



# 1. INTRODUCTION

*To criminalize*, according to the standard dictionary definition, means “to turn a person into a criminal.” When you stop to think about it, of all the tasks assigned to law this one is perhaps the most formidable. It signals the power that law exercises in our society. This power to criminalize is something that law itself takes very seriously.

According to traditional legal doctrine, law’s role in society is to dispense justice in an unbiased fashion, dispassionately and without favour or ill will. “Equality of all before the law”—regardless of class, race, sex or creed—is the hallmark of the rule of law. When criminal cases are brought before the court, law’s task is to discern the “truth” of the matter by extracting the legally relevant facts of the case to determine the guilt or innocence of the accused. The Criminal Code contributes to the appearance of consistency, uniformity and precision in law. For instance, crimes against the person—such as assault, assault with a weapon or causing bodily harm, and aggravated assault—are hierarchically ordered on the basis of their seriousness, with corresponding sanctions attached. When violence breaks out, the matter for law becomes one of imposing its definition on the event to render a judgment on who is to be criminalized. In the process, law imposes an order; it imputes reason and sensibility to the messiness of everyday life.

Critical legal theorists have argued that this business of criminalizing is much more complicated than it might first appear. Far from being an impartial and objective enterprise, law deals in ideology and discourse—through the meanings and assumptions embedded in the language that it uses, through its ways of making sense of the world and through its corresponding practices. While law’s concern is ostensibly with making judgments on legal matters (such as culpability, admissibility or reasonableness), there is more at work. Extracting the legally relevant facts of a case from the messiness of people’s lives involves a deciphering or translation. It also involves making judgments on the legal subjects themselves, in terms not only of what they have done, but also of who they are, and on the social settings or spaces in which they move. The net result is the reproduction of a very particular kind of order; and this order, as we will



demonstrate, is one in which gender, race and class inequalities figure prominently.

In effect, two very different readings somehow need to be reconciled: law as a fair and impartial arbiter of social conflicts; and law as one of the sites in society that reproduces gender, race and class inequalities. As with most difficult issues, the reconciliation of these two readings is neither simple nor straightforward. Our purpose in this book is to offer an analysis that acknowledges the tensions between these two views of law.

The approach we take up here understands law as being premised on principles of fundamental justice (innocent until proven guilty, due process), principles that legal actors must strictly follow in the processing of criminal justice cases. Within this framework, the role of the Crown attorney is not to obtain a conviction, but rather to present credible evidence relevant to what is alleged to be a crime. The duty of the defence counsel is to ensure that the Crown proves every element of the alleged offence “beyond a reasonable doubt” and that the accused’s rights are not violated during the investigation and prosecution of the offence. As officers of the court, lawyers are bound by professional codes of ethics and formal obligations that delimit their roles. Yet—and here is the crux—lawyers can exercise considerable agency in their work, not just in the interpretation and utilization of rules and procedures, but also in their case-building strategies.

The very nature of how legal actors choose to carry out their assigned tasks opens the way for particular constructions to enter the legal arena—constructions of the accused, complainant and witnesses in a criminal case, as well as of the event itself and the social space in which that event occurs. These constructions are built upon particular discourses (relating to masculinity, femininity, race, class and social space). But these discourses are not simply “invented” by law. Their salience draws, in large part, from the very strong resonance they have in the wider society. In these terms, the constructions on which lawyers frame their case-building strategies are conditioned by the particular socio-political context of the time: the assemblage of institutions, practices and discourses that legitimate the prevailing social order. One of our main premises, then, is that law is not just a set of rules and procedures, but a *process* that entails gendering, racializing and classing practices.

Law, then, is a complex and contradictory terrain, at once promoting an image of equality (and sometimes living up to that image) while also constituting those who stand before it in gendered, racialized and class-based terms (thereby reproducing social inequalities). This is our basic



starting point for investigating law's power to criminalize. But there is more to be clarified before we proceed.

### FOCUSING ON VIOLENT CRIME

While the power to criminalize extends to a variety of actions and behaviours, we choose here to concentrate on the criminalization of interpersonal violence.<sup>1</sup> Our choice is an obvious one for a number of reasons. Of all the offences that the criminal justice system is called on to adjudicate, it is crimes against the person—homicides, assaults and robberies, for instance—that are most likely to generate attention. Violent crimes feature regularly on the front pages of newspapers or as the lead item of evening TV news reports. Indeed, public concern over the issue of violent crime has heightened in recent years, even though crime rates have been on the decline (Statistics Canada 2003). The fear and anxiety invoked by violent crime—especially when it is featured so prominently in the media—lead to a scrutiny of law's ability to dispense justice in these cases. In this respect, violent crime is one area where the tension between the two readings of law is most acute.

Crimes involving interpersonal violence are presumably ones in which the seriousness of the charge is such an overriding consideration in the criminalization process that extra-legal factors (such as the gender, race or class of the accused) are not likely to invade the practice of law. In other words, given the nature of the offence, we would expect law's claims to impartiality, fairness and justice to be most in evidence in violent crime cases. At the same time, however, certain groups in our society are more likely than others to be criminalized for a violent offence. Aboriginal people, for instance, are overrepresented in the criminal justice system relative to their numbers in the general population.

- While Aboriginal people comprise 2 percent of the adult Canadian population, they make up 17 percent of the prison populations across the country (Statistics Canada 2000a). In 1998–99, Aboriginal people represented 13 percent of admissions to probation and 11 percent of conditional sentence admissions (Statistics Canada 2001).
- The overrepresentation of Aboriginal persons is greatest in the Prairie provinces. In 1998–99 the proportion of Aboriginal persons admitted to adult provincial facilities in Saskatchewan (76 percent) was almost ten times higher than their proportion in the provincial adult population (8 percent). While Aboriginal peoples made up 9



percent of the adult population in Manitoba, they comprised 59 percent of admissions to provincial custody. In Alberta, where 4 percent of the adult population is Aboriginal, 38 percent of admissions to provincial facilities were Aboriginal persons (Statistics Canada 2001).

- While the majority of people incarcerated in Canada's jails are economically disadvantaged, this is especially the case for Aboriginal inmates; they have less education and are more likely to be unemployed than are non-Aboriginal inmates. Some 48 percent of Aboriginal inmates in provincial and territorial custody and 56 percent of those in federal custody have less than a Grade 10 education, compared with 31 percent of non-Aboriginal inmates in provincial and territorial custody and 43 percent of those in federal custody. Some 70 percent of Aboriginal inmates in provincial and territorial custody and 53 percent of those in federal custody were unemployed at the time of arrest, compared with 47 percent of non-Aboriginal inmates in provincial custody and 40 percent of those in federal custody (Statistics Canada 2001).
- Aboriginal women are even more overrepresented in Canada's jails than are their male counterparts. According to a one-day snapshot of prisoners conducted in October 1996, Aboriginal females accounted for almost one-quarter (23 percent) of the adult female inmate population. Aboriginal males accounted for 18 percent of the adult male inmate population (Finn et al. 1999).
- The one-day snapshot also found that Aboriginal inmates were incarcerated more often for violent crimes than were non-Aboriginal inmates (42 percent compared with 31 percent in provincial and territorial facilities, and 79 percent versus 72 percent in federal facilities) (Finn et al. 1999).

Can these disproportionate incarceration rates of Aboriginal men and women be explained with reference to crime-producing conditions in their communities and families? Or do features of the criminalization process itself play a role?

Given that the Criminal Code, with its hierarchical ordering of crimes on the basis of seriousness, contributes to the appearance of consistency, precision and uniformity in law, the matter of what constitutes violent crime would appear to be relatively straightforward. Colin Sumner (1997: 1), however, makes the point that "even a serious matter like violence is not a simple fact which speaks loudly for itself." What counts as violence



is culturally and historically variable. According to Sumner (1997: 3), violence is

subject to the acculturated or political understandings and standpoints of the viewer. One man's "healthy aggression" is another woman's "mindless violence"; one society's blood feud is a system of social control, another's is dangerous vigilantism; one country's civilization is another's barbarism; one country's ethnic cleansing is another's war crime.

How law constructs violence in a particular case will be informed by culturally and historically specific understandings. The question is whether and in what ways these understandings of violence are gendered, racialized and class-based.

Another way in which the issue of violent crime calls forth the tension between the two readings of law has to do with law's potential as a mechanism for realizing substantive change in society. Over the past three decades, feminists have been instrumental in bringing about legal reforms to redress women's inequality in society. Nowhere have these efforts been more pronounced than in the area of law's response to violence against women (especially in the form of rape and wife abuse). Concerted lobbying efforts by women's groups have led to changes to laws dealing with sexual violence and to the implementation of what Jane Ursel (2001) terms "a new paradigm of justice" for responding to cases of domestic violence. In effect the occurrence of violence against women has been transformed from a private trouble to a public issue worthy of law's attention, which reinforces Sumner's point—that what counts as "violence" is culturally and historically variable. At the same time, however, questions remain about whether the reforms have worked. Do recent reforms in the area of law's treatment of violence against women stand as a testament to law's claim to uphold principles of fundamental justice? Or do the case-building strategies of lawyers in these cases undermine efforts to bring about significant reforms?

### STUDYING LEGAL PRACTICE

The role of gender, race and class in the processing of criminal justice cases has been a key area of concern within criminology. By far the most common approach used by criminologists to address this issue has been to focus on sentencing outcomes. Criminologists have employed quantitative methodologies to compare the severity of sentences accorded to men



and women, whites and racial minorities, and upper-class and economically marginalized groups (see, for example, Crow 1987; Daly 1987, 1983; Zatz 1984; Ericson and Baranek 1982). Yet such studies have produced inconclusive and inconsistent findings. Criminalization appears to be conditioned by case facts (the seriousness of the offence and prior record) and extra-legal factors (the age, race, ethnicity and sex of the accused), but not in a consistent fashion. Marjorie Zatz (1984: 147–48) captures the tentative nature of these findings: “The sum of our knowledge is that for some offences, in some jurisdictions, controlling for some legal and extra-legal factors, at some historical points and using some methodologies, some groups are differentially treated.” Although sentencing studies may demonstrate disproportionate treatment of certain groups in society, the approach of focusing on outcomes misses much of what transpires in the criminalization process.

In a similar fashion, the study of widely publicized cases has provided insight into how gender, race and class play out in particular cases. For instance, the trial of former U.S. football star O.J. Simpson for the murder of his wife, Nicole Brown Simpson, and her friend, Ronald Goldman, raised issues around domestic violence, racial stereotypes and the extent to which money can be used to buy the best defence (Hutchinson 1996; Barak 1996). Similarly, the Canadian trials of Karla Homolka and Paul Bernardo for the sexual assaults and murders of two young women, Leslie Mahaffy and Kristen French, generated considerable commentary around gender and women’s culpability (McGillivray 1998; Pearson 1997). Nevertheless, the more routine ways in which gender, race and class work in the criminal justice system have eluded criminologists.

Investigating the routine processing of criminal cases is no easy matter. As Sheilah Martin (1993: 32–33) notes:

A major problem is getting access to the cases themselves. Relying on published cases means easier, less costly access but the available range of cases is limited and has passed through the filter of the publisher’s assessment of relevance and their editing procedure.... Although reviewing every case on a selected subject matter is preferable, it is rarely feasible—even for defined geographical regions and within limited time spans. In many areas of concern ... there are no available written judgements. While transcripts of the proceedings can be created and ordered, they are exceptionally expensive.



Some researchers have relied on observation of court proceedings to examine the processing of criminal cases. Sue Lees (1994: 125) comments on the difficulties encountered with this methodology: “In the UK anyone can gain access to the public gallery. However, it is often difficult to hear, space is limited and access cannot be guaranteed, nor notes easily taken, so access to the press seats is essential, which can take a long time to negotiate.” Lees (1994: 126) makes another important point: “The law often constitutes gender [and race and class] relations in its discretionary spaces rather than in its explicit rules.” We need a methodology, therefore, that is capable of mining those spaces.

The two methodologies employed in this book attempt to do just that. The first involved gaining access to Crown attorney case files of men and women who had appeared before the Manitoba Court of Queen’s Bench on violent crime charges (homicide, sexual and non-sexual assaults, and robbery). A large percentage of criminal cases in Canada are disposed of without proceeding to the trial stage. As a superior court of criminal jurisdiction, however, the Court of Queen’s Bench hears the most serious cases. For research purposes, this means that there is typically extensive documentation on each case.

We studied a total of ninety violent crime cases covering a four-year period (1996–99). We began by drawing an initial sample of forty-five cases involving women defendants, which represented 83 percent of the women who appeared before the Court of Queen’s Bench on a violent crime charge during the four-year period. For comparative purposes we also drew a random sample (stratified by offence type) of forty-five men.<sup>2</sup> The files on these cases included a number of documents: police incident reports, police notes, bail-hearing transcripts, transcripts of the preliminary hearing, notes written by the Crown, correspondence with the defence, pre-trial memos, pre-sentence reports, psychological assessments, medical reports, character letters, relevant case law and appeal court decisions. To gather as much information as possible, for several of the cases we ordered court transcripts of sentencing submissions and reasons for sentence. Because some of the cases were reported, we were also able to gain access to further information about them. In total we produced over a thousand pages of detailed summaries and verbatim quotes on the ninety cases studied. Although it was a time-consuming process, our efforts in drawing together these legal documents afforded a unique opportunity to study how the justice system processes violent crimes.

Police incident reports, for example, show a distinct formulaic quality. Presiding officers are given the task of detailing a case’s legally relevant

facts, which together are meant to establish the basis for the criminal charge. Typically included are statements made by the accused, complainant and bystanders as well as comments by police on the demeanour of the accused. These reports form the starting point for the Crown attorney in building a case against the accused “beyond a reasonable doubt.”

Most of the cases that reach the Court of Queen’s Bench have a preliminary hearing, the purpose of which is for the judge to determine whether there is sufficient evidence to warrant committing an accused to trial. As André Marin (1995: 115) notes, the preliminary hearing is used by the defence “to test the strength and credibility of the evidence of the Crown witnesses and to take advantage of the hearing as a ‘dry run’ for the trial.” In this respect, transcripts of the hearing offer a unique lens into the legal process. As a “dry run” for the trial, the preliminary hearing becomes a site in which the strategies used by defence lawyers to undermine the case against the accused are revealed. These strategies often involve the construction of alternative accounts or plausible scenarios. Given the standard of reasonable doubt, they also entail attacks on the credibility of the Crown’s key witnesses in the case.

One document found in all of the Crown case files is a memo written by the Crown attorney in charge of the case to the Senior Crown attorney. The memo typically includes factual statements about the case, the defences that might be raised by the defence and descriptions of Crown witnesses (with special attention to their credibility). The Crown also often comments on what are perceived to be the strengths or weaknesses of the case against the accused.

Plea bargaining often occurs after the preliminary hearing, but if a case does go to trial, the files may also include court transcripts of sentencing submissions, judges’ reasons for sentence, pre-sentence reports and the like. It is at the point of sentencing where competing accounts of the defendant are most likely to surface, as the Crown and defence put forward their justifications for a particular sentence and the judge makes a determination.

While each of these documents has been constructed with a particular purpose and a particular audience in mind, they can tell us a great deal about the process of criminalizing violence. We learn, for example, what is considered noteworthy about a particular case and, just as important, what is not. In the process, the gendered, racialized and class-based presuppositions that inform the law’s construction of violent crime also come into view.

In addition to analyzing the Crown attorney case files, we interviewed



twelve criminal defence lawyers. Our aim was to explore the case-building strategies they utilize in defending clients charged with violent offences. Because of solicitor-client privilege, lawyers cannot discuss details about specific cases they have taken on without violating professional codes of conduct and confidentiality. To circumvent this issue, we constructed a number of mock police reports that were designed to capture some of the typical situations and typical persons involved in violent crime events. We then used these mock reports as the basis for our discussions with the lawyers about the strategies they would employ to defend such cases.

In combination, the information obtained from a content analysis of Crown attorney case files and in-depth interviews with defence lawyers allows us to explore lawyers' strategies for translating the everyday experiences of defendants into legally recognized accounts. These data have the potential to reveal how lawyers negotiate their roles and strategies within the framework of procedural fairness, as well as the extent to which the prevailing socio-political context and discursive constructions based on gender, race and class inform their case-building work.<sup>3</sup>

## THE PLAN OF THE BOOK

In chapter 2 we elaborate further on the theoretical approach that we use to investigate the tension existing between law's claims to fairness and impartiality and the view that law is a site for the reproduction of gender, race and class inequalities. Borrowing from radical, feminist, critical-race and post-structuralist theories, our approach situates lawyering as "structured action" and locates the agency of lawyers within three main dimensions: the Official Version of Law, the discursive nature of legal practice and the broader socio-political context in which law operates.

Chapter 3 focuses on the gendering of violent crime. Our aim is to show how particular scripts of masculinity and femininity (albeit bounded by class and race factors) play out in legal practice. We suggest that because the constructions of "normal crime" that Crown attorneys and defence lawyers use to inform their case-building strategies are premised on an equation of "aggression = male activity," men accused of violent crime do not necessarily betray their gender. Nevertheless, women defendants who appear before the court on violent crime charges are an anomaly; they breach not only the constructions of "normal crime," but also the feminine scripts typically held out to women.

The racialization of violent crime is the subject of chapter 4. We suggest that understanding how race (and class) work in law involves



attending to complex and complicated processes that have to do with racist ideological representations and racialized spaces. Lawyers, for instance, rely on stereotypes of Aboriginal people as welfare recipients and “drunken Indians” and on assumptions of Aboriginal communities as places where violence, alcohol and drug abuse, welfare dependency and crime are commonplace. To draw out further how the language of space is used to signify the meaning of violence and the culpability of the accused, we also consider violence that occurs in sexualized spaces of the inner city and in white, middle-class suburban spaces. The chapter concludes with a consideration of whether efforts to legislate equality—as in “special considerations” legislation designed to resolve the overincarceration of Aboriginal peoples—have the potential to realize significant change.

Chapters 5 and 6 take up the issue of using law as a mechanism for realizing substantive change in society with respect to the feminist engagement with the law. We suggest that the agency of lawyers is a formidable element of the power of law that has been largely overlooked in debates about legal reform. To gauge the success of feminist-inspired legal reforms designed to protect women and children complainants, chapter 5 considers the criminalization of men charged with sexual assault. In chapter 6 we critically examine the “new paradigm of justice” promised by proponents of zero-tolerance policies in the criminalization of domestic violence. These two chapters make evident how, in the interest of defending their clients, lawyers can strategically subvert and sabotage the intention of law reforms that they believe are politically motivated. The irony is that while lawyers may resist efforts to use law to realize significant change in the area of women’s inequality, lawyering strategies are themselves imbued with gendered, racialized and class-based stereotypes.

Our concluding chapter brings the discussion to a close by considering the implications of our analysis for working through the tensions in law. Traditional legal doctrine asserts that law’s role in society is that of dispensing justice in a neutral, impartial and unbiased fashion. Yet law is a site in which gender, race and class inequalities are reproduced. What are the prospects, then, for challenging law to live up to its claims in order to realize a more just society?

## NOTES

1. We are mindful that concentrating on the processes involved in criminalizing interpersonal violence (as it is defined within legal practice) restricts our focus to only certain forms of violence in society. Corporate crime, environmental crime, workplace health and safety violations and the like cause untold damage



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to Canadians each year (see, for example, Snider 1999). In this respect, the issue of what is *not* criminalized is just as significant as what is.

2. The men's sample represented 6 percent of the cases involving male defendants who appeared before the court on violent crime charges.
3. The appendix provides a more detailed description of our methodology.

