Advances Less Criminal than Hormonal: Rape and Consent in *R. v. Ewanchuk*

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POSTSCRIPT:

The Supreme Court of Canada sided with Chief Justice Fraser's view in a unanimous decision released February 25, 1999.

Feminist theorist Catharine MacKinnon shocked us in 1983 by declaring that hetero-sexual intercourse is rape. She said: "[p]erhaps the wrong of rape has proven so difficult to articulate because the unquestionable starting point has been that rape is definable as distinct from intercourse, when for women it is difficult to distinguish them under conditions of male dominance."[1] For most people, this pronouncement is outrageous — even offensive — in its challenge to "normal" sexual experience. After outrage, the next likely response would be to wonder how bleak MacKinnon's personal experience must have been to foster such a bitter critique. Sixteen years later, the world is surely different. After all, sexual assault laws now recognize the injustices historically perpetrated against women. Courts are taking women's accounts of rape more seriously. MacKinnon's theory, premised on the virtual sexual slavery of women, no longer seems relevant given these improvements in the status of women. At the very least, society's consciousness about the reality of rape has risen to an awareness that "no means no."

Unfortunately, the process of social enlightenment is not yet complete. In *R* v. *Ewanchuk,* the Alberta Court of Appeal upheld the trial acquittal of a man accused of sexual assault. The lone dissent of Chief Justice Fraser could not have been more scathing. She would have allowed the appeal and entered a conviction. Justices McClung and Foisey in their majority decision simply refused to contradict the trier of fact. *R.* v. *Ewanchuk*[2] is a problem for which the work of feminist legal theorists Catharine MacKinnon and Robin West has relevant application. *Ewanchuk* illustrates the continuing role of the law as a means by which male hierarchy controls women's sexuality, and the failure of the law to address sexual assault as experienced by women.

In the case, the 17 year old complainant met with the accused for a job interview which took place at Ewanchuk's van and attached trailer, parked in the lot of a large shopping mall in Edmonton. They eventually moved into the trailer, which served as Ewanchuk's shop for his custom wood-working business, because the complainant wanted to smoke a cigarette.

The complainant alleged that after entering the trailer, the accused, a larger and older

1 C.A. MacKinnon, "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence (1983)" in K. Bartlett & R. Kennedy, eds., *Feminist Legal Theory: Readings in Law and Gender* (Boulder: Westview Press, 1991) 181 at 187.

2 *R.v. Ewanchuk*, (1998), 212 Alberta Reports 81 (Court of Appeal).

man, locked the door behind them. Ewanchuk then gave the complainant $100 as a gift for herself and her baby. In conversation, she revealed that she was an "open, friendly, and affectionate person; and that she often liked to touch people."[3] They touched and hugged. While at trial Justice Moore characterized these events as mutual, Fraser in her dissent clearly found that the complainant simply responded "yes" to Ewanchuk when he asked whether she was open, friendly and affectionate, and that the hugging was also initiated and pursued by Ewanchuk alone.[4] Ewanchuk told her that he wanted a massage. She then massaged him and allowed him to return the massage. During the two and a half hours that they were in the trailer, he did three things that formed the basis of the complaint. He attempted to touch her breast, to which she clearly said "no." Ewanchuk also rubbed his pelvic area against hers, to which she clearly responded "no." He finally pulled down his shorts and placed his soft penis on her pelvic area, to which she again said "no." When she eventually told him that she wanted to leave, they left together.

The context in which the activity took place becomes clearer with examination of the transcript of the complainant's testimony.[5]

> Q. When he laid on top of you, what were you doing?
>
> A. I was just laying there. I was – I didn't say anything. I didn't move.
>
> .....
>
> Q. At the time he said to you, Don't be afraid, were you afraid?
>
> A. Very afraid. He said to me, I had you worried, didn't I? You were scared weren't you? And I said, Yes, I was very scared. And I had been holding myself from crying, and I knew that the expression on my face was fearful, and I did have tears in my eyes, and then he just said, it's okay. And he went to hug me, and he just laid on top of me again and continued what he was doing.

3 See above at 86.
4 See above at 93.
5 See above at 94.

A. This whole time I barely said anything except for the times that I said, No, stop.

At trial, Moore stated that the young woman was a credible witness and that he believed that she was afraid. After considering if there were any reasonable (objective) grounds for her to feel afraid, he noted that "she did not communicate that she was frozen to the spot, and that fear prevented her from getting up off the floor and walking out of the trailer."[6] Although the question of how one communicates when they are "frozen" with fear was not asked (let alone answered), Moore determined that the Crown had to prove lack of consent and the accused's knowledge of lack of consent beyond a reasonable doubt. He determined that the Crown failed to do this, and Ewanchuk was acquitted.

On appeal, McClung, in his majority decision, held firmly to the position that "[t]he facts revealed by the record establish that the accused had no proven intention of forcibly pursuing his way with the complainant during the two and one-half hours they were alone in his trailer."[7] McClung determined that the evidence was not clear as to whether the complainant's concerns were the result of Ewanchuk's actions or "influenced by what she had learned on television."[8] There was evidence that the complainant had formulated a plan of "display of bravura confidence"[9] inspired by something she had seen on television. The program had presumably suggested this strategy as a means of preventing the escalation of violence in a sexual assault. One of the concerns following the decision was why McClung minimized the value of this plan since it actually succeeded. The fact that she stated that she was afraid of Ewanchuk also seems to have been ignored. McClung held that the size and age disparity between the two parties was not a significant factor. This begs the question: are physical size and seniority not significant factors when the issue is one of consent in circumstances of power imbalance? McClung then went so far as to assert that:

> ...it must be pointed out that the complainant did not present herself to Ewanchuk in a bonnet and crinolines. She told Ewanchuk that she was the mother of a six-month old baby and that, along with her boyfriend, she shared an apartment with another couple. (*I must point out these aspects of the trial record, but with no intention of denigrating her or lessening the legal protection to which she is entitled)* [emphasis added].[10]

McClung characterizes the incidents of unwanted sexual touching variously as "clumsy passes,"[11] "romantic intentions,"[12] "overtures,"[13] a "performance...[which] would hardly raise Ewanchuk's stature in the pantheon of chivalric behavior"[14] and "advances . . . less criminal than hormonal."[15] He concluded that the criminal intent of the accused as a matter of fact was not established at trial, and that fact could not be made the subject of an appeal. How is it possible to believe that the three admitted incidents of sexual touching were wanted? How could they not therefore constitute an assault?

MacKinnon's work suggests explanations for this apparent break-down of the justice system. Her theory is based on the premise that society is created and organized by sexuality. Sexuality is as important to society in a feminist theory as the idea of work is in defining society in Marxist theory. She maintains that: "Sexuality is to feminism what work is to Marxism: that which is most one's own, yet most taken away."[16]

6 See above at 85.
7 See above at 87.
8 See above at 87.
9 See above.
10 See above.
11 See above.
12 See above at 88.
13 See above at 89.
14 See above.
15 See above at 91.
16 C.A. MacKinnon, "Feminism, Marxism, Method, and the State: An Agenda for Theory" (1982) 7:3 Signs: Journal of Women in Culture and Society 515.

The parallels between Marxism and feminism[17] are extensive and underline the centrality of sexuality to MacKinnon's theory of feminism. She argues that "[a]s the organized expropriation of the work of some for the benefit of others defines a class —workers — the organized expropriation of the sexuality of some for the use of others defines the sex, woman."[18] The control of women's sexuality through the "erotization of dominance and submission" is achieved through objectification of women, a process that methodically creates inequality and male directed social power.[19] The major task of feminism is to reveal the male perspective that is presented to the world as objective:

> This defines [feminism's] task not only because male dominance is perhaps the most pervasive and tenacious system of power in history, but because it is metaphysically nearly perfect. Its point of view is the standard for point-of-viewlessness, its particularity the meaning of universality.[20]

This strategy of claiming objectivity has become what MacKinnon calls "the law of the law."[21] She contends that the law "institutionalizes the objective stance as jurisprudence."[22] The blatant disregard for the experience of the complainant in *Ewanchuk* may thus be partly explained by the reluctance to overturn the "objective" findings of the trier-of-fact that are not objective at all, but an exercise in maintaining male control over women's sexuality by applying a male standard.

MacKinnon's approach has been the focus of criticism by a number of different theorists. Criticism by Robin West in particular recognizes the reaction of outrage by many women to MacKinnon's theories by maintaing that her theory simply does not coincide with women's reported experience. West agrees with MacKinnon up to the point that "[t]he cause of women's disempowerment, as well as its effect, is the expropriation of [women's] sexuality."[23] West disagrees, however, with three assumptions of radical feminism: firstly, that equal distribution of sexual power is what makes all women happy, secondly, that the focus of the feminist agenda ought to be the hierarchical source of women's suffering (rather than the quality of the suffering itself), and thirdly, that any evidence indicating that women desire anything other than empowerment can be dismissed as "false consciousness."[24] This assertion of the definitional nature of objective — "equality-of-sexual-power-as-subjective-good" — contradicts the importance of consciousness raising in the effort to insure that all women's voices are heard. The problem, according to West, is that:

> Women report — with increasing frequency and as often as not in consciousness-raising sessions — that equality *in sexuality* is not what we find pleasurable or desirable. Rather, experience of dominance and submission that go [sic] with the controlled, but fantastic, "expropriation" of [women's] sexuality *is* precisely desirable, exciting and pleasurable — in fantasy for many; in reality for some . . . . The conflict between felt pleasure and stated ideal has become a dilemma for radical feminism, but it has created an unprecedented debacle for our very young radical feminist theory, and one which threatens to be fatal.[25]

West identifies two strategies by which the problem is avoided: MacKinnon's reliance on false consciousness, and a liberal position that "fantasies are private and beyond political analysis; the role of the law should be to expand, not shrink, the options available to women, including the option, if freely chosen, of masochistic desire, fantasy, practise and pleasure."[26]

17 Note that MacKinnon means "radical" feminism when she says "feminism." Liberal and socialist feminism are simply liberalism and Marxism applied to women. "Radical feminism is feminism. Radical feminism — after this, feminism unmodified — is methodologically post-marxist." See note 1 at182. See also note 8: "This feminism seeks to define and pursue women's interest as the fate of all women bound together. It seeks to extract the truth of women's commonalities out of the lie that all women are the same."

18 See note 16 at 516.

19 See note 1 at 181.

20 See above at 182.

21 See above at 186.

22 See above.

23 R.West, "The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory" in A. Fineman & N.S. Thomadsen, eds., *At The Boundaries of Law: Feminism and Legal History* (New York: Routledge, 1991) 115 at 124.

24 See above at 125.

25 See above at 127.

26 See above.

West's approach to feminist theory, while different from MacKinnon's, also offers valuable insight into the *Ewanchuk* decision. West identifies an uncritical acceptance of the "separation thesis"[27] by legal theorists as central to patriarchal systems. "Official" liberal legalism and cultural feminism, as well as "unofficial" critical legalism and radical feminism, all accept — in differing and often oppositional ways — that we are "physically separate from all other human beings . . . and that distinction . . . is central to the meaning of the phrase 'human being.'"[28] The separation thesis, according to West, describes what it means to be male rather than female. She observes that: "Women are not essentially, necessarily, inevitably, invariably, always, and forever separate from other human beings: women distinctively, are quite 'connected' to another life when pregnant."[29] West also identifies the connective role of heterosexual penetration which may lead to pregnancy, the potential of pregnancy represented by menstruation, and post-pregnancy breast-feeding.[30] Women are thus not essentially separate from others as they experience material and existential connection in life. The separation theory as a basis for legal and feminist theory consequently excludes women in a real way. The accepted definition of "human" is either clearly wrong, or must be understood to mean that women are not "human."[31]

One notable extension of West's theory is her assertion that women experience pleasure and pain subjectively and qualitatively in a different way than men. Women, she contends, also experience more pain quantitatively because "women often find painful the same objective event or condition that men find pleasurable."[32] West points to oxymorons such as "date-rape" and "sexual harassment" to illustrate semantically the dichotomy in the experience of pleasure for men and pain for women. West also sees pornography, and the fact that men simply do not experience the pain and threat of sexual harassment, assault or domestic violence, as evidence of the difference in the experience of pain for women.[33]

West identifies four reasons for the neglect of women's experience of pain by feminist legal theorists: the inadequacy of language, the psychological transformation of experience through false consciousness, the politics of women in general who are unable or unwilling to recognize their different pain, and most significantly, the application of non-feminist normative models which ignore the significance of women's subjectively different experience of pain.[34] She maintains that "because of the normative models employed by modern legal feminists, the internal, phenomenological reality of women's hedonic lives — and its difference from men's — has become virtually irrelevant in feminist legal theory."[35] The consequence of this is that legal theory and the legal system are based on a model of human nature that does not represent women.

Critics of both MacKinnon and West, particularly the critical race theorists, claim that their work fails to account for the experience of all women. Critical race theorist Angela Harris rejects the "notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience."[36] She argues that in trying to describe the experience of all women, MacKinnon is in fact ignoring or merely reducing to footnotes the experiences of non-white women.[37] This marginalizing of the experience of women of colour is destructive to the interests of women in the same manner as is that of a patriarchal order presenting its white, privileged, and

27 R. West, "Jurisprudence and Gender [1988]" in K. Bartlett & R. Kennedy, eds., *Feminist Legal Theory: Readings in Law and Gender* (Boulder: Westview Press, 1991) 201 at 201.
28 See above.
29 See above at 202.
30 See above.
31 See above.
32 See note 23 at 115.
33 See above.
34 See above.
35 See above.
36 A. Harris, "Race and Essentialism in Feminist Legal Theory," (1990) 42 Stanford Law Review 581 at 585.
37 See above at 240.

heterosexual (male) view as an objective one. West also falls into the trap of gender essentialism by focussing on the connectedness of women and the assumption of women's "deep, unitary self...[that] is deeply and primarily gendered."[38] In order for feminism to speak for all women (as it must so as not to perpetuate the present and historical exclusion of some to the benefit of others), it is imperative that the experience of women who are simultaneously affected by racial, economic and social forces be considered.[39]

Although West has been criticized for assumptions of gender essentialism, there is some recognition in her theory that men are "connected" to some degree through heterosexual penetration, or with their mothers as babies in the womb. The qualification to her theory in the conclusion of "Jurisprudence and Gender" is confusing, but seems intended to suggest the possibility of "masculine jurisprudence" evolving into "humanist jurisprudence," and finally becoming "jurisprudence unmodified" echoing MacKinnon's "feminism unmodified."[40] The connection thesis and complementary hypothesis that women consent to sex for men's benefit as a protective mechanism against male sexual aggression assumes a fundamental and probably irreconcilable difference between men and women that suggests it is hopeless to seek common ground. The theory also proposes that women are controlled by social forces to which they react unknowingly in a way that constitutes their meaning as persons. This sounds very much like antique essentialist characterizations of women as "irrational." Although the theories of both West and MacKinnon no longer lead the critical discourse, they are still relevant in dealing with situations where sexuality and sexual ideologies demand examination. Less essentialist, more "point-of-view" oriented postmodern theories incorporate the experience of individuals for whom oppression is not rooted simply in sexuality, but derives from other sources such as class and race or a more complex mixture of any or all of these, including sexuality. Monolithic "grand" feminist theories that globalize women's experience can still reveal significant flaws in the male dominated legal system. The decision in *Ewanchuk*, to the extent that it is driven by inappropriate considerations of sexuality, is particularly vulnerable to critical analysis by grand theory.

In *Ewanchuk*, at trial, Justice Moore accepted that the complainant was genuinely afraid, but held that she failed to communicate her fear adequately to the accused, thus implying her consent. Fraser in her dissent correctly points out that the obsolete, judicially created theory of implied consent assumes that women are in a perpetual state of availability that must be expressly withdrawn in order to support an accusation of sexual assault. She states that: "Under this theory, because . . . the 'default' position was assumed to be consent, the focus was — wrongly — on whether the woman expressed her dissent rather than on whether she gave her assent."[41] The law of implied consent clearly does not have the protection of women's interests in mind: it favours men by taking control of women's sexuality out of the hands of women, as MacKinnon asserts:

> The organized expropriation of the sexuality of some for the use of others defines the sex, woman. Hetero sexuality is its structure, gender and family its congealed forms, sex roles its qualities generalized to social persona, reproduction a consequence, *and control its issue"* [emphasis added].[42]

38 See above at 249.
39 See also P. Williams "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights" (1987) 22 Harvard Civil Rights-Civil Liberties Law Review 401; M. Matsuda "When the First Quail Calls: Multiple Consciousness as Jurisprudential Method" (1989) 11 Women's Rights Law Reporter 7; M. Kline "Race, Racism, and Feminist Legal Theory" (1989) 12 Harvard Women's Law Journal 115; P. A. Monture-Okanee "The Roles and Responsibilities of Aboriginal Women: Reclaiming Justice" (1992) 56 Saskatchewan Law Review 237.
40 See note 27 at 233.
41 See note 2 at 100.
42 See note 16 at 516.

Rape is a very specific location at which sexuality and control of power intersect. MacKinnon perceives that "calling rape violence, not sex, thus evades, at the moment it most seems to confront, the issue of who controls women's sexuality, and the dominance/submission dynamic that has defined it."[43] The control of power in this legal context reinforces the socially constructed woman. She makes the connection that femaleness is defined socially as "attractiveness to men, which means sexual attractiveness, which means sexual availability on male terms."[44]

While sexuality and application of grand theory is the focus here, there are also nagging questions that might be addressed by critical race theory: would Ewanchuk have been treated the same by the courts if he was not white and heterosexual as well as male? Could a lesbian of colour expect the same result in a similar situation?

The young woman in *Ewanchuk* was touched in a sexual manner against her will, but the sexual element of the incident is virtually ignored. The focus is instead diverted and therefore fails to reveal that sexuality and its control are at issue. This strategy maintains the illusion of sexuality as exclusively private: something that does not exist in the public, social, or political sphere. MacKinnon observes that "the issue in rape has been whether the intercourse was provoked/mutually desired, or whether it was forced: was it sex or violence?"[45] The distinction is often unclear in the context of rape because the male point of view wants it that way, and she says that "the defining theme . . . is the male pursuit of control over women's sexuality."[46]

The state itself is "male" in a feminist sense according to MacKinnon in that it constitutes social order in the interests of men as a gender to ensure control over female sexuality at all levels, including the legal level.[47] The primary method through which the liberal legal system legitimizes itself is by presenting its own view as objectivity.[48] In *Ewanchuk,* this strategy is apparent with McClung's refusal to question findings of fact made by the trial judge. The focus on the apparent lack of violence in the incidents of sexual touching once more shifts attention away from their sexual nature. McClung refuses to examine the events in question because he claims, in essence, that to do so would contaminate the "objectivity" of Moore's determination by introducing the subjective view of the appellate court. MacKinnon could have been referring to *Ewanchuk* when she stated:

> [w]hen [the state] is most ruthlessly neutral, it will be most male; when it is most sex blind, it will be most blind to the sex of the standard being applied. When it most closely conforms to precedent, to 'facts,' to legislative intent, it will most closely enforce socially male norms and most thoroughly preclude questioning their content as having no point of view at all.[49]

Another consequence of male power in the law that is apparent in *Ewanchuk* is the defining of rape in male terms of acceptable levels of violence. At trial Moore asked: "are there any reasonable grounds for [the complainant] to fear that [the accused] would apply force?"[50] Why is Ewanchuk laying on top of the young woman and grinding his pelvic area on hers not considered an application of force? The law of rape as defined from a male point of view creates the problem of distinguishing rape from sex.[51] MacKinnon asserts that sex is something that men take from women who are socially defined by their sexuality as being "that which is for sex with men":

43 See note 1 at 189.
44 See note 16 at 531.
45 See above at 532.
46 See above.
47 See note 1 at 186.
48 See above.
49 See above at 195.
50 See note 2 at 86.
51 See note 1 at 189.

> Having defined rape in male sexual terms, the law's problem, which becomes the victim's problem, is distinguishing rape from sex in specific cases. The law does this by adjudicating the level of acceptable force starting just above the level set by what is seen as normal male sexual behavior, rather than at the victim's, or woman's point of violation.[52]

From the perspective of the law as male, the complainant's experience is just like normal sex. MacKinnon succinctly argues that "rape is a sex crime that is not a crime when it looks like sex."[53] Under the unequal protection of sexual assault laws, the dispute is reduced to a contest between the meaning as determined by the woman's experience, and the meaning of the man and the law as defined by men.[54] What the law does not recognize is that the injury of rape is in the meaning of the experience to the victim, yet the crime is defined in the meaning of the act to the attacker.[55] This contradiction is played out in *Ewanchuk* in the focus on the *mens rea* of the accused. McClung states that: "[t]here is no room to suggest that Ewanchuk knew, yet disregarded, her underlying state of mind as he furthered his romantic intent."[56] Yet, Ewanchuk did know that the complainant clearly said "no" three times, and that she was frightened to the verge of tears, and that he was responsible for her fear. Despite the court's recognition that the woman's experience was frightening, and that her personal integrity was violated, and that Ewanchuk knew that he was responsible for the emotional injury, he was acquitted. The major focus in the trial and the appeal is on the "fact" of his lack of intent. In this situation, MacKinnon explains that "because he did not perceive that she did not want him, she was not violated. She had sex. Sex itself cannot be an injury. Women consent to sex every day. Sex makes a woman a woman. Sex is what women are *for*."[57] Even though the facts clearly demonstrate that Ewanchuk was aware, or at least should have been aware of the complainant's distress, Moore's characterization of the events as something other than sexual assault remains unchallenged.

The need for the law to extract a single objective truth from the separate subjective accounts of the two parties often creates the situation of a woman who is raped by a man, who thought they were just having sex. There are obviously cases where intent to rape exists, but "many (maybe even most) rapes involve honest men and violated women."[58] When "no" means "yes," or "maybe" to a man, how reasonable is it to allow his perspective to determine whether a woman experiences injury?

The most offensive portion of McClung's decision is his disclaimer in paragraph four, which actually draws more attention to his focus on inappropriate details. He notes the trial judge's prior determination of the importance of the fact of what the complainant was wearing: "both [complainant] and [accused] were wearing shorts and T-shirts. *Underneath her shorts and T-shirt [the complainant] wore a brassiere and panties*"[emphasis added].[59] How is this relevant? Whatever the reason, McClung feels compelled to note that: "it must be pointed out that the complainant did not present herself to Ewanchuk or enter his trailer in a bonnet and crinolines."[60] Exactly why this "must be pointed out" speaks more to the judge's state of mind than anyone else's. McClung clearly disapproves of her attire, and creates a sense of his belief that she consequently deserved what happened. This characterization of her sexuality is consistent with MacKinnon's analysis of how "the law of rape

52 See above.
53 See above.
54 See above at 190.
55 See above.
56 See note 2 at 88.
57 See note 1 at 190.
58 See above at 192.
59 See note 2 at 85.
60 See above at 87.

divides the world of women into spheres of consent according to how much say [they] are legally presumed to have over sexual access to [themselves] by various categories of men."[61] McClung, speaking for the patriarchal state, disapproves of the complainant's life style. She fails the test of the feminine stereotype. She is treated as "unrapable" since she has nothing to lose: she is a young single mother, she is unwed and living with another young couple, dresses inappropriately in the presence of men, and accepts gifts of money from strangers. MacKinnon observes that: "bad girls, like wives, are consenting, whores, unrapable."[62]

While MacKinnon's feminist theory illustrates the role of the patriarchal legal system in *Ewanchuk*, West's work provides an excellent basis for analyzing the behavior of the complainant and explaining the Court's failure to recognize her suffering. A major reason that the Court held that the complainant had implied her consent was that she remained in the trailer for two and a half hours without attempting to leave. During this time she admitted that she was an "open, friendly, and affectionate person; and that she often liked to touch people."[63] She demonstrated her willingness to touch people by giving Ewanchuk a body massage. The fact that she remained after the unwanted sexual touching began is reasonably explained by her fear, which the Court accepts. What the Court avoids discussing in any way, yet somehow seems to hold against her in the final tallying of evidence is that she made such "provocative" statements and actually touched Ewanchuk at all. The "separation thesis" underlying liberal legal theory would account for this as an attempt to support the needs of a pleasure maximizing and autonomous self.[64] This analysis is flawed according to West because women are not necessarily and essentially autonomous beings. What may be true for men (and West does not accept that men are autonomous either)[65] — is, however, not true for women.

West's "connection thesis" provides an alternative explanation for the young woman's behavior based on the premise that women are fundamentally different than men in that they do not consent for their own pleasure, but to increase the pleasure of others.[66] She argues that "women define themselves as 'giving selves' so as to obviate the threat, the danger, the pain, and the fear of being self-regarding selves from whom their sexuality is taken."[67] This is not to say that she did actually consent to Ewanchuk's advances. The facts, despite the decision, are clearly otherwise.

The complainant consciously adopting a strategy of silent non-consent after behaving much like a model of the "giving self" illustrates West's theory. West describes this reaction as: "[S]he embraces a self-definition and a motive for acting which is the direct antithesis of the internal motivational life presupposed by liberalism."[68] Thus, she believes that she is a "giving" kind of person and admits this to Ewanchuk. Whether the admission was coerced or not, she adopts this behaviour in her life, at first consciously and then without awareness, in order to protect herself and control the pervasive threat of male sexual aggression. This "reconstituting" of herself also manifests at a more conscious level in her defensive strategy of silent non-consent. She feared that if she struggled "he would force [her] to do something worse or he would force himself on [her] more."[69] Thus, the complainant in *Ewanchuk* creates herself as a giving person to increase the pleasure of others as a protective

61 See note 1 at 188.
62 See above.
63 See note 2 at 86.
64 See note 23 at 122.
65 "[M]aterial biology does not *mandate* existential value: men *can* connect to other human life." See note 27 at 232.
66 See note 23 at 121.
67 See above at 122.
68 See above at 123.
69 See note 2 at 94.

strategy against the threat of male sexual violence. The accused and the legal system — both driven by an ideal that is essentially masculine nature presented as human nature — fail to appreciate her need for protection and inevitably misinterpret her actions.

The Court, in applying a male model of the autonomous liberal person, assumes the young woman's need for autonomy is only threatened by violent "criminal" harm. West contends that the official value of the rule of law is autonomy, not intimacy.[70] Women's values are not reflected in a law that does not recognize the importance of intimacy. According to West, the law of men determines that "[s]exual invasion through rape is understood to be a harm . . . only when it is accompanied by violence that appears in a form men can understand (meaning a plausible threat of annihilation)."[71] The young woman in *Ewanchuk* consequently does not meet the requirements for protection of the law since she was not harmed in a way that men and a patriarchal legal system recognize.

In closing, the work of MacKinnon and West, although somewhat outdated, still provides insight into patriarchal jurisprudence and the working of the legal system. Critical race theory can further provide the means for a more complex analysis of underlying issues of race, class and gender identity beyond a single focus on gender. The decision in *Ewanchuk* illustrates MacKinnon's assertion that control of women's sexuality by men is significant and needs to be recognized before any kind of equality can be achieved. West adds the proposal that women, unlike men in general, are not motivated to maximize their own pleasure, but have reconstituted themselves to increase the pleasure of others as a protective strategy in the face of potentially violent male sexual aggression. While this transformation is self-interested in the liberal sense, once the strategy becomes self-definitional, the woman is motivated by reasons antithetical to liberal self-interest, namely, the pleasure of others. The liberal male perspective of the trial and appellate courts lacks even internal consistency with sexual assault legislation, which is itself simply more liberal male legalism, according to West and MacKinnon. Perhaps the fact that a court acquitted Ewanchuk despite the facts and despite the law is the most sobering comment on the true meaning of patriarchy. In that context, controversial declarations challenging how "enlightened" we really are about sexual assault and sexual politics in patriarchal society are more difficult to dismiss.

70 See note 27 at 230.
71 See above.