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Women's Voices and the Criminal Law

A STRIKING ASPECT of public debates in late twentieth-century Canada is concern about the criminal justice system. While tension between "law and order" and "restraint" is not new, women's voices are increasingly a feature of the political context in which decisions are made about the values promoted through this system. The focus of this article is the increasing influence of women on, and corresponding responsibility for, criminal law.

The concept of "restraint" has been a dominant one in criminal law reform literature of the last several decades, albeit one that is losing its power in the face of public concerns about security and retribution. It has been a commonplace to say that criminal law should reflect only the most fundamental values of our society. Thus, in one of its earliest reports, the Law Reform Commission wrote of "our" values, suggesting consensus.[1] In 1982, the federal government, under the leadership of then Minister of Justice, Jean Chrétien, called for a re-examination of the substantive content of the criminal law, based on the concept of restraint. Thus, criminal law should be limited to those acts which seriously threaten fundamental values.[2]

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[1]Law Reform Commission of Canada, *Our Criminal Law* (Ottawa: Minister of Supply and Services, 1976) 5.

[2]*The Criminal Law in Canadian Society* (Government of Canada, 1982) 41–51. Calls for restraint by criminal law reformers is by no means new. In 1764, Cesar Beccaria published his famous *Treatise on Crimes and Punishments*, a systematic attack on the tyranny, absurdities, cruelty and abuses of the criminal law of the Europe of his day, but it is easy to find modern examples of many of his concerns: the problems of racism mirror his concerns about arbitrary detention, the dreadful conditions in prisons, the fear of crime. In particular he pleaded for restraint in criminal law, based on the idea that we should give up the least amount of liberty that we have to, to enjoy the remainder in security.

The idea of limiting criminal law to the protection of fundamental values makes sense in a homogeneous society with a high degree of consensus about those values. Canadian criminal law, however, faces significant challenges in articulating what is fundamental. These challenges arise from the transplantation of criminal law from the English common law to a place with indigenous Aboriginal legal systems, a history of immigration of large numbers of English- and French-speaking peoples, and a population drawn from an increasingly diverse mix of racial and cultural backgrounds. The resulting complexity has been compounded in recent years by the struggle for equality.[3] How do we decide what is the minimal content of criminal law in a world of diversity?

Some of the pressures for reform have to do with expanding the scope of criminal law in an effort to recognise the criminal forms which inequality takes. Examples relating to hate crimes and sexual assault are discussed below. It is difficult however to argue for expansion of the criminal law without appearing to be an enemy of restraint, tolerant of state intrusions on liberty, and indifferent to the fairness of trials at the same time. The question that I ask in this paper, therefore, is: can we have both equality and restraint in the use of the criminal law in a heterogeneous society?

There are good reasons for restraint. To inflict punishment is the most blatant exercise of coercive power by government; it should not be done without strong community support for the values justifying that punishment, particularly since the criminal law is more likely to mirror the forms that inequality takes than to challenge them. However, in my experience, appeals to limit crimes to those matters which we can agree are fundamental are often used to marginalize certain ideas of what should be criminalized in a way that treats as insignificant, or even non-existent, the harms experienced by less powerful groups in society. Those who cannot hope to find consensual recognition of the serious harms that they experience will never see their concerns reflected in the criminal law. Such groups may not themselves benefit from restraint as they can experience both an inegalitarian restraint and an inegalitarian lack of restraint.

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[3]See John McInnes and Christine Boyle, "Judging Sexual Assault Law Against a Standard of Equality," *University of British Columbia Law Review* (1995): 341, 346.

A dramatic example of a lack of restraint can be found in the criminalization of the potlatch ceremony, the public distribution of gifts which was a central part of the culture of many West Coast First Nations. The federal Parliament had the political power to make that ceremony an offence contrary to the Indian Act from 1885 to 1951, but that of course did not make it the right thing to do. In these societies, prestige was claimed through the giving away of wealth in a measure befitting the status desired by the individual. The idea of accumulating wealth for any purpose except to give would have been unthinkable. Nevertheless, in late nineteenth-century Canada, there were grave concerns about what were perceived to be the harmful effects of the potlatch, in terms of health, the encouragement of prostitution as a source of funds, and its interference with education. Around the time Sir John A. MacDonald announced an intention to suppress the potlatch, one observer referred to it as demonstrating an insane exuberance of generosity. There was by no means consensus among First Nations people about the ceremony, but certainly many felt a keen sense of injustice at its criminalization. Nootka chiefs, for example, pointed out that no law prevented Whites from hosting dinners, giving gifts or attending dances, and it was noticed that Christmas had not been criminalized.[4]

Conversely, it is possible that the criminal law could fail to address serious harms in an inegalitarian way, certain groups enjoying such a low status that the harms which contribute to that status are tolerated by law. The idea of crime as a function of poverty and disadvantage may lead us to neglect the crimes of privilege, the criminal form that inequality takes. We may tend to focus more on the misdeeds of the "disorderly and parasitic poor" rather than the "disorderly and parasitic rich."[5]

A dramatic example of inegalitarian restraint can be found in the fact that, until 1983, it was not a crime for husbands to rape their wives.[6] Similarly, it might be noticed from a Muslim perspective,

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[4]See generally, Douglas Cole and Ira Chaikin, *An Iron Hand Upon the People: The Law Against the Potlatch on the Northwest Coast* (Vancouver: Douglas & McIntyre, 1990), and Daisy (My-yah-nelth) Sewid-Smith, *Prosecution or Persecution* (Nu-Yum-Baleess Society, 1979).

[5]Douglas Hay et al., *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (London: Allen Lane, 1975) 54–55.

[6]*Criminal Code*, R.S.C. 1985, c.C-46, s.278.

that far from criminalizing the drinking of alcohol, Canadian law sees extreme intoxication as a defence.[7]

So, what if we question the notion of "our" values as claiming consensus for what are simply the most powerful political views? What if we are alert to and reject attempts to use the concept of restraint intermittently to shape a set of inegalitarian criminal norms? We are left with a market-place of ideas of what should be criminalized. Within a society lacking a single cultural identity, views will differ on what is fundamental. Ideas of the proper focus of the criminal law will change over time.

The problem with a market-place image is that in practice the notion of ideas competing for reflection in criminal norms is no more likely than the idea of consensus to attach significance to the harms experienced by marginalized groups. Competitive success in the political market-place can turn on many factors, the most obvious being the head-counting of our voting system and the constraints of our party political system. I have suggested elsewhere that it is possible to turn to the *Canadian Charter of Rights and Freedoms* to reduce concerns about cultural arbitrariness in criminal norms,[8] and much feminist engagement with criminal law has used the idea of equality in an attempt to set some sort of external standard to which the law must conform.[9]

I do not, however, want to reach to the *Charter* to find standards for what we do and do not criminalize. I am going to reach instead to a non-legal concept that is emerging in public debates about taxing and public spending in order to suggest that we need some equitable balance in what we do and do not criminalize. We are increasingly seeing references to inter-generational equity in the allocation of state funds, for instance, in the claim that it would be wrong to borrow from younger generations to pay the pensions of older generations. We spend a good deal of money paying for courts to resolve disputes between heterosexual couples, while we do not even offer same-sex couples a state registration service for their relationships. In my view our financial support for motor vehicles is out of balance with our support for

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[7]R. v. Daviault [1994] 3 S.C.R. 63.

[8]"The Role of Equality in Criminal Law," *Saskatchewan Law Review* 58 (1994): 203.

[9]See for example the Women's Legal Education and Action Fund, *Equality and the Charter: Ten Years of Feminist Advocacy Before the Supreme Court of Canada* (Toronto: Emond Montgomery, 1996).

public transport. So far analysis of overall equity in taxing and spending is embryonic at best, but the idea, I think, reflects some kind of public unease where the allocation of public funds is tilted too much toward the interests of certain classes of people. To illustrate this notion I will compare John and Mary.

John and Mary pay the same amount of income tax. But John is a heterosexual driver who smokes, abuses his wife, has six children and wastes water. Mary is a peaceful and celibate bicycle rider who eats healthy local food, volunteers as a Big Sister, and uses a composting toilet.

Similarly we can bring an intuitive sense of balance to our thinking about what is criminalized and what defences are available. Instead of considering criminal law as applying to demonized "others" rather than ourselves, it is useful to remind ourselves that the categories of Victims and Criminals are not water-tight and to consider that we may all have to tolerate some intrusion on our freedom that we do not consider justified. Mary may see a lack of restraint in the State forbidding her to smoke marijuana. John may have the same perspective on the gun-control laws. If John is subject to minimal gun-control laws, if the State is sympathetic to wife abuse (through reluctance to enforce the law, or by allowing the defences of provocation and extreme intoxication), and if there are no effective crimes of pollution to stop him putting pesticides in Mary's water supply, then concerns arise about imbalance in the criminal law. Groups start to organize around the particular imbalances that are of concern to them. Mary will join with others to influence the formation of criminal law through Parliament or the courts or both, a phenomenon that is very noticeable in late twentieth-century Canada. Women and feminist organizations have been outspoken in recent years, drawing attention in particular to the lack of importance placed on physical security as compared to property interests.

While there is probably most scope for activism around issues of enforcement and sentencing, there is what may be surprising room for activism around what should and should not be criminal. There may be some rough consensus about the core values of criminal law, but this breaks down very quickly. It is a crime to kill, but should euthanasia or killing a foetus be a crime? It is a crime to hit, but is hitting your children okay? It is a crime to steal, but should we adopt the values of some First Nations who have a

broader concept of borrowing as distinct from stealing? What role should necessity play in deciding who is innocent? I believe that in Islam law books are not subject to the law of theft, since it is assumed that the contents of the book are sought rather than the physical entity—quite a contrast to our copyright laws![10] Examples of contested criminal norms, of disputes about what should be seen as criminal behaviour, are easy to find. In this century they often have had to do with sex, in the sense of sexuality and in the sense of gender: homosexual behaviour, pornography, prostitution, abortion, midwifery, and now female circumcision and whether transmission of HIV should be a crime. Some may consider the debate over gun-control laws to fall into the category of debates over sex too.

Less visible to the general public are the on-going debates about the meaning of criminal concepts and whether they reflect respect for our sexual and cultural diversity. For example, if you kill someone in a rage, you are guilty of the lesser offence of manslaughter rather than murder if the "ordinary person" could be so enraged. I have argued that the law understands what is "ordinarily" enraging in a way that privileges the anger of certain groups over others. I wonder whether, if women started to kill pornographers, would judges instruct jurors in such a way as to facilitate their understanding of anger as ordinary rather than the creation and use of pornography as ordinary? Is homicidal rage in response to racism as ordinary as rage at a wife's infidelity?[11]

Even if we focus alone on inter-gender equity in the formation of criminal norms, there are numerous issues I could address. I have to be selective so I have decided to tell the story of the increasing influence of women in particular by looking at two debates, two flashpoints where I believe there was doubt about the overall equity of the criminal law. One relates to hate propaganda, the other to the boundaries of sexual assault. Women's voices were not heard in the debate about hate propaganda until twenty years after the legislation was passed. In contrast, women played a very significant role in framing recent sexual assault legislation.

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[10]Israel Drapkin, *Crime and Punishment in the Ancient World* (Lexington, MA: Lexington Books, 1989) 278.

[11]See Isabel Grant, Dorothy Chunn and Christine Boyle, *The Law of Homicide* (Carswell, 1994) 6.2.

Hate Propaganda

I want to take you back to 1965 and the Report of the Special Committee on Hate Propaganda in Canada, chaired by Maxwell Cohen.[12] The problem of inciting hatred against particular groups was not a new one in the sixties in Canada, and there had been public concern about it both before and after World War II. It seemed to intensify in the early sixties, however, emanating from Toronto, where, for example, thousands of hate pamphlets were dropped from downtown buildings to young people waiting to see the Beatles at Maple Leaf Gardens on 17 August 1965.[13] It was fed by and large from sources in the United States, and spread to other provinces. For example, in May 1964, pamphlets were sent from the National White Americans Party to people in Dartmouth, Musquodobit Harbour and Halifax. This was an organization that promoted the return of "negroes" to Africa, the execution of Communist Jews, and the sterilization of all Jews. The Committee was of the view that while there was not a crisis, there was a serious problem, and that "men of goodwill should be repelled by these malicious and ignorant pretensions and that Canadian Jews, remembering the debasement of all Judaeo-Christian values by Nazi policy, should be especially sensitive to these abuses of freedom that a democratic society must possess and protect."[14]

The Committee was comprised of, and heard from in its deliberations, men of goodwill who reflected the establishment of the day. Maxwell Cohen himself was a respected Dean of McGill University and an internationally renowned and passionate defender of human rights. Two youngish associate professors were also members: Pierre Trudeau from the University of Montreal, and Mark MacGuigan from the University of Toronto. They heard from the Postmaster General, the head of the CBC and the RCMP, among others.[15] It is from the Committee's recommendations that our present hate propaganda crimes, to be found in sections 318 and 319 of the *Criminal Code*, spring. It is a crime to advocate or promote genocide against an "identifiable group." It is a crime to incite hatred of an identifiable group where this is likely to lead to a breach of the

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[12] *Report to the Minister of Justice of the Special Committee on Hate Propaganda in Canada* (Queen's Printer, 1966).

[13] *Hate Propoganda* 11.

[14] *Hate Propoganda* 59.

[15] *Hate Propoganda* 2.

peace. It is a crime wilfully to promote hatred against an identifiable group other than in private conversation. So the concept of identifiable group is pivotal. It means "any section of the public distinguished by colour, race, religion or ethnic origin."

The notable omission is of course "sex". The Committee did not include the problem of hate propaganda directed at women, and indeed it would have been surprising if the more current linkage between, for instance, pornography and hatred, had been made in the mid-sixties. It cannot be assumed, however, that even if the linkage had been made and the Committee had had the benefit, for instance, of submissions by such organizations as the National Association of Women and the Law and the Women's Legal Education and Action Fund, that sex would necessarily have been included. The debate continues over whether criminalizing the incitement of hatred on the basis of sex would or would not be used to benefit women.

This more current issue mirrors to some extent the public debate that took place at the time over whether hate propaganda should be criminalized. Generally proponents of this step recognized the "power of words to maim" as the Committee itself said, and the legitimacy of taking strong measures to protect vulnerable minorities, especially in the wake of the horrors of World War II. Here is a taste of the debate. Pat O'Neal, of the Vancouver Labour Council, supported the legislation. "If we fail to speak out against the hate mongers, we encourage them to even greater effects."[16] Paul Goldstein, of the Association of Survivors of Nazi Oppression, said that the "outlawing of hate propaganda is just as necessary as outlawing murder, blackmail, or other offences."[17] Stephen Cohen, a law student at McGill University, felt that criminalization had a number of social benefits, including the reassurance of "minority groups that they are backed up by the majority of the society in which they live."[18] Mark MacGuigan, by now a Liberal MP, supported the legislation in the Commons in 1970. Lincoln Alexander, a Conservative MP, later to become, I believe, the first Black Lieutenant

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[16]"Anti-Hate Statute Opposed," *Province* [Vancouver] 30 May 1964: 9.
[17]Carmen Cumming, "Anti-Hate Bill Hits Snag," *Vancouver Sun* 10 May 1969: 12.
[18]Stephen Cohen, "Hate Propaganda—The Amendments to the Criminal Code," *McGill Law Journal* 17 (1970): 785.

Governor of Ontario, told the Commons how he had endured spite, hatred and humiliation growing up as a Black child in Canada.[19]

On the other hand, the voices of restraint stressed that the law would infringe on freedom of expression and that criminalizing the expression of any opinions was too dangerous in a democratic society. The Canadian Civil Liberties Association was afraid that the law would be used against disadvantaged people, such as Indian people blaming the "white man" for their poverty.[20] A leading legal academic, Harry Arthurs, identifying himself as Jewish, feared increased publicity and a platform for hatemongers who, if driven underground, would develop the "allure of the illicit and the camaraderie of co-conspirators." He viewed the legislation as a precedent for repression and felt that State efforts to control the dissemination of harmful materials were doomed to be ineffective, citing prohibition, narcotics, and censorship of "various manifestations of sexuality."[21] John Diefenbaker opposed the law as an assault on freedom.[22] The Reverend Leslie K. Tarr of the Central Baptist Seminary, Toronto, felt it went beyond the "proper sphere of criminal law."[23]

What is striking to modern eyes is the absence of women's voices in this public debate about criminalization. Women do not appear until about twenty years later when the legislation, largely unused, was challenged as contrary to the new *Canadian Charter of Rights and Freedoms*. This was in the famous case of *R. v. Keegstra*.[24] In Eckville, Alberta, James Keegstra taught his grade 9 and 12 students social theories based on hatred of Jewish people and Judaism. He was charged with wilfully promoting hatred against an identifiable group. He argued unsuccessfully before the Supreme Court of Canada that the offence unconstitutionally infringed his right to freedom of speech, the Court splitting along the same lines

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[19]*House of Commons Debates*, 2nd Session, 28th Parliament, 7 April 1970: 5594–96, 5612.

[20]Excerpts from the Canadian Liberties Association Submissions on Hate Literature Bill, "A Plan to Stifle Hate without the Law," *Globe and Mail* 24 April 1969: 7.

[21]Harry Arthurs, "The Plea for Defeating Racists by Free Speech," *Globe and Mail* 24 April 1969: 7.

[22]*House of Commons Debates*, 2nd Session, 28th Parliament, 9 April 1970: 5680–85.

[23]Leslie K. Tarr, "Why the Hate Literature Law Shouldn't be Adopted," *Globe and Mail* 16 April 1969: 7.

[24](1990), 1 C.R. (4th) 129.

as the earlier debate. The majority felt that hate propaganda causes very real harm: it encourages division, hostility and abuse and may produce discrimination and even violence. In passing this law, Parliament was acting in accordance with its international commitment to prohibit hate propaganda, and was showing its commitment to a multicultural vision of our nation. It is at this stage that women's voices are heard for the first time in the debate over whether hate speech should be a crime. I mean this on two levels.

(1) By 1990 there were three women on the Supreme Court of Canada. Two, Wilson and L'Heureux-Dubé JJ., voted with the majority. One, McLachlin J., dissented. All three judges are publicly associated with making criminal law more consistent with equality, but they disagreed. Is the rejection of hate speech a fundamental value in Canada? Is it one of "our" values? I do not think that we can say that it is, but I do not think that means that it is illegitimate to use the criminal law to reflect the diverse ways in which we can sustain serious harm in a society that still suffers from racial, cultural and religious hierarchies.

(2) By this time, partly in response to the *Charter*, women's groups had come into existence with, broadly speaking and among many other things, a feminist criminal law reform agenda. One of them, the Women's Legal Education and Action Fund (LEAF), intervened in *Keegstra* to support the constitutionality of the hate propaganda offences. LEAF argued that the issue of whether the State can criminalize hate speech is as much an issue of equality as of expression, since the promotion of group hatred erodes the equality rights of the target group; that hate speech is the practice of inequality similar to sexual harassment and other discriminatory acts which take a verbal form, such as signs reading "Whites Only."[25] This argument foreshadowed the attention to equality that would later be included in the Preamble to Bill C-49, reforming the law of sexual assault.[26] The constitutional guarantee of equality is not just a sword to be used to attack legislation. It is also a shield. When the *Charter* is used to attack crimes which promote inequality, using for example such concepts as expression and fundamental

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[25] *Equality and the Charter, Ten Years of Feminist Advocacy Before the Supreme Court of Canada*, in *Hate Propoganda* 136–45.

[26] *An Act to Amend the Criminal Code (Sexual Assault)*, S.C. 1992, c.38.

justice, then equality can be used as constitutional support for such initiatives. The jury is still out on whether equality will be an effective shield and on whether it will be taken seriously as a constitutional right co-existing with other constitutional rights, but in discussing the second debate I want to show that at least Parliament has been persuaded to insist that equality inform the construction of criminal responsibility.

Bill C-49: The New Sexual Assault Law

My other example of contested criminal norms can be found in Bill C-49, the most recent reform of the criminal law of sexual assault. The story of Canada's sexual assault law has been a revolving door of progressive Parliamentary reform and judicial rejection of that reform. The latest revolution began with the case of *R. v. Seaboyer*[27] when the Supreme Court of Canada found the "rape shield" law to be unconstitutional. This was the law which, to some extent, protected sexual assault complainants from questioning about their sexual history. In 1991 Kim Campbell, then Minister of Justice and Canada's first woman in that role, quickly made a public commitment to introduce new legislation to replace the law. The process which led to the introduction of Bill C-49 was quite different to that leading to the hate propaganda laws. There was certainly a sense of a social problem that needed to be addressed, primarily the examination of the sexual history of witnesses and the defence of honest belief in consent, which allowed a person accused of sexual assault to argue that even if the victim had not consented he honestly believed that she had. But the process adopted to address such problems was unprecedented in the breadth of the consultations with women's groups and individuals knowledgeable about the reality of, and legal practices surrounding, sexual assault.[28]

In contrast to the process I can remember from the start of my interest in criminal law, when wide-ranging consultations were thought to be discussions with the police and some liberal academics, the views of an astonishing number of organizations were sought, ranging from organizations that promote the interests

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[27](1991), 7 C.R. (4th) 117 (S.C.C.).

[28]See Sheila McIntyre, "Redefining Reformism: The Consultations that Shaped Bill C-49," *Confronting Sexual Assault: A Decade of Legal and Social Change*, ed. Julian V. Roberts and Renate Mohr (Toronto: U of Toronto P, 1994).

of women in general, such as the Canadian Advisory Council on the Status of Women, to those which focus on certain intersecting experiences of inequality, such as the Native Women's Association of Canada, Prostitutes and Other Women for Equal Rights, the DisAbled Women's Network, and the National Association of Immigrant and Visible Minority Women.

Two ideas emerged from these consultations. One was that significant changes were seen as necessary in the sexual assault offences, that there was seriously harmful behaviour left unaddressed by the criminal law. The other was that close attention had to be paid to layers of disadvantage among women in framing the law. Sexual stereotypes influencing the construction of legal doctrines intersect with those based on race, national origin, disability and occupation. Examples of such stereotypes are that Black women are promiscuous, that lesbians need to be sexually awakened by male force, that girls with mental disabilities are over-sexed and uncreditworthy, and that Asian women are submissive. The first idea, that attention must be paid to the offences themselves, was reflected in Bill C-49, the second less so.

Some feminists have warned us to "avoid the siren call of law."[29] Nevertheless numerous women, knowledgeable about sexual assault, actively participated in the framing of the Bill. Did they make a difference? I think there are a number of points where their influence is apparent.

(1) The Preamble

It was unusual, if not unprecedented, for a criminal law amendment Bill to have a Preamble, which is an introduction setting out the goals of Parliament in passing the law. This was politically significant in itself, since Parliament must have seen itself as doing something likely to need defending against constitutional attack. Far from reflecting "our" values, the Bill was launched on a hostile world. The Preamble essentially adopted equality as a shield and was designed to show that Parliament had good reasons for passing the law and had taken all relevant constitutional values into account. Incidentally, the same device was to be used to protect the later legislative responses to the defence of extreme intoxication, and to the new rules requiring production of complainants' records in sexual assault cases.

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[29]Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989) 160.

This Preamble made explicit the impact of sexual assault on the lives of women and children, made the linkage to equality, and claimed to be promoting fairness to complainants as well as accused persons. It did not do what was urged by most groups consulted, that is, link sexual assault explicitly with intersecting inequalities. That linkage is very important. We do not have equal opportunity sexual assaulters. People are selected as appropriate targets for sexual abuse on the basis of vulnerability and accessibility and the likelihood that they will not be taken seriously by the legal system. Thus a First Nations woman is a good target. A child with a mental disability is a good target. The issue is whether the law mirrors such discriminatory practices or challenges them. The Preamble lays a foundation for challenge in that it says that sexual assault is a sexual equality issue. It does not state that it is a race equality or any other kind of equality issue.

(2) Consent

Nevertheless there are signs of recognition of the complexities of the way people are targeted for sexual assault in the new law on consent. The law has always been somewhat vague with respect to the meaning of consent. Its vagueness has allowed judges to incorporate their own assumptions about sexual relations in the law. Thus, in one notorious case, a judge, in acquitting a man accused of sexually assaulting a woman who had said no, said that "no can mean maybe." He did not go on to explain how maybe can mean yes.[30] I recently read a book on sex education to prepare myself for discussions with my god-daughter, Elise. A statement that appeared frequently in this book as an appropriate message for children is: "The person who says 'no' rules." There is at least one judge in Canada who could benefit from a refresher course on sexual relations.

In any event, such assumptions about sexual relations are now challenged by the new consent provisions. Parliament has listed a number of situations where consent is not obtained. Thus there is the "no means no" provision, since there is no consent where "the complainant expresses, by words or conduct, a lack of agreement to engage in the activity."[31] Unless there are judges who are still capable of deciding that "no" does not indicate a lack of

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[30]R. v. Letendre (1991), 5 C.R. (4th) 159 (B.C.S.C.).

[31]*Criminal Code*, R.S.C. c.C-46, s.273.1(2)(d).

agreement, then this should bring an end to the failure of the law to acknowledge the harm of being treated as belonging to a group whose "no" can be ignored with impunity.

(3) The Mistaken Belief in Consent Defence

The Bill made one last change to what is criminalized under the heading of sexual assault. The mistaken belief in consent defence could be said to epitomize the debate over the sexual politics of restraint in the criminal law. This aspect of the law was much criticized as defining as innocent those men who were most impervious to the wishes of others. In 1991, a Parliamentary Report called *The War Against Women* recommended that the defence be removed.[32]

The Bill did not go that far, but did make one politically significant change in that it removed the defence from persons who did not take reasonable steps, in the circumstances known to them at the time, to ascertain that the victim was consenting. Of course the scope of sexual assault will now depend on what we mean by reasonable steps, but I hope that it means that the accused will not be able to use the following arguments based on Canadian cases in the past: that he honestly believes that no means maybe or yes; that sex trade workers consent to have sex with anyone who wants to have sex with them; that a girl who has had sex with him on one occasion must be willing to have sex again; that force and terror are not inconsistent with consent; or that the passivity of a sick woman signifies consent. Women and children should no longer be at the mercy of those who think that passivity is consent and resistance is the consent of a virtuous woman. Since the law now requires that people who wish to touch others sexually take some responsibility for avoiding the serious harm of unconsensual sex, I hope that this promotes an improvement in the status of women through increased respect for sexual autonomy. I hope it also promotes a world in which women who do not make it clear that they want to have sex never have any, and that men and women who respect female sexual initiative have lots. It remains doubtful whether the law, by itself, can produce a significant shift in deep-rooted assumptions about sexual roles and accessibility. There is still a real danger that more powerful persons may persist in self-

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[32] *The First Report of the House of Commons Standing Committee on Health, Social Affairs, Seniors and the Status of Women* 44–45.

interested misconceptions about the willingness of more vulnerable persons to have sex with them.

Nevertheless this provision has been controversial. Some opponents of the Bill argued that the reasonable steps requirement places an unfair burden on those who would have sex with others. Here are some samples. Robert Wakefield of the Criminal Lawyers' Association was quoted as saying that the "legislation is trying to change society's traditional belief in the role of men as sexual initiators." "This has gone on for centuries," he said. "There's a biological imperative behind it." It "sounds innocent" to require men to take reasonable steps, but "it is contrary to centuries of accepted behaviour."[33] The Civil Liberties Association was concerned about stolen kisses and the teenager who steals them on his first date. He would be a criminal under the no means no law.[34] When I say that women were present in this debate, that includes REAL Women, who were quoted as follows: "Women must learn to take responsibility for anything they can control—alcohol consumption, not being alone with a man where protection is not available [and I don't think they meant condoms], not wearing seductive clothing in appropriate situations, etc."[35] My favourite quotes come from Brian Greenspan, president of the Criminal Lawyers' Association. "To suggest we're going to change the way people relate to one another by virtue of the criminal law is absurd." He showed a sense of the overall equity of the criminal law by saying that, as a 45-year-old male, he felt that his entire generation could technically be deemed sexual offenders.[36]

Women are not simply constructed as victims in their political interaction with the criminal law. I have focused on their agency already in speaking out to defend the constitutionality of hate propaganda offences on the basis of equality. They have fought for and achieved significant changes to sexual assault law, explicitly

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[33]Geoffrey York, "Lawyers Oppose Proposed Rape Law," *Globe and Mail* 15 May 1992: A3.

[34]Wayne Lowrie, "A Kiss Stolen on a First Date a Possible Crime, MP's Told," *Vancouver Sun* 22 May 1992: A4.

[35]Geoffrey York, "Sexual Assault Legislation Attacked," *Globe and Mail* 20 May 1992: A6.

[36]Mary Williams Walsh, "The Rape Trial on Trial in Canada: A Bill to Be Introduced Aims to Protect Alleged Victims From Defense Lawyers Intent on Discrediting Their Versions of Assaults," *Los Angeles Times* 8 Dec. 1991: A4.

grounded in equality. A similar process has taken place with respect to extreme intoxication. When the Supreme Court of Canada recognized this new defence, Parliament acted quickly in response to the concerns of women and others. It amended the *Criminal Code*, removing that defence in cases of violence, again explicitly grounding that initiative in equality. People cannot absolve themselves from criminal responsibility for harming others by consuming great amounts of alcohol or drugs.[37] As with hate propaganda, the sexual assault and intoxication laws will be subject to constitutional challenge. I have no doubt that women's organizations will actively respond to such challenges, but I want to finish with some reflections on what we are using our increasing influence with respect to criminal law to do.

Conclusion

What have women's voices added? On the whole they have helped bring to the forefront the harms of inequality, such as those flowing from hate speech or membership in a group targeted for coerced sex. But the very importance of focusing on harms otherwise neglected by the criminal law inevitably carries with it a tendency to promote use of criminal law, thus risking the charge of lack of restraint. This is a serious charge, especially when one considers who is most likely to be caught by the criminal law net. We should not consider the inequities of criminal norms in isolation from the inequities of trial procedures and punishment.

For example, the *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*[38] found that White people were less likely to be kept in prison prior to trial and less likely to be sent to prison than Black people even though they were more likely to have a criminal record and more likely to have a serious criminal record. The Report documents how corrections officials tolerate racial slurs, treat minority prisoners with contempt, and deny them services available to other prisoners.[39]

In general, prisons are still lousy places to be and are very difficult to reform. A 1996 Correctional Service Canada survey found that one in five inmates had been beaten or threatened while seven

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[37] *Criminal Code*, R.S.C. 1985, c.C-46, s.33.1.

[38] (Toronto: Queen's Printer, 1995).

[39] *Systemic Racism* 304–29.

per cent had been assaulted with a weapon. Almost half said they do not feel safe. For many, thoughts of suicide are a dominant part of life, one in five maximum-security inmates saying that they considered suicide in the preceding week. Nearly one in three were double-bunked in a cell designed for one, and twelve per cent said they lived in fear of their cellmate.[40] The correctional system has been denounced as a "lawless state" not subject to the rule of law, most recently in the report on the events in the Prison for Women in Kingston, Ontario.[41]

Nevertheless one of the most prominent voices in Canada at the moment is that of the victims of crime movement, dedicated, in my view, to increasing the risks of being a victim of law enforcement in order to reduce the risks of being a victim of crime. The strange bedfellows argument appears in the criticism of feminists as being in bed with this punitive movement. On one level that does not concern me. We are complex human beings capable of holding opinions in tension with each other all the time. As the American scholar Ann Scales put it: "You are a strange bedfellow when you sleep alone."[42] On another level I do ask whether equality can ever truly be promoted by a system that, however transformed it might eventually be in the way it views women, still resorts to the barbarity of imprisonment, depersonalization and stigmatization, as the means by which the harms experienced by women and overlapping disadvantaged groups can be acknowledged.

I do not at all suggest that women have not spoken out against the use of a repressive system which tends to individualize harmful behaviour and individualize it in discriminatory ways. Understandings of crime and punishment as brutalizing both victims and criminals, very much in tune with current thinking about restorative justice, can be found in the feminist literature,[43] although the media may not capture the full complexities of feminist engagement with criminal law. But increasing influence brings increasing responsibility to reflect on the pain of punishment as

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[40]As described by Kirk Makin, "Prison Haunted by Fear of Violence," *Globe and Mail* 7 June 1996: A6.

[41]*Commission of Inquiry into Certain Events at the Prison for Women in Kingston* (Ottawa: Public Works & Government Services Canada, 1996) 180.

[42]"Feminist Legal Method: Not So Scary," *UCLA Women's Law Journal* 2 (1992): 9.

[43]See for example Patricia File, ed., *Women and Criminal Justice* (National Association of Women and the Law, 1987).

well as the pain of crime. Critics of criminal law reform which is directed at the harms experienced by low status groups in society put a disproportionate political and constitutional burden on reformers to justify use of the criminal law, but women should not relinquish their growing influence over the values reflected in that law. At the same time strong voices are needed to oppose any trend that would depreciate the right to a fair trial, and to show concern about the rates and conditions of imprisonment. Now is the time to speak out for restraint in the use of the criminal law, but it must be a new restraint, one informed by the arbitrariness, pain and indignity of punishment as well as the diverse harms experienced by all groups in society.