Equality Without
Why Feminists Oppose the

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Cet article donne une vue d'ensemble sur les théories féministes autour de l'égalité et affirme que les réformes du ministère de la Justice depuis les cinq dernières années ont des implications négatives sur les balises de la démocratie et donc sur les droits à l'égalité des femmes.

This article will firstly provide an overview of feminist theorizing around equality. It will secondly turn to the case law decided pursuant to the equality guarantees (sections 15 and 28) of the *Canadian Charter of Rights and Freedoms* in an effort to extract the broad principles and analytic approaches used by the courts in Canada, particularly where they are congruent with feminist approaches. Thirdly, the paper will summarize the changes in criminal procedure brought about by two bills that have already become law and the kinds of changes we might see in the third stage. Fourthly and finally, the paper will illustrate the practical and symbolic implications of these reforms for women, by reference to equality rights and democratic values.

Feminist approaches to equality analysis

The women's movement in Canada was responsible for the political campaign that resulted in the inclusion of s.28 in the *Canadian Charter of Rights and Freedoms* in 1982 (Hosek). The women's movement and its lawyers were also responsible for much of the specific language that constituted the final drafts of both ss.15 and 28, as well as the *facta* in numerous legal challenges fleshing out the meaning of these sections (LEAF).

The question is whether a law contributes to women's subordination, in light of its origins, the social and economic effects, and its meaning for women's lives.

Feminist conceptions of equality theory, and specifically s.15, are grounded in feminist methods of analysis. Feminist methodology is attentive to context, which includes both the immediate context of the dispute at hand as well as the larger context in which it is situated. As applied to law, this method relies upon historical origins of laws and practices, the interests and values furthered and submerged by the law or practice, the specific context of women's lives, economically, politically, and socially, and the impact upon women, both quantitatively and qualitatively.

Formal equality, as both a principle and a tool of analysis, is premised upon that idea that likes should be treated alike. It has almost never been applied to women's benefit because women have frequently been declared "different" in a "relevant" way from men, such that no violation of the principle could be detected (see, for example, *R.* v. *Bliss*). Catharine MacKinnon calls it the "sameness/difference" approach and argues that it is deeply problematic for women: it uses men as the standard for assessment of equal treatment, it fails to raise critical questions about the nature/source of "difference," it fails to account for inequalities that have been socially created, it masks inequality through a principle of "gender neutrality," and it contains no vision of substantive equality (32).

MacKinnon has convinced many Canadian feminist lawyers that the equality issue is not about difference, but rather about dominance. She argues that the essential question is whether a law or practice contributes to women's subordination, in light of its historical origins, the social and economic effects, and its meaning for women's lives. We therefore seek an interpretation of s.15 that would produce "substantive equality," that is, a society in which men and women experience equal benefit of the law, in terms of the "good" produced by our social, economic, and political order, as well as experiencing their fair share and no more of its "bad" effects. To add to the complexity, Katherine De Jong argues:

> Since change is a dynamic process and "equal" is a relative term, the "meaning" of sections 15 and 28 will be determined through the process of interpretation in specific situations. Attempts to formulate all-inclusive, static definitions of the meaning (content) of "equal" are irrelevant and doomed to failure. Thus, "equality rights" are not an end in themselves, but are a means to an end; they are a legal tool which will result in substantive equality between women and men. (1985a, 1.3)

In pursuing this idea about equality analysis as a means to an end, Salina Shrofel notes that there are three ways in which legislation discriminates against women: through overt or facial discrimination created by sex-specific laws,

through ignoring the disparate impact legislation may have on women given their experience of extra legal economic, social, and political inequalities, and through discriminatory implementation (by judges, administrators, police, etc.). She criticizes the Saskatchewan government for the narrow vision it displayed in its statute audit review of all of its legislation for compliance with ss.15 and 28 of the *Charter*: the review simply eliminated direct discrimination by substituting gender-neutral language. Shrofel points out that if an adverse impact analysis is not performed, one form of discrimination may simply be replaced by another. In fact, De Jong argues that the deployment of "gender neutrality" can be an insidious form of discrimination: "If a law genuinely *is* neutral, then by definition it must make no choices, draw no lines, *do* nothing. Neutral laws embody political decisions to take no action to alter existing power structures" (1985b, 130).

Given the goal of substantive equality and the forms of discrimination described above, an example may illustrate why one theory or model of equality is unlikely to be helpful in all situations. For example, a formal equality theory was used to challenge the earlier *Criminal Code* offence of vagrancy because it used language that confined the criminal offence to women who worked as prostitutes (*R.* v. *Lavoie*; *R.* v. *Patterson*). However, a disparate impact discrimination argument was used to argue for further revision of the later gender-neutral offence so as to ensure that women were not bearing alone the huge cost of criminalizing soliciting (Canadian Advisory Council on the Status of Women).

Most recently, while the new offence now clearly includes the behaviour of customers who solicit, there is abundant evidence to suggest that although women working as prostitutes comprise four per cent of those involved in sex for money exchanges, in most jurisdictions, women are the overwhelming majority of those who are "detected" committing the offence of soliciting and who are therefore arrested and charged (sometimes at a rate of 75 per cent to 25 per cent) (Shaver). What is unclear is the exact "cause" of this pattern: structural inequality is implicated in producing women whose livelihood depends on commodifying their sexuality; the overrepresentation of racialized women in prostitution, and particularly street prostitution, point to colonization and racism as significant causes; familial male sexual violence against children and women also has a role in shaping these patterns; the law enforcement method used (the "decoy" method) skews the arrests, as must racism; it seems likely that prevalent social beliefs about women's sexuality and prostitutes in particular influence the implementation of the decoy method; and finally, by focusing on "solicitation" as the key element of the crime, it may be that even this definition is not "neutral" in impact. Thus, the social history of prostitution and the history of its legal treatment, as well as broader patterns of inequality tell us a great deal about the underlying values and interests that continue to animate a law.

As the foregoing description makes clear, all three tools of analysis may be critical to creating an analysis that moves us towards substantive equality for women. It is for this reason that, for example, Christine Boyle proposes that if we truly wanted to eliminate the practice of selling sex for money, and to relieve poor women of the unequal burden of law enforcement, police control, and the costs associated with criminal conviction and sentence, we should target and criminalize only the behaviour of the customer. She argues that this focus on the behaviour of (male) customers is appropriate because we are otherwise unable to ensure that the criminal law punishes both women and men equally due to women's economic and sexual subordination, the biases embedded in policing, and given women's lack of input in determining what actions are defined as "criminal." Finally, if one doubts that criminalizing men will effectively eliminate prostitution, then nothing less than full decriminalization will move us toward substantive equality for women.

Feminists such as Diana Majury and Margrit Eichler have sketched out broad approaches to s.15 and to anti-discrimination. Thus, Majury argues that equality claims must first be rendered concrete rather than abstract by identifying the full context for the alleged discrimination or inequality:

> A complaint or challenge must be examined in the general context of the history of oppression experienced by the group to which the person(s) before the court belongs.

"Equality rights are not an end in themselves, but are a means to an end; they are a legal tool which will result in substantive equality between women and men."

SECTIONS FROM THE CHARTER

The Charter of Rights and Freedom
Part I of the Constitution Act, 1982
Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms
1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms
2. Everyone has the following fundamental freedoms:
(a) freedom of conscience and religion;
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(c) freedom of peaceful assembly; and
(d) freedom of association.

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

Equality Rights
15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

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

The complete text of the Canadian Charter of Rights and Freedoms is available from the Department of Justice website at: http://canada.justice.gc.ca/Loireg/charte/const_en.html.

> The social, economic, and legal inequalities currently faced by that group are additional and important pieces of the general context. The historical and current practices of the respondent and the history of the rule or practice being challenged also need to be examined. The specific context includes the historical and current social and economic realities of the person(s) making the complaint. (417)

Majury argues that, second, when assessing the impact of a law, an equality analysis must presume inequality and disadvantage, rather than require that women "prove it" over and over (see Martin 1993).

Eichler has developed specific indicia of inequality that she uses to argue for an interpretive approach to s.15 that requires minimizing the degree of inequality experienced by different groups. Her indicia are likelihood of survival, assigned human worth, control over property, control over valued goods and services, control over working conditions, control over knowledge and information, control over political processes, control over symbolic representation, control over one's body, control over daily lifestyle, control over reproductive processes, and symmetry or asymmetry in affective relationships. She suggests that while we cannot immediately and effectively "equalize" all in society, policy and legal choices can be pursued that will promote what she calls "minimal stratification": the choice that will reduce disparities among groups on a specific indicia of inequality, as well as lead to greater equalization in terms of the groups' placement across the range of indicia of inequality.

The significant aspects of Eichler's approach are that it permits us to think about the move towards equality in a more complicated way, acknowledging that specific groups of women may experience some benefits over men arising from their sex or gender (e.g., longevity), their race, or class, but yet insisting that these measures be placed within the larger context of the other benefits and burdens placed on each group. Furthermore, this approach asks us to consider the various ways, not simply economic or abstractly "social," in which power is exercised in this society.

Because the goods and ills produced and distributed through our current arrangements are built upon not only gender relations but upon the practices of colonization and imperialism, western liberal democracy, and a capitalist economy, any efforts to move towards "substantive equality" must also take these additional dimensions into account. Nitya Iyer (formerly Duclos) has significantly enriched a feminist understanding of equality through her analysis of human rights case law in Canada. Her research maps the ways in which anti-discrimination discourses implicitly use the white male as "norm" and identify inequalities only to the extent that they can be explained by reference to one "deviation" from the "norm." Thus, a racialized woman claiming race and sex discrimination must show that she was discriminated against because of

her race or her sex, not both: she must show either that a racialized man would not have been so treated, or that a white woman would not have experienced the discrimination. Otherwise, the "difference" is located in her, and she has no legal remedy. Iyer argues instead for an appreciation of the complexity of intersecting oppressions, for new constructions of inequalities such as racist sexual harassment and sexist racial harassment, and an approach to discrimination that looks at the multiplicity of characteristics possessed by the individuals involved, the relationship between them and the conduct arising out of it, and the larger institutional and social context in which that relationship is located. This approach, she argues, may allow us to see discriminatory conduct not as "caused" by the complainant's deviation from some norm but rather as arising out of the perspectives and structures of the dominant group.

Valerie Palmer, "Aerial," oil on linen, 42" x 52", 1993.
Courtesy of Nancy Poole's Studio, Toronto, Ontario. Photo: Tom Moore

Sherene Razack (1991) has also developed a more complex understanding of inequality by demonstrating that the category "woman" is of limited theoretical utility in deconstructing oppressions. Razack suggests first that when situating equality claims, including those of white women, we must include systemic racism as part of the context informing those claims, and that we must identify the locations and experiences of those differentially affected by racism and "disabilityism." Razack argues further that we need to problematize "whiteness" and to explicate the ways in which white women benefit from white supremacy in order to confront and change systemic racism. Her vision of an equality analysis therefore asks us first to situate ourselves in any analysis, in order to move beyond relations of dominance and positions of superiority, and second to identify our privileges and penalties (Razack 1998a).

Dianne Pothier has written on the law's construction of physical disability and has argued for several shifts in equality analysis that are necessary in order to deconstruct "disability." She urges recognition that there are many ways to do certain tasks and that some of the barriers for people with disabilities are others' discomfort with new or different ways of doing a task. She suggests that new standards are needed since it is neither obvious nor just that people with disabilities be judged by able-bodied standards; and she rejects "solutions" to equality dilemmas that create undue burdens for someone else. Marcia Rioux has written on equality and mental disability, arguing that any concept of equality must be substantive to have any meaning at all for those with intellectual disabilities. She suggests that we turn to a concept of equality of well-being, eschewing the dominant vision of merit as efficiency, so as to include all within our social and economic structures.

The work on lesbian experiences of inequality has also grappled with the complexity of lesbian oppression as differentially experienced through other markers such as race, class, and disability (see Eaton 1994), and the question of seeking equality within structures that are fundamentally unequal. Gwen Brodsky, for example, has argued that gays and lesbians must create equality strategies that challenge existing systems: instead of arguing that same-sex couples should be treated as "family" for the purposes of benefits, she suggests the recognition of a right to choose or declare one's family, regardless of whether that relationship can be assimilated to a heterosexual marriage.

Finally, other feminist authors have explored the implications of class, and particularly poverty, as part of an equality analysis (Jackman). This means that economic barriers must be presumed for many women, and that among criminalized women, for example, literacy and basic health care remain unmet needs. Furthermore, because our class privileges mediate our experiences of gender oppression, we need to attend to these complexities when we undertake equality analysis (Johnson).

Judicial approaches to equality

The jurisprudence around s.15 is still developing, indeed as it should, given some of the cautions voiced above regarding the need for an evolving method to meet a goal of substantive equality. It is therefore suggested that there is a significant policy-making function and leadership role appropriate to government that gives it a different responsibility and scope in pursuing a model of equality.

Generally, a s.15 argument requires that the claimant prove, on a balance of probabilities, that a) the law or practice draws a distinction between members of different groups on the basis of one or more personal characteristics or fails to take into account the group's disadvantaged position within society, resulting in substantively different treatment on the basis of one or more personal characteristics; b) the basis for the distinction is one of the prohibited grounds listed in s.15(1) (e.g. sex or race) or an analogous ground (e.g. sexual orientation); and c) the distinction must result in "discrimination," by, for example, imposing a burden or withholding a benefit in a manner perpetuating or promoting prejudice, stereotyping, or historical disadvantage. If successful, the burden shifts to the government to show, again on a balance of probabilities, that the s.15 violation is a reasonable one, demonstrably justified in a free and democratic society under s.1.

The argument that a law or practice violates s.15 through direct discrimination has been made in a number of cases. From *Andrews* v. *Law Society of British Columbia* [hereinafter *Andrews*], the first s.15 case decided by the Supreme Court, emerged several important principles regarding equality analysis, many of which, according to Majury and to Mary Eaton (1990), are consistent with feminist analysis. The Court stated that the "similarly situated" test should not be adhered to, and that different methods of equality analysis must be undertaken in different circumstances; the Court emphasized instead that the "main consideration" is the impact of the law on a group or individual; the judgment stated that equality is an evolving or comparative concept that does not lend itself to a fixed formula; and it referred to context, including social, historical, economic, and political as part of its analysis of whether the law in question constituted "discrimination."

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R. v. *Turpin*, the next major s.15 case, added an important dimension. In clarifying the question of whether all legislative distinctions that deprive some groups of access to a good (here it was a *Criminal Code* trial option available to the accused charged with s.469 offences in Alberta, but not to those charged with the same offences in other parts of the country), the Court ruled that

> [a] finding that there is discrimination will ... in most but perhaps not all cases, necessarily entail a search for disadvantage that exists apart from and independent of the particular legal distinction being challenged. (*Turpin* 1332)

The Court therefore rejected the claim, since Albertans accused of criminal acts have not, historically, been singled out for disadvantageous treatment.

Sex discrimination challenges to law and policy based on facial discrimination have been somewhat rarer, and often litigated by men (Brodsky and Day). For example, sex-specific offences, usually sexual offences committed by men against girls and young women, have been challenged by accused men in a number of cases. Although these offences have now been rendered "gender neutral" in the *Criminal Code*, some cases were still in the legal process and were therefore argued as s.15 violations.

The Supreme Court of Canada in *R.* v. *Hess* upheld sex specificity with respect to the offence in s.146(1) (statutory rape), on the basis that there is no s.15 violation where the offence "can only be committed by one sex" and where "there may be sound policy reasons for protecting one group and not the other and these reasons may be based on the biological distinctions between them" (*Hess* 928). As Bill Black and Isabel Grant argue, the analysis in the majority opinion by Justice Wilson should be placed in context of the other major decisions by the Court on s.15, including *Andrews* and *Turpin*. Thus, although the accused here could show that the legislation created a distinction based on sex, he could not show "discrimination" because he was not a member of a historically disadvantaged group whose vulnerability was increased by the legislative prohibition.

The implication of this judgment for the protection of potential victims of statutory rape are somewhat more difficult to minimize. Here Justice Wilson focussed on "biological differences" as justifying different legal treatment. Given the serious harms that arise from sexual interference with children apart from pregnancy, this case suggests that the government can choose which harms it will protect against, even if they are "gendered." Again, Black and Grant argue for a muted reading of the case on this point, noting that Justice Wilson recognized the fact that there was another offence that criminalized certain forms of sodomy, thereby providing adequate protection for boys.

The other important case decided by the Supreme Court on the issue of whether sex specificity necessarily offends s.15 also concluded that it did not. In *Weatherall* the Court was called upon to decide whether it amounted to a *Charter* violation for the prisons to permit, by failing to prohibit, strip searches of male prisoners by female

guards. Although not directly challenged by this litigation, what was at issue was a regulation made under the *Penitentiary Service Regulations* that prohibited male guards from strip-searching female prisoners, but did not create a comparable rule for female guards. The Court found no s.15 violation, stating that:

> [E]quality does not necessarily connote identical treatment and, in fact, different treatment may be called for in certain cases to promote equality. Given the historical, biological and sociological differences between men and women, equality does not demand that practices which are forbidden where male officers guard female inmates must also be banned where female officers guard male inmates. The reality of the relationship between the sexes is such that the historical trend of violence by men perpetrated against women is not matched by a comparable trend pursuant to which men are the victims and women the aggressors.... [W]omen generally occupy a disadvantaged position in society in relation to men. Viewed in this light, it becomes clear that the effect of cross-gender searching is different and more threatening for women than for men. The differential treatment to which the appellant objects thus may not be discrimination at all. (*R.* v. *Weatherall* 877)

Furthermore, the Court went on to find that even if s.15 had been offended, the discrimination could be justified by reference to the governmental objectives of promoting rehabilitation by "humanizing" the environment through cross-gender staffing and of promoting employment equity for women guards. It should be noted here that although the judicial statements on the meaning of equality and women's experiences are very helpful for other equality claims, the problem with this decision from a feminist standpoint is that it undermines the right to privacy and dignity for imprisoned men, which ultimately denigrates democratic values (see Bartholomew).

Finally, women's claims with respect to facially discriminatory legislation can also be framed in terms of their experience as a significant subset of "women." For example, in *Dartmouth/Halifax County Regional Housing Authority* v. *Sparks*, decided by the Nova Scotia Court of Appeal in 1993, the court was willing to recognize single, Black mothers living on social assistance as a group protected on analogous grounds under s.15 of the *Charter*. It found that a provision of the provincial residential tenancies legislation that provided for a shorter notice period for eviction of public housing tenants discriminated directly against this group and could not be saved under s.1.

R. v. *Bob et al.* represents an important first in the area of disparate impact claims under s.15 in the criminal law. In this case, the Saskatchewan Court of Appeal refused to enforce a licensing requirement for bingo on a reserve, on the basis that forcing the accused to pay the fee amounted to requiring the accused to give up a right that others did not have to give up in order to comply with the criminal law. The court determined that although other Canadians did not enjoy the same right as did the accused (here the right to be exempt from "taxation"), the requirement imposed a disadvantage upon Aboriginal persons that resulted in disparate impact discrimination. The charges for carrying on bingo without a license were dismissed in view of the *Charter* violation.

In *R.* v. *Rehberg* the Nova Scotia Supreme Court found that a section of the regulations governing the receipt of social assistance benefits violated s.15 of the *Charter* and thus could not be relied on for a fraud prosecution under the *Criminal Code*. The court determined that the rule prohibiting co-habitation, the "spouse in the house" rule, had a disparate impact upon single mothers in poverty. The court found that single women living with children in poverty formed a group for the purposes of the prohibited grounds in s.15 because such women are most likely to experience poverty as a characteristic.

The court noted that this prohibition applied only to single parents, not to all recipients of social assistance, that single parents on welfare were disproportionately female (97 to 98 per cent), and that there were significant negative effects associated with the prohibition, including limits on welfare recipients' ability to form lasting relationships and denial of benefits if caught violating the rule. In concluding that s.15 was violated and could not be saved under s.1, the court referred to the historical underpinnings of the legislation and noted the patriarchal notions that informed it, as well as the stereotypes currently associated with mothers on welfare.

In *R.* v. *C.M.* one justice of the Ontario Court of Appeal, Justice Abella, found that s.159 of the *Criminal Code* violated s.15 based on a disparate impact theory. She noted that the section creates a higher age of consent for anal intercourse than for other forms of intercourse, and after stating that anal intercourse is a primary means of sexual expression used by gay men, determined that the prohibition had a disparate impact upon gay men. Justice Abella was willing to find that gay men were protected under s.15, viewing sexual orientation as an analogous grounds to the other s.15 grounds on the basis of historical disadvantage and the specific efforts of the criminal law historically to control by punishment men's deviation from heterosexuality. The judgment followed *Andrews* and *Turpin*, noting that the section contributed to existing disadvantaged social status experienced by gay men, drawing as well upon Eichler's analysis.

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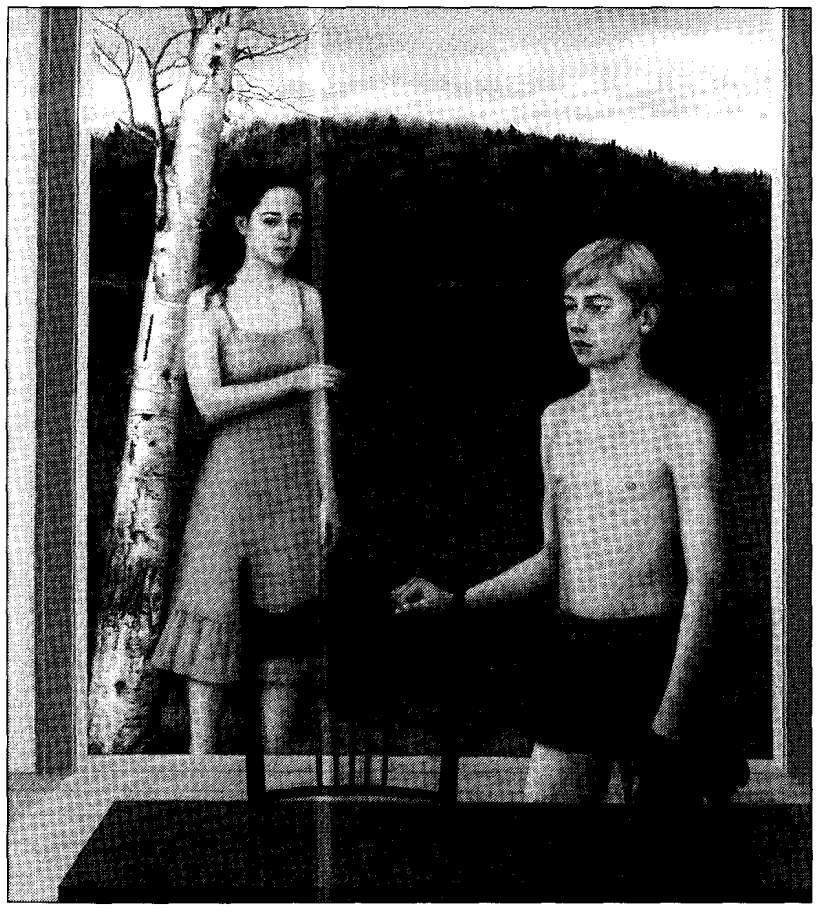


Valerie Palmer, "Clouds," oil on linen, 52" x 42.5", 1991. Courtesy of Nancy Poole's Studio, Toronto, Ontario. Photo: Tom Moore

In *R.* v. *White (S.D.)*, decided by the Nova Scotia Court of Appeal, two women charged with soliciting for the purpose of prostitution argued that s.15 was violated because the law enforcement technique used, the "decoy" method, resulted in an arrest rate of 80 per cent women, 20 per cent men, even though men participated equally in the exchange itself. The court rejected the analysis and responded that although the method was ineffective for detecting and arresting male prostitutes and male customers, it did not violate women's s.15 rights to use this method because women working as prostitutes were more likely to perform the prohibited act e.g. "solicitation for money" than were male customers. It should be noted here that the court relied on the oral evidence of a police officer to this effect, and not any statistical or other evidence, that the police essentially admitted that the method was skewed against women, that the ratio of male to female arrests varies greatly across jurisdictions (see Shaver) suggesting that there is more to "method" than meets the eye, and that the starting premises of the disparate impact analysis were in fact way off, thus worsening the disparate impact of the 75:25 arrest ratio.

In *Rodriguez* v. *Canada (A.G.) and B.C. (A.G.)*, the claimant had challenged the constitutionality of s.241(b) of the *Criminal Code*, which prohibits aiding suicide. She argued, and it was accepted by two justices, that the offence had a disparate impact upon people with disabilities who cannot end their own lives and therefore must rely on the aid of others who are willing to risk criminal prosecution. Chief Justice Lamer's specific language on the s.15 implications is instructive in terms of feminist analysis:

> Not only does s.15 require the government to exercise greater caution in making express or direct distinctions based on personal characteristics, but legislation equally applicable to everyone is also capable of infringing the right to equality enshrined in that provision, and so of having to be justified in terms of s.1. Even in imposing generally applicable provisions, the government must take into account differences which in fact exist between individuals and so far as possible ensure that the provisions adopted will not have a greater impact on certain classes of persons due to irrelevant personal characteristics than on the public as a whole. In other words, so as to promote the objective of a more equal society, s.15(1) acts as a bar to the executive enacting provisions without taking into account their possible impact on already disadvantaged classes of persons. *(Rodriguez* 549)

Chief Justice Lamer also made the point that deprivation of the "right to choose" may amount to a burden at law, emphasizing the values of autonomy and self-determination, and that it is not necessary to show that all or most people with disabilities would be so affected (*Rodriguez* 343–44).

In the realm of s.15 challenges directed at the distribution of social and economic benefits based on a theory of disparate impact, the successes have been rarer. Most recently in Ontario, in *Masse et al.*, the Ontario Court, General Division ruled in 1996 that social class or poverty does not constitute a protected ground under s.15 of the *Charter*, such that welfare recipients who saw their benefits cut by 20 per cent had no basis for an argument.

In *Symes* v. *Canada* the applicant lawyer argued that the provisions of the *Income Tax Act* had a disparate impact upon professional or self-employed women because it denied a business deduction for child care expenses associated with earning business or professional income. The Court ruled that counsel for Symes had not proven that this provision had an adverse impact on women because she had not proven that it is women who disproportionately bear the financial, as opposed to the social, costs of child care. It was also suggested that single mothers as a class might have been able to make a more compelling disparate impact argument here.

More recently, in *Thibaudeau* v. *Canada*, the applicant

argued that the inclusion/deduction system in the *Income Tax Act* for dealing with child support discriminated, using a disparate impact analysis, against separated mothers, who constitute 98 per cent of those in receipt of such payments, by requiring that they report this money as "income" for tax purposes. This s.15(1) argument was avoided by the Court, which instead analyzed the legal distinction as one of direct or facial discrimination, and concluded that the law distinguished "separated and divorced couples" with children from others, but that this was an advantage rather than a disadvantage, in that such "couples" received an overall benefit of tax savings. To the extent that unfairness is created by this system, the majority attributed it to the failure of the family law system to properly reflect the tax implications in calculating support obligations.

It is noteworthy, from a feminist standpoint, that both of these latter s.15 decisions involved a gender split among the judges: in both cases the two women justices dissented, and would have found disparate impact discrimination in violation of s.15. For policy-makers this split is important: it underlines the feminist challenge to the notion of "judicial neutrality"; it signals that there may a major difference in the characterization of the "facts" and "issues" by men and women; and it illuminates future directions for s.15 litigation as more women have something to say about it.

Several cases have been won, however, at the Supreme Court where citizens argued that the government discriminated in violation of s.15 by its failure to undertake some positive act, and one of these explicitly recognized disparate impact theory. In *Vriend* v. *Alberta*, the Court found that the province of Alberta had discriminated against gays and lesbians by failing to protect them against discrimination in the province's human rights statute, and proceeded to read sexual orientation into the statute as a prohibited ground of discrimination. In *Eldridge* v. *British Columbia*, the Court held that British Columbia's failure to fund sign language services for a deaf woman who gave birth without being able to communicate with her physician violated s.15 on the basis of disability. Here the governing statute said nothing about sign language services, leaving it to hospitals to determine which services were "medically necessary." Hospitals administering the British Columbia legislation were said to be implementing government policy and therefore were subject to the *Charter*, and the government was ordered to administer its legislation in a manner consistent with s.15, which meant that those with physical disabilities must benefit equally from government services otherwise available to everyone.

There are also two other cases out of the Supreme Court that may have positive implications for a progressive and complex understanding of equality. In *R.D.S.* v. *R.* the Supreme Court, by a narrow majority, ruled that remarks made by Judge Corrine Sparks, the first African Canadian judge appointed to the bench in Nova Scotia, in a criminal case before her did not give rise to a "reasonable apprehension of bias" against either white people or police. The two women justices formed part of the majority decision and ruled that a judge can and should take into account social context and personal experience, consistent with the values of s.15 of the *Charter*, as an important step toward achieving judicial impartiality. Razack (1998b) has pointed out that while the decision in this case remains problematic for many reasons (the dissent was authored by three justices who would have found reasonable apprehension of bias; four of the six majority justices found that Judge Sparks' remarks were close to the line of inappropriate; and none of the justices accepted as a general proposition that race always matters, but instead constructed white innocence as the norm and race as material in only highly specific circumstances), it does offer "a small ray of light" (Razack 1998b, 65).

Secondly, in *R.* v. *Ewanchuk* in her concurring opinion that caused Justice McClung of the Alberta Court of Appeal to fly into a rage, Madame Justice L'Heureux-Dubé invoked the *Convention on the Elimination of all Forms of Discrimination Against Women*, an international legal document to which Canada is a party. She used it to support her argument that the human rights of women must be protected and respected by domestic law, consistent with ss.7 (security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice) and 15 of the *Charter*, and to demonstrate the ways in which the legal interpretations of the law governing sexual assault by the trial judge and the Alberta Court of Appeal breached these obligations. This reliance on an international convention as an interpretive aid may assist in other progressive interpretations of equality rights drawing on international standards, such as those used for prisoners, indigenous peoples asserting their right to self-determination, and demands on the state for the basic necessities of life.

Discrimination in the enforcement of the law has been argued in fewer cases, and with less successful results. However, these claims are also in their infancy in terms of developing modes of proof and analytical frameworks. For example, *White (S.D.)*, described earlier, was a disparate impact claim against a practice of law enforcement that was also implemented in a discriminatory way, given the police admission that the method did not catch male offenders and given the stereotypes and the beliefs associated with women who work as prostitutes, as well as a fairly well-documented history of police antagonism towards prostitutes. Some of the problems with the reasoning

A judge should take into account social context and personal experience, consistent with the values of s.15 of the *Charter*, as a step toward achieving judicial impartiality.

in this case were noted above; as well, if it is difficult to convince a court with respect to a disparate impact claim, then a discrimination in enforcement argument may be even harder to sustain.

One of the first cases to advance an argument that the criminal law was being enforced in a manner that violated s.15 was *R.* v. *Thompson, Fraser, and Smith.* In this case, the accused claimed that in the aftermath of the Cole Harbour (Nova Scotia) high school riots the police had deployed their resources to focus their investigation upon African Canadian students and to charge them in a pattern that was unrepresentative of their involvement in the riot. Although the argument was described as a disparate impact argument, it was really a discriminatory enforcement claim. The argument was unsuccessful because the Nova Scotia court determined that the investigations had been pursued against both white and African Canadian students, and that if some of the prosecutions did not come to fruition against white students, it was because the African Canadian student witnesses were either more reluctant to deal with the police or more difficult for police to contact. While recognizing that the difficulties in demonstrating racial bias in investigation and prosecution are real, it may be noted that the two explanations accepted by the court are not free of reliance on systemic racism. By way of further example, although the majority of the Court in *R.* v. *Wong* acknowledged that the use of video surveillance in a hotel room to apprehend gamblers was unauthorized by law and *prima facie* violative of other provisions of the *Charter*, they refused to exclude the evidence from the trial on the basis that other methods, e.g. undercover surveillance were impractical because the police force had so few Chinese officers available. Justice Wilson dissented, commenting that it was inappropriate for police to rely on the current results of past practices of racial discrimination to justify resort to a very intrusive law enforcement technique against a racial minority group.

The torts claim pursued by *Jane Doe* against the Metro Toronto Police is significant as the first judgment recognizing the legal theory that systemic failure to enforce the law to the detriment of women who are at risk of male violence violates s.15 of the *Charter*. The court recognized that the police were in breach of their tort duty to warn, as well as their legal obligations to uphold the law and prevent crime in a manner consistent with s.15 of the *Charter*, in the way that they exercised their discretion in the investigation and apprehension of a rapist in Toronto. In this case, the court focussed specifically upon the underlying beliefs that informed the police decisions, describing these beliefs as sex discriminatory, and the language used by police as indicative of their beliefs, and held that the resultant practices violated s.15 and s.7.

Although the Court has frequently ignored women's constitutional claims particular legislation will require that the Court confront the conflict head on.

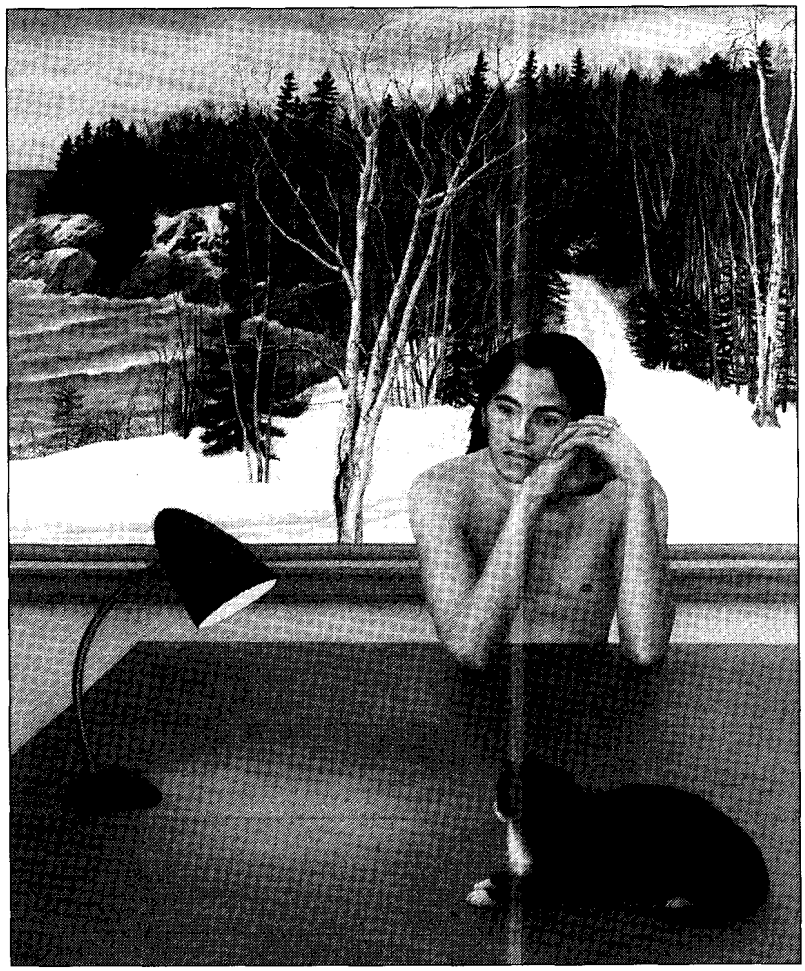
R. v. *Little Sister's Books and Art Emporium* is another successful case where discrimination in the enforcement of the law was successfully advanced as the legal theory. In this case, the applicant bookstore was able to convince the British Columbia Supreme Court that Canada Customs' law enforcement practices with respect to the importation of materials deemed "obscene" within the meaning of the *Criminal Code* discriminated against them on grounds prohibited under s.15 of the *Charter*. The bookstore alleged that the statistics regarding detained shipments, the patterns of detention, and the use of a specific enforcement policy directed at gay and lesbian bookstores all supported their argument. The court first granted a declaration of *Charter* violation and then in a later decision, when the practices continued, granted an injunction against Canada Customs.

Finally, there are some cases that support reliance upon s.15 as an interpretive aid and as support for governmental intervention. First, there are several cases where s.15 was not articulated as part of the analysis, but yet it is clear that both feminist analysis and implicit recognition of women's s.15 rights undergird the decision (for e.g. *R.* v. *Lavallee; Canadian Newspapers Co.* v. *Canada*). Similarly, in *R.* v. *Parks* the Ontario Court of Appeal inserted judicial checks into aspects of criminal procedure (jury selection) in order to reduce or respond to a presumed backdrop of racism and discrimination. Although the accused in these two cases did not argue on the basis of s.15, it is evident that a notion of equality underlies these decision: the judgments exhibit a willingness to presume systemic discrimination without requiring "proof" and a readiness to insert criteria to reduce its operation.

Second, there are other cases where the Court has signalled that s.15 is relevant to the interpretive task at hand. For example, in *R.* v. *Seaboyer* the Supreme Court noted that women's ss.7 and 15 rights must be considered and balanced against the s.7 rights of accused men in the context of constitutional challenges to criminal legislation designed to correct sex discrimination in criminal justice practices. In *R.* v. *Butler* the Court relied on women's equality interests in interpreting the scope of s.2(b) in the context of pornography, as well as in the balancing of government objectives under s.1 although it did not explicitly invoke s.15. In *R.* v. *Osolin* the Court explicitly recognized sexual assault as an issue of (in)equality, and stated that women's ss.15 and 28 rights must be considered when determining the scope of cross-examination.

Although it is true that the Court in fact has frequently either ignored or minimized women's constitutional claims when confronted with accused men's claims to *Charter* ss.7 and 11(d) rights (see *Seaboyer* and *O'Connor*), recent cases such as *Dagenais* v. *Canadian Broadcasting Corp.*

have re-asserted that balancing of other conflicting *Charter* rights must be pursued, and particular legislation (Bills C-49,[1] C-72,[2] and C-46[3]) that has been drafted relying explicitly on ss.15 and 28 as support will require that the Court confront the conflict head on.



Valerie Palmer, "Isacor," oil on linen, 45" x 36", 1992. Courtesy of Nancy Poole's Studio, Toronto, Ontario. Photo: Tom Moore

Criminal law reform proposal

The criminal procedure reforms pursued by the Department of Justice over the past five years have negative implications for democratic safeguards and therefore for women's equality rights, whether we interact with the criminal justice system as offenders or as women who have been injured by criminal violence. Bill C-17[4] and Bill C-42[5] were passed in 1994 and 1996 respectively; the third phase of these reforms was subjected to a broad consultation in the fall of 1998 and is currently undergoing revision. These reforms to the *Criminal Code of Canada* are frequently presented as merely technical changes that are needed to ensure uniformity and to reflect existing practices in criminal law. Officials also candidly acknowledge that the changes are intended to conserve resources and to speed the trial process, signalling the political intentions motivating these reforms (Makin; Melnitzer). While the government is no longer attributing these reforms to women's concerns and criticisms of criminal justice, some authors identify feminist interventions in criminal law as facilitative of reforms such as these (Martin 1998).

Generally, the types of reforms pursued in these initiatives relate to the way in which criminal prosecutions are conducted and sentenced as opposed to the substantive definition of criminal offences. They affect matters such as the mode of trial, e.g. whether the person accused will have a summary trial before a provincial court judge, without a preliminary inquiry or a jury, or enjoy the right to elect a trial by way of indictment in which both of these traditional democratic safeguards would be available; the sentence ceilings for many offences; the imposition of criteria to obtain a preliminary inquiry, as well as constraints on its breadth and its conduct; and a new obligation on defence and Crowns to disclose their intention to call expert witnesses and to provide the details of the proposed testimony.

The Department of Justice released in April 1993 a consultation paper discussing possible changes to the preliminary inquiry to which Status of Women, among others, responded in the summer of 1994 (Sheehy). At the same time, Justice proceeded with its first round of procedure reforms, C-42, introduced into Parliament in June 1994 and given Royal Assent in December 1994. For the purpose of this paper, the important features of Bill C-42 were as follows:

First, a group of offences (including threatening to cause bodily harm or death, assault with a weapon or causing bodily harm, unlawfully causing bodily harm, and fraudulent personation with intent to gain advantage—all indictable offences), were re-classified as hybrid offences, whereby Crown attorneys can exercise their discretion to proceed summarily or by way of indictment.

Second, a new sentence maximum for specified summary conviction offences was identified. Although the *Criminal Code* provides that the ceiling for a summary conviction offence is six months imprisonment unless otherwise indicated, the *Code* does not ordinarily use a maximum beyond six months for summary offences. Bill C-42 created a new ceiling of 18 months imprisonment for all of the new hybrid offences mentioned above if the Crown elects a summary trial, and also makes this new ceiling available for sexual assault (which was already a hybrid) if the Crown proceeds summarily.

Third, the summary jurisdiction was widened for a number of property crimes (theft, possession of property obtained by crime, false pretenses to obtain property, fraud, personation to obtain advantage or property, mischief in relation to property) by raising the ceiling for the

value of the property at issue from $1,000 to $5,000.

Fourth, the sentence ceiling for several offences was raised from two to five years (failing to stop after an accident) and from two to ten years (theft) if prosecuted by indictment.

Fifth, a new subsection was added to permit the Attorney General for Canada to intervene in a private prosecution (the provincial Attorneys General already had this right) and to exercise the powers conferred pursuant to s.579 of the *Criminal Code*. Concretely, this means that if the Crown's office declines to prosecute an alleged violation of the *Code* and a private citizen assumes that role, the federal government can intervene and take over the prosecution itself or stay the proceeding indefinitely.

Bill C-17 was tabled in December 1995 and received Royal Assent in April 1997. It made the following changes that relate to this article:

First it added to the pool of newly created hybrid offences by converting another group of indictable offences into hybrids: forcible confinement, breaking and entering a place other than a dwelling house with intent to commit an indictable offence therein, entering or being in a dwelling house with the intent to commit an indictable offence therein, forgery, and uttering a forged document.

Second, it imposed the new summary conviction maximum of 18 months imprisonment for forcible confinement. Third, it lowered the indictable sentence ceiling for a number of offences from 14 years imprisonment to ten years (breaking and entering a place other than a dwelling house, forgery, and uttering forged documents).

The types of reforms that we can expect to see in the third stage of the criminal procedure reforms can be predicted only at a general level based on news accounts over the last few years as well as the package that was presented for broader consultation by the Department of Justice in the fall of 1998.

First, we can expect to see a much broader implementation of the hybridization approach, such that most offences in the *Code*, except for those considered to be extremely serious, will make available to the prosecutor the option of proceeding summarily or by way of indictment.

A feminist equality analysis must examine these laws from the standpoints at which women enter the criminal justice system, as both offenders and as potential complainants.

Second, we will likely see more tinkering with maximum sentences such that a broader range of summary conviction offences will carry the new 18-month maximum, and many indictables will see their ceilings lowered.

Third, we should expect to see a major curtailment of the right to a preliminary inquiry, since this has been a constant theme of the reforms over the past five years.

Fourth, the next stage of procedure reforms will likely bring a new legal obligation requiring the defence to disclose to the prosecutor proposed expert testimony that will be offered by the defence at trial. Currently, defence lawyers do not have the same disclosure obligations that Crown attorneys have, and this obligation would be relatively unique, although an accused who does not disclose a defence of alibi at the earliest possible moment may be prejudiced by this delay at trial (Mewett and Manning).

Finally, although it has been raised only recently in the fall 1998 consultation, there is some possibility that the reforms will endow prosecutors with further powers to control or direct prosecutions that are initiated by private prosecutors.

Feminist analysis of the proposal

A feminist equality analysis of these *Criminal Code* reforms must examine these laws from the standpoints at which women enter the criminal justice system, as both offenders and as potential complainants, and recognizing that "women" are by no means a homogeneous group in this context. For example, we need to recognize that women who are poor, who are racialized in this society, who have addictions, and who have experienced childhood violence, state intervention, and sexual abuse, are most likely to find themselves criminalized, even though over our lifetimes we have all, at times, engaged in "criminal" acts. Similarly, there are certain groups of women who are more vulnerable to victimization, again due to systemic structures. For example, women with disabilities, women and children who are or were "captive" in state-run institutions such as residential schools for Aboriginal children, children and youths in group homes and placements run through child welfare laws, and children and youths apprehended through juvenile or young offender legislation are all known to be at high risk in terms of victimization.

Further, there are groups of women who may not necessarily be at higher risk of criminalization or victimization, but for whom the consequences of criminal justice intervention are more debilitating than they are for other women. For example, institutionalized youths and racialized women may be less credible as witnesses, accused, or complainants in criminal proceedings; there may be immigration consequences for women who themselves or their mates are convicted of indictable offences in terms of their immigration status; women whose sexual assault allegations are not believed may become even more vulnerable to future assaults; and women who are convicted of offences often lose custody of their children, sometimes to child welfare authorities, such that their children too become vulnerable to institutional abuse.

A feminist analysis would then note that the reforms are framed in neutral terms and appear to pass the "equal treatment" model of equality as they draw no distinctions

among any identifiable groups. Perhaps obviously, the "equal opportunity" vision of equality seems to have little application, since it is difficult to imagine what its relevance could be in the context of criminal law, where we would not want to contest the terrain of "success."

The disparate impact model for detecting inequality may assist in assessing the impact of these changes on women as accused and as complainants. At the same time, this model is exposed as limited if we were to use it to identify numerical impact alone, given that the overwhelming majority of both offenders and victims of crime are men. Instead, we must insist that the disparate impact analysis in *Thibadeau* was incorrect, and that disparate impact for women must mean a qualitative assessment of the impact of a law upon women's lives. Further, we must think at the more abstract level about how these changes affect democratic structures and interact with the law and order movement, given that the most marginalized will experience their effects. In other words, given the social, economic, and political environment in which these reforms to the *Criminal Code* are implemented, what will they mean concretely for differently situated women?

First, there are some positive features of these changes that must be identified. By opening the summary prosecution route for many offences that had previously been categorized as pure indictables, the government is, in some sense, rendering these offences less serious, although it is certainly not de-criminalizing them. When prosecuted as summary offences, accused persons will be subject to lower maximum sentences and presumably lesser social stigma; their employment and immigration futures will be less compromised by the criminal record (deportation can follow conviction of an indictable offence); and the proposal may have the effect of making pardons more readily available because the *Criminal Records Act* uses a shorter waiting time for summary conviction offences than convictions obtained by way of indictment. When combined with the lower indictable sentence maximum that has also been introduced for a number of these new hybrids, the reclassification component of the reforms appears progressive in its overall direction.

For women who enter the criminal justice system as complainants, these reforms also have some positive aspects. It is encouraging to see the Department of Justice concerned to address the abuse of complainants at the preliminary inquiry; it is also apparent that the Department is thinking about the implications of the expansion of summary jurisdiction under these proposals for women, since it has also discussed the possibility of extending the time period in which a summary conviction offence can be prosecuted, given the numbers of adult women and men who are reporting historic sexual abuse.

Overall, however, the changes will have negative effects for women, as well as for men. First, the expansion of summary jurisdiction signals an expansion of "summary justice": trials that take place before a provincial court judge (lower court) as opposed to a general division judge (higher court); trials in which accused persons do not have the right to either a preliminary inquiry to test the state's case against them or to a trial by jury, as they would if the case were prosecuted by way of indictment; trials that will be, by and large, funded by legal aid programs at a lower level than trials on indictment; trials in which there will be great pressures on judges, given their caseloads, and lawyers to process the cases quickly, perhaps at the expense of detailed examination of the facts and law;[6] and trials that will therefore place more accused in the position of pleading guilty and "getting it over with."

The preliminary inquiry and the jury are important safeguards on the criminal process. The preliminary inquiry provides a check on state power, as illustrated by the discharges of Susan Nelles and Dr. Nancy Morrison at the preliminary inquiry stage. Trial by jury is particularly important for racialized accused, where, as we should know by now, race always matters and will play a significant role in trial outcomes. With a jury trial an accused has the possibility of at least raising the issue of systemic racism and challenging the jury composition on this basis. In a trial by judge alone, an accused will not be able to examine a particular judge for her or his racial biases as they would a potential juror, and if the prosecutor chooses a summary trial, the accused's loss of the choice of summary trial before a provincial court judge, or trial by judge alone or judge and jury at the superior court level also means that the accused loses the possibility of "judge shopping." An accused will not be able to avoid a judge who has demonstrated biases and accused in smaller jurisdictions that have a very limited provincial bench will be greatly affected. Furthermore, without a jury to provide a justification for introducing evidence of systemic bias to address commonly held myths and stereotypes, it will be harder to raise issues of systemic misogyny, racism, and homophobia, for example, during the trial itself.

The right to a jury trial is critical where the offence is politically charged, e.g. assisting suicide, assault on a police officer, abduction by parents of children, and procuring a miscarriage. If a necessity defence is proposed, for example, or where the accused has disobeyed a court order, trial by jury rather than a judge will be pivotal. An accused who is African Canadian and who disputes the allegation of assault against a police officer may also need a trial by jury to have any chance at acquittal.

There are also access to counsel issues arising out of the reforms for all accused, but particularly for racialized persons and for women. While legal aid plans in provinces

Given the social, economic, and political environment in which these reforms are implemented, what will they mean for differently situated women?

such as Ontario continue to fund summary trials if there is a likelihood of imprisonment, the caps are so low that lawyers may decline legal aid certificates for these offences. More accused are now going unrepresented, and many more will go unrepresented, even though they may face sentences of up to 18 months imprisonment, without preliminary inquiry or jury trial. The reforms contain nothing to ensure the delivery of legal services to the increasing numbers of accused who will be processed summarily. Research conducted by the Canadian Association of Elizabeth Fry Societies suggests that women are less likely than men to receive legal aid and representation because the vast majority of women in the criminal justice system are charged with minor property and victimless offences (see Walpole). Broadened resort to summary jurisdiction will therefore arguably have a disparate impact upon women's access to legal representation, both as offenders and as complainants.

Lack of legal representation has serious implications: the person is more likely to plead guilty, more likely to receive a criminal record, and more likely to experience other consequences flowing from conviction, including unemployment, disruptions in families, further involvement in the criminal justice system, and imprisonment for future convictions. The Manitoba Aboriginal Justice Inquiry has already identified this cycle of minor charges and lack of legal representation, leading to criminal record and likelihood of incarceration down the road, as having a disparate impact upon Aboriginal offenders. It can be expected that other racialized groups, such as African Canadian women and men, might have the same experience. In particular, given the evidence that suggests that African Canadians are sentenced more harshly than are whites for comparable offending (Renner and Warner; Commission on Systematic Racism in the Ontario Criminal Justice System[7]), one can only expect that the disparity would widen in the absence of legal representation.

Further, by increasing the numbers of offences classified as hybrid and thereby expanding prosecutorial discretion, the reforms will further reinforce systemic racism. Discretion often operates to the disadvantage of disempowered groups. We already know that prosecutorial discretion is exercised against African Canadian men at least with respect to certain offences, such that they are much more likely to be prosecuted on indictment and therefore face a more serious sentencing range than are white men on similar facts (*Systemic Racism* 192). While women charged with criminal offences may receive the benefit of Crown discretion with respect to certain kinds of offences, this depends on the race, class, sexual identity, and familial circumstances of the woman (Eaton 1983), and the nature of the offence, and thus again, this discretion buys privilege for some at the expense of others. It is imperative that any widening of the provincial prosecutors' discretion be directed by and within s.15 of the *Char-ter*, so as to ensure that disparities are not deepened. A non-neutral approach to this issue would aim to reduce the disparities produced through Crown discretion, with federal responsibility for devising mechanisms for ensuring the injection of *Charter* values into Crown decision-making.

Finally, the new disclosure obligation will have negative implications for all accused. For women offenders, the benefits of seeking the kind of counselling support that may be necessary to establish a defence will carry a serious risk of disclosure to the Crown. Women who have killed violent mates require a great deal of support to come to some understanding of what has happened such that they can articulate that experience in terms of a legal defence, such as self-defence. There is already precedent for the proposition that defence may have to disclose such reports (*R.* v. *S. (R. J.)*), and given that such reports or records could be very damaging to the defence as well, many lawyers might advise against the woman seeking counselling. One who is facing the possibility of life imprisonment, should not be required to make such an unconscionable choice.

For women who have been raped or assaulted who are willing to testify against assailants, there are several important risks associated with these reforms to the *Criminal Code*. The trial summary process is not necessarily positive for women in this position, even apart from the broader consideration of women's interests examined above. While it is true that a summary trial is likely to take place more quickly and result in a guilty plea, it may also afford greater access to diversion, whereby the offence is removed from the criminal justice system without adjudication of criminal responsibility. If accused are unrepresented at trial, they may themselves cross-examine the complainant, and judges may be more prone to stay the proceedings on the grounds that the accused has been denied access to counsel (*R.* v. *D.Z.*).

The various proposals to abolish or dramatically curtail the preliminary inquiry may save some court time, since defence and Crowns may agree on the scope and witnesses for the preliminary hearing. However, it must be emphasized that women have not objected to the "inconvenience of delays" or to "duplication" or even to testifying twice. What has been identified as objectionable and in violation of women's *Charter* rights is the misuse of the preliminary inquiry and the trial as an opportunity to harass, intimidate, humiliate, and generally break down the woman (Edelson qtd. in Schmitz). Curtailment of access to the preliminary inquiry may have several other unintended consequences that would worsen the situation of women: it is possible that discriminatory practices will intensify at the trial stage if the defence lawyer has only this opportunity to test the case, and it seems likely that there may be trial delays associated with this change. Finally, the lack of a preliminary inquiry may reduce the number of guilty pleas entered by men accused of offences of violence against women (because upon hearing the evidence at a preliminary inquiry defence may so advise their client),

which is also not a benefit for women.

While it might be progressive for women to have the scope of the preliminary inquiry defined, confined by judges, and on record to prepare the woman for trial and to curb abusive tactics, any such changes to the preliminary inquiry must not be framed in terms of "accommodating" "vulnerable witnesses." "Vulnerability" here is created by the nature of the offence and its legal treatment: in other words, offences of male violence against women and children are premised upon their inequality, which is in turn exacerbated by the legal processing, including the "rules" or lack thereof with respect to the examination of witnesses. It would be much more useful if the law specified the purposes of the preliminary and tied its scope closely to those purposes by reference to the equality and security of the person rights of women. Any effort to create legal "duties" on the part of trial judges to control witness questioning in terms of "relevance" and the law regarding forms of evidence including women's sexual history, credibility, and character must be grounded in law and women would require access to lawyers to argue for their enforcement.

Women have asked for vindication of their *Charter* rights, not special treatment. The legal treatment of women in the preliminary inquiry and trial process has constitutional dimensions. Several judges have explicitly recognized the specific ways in which women and children who have been assaulted are dealt with at the preliminary inquiry (*R.* v. *Darby*) and despite assertions to the contrary, the tactics and strategies used against women and children (and those men who report historic sexual assault) are comparatively unique to these offences. Thus, any changes to the preliminary inquiry should be grounded in women's rights under ss.7, 15, and 28; women should have standing, not on the basis that they are complainants but on the basis of the need to vindicate their s.15 rights. The problematic can be cast as a denial of formal equality to the extent that specific rules and practices have been designed to render determinations of culpability with respect to male violence against women complex and extremely costly for women. It can be described as discriminatory enforcement of the law, whereby negative stereotypes about women are employed by lawyers to attack women's credibility and to render them mute, particularly when police, Crowns, and judges do nothing to stop it. It could also be cast as a disparate impact issue, if it could be argued that the practices and rules are themselves "neutral" but have a harsh impact upon women, in part because free reign to discriminate is thereby granted to officers of the court. The cases that might support these arguments include *Weatherall, R.D.S., Osolin, Eldridge, Ewanchuk*, and *Vriend,* although it might be difficult to frame an enforceable positive obligation upon the government to act through legislation, and it is uncertain how the Supreme Court would respond if such legislation, even with a clear record, were challenged. This is because a broader notion of equality, one that encompasses democratic values and social justice, has yet to be recognized in law.

Conclusions

Feminists engaged in the social, political, and legal struggle for equality are implicated in broader debates about justice. This means that when we analyze criminal law reforms we must attend to the fact that women are offenders as well as complainants, that many offenders have themselves been victimized, that women's experience of criminal law is mediated through social class, racism, lesbophobia, and disabilityism, that criminal law framed in neutral terms can be and is used against women, and that calls for law and order or victim's rights initiatives undermine democratic values and institutions, reinforce state power and relations of dominance, and divide us further along those lines. Examples abound of legislative initiatives that invoke law and order debates, many of which have been opposed by feminists: the new restrictions on parole eligibility for those serving life sentences, created primarily in response to Clifford Olsen,[8] the DNA legislation that authorizes the taking of samples and the creation of a databank,[9] the antistalking legislation,[10] the denial of the right to vote to federal prisoners,[11] the new victim's rights bill,[12] and the *Youth Criminal Justice Act*,[13] among others. Feminists must be involved in fighting to preserve the preliminary inquiry, and trial by jury, and must fight to be involved in resisting mandatory minimun sentencing,[14] and erosions of the right to silence. Our equality depends on it.

The author acknowledges the research assistance of Lori Harreman as well as the influence of Jane Doe, Lee Lakeman, and Kim Pate on her thinking. The author would also like to thank the Department of Justice for permission to publish slightly revised versions of an analysis prepared for them on this topic, "Gender Analysis of Potential Criminal Procedure Reforms." The views and errors in this article are the author's alone.

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[1] *An act to amend the Criminal Code*, S.C. 1992, c. 38.
[2] *An act to amend the Criminal Code (self-induced intoxication)*, S.C. 1995, c. 32.
[3] *An act to amend the Criminal Code (production of records in criminal proceedings)*, S.C. 1997, c. 30.

[4]*An Act to amend the Criminal Code and other Acts (miscellaneous matters)*, S.C. 1994, c. 44.

[5]*Criminal Law Improvement Act,* R.S.C. c. 1997, c.18.

[6]See Carlen, as well as McBarnet, for two studies of the "two tiers of justice" provided by the lower versus higher courts in the United Kingdom.

[7]Hereinafter *Systemic Racism.*

[8]See s.745 of the *Criminal Code*, as well as letters to Allan Rock, then Minister of Justice, from the Canadian Association of Elizabeth Fry Societies, dated 18 March 1996 and 10 June 1996.

[9]See s.487.04 of the *Criminal Code*, as well as Kubanek and Miller.

[10]See s.264 of the *Criminal Code*, as well as Cairns Way.

[11]The newest law was successfully challenged under the *Charter*, *Sauve* v. *Canada.*

[12]*Act to amend the Criminal Code (victims of crime)*, tabled in Parliament 15 April 1999.

[13]Bill C-68, tabled in Parliament 11 March 1999.

[14]For similar campaigns in England, see Women Against Rape and Legal Action for Women 1997a, 1997b.

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