1990, 1987:102).

Grounds statements are claims which define and give the dimensions of the problem (as perceived by the specific claims-maker) and typify what kind of issues are relevant (Best, 1990:25). Warrants are values to which one appeals; they are the justification for actions in response to the social problem as defined by the grounds statements (Best, 1990:31). Warrants “ can act as bridges, and authorize the sort of step to which our particular argument commits us” (Toulmin, 1958:98). They provide the link between the grounds of the argument and the conclusions which are drawn. Conclusions are the specific remedies advocated by claims-makers to alleviate or solve a social problem (Best, 1990:37). The conclusions which result will depend upon how the problem has been shaped by its grounds and warrants throughout the construction process.

The “social problem” identified by claims-makers in reference to *R. v. Daviault* combined two separate and contested issues - drunkenness and sexual assault. Each element has individually been constructed as problematic through claims-making activities, and Daviault’s case provided a vehicle for renewed claims-making.

Claims-makers and Ownership

Claims-makers are individuals or groups who have defined an issue as being problematic and who often attempt to bring forth a specified solution (Best, 1990). Not all people or groups are equally able to participate in the social construction of issues as problems. Factors such as resources, competition from other claims-makers, and timing can thwart the effectiveness of an interested group’s claims-making activities. The effects of personal interests upon issues which are raised to the status of “social problem” are clear when it is noted that many examples exist of painful, everyday situations which are not subject

to public outcry. Social constructionism entails a view that “social problems emerge and are legitimated through the action of various “claimsmaking” groups in society” (Conrad & Schneider, 1980:19). Each problem is also marked by who has gained ownership and participated in the defining of the issue as problematic and why (Best, 1990).

Those with the most persuasive claims and the most influence may be successful in gaining ownership of a problem and the right to propose what action should be taken. This in turn may lead to greater prestige, funding, or public prominence for the successful claim-maker (Best, 1990).

Definitions

A discussion of the “drunkenness defence” must include a definition of specific terms. “Heavy drinking”, “drunkenness”, and “severe intoxication” are terms which are difficult to define clearly, and are subject to the judgments of authors and researchers. Who is in the position to quantify what amount of drinking constitutes too much for any particular individual? Just short of toxicity, the effects of alcohol vary widely and depend upon a multiplicity of biological, psychological, and cultural variables including body fat percentage, sex, age, environment, mood, physical tolerance, stress, fatigue, interaction effects with other substances, and expectation (Greenberg, 1981). Tests which purport to measure blood alcohol levels are based on a quantitative standard, while visual cues are inadequate in recognizing the multiple faces of drunkenness.

In *Daviault*, the courts discussed “severe intoxication akin to automatism”. Automatism is a medico-legal term which is defined as “the existence in any person of behaviour of which he is unaware and over which he has no conscious control” (Blair,

1977:167). It is unclear whether this term is intended to refer to a state which can be differentiated from the commonly known “drunken blackout”. It is a condition in which complex activities and movement can be carried out with little or no “conscious” guidance, although the automaton may appear to be unaffected by drink. It is virtually impossible to accurately identify and measure such occurrences.

Drunkenness is not actually a true defence in law; however, evidence of drunkenness may be presented in some cases to provide a basis for a defence of lack of intent or lack of voluntary action.

“Sexual violence” is used to express one of the multiple forms violence against women (and men) takes, and is subject to numerous definitions. “Sexual assault” is a broad term used in place of “rape” as the latter term fails to grasp the various indignities which are experienced as both sexual and assaultive. In Canadian law it is a three-tier offence as defined by s.271-273 of the Criminal Code (Appendix A, with s. 274 CC) and involves a lack of voluntary consent by the complainant to sexually intrusive or violent behaviour.

Resources

In preparation for my social constructionist analysis, I reviewed both general and specific literature regarding drunkenness and sexual assault in order to gain a broad overview of the legal, medical, and feminist issues surrounding *Daviault*. My review included secondary data from alcohol and crime research, with a concentration on sexual assault and intoxication materials. Whenever possible, materials which looked at both elements together (intoxicated sexual assault) were used. Such information was gathered from newspaper articles, news releases, periodicals, internet web sites, pamphlets, and books, which varied in

their legal, medical, feminist, or sociological perspectives. The majority of information on the involvement of alcohol in sexual assault offences has been gathered from victimization surveys, criminal justice and police data, and statistical analyses.

Examples of Data Sources

Because sexual assault is estimated to be highly under-reported (Canadian Panel on Violence Against Women, 1993a; b), the information gathered by police and courts is inherently limited. There are likely differences between those who choose to report to legal authorities and those who do not (Gunn & Minch, 1988). Those who report do not fully represent the larger population of sexual assault survivors. The offences which are then recorded are subject to judgment calls on the part of the police who also vary in their recording practices (i.e. the information deemed relevant). One is left with an incomplete picture of dynamics of the offence, the victim, the offender, and the role of alcohol, if any.

The Uniform Crime Reporting survey (UCR) is a micro-level database which records the number of incidents reported to the police and the resultant disposition of charges. It provides information on the offence, victims, suspects and whether or not alcohol or drugs are involved. Since not all police departments in Canada are included in the UCR, the representativeness of data is limited.

Data from the UCR survey indicate that 84% of sexual assaults reported to police involved female victims, with 98% of those charged being male (Roberts, 1994:3)

Victimization surveys can make up for some of the shortcomings of police and court records and ideally can reach a wider and more representative sample. They give a sense of the scope of the problem of sexual assault and can include inquiries into the presence of

drinking or drunkenness in an assaultive situation. The Canadian Panel on Violence Against Women undertook a victimization survey from which much information was gathered.

The Canadian Panel on Violence Against Women sponsored the Women's Safety Project (Appendix A, 1993). The Women's Safety Project was a community study based on 420 personal interviews with women in Toronto (1993, A1). These interviews were conducted to reveal women's own experiences of violence.

This study reports that over one in three women have experienced forced sexual intercourse. One in two women had been a victim of sexual assault or attempted sexual assault (A6). Ninety-nine percent of the sexual assaults reported in this study were committed by men (A7). In 81% of the sexual assaults reported to the Women's Safety Project, the perpetrators were men known to the female victim (A7).

While it is difficult to assess the presence and/or amount of alcohol consumed by perpetrators in many cases of sexual assault, limited data is available from selected police departments in Canada. In 1992, this data indicated that alcohol consumption was apparent (at the time of the offence) in 28% of those accused of sexual assault (cited in Wolff and Reingold, 1994:9-10).

Barnett and Fagan (1993 :15-16) found that alcohol was a variable in spousal/partner violence. Alcohol use was cited by 29% of women who reported violence at the hands of a partner, with more severe assaults indicated when drinking is involved. Fifty-six percent of incidents involving intoxicated perpetrators resulted in physical injuries to their partners, as compared to 33% of incidents involving abusive, non-drinking men.

Methodological Flaws in Alcohol and Violence Research

In examining the data gathered on alcohol and sexual violence one notes common flaws in the research including a lack of uniformity in definitions of both drinking and sexually assaultive behaviour, biased samples, vaguely defined concepts of “intoxicated violence”, and a failure to note the context in which drunkenness and violence occur (Greenberg, 1981: 71). Most of the literature does little more than conclude that there is a positive relationship between violent crimes and the presence of alcohol in (or preceding) the situation. Consequently the role of alcohol and drinking in sexual assaults, and violence against women generally, is left as a vague correlation which explains little.

CONTEXT: THE LEGAL CONSTRUCTION OF THE INTOXICATION DEFENCE

Legalities

A review of the legal construction of the defence of intoxication in Canadian law is useful in understanding the later involvement of different claims-makers and the substance and context of their claims. The issues which have been raised by the drunkenness defence have been played out in a legal forum which has affected the approaches various groups have taken in response. All claims-makers involved in the drunkenness defence have had to adapt their rhetoric to encompass the legal construction of elements which have previously shaped the issue as well as the particulars of the persons involved in key cases. A brief legal history of the defence will situate the issues and aid in examining the construction of various claims.

Legal History

Until early in the nineteenth century, intoxication was never a defence to criminal charges (Hall, 1944:1046; Orchard, 1977:61; Singh, 1933: 528), and was instead viewed as an aggravating factor in the commission of an offence. The general legal view was that “if a drunken man commit a felony he shall not be excused because his imperfection came by his own default” (Lord Bacon, cited in Singh, 1933:530). A drunken individual who committed an offence was believed to be morally and legally at fault, and was held accountable for his/her actions. Sayre (cited in Singh:536), has stated the prevailing view as: “the act of getting drunk may of itself be considered morally blameworthy...in a day when criminal liability strongly connoted moral delinquency, the absence of an evil intent caused by intoxication was not allowed as a defence against criminal liability”.

The development of the contemporary common-law rule (in use in Canada until the *Daviault* decision) began with the English case of *Director of Public Prosecutions v. Beard* in 1920. While there had been previous cases in which drunkenness was put forward as a defence (*R. v. Cruse*, [1939]; *R. v. Meade*, [1909]; *R. v. Meakin*, [1836]; etc.), it was the *Beard* case which was to provide the common-law rules regarding the use of intoxication as a defence for certain offences (Gold, 1976; Singh, 1933:543-546). *Beard* was charged with murder after he strangled a young woman to death while sexually assaulting her. *Beard's* counsel argued that, at the time of the offence, *Beard* was too intoxicated to form the intent required by law to be found guilty. Though *Beard* would eventually be found guilty of manslaughter, the decision of the House of Lords in his case would profoundly shape (and confuse) legal decisions throughout Commonwealth countries for the next six decades.

The two main contentious issues which arose from *Beard's* case involved two mental elements which are required for a conviction in criminal law: intent to commit a crime (associated with *mens rea*) and voluntariness of action (associated with the *actus reus*) (see the majority opinion in *R. v. Daviault*, [1994] on this subject). It is a fundamental principle of our law that an individual must both intend to commit the criminal act in question and do so voluntarily. The question, as it arose from *Beard*, was whether or not a man could be so intoxicated as to be unable to form the necessary intent, or to act in a voluntary manner. It would follow from the fundamental principles that evidence which negated either the guilty mind or the voluntary component required for a conviction should result in an outright acquittal on the charges.

However, the decision arising from *Beard* did not follow a stringent application of the

mens rea and *actus reus* requirements which fundamental principles would entail. The position of the House of Lords in *Beard* can be summarized by the following three rules as stated by Lord Birkenhead L.C (at pp. 500-502):

(1) That insanity, whether produced by drunkenness or otherwise, is a defence to the crime charged. The distinction between the defence of insanity in the true sense caused by excessive drinking, and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention, has been preserved throughout the cases....

(2) That evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent.

(3) That evidence falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

The "Beard Rules", as they came to be known, were interpreted by courts in a narrow manner. After *Beard*, evidence of intoxication could be introduced as part of a defence alleging an individual's lack of intent in the case of *specific intent* offences (see section below). For specific intent offences, evidence of intoxication which indicated an individual was incapable of forming the necessary intent could result in an outright acquittal on the charge. However, since the common-law rules were interpreted in this way, drunkenness was still no defence for crimes of general intent. Thus, an accused who successfully avoided conviction for a specific intent offence by reason of drunkenness, would still be held accountable for a lesser or included crime of general intent.

Specific And General Intent

The distinction between offences of specific and general intent which arose out of the *Beard* Rules has been problematic for academics and jurists alike (Colvin, 1981:751; Gold, 1976:34, 50-51; Smith, 1976:376; Williams, 1976:660) . While attempts have been made to discern logical differences between the two types of offences, this classification is a matter of law and not due to any coherent distinction. Simply stated, the main difference between specific and general intent offences is that evidence of intoxication can be used as a defence in specific intent cases.

Some writers have sought to clarify what is meant by the specific/general intent classification. One argument is that an offense of specific intent requires proof of an “ulterior” motive which goes beyond the commission of an act (Gold, 1976:58-59; Smith, 1976:377; Colvin, 1981:757-763). Lord Simon attempted such a definition in saying “....a crime of specific intent requires more than contemplation of the prohibited act and foresight of its probable consequences. The *mens rea* in a crime of specific intent requires proof of a purposive element” (p.152G). This definition does not explain why murder is classified as a specific intent offence or why crimes of general intent are tried as specific intent offenses in cases of “attempt” only (for further discussion see Colvin, 1981; Farrier, 1976; Gold, 1976). General intent offences are those which have only a minimal level of intent required and can often be inferred from the commission of the act itself. Those who make this distinction argue that it is difficult to conceive of a case in which an individual would be so drunk as to lack the minimal intent required in general intent offences (Smith, 1976:378).

However, it can be argued that there are cases in which an individual may be so

intoxicated as to be lacking what is considered “general intent”. The application of the *Beard* Rules in such a case provides no justification (based on legal principles) as to why an intoxicated individual should remain accountable for general intent offences while being cleared of a specific type offence. The belief that a specific intent offence required some extra mental motive which could be negated by intoxication was hindered by comments Lord Birkenhead made within the *Beard* judgment. The confusion resulted from two of Lord Birkenhead’s statements:

I do not think that the proposition of law deduced from these earlier cases is an exceptional rule applicable only to cases in which it is necessary to prove a specific intent in order to constitute the graver crime - eg., wounding with intent to do grievous bodily harm or with intent to kill. It is true that in such cases the specific intent must be proved to constitute the particular crime, but this is, on ultimate analysis, only in accordance with the ordinary law applicable to crime, for, speaking generally (and apart from certain special offences), a person cannot be convicted of a crime unless the mens was rea (*Beard*, [1920] A.C. at p. 504).

He also stated:

If he was so drunk that he was incapable of forming the intent required he could not be convicted of a crime which was committed only if the intent was proved. This does not mean that drunkenness in itself is an excuse for the crime but that the state of drunkenness may be incompatible with the actual crime charged and may therefore negative commission of that crime (*Beard*, [1920] A.C. at p. 499).

From these comments, one could argue that the only distinction to be made in cases of severe intoxication is whether or not mens rea was present (specific or otherwise). However, the final judgment in *Beard* did not bear out such a distinction, and these remarks by Birkenhead have only served to complicate the matter.

It has also been suggested that a classification of offences as specific or general intent

is useful when one looks at the sentences involved (Colvin, 1981:763-767). That is, many crimes of specific intent have particularly stringent sentences which provide very little leeway for judicial discretion. For example, murder, which is classified as a specific intent offence, has a mandatory life sentence with no possibility for parole for at least 10-15 years. By allowing an individual to use evidence of severe intoxication to negate mens rea in this type of case, it follows from the *Beard* rules that he could be acquitted of the charge of murder while still being held accountable (guilty) of the lesser and included general intent offence of manslaughter. A conviction for manslaughter provides the presiding judge with more sentencing options which may allow some mitigation for the offender's drunken state (Colvin, 1981; Hall, 1944:1061, 1066). This view is further supported by Dickson J. in *Leary v. The Queen* (1978), a Canadian case which upheld the common-law rule from *Beard*:

The notion that drunkenness might negate an intent integral to the more serious charge, such as murder, and permit conviction of a lesser charge, such as manslaughter, of which the intent was not a constituent element, was conceived in response to humanitarian urgings which sought to distinguish between the homicide committed in cold blood by a sober person and one committed by a drunken person (pp. 39-40).

A concept of recklessness has also been used to distinguish between specific and general intent offences (Gold, 1976:59-62). In general intent offences, the drunken individual is convicted because he or she was reckless as to the consequences of becoming intoxicated. Specific intent offences require proof of additional intent beyond recklessness. However, the legal concept of recklessness generally requires that an accused have some foresight of the potential harmful consequences which may occur as a result of his/her actions (Gold, 1976:39). A stringent application of recklessness implies that intoxicated individuals knew

there was a likelihood of acting criminally as a result of becoming drunk. I argue that many people do not foresee such consequences occurring as a result of becoming intoxicated.

Despite disagreement over the validity of the specific/general intent dichotomy, the rules barring a defence of intoxication in general intent offences have remained largely intact due to policy considerations. While no justification based on legal principles exists to explain why one is allowed a drunkenness defence to negative intent in specific and not general type offences, social policy and public protection issues are most often cited as reason enough (Hall, 1944:1054). In the case of *D.P.P. v. Majewski* ([1977] A.C. 443), in which the issue of the use of intoxication as a defence was again raised, Lord Salmon explains the court's logic behind the specific/general distinction in stating:

I accept that there is a degree of illogicality in the rule that intoxication may excuse or expunge one type of intention and not another. This illogicality is however, acceptable to me because the benevolent part of the rule removes undue harshness without imperiling safety and the stricter part of the rule works without imperiling justice. It would be just as ridiculous to remove the benevolent part of the rule (which no one suggests) as it would be to adopt the alternative of removing the stricter part of the rule for the sake of preserving absolute logic. Absolute logic in human affairs is an uncertain guide and a very dangerous master (pp. 483-484).

Lord Elwyn-Jones further stated that the "prime purpose of the criminal law" is "to maintain order and to keep public and private violence under control" (146B). Thus, public policy took precedence over other concerns with fundamental legal principles (Hall, 1944: 1054; Orchard, 1977:60).

Despite the problems with the specific/general intent construction, the distinction remained largely unchallenged until recent years because of such policy considerations. As a result, offences have been assigned a label which designates their standing as either that of

specific or general intent, and the common law principle that intoxication provides a defence only for the former type has remained. For a breakdown of this classification see Table 4.

TABLE 4
CLASSIFICATION OF CRIMES

Examples of Crimes of Specific Intent	Examples of Crimes of General Intent
Murder	Manslaughter
Attempted Murder	Unlawfully Causing Bodily Harm or Assault Causing Bodily Harm
Wounding with intent	Assaulting a Police officer
Break & Enter with Intent	Indecent Assault
Unlawfully in Dwelling House with Intent	Incest
Theft	Common Assault
Robbery	Sexual Assault/Rape
Receiving Stolen Property	"Joyriding"
Sexual Interference of child under age 14	
Sexual Exploitation " " " "	
Invitation to Sexual Touching " " "	

Compiled from: Gold, (Canada) 1976: 66-69

The distinction between specific and general offences and their applicable legal dispositions remained intact in Canadian common-law despite a number of cases which re-visited the issue. Again, public policy considerations took precedence. The decision in *Beard* was later confirmed in *Leary v. The Queen* in 1978. Leary was charged with rape, an offence categorized as general intent, and therefore the judge instructed the jury that “drunkenness is no defence to a charge of this sort” ([1978] 1 S.C.R. 29). The majority position was summarized as:

Society simply cannot afford to take a different position since intoxication would always be the basis for a defence despite the fact that the accused had consumed alcohol with the knowledge of its possible aggravating effects.....to permit such a defence would “open the floodgates” for the presentation of frivolous and unmeritorious defences (cited in *Daviault* [1994] 3 S.C.R. 63 at 10).

This is not to say that there has been no opposition to the specific/general intent distinction and the rules regarding intoxication. It has been contended that holding an individual liable for general intent offences which have been committed in a state of extreme intoxication essentially punishes that individual for being drunk (Orchard, 1977:69). In such cases, an accused’s intention to drink is substituted for the intention to commit the prohibited act. Again, policy reasons are given to justify such illogical results.

In summary, law has long adhered to the principle that drunkenness is no defence to general intent charges in Canadian common-law. The rules set out in *Beard* have largely been maintained, with minor adjustments made. Thus, the idea of capacity for intent has been replaced with an emphasis on the accused’s actual intent at the time of the offence, and there is less adherence to the proposition that “a man intends the natural consequences of his

actions” (*Director of Public Prosecutions v. Beard*, [1920] A. C. at p. 502).

With the enactment of the *Canadian Charter of Rights and Freedoms* in 1985, many of the concerns raised in *Beard*, *Leary* and *Majewski* would again occur. The *Charter* resulted in new challenges to the common-law rules and an increased concern with the protection of individual rights as enshrined in the *Charter*. The case of *R. v. Daviault* would once again bring these issues to a head.

R. v. Daviault

R. v. Daviault can be viewed as the impetus for feminist involvement in the drunkenness defence. It provided an extreme typifying example of the dangers which could result if individuals were allowed to excuse their behaviour because they were too drunk to form intent. For women activists, the dangers of allowing individuals to use such a defence in response to a general intent offence would directly affect the safety of women.

R. v. Daviault was a case in which the defendant was charged with sexually assaulting a 65 year-old, partially paralyzed woman acquaintance who was confined to a wheelchair. Notwithstanding the common law rule which excluded the use of intoxication as a defence to a general intent offence (which includes sexual assault), Daviault’s defence included such evidence. A single medical “expert” (a completely subjective term in social constructionism), a pharmacologist, was brought forth to testify on Daviault’s behalf as to what hypothetical effect the amount of alcohol he had ingested would have on his mental processes. The facts of the case as they were presented (see Healy, 1995: for details) were that Daviault had consumed seven or eight bottles of beer on the day in question, and then continued to drink the greater part of a 40 oz. bottle of brandy at the victim’s apartment. The pharmacologist

testified that this amount would have resulted in such a high level of blood alcohol that Daviault conceivably would have been in a temporary state akin to automatism, and thus unaware of his consequent actions.

The trial judge felt that this was enough evidence to raise doubt as to whether Daviault was capable of forming even the minimal intent required to convict of a general intent offence, and instructed the jury to consider Daviault's intoxication in their decision. Daviault was subsequently acquitted, a decision immediately appealed by the Crown. The Court of Appeal ordered that a verdict of guilty be entered in keeping with the common law precedent arising from *Beard (Director of Public Prosecutions v. Beard)*, [1920] A.C. 479), and confirmed in the *Majewski*, *Bernard* and *Leary* decisions (*Director of Public Prosecutions v. Majewski*, [1977] A.C. 443; *R. v. Bernard*, [1988] 2 S.C.R. 833; *Leary v. the Queen*, [1978]).

Daviault then launched an appeal to the Supreme Court of Canada on the grounds that the common-law rule which negated the defence of drunkenness in general intent offences offended both sections 7 and 11(d) of the *Charter of Rights and Freedoms*. By excluding the defence of drunkenness, Daviault argued that the common-law was contrary to his right to a presumption of innocence and his right to a fair trial based on fundamental principles of law. Section 7 and 11(d) of the *Charter* state:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11. Any person charged with an offence has the right:

(d) to be presumed innocent until proven guilty according to

law in a fair and public hearing by an independent and impartial tribunal.

The principles of fundamental justice require that the prosecution prove that the accused had both the elements of *mens rea* and *actus reus* necessary to convict - even the minimal intent required for general intent offences. To convict an individual without allowing him or her to present evidence of intoxication so severe as to rebut the presumption that a “man intends the natural consequences of his acts” (*Beard*, [1920] p.502), was contrary to both sections 7 and 11(d) of the Canadian *Charter*.

The result of such a challenge was a majority opinion by the Supreme Court which effectively struck down the common law rule regarding drunkenness on the basis that a state of drunkenness akin to automatism could result in a lack of *mens rea* or the voluntariness of action required to convict. To deny such evidence of severe intoxication was to deny the fundamental principles of justice as they have been constructed.

Writing for the majority, Cory J. stated:

I cannot agree with his conclusion that it is consistent with the principles of fundamental justice and the presumption of innocence for the courts to eliminate the mental element in crimes of general intent. Nor do I agree that self-induced intoxication is a sufficiently blameworthy state of mind to justify culpability, and to substitute it for the mental element that is an essential requirement of those crimes. In my opinion, the principles embodied in our Canadian Charter of Rights and Freedoms, and more specifically in ss. 7 and 11(d), mandate a limited exception to, or some flexibility in, the application of the Leary rule. This would permit evidence of extreme intoxication akin to automatism or insanity to be considered in determining whether the accused possessed the minimal mental element required for crimes of general intent (*R. v. Daviault*, p.7).

Justice Cory further argued that while it may be “morally reprehensible” to voluntarily drink oneself into such an intoxicated state, the intent to get drunk was not enough for a

finding of criminal fault (1994:7). Drinking alcohol is not an illegal act in Canada, and to penalize an accused who drank so much as to be in a state akin to automatism is to essentially punish the individual for becoming drunk. The Court further held that there was no pressing policy concerns which would entail a s.1 (Charter of Rights and Freedoms) override of their decision (*R.v. Daviault*, [1994] 3 S.C.R. 63: 17).

The three dissenting justices were of the opinion that the intent to become so intoxicated to render oneself unable to control one's actions could substitute for the minimal intent required in general intent offences. The policy considerations of the common-law arising from *Beard* were again held to justify the exclusion of the drunkenness defence in crimes of general intent. Stating that one of the main purposes of the criminal law is to protect the public, the dissenting justices argued that:

Society is entitled to punish those who of their own free will render themselves so intoxicated as to pose a threat to other members of the community. The fact that an accused has voluntarily consumed intoxicating amounts of drugs or alcohol cannot excuse the commission of a criminal offence unless it gives rise to a mental disorder within the terms of s. 16 of the Criminal Code (p.3).

That is to say, unless an accused is so intoxicated to reach a state that meets the requirements for "mental disorder/insanity", drunkenness should not excuse one's behaviour. It is of interest that by referring to the provisions of s.16 of the Criminal Code, the dissenting justices were yielding authority to medical practitioners and a medical construction of drunkenness. (Medical constructions of drunkenness will be more fully discussed in Chapter 8).

The dissenting justices in *Daviault* also presented a case for equating the act of becoming so intoxicated that one loses the ability to control one's behaviour to the legal concept of recklessness. Recklessness requires that an individual could, or should, have

reasonably foreseen that his/her actions would lead to criminal harm. They posited that an individual who drinks to a state of oblivion has not taken reasonable precautions to minimize potential and foreseeable harm from occurring. Individuals who drink to the extent that they are unaware of their actions or unable to intend the consequences of their actions, may be considered to be acting recklessly ([1994] 3 S.C.R. 63: 31, 36).

The majority concluded that an individual would have to have some foreknowledge that he or she was likely to act in a violent and illegal manner in order to be considered truly reckless. While they acknowledged the difficulties posed by this difference in opinions, the decision in *Daviault* was bound by the construction of legal principles.

The Law as it Stood post- *Daviault*

The immediate effect of *Daviault* on the law was to wipe out the specific/general intent dichotomy as relevant to the defence of intoxication. Due to Charter sections 7 and 11(d), a defendant could present evidence of extreme intoxication leading to a state akin to automatism to a judge or jury in cases of general intent, including sexual assault. The defendant must prove on a balance of probabilities that he or she did not form the necessary intent, or was acting involuntarily as a result of extremely severe intoxication. The Court proposed that the defence would only apply to cases of intoxication resulting in a state akin to automatism and would not result in widespread use by defendants. Those who chose to present a defence based on drunken automatism would face the difficulty of proving a state which is marked by blackouts and memory loss. Evidence in support of this defence must further be corroborated by “expert” testimony (*R. v. Daviault*, [1994] 3 S.C.R. 63, 93 C.C.C. (3d) 21, 33 C.R. (4th) 165)

As a direct result of *R. v. Daviault*, a defendant could use the drunkenness defence to negate his or her culpability for specific and general intent offences (C.C.C., 1994: s.271). An accused could avoid conviction for lesser, included offenses; an option which the common-law had enlisted to ensure that defendants in such cases were not completely absolved of responsibility. Prior to *Daviault*, defendants who had argued that severe intoxication was sufficient grounds to avoid conviction of specific intent offences such as murder would still be liable for the lesser and included general intent offence manslaughter. Previously, sexual assault as a general intent offence was not subject to a defence of extreme drunkenness.

After the decision in *Daviault*, the law permitted a successful defence of intoxication akin to automatism to result in an outright acquittal, regardless of specific/general intent designation. The court decided that an individual who is so intoxicated that he or she lacks intent at the time of the wrongful act is “morally innocent” and not guilty of an offence. It was explicitly left to the government to decide if legislation was required to change the law regarding the defence of intoxication, with the majority writing, “...it is always open to Parliament to fashion a remedy which would make it a crime to commit a prohibited act while drunk” (*R. v. Daviault*, [1994] 3 S.C.R. 63, p.21).

Parliament, with input from feminists, were quick to rise to the challenge.

DAVIAULT IN A FEMINIST ERA

The context of Daviault's case was not solely one of legal issues about *mens rea* and *actus reus* or Charter rights. The offence combined the elements of drunkenness and sexual assault in a manner which appeared to offend the public. News accounts of the Supreme Court decision in *Daviault* described the "national storm of controversy" (Bindman, August 10th, 1995) which "erupted" and "raised protests across the country" (Reuters, October 3rd, 1994). Public response to "the notion that extreme drunkenness constitutes a defence to sexual assault has been overwhelmingly negative" (Pearson, 1996:295), and has "sparked outrage and concern for its lack of appreciation for the victims of violence and of sexual assault in particular" (Grant, 1995:277).

Daviault, Claims-making, And The Involvement Of Women

That women's groups were actively sought out by the Justice Department of Canada for consultations on "what should be done" about the problem of *Daviault* indicates that the issue in part had undergone some form of definition process. The Supreme Court majority chose to construct the issue of the drunkenness defence as one of fundamental principles accorded an accused under the *Charter*, rather than as one with pressing concerns for potential victims. The Supreme Court refused to grant intervener status to LEAF (Legal Education and Action Fund) during the trial of Daviault, effectively eliminating women's concerns from consideration (Sheehy, 1995a:19). Instead, the Court's decision in *R. v. Daviault* was made solely within an arena of justice and Charter considerations.

The Justice Department perceived the issue differently, and was reportedly "going to

be looking at this as a priority item” (Reuters, Oct. 1994). The participation of groups such as the National Association of Women and the Law (NAWL), the Canadian Advisory Council on the Status of Women (CACSW), and Aboriginal representatives, in the aftermath of *Daviault* indicate the government had some direction in mind. In December, 1994, “women activists and lawyers” were directly involved in consultations about the state of the drunkenness defence (Sheehy, 1995a:27). In this instance, feminists were an interest group invited to participate in claims-making activities.

Other established claims-makers, who had previously shaped the issue of drunkenness as a defence, played a decidedly minor role in this latest debate. The government of Canada did not look to mainstream legal theorists or scientific experts for input or solutions. Instead, women appear to have been targeted for their opinions on the drunkenness defence, at least in part, because the case of *Daviault* involved a female victim who was sexually assaulted. The safety of women, particularly safety from sexual violence, is an emerging concern which has received increasing publicity as a “social problem” on its own. Feminists claimed ownership of the issue of the drunkenness defence and completed construction of it as a problem which affects the safety of women (and children to a lesser extent). In doing so “they demonstrated the effectiveness of feminist lobbying in persuading Parliament to consider some of the realities of the justice system’s response to sexual assault when balancing the rights of victim and accused” (Bakan, 1997:96).

Feminist Ideologies and Discourse

The participation of these groups also demonstrates the increasing influence of feminist claims-makers on political decisions. In the last twenty-odd years, feminists have

participated in claims-making activities which have advanced feminist ideology and discourse pertaining to women's rights. The language used in describing the claims throughout the consultations was distinctly feminist, and the construction of the issue of drunken offending was from a woman-centred perspective. The rhetoric used was designed to raise awareness of "sexist" attitudes which were viewed by feminists as reinforcing and perpetuating men's violence towards women (Sheehy, 1995a).

While it is beyond the scope of this thesis to discuss in detail the variety of viewpoints (liberal, radical, Marxist, socialist, etc.) which are included under the broader term "feminism", they are all linked by the premise that gender inequality is socially structured and that political action is required to right the power imbalance (Canadian Panel on Violence Against Women, 1993a:13). They vary in their views as to the sources of inequality and whether gender repression is systemic or resolvable within the confines of established structures (See Table 5), (Alleman, 1993:7). The perspectives of note in claims-making activities on the drunkenness defence are a melding of liberal and radical feminism. Rhetoric may originate and be informed by radical feminism, but solutions are more likely to take a liberal approach by seeking changes within existing social institutions.

Feminists view our society as patriarchal, with institutions acting to promote and perpetuate male domination of the existing power structures. Gender is a social construct which leads to differing male and female "roles", norms, and socialization processes (Canadian Panel on Violence Against Women, 1993a,b). Feminism provides a "lens through which violence against women is seen as a consequence of social, economic and political inequality built into the structure of society and reinforced through assumptions expressed in

the language and ideologies of sexism, racism and class”(Canadian Panel on Violence Against Women, 1993a:3). The structure of society is one based upon patriarchal relations, with men retaining relatively greater positions of power and the authority to make decisions affecting both women and men. Such a society is destined to be unequal by virtue of its power structure. Women are not merely regarded as different from men; they are regarded as inferior, inadequate, inconsequential (Brownmiller, 1975, Clark & Lewis, 1977). It is further asserted that these attitudes run rampant throughout society, even if they are not openly expressed. They restrain women from participating fully in society, and relegate women to an inferior status (Alleman, 1993; Ward, 1995).

TABLE 5
VARIETIES OF FEMINIST THOUGHT

THEORETICAL DIMENSIONS	LIBERAL FEMINIST	MARXIST FEMINIST	SOCIALIST FEMINIST	RADICAL FEMINIST
Primary Problem	Discrimination	Capitalism & Class Relations	Class & Patriarchy	Patriarchy & the Nature of Man
Manifestation of the Problem	Gender inequality	Class relations & private property as basis of male inheritance	Social oppression	Subordination & sexual exploitation of women
Causes of Gender Inequality	Societal inhibitions to female opportunities & participation	Capitalist class relations	Gender and class relations in which sexuality and labour are linked	Man's need to control and exploit women
Process of Gender Formation	Socialization into gender roles and sex types	Master/slave relationship applied to husband/wife	Power relations that grow out of human reproduction	Gender power relations based on male heterosexuality
Gender Problem Systemic	No	Yes	Yes	Yes
Program for Change	Affirmative action; Equal opportunity laws and policies	Revolution; socialize child care; eliminate male-dominated inheritance syst.	Construct a new social order based on equality of class and gender	Create changes at structural/cultural level, create a society devoid of power relations, change from male-centred institutions
Primary Criminal Justice Concerns	Social repression & discrimination of women and female offenders; the criminalization of women	Curb the harsh treatment of working class offenders, & curbing violence against women due to inequality	Identify the societal causes and abuses that result in the double oppression of women in the home & workplace	Sexual assault; exploitation of women by men

Source: Alleman, T., 1993:7

Feminists constructed the drunkenness defence as a problem which impinged upon the rights of women to live free from the fear (or reality) of sexual violence (Sheehy, 1995a; 1995b). In the clash of women's issues and alcohol issues, the dangers of alcohol do not take precedence in the rhetoric of social problems. The mobilization of women's groups in relation to the drunkenness defence was more about feminist issues against gendered violence than about drunkenness specifically. The issues that were highlighted in *Daviault* can be linked to feminist claims-making in terms of male violence (specifically sexual assault) against women, and equality rights as guaranteed under the Charter.

Sexual Assault: Feminism vs. The Status Quo

Feminists argue that sexual assault is gendered violence which reflects misogyny and inequality in the greater patriarchal society. Sexual violence is said to be about power and domination which results in the restriction of women's activities and lives (Canadian Panel on Violence Against Women, 1993a,b). Feminists also contend that gender stereotypes which constrain male and female behaviour have normalized the view of man as virile seducer and woman as complacent participant which may be expressed in sexual violence (Canadian Panel on Violence Against Women, 1993a,b; Rose, 1977:78).

Susan Brownmiller, in *Against Our Will*, was one of the first feminists to argue that historically men have dominated women and that rape is a method of intimidation in perpetuating the patriarchal power relations between the sexes. She asserted that "[r]ape is man's basic weapon of force against women, the principal agent of his will and her fear" (p. 14), a claim that was revolutionary when first stated in 1975. Since then, much of feminist claims-making has focussed on redefining sexual assault and deconstructing stereotypes which

are said to reflect their patriarchal heritage. Feminist rhetoric is an attempt to discount these traditional stereotypes as “myths”, and seeks to replace these “myths” with the “facts” as perceived by women whose consciousness has been raised (Brownmiller, 1975:283-346; Ontario Women’s Directorate, 1998; Ward, 1995:32-37). From a social constructionist perspective, the fact-myth distinction is a claims-making device which is rhetorical in nature.

The crime perpetrated by Daviault pitted traditional legal constructions of sexual assault and intoxicated violence against a feminist construction which capitalized on the outrage depicted by the media in response to the Supreme Court’s decision. Feminist rhetoric used in campaigning against allowing drunkenness as a defence can be viewed as largely a response to earlier constructions of the separate “social problems” of drunken violence and sexual assault.

Social Constructions of Sexual Assault

Rape violates women physically and mentally, humiliates them, devastates their sense of self-respect, undermines their dignity, and often leaves them with a sense of inferior status in the community which may never be undone. Threat of rape makes threat of such violation a permanent feature of the landscape of women’s lives.

It is submitted that sexual assault is an equality issue....Women are singled out for sexual assault and their accusations of sexual assault are systematically disbelieved because of their gender, that is, because they are relegated to an inferior social status as female, including being socially defined as appropriate targets for forced sex...

It is submitted that in an equal society, sexual assault on women and children would be exceptional, rather than as common as it is under current conditions of equality (Affidavit of LEAF in *R. v. Gayme*, cited in Razack, 1991:111)

Feminist claims-making challenges conceptions which are perceived as reinforcing and perpetuating sexist thinking in regard to rape and sexual assault. According to feminists, the

criminal justice system and legislative bodies (which are predominantly “masculine”) in Canada have been influenced by patriarchal stereotypes in defining and controlling sexual assault (Los, 1994). The courts and legislators are dominated by men - leading to definitions and solutions to violence against women formulated from a male perspective (Canadian Panel on Violence Against Women, 1993b:47). As Los (1994:21) has stated:

Given the fact that legal language, the legislature, and the judiciary have traditionally been a male domain, it can safely be assumed that the process of the legal construction of the crime of rape has been shaped by ideological and cultural perceptions and assumptions, that are shared by men, rather than by both men and women.

From a feminist perspective, traditional views are sexist and need to be dispelled as myths. The stereotypes act to perpetuate sexual assault by fostering a belief that women are passive individuals in need of masculine domination. Socially embedded gender roles dictate male/female identities which conform to outdated stereotypes, and culture reinforces a male versus female hierarchy (Brownmiller, 1975; Canadian Panel on Violence Against Women, 1993a,b).

Feminists argue that sexual assault legislation has been subjected to such “myths”. Former rape laws were identified by feminists as premised upon beliefs that women were male property (Brownmiller, 1975), and female sexuality was “a commodity to be used and enjoyed by men” (Clark & Lewis, 1977:120-123; Ward, 1995:23). For example, prior to 1983, Canadian law did not bar husbands from sexually assaulting their wives (Canadian Panel on Violence Against Women, 1993b:18; Los, 1994:23). Women, through marriage, were “sexually available” to their spouses, and had little legal recourse if they were sexually assaulted by their husbands (Los, 1994:23; Rose, 1977:77, 79-80).

Another legal construction of sexual assault portrayed women as devious and prone to making false accusations (Rose, 1977: 77; Los, 1994:24-25). This may explain the prior legal stance which required corroboration in sexual assault case which necessitated evidence above and beyond the victim's testimony to convict an accused. The conventional view further held women to be likely to consent to sexual relations - and just as likely to later claim they were assaulted. In an oft cited quote, Hale stated the still popular belief that the charge of rape is "an accusation easily to be made and hard to be proved, and harder to be defended by the accused, though never so innocent"(1847:634). Men often fear they will fall victim to spurious charges by devious females. Thus, women who report sexual assault often face disbelief and suspicion at every stage of the criminal justice process, in a traditionally male dominated system (Horne, 1993; Roberts, 1993).

Additionally, former rape laws had a "recent complaint" clause which required sexual assaults to be reported immediately (Los, 1994:24). The credibility of a woman's complaint was somehow connected to the length of time taken to report the assault to the police. Feminists argue the law was designed to "protect" men from "devious" women who have second thoughts about sexual interactions. This is a variation on "women lie about being sexually assaulted" (Ontario Women's Directorate Fact Sheet, 1998) in male constructions of sexual assault.

Sexual assault is also one of the few crimes in which the victim is often implicitly held responsible for the behaviour of another individual; in other words, she "provoked" the assault. There is an underlying premise that it is impossible to rape an unwilling victim (Clark & Lewis, 1977:151). Historically, questions were raised as to the type of clothing the woman

was wearing, her behaviour, and her sexual history (Los, 1994:25; Rose, 1977:83) - questions which are deemed irrelevant for other types of violence (Ward, 1995:33). For instance, it is hard to conceive of robbery victims being routinely queried as to how they might have provoked their offenders.

Women may also be viewed as exaggerating the effects of sexual assault. In the conventional (ie. patriarchal) view, sexual assault is perceived as an extension of consensual intercourse (Clark & Lewis, 1977:140-142; Los, 1994:25; Ward, 1995), and therefore should not be overly harmful or offensive to women. The view that women secretly enjoy being sexually violated (the classic "rape fantasy") has also done little, from a feminist perspective, to promote equality in sexuality. The violent component is overlooked by regarding rape as another form of sex which the woman deserved or desired (Brownmiller, 1975; Glover Reed, 1991).

These are only a few of the sexual assault "myths" identified by feminists as adversely affecting women. However, these examples give an indication of the rhetoric used in constructing sexual assault from traditional and feminist perspectives. These constructions have had an historical influence on criminal justice legislation and practice. In Canada, the emergence of feminist rhetoric (and claims-makers) has had an impact on legal definitions of rape, and this is evidenced by the 1983 changes to the criminal code. A feminist construction of sexual assault addresses the concern of many women that, "although men in general have become more sympathetic and understanding of many issues, they cannot experience rape in the same way as women - they cannot know the reality" (Dowdeswell, 1986:39). Feminist rhetoric attempted to detail that reality for all.

Sexual Assault Claims-making - Results

As a result of grass roots movements and feminist lobbying, rape legislation underwent tremendous changes in Canada (see Los, 1994, for a complete description of this process). Sexual assault as an issue requiring both political and cultural intervention was recognized by feminist workers in the 1970s and the early 1980s. The constructions which had shaped previous legislation were publicly denounced as sexist and harmful to women as a group. In combating these stereotypes, feminist claims-making in the area of sexual assault must be viewed as initially successful in Canada. Bakan describes this process:

Amendments to federal legislation lightened evidentiary burdens for sexual assault convictions, restricted admission of evidence about previous sexual conduct, and prohibited publication of victims' names in the press. These changes provided valuable safeguards for women against sexual bias in the justice system, removed disincentives to their coming forward with complaints, and increased conviction rates for sexual offenders (1997:96).

The changes to the Criminal Code in 1983 included a three tier designation of "sexual assault" to replace the former crime of rape (Roberts, 1994:2). Rape was identified by feminists as a male construct which defined it as "illegal sex" (Ward, 1995:32), and as a criminal category, restricted to forcible vaginal penetration which did not begin to address the multiple realities of sexual violation. Efforts to change the criminal code in the early 1980s permitted women's groups to participate throughout the process and to voice contrary claims, some of which were incorporated into that legislation (Los, 1994). As a result, the term "sexual assault" replaced "rape" and several other offences, and defined the issue in terms of the underlying violence which applies to all forms of unwanted sexual contact (Canadian Panel on Violence Against Women, 1993a,b).

Under the 1983 legislation, men could be charged with sexually assaulting their wives, a provision which had previously been denied to women within marriage (Canadian Panel on Violence Against Women, 1993a:18). Further, corroborative requirements are no longer legally mandated in order to obtain a conviction for sexual assault offences.

Feminists have had to remain vigilant in their struggle to define and construct sexual assault in the legal forum. In two cases, *R. v. Seaboyer* (1991), and *R. v. Gayme* (1991), the defendants successfully argued that the “Rape Shield” law in Canada barring open use of a complainant’s sexual history to infer credibility or consent violated their rights. Another recent sexual assault defendant attempted to gain access to his victim’s counselling records, again arguing that they were relevant to his defence (*R. v. O’Connor*, [1995]). Such cases weaken feminist attempts to control the language and terms of sexual assault.

The Charter of Rights and Freedoms

A further development which facilitated feminist claims-making in Daviault was the inclusion of equality principles in the Canadian *Charter of Rights and Freedoms*. A number of feminist writers have attributed the emergence of an organized women’s legal movement (i.e. claims-makers) in Canada to the development of this *Charter* which coincided with constitutional reform in the early 1980s (Gotell, 1990; Razack, 1991). When it became apparent that the government was reluctant to guarantee equality rights of substance in a new *Charter*, a small group of feminist lawyers felt compelled to act. In the struggle to ensure that all women were represented in the process, women from across Canada with a variety of backgrounds participated in what began as a feminist campaign carried out predominantly by white, well-educated women (Gotell, 1990).

The results of this movement are evident in the inclusions of sections 15 and 28 of the

Charter of Rights and Freedoms:

Equality Rights

15.(1) 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.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.
(emphasis added)

General

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

The inclusion of these sections was an important victory for feminist claims-makers. Without their inclusion, there would be little legal recourse for challenging the decision of the court in *Daviault*. Both sections 15 and 28 would be invoked by feminist groups to justify legislative intervention on the drunkenness defence. In terms of claims-making, the dispute over *Charter* rights resulted in a well organized pressure group unified by a feminist mandate. Contacts were made, allegiances formed, and resources stockpiled during this period of claims-making. Experience was gained in working within the confines of a legal system which has been characterized as both “liberal democratic” and “patriarchal” (Gotell, 1990). It alerted feminists to the difficulties of negotiating in what they perceived to be a male-dominated system of law.

It is somewhat ironic that the *Charter of Rights and Freedoms* would become a valuable tool for feminist advocacy groups (e.g. LEAF) in promoting their vision of equality through court challenges, because the *Charter* is also the basis for the *R. v. Daviault* judgment that feminists found contentious. However, feminists were aware at the time that, "...if women could convey their point of view to those in responsible positions, they could influence how equality rights were ultimately understood in the courts" (Razack, 1991:38). Through a process of "influencing the influencers" (Razack, 1991:37), groups such as LEAF were able to promote feminist ideals to an increasingly attentive government. This is the essence of claims-making activities: a process LEAF and others would return to in many cases (eg. *R. v. Gayme*, *R. v. Seaboyer*) before *Daviault*.

Daviault

Both examples of women's claims-making in relation to sexual assault and the fight for *Charter* guarantees provide some background into the emergence of feminist intervention in *Daviault*. By understanding the position of women on these issues, one can understand both the origins and the aims of the grounds, warrants, and conclusions made in reference to the drunkenness defence. Without prior claims-making by feminists in the areas of sexual assault and charter rights it is conceivable that *Daviault* (or the campaign against the ruling) would have been framed in different terms. The acceptance of these earlier claims gave women authority to pursue other claims and take on their ownership. While this is an overly simplistic reduction of events, it should be obvious that there are other factors and other "crusades" which played a role in the emergence of women as legitimate claims-makers. However, a feminist construction of sexual violence against women and the inclusion of

equality rights in the *Canadian Charter of Rights and Freedoms* were to have a direct impact on future claims-making activities.

FEMINIST CLAIMS RE: THE DRUNKENNESS DEFENCE

Claims

The claims-making used to designate an issue as a “social problem” which requires a certain type of intervention can be broken down into Toulmin’s three components - grounds, warrants, conclusions - all of which are rhetorical in nature. How claims are constructed factors heavily in which aspects of the issue are expressed and take prominence. From a social constructionist perspective, both the alleged “facts” and the alleged “myths” which characterize an issue must be viewed as socially constructed knowledge as funneled through someone else’s doctrine. Claims which make it to public consciousness are essentially the rhetoric of concerned claims-makers who have gained dominance in shaping the issue.

Drunkenness Defence as Unfair to Women

The feminist claims which sprang from the *Daviault* decision contained a powerful mixture of rhetorical styles in the appeal for legislative intervention. It has been shown that the drunkenness defence does not involve new phenomena which had never before been at issue. The *Daviault* case could be viewed as the impetus to feminist involvement in what is only the most recent incarnation of the issue as a social problem. *Daviault* threatened perceived gains made by feminists in the areas of family violence and sexual assault in the last decade. The response of feminists and women’s groups was organized around creating legislative change which would reflect the grounds and warrants their claims were based upon.

Grounds

a) Defining and Typifying the Problem

Daviault provided feminist groups with what Best (1990) would describe as an “atrocious tale” which would come to typify the drunkenness defence as a women’s problem in the 1990s. Many claims open with a dramatic or extreme example which grabs the attention and sets the dimensions of the issue. In *Daviault*, the victim was an older woman who was partially paralyzed and confined to a wheelchair. She was sexually assaulted by a guest (the husband of an acquaintance) in her own home. Mr. Daviault was portrayed as an alcoholic who spent the better part of a day drinking himself into oblivion and then attacked a woman who was both vulnerable and defenceless.

These “facts” which were presented about the *Daviault* case had all the emotional elements which offend people. Best states that “by focusing on events in the lives of specific individuals, these stories make it easier to identify with the people affected by the problem. Horrific examples give a sense of the problem’s frightening, harmful dimensions.” (1990:28) *Daviault* portrayed the horrors that could and would occur if men were allowed to sexually assault women and then avoid conviction by arguing they were too drunk to know what they were doing. The Supreme Court decision arising from *Daviault* to allow evidence of severe intoxication akin to automatism to form part of a defence against general intent crimes was presented as misguided and against the interests of women and children (Sheehy, 1995a,b). *Daviault* caught the attention of women’s groups and provided the flashpoint for transforming the drunkenness defence into a women’s issue requiring feminist intervention.

b) Drinking and Sexual Violence

Women's groups located in *Daviault* a chance to confront the connection between alcohol and sexual violence. Drunkenness has long been associated with sexual licentiousness, and it is perhaps only surprising that the decision that the Supreme Court eventually made in *Daviault* did not arise much earlier. The Charter of Rights and Freedoms may not previously have existed for use in such a defence, but attitudes have persisted which are clouded with long-standing notions of the effects of alcohol in removing sexual inhibitions. MacAndrew and Edgerton (1969:7-8), made a number of cross-historical references to the purportedly "known" effects of alcohol on human behaviour and remarked on the sexual focus of many of these comments. The examples range from an Anti-Saloon League poster from 1913 which stated that "alcohol inflames the passions, thus making the temptation to sex-sin unusually strong", to a 1965 statement from the spokesperson for the American Medical Association that "as far as sexual behavior is concerned, it is well-known that alcohol reduces the inhibitions of individuals and removes the controls.....therefore, impairment of the judgment by alcohol may cause sexual behavior that would not occur were he not exposed to the loss of control that alcohol brings about"(cited in MacAndrew and Edgerton, 1969:8).

Feminists claimed the decision in *Daviault* only served to reinforce the notion that alcohol, not the man, is responsible for the behaviour. It has been suggested that:

For those who contend the development of the basic principles of criminal responsibility has failed to respond adequately to male violence, the decision is troubling because it gives offenders an additional basis on which to try to evade responsibility for grievous conduct frequently directed against women and children (Pearson, 1996: 296).

In two briefs prepared by Sheehy for the Canadian Action Council on the Status of

Women (CACSW), and the National Association of Women Lawyers (NAWL), there were concerns about the claims made with regard to alcohol as a causal factor in crimes of violence and sexual violence in particular. It was recommended that the language used in any legislative redress to *Daviault* stress that responsibility resided with the offender and not in his state of drunkenness (Sheehy, 1995a, b).

However, the attribution of blame to alcohol is widespread and strongly rooted in the attitudes of many offenders and members of the judiciary. Sexual violence that occurs at the hands of intoxicated individuals and decisions such as *Daviault* further indicate that there are conflicting norms regarding the “permissiveness” of drunkenness and violence within our society. This opinion is supported by research and general media accounts of cases involving alcohol and violence. Pasquali, in her study of sentencing practices for sexual assault in the Northwest territories, discusses the **mitigating** effect alcohol appears to have on judicial decisions. Out of 11 adult offenders whose records were studied, four were intoxicated and “in at least two of these cases, assumptions are made about the role of alcohol which are not warranted given clinical and empirical findings” (1995:55). To quote from the judicial decisions directly:

.....I want to make it very clear that on the facts of the case I find that the offence was a spontaneous one, that it was induced largely by alcohol consumption.
(Offender 5)

It is quite possible this offence would not have occurred if you had been sober.
(Offender 9)

Similarly, in sentencing a former cabinet minister for physically assaulting his wife, a local justice is quoted telling the accused that “If you didn’t drink, you wouldn’t be here.”

(Toronto Star, January 17, 1998: A3). In the case of *R. v. Blair* (1994), the trial judge placed great weight on information which related to the accused's familial history of alcoholism combined with the two-day drinking binge embarked on before the assault. In his comments, the judge states that *Blair* "must have been acting or driven by these latent drives within himself that were disconnected with his free will and that he was not acting voluntarily. His failure to act voluntary [sic] was induced by the consumption of alcohol and the drugs in question" (*R. v. Blair*, 1994).

These are all recent decisions. Such judicial opinion is based upon (and reinforces) a social construction which is contrary to present-day feminist claims (Boyle, 1994:136-156). The claim that alcohol causes anti-social behaviour allows a transfer of blame that the accused can incorporate into a belief system which already regards women as appropriate targets for violence (Pearson, 1996:296). Further, "since he can attribute his actions to chemical use, he is not required to feel responsible for them or to experience the guilt and disapproval of others" (Glover Reed, 1991: 134).

If the judiciary makes a connection between alcohol and sexual assault, it is not surprising that such attitudes would filter down to the offenders they excuse. Feminists argue that decisions such as *Daviault* only serve to reinforce this connection for offenders - to the detriment of women. La Prairie (1993: 236), in a study of Cree communities, found that "women were the primary victims in interpersonal offences, and that alcohol was a factor in virtually all the sexual assaults and a major factor in all other interpersonal offences". Further, interviews with men accused of sexual assault indicate that they are all too willing to blame alcohol use for their crimes (McCaldon, 1967:47 cited in Brownmiller, 1976:207-208).

c) Severity of Assaults: Men's and Women's Drinking

It can be argued that the tendency to blame alcohol for sexually violent acts is one that doubly disadvantages women. Women's drinking is subject to different norms and additional restraints which do not apply to men. Drunkenness is offered in mitigation of male sexual violence and yet also serves to exacerbate both the situation and the view of women under the influence. There is a double standard operating here, which, combined with prevalent constructions of legitimate sexual assault, can isolate female victims further. It has been noted that:

Women with alcohol or other drug problems are especially vulnerable to rape, as are victims of incest. Women in both categories are more frequently chosen as victims. Koss and Harvey report women with alcohol and other drug problems experience more and different types of rapes than other women and the duration of assault is often longer, probably because she resists less if inebriated or her resistance won't be taken as seriously. Group rape is especially likely to involve alcohol or other drug consumption by the perpetrators (Glover Reed, 1991:146).

Sexist assumptions about alcohol use are identified by feminists as more responsible for this phenomenon than alcohol use itself. However, both men and women refer to such assumptions in assessing incidents of sexual assault, with the result that both sexes tend to discount or minimize behaviour that occurs while drunk (LaFree, 1989:65-66).

d) "Dutch Courage"

Another ground given for legislative action by feminists is related to the concern that men may use alcohol to excuse subsequent behaviour. Women who work in crisis centres expressed a belief that some men would purposely use alcohol in order to decrease their accountability (both to themselves and to the legal system) (Sheehy:1995a:11). Pasquali has

commented that “[C]linical data suggest that offenders often intentionally drink in order to reduce any inhibitions which might, in a sober state, prevent them from offending. In other words, it is often the desire to sexually offend that leads to drink rather than the other way around” (1995:31). Sheehy (1995a:11) cites a chilling example of intoxication reportedly occurring after an assault on a woman - in anticipation of potential police involvement. Though the courts have specifically stated that the defence of intoxication is not to be used in cases of “Dutch courage” (drinking to embolden one’s behaviour), women’s groups fear that this distinction will not occur in reality.

e) The Response of Police and Courts

In reported cases of sexual assault involving a drunken offender (or victim), police are left to judge the level and timing of intoxication and must assess the accused’s account versus the victim’s. In light of *Daviault*, police may be more inclined to factor in drunkenness in determining a course of action with the result that greater numbers of sexual assaults are deemed “unfounded”. Between 9 - 14% of sexual assaults (levels I-III) were declared unfounded in 1992 (Roberts, 1993:10), a figure which could be adversely affected by *Daviault*. Clark and Lewis have suggested that police decisions on whether a charge is founded or unfounded are “related to the victim’s moral character rather than to evidential requirements” (cited in Morris, 1987:172). LaFree’s examination of sexual assault cases in Indianapolis indicated that in all instances, unfounded cases included police reference to the “non-conformist” characteristic of the victims (1989:72-73). Police defined non-conformist behaviour as, “hitchhiking, *drinking at the time of the offense, being at a tavern or bar without a male escort*, allegedly engaging in sex outside of marriage.....” (emphasis added,

LaFree, 1989:73) . Evidence of drunkenness on the part of the offender and/or victim may further obscure what is considered a legitimate assault.

This filtering process can occur at any stage of the legal process, from initial police involvement onward. Gunn and Minch have described the different levels of the criminal justice system at which attrition may occur (1988:70-79). In their examination of data on the response of the criminal justice system to reported sexual assaults in Winnipeg (1976-1977), they found that cases were filtered at the police, crown, and court levels. A summary of these results are presented in Figure 2. The Crown may not prosecute if there is evidence that the accused was intoxicated, especially if expert testimony is needed to refute this evidence.

The Ontario Women's Directorate, in "Sexual Assault, Dispelling the Myths", states that 44% of women who do not report their assaults to police cite concern with police and court attitudes towards sexual assault victims as a prime reason. Another 50% of non-reporters indicated a belief that police would do nothing in response. This, in combination with the already low number of women who report sexual assaults due to fear of systematic ignorance or victimization, may make the number of cases successfully undertaken and prosecuted decrease drastically if a defence of drunkenness were permitted (Sheehy, 1995a:11).

FIGURE 2

**FILTERING OF OFFENDERS' SEXUAL ASSAULT CHARGES
IN WINNIPEG, 1976 - 1977**

Original Crown Charges N=211		
Reduction of Charges		Termination of Charges
	Police Level N=211	Police unfounded N=61 n=61 Charges Dropped by Victim n=38 No suspect apprehended n=23
Plea bargained charges n=10	Crown Level n=89	Victim initiated n=7 Crown unfounded n=5
Plea bargained charges n=21 Guilty at trial on reduced charges n=7	Court Level n=67	Charges terminated (by victim or judges at preliminary hearing) n=8 Acquittal at trial n=8 Not guilty by reason of insanity n=2
	Guilty at Trial n=21	
TOTAL n=38 18%	TOTAL n=21 10%	TOTAL n=152 72%

Source: "The Response of the Criminal Justice System"
Gunn & Minch, 1988: 81

f) Reporting

Women activists further proposed that to allow the decision in *Daviault* to stand uncontested would have an adverse impact on future reporting of sexual assaults (Shaffer, 1996:323, Sheehy, 1995a:11, b:10). In instances in which the victim or the offender has consumed alcohol, the victim may doubt the legitimacy of her claims if the legal system allows a defence of intoxication. This is not to say that her trauma is any less, but that it may affect her willingness to report the assault to the authorities. It is often difficult for women to report sexual assault in light of the courts' history in this area, with the result that only an estimated 6 -10% of sexual assaults are reported to the authorities (Canadian Panel on Violence Against Women, 1993a; Ogrodnik, 1994:10). The Court's decision in *Daviault* could result in a further decrease in reporting if women believe that drunkenness is, or is perceived as, an acceptable excuse for sexual offending (Sheehy, 1995a,b).

g) Mistake of Fact

Feminists have argued that to allow the defence of severe intoxication to be used in general intent offences would open the courts to the use of other defences which may be harmful to women. Of great concern to feminists involved in the drunkenness defence were two criminal defences which potentially could increase in scope if the decision in *Daviault* was to remain in effect. Both "mistake of fact" and "psychological blow automatism" have been cited as defences which could be used in combination with, or as alternatives to, the defence of intoxication in sexual assault cases (Sheehy, 1995a).

A mistaken belief that consent to intercourse has been granted is already permitted by the courts as a defence in sexual assault cases (s.265(4)CCC). A judge can instruct a jury to

consider the reasonableness and honesty of a defendant's claim to believe the complainant had consented to "the conduct that is the subject matter of the charge" (Canadian Criminal Code (C.C.C.) Revised, s. 265 (4)). It is not to be used in conjunction with the defence of intoxication. That is, an individual is not allowed to argue that his mistaken belief in consent resulted from voluntary intoxication (C.C.C. s. 273.2(a)(i)). The concern of feminists is that the defence of "mistake of fact" is itself troublesome in sexual assault cases because of underlying assumptions which view women as implicitly consenting to, if not outright desiring, sexual domination (see Brownmiller, 1975; Glover Reed, 1991). Sheehy points out that mistake of fact is "one of the most common defences used by men accused of sexual assault" (1995a:12).

Women's groups feared that *Daviault* would result in applications contrary to s. 273.2(a)(i) combining both "mistake of fact" and intoxication defences by an accused. Judicial reinterpretation of the law in light of *Daviault* could conceivably lead to a combination of all evidence being presented in determining the accused's actual state of mind at the time of the offence. Even before *Daviault*, this fear was exemplified by the sexual assault trial, *R. v. Edgar* (1991). Edgar argued successfully that he had made a "mistake of fact" in failing to obtain the woman's consent because he was intoxicated at the time and in his intoxicated state, concluded she was a willing participant. This decision occurred despite s.273.2(a)(i). The combination of evidence of intoxication and mistaken belief appears to have held more weight than evidence that the victim was sleeping when he began intercourse with her. Consequently, Edgar was acquitted.

A result of *Daviault* was the increased likelihood of cases like *Edgar* and the

continued minimization of the harm to women who are sexually assaulted. Attribution of blame to alcohol is further supported by cases such as this, with the judge in the case stating that, "Liquor did play a real role in the events.....if his sensibilities had not been dulled by drink, he would not have made the mistake which he did" (R. v. Edgar, [1991], 10 C.R. (4th) 67 (B.C.Prov.Ct), at 74).

h) Psychological Blow Automatism

Feminists also made a connection between the defence of "mistake of fact" and the defence of "psychological blow automatism". "Psychological blow automatism" is a medico-legal concept which describes a disassociated state (functioning, but not conscious of behavior) which occurs in response to an extreme emotional or psychological blow. *Daviault* is viewed as potentially expanding the perimeters currently constraining use of psychological blow automatism as a defence. The success of *Daviault* on the basis of a Charter challenge opened other limited defences to the full scrutiny of s. 7 and 11(d).

i) Statistics

Grounds for action in the area of the drunkenness defence are also found in statistical examples. Best (1990:45-64) describes the use of statistics to support claims-making activities as a rhetorical device which provides legitimacy through numbers. Official statistics tend to be viewed by the public as scientific and are particularly persuasive in claims-making. The statistics which are available on the incidence of alcohol use in sexual assaults are used to provide further support for the idea that this is an area which requires an organized response.

There is no shortage of research to support the claims that alcohol use and sexual assault are highly correlated. Rada (1975) collected data on 77 convicted rapists and found

that approximately 50% of them had been drinking at the time of their crime. Amir (1971) found that 24% of offenders in 646 rape cases had been drinking prior to their attacks. A World Health Organization report from 1979 found that alcohol was involved in 13 to 50% of rapes worldwide (Gottheil et al., 1983). In the figures cited by Pernanon (1991:193-194), 31% of sexual assault offenders were found to have used alcohol.

In Canada, 11% of all reported violent offences were attributed to sexual assault incidents, second only to common assault (Ogrodnik, 1993: 7). In 1993, there were 34,764 reported sexual assaults, an increase of 1% from the previous year. If the law arising from *Daviault* is maintained, feminists argue that a perception that intoxication may act to exonerate an accused may increase the numbers of sexual assaults, reported and unreported.

The statistical portrait of alcohol and sexual violence against women provides a compelling reason for women's participation in discussions of the drunkenness defence. Numerical representations of a "problem" are often accepted over other types of rhetoric and discourse, thus making statistics powerful rhetorical weapons in claims-making.

j) Increase in Use of Defence of Intoxication

A very real fear for women which arose from *Daviault* was that men would increasingly rely on the decision in defence of their own violence against women. Sheehy (1995a:6, 1995b) notes that, in the weeks following the ruling, the defence of intoxication was successfully used by defendants charged with violent offences against women in Quebec, Alberta, and Prince Edward Island. Thus, the *Daviault* decision was not a momentary aberration and it affected trials across Canada (see: *R. v. Blair* [1994]; *R. v. Misquadis*, [1995]).

Bakan has commented that “[D]espite the Court’s speculation that the extreme-drunkness defence would only rarely succeed, now its rule has been frequently used by lower courts to acquit or order new trials for men accused of assault, sexual assault, and other crimes (1997:98). Sheehy (1995a:4; 1995b:8) has commented that five men successfully used the drunkness defence prior to the Supreme Court ruling in *Daviault* (*R. v. Saulnier* [1992]; *R. v. Edgar* [1991]; *R. v. Finalyson*, [1990]; *R. v. McIntyre*, [1992]; *R. v. Tom* [1992]), with a number of acquittals in cases of male violence against women registered immediately after *Daviault* (e.g. *R. v. Blair*, [1994]; *R. v. Misquadis*, [1995]). An implication of this for feminists is that the *Daviault* example may represent only a fraction of the cases that will successfully argue drunkness as a defence - to the detriment of women (Sheehy, 1995b:8).

k) Women as Offenders

Theoretically, the drunkness defence is equally applicable to women who commit offences while severely intoxicated as it is for male offenders. In practice, feminists believe that it is unlikely that female offenders will benefit from the *Daviault* decision. Men are far more likely to be charged with crimes of violence, with 1991 data indicating 110,000 such charges against men compared to 13,000 against women (Johnson & Rodgers, 1993:102). An estimated 98% of sexual assaults are perpetrated by men (Roberts, 1993:7). Further, it is predominantly men who make use of the drunkness defence in response to charges of sexual assault (Sheehy, 1995a:9).

The majority of female offenders in Canada are arrested for property crimes or for provincial liquor law violations. While police statistics reveal that the total number of charges against women have steadily increased over the last twenty years, non-violent offences

account for the largest share of this increase (Johnson & Rodgers, 1993: 98-102). In those instances where women do commit acts of violence, research suggests that “a considerable proportion consists of acts of rebellion or retaliation against men in abusive or exploitive domestic situations” (Johnson & Rodgers, 1993:102). While intoxication may be a factor in these acts of violence, women do not appear to use the drunkenness defence to negate intention or voluntariness.

Feminists believe that women as offenders will not be affected by the *Daviault* decision in the same manner as women as victims (Sheehy, 1995a). The drunkenness defence remains a non-issue in female offending, while simultaneously condoning or excusing male violence directed at female targets. The defence appears to offer a distinct advantage to men by providing an extra tool for their defence that does not equally apply to women as offenders (Sheehy, 1995a:9).

1) Aboriginal Women in Canada

The effects of a system which is both sexist and racist is most clearly demonstrated in the treatment of Aboriginal women as offenders and victims. The higher rates of alcohol abuse among native populations, combined with drinking patterns which are “periodic, high-volume drinking (binge drinking) and problem drinking (trouble with the law, fighting, family problems while drinking)” (Health & Welfare Canada, 1989:21) cannot solely account for their increased involvement with the criminal justice system. Feminists claim that native people, specifically native women, would be further adversely affected by the *Daviault* decision. The criminal justice system has been described as tending to:

“excuse male violence and racist violence but, at the same time, to explain the

results in terms of “general” principles that are theoretically available for the benefit of all. These trends should flag the real possibility that, for example, Aboriginal women offenders may not easily gain access to the defence of extreme intoxication” (Sheehy, 1995b:9).

Canadian aboriginal women were perceived as particularly disadvantaged by the *Daviault* decision because of combined racism and sexism within the justice system (Sheehy, 1995a; La Prairie, 1993). Racism within the system may be evident in the finding that Native women are 88 times more likely to be incarcerated than non-native women (Health & Welfare Canada, 1989:22). Aboriginal women are more likely than non-Aboriginal women to be incarcerated for violent offences, and are twice as likely as Aboriginal men to have alcohol play a role in their incarceration (La Prairie, 1993:236). Of the women who come into contact with the criminal justice system and are incarcerated, an overwhelming percentage are aboriginal women who have specific drug abuse problems unrelated to an application of the intoxication defence (see La Prairie, 1993:235-244).

Grounds: a summary

This chapter has described the grounds which have been offered in the social construction of the drunkenness defence as a social problem of particular concern to women. By emphasizing the concerns of women (and children to a minor extent), this latest construction has implemented feminist rhetoric to further an agenda for equality rights. The “problem” targeted is not drunkenness, but rather violence against women and children under the guise of drunkenness.

6WARRANTS

Claims-makers use warrants to justify the type of intervention they are proposing. After a set of conditions have been defined as socially problematic, warrants “can act as bridges, and authorize the sort of step to which our particular argument commits us” (Toulmin, 1958:98). Warrants are often implicitly linked to the values which claims-makers impute to their target audience and inject an emotional element into arguments. Justification provided by warrants are less amenable to overt examination when they appeal to value and moral systems which are not easily articulated or debated. For these reasons, warrants often must be inferred from the larger rhetorical argument (Best, 1987:108).

The following are a few of the warrants which can be discerned in relation to feminist claims-making in *Daviault*. Some of these warrants are applicable to other claims-making activities and are linked to values which are common in our society. Any such list is necessarily selective and incomplete because of the implicit nature of many warrants (Best, 1987:108-109), therefore the following should be considered a sampling of the possibilities.

Morals as Warrants

Warrants which make reference to morals are particularly effective in justifying a course of action as mapped out by interested claims-makers. Though morals are not appealed to as explicitly as in earlier eras (e.g. Temperance and Prohibition), they act as a starting point from which many issues are constructed as problematic. The insertion of morality into the drunkenness debate has led to a characterization of individuals who drink and act violently as being morally inferior and treacherous to the public. Here, the

malevolence assumption casts the drunken offender as doubly base - if drinking and alcohol is evil, then drinking and violently acting out is more so.

Morality issues are highlighted in the warrant statements which are used in connection with the drunkenness defence. The Supreme Court majority in *Daviault* declared that an individual could not be held legally responsible for crimes committed in the absence of *mens rea* or voluntary *actus reus*. The courts declared that punishing such individuals would be tantamount to penalizing the “morally innocent” (*R. v. Daviault* [1994] 3 SCR 63). This view of moral innocence was based upon fundamental legal principles and did not necessarily correspond with the “public” sense of innocence (Healy, 1995: 271; Pearson, 1996:296).

The legal construction of the drunkenness defence presented by the majority in *Daviault* is deeply contested by feminists, who have taken the position forwarded by the minority and claim that the act of drinking oneself into a state of oblivion is itself morally blameworthy. An individual may lack *mens rea* for the particular offence, but “the reason why a person lacks *mens rea* should matter in determining whether a person is morally at fault for his or her actions” (Shaffer, 1996:317). Therefore, action against the Supreme Court’s decision was warranted because Canadians “hold a strong moral view that people who commit violent acts against others while in a state of intoxication to the point of loss of control or awareness, should be held criminally responsible for their behaviour” (Department of Justice, 1995).

In rhetorical arguments, morality issues appeal to our inner sense of right and wrong. While the underlying logic used to determine Daviault’s guilt or innocence is simple enough to understand, it does not coincide with an emotional sense that individuals who are extremely

drunk and violent are morally innocent. As Healy (1995) has stated, “the public does not easily understand why the prospects of acquittal should rise with progressively severe intoxication” (p271). The point raised by activists is that there is more than one conception of moral blameworthiness, and that one may be legally “innocent” and still morally wrong. The dissenting justices in *Daviault* concurred with this view and held that “Those found guilty of committing sexual assault are rightfully submitted to a significant degree of moral opprobrium, and that opprobrium is not misplaced in the case of the intoxicated offender” (per Sopinka, *R. v. Daviault*, [1994] 3 S.C.R. 63 at 3).

This position provides a strong warrant statement for changing the law regarding intoxication after the *Daviault* decision. By implying that a similar moral position exists throughout society the appearance of consensus is reached. Social consensus gives weight to a course of action, and bolsters campaigns for change.

Rights and Freedoms

Since the enactment of the *Charter*, many feminist claims involve a discourse of rights and freedoms. In campaigns organized to combat gender discrimination, violence against women, and anti-choice proponents, these warrants are a crucial component of feminist thinking. Sexual assault, and intoxicated sexual assault, are framed by women activists as equality issues which require legal or political intervention.

The rhetoric of rights and freedoms for an accused was used by the Supreme Court to warrant their interpretation of the law in *R. v. Daviault*. In contrast, feminists emphasized the rights of women and children to participate fully and safely in our society and argued these rights justify superseding some of an accused’s rights (Sheehy, 1995a,b). It was proposed

that a society which promotes equality for all citizens regardless of gender, class, ethnicity, etc. cannot also implicitly sanction violence against any of its citizens by allowing legal decisions like *Daviault* to stand. Both s. 15 and 28 of the *Charter of Rights and Freedoms* were highlighted by women pursuing claims to equal protection under both the *Charter* and the law (Sheehy, 1995b).

The Vulnerability of Women and Children

Similar justification for action stressed an image of women and children as vulnerable and in need of protection from violence. This warrant, which is related to the warrant of “rights and freedoms” for these same groups, was adopted by feminists and Parliament to justify legislation which was contrary to *Daviault*. In particular, it was recognized that:

Violence has a particularly disadvantaging impact on the equal participation of women and children in society and on the rights of women and children to security of the person and to the equal protection and benefit of the law as guaranteed by sections 7, 15 and 28 of the Canadian Charter of Rights and Freedoms (Department of Justice Information Note, 1995:1).

The implications of the *Daviault* case were presented as dire in terms of women and children’s safety. To permit the use of the drunkenness defence was to condone men’s violence against these vulnerable groups. Protection is needed to combat and deter offenders who inflict violent intoxicated behaviour on the “weaker” individuals in society.

The addition of children to the rhetoric is noteworthy because it expands the impact of *Daviault* beyond women. Children are regarded as particularly “blameless” victims of abuse and violence (Best, 1990:34; 1987:110). Child victims of violence provided compelling images which warranted Parliamentary action. By including children, an overt and potentially

alienating feminist stance is thus softened and made more palatable to those who have negative views of feminism.

Victims' Rights

The campaign against the drunkenness defence also promoted victims' rights as paramount over those of offenders. As part of a recent trend in which North American claims-makers advocate for victims of all types of crimes, offenders are increasingly portrayed as relinquishing many of their rights by committing criminal offences. Victims of crime are portrayed as blameless individuals in need of intervention to avoid secondary victimization by a criminal justice system which appears to protect the rights of offenders to the exclusion of victims.

The campaign against drunk driving and the emergence of grass roots movements such as Mothers Against Drunk Drivers (MADD), and Students Against Drunk Drivers (SADD) also contributed to the general portrayal of victims' rights as paramount over those of "drunks" (Reinarman, 1988). Liability lies in the act of drinking and driving, not in the occurrence of actual harm. The laws against driving while under the influence are justified in terms of protection for the general public. Through their successes in changing laws and attitudes, anti-drunk driving crusaders may be viewed as influential to other claims-making activities which include a victim or "drunkenness" component.

Other examples exist of a general movement towards the protection of potential victims having had a diverse impact on the discourse of rights. Individuals who use drunkenness to excuse violence against women have been situated by victims' rights claims-makers in a general category of offenders who require increased public censor. This category

includes “dangerous offenders”, “sexual predators”, and child abusers, and is marked by public abhorrence at the perceived preferential treatment received from a legal system which is concerned primarily with the constructs of fundamental legal principles and due process. Feminists have capitalized on this public sense of outrage in promoting legislative action on the *Daviault* decision. The dangers of allowing individuals to claim drunkenness in response to criminal activity warrant intervention.

Daviault: Creating a Flood

Feminists provided further justification for opposing the *Daviault* ruling by citing a number of decisions, both pre- and post-*Daviault*, in which the defence of intoxication was successfully used in response to drunken violence. Such decisions have raised apprehension that a flood of cases in which severe intoxication is successfully used as a defence would result. Note that this point is made as both a ground statement and a warrant. The hypothesized flood of cases provided a ground for action. That a number of cases indeed resulted in acquittals based on drunkenness in the post-*Daviault* era provides justification for further action. Eight out of ten acquittals based on a defence of intoxication were cases which involved assaults against women (Sheehy, 1995a: 4, 6). When it is noted that a number of trials of general intent offences proceeded with a defence of intoxication before the Supreme Court’s decision in *Daviault*, additional impetus for action is warranted.

Rhetorical Styles

Warrants justify action by making references to values and interests (Best, 1987:115). Grounds statements may provide valid reasoning for claiming the existence of a “social problem”, however, without convincing and relevant warrants for action, demands for

intervention are unlikely to be met. Grounds and warrants are important components of rhetoric which vary with each individual movement's objectives and targeted audience.

Thus far, the claims of the women's movement against the *Daviault* decision have stressed a rhetoric of rectitude and rationalization. In consultations, a rhetoric of rectitude (Best, 1987:116), or a rhetoric of morality (Spector & Kitsuse, 1977:95), was used to persuade governmental representatives that the drunkenness defence was, indeed, a moral issue. Such claims are relatively straightforward and are directed at "converted" audiences - those who already share the values and morals of claims-making participants.

There also appears to be use of a rhetoric of rationality by feminist claims-makers interested in pursuing policy to combat *Daviault*. This shifts the goal of claims-making beyond changes of interpretation and advocates changes in policy or legislation. Interpretative change entailed the acceptance of feminist rhetoric to describe the problem and terms of the drunkenness defence. The drunkenness defence is not only about drunkenness; it has now been interpreted as a problem affecting women and children's ability to live free from sexual violence (Sheehy, 1995b:28-29). However, feminists were interested in more than altered problem definition. Political change was also sought. Rational appeals were directed at persuadable audiences who may not necessarily have held the same moral viewpoints. The use of numbers and related data are useful tools for claims-makers pursuing a course of social action which will appeal to rational audiences.

In combining styles of rhetoric, women's activists were successful in appealing to both the converted and persuadable members of Parliament. Additionally, feminist claims and rhetoric corresponded with other emerging claims-making campaigns for "victims' rights" and

“getting tough on crime”. The rhetoric used in all of these “social problem” campaigns overlap to some extent and contribute to the current political and social climate. Using two methods of rhetoric within this current context enabled feminists to push for both interpretive change and legislative action on the drunkenness defence. The next chapter on feminist conclusions examines these changes/actions using Toulmin’s model.

FEMINIST CONCLUSIONS IN RESPONSE TO *DAVIAULT*

The conclusions espoused by claims-makers usually entail what sort of action is required to solve or alleviate the social problem as constructed by interested parties. Those who have successfully defined the grounds of the claim and have provided the warrants for action are able to dictate probable resolutions as well. Many of the conclusions arrived at by feminists in reference to *Daviault* were incorporated by the Justice Department of Canada and presented to Parliament in the form of Bill C-72. Women's groups were largely successful in adjudicating the legislative response to the Supreme Court's decision in *Daviault* because their construction of the problem was accepted as valid and authoritative.

The measures advocated by feminists involved in government consultations in the post-*Daviault* period can be traced to their origins in both the grounds and warrants formulated by feminist groups. In a "unanimous proposal" (Sheehy, 1995a:18), women activists and lawyers proposed a number of changes to the law regarding intoxication defences. New legislation which noted the "social problem of alcohol abuse and violence against women" was advocated (Sheehy, 1995a:18). Women and children were identified as needing legislative protection which considered their disadvantaged position in a society which allows its citizens to argue severe intoxication in response to criminal charges. Legislation which would address these concerns was viewed as more than changing the law - the hope was that a law combatting the *Daviault* decision would have an impact on public attitudes of sexism and discrimination. As expressed by a member of LEAF, "Feminism applied to law insists on law's transformative potential, that is, on the role that law can play in

the creation of a society based on an ethic that responds to needs, honours difference, and rejects the abstractions of scientific discourse” (Razack, 1991:21).

Bill C-72

The urgency with which claims were made about the implications of *Daviault* is evident by the swift response by Parliament in drafting Bill C-72. Bill C-72, an Act to Amend The Criminal Code (Self-Induced Intoxication), received its first reading only five months after the Supreme Court’s decision in *Daviault* (1st Sess., 35th Parl., 1994-95). It received Royal Assent on July 13th, 1995, less than ten months after the *Daviault* ruling was released. The amendment sought to incorporate many of the recommendations made by women in response to *Daviault* and held people liable for violent acts committed while they were intoxicated.

Bill C-72, in essence, was codification of the common-law rules in place prior to *Daviault*. Individuals who by reason of self-induced intoxication committed violent offences without the applicable *mens rea* or *actus reus*, could be held accountable for general intent offences. A new fault element has been created, with criminal fault arising from a breach of conduct which “Canadians owe to each other in this context” (Department of Justice, News Release, 1995a). In deeming that there is a “standard of reasonable care and conduct” which is expected, those who commit violence while drunk are criminally negligent (Pearson, 1996:295), with criminal fault applying to a breach of this standard of care. The maximum sentence upon conviction is the same as that specified for the offence committed, although in all probability intoxication will remain a mitigating factor in sentencing.

The effects of feminist claims-making are evident in the language used by the

Department of Justice in news releases referring to the proposed new legislation. Nowhere is this more evident than in comments made by the then-Minister of Justice, Allan Rock, who states:

Members of Parliament, through this Bill, are expressing their grave concern regarding violence in our society, especially against women and children (.....). The criminal law must reflect our shared values and notions of accountability if it is to have our confidence. I believe we have reached this objective in this Bill (Department of Justice News Release, 1995a).

The preamble to Bill C-72 further supported the feminist construction of *Daviault* in its references to violence against women and children, the right to equal participation in society, and in its expression of concern that non-intervention in this area “may be used socially and legally to excuse violence” (Bill C-72, Preamble, 1994-95).

Bill C-72 was applauded by women claims-makers for using sex-specific language in its preamble to describe the problem as one of violence against women. Unlike the previous common law understanding in place pre-*Daviault*, the proposed amendments only apply to threats to bodily integrity and crimes of violence and do not extend to property offences. This reflects the claims-making of women which emphasized the seriousness and impact of *Daviault* as a case of sexual violence.

While the preamble of the Bill refers to women and children as needing protection from crimes of violence, the Bill also uses gender-neutral language in the body of the proposed amendments. Thus, both women and men will be held accountable for violence committed while in a state of self-induced intoxication under the new legislation. It is proposed that the use of gender-neutral terms will allow the Bill (and s. 33.1) to avoid a Charter challenge by men on the grounds of “under-inclusivity” (s. 15) (Sheehy, 1995b:38-

39).

Feminists pointed out that codifying the common-law in place before *Daviault* will neither require the creation of a new offence nor entail an overhaul of the Criminal Code of Canada (Sheehy, 1995a:19). Bill C-72 would require minimal changes for its enactment without requiring the implementation of new, complex rules as proposed in alternative measures (see Chapter 8). Police, prosecutors, and courts are familiar with the common-law from before *Daviault* and are not required to assume new responsibilities or powers of enforcement.

Feminist activists had further pointed out that while offenders such as Daviault had relied on sections 7 and 11(d) of the Charter to “protect” their rights, the fundamental principles they referred to should equally apply to the victims of violent offences. Bill C-72 was viewed as respecting the rights of an accused while simultaneously protecting the interests and rights of women and children. This concurred with a public conception that too often offenders’ rights appear to take prominence over those of law-abiding citizens in our criminal justice system. For feminists, tempering the rights of the accused with those of victims results in a greater sense of fairness (Sheehy, 1995b:33).

Critique of Bill C-72

Though feminists commended the Minister for the proposed legislation which “clearly recognizes that sexual assault is a sex equality issue, which requires that laws be formulated and interpreted in light of all of the provisions of the Canadian Charter of Rights and Freedoms, and in particular Sections 1, 7, 11(d), 15, and 28” (Sheehy, 1995b: 3-4), there were still some objections to Bill C-72. A clear expression of these is found in a brief

prepared for NAWL, which lists and summarizes six recommendations to improve the wording and effectiveness of the Bill (Sheehy, 1995b:1). Many of the recommendations reiterate the claims made in ground and warrant statements described in Chapters 5 and 6.

Bill C-72 was found to be inadequate in terms of the language of causation and attribution of blame to alcohol. The preamble refers to the “close association between violence and intoxication”, and states that “the potential effects of alcohol and certain drugs on human behaviour are well-known to Canadians” (Bill C-72, Preamble). NAWL would prefer that any references to causation (i.e. violence caused by alcohol) be removed and/or a statement included that notes there is conflicting scientific evidence regarding the effects of alcohol which is not resolvable at this point in time. This counters medical claims-making that purports to measure and describe any such effects of intoxication on human functioning.

The approach taken by Parliament in Bill C-72 was viewed as the best of a number of possible legislative interventions suggested to combat the issues raised by feminists in response to *Daviault*. While still subject to some minor objections, Bill C-72 was a satisfactory resolution to most of these issues. Women claims-makers had been successful in making their rhetoric heard, as MP’s from all parties approved the bill.

Changes to the Canadian Criminal Code

The amendment to the General Part of the Criminal Code took effect in mid-September of 1995. (Bindman, 1995). Section 33.1 of the Criminal Code now states that voluntary self-induced intoxication is not permitted as a defence to general intent offences. By over-ruling the Court’s decision to permit a defence of intoxication for general intent offences, the government’s response has been termed “in your face legislation” (Roach, cited

in Pearson, 1996:303). Bill C-72 (and s.33.1) is Parliament's method of saying "the Court was wrong".

The text of s. 33.1 of the Criminal Code is as follows:

Self-induced Intoxication:

33.1(1) When defence not available

33.1(1) It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2).

33.1(2) Criminal fault by reason of intoxication

(2) For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.

33.1(3) Application

(3) This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.

1995, c.32, s.1.

Note that this is essentially a codification of the common law rule regarding voluntary intoxication in place prior to *Daviault*, although slightly narrower in scope (property offences are excluded).

The urgency with which claims were made in response to *Daviault* and the quick response of Parliament were further echoed by Justice Minister Rock's decision to implement the law without first referring it to the Supreme Court of Canada for a ruling on its

constitutionality. In an interview in August, 1995, he stated that “We’ve decided the public interest is more in proclaiming it and having it become effective than waiting the time necessary to ask the court’s ruling.....We wanted to send a message that people have to be held responsible for their criminal conduct even if they intoxicate themselves voluntarily.....Proclaiming the bill will achieve that.” (Bindman, 1995:1). Women praised this decision, with Lisa Addario of NAWL stating, “It signals the government’s willingness to stand behind their own legislation. I think the wrong message would have been sent had the government decided to invoke a procedure that isn’t often used.” (Bindman, 1995:2).

Section 33.1 was commended for its clear language and statement of underlying policy, its limit in scope to violent offences, and its preservation of criminal sanctions for intoxicated and violent offenders (versus mental health treatment) (Sheehy, 1995b). The amendment was viewed as necessitating the least amount of disruption to the criminal justice system, as it did not require the creation of new charges or sentencing schemes.

Critique of Canadian Criminal Code s. 33.1

The enactment of s.33.1 was not entirely a success for feminist claims-makers. Since the new legislation remained essentially unchanged from the tabled Bill, the criticisms leveled at it by women were similar to those cited for Bill C-72. Other concerns centred on the limitations of the specific/general intent split in designating which offences would be covered under s.33.1 (Sheehy, 1995b:20-21). There are many examples of violence or interference (or threats) to the bodily integrity of another which are considered specific intent offences and are not subject to a bar on the use of a defence of intoxication. Evidence of self-induced intoxication may still form part of a defence to offences which involve sexual contact with

children. Sexual interference, invitation to sexual touching, and sexual exploitation (ss. 151, 152, and 153 *Canadian Criminal Code*) are all examples of offences which s.33.1 does not cover because they are categorized as crimes of specific intent. Although future reforms of the General Part of the Criminal Code may address this concern, the enactment and wording of s.33.1 may make such reforms more complex (Sheehy, 1995b:21).

Section 33.1 was also faulted (Sheehy, 1995b) for its failure to use sex-specific language throughout, and thus did not go far enough in identifying males as the primary perpetrators of violence, and women and children as their victims. Women activists and lawyers had hoped that a stronger statement to this effect would have been made in fulfilment of their proposals. However, the legislative decision to use gender-neutral language in the body of s.33.1 may decrease the likelihood of a successful Charter challenge (Sheehy, 1995b:29). Men have increasingly used the Charter as a tool to challenge a number of “equality” issues which were perceived as unfairly biased in favour of women (e.g. *R. v. Seaboyer*, [1991]; *R. v. Gayme* [1991]). The inclusion of gender-specific language in the preamble which identifies women and children as affected by violence is a compromise which is likely to make the amendment more resistant to such challenges.

Additional Feminist Conclusions and Proposals

A variety of other strategies in addition to legislative changes were proposed by feminist activists and lawyers in response to *Daviault* (Sheehy, 1995a:20-21). Education for court officers on intoxication and violence was advocated to increase awareness and sensitivity to biases regarding drunken offending. Standard guidelines for prosecutors are recommended to ensure that general intent cases involving intoxicated offenders are

vigorously pursued through the criminal justice system. “Expert” witnesses should be hired to counter testimony from defence “experts” who attest to the hypothetical effects of alcohol consumption on cognition and behaviour. No such contrary evidence was presented during *R. v. Daviault* to rebut the pharmacologist’s testimony.

A proactive approach was further encouraged in respect to the use of a combined intoxication and mistake of fact/psychological blow automatism defence (Sheehy, 1995a:19). There was apprehension among women participating in governmental consultations that the decision in *Daviault* could prompt similar challenges to the availability (or lack thereof) of intoxication and “mistake of fact” (or “psychological blow automatism”) as a defence to sexual assault charges (Sheehy, 1995a:12-14). Measures to limit the use of a combined defence are deemed to be necessary to ensure that new avenues are not opened for excusing violence against women.

Other proposed measures included a review of sentencing practices for cases in which either the offender or victim had been drinking. The mitigating effect of intoxication for offenders has been noted in judicial decisions and sentencing practices (Pasquali, 1995). Alcohol is blamed for anti-social behaviour and acts to minimize the criminal conduct. It is additionally noted that intoxicated victims are perceived as contributing to the offence, or as less credible complainants (Glover Reed, 1991; LaFree, 1989). Feminists argue that these perceptions, along with the sexist attitudes which sexual assault survivors confront, are to be discouraged throughout the justice process.

Summary

The passing of Bill C-72 must still be viewed as an important victory for feminist

activists because it marked a largely successful claims-making campaign by and for women. Many of the grounds and warrants expressed by women activists during the consultation process were addressed or incorporated into the preamble and body of the legislation. Women had their concerns taken seriously and their voices heard.

In my opinion, the inclusion of s. 33.1 in the General Part of the Criminal Code does not benefit women only. While they may be the primary pressure group on record throughout the *Daviault* aftermath, it is proposed that the new rules regarding intoxication appeal to a wider audience. There is a comment made in NAWL's brief on Bill C-72 (and, by extension, s. 33.1) which perhaps best summarizes the benefit of the amendment to the public at large:

By articulating a theory of criminal fault that accords with common sense and with prevailing understandings of what is "moral innocence", the Bill will be better able to restore the public's faith in the credibility of the criminal justice system, which has been severely eroded by rulings such as *Seaboyer* and *Daviault* (Sheehy, 1995b:33).

COUNTER-CLAIMS AND ALTERNATIVES

There were other options available in relation to the issues raised by *Daviault*, and the drunkenness defence generally. The success of feminists in gaining ownership of the problem's definition and its remedy obscures the fact that there are alternative perceptions of *Daviault*.

Alternatives to Bill C-72

Bill C-72 and the resulting Criminal Code amendment were not solely or inevitably the only course of action which could have been followed in response to *Daviault*. There are alternatives which have been offered, and in some cases, implemented, in other jurisdictions and which differ in aim and orientation from Canada's treatment of *Daviault*. From a social constructionist perspective, it would be important to examine other options that proceed from different constructions of the grounds, warrants, and conclusions. Some of these alternative positions will be examined and compared to the course taken by Canadian claims-makers.

R. v. O'Connor - Australia

In the absence of claims-making activities, the decision of the Court in *Daviault* could conceivably have been codified as part of the criminal law. This is the path chosen by some jurisdictions in Australia and New Zealand which have opted to utilize an open policy towards the use of drunkenness as a defence. In June of 1980, the specific/general intent distinction first made in *D.P.P. v. Beard* was discarded, with evidence of severe intoxication permitted in either offence type (per *R. v. O'Connor*). Evidence of intoxication so severe as to negate even the minimal intent (*mens rea*) or voluntariness of action required for general intent

offences can result in an outright acquittal on such charges (Goode, 1984; Orchard, 1993).

This mirrors the decision by the Supreme Court in *Daviault*.

The accused in *R. v. O'Connor* (1980), stabbed a police officer in the arm while in a state of severe intoxication arising from a combination of alcohol and hallucinogenic drugs. In *O'Connor*, the High Court of Australia rejected the common law specific/general intent differentiation developed from *Beard* and *Majewski*. Instead, the court ruled that “self-induced intoxication may be relied upon to support a denial of any requirement that conduct, circumstances or consequences be intended, known or foreseen, or that conduct be conscious and voluntary” (Orchard, 1993:426). The decision reached in *O'Connor* was based on much the same reasoning as used by the Supreme Court of Canada in deliberating *Daviault's* case. Fundamental principles which require the presence of both *mens rea* and *actus reus* at the time of the offence were significant factors to be considered by the criminal justice system in cases of extreme intoxication.

This ruling applies only to those jurisdictions in Australia and New Zealand which do not have a Criminal Code and rely on common law principles instead. Evidence from jurisdictions which allow the defence of intoxication to be used in trials of general intent has been compiled and provides data on the use and success of the defence. The Australian experience with the drunkenness defence exemplifies, to some extent, the effect codifying *Daviault* could have had upon Canadian criminal trials.

The rhetoric used by women in crusading against *Daviault* illustrated their fears about living in a society which permitted the decision to stand (see Chapter 4). Despite claims by feminists that the decision in *Daviault* would lead to a flood of men using the drunkenness

defence as a shield against conviction for sexual assault, the Australian experience does not support this. There has been relatively low use of the defence of intoxication in either specific or general intent offences. A review of 510 criminal trials from the District Court of New South Wales showed the defence of intoxication (in the year following *O'Connor*) had been raised in only 2.16% of the total cases. In only one case (0.2% of total) was there clear evidence of an acquittal based upon a successful defence of extreme intoxication (Smith, 1981:276-277). Any initial increase in the use of a defence of intoxication may “only be a passing fashion possibly due, in part, to the publicity given to O'Connor’s case but the conspicuous lack of success of those raising the issue should, one would think, tend to discourage others” (Smith, 1981:277).

The *O'Connor* case differed in many respects from that of *Daviault*, which may partially explain the differences in their outcomes for their respective countries. This is not to imply that *O'Connor* did not evoke condemnation from the Australian public (see Smith, 1981:270-271). However, O'Connor’s crimes did not include sexual assault, and the High Court’s decision was handed down in 1980. The social construction of the problem in Canada occurred in a different era (1990s) and context which saw the “problem” take on its feminist form.

Recently, however, there have been renewed calls in Australia for removing the defence of severe intoxication from use in general intent crimes (Australian Broadcasting Corporation, 1997; Minister for Justice, 1997). Re-examination of the drunkenness defence occurred after a rugby player (Noa Nadruku) was acquitted on charges of assaulting two women because he asserted he was too drunk to intend, or recall, the assaults. In a statement

similar to Canadian feminist claims regarding *Daviault*, the Australian Federal Minister for the Status of Women, Judi Moylan, claimed that “It is examples like this that undermine the confidence that Australian women and men have in the protection [of] the law” (Australian Broadcasting Corporation, 1997:1; Conroy, 1997:1). The rhetoric of women and victims’ rights may be gaining authority in Australia.

The Australian example arising from *O’Connor* offers a legalistic construction of the issues raised by evidence of intoxication, and is in keeping with a mandate to ensure an adherence to fundamental legal principles in protecting an accused’s rights. While this option is simple to understand and implement, it fails to address the protection issues claimed by women’s groups in response to *Daviault*. Public safety will still be in question if a defence of extreme intoxication is made available to all accused. According to the warrants used by feminists in claims-making activities against the drunkenness defence in Canada, even one acquittal due to intoxication is one too many for victims of sexual assault. The rhetoric examined in previous chapters provides a more complete list of grounds which oppose this option.

Offence of Criminal Intoxication

Another response to *Daviault* is supported by academics who prefer the creation of a lesser and included offence of “drunk and dangerous” (Shaffer, 1996:321), “criminal intoxication” (Orchard, 1993:428), “dangerous incapacitation” (Quigley, 1995: 287-288), or an alternative and separate offence such as “intoxicated criminal negligence causing harm” (Sheehy, 1995a:17) or “criminal intoxication” (Schabas, 1984:160). Such proposals are obliquely referred to by Cory J. in writing the majority opinion for *Daviault*. He specifically

stated that “it is always open to Parliament to fashion a remedy which would make it a crime to commit a prohibited act while drunk” (*R. v. Daviault*, [1994] 3 S.C.R.63:197) While it was unconscionable for the courts to uphold the specific/general intent split under the terms of the Charter, legislating a new offence was offered as a reasonable alternative.

The proposal for a lesser, included charge of drunk and dangerous would ensure that individuals acquitted by the rules of *Daviault* would still face conviction for acting dangerously while intoxicated. An individual who commits the *actus reus* of a violent offence may be acquitted of that offence but convicted under the lesser, included offence type (Shaffer, 1996:321; Orchard, 1993:428). The maximum penalty would be similar to, or slightly less than that of the offence whose *actus reus* was performed.

Advocates for this position claim that it will result in convictions which are no longer obtainable through common-law provisions. The sentences proposed are in keeping with the seriousness of the original offence and holds the individual culpable for their behaviour. In essence, the fault element of the offence is the state of drunkenness (similar to that of drinking and driving which holds that intoxication is no defence where it is an element of that offence; *R. v. Penno*, [1990]).

A new offence such as “dangerous” or “criminal intoxication” would criminalize the conduct of becoming incapacitated. A voluntarily intoxicated offender could still be acquitted for the violent offence but face conviction for a separate offence of “criminal intoxication” (Schabas, 1984:155). The individual has voluntarily intoxicated him or herself, leading to an inability to control his/her actions. The *mens rea* of this proposed offence would arise from deliberate intoxication, defined to mean “taking the intoxicant of his own

will, being aware that, in the quantity he knowingly took, it would or might cause him to become intoxicated” (Virgo, 1993:421). Liability (in this view) results from a test of recklessness which requires the accused to have some foreknowledge of the potential for intoxication to occur. The distinction between self-induced and involuntary intoxication would still stand, with the latter remaining a full defence to criminal charges.

While a new offence type has support as a worthy solution to the problem of the drunkenness defence, Goode (1984:121) views the creation of an alternative charge to be troublesome because its application may be “grossly overbroad”. It could apply to all offenders who have committed criminal acts while intoxicated, “lumping together persons who have killed and raped with others who have involuntarily hit someone or stolen some small item under a mistaken belief that it was their own” (Schabas, 1984: 160). Women’s groups have also voiced these concerns within feminist rhetoric, noting that a separate offence would obscure the actual harms committed against women - it hides the violence “socially and statistically” (Sheehy, 1995b:37; 1995a:17).

Create a Special Verdict for Extreme Intoxication

A third proposal offered in lieu of *Daviault* involved the creation of a new verdict for instances of “automatic” behaviour arising from severe intoxication. This verdict would entail an individual being detained under s. 16 of the Criminal Code if he/she successfully argued a defence of extreme intoxication. Proponents of a special verdict rely heavily on a medical construction of alcohol problems and view drunken behaviour as the manifestation of an underlying mental disorder.

Medical Claims-making

Medicine, with its rhetoric of science and objectivity, has supplied the dominant vision of alcohol problems since the early 1940s (Conrad & Schneider, 1980, 1992). Medical professionals have been extremely successful in obtaining ownership of alcohol issues and in mandating the solutions. The notion that there is a disease of “alcoholism” has largely been accepted, has resulted in the “medicalization” of many social problems, and has expanded “the influence of medical professionals into problems previously understood from moral or legal orientations, so that what was once viewed as drunkenness becomes the disease of alcoholism” (Best, 1989:76). Medicine claims to hold special knowledge that is essential to understanding certain offenders, including drunken and other substance abuse offenders. While not discounting the role that medicine rightfully can play in ameliorating some conditions, this role is one that medical professionals have sought out and designated for themselves through claims-making activities.

The emergence and gradual acceptance of the disease model of alcoholism during the last half century “doesn’t mean that society before had not noticed those we now think of as suffering from alcoholism. Certainly, those deeply in trouble with alcohol have been recognized for centuries, but their existence was accepted as a fact, without question or any particular thought about the matter” (Kinney & Leaton, 1991:55). However, with the emergence of the disease model of alcoholism, drinking to excess began to be viewed as pathological behaviour over which the individual had little or no control. The intoxicated offender is portrayed as an alcoholic: a sick, or diseased individual. By classifying deviant drinkers as alcoholics there is a shift in emphasis from punishment to treatment as an

intervention. The disease model of alcoholism effectively denies the relevance of personal responsibility and free will. Because alcoholics are “chemically dependent” and suffering from a chronic and debilitating illness, they are unable to control their drinking and any consequent behaviour that occurs is a manifestation of an addiction.

Alcoholism can result in delirium tremens, acute alcoholic hallucinosis, Korsakoff’s syndrome and alcoholic dementia (Leonard, 1978:53-58) any of which may manifest itself as a state of automatism. Cases of “insane automatism” arising from a “disease of mind” may be considered under of s. 16(2) of the Criminal Code and be found “not criminally responsible”. Accordingly, these individuals are confined indefinitely to a mental health institution.

Severe Intoxication Resulting in a State Akin to Automatism

The case of *R. v. Daviault* was initially constructed from the perspectives of law and medicine. Mr. Daviault was brought to trial for the sexual assault of a female acquaintance and was initially acquitted because the presiding judge allowed evidence of Daviault’s drunken state to be considered. Daviault’s claims of being too drunk to intend (or remember) the sexual assault were bolstered by unopposed evidence provided by a pharmacologist and subjected to a test of legal principles. Both positions viewed severe intoxication as leading to a state of “automatism” to be a plausible defence to criminal charges of sexual assault. Medical ownership and authority over problems associated with alcoholism were persuasive in defining *Daviault* as a case of “medico-legal automatism”. The courts deferred to medicine’s presumed expertise and accepted a medical construction of the details of Daviault’s condition at the time of the offence, and made its decision without the input of other claims-makers.

The pharmacologist's evidence in *Daviault* was that the accused's behaviour arose from severe intoxication resulting in a state akin to automatism. He hypothesized that the amount of alcohol that Daviault was alleged to have imbibed on the day in question (6-8 beers and 35-40 oz. of liquor) would result in a blood-alcohol ratio which could cause a 'blackout'. He further testified that an individual in such a state would not be aware of his/her actions and would be temporarily dissociated from reality and normal functioning.

Tiffany and Tiffany (1990) claim that there exists a phenomenon called "pathological intoxication", which is a rare but distinct condition akin to automatism at work in drunken offenders. First described by Jellinek in 1942, pathological intoxication differs from "normal" drunkenness in the small amounts of alcohol consumed and the "sudden onset of the automatism and the seriousness of the crimes that may be committed whilst in this mental state and which may include burglary, sex offences, arson or homicide"(Blair, 1977:170). The theory is that a small percentage of individuals suffer from a form of temporal lobe epilepsy which is aggravated by the ingestion of alcohol. Drinking alcohol results in a psychomotor epileptic attack which is accompanied by violent and explosive behaviour (Tiffany & Tiffany, 1990). Pathological intoxication may also occur in individuals who have suffered a concussion or have an underlying brain atrophy or injury (Blair, 1977:172).

The Impact of Medical Claims-making in *R. v. Daviault*

The court relied on the testimony of a single pharmacologist in coming to the conclusion that Daviault was in a state of automatism which could negate the mental element required for sexual assault. No evidence was called to dispute the pharmacologist's findings. The medical opinion offered on the effects of alcohol can be viewed as a rhetorical exercise

which profoundly affected the conclusions arrived at by the Supreme Court.

Contested Meanings

Even amongst scientists, there is some disagreement as to the effects of alcoholic blackouts on mental functioning. The idea that a state of automatism can arise from intoxication (pathological or otherwise) is a medical construction of a state of mind not readily subject to tests of proof. Kinney and Leaton (1995:152) state in a recent overview of alcohol issues that “there is no evidence to support the contention that a blackout alters judgment or behaviour at the time of its occurrence. The only deficiency appears to be in later recalling what occurred during the blackout.” They further contend that while there is still some question of the exact mechanism at work in alcoholic blackouts, memory is selectively impaired while “virtually all other spheres of affect - cognition, behaviour, and brain function - remain relatively intact” (1995:150). Other medical evidence supports the contention that “an intoxicated offender who is capable of performing a violent act against another must be capable of conscious, voluntary action” (Shaffer, 1996: 325). Therefore, the medical evidence presented at Daviault’s trial (and relied upon by the court) may have been erroneous.

A secondary issue which arises is the purported effect of alcohol on male sexual functioning. Common experience has connected severe intoxication with a lack of ability to perform. Some researchers have found evidence which supports this notion that there is “both a direct testicular and hypothalamic-pituitary effect of alcohol” (Morris, 1984:252). In short, alcohol affects the hormonal balance of chronic alcoholics to the extent of impairing ability to have and maintain an erection. The implications of this research for sexual assault

cases was not a factor in Daviault's trial.

A "Special Verdict"

A special verdict which enforces the provisions of section 16 of the Criminal Code and would conceivably lead to detention and medical intervention has also been suggested to replace the drunkenness defence. Such an option would allow individuals with alcohol (or other) addiction to receive treatment for their "disease" while additionally protecting the public by removing them from society for a period of time.

Fingarette and Fingarette Hasse (1979), have advocated the use of a "Disease of Mind" doctrine in court cases involving offenders who were severely intoxicated and acted criminally. "Under the disease of mind doctrine, the jury's findings that the defendant was guilty of the offense but suffered Disability of Mind would better express the public intuition" (67). The disease of mind proposal is similar to the Canadian insanity defence allowed under section 16(2) of the Code and is unlikely to compel a change in disposition.

From a feminist perspective, a special verdict is problematic because it places drunken offending within a medical context. Medical professionals could once again gain ownership of the issue and would be responsible for the solutions proposed, effectively removing women's groups from participation. Historically, medical intervention has been problematic to women because it tends to label behaviour as "sick" (which involves the imputation of non-responsibility), rather than criminal or immoral (which involves the imputation of responsibility). This labelling tends to gloss over the violence involved and the accused's responsibility for causing that violence. The treatment of individuals by the mental health system can thus undermine the seriousness of violence against women and its links to systemic

inequality (Sheehy, 1995a:16).

For feminists who are concerned by the structured inequality perpetuated by the criminal justice system, medicalization of the problem entails the substitution of other biases. The mental health system “also works in ways that are systematically biased in terms of sex, race, and class” and “offenders are likely to come disproportionately from disadvantaged groups” (Sheehy, 1995a:16).

Alternative Claims, Alternative Conclusions

The alternative constructions and interventions described in this chapter provide evidence that a feminist construction of the “drunkenness defence” was not the only construction which could be accepted and incorporated. A feminist construction of the issues relating to *Daviault* was one of a number of possible constructions that could have been applied. Through an effective and timely use of rhetoric, feminists were able to persuade the Canadian public and Parliament of the legitimacy of their claims and the appropriateness of their conclusions.

Alternative options remind us that “social problems” can usefully be considered as social constructions rather than as objective conditions that can be clearly determined. Depending upon one’s viewpoint, differing constructions of the problematic nature of an issue can and do result. Table 6 summarizes the grounds, warrants, and conclusions which constitute the legal, medical, and feminist claims forwarded in respect to the drunkenness defence.

TABLE 6

COMPARISON OF ELEMENTS OF RHETORIC RE: THE 'DRUNKENNESS DEFENCE'

Rhetoric	Legal	Medical	Feminist
Grounds:	<ul style="list-style-type: none"> -Cannot convict without evidence of both mens rea and actus reus -Intoxicated offender may lack mens rea - Intoxicated offender may lack voluntariness of action -Specific/general intent distinction illogical, inconsistent - no basis for permitting drunkenness defence for specific intent offences, but not general intent offences <p><i>(R. v. Daviault [1994] 3 S.C.R. 63)</i></p>	<ul style="list-style-type: none"> -Alcohol is a disinhibitor/can produce state akin to automatism -Alcoholism as a disease, uncontrollable -Pathological intoxication is a distinct physiological condition which produces uncontrolled rage state (Tiffany & Tiffany, 1990) 	<ul style="list-style-type: none"> -Drunkenness defence removes responsibility from offender -Too many women victimized by intoxicated men -Flood of men using drunkenness defence, if permitted -Perceived impact on defences of "Mistake of Fact" & "Psychological Blow Automatism" -Drunkenness defence may result in decreased reporting by victims of assault (Sheehy, 1995a,b)

Rhetoric	Legal	Medical	Feminist
Warrants:	<ul style="list-style-type: none"> -Fundamental Principles of Justice - Charter rights 7, 11(d) 	<ul style="list-style-type: none"> -Punishment not warranted for the sick/addicted -Illness requires medical treatment, specialized care of "experts" (Conrad & Schneider, 1992) 	<ul style="list-style-type: none"> -Priceless value of women and children -Equality rights for women under the Charter - Blamelessness of victims - Vulnerability of women and children -Morality issues
Conclusions:	<p>Acquittal based upon a lack of <i>mens rea/actus reus</i> (in cases of severe intoxication producing a state akin to a state of automatism)</p>	<p>Treatment</p> <ul style="list-style-type: none"> - Creation of a "Special Verdict" - Use of s. 16 of Canadian Criminal Code 	<p>Deterrence through incarceration</p> <p>Crime of self-induced intoxication</p> <p>Denunciation of violence against women and children</p>

DISCUSSION

In dissecting the evolution of claims-making activities of feminists in relation to the drunkenness defence, we are awakened to the complexity and multi-dimensional nature of social problem construction. Problems do not emerge spontaneously, they must be named and defined by those in a position to be heard. Daviault could have remained an obscure defendant in another sexual assault trial if not for the intervention of interested parties. The cycle of the drunkenness defence as a social problem has been subject to legal, medical and feminist analyses, with women as beneficiaries of this latest construction process.

A social constructionist perspective permits an analysis of claims content; by examining the images of issues which have been defined as problematic, we can understand the images which shape solutions and policy-making. However, it is overly simplistic to conclude that problem construction directly leads to policy formation. In this example, women's groups, working with a largely converted audience, were able to direct the dominating images in the drunkenness debate. By successfully claiming that the drunkenness defence was an issue which affected women and children's safety, feminists were in a position to guide the direction of new legislation.

A medical model could conceivably have been used in the present construction of the drunkenness defence. Medicine has exerted tremendous power and authority in the construction of a number of modern "social problems" (Conrad & Schneider, 1992). However, it can also be argued that while a medical model of deviant drinking may have a great deal of positive public support in the case of the "docile addict" or "public drunk", the

“feeling continues that punishment should not be done away with if the same addict, under the influence of drugs or alcohol, had committed a crime - stolen, robbed, raped, or killed” (Kittrie, 1971:214). Individuals who are violent while intoxicated do not fit the image of someone who is “morally innocent” and requiring special care. The case of *R. v. Daviault* would pit such beliefs against claims which adhered to the medical model of automatism.

An analysis of claim content can also illustrate where moral boundaries are being drawn or challenged (Loseke; 1989:202). The Court, through the *Daviault* decision, had claimed that offenders who lacked intent due to intoxication were “morally innocent”. By this definition, moral blame arises only when the intent to commit a criminal act is contemporaneous with its performance. While this may be a correct application of legal principles, it does not appear to be a definition which fits with the Canadian public’s conception of moral blameworthiness. Claims-making around *Daviault* may be viewed, in part, as “political” attempts to clearly establish and define what is morally acceptable. The Criminal Code amendment (s.33.1) is a legal expression of this image of morality.

Renaming an Old Issue

What in effect is overlooked is that the legislative response (Bill C-72) to *Daviault* was essentially codification of the same common-law rules which had existed previously. The legislation which made the specific/general intent distinction relevant again to the defence of intoxication was different only in its focus on violent offences. Though the issue has been transformed in terms of rhetoric and its subject of concern, the prescribed intervention differs little from its origins.

There is still no clarity in the reasoning behind the specific and general intent offence

classification scheme. Attention should be directed towards establishing a logical differentiation between offence types if it is decided that this type of designation is to remain relevant to the use of a defence of intoxication. Consistency in law, based on clear principles, adds legitimacy to our criminal justice system. The vagueness of the specific/general categorization of offences could result in problems in understanding and applying the law.

Feminist claims-making may have led to differences in the discourse of drunken violence, but in legislating the common-law position there is very little new offered in terms of substantial legal change. There are new objectives offered in justification of s. 33.1, with the protection of women and children from violence being paramount. However, there is little sense of anything new or innovative being introduced to prevent or control that violence. Recall that the common law itself was based on the *Beard* rules which arose from a case of sexual violence (against a female) committed by an intoxicated male. Sexual violence committed by intoxicated individuals is still occurring (as evidenced in both *Daviault* and *Edgar*), yet there has been a shift in the rhetoric used to portray the drunkenness defence as problematic- a shift toward a feminist perspective/construction.

The drunkenness defence underwent an interpretive change (Best, 1990: 115), and was characterized as a problem which particularly disadvantaged women and children. Prior to *Daviault*, the drunkenness defence appears to have been constructed so that intoxication and alcohol control were central to the rhetoric. Attention was centred on the intoxicated offender and on his or her moral failings. Feminists constructed the drunkenness defence in terms of gendered violence and as an equality issue. The current political context, which seems to favour a victim centred and/or a “get tough on crime” approach(es), and an

acceptance of feminist rhetoric (perhaps coinciding with other powerful interests/fashions), has led to changes in interpreting this problem. The power of feminist lawyers, legal scholars, etc., is evidenced by their ability to garner acceptance of their rhetoric in interpreting the issues surrounding the drunkenness defence.

Why a Feminist Construction was Accepted

An acceptance of a feminist interpretation of the drunkenness defence did not require radical alterations in policy or practice (Sheehy, 1995a, 1995b). While feminist rhetoric was adopted by Parliament to justify legislating the common law, major changes in implementation and practice were avoided. Theoretically, police and courts do not take on greater responsibilities with the enactment of s. 33.1 (Sheehy, 1995a:19). Consequently, costs associated with enforcement and processing should not increase. These factors may have contributed to a general acceptance of the feminist construction.

Though feminists have concentrated their claims-making on sexual violence, the legislation banning the use of the drunkenness defence for offenders applies to all victims of intoxicated violence in general intent offences. While predominantly designed to target male offenders who use intoxication to deny responsibility for sexual aggression, all victims of such violence are subject to protection under s. 33.1. This inclusion may also account for the unimpeded response to *Daviault*. Parallels can also be made to other victims' rights claims which may increase awareness and approval of the response to *Daviault*. The rights of crime victims have recently been promoted by a variety of claims-makers in constructing social problems. Victims of "dangerous offenders", "drunk drivers", and "sexual predators", have all been identified in the rhetoric of claims-making groups as requiring legal protection. Thus,

claims regarding drunken violence must be situated within a social context in which victims rights are increasingly prioritized.

Alcohol and intoxication continue to be sources of ambivalence in our society, and this ambivalence will undoubtedly continue to spur claims-making activities. While sexual assault issues dominated feminist rhetoric in response to *Daviault*, the drunkenness defence, by definition, is additionally about drunken violence versus other violence. The combination of problematic portrayals of both drunkenness and sexual violence make the rhetoric of *Daviault* especially compelling. The “problem” of drunken violence has been drawn in broad enough terms to appeal to more than women and children.

Potential Difficulties with s. 33.1

The amendment to the Criminal Code of Canada forbidding use of the drunkenness defence in general intent offences does not necessarily mean that the “problem” of drunken offending has been solved and will cease to be an issue. Drunken violence has been subject to claims-making throughout the years and it is unlikely that this latest skirmish will conclude its problematic construction.

It is inaccurate to think that successful claims-making leads to solutions which will eradicate targeted social problems. Loseke states (1989):

Neat and tidy relationships between problem definitions and solutions do hold for claims-makers who have the luxury *and* the political necessity of choosing their examples and of ignoring cases not fitting the problem as constructed. But then this constructed reality is used to inform practical actions toward a wider range of concrete cases. So, it is not surprising that policies advocated by claims-makers often work better in theory than they do in practice (p. 203).

Policies or interventions which cater to the images of prominent claims-makers may be too

narrow to effect real change. Changes in language alone cannot eradicate identified “problems”, as complex issues require more complex approaches and solutions. It is naive to think that drunken offending will cease with the enactment of s.33.1, and it remains to be seen whether the occurrence of drunken violence is affected by the change in rhetoric.

Deterrence

To justify the amendment to the criminal code in response to *Daviault*, deterrence through denouncement was emphasized. It was proposed that s. 33.1 would lower the incidence of drunken sexual assault through the imposition of legal penalties. Legal sanctions applied to certain drunken behaviours are perceived as deterring both the general population and specific offenders from committing violent offences while intoxicated.

Whether s. 33.1 will actually deter future acts of violence against women is unknown. The irony here is that alcohol is believed to lower one’s inhibitions and cloud reasoning. With the possible exception of those who drink for “Dutch Courage”, intoxicated individuals who are affected in this manner are unlikely to consider the consequences of their actions - making the principle of deterrence moot. Specific deterrence may not work for chronic alcoholics who have adopted the belief that they are powerless to control the effects of their disease.

Charter Issues

The new criminal code amendment is still open to *Charter* challenges based on the same sections applied in *Daviault’s* defence. The Supreme Court did not fully explore s.1 of the *Charter*, nor did it find it necessary to balance the rights of victims (women and children) with those of an accused. The Supreme Court has indicated that it is committed to upholding an accused’s rights in adherence to fundamental principles of law. There is no reason to

assume that the courts will consider the feminist interpretation of equality rights of women and children in any future challenges to s. 33.1 of the criminal code.

It remains to be seen whether s. 33.1 will withstand a *Charter* application in future cases. The difference today is that the drunkenness defence is excluded from use in general intent offences through legislation (as opposed to common law precedent). This legislation may carry sufficient weight to withstand *Charter* challenges based on s. 7 or s. 11(d).

However, a favourable ruling by the courts for a defendant pleading severe intoxication could renew the claims-making process.

Difficulties within a Liberal Democratic System of Law

There are difficulties feminists must overcome in order to effect true changes in social attitudes and practices. The claims-making activities of women are restricted in their feminist scope by our existing liberal democratic system of law (Gotell, 1990). A liberal and democratic system is presumed gender neutral and presupposes that all individuals are equal and have a right to equal treatment before the law. However, for feminists, the world itself is not gender neutral. A law which is gender neutral goes against the feminist view that sexual assault is a unique, gendered crime (Los, 1994:34).

However, it is within this system which feminists must work for change. For radical feminists this is problematic because no true changes in society will occur without restructuring our (patriarchal) criminal justice system and institutions to incorporate feminist views (Gotell, 1990). Until such a restructuring occurs, many feminists are working with the existing system to ensure it is as equitable as possible for women and men. Feminist claims-making may make this latter goal more accessible by including women in public, legal, and

medical discourse.

Conflicting Messages

Though the *Daviault* decision has been targeted for the underlying sexism which excuses drunken assaults against women, feminists have used the image of women and children as defenceless and vulnerable to these types of attacks. It is ironic that women appeal to other women by emphasizing their power to confront sexism and to make systematic changes towards the goal of equality, while their appeals to the general public and government play upon the image of women and children as helpless groups requiring protection from male violence.

Another concern arises in the images which have been used to define the problem of intoxicated offenders. By using extreme examples such as *Daviault* in claims-making imagery and for policy construction, it sets a kind of skewed standard by which other cases are measured. Cases which do not conform to the prevailing images of drunken assault may garner less response from relevant criminal justice authorities. While extreme cases are considered more newsworthy and make compelling examples for claims-makers, they tend towards one-dimensional depictions which do not address the true complexities of real life.

Selective Attention to Details

The Supreme Court's ruling was met with outrage because there was a perception that the decision gave blanket immunity to individuals who offended while intoxicated. It was assumed that the *Daviault* ruling applied to every instance in which violence occurs while the perpetrator is drunk. This perception is inaccurate. The decision applies only to those cases in which an individual is "so intoxicated as to be in a state akin to automatism" (*R. v.*

Daviault, 1994 3 S.C.C 63). The justices posited that such a state would occur very rarely, and their decision would not result in a drastic increase in the use of the drunkenness defence. The ruling does not apply to the majority of cases which involve drinking and violence. However, “most members of the non-legal public might, for example, fail to understand that *Daviault* only applies to extreme levels of drunkenness, believing instead that drunkenness generally offers an excuse for criminal conduct” (Shaffer, 1996:317).

It is a reflection of the claims-making process that the issue was constructed in a manner which fuelled public condemnation of the ruling. The provision of the court that the drunkenness defence could apply only to those cases involving intoxication to the point of automatism has been neatly excised from the discourse of claims-makers. The “problem” of the drunkenness defence was instead constructed as “open season” for violent drunks resulting in “rapists getting off on the basis that they have had a few drinks” (Stuart, 1995:289).

This reminds us that social problem construction is subject to interpretation by interested claims-makers. What has been highlighted and emphasized by feminists in response to *Daviault* ruling is not necessarily similar to the focus of the courts. Feminist rhetoric in favour of women and children’s equality rights may have merely supplanted the legal discourse on the drunkenness defence for the present.

Implications for Further Research

While social constructionism is not a theory of crime causation, in this case study it permitted an inspection of the process of claims-making by which a new element of criminal fault was defined and legislated. What is important is how law is created and applied as

opposed to a determination of the etiology of crime. A social constructionist perspective does not hypothesize about the relationships between variables, but it does provide insight into the changing face of justice and the political nature of crime designation.

Research on other facets of the drunkenness defence could be performed as well. Future research could be directed at measuring the effects of s. 33.1 upon criminal justice processing of sexual assault cases. Victim and offender perceptions of intoxicated sexual assault could be assessed to gain insight into the reported impact (if any) of the new legislation.

Research can also be focused on tracing the development of other “social problems” from a social constructionist perspective. This could entail an examination of historical or emerging issues. For example, the emergence of “date-rape” drugs, such as Rohypnol, are a troubling development for those committed to eradicating sexual assault and the misogynist attitudes which contribute to violence against women. Such drugs completely disable women from consenting to sexual relations, and are a new tool in perpetuating sexual assaults. It will be interesting to see if these new types of “rape” drugs will be addressed by current legislation or by new rounds of claims-making.

Personal Thoughts

I pause here to note that I found it extremely difficult to bracket my own constructions of sexual assault and drunkenness and to maintain a neutral examination of the claims. In identifying strongly with feminist principles in my personal life, it was hard to examine the feminist rhetoric used in response to *R. v. Daviault* without treating it as obvious and factual. However, social constructionism entails deconstructing “facts” as creations filtered through

ideology and perception. I believe part of the importance in performing a social constructionist analysis of issues lies in stimulating deeper awareness of the elements which shape our own perceptions and attitudes towards those issues.

Acknowledgment of my own biases was necessary in order to examine the claims of the various groups who were involved in constructing the drunkenness defence as socially problematic. I became more aware of how subjective elements are present throughout the process of research. The reader is reminded that one's interpretation of the social construction of the drunkenness defence may differ according to one's own values and perceptions. The rhetoric which appeals to me may not necessarily appeal to you.

Furthermore, the term "rhetoric" is not necessarily pejorative; rhetoric is the language of claims-makers. In taking a social constructionist perspective, I needed to consider that one group's view, for analytic purposes, is as valid as any other's. In social constructionism, rhetoric refers to the ways in which "social problems" are interpreted and defined in order to persuade others of the terms, and legitimacy, of the problem. My own internalization and incorporation of feminist principles is an example of the power of that rhetoric.

Feminists (and other claims-makers) have recognized this power. By taking control of the definition of "social problems", claims-makers can exert tremendous influence on the types of "solutions" offered. The drunkenness defence provided another opportunity for feminists to address the construction of sexual assault in Canadian society. Feminists hope that their construction of sexual assault and drunken violence will be accepted, not only by Parliament and potential male offenders, but by the victims of sexual assault as well.

New Constructions, New Possibilities

Women are increasingly learning that a male-centred construction of reality doesn't have to be the only construction; instead, women "find themselves demystifying that reality and challenging its validity" (Razack, 1991:137). The criminal justice system is slowly being altered by such forays into legal claims-making by feminists and women activists. It bodes favorably for those interested in the incorporation of feminist principles into the laws of Canada.

The realities that feminists name in court force a showdown between the discourse that denies women's context and the oppression of women by men and the world view of feminism that is built upon the integrity and necessary integration of women's experiences, however diverse and historically constructed those are (Razack, 1991:137).

Feminist claims-making related to sexual assault and the drunkenness defence are examples of this. In this latest construction of the drunkenness defence, feminists were successful in defining the "social problem" of drunken violence as unacceptable. Perhaps it is time for women's voices to be heeded in respect to other issues. It is through claims-making activities (such as that arising from *Daviault*) that feminists may be successful in making those voices heard.

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Appendix A

Criminal Code Offences - Sexual Assault

Sexual Assault/No defence

271. (1) Every one who commits a sexual assault is guilty of
- (a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or
 - (b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

Sexual Assault with a Weapon, Threats to a third party or causing bodily harm.

272. Every one who, in committing a sexual assault,
- (a) carries, uses or threatens to use a weapon or an imitation thereof,
 - (b) threatens to cause bodily harm to a person other than the complainant,
 - (c) causes bodily harm to the complainant, or
 - (d) is a party to the offence with any other person,
- is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

Aggravated Sexual Assault/Punishment

273. (1) Every one commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures or endangers the life of the complainant.

(2) Every one who commits an aggravated sexual assault is guilty of an indictable offence and liable to imprisonment for life.

Meaning of “Consent”/Where no consent obtained/ Subsection (2) not limiting.

273.1. (1) Subject to subsection (2) and subsection 265(3), “consent” means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

- (2) No consent is obtained, for the purposes of sections 271, 272 and 273, where
- (a) the agreement is expressed by the words or conduct of a person other than the complainant;
 - (b) the complainant is incapable of consenting to the activity;
 - (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
 - (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
 - (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

(3) Nothing in subsection (2) shall be construed as limiting the circumstance in which no consent is obtained; 1992.

Where Belief in Consent not a Defence

273.2. It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

(a) the accused's belief arose from the accused's

(i) self-induced intoxication, or

(ii) recklessness or wilful blindness; or

(b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting; 1992, c.38, s.1.