CANADIAN CRIMINAL LAW AND PHYSICAL VIOLENCE AGAINST WOMEN: CHALLENGES AND CHANGES

Myrna Dawson*

Introduction

In Canada, the past three decades have witnessed significant legal and social transformations in its response to violence against women.[1] And, while debate continues to focus upon the improvements that still need to occur, it has been argued that Canada has been a world leader in this movement and, in particular, in the criminalization of wife assault.[2] This article will examine some of the key changes in Canadian criminal law and policy related to the treatment of male violence against women in response to the increasing recognition that gender affects the way law is applied and how it is experienced in significant ways. A brief overview of the incidence and prevalence of two types of male violence against women[3] – sexual assault and intimate partner violence[4] – will be provided, followed by a discussion of some of the key substantive and procedural rules that have changed and the institutional practices that have been implemented to

* Associate Professor, Department of Sociology and Anthropology, University of Guelph

1 It has been argued that significant change has occurred in recent years with the recognition that violence against women cannot be addressed adequately if framed as a formal equality issue; rather it must be conceptualized as an issue of substantive equality that recognizes and addresses women's inequality in society generally before the legal treatment of violence against women can be addressed in any significant way (see E. A. Sheehy, "Legal Responses to Violence Against Women in Canada," in *Violence Against Women: New Canadian Perspectives*, eds. K.M.J. McKenna and J. Larkin (Toronto: Ianna, 2002), 477-479.

2 K.M.J. McKenna and J. Larkin, *Violence Against Women: New Canadian Perspectives* (Toronto: Ianna, 2002); L. MacLeod, *An Exploration of the Contribution to Prevention Made by Projects on Woman Abuse Funded by the Family Violence Prevention Unit Health Canada* (Ottawa: Public Health Agency, 1994).

3 I focus on these two forms of violence against women because they represent the majority of violent offences experienced by women in Canada as documented below. Therefore, much of the legislative and policy initiatives have targeted these acts.

4 Historically, this type of violence was referred to as wife assault and then as spousal violence. Today, recognizing that the diversity of relationships is broader than a century ago, intimate partner violence is commonly used. I adopt the latter in this paper although the terms will be used interchangeably depending on the time period being discussed.

respond to feminist and others' concerns. The article will conclude with a discussion of the challenges that remain.[5]

Prevalence of violence against women in Canada

The availability of data on male violence against women has increased significantly in recent years. In 1980, the Canadian Advisory Council on the Status of Women provided the first national estimate of intimate partner violence when it reported that "1 in 10 Canadian women who are married or in a relationship with a live-in lover are battered."[6] Today, there are a variety of data derived from police reports and victimization surveys that provide estimates of violence against women in this country.[7]

According to the General Social Survey on Victimization, the rate of sexual assault for women is five times higher than for men (35 per 1,000 women versus 7 per 1,000 men).[8] Of those cases reported to police in 2002, about 80% involved female victims with males comprising 29% of child victims, 8% of adult victims, and 12% of youth victims.[9] Young women and girls are at the highest risk of sexual victimization in Canada.[10] Perpetrators of sexual assault are primarily male, ranging from 91% to 97% and, according to police, the majority of perpetrators are known to their

---

5 I use the term 'female' and its pronouns to refer to the victim and the term 'male' and its pronouns to refer to the perpetrator throughout because, first, this article is examining the legal responses to physical violence against women and, second, to recognize the gender specific nature of these crimes. That is, victims of sexual assault are predominantly women as are the victims of serious and chronic forms of intimate partner violence as documented below.

6 L. McLeod, *Wife Battering in Canada: The Vicious Circle*. Canadian Advisory Council on the Status of Women.

7 For example, Statistics Canada administers the *Uniform Crime Reporting Survey;* the cyclical *General Social Survey on Victimization*, the most recent of which was conducted in 2004; the 1993 *Violence Against Women Survey*; and, finally, the *Homicide Survey* which includes data on spousal homicide (For more information, see crime and justice, http://www.statcan.ca/english/sdds/indext.htm).

8 While general trends for sexual assault are provided, it is important to note that this offence involves varying levels of severity with the majority of reported offences being of the least serious level of sexual assault (for full discussion, see R. Kong, H. Johnson, S. Beattie, and A. Cardillo, *Sexual Offences in Canada* (Ottawa: Statistics Canada, 2003), 6. However, sexual assaults are the least likely (8%) of all violent offences to be reported to the police; M. Gannon and K. Mihorean, *Criminal Victimization in Canada, 2004* (Ottawa: Statistics Canada, 2005, 12).

9 Ibid., 1.

10 Kong et al., *Sexual Offences in Canada*; Gannon and Mihorean, *Criminal Victimization in Canada*.

victims (10% friends; 41% acquaintances; 28% family members, 20% strangers).[11] Finally, police are more likely to find reports of sexual assault unfounded compared with other crimes[12] and persons charged with sexual offences are less likely than other violent offenders to be found guilty in adult criminal court.[13]

Victimization data on intimate partner violence show that, in 2004, seven per cent of women and six per cent of men who were married or living common-law reported that they had been physically or sexually assaulted by a spousal partner at least once during the previous five years.[14] Some argue that this supports the parity of male and female violence in intimate relationships, however, this ignores further realities supported by recent empirical data: (1) Women are more often victims of severe forms of violence from male partners than vice versa[15]; (2) The impact of violence such as injuries and the need for medical attention are also more severe for women than men[16]; and (3) the majority of intimate partner killings are perpetrated by men.[17] In summary, victims of serious, chronic and often fatal intimate partner violence are primarily women.

From Rape to Sexual Assault

In 1892, the first *Criminal Code of Canada* stipulated that rape could only be punished if committed by someone other than a husband, if penetration had occurred, and if it was shown that the victim did not consent to the act.[18] As a result, rape victims, primarily women as recognized in the way

---

11 Kong et al. 2003: 8.

12 J.V. Roberts, H. Johnson, and M. Grossman, "Trends in Crimes of Sexual Aggression in Canada: An Analysis of Police-Reported and Victimization Statistics," *International Journal of Comparative Criminology*, 2, 2 (2003): 187-200.

13 Kong et al. 2003: 1.

14 *Measuring Violence Against Women: Statistical Trends 2006* (Ottawa: Statistics Canada, 2006).

15 Ibid., 19. More serious violence includes being beaten, choked, threatened with a gun/knife, and sexual assaults.

16 Ibid., 20.

17 Ibid., 23.

18 Attempted rape or indecent assault occurred if an offender did not achieve penetration or if there was forced oral sex or penetration with other objects. See R. J. Richards & E. Fruchtman, "Shaping the Law Concerning Sexual and Domestic Assault to Improve Victim Reporting: The Canadian Experience," *Criminal Law Forum* 2, 2 (1991): 303-310; Sheehy, *Legal Responses to Violence*, 475; E. Comack & G. Balfour, *The Power to Criminalize: Violence, Inequality and the Law* (Halifax: Fernwood, 2004), 111-112.

the law was written, faced significant obstacles if they reported their victimization to police. Further exacerbating the situation, other common law rules applicable only to the offence of rape contributed to women's secondary victimization by the criminal justice system.[19] For example, it was standard practice for a woman's prior sexual history to be used as evidence of her credibility (or lack thereof). As a result, evidence about the victim's previous sexual relations with the alleged offender as well as any third parties with whom she may have had sexual relations in the past could be deemed admissible. While the evidence had to be shown as relevant, according to particular criteria, the defence was often permitted by the court to ask about the victim's sexual history even if there was no factual basis to do so.

There was also the doctrine of recent complaint that meant if a victim did not immediately report the rape, her delayed response could be used by the defence as evidence that the complaint was false. Finally, a judge was required to warn the jury that convicting an alleged offender based solely on the uncorroborated testimony of a victim could be dangerous. It was not until almost a century later, and largely the result of the women's movement, that the discriminatory effects of these laws and their interpretations by criminal justice actors would be recognized. By this time, however, these requirements had legally constructed the rape victim as unreliable and unbelievable – a stereotype that remains common today.[20] In the 1970s, initial steps were taken to reduce the hurdles faced by victims of rape. In 1976, for example, the Parliament of Canada eliminated the requirement that judges instruct juries about the dangers of uncorroborated victim testimony[21] and made admission of the victim's sexual history as evidence subject to stricter criteria.

The situation for victims was not significantly ameliorated with these changes; however, after persistent lobbying efforts by women's groups, Bill C-127 came into effect in January 1983. Framing the offence of sexual assault in gender-neutral terms,[22] this bill abolished the offences of rape,

---

19 Sheehy, *Legal Responses to Violence*, 475.

20 See Richards and Fruchtman, *Shaping the Law*, 306; J. Horney and C. Spohn, "Influence of blame and believability factors on processing of simple versus aggravated rape cases," *Criminology* 34 (1996): 135.

21 The requirement was repealed, but the judiciary retained some discretion as to when it was still appropriate to warn, leading to some continuation of this practice (Richards and Fruchtman, *Shaping the Law*, 307, 314).

22 This meant that both men and women could be victims of sexual assault whereas, with respect to the previous offence of rape, only women could be complainants.

attempted rape and indecent assault, replacing them with the new offence of sexual assault that had three levels of severity: (1) sexual assault; (2) sexual assault with a weapon, threats to a third party and bodily harm; and (3) aggravated sexual assault.[23] The penetration requirement was also removed which had often become the focus at trial and the source of embarrassing questions for the victim. In addition, the marital exemption was removed which meant a wife could now charge her husband with sexual assault[24] and the doctrine of recent complaint was abolished to recognize the variety of ways that women can react to their victimization.[25] Additional limitations were imposed on the ability of defence lawyers to introduce evidence about the sexual history of the complainant,[26] judicial discretion to warn juries of the danger of convicting based on a victim's uncorroborated testimony was eliminated,[27] and the public disclosure of the complainant's identity was restricted.[28]

This change was in response to findings by the Royal Commission on the Status of Women appointed in the 1970s that highlighted the unfairness of different rules for rape depending on various characteristics of the female as well as the unfairness of limiting sexual offences to male perpetrators only and the lack of protection for boys and men from being victimized in this way (Sheehy, *Legal Responses to Violence*, 477).

23 These offences are currently covered in sections 271-273 in the *Criminal Code of Canada*.

24 See section 278 *CCC*.

25 See section 275 *CCC*. Reasons for delayed reporting may be trauma, fear, reluctance to describe her sexual assault to strangers, and concern about her treatment within the criminal justice system (see Kong et al. Sexual Offences in Canada, 6; D. Lievore, *No Longer Silent: A Study of Women's Help-Seeking Decisions and Service Responses to Sexual Assault* (Australian Institute of Criminology, 2005). In fact, a recent survey of sexual assault survivors found that one of the most important considerations for victims when deciding whether or not to report is how they feel they will be treated by criminal justice actors, see T. Hattem, *Survey of Sexual Assault Survivors* (Ottawa: Department of Justice Canada, 2000), 13.

26 For example, Section 276 prohibits evidence of the complainant's sexual history with anyone other than the accused with a few exemptions (for full discussion of changes in Bill C-127, see Richards and Fruchtman, *Shaping the Law*, 315). Section 277 stipulates that there is no legal basis for introducing as evidence the victim's sexual reputation to challenge the credibility of the complainant.

27 See Section 274, *CCC*.

28 The government made further amendments to the legislation in 1985 to provide greater protection for child complainants by recognizing the unequal power relations between adults and children with respect to age, dependency and trust that might prevent a young person from resisting unwanted sexual contact.

In summary, Bill C-127 represented a key transformation in rape law reform in Canada because it recognized the gender bias inherent in the previous rape legislation in three key ways.[29] First, acknowledging the low reporting rates in cases of sexual assault, it was hoped that the changes would increase the likelihood that women would report their victimization.[30] Second, to recognize feminist arguments that rape is not about uncontrollable sexual urges, but rather it is a crime about violence and the control of women, the changes were meant to redirect attention from the sexual nature of the act to the violence committed by the offender.[31] Finally, the bill limited judicial discretion with respect to interpreting the relevance of women's sexual history and its relation to her consent and/or credibility.

Despite these improvements, Bill C-127 was not without its critics, some of whom drew attention to the fact that it did not provide a definition of sexual assault. In response to this, in 1987, the Supreme Court of Canada ruled in *R v. Chase* that sexual assault does not depend on contact with a specific part of the body, but does depend on the nature of the contact and the situation, words and gestures, and any other circumstances related to the offence.[32] More vehement criticisms of Bill C-127, however, focused on the removal of the corroborating evidence rule and on the additional constraints placed on the use of the complainant's sexual history. It was argued that these two provisions violated the rights of the accused as protected under the *Canadian Charter of the Rights and Freedoms* guaranteeing an accused the right to a fair trial and to present a full defence. These criticisms resulted in a constitutional

---

29 Department of Justice Canada, *Sexual Assault Legislation in Canada: An Evaluation* (Ottawa: Supply and Service Canada, 1985); K. Tang, "Rape Law Reform in Canada: The Success and Limits of Legislation," *International Journal of Offender Therapy and Comparative Criminology,* 42, 3, (1998): 260.

30 After the passage of Bill C-127, the rate of total sexual assaults reported to police increased (Kong et al. *Sexual Offences in Canada,* 3), but the increase was driven primarily by Level 1 offences and peaked in 1993. Researchers have concluded that there is not enough evidence to link this rise to legislative initiatives only (see J.V. Roberts and M. Grossman, "Changing Definitions of Sexual Assault: An Analysis of Police Statistics," eds. J.V. Roberts and R.M. Mohr, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 57-83.

31 R. Gunn and C. Minch, *Sexual Assaults: The Dilemma of Disclosure, the Question of Conviction.* (Winnipeg: University of Manitoba Press, 1988); D. Stuart, "Substantive Issues Before and After Bill C-49," *Criminal Law Quarterly,* 35 (1992).

32 See *R. v. Chase* [1987] 2 S.C.R. 293. In this case, the Supreme Court overturned a New Brunswick Court of Appeal decision that grabbing a woman by her breasts did not constitute a sexual assault.

challenge that lead to the Supreme Court of Canada striking down the non-discretionary ban on evidence relating to women's sexual history in all but four situations (see sections 276 and 277 of the *Criminal Code*).[33] The controversy and public pressure that followed this decision led to the introduction of Bill C-49 (*An Act to Amend the Criminal Code*) in 1992.

Under Bill C-49, evidence that the complainant engaged in sexual activity with the accused or with any other person was no longer admissible to show that the victim was more likely to have consented or that the victim's testimony was less credible. A new test for judges was introduced to determine whether a complainant's sexual history could be admitted at trial. Bill C-49 also provided a definition of consent which was previously absent, defining it as the "the voluntary agreement of the complainant to engage in the sexual activity in question,[34] specifying situations in which a victim cannot give consent under law. The bill requires that men take 'reasonable steps' to ensure that a woman had given consent and restricts the defences available to those accused of sexual assault such as 'mistaken belief'.[35] In short, the main goal of Bill C-49 was to refocus criminal trials in cases of sexual assault further away from the conduct of the complainant and towards the behaviour of the accused.

In what many describe as a defence strategy to get around the restrictions on admitting sexual history as evidence, a trend developed in which complainants' personal records were requested for the accused's defence. In 1995, the Supreme Court of Canada ruling in *R. v O'Connor*[36] allowed the defence scope to request complainant records (e.g. counselling and other personal records held by third parties), stating that Sections 7 and 11(d) of the *Charter* requires the Crown to seek all documents on the complainant and make them available to the defence for discovery. This ruling meant, for example, that those working with survivors at sexual assault centres would be required, if subpoenaed, to turn over all files and counselling records related to a case before the court. While the ruling was meant to allow an assessment of the complainant's ability to understand and take part in the proceedings, there was still concern that it could be used at trial to undermine the complainant.

---

33 See *R v. Seaboyer, R v. Gayme* [1991] 2 S.C.R. 577; Sheehy, *Legal Responses to Violence*, 480.

34 Section 273.1, *CCC*.

35 Prior to the introduction of Bill C-49, it was maintained that an accused did not violate the law if he believed that the woman had consented; see Section 273.2(b), *CCC*.

36 *R v. O'Connor* [1995] 4 S.C.R. 411; Kong et al., *Sexual Offences in Canada*, 11.

Many opposed this ruling and, in response to the outcry, Parliament passed Bill C-46 in 1997 to ensure that disclosure requests were subject to careful scrutiny. The bill specified more restrictive grounds for access, required that the defence establish that the records were relevant, and restricted disclosure to only that information that was important to the case. It also broadly defined the scope of records subject to these restrictions and prohibited defence from making disclosure requests prior to the trial.[37]

Today, while some of the above provisions continue to be challenged and debated, most agree that rape law reform has, at least to some degree, improved the experiences of sexual assault survivors who report their victimization to the police.

Criminal law and intimate partner violence

The historical treatment in the criminal justice system of men's violence against female partners has not been much better than that experienced by victims of sexual assault. However, in contrast to the early treatment of rape described above, husbands could be charged for assaulting their wives[38] and, on the surface, there were no obvious procedural or evidentiary hurdles faced by female victims of intimate partner violence. Because of this, it is has been assumed that violence against women by their husbands was historically proscribed by law; instead, it was more the *degree* of violence used by husbands rather than the violence itself that was regulated. For example, adopted by Canada, British common law as stated by Bacon in the mid-18th century was that "The husband hath, by law, power and dominion over his wife, and may keep her by force within the bounds of duty, and may beat her, but not in a violent manner."[39]

---

37 Almost immediately after its passage, a constitutional challenge argued that this bill violated fair trial guarantees of the Charter in the case of *R v. Mills* (1999). The higher court upheld the legislation that governed the production of records. For a case law review of the types of records requested, characteristics of the complainant and defendants as well as reasons for decisions, see S. McDonald and A. Wobick, Bill C-46: Records Applications Post-*Mills*, A Caselaw Review (Ottawa: Department of Justice Canada, 2004); see also, L. Gotell, "The Hysterical Complainant, and the Disclosure of Confidential Records: The Implications of the Charter for Sexual Assault Law," in *Osgoode Hall Law Journal* 40, 3-4: 251-293.

38 Specifically, in the *Criminal Code,* this would occur under the offence of common assault, section 266; assault causing bodily harm or assault with a weapon, section 267; and aggravated assault, section 268.

39 C. Strange, "Historical Perspectives on Wife Assault," in *Wife Assault and the Canadian Criminal Justice System: Issues and Policies* (Toronto: Centre of Criminology, 1995), 295.

The basic problem, then, was that intimate partner violence was not perceived by society generally nor criminal justice actors to be a crime like other acts of violence that occurred outside the home, despite its purported legal proscription. Canadian research has shown that this attitude was present in all aspects of the criminal justice system, including the police,[40] the prosecution,[41] judges,[42] and those involved in the development of case law.[43] It was again the forces behind the women's movement that brought the seriousness of violence against women by male partners to the attention of policymakers, arguing that this type of violence *is* a crime and should be treated as such. However, it is also acknowledged that the dynamics of intimate partner violence are unique from other acts of violence because victims and offenders may still be living together (and want to continue to do so), have children in common and, as a result, share bonds – both emotional and financial – that do not exist between other victims and offenders.[44]

---

40 K. Hannah-Moffat, "To Charge or Not To Charge: Front Line Officers' Perceptions of Mandatory Charge Policies," *Wife Assault and the Canadian Criminal Justice System: Issues & Policies,* eds. M. Valverde, L. MacLeod, K. Johnson (Toronto: Centre of Criminology, 1995) 35-46; G. Rigakos, "Situational Determinants of Police Responses to Civil and Criminal Justice Injunctions for Battered Women," *Violence Against Women,* 3, 2 (1997): 204-216; J. Ursel, "Mandatory Charging: The Manitoba Model," in *Unsettling Truths: Battered Women, Policy, Politics and Contemporary Research in Canada* (Vancouver: Collective Press, 1998).

41 L. MacLeod, "Policy Decisions and Prosecutorial Dilemmas: The Unanticipated Consequences of Good Intentions," in *Wife Assault and the Canadian Criminal Justice System: Issues and Policies,* eds. M. Valverde, L. MacLeod, and K. Johnson (Toronto: Centre of Criminology, 1995), 47-61.

42 D. Crocker, "Regulating Intimacy: Judicial Discourse in Cases of Wife Assault (1970-2000)," *Violence Against Women,* 11, 2 (2005): 197-226.

43 M.G. Brown, Gender *Equality in the Courts: A Study by the Manitoba Association of Women and the Law* (Ottawa: National Association of Women and the Law, 1988); M.G. Brown, *Gender Equality in the Courts, Criminal Law: A Study by the Manitoba Association of Women and the Law* (Ottawa: National Association of Women and the Law, 1991)

44 T. Brown, *Charging and Prosecution Policies in Cases of Spousal Assault: A Synthesis of Research, Academic, and Judicial Responses* (Ottawa: Department of Justice Canada, 2000); H. Johnson, *Dangerous Domains: Violence Against Women in Canada* (Toronto: Nelson, 1996); J. Ursel and S. Brickey, "The Potential of Legal Reform Reconsidered: An Examination of Manitoba's Zero-Tolerance Policy on Family Violence," in *Post-Critical Criminology,* ed. T.O'Reilly-Flemming (Scarborough, ON: Prentice-Hall, 1996).

Because it was not the lack of legal provisions per se, but rather inadequate enforcement of these provisions by criminal justice officials, efforts to change policy focused primarily on institutional practices and the attitudes held by those who were responsible for those practices (i.e. police, prosecutors and, more recently, judges). The main goal of these developments has been to move intimate partner violence from its historical location as a private, family matter to one of a legal and social concern. Discussed briefly below, five key initiatives represent significant transformations in the way that these cases are handled: (1) mandatory charging; (2) pro-prosecution or no-drop policies; (3) specialized courts; (4) family violence legislation; and (5) *Criminal Code* amendments.

Mandatory charging and pro-prosecution policies were introduced in Canada in the early 1980s, requiring police and prosecutors to charge and prosecute all cases of intimate partner violence in which there are reasonable and probable grounds to believe an offence has occurred. Responding to the perceived inadequacy of the criminal justice system to deal with these cases, the aim of the policy was to increase the severity and certainty of the criminal justice response to intimate partner violence, to encourage the reporting of these offences, to offer protection and assistance to victims and, ultimately, to reduce the incidence of intimate partner violence in Canada.[45] Prior to this, women were often left on their own to bring charges against their husbands, potentially resulting in their further victimization through retaliatory violence by the abuser or the trauma of having their case processed through a non-responsive criminal justice system.[46] At the prosecution stage, charges were often dropped (unless there were exceptional circumstances), if the victim did not agree to testify because her testimony was often the only evidence introduced.

Today, although there is no national charging or prosecution policy on spousal abuse, all 10 provinces and three territories support, at least in principle, the criminalization of intimate partner violence.[47] The effectiveness of charging and prosecution policies, however, has been the focus of considerable debate because research has shown mixed results for

---

45 Brown, *Charging and Prosecution Policies*; V. Pottie Bunge and A. Levett. *Family Violence in Canada: A Statistical Profile* (Ottawa: Statistics Canada, 1998)

46 There are numerous problems with leaving it up to the assaulted woman to lay a charge (see Richards and Fruchtman, *Shaping the Law*, 330); Johnson, *Dangerous Domains*, 206-209.

47 Department of Justice Canada, *Final Report of the Ad Hoc Federal-Provincial-Territorial Working Group Reviewing Spousal Abuse Policies and Legislation* (Ottawa: Department of Justice Canada).

their ability to reduce intimate partner violence and mixed reactions from those most closely affected – women and criminal justice actors.[48] In particular, it has been highlighted that the policies do not recognize the unique nature of these crimes as outlined above and have further disempowered or re-victimized victims through their contact with the criminal justice system.

These directives provided the momentum, however, for other initiatives that recognize intimate partner violence differs in important ways from violence that occurs between those individuals who do not share an intimate or familial relationship. One such initiative is the move toward specialized courts or processes that bring together legal and victim service professionals when responding to these crimes, moving away from the traditional court model. These courts have been implemented in a number of jurisdictions to respond to the challenges of reluctant or recanting victims, the inadequacy of many of the traditional punishments, and to deal with the high volume of cases coming through the court as a result of mandatory charging and pro-prosecution policies.

Manitoba was the first province to develop a specialized response to family violence in 1990, responding to public concern that legal responses to this type of violence were more lenient, often inappropriate, and unjust – particularly when compared to sanctions imposed for other types of crime.[49] In the late 1990s, Ontario followed suit, introducing one of the most comprehensive specialized domestic violence court programs in the country, implementing specialized processes in each jurisdiction. Ontario's program combines two approaches to the prosecution of these cases. The early intervention approach provides eligible first-time offenders[50] whose victims agree to participate with a treatment option if they plead guilty to their offences. The coordinated prosecution approach strives to reduce

---

48 For a synthesis of research literature that evaluates the effectiveness of these policies, see T. Brown, *Charging and Prosecution Policies*; see also T. Landau, Synthesis of Department of Justice Canada Research Findings on Spousal Assault (Ottawa: Department of Justice Canada, 1998).

49 H. Johnson, *Dangerous Domains*, 215-217.

50 The criteria for an eligible first-time offender is (1) no prior record for a domestic violence-related offence; (2) no use of a weapon in the commission of the current offence; and (3) no significant harm to the victim (see M. Dawson and R. Dinovitzer, "Specialized Justice: From Prosecution to Sentencing in a Toronto Domestic Violence Court," in *What's Law Got to do it? The Law, Specialized Courts and Domestic Violence in Canada,* eds. J. Ursel and L. Tutty (Toronto: Cormorant Press, 2007).

reliance on the victim by using additional evidence that can support victim testimony or stand in lieu of it if required.[51]

Other specialized court initiatives have been introduced in recent years, including a specialized domestic violence docket court in Calgary, Alberta in 2000[52] and a Domestic Violence Treatment Option Court in the Yukon in 2001.[53] Other jurisdictions are currently introducing such initiatives or discussing potential implementation. While specific components of the courts vary, they share two key goals – to increase victim safety and to make offenders more accountable for their actions (whether through treatment or sanctions). While still early, there is some evidence that dedicated courts are effective in various ways. For example, the longest-existing court in Manitoba saw increases in probation supervision, jail sentences, and court-mandated treatment.[54] These increases meant that offenders were monitored more often, received harsher sentences and could receive treatment as well as punishment for their behaviour – all factors that should make victims safer and help make offenders more accountable. In Ontario, victim/witness assistance programs (VWAP)[55] are a key part of the process and research has shown that victims are more likely to cooperate with the prosecution when they meet with VWAP

---

51 Additional evidence could include 911 emergency transcripts, medical reports, photographs of injuries, and a videotaped victim statement within 24-hours of the incident (for more detail, see Dawson and Dinovitzer, *Specialized Justice*).

52 I. Haffart and M. Clarke, *Homefront Evaluation: Final Report*. (Calgary, AB: Homefront, 2004).

53 J.P. Hornick, M. Boyers, L. Tutty, and L. White. *The Domestic Violence Treatment Option (DVTO), Whitehorse, Yukon: Final Evaluation Report*. (Ottawa: National Crime Prevention Centre, 2005).

54 J. Ursel, "His sentence is my freedom": Processing domestic violence cases in the Winnipeg Family Violence Court," in *Reclaiming self: Issues and resources for women abused by intimate partners*, eds. LM. Tutty & C. Goard. (Halifax: Fernwood, 2002); J. Ursel, "Over Policed and Underprotected: A Question of Justice for Aboriginal Women," in *Intimate Partner violence: Reflections on Experience, Theory and Policy*, eds. Marcy R. Hampton and N. Gerrard. (Toronto: Cormorant Books, 2006).

J. Ursel, "Using the Justice System in Winnipeg," in H. Johnson and K. Au Coin, *Family Violence in Canada: A Statistical Profile 2003* (Ottawa: Statistics Canada, 2003), 54-56.

55 VWAP is designed to provide assistance and support to victims and/or witnesses during their contact with the criminal justice system (http://www.attorneygeneral.jus.gov.on.ca/english/about/vw/vwap.asp).

representatives,[56] one of the goals of the courts in that province. However, systematic evaluations are rare in most jurisdictions, measures of success vary, and many courts are still too new and diverse in their components to allow for a comprehensive or comparative understanding of the ability of these courts to respond more appropriately to intimate partner violence than a regular court. There is need for a more systematic, longitudinal national evaluation before concrete conclusions about the efficacy of these courts can be made.

Also within the past few years, various provinces have passed family violence legislation that is meant to protect victims, again by focusing on improving the justice system response. Although provisions vary, there is some form of intervention or protection order common to all legislation and most contain four key elements: "the prohibition of the accused to contact or communicate with the victim, the removal of the accused from the family home, the supervision by a peace officer of the removal of the accused's personal effects, and the exclusive occupation of the residence by the victim."[57]

Finally, *Criminal Code* amendments have also sought to improve the legal response to violence against women.[58] First, in response to several cases that involved women killed by male partners after being stalked and harassed, Canada passed Bill C-126 in 1993 which made stalking an offence called criminal harassment. Section 264 of the *Criminal Code* defines criminal harassment as "repeatedly following another person from place to place or repeatedly attempting to contact the person." Other behaviours covered under this offence include watching someone's home or place of work and making threats. Since the introduction of this offence, relevant sections of the *Criminal Code* have been amended.[59] First, in 1997, Bill C-27 made murder committed in the course of criminally harassing a victim automatically first-degree murder,

---

56 M. Dawson and R. Dinovitzer, "Victim Cooperation and the Prosecution of Domestic Violence in a Specialized Court," in *Justice Quarterly* 18, 3 (2001): 613-614.

57 R. Fitzgerald, *Family Violence in Canada: A Statistical Profile* (Ottawa: Statistics Canada, 1999), 43; for a review of the Saskatchewan's legislation, see Department of Justice Canada, *A Further Review of the Saskatchewan Victims of Domestic Violence Act* (Ottawa: Department of Justice Canada, 1999).

58 For a summary of these changes, see *Spousal Abuse: A Fact Sheet From the Department of Justice Canada* (http://www.doj.ca/en/ps/fm/spouseafs.html).

59 G. Blackell and H. Johnson, "Criminal Law Responses to Intimate Partner Violence," in *Criminal Justice in Canada: A Reader*, ed. J.V. Roberts and M. Grossman (Toronto: Harcourt Brace Canada, 2006); K. Au Coin, *Family Violence in Canada: A Statistical Profile*, (Ottawa: Statistics Canada, 2005), 33.

regardless of whether the murder was planned and deliberate as required by this charge. In addition, criminal harassment that occurs while a protective court order is in effect is to be considered an aggravating factor at sentencing. Finally, in 2002, the maximum penalty for criminal harassment was increased from five to 10 years. [60]

Second, in 1995, Bill C-42 was passed to make it easier to obtain peace bonds (i.e. protective orders). It also allowed for police or others to apply on behalf of someone at risk and increased the maximum penalty for its violation from six months to two years. A year later, in response to reports by the Canadian Sentencing Commission and the Daubney Committee, Bill C-41 was proclaimed, making significant legislative reforms to the sentencing process. As part of this, Section 718.2 of the *Criminal Code* includes a statement of the purpose and principles of sentencing that is designed to guide trial court judges in their decisions. [61] This section outlines aggravating factors that should be taken into account at sentencing and stipulates that evidence that an offender has abused a spouse, common-law partner or child should be considered as such at sentencing. This addition represents a key change because, prior to this, our penal laws made no mention of the relationship between a victim and a defendant and the meaning of this relationship in the criminal process. Under this bill, restitution can be sought by spouses and children from their abuser for expenses arising from their need to leave home to avoid victimization. Finally, in 1999, Bill C-27 amended the *Criminal Code* to help make the criminal justice system experience easier for victims and witnesses by implementing measures that would take into account victim safety at bail hearings and protect their identity.

Conclusion

Today, a husband's use of violence against his wife is to be treated as seriously as other violent crimes, a man can be charged with raping his

---

60 Department of Justice, A Handbook on Police and Crown Prosecutors on Criminal Harassment (Ottawa: Department of Justice, 2004). Research examining the impact of Section 264 has been limited; however, a study of 600 criminal harassment cases in 1993 found that many charges were stayed or withdrawn before trial (58%) with many of those resolved through peace bonds. Of those that proceeded, 35% of accused were convicted and 25% of those cases resulted in jail time. For more information, see R. Gill and J. Brockman, *A Review of Section 264 (Criminal Harassment) of the Criminal Code of Canada* (Ottawa: Department of Justice Canada, 1996).

61 The goal of this section is to provide judges with some guidelines about the primary purpose of sentencing and a list of some of the principles that should be used to decide on the punishment imposed.

wife, and all victims of sexual assault are to be treated in a more consistent and fair manner. Despite the above improvements, however, several challenges remain before it can truly be argued that gendered experiences are being recognized in law and some of these are discussed below.

First, changing laws does not automatically transform the attitudes held by those who are responsible for enforcing those laws. Some police, prosecutors and judges may still hold stereotypical attitudes about gender and violence that were more evident earlier in the century. Indeed, members of society at large continue to retain such beliefs despite decades of social change. For example, feminist researchers have found that the traditional view of the 'real' rape victim continues to dominate in investigations and prosecutions and this knowledge impacts victims' decisions about whether or not to report their victimization.[62] In particular, the relevance of a complainant's sexual history continues to be debated despite recent changes to clarify these provisions. And, while there is an overall view by both Crowns and defence that there has been a reduction in the unwarranted use of a victim's sexual history, a report by the federal Department of Justice[63] found that "myths and stereotypes still appear to be operative in the minds of many judges."[64] Similarly, stereotypical attitudes that continue to see intimate partner violence as a private problem or as merely the result of normal interpersonal conflict that sometimes culminates in a crime of passion – and not gender-based violence – have resulted in inconsistency across jurisdictions in the criminal justice responses to these crimes and in the continued treatment of these acts as less serious than other violence.[65]

---

62 For example, see J. Allison and L.S. Wrightsman, *Rape: The Misunderstood Crime* (Newbury Park, CA:

Sage, 1993); also R. Gunn and R. Linden, "The impact of law reform on the processing of sexual assault cases," *The Canadian Review of Sociology and Anthropology* 34, 2 (1997): 155-174; see also C. L'Hereux-Dube, "Beyond the myths: equality, impartiality, and justice," *Journal of Social Distress and the Homeless* 10, 1 (2001), 87-104.

63 For review of the impact of Bill C-49, see C. Meredith, R. Mohr, and R. Carins Way, *Implementation Review of Bill C-49* (Ottawa: Department of Justice Canada, 1997).

64 Ibid.

65 For an examination of stereotypes related to intimate partner violence, see M. Dawson, "Intimacy, violence and the law: Exploring stereotypes about victim-defendant relationship and violent crime," *Journal of Criminal Law and Criminology* 96, 4 (2006): 1417-1450.

Second, the gender-neutral language of the offence of sexual assault and the treatment of male violence against female partners under the offence of common assault continues to obscure the gender-specificity of these acts. Decades of research support the following three facts: (1) Women are the primary victims in cases of sexual assault and men are the primary perpetrators[66]; (2) Women are the primary victims of serious and chronic intimate partner violence and battering by men[67]; and (3) When women use violence against male partners, it is often in self-defence or in fear of their lives or the lives of their children.[68] Therefore, sexual assault and intimate partner violence represent gender-based violence – violence predominantly committed by one gender against the other gender, a phenomenon that is perpetuated and maintained by the existence of gender inequalities at the societal level. However, the law and some of its representatives continue to treat these acts as if gender is not important in understanding their dynamics or in our response to these crimes. This attitude has had a significant effect on the legal response to intimate partner violence, for example, because these new practices have lead to the counter-charging of women so that those women who resist the violence of their male partners or who fight back may find themselves charged as well.[69]

Third, violent men who assault their wives or use sexual violence against women continue to benefit from a variety of controversial defences. For example, the defence of provocation is available in cases of homicide and can reduce a charge of murder to manslaughter and/or be taken into consideration as a mitigating factor in sentencing.[70] Historically, this defence has been most

---

66 Kong et al., Sexual Offences in Canada, 7-8.

67 K. Au Coin, *Family Violence in Canada: A Statistical Profile 2005* (Ottawa: Statistics Canada, 2006), 16; H. Johnson and V. Pottie Bunge, "Prevalence and Consequences of Spousal Assault in Canada," *Canadian Journal of Criminology* 43, 1 (2001): 27-39.

68 R.P. Dobash, R. Dobash, M. Wilson and M. Daly, "The Myth of the symmetrical nature of domestic violence," *Social Problems* 39 (1992): 71-91; M.S. Kimmel, "Gender Symmetry in Domestic Violence: A Substantive and Methodological Research Review," *Violence Against Women* 8, 11 (2002): 1332-1363.

69 For example, see S. Pollack, V. Green, and A. Allspach, *Women Charged with Domestic Violence in Toronto: The Unintended Consequences of Mandatory Charge Policies* (Toronto: Status of Women Canada, 2005).

70 For a full discussion of the defence of provocation, see Grant, I., D. Chunn, and C. Boyle. *The Law of Homicide*. (Scarborough, ON: Carswell, 1998), Chapter 6, Section 2; A.Côté, D. Majury, and E. Sheehy, *Stop Excusing Violence Against Women: NAWL's Position Paper on the Defence of Provocation* (Ottawa: National Association of Women and the Law, 2000).

commonly used in cases typically referred to as 'crimes of passion,' usually involving a man who kills his wife because of her suspected or actual infidelity. Over time, courts have broadened the benefit of the provocation defence to men who kill their female partners in various situations and it is argued that this trend has been seen in Canadian courts as well.[71] Similarly, with respect to sexual assault, in 1994, the Supreme Court, under the *Charter*, widened men's immunity from criminal culpability for sexual and other violence by recognizing a new defence of "extreme intoxication."[72] And, while Bill C-72 was passed by Parliament in 1995 stipulating that self-induced intoxication is not a defence to crimes of violence, such factors may still act to reduce an offender's culpability at sentencing.

Fourth, one of the primary goals of reform was to increase the likelihood that women would report their victimization to police and to increase the severity of the criminal justice response. In the case of sexual assault (compared to assaults generally), research has shown that there was an increase in reporting after key legislative changes in the 1980s, but this difference has diminished. One reason for this may be that there has been little corresponding change before and after legislative initiatives in the 'founding' rate (i.e. official action taken after the complaint is reported) and these cases still have the highest attrition rates compared to other types of violent crime.[73] Similarly, after the policy directives were issued about mandatory charging, reporting rates for intimate partner violence increased substantially. However, this was not likely due to an increase in victims' willingness to report, but rather that the decision to report was removed from her.[74]

An inventory of the above challenges is not meant to take away from what has been achieved. The positive aspects of the evolutionary changes in how society responds to violence against women in Canada cannot be disputed. While reporting rates may not be as high as anticipated or sanctions not as severe for these crimes as some had hoped, social and legal reform can and has had other effects. For example, "the symbolic messages from the rape law reform movement are as important as the legal

---

71 Côté et al., *Stop Excusing Violence Against Women*, 6; see, for example, cases R v. Galgay [1972] 2 O.R. 630 (C.A.); R v. Carpenter (1993) 14 O.R. (2d) 641 (C.A.); R v. Thibert (1995), [1996] 1 S.C.R. 37; R v. Stone [1999] 2 S.C.R. 290.

72 R v. Daviault, [1994] 3 S.C.R. 63.

73 Tang, Rape Law Reform, 1998, 263.

74 Overall, in 2004, less than 30% of spousal assault victims reported their case to the police (see L. Ogrodnik, *Family Violence in Canada: A Statistical Profile 2006* (Ottawa: Statistics Canada 2006).

sanctions designed to reduce sexism in rape laws."[75] Similarly, the increased public awareness of intimate partner violence as a serious social and legal problem can have long-term affects beyond what increases in jail terms might pose. In short, the public discussion and transformation of legal and social norms can have a profound effect on societal attitudes. The effects of these initiatives will take time to fully reveal themselves and so their successes should not be assessed in the short-term; however, the momentum to further transform and illuminate the gendered aspects of law should not abate in the meantime.

[75] Ibid., 268.