

# LAW, CRIME, AND POLICY: A READER<sup>1</sup>

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## INTRODUCTION: SOCIAL REGULATION AND THE CRIMINAL JUSTICE SYSTEM

Each of the title concepts, law, crime, and policy, presupposes something about the others. Our focus is on state-sponsored policies, which are located in the criminal justice system, although we do not assume that crime problems are best solved in the CJS. More broadly defined "social policy" might be more effective in changing those conditions which engender crimes. We acknowledge, minimally, the limits of the CJS to actually change the social problems to which it responds and reacts. However, that does not mean that the CJS is powerless to make changes or is irrelevant. In fact, some post-modernists argue that CJS interventions automatically make things worse; they reproduce where they do not actually create the social problems which they then respond to and attempt to solve. Like most things, we need to take a position which denies this extreme nihilism while acknowledging that the CJS is certainly limited in its efficacy. That does not mean that it is unimportant, nor that CJS interventions are without consequences. We think that the consequences can, but don't have to be, beneficial for positive social change.

According to a dialectical approach to social explanation, sociologically, an individual is born into a pre-existing set of social structures and practices; simultaneously, he or she is involved in the continual reproduction and transformation of social life. This perspective reflects Giddens' idea of the duality of structure: that structures both constrain social action and enable it, while social action itself both reproduces social structure and transforms it. Since resources are structured unequally, however, people differ in their exercise of power, or ability to shape social life in accordance with their desires, although no one is either all powerful or powerless in the active society. This gets at dialectical.

In general, we live in a polarized, exploitative society, which refers to something more than the differential ability of social groups to perpetuate or transform social life as they see fit. A modified pluralist perspective would postulate that groups are unequal in their ability to exercise power or influence over the direction of social life (or policy). I think in this context the notion "polarized" has to be nuanced. On the one hand, it is necessary to recognize the variety of social groups who articulate interest and, at least potentially, influence policy-making. On the other hand, it is useful to point out the extreme disparity between the top and the bottom, and the tendency currently to widen the gap between the powerful and those with fewer resources. There is not just a single hierarchy, however, but inter-connected hierarchies. LaPrairie, for example, is concerned about the widening gap within native communities between the leader and the members.

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<sup>1</sup> *Law, Crime and Policy: A Reader*. Toronto: Canadian Scholars Press Reprint. Section Openers (1997).

While the economic order is based on exploitation, we do not explore this notion in any detail, pointing out that there is a relationship between the amassing of wealth at one pole (internationally, nationally, locally) and the relative deprivation of the other pole. The key point would be to elaborate the basis on which some groups (those with access to resources of power – money, position, authority, armaments, etc. – are better positioned to shape policy.

We see the state as relatively autonomous from economic power although ultimately dependent upon it. We do not accept the classical pluralist view of equally influential groups, in which policy is a grand compromise achieved by an otherwise neutral state. This does not mean that, simply put, state policy is determined by powerful interests. Even if this were true, it could not be assumed that all powerful groups share identical interests. Minimally, then, there are contradictions and conflicts among the most powerful. Developing a "relative autonomy" approach implies that policy is not one-sided. One common approach is to argue that the state is responsible for reproducing the structure of unequal relations while creating opportunities for changes in the balance of forces and powers within this framework. At least it should be recognized that some parts of the social framework are more mutable than others. The private ownership of the means of production is an example of a social relationship that is at the least mutable end. The relative distribution of income among the upper, middle, and lower classes may be subject to greater variation depending on the relative strength of various groups. Like apartheid in South Africa, nothing is immutable. Even such a basic change as has taken place in South Africa (social, legal, political and, to a lesser extent economic), however, has not profoundly altered the socially unequal position of the majority in that society. Relative autonomy should be understood in the light of some of these ideas. Not only are some groups better positioned to shape policy, but some policies are more readily transformed than others.

With respect to criminal law, the main distinction is between laws and practices which regulate and/or criminalize certain activities of the powerful (anti-combines, pollution, health and safety, etc.), and those which regulate and/or criminalize other harms to individuals or property. With respect to white-collar crimes, you might expect to find the clearest examples of class-bias in the CJS (vague legislation, sporadic enforcement, light punishment). However, capitalism needs regulation to work: enforcement of contracts, legal norms of exchange, etc..

Furthermore, much of what is criminalized is harmful to ordinary people, an argument that is not necessarily contradictory to the view that the state is responsible for the social control of the working and under classes; that is, the argument that criminal law is repressive and designed for social control. You don't deny that this is a consequence of the law, only asserting that, in the given circumstances, the working and under class are also victims of criminal actions and, therefore, have a substantial interest in social order of a certain kind. Victims look to the state for protection and retribution.

The sociological approach to law, crime, and policy (class, values, social mobilization, etc.) brings us back to the question of how groups shape policy. To look at this, simply, again, policy is shaped directly by those with power. For example, oil

companies can withdraw investment from a country to protest high taxation policies. States compete with each other to offer attractive investment opportunities for multinational companies (for example, forgiving loans to Michelin). In turn, the companies make decisions which profoundly affect the life chances of individuals and groups. However, other interest-based groups can also shape policy. Understanding this phenomenon would require a discussion of the conditions for social mobilization of the more or less marginalized and the resources which can be used. The law, itself, can become a resource. The Charter is the best example. Minorities of many kinds have used the Human Rights Act and the recognized fundamental liberties to further their interests. Morality is a resource, whether for moral entrepreneurs or for more marginal groups, such as aboriginals, who utilize historical guilt about past maltreatment to further their contemporary agendas. This approach, then, elaborates upon social constructionism.

If the above will elaborate the ways sociologists explain changes in policy, an alternative framework is proposed by legal scholars, who elaborate a significant part of the ideological context rooted in contextual social constructionism. With respect to "system factors", one common position is to deny that there is, in fact, a criminal justice "system"; rather, there are a variety of interests and positions within it, meaning there may be contradiction and conflict within and between the parts (due process vs. crime control; cops vs. the courts; punishment vs. rehabilitation vs. restorative justice, etc.). Each sector, then, has a vested interest in maintaining itself. On the other hand, there may be some sense that criminal justice agents act in ways that are protective of the integrity of the system as a whole; for example, blaming miscarriages of justice on "rotten apples" or mistakes rather than on fundamental principles or organizational structures (such as the over-use of imprisonment).

Broadly speaking, the history of the CJS can be explained in terms of the relative strength of liberal or conservative paradigms. There would be a connection between a vested interest and the adoption of a particular paradigm (cops and law/order; lawyers and due process). This argument, however, should not be pressed too far because it gets into the issue of the relative autonomy of ideology. On the one hand, policy change often entails a conjunction of liberal and conservative values. From a radical perspective, they are two sides of the same coin: different means to the same end. This was true also of the creation of the penitentiary. Experience suggests that reform proposals get implemented within a pre-existing structure which tends to limit the efficacy of the reforms; for example, community consultation within a structure in which the police determine priorities; rehabilitation which does not contradict the paramount importance of security; diversion which is grafted onto a punitive justice system rather than acting as an alternative. Nevertheless, internal CJS philosophies are significant and ideologies help shape outcomes.

## **THEORETICAL PERSPECTIVES**

There is a bewildering array of theories of crime and it is necessary to be highly selective. It is important to note, first, the decline in the functional and Marxist paradigms. The

dominant, consensus version of functionalism was critiqued by neo-Marxism (conflict theory). The Marxist version of conflict theory, however, has also been overshadowed in the contemporary period because of the relevance of gender, race, ethnicity and nationality to issues of social explanation and criminal justice. It is equally important to note the continuing relevance of the so-called classical theorists, Durkheim, Marx, and Weber, pinpointing aspects of their theories which could, eclectically, be utilized in a reasonable theoretical perspective. Weber, in particular, bridges the sociological and legal frameworks, as introduced in the previous section.

Like any theory, criminological theory arises in a certain time and place and, to understand it, you need to understand the context that produces the specific theory. For our purposes, however, it is enough to realize that theories are produced in relation to previously existing explanations. To simplify greatly, consensus theory can be considered a version of more general conservative theory.

In response, pluralist theory developed as an improvement, although pluralist theorists, like consensus theorists, considered the state to be neutral, as representing a compromise of the interests in civil society. Pluralism is a kind of "liberal" theory. Laws that benefit minorities, for example, are usually explained as the result of pluralism.

Conflict theory was developed as an attack on pluralism. In conflict theory, the state is not seen as neutral, but as serving the interests of the dominant economic class. Conflict theory is a "radical" theory in which two versions of conflict theory may be identified: instrumentalism and structuralism. The instrumentalists believe in a relatively direct connection between the interests of powerful people or groups and law and policy. Crudely, it is a kind of "conspiracy" theory: the heads of the large corporations give the Prime Minister his orders. The Instrumentalists had trouble, however, explaining those laws which did not seem to meet the interests of the dominant class. Why were trade unions made legal, for example? Why were their laws against corporate mergers? This problem was addressed by the second version of conflict theory: structuralism.

The structuralists believe that the state and civil society exist in a system (or structure) within which the dominant class benefits the most. The state acts to preserve the system, to make it work better or to solve its problems. By doing so, the state claims to be acting in the interests of everyone. However, preserving the system and making it work better always satisfies the interests of the dominant economic class. The heads of the dominant corporations don't have to telephone their orders to the Prime Minister; the government automatically acts to strengthen the system (or structure), thereby automatically strengthening the position of the dominant groups within it.

According to the structuralists, the state is "relatively autonomous" from the dominant economic class. The government may make any laws it likes, even those that benefit minorities, provided that these laws do not harm in any significant way the interests of the dominant economic class. Only if the dominant class feels threatened by these new laws will they act, for example, by ceasing to make political contributions, by withdrawing investment from the economy (causing recessions and unemployment, which they then blame on the government), or by other means. Conflict theory in criminology is also known as "Critical Theory". It is the latter term which Schissel uses in

the reading below.

It should be obvious, then, that critical theory does not adequately explain how laws are actually made. There seem to be too many exceptions for Instrumentalism to be adequate. As for the structuralists, at best they explain the limits within which laws can be made (they must act to strengthen or correct the system), but they do not explain the actual way in which laws get made within these limits.

This, then, leads us to "post-critical" criminological theory, the most important kind of which is social constructionism. In some ways, it is a return to pluralism because it examines the way in which many social forces influence the creation of law. However, it is also close to critical theory because it usually focuses on the way dominant groups see the world and the ways they then proceed to shape the way that the general population sees the world. Social constructionism, then, emerged to offer a more complex explanation for social change in the context of the awareness of the salience of gender, race, and other significant sociological factors.

A dialectical type of social constructionism, which weighs both ideological and structural factors, should be distinguished from a type of social constructionism which focuses exclusively on changes in ideas and the consequences of ideational change. In the elaboration of a social constructionist account, concepts such as "stages", "moral panics", "hegemony" and "images of society" arise.

The simplest way to think of social constructionism is to consider the creation of law to be a chain reaction. First, there are particular social interests of a political and/or economic kind which want to exert control over people, particularly those they consider a threat to themselves. The biggest threat comes from those who are not well integrated into the existing structure of power and wealth. If you are well integrated into this structure, then you have something to lose and social control is not a problem. If you are unemployed, or marginal to the workforce by virtue of living on welfare or being young, for example, then dominant social groups need to find ways to exercise power over you.

These powerful economic and political interests need to shape the way society thinks about the potentially marginal, dangerous groups. If they can be perceived by society in general as dangerous or immoral and in need of strong controls, then it is easy to justify strict laws and the use of power to keep them in their "place".

What the general population is to "think" of these marginal groups is "constructed" as an image, and then this image is disseminated to the population. The role of the media is crucial in the successful dissemination of the "constructed" image. Basically, in terms of post-critical, post-modern, deconstructionist theory, the images projected to the population are "discourses"; the institutions which do the dissemination (principally the various mass media) are "discursive agents". The image is constructed by exaggerating isolated or atypical events into a more widespread social problem which threatens everyone. Overgeneralized, inaccurate and stereotypical images are developed which are then taken by people to represent "truth".

The result is a socially constructed ideology that, at its more fully developed, engenders a "moral panic" which misrepresents the truth but appears to be extremely dangerous, about which official action must be taken. These images are taken out of

context; they are simplified and not made understandable in terms of the social context in which they occur. This is part of the process of exaggeration and simplification (decontextualizing). For example, it is widely assumed that violent crime is escalating to the point of being out of control; therefore something must be done, particularly something more punitive. Crime statistics, however, do not substantiate the reality of a violent crime wave. Images of growing violent crime are socially constructed. Such socially constructed images are, however, real in their consequences: they have an effect on what people think and do, and on the laws that are made.

People respond to these inaccurate, exaggerated images, and demand action. Typically, the image of choices that is embedded in the dominant ideology reflects a discourse in which the choice of response is limited to a framework of more severe punishment, or criminalization, or some other punitive response. The state then acts on the basis of the public response, which has been constructed and manipulated, making new, more strict laws, tightening controls, increasing punishments, etc. This process of public advocacy of a law-and-order approach is more likely to occur when people are genuinely troubled over some other important matter, such as high unemployment, or economic uncertainty. In a climate of anxiety, harsh laws can be re-written against those perceived to be causing the trouble (such as immigrants taking away jobs), or against others who are really scapegoats, such as youths. The following sections begin by elaborating on this social constructionist approach and applying it to questions of law, crime, and policy in specific areas of the criminal justice system.

## **SECTION II**

### **WOMEN AND THE CRIMINAL JUSTICE SYSTEM**

How women fit into the criminal justice system has been one of the most controversial areas of criminology. In virtually every area of the justice system, the experience of women may be differentiated from the experience of men. With respect to being victims of crime, men are victimized more often than women. Men, for example, are more likely to be assaulted, robbed, and murdered. Within this broad generalization, however, there are specific instances where women's victimization is greater. Women are more likely to be victimized in intimate settings (such as in cases of spousal abuse and homicide); women are much more commonly than men victims of sexual assault, stalking, and criminal harassment; women suffer higher rates of elder abuse; women are victimized more than men in the sex trade. Women may also fear crime more than men.

Men are also over-represented among offenders. Violent crimes, in particular, are primarily the responsibility of men. Women, however, may be responsible for more than their proportional share of cases of shoplifting, cheque and welfare fraud, and prostitution. Consistent with the above, males are also arrested at a significantly higher rate overall.

Elsewhere in the system, women are consistently under-represented with respect to the population. There are fewer women police officers and correctional officials; fewer

women judges and crown prosecutors; fewer women criminal lawyers; even fewer women criminologists. More fundamentally, it is argued that the perspective of women is largely absent from the philosophy and practice of the criminal justice system. Women, then, are doubly or triply victimized within the justice system itself.

These are long-standing patterns in social position and behaviour. Towards the end of the twentieth century, however, it became clear that changes were occurring in the status of women. Arguably, as women achieved more equality in society, as they joined the workforce in greater numbers, and achieved legal and social equality, patterns of offending between women and men would be likely to converge. Over time, then, women will achieve representativeness in all aspects of the system, from equal offence rates to equal numbers of police officers and judges.

This optimistic projection has been overshadowed by the persistence of differential experiences and treatment. Within the terms of the argument itself, equality is still a long way away. Relatively few women have achieved positions of power and influence allowing them to pursue careers as white collar criminals. Despite affirmative action, women comprise no more than ten per cent of Canadian police officers. The types of crimes committed by women are still overwhelmingly the "feminine" variety. Despite the advantage of the battered women defence, more women than men are still murdered in cases of intimate homicide. There may be some evidence that more women, including more female youth, are being charged with assault. It is unclear, however, whether additional charges against women reflect an actual increase in violent behaviour or, on the contrary, merely result from a greater willingness to lay charges against women.

Perhaps more fundamentally, the expansion of the number of women in an essentially male-dominated justice system does not necessarily mean the expansion of a woman-centered perspective. Women judges do not necessarily make non-sexist decisions, or decisions that reflect a woman's standpoint.

## **WOMEN AS RECIPIENTS OF UNEQUAL JUSTICE**

The treatment women receive in the justice system has been regarded as unfair from several different points of view. On the one hand, women are sometimes viewed as victims of negative discrimination. Even when prostitution laws were re-written to be gender neutral, for example, more women than male customers were charged by the police. As juvenile delinquents, females were sentenced to longer terms of confinement, for a wider range of misbehaviours, than boys. This was justified in paternalistic terms as in the girls' best interests. Certain male practices, such as wife battering, were assumed to be normal and outside the purview of the justice system.

Even when the law was supposedly applied equally, women perceived unfair treatment. Women suffer considerable victimization in intimate relationships where they are often vulnerable to larger, domineering, and aggressive men. In a situation of actual inequality, women under attack often resort to the use of weapons, commonly knives, to defend themselves. Since the law was written from a male perspective, it assumed that the assailants were basically equal. Consequently, the use of a weapon was deemed an

aggravating factor. The equal application of the assault yardstick to women and men was reflected in more serious charges and more severe sanctions for women.

Within criminology, however, an alternative interpretation had become dominant. Some criminologists argued that women received an unfair advantage in the system because they benefitted from preferential treatment. This is sometimes known as the "chivalry" hypothesis. Victimization surveys suggest that men are less likely to report their own victimization if it occurred at the hands of women. Juvenile girls are more likely than boys to receive informal handling. Certain laws provide benefits for women. The crime of infanticide, for example, is only available for new mothers who murder their own new-born children. The law-makers assumed that they must have been out of their right mind to so violate what was thought to be natural instinct. In addition, women benefit from sex-specific defences to criminal charges. Men, for example, cannot claim lessened responsibility because of pre-menstrual syndrome. The battered women defence, discussed below, was initially applied specifically to women. Of course, these examples can be defined as "unfair" only if it is assumed that women are identical to men. If women are essentially different from men, in specific, identifiable ways, then different rules and procedures are not necessarily unjust.

One way to reconcile this debate about whether the treatment of women is preferential or negatively discriminatory is to view the system through the lens of ideology. The hegemony of men in the criminal justice system corresponds with the dominance of patriarchal ideology. Viewed through the image of patriarchy, deviant women are judged differently according to whether their actions uphold or contradict the appropriate roles and norms assigned to women. Chivalry is extended to women whose lifestyles are consistent with the norms appropriate for women. Women who shoplift, for example, are only providing for their families and should be treated leniently. Women who violate the norms of the middle class family by being single mothers, or being divorced, or working in the sex trade, are made objects of control by the justice system and treated more harshly. Similarly, women who act violently violate the code of appropriate conduct for women. In this respect, the battered women's defence and other women-specific defences may represent the weakening of patriarchal ideology in the justice system. Alternatively, however, they may simply reiterate women's traditional status as not only different from men, but as weak and inferior to men.

The question of the differences and similarities between women and men has been a dominant theme in recent feminist theory. The criticism that the justice system is dominated by a hegemonic, patriarchal ideology is reflected in a variety of women-centered theories. Feminist criticisms of criminal justice can be classified according to their identification of the source of the oppression of women and the resulting solution. The most pervasive form of feminism is liberal in its orientation, arguing that the arguing that the social and legal structure of society is fundamentally fair and just. In its operation, however, certain groups – and particularly women – have not been treated fairly. Women are not in any essential way different from men. Any differences between the sexes is the result of socialization experiences and, accordingly, the solution for women is reeducation and consciousness raising. Within the justice system, women should demand

equal treatment, meaning the same treatment received by men. Legal and administrative reforms can, presumably, achieve these objectives.

Socialist feminists do not accept the view that the current economic or justice systems are fundamentally just. The basic problem for women is that they are subordinate to men in the economic sphere, a situation which is necessary for the smooth functioning of capitalism. The legal system as a whole justifies and reinforces the subordinate status of women. It is not actually possible to achieve equal treatment within the present, capitalist system, so liberal feminist efforts will never be successful in eliminating oppression. At best, liberal reforms will allow some women to achieve power and dominance within the capitalist system that, necessarily, would still oppresses the majority of working class women. The liberation of women, in all aspect, requires a fundamental economic revolution. Like liberal feminism, however, socialists tend to assume that women and men are not essentially different in character or potential. The traditional claim that women are more emotional and less rational than men, for example, is rejected on the grounds that it represents an ideology that perpetuates the inferiority of women.

One way radical feminists differ from both liberals and socialists is on the question of differences between the sexes. If women *are* more emotional and less rational than men, this is only a source of inferiority in a society dominated by male standards. This hierarchy (brain over heart) could, conceivably, be turned on its heads in a world which valued emotional openness more highly than cool logic. If being a woman, in any society, is essentially different from being a man, then the solution to unequal treatment in the justice system is not to treat women and men the same. To do so would be oppressive to one sex or the other, depending on which was hegemonic. Since men dominate the present social order, equal treatment would actually still be unfair to women. Capitalism may be part of the oppression of women because it represent a rational, individualised, and formal economic system – that is, it is essentially based on a male model – but the socialist feminist demand for a revolution does not go far enough because it merely substitutes one male model of rational social order for another.

The issue of the possible substitution of an essentially feminine model of justice for the currently hegemonic masculine model is discussed by Frances Heidensohn. She accepts that women possess distinctive psychological attributes from men. The question she addresses is whether or not it is possible or feasible to develop a distinct justice system for women based on these distinct characteristics. It is a fundamental problem that definitions of “difference” do not occur in an ideological or power vacuum. Given the substantial power interests of men in the social order, it is difficult to see how a strategy of defining the feminine as superior could, itself, reverse the hegemony. Within a masculine hegemony, the identification of ways women are different from men reinforces the definition of feminine inferiority.

## **WIFE BATTERY**

Physical assaults on women by their intimate male partners is one of the most visible

manifestations of masculine dominance. Crimes among intimates is certainly one of the most difficult areas for devising appropriate public policy. There is a tradition that would define the family as a private sphere and shield events within the family from the interference of the police and other state agencies. The two principle exceptions to this which have been developed concern the welfare of children and the social regulation of sexuality.

The child-saving movement that emerged in the late nineteenth century empowered the state to remove children from situations that were deemed abusive or neglectful. The right of the child to protection overrode the parents' right to keep their family affairs private. Even this form of intervention is controversial. How much power should be vested in the state to define what is and what is not acceptable parenting? When is supervision, surveillance, and intrusion into the private, family sphere warranted and when is it an invasion, amounting to a form of social regulation of the poor and marginalized? When the state does intervene, should it act to improve conditions within the family so that children can be returned? If restoring harmony in the family ultimately amounts to reinforcing the authority and dominance of the male head, it is likely to be the case that such intervention is not in the interests of all family members.

The state has also seen fit to regulate sexual matters which, by definition, are largely intra-family matters. Laws forbidding or restricting the use of contraceptives and abortion, for example, have profound consequences for shaping sexuality within relationships. Similarly, laws have been used to reinforce compulsive heterosexism. By the 1970s, however, the state had begun to retreat from some aspects of this regulation, liberalizing access to contraception, for example, and decriminalizing much consensual, adult sexuality.

The state was much more reticent to intervene in the relationship between husbands and wives. The marriage contract was viewed as legalizing sexual access. Men who had to resort to force in their sexual relationships with their wives could not be charged with rape. As with children, men were permitted to use a considerable degree of physical violence to correct the perceived misbehaviours of their wives. Most of this violence took place behind closed doors and was accepted as the right of men and the lot of women. In some cases, this intra-family violence amounted to a domestic "disturbance". In most cases, neighbours knew what was occurring but did not intervene, even when they thought it was wrong. Sometimes a witness or the victim herself would call the police. The police regularly responded to the breach of *public* disorder - fights in the streets or the bars, for example - by arresting the worst offenders and laying charges. Violence within the family, however, was a *private* matter. The police responded as peace keepers, restoring the tranquility of the neighbours and temporarily quieting the household, but seldom taking any formal action. In some cases where there was clear physical evidence of a serious assault requiring medical attention, the police might lay formal charges. Such intervention was infrequent. They were more likely to tell the victim that if she felt so inclined, she could lay assault charges *herself* and take her partner to court. The message was clear: a certain degree of violence in the family was socially acceptable.

One of the lasting legacies of the feminist movement was to make wife battery socially *unacceptable*. Initially, the failure of the criminal justice system to respond adequately to wife assault was targeted as representing discriminatory treatment against women. A violent confrontation between two strangers on the street where a victim could be identified would result in police intervention and charges. If a husband physically bullied and battered his wife to an identical degree, the police would interfere, at most, only to restore a temporary “peace”. It was an obvious case of unfair and unequal treatment.

Many forms of social intervention were developed to intervene in cases of wife battery. Educational campaigns were designed to change attitudes about what was acceptable within relationships in an attempt to actually prevent violence. Feminists organized social intervention in the form of the shelter movement, giving women in violent relationships a safe haven as well as feminist counselling. They also demanded changes in the handling of wife battery by the criminal justice system. The police should treat domestic assault cases in the same way they handled other cases of assault.

The result of this new social construction of domestic violence, resulting not from dominant groups or the state, was the implementation of mandatory arrest policies. The police were instructed to lay charges in domestic situations if they believed, on reasonable and probable grounds, that an assault had occurred. They were to lay charges regardless of the wishes of the victim. It seemed to be a clear victory for those who were demanding an equal justice system. As suggested above, however, the problem with equal treatment is that it is not automatically best to treat situations that are fundamentally different as if they are the same. The new instructions were to ignore the dependent and/or intimate nature of the setting; yet the history of intimacy and dependency between the parties makes the crime particularly complex and an automatic charge policy is a blind, blunt instrument that may be perceived by victims as causing them more harm.

Charges, it was noted above, were to be laid regardless of the wishes of the victim. In defence of their traditional style of non-interference, the police claimed that battered wives frequently wanted no more than to have the police stop the assault in progress. They often asked that charges not be laid. They sometimes invented excuses for their injuries to protect their partners. They were frequently unreliable witnesses because, even if they agreed to the laying of charges, by the time of the trial they had often relented, perjuring themselves on the stand to prevent their partner from being convicted. At times, the police claimed, the husband and wife would turn their wrath, together, against the interfering police officers, making responding to domestic disturbances dangerous and unpredictable.

From the perspective of the police and prosecution, this was perverse behaviour. The simplest explanation was that victims feared retaliation for calling the police and for laying charges. The solution was to make charging a purely police matter. The victim, then, could not be blamed for laying a formal complaint. The result was an increase in the laying of formal charges. This policy has been pursued in many jurisdictions. Early studies suggested that in cases where formal charges were laid, there was a reduction in further incidents of domestic violence (Sherman and Berk, 1984). The policy appeared to

effectively deter battering men. Increased criminal justice intervention, more arrests and greater punishment, was consistent with the neo-conservative direction of public policy in the 1980s and 1990s. Mandatory charge policies spread rapidly throughout North America. Subsequent reanalysis of the data, as well as broader considerations of the use of criminal sanctions as the only appropriate response to intimate violence, have led to some reconsideration about the place of the criminal justice system in responding to domestic violence (Currie and MacLean, 1992).

It should be noted that many cases still do not result in charges. The police are sensitive to the question of "reasonable and probable" grounds. They need not only believe that an assault had occurred, but have to believe that the case can be sustained in court. Often, the victim is the only witness to the assault. If the victim fails to cooperate, particularly in the police interview, justifying an arrest and swearing an information become more problematic.

The absence of cooperation on the part of some victims has much more complex roots than only fear of retaliation. The majority of battering situations which come to the attention of the police involve poor, dependent families with few resources. In an intimate relationship that has some positive benefit for the victim, such as a partner who contributes to the family income, sending a battering husband to prison forces the family onto welfare. The criminal justice solution further victimizes the victim. If the assaulter faces a fine, then that amounts to a loss of income for the whole domestic unit, including the victim of the assault.

Questions about the effectiveness of mandatory arrest policies raises a broader issue of public policy: what is the appropriate role of the criminal justice system in bringing about social reform? One long-standing sociological viewpoint on criminal behaviour is that crime reflects deeply-rooted social problems, such as poverty, discrimination, unemployment, and inequality. The implication is that it is not possible to solve the "crime problem" in the absence of solving the social causes of criminal behaviour. Within criminology, this issue is whether changes in the laws themselves or in the way the laws are administered can lead to real social reform. Laws, it is argued, are only as effective as the people who implement them allow them to be. For some, this suggests that attempts to bring social reform are doomed to failure if they confine their attention to changing the criminal justice system.

In the case of combating wife battery, it was argued above that the mandatory arrest and charge policy was at first believed to demonstrate how making changes to the criminal justice system could be effective, particularly in shaping how the police respond to crimes of intimate violence. Jane Ursel and Stephen Brickley address this question in their examination of "Manitoba's Zero Tolerance Policy on Family Violence". They conclude that it is wrong to abandon the task of making changes to the justice system. The fundamental issue is whether changes in policy result in the creation of new institutions which are effective in helping achieve the intended purpose of the legal reform. In Manitoba, Ursel and Brickley argue, a special family violence court not only holds batterers legally accountable for their violence, but deals effectively with the complexities involved in cases of violence between intimates.

## THE BATTERED WIFE DEFENCE

Probably the better known example of an effective policy change beneficial to women within the criminal justice system is the successful use of the battered women's syndrome as a defence in cases of spousal homicide. The law on assault reflects a masculine standpoint. There is, first, the acceptance of a consensual fight between equals which is permissible as long as aggravating factors are not present. There must be implied consent. The harm suffered must not be excessive or disproportionate. Generally speaking, only the unskilled use of hands and feet is acceptable; no other weapon should be employed.

Second, there is the right to inflict disproportionate harm on someone, even to cause their death, in certain circumstances. The eventual homicide victim must be the initial aggressor. The attack must be sufficient to cause a reasonable apprehension of serious bodily harm. The self-defensive action must be taken at the time of the attack when there were no other alternatives. You must use force that is not excessive. If there is an opportunity to escape from the immediately dangerous situation, it must be taken – no homicide is justifiable unless escape is impossible.

This image seldom fits the scenario of the battered wife. In many cases there is a significant disproportion between the victim and her attacker. Use of a weapon in the heat of the attack to even the odds somewhat, however, has often been interpreted by the courts as utilizing excessive force, leading to women being convicted of manslaughter or second degree murder. It is a case where the equal application of the letter of the law results in injustice for women.

The laws on assault are entirely inappropriate in cases of long-term physical and emotional abuse. Law makers did not envisage a situation in which a dependent person would be systematically and repeatedly assaulted by an aggressive, domineering, and controlling spouse. Trapped by dependency, with no possibility of seeing a way out of the situation short of suicide, the women in a battering relationship learns to anticipate attacks (although some happen at random), and devises schemes to placate her spouse. The situation is even more desperate when the attacks are directed not just at herself, but at her children or other family members. In the instant of being attacked, escape is impossible and, at most, she can defend herself and her family. Women in this situation have reached rock-bottom. A few have taken what appeared at the time to be the only way out: they have killed their spouse. Sometimes these homicides occur in the midst of a battering episode, for example, using a knife for protection. In other cases, there has not been an immediate attack; the husband may be sleeping, or walking away. Legally, then, the self-defence argument is unavailable and conviction for murder is likely.

In 1990, the Supreme Court of Canada was asked to review a murder conviction in the case of a battered women who shot her husband when she was not, immediately, being attacked. The case of Lyn Lavallee was precedent-setting in Canada because the Supreme Court accepted expert testimony on the "battered woman syndrome" and then ruled that should it be probable that such a syndrome exists in a spousal murder case, acquittal can be possible. The suggestion that the ruling would result in an "open-season"

on battering (or allegedly battering) men have materialized. Instead, it appears to be an example demonstrating that groups of people in distinct circumstances (such as battered women) can achieve equal justice only by receiving differential treatment.

Christine Boyle, in "The battered wife syndrome and self-defence", discusses the implications of this new defence, introduced initially as specific to women. She argues that it is a positive step to have the courts acknowledge the distinct perspective of a woman, in contrast to the model of masculinity which implicitly underlies criminal law. One of the fundamental inconsistencies is that the battered women syndrome induces deep feelings of passivity and helplessness. Presumably, the woman truly mired in this "syndrome" is unable to do anything. The murder itself, however, would appear to be an act of strength and volition, and might be presumed to be evidence that would refute the existence of the syndrome.

## **SEXUAL ASSAULT**

Despite the existence of the battered woman defence, many more women than men are murdered in cases of domestic violence. In the case of sexual assault, the imbalance between female victims and male perpetrators is overwhelming. Until 1983, the Canadian Criminal Code defined the offenses of "Rape" and "Indecent Assault". According to the rape statute, at the time section 143, "a male person commits rape when he has sexual intercourse with a female person who is not his wife, (a) without her consent or (b) with her consent if the consent (i) is extorted by threats of fear or bodily harm, (ii) is obtained by personating her husband, or (iii) is obtained by false and fraudulent representations as to the nature and quality of the act." A conviction for rape was punishable by imprisonment for life.

Under Section 143, only males over the age of 14 could be charged with the offense and only a female could be "raped". A man could not be charged with raping his wife. Rape could be charged only where sexual penetration took place, although it could be "slight" penetration. At the time, the law was concerned to protect men from false accusations. To obtain a conviction, for example, the assault had to be recent. If the victim did not complain right away, the veracity of her claim was doubted. There also had to be evidence that corroborated the complainant's story. The victim's testimony alone was insufficient.

Equally controversial was the trial itself. The victim was obliged to testify and suffer attacks on her credibility by the defence lawyer. Her past sexual behaviour with other people, including the assailant, could be introduced as evidence in court to undermine her complaint. The result was a double victimization. Women were emotionally assaulted a second time in court.

All of these elements came under attack by feminists who claimed that the law was designed to protect men who raped more than their victims. They demanded gender-neutral laws which distinguished between acts of sexual violence not on the basis of whether there was "penetration", a definition which focused on the sexual nature of the attack, but on the degree of harmfulness, a definition which focused on the violence

experienced. In 1983, Parliament withdrew the previous laws on rape and indecent assault, and substituted three sections on "sexual assault" under the Criminal Law Amendment Act. The three levels of assault were differentiated according to the degree of violence used, for example, whether a weapon was used or serious bodily harm resulted. The lowest level of sexual assault was defined as follows:

271. (1) Every one who commits a sexual assault is guilty of  
(1) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or  
(b) an offence punishable on summary conviction....

Sexual assault was made sexually neutral; that is, both men and woman can be charged or be victims under the law. The exemption for husbands was withdrawn as was the need for corroborative evidence. An accused could then be convicted of sexual assault in the same manner as for any other offence. Similarly, the 1983 law abolished the recent complaint rule.

Another important reform was the institution of what became known as the "rape shield law" (Section 276) that imposed limitations on the questioning of sexual assault victims about their previous sexual activities. Known as the "rape shield law", the key issue is the extent to which a court has the right to ask a victim about her previous sexual conduct or sexual reputation. Remember that it is impermissible to ask the *accused* about his previous sexual conduct, including any prior convictions for sexual offenses (although these will become relevant if he is found guilty, during the sentencing stage). Under Section 276 of the *Criminal Code*, "no evidence shall be adduced by or on behalf of the accused concerning the sexual activity of the complainant with any person other than the accused". There were some exceptions to this rule but, overall, it prevented the trial from becoming an attack on the victim. Defence lawyers, however, claimed that the rape shield law prevented their clients, in some cases, of having a fair trial. In 1991, in *R. v. Seaboyer* and *R. v. Gayme*, the Supreme Court struck down section 276.

## SECTION III

### YOUTH AND THE CRIMINAL JUSTICE SYSTEM

Youth have long occupied a central place in the criminal justice system. Many people are loath to give up on young people when they get into trouble, believing they can be helped to become mature, responsible adults. Young people are still in the process of forming their character; their behaviour is more susceptible to a variety of influences, both positive and negative. Family background and environment are crucial factors in shaping early socialization. When parents appear to fail in this primary task, the agents of the state take over responsibility, acting in place of the parents. As with parenting in general, however, the state faces the dilemma of devising appropriate means to effect positive changes in misbehaving youth. For some, a swift "kick in the pants" is all the correction a young

person needs. Youth crime is, for them, begotten by too much leniency and permissiveness. The social definition of abuse has become so wide that parents and teachers can no longer discipline children who are ostensibly under their authority. The result is an increase in youth crime and an apparent need to tighten social control and protect social order. In some communities, for example, special curfews are imposed on the young to keep them out of trouble. Ironically, however, new laws increase the number of law-breakers since some will not comply with the new rules. By definition, you are likely to end up with more rule-breaking than previously.

For others, the application of force to compel external compliance with sometimes arbitrary rules is, by definition, a form of oppression. It teaches, by example, only the acceptability of the use of violence. From this perspective, the call for the return of corporal punishment in the schools and the home will produce only negative consequences for youth and society in the long run. When authority is legitimate, the judicious use of punishment, fairly and evenly applied, reinforces conforming behaviour and strengthens the position of those who wield the stick. When authority is not legitimate, as the proponents of greater punishment now believe to be the case, giving those in authority more power to punish will succeed only in reinforcing the feelings of injustice and alienation of those punished. The result will be a cycle of violence and repression which magnifies social problems rather than resolves them. On the other hand, in the absence of both the practice and the symbolism of punishment, how can social boundaries of behaviour be established and reinforced?

This dilemma, which is ultimately how to properly socialize the next generation, has been at the root of many of the attempted reforms of the youth justice system. The criminal justice system has had, at least in more modern times, a dual focus: on punishment and deterrence, and on rehabilitation and reform. Since youth are seen as more amenable than adults to reformation, they have been the focus of much progressive legislation. The reformatory movement of the late 19<sup>th</sup> century, for example, was intended to identify youthful criminals who could still be "saved" from a life of crime by being placed in an environment where they would receive the proper socialization that their parents had, presumably, failed to provide. Those who were "corrigible" had to be helped to lead productive, crime-free lives. Reformation has been the dominant thrust of the youth justice movement throughout this century.

At least reform represented the official ideology. It became painfully clear, however, that the reformatory movement failed in its objectives. Young inmates were still serving time in institutions that generated criminality more than prevented it, as much in its routine operations as in the direct abuse which many young people suffered in these reformatories. The failure of the reform school led directly to demands to change the youth justice system, to prevent young people in trouble from being subject to further harm to themselves. Revisionist sociologists argued, in turn, that early intervention by the criminal justice system helped transform minor youthful deviants into career criminals. Most youth were sometimes deviant in one way or another. Some, however, were singled out, more by who they were than by what they had done, and were officially processed, labeled, and treated as "delinquents". The result of this stigmatization was a

self-fulfilling prophesy. Being treated as “bad” people, those defined as delinquents came to see themselves as bad and acted accordingly. Their behaviour confirmed the label. The criminal justice system had not failed; it had actually succeeded in creating criminals. The implication of this argument was that justice would best be served by non-intervention. This, however, was clearly unsatisfactory. Many deviant actions are socially harmful and require correction. What was necessary, then, was to divert youth away from the formal justice system as much as possible while not ignoring their deviant actions that were harmful to themselves or others.

It was also clear to social critics that the position of youth had changed in the 20th century. Youth is a social category which everyone normally experiences for a short period and then matures beyond. It is a temporary identity. Nevertheless, a distinct youth culture had emerged that contributed to the establishment of a social identity for youth which had stability over time even as group membership changed. By mid-century, minorities were defying social conventions and challenging discriminatory laws, more or less successfully. Young people were similarly inclined, although the forms of rebellion which were taken were distinguished by class and race. A new generation of militant, young blacks armed themselves in self defence. Middle class university students consciously rebelled against the symbols of social order. The youth problem was no longer confined to lower class delinquency. Youth had emerged as a socially significant and potentially dangerous social category.

Along with other institutions of social order, the youth justice system was criticized for perpetuating injustice. Youth were being treated in a paternalistic way. They were declared delinquent for doing things that adults were freely and legally permitted. Youth could be confined for long periods of correction putatively for their own good. The rights and safeguards that were built into the justice system to protect adults were denied to young people. In response, youths demanded the same rights as other social groups. It was clear, however, that the demand for equal rights required a parallel acceptance of individual responsibility. What was necessary, then, was to make youth responsible and accountable for their own behaviour while extending to them the same rights enjoyed by adults. The logical result of these demands would be to extinguish any differences between the adult and youth criminal justice systems.

Many criminologists, however, balked at taking such an extreme step. For all its paternalism and other faults, youth criminal justice had evolved to protect youth from the worst aspects of the adult system. Young people were different from adults. The criminal justice system had to keep in mind the special circumstances of youth, balancing their rights with those of their parents and of society, and differentiating the degree of responsibility and accountability expected from youth from the level expected from adults. This implied devising a separate set of rules for criminal youths.

The fundamental principle of the western model of justice is that everyone should be treated equally. It is clear, however, that not everyone is, in fact, equal. Consequently, the western justice model has been modified to take special circumstances into consideration. Those deemed mentally incapable of understanding their criminal acts, such as the mentally challenged or the insane, were excluded from criminal

responsibility. The question of whether special provisions should be made for women was discussed in the previous section. Similarly, distinctions were made on the basis of age.

The very notion of a youth justice system implies a recognition that, before a specific age, people should not be held criminally responsible. They are unable to understand and appreciate the full, social consequences of their actions. The line between those who can and cannot form a “guilty mind” has been drawn at different ages in various times and places. In England, the long-standing tradition had been to draw distinctions at multiples of seven. Below seven years, children could not be held criminally responsible. Between seven and fourteen, youth were to bear some responsibility for their transgressions, although they should not be subject to adult requirements or punishments. After fourteen, people were capable of understanding their actions and should be held criminally responsible for them. The full age of maturity and adulthood – for owning property and voting in elections – was 21, although this age had no bearing on punishment.

In Canada, under the Juvenile Delinquent’s Act (1906), this tradition was modified. Although the age of full responsibility differed from province to province (and even sometimes differed for males and females), “delinquents”, for whom separate treatment was required, were generally defined as those under 16. This meant, however, that 16-year-olds could be imprisoned with adults. This had very serious negative consequences for impressionable youth who would be subject to intimidation and exploitation from, and influence by, older, hardened criminals. The Juvenile Delinquent’s Act was supposedly based on a philosophy of welfare, of acting in the best interests of the child. It turned out, however, that this protective role often resulted in longer terms of punishment for acts which were legal for adults. By the 1960s, it was apparent to most that the Act needed to be replaced. Conservatives demanded greater accountability and responsibility be expected from youth; liberals demanded the implementation of an equal justice model, extending to youth the same protections and rights which had been legislated for adults.

These considerations, among many others, led to demands for a progressive reform of the youth justice system. The result of a decade-long debate about youth justice was an act which attempted a compromise, incorporating contradictory demands. The social welfare model of the old Juvenile Delinquent’s Act was retained in the recognition that youth had special needs. Crime control was strengthened because youth were to be held responsible for their actions. Above all, the new Young Offender’s Act (YOA) embodied a justice model, extending to youth many of the rights previously reserved for autonomous adults. Implemented in 1984, the YOA has been the most controversial part of the justice system since its inception. Much maligned by conservatives, the YOA, in its initial form, represented a compromise between those who demanded greater accountability from youth and those who sought diversion and reformation.

Within the philosophy of the YOA, youth were responsible for their crimes. They were also to have the same rights to counsel as adults, the same safeguards about self-incrimination and the right to silence. In addition, recognizing the special needs of youth,

many safeguards were included to protect youth from some of the harmful consequences of the justice system. Youthful offenders, for example, could not be identified publicly to avoid stigmatization. Youth were to be tried and incarcerated in separate facilities, away from the influence of adult criminals. Above all, the YOA was concerned with diverting youth. Sixteen and seventeen year-olds were reclassified as “youths” to keep them away from the adult system. Those under twelve were to be diverted from the criminal justice system altogether. Provincial Social Services legislation was deemed adequate to assist these younger children who were in trouble with the law. For youth offenders themselves, provided they were non-violent first offenders, specific diversion programmes were established to avoid official handling through the courts. As much as possible, sentences were to be served in the community. If incarceration was necessary, the main purpose of confinement was to effect reformation. Accordingly, sentences were to be short, even for the most serious offences – three years for homicide, for example.

The most numerous and vocal critics of the YOA asserted that it was too liberal. Anyone under twelve simply got away with a crime because they were too young to be charged. Youth, themselves, were knowledgeable about the Act and about their rights, and capable of manipulating the justice system to suit their purposes. With such short sentences, young people, even young sixteen and seventeen year old near-adults, could get away with murder. Far from being a cure for youth crime, the conservative critics charged, the YOA itself promoted crime. Young people were encouraged to act criminally and violently by the leniency of the act which was supposed to curtail their deviance.

If the YOA was failing to control youth crime – indeed, if the YOA actually contributed to youth crime – the result should be measurable. The effectiveness or otherwise of the act should be judged on whether the amount of youth crime was increasing or decreasing. Given this argument, the critics appeared to be on solid ground. There was a widespread impression that youth crime, particularly violent crime, was increasing in Canada. This conclusion was confirmed by Jeffrey Frank whose report in *Canadian Social Trends* confirmed that, between 1986 and 1991, the rate of violent crime charges laid against youth had risen substantially more (106%) than the rate of violent crime charges against adults (45%) (Frank, 1992). Frank noted, however, that when a crime of violence is reported, it is often not clear whether the offender is or is not a young offender. These statistics, then, reflected only the *charges laid* against youth; they were not necessarily a measure of the actual amount of violence committed by youth, a point discussed further below.

Police statistics tell only part of the story about the YOA, however. The criticism about the YOA has not come only from the conservative side of the political spectrum. Liberal criminologists have looked beyond the actual justice model wording of the Act to its implementation within a conservative, punishment-oriented criminal justice system. Rather than being lenient, the liberals consider the YOA harsh because a higher proportion of youthful offenders are serving time in custody. Rather than diverting young offenders from the system, it seemed that more offenders than ever were being brought through the system and being placed in secure custody. Furthermore, if the statistics indicating more and longer sentences told a different story from the UCR data,

these police statistics that indicated an increase in youth crime were themselves subject to criticism. Frank had initiated the debate about what the statistics meant. He suggested it was unclear whether there was actually more youthful violence in society, or whether there was simply a change in the way that youth violence was officially treated. There are many steps between an actual act of aggression and the formal laying of a criminal charge. Perhaps what had previously been considered a school-yard scrap, for which only unofficial actions were to be taken, was now being seen as a matter for police intervention. Perhaps the police were interpreting minor aggression as assaults, laying charges and inflating the violent crime statistics. It may be that the increase in violent crimes is confined to only the lowest level of assaults (level one, or “common assault”). If this were the case, it would suggest that the police were now defining as crimes various actions that, before, had simply been disregarded as relatively normal aggression.

The arguments about the length of sentences under the YOA and the alternative interpretations about the increase of the rate of youth violence were largely confined to liberal, academic circles. The conservative position appears to have more widespread social support. The police statistics strengthened the conservative arguments about the leniency of the YOA and contributed to a public opinion harshly critical of youth justice. The government responded to these criticisms several times by introducing changes to the Young Offender’s Act, making it more punitive and less liberal. Amendments have increased the period of incarceration and probation for violent offences, such as murder (now a maximum of ten years, of which six may be served in custody). Cases may be transferred more routinely from youth to adult court. Longer periods of incarceration for youth may be justified in the youth’s “best interests”, a move away from the equal rights model of the YOA to the previous Juvenile Delinquent’s Act, when youth could be confined for longer periods than adults to “help” them. These measures, however, have not satisfied the lobby groups who want a different youth justice model, emphasizing punishment, discipline, and ultimately seeking an end to making youth an exceptional category. The Canadian government has continually been on the defensive against these attacks. In 1998, a new set of amendments was proposed, including re-naming the YOA the Youth Criminal Justice Act. Whether the new name will amount to a new philosophy, however, is unclear.

For liberal criminologists, however, the premise on which these changes are based is flawed. The actual behaviour of youth had not changed – they were not necessarily acting more violently. It was clear, however, that there was a public perception that youth violence was growing out of control. How could this discrepancy between what the liberals believed to be true and what the general public believed to be true be explained? For some critical sociologists, the explanation lay in the existence of a media-fueled “moral panic” about youth crime. Two of the articles below examine the question of youth violence through the lens of “moral panics”.

## **SOCIAL CONSTRUCTION, MORAL PANIC, AND YOUTH CRIME**

The simplest way to think of social constructionism is to consider the creation of law to

be a chain reaction. First, there are particular social interests of a political and/or economic kind which want to exert control over people, particularly those they consider a threat to themselves. The biggest threat comes from those who are not well integrated into the existing structure of power and wealth. If you *are* well integrated into this structure, then you have something to lose and social control is not a problem. If you are unemployed, or marginal to the workforce by virtue of living on welfare or being young, then dominant social groups need to find ways to exercise power over you.

Second, these powerful economic and political interests need to shape the way society thinks about the potentially marginal, dangerous groups. If they can be perceived by society in general as dangerous and in need of strong controls, then it is easy to justify strict laws and the use of power to keep them in their place.

Third, then, what the general population is to think of these marginal groups is “constructed” as an image, and then this image is disseminated to the population. The role of the media is crucial in the successful dissemination of the “constructed” image. Basically, in terms of post-critical, post-modern, deconstructionist theory, the images projected to the population are “discourses”, the institutions which do the dissemination (principally the various mass media) are “discursive agents”.

The image is constructed by exaggerating isolated or atypical events into a more widespread social problem which threatens everyone. Overgeneralized, inaccurate and stereotypical images are developed which are then taken by people to represent “truth”. The result is a socially constructed “moral panic” which misrepresents the truth but appears to be extremely dangerous, about which official action must be taken.

These images are taken out of context; they are simplified and not made understandable in terms of the social context in which they occur. This is part of the process of exaggeration and simplification (decontextualizing). For example, it is widely assumed that violent crime is escalating to the point of being out of control; therefore something must be done, particularly something more punitive. Images of escalating violent crime are socially constructed. Such constructed images are, however, real in their consequences: they have an effect on what people think and do, and on the laws that are made.

People respond to these inaccurate, exaggerated images, and demand action, usually in the form of criminalization or some other punitive response. The state then acts on the basis of the moral panic, making new, more strict laws, tightening controls, and increasing punishments.

Moral panics are more likely to occur when people are genuinely troubled over some other important matter, such as high unemployment or economic uncertainty. In a climate of anxiety, harsh laws can be re-written against those perceived to be causing the trouble (such as immigrants taking away jobs), or against others, such as youths, who become scapegoats.

In his article sub-titled "Post-Critical Criminology and Moral Panics: Deconstructing the Conspiracy against Youth", Bernard Schissel applies the social constructionist model, outlined above, to the contemporary concern over youth violence and the resulting demand to make the youth justice system more punitive. Schissel

believes that four theoretical models need to be combined to understand the current "moral panic" over youth crime. The first three adopt a "critical perspective". Marxist criminology draws attention to the use of the criminal justice system by powerful interests to control the working class and other marginalized groups in society. Left realists focus attention on victimization, on the real social harms that criminal behaviour causes. Finally, feminists draw attention to the gendered nature of criminal justice and the power of patriarchal ideology to shape justice practices.

In addition, Schissel adds a "post-critical" or "deconstructionist" theoretical position which focuses attention on the dynamic process by which "expert" opinion shapes public perceptions. Experts explain phenomenon in certain ways, using symbols and language cues to shape people's perceptions of truth. Not all expert opinion is equal, however. Given the existence of powerful social forces described in the Marxist and feminist accounts, those expert opinions which reflect the views of dominant social groups are most widely spread through the media. The result is the dissemination of crime myths, in this case, specifically about youth crime and violence.

Using examples of the media misrepresentation of rare criminal events, Schissel demonstrates the techniques by which a particular discourse about youth violence actively constructs public perceptions and shapes policy considerations. Basically, you begin with a "truth claim" which may or may not be true. The truth claim usually contains a "moral message". Social constructionists are concerned (1) with how and by whom these truth claims and moral messages arise or are created; (2) how these one-sided and decontextualized messages are communicated; (3) how people come to accept the claims as truth; (4) the resulting "panic" response; and (5) the policy changes which result from the panic.

Contextual social constructionists seek not only to understand this process, but to test the validity of the truth claims. To see whether youth violence was actually increasing in Canada, Schissel first examined official, UCR statistics. The statistics conformed that youth violence was increasing. He then examined the statistics further (the process here is known as deconstructionism -- taking something apart to see how it was constructed) and determined that the apparent increase in the rate of violent crimes by youths resulted primarily from changes in the way officials interpreted low-level assaults among children and responded to them. The change in the rate of violent crimes did not necessarily reflect an actual increase in violent behaviour among youth.

W. Gordon West contributes to the debate about whether the current concern over youth violence is, basically, a socially constructed moral panic. He addresses the debate about whether schools are becoming more violent places, examining offences reported in Metro Toronto schools. West finds evidence of increased reporting of violence but raises questions about the possible discrepancy between the amount of violence that is actually occurring and the tendency to handle more violence officially. If the evidence is insufficient, by itself, to justify the common perception about out-of-control youth violence, some other explanation for this widespread belief is necessary. Like Schissel, West argues that a socially constructed moral panic is behind the demands for a more punitive judicial system, a policy position he believes to be unwarranted.

A more detailed discussion of the evidence for a moral panic interpretation of the widespread demand for greater punitiveness in youth justice is made by Raymond Corrado and Alan Markwart ("The need to reform the YOA in response to Violent Young Offenders"). They address two key controversial arguments: whether violent crime is increasing among youth, and whether the implementation of the YOA is actually harsh rather than lenient, because of the greater tendency to incarcerate youth who commit minor offences.

Corrado and Markwart review youth criminal statistics and ask (a) whether they indicate an actual increase in the reporting of violent youth crimes and, (b) whether any increase in reporting is merely the result of changed social attitudes about what is acceptable, and/or a change in the charging practices of the police. For example, has the social tolerance of violence decreased over the last decade (as, it could be argued, the social acceptability of family violence has)? Unlike West, the authors argue that the official statistics cannot be readily deconstructed. Rather than reflecting an unjustifiable "moral panic", Corrado and Markwart conclude that the concern over increased youth violence is justified by the official statistics on charges laid.

The second issue is whether the YOA is already quite punitive with respect to some, relatively minor, offenses. Evidence suggests that it is. Compared with other western liberal democracies (with the exception of the United States), Canada commits a higher proportion of offenders to prison – adults as well as youths, violent criminals as well as property criminals. This begs the obvious question: would increasing the severity of punishment lower the crime rate? Corrado and Markwart are doubtful that it would. The ultimate question is, given all the contrary evidence and argument, what should be done about youth justice in Canada? Although the authors discuss a variety of changes, including some more radical proposals drawn from other countries, the essential point is that the youth justice system, itself, is not the proper instrument to effect social reforms. Rather, effective crime prevention involves wider issues of general social policy.

## SECTION VI

### SOCIAL REGULATION

Law has always been connected to morality. Most moral rules, however, are unwritten and more or less relative to time, place and circumstances. Some rules are considered sufficiently important to be written in codes of law that usually define actions which are proscribed or prohibited. At one extreme, law and morality are indistinguishable. When the thief has a hand cut off or the adulterer is stoned to death, the written law reinforces social rules of moral and immoral conduct. The classical "ten commandments" are certainly moral rules. While according to this moral code, you are to honour your mother and father, and keep the Sabbath holy, only a few of these commandments -- the prohibition against stealing and murder, for example -- have been codified into secular "laws" enforced by the state.

The secularization of society, then, has led to the gradual separation of some rules

of morality for regulation by the state. Which moral rules are reserved for the state and which are taken care of by less formal means is a matter of the social construction of law. When Canadian Prime Minister Pierre Trudeau stated, in 1972, that the government had no business in the bedrooms of the nation, he was distinguishing those areas of morality which should remain under the purview of the state from those that should not. At that time, the Canadian government decriminalized hitherto illegal activities such as homosexual acts between consenting adults and attempted suicides. Other morally troublesome acts, or crimes of public morality, such as abortion, assisted suicide, illicit drugs, gambling, or prostitution, continued to be regulated by the state.

These crimes of public morality were labelled “victimless crimes” by criminologists because the parties to the offences were assumed to engage in them voluntarily. This was a revisionist view at the time, developed to counter the dominant social construction of a generation of moral entrepreneurs who had succeeded in defining these actions as not only immoral, but criminal. These earlier conservatives sometimes called prostitution “white slavery”, conjuring a picture of innocent young women being led astray by unscrupulous pimps who kept their “stable” of prostitutes under control by fear of violence or addiction to narcotics. Drug peddlers preyed on the poor and the young, promising ecstasy and delivering enslavement and madness. These images still have considerable potency for shaping public perceptions of drug dealers and pimps.

In the face of these exaggerated accounts, revisionist criminologists argued that many prostitutes chose “the life” on the street because it was more lucrative than their realistic alternatives, such as house-cleaning or work as a waitress. People chose to take drugs for the enjoyment of the experience, much as mainstream society drank alcohol. For the revisionists, then, these actions may have become defined as “crimes” in the dominant construction, but they were actually “victimless” except in the sense that, by criminalizing them, those who were prosecuted for crimes of public morality became victims of the state. Furthermore, they argued, the attempt to regulate crimes of “vice” by legal enforcement were doomed to fail. At best, people would simply ignore the laws; at worst, enforcement would bring about undesirable consequences. Prohibition, for example, had succeeded only in providing a springboard for the growth of organized crime.

These alternative, revisionist views fed public policy debates and culminated in a spate of decriminalization. Simple possession of soft drugs became a summary offence punishable by a fine. The defence of artistic merit saved many artists and distributors from being convicted for obscenity. The Canadian abortion law was declared unconstitutional. Human Rights legislation was expanded, by governments and by interventionist courts, to include same sex couples. Rather than prohibiting gambling, through its legalization and then taxation of gaming and lotteries, the state has itself become the biggest House. As a balm to the government’s conscience, a portion of the gambling profits are used for treating the victims – the compulsive gamblers themselves.

In many ways, then, many former crimes of public morality have undergone the liberal reform of deregulation. Many of the earlier readings have indicated, nonetheless, that the criminal justice system has, simultaneously gone in a contradictory, more

conservative, direction. Jails are privatized and youth boot camps open at the same time that the use of conditional sentences increases and the federal police adopt restorative justice initiatives. The expansion of due process in some cases has been overshadowed by the contradictory tendencies of criminalization and control. In Canada, the most significant change has been the evolution and subsequent replacement of the Young Offender's Act. Both liberal and conservative tendencies -- two sides of the control paradigm in criminal justice -- continue to co-exist. Certain aggravating factors, such as the promotion of hatred, have been identified and used to justify increased punitiveness in the system, while special defences, such as the battered woman syndrome, are introduced to protect vulnerable victims.

Nowhere does the ambiguous nature of criminal justice initiatives appear to be as contradictory as in the areas of public morality. In large measure, this is because several important principles are in conflict. The contradiction between, for example, the right to self-expression and the right to security of the person, which arises in the case of obscenity, cannot be resolved ultimately in favour of one proposition or the other but must entail an overall balance of the two fundamental principles judged, frequently, on a case by case basis. Four controversial issues of social regulation are identified below: prostitution, pornography, drug use, and assisted suicide/mercy killing.

## **PROSTITUTION**

Nineteenth century Canadian society was, to a considerable extent, ambivalent about prostitution. Houses of ill repute were more or less tolerated in certain parts of the country. Prostitution may have been immoral and evil, but it was necessary to provide protection for virtuous women. Moral reformers of the period, however, condemned prostitution for not only being morally wrong, but also as a form of exploitation of women. Prostitutes needed to be rescued from their degradation, caused either by unscrupulous white slavers or by their own moral weaknesses. This debate about the social acceptability of prostitution has now been re-opened.

Contemporary attitudes to prostitution are shaped by the feminist movement and the ambiguities within it. For some feminists, patriarchy defines women as sexual objects. Prostitution represents the epitome of this objectification, where women's bodies become directly marketable for the pleasure of men. The full liberation of women, then, entails ending prostitution. This conclusion, on the surface, is similar to the conservatives who also claim to want to abolish prostitution. For conservatives, however, the means to this end is criminalization of all who benefit from the proceeds of prostitution, including the women themselves. The more liberal or reform-minded (including liberal feminists) would punish the exploiters of the prostitutes (pimps, clients, and other such as desk clerks, taxi drivers, and bar owners who benefit financially from the trade) while attempting to reform the prostitute through re-education.

For socialist feminists, these short-term measures perpetuate both prostitution and the careers of those social agents who depend on the criminalization and/or reformation of prostitutes. The goal of eliminating prostitution is an outcome which requires, as a

prerequisite, the full legal and social equality of women. In a situation of full equality, women would no longer need to sell their bodies, and men would establish non-exploitative relationships with women based on mutual respect. The revisionist sociologists who defined prostitution as victimless had assumed, like the socialists, that engaging in the sex trade was a rational economic choice for women with few realistic or equally viable alternatives. The element that all these otherwise different positions share is the view that prostitution is wrong and/or harmful to the people involved, and they also share the goal of eliminating the sale of sex.

There is an alternative view which would legalize prostitution, while retaining some degree of social regulation over the sex trade. Sociologists have long pointed out that granting sexual access to a woman in exchange for financial benefits supplied by a man defines the traditional form of marriage as well as it does the indiscriminate act of prostitution. Furthermore, it is not primarily women who engage in the sex trade. There is a growing proportion of male prostitutes and, more fundamentally, customers are still primarily male. The work of the prostitute is little different from any other form of work. If it is alienating, it is not the sexual nature of the work that makes it objectionable, but the social inequality between women and men.

These argument reflects a more libertarian point of view, also shared by some radical feminists. In this view, the sale of sexuality is not wrong and becomes harmful only in the context where it is criminalized. Harm is caused by the state's attempt to regulate an otherwise normal social practice. So long as the choice is freely made, prostitution is victimless and is an expression of a person's control over her or his own body. Prostitution is simply part of the great variety of forms of human sexual experience and should be protected by the right to freedom of expression. Forms of the sex trade have always existed and will persist as long as people have the freedom to define their own sexuality. At most, the state should ensure that those who work in the sex trade are protected by having frequent medical checks, prompt treatment, and the respect of the criminal justice system.

In the article below, Shaver presents an argument in favour of deregulation. She traces the evolution of prostitution law in Canada, beginning with the social construction of the conservative moralists who sought to protect women from exploitation (or from their own moral weaknesses). In this environment, mostly women and mostly prostitutes faced criminal charges. The partial liberalization of moral laws which took place in the early 1970s in Canada extended to prostitution only insofar as the law forbidding soliciting sex was made gender neutral; that is, charges could be laid against both the (mostly female) prostitutes and the (mostly male) customers. Prostitution itself, however, was neither explicitly defined nor made illegal. Instead, acts surrounding prostitution were criminalized, such as living off the avails, or keeping a "bawdy house". The soliciting law proved difficult to prosecute successfully, however, because the police would lay a charge and the court would dismiss it unless the solicitation was defined as being "pressing and persistent".

It is now illegal to "communicate" in public for the purpose of engaging in prostitution, a law which clearly violates the *Charter* right to freedom of speech. The

courts have declared, nonetheless, that prostitution is sufficiently harmful to society that this restriction on free speech is justifiable. The definition of “harm” the courts currently use is meant to be “objective” – the noise and nuisance that the sex trade causes in otherwise peaceful, quiet communities. Shaver questions the hidden moralism behind this “objective definition”.

In her article, Shaver raises several fundamental questions about the regulation of the sex trade. Is work in the sex trade fundamentally different from other types of work, both in the present social and economic climate, and in general? Is it necessary to have specific laws regulating the sex trade, or are existing laws adequate to protect people (primarily women) who work in the trade from harm and exploitation? Shaver differentiates the perspectives of many feminists and others on these questions and presents her own conclusion in favour of decriminalization.

## **PORNOGRAPHY**

Similar questions about freedom of expression and potential social harm arise with the legal definition of obscenity. Again, liberal feminists find common ground with traditional conservatives in the cause of criminalizing pornography. The conservatives, however, are on weaker ground if it is assumed that morality is relative – who is to say what others may or may not see or hear? The liberal feminists regarded pornography as another form of the oppression and exploitation of women, reinforcing the role of women, in general, as sexual objects, thereby affecting all women negatively.

The debate about pornography has focused on the issues of erotica and civil rights. For strict conservatives, any public material that is sexually explicit is immoral and people need to be protected from the harms that exposure to pornography cause. Liberals would distinguish between material which, on the one hand, is explicitly sexual but has artistic or literary merit (erotica) or serves a social good (such as education) and, on the other hand, depictions of sex which have no redeeming social value and are, therefore, exploitative.

Many of the arguments made with respect to the sex trade above are also present in the debate over pornography. Work in the pornography industry is similar to any other form of work in society, although the specific character of the work is affected by the capitalist and patriarchal social context in which it occurs. The problem is not simply that sex is portrayed but, rather, it is the depiction of the subordinate position or victimization of women that is harmful. While agreeing that, in the abstract, adults must be assumed to be autonomous and capable of deciding what is and is not in their interests to experience, Pycz argues that this model of the autonomous person is inappropriate in the existing social context. Not only do women, in particular, experience many social barriers to the creation of independent “selves”, pornography itself inhibits the creation of an autonomous self-identity. You cannot justify free choice for pornography in a context where pornography itself prevents some people (primarily women) from being able to develop the autonomy necessary to exercise this free choice.

As with the law against soliciting, the suppression of pornography clearly violates

*Charter* rights of freedom of expression. The *Charter*, however, also protects a person's right to security of the person. Drawing the line between protecting the rights of the creator and distributor of erotica from the rights of women (in particular) to social protection is a difficult task. Generally, the suppression of pornography is restricted to two types: depictions of sexuality in the context of degrading violence where no socially acceptable purpose is present and obscenity involving children.

What is to be judged obscene? In Canada, obscenity is defined as a combination of the "undue" exploitation of sexuality in combination with crime, horror, cruelty or violence. For some pacifists, the explicit depiction of violent acts even in the absence of sexuality is, in itself, obscene, and people should be protected from exposure to such wanton aggression. The combination of violence and sexuality is more widely accepted as potentially harmful. It may reinforce myths of rape and desensitize people to actual violence. Over time, then, the definition of pornography has evolved from being largely a question of morality (sex) to a less subjective question of harmfulness.

At first, the courts applied a "community standards" test - material was not obscene if it could be shown that it was tolerated by the average community member. A minority in the community might be outraged, but could be over-ruled by the tolerant majority. What should be legal was not just what someone would want to see themselves, but what they would tolerate someone else seeing. On the other hand, the standard of the majority is not always a reliable guideline. A majority in a community might hold prejudices against an identifiable social group, but to discriminate against this group would still be contrary to the rule of law. Consequently, the courts have defined the community standard more strictly to suppress only those depictions or expressions which the community might be thought to believe cause harm. Material is obscene if it fails this community standards test and exploits sexuality in an "undue" fashion which is without artistic or social merit.

One of the problems in the application of this doctrine is that a distributor of pornography might not know whether something is obscene until after the court decides. The distributor who knows the general nature of the work and therefore knows that someone may find it offensive, is liable to be prosecuted should a complaint be made and should the police decide to lay a charge. If the judge rules that the material violates community standards, unduly exploits sex, and has no artistic merit, the distributor will learn that the material is legally obscene, and therefore that she or he has committed a criminal act, only upon conviction.

The production and possession of potentially obscene material for private and personal consumption is not, in most cases, illegal in Canada. Laws do, however, forbid the distribution, exhibition, or circulation of obscene material. The one exception is pornography involving children which is illegal simply to possess. As in the case of child prostitution, young people are defined as especially vulnerable, as more easily exploited and, consequently, as in need of special legal protection.

## ILLCIT DRUG USE

In the case of pornography, the question arises whether making objectionable material criminal, an act which restricts freedom of expression, actually causes more social damage than would result simply from viewing the obscene material. The argument about harmfulness seems less ambiguous in the case of drug use. Addictions to heroin or "crack", for example, seem obviously damaging to individuals, families and the community as a whole. It is clear from the persistent debates about the legalization of marijuana, however, that the issue of drug use is just as controversial as the varieties of sexual regulation discussed above.

The criminalization of drug use in North America furnished the earliest examples of how changes in the laws could be interpreted through social constructionism. Middle class lobbyists, acting as moral entrepreneurs, used the mass media to depict the harmfulness of narcotic use. Campaigns aimed at criminalizing certain drugs, such as heroin or marijuana, associated their use with the life-styles of marginalized and disreputable social groups, such as Chinese immigrants or black jazz musicians. Similarly, though more temporarily, the temperance (anti-alcohol) movement was successful in having the production and distribution of alcohol banned during prohibition in the 1920s.

The failure of prohibition revealed many ambiguities about the prohibition of certain substances and brought into stark contrast the apparently arbitrary distinction between those harmful substances that are legally prohibited and those that are permitted. The inconsistencies inherent in legalizing some harmful products (tobacco, alcohol) and in criminalizing what many regard as less harmful substances (marijuana) still fuels debates about public policy.

This ambiguity was exposed most sharply by sociologists in the 1960s who explored the social problems caused by *legal* drug use. The main criticism that emerged at that time focused on the social construction of the legally acceptable and normative use of drugs. On the one hand, there were serious problems associated with the legal prescription of mood-altering substances for a range of behaviours, from those defined as mental illnesses to temporary anxiety. From valium to Prozac, prescription drugs have been used to help individuals cope with oppressive realities. Critical sociologists claimed that the drugs simultaneously prevented the afflicted individuals from taking positive steps to solve the personal or public troubles causing their afflictions. In addition, psychiatrists who defined social differences as mental illnesses prescribed a new generation of powerful mind-altering drugs that operated as potent forms of social control, generating uniformity and conformity. The critics condemned North America as a "drug culture", with nicotine for relaxation, alcohol for stimulation, and a host of other mood-altering over-the-counter and prescription drugs to relieve any symptom which could be defined as somewhat unpleasant. From this perspective, the illegal "drug sub-culture" of the 1960s was simply a variant of the normal.

At that time, the moral entrepreneurs had been successful in defining what was morally acceptable and unacceptable and having these conceptions written into

legislation. Canada's Narcotics Control Act criminalized a range of drugs from opiates to marijuana. As long as drug use was restricted to the marginalized and disadvantaged, no change was likely.

By the early 1970s, however, a liberalization occurred in the enforcement of drug offences in Canada. More than any other single fact, the change in the composition of illicit drug users necessitated this partial decriminalization. As soft drug use, particularly marijuana and its derivatives, increased among the college population, significant numbers of middle class casual users found themselves charged, convicted, and imprisoned. As the harmful effects of the *legal control* of drugs (middle class youth being imprisoned and having criminal records) ascended the social ladder, so too did an alternative social construction of marijuana as relatively benign, particularly in comparison with the obvious harmful effects of a legal substance such as alcohol. In response, the police were directed to focus their attention on the suppliers and sellers, while possession of small quantities of marijuana was partially decriminalized. Simple possession of marijuana was now punished by a fine that, in some cases, was less severe than for the illegal possession of alcohol. This was the extent of the liberal reform, however, in North America.

By the 1990s, the liberal visions of social reform which predominated in the 1960s and early 1970s succumbed to a neo-conservatism which has continued throughout the decade. As part of an overall "war on crime" - in fact, a war on the poor and visibly disadvantaged - the state has launched a campaign against drugs directed primarily at the supply side. By targeting supply, the state's "war on drugs" will never be won.

Social constructionism permits another insight into the relationship between the social regulation of drugs and the criminal justice system. The advocates of the contemporary war on drugs link the illegal trade with organized criminals and motorcycle gangs. The identification of an organized and powerful opponent, in turn, necessitates the deployment of more sophisticated and expensive resources which are placed in the hands of the agents of control. The scenario is a familiar one. Not only did the prohibition of alcohol in the 1920s, as an unintended consequence, stimulate the growth of organized crime in North America, it also justified the expansion of U. S. federal enforcement agencies such as the F.B.I. and the Federal Drug Enforcement Administration. Now, national and local police agencies are demanding that more public resources be devoted to fight the new menace of organized drug cartels.

The alternative is to focus on the demand side; to spend resources on social improvements which can, potentially, eradicate the poverty and despair which is at the root of the drug problem in inner-city North America. In an era dominated by the social construction of the importance of law and order, however, state expenditures are easily justified only if they enhance the control and surveillance capacities, and the punitiveness, of the system.

## **ASSISTED SUICIDE AND EUTHANASIA**

For many people, prostitution, pornography, and illegal drug use pose questions that are

relatively distant or academic. The question of death and dying, however, touches everyone, usually at many points in a life course.

In the past, unless you deliberately courted death for religious reasons – in which case you were celebrated as a martyr – the choice to commit suicide was morally unacceptable in Christian cultures. Not only were people who committed suicide forbidden a burial in consecrated ground, the attempt to kill yourself was criminalized. The prohibition against suicide was removed from the Criminal Code in 1972, as part of the overall liberalization of Canada's criminal laws. The law, however, continues to punish those who aid or abet a person's suicide with a maximum of fourteen years in prison. Furthermore, to actively kill someone by, for example, knowingly administering a lethal dose of morphine with the intention of hastening that person's death, is still homicide, punishable in law by life in prison. In the case of assisted suicide and active euthanasia, the sentiments of the [population and the actual practices of people in Canada have changed considerably over the last twenty years despite the absence of any legal change.

People's changed views on assisted death have been driven by advances in medical technology. If the positive side of the new medical miracles is that people can be brought back from near death, the dark side of this technology is that people can also be put through a lingering, painful, and meaningless death. The courts now generally permit *passive* euthanasia, the withholding of medicine, food, or technology necessary to sustain life in cases where natural death would otherwise occur. In 1975, seventeen year-old Karen Ann Quinlan collapsed after taking a combination of alcohol and tranquilizers. Permanently brain damaged, the courts eventually allowed her parents to remove the respirator -- an act of passive euthanasia. Karen Ann Quinlan, however, was able to breathe unaided and remained alive, though unconscious, for ten years. She finally died of pneumonia when treatment was withheld to allow a natural death (Mullens 1996: 37-38). Since that time, the decision to remove life support systems from dying patients is made daily and routinely.

*Active* euthanasia has been much more controversial – the purposeful administration of a substance to another person to hasten their death. This is, by definition, murder. However, patients suffering from painful, incurable diseases are now routinely given powerful, pain-relieving drugs such as morphine towards the end of their lives even when the amount of the drug necessary to stop the pain is effectively a lethal overdose. The simple distinction appears to be that, in the morphine example, a drug is administered for a beneficial, medical purpose: to relieve suffering. The death is a, perhaps, unfortunate side-effect. This is different from the active administration of a substance which has the sole purpose of killing the patient. No doubt, there is a fine legal, medical, and ethical line between the two. In 1998, Halifax physician Nancy Morrison faced a first degree murder charge when she made a decision which appeared to step across this invisible line. This distinction, however, is made in hospitals every day.

Passive euthanasia, the withdrawal of life-sustaining technology, occurs often to patients who are unaware that their own death is impending. In a growing number of cases, people have expressed before-hand what they would wish to happen to them

under these circumstances. It is then the responsibility of the surviving care-givers to ensure that the dying person's wishes are carried out in the absence of their conscious awareness.

Suicide is different because it is an act of volition. The person seeking her or his own death intends to die and performs the necessary actions to bring about this result, unlike in the case of euthanasia where the actions of one person directly and intentionally cause the death of a second person. Medical advances, however, have kept people consciously alive when they are unable to perform even the simplest physical action on their own behalf. They no longer have the ability to end their life, should they so choose. In situations such as these, some terminally ill or disabled people believe they ought to have the right to die when they choose even though it requires some assistance. Medical practitioners can assemble a device which can deliver his or her own fate. In Canada, anyone who encourages this practice, or actively helps the patient by erecting the necessary equipment, faces the charge of aiding and abetting the patient's suicide.

Sue Rodriguez brought the nation face-to-face with the reality of assisted death when she petitioned the Supreme Court to strike down the law prohibiting assisted suicide. The Supreme Court turned her down in a very close decision. Ms. Rodriguez then went ahead and arranged her own, assisted death in defiance of the law. The physician attending her suicide has neither been identified nor charged in the case.

In addition to stimulating public debate on euthanasia and assisted suicide, Sue Rodriguez's death prompted the Canadian Senate to form a Special Committee to examine the question. The issues debated by the Senate Committee are summarized and discussed by Barry Hoffmaster in his article, "Dragons in the Sunset". Hoffmaster presents a dispassionate account of the arguments which support assisted death ("The Sunny Shores") as well as the arguments about the harmful effects which might result from making assisted death legal ("The Dark Forest").

In the second part of his article, Hoffmaster identifies seven considerations which should be kept in mind when assessing the strength of the two opposing arguments. He notes that there is no direct path from a moral argument to public policy - that the merits of either case must be judged on their effects. Second, since no policy will be infallible, both types of harms will result: suffering will be prolonged unnecessarily in some cases; people with the will to survive will be put to death in other cases. Measuring and balancing these potential harms is a formidable task.

Third, even the present laws can be administered in a way which allows justice to be tempered with mercy. Nancy Morrison's charges were dismissed; the physician attending Sue Rodriguez's death was not charged; in the United States, Jack Kervorkian is routinely acquitted by juries. The question is whether the current laws are necessary to prevent abuse, at the cost of the suffering of those who are eventually allowed to go free. The present legal system, then, disallows the practice but then allows lenient treatment where it is deemed in the public interest. This leads to the question of whether an alternative legal system, one that would legalize assisted death and only intervene in cases where there was clear evidence of abuse, would be better. The debate is about whether safeguards against abuse could ever be adequate and, if not, whether the

individual cases of abuse that would inevitably result make legalization too potentially harmful.

Fifth, it is not clear that the generally recognized alternative, palliative care (where patients are helped to die in a largely passive way through the administration of pain killing drugs) actually has the technical ability to allow all people to die with minimal, otherwise unnecessary suffering. The balance of harm here is to cause otherwise unnecessary suffering to the dying. Finally, the question remains whether a change in the definition of non-culpable assisted suicide and active euthanasia would have a profound symbolic effect on people's conceptions about the sanctity of life.

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