Feminism, Punishment and the Potential of Empowerment

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Abstract – This paper argues that understanding the potential roles law and the state can play as transformative tools in counter-hegemonic feminist struggle requires that they be historically and structurally situated and contextualized, for both can be and have been facilitative as well as repressive. The paper examines, first, the negative consequences of using criminal law and the criminal justice system as instruments of reform, arguing that criminal law lacks transformative potential because of its particular role vis-à-vis the welfare state, dominant ideologies, and the struggle for change. Rights struggles are examined next, and it is argued that feminists should engage with law only under certain specified conditions to advance particular aims. The paper suggests some legal dead ends feminists should avoid, then examines alternative strategies which, it is argued, have the potential to empower and thereby to produce real and lasting improvements in women’s lives.

Résumé – Cet article défend la thèse selon laquelle la compréhension des rôles potentiels que peuvent jouer la loi et l’État dans la lutte féministe contre-hégémonique en tant qu’outils de transformation nécessite qu’ils soient d’abord historiquement et structurellement situés et contextualisés, les deux pouvant être et ayant été à la fois des outils facilitateurs et des armes répressives. Cet article étudie d’abord les conséquences négatives de l’utilisation du droit criminel et du système de justice criminel en tant qu’instruments de réforme, opposant que le droit criminel ne présente pas le potentiel transformateur nécessaire en raison de son rôle particulier vis-à-vis l’État-providence, des idéologies dominantes et de la lutte pour le changement. Les luttes pour les droits sont ensuite étudiées et l’auteure soutient que les féministes ne devraient se servir du droit que pour atteindre quelques buts particuliers et ce, seulement à certaines conditions bien précises. L’auteure énonce enfin quelques écueils à éviter et termine par l’examen de stratégies alternatives qui, invoque-t-elle, ont le potentiel de donner du pouvoir et, par conséquent, de produire des effets réels et durables sur la vie des femmes.
The main criterion for determining the success or failure of reforms should be the impact of the changes made on the lives of the women involved.¹

In accepting law’s terms in order to challenge law, feminism always concedes too much.²

We can’t dwell on the blame. We have to move on. The longer we spend blaming, the more time it will take.³

*Introduction*

The purpose of this paper is to argue that the focus in feminist thought on women’s injuries at the expense of women’s uniqueness and progress is one-sided and harmful. In policy terms, it leads to an emphasis on punishment and victimization rather than empowerment and transformation. This paper looks first at the negative consequences of attempts to use the criminal justice system as an instrument of reform, tracing the historical, theoretical and empirical results of employing it as such. The focus then shifts onto alternative and, it is argued, more productive strategies. This leads to a discussion of the conditions and types of rights and rights struggles which may be fruitful. Feminist approaches offering more potential for amelioration and empowerment and a more positive orientation are discussed at the end of the paper.

The emphasis on injuries and punishment has its origins in anger. As women have gradually rediscovered their history, redefined their entitlements, and realized the extent, viciousness and pervasiveness of misogyny in Western institutions and cultural practices over private and public spheres, they have become justifiably angry. Rage is a usual companion of social movements—the anger of black people in United States, for example, will be fuelling riots for some time to come. Indeed, reformers typically get more angry as movements succeed, because the rage comes to be seen as increasingly legitimate and the dangers of expressing it openly lessen. On political and ideological levels, calls for vengeance and punishment are appealing to those seeking change because they attract the attention of mass media and of political elites. However, this paper will argue that strategies built on rage which employ criminal law and the criminal justice system tend to


backfire. By focusing feminist energies on villains and victims, political and theoretical attention is directed away from tactics with greater potential to empower and ameliorate.

This paper should not, however, be read as advocating a dichotomous, black-and-white renunciation of all arguments based on injury or punishment, or a blanket rejection of criminal law under all circumstances. Such a "masculinist" discourse, an arrogant insistence on the virtues of a particular position to the exclusion of all competing ones, embodies the very characteristics of social theory we should be questioning. The aim here is to suggest that feminism may have over-emphasized the negative, and it might be time to shift the balance. The paper seeks to contribute one more voice to the debate, not excoriate all who have gone before.

The argument against a strategic focus on punishment and injury has moral, philosophical and political roots. Feminism, a movement rooted in amelioration and empowerment, should look carefully before embracing policies which have historically offered little of either. The institutional arm of punishment, criminal justice systems, consists of a subset of bodies and practices that were never designed to provide remedies, or to offer alternatives to the victimized. To the extent that feminism succeeds in extending punishment, it widens the net of social control over those men and women who are vulnerable to arrest and incarceration because of their class, ethnicity, race or gender.

Punishment itself is a mystifying concept, performed by a group of anonymous employees of the state ostensibly in the name of the public, but the public has neither access to, nor control over penal power. While instruments of control and regulation are necessary even in humane and egalitarian social orders, punishment, a specific way of conceptualizing and reacting to problems of control, is not. The institutionalization of punishment as a technique of control is a socio-political device whose development is linked to particular social orders and historical periods. Alternative responses are possible, even if they seem impossibly utopian at the present time. But, as counter-hegemonic strategies, they must be struggled for. As the history of social reform illustrates, radical change requires an intellectual foundation. Thus it is necessary to explore alternate possibilities at the conceptual and ideological levels. Envisaging and working through humane, rational and democratic tools to replace the present knee-jerk reliance on punishment is a long and difficult project. However, it is infinitely more worthwhile than continued reliance on policies which increase the level of punishment over populations already vulnerable and victimized.

4. C. Gilligan, In a Different Voice (Boston: Harvard University Press, 1982).
Punishment and Criminal Justice Systems

This section will look at the problems of employing strategies reliant in the first instance on criminal justice. Problems will be examined first from the viewpoint of theory; then the empirical evidence showing the results of such strategies, particularly their effects on the women they were meant to help, will be outlined.

Theory and Criminal Justice

This paper comes out of a post-Gramscian structuralist position that conceptualizes law as a form of power\(^7\) whose terrain and locus has been strengthened by joining forces with the increasingly powerful modern state. As a discourse, law makes certain claims to truth and in the process disqualifies other knowledges, experiences, and claims. Indeed, law has in recent years incorporated the formerly competing knowledge claims of various branches of science, particularly those disciplines specializing in social control such as psychiatry and psychology, to extend its scope and expand its sphere of influence.\(^8\) Institutions responsible for internal and external security (for example, police, criminal justice officials and armed forces) have the power of law further reinforced by being granted a monopoly on the use of force. Most societies have restricted access to weapons to specially authorized employees, typically in the public sector (United States being the striking exception); legitimizing agents’ use of guns and violence against fellow citizens is therefore a unique privilege. In most capitalist states, the criminal justice system is unique in still another way: it is the only institution that, in addition to adjudicating guilt or innocence, must ensure that those adjudged deviant are incarcerated and punished (notwithstanding the official rationale that offenders are to be held as punishment not for punishment).

This extension of formal social control through law, originating with the Industrial Revolution, the rise of capitalism and the development of techniques to rein in the poor, the “dangerous” classes, youth and women,\(^9\) now encompasses virtually all classes and, increasingly, both genders. Before mass industrialization and urbanization, women’s activities were largely confined to the private sphere, and the primary responsibility for controlling them rested on the male head of the household in which they resided (typically a father or husband). This authority was backed up by central institutions such as the church, and reinforced by


\(^8\) Smart, *supra* note 2.

custom and community mores. These developments, combined with new technologies of control (from cost-accounting to computer-controlled surveillance), and the afore-mentioned advances in medicine and the social sciences, have produced a limitless expansion in the quantity, intrusiveness and scope of law, and its impact on women's lives in both private and public spheres.

Gramscians would modify these observations by emphasizing that law, and the institutions it empowers, is not invincible; it does not always work in ways which further the aims of those who use it. Postmodernists would further soften law's impact by arguing that, as state control agencies escalate control efforts, and those controlled see the difference between their experiences of reality and the official version, "contempt accrues to the controllers". Contempt without the power to resist has limited effect; nevertheless, we must recognize that scholars have sometimes overgeneralized the relation between law and social structure. Some legal relations are essential to particular social structures—for example, property and contract law to capitalism—while others are relatively autonomous. Some have the potential to empower dissident groups; others do not. As this paper will argue, law must always be situated: its effects and potential depend on the kind of law employed (civil, criminal, administrative); the level of the state targeted (federal, provincial, local); and the historical relationship between the particular struggle and broader social forces of resistance, domination, and change.

History illustrates, however, that law has generally acted to reinforce dominant gender, race and class patterns. In conjunction with other institutions of the state, it has aligned itself structurally with both capitalism and patriarchy, and played a key role in maintaining hegemony, defined as "the process(es) of generating the "spontaneous consent" of the governed to the rule of a particular social group (class) through the development and promotion of ideologies that act as a social cement". The documented struggles of working class people, people of colour


and women throughout the 18th and 19th centuries illustrate the close connection between legal rule, in its administrative, civil, and criminal guises, and dominant classes, races and genders. Therefore the potential for using law to facilitate liberative struggle is real, but success is likely to be hard to come by—the struggle may fail or, worse, prove counterproductive over time.

Using the capitalist state, however, has sometimes resulted in significant ameliorative change in Western democracies. The state, as the terrain on which battles are fought, is only one form of rule-governed authority, but it oversees the regulation of all other realms (the family, school and church, for example). In modern capitalist democracies, it too is multi-determined. As a centre of power (but not the centre of power), it contains different institutional sites with different characters and varying potential as instruments of transformation. As with law, some sites are primarily educative and symbolic, others primarily repressive and coercive. Because it is not unitary, there are many different levels of the state, and many distinctions, tensions and voices within it. Nor does it exercise power independently; it is an institutional complex where social forces battle and social conflicts emerge. However, the terrain is by no means a “level playing field”, equally open to all forces and agents. Its shape (or tilt, to continue the geographic metaphor) reflects earlier struggles, and each new struggle is interpreted and resolved in light of the resolutions or compromises which preceded it. The interests of non-dominant groups are reflected but not represented; the state contains counter-hegemonic views by organizing and privileging dominant ones at the expense of the non-dominant.

Dissident groups and practices, then, are typically marginalized through hegemonic ideological constructions of reality. Ideology, the “elements of consciousness operating and originating in social practices which resonate throughout a society and which mirror and mediate its main societal relations and institutional forms”, does not necessarily reflect a factually incorrect view of the world or a rigid ruling class perspective. As components of people’s lived experiences, ideologies guide and mould ways of seeing the world and interpreting day-to-day living. They are riven with contradictions, which give them

17. Comack, supra note 1 at 5.
transformative potential. Dominant institutions and structural realities—class, age, race, gender—shape them, even though everyone experiences these realities subjectively and therefore differently. Every social order provides made-to-order, easily available dominant ideologies, “the conventional wisdoms providing the ready references, directives, rules and mediums which permeate institutions, allowing members to interact, predict, understand, evaluate and perform according to the requisite social goals”.

These dominant ideologies, disseminated and reinforced through the agents of socialization, education, law, religion, and media, reinforce certain interpretations of reality and ignore or deny others. Feminist theorists have pointed out that dominant ideologies strongly reinforce patriarchy, for beliefs about women’s nature and social role are even more universal than those reinforcing capitalism. Social movements attempt, through collective organization and struggle, confrontations with law and the state and judicious use of media, to challenge such belief systems. Thus, while there are interstices in law and hegemonic order where struggle can occur and resistance grow, the barriers faced by all who seek progressive change are formidable.

We will follow up this theme on the potential to construct counter-hegemonic change in Part II; my purpose here is to argue that criminal law and the criminal justice system have a distinct and much more restrictive role. On the theoretical and practical/political levels, their relation to social change and dominant ideologies is unique, their power to serve as tools of social transformation very limited. Feminist scholars have themselves pointed out the patriarchal nature of law in general, the ways its form, language, and substance reflect and reinforce male or elite or racist views, and have alluded to its tendency to boomerang against women.

Yet building strategies upon it is still the norm. Criminalization is politically appealing because it simplifies conflicts by stressing moral indignation over reason, offering “a concrete terrain of struggle, a reachable result”. But what if the result is not ameliorating for women; if strengthening criminal law plays into the hands of those who would disempower women?


Criminal justice lacks transformative potential because it does not operate in the same way as other mainstream institutions; it fills different ideological and structural roles. Criminal justice refers to a set of institutions whose primary role is to further social control, a task made easier if its “clients” are de-legitimized, rendered voiceless and powerless, ideologically and structurally isolated from the working class. The work of transforming law-breakers from political rebels to despised criminals took place during the early stages of industrial capitalism, before the dominance of monopoly capitalism, and has stood remarkably firm since that time. In criminal justice, the official mandate of police, courts, and criminal justice officials is to control and coerce (and thereby “protect”, which is the official legitimation for the first two).

Institutions outside the social control/punishment nexus accomplish tasks which benefit a large multi-class client group—they educate, heal, serve deities, provide public transportation or child-care. At a more basic level they also control and coerce, but that is not their primary role. They have legitimate functions, potentially useful to all classes, genders and ethnic groups, and can be called to account if they control or coerce at the expense of these central duties. Schools, for example, can be forced to change their procedures if they are punishing children rather than teaching them to read; general hospitals will be publicly criticized if they merely control patients as opposed to treating illness.

Such institutions must also be cognisant of obligations to respect dominant norms such as universalism (the right to be treated equally, regardless of class, gender, ethnicity, etc.), and justice. If hospitals heal and counsel men but administer drugs to women, if schools treat girls or lower-class students differently than boys, progressive groups can publicize such discriminatory practices through the tactics of social protest. Luckily, for those promoting change, mass media find such stories almost as irresistible as those dealing in the politics of envy or vengeance, for both ideological and economic reasons. Such protests are both instrumentally and expressively useful—that is, they promote consciousness raising in addition to instigating possibly significant change in the practices and procedures of the institutions in question. In mainstream institutions, where dominant ideology can be publicly challenged in this way, states responsible for the long-term survival of the status quo can be forced to enact policies which do not support


25. Under the guise of protecting the public, criminal law and its institutions function to stigmatize and de-legitimate despised individuals, causes or groups.

dominant interests (or at least support them to a lesser degree). If they fail to take
legitimating action under such conditions, they risk jeopardizing hegemony.

Calling the criminal justice system to account ideologically, on the other hand,
means asking it to become an equal opportunity oppressor, requiring it to control
and coerce all groups in the same way and to the same degree. Tactically,
struggling for universalism inside prisons may mean—indeed, has meant—making
conditions worse for female prisoners. Since women are usually seen as less
dangerous (to the public) than male criminals, “social junk” as opposed to “social
dynamite”; equality may mean changing prison conditions to ensure that the

treatment of women is as repressive as that accorded males. Hardly a progressive
goal, particularly when the positive side of egalitarianism makes no promise
beyond providing female prisoners with the same inadequate educational and job-
training options offered to men. The few ameliorative reforms that have come
about (such as the introduction of sweat lodges and healing circles for First
Nations inmates) have been the result of emphasizing differentiation, the opposite
of universalism. The kinds of liberative struggles possible in institutions outside
the social control milieu, then, yield results that are neutral at best and repressive
at worst in institutions of criminal justice.

Turning from macro-level theoretical issues to the organizational level, additional
problems impede amelioration and empowerment in the institutions of criminal
justice. Although problems rooted in operational procedures should be easier to
alter than structural barriers—because the former are human inventions operated
and controlled by employees responsible to elected political officials—this has
not proved to be the case. Indeed, even though some police officers, prison
guards, and policymakers are now women (a minority are even committed
feminists), criminal justice has been strengthened by cycles of reform, even
though similar cycles have liberalized other institutions in the welfare state. The
inability of even the best-intentioned individuals to surmount opposition and
institute progressive change in institutions of criminal justice has been minimal
thus far. This paradox should itself have generated deeper inquiry into the structural
and organizational roots of criminal justice.

When the problem has been addressed, localized and specific factors have been
favoured over structural explanations. The ability of penal and court systems to
resist accessibility and openness is well documented. Government commissions
come and go, and as soon as the spotlight is shifted off the particular institution
(which never takes very long), normal patterns resume. The virtually complete
secrecy that prison and court officials have been allowed to preserve, combined
with the ideological and structurally induced weakness of social movements

29. S. Ekland-Olson & S. Martin, “Organizational Compliance with Court Ordered Re-
dedicated to strengthening de-legitimated social groups such as prisoners, are key explanatory factors. However, the two are causally related: the relative powerlessness of such movements has meant that policies mandating secrecy and putting unlimited discretion in the hands of criminal justice officials were not successfully challenged until very recently.30 External progressive groups such as labour unions, feminists and native peoples have been reluctant to champion the rights of "criminals"; Marx himself called the underclass a lumpenproletariat devoid of revolutionary potential. The demonization of young male people of colour has been reinforced by recent right-wing anti-drug, anti-crime coalitions, and by victims movements.

From law passage to sentencing, officials exercise wide, unchallenged, and virtually unmonitored discretion: over which complainant is believed or ignored; over who is charged or let off with a warning; over which crimes are high-priority and which are given short shrift. We know that criminal justice systems typically target as offenders those with the fewest resources (political, economic, ideological), who can be processed with the least resistance.31 This has meant young, poor, minority-group males were disproportionately likely to be apprehended and incarcerated. “Respectable” women were, in the past, more likely to end up in mental hospitals than prisons, since they were seen as unstable and easily influenced rather than criminal. This situation has changed, however, with the moral panic over drugs leading the percentage of women incarcerated to double over the last decade in the United States.32 Poor and minority/native neighbourhoods are under the heaviest surveillance. These defendants are less likely to be released on bail or given the benefit of the doubt by court officials, and they can seldom afford to hire aggressive private lawyers to make trouble for police or court officials (which is not to imply that most privately retained lawyers counsel not-guilty pleas or that

30. Lawyers, radical and otherwise, and professional advocates for prisoners such as the John Howard and Elizabeth Fry Societies, have won several significant legal victories in Canada since the entrenchment of the Charter of Rights in the Constitution in 1982. Constitutional challenges occurred regularly in United States throughout the 20th century, with notable victories coming in the late 1960s and 1970s. See J. Irwin, Prisons in Turmoil (Boston: Little Brown, 1980). However, as Mandel and Jackson have pointed out, legal rights are not automatically or easily incorporated into bureaucratic routine. See M. Mandel, The Charter of Rights and the Legalization of Politics in Canada (Toronto: Wall & Thompson, 1989); M. Mandel, “Democracy, Class and Canadian Sentencing Law” in Comack & Brickey, eds., supra note 1; M. Jackson, Prisoners of Isolation: Solitary Confinement in Canada (Toronto: University of Toronto Press, 1983). The impenetrability and secretiveness of prison life makes external surveillance almost impossible to maintain, because the curtain can only be breeched briefly, after the fact, when murders or riots have occurred.


no legal aid or duty counsel challenge “the system”, since most defence attorneys do not, whether paid by the state or the client.\footnote{W. Chambliss, “On Lawmaking” in Brickey & Comack, eds., \textit{supra} note 1; Mandel, \textit{supra} note 1; L. Snider, “Legal Aid, Reform and the Welfare State” (1986) 24 Crime and Social Justice 210; Ratner, \textit{supra} note 24.}

Officials have their own norms about the legitimacy of victims as well. In general, the higher the social class, power, and “respectability” of the victim (in the eyes of the authoritarian, militaristic and puritanical occupational subcultures of police officers and guards), the more seriously his or her injuries will be taken.\footnote{R. Quinney, “Crime Control in a Capitalist Society” in I. Taylor, P. Walton & J. Young, eds., \textit{Critical Criminology} (London: Routledge & Kegan Paul, 1975); Ratner, \textit{ibid.}} Patriarchal values dominate this process at least as profoundly as the more frequently documented biases against working-class people and minorities.\footnote{G. Geller, “Feminism and Criminal ‘Justice’: An Uneasy Partnership” (1988) 17:3 Feminist Perspectives on the Canadian State 100; K. Faith, “Justice, Where Art Thou? And Do We Care?” (1989) 1:1 Journal of Human Justice 77.} Thus, although passing criminal laws is a public process, full of sound and fury, enforcing them in the institutions of criminal justice remains a complex and largely invisible one.

**Empirical Evidence**

Let us look first at initiatives employing criminal law to further feminist goals. In this area, the effect on the women the legislation aimed at empowering—the battered or assaulted woman—must be the prime, if not the only criterion for evaluating the success or failure of law reform.\footnote{This discussion focuses on male assault of female partners. We have too few studies on lesbian or gay battering to know whether similar patterns prevail in these “family” units or not.} When doing this, one notices first the cases where “reform” has actually worsened the plight of the victimized. Women found themselves facing contempt charges for refusing to testify against batterers,\footnote{“Battering Victims Sentenced” \textit{Toronto Star} (10 August 1986) A8.} for example, or arrested for pointing a gun to stop a beating.\footnote{\textit{Winnipeg Free Press} (18 March 1992).} In other instances, women were forced to contend with heightened state interference in their lives, facing social workers eager to investigate everything from finances to sex lives.\footnote{L. Snider, “The Potential of the Criminal Justice System to Promote Feminist Concerns” (1990) 10 Studies in Law, Politics and Society 143. See also S. Caringella-MacDonald, “Marxist and Feminist Interpretations on the Aftermath of Rape Reforms” (1987) 12 Contemporary Crises 4; D. Klein, “Violence Against Women: Some Considerations Regarding its Causes and its Elimination” (1981) 27:1 Crime and Delinquency 85.}
Moving to case studies, initiatives where the use of criminal law has been pronounced successful are much more equivocal on closer analysis. Jane Ursel\(^40\) outlines the struggle in Manitoba to force courts and police to take wife battering seriously, beginning with a 1983 directive from the Attorney General instructing police to charge all wife abusers. While the argument is complex, she maintains that changes in criminal law have significantly improved the position of female victims. Let us look at the evidence presented. First, the number of charges against abusers has gone up, a slow but steady increase since the 3673 charges laid in 1983—its self up from 2458 in 1982.\(^41\) Attrition rates have been reduced, particularly at the courtroom level, and criticisms by judges and lawyers of the Attorney General’s 1983 directive to charge abusers has largely evaporated. “More appropriate” sentences\(^42\) have been obtained for abusers. Crown appeals have also increased\(^43\) so presumably some “inappropriate” sentences are still being imposed. The percentage of offenders receiving a court-imposed sanction has increased from 48 to 64%; the percentage of those receiving fines alone as sanctions is down; probation and mandatory counselling dispositions are up; and jail sentences have increased from 2 to 7% of cases. Most of the offenders processed have working- or lower-class origins, are under 40 (70%), and have prior records (70%). They have low-level jobs if employed at all, and little education. (Data on racial origin were not presented, but it would be a safe bet that many of those charged are native or Metis in origin.)

The argument for interpreting this material as evidence of the success of employing criminal law is weak, particularly on the one criterion that counts—bettering the life of the victim. As indicated above, there is no reason to conclude that arresting and charging more suspects is helpful to the women involved, or even that it represents the option she would have preferred. As always, the men arrested are not a representative sample of abusers—they are the abusers with the fewest resources and the least ability to resist. It is abundantly clear from self-report studies and other sources,\(^44\) that poor men and natives are not the only, or


\(^{40}\) Ursel, supra note 1.

\(^{41}\) This would seem to indicate that feminist pressure was having an effect on government attitudes before policy was changed.

\(^{42}\) Ursel, supra note 1 at 272.

\(^{43}\) Ibid. at 275.

even the most serious offenders against women. Mobilizing class bias (and probably racism as well) in the name of justice, and of feminism, is not a clever strategy.

Second, the fact that most of those arrested have prior records is presented as evidence of their "dangerousness". But an equally plausible interpretation is that those with records are the easiest subjects for police to arrest, process and convict, as they are already stigmatised and labelled. Is there any reason to believe that putting more poor young males through the public trauma of criminal justice processing, and subjecting more of them to jail or "mandatory counselling" and compulsory therapeutic programmes, which have the highest records of failure, accomplishes any purpose except to provide more jobs for middle- (and some working-) class officials in criminal justice? The one documented effect of imprisonment is to make those subject to it more resentful, more dangerous, more economically marginal, and more misogynous. Those arrested are disproportionately men already subjected to the injuries of class, racism and often childhood abuse as well. Moreover, there is no literature showing that punitive sanctions, particularly applied to marginalized offenders for expressive rather than instrumental offences have any transformative or deterrent effect.

On the other hand, once separated from criminal justice and its mission of punishment, Ursel presents evidence that shows certain feminist initiatives have made a real difference to the lives of Manitoba women. The number of community-based women's assault services increased from five to 23 in the period under study. Ten of these are shelters, several are non-residential programmes, and all are apparently controlled by women. In addition, programmes to train police recruits have been set up (laudable from ideological and practical perspectives, however slim their chances of transforming paranoid and patriarchal police subcultures), as well as treatment groups for batterers, and a Women's Advocacy Program. Funding for battered women has tripled, from $300,000 in 1983-1984 to $1.7 million in 1987. (However it is unclear how much money will go towards

45. Ursel, supra note 1 at 279.
47. Expressive offences refer to those committed for primarily emotional motives, as ends in themselves, to demonstrate sexual prowess or win status in a peer group, for example. Rape, especially group rape, much juvenile delinquency and recreational drug use are examples of crimes that are frequently expressive in nature. Corporate crime, professional theft, fraud and bank robbery, on the other hand, are typically instrumental offences committed as a means to an end, the end frequently being monetary gain. As more "rational" offences, they are more amenable to preventive strategies that alter the cost and payoff structure of the offence. Like all ideal-type dichotomies, the distinction between expressive and instrumental offences, while useful for classificatory purposes, is never absolute. Most offences (and offenders) exhibit some features of both types.
48. Walker, supra note 46.
increased punishment of offenders, and how much for amelioration and empowerment of female victims.) Ursel points out that feminists employed in provincial and federal bureaucracies outside criminal justice played a crucial role throughout, supporting the principle of community-based programmes run by local women even at the expense of their own department and their own jobs.49

Thus we see evidence of real progress produced by feminists and their allies through struggle and engagement with mainstream institutions and government departments. But little success was achieved when changes were channelled through criminal justice—a finding consonant with similar studies elsewhere.50

The effect of initiatives directing police to arrest males accused of assaulting their partners has been extensively studied in the United States. An early study, much publicized in the media, reported that arrest decreased the chance of future assaults.51 Subsequent studies—six replications were commissioned by the National Institute of Justice in Dade County (Miami), Atlanta, Charlotte, Milwaukee, Colorado Springs and Omaha—have not supported an arrest effect. For example, Dunford et al.,52 in Omaha, found no difference in recidivism between assailants who were counselled, separated (the assaulter was sent away from the home for a 12 to 24-hour period), or arrested. Still, such initiatives have often been interpreted as evidence of the success of feminist initiatives. Dobash and Dobash,53 summarizing studies in the United States and the United Kingdom, see American feminism as instrumental in altering police practices and changing prosecution offices. The result, it is argued, has “advanced the agenda of social change” and produced “greater democratization of agencies of the State”.54

Spurred by equal protection suits, the practice of mandatory arrest and mandatory police response to complaints of battering have become almost commonplace in the United States and (less dramatically) in Canada. The San Francisco Family Violence Project, launched in 1980, “succeeded in heightening public awareness and altering persistent patterns [of denial and non-response by police] within criminal justice”.55 Similarly, the Duluth Domestic Abuse Intervention Project, “another successful programme”,56 instituted a pro-arrest policy that produced,
from 1982 to 1984, a 47% reduction in repeat calls and a 77% rate of guilty pleas (1992:181). Phrased differently, this meant that the percentage of women in the local shelter involved in court cases increased from 17% in 1980 to 43% in 1983. And in London, Ontario the number of arrests increased from one in every 16 calls in 1979 to three of every four in 1983, and victims were deemed more satisfied as well. The Dobashes conclude that “significant progress” in establishing “meaningful consequences” for abusers has occurred. The Santa Barbara Family Violence Project, on the other hand, has been pronounced a failure because it did not produce more prosecutions and arrests.

This North American record is contrasted with the situation in Britain where police and courts have, by and large, resisted initiatives to force them to arrest and prosecute suspected abusers on a routine basis. Efforts to protect women through civil injunctions have also been largely ineffective, as judged by the women themselves, although dramatic increases in the number of injunctions granted have occurred. Injunctions jumped from 6400 in 1980 to 15,539 in 1987. However, to interpret the increased use of criminal justice as evidence of the success of feminist initiatives to empower women (and particularly women victims of physical and sexual assault) is to make an unwarranted leap of faith and logic. Surely an increase in the number of injunctions and/or arrests shows only that social control is a growing and prosperous industry. To be fair, the Dobashes recognize the downside of criminal justice despite their optimistic conclusions. As they point out, one of the first documented effects of mandatory arrest legislation was the increase in the number of women arrested, usually for using violence to defend themselves against their attackers. They also note that criminal justice systems discriminate against men of colour. Moreover, the traditional prejudices court officials harbour against nontraditional women (usually those who offend against patriarchy by living without males to control them), results in increased discrimination and harassment against them. And, feminist dependence on criminal justice has legitimized the expansionary agenda of the criminal justice system.

Moreover, the most urgent need is to transform the community to which abusers return, and institute structural change at this level. The chances of doing this are surely diminished when all our efforts are directed toward initiatives that

57. Ibid.
59. Dobash & Dobash, supra note 53 at 183.
60. Ibid. at 183–84.
61. Ibid. at 192–93.
62. Ibid. at 199.
63. Ibid. at 206–09.
end up scapegoating marginal minority males. This is not to suggest that those arrested are predominantly innocent—there is no evidence of this—nor to argue that their offences be trivialized or ignored. The violence must be halted. And the Dobashes and others may be correct in pointing to changes in criminal law as important symbolic victories. But the key question remains: to what degree have such victories for feminism as a movement (still largely middle-class and white) been achieved at the expense of working- and lower-class women, women of colour and native peoples? Indeed, one of the most frequently reported findings is the resistance of most victims to criminal dispositions, either to the arrest itself or to the necessity of testifying as a court witness against their partner. One interpretation of this is that women do not necessarily want criminal charges laid against their assailant: they want the assault stopped. Unfortunately, police are the only agency empowered to take direct action using countervailing force, and they are available (at no apparent cost) 24 hours a day. Even after decades of struggle, few long-term, realistic alternative options are available to poor, rural and isolated women. Short-term counselling and shelters and feminist-operated safe houses have been literal and figurative life-savers but they are clearly not enough. And these have become increasingly dependent on criminal justice systems for funds and staff. Fighting for alternate ways to allow women to support their children, make a decent wage, and live in dignity with or without male partners must surely become the focus of future policy initiatives.

Certain conclusions are inescapable: policies mandating arrest and punishment do not provide solutions to the real problems of women—they do not ameliorate the day-to-day realities of battering, rape, and assault, and they may increase stress by adding a public level of suffering, at the hands of the criminal justice system, its practices and officials, to that endured in the private sphere. Reform initiatives seeking to promote liberal, humane or feminist values through criminal justice systems have failed, while initiatives promoting increased criminalization (as long as the discretionary powers of officials are not challenged) have largely succeeded, in North America at any rate. Many of the latter—victims’ rights movements in the United States provide good examples—are consonant with dominant ideological forces in that they seek to intensify control over potentially dissident groups in an era of high unemployment and fiscal crisis.64 Whatever their origins, they are accordingly embraced with some enthusiasm by state authorities, the media and relevant corporate elites, translated into law, and end up intensifying state control. Under the pretence of responding to pressure from such groups, including calls by feminists for longer sentences for rapists and sexual assaulters, many American states are passing statutes that weaken the standards of evidence required for conviction and allow preventive detention, arrest without

warrant and seizure of property. At the same time funding for counselling, therapy, or women's shelters has been systematically eliminated. None of this means the state is implacably patriarchal. As illustrated by Ursel's work, among others, there are interstices where feminists, inside and outside state structures, have made a difference. However, as argued throughout this section, institutional sites and types of law vary. They occupy different structural niches with different potentials for resistance and transformation. Macro-level and organizational level realities combine to make the institutions that comprise the criminal justice system the least likely candidates for transformative struggles. It is essential, therefore, to shift the balance of struggle away from criminal law and into arenas with greater ameliorative and empowering potential. The symbolic gains achievable through public forays to change criminal law must be balanced against the losses and costs of this strategy. We must be particularly attentive to their consequences for the most vulnerable women, whose fates cannot be easily disentangled from the lives of their partners and lovers. This may force us to take account of the effects of our criminalizing agendas on vulnerable male populations; a tactic that might not mesh well with present-day agendas promoting punishment, but one that has great resonance historically. Connectedness and care of "the other" have long been key feminist values.

In the next section we will examine another use of law to promote transformative ends, looking at the pitfalls and potential of struggles to translate interests into legal claims through what have come to be called rights struggles.

The Perils and Pleasures of Rights Struggles

Rights struggles are also problematic as foci for social action. While usually outside the jurisdiction of criminal law and the discourse of punishment (and therefore avoiding the worst of the traps described in Part 1), they do privilege law rather than social restructuring, and they do assume law reform is a legitimate way of redressing social problems. A politics of litigation is usually required to advance rights struggles (despite the objections of Bartholomew and Hunt that this is not necessarily the case), and such a struggle may be counter-hegemonic. Furthermore, movements dedicated to the "autonomy of resistance" tend to

65. Elias, supra note 39.
66. Ursel, supra note 1.
reinforce rather than challenge hegemonic relations of production. They tend not to confront the structural realities within which political struggles take place. On the other hand, they can have symbolic, and sometimes instrumental value as well.

Bearing these issues in mind, it will be argued here that rights, be they legal or constitutional, and the rights discourses and litigation they may or may not require, must be contextualized, broken down, situated. To summarize the arguments that will be advanced, feminists should engage law, it will be suggested, in the following ways: first, to remove any remaining impediments, laws which stand in the way of full legal equality or which “disadvantage women as a sex class”; 70 second, to prevent the passage of laws which will create new barriers (this includes struggles to prevent new and disabling interpretations of previously existing laws); and third, to establish concrete rights, cutting across both class and gender, which will consolidate present gains and empower future generations of women. Thus, rights struggles may need to become less central, but they will still be necessary under certain conditions. Particular historic and culturally specific circumstances, where the symbolic and hegemonic value of securing rights in a particular arena outweigh the disadvantages (the time and cost of litigation, the individualizing and de-politicization that attends translating issues into the language of law, etc.), will inevitably occur. However (for reasons to be explored below), the aim should be to secure concrete rights—to day care, minimum income, or the like—rather than abstract rights such as equality.

The Potential of Struggles Using Non-Criminal Law

The argument presented is that some aspects of civil and administrative (but not criminal)71 law may provide opportunities dissenting groups can use to secure structural as well as ideological change. Played out against a minimally liberal state and media, conflicts may be transformed into sites of ideological struggle, highlighting the injustices facing women (or workers, native peoples, lesbians, and similar groups). Through such struggles dominant ideologies (and ultimately hegemony) can be challenged, for the credibility of dominant beliefs rests on peoples’ isolation and shame, and on the tendency to individualize or blame oneself when discrepancies between dominant ideology and daily reality are


71. As we have seen, changes in criminal law tend to enlarge the domain of punishment while offering no concrete benefits to women at risk. At best they might have the potential for symbolic advance but not structural change. The distinction is a crucial one because it means the everyday lives of women are unlikely to be made better by, for example, new criminal laws proscribing heavier punishment for rapists, but they may be transformed by statutes delivering higher wages, day care or paid maternity leave.
confronted. The ideological, legal and political changes created through rights struggles may lead to long-term change and tangible progress. In addition, limited structural change can be precipitated. This is the best case scenario; the pitfalls, as many have pointed out, are numerous.72

A major problem with seeking universalistic rights through law is the emphasis this places on the juridical subject, and the transformation of the nature of political struggle this requires. Translating social conflicts into legal language means directing attention away from collective or gender memberships and depoliticizing group conflicts. They become struggles over the rights of individuals,73 and their historic and structural roots are irrelevant, resulting in the reinforcement of the status quo.74 Since this tendency is built into the basic structure and language of Western legal systems, it is not easily overcome.

Rights struggles can be politically divisive as well, especially when they are exclusive rather than inclusive—that is, when they seek to create special rights for women at the expense of men and other groups. They may divert feminist energies into "a fruitless quest to prove 'harm'".75 Although feminists may be more successful in penetrating civil and administrative legal spheres than criminal justice systems, women still do not control the results, the enforcement or the interpretation of laws that result from rights struggles. In particular, abstract concepts such as equality and justice have many "limits and contradictions".76 And reliance on law and the state has backfired in the past, when control by state


75. Smart, supra note 2 at 130.

officials has allied with patriarchal control in the private sphere through ideological constructions of familial autonomy, resulting in situations where “a man’s home is his castle”, but his wife’s prison.77

The most damning argument against rights struggles, however, is the simplest one: that laws creating equal rights for women have not been effective. They have “failed to produce substantive changes in the everyday lives of women or in the relations of power between women and men”.78 Equal pay legislation in Canada, for example, has apparently achieved minuscule gains, and only for the most privileged female workers. Could we have achieved more universal and expeditious results by struggling to increase the percentage of the female workforce in unions,79 or upping the minimum wage,80 rather than chasing the chimera of legal equality? Fineman81 and Weitzman82 have both pointed out that equal rights (to family income, assets, and children) in divorce law can disadvantage women and children because legal presumptions on the equality of spouses ignore the realities of structural discrimination against women, as both mothers and wage labourers. And, although the ideological “fit” is quite different, we have already seen the dangers of attempting to make women’s conditions in criminal justice systems “equal” to those of men.83

It is hard to argue against these reservations. Language and meaning are socially constructed; therefore, judges interpreting laws feminists hoped would bestow rights on women will look to the meaning and purpose of the particular law and make decisions in light of their own class and gender norms and those of the legal profession. Neither source of inspiration is likely to be particularly progressive. Law is about power and dominant ideologies are likely to inform legal officials, acting in good faith by their own lights, that the “real” intention of legislators was to keep power in the hands of constituted authorities and males.

77. Gavigan, ibid.; Smart, ibid.
78. Findlay, supra note 18 at 31.
(Unfortunately, it probably was!) Legal precedents will also push them in this direction.

Moreover, the granting of rights is class- and race-specific—only in theory are abstract rights guaranteed to all. In practice, considerable economic, social and political power, as well as decades of struggle, has been required to translate an abstract legal right into a concrete social benefit. Considerable power is necessary to secure the social conditions that will allow rights to be used in an ameliorative fashion. Indeed, inequalities in power explain why many feminist “victories”, from equal employment opportunities to freedom from gender discrimination, have primarily benefitted privileged white women.

However, this time lag may be a short-term phenomenon. It takes time and effort to get social benefits distributed down the class system, particularly when the intended beneficiaries are isolated and unorganized. Unions speeded up the process of changing legal victories into practices on the shop floor earlier this century, but even here the benefits went primarily to white males. While lower-class women, women of colour and native women may be the last groups to realize benefit from certain rights struggles, this does not mean such benefits cannot or will not transform their lives. The time lag is unconscionable because the needs of those near the bottom of the social order are the most acute. However, the point is that some analysts have been employing a woefully short time frame and writing off certain rights struggles as unsuccessful on the basis of inadequate evidence. The battle for pay equity, for example, may bear fruit even though its short-term effects have been disappointing. No one today is arguing that the rights struggles of 19th-century women to own property or vote were misguided or futile even though the benefits were initially restricted to elite women. And there is evidence—indeed, it is splitting some feminist coalitions apart—that formerly powerless women, organized into social coalitions, are no longer waiting passively for benefits to “trickle down” to them. By seizing the initiative in this way and forcing the agenda, they are moving to take control of the substance as well as the timing of social reform.

Engaging Law to Remove Barriers

The second condition which may necessitate engagement with law is the removal of legal impediments. As Smart has pointed out, first-wave feminists became involved with law reform because of the need to abolish laws which accorded special privileges to men. Laws that reinforce patriarchy and serve as barriers to feminist goals of empowerment and amelioration are far from obsolete despite the


85. Smart, supra note 2.
fact that earlier generations of feminists succeeded in removing the most egregious legal barriers in Anglo-European countries. Laws denying women the right to own property or retain it after divorce, laws making children the property of the father, laws barring women from education and shutting them out of professions, are now gone. Ironically, however, many of the laws that impede women's struggles today are boomerangs, the product of earlier attempts to secure abstract rights that are now, through universalism and technology, being used against women.

The continual expansion of the “psy” disciplines of social control and allied technologies has produced conditions allowing ever-greater levels of state or medical surveillance. Scientific discoveries about the nature of reproduction or the structure of mental resistance have far-reaching implications for multinational corporations or nation-states. Deliberations over the ownership, use and regulation of scientific techniques of surveillance and control are conducted in secret, and the machinery of ensuing legislation is extremely complex. Thus, it is possible that laws with the potential to put women at a serious disadvantage can escape public notice throughout their early stages—that crucial formative period when the limits of debate and compromise are decided. Indeed, formerly neutral laws can become damaging to women when new technologies complicate their meaning or potential. This highlights the ever-present counter-hegemonic risk universalistic legislation presents. The translation of individual desires into legal rights may present similar problems. Zipper and Sevenhuijsen, for example, trace the evolution of the seemingly innocuous desire of adopted children to know their birth parents (mother) from a subjective longing into a legal right, and the frequently horrendous disruptions this has on newly discovered mothers.

Burgeoning reproductive technologies illustrate these dangers. The interests of the medical profession in retaining and increasing control over (female) patients, combined with the interests of multinational pharmaceutical companies in generating the largest possible profits, have produced the medicalization of all stages of women’s lives. Childbirth can only be accomplished through the application of sophisticated technologies controlled by medical professionals;


87. Smart, supra note 2.

menopause becomes a disease that can only be alleviated by prescribed (and expensive) hormone “therapy”. The ability to fertilize an ovum outside the woman’s uterus has allowed men to claim legal rights to babies born to surrogate mothers. Fetuses have been granted “rights”—not only the right to be born (which justifies restrictions on women’s reproductive choices), but also to be born “healthy” (which justifies incarcerating pregnant women with alcohol or other drug problems). Indeed, criminal charges were laid against several women in Pennsylvania in 1992 after they gave birth to babies allegedly addicted to cocaine. Historically it is clear that concern for public health has led to increased coercion and surveillance over women, particularly lower and working class women. 89

Limits on the Powers of Law

Foresoeing the dangers of impending legislation, then, is an important task. However, we must not forget that this attention to law is rendered necessary by the fact that women are still relatively powerless. Laws have the potential to be interpreted in ways which hurt women because women lack the power to resist such interpretations. Laws, however complex and ambiguous, do not generally wreak havoc upon dominant groups. They are practically never interpreted in ways which threaten the rights of males or upper-class people, because both dominant ideology and social practice direct judges away from this reconstruction of reality. When asked to decide on two equally plausible interpretations of a statute, the one chosen will generally favour the status quo, and benefit established concentrations of power. Should this not happen, legislators—in the absence of organized counter-hegemonic pressure from external groups—can merely change the wording of the law to ensure that the offending interpretation is henceforth rendered impossible. This happened in the United States when the Supreme Court declared capital punishment unconstitutional, with the result that state politicians quickly redesigned existing statutes to circumvent the Supreme Court’s objections, then went back to executing as usual. Legal action is sometimes important not because law in itself will increase the power of women, for history shows repeatedly that law has limited independence from structural forces, and limited potential to act as an independent instrument of social change. But legal battles may be a means to an end; the end being to increase the power of women on ideological, political, or economic levels. They must never replace strategies designed to empower, nor be confused with them. Law reform, then, is best envisaged as a defensive tactic, to be used when it cannot be avoided. Like

surgery or growing old, it is only advisable when the alternative course of action is worse.

The secondary role law plays in battles for meaningful change highlights another point that should guide political action: concrete rights—to guaranteed employment, universal medicare, day care or reproductive rights—are tactically preferable to abstract ones. The reasons are straightforward. First, abstract reforms tend to benefit, at least initially, those who need them least. Second, costly legal battles are not usually necessary to determine the meaning of concrete rights because they are less opaque. The meaning of a law granting every woman six months paid maternity leave per child, for example, is reasonably straightforward. It does not require a doctorate in law to figure out what has actually been won or how it relates to everyday life. Third and relatedly, it is harder for reactionary forces to launch counter-hegemonic struggles to change the meaning of the “right”, or use it to strengthen conservative forces.

To ensure lasting effects, struggles for concrete universalistic rights should develop constituencies that cut across gender as well as class and ethnic lines. Because the ultimate success of feminism depends on collective struggle with alliances of like-minded people, avoiding the divisive potential of battles for special exclusionary rights, as opposed to universal ones, is crucial. Having the widest possible coalition of allies is especially important for counter-hegemonic movements because only those causes ideologically compatible with dominant forces, or those with power bases inside state bureaucracies, can consolidate their victories without the power that majorities (or well-placed, vocal, large minorities in a pinch) confer. Isolated minorities representing counter-hegemonic causes may occasionally get laws passed, but they will not have the clout to get them enforced or incorporated into decision-making structures and workplace routines. Wide-ranging support for feminist issues is crucial, then, to ensure that the benefit conferred is actually delivered to those it is supposed to benefit. The more powerless and marginal the intended beneficiaries, the harder this will be to accomplish. Movements lacking broad-based support, such as welfare rights or poverty coalitions, have failed precisely because the momentum has disappeared once the media and outside pressure groups take up other issues.

Limiting rights struggles to concrete issues where large, cross-class and cross-gender coalitions are a reasonable possibility, in areas with the potential to empower and politicize such as health care and employment, then, maximizes the chances of long-term success. Should the reform be passed into law, it may be tactically important to press for new bureaucratic arrangements within state structures to implement the changes. Maximum leverage will be achieved if the new bureaucracy is controlled by feminists or “friends”. This is a controversial recommendation because state bodies are subject to cooptation and inertia, but consolidating a reform in this way provides a set of allies inside state structures who then have vested interests in retaining and expanding the benefit secured. Arguments generated from the inside—mounting defences against competing
organizational priorities or protecting one’s share of a shrinking budget pie—are more likely to be successful. On-going pressure from the outside is still essential, however, to give allies on the inside the leverage they need. They have to be able to tell their political masters that the recommended policy change is really very conservative when one considers what those angry women demonstrating in the streets are demanding! External pressure, then, makes a necessary progressive policy appear to conservative state officials as the better of two unpalatable courses of action. External groups are also necessary to ensure that key beneficiaries of the reform remain those outside state structures, not officials or politicians.

There is also much to be done without invoking law. On the ideological level, educating the public and convincing people of the validity of feminist causes, through legal, extra-legal, and non-legal struggles, employing a variety of means and embracing a number of institutional levels, is crucial to secure long-term change. As argued earlier, it is through a redefinition of the rights and nature of women that real progress is made. While not wishing to privilege the ideational level (since structural changes must go hand in hand with the ideological, and law itself has an ideological component), one must recognize that dominant “malestream” ideas about the nature, purpose and potential of women have been a major stumbling block for the feminist movement. In part, this is because it is not easy for either sex to remove blinders put in place by their earliest socialization experiences, and continually reinforced from that time forward. In part it is because, like all ideologies, there are elements of truth embedded within complex dominant ideological systems, truths which catch one emotionally and unconsciously even if they have been examined and rejected on conscious and rational levels. Public struggle is a key way to change dominant ideologies about women, and thus an important device for achieving the generational changes that are essential if real progress is to occur.

This process can be best illustrated by looking at the struggles of another counter-hegemonic group, workers, and their campaigns for the right to refuse dangerous work. Although this struggle was more superficial than the one feminists confront—because the psychological processes confronting feminist aims are rooted deeply in human psyches—opposition from the forces of capital and state were initially virulent, extensive, and very powerful. Only very slowly, through a series of highly public struggles, demonstrations, speeches, publications and confrontations with the police and army, did workers successfully challenge the fervently held belief that facing hazardous conditions was part of the job contract, a condition of employment accepted whenever they “freely” took a job. In one set of state-sponsored hearings, for example, managers with Canadian Pacific Railways argued that running along the tops of railway cars (in a train going 50 miles an hour) was not dangerous as long as the workers were careful—and it was their...
habit of abusing liquor that made so many of them fall off. A series of very ineffective laws were passed at first, by political states that were, in some instances, directly controlled by the forces of capital.

Gradually, however, dominant ideology changed—and the limits of “reasonable” business behaviour and “reasonable” risk shifted. Gradually, conditions that had been accepted as part of the employment bargain in 1890 became marks of the irresponsible employer by 1940. Law did not cause this transition—in many instances, the power to pass laws outlawing dangerous conditions did not exist until long after the conditions had declined and become characteristic of the “bad apples” on the fringe of respectability. Indeed criminal law was almost totally absent, criminal prosecutions of employers virtually unknown. The struggle to refuse dangerous work was also facilitated by the fact that many hazardous conditions were rendered unnecessary by technological improvements, thus removing the crucial link between unsafe conditions and profit maximization, making reforms financially expedient and considerably lessening resistance from capital. Nevertheless, the development of safer technologies was itself spurred by employee resistance to dangerous conditions. Whatever the reasons, prevailing definitions of acceptable levels of risk for first-world employees did change dramatically over the last 100 years. The result is that people work shorter hours, in cleaner, lighter, better ventilated conditions, with more break time and more protection against arbitrary dismissal. They also live longer. It is this process of ideological and structural change that feminism, ideally, buys into by entering the public arena.

Alternatives—Theory and Praxis

The attempt to construct a specifically feminist jurisprudence, an elaborate structure of formal law based on women’s values and reflecting women’s realities, represents one alternative. Although I would argue that this initiative is deeply flawed—it rests on the premise that law, particularly but not exclusively criminal law, can effect structural change and deliver empowering remedies, it encourages a passive discourse of victimisation, and it colludes with “law’s overinflated view of itself”—some of its basic elements are useful. For example, Gilligan argues that the “male” voice of law has concerned itself exclusively with equality, fairness and rights. There is, however, a “female” voice, totally excluded from

93. Smart, supra note 2 at 22.
94. Gilligan, supra note 4.
legal thought in the past, which talks about caring for and responding to the needs of others. Similarly, MacKinnon sees the two basic precepts of Anglo-American legal systems, objectivity and neutrality, as embodying male power, male concepts of reality and male values, and calls for a separate legal system based on women’s experiences.95 Consciousness raising sessions are mentioned as a way of discovering distinctive female values. Unfortunately feminist jurisprudence has focused more on women’s injuries and oppression, and on criminal law as a response to these, than on the discovery and potential of “women’s values”.

As ideological starting points, however, some of the ideas underlying feminist jurisprudence may be useful. An interesting attempt to develop the idea of “women’s values” has been made by Gail Kellough.96 The concept of a reproductive code—a set of values shared by women, forged by their common experiences around birth, nurturance and socialization of the young—expands women’s realities beyond pain and injuries. Since primary nurturing roles have been assigned to women in most world cultures, Kellough asks whether and how women’s reproductive experiences, and the social roles emanating out of these, shape particular world views. Specifically, she hypothesizes that responsibility for nurturance and socialization requires women to prioritize attachment to other human beings. Such roles also assign priority to nurturing skills and an emphasis on social connectedness. Because these are social codes, arising from the oft-documented reality that the young of every mammal must be given to (nurtured) before they can become emotionally healthy adults, there is no need to bring biological imperatives into the equation. Successful nurturance essentially requires empathy, attachment, attention to the needs of others, and the ability to put their needs before one’s own.

Classical moral reasoning and legal discourses, however, have both assumed humans are “naturally” self-interested, and therefore that care for others is not a rational, consciously chosen act. It must therefore be philosophically accounted for in some “exceptional” fashion. However, this quintessentially male form of reasoning overlooks the basic biological and social fact that the pre-condition for the creation of autonomous human beings is nurturance. Activities that empower others require the nurturer to dedicate herself freely to their needs. Such acts do constitute, in many instances, freely chosen acts of “self-sacrifice”, contrary to the usual codes. By ignoring this pre-conditioned labour, philosophical thought has rendered it invisible. In addition to being unrecognized in legal, moral or philosophical modes of thought, this female labour form is totally unrewarded in


economic spheres. Pressure from feminism in recent decades has forced law to take account of certain female acts of care (such as the decision to bear a child), but such acts have been misinterpreted in a dominance/subordination discourse. The struggle for reproductive choice, where women seeking to control the timing and amount of nurturance they will provide are seen as selfish and anti-family, illustrates this dilemma.

In the struggle to control law and shape dominant ideology, patriarchy has used women’s concern for others, particularly their families, to split and weaken feminism. It has successfully pitted women who see themselves primarily as mothers and spouses against those whose identities rest on their roles outside the family. Feminist movements themselves have sometimes unwittingly given the forces of reaction ammunition, by de-emphasizing the key roles women play in socializing and nurturing, preferring “hard” discourses based on rights and privileging criminal law. This is not surprising, given that women’s special responsibilities and roles have been used against them so often, and with such devastating effect, but it is shortsighted.

For this is a classic struggle between hegemonic and counter-hegemonic forces. Conservative groups have argued that women can only fulfill their responsibilities for caring and nurturance if they eschew power in the public sphere. Given structural conditions that deny parents employed outside the home any right to child care, supported by dominant ideologies that limit the working father’s household responsibilities to “helping the wife” if he chooses to do so, this false dichotomy of choices contains, like most ideological constructions, a kernel of truth. In the struggle to construct counter-hegemonic positions, feminist theorists must begin by pointing out the sexist assumptions and cultural contingencies that underlie such reasoning. Women’s roles as mothers and nurturers, as agents of socialization upholding humane people-centred values in a capitalist world where selfish individualism is the norm, can and must be reconciled with women’s right to empowerment, to full citizenship in public and private arenas.

Building theory on women’s experiences, and taking seriously values coming out of the mode of reproduction (without excluding those emanating in injury and pain, for these are also very real), means we must do more than construct meticulous and complicated legal castles. Theoretical constructions built upon women’s experiences as a whole are likely to be specific, localized, and positive; not abstract, legalistic, and negative; they must “reconstruct a new human subjectivity with a better explanation of human reality”. We start constructing counter-hegemonic enterprises by building on real activities and interests, but


98. Hunt, supra note 6.

those with the potential to transcend hegemonic discourses and transform “common sense” beliefs.\textsuperscript{100} Intellectual and ideological debates allow feminism to constitute women as subjects, not merely objects, of dominant discourses. Such theorizing provides positive ways feminists can enter public discourse, influence the debate over policies, and stake claims for a fair share of the resources that come out of such analyses.

Empowerment, then, on the ideological, economic, and political levels, is the key to transforming women’s lives—and to ultimately preventing gender-related injuries. In the short term, better access to services, changes in the unjust distribution of time, money, and work that now benefits men at the expense of women, in both public and private spheres, are all important goals.\textsuperscript{101} Such strategies require a certain engagement with law, particularly civil and administrative. And criminal law has a place here as well. The struggles to secure legal reforms that redefined rape as sexual assault and rediscovered wife battering as a moral evil have ideological and symbolic significance—if only because of the unfortunate centrality criminalization and control discourses enjoy in public arenas. Obviously, short-term intervention strategies that allow the state to intervene and stop men from beating and raping women are essential and, whether due to a failure of imagination or not, the only ones we now have rely on criminal law. All the same, minimizing the damage done by criminal law is equally essential.

Indeed, many fruitful ideas have come out of feminist recognition of the damage criminal law and control campaigns have inflicted on poor, black and native men and women, and their communities. Building on Quaker and abolitionist traditions, “feminist peacemakers” have been pushing governments to provide preventative community-based education for male and female children. They have also fought to secure funding for victim/survivor services and offender restoration, to minimize if not eliminate the social conditions that foster rape-prone societies. These are non-punitive actions that directly and indirectly alleviate human suffering;\textsuperscript{102} they promote healing rather than punishment. Other initiatives we could build upon are also “out there”, being debated in academic and media circles. For example, many people of colour insist that progressive academic theorists have forgotten the key role families have played in their struggles, as collective sources of strength and resistance against racism.\textsuperscript{103} In a related vein,

\textsuperscript{100} Hunt, supra note 6 at 313–14.


\textsuperscript{103} H. Carby, “White Woman Listen! Black Feminism and the Boundaries of Sisterhood” in The Empire Strikes Back: Race and Racism in 70s Britain (London: Hutchinson,
Sugar and Fox\textsuperscript{104} point out the key roles family and concepts of connectedness and healing have played in aboriginal cultures. All of these provide building blocks and starting points for feminist strategies.

\textbf{Conclusion}

To sum up, this paper has argued that feminism is at risk of emphasizing the negative, adopting punishment and injury-obsessed agendas at the expense of positive, empowering and ameliorating ones. There is a temptation to rely too much on law and legal reform, whether through changes in criminal law, rights struggles, or the development of grand legal theory. Negative agendas partake of victimization and punishment discourses which take power away from women. The argument in this paper favours specificity: we must recognize that different types of law and different institutional sites have different transformative potential. The potential will vary by nation-state and historical period as well. Although it is impossible (and undesirable) to lay out in advance all the strategies that feminists may find useful (since they must be tailored to local ideological and material conditions—which is why Smart\textsuperscript{105} has argued that theory is the antithesis of praxis), analyses of the evidence will at least make some of the blind alleys more obvious. Such general guidelines, informed by theoretical and empirical analysis, remain both possible and essential guides to effective social action.

\begin{itemize}
\item \textsuperscript{104} F. Sugar & L. Fox, "Nistum Peyako Seht' Wawin Iskewwak': Breaking Chains" (1989) 3:2 C.J.W.L. 465 at 482.
\item \textsuperscript{105} Smart, \textit{supra} note 2.
\end{itemize}