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Attending to Equality: Criminal Law, the Charter and Competitive Truths

Rosemary Cairns Way*

I. INTRODUCTION

In November 2001, Justice Rosalie Abella delivered a keynote address on the challenges of judging in the 21st century.¹ Her remarks were provocative, moving, aspirational and multidisciplinary, weaving music, literature, contemporary culture, the media, history and current events into reflections on the judicial task. Justice Abella succinctly captured the social dynamic of the 1950s, writing: “The ‘truth’ was obvious, compliance was expected, and competitive truths and their adherents were squelched.”² Although written as part of Justice Abella’s “impressionistic justice journey”³ through the late 20th century, her discussion of the power of competitive truths resonated with my thinking about this essay. This paper was presented as part of the 15th Annual Osgoode Constitutional Cases Conference, a conference which this year marked the 30th anniversary of the entrenchment of the *Canadian Charter of Rights and Freedoms*.⁴ It was delivered as part of a panel entitled “The Justness of Criminal Justice: How Has the Charter Changed the Problems We Face?”, in which panellists were asked to “reflect on the social justice issues raised in the criminal justice system and how those issues have remained, changed or been redressed over the life of the Charter”. We were charged with critically examining how our understanding and response to crime has changed over the past 30 years. More specifically, we were asked what, if anything, the Charter had to do with it. My discussion is limited to the substantive criminal law of blame and punishment. I will not be concentrating on jurisprudential details, but

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¹ Rosalie Silberman Abella, “Judging in the 21st Century” (2001-2002) 25 *Advocates’ Q.* 131.

² *Id.*, at 133.

³ *Id.*, at 132.

⁴ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

rather on broad concepts. My analysis is impressionistic and personal, and it reflects my commitments as a critical feminist and as an educator of future criminal justice professionals. My argument is this. We need to both seek out and pay more attention to the competitive truths about criminal law. The most destabilizing competitive truth about criminal law which has emerged over the last 30 years is that the criminal law raises equality issues. The Charter has had something (but not much) to do with that. In my view, the criminal justice system's capacity to respond to social justice issues will be enhanced when equality values are fully and substantively incorporated into our "truths" about criminal law. And, as a corollary, the failure to incorporate equality will hinder our attempts to respond to the social justice challenges that permeate our criminal justice system. To be clear, this is primarily a claim about the incorporation of the equality value, a value which courts have repeatedly insisted should be central to the development of the law,⁵ and not a claim about the application of section 15 of the Charter.⁶ Incorporating equality requires deliberate attention to perspective, context, power, vulnerability, presence and absence.⁷ It is difficult and it is complicated. But, as the Canadian Judicial Council suggests in *Ethical Principles for Judges*, it is "at the core of justice according to law".⁸

⁵ In *Hill v. Church of Scientology of Toronto*, [1995] S.C.J. No. 64, [1995] 2 S.C.R. 1130, at para. 92 (S.C.C.), the Court concluded:

The Charter represents a restatement of the fundamental values which guide and shape our democratic society and our legal system. It follows that it is appropriate for the courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enunciated in the Charter.

See, generally, Peter Hogg, "Equality as a Charter Value in Constitutional Litigation" (2003) 20 S.C.L.R. (2d) 113.

⁶ Many commentators, advocates and activists are increasingly discouraged about the complex and unsatisfactory evolution of s. 15 jurisprudence. See, generally, the collection of essays in Sheila McIntyre & Sanda Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (Markham: ON: LexisNexis Canada, 2006) and Fay Faraday, Margaret Denike & M. Kate Stephenson, *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006).

⁷ Rosemary Cairns Way, "Reconceptualizing Professional Responsibility: Incorporating Equality" (2002) 25 Dal. L.J. 27, at 33. See also Patricia Hughes, "Recognizing Substantive Equality as a Foundational Constitutional Principle" (1999) 22 Dal. L.J. 5.

⁸ The Canadian Judicial Council, in its statement of *Ethical Principles for Judges*, identifies equality as one of its five basic principles, and counsels judges to "conduct themselves and proceedings before them so as to assure equality according to law". A commentary on equality recognizes both the challenge and the centrality of the principle.

The Constitution and a variety of statutes enshrine a strong commitment to equality before and under the law and equal protection and benefit of the law without discrimination. This is not a commitment to identical treatment but rather "... to the equal worth and human dignity of all persons" and ... "a desire to rectify and prevent discrimination against particular groups suffering social, political and legal disadvantage in our society."

II. SOCIAL JUSTICE AND THE CRIMINAL JUSTICE SYSTEM

What are the social justice issues raised by the criminal justice system? In my view, everything about our criminal justice system is permeated with social justice implications. I understand the term social justice to refer broadly to the relationship(s) between law and the issues which face vulnerable communities.⁹ Social justice scholarship emphasizes analysis and critique of the role of law in the development and maintenance of social, political and economic inequality, and encourages reflection on law's potential to be an instrument for social change. In Canada, social justice scholarship is attentive to the needs of historically marginalized groups including, *inter alia*, poor people, people challenged by mental illness or addiction, Aboriginal peoples, members of ethnic, religious and sexual minority communities, racialized individuals, women, children and the undereducated. All of these groups are overrepresented in the criminal justice system, as accused persons, convicted offenders, prison inmates, victims and witnesses, and, just as importantly, as the family, neighbours and community of those listed above.¹⁰ One

Moreover, Canadian law recognizes that discrimination is concerned not only with intent, but with effects. Quite apart from explicit constitutional and statutory guarantees, fair and equal treatment has long been regarded as an essential attribute of justice. While its demands in particular situations are sometimes far from self evident, the law's strong societal commitment places concern for equality at the core of justice according to law.

Canadian Judicial Council, *Ethical Principles for Judges*, online: <http://www.cjc-ccm.gc.ca/cmslib/general/news_pub_judicialconduct_Principles_en.pdf>, at 23-24. The five principles are judicial independence, integrity, diligence, equality and impartiality.

⁹ This is the definition of social justice used by the social justice teaching group at the University of Ottawa, Faculty of Law. See the Faculty of Common Law's webpage on Law and Social Justice, online: Faculty of Law, Common Law Section <http://www.commonlaw.uottawa.ca/index.php?option=com_content&task=view&id=629&Itemid=161&pid=161&lang=en>.

¹⁰ Ontario, *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (Toronto: Queen's Printer for Ontario, 1995), online: Legislative Assembly of Ontario <<http://www.ontla.on.ca/library/repository/mon/25005/185733.pdf>>; David Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006); Public Safety Canada, *Corrections and Conditional Release Statistical Overview 2011*, online: <<http://www.publicsafety.gc.ca/res/cor/rep/2011-ccrso-eng.aspx>> reports that 8.9 per cent of federal offenders are Black. This proportion has been increasing for at least the last three years (2010 — Black offenders made up 7.9 per cent of the population; 2009 — Black offenders made up 7.4 per cent of the population; 2008 — Black offenders made up 6.9 per cent of the offender population). Statistics Canada reports that 2.2 per cent of the Canadian population is Black. In other words, Black Canadians are overrepresented in federal correction institutions by a factor of 4. Jonathan Rudin, "Addressing Aboriginal Overrepresentation Post-Gladue: A Realistic Assessment of How Social Change Occurs" (2008-2009) 54 *Crim. L.Q.*, 447, at 451: "[T]he 2006/2007 ... figures from Statistics Canada show that Aboriginal people make up 20 per cent of the jail population in provincial facilities, up from 16 per cent in 2001. Currently, over 1 in 5 inmates in federal and provincial jails are Aboriginal. For women, almost one in three women in jail is Aboriginal. And the figures are even worse for youth." Canada, Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator*

need only spend a day or two in a busy criminal courthouse to observe what systemic and structural inequality look like in Canada. And one need only glance at the annual reports prepared by the Office of the Correctional Investigator to appreciate that our prisons are disproportionately occupied by those whose lives have been compromised by social injustice.¹¹ Consider, for example, the following snapshot of lived social injustice, a profile of federally sentenced women extracted from the most recent Report of the Correctional Investigator:

1. In the last 10 years, the number of Aboriginal women in custody has increased by 86.4 per cent, compared to 25.7 per cent over the same period for Aboriginal men.

(2008-2009), online: <<http://www.oci-bec.gc.ca/rpt/annrpt/annrpt20082009-eng.aspx>>: “Aboriginal rates of incarceration are now almost nine times the national average”. Corrections Canada, *Profile of a Canadian Offender* (January 2010), online: Correctional Service of Canada <<http://www.csc-scc.gc.ca/text/pblct/qf/pdf/07-eng.pdf>> reported that: 13 per cent of male offenders and 24 per cent of female offenders have very serious mental health problems on admission; there is a “prevalence” of learning disabilities as well as offenders with low functioning capacities; 75 per cent of offenders have a serious substance abuse problem; and a high rate of infectious diseases (7-10 times the national average for HIV and 30 times the national average for Hepatitis C). See also with respect to mental illness, the presentation of Howard Sapers, Correctional Investigator of Canada, Speaking Notes (Appearance before the Standing Committee on Justice and Human Rights, May 25, 2009), at 7-9, online: Office of the Correctional Investigator <<http://www.oci-bec.gc.ca/comm/sp-all/sp-all20090525-eng.aspx>> and Canada, Office of the Correctional Investigator, *Annual Report of the Office of the Correctional Investigator* (2008-2009), at 2-6, 15, online: <<http://www.oci-bec.gc.ca/rpt/annrpt/annrpt20082009-eng.aspx>>. See, as well, K. Roach & A. Bailey, “The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Law from Investigation to Sentencing” (2009) 42 U.B.C. L. Rev. 1, at 11. Roach and Bailey cite studies which suggest that at least 10 per cent of the carceral population suffers from some form of FASD, 10 times its presence in the general population (at 8-9), and that half of the individuals suffering from FASD experience incarceration (at 9). See, as well, the position paper of the Canadian Psychiatric Association, *The Treatment of Mental Illness in Correctional Institutions* (November 2011), online: <<http://publications.cpa-apc.org/media.php?mid=1249>>, which argues, *inter alia*, in Canadian Psychiatric Association, Media Communiqué, “Psychiatrists urge government to address worsening mental health problems among inmates” (December 7, 2011), online: <<http://www.cpa-apc.org/media.php?mid=1664>>:

The current situation is the result of poorly planned deinstitutionalization. Hospital bed closures have been too rapid and too extensive. Community resources have been underfunded and limited. The result has been a fragmented healthcare system where no one has taken responsibility for the care of one of the most disadvantaged and marginalized populations. Many people suffering from serious mental illnesses end up incarcerated in part due to the lack of resources to treat them in the community, with the result that correctional facilities have become de facto psychiatric institutions. Access to care for many only occurs after they have been criminalized. ... If the government does not include a robust mental health strategy with its aggressive stance on justice policy, the mental health crisis in our prisons will worsen. It's time to stop using prisons as a parallel healthcare system for people with mental illness.

¹¹ See the wealth of information available online at the Office of the Correctional Investigator: <<http://www.oci-bec.gc.ca/index-eng.aspx>>.

2. Thirty-four per cent of the incarcerated women offender population is Aboriginal.
3. In 2010, 86 per cent of women offenders reported histories of physical abuse, and 68 per cent reported a history of sexual abuse at some point in their lives, representing an increase of 19 per cent and 15 per cent respectively since 1991.
4. Approximately 45 per cent of women offenders reported having less than a high school education at intake.
5. In 2009, 29 per cent of women offenders were identified at admission as presenting mental health problems, and this proportion has more than doubled over the past decade.
6. Thirty-one per cent of women were identified, at intake, as having a past mental health diagnosis, representing a 63 per cent increase over the past decade.
7. Since 2003, at intake, approximately 77 per cent of women have reported abusing both alcohol and drugs.
8. Just under one-half of women self-report having engaged in self-harming behaviour.¹²

These statistics provide painful evidence of what we know. We disproportionately incarcerate the marginalized, and the Charter seems to have had little impact on our tendency to do so. The administration of criminal justice in Canada is overflowing with social justice issues. As criminal justice professionals, we have a public obligation to respond.

III. THE RELEVANCE OF THE CHARTER

Five years ago, Professor Roach argued that, despite its pervasiveness, and despite manifestly just results in a number of important cases, the Charter was in fact of limited relevance to the justness of criminal justice.¹³ In a wide-ranging discussion of significant criminal justice issues, he offered what he described as “a sense of perspective”¹⁴ about

¹² M. Barrett, K. Allenby & K. Taylor, *Twenty Years Later: Revisiting the Task Force on Federally Sentenced Women*, Research Report 2010 No. R-222 (July 2010), online: Correctional Service Canada <<http://www.csc-scc.gc.ca/text/rsrch/reports/r222/r222-eng.shtml>>; Public Safety Canada, *Corrections and Conditional Release Statistical Overview: Annual Report 2010* (December 2010), online: <http://www.publicsafety.gc.ca/res/cor/rep/_fl/2010-ccrso-eng.pdf>.

¹³ Kent Roach, “A Charter Reality Check: How Relevant Is the Charter to the Justness of Our Criminal Justice System?” [hereinafter “Roach”] in Jamie Cameron & James Stribopoulos, eds., *The Charter and Criminal Justice: Twenty-Five Years Later* (Markham, ON: LexisNexis Canada 2008) [hereinafter “Cameron & Stribopoulos”] 717, at 719.

¹⁴ *Id.*, at 718.

the relevance of the Charter and cautioned that the justness of criminal justice might have more to do with Parliament than the courts. In my view, this cautious assessment of the Charter's impact reflects an important truth of criminal justice. Criminal justice problems are inherently multi-dimensional. Solutions are necessarily multi-factorial and often beyond the capacity of courts. It is naïve to assume that Charter rights alone are capable of generating or sustaining the range of pragmatic, theoretical, political and systemic changes necessary to ameliorate even some of what is unjust about criminal justice. But Charter rights are not irrelevant. Their relevance and their potential depend on one's views about what might make the criminal justice system more just. Those views will, of necessity, reflect subjective preferences about what counts as justice and what a criminal justice system should achieve. In his recent book, *The Collapse of American Criminal Justice*, William Stuntz suggests that a decent criminal justice system must "produce justice, avoid discrimination, protect those who most need the law's protection, keep crime in check, and maintain reasonable limits on criminal punishment."¹⁵ For me, a "just" criminal justice system does all of those things and does it in a way which is fair, humane and efficient. Its structure and norms reflect Charter values, especially the values of equality and liberty. It functions in a manner consistent with the kind of democracy described by Dickson C.J.C. in *Oakes*,¹⁶ one which embodies:

[R]espect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.¹⁷

In approach it is deeply contextualized, recognizing, acknowledging and reflecting the shifting social contexts in which it operates, as well as the social and political particularity of the participants.

Acknowledging the social justice reality of the criminal justice system is both challenging and destabilizing. It is difficult to square the liberal individualism which characterizes dominant theories of responsibility and blame, an individualism which is premised on individual dignity, the capacity for choice, and formal equality of treatment, with

¹⁵ William Stuntz, *The Collapse of American Criminal Justice* (Cambridge, MA: Belknap Press, 2011), at 2.

¹⁶ *R. v. Oakes*, [1986] S.C.J. No. 7, [1986] 1 S.C.R. 103 (S.C.C.).

¹⁷ *Id.*, at 132 (S.C.R.).

the systemic social and structural inequalities which characterize the lives of those most likely to be caught up in the system. As Mark Kelman trenchantly observed: “Pure-choice theorists must at least be quite bothered by the disproportionate number of criminals who were victims of racism, poverty, and unstable and abusing families ... we must wonder about the meaningfulness of blaming those who we can so readily understand.”¹⁸ More recently, Ben Berger, describing what he calls “the gothic majesty of law’s independence from social inequality”,¹⁹ argues that “we need our criminals to expiate our social sins of callous disregard for social dislocation and deep societal inequality”²⁰ and suggests that recognizing the key role of social and political contributors to crime “would complicate to the point of structural paralysis the question of assigning guilt and responsibility”.²¹ I suspect he is right. The methodology of criminal law requires a narrowing time frame in order to focus on individual blameworthiness.²² This time narrowing, although functionally defensible, has the effect of rendering the systemic social and political factors which contributed to the occurrence of criminalized harm, invisible. It is hard to imagine an alternative system that could fully incorporate the systemic contexts which inform human behaviour, while at the same time responding to the personal victimization which the criminal law seeks to legitimately name, denounce and deter. However, in my view, the system’s ongoing legitimacy depends on our collective willingness to acknowledge the tension between theory and reality. We need to ask whether the inegalitarian impacts of the criminal law are the necessary and inevitable collateral damage of a system whose central organizing principle is individual responsibility.²³ And, even if we conclude that they are, we surely have an obligation to ensure that the system does not unnecessarily exacerbate the unequal social contexts in which it operates.

I argue that questions about the justness of criminal justice, and about the Charter’s responsive and constitutive role with respect to

¹⁸ M. Kelman, “The Origins of Crime and Criminal Violence” in D. Kairys, ed., *The Politics of Law: A Progressive Critique* (New York: Pantheon, 1982) 214, at 220.

¹⁹ Benjamin Berger, “Mental Disorder and the Instability of Blame in Criminal Law” in Francois Tanguay-Renaud & James Stribopoulos, eds., *Rethinking Criminal Law Theory* (Oxford: Hart Publishing, 2012), at 118.

²⁰ *Id.*, at 119.

²¹ *Id.*

²² Mark Kelman, “Interpretive Construction in the Substantive Criminal Law” (1980-1981) 33 *Stan. L. Rev.* 591.

²³ Alan Norrie, *Crime, Reason and History: A Critical Introduction to the Criminal Law*, 2d ed. (London: Butterworths, 2001), at 10-14.

justness, turn, at least in part, upon the ways in which Charter analysis potentially unearths, renders visible and potentiates criminal justice responses to systemic inequality. In other words, has Charter analysis encouraged the emergence of competitive truths which displace or disrupt the often abstract, and sometimes complacent, individualism of much criminal theory?²⁴ Can we link those competitive truths to the discourse of rights, or, at least to the discourse of Charter values? In what follows, I will briefly examine two ways in which the Charter has had an impact on how we conceptualize criminal justice issues, and suggest that these shifts may allow us to respond more constructively to the social justice issues which permeate the criminal law.

IV. COMPLICATING BLAME

The dominant narrative of the Supreme Court's initial foray into constitutionalized fault is that the Court moved from "bold idealism" to "cautious contextualism",²⁵ from a "burst of enthusiasm" to a period of "consolidation" and "retrenchment".²⁶ In the *Motor Vehicle Reference*²⁷ the Court did two things. First, it signalled its intention to take section 7 seriously by refusing to be constrained by a substance/procedure debate which, in its view, had no relevance in the Canadian context. Second, the Court jumped at the opportunity to follow the jurisprudential path championed by Dickson J. in *Sault Ste. Marie*.²⁸ What was previously a matter of criminal law policy became a matter of constitutional entitlement, and the potential individualized unfairness of absolute liability which concerned Dickson J. in the regulatory context was recast as a denial of fundamental justice. Justice Wilson, in a compelling dissent, focused on the combination of absolute liability and mandatory imprisonment.²⁹ For her, fundamental justice was about more than "moral innocence", however defined. It was about the combination of automatic imprisonment with absolute liability, a combination which in her view

²⁴ *Id.*, at 15-32.

²⁵ Roach, *supra*, note 13, at 718.

²⁶ Justice Marc Rosenberg, "Introduction" in Cameron & Stribopoulos, *supra*, note 13, at lxiv.

²⁷ *Reference re Motor Vehicle Act (British Columbia) s. 94(2)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.) [hereinafter "*Motor Vehicle Reference*"].

²⁸ *R. v. Sault Ste. Marie (City)*, [1978] S.C.J. No. 59, [1978] 2 S.C.R. 1299 (S.C.C.).

²⁹ *Motor Vehicle Reference*, *supra*, note 27, at para. 103.

was both unreasonable, extravagant, disproportionate and incompatible with the principle that punishment should be kept to a minimum.³⁰

The decisions in *R. v. Vaillancourt*³¹ and *R. v. Martineau*³² took the debate about moral innocence and applied it to an arguably anachronistic murder provision. Moral innocence became, in the context of murder, a constitutional requirement of subjective intention with respect to death. Unwilling to moor its analysis in the simple fact of gross disproportionality between a mandatory life sentence and the wide spectrum of intentions captured by the felony murder rule, the Court articulated a test dependent on stigma that became ultimately unmanageable, and which led to constitutional analysis almost breathtaking in its circularity. Alan Young has suggested that the principle of fundamental justice identified in the *Motor Vehicle Reference* — the principle of no imprisonment without fault — “may have been full of sound and fury signifying nothing”.³³ Jamie Cameron, who characterizes the constitutionalization of *mens rea* as “no more than a modest success”³⁴ suggests that while both “*Vaillancourt* and *Martineau* raised the spectre of radical reforms to the criminal law”,³⁵ the Court was ultimately unprepared to engage in the kinds of whole scale restructuring which a fully realized commitment to subjectivism might have required. She writes:

[T]he constitutionalization of *mens rea* ended with *Creighton* and its companion cases. Commentators saw wholesale retreat, if not an about-face, in the post-*Martineau* decisions. ... To this day, it is a matter of disappointment to some that the *MVR*'s promise remains largely unfulfilled.³⁶

My narrative of this story is different. In my view, the early stages of constitutionalized fault represented the seamless merger of an evolving common law commitment to subjectivism³⁷ with the liberal individualism of the Court's initial approach to the Charter. There are many reasons that the Court adopted this stance, including a desire to distance itself from Bill of Rights decisions, a need to forcefully respond to the legiti-

³⁰ *Id.*, at para. 128.

³¹ [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636 (S.C.C.).

³² [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.).

³³ Alan Young, “Done Nothing Wrong: Fundamental Justice and the Minimum Content of Criminal Law” in Cameron & Stribopoulos, *supra*, note 13, 441, at 482-83.

³⁴ Jamie Cameron, “Fault and Punishment under Sections 7 and 12 of the Charter” in Cameron & Stribopoulos, *id.*, 553, at 569.

³⁵ *Id.*, at 563.

³⁶ *Id.*, at 569.

³⁷ *R. v. Pappajohn*, [1980] S.C.J. No. 51, [1980] 2 S.C.R. 120 (S.C.C.).

macy critique, and a belief that the line between policy and law was discernible. The problem, in my view, was that the Court's claims about the relationship between subjectivism and innocence were devoid of political and normative context. The combination of eager idealism, fondness for overarching conceptual coherence, and an uncompromising commitment to subjectivism masked the complexity and context-specific nature of assessments of blame. In the context of sexual assault, feminists had long argued that privileging subjectivism in fact immunized male perspectives on sexual communication at the same time as it ignored the gendered stereotypes which informed that perspective.³⁸ Feminists also argued that entrenching subjectivism would dismantle the doctrinal distinction between specific and general intent offences, a distinction which, on the ground, seemed to benefit those most at risk from being victimized by intoxicated sexual violence.

In 1992, I worried that we were moving inexorably towards an uncritical constitutionalization of subjectivism.³⁹ I was wrong, of course. Ironically, the constitutionalization of *mens rea* seems to have "stalled" because the dramatic political and constitutional implications of entrenching a particular construct of blame became apparent, and the Court dug in its heels. Although not articulated as such, I think that this unwillingness reflected the Court's eventual acknowledgement of the complexity of blame. A competing truth about blame and responsibility emerged. Different criminal harms occur in different social contexts. A contextual, crime-by-crime approach to fault was more apt to respond to these social context nuances than a one-size-fits-all commitment to subjectivist theory. The post-*Creighton*⁴⁰ fault decisions were a retrenchment from the expansive potential of the early cases, but they were not regressive. Rather, they were a progressive and appropriate response to the multi-dimensional interests affected by criminal law, interests which the Court was beginning to take seriously.

³⁸ See text *infra* and accompanying notes.

³⁹ Rosemary Cairns Way, "The Charter, the Supreme Court and the Invisible Politics of Fault" (1993) 12 Windsor Y.B. Access Just. 128.

⁴⁰ *R. v. Creighton*, [1993] S.C.J. No. 91, [1993] 3 S.C.R. 3 (S.C.C.).

V. RECOGNIZING EQUALITY

In my view, the constitutional ideal of equality is the most obvious potential catalyst for the reconceptualization of criminal justice issues.⁴¹ Thirty years ago, the idea that the criminal law raised equality issues was both unfamiliar and largely misunderstood. The dominant conception of the criminal law was, for the most part, devoid of equality awareness and binary in nature, with state power to name and punish criminal behaviour counterbalanced by the classical liberal (freedom from) rights afforded the individual accused. In the criminal law, judicial intervention on behalf of the accused was likely to be seen as both rights-promoting and costless, primarily because courts failed to acknowledge the rights-denying potential associated with limiting state power as well as the anti-egalitarian nature of a number of criminal law norms. Recognizing the multi-dimensionality of the interests at stake in the criminal law renders the relationship of the Charter, which protects both liberty and equality, to the substantive criminal law exceedingly complex.

Christine Boyle put it succinctly almost 20 years ago. She argued that equality had never been in the forefront of “thinking about the overall burdens and benefits of criminal prohibitions”,⁴² and that courts and lawyers preferred to characterize criminal law questions in terms of fundamental justice, fair trial and privacy rights. She argued that “it is a liberal illusion that equality concerns are effectively addressed by considerations of power imbalances as between the state and the accused,”⁴³ and insisted that the criminal law needed to pay attention to all the other inequalities perpetuated, exacerbated and ignored by the system.

The reconceptualization of sexual assault which culminated in the 1992 reforms offers a powerful example of the impact of equality.⁴⁴ In

⁴¹ See Rosemary Cairns Way, “Culpability and the Equality Value: The Legacy of the Martineau Dissent” (2003) 15 C.J.W.L. 53 and “Incorporating Equality into the Substantive Criminal Law: Inevitable or Impossible” (2005) 4 J.L. & Equality 203.

⁴² Christine Boyle, “The Role of Equality in the Criminal Law” (1994) Sask. L. Rev. 203, at 207 [hereinafter “Boyle, ‘Equality’”].

⁴³ Christine Boyle & John MacInnes, “Judging Sexual Assault Law against a Standard of Equality” (1995) 29 U.B.C. L. Rev. 341, at 346 [hereinafter “Boyle & MacInnes, ‘Judging Sexual Assault’”].

⁴⁴ There is a vast literature on sexual assault. An excellent collection of articles from that era can be found in J.V. Roberts & R.M. Mohr, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) [hereinafter “Roberts & Mohr”]. See, also L. Vandervort, “Mistake of Law and Sexual Assault: Consent and Mens Rea” (1988) 2 C.J.W.L. 233.

my view, both the actual reframing of sexual assault law and the manner in which it was achieved exemplify an operationalized commitment to equality. The reform was the culmination of the concerted, unrelenting and determined efforts of Canadian feminists. Two characteristics of that movement were of particular legal significance. First was the explicit recognition of the multi-dimensionality of the issues and the range of rights claims which needed to be acknowledged and accommodated. This recognition was manifested in the broad range of stakeholders who participated in a consultative and deliberate re-imagining of how criminal law could work better.⁴⁵ Second was the strategic use of the constitutional norm of equality. Feminists argued that sexual assault raised equality issues. They argued convincingly that the crime was gendered, that the way the offence was interpreted and enforced affected women's safety, access to justice and social equality, and insisted that the law should not promote or rely on discriminatory stereotypes. To be clear, it was not a case of displacing the familiar and critical values of liberty, security and fair trial; rather, it was about ensuring that equality was part of the mix. It makes a difference, as Professor Boyle pointed out in 1994, how we describe the rights at issue in particular legal questions. It is only when "all the relevant rights claims [are] on the table together"⁴⁶ that lawyers, law-makers and courts can carefully confront and give meaning to the multiple and diverse interests at play in criminal law.

While the use of the equality norm in sexual assault law reform was primarily directed towards the equality interests of victims, subsequent cases have demonstrated that attentiveness to equality goes beyond so-called "victims' rights".⁴⁷ Although not always (or even often) framed in the language of equality, it is clear that courts have gone beyond a

⁴⁵ Sheila McIntyre, "Redefining Reformism: The Consultations that Shaped Bill C-49", in Roberts & Mohr, *id.*, at 293.

⁴⁶ Boyle, "Equality", *supra*, note 42, at 209.

⁴⁷ Indeed, many critical feminists were deeply concerned about the risk that women's equality claims would be appropriated in harsh and retributive justice responses. Scholars such as Dianne Martin warned that:

[T]hat association — between taking crimes against women "seriously" and treating offenders punitively — is a troubling consequence of feminist activism around the victimization of women: an activism that paralleled and propelled the emergence on the public/political terrain of "victim" as a new status of citizenship and personhood.

(Dianne Martin, "Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies" (1998) 36 Osgoode Hall L.J. 151, at 159.) In other words, the challenge, for critical feminists, was to imagine ways in which the criminal law could be restructured in a manner which was attentive to the equality rights of women and children without simultaneously ignoring the equality claims of accused persons. See, more generally, Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999).

simplistic equating of equality with victims' rights, and towards a more nuanced understanding of the complexity of rights claims which are engaged by the criminal law. Appellate court policy on interventions reflects an institutional commitment to multi-dimensionality. Consider, for example, the case of *R. v. Mabior*,⁴⁸ which was argued at the Supreme Court in January 2012. The issue in *Mabior* is the relevance of viral load to the disclosure obligations resting on HIV-positive accused.⁴⁹ The larger question is how the criminal law should respond to the evolving social challenge of HIV/AIDS, a question that implicates both the liberty and equality interests of sero-positive individuals, themselves a group characterized by multiple and intersecting grounds of inequality, as well as the liberty and equality interests of those potentially put at risk by a failure to disclose. Interveners in *Mabior* include the Canadian HIV/AIDS Legal Network, HIV & AIDS Legal Clinic Ontario, Positive Living Society of British Columbia, the Black Coalition for AIDS Prevention, the Canadian Aboriginal AIDS Network, L'institut national de santé publique du Quebec and the British Columbia Civil Liberties Association.

I am convinced that the combination of attentiveness to multi-dimensionality and context, combined with a commitment to a constitutionalized equality value can reshape the ways in which we think about much of the criminal law. Three recent cases offer examples. In *R. v. Tran*,⁵⁰ the Supreme Court considered the availability and scope of the provocation defence in a factual context charged with equality dimensions. Justice Charron, speaking for the unanimous Court, concluded that:

[T]he ordinary person standard must be informed by contemporary norms of behaviour, including fundamental values such as the commitment to equality provided for in the *Canadian Charter of Rights and Freedoms*. For example, it would be appropriate to ascribe to the ordinary person relevant racial characteristics if the accused were the recipient of a racial slur, but it would not be appropriate to ascribe to the ordinary person the characteristic of being homophobic if the accused were the recipient of a homosexual advance. Similarly, there can be no place in this objective standard for antiquated beliefs such as

⁴⁸ [2010] S.C.C.A. No. 492 (S.C.C.), granting leave to appeal *R. v. Mabior*, [2010] M.J. No. 308, 2010 MBCA 93 (Man. C.A.).

⁴⁹ Obligations recognized in *R. v. Cuerrier*, [1998] S.C.J. No. 64, [1998] 2 S.C.R. 371 (S.C.C.).

⁵⁰ [2010] S.C.J. No. 58, [2010] 3 S.C.R. 350 (S.C.C.).

‘adultery is the highest invasion of property’ [reference omitted], nor indeed for any form of killing based on such inappropriate conceptualizations of ‘honour’.⁵¹

In *Canada (Attorney General) v. Bedford*,⁵² the Ontario Court of Appeal considered a constitutional challenge to the sections of the *Criminal Code* which “indirectly restrict the practice of prostitution by criminalizing various related activities”.⁵³ The court struck down the “bawdy house” provision pursuant to section 7 of the Charter and identified a section 7 defect in the “living on the avails” provision which it cured by reading in a phrase limiting the provision to “circumstances of exploitation”. The Court was divided on the constitutionality of the “communicating provision”, with the differences between the majority and minority primarily reflecting a disagreement on the significance of the impact of the provision on street prostitutes. Justice MacPherson, in dissent, focuses on the particular and disproportionate vulnerability of street prostitutes and holds that “the equality values underlying s. 15 of the *Charter* require careful consideration of the adverse effects of the provision on disadvantaged groups”.⁵⁴ Relying on the decision of L’Heureux-Dubé J. in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*,⁵⁵ MacPherson J. concludes that the section 7 analysis needs to take account of the pre-existing inequalities that characterize the lives of the most vulnerable sex workers, whose experiences reflect multiple intersecting inequalities related to gender, race, sexual orientation and disability.⁵⁶

⁵¹ *Id.*, at para. 34.

⁵² [2012] O.J. No. 1296, 2012 ONCA 186 (Ont. C.A.) [hereinafter “*Bedford*”].

⁵³ *Id.*, at para. 2. *Criminal Code*, R.S.C. 1985, c. C-46.

⁵⁴ *Id.*, at para. 356.

⁵⁵ [1999] S.C.J. No. 47, [1999] 3 S.C.R. 46 (S.C.C.). At para. 112, L’Heureux-Dubé J.

wrote:

Before turning to the analysis of the s. 7 rights implicated and the principles of fundamental justice, I would emphasize that this case also implicates issues of equality, guaranteed by s. 15 of the *Charter*. These equality interests should be considered in interpreting the scope and content of the interpretation of the rights guaranteed by s. 7. This Court has recognized the important influence of the equality guarantee on the other rights in the *Charter*. ... All *Charter* rights strengthen and support each other [examples omitted] and s. 15 plays a particularly important role in that process. The interpretive lens of the equality guarantee should therefore influence the interpretation of other constitutional rights where applicable, and in my opinion, principles of equality, guaranteed by both s. 15 and s. 28, are a significant influence on interpreting the scope of protection offered by s. 7.

⁵⁶ *Bedford*, *supra*, note 52, at 356.

Finally, in *R. v. Ipeelee*,⁵⁷ the Supreme Court engages in an extended review of section 718.2(e) of the *Criminal Code* and its decision in *R. v. Gladue*.⁵⁸ *Ipeelee* includes, in my view, a quite remarkable discussion of how courts can respond to the existence of systemic discrimination through the sentencing process. Justice LeBel writes:

Canadian criminal law is based on the premise that criminal liability only follows from voluntary conduct. Many Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. While this rarely — if ever — attains a level where one could properly say that their actions were not *voluntary* and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their moral culpability. ... Failing to take these circumstances into account would violate the fundamental principle of sentencing — that the sentence must be proportionate to the gravity of the offence and *the degree of responsibility of the offender*.⁵⁹

Although LeBel J. does not use the word “equality”, the decision is enriched by his attention to the “devastating intergenerational effects of the collective experiences of Aboriginal peoples”,⁶⁰ the ways in which those effects have translated into “lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration”,⁶¹ and the potential disproportionate and adverse impact of apparently neutral sentencing criteria in a context characterized by systemic inequality. The Court concludes that a just sanction does not “operate in a discriminatory manner”, and sentencing judges have an obligation to ensure that their sentences are not contributing to, or exacerbating “ongoing systemic racial discrimination”.⁶² In other words, sentencing judges need to attend to equality.

VI. CONCLUSION: THE CHALLENGE AHEAD

There is a certain irony in the fact that the social justice challenge currently preoccupying criminal lawyers is the use of mandatory mini-

⁵⁷ [2012] S.C.J. No. 13, 2012 SCC 13 (S.C.C.).

⁵⁸ [1999] S.C.J. No. 19, [1999] 1 S.C.R. 688 (S.C.C.).

⁵⁹ *R. v. Ipeelee*, *supra*, note 57, at para. 73 (emphasis in original).

⁶⁰ *Id.*, at para. 82.

⁶¹ *Id.*, at para. 60.

⁶² *Id.*, at para. 67.

mums, given the fact that mandatory minimums were at issue in the early and foundational section 7 cases. In 2007, Professor Roach argued that excessively retributivist criminal justice policies and increased reliance on imprisonment through the use of mandatory minimums were impediments to the advancement of justice. He also predicted that “this policy trend will in all likelihood not be restrained by the Charter and the courts”.⁶³ I think he may be wrong. The suggestion that the Charter may be largely irrelevant to a criminal justice policy which will dramatically exacerbate prison overcrowding, worsen prison conditions, distort the exercise of prosecutorial discretion, interfere with the practice of plea bargaining, and have a disproportionate and discriminatory impact on Aboriginal peoples, racialized individuals, the mentally ill, their families and communities of support might lead one to decide, as Harry Arthurs has powerfully argued, to “say no to the constitution”.⁶⁴

I am not prepared to do that. I think that the ideologically driven and evidence-disregarding imposition of mandatory minimums is vulnerable to Charter challenge. Both *R. v. Ipeelee* and *R. v. Smickle*,⁶⁵ in which Molloy J. concluded that the three-year minimum in section 95(2) was, on the facts before her, fundamentally unfair, outrageous, abhorrent, intolerable and arbitrary, offer fodder for constitutional challenge.⁶⁶ It is not my intention here to analyze the ways in which mandatory minimums are constitutionally infirm. Rather, I want to suggest that our constitutional analysis must be alive to equality, either as an interpretive lens through which other rights are constructed, or as a stand-alone claim about the discriminatory adverse impacts of mandatory minimums.

As my colleague Elizabeth Sheehy has noted, Canadian courts have not yet been called upon to evaluate mandatory minimum sentencing against equality standards.⁶⁷ She offers a compelling argument that mandatory minimums violate section 15 through their disparate impact

⁶³ Roach, *supra*, note 13, at 720.

⁶⁴ Harry Arthurs, “Constitutional Courage” (2003) McGill L.J. 1.

⁶⁵ [2012] O.J. No. 612, 2012 ONSC 602 (Ont. S.C.J.).

⁶⁶ See the articles in this volume by Allan Manson and Debra Parkes. See also Benjamin L. Berger, “A More Lasting Comfort: The Politics of Minimum Sentences, the Rule of Law and *R. v. Ferguson*” (2009) 47 S.C.L.R. (2d) 101; Kent Roach, “Searching for *Smith*: The Constitutionality of Mandatory Sentences” (2001) 39 Osgoode Hall L.J. 367.

⁶⁷ Elizabeth Sheehy, “The Discriminatory Effects of Bill-C-15’s Mandatory Minimum Sentences” (2010) 70 C.R. (6th) 302. For a discussion of the disproportionate impact of mandatory minimum sentences on Aboriginal peoples, see Larry N. Chartrand, “Aboriginal Peoples and Mandatory Sentencing” (2001) 39 Osgoode Hall L.J. 449; Faizal R. Mirza, “Mandatory Minimum Prison Sentencing and Systemic Racism” (2001) 39 Osgoode Hall L.J. 491. See also the analysis by Professor Chartrand in this volume.

on Aboriginal peoples, other racialized groups and women, particularly Aboriginal and racialized women. Unfortunately, when systemic equality arguments are raised in courts, judges seem reluctant to adopt them, particularly when the claims are based on the compounding and aggravating impact of limiting judicial discretion. In two recent cases, *R. v. Johnson*⁶⁸ and *R. v. Nur*,⁶⁹ trial judges have faced these kinds of claims in the context of the so-called “*Truth in Sentencing Act*” and the mandatory minimum penalty in section 95(2) of the *Criminal Code*. In *R. v. Johnson*, Green J. concludes that “the impact of lengthier sentences will be disproportionately absorbed by historically disadvantaged and vulnerable groups, particularly Aboriginal and mentally ill offenders”.⁷⁰ In addition, he accepts that the “custodial sentencing disadvantage visited on those detained in custody pending their trials as a consequence of the Bill C-25 amendments would only be compounded in the case of black persons as they are more likely than members of other races to be denied bail.”⁷¹ Despite these conclusions, he finds no violation of section 15, concluding that:

[T]he current demographic evidence relating to pre-trial custody suggests that detention orders are correlated with considerations such as attenuated community ties, unemployment and a history of prior criminality. These factors may disproportionately characterize members of the black and Aboriginal community, but they are present in all racial and ethnic groups and are far from universal or defining features of persons sharing either of the Applicant’s ancestries. *Further, the Applicant’s argument, logically pursued, renders much of criminal law — or, at minimum, those statutory instruments bearing on penal sanctions — vulnerable to s. 15 challenge on the same footing. This hardly seems tenable.*⁷²

Similarly, in *R. v. Nur*, Code J. appears to accept the evidence that 62.1 per cent of the charges laid under section 95 between May 1, 2006 and October 31, 2010 involved Black accused, undoubtedly, in his opinion, “a disproportionately high number”.⁷³ And yet, he also concludes that there is no violation of section 15, concluding that the law itself is not the cause of discriminatory impact:

⁶⁸ [2011] O.J. No. 822, 2011 ONCJ 77 (Ont. C.J.).

⁶⁹ [2011] O.J. No. 3878, 2011 ONSC 4874 (Ont. S.C.J.).

⁷⁰ *R. v. Johnson*, *supra*, note 68, at para. 94.

⁷¹ *Id.*, at para. 61.

⁷² *Id.*, at para. 130 (emphasis added).

⁷³ *R. v. Nur*, *supra*, note 69, at para. 77.

It is not difficult to establish that poverty, unemployment, poor housing and weak family structures contribute to the proliferation of gang culture and gun crime. It is also not difficult to establish that these phenomena will attract heavy police attention and will lead to the laying of large numbers of s. 95 charges. Finally, it is not difficult to establish that anti-black discrimination undoubtedly contributes to many of these underlying societal causes. However, none of this establishes that s. 95 itself violates s. 15 of the *Charter*. ... The s. 15 arguments advanced by the Applicant and the Intervener could be made in relation to any provision of the *Criminal Code* that results in mandatory imprisonment, for example, the sentence for the offence of murder. If disproportionate numbers of blacks are charged with murder because of the discriminatory impact of poverty, unemployment, poor housing and biased law enforcement decisions, would it be appropriate to strike down the mandatory minimum penalty for murder? Obviously not.⁷⁴

These judgments reveal much about the challenges of making systemic inequality legally relevant to claims about the treatment of individual accused. They also reveal much about the poverty of our thinking about equality. The challenge of identifying and taking seriously competitive truths is the challenge of being prepared to re-examine what might be obvious, and what is, or might be, tenable. The Charter offers a jurisprudential vehicle for that re-examination. The last 30 years of decision-making in criminal justice has been characterized by an increasing willingness to address complexity and an increasing openness to multiple voices. I think that both of those trends are consistent with a commitment to operationalizing the equality value in the criminal law. I want to conclude by suggesting three things. One, we need to take account of equality in our conceptualization of the constitutional infirmities of, for example, mandatory minimums. Two, we need to name inequality as one of the unconstitutional results of limiting judicial discretion at the sentencing stage, discretion which in fact reflects principles of substantive equality. Three, we need to be prepared to hear from those who might offer competitive truths about the justness of our justice system. Our democratic commitments to both social justice and equality require it.

⁷⁴ *Id.*, at paras. 79-80.