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Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies

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Commentary



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Abstract

Were the last 30 years of feminist law reform activity around criminal justice misdirected? Or, if not misdirected, have the efforts been appropriated and manipulated by the New Right? This commentary reflects on this history, and on the failures of the retributive justice project generally, and argues for a reexamination of both. The discussion focuses on the tactics of the New Right and on the retributive goals of some victims' rights organizations as a means of highlighting the unintended consequences of key feminist initiatives around violence against women. Finally, the commentary identifies alternatives to retribution and a need for careful attention to the wider implications of all activism.

Keywords

Feminist jurisprudence; Criminal law; Law reform

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COMMENTARY

RETRIBUTION REVISITED: A RECONSIDERATION OF FEMINIST CRIMINAL LAW REFORM STRATEGIES[©]

DIANNE L. MARTIN*

Were the last 30 years of feminist law reform activity around criminal justice misdirected? Or, if not misdirected, have the efforts been appropriated and manipulated by the New Right? This commentary reflects on this history, and on the failures of the retributive justice project generally, and argues for a re-examination of both. The discussion focuses on the tactics of the New Right and on the retributive goals of some victims' rights organizations as a means of highlighting the unintended consequences of key feminist initiatives around violence against women. Finally, the commentary identifies alternatives to retribution and a need for careful attention to the wider implications of all activism.

Est-ce que les trente dernières années d'activités de la réforme du droit féministe, en rapport avec la justice criminelle, furent mal orientées? Ou, si tel ne fut point le cas, est-ce que les efforts furent appropriés et manipulés par le nouveau droit? Ce commentaire est fondé sur l'histoire de cette réforme, ainsi que sur les échecs du projet de justice distributive en général; il soutient que les deux cas nécessitent un nouvel examen. La discussion traite des tactiques du Nouveau droit ainsi que des buts vengeurs de quelques organisations des droits des victimes comme moyen de souligner les conséquences involontaires des initiatives féministes majeures dans la lutte contre la violence envers les femmes. Finalement, le commentaire identifie les alternatives à la vengeance et le besoin d'une attention prudente quant à l'implication plus large de tout activisme.

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PREFACE

This paper revisits some feminist criminal law reform initiatives, considers the influence of retributive justice values on those initiatives, and relates both to the increasing significance of the new victims' rights movement. Although the content is critical of many reforms to the criminal law attributed to or claimed by the women's movement, the perspective is feminist,¹ and written in a spirit of feminist analysis and self-examination. It is a broad and somewhat speculative critique, of necessity simplified, and reliant on the benefit of hindsight. It is an approach that will provide many opportunities for debate and discussion. Those moved to agree will find many occasions for refining, developing, proving, or contesting both the propositions and the support offered for them. That is one of its goals. The discussion is not intended to be definitive in either a doctrinal or sociological sense, but rather the argument, comments, and concerns are offered as a commentary that, to me, raise some important questions for feminism. My hope is that the process of asking the questions will spur a search for new directions for feminist engagement with the criminal law, and a new interest in testing and re-examining some of our current approaches.

My experiences as an activist and as a lawyer practising criminal law as a defence counsel and, on occasion, as an advocate for assaulted women ground this writing. That experience forged my distaste for a

¹ Feminism is a varied and evolving philosophy and those who consider themselves to be "feminist" are a diverse group with a broad range of perspectives. For the purposes of this comment, feminists and feminism are spoken of as sharing at least two things: first, a recognition of the systemic and pervasive nature of sex and gender discrimination in our society; and second, a commitment to transforming society to remove that oppression. In that sense feminism involves a political, activist dimension. The "feminism" that I claim identifies systemic and pervasive discrimination and oppression on the basis of class and race as well.

system² that processes and reprocesses the same young men—and a few women—in and out of prisons, while failing to deliver on the promises made in its name to keep us safe from the harm they do. Of course, that has always been one of the purposes of the criminal law—to control the “dangerous classes” and to perpetuate and replicate existing power relations, but as a feminist, I am increasingly concerned that feminist ideas and credibility are being appropriated to strengthen an apparatus that I believe should be dismantled, not supported. At the same time, the paper is informed by the belief that law reformers and activists must accept responsibility for the unintended as well as the intended consequences of our efforts.

Finally, it is obviously a scholar’s duty to help to identify and examine those consequences. Much of my own research and writing has explored the tensions around the implications of the use of the criminal law for and against women. This paper is a logical extension from that foundation.

I. INTRODUCTION

[I]f feminists are to continue their traditional engagement with law, our strategies and demands should continually be re-examined in the light of experience of law and legal practices.³

Feminist activism⁴ around criminal justice issues has been relatively successful in terms of contemporary social change movements, although a closer examination reveals that many of the “successes” are limited to reforms in the legal sphere. Repeal of the most egregious abuses of traditional rape laws, for example, which made rape within marriage a legal impossibility and which required evidence to

² “System” is something of a misnomer, although it is commonly used in this context. I use “system” in this paper to refer to the investigative, enforcement, prosecution and punitive aspects of criminal law, procedure, and related institutions.

³ C. Smart & J. Brophy, “Locating Law: A Discussion of the Place of Law in Feminist Politics,” in J. Brophy & C. Smart, eds., *Women-in-Law: Explorations in Law, Family and Sexuality* (London: Routledge and Kegan Paul, 1985) 1 at 18. Although Brophy and Smart urged caution and close analysis for feminist engagement with law reform, it is interesting that in 1985 the debate was more concerned with turning to the law at all.

⁴ Again, there is no agreed upon list of feminist goals, but this paper assumes equality, assurance of bodily integrity, and freedom from harms inflicted because of gender as basic to a feminist agenda.

corroborate a woman's complaint,⁵ was brought about through feminist efforts of thirty years ago. The goal was essentially one of formal equality—to remove those aspects of rape law that treated women differently than men. These early initiatives were sharply critical of the legal system generally, and the criminal justice system in particular, but the nature of that criticism evolved with experience. Gradually, some feminists began to engage in reform strategies designed to use law for more pro-active purposes—to use it to shape and change attitudes and behaviour within the legal system itself and in society as a whole; in other words, to address institutional and systemic inequality.

For example, subsequent *Criminal Code* amendments to rape laws directly address the prevalence of stereotyped reasoning about women victims of sexual assault, the “rape myths” that founded the belief that prosecutions should not succeed on the testimony of the victim alone. The next generation of reforms addressed the problem not by removing special rules for the prosecution, which had already been achieved, but by establishing special rules for their defence, as strict limits were imposed on use of the complainant's prior sexual history. The form of the limits was also pro-active, as the provisions speak directly to judges about how they should approach their duties in a sexual assault trial. The new provisions explicitly prohibit using prior history evidence to draw an inference that because of that history the complainant is more likely to have consented to the activity in question, for example, in an effort to forestall one of the more pernicious of the rape myths.

This is a fundamental change that strikes a new balance in criminal prosecutions—the trial is no longer simply a contest between the state and the accused. Now if a relevant use of prior history is claimed, the *Code* requires the judge to balance the right of the accused to make a full answer and defence to the charge, against the importance of ensuring that sexual assaults are reported and the need to “remove from the fact-finding process any discriminatory belief or bias” when considering whether to permit any questioning of the complainant about the history. Both the content and the tone of these provisions reflect the influence of feminist involvement with their drafting, and further, reveal the didactic purpose at their core.⁶

⁵ *Criminal Code*, R.S.C. 1985, ss. 274 (corroboration not needed), 275 (recent complaint rule abrogated) [hereinafter *Code*].

⁶ *Ibid.* s. 276. For a discussion of the feminist lobbying effort that led to this very particular language and focus see R. Currie, “Update: Bill C-49—The New Rape Law” (March 1992) 12(2) *Jurifemme* (newsletter of the National Association of Women and the Law) 1 at 4.

There have been other changes and more are hoped for—a history that amounts to an apparent success story in social transformation. This success is more apparent than real, however, for feminists concerned with transforming the unequal power relations that lie at the heart of the oppression of women. Much of this apparently pro-active legal activism and legal drafting was, in essence, still reactive. Sexual violence continued to harm and to control women, the justice system continued to refuse to respond to and include women's experience, and the system's key players—police officers, lawyers and judges—continued to display persistent misogyny and aggressive sexism. Simple legal reforms were clearly not enough, and the attention of feminists—particularly, but not only those trained in law, became committed to more sophisticated efforts; a development which has had two problematic effects, intended or not. First, feminism became associated with punitive criminalization strategies; and second, reliance on the criminal law as a tool of social engineering became increasingly popular.

Whatever the motive of criminal law reformers, the reality is that the claims that have been heard or acted upon by legislators and courts, in contrast with those that have been advanced, are those that strengthen the criminal justice system as it is. That system does little to serve goals of equality and security. It dispenses punishment and preserves state authority so that existing power relations are legitimated and replicated, by means of a process which was developed to achieve just that effect—the contest style, adversarial model of guilt determination. That system is anything but transformative and given the individualistic retribution ethic at its core, it probably cannot be. This is the dark irony at the core of feminist criminal law reform efforts.

Feminist activism was engaged originally with criminal law reform because so much about the criminal justice system was at worst abusive and at best inattentive to human needs, particularly the needs of women and victims of violence. Little about the criminal justice system merited feminist support and much required amendment, particularly the essentially nineteenth-century patriarchal values that (still) dominate criminal law doctrine. However, the reform agenda moved beyond challenging the criminal justice system as a whole, and acquired some new allies, with their own agendas. One of the most troubling, and most ubiquitous of the new initiatives is the attempt to use the criminal trial, and the punishment that it justifies, as an occasion of healing and closure

for crime victims.⁷ This goal is also being relied upon as the justification for a range of procedural amendments that essentially make convictions easier to obtain by reducing the trauma of testifying and participating in the trial process.⁸ In effect, much of the present reform agenda seeks to do more (good) with the criminal sanction, not less (harm).

Changes like these raise difficult questions of theory and practice, and necessitate a pause to reflect on where we have come from and where that past might be leading. On my analysis, and from my experience, most of the myriad reforms to criminal law and procedure that have been implemented in the last quarter-century have lengthened

⁷ The source of the now ubiquitous proposition that there is a therapeutic component for victims in successfully confronting their abuser in court is not entirely clear. A relatively early reference is in a review in *Psychology Today* of a Chilean study written by psychiatrists assisting torture victims. Published under pseudonyms, the psychiatrists report that in 39 cases, their clients experienced valuable catharsis in testifying against their torturers which "channeled the patients' anger into a socially constructive action." Strikingly, the testimony included the information the torturers had tried, but failed, to extract, allowing confession to become "denunciation instead of ... betrayal": A. J. Cienfuegos & C. Monelli, "The Testimony of Political Repression as a Therapeutic Instrument" (1983) 53 *Am. J. Orthopsychiatry* 43 at 50, reviewed in V. Adams, "Crosstalk" (June 1983) *Psychology Today* 84. More recently, the value of "confrontation," was given substantial currency in E. Bass & L. Davis, *The Courage to Heal* (New York: Harper and Row, 1988). The idea has evolved to the extent that it is frequently discussed in journals devoted to issues such as child sexual abuse. Two fairly recent series in the *Journal of Child Sexual Abuse*, demonstrate the issues well, including the position that adversarial proceedings cannot ever be transformed sufficiently to make "healing an enforceable order." Only two of the six pieces, both by lawyers (of four written by lawyers), are critical of the proposition that civil litigation can be therapeutic; all were more cautious about the criminal process, because of the burden of proof, the right of silence, and the lack of control over the process. The description of how traumatic the process is from the plaintiff/survivor's perspective is very vivid in the first piece by Penelope. See Penelope, "Suing My Perpetrator: A Survivor's Story" (1992) 1:2 *J. Child Sexual Abuse* 121; L.E. Walker, "When an Incest Survivor Sues Her Father: A Commentary" (1992) 1:2 *J. Child Sexual Abuse* 127; C.P. Ewing, "Suing Your Perpetrator: Response to a Survivor's Story" (1992) 1:2 *J. Child Sexual Abuse* 131; S. Clute, "Adult Survivor Litigation as an Integral Part of the Therapeutic Process" (1993) 2:1 *J. Child Sexual Abuse* 121; M. Mallia, "Adult Survivor Litigation as an Integral Part of the Therapeutic Process: A Reply" (1993) 2:1 *J. Child Sexual Abuse* 129; and J.E. Thompson, "Healing is an Unenforceable Order" (1993) 2:1 *J. Child Sexual Abuse* 131.

⁸ For example, see *R. v. Levogiannis*, [1993] 4 S.C.R. 475 (concluding that the use of a screen to shield a young complainant/witness from seeing the accused is constitutionally permissible in view of the importance of facilitating the giving of evidence by young victims of sexual abuse); and *R. v. L.(D.O.)*, [1993] 4 S.C.R. 419 (concluding that provisions permitting the use of the videotaped evidence of young witnesses in sexual abuse cases is constitutional because it makes the participation in the criminal justice system less stressful and traumatic for young complainants). The validity of the psychological theory behind these provisions is not undisputed, however, and the proposition that they serve the "search for truth" is a troubling one in the criminal law context given the presumption of the truthfulness of the complaint that is implicit. See R. Underwager & H. Wakefield, "Poor Psychology Produces Poor Law" (1992) 16:2 *L. & Hum. Behav.* 233.

the reach and sharpened the tools at the system's disposal.⁹ Whether seemingly transformative—the emergence of a rights-bearing and influential “victim”—or merely pragmatically necessary, the recent innovations in criminal law do not represent a triumph for feminism, despite appearances. For the most part, this history has been one of appropriation and distortion of feminist goals and techniques for purposes quite other than feminist ones, and of the women's movement making a virtue out of the necessity of working within an oppressive system.

The most striking of the reforms—the dramatic new focus on the rights and needs of crime victims—illustrates the dilemma. The claim is for more rights for all crime victims, undifferentiated; the reality of what is heard and repeated by politicians and mainstream media is quite different. Only certain victims are attractive to those who benefit from the politics of criminal law reform,¹⁰ and only they are recognized as “real” or “innocent” victims, such as “innocent” children or “good” mothers. These “real” victims are raised as icons—the poster people of crime control campaigns—while offenders (male, poor, marginal) are ever more effectively demonized. It goes without saying that “law and order” campaigners make no similar efforts against corporate or white collar malefactors.¹¹ The rights of these “real” victims are zealously advanced, within trials and elsewhere, and are placed in competition with—balanced against—those of “criminals,” who by definition have too many rights. Indeed, “criminals” must be subjected to increasingly

⁹ Others have observed the same trend, which was becoming obvious more than 10 years ago when incarceration rates began to rise. For example, see M. Mandel, “Democracy, Class and Canadian Sentencing Law” (1984) 21-22 *Crime & Soc. Just.* 163. See also L. Snider, “The Potential of the Criminal Justice System to Promote Feminist Concerns” (1990) 10 *Stud. L., Pol. & Soc'y* 143 [hereinafter “Potential”]; and L. Snider, “Feminism, Punishment and the Potential for Empowerment” (1994) 9(1) *Can. J.L. & Soc'y* 75 [hereinafter “Empowerment”] and accompanying text at notes 29, 30, *infra*.

¹⁰ This paper argues that the criminal law is a political football that is frequently tossed to serve right-wing interests. See discussion in Part IV, below.

¹¹ The point has been made so well and so often, it is almost a part of the “common sense” of critical legal analysis. Some of the best analyses have been feminist. For example, see F. Pearce & L. Snider, eds., *Corporate Crime: Contemporary Debates* (Toronto: University of Toronto Press, 1995); D. Cook, “Fiddling Tax and Benefits: Inculcating the Poor, Exculpating the Rich,” in P. Carlen & D. Cook, eds., *Paying for Crime* (Milton Keynes, U.K.: Open University Press, 1989) 109; and D. R. Gordon, *The Justice Juggernaut: Fighting Street Crime, Controlling Citizens* (New Brunswick, N.J.: Rutgers University Press, 1991). See also H.J. Glasbeek, “Why Corporate Deviance is Not Treated as a Crime—The Need to Make ‘Profits’ a Dirty Word” (1984) 22 *Osgoode Hall L.J.* 393; J.H. Reiman, *The Rich Get Richer and the Poor Get Prison: Ideology, Class and Criminal Justice*, 3d ed. (New York: Macmillan, 1990); and J. Braithwaite, *Inequality, Crime and Public Policy* (London: Routledge and Kegan Paul, 1979).

harsh punishments in order to demonstrate that the system has taken the wrong done to their victim, if a "real" victim, seriously. The unworthy, such as "bad" mothers, "bad" girls, and unruly youth, are never real victims, on the other hand. Instead, they are subjected to ever more invasive controls and surveillance, such as the "fink" lines, fraud squads, and fingerprinting requirements being widely used against welfare recipients,¹² or the increasingly harsh measures taken against young offenders.¹³ In the meantime, social and economic policies that would reduce crime generally and provide women with the means to improve their own lives, such as adequate day care or affordable housing, or youth the reason to live theirs within accepted norms, such as meaningful work, are scaled back or eliminated entirely.

It was not inevitable that a punitive, retribution-driven agenda came to dominate criminal law reform and the most publicly accessible face of the women's movement, but it would have been very difficult to resist or prevent. Despite a rich literature that critiques punitive criminal justice initiatives,¹⁴ at the level of popular discourse, where

¹² Ontario, for example, is borrowing widely from American jurisdictions in its "get tough on welfare" strategy. The strategy is widely publicized: C. Mallan, "New get-tough bill on welfare unveiled today" *The Toronto Star* (12 June 1997) A13; and N. Pron, "Welfare finger analysis irks critics" *The Toronto Star* (20 March 1997) A4. There is more than ideology involved; women on welfare who are victims of the New Right strategy and who are prosecuted for "welfare fraud" are very likely to be imprisoned, even when it is clear that the crime was motivated by need: see D.L. Martin, "Passing the Buck: Prosecution of Welfare Fraud: Preservation of Stereotypes" (1992) 12 *Windsor Y.B. Access Just.* 52.

¹³ Enforcement efforts against youth, particularly minority youth are producing significant increases in the numbers of young people in custody: see Canadian Centre for Justice Statistics, *A Graphical Overview of Crime and the Administration of Criminal Justice in Canada* (Ottawa: Statistics Canada, May 1996) at fig. 6.12, 146-47 [hereinafter *A Graphical Overview of Crime*]. Studies reported in D.P. Cole, *et al.*, *Commissioners Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995) [hereinafter *Systemic Racism*] at 82, 83, 101, 185, demonstrate that intensive policing supported by vigorous prosecution and efforts to imprison convicted offenders, particularly for even minor drug offences, have produced sharp disparities in the criminalization of Black youth when compared with white youth. Media stories illustrate the attitude that youth are dangerous and only punitive responses are adequate: see T. Claridge, "Teenager gets nine years in stabbing—Case tried in adult court after judge finds provisions of Young Offenders Act insufficient" *The [Toronto] Globe and Mail* (19 March 1997) A10.

¹⁴ To touch on a few, see for example, D. Currie, "Battered Women and the State: From the Failure of Theory to a Theory of Failure" (1990) 1(2) *J. Hum. Just.* 77; K. Daly, "Men's Violence, Victim Advocacy, and Feminist Redress" (1994) 28 *L. & Soc'y Rev.* 777; D.L. Martin, "Casualties of the Criminal Justice System: Women and Justice Under the War on Drugs" (1993) 6 *C.J.W.L.* 305; L. Snider, "Empowerment, *supra* note 9"; and L. Snider, "Toward Safer Societies: Punishment, Masculinities and Violence Against Women" (1998) 38 *Brit. J. Criminology* 1. Others have effectively critiqued reliance, or over-reliance on legal strategies generally: see G. Brodsky & S. Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa:

hegemonic values are shaped, the retribution claim has either dominated or at least has been closely associated with feminist claims in the popular mind. That association—between taking crimes against women “seriously” and treating offenders punitively—is a troubling consequence of feminist activism around the victimization of women: an activism that paralleled and propelled the emergence on the public/political terrain of “victim” as a new status of personhood and citizenship. That relationship, between feminist discourse, victimhood and repressive criminal law reforms, is the reason for this paper, which will argue that feminist criminal law reform efforts have been subsumed within, changed and at times (mis)used by an updated version of the retribution ethic to justify a series of problematic changes to criminal law and to criminal procedure.

The current political climate is not particularly receptive to ideas for transformative changes in criminal justice, such as rejection of retribution as a governing principle, but it is a system that is in need of transformation nonetheless. The women’s movement has the legitimacy and the political potency to bring one about. That can only happen, however, if the retributive ethic is reexamined and rejected, reactionary and simplistic political strategies exposed, and new coalitions and strategies devised. This paper offers a modest beginning to that project.

II. PROMISES A RETRIBUTIVE JUSTICE SYSTEM MAKES BUT CANNOT KEEP

Stripped of moralizing, law exists not only to restrain retribution but to mete it out—and to mete it out on behalf of individuals whose rights have been violated as well as in the interests of society as a whole. ... A society that is unable to convince individuals of its ability to exact atonement for injury is a society that runs a constant risk of having its members revert to the wilder forms of justice.¹⁵

Susan Jacoby is describing what many in our society believe is the dominant purpose of the criminal law; that it is essentially about retribution—as revenge or atonement—offered in the name of security, in exchange for legitimacy. The promise is that the criminal justice system will protect citizens and communities, and that it will do so by

Canadian Advisory Council on the Status of Women, 1989); B. Cossman, “Dancing in the Dark’: A Review of Gwen Brodsky and Shelagh Day’s *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?*” (1990) 10 Windsor Y.B. Access Just. 223; J. Fudge, “What Do We Mean by Law and Social Transformation?” (1990) 5 Can. J.L. & Soc’y 47 [hereinafter “What Do We Mean?”]; and J. Fudge, “Evaluating Rights Litigation as a Form of Transformative Feminist Politics” (1992) 7(1) Can. J.L. & Soc’y 153 [hereinafter “Evaluating Rights Litigation”].

¹⁵ S. Jacoby, *Wild Justice: The Evolution of Revenge* (New York: Harper, 1983) at 10.

apprehending offenders and meting out “appropriate” measures of punishment. A corollary to this promise is that when the criminal justice system fails to keep citizens safe (which is inevitable) and fails to satisfy the need for recognition of the wrong done (increasingly common), the system can be, and indeed must be, reformed so that it will mete out more retribution, and thereby provide more security and an enhanced sense that justice was done. This justification for preserving retribution as a basic principle of criminal law was recently acknowledged by the Supreme Court of Canada, which described retribution as determining the moral blameworthiness of an offender, by representing “nothing less than the hallowed principle that criminal punishment, in addition to advancing utilitarian considerations related to deterrence and rehabilitation, should also be imposed to sanction the moral culpability of the offender.”¹⁶

These promises of morality, protection, and recognition of harm are false promises. The criminal justice apparatus is about order and its reproduction, and about maintaining the existing hierarchy of status and privilege, and only incidentally about crime or morality or the safety of individual citizens and their communities. It operates most effectively at the level of the symbolic, by naming individual offenders as morally defective, and using them as scapegoats, and only incidentally as a useful tool for community security,¹⁷ although at times it is the only and the most appropriate social institution available. It is also about legitimacy and, as Jacoby points out, about meting out retribution to enough offenders in large enough quantities to preserve that legitimacy. When this expensive and extensive system fails to keep individuals and communities safe, they are angry and vocal about their disappointment. In response to that disappointment, and to its political significance, those who manage the system turn from the complex and difficult (the security of individuals and their communities) to the symbolic and possible (the need for recognition of the wrong done). In spurious satisfaction of that legitimate need to give significance to a harm, the state offers ever greater levels of and forms of punishment to selected victims. That more punitive retribution is frequently what is demanded

¹⁶ *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500 at 556.

¹⁷ This purpose of the criminal law in a liberal democracy, and the processes which fulfill it, have been persuasively chronicled by a number of critical criminologists: see, for example, R.V. Ericson, *Reproducing Order: A Study of Police Patrol Work* (Toronto: University of Toronto Press, 1982); D.J. McBarnet, *Conviction: Law, the State and the Construction of Justice* (London: Macmillan, 1981); D. Hay, “Property, Authority and Criminal Law” in D. Hay *et al.*, *Albion’s Fatal Tree: Crime and Society in Eighteenth-Century England* (London: Penguin, 1975) 17; and S. Hall *et al.*, *Policing the Crisis: Mugging, the State and Law and Order* (London: Macmillan, 1978) at 228.

begs the question. If revenge and punishment equated with safety and individual security, the most vengeful societies would also be the safest and fairest.

In fact, the state has a very limited scope within which to fashion responses to public concerns about safety and security, particularly when it does so from within existing criminal justice system paradigms. It can essentially only draw on the power to define, to name certain conduct as criminal legislatively, and/or on the power to enforce these definitions through policing, prosecuting, and punishing. The traditional rationale guiding both is that a shared morality will be strengthened by and expressed in the criminal law and that a sense of security and community will be sustained by the fair and equal enforcement of the laws thus enacted. As atonement for injury is exacted by the state on behalf of its aggrieved citizen, the social contract is strengthened. As others witness the price the wrongdoer must pay, they learn what not to do. These are limited and limiting responses to the social problems of a liberal industrial state and it is not surprising that they are not delivering on the promises made.

The idea that punishment will keep us safe has been around for a long time, of course, and in the tenets of criminal law, it is known as the doctrine of deterrence. In essence, it is premised on the assumption that behaviour is directed by a rather primitive cost-benefit formula. As rational beings, so the theory goes, citizens know what the law forbids and may choose to obey or not. If the "cost" of lawbreaking is high enough, this rational citizen will choose not to break the laws. If, on the other hand, the "price" is too low, in that the consequences are too lenient, the law is not a deterrent and the rational citizen will flout it.¹⁸

¹⁸ The inherent absurdity of such a primitive understanding of behaviour is well understood in the literature, and even in some courts, but "deterrence" continues to be a potent concept in popular understanding and in many courtrooms. See generally: J. Braithwaite, *Crime, Shame, and Reintegration* (Cambridge: Cambridge University Press, 1989) [hereinafter *Reintegration*]; K.C. Kennedy, "A Critical Appraisal of Criminal Deterrence Theory" (Fall 1983) 88 Dickson L. Rev. 1 at 7; and T. Mathiesen, *Prison on Trial: A Critical Assessment* (London: Sage, 1990). Mr. Justice Josiah Wood of the British Columbia Court of Appeal has gone farther than most Canadian judges in questioning the wisdom of the theory of deterrence. In *R. v. Sweeney* (1992), 71 C.C.C. (3d) 82 (B.C.C.A.), a case of criminally negligent driving causing death, (involving alcohol), he challenged the prevailing view that long jail sentences would serve as a deterrent in these cases and thus save lives, and declined to impose a penitentiary term on a deeply remorseful first offender; he was sentenced to the maximum reformatory term instead. His position did not ever entirely prevail, however: see *R. v. Anderson* (1992), 74 C.C.C. (3d) 523 (B.C.C.A.) (five years); and *R. v. Lake* (23 May 1996), (Ont. C.A.) [unreported] (six years). However, efforts to increase a nine-year sentence because of the incidence of spousal homicide in Canada were recently rejected by the Ontario Court of Appeal in *R. v. Edwards* (1996), 28 O.R. (3d) 54. However, see the criticism of that decision by Isabel Grant and Debra Parkes, who argue that the sentences meted out in cases of wife abuse are

This basic thesis has been refined, particularly by feminist theorists who work within the criminal justice paradigm, to account for the “cost-benefit” choices made by victims of crime as well. This refinement posits that if the law is too forbidding and unwelcoming to victims of crime they will not engage it. If they do not set the law in motion against the men who use violence against them, those men will continue to assault and abuse, because either the “cost” is worth paying (because it is low), or the risk is worth taking given the unlikelihood of prosecution. Similarly, if the consequences for this lawbreaking are too lenient, women will not find it “worth it” to engage the law and men will, again, not be deterred.¹⁹

There is, of course, some truth in this model for some people in some circumstances. But of the many difficulties with this theory, the most serious is that deterrence works very poorly for the crimes that are of greatest concern to popular conceptions of the criminal law, such as acts of personal violence. That is so for many reasons. A theory of rational choice is largely irrelevant to acts motivated by non-rational impulses and/or produced out of circumstances more compelling than concern over the possibility of detection and prosecution. Even when there is some element of choice—perhaps concerning the predisposing circumstance, for example—fear of punishment is often not an effective deterrent because the chances of any individual getting caught are very small.²⁰ Apprehension rates overall are low in cases of unknown assailants quite apart from the issues around reporting these offences when assailant and victim are known to each other. State punishment also lacks legitimacy as a deterrent because of unfair enforcement

too lenient, in “Sentencing for Domestic Attempted Murders: ‘Special Interest Pleading?’” (1997) 9 C.J.W.L. 196.

¹⁹ This idea has had currency for some time. In 1984, Toronto lawyer N. Jane Pepino headed an inquiry into a shocking crime committed by a man on parole. In justifying her recommendations about increasing limits on parole-granting in high profile cases, she said: “It is recognized that public confidence in the justice system is a factor in deterring violent crime, in that increased confidence in the system should result in increased reporting of offences and more effective prosecution. Beliefs that sentences are inadequate, that convictions are rarely registered, that the court process is an ordeal or that early prison release programmes are being abused by recidivists, lead to an erosion of public confidence in the current justice system that indirectly influences its effectiveness”: *Final Report (of the) Task Force on Public Violence Against Women and Children* (Toronto: The Task Force, 1984) at 98. See also discussion in Part III, below.

²⁰ For example, of the 30,273 reported robberies in 1994-95 (therefore lower than the total robberies in that year) only 9,545 were cleared by charge or otherwise, yielding a clearance rate of only 31.5 per cent: *Canadian Crime Statistics, 1995* (Ottawa: Canadian Centre for Justice Statistics, 1995).

mechanisms, which are over-inclusive of youths and minorities.²¹ Ironically, this very unfairness deters some victims from bringing complaints as much as the unfriendliness of the system itself.²²

A related, and psychologically and sociologically more sophisticated assumption, is that of the criminal law as teacher, which is premised on the supposition that citizens look to the law to learn what matters in their society. This assumption recognizes that not all harmful consequences and behaviours are caused by actors making deliberate choices, but supports the argument that denunciation through punishment will “teach” the society as a whole that the behaviour is wrong and thus that it will stop. Again, this assumption rests on some doubtful premises; first, that values and norms come from the law and second, that the law’s message is respected. In view of unfair and even abusive enforcement, and actors committing desperate, angry, “irrational” acts that they may very well understand to be wrong in other contexts, these lessons are only very imperfectly learned. The lesson actually taught may simply be that might—in this case the might of the justice system—makes right, or he who has the biggest stick wins. These are not lessons that transform violent and desperate behaviours.²³

Ultimately, however, the fatal flaw is that the system, as it is, is a technique for scapegoating. Most “criminals” are never punished, and of those that are punished, some are punished unfairly—whether wrongly convicted, or convicted of more than they should be held to account for, or faced with excessive, inappropriate punishment. In the result, those most likely to commit the crimes the system pays most attention to (marginalized young males committing individual acts of trespass or breaches of drug laws) neither fear nor respect the sanctions. Moreover, a scapegoating system is by definition arbitrary and more symbolic than real. The result is that for many potential offenders, the risk is worth taking if it is adverted to at all. In this sense, then, of guaranteeing security, the criminal justice system is remarkably ineffective. In the more important realm of setting the standards and reinforcing the values essential to a civil society, the arbitrariness and the

²¹ The extent to which enforcement is racist and stereotype-driven is increasingly well documented. For an extensive analysis of the phenomenon, see *Systemic Racism*, *supra* note 13.

²² That is certainly one of the reasons that some women are so reluctant to access the criminal justice system when they face violence within their own homes and communities. For a review of the literature, and a case study, see D.L. Martin & J.E. Mosher, “Unkept Promises: Experiences of Immigrant Women With the Neo-Criminalization of Wife Abuse” (1995) 8 C.J.W.L. 3.

²³ For an historical inquiry that also suggests that this might well be so, see D. Hay, “Time, Inequality, and Law’s Violence,” in A. Sarat & T.R. Kearns, eds., *Law’s Violence* (Ann Arbor: University of Michigan Press, 1992) 141.

cruelty also work to diminish effectiveness. Techniques that divide, label, stigmatize, and brutalize, which are the tools of a punishment-based justice system, and which do so arbitrarily and unfairly, do not teach us to be gentle, considerate, and responsible.

These failures, both actual and perceived, have not gone unnoticed and are generating considerable political and public attention. Unfortunately, much of that attention is being expressed as the need for more, not less punishment; more, not less retribution, and more ways to win prosecutions. This campaign for “more” has acquired considerable potency through the lobbying and media campaigns of the growing victims’ rights movement and its corporate and political allies, a movement that often allies itself with the goals and rhetoric of the women’s movement. Even a cursory examination of this rhetoric and these alliances suggests that it amounts to an appropriation of feminist discourse, a discourse which has itself been changing to support the greater reach of the criminal sanction and increased use of punishment. The next two sections briefly consider this story; first, by tracing some changes in feminist discourse and strategy; and second, by locating some key feminist claims within the “law and order” agenda.

III. THE WOMEN’S MOVEMENT AND FAILURES OF THE CRIMINAL JUSTICE SYSTEM

[C]urrent sentencing practice for rape may be criticised on two main grounds. First, the level of punishment often dispensed is inadequate to meet the above objectives, or to persuade victims that it is worthwhile for them to seek justice through the courts...²⁴

The contemporary history of the women’s movement tells the story of the abuse and battery of women and children in many contexts. In terms of widespread engagement with the legal system, that story begins with a crime that victimizes women almost exclusively—rape. Rape was one of the first crimes to be subjected to feminist scrutiny and reform, at least scrutiny that had an effect on laws and practices. The strategies and perspectives that were developed around it and the reform of its prosecution and punishment have been influential on all the reform initiatives that followed, specifically wife abuse, closely followed by reforms to the prosecution and punishment of the sexual abuse of children. The strategy that has dominated has been one of easing prosecution and increasing punishment in the name of

²⁴ Z. Adler, *Rape on Trial* (London: Routledge and Kegan Paul, 1987) at 135 [emphasis added].

encouraging victims to participate. As Madame Justice L'Heureux-Dubé expressed it in supporting strict limits on access to complainants' counselling records in sexual assault cases, "society has a legitimate interest in encouraging the reporting of sexual assault"25 The underlying assumption is that limits on an accused person's ability to defend himself against the allegation can be justified because of the importance of encouraging complaints. The terrible difficulty this poses institutionally is that the assumption presumes guilt. It presumes that the complaint is true, the defence spurious, and the trial a mere demonstration of that "fact." The corollary, equally problematic, is that once a complaint has been prosecuted the sentence has to be severe enough that it makes the decision "worthwhile."²⁶ That this approach should dominate was not inevitable; it was, however, highly likely once critical and political attention became law-centred in general and retribution-based in particular.

Initial work by feminists persuasively identified rape not as an act of rampant sexuality, as it had been seen, but as an exercise of power and dominance, committed by men because they could and because it represented the ultimate act of control over women.²⁷ This insight resulted in the exposure of the values and myths that informed the special laws relating to rape, such as the legal impossibility of rape within marriage, and were the focus of concerted criticism and challenge. Challenges to the rape/power dynamic and its reflection in doctrinal rules also led to the identification of the ways that the trials themselves were brutalizing for complainants and a deterrent to the bringing of complaints. Rape myths informed the defence of accused rapists and intrusive and offensive cross-examinations of complainants about their own sexual histories were the rule. Activists working to raise awareness of these abuses coined slogans stamping the trials as "second assaults," a label and a perception that has stuck.²⁸ The evolution was fairly rapid,

²⁵ *R. v. O'Connor*, [1995] 4 S.C.R. 411 at 504.

²⁶ *Supra* note 19.

²⁷ S. Brownmiller, *Against Our Will: Men, Women and Rape* (New York: Simon and Schuster, 1975).

²⁸ See L. Madigan & N. Gamble, *The Second Rape: Society's Continued Betrayal of the Victim* (New York: Lexington, 1991); and P.Y. Martin & R.M. Powell, "Accounting for the 'Second Assault': Legal Organizations' Framing of Rape Victims" (1994) 19 L. & Soc. Inquiry 85. Recently, young men who had been abused as boys and teens by a pedophile-hebophile who fondled them in exchange for favours such as special access to hockey games and hockey stars, shouted the same slogan at a judge who sentenced the remorseful man, who is prepared to undergo chemical castration, to two years less-one-day in jail plus three-years probation. They had hoped for the (unusual) imposition of the maximum sentence for his offences—ten years. "[Stuckless] hurt every

moving from a critique of patriarchy expressed in the criminal law, to analyses questioning the efficacy of the criminal law as a tool to assist women. At this point, analyses and strategy choices began to diverge. The analysis that was most successful, if measured on the basis of legal changes achieved, or in terms of impact on popular discourse, addressed the system on its own terms. The sexist, patriarchal attributes of the criminal law and its limited perception of women were constructed as barriers to obtaining convictions. Similarly, the sexist beliefs of prosecutors and judges who sought and imposed relatively light sentences for most sexual assaults—an offence which covers the range from touching to rape—were categorized as trivializing the traumas endured by women who had not suffered the paradigmatic rape by a brutal stranger. For these feminists, reform initiatives aimed at supporting complainants fairly quickly evolved into developing means to ease the road to convictions and to increase penalties.

There are, of course, many feminisms. Others have conceived of the role of law differently, and opposed this emphasis on a criminalization approach to oppressive and coercive sexual exploitation. Because of that concern they closely examined the claims and the outcomes, a step that in my view should be an integral part of any reforming/transforming strategy. In one such piece of work, sociologist Lauren Snider examined the campaign that in Canada led to redefining the separate crimes of rape and indecent assault into one offence of sexual assault, with a range of punishments.²⁹ She documents the failure in the mid-1980s of the progressive or liberalizing aspects of the reforms sought in regard to sexual assault, and the implementation of only those reforms that made conviction easier or sentences longer. The only progressive successes in this initiative were (temporarily) halting the creation of offences related to the sexual conduct of “children” (persons under 18) and pornography. The difficult question her analysis highlights is how can a reform be counted as both feminist and a success

one of us and today you did the exact same goddamned thing. You did us worse today than he ever did,” shouted one: G. Oakes, “Sex abuser jailed less than 2 years. Victims of ex-Maple Leaf Gardens worker outraged” *The Toronto Star* (28 October 1997) A1. The Crown successfully appealed the sentence, arguing that because of the number of victims, Stuckless’ case constitutes “the worst offender and the worst offence” and thus merits the *Code*-maximum: D. Downey, “Stuckless should serve 10 years, Crown argues. Appeal court asked to impose maximum penalty on ex-Gardens employee who pleaded guilty to sexual assault on boys” *The [Toronto] Globe and Mail* (26 June 1998) A10. The Ontario Court of Appeal increased the sentence to six years (less time-served) and overturned the term of probation, as well as the mandatory castration: T. Tyler, “Predator’s term raised to 5 years. But appeal court quashes 3-year probation in Gardens sex case” *The Toronto Star* (12 August 1998) A4. The increased sentence represents a return to an outdated notion of general deterrence.

²⁹ “Potential,” *supra* note 9.

when it strengthens an unequal and unfair apparatus, particularly when the available evidence suggests that it has done so without producing either more safety or more equality?³⁰

Snider's critique, and others like it,³¹ which raise fundamental questions about alliances with law's power are raised with even greater urgency in the case of wife abuse. Rape and sexual assault are too common, but they are not commonplace. Unfortunately, that is just what the scope of domestic violence is—it approaches the commonplace. As such, it has long been a question of grave concern for the women's movement and now, apparently, for governments and policymakers. With wife assault, as with rape, the initial focus of feminist analysis was on the gendered relationships that produce and sustain it, a focus that evolved for the majority into an uneasy alliance with the criminal justice system. And, as with rape, there are feminists who are critical of this alliance.³²

The Battered Women's Movement has been working to alleviate and eradicate wife battering for all of the thirty years of the contemporary "wave" of feminist activism, and most of its efforts and strategies have been local and grassroots. Shelters and transition houses have been formed, counseling and support offered, and only latterly has there been direct engagement with criminal law. That is so, in part, because battered women have not wanted to add law to the painful and destructive forces in their lives and their counsellors and advocates have understood that. It is also because the legal remedies available were, and frequently still are, partial, patronizing, and punitive. Early work documented failures in policing in particular with depressing regularity. For example, a survey of Wisconsin women, free of violence for at least one year, found many of them dissatisfied with police response. Their concerns are typical of those documented in the literature throughout the common-law world—the police response was invasive, inappropriate, and ineffective. Typically women call police for immediate protection in fear of their lives, but also for support. The women in the Wisconsin study resented the police orientation toward treating their call as a disturbance that had to be defused, and the time spent talking to the

³⁰ *Ibid.* For a further critique by Snider of the use of the criminal sanction, see "Empowerment," *supra* note 9. For a more general critique of reliance on law see "What Do We Mean?," *supra* note 14; and "Evaluating Rights Litigation," *supra* note 14.

³¹ "Potential," *supra* note 9.

³² S. Maidment, "The Relevance of the Criminal Law to Domestic Violence" (1980) *J. Soc. Welfare* L. 26; Currie, *supra* note 14; J. McCord, "Deterrence of Domestic Violence: A Critical View of Research" (1992) 29 *J. Res. Crime & Delinq.* 229; and Martin & Mosher, *supra* note 22.

batterer while ignoring them. They also identified the failure to record the occurrence in police records at all, when charges were not laid, as problematic. Although a prime police motivation for this practice was to avoid discipline for negligence or, more recently, for failing to follow mandatory charging policies, the practice had the effect of weakening the woman's credibility in subsequent incidents.³³ Other studies documented the ways that wife assaults receive police attention that downplays the seriousness of the violence by locating it within the disguise of a "domestic dispute," rather than as assaults in progress. This characterization was reported as leading some officers to intentionally delay in hopes that "arguments" will have cooled down by the time of their arrival. When arrests were made, they are often not for the assault itself but for resisting arrest, public nuisance or drunkenness cases.³⁴

If that has changed (the record is varied), it is because of feminist activism and political alliances. Feminists around the world identified and addressed the failures of the justice system in regard to wife abuse in remarkably consistent ways. The scope of the problem of battering and the lack of resources to assist battered wives was usually the first concern, but the failure of police and justice officials to acknowledge the seriousness of the harm and act to remedy it follow closely. It seems then that an almost irresistible pressure drove the movement toward criminal justice reforms and solutions, and to make use of "law and order" arguments to ensure that criminal justice actors will become involved.³⁵ That is, the focus became devising strategies, techniques and arguments based on the need to make prosecutions easier and punishment more severe. One of the most common responses was to implement "mandatory charge/no drop" policies for police and prosecutors. In Canada recently, that process has been escalating and the language of "zero tolerance" has been added to the

³³ L.H. Bowker, "Police Services to Battered Women: Bad or Not So Bad?" (1982) 9 *Crim. Just. & Behav.* 476.

³⁴ N. Oppenlander, "Coping or Copping Out: Police Service Delivery in Domestic Disputes" (1982) 20 *Criminology* 449.

³⁵ The phenomenon was well documented; in particular see Currie, *supra* note 14; Martin & Mosher, *supra* note 22; G.A. Walker, "The Conceptual Politics of Struggle: Wife Battering, the Women's Movement, and the State" (1990) 33 *Stud. Pol. Econ.* 63, and G.A. Walker, *Family Violence and the Women's Movement: The Conceptual Politics of Struggle* (Toronto: University of Toronto Press, 1990).

discourse around the need to improve—as in increase—criminal justice initiatives around woman abuse.³⁶

This adoption of, or adaption to, the goals and language of a retribution-based justice system has permeated feminist discourse all over the world. Similar attitudes are apparent in a recent study of the legal system's response to wife assault in New Zealand,³⁷ the country that pioneered alternative justice models in the Family Group Conference.³⁸ The authors were part of the University of Waikato Domestic Protection Team and carried out research into the experiences of battered women with the justice system, particularly with “domestic protection orders” and the ineffective response of the justice system to repeated breaches of these orders. They identified a wide gap between the realities of women's experiences of violence in their homes and the “minimisation, trivialisation, and victim blaming” frequently encountered from both the family court and the criminal justice system. That all three occur in criminal courts is undeniable. However, in this study, evidence that these denials of women's experience were occurring was found in an equation that balanced the measure of judicial “recognition of harm” against the length of the prison sentence imposed. The reluctance of judges to impose prison sentences in cases of serious violence—when it would impact adversely on the family as a whole—was identified as a hallmark of the “gap” between the reality of the level of harm and judicial blindness to it. Judges who considered that the fact that the accused was a first offender, that he had taken “steps” about his

³⁶ See Canadian Panel on Violence Against Women, *Changing the Landscape: Final Report of the Canadian Panel on Violence Against Women* (Ottawa: The Panel, 1993) (Co-chairs: P.T. Marshall & M.A. Vaillancourt) at 23-25; and Task Force on the Sexual Abuse of Patients, *The Final Report of the Task Force on the Sexual Abuse of Patients: An Independent Task Force Commissioned by the College of Physicians and Surgeons of Ontario* (Toronto: The Task Force, 1991) (Chair: M. McPhedran); and *Domestic Abuse: Toward an Effective Legal Response* (Edmonton: Alberta Law Reform Institute, 1995). The use of teams of prosecutors and courts especially dedicated to the prosecution of wife abuse is also growing. One of the first in Canada was in Winnipeg. The experiment is described by E.J. Ursel, “The Winnipeg Family Violence Court” in M. Valverde, L. MacLeod & K. Johnson, eds., *Wife Assault and the Canadian Criminal Justice System: Issues and Policies* (Toronto: Centre of Criminology, University of Toronto, 1995) 169.

³⁷ R. Busch, N. Robertson & H. Lapsley, “The Gap: Battered Women's Experience of the Justice System in New Zealand” (1995) 8 C.J.W.L. 190.

³⁸ The acceptance of this traditional Maori approach to offenders into the New Zealand legal system dealing with youthful offenders is well set out by parish priest and prison chaplain Jim Consedine: *Restorative Justice: Healing the Effects of Crime* (Lyttelton, N. Z.: Ploughshares, 1995). It has been used in a pilot project in Newfoundland and Labrador in cases of family violence. The pilot is described by L. Macleod in conversation with J. Pennell and G. Burford, “Family Group Conferencing: A Community-Based Model for Stopping Family Violence” in Valverde, MacLeod, Johnson, eds., *supra* note 37, 198.

drinking problem, that the complainant had forgiven him, and that jail would cost the accused his job, were criticized for relying on these factors in deciding not to incarcerate. From a perspective that equates recognition of harm with the length of a prison term, it is doubtful that anything would be recognized as justification for a non-custodial term. The fact that there had been abuse and that there had been a breach of a protection order *per se* determined the appropriate outcome, with no serious consideration of, or reference to, individual factors or the interests of and wishes of the woman herself.³⁹

There is almost an element of cynicism, or, at the least, investigator bias, around studies such as this. That is, feminist investigators are expecting to see that the criminal justice system is responding inadequately to woman abuse. Through this lens, sentences are almost inevitably too lenient, and prosecutions too difficult.⁴⁰ The alternative bias, is to measure effectiveness on the basis of the severity of the punishment imposed. On this measure, criminal justice responses that are not punitive are seen to be unresponsive to victims'/women's harms.⁴¹

³⁹ Consendine, *supra* note 38 at 214. This narrow vision of what represents an appropriate response to battering is very widespread. We documented its roots and extent in Martin & Mosher, *supra* note 22.

⁴⁰ This approach also contributes to an almost inevitable cynicism. For example, see M. Landsberg "Mother fights for new trial in killing of daughter" *The Toronto Star* (7 November 1992) J1. The column recounts the mother's efforts sympathetically in a case where a jury acquitted the accused and the prosecution could find no error of law justifying an appeal. Landsberg describes the trial as "the usual blame-the-victim sexist circus that has made many women deeply cynical about the possibility of justice in the courts" as if that explains it all—and for some it does. More difficult are the challenges that stem from the practice of a feminist research method. See C. Armstead, "Writing Contradictions, Feminist Research and Feminist Writing" (1995) 18 *Women's Stud. Int'l F.* 627.

⁴¹ The equation of prison sentence with recognition of harm generally is also widespread: see Grant & Parkes, *supra* note 18. It was reiterated recently at an inquest into the murder of Arlene May and suicide of her abuser, Randy Iles, when the research of Ottawa consultant Richard Gill was reported on. Gill was commissioned by the Department of Justice to review the hastily enacted "Criminal Harassment" provisions in the *Code*. His report was critical, measured against the granting of bail and imposing of sentences of imprisonment, as criteria for determining gender bias and sensitivity to women's safety by the judiciary. Fifty-five per cent of those arrested were released on bail, while 81 per cent of those convicted did not receive a sentence of imprisonment. He is reported as testifying at the May-Iles inquest, that "judges are insensitive to criminal harassment and there is a lack of understanding. Weak sentences are imposed and jail is a rarity." The difficulty with this conclusion is the assumption that jail equates understanding and lack of gender bias. The study was not able to equate the prosecution and sentencing practices to outcomes for victims, and did not consider other options for addressing stalking and harassment other than criminalization. The latter conclusion was based on an assumption that all incidents of harassment were alike in severity and risk, although no evidence was offered to support it: W. Darroch, "Justice system gender biased, research claims" *The Toronto Star* (15 April 1998) B4.

The issue of how to measure system responsiveness, when the system itself is so flawed, is not a simple one. That is particularly so when issues of race and gender intersect, such as in the Aboriginal community. This is a community that as a whole is served badly by the criminal justice system. Racist, patronizing ignorance marks the relation of the justice system to Aboriginal men, women, and youth alike.⁴² However, a focus on the system's failures generally can mask and mute its particular failure to protect women. The power of retribution to appear to redress this imbalance is unmistakable. Emma LaRocque, of the Department of Native Studies, University of Manitoba, rejects any "sympathy" for the victimized history of Aboriginal male offenders as misplaced and a means to perpetuate the violence against Aboriginal women and children. Her espousal of significant punishment of Aboriginal men who abuse Aboriginal women as a measure that the harms caused are understood by the wider society to be significant, demonstrates clearly the power of the retribution model.⁴³ LaRocque is unflinching: "if individuals are not capable of personal responsibility and moral choices ... then they are not fit for normal social engagement and should be treated accordingly."⁴⁴ On the question of the sentences imposed, LaRocque argues that first they are "wantonly lenient" and that that lenience is not only wrong in itself, but that it perpetuates sexual violence against women. Her concern is expressed in language that is replicated daily by "law and order" proponents:

⁴² See C. LaPrairie, "Community Justice or Just Communities?: Aboriginal Communities in Search of Justice" (1995) 37 Can. J. Criminology 521; C. LaPrairie, "The Role of Sentencing in the Over-representation of Aboriginal People in Correctional Institutions" (1990) 32 Can. J. Criminology 429; D. Ellis & D. Beaver, *The Effects of Formal Legal and Traditional Interventions on Women Abuse in a First Nations Community* (Toronto: LaMarsh Research Programme, York University, 1993); Manitoba, Aboriginal Justice Inquiry, *Report of the Aboriginal Justice Inquiry of Manitoba* (Winnipeg: Queen's Printer, 1991), vol. I, "The Justice System and Aboriginal People" c. 4, "Aboriginal Over-Representation," and vol. II, "The Deaths of Helen Betty Osborne and John Joseph Harper" (Commissioners: A.C. Hamilton & C.M. Sinclair). Similar tensions operate within Black communities: R. Tong, "Black Perspectives on Women, Sex and the Law," in R. Tong, *Women, Sex and the Law* (London: Rowman and Allanheld, 1984) 153 at 170-71; A. Mama, *The Hidden Struggle: Statutory and Voluntary Sector Responses to Violence Against Black Women in the Home* (London: London Race and Housing Research Unit, 1989) at 174, concerning community loyalties; S.L. Miller, "Unintended Side-Effects of Pro-Arrest Policies and their Race and Class Implication for Battered Women: A Cautionary Note" (1989) 3 Crim. Just. Pol'y Rev. 299; and D. Hawkins, "Devalued Lives and Racial Stereotypes: Ideological Barriers to the Prevention of Family Violence Among Blacks" in R.L. Hampton, ed., *Violence in the Black Family: Correlates and Consequences* (Toronto: D.C. Heath, 1987).

⁴³ E. D. LaRocque, "Violence in Aboriginal Communities," in M. Valverde, *et al*, *supra* note 37, 104.

⁴⁴ *Ibid.* at 109.

When all is said and done, what of the victim? Where is the help for her? Where is the concern for *her* rehabilitation?

The whole judicial process reflects privileged, white male definitions and experience. It also reflects tremendous naïveté—often found in white liberal social workers, criminologists and justices. These lenient sentences are consistent with the growing horrification of rapists and child molesters as “victims.” Today there is persistent sympathy for sexual offenders with little, if any, corresponding concern for the real victims.⁴⁵

IV. THE NEW RIGHT COALITIONS

Canadians deserve to feel that they and their families are safe in their homes, at work, at school, on the street and in their communities. We want to live in a country where our children can play in the park, go to school, and grow up without fear. And we want a justice system that does more to protect law-abiding citizens than it does criminals. Canadians want a country where we can look to the future, instead of over our shoulders.⁴⁶

Social, legal, economic, political, cultural—none of these forces operate alone in a society or without influencing each other, and that is true of the the criminal justice issues that have concerned the women’s movement. As the failures of patriarchal, retributive justice are identified as failures to serve women and children, they become an issue for the women’s movement. But, at the same time, they become part of different agendas and victimized women and children become the justification behind political opportunism and appropriated expectations. Whether opportunistic or sincere, there has been a proliferation of misleading but successful “law and order” campaigns led by new right politicians and by the new alliances between victim’s groups and the corporate sector—campaigns that are highly effective in influencing both popular discourse and legislative agendas. Similarly, whether because of deliberate appropriation or the emergence of a dominant discourse, an examination of the rhetoric of these campaigns reveals how significant the role of the victim/woman has become. All the campaigns stress the need to better serve (real) victims, all decry violence against women, all cite an unresponsive, ineffective and overly

⁴⁵ *Ibid.* at 110 [emphasis in original].

⁴⁶ P. Manning, *A Fresh Start for Canadians*, 3d ed. (Calgary: Reform Party of Canada, 1997) at 14 [hereinafter *A Fresh Start*].

lenient criminal justice system, and all boast “partnerships” between victims, corporations, and concerned politicians.⁴⁷

Two key claims are dominating contemporary “law and order” rhetoric—and both draw from and in turn influence feminist criminal law strategies. The first claim is that crime is “spiralling out of control,” a proposition which feeds on our fears about violence in general and street crime in particular. The second is that the criminal justice system is unable to deal with this burgeoning crime threat—because the system is too “soft” on crime, and too unresponsive to crime’s victims. Both claims are exacerbated by media coverage of street crime that results in a significantly distorted understanding of the scope of the problem.⁴⁸ That exaggeration in turn serves other interests. Indeed, fear is a growth industry. Marketing schemes for cell phones, for example, present these devices as essential particularly for women’s security and contribute to the common sense that it is “dangerous out there.”⁴⁹

The second claim points to an excess of rights for criminals and a dearth of rights for victims as a problem in urgent need of a solution. This assertion exacerbates the fear of crime generally as it plays on a sense of helplessness felt by those cast in the role of crime victim and on the sense of grievance experienced by large segments of society for being denied important entitlements, or rights. High-profile stories about the effect of constitutional rulings resulting in the dismissal of criminal prosecutions, or favouring the rights of the accused, are repeated endlessly and commented upon widely, thus contributing to a sense that

⁴⁷ For example, the Reform Party platform, under the promise of making the “streets safe again” is to: “Enact a Victim’s Bill of Rights that puts the rights of law-abiding Canadians ahead of those of criminals; Reform the criminal justice system to provide you with safer communities, safer streets, and safer homes; Hold a binding referendum on the return of capital punishment; Repeal the Liberals’ costly firearm registry (*Bill C-68*) and replace it with meaningful laws to fight the criminal use of firearms; Reform the parole system and abolish early release for first-degree murderers; Replace the Young Offenders Act with measures that hold young criminals accountable for their actions; Pursue crime prevention through social policies that strengthen families and communities”: *ibid.*

⁴⁸ See *supra* notes 17-20.

⁴⁹ Media reports reinforce the fear, as reports of who is at greatest risk cloud the issue of how great that risk is, overall. To be the most vulnerable to a threat that is highly unlikely to materialize, or if it does is likely to be minor and manageable, is quite different from being at high risk of being a victim of a dangerous and prevalent threat. The latter message is dominating in the case of the risk of crimes against women, even though reports of spousal assault dropped 7 per cent from 1993 to 1996: K. Makin, “Young women warned of assault. Living common law with mate under 25 increases risk of attack, Statscan finds” *The [Toronto] Globe and Mail* (29 May 1998) A8. Seniors are also very fearful, and offences against them arouse considerable public outrage: D. Roberts, “Attack on elderly pair in their home stirs rage. Police in Winnipeg fear criminals are seeking out seniors as easy robbery targets” *The [Toronto] Globe and Mail* (9 December 1997) A6.

the justice system is failing ordinary people.⁵⁰ This second concern resonates widely. Criminal courtrooms are not victim-friendly places. Adversarial contests that begin with the legal presumption of innocence put the complainant witness in the position of having to prove “her” case, and make her subject to challenges to her credibility, competence, and sincerity—as a matter of legal principle.⁵¹ However, they are even less friendly toward accused persons, where in spite of the legal presumption of innocence, most accused are seen as *de facto* guilty—and must affirmatively prove their innocence or be convicted⁵²—and risk being perceived as abusing their rights by the mere

⁵⁰ See, for example, both *R. v. Seaboyer*, [1991] 2 S.C.R. 577 (striking down provisions limiting cross-examination of sexual history, that were known inaccurately, but enduringly, as the “rape shield” law) and *R. v. Askov*, [1990] 2 S.C.R. 1199 (staying criminal charges for a failure to prosecute within a reasonable time), generated widespread concern and controversy. The women’s movement lobbied successfully for a legislative response to *Seaboyer*: see *supra* note 6 and accompanying text. Cases with less widespread implications also receive considerable attention, and often reflect the popular view that the system is failing. See, for example, D. Roberts, “Manitoba murder suspect freed because of RCMP mistakes” *The [Toronto] Globe and Mail* (29 April 1998) A17. A second degree murder charge was stayed because the only evidence the RCMP had that the accused man had murdered a young woman was in a confession that was inadmissible because of the failure of police to allow him to call his lawyer. The victim’s family are reported as “having lost faith in the justice system.” The victim’s sister is reported as saying: “All the family’s faith was put into the justice system and they’re not going to be able to do anything?” See also W. Darroch, “My stores held up 20 times: Murder victim’s brother blames Young Offenders Act for crimes. Tom Ambrose says his brother’s killer should have been in jail” *The Toronto Star* (5 December 1997) D8.

⁵¹ This reality is particularly poignant in cases of child abuse, when children face apparent disbelief. A judge of the Ontario Court General Division recently urged police and prosecutors to reconsider prosecutions based solely on the uncorroborated testimony of very young children, or of older children describing events that took place years in the past. Mr. Justice David Humphrey, in dismissing a charge, expressed a sense of frustration that may well be widely shared: “I wish somebody in authority with a modicum of common sense would put a stop to this nonsense and would make the well-being of the child the paramount issue. Tell the child, the parents, the therapist and the social worker the facts of life in the real world. Tell the child that they are believed, but there is simply not enough evidence to prosecute. That way, the child, as I say, will not be victimized probably for the second time, and will be able to maintain their dignity and integrity, and not be led to believe that our justice system is, in fact, unjust”: *R. v. Brooks* (25 March 1998), (Ont. Ct. (Gen. Div.)) [unreported] at 4 (transcript).

⁵² The family of the murdered girl who was so disappointed that the charges were dismissed because of an inadmissible confession, had obviously concluded that the police had arrested the “right” man and that his involuntary confession was “true”: Roberts, *supra* note 50. Equally obvious, not every person that the police charge, or who confesses, is, “in fact” guilty as wrongful convictions attest, but that is rarely a view expressed by victims or survivors whose need for a resolution make them particularly likely to believe the police version. See also R.V. Ericson, “The Decline of Innocence” (1994) 28 U.B.C. L. Rev. 367.

fact of denying their guilt and defending themselves.⁵³ In fact, courtrooms are only at all welcoming to the justice system's habitués—lawyers, police officers, judges, and courthouse personnel, but this is a symmetry not generally appreciated by crime victims and their advocates. Much of the contemporary reform agenda is based on these perceptions of inequity, both at the level of the dominant discourse, and concretely. Complainants in criminal proceedings are almost universally identified, and self-identify as “victims,” which begs the (legal) question of whether a crime was actually committed.⁵⁴ Complainants also identify the accused as a killer, a rapist, an abuser—which begs the essential question of whether he or she actually committed the act in question—and wonder aloud why a “killer” has more rights than they have.⁵⁵

In an attempt to address and to redress these inequities, victims are claiming, successfully, the right to be heard in court on a variety of motions, with counsel, and otherwise to influence directly the course of trials.⁵⁶ More and more energy and concern is being consumed by demands based on these positions, which are dominating much of law reform.⁵⁷ That economic and social insecurity are more likely sources

⁵³ S. Skurka, “Two Scales of Justice: The Victim as Adversary” (1993) 43 *Crim. L.Q.* 334, discussing the general concern in the context of the use of “Victim Impact” statements; and see A. N. Young, “Two Scales of Justice: A Reply” (1993) 45 *Crim. L.Q.* 355.

⁵⁴ For one example of many, see K. Pittaway, “Sex assault: would you press charges? Seek justice in a sex-assault case, and your life is on trial. We're not even close to balancing the rights of victim and accused” (October 1997) 70:10 *Chatelaine* 74.

⁵⁵ *Ibid.*

⁵⁶ See D.L. Martin, “Rising Expectations: Slippery Slope or New Horizon? The Constitutionalization of Trials in Canada,” in J. Cameron, ed., *The Charter's Impact on the Criminal Justice System* (Toronto: Carswell, 1996) 87 [hereinafter “Rising Expectations”]. Victims' groups are now also engaging the court process to enforce victims' rights generally: see R. Mackie, “Crime victims to sue province. Justice system failed, Ontario women say” *The [Toronto] Globe and Mail* (12 June 1998) A11.

⁵⁷ The changes encompass the entire criminal justice system (many of them long overdue and necessary, others are more problematic—the issue is the extent of the change). Evidence law has been reformed to remove spousal privilege in cases of offences against children, corroboration requirements have been removed and cross-examination of complainants in sexual assault cases restricted; new offences have been developed, particularly involving prostitution, pornography and child sexual abuse; new policies concerning violent offences against women and children such as mandatory charge/no drop policies have been developed, and the establishment of specialized police and prosecution teams for investigating and prosecuting these offenses are commonly promised if not provided. Concerns that preliminary inquiries, which require that a victim/witness testify twice (difficult for some in itself), and thus face cross-examination over differences, if any, in the two accounts, and that victims are subjected to “abusive, unduly prolonged and inappropriate questioning” are the subject of a Department of Justice reform package to limit the right to a preliminary inquiry, and to restrict cross-examinations: see K. Makin, “Curb sought on court

for the fears and anxiety being articulated in post-industrial societies may be true, but “crime” (undifferentiated and unexamined) is a much more convenient and useful peg to pin it on for many interests. It is also an easier one to accept; this culture is very accepting of the “right” to exploit labour and resources in an untrammelled way, and claims that high unemployment and starvation wages are contributing to a general lack of security are not resonating.

A closer examination of these propositions—that crime is out of control and the justice system is as well—suggests something more complex. On the key claim that violent crime is increasing, a recent occasional paper, from a right-wing think tank, entitled *Streets of Fear: The Failure of the Canadian Criminal Justice System*,⁵⁸ illustrates how the crime card is played by political interests. The paper asserts simply that the increase is occurring at an “appalling” rate. This proposition is by now so imbedded in the public mind that it apparently needs no support. The balance of the discussion flows from this “fact” with a predictable litany of needed get tough reforms. However, rather than demonstrating a troubling increase, crime rates generally have declined steadily for the past several years. Indeed, this is the pattern in the United States as well, not surprising given aging populations.

Basic analysis of the rate of violent crime is illustrative. Increases in the past of this measure (violent crime rates have also declined recently) has been the subject of the most concern. Although for the past five years this rate has also remained steady, or shown a decline, the rate of violent crime almost doubled between 1977 and 1992. However, when the content of that statistic is examined, it becomes apparent that over half—58 per cent—of the violent crimes committed in 1992 did not involve weapons or serious physical injury.⁵⁹ In other words, it is reasonable to conclude that a good deal of non-serious physical contact and confrontation is being counted as “violent” crime, which is something that is more a matter of social construction than any objective measure of threat. Simply put, a change in perceiving and thus counting this type of behaviour is responsible for much, if not all, of the reported increase, and not an increase in what was counted as

hearings. Defence lawyers call Ottawa plan to curtail preliminary inquiries an assault on jury system” *The [Toronto] Globe and Mail* (9 December 1997) A1. Sentences are much longer for those selected for exemplary punishment: see generally Martin & Mosher, *supra* note 22.

⁵⁸ P.T. Brode, *Streets of Fear: The Failure of the Canadian Criminal Justice System* (Toronto: Mackenzie Institute, 1993) at 4 [hereinafter *Streets of Fear*].

⁵⁹ *Canadian Crime Statistics, 1992* (Ottawa: Canadian Centre for Justice Statistics, Statistics Canada, 1992).

violence in 1977.⁶⁰ Whether or not it is a good thing to now include in the violent crime rate behaviour that which was previously not reported to police, from schoolyard bullying to acquaintance-rape and wife abuse, it is misleading to fail to take these perceptual and rhetorical changes into account when determining or discussing apparent increases. It is also important to keep them in mind when trying to understand the continued high level of fear of crime as well. Encouraging the use of the criminal sanction in response to behaviours previously dealt with by informal mechanisms has a range of consequences, as the writing of *Streets of Fear* demonstrates. One of the more troubling consequences is that social trust and cohesion and confidence decline in the face of exaggerated fears of our neighbours, and as a result we are increasingly willing to support draconian crime-control measures, and, indeed, demand them. The other is that we lose the will and the skill to respond to slights and wrongs and harms ourselves, through social and community resources. This is not simply a case of media exaggeration and inaccuracy. Indeed, the mainstream press has for some time included stories about the fear of crime persisting in the face of declining rates of crime in their reporting.⁶¹ Other interests and influences are maintaining and utilizing this focus on the crime question. One such interest is the corporate agenda.

Corporations have been piqued by the potential in the Victim's Rights Movement—which has itself been professionalized and “corporatized”—both trends which institutionalize and entrench

⁶⁰ It is not difficult to see how these perceptions are formed. A full page spread in a section of the paper directed toward high school students is headlined, “Fear in the schoolyard” and is sub-headed, “Are teenagers becoming more violent?” in a recent *Toronto Star* feature. The opening paragraph describes a teenager stabbed in the washroom by her ex-boyfriend, and an eight-year-old with her nose bloodied for refusing to kiss a classmate: *The Toronto Star* (12 May 1997) A26. The impact of this type of coverage is substantial, and is a significant component of how experiences are characterized—crime versus bullying, for example: see J.V. Roberts & A.N. Doob, “Sentencing and Public Opinion: Taking False Shadows for True Substances” (1989) 27 *Osgoode Hall L.J.* 491; and L. M. Friedman, *Crime and Punishment in American History* (New York: Basic, 1993) c. 20. For an explanation of how the media contributes to an exaggerated fear of crime in society, see J.V. Roberts & A.N. Doob, “News Media Influences on Public Views of Sentencing” (1990) 14 *L. & Hum. Behav.* 451.

⁶¹ The refusal of individuals and communities to act on the declining rates is occasioning considerable commentary: see F. Butterfield, “Crime Keeps on falling, but Prisons Keep on Filling” *The New York Times, Week in Review* (28 September 1997) 1; M. Campbell *et al.*, “Shakedown in the schoolyard. Youth crime may not be rising but bullies are getting more sophisticated and brutal” *The [Toronto] Globe and Mail* (4 October 1997) A1; and K. Kenna, “Fall in murder rate cold comfort for victim's loved ones. All-American boys' slayings spark outcry for death penalty. Americans are not persuaded by statistics. They are persuaded by the extraordinary event or the extraordinary crime” *The Toronto Star* (7 October 1997) A10.

positions. One of the oldest and most well known of these groups, Mothers Against Drunk Driving (MADD), is very well integrated into the corporate mainstream, while it functions as a significant small business in its own right. In 1995, MADD Canada had revenues in excess of \$2.3 million, and expenses of just over \$2.2 million. Originally, and continuing to be, an American phenomenon, it is now registered as a national charitable organization in Canada, with local chapters in several provinces, primarily in large population centres—sixteen out of twenty-one are in Ontario. MADD's alliances with the financial and corporate sector are substantial and explicit. The annual statement names "official" partners including Allstate Insurance and the Bank of Montreal; "corporate" partners including Hallmark, Shoppers Drug Mart, and Travelodge; and an associate partnership with Nissan.⁶²

The purpose of groups like MADD is to influence public opinion—in this case, against drinking and driving—and they are spending considerable amounts of the money they and their corporate partners raise to do so. In the usual course of this type of campaign, this spending results in considerable skill and resources being directed toward convincing the public that their particular crime interest remains at crisis proportions and is thus in need of more attention. Not surprisingly, MADD Canada's largest expense in 1995 was on "public awareness" at 43.5 per cent, or approximately one million dollars. Its next largest expense, at 25.6 per cent, was administration and fundraising. One-quarter of revenues to the cost of fundraising is considered high in charity circles,⁶³ but MADD utilizes a number of professional fundraising techniques, such as commercial telephone soliciting firms, which inevitably drive up costs (the telephone solicitor is usually paid on a commission basis—there is no other affiliation with the charity or group for which the canvasser is soliciting).⁶⁴ So long as this strategy continues to serve the interests of MADD's directors and partners, and to provide employment for a considerable staff, it is unlikely that MADD will declare its campaign successful and shut itself down. It is more likely that it will

⁶² See MADD annual report, 1995: *Great Progress on the Long Road to Success* (Mississauga, Ont.: MADD Canada, 1996).

⁶³ The guidelines formulated by the National Charities Information Bureau in the United States advise that fundraising expenses be "reasonable" with regards current and future needs: *Standards in Philanthropy* (New York: National Charities Information Bureau, 1988). See also *CBBB Standards for Charitable Solicitations* (Washington, D.C.: Philanthropic Advisory Service of the Council of Better Business Bureaus, 1982).

⁶⁴ See, for example, Connecticut Office of the Attorney General, Press Release, "Telephone Solicitation Raises Consumers' Questions" (10 February 1997).

switch focus and develop new issues and tackle new problems.⁶⁵ At the moment, however, drunk driving is still a "growth crime."⁶⁶ In Ontario in 1995-96, 15 per cent of all cases brought to adult court were for impaired driving charges.⁶⁷ Drunk driving and the campaign against it are also commanding significant public resources. The Ontario Ministry of the Solicitor General and Correctional Services provided \$1.2 million in specific grants to police in 1995-96 simply to fund the overtime cost of street-stop enforcement programs such as "Reduce Impaired Driving Everywhere" (RIDE), and the Ministry of the Attorney General funds a "Drinking/Driving Countermeasures Office."

There is evidence, however, that something is working. According to information from the Canadian Centre for Justice Statistics, the number of persons charged with respect to total traffic enforcement declined from 249,733 in 1995 to 149,032 in 1997; much of the decline was in alcohol-related offences. We will never know whether some part or all of this decline would have occurred anyway as lifestyles and an aging population lead to declines in alcohol consumption and improved driver skill and safety. What is clear is that once groups like MADD are in place and entrenched, and programs like RIDE are operating, spending levels and organizational commitments decline extremely slowly.

Groups like MADD are obviously not feminist, and do not even fit well into the victims'-rights camp, but the utilization of the image of mothers as well as the grief and anger of those who have lost loved ones to senseless drunk driving deaths make them an important exemplar. However more classic victims' groups also use female images while they draw more explicitly upon feminist concerns about unredressed and ongoing violence against women in their homes and within their intimate relationships. Both the moral legitimacy of the "good" victim and the discourse of feminist analysis are being appropriated by the alliance of victims' movements and the New Right.

Both are apparent in the promotion of victims and a "victims' rights bill" by both the federal Reform Party and the Ontario

⁶⁵ "Drunk-driving fight hits high gear. Police, brewers join demands for tougher laws" *The Toronto Star* (27 July 1998) A6. For a look at how other interest groups reshape their agendas and continue their campaigns, see S.A. Holmes, "Good Times are Bad for Interest Groups" *The New York Times, Week in Review* (26 July 1998) 3.

⁶⁶ Crime generally is a growth industry. Spending on police services in Canada between 1988-89 and 1992-93 has risen from \$4.39 to \$5.72 billion. In 1992-93, spending on policing was one and one-half times greater than all other justice costs combined: *A Graphical Overview of Crime*, *supra* note 13 at 152.

⁶⁷ *Canadian Crime Statistics, 1995*, *supra* note 20.

Progressive Conservative government. In the Reform Party platform booklet, *A Fresh Start*,⁶⁸ the party promises to “shift the balance from the rights of criminals to the rights of victims and law-abiding citizens. If you are a victim, we will put you first” The booklet, also asserts what feminists have been claiming for years, that “our impersonal system often forgets that crime is not just a matter between the accused and the Crown.” Similarly, in a newsletter published by the Ontario Progressive Conservative party, “Promises Made, Promises Kept: Two-Year Major Milestones of the Harris Government,”⁶⁹ the government boasts of its accomplishments in enacting a Victims’ Bill of Rights (December 1995), in investing \$10.2 million into Victim/Witness Assistance programs and in establishing tougher standards with respect to parole decisions. On the latter initiative, it makes the appalling, and unexamined claim: “As a result, for the first time ever, parole is being denied more often than it’s granted.” The government, otherwise devoted to cost-cutting and tax breaks, goes so far as to state as a good thing even for cost cutters, that it has given money to shelters for battered women to provide safer facilities, and more money to “support women and their families in breaking the cycle of violence.”⁷⁰

The appeal of these issues to legislators and politicians is obvious. For politicians who want to be elected, and for those who want to remain in power, the “crime card” has always had appeal, particularly as a distraction from other less popular initiatives.⁷¹ On the one hand, rising expectations about rights and entitlements,⁷² let alone expectations about employment and living conditions, are not readily met. On the other hand, serious harms continue to be inflicted on the

⁶⁸ *Supra* note 46 at 15.

⁶⁹ It was sent out with cover letter dated July 15, 1997.

⁷⁰ *Ibid.* The claims are ironic given the size of cuts to all social spending that has been the hallmark of this administration. For a look at similar values expressed by several American organizations that can be found on the Internet, see Justice Against Crime Talking at <http://users.deltanet.com/users/ghc>, and Texans for Equal Justice at <http://www.flex.net/~judge>.

⁷¹ The Ontario government’s recent initiatives against young offenders have been identified by a political pollster as “a good issue for the PCs to trot out as an election issue because it tends to appeal more to the PC voters. ... Everybody likes a tough stance on crime. ... If the PCs want to make it an issue and say, ‘Look, the place has gone to hell in a hand basket,’ they could possibly do that”: J. Rusk, “Tory panel wants to crack down on Ontario’s youth crime. Tough position may be sound election strategy, pollster says” *The [Toronto] Globe and Mail* (2 June 1998) A7. In view of a “gender gap” in popularity, it is not unreasonable to infer that the continued focus on crime has a political purpose: see J. Coyle, “Gender gap widening for Tories” *The Toronto Star* (5 May 1988) B1.

⁷² See “Rising Expectations,” *supra* note 56.

vulnerable; harms that the justice system does not appear able to prevent. The solution to this seemingly insoluble dilemma that has been attractive to legislators has been to agree to system changes demanded by an ever more powerful victims' movement and by the more punitive element of the women's movement, in apparent attentiveness to community voices and concerns. Equally, governments often will initiate or suggest punitive solutions to problems that either do not exist in any urgent sense, or were presented by victims in quite another context. However, it is a safe assumption that any initiative announced will reinforce a message of concern over the "crime problem," and/or the interests of crime victims.⁷³

Initiatives like these continue to be claimed as part of the "important steps" the Ontario government has taken "to protect communities and crime victims." In a pamphlet mailed in June 1998 to all residents in Ontario, entitled "Are We on the Right Track?", the government quotes Priscilla DeVilliers, president of Canadians Against Violence Everywhere Advocating its Termination (CAVEAT) as saying, "Safety in the community is more than the absence of injury. We need to look at the culture of fear—it's simply unacceptable." In response to this ambiguous assertion, the government describes six initiatives that have produced "more safety on our streets, less violence in our schools." The initiatives described are highly unlikely to in any way contribute to this laudable goal, but they are expressed as if they were effective responses to real problems. The first adopts a labeling/scapegoating response to the fear and prejudice that sexual offenders in particular attract: "A new law will allow police to warn communities of dangerous offenders and will prevent convicted criminals from changing their names to hide past records."

The second describes the "boot camp" experiments in evocative terms, that falsely imply that all young offenders now receive this

⁷³ The Ontario government has targeted young people in particular, picking up on an undercurrent of fear and anger directed toward youthful offenders. Announcements about tough measures against young offenders have been regular, and a "Crime Control Commission has been established headed by a trio of backbenchers (Jim Brown, Gerry Martiniuk and Bob Wood) who have all described experiences with young offenders that frightened them." See J. Armstrong, "Tough boot camp rules to spread. Young offenders to face stricter conditions" *The Toronto Star* (9 December 1997) A1; J. Ruimy, "Tough stand taken on youth crime. Panel of MPPs to recommend initiatives" *The Toronto Star* (31 January 1998) A6; and J. Duncanson, "3 welcome debate on crime. Tory MPPs stand behind get tough stance" *The Toronto Star* (23 March 1998) E5. The federal government's stand is generally "softer," but equally well directed toward the victim lobby, in a recent announcement about a victim help centre: see D. Ferguson, "Ottawa plans oasis for victims of violence. 'One-stop' centre to offer comfort and counselling" *The Toronto Star* (21 April 1998) A7.

“treatment,” and, that previous programmes (now thankfully dispensed with) focussed on trivial “coddling”: “Young offenders are now held in strict discipline programs that emphasize education and responsibility, *not entertainment and recreation.*”⁷⁴

The third initiative describes the policy of rarely granting parole, and thus holding prisoners to the end of their sentences to be released without supervision or follow up, in the following terms: “The parole process for provincial inmates has been cleaned up, *resulting in a drop in the crime rate among parolees.*”⁷⁵

The last three “steps” are not in fact actions already taken, but rather are plans or promises, without detail, to register pedophiles and sex offenders, to have “greater protection for victims of domestic violence and increased safety on urban streets and in schools,” and to support law enforcement officers “who protect our lives and safety at the risk of their own.” In a document mailed to voters in a pre-election year, it may not be surprising that grand claims are made, with little detail. What is of significance is the unrelentingly punitive and retributive tone.

There is a similar appeal in the “crime card” to corporate interests, who have been seeking aggressively a diminished role for government, while claiming that the private sector—which must include them—can better serve “legitimate” social and community needs. A law

⁷⁴ [Emphasis added]. The “boot camp” or “strict discipline” approach adopted as a centre point of the Ontario government’s crime strategy is controversial in at least two ways. First, the first “camp” is also the first private prison in Ontario, and the company chosen to operate it is reported to have a somewhat spotty record in the American facilities it previously operated: see S. Anderson, “Boot camp honchos defend US record. Firm they worked for lost Florida corrections gig after jail riot” *Now* (14-20 August 1997) 26. Second, and even more serious, the approach was introduced before study of the option was completed and reported, and plans made to expand it in the face of problems with the pilot “camp.” The haste suggests an ideological and political motivation: see J. Rusk, “Tough rules planned for youth offenders. Province considers using boot-camp-style discipline for all young people in system. He believes in retributive justice. He has little interest in rehabilitation” *The [Toronto] Globe and Mail* (4 September 1997) A6; J. Armstrong, “Boot camp to get even tougher: Ontario vows to go on with plans despite problems” *The Toronto Star* (4 September 1997) A1; S. Anderson, “Boot camps don’t work? Tories still pushing them. Solicitor General Bob Runciman didn’t wait for study before backing camps. U.S. data indicates strict discipline only makes youth reoffend” *Now* (19-25 March 1998) 26; and S. Prochownik, “Boot camps breed rebels, not citizens” *The Toronto Star* (6 March 1998) A23.

⁷⁵ [Emphasis added]. Given a drop in the number of parolees, it is almost inevitable the crimes committed would also drop. However, the strategy has a more serious flaw. The prediction of dangerousness or risk for recidivism is not a science, and efforts to make predictions are seriously flawed. A recent study on the federal policy of denying selected prisoners not only parole, but also release based on earned remission of sentence, was reportedly failing “miserably to predict those most likely to reoffend”: K. Makin, “Early-release law a failure, study says. Inmates rejected for parole are not the ones most likely to reoffend, researcher says” *The [Toronto] Globe and Mail* (14 October 1997) A3.

and order agenda that increases surveillance and control of the underclass and directs justice resources toward street crime (and away from “crime in the suites”), while allying with apparently progressive issues such as reducing crime against women and increasing rights for crime victims has obvious public relations value. More directly, privatization strategies are opening up the corrections “market” to for-profit operations. This is a trend that began in Britain, and the United States,⁷⁶ gained significance in Australia⁷⁷ and is spreading to Canada as companies build and operate prisons and youth facilities and contract-out prison labour, while communities look forward to the jobs and spending a new prison represents.⁷⁸ The attraction for the women’s movement—at least that part that has become committed to criminalization strategies—and for the victim’s movement, is also clear: access to the levers of power, funding when public sources of support are disappearing, and considerable public support and discussion of issues that for too long were ignored and relegated to the “private” domain.

V. CONCLUSION: NEW DIRECTIONS

Communitarianism without rights is dangerous. Rights without community are vacuous. Rights will only have meaning as claims the rich can occasionally assert in courts of law unless community disapproval can be mobilized against those who trample the rights of

⁷⁶ There is a considerable literature discussing and assessing this trend. For example, see: J.J. DiJulio Jr., “What’s Wrong with Private Prisons” (Summer 1988) 92 *Pub. Interest* 66; J.G. Di Panio, “Private Prisons: Can They Work? Panopticon in the Twenty-first Century” (1995) 21 *New Eng. J. on Crim. & Civ. Confinement* 171; and S. Frazier Stacy, “Capitalist Punishment: The Wisdom and Propriety of Private Prisons” (1991) 70 *Neb. L. Rev.* 900. Concerning the British experience see C. Graham, “Privatization—The United Kingdom Experience (Comparative Models of Privatization: Paradigms and Politics)” (1995) 21 *Brook. J. Int’l L.* 185; and M. Ryan, “Evaluating and Responding to Private Prisons in the United Kingdom” (1993) 21 *Int’l J. Soc. of L.* 319.

⁷⁷ D. McDonald & D. Biles, “Who Gets Locked Up? The Australian Police Custody Survey” (1991) 24 *Aust. & N.Z. J. Criminology* 190; R. Midford, “Imprisonment: The Aboriginal Experience in Western Australia” (1988) 21 *Aust. & N.Z. J. Criminology* 168; and P. Moyle, “Privatization of Prisons in New South Wales and Queensland: A Review of Some Key Developments in Australia” (1993) 32 *Howard J. Crim. Just.* 231.

⁷⁸ J. Gandy & L. Hurl, “Private Sector Involvement in Prison Industries: Options and Issues,” 29 *Can. J. Criminology* 185; D. Girard, “Firms to bid on offender centres” *The Toronto Star* (6 February 1998) A4; J. Armstrong, “Penetang, Lindsay chosen for mega-jails” (9 October 1997) *The Toronto Star* A8; and J.R. Finlay, “Town’s lust to host jails is desperate” *The Toronto Star* (20 August 1997) A23.

others. Restorative justice can enliven rights as active cultural accomplishments when rights talk cascades down from law into community justice.⁷⁹

Feminist analysis has catalogued many of the failures of the criminal justice system, but it is not enough to identify the false promises of universality, equality, and effectiveness. The insidious promise of deterrence as a promoter of safety and retribution as the only means to public acknowledgement of a wrong must also be exposed, both in theory and in practice, particularly if the early goal of transforming abusive institutions is to have any chance of success. New models for measuring the effectiveness of interventions are needed, as are new approaches to the harm that patriarchy does to us all. When violence is perpetrated and perpetuated, and trust is abused, there is a clear need for an intervention that provides safety and restores peace. Beyond immediate security considerations, the need for a clear and public acknowledgement of the wrong that has been done is a legitimate and indeed fundamental need of any crime victim. The ultimate false promise lies in the identification of punishment/retribution with that recognition. At the same time, those who abuse, and the communities that condone or ignore their conduct must change; the false promise that punishment will achieve that change must be more than acknowledged; and the understanding must be incorporated in new strategies. One source of new insights and new strategies is to look to other progressive movements concerned with criminal justice, such as the movement for restorative/transformational justice.

The essential destructiveness of retribution-based acknowledgement of harm is particularly clear when one considers the situation of the battered wife who wants the violence to stop but who does not wish, or cannot afford (or both), to end the relationship. The criminalization approach that has become the official norm of responses

⁷⁹ J. Braithwaite, *Restorative Justice: Assessing an Immodest Theory and a Pessimistic Theory* (Paper prepared for the course; "Restorative Justice: Theory and Practice in Criminal Law and Business Regulation," Faculty of Law, University of Toronto, 1997) [unpublished] at 76. Braithwaite's most recent research has persuaded him that the great potential of the restorative justice movement, while it has not been realized, remains a possibility; hence the "immodest theory" of how to transform the system. However, individual rights of victims, accused, and offenders can be seriously harmed in communally-based models that do not have adequate safeguards, and, are being harmed in some of the experiments; hence, the "pessimistic theory." He concludes that more and better research and models, and very careful attention to the needs of victims and the rights of the accused are needed to ensure success for, or alterations to, the restorative justice model. For a critique that suggests the idea of "restorative" justice does not go far enough—given that for many offenders there is no community to restore them to and given the realities of racism and classism—and thus the goal must be transformational justice, see R. Morris, *Penal Abolition, The Practical Choice: A Practical Manual on Penal Abolition* (Toronto: Canadian Scholars' Press, 1995).

to battering⁸⁰ pits her against her spouse in a contest that individualizes and depoliticizes spousal violence, and threatens her family in fundamental ways. An immediate threat is posed by her partner's inevitable loss of employment if the substantial prison terms called for are imposed.⁸¹ A feminist response should not be to say to this woman, "You are mistaken in your opinion of the harms that may be done to you by the criminal process. You are mistaken in choosing family integrity over the integrity of the justice system. You are mistaken in relying upon your own opinion about how to deal with your situation and not that of the police or the prosecutor or the counsellor or the expert." These are patronizing and presumptuous attitudes that also alienate women who might benefit from discussing them further and that drive women away from the resources and help they might need. For women who do not want their relationships with accused batterers to continue, similar pressures operate to prevent them from avoiding the criminal route, and preserving their privacy and some retained dignity about their personal lives (and mistakes). It is not enough to say "you shouldn't feel that way," many women do not want to admit that they are battered in an adversarial court, where all that they can expect is a form of punishment imposed on their partner. What, then, is the solution? Leaving men to batter and their partners to deal with it alone is clearly not an acceptable answer. One initiative that has potential is the Family Group Conference model, both as it was developed in New Zealand and as it has evolved elsewhere—for example in Australia and in Newfoundland and Labrador.⁸²

Instead of placing the criminal prosecution front and centre, the Family Group Conference approach uses it as a fall-back tool for the recalcitrant man who will not cooperate or who fails to honour the conditions of the alternate disposition. Instead of an accusatory adversarial contest as the first stage, if the abuser acknowledges responsibility for the assault, Family Group Conference relies on a consensus-building "circle" of all the relevant participants, the "family" of any given set of participants, whoever they might be. The wrong is acknowledged within this circle of the significant people in a couple's

⁸⁰ See discussion *supra* notes 14, 22.

⁸¹ For others, see Martin & Mosher, *supra* note 22.

⁸² One discussion of the potential for this approach is discussed in J. Braithwaite & K. Daly, "Masculinities, Violence and Communitarian Control" in T. Newburn & E. A. Stanko, eds., *Just Boys Doing Business: Men, Masculinity and Crime* (London: Routledge, 1994) 189. The entire collection is an example of what I mean by the need for newly invigorated analyses. See also *supra* note 38 concerning the Newfoundland and Labrador experiment.

lives, and ways to heal and restore both the perpetrator and the victim are identified and implemented. The process is a true alternative, but not a panacea; there are also real problems with these responses, and significant limitations.

It is not a solution, for example, when there has not been an admission of guilt, or willingness to accept responsibility for the conduct. Although an admission is a necessary limit on the cases that are appropriate for conferencing, it has at least two risks associated with it. Because the "carrot" to encourage participation in something like a Family Group Conference is that usually the likelihood of a prison sentence will be avoided, there will be some men who participate without actually accepting responsibility. Of that group, a minority will actually be factually innocent. In either case (innocent but not willing or able to contest guilt, or guilty but rationalizing), participation as a convenience weakens the transformative potential. There are similar problems when victims participate because of community or institutional pressure, which can be substantial.

Some of these issues were considered recently by Julie Stubbs of the University of Sydney. Stubbs recognizes the political and conceptual dilemmas facing feminists who advocate reliance on the criminal justice system to protect women from violence, such as the criminal justice system's bias and differential impact on marginalized accused (and victims), and the expansion of coercive powers that has resulted from women's involvement with these reforms. However, she also assumes that women need recourse to the criminal justice system for protection, and she disagrees with the proposition that criminal justice intervention is inevitably oppressive or unjust.⁸³

She makes two important points. First, successful experiences with an "evolved" criminal justice apparatus are possible, and second, serious problems exist in alternative models such as Family Group Conferences. The "successes" to which Stubbs points are the experience of four remote First Nations communities in Northern Ontario with policing, particularly around domestic violence, and experiences in Hamilton, New Zealand, with an integrated police/community response to wife assault. She uses these two examples to illustrate the flaw in

⁸³ "Communitarian' Conferencing and Violence Against Women: A Cautionary Note" in Valverde *et al.*, eds., *supra* note 37, 260. She is critiquing M.H. Rutenberg, "A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy" (1994) 2 *Am. U.J. Gender & L.* 171; and L. Snider, *supra* note 14. A more fully developed critique of all of the "restorative" justice claims has been developed by John Braithwaite, the Australian criminologist whose theoretical work on republican criminology has been so important in the development of justice alternatives: see *Reintegration*, *supra* note 18.

making sweeping claims against criminal justice intervention. She continues her inquiry by critiquing the New Zealand Family Group Conference as an inappropriate alternative to a criminalization strategy or, at least, a most problematic one and examines the results of the evaluations of Family Group Conferences conducted by Gabrielle Maxwell and Allison Morris.⁸⁴

A feminist critique of this type of alternative is of great value, as is a feminist response to it. Stubbs raises valid concerns. She identifies correctly the risk that a victim's participation in a conference may not be truly voluntary—particularly a concern in small, closed communities. She weakens her critique, however, by claiming that it is not clear on what basis advocates assert that community conferences will be less traumatic for women than court. A question like this fails to address the real issues with involuntary participation in any process—criminal prosecutions, mediations or Family Group Conferences. For a woman who would find the power differentials in a mediation-style forum difficult, court would be a nightmare—and is. For most people, and that definitely includes victims of wife abuse, court is tremendously traumatic. It is in part that trauma that sustains and nourishes victims' rights claims and supports.⁸⁵ A serious problem in a related vein flows from the fact that it is too easy to underestimate how traumatic a litigated resolution to a legally constructed issue really is, and that it is so for all witnesses and complainants. Her last point is that it is not clear that women would prefer the Family Group Conference to court. She cites her own research that identifies women as needing the support of a skilled advocate and the anonymity of court in order to proceed. The issue of anonymity is undoubtedly the case for some (who, nonetheless, do not have any options to compare with), but is definitely not true for all. Moreover, assistance of an advocate is helpful in any process and should be a part of all Family Group Conferences (as they are in Newfoundland and Labrador). Finally, Stubbs's critical concern about the reliance of this strategy on the police misses the point that she herself makes about the continued necessity of reliance on the criminal justice system. Surely the involvement of the police, inevitable if one changes nothing in the process except to offer more support (one of the options she indirectly supports) cannot be *worse* in a community-based model. In fact, it is one of the strengths of Family Group Conferences and one of the ways it may claim a place out of the margins and into the

⁸⁴ *Family, Victims and Culture: Youth Justice in New Zealand* (Wellington, N.Z.: Social Policy Agency and Institute of Criminology: Victoria University of Wellington, 1993).

⁸⁵ See *supra* notes 7, 28, and accompanying text.

centre where it may successfully challenge retributive models.

Ultimately, what is important is that the process that developed initiatives like Family Group Conferencing as an alternate response to wife abuse, as well as other initiatives such as the ones Stubbs describes, point a way for feminist theorists and activists to find a way out of the retribution trap. Initiatives like these, it seems to me, widen the circle of theory and alliances in important ways. Alliances with penal abolitionists, defence lawyers, and associations concerned with wrongful convictions, and with the peacekeepers of Aboriginal societies can point to new directions for activism. Incorporating theories and perspectives from critical and republican criminology, critical race studies, and other progressive schools will help to ensure fewer unintended consequences.