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Christine Boyle

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Abstract

Professor Boyle analyses criminal law scholarship from a feminist perspective in order to illustrate the invisible polemics of existing research. Generally, the feminist point of view is marginalized, while legal writing that is male in language and coverage abounds. If the protection of tenure was given to authors (such as feminists) who voice new or unpopular ideas, rather than to those whose positions are guaranteed by main stream writing, broader policy options would emerge and criminal law theory in general would benefit.

CRIMINAL LAW AND PROCEDURE: WHO NEEDS TENURE?

BY CHRISTINE BOYLE*

Professor Boyle analyses criminal law scholarship from a feminist perspective in order to illustrate the invisible polemics of existing research. Generally, the feminist point of view is marginalized, while legal writing that is male in language and coverage abounds. If the protection of tenure was given to authors (such as feminists) who voice new or unpopular ideas, rather than to those whose positions are guaranteed by main stream writing, broader policy options would emerge and criminal law theory in general would benefit.

There are two themes running through this review of Canadian criminal law literature. First, the question is raised of who really needs the security that tenure is supposed to provide. At least one purpose of the institution of tenure is to protect, and thus encourage, the dissemination of unpopular ideas; ideas that challenge the *status quo* and which therefore might otherwise result in some form of retribution.¹ It is assumed for the purposes of this essay that such ideas are valuable for Canadian society in that they provide a voice for people and aspirations otherwise ignored. They also broaden the range of perceived policy options. As L.D. Collins asserts in his article "The Politics of Abortion: Trends in Canadian Fertility Policy":² "Normal policy issues are resolved through a process of elite accommodation in which participants share common ideological assumptions regarding the scope of acceptable choices and the rules governing change."³

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* Professor of Law, Dalhousie University, LL.B., LL.M., of the Inn of the Court of N. Ireland, Barrister-at-Law, Member of the Nova Scotia Bar.

¹ For a discussion of tenure, see Panel Discussion, "Motivating the Law School Faculty in the Twenty-First Century: Is There Life in Tenure?" (1979) 30 J. Leg. Ed. 1. For an argument that tenure may have the effect of discouraging things other than traditional doctrinal research, see S.H. Leleiko, "The Opportunity to be Different and Equal — An Analysis of the Interrelationships Between Tenure, Academic Freedom and the Teaching of Professional Responsibility in Orthodox and Clinical Legal Education" (1980) 55 Notre Dame Law. 485. Early tenure has been suggested, in the U.S., as one reason for the "boring sameness of the doctrinal policy analysis that has been the stable product of the law reviews for 25 years." J.H. Schlegel, "Searching for Archimedes — Legal Education, Legal Scholarship, and Liberal Ideology" (1984) 34 J. Leg. Ed. 103 at 104.

² (1982) 7 Atlantis 2.

³ *Ibid.* at 4, citing K.D. McRae, "Constitutionalism and the Canadian Political System" and S.J.R. Noel, "Consociational Democracy and Canadian Federalism" in K.D. McRae, ed., *Consociational Democracy: Political Accommodation in Segmented Societies* (1974).

One way of conceptualizing criminal law is as a process whereby the dominant group labels what is deviant.⁴ Basic ideological choices are evident in substantive and enforcement decisions that define what is deviant; for instance, some kinds of abortion, soliciting by prostitutes, and contempt of court. Such choices are evident also with respect to what is *not* deviant; for instance, pornography, sexual harassment, some forms of wife abuse, and negligent sexual assault. To the extent that academics share the dominant values, they have no need for tenure; it is simply job security. Researchers and writers who do challenge these values are themselves at risk of being labelled deviant in some way and thus tenure may be justified for them.

Second, this is an attempt to analyze the existing literature from a feminist perspective. At the risk of minimizing the importance of this method of analysis, however, it should be said that other radical perspectives could be used to expose the invisible polemics in most criminal law research. It will be argued that most writing to date contains implicit polemical messages about acceptance of the *status quo*, the importance of particular methods of analysis, and judgments on value of content. Thus there is writing that embodies a male perspective on the world masquerading as an objective non-gendered perspective.⁵ This masquerade embodies an extravagantly polemical statement that the male equals the human and that it is not worth inquiring about the existence of a female perspective. If feminist writers were to try to reverse this, they would be regarded as lunatics and certainly not as serious colleagues or students. Such invisibly polemical writing isolates openly political writing and gives the false impression of a contrast between, for example, feminist writing and 'neutral', 'value-free', or 'objective' analysis.⁶

The following comments are based on two things: my general knowledge of the literature in the field and a survey of what has been written in Canadian journals over the last two years. My method has

⁴ "[L]abelling [of deviance] is largely a matter of some persons or groups imposing their rules on others. Ultimately, then, who will be defined as deviant, and for what is a question of political and economic power." H.S. Becker, *Outsiders* (1963) at 17. Contemporary deviance theory therefore stresses power and intergroup conflict as key determinants of deviance outcomes . . . and examines the development and conduct of collective struggles over public definitions of deviance. . . ." E.M. Schur, *Labelling Women Deviant: Gender, Stigma, and Social Control* (1984) at 6.

⁵ In C. MacKinnon's often-quoted words, "male dominance is . . . metaphysically nearly perfect. Its point of view is the standard of point-of-viewlessness, its particularity the meaning of universality." In "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence" (1983) 8 *Signs* 635 at 638-39.

⁶ The materials covered so far are the leading texts and collections of essays, the reports and working papers of the Law Reform Commission, the Osgoode Hall Law Journal, the Criminal Law Quarterly, the Dalhousie Law Journal, the Canadian Bar Review, the Alberta Law Review, the Canadian Business Law Journal, and the Canadian Journal of Family Law.

been more impressionistic than rigorously scientific, and what I am trying to convey is my personal sense of the academic world in which I work. I could use various concepts to express that perspective. Alienation is perhaps too strong, although I often feel alienated. Marginalization is better and has been found useful by many feminists. It may be impossible to improve on Simone de Beauvoir's classic analysis of "otherness."⁷ I would be a monster if I did not realize that I too form part of an establishment that arouses similar feelings and so I am very aware that my impressions are affected by the limitations of my own perspective, which I suppose is that of a white, English-speaking,⁸ middle-class, heterosexual, academic woman. What follows is an analysis of the spectrum of legal writing from this standpoint. In summary, the spectrum envisaged encompasses an overt woman-hating perspective through to writing that is feminist in its coverage and methodology.⁹

In other words, there are gradations of visibility both of women and feminism. The vast bulk of work in the Canadian criminal law field falls in between, into two main groups: writing that is male in language and coverage and writing that is feminist in coverage.

Given generous speculation about the motives of some academics, I have not been able to identify any *overtly* women-hating research in this area. What is, however, identifiable as a phenomenon in Canada is the making or maintaining of distinguished men: men who remain distinguished no matter how unscholarly their approach to women or how negative or harmful their writing has been. These giants are not home-grown, but are referred to frequently and respectfully. The two outstanding figures in Canadian criminal law are J.H. Wigmore and Glanville Williams. Both promoted the idea that women and girls lie

⁷ *The Second Sex* (1953). An excellent illustration came to light as I was looking up the date of publication of her book. de Beauvoir does not merit an entry of her own in A. Bullock & O. Stallybrass, eds., *The Fontana Dictionary of Modern Thought* (1977). K. Lahey and S. Salter describe the feeling very well in the context of corporate law in "Corporate Law in Legal Theory and Legal Scholarship: From Classicism to Feminism" (1985) 23 Osgoode Hall L.J. 543 at 570. "Issues of oppression and power relations arise only between rich, white males; the whole drama . . . has an air of unreality, a sort of legal star wars."

⁸ For the purposes of this essay, I have not attempted to expand my limited knowledge of the extensive French writing in this field. In failing to do this, I am very much part of the mainstream of English Canadian academics. For a sense of what is available, see B.P. Archibald, Review (1984) 8 Dal. L.J. 248. I do not speak any of the native Canadian languages and do not know anything about their methods of social control. Again this makes me part of the mainstream. See, however, M. Carswell, "Social Control Among the Native People of the Northwest Territories in the Pre-Contact Period" (1984) 22 Alta. L. Rev. 303.

⁹ These are, of course, not contrasting extremes. In no way are they equivalents. They present contrasts in being negative and positive to women.

about sexual assault, an idea that, until recently, has been accepted in Canadian law.

Wigmore stated:

Modern psychiatrists have amply studied the behaviour of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes is that of continuing false charges of sexual offenses by men.¹⁰

Wigmore's manipulation of his authorities to justify his conclusions has recently been exposed by L.B. Bienen in an article entitled "A Question of Credibility: John Henry Wigmore's Use of Scientific Authority in Section 924a of the Treatise on Evidence."¹¹ This has not created any scandal in the world of criminal law and evidence, and I predict that it will not, because Wigmore's attitude to women is probably deeply irrelevant,¹² given the values that predominate in Canadian legal academic life.

Glanville Williams also contributed to the idea that women are prone to accuse men of rape falsely. He suggested lie detector tests as a remedy. He offered absolutely no scholarly support for this suggestion.¹³ It is submitted that in Canada we should be more parsimonious with our admiration.¹⁴ However, it is a point in our favour that women do not become visible as objects of hatred in our literature. Yet, given the examples of Wigmore and Williams, I doubt that if we did, the inciters of hatred against women would have a need for tenure.

¹⁰ *Evidence in Trials at Common Law* (1970) s. 924a at 736. He suggests at 737 "that charges should not go to the jury unless the female complainant's social history and mental make-up have been examined and testified to by a qualified physician."

¹¹ (1983) 19 Cal. West. L. Rev. 235.

¹² His attitudes have always been evident but this does not appear to have affected his citation as a leading exponent of the law of evidence. For example, he quotes H.G.A. Gross, *Criminal Psychology* (1911) at 30 in *The Science of Judicial Proof* (1937) at 336-37: "With [women's] hypocrisy we have, as lawyers, to wage constant battle. Quite apart from the women's ills and diseases which women assume before the judge, everything else is pretended; innocence, love of children, spouses and parents; pain at loss and despair at reproaches; a bleeding heart at separation; and piety — in short, whatever may be useful."

¹³ [1962] Crim. L. Rev. 662. This is an assertion that is commonly made without any authority at all. See also M. Ploscowe, "Sex Offences: The American Legal Context" (1960) 25 *Law & Cont. Probs.* 217 at 223: "Far too many men have been railroaded on sex offence charges," and R. Slovenko, *Sexual Behaviour and the Law* (1965) at 9. Slovenko cites Ploscowe as authority.

¹⁴ The respectful citation of men like these conveys to me the implicit message "O.K., so X was weird about women — now we know better — but he did all sorts of other good stuff." The reaction I have to that is similar to the reaction I have, as an Irish woman, to encountering a pub called The Oliver Cromwell in the English countryside. It is perhaps more significant, however, that there is no need to think of, never mind mount, any justification such as the one suggested above.

In a practical sense, therefore, at the most extreme end of the spectrum is research that is male-oriented both in language and coverage. In other words, the world being examined is male and is discussed in male terms: the Men and the Law category.¹⁵ Persistent liberal inclinations make me reluctant to argue that there is something inherently offensive about this as an area of intellectual activity. I am still inclined to think that there is not, as long as there is no pretence or, what is more likely, no unconscious assumption of universal relevance.

Examples are easy to find, and I am choosing the following article as an illustration precisely because it does display sensitivity to the dynamics of power. In other words, it is the kind of scholarship of which I would like to see more, if women became visible in it. The article I have chosen is by Louis A. Knafla and Terry L. Chapman and is entitled "Criminal Justice in Canada: A Comparative Study of the Maritimes and Lower Canada, 1760-1812."¹⁶ For more examples, open any journal. A particularly distressing one is W.W. Pue, "The Criminal Twilight Zone: Pre-Trial Procedures in the 1840's."¹⁷ "Fairness" is discussed without any mention of the issue of fairness to women of being tried in a totally male system. However, the accused is male linguistically, so perhaps only fairness to males is covered. How are we supposed to know? Why would there be such a limitation in any event?

The Knafla and Chapman article is largely not about women at all: "These Loyalists were men . . .,"¹⁸ "the evil in men."¹⁹ This narrow focus causes difficulty when it comes to the conclusion that the "ruling elite instilled a respect for the law that was based on the active participation of the local communities."²⁰ Since women were not partici-

¹⁵ See generally, D. Spender, *Men's Studies Modified: The Impact of Feminism on Academic Disciplines* (1981).

¹⁶ (1983) 21 Osgoode Hall L.J. 245.

¹⁷ (1983) 21 Alta. L. Rev. 335. F. O'Connor & L.P. Wright, "Mirror, Mirror on the Prison Wall!" (1984) 26 Crim. L.Q. 318; L.C. Green, "Is There an International Criminal Law?" (1983) 21 Alta. L. Rev. 251; B. Hovius & R. Martin, "The Canadian Charter of Rights and Freedoms in the Supreme Court of Canada" (1983) 61 Can. B. Rev. 354. It interests me that research on the Charter does not appear to demonstrate any more interest in women than non-constitutional criminal law literature. To the extent that academic research is funded by taxpayers, I wonder if women are receiving the equal benefit of the use of this money. I will make this argument when I come to the work of the Law Reform Commission.

¹⁸ *Supra*, note 16 at 247.

¹⁹ *Ibid.* at 256.

²⁰ *Ibid.* at 274.

pating as judges, lawyers, law-makers, and probably rarely as offenders,²¹ it is odd, to say the least, to refer to *community* participation.

This invisibility stands in startling contrast to the authors' references to 'Negroes', native people, the French as a 'conquered' people, Acadians, and European minorities. For instance, there is discussion of the make-up of juries with respect to nationality but not with respect to gender.²² There is a tidiness to this, a reminder that there is some predictability to the world. The near-exclusion of women from Knafla and Chapman's work mirrors the exclusion of women from the legal process they are describing. We were left out then and we are left out now. I feel excluded from reality and from the academic community when I read work of this kind,²³ no matter how instructive it otherwise is.

The point being made here is not the offensiveness of this treatment of women as invisible (although many consumers may indeed find it offensive and distracting), but the severe limitations of the analysis. Such limitations become critical when gender is obviously material to the analysis, and yet is insistently dismissed as irrelevant. For example, it is difficult for me to imagine an analysis of incest, the sexual abuse of children, and the legal response to these problems without reference to the significance of gender. To put it quite bluntly, men abuse women and children;²⁴ the criminal justice system from legislators to police officers is predominantly male; and the operation of this system has been heavily weighted toward the protection of males. Nevertheless, a non-gendered analysis is precisely what John Nigel Pepper attempts in his article "The

²¹ It is at this level only that a few women become visible, but most space is devoted to the description of the tortures of one nameless woman who was found guilty of attempted murder and attempted suicide, and *ibid.* at 267, the authors state:

The court sentenced her to be publicly beaten, flogged, branded on the right shoulder with the fleur-de-lis, banished from the Trois Rivières area and fined. [On appeal by the Crown] the woman was sentenced to be hanged at the public gallows, to have her body exposed for two hours and finally to be discarded at the public dump.

This is all. We are given no idea of who she was, or what lesson to draw from this. Was this usual treatment, for everyone, for all women? In fact some more information is available. She was a slave called Marie who attacked her mistresses and then tried to hang herself. Being flogged naked at the crossroads was not enough so she was hanged as well. She was a real woman who is part of our history: see *Dictionary of Canadian Biography*, vol. 3 at 430. Why are we treated to this full description of her tortures in an article in which women are otherwise energetically ignored?

²² *Ibid.* at 266.

²³ For examples of how to avoid excluding women, see generally J. Vickers, ed., *Taking Sex Into Account: The Policy Consequences of Sexist Research* (1984). It includes an article by M. Baker, "Male-Dominated Criminology: Implications for Women in Correctional Institutions."

²⁴ The Badgley Committee found that most sexual assaults against children were committed by males. See Report of the Committee on Sexual Offences Against Children and Youths, *Sexual Offences Against Children* (1984) at 215.

Child Witness.”²⁵ Although he sometimes uses male pronouns and sometimes both male and female, this does not appear to have any impact on the coverage attempted — gender is treated as immaterial throughout. Simply changing one’s language does not necessarily reflect a change in perspective.

It is more usual, however, to find maleness of language and narrowness of focus linked, as in some recent discussions of criminal defences. Defences are in essence the product of a political intuition of what makes behaviour, which would otherwise be criminal, non-culpable. If that intuition is male-centred, then serious questions arise about the need for more women-oriented defences, that is, defences that are sensitive to the reality of women’s lives. It could be argued, for instance, that it is a male perspective that leads to the rule that there is no absolute duty to retreat as well as the insistence on an imminent assault in self-defence.²⁶ This deprives the decision maker of the opportunity to examine the whole context, including any history of violence and the existence of realistic alternatives to self-help. Self-defence doctrine tailored to the dangers men experience but not those faced by women would, in the most immediate sense, be depriving women of the “equal protection” of the law as promised in the Charter.²⁷ Discussion of reform that neglects such concern is of limited usefulness. The work of Grant S. Garneau, “The Law Reform Commission of Canada and the Defence of Justification,”²⁸ and Eric Colvin, “Codification and Reform of the Intoxication Defence,”²⁹ provide illustrations. Both use male nouns as well as pronouns. Colvin refers to “man” intending the natural consequences of his acts³⁰ and Garneau gives us “layman” and “juryman,” thus providing a nice example of the inelegant *avoidance* of a common gender-neutral word: juror.³¹ Gender is immaterial to the analysis of both. Professor Colvin makes a plea for conceptual tidiness, a virtue in fact embodied in his article.

Analytical clarity is a problematic value, especially when presented as something worth pursuing in a vacuum. Intoxication provides a good

²⁵ (1984) 26 Crim. L.Q. 354. See also K. Lahey, “Research on Child Abuse in Liberal Patriarchy” in Vickers, *supra*, note 23.

²⁶ See *R. v. Deegan*, [1979] 6 W.W.R. 97 (Alta. C.A.), and *R. v. Whynot (Stafford)* (1983), 37 C.R. (3d) 198 (N.S.C.A.).

²⁷ *The Canada Act*, 1982, c. 11, s. 15.

²⁸ (1983) 26 Crim. L.Q. 121.

²⁹ (1983) 26 Crim. L.Q. 43.

³⁰ *Ibid.* at 51.

³¹ *Supra*, note 28 at 122, 126.

example. It may be true that women are at serious risk of being sexually assaulted by men too drunk to direct their minds to consent. Colvin's tidy world in which intoxication is relevant to *mens rea* may have a cost attached in terms of the protection of women from drunken sexual assaulters. He does not, however, even speculate about the costs of the values he is promoting. In the absence of any such discussion, I find it difficult to develop any opinion about his analysis. In other words, it seems to me to be an important inquiry to ask who bears the cost of values such as conceptual tidiness.³² If it appears that certain of our values just happen to benefit mostly people who are male, while the costs are borne by women, then this is something that should at least be addressed on a policy level. Indeed, it is a reasonable argument that it now has a constitutional dimension. To Professor Colvin and to other proponents of a high level of abstract uniformity,³³ this is not what they wish to discuss and so, to a reader like me, their discussion stops before the really hard, important questions are reached.

I do not think that this type of work is intended to be negative to women, but it is possible that women may bear a disproportionate share of the costs of the success of the arguments presented. Perhaps it is time that man indeed be taken to intend the natural consequences of his acts, including his scholarly activity. One should not make arguments about ideas in the abstract without at least considering that they may be put into effect in a non-egalitarian world.³⁴

A variation on the invisibility theme is that it would appear from a perusal of most writing in this field that there is no energetic, thriving school of feminist legal theory in Canada. There are academics who ignore women and academics who do not, but the ones who do not

³² Other examples spring to mind: freedom of expression is a crucial one, as is privacy. What is the distribution in terms of gender of the cost of respecting such values?

³³ See, e.g., the judgment of Dickson J., dissenting, in *Pappajohn v. The Queen* (1979), [1980] 2 S.C.R. 120. I debated whether to include Professor Don Stuart's work in this category, but concluded that that would be unfair. Clearly his text, *Canadian Criminal Law* (1982), displays considerable deference to the values of analytical clarity and good intellectual housekeeping. If this were all, I would feel concern that the leading text displayed no sensitivity to the fact that apparently gender-neutral concepts can do real harm in a world where gender is very material. However, his abstractions are not absolute and his approach acknowledges some of the reality within which the criminal justice system works. His work could not be described as women-centred but it is, to a degree, women-conscious in an open-minded and liberal kind of way.

³⁴ An extreme example of the phenomenon can be found in Mary Daly's book, *Pure Lust* (1984) at 48, where she quotes Robert Oppenheimer, "the father of the atomic bomb": "It is my judgment in these things that when you see something that is technically sweet, you go ahead and do it, and you argue about what to do about it only after you have had your technical success. That is the way it was with the atomic bomb. I don't think anybody opposed making it; there was some doubt about what to do with it after it was made."

adopt a feminist perspective rarely feel any scholarly obligation to refer to feminist analysis. To quote the words of Mark Tushnet in another context, scholars "attributed judicial decisions to, in what I am embarrassed to call the most sophisticated works, the interplay of responses along several forms of a liberal-conservative categorization."³⁵ Where legal writing rises above the level of case-mongering and addresses normative and policy choices, the range of acceptable analysis seems surprisingly narrow. A good article and an excellent example of the genre has been produced by my colleague Bruce Archibald in "The Law of Arrest."³⁶ To be fair, it is not exactly easy to put one's hands on a feminist analysis of arrest, but a feminist analysis of prostitution is not so elusive. One would not be aware of this from reading one recent article on the subject:

The debate can be caricatured thus: residents and property-owners are lined up on one side and civil libertarians and social action groups on the other. The former are concerned about neighbourhood nuisance, diminished property values and associated small crimes. The latter are concerned about discriminatory application of the law based on economic circumstances or sex, the creation of "victimless" crimes, and overbroad prohibitions which go beyond the nuisance-related concerns of the residents and property-owners.³⁷

While there is a hint of consciousness of gender here, although it is in the form of the gender-neutral 'sex' discrimination rather than discrimination against women, there is no sense of another major perspective on the issue, that of feminists who are concerned about the legal victimization of women and children already victimized by economic circumstances, commoditization of sex and the male demand for it.³⁸

This phenomenon is far more significant, however, when it appears in the work of the Law Reform Commission. The silence is not total,³⁹

³⁵ "Post Realist Legal Scholarship" (1980) 6 Wisc. L. Rev. 1383 at 1397.

³⁶ In V.M. Del Buono, ed., *Criminal Procedure in Canada* (1982) at 125ff.

³⁷ H.W. MacLauchlan, "Criminal Law Meets Civil Law: More Than One Way to Skin a Cat" (1985), 42 C.R. (3d) 284 at 285.

³⁸ See, e.g., the Canadian Advisory Council on the Status of Women, *Prostitution in Canada* (1984); B. Heyl, "Prostitution: An Extreme Case of Sex Stratification" in F. Adler & R.J. Simon, eds., *The Criminology of Deviant Women* (1979); M.A. Jennings, "The Victim as Criminal: A Consideration of California's Prostitution Law" (1976) 74 Cal. L. Rev. 1235; Erbe, "Prostitutes: Victims of Men's Exploitation and Abuse" (1984) 2 Law & Inequality 609.

³⁹ E.g., wife abuse (and husband abuse) is discussed in Working Paper 38, *Assault* (1984) at 36-38. Compare the analysis here to the understanding of the basic dilemma involved in trying to use the criminal law to protect women shown by Professor Olsen: "Any effort to protect women from private oppression by their husbands may expose them to public oppression by the state; any effort to keep the state out of our personal lives will leave us subject to private domination." In "Statutory Rape: A Feminist Critique of Rights Analysis" (1984) 63 Texas L. Rev. 387 at 393. However, I feel grateful that the Law Reform Commission has mentioned wife abuse in its analysis of assault. See M. Daly, *Pure Lust* (1984) at 50-60, for her discussion of the "mind-shrinking strategies [that cause] women to scramble for crumbs. . . ."

but at times is evidence of considerable determination. The Report on Contempt of Court provides a good example. It is not difficult to imagine that the law allowing the judiciary to punish for criticism of itself might have a special impact on women, who may wish to exercise their freedom of expression to point out sexist bias when they see it. The Law Reform Commission, however, has no concerns about misogynistic judges:

[Canadians] voluntarily . . . accept their decisions and rulings because judges are impartial. A litigant who loses, however unhappy he may be to have lost, will accept his lot because he will have inevitably received a decision untainted by prejudice or bias.⁴⁰

Further, "a judge will not hesitate to withdraw from a case if his [*sic*] impartiality is in doubt in the least."⁴¹ Thus the Commission recommends the retention of a form of contempt that they call "affront to the judiciary," an offence, moreover, without any defence of truth.⁴² In other words, it will not make any difference if the judge is demonstrably biased against women. The public interest in this fact is less important than the judge's feelings and the reputation of the judiciary.

Examples proliferate. Thus in Working Paper 29, *The General Part — Liability and Defences* (1982), mistake of fact, self-defence, and necessity are all discussed as if reality were gender-neutral and no concern need be expressed about the impact on women of the abstractions discussed and proposed.

The Law Reform Commission is a public body funded by both female and male taxpayers. It seems clear that its operations fall within the scope of the Charter, even given the narrowest approach to state action. To the extent that it fails to address the concerns of women and to derive assistance from feminist analysis, it is submitted that women are not receiving the equal benefit of the law creating the Canadian Law Reform Commission.⁴³

Why is this the case, and why is the focus of much of the academic writing on criminal law relatively narrow? My speculation is that many academic criminal lawyers, including those who work for the Law Reform

⁴⁰ Report, *supra*, note 24 at 10.

⁴¹ *Ibid.* at 26.

⁴² *Ibid.* at 27. In a recent rape case, the complainant was jailed for seven days for contempt because she refused to testify, fearing for herself and her family. See M. Strauss, "Experts Disagree on Sentencing of Reluctant Witness" *The [Toronto] Globe and Mail* (2 Dec. 1983). The judge threatened twelve women with contempt when they held up a banner stating: "We hold this court in contempt of women."

⁴³ See the *Law Reform Commission Act*, R.S.C. c. 23 (1st Supp.), as am. 1974-75-76, c. 40, and 1980-81-82-83, c. 47, s. 53.

Commission, are not self-conscious appraisers of their own research. They seem unconscious of the political context within which they are writing. As Mark Tushnet suggests, “problems arise as claims to objective knowledge are confronted with the reality that knowledge is produced by individuals located inextricably within the arena about which they are said to have knowledge.”⁴⁴ This can be contrasted with work in other disciplines as, I suspect, anyone who has attended non-law sessions at the Learned Societies’ meetings can confirm. As Edwin Schur suggests, for instance, of sociologists, they “are somewhat less inclined than before to insist that sociology is a narrowly scientific, ethically neutral enterprise. Particularly in areas of great public interest and controversy, the centrality of value questions is readily apparent.”⁴⁵

Returning to the spectrum, there seems to be a small amount of writing in which the author makes a conscious effort to avoid sexist language. This may or may not affect coverage. In other words, women may be visible, not as women in terms of content, but simply as a linguistic version of men. The alteration of language *per se* does no more than place the writing on the very fringes of feminist scholarship. Nevertheless, it is positive as it removes an alienating element for consumers.⁴⁶

This brings us to explicitly feminist scholarship, of which there is a growing amount. If one defines as feminist the scholarship that treats women and our concerns as worth writing about,⁴⁷ then this is a broad category and would include work by male academics. For example, Graham Parker in his article “The Legal Regulation of Sexual Activity and the Protection of Females”⁴⁸ conveys this idea. He also demonstrates awareness of the sexual double standard and the fact that so-called protection might not be beneficial to women. An excellent article and a good illustration of the point that men are not precluded from feminist

⁴⁴ “Legal Scholarship: Its Causes and Cure” (1981) 90 Yale L.J. 1205 at 1220.

⁴⁵ Schur, *supra*, note 4 at 13.

⁴⁶ For some rare examples, see Archibald, *supra*, note 8; D. Gibson, “Determining Disrepute: Opinion Polls and the Canadian Charter of Rights and Freedoms” (1983) 61 Can. Bar Rev. 377 (it was particularly important in this article as Professor Gibson was discussing community standards: the reader needs to know the author’s sense of what community is being discussed). The rarity of these samples in work that is not explicitly feminist leads me to wonder if some editors do not have a policy of editing out female pronouns.

⁴⁷ I mean worth writing about in a positive sense, not in the Wigmore-Glanville Williams sense.

⁴⁸ (1983) 21 Osgoode Hall L.J. 187.

scholarship is "The Rise and Fall of the Corroboration Rule in Sexual Offence Cases," by Jeffery Hoskins.⁴⁹

Of course, women scholars have contributed most to this body of work, which roughly falls into two classifications: (1) work that is feminist in coverage, and (2) work that focuses on feminist legal theory or uses a feminist methodology.⁵⁰ Much feminist research shows evidence of both. In the coverage category, there is work in the areas of criminology,⁵¹ evidence,⁵² substantive criminal law,⁵³ and the history of criminal law in Canada.⁵⁴

There remains a great deal yet to be done in all areas. It would be tremendously useful to have research on the political process of labelling deviance,⁵⁵ both with respect to women deviants and with respect to the role of women in the law-making, enforcement, and sentencing⁵⁶ processes. We need work on the contexts of women's crime; for instance, crime associated with systems of social control such as the welfare system and the mental health system. We need studies on the effects of the banning of midwifery in Canada and the control of women's reproductive choices by the medical profession. We need empirical research on the operation of the criminal justice system with respect to women: are the

⁴⁹ (1983) 4 Can. J. of Fam. L. 173. See also the empirical work done by V.P. Hans & N. Brooks, "Effects of Corroboration Instructions in a Rape Case on Experimental Juries" (1977) 15 Osgoode Hall L.J. 701, and L.D. Collins, "The Politics of Abortion: Trends in Canadian Fertility Policy" (1982) 7 Atlantis 2.

⁵⁰ For an introduction to feminist methodology, see J. Vickers, "Memoirs of an Ontological Exile: The Methodological Rebellions of Feminist Research" in A. Miles & G. Finn, eds., *Feminism in Canada* (1982).

⁵¹ See S. Gavigan, "Women's Crime and Feminist Critiques: A Review of the Literature" (1983) 6 Can. Criminology Forum 75. See also M.A. Bertrand, *La femme et le crime* (1979) and L.M.G. Clark & D.J. Lewis, *Rape: The Price of Coercive Sexuality* (1977).

⁵² See, e.g., C. Boyle, "Section 142 of the Criminal Code: A Trojan Horse?" (1981) 23 Crim. L.Q. 253. I am not as yet aware of any feminist analysis in the area of criminal procedure. None is included in the leading book of essays, *supra*, note 36.

⁵³ See, e.g., the Canadian Advisory Council on the Status of Women, *Prostitution in Canada* (1984); D. Kinnon, *Report on Sexual Assault in Canada* (1981); L.M.G. Clark, "Liberalism and Pornography" in D. Copp & S. Wendell, eds., *Pornography and Censorship* (1983); "Beyond Badgley: A Critical Review" (1985) 5 Can. Human Rights Advocate 7; and C. Boyle, *Sexual Assault* (1984).

⁵⁴ See, outstandingly, Constance Backhouse's historical research, e.g., "Nineteenth-Century Canadian Rape Law 1800-92" in D.H. Flaherty, ed., *Essays in the History of Canadian Law*, vol. 2 (1983) and "Nineteenth-Century Canadian Prostitution Law: Reflections on a Discriminatory Society" in *ibid.*

⁵⁵ For instance, along the lines of N. Boyd, "The Origins of Canadian Narcotics Legislation: The Process of Criminalization in Historical Context" (1984) 8 Dal. L.J. 102. Here he discusses the history of the criminalization of narcotics use with reference to the role of Chinese Canadians.

⁵⁶ See, e.g., the finding that there are no significant differences between men and women with respect to sentencing for violent crimes, C.L. Boydell & C.F. Grindstaff, "Societal Reaction to Violent Personal Crime" in C.L. Boydell, P.C. Whitehead & C.F. Grindstaff, eds., *The Administration of Criminal Justice in Canada* (1974).

people working within it in Canada “patrolling the boundaries of the female sex role”?⁵⁷ We need interdisciplinary research on the operation of ‘objective’ tests. How can male-oriented decision makers decide what is reasonable for a woman? We need broad-ranging critical evaluations of our substantive criminal law. Does our system inhibit women’s freedom of expression to criticize the judiciary, to bring complaints of sexual harassment, and to lay charges of sexual assault?⁵⁸ Conversely, does it leave uncontrolled the male interest in freedom of expression to consume pornography? We need consciously women-centred doctrinal research on substantive criminal law, including the general part.

There is a tiny amount of pure (as opposed to applied) theoretical work, but more would be very helpful to researchers on the previous level. The Canadian Criminology Forum may be showing some leadership in this context as it has also⁵⁹ published “Two Views on the Oppression of Women: The Limitations of Marxist and Radical Feminist Perspectives” by Dany Lacombe, a graduate student at Toronto’s Centre of Criminology.⁶⁰ Also in this category should go Lorene Clark’s work on liberalism and pornography⁶¹ since her analysis could easily be applied in other areas of criminal law. The work of Professor Toni Pickard should be singled out as outstandingly feminist in methodology, even if it is not so in a self-identified way. Pickard is obviously concerned about areas of law that have a real impact on the lives of women and combines highly abstract thought with a contextualized approach stressing the social realities of each crime.⁶²

The thread running through the discussion of the above spectrum of intellectual inquiry is the question of who, if anyone, needs tenure? The answer is partly dependent on the whole political atmosphere in academia. To what values is it receptive and who is at risk of being

⁵⁷ M. Chesney-Lind, “Chivalry Re-Examined: Women and the Criminal Justice System” in L.H. Bowker, ed., *Women, Crime and the Criminal Justice System* (1978).

⁵⁸ I have been trying in vain so far to find work on the use of public mischief charges against women who are treated as having made false accusations.

⁵⁹ See also *supra*, note 51.

⁶⁰ (1984) 6 Can. Criminology Forum 165. Mr. Justice Allen Linden, President of the Law Reform Commission, has also commissioned a critique of its work by Professor Kathleen Lahey, who has been an important influence on so much of the work in the field of Canadian feminist legal theory. See *Implications of Feminist Theory for the Direction of Reform of the Criminal Code* (1984).

⁶¹ *Supra*, note 53. One could certainly classify her work on rape as theoretical also.

⁶² See “Culpable Mistakes and Rape: Relating Mens Rea to the Crime” (1980) 30 U. Toronto L.J. 75 and “Harsh Words on Pappajohn” (1980) 30 U. Toronto L.J. 415.

rejected as 'unscholarly'?⁶³ (When I speak of being "at risk" I refer to real people losing their jobs and being unable to work in academia to support themselves and their families.⁶⁴)

I do not know if I can answer this question, except in a negative way. It is clear that the producers of the vast bulk of criminal law writing do not need tenure to do so and their claims to job security are identical to those of, say, the postal workers. Feminist scholars may need the protection of tenure, but I would submit that what is being produced under this protection is not yet radical, challenging material. I fully acknowledge my own lack of courage in attempting to stretch the range of policy choices. My only conclusion is that those of us who have the security of tenure should make more concerted efforts to pay for the privilege.

What are the prospects for the future? Surprisingly, there is support for the growing body of feminist research outside academic circles. The Canadian Advisory Council on the Status of Women has been doing some innovative and courageous work. Their Report, *Prostitution in Canada* (1984) leaves one with a real sense of scholarship with a purpose, the improvement of Canadian society. It is also possible that good feminist scholarship might be a commercial proposition. The recent book, *Women Against Censorship* (1985), edited by Varda Burstyn, is a welcome change from the hidden values and false stance of objectivity that are encountered in so much academic writing. The appearance of more works of this nature in the public realm may well give academics the courage we presently lack.

It is vital that radical, and specifically feminist, writing be encouraged, as it has at least the glimmerings of a vision for the future. Perhaps that is the most fundamental classification of all: that between research that gives one the sense that as human beings we are putting our intellect, our energy, and our emotion to some purpose in an impulse toward the good; and research that displays a complacent acceptance of the inequitable *status quo*. When academics stop *wanting things to be better* then perhaps it is time that they pass their tenure on to the irritating young person down the hall.⁶⁵

⁶³ That the context is crucial can be illustrated for skeptics by imagining an academic world with feminists in control. Who then would feel at risk and marginalized? Imagine a seminar at which you are seriously asked, "Is non-feminist work *really* scholarly?"

⁶⁴ I want to stress this because I have been invited to join in the "is feminist analysis really scholarly" debate by people to whom it is an interesting abstract issue. To me it means my means of support.

⁶⁵ "Reverse tenure" has been suggested by William Birenbaum, President of Staten Island Community College, as cited in D. Park Jr., "Tenure Shock" (4 June 1973) *The Chronicle of Higher Education* at 16-17, and described in the Panel Discussion, *supra*, note 1 at 10. It is supposed to protect new faculty and ensure a high level of performance.