The Criminalization of Stalking: An Exercise in Media Manipulation and Political Opportuuism

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Canada's new criminal harassment law criminalizes behaviour more commonly known as "stalking". The stalking law was the centrepiece of Bill C-126, a government initiative responding to increased public concern about violence against women and children. The author critically analyzes the stalking initiative as three phases of a "moral panic". She argues that the combined impetus of media manipulation and political opportunism led to the swift enactment of Bill C-126 and resulted in an inadequate response to the complex issue of violence against women.

The first phase of this "moral panic" was characterized by the media's role in defining and sensationalizing the threatening behaviour. The typical media portrayal of stalking incidents played upon a cultural pornographic imagination. The images conveycd encouraged public perception of the stalker as an extreme example of male aggressiveness, while at the same time emphasizing female vulnerability. As a result, stalking quickly became the subject of public outrage over the ineffectiveness of existing criminal law. The media failed to address, and the public never considered, the systemic nature of male power relations as an important contributing factor to the problem of violence against women.

The author depicts the second phase of the stalking initiative as the inevitable politicization of the issue. She characterizes the government bid to pass Bill C-126 as a hurried and superficial process, spanning a mere seven months from the Bill's conception to the enacting legislation. Women's voices were heard only during a one-day "Information Exchange" session, during which representatives of women's groups repeatedly called for government dialogue concerning the systemic nature of violence against women. Representatives advocated a comprehensive front-line approach to the problem of violence against women rather than endorsing the simple imposition of legal solutions. The author submits that the government's desire to react to the "urgent" need for a stalking law before the end of its mandate, encouraged politicians to respond primarily to heightcned media attention and effectively ignore the arguments voiced by women's groups in response to the proposed legislation.

Finally, the author critically examines the third phase of the government initiative, *i.e.* the legislative process leading to the enactment of the stalking law, and raises substantive concerns about the offence itself. She describes a process characterized by insufficient consultation with those most experienced with the issue of violence against women. As a result, the author submits that the new offence will make little material difference in women's lives. In particular, the absence of a preamble to contextualize the offence, the requirement of "reasonable fear" and the inclusion of a complex intent element will compromise the effectiveness of the provision as a solution to the problem of stalking.

In conclusion, the stalking initiative is unfavourably compared to the model of inclusive polities demonstrated in the process behind Bill C-49, the recently enacted sexual assault legislation. The three phases of the stalking initiative expose a consistent failure to appreciate and acknowledge the systemic nature of violence against women and represent a step back for government policies of inclusive, constituency-driven reform.

Les nouvelles dispositions canadiennes sur le harcèlement criminel visent à criminaliser un comportement communément désigné par «stalking». Elles sont au cœur du projet de loi C-126 qui répond aux inquiétudes croissantes du public concernant la violence faite aux femmes et aux enfants. L'auteure analyse de façon critique cette initiative gouvernementale en la matière, la qualifiant de «panique morale» en trois phases. Elle soutient que la manipulation médiatique et l'opportunisme politique sont à l'origine de l'adoption rapide du projet de loi C-126, ce qui explique son incapacité à faire face à la complexité de la violence faite aux femmes.

La première phase de cette «panique morale» a été caractérisée par le sensationalisme des médias quant à la définition du harcèlement criminel. Le portrait-type que les médias nous offrent de ce type de comportement insiste sur l'imaginaire pornographique. Ces images représentent le «harceleur» comme étant l'archétype de l'agressivité mâle, tout en insistant sur la vulnérabilité féminine. Cela explique la vive réaction du publie par rapport à l'inefficacité du droit criminel en matière de harcèlement criminel. L'auteure note toutefois que ni les médias ni le public n'ont pris cn compte le caractère systémique des relations de pouvoir entre les hommes et les femmes et leur influence sur la violence faite aux femmes.

La politisation du problème constitue la seconde phase de l'initiative gouvernementale. Selon l'auteure, l'adoption du projet de loi C-126 est le fruit d'une procédure rapide et superficielle, n'ayant requis que sept mois, de sa conception jusqu'à son adoption. Les voix des femmes n'ont été entendues qu'une seule journée, lors d'une session d'échange d'informations où les représentantes des groupes de femmes ont demandé au gouvernement d'entamer un dialogue portant sur la nature systémique de la violence faite aux femmes. Les représentantes favorisaient une approche globale par rapport à la violence faite aux femmes, plutôt que la seule adoption d'une solution légale. L'auteure soutient que la décision du gouvernement d'intervenir rapidement tout juste avant la fin de son mandat, afin de réagir au besoin «urgent» d'une loi interdisant le «stalking», a davantage servi à épouser les revendications des médias qu'à répondre aux demandes des groupes de femmes. Enfin, l'auteure examine la troisième phase de l'initiative gouvernementale, c'est-à-dire le processus législatif ayant mené à l'adoption de la loi sur le harcèlement criminel. Ce processus a été marqué par une consultation insuffisante auprès des personnes les plus affectées par la violence faite aux femmes. Cela explique pourquoi la nouvelle infraction apportera peu de changement à la vie des femmes. L'auteure aborde ensuite l'infraction elle-même. Selon elle, l'absence d'un préambule à l'infraction, la néeessité d'une «peur raisonnable» et l'inclusion d'un élément intentionnel complexe contribueront à miner l'efficacité de l'article comme solution au problème du harcèlement criminel.

En conclusion, l'initiative cn matière de harcèlement criminel soutient mal la comparaison avec le modèle politique suivi lors de l'adoption récente du projet de loi C-49 sur l'agression sexuelle. Les trois phases suivies par le gouvernement témoignent de l'absence de vision globale en ce qui concerne le problème systémique de la violence faite aux femmes et constituent un recul par rapport aux types de réformes axées sur les véritables besoins de la population.

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On August 1, 1993, Bill C-126, *An Act to Amend the Criminal Code and the Young Offenders Act*, was proclaimed in force.[1] The Bill contains a miscellany of sections intended, in the words of then Minister of Justice Pierre Blais, "to reinforce the provisions of the Criminal Code that deal with family violence, child abuse and violence against women in general."[2] The centrepiece of the new legislation, if public reaction and political posturing are determinative, is the new offence of criminal harassment, or "stalking", as it is known by the public and in the popular media.[3] Both the naming of this behaviour and its criminalization have occurred with bewildering speed in Canada and the United States. In the three-year period since the first "anti-stalking" legislation was enacted by the State of California, at least forty other American states have either passed or drafted similar legislation. Stalking first appeared publicly on the federal government's political agenda in January of 1993.[4] A mere eight months later the legislation was enacted.

The speed of the government's response to this issue is virtually unparalleled and is particularly noteworthy when placed in the larger context of the government's overall lack of commitment to issues of concern to women.[5] In

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[1]S.C. 1993, c. 45.

[2]*House of Commons Debates* (6 May 1993) at 19015.

[3]Section 264 uses the term "criminal harassment" to name what it criminalizes; however, the behaviour is invariably referred to by politicians and the media as "stalking". The choice of the language of harassment seems to have originated in an "Information Exchange" held between representatives of women's groups and officials of the Department of Justice (see text accompanying notes 58-61). Justice officials were informed of the offensiveness of the term "stalking", which creates an image of hunter and hunted, contributes to the objectification of the victim and sensationalizes the behaviour. I will use both terms as it is important that my reconstruction of the stalking initiative accurately reflect the process. And in this case, the naming is an important part of the story. As Carol Smart suggests, "[H]ow their experience is turned into something that law can digest and process, is a demonstration of the power of law to disqualify alternative accounts" (*Feminism and the Power of Law* (London: Routledge, 1989) at 11).

[4]See *infra* note 50 and accompanying text.

[5]One particularly powerful example of that lack of commitment emerged on July 5, 1993 with the release of the Report of the Federal/Provincial/Territorial Working Group of Attorneys General Officials, *Gender Equality in the Canadian Justice System* (Ottawa: Queen's Printer, April 1992). The report comes to the conclusion (unsurprising to feminists) that profound sexism pervades every aspect of the justice system. It contains more than 50 substantive recommendations for immediate action and more than 60 proposals for further study. The report was completed in *April 1992* but was not released for *15 months*. It is also interesting to note that the stalking initiative *preceded and effectively pre-empted* the report of the Canadian Panel on Violence against Women, released on July 30, 1993 (*Changing the Landscape: Ending the Violence, Achieving Equality* (Final Report) (Ottawa: Queen's Printer, 1993)). The Panel, at a cost of $10.5 million to the federal government, was charged with investigating and proposing solutions to violence against women. The report contains 494 recommendations. Many witnesses appearing before the Parliamentary Committee noted that at the same time as the stalking legislation was announced, the government was continuing its program of massive budgetary cuts to front-line organizations. For example, Bev Bains, Executive Coordinator of the National Action Committee on the Status of Women, testified:

> In the same week that Bill C-126 was tabled, Finance Minister Don Mazankowski announced a 20% cut to women's groups, the very groups that assist women victims of criminal harassment and promote a range of issues to improve the status of women in society, which ultimately is the solution to violence against women (*Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-126*, No. 2 (26 May 1993) at 1635).

this paper I wish to examine both the reasons for this haste and its implications. The story of the stalking initiative is more than the story of a criminal justice response to the complex issues of violence against women. It is also a story of media manipulation and political opportunism, which powerfully demonstrates that criminal law reform, as a strategy for empowering women, has significant costs.[6]

Women's Lives: Stalking in Context

Stalking is one vicious manifestation of a broader spectrum of violence against women — one part of a multi-faceted whole, integrally linked to the systemic social, economic and political inequalities experienced daily by Canadian women. The statistics detailing the extent of violence against women in Canada provide horrifying evidence of the "brutal face of inequality".[7] For example: one in four women can expect to be sexually assaulted at some time in her life, one half of those before the age of seventeen;[8] one in ten women is beaten by her husband, ex-husband or live-in partner;[9] eighty percent of Aboriginal women surveyed on Ontario reserves in 1989 had been abused or assaulted;[10] forty percent of disabled women surveyed in a 1989 survey had been raped, abused or assaulted;[11] and one hundred and twenty women in Canada died at the hands of a current or former partner in 1991.[12] Stalking is one aspect of this pattern of violence — indeed, statistics suggest that non-

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[6]For a compelling feminist analysis of the limitations of law reform, see Carol Smart, *supra* note 3. See also Laureen Snider, "Legal Reform and Social Control: The Dangers of Abolishing Rape" (1985) 13 Int'l J. Soc. L. 337; Judy Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of *Charter* Litigation to Further Feminist Struggles" (1987) 25 Osgoode Hall L.J. 485; Sherene Razack, *Canadian Feminism and the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality* (Toronto: Second Story Press, 1991); Catharine MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, Mass.: Harvard University Press, 1989) especially at Part III.

[7]The phrase is taken from the title of a brief presented to the House of Commons Subcommittee on the Status of Women, February 1991 (Canadian Advisory Council on the Status of Women, *Male Violence against Women: The Brutal Face of Inequality* (Ottawa: Canadian Advisory Council on the Status of Women, 1991) [hereinafter *Brutal Face*]). The link between inequality and violence, long recognized by feminists, is central to the Final Report of the Canadian Panel on Violence against Women subtitled, *Changing the Landscape: Ending Violence, Achieving Equality*, *supra* note 5.

[8]J. Brickman & J. Briere, "Incidence of Rape and Sexual Assault in an Urban Canadian Population" (1985) 7 Int'l J. Women's Studies 195.

[9]See Linda MacLeod, *Wife Battering in Canada: The Vicious Circle* (Ottawa: Canadian Advisory Council on the Status of Women, 1980); Linda MacLeod, *Battered But Not Beaten: Preventing Wife Battering in Canada* (Ottawa: Canadian Advisory Council on the Status of Women, 1987); Linda MacLeod, *Preventing Wife Battering: Towards a New Understanding* (Ottawa: Canadian Advisory Council on the Status of Women, 1989); E. Lipri, "Male Violence in the Home" (1989) 14 *Canadian Social Trends* 19.

[10]Ontario Native Women's Association, *Breaking Free: A Proposal for Change in Aboriginal Family Violence* (Thunder Bay, Ont.: Ontario Native Women's Association, 1989), as cited in *Brutal Face*, *supra* note 7 at 8.

[11]Health and Welfare Canada, *Working Together: 1989 National Forum on Family Violence – Executive Summary* (Ottawa: Queen's Printer, 1990) at 15.

[12]P. Owen, "Wife Abuse: Hidden Horror Devastates Lives" *The Toronto Star* (15 November 1992) A1.

violent harassment frequently escalates into assault, attempted murder or murder.[13]

The behaviour now labelled as stalking is as various as the individuals who engage in it. However, women's stories reveal a number of patterns. The following is a "typical" scenario:

> The harassment usually begins when a woman leaves her husband or boyfriend, or when she spurns the advances of an acquaintance. Less often, the problem arises when a complete stranger becomes obsessed with a woman who will not reciprocate his "affections." In all cases, however, the resulting conduct is similar. The woman is incessantly watched, followed and often receives countless phone calls a day. Often anyone associated with the woman is subject to similar treatment, and as a result many women lose their jobs, friends, and become increasingly isolated. Often no direct threat is made but the message is made clear; the behavior will not stop until she becomes his.[14]

The Manitoba Department of Justice, in its brief presented to the Parliamentary Committee on Bill C-126, identified the following "disturbing patterns" in stalking cases:

> 1) the accused were male, victims were female; 2) the accused and the victim had a prior relationship; 3) in most instances the relationships were ended by the victim; 4) the accused generally maintained a belief in the viability of the relationship; 5) the accused were obsessed with maintaining contact, jealous of any steps taken by their victims to establish new relationships, and prevented their victims from carrying on with their lives; and 6) all victims feared for their lives and those of their children; the pattern of harassing telephone calls, mail, attempting contact through third parties, and confrontations in both public and private places instilled tremendous fear.[15]

These descriptions make clear that stalking is a form of psychological and/or physical terrorism that relies upon the existence of unequal power. Stalking is, therefore, primarily about control. The behaviour now labelled as stalking is neither new nor particularly distinct from other aspects of violence against women. Yet it has warranted a distinct reaction. The rhetoric of state concern and protection has been accompanied by state action of the most repressive kind — speedy criminalization.

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[13]In fact, the risk which stalking creates for women may depend differentially on their race and/or class. At a national conference on stalking held in Victoria, B.C. in May 1993, Teresa Nahanee, Constitutional Coordinator for the Native Women's Association of Canada, stated that stalking would be a "luxury" in native communities since men do not "stalk" native women, they just kill them ("A Step Behind: Who Is There? A Conference on Stalking: The Criminal Harassment of Women" (Paper presented to the National Conference on Stalking, Victoria, B.C., 14 May 1993) [unpublished]). A report by the Ontario-based Women We Honour Action Committee documents the murders of 551 women killed in Ontario between 1974 and 1990. Although the report did not gather evidence of stalking systematically, one of its authors estimated that at least 80% of the intimate femicides (women killed by estranged or intimate partners) were preceded by threats to the victim (Maria Crawford & R. Gartner, "Women Killing: Intimate Femicide in Ontario 1974-1990" (Paper presented to the National Conference on Stalking, Victoria, B.C., 14 May 1993) [unpublished]).

[14]Judy Cotte, "Not Until He Hurts You: The Need for a Criminal Harassment Provision in the Criminal Code" (Paper prepared for the Metro Toronto Action Committee on Public Violence Against Women and Children, 1993) at 2 [unpublished].

[15]Manitoba Department of Justice (Brief for Presentation to the Legislative Committee of the House of Commons on Bill C-126, May 1993) [unpublished].

What follows is my description of the stalking initiative.[16] The structure of this description is based on the parallels I see between this law-making initiative and the work of Stanley Cohen in his book, *Folk Devils and Moral Panics*.[17] Cohen's book analyzes what he describes as the "moral panic" which occurred in Britain in the 1960s over the emergence of the Mods and Rockers, a particular form of youth culture whose behaviour was socially characterized as both deviant and delinquent. Cohen describes the period of moral panic as follows:

> A condition ... emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by ... right-thinking people; socially accredited experts pronounce their diagnoses and solutions; ways of coping are evolved ...; the condition then disappears, submerges or deteriorates.[18]

Cohen's description of a moral panic resonates with the history of the stalking initiative. I will present that history in three distinct phases which mirror Cohen's chronology.

The first phase in the story of the criminalization of stalking was the emergence and definition of the issue, with the media playing a pivotal role. The second phase, the manning (!) of the moral barricades, was the politicization of what was identified as a threat, and the reconfiguration of the problem as one which was amenable to legislative intervention. The third phase, the coping phase, was the formal process of amendment and adoption of legislation criminalizing stalking.

My presentation of each phase of the initiative will be followed by a critical analysis of what occurred — "a counter-story". By way of conclusion, I will consider the final aspect of Cohen's chronology, the submersion and/or disappearance of the problem. I submit that there is a real risk that this legislation will, in fact, make little material difference in women's lives. The criminalization of stalking may simply assuage public concern about violence against women while deflecting political energy away from the systemic analysis and response which is needed.

Phase I: Naming the Problem — The Mass Media and the Stalker

The phenomenon of stalking came to mass media and public attention in 1989 in California. The much-publicized murders of five women stalked by their ex-partners, and the murder of television actress Rebecca Schaeffer by an

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[16]I should at the outset make clear that my involvement in this legislative process was as an academic. I am a white female law professor teaching courses in criminal law, legal theory and constitutional law. My approach to criminal law, as an academic, is feminist and critical. I have no first-hand, professional experience with female victims of violence. This paper is a critical analysis of a discrete moment of law-making, and in no way intends to trivialize the very real harms experienced by women who are victims of this kind of violence. Rather, my intent is to expose and critique both the process through which this legislation evolved and the attitudes towards women which were manifested in that process.

[17]2d ed. (New York: St. Martin's Press, 1980).

[18]*Ibid.* at 9. Cohen continues, "Sometimes the object of the panic is quite novel and at other times it is *something which has been in existence long enough, but suddenly appears in the limelight*" [emphasis added].

obsessed fan, prompted the State of California to enact legislation creating the crime of "stalking".[19] Not surprisingly, the mass media seized upon this "new crime". In the three years following the enactment of the California statute, stories about stalking proliferated in every form of media: television,[20] radio,[21] magazine[22] and newspaper.[23] Despite the fact that the stories on stalking emerged from diverse sources and in various journalistic styles, they are remarkably similar. Many begin with a graphic description of one victim's experience, often written or presented in a way which exploits the reader's own sense of potential vulnerability.[24] For example:

> Barbara Walters: We begin tonight with a fearsome terror that's often a countdown to murder. You're being followed and it never stops. Around the clock — where you live, where you work — someone is stalking you and waiting to attack.[25]

> For years, a man named Ralph Nau wrote strange, terrifying letters to the movie stars he loved. Despite their fears, he was free to pursue them, until he was accused of a grisly murder. Now, he may soon be free again, as the courts struggle to cope with this chilling case of erotomania.[26]

> Alison felt like a prisoner, only there were no boundaries. She was free to go everywhere, yet she was not. She'd stop into her favourite café and moments later *he* would sit down just a few tables away. She'd be at work, *he* would suddenly show up. She would be out shopping, *he* would be lurking around the corner.[27]

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[19]Cal. Penal Code § 646.9 (West 1990):

> **646.9** (a) any person who willfully, maliciously, and repeatedly follows or harasses another person and who makes a credible threat with the intent to place that person in reasonable fear of death or great bodily injury is guilty of the crime of stalking.

[20]Examples abound: "I Can Make You Love Me: The Story of Laura Black" CBS, TV movie (December 1991); "I Know He's Out There" ABC News, *20/20* (10 January 1992); Ted Koppel, ABC, *Nightline* (September 1992); NBC, *The Today Show* (September 1992); "Everywhere you look" CBC, *Primetime* (7 April 1993). This latter feature documentary on stalking was replayed July 30, 1993. The story of Dianne Lupton, a stalking victim, was carried on CBC, *Life: The Program* (February 1993).

[21]See *e.g.* "Wrongful Pursuit" *Sunday Morning Centrepoint* (25 April 1993).

[22]See *e.g.* M. Tharp, "In the Mind of a Stalker" *U.S. News and World Report* (17 February 1992) 28; S. Streshinsky, "Stalked! Nowhere to Hide" *People Magazine* (17 May 1993); S. Streshinsky, "The Stalker and His Prey" *Glamour Magazine* (August 1992) 238; J. Furio, "Can New State Laws Stop the Stalker?" *Ms.* (January/February 1993); P. Todd, "Victims" *HomeMakers Magazine* (January/February 1993) 13.

[23]See *e.g.* C.L. Hayes, "If That Man is Following Her, Connecticut is Going to Follow Him" *The New York Times* (5 June 1992) B1; E. Ross, "Problem of Men Stalking Women Spurs New Laws" *The Christian Science Monitor* (11 June 1992) 6; L. Corbella, "Women Who Walk in Fear" *The Toronto Sun* (26 September 1992); J. Turner, "When Women are Stalked" *The Toronto Star* (15 August 1992) F1; T. Appleby, "Stalking Deterrent Debated in Canada" *The [Toronto] Globe and Mail* (16 February 1993) A1.

[24]The presentations are sensationalized in different ways in different media formats. Magazine and newspaper articles are often accompanied by pictures which emphasize the loneliness and terror of the victim. Radio and television stories take advantage of both auditory and visual stimuli with eerie music, ticking clocks, darkened rooms and shadowed faces. These effects are in fact based upon techniques used in horror and thriller movies which themselves are often based on stories of a male pursuer and a female victim.

[25]ABC News, *20/20*, *supra* note 20.

[26]B. Rubenstein, "The Stalker" *Chicago* (February 1992) 69.

[27]Turner, *supra* note 23.

> First came the phone calls, the roses and the declarations of love. Then, Karen Macqueen's unwanted suitor turned into someone far more sinister — a shadowy figure who stalked her day and night, vandalized her car, and once told her, "If I can't have you no one can."[28]

Typically, the stories then turn to the inability, ineffectiveness or failure of the law to respond to the victimization described: "An insidious crime of passion is on the rise. Incredibly there's no law against it."[29] The implicit message legitimates and confirms the law's potential to solve the identified problem.

At the same time, many of the articles characterize the stalker as obsessed, disturbed or pathological to the point of indifference to the law:

> Stalkers range from coldblooded killers to lovesick teens, huddled beneath an umbrella of psychological syndromes: paranoia, erotomania, manic depression and schizophrenia. To some degree, all are mentally or emotionally disturbed ...[30]

Finally, many of the pieces focus on the victimization of celebrities, although there is typically a reference to the risks faced by "ordinary" women. In summary, this barrage of information sends the primary message that "stalking" is a relatively new behaviour, that it is on the increase, that we are all at risk but that public figures are particularly vulnerable, that "stalkers" are obsessed and pathological, that the law as it stood was ineffective, and that criminalization and increased penalties would be an appropriate and necessary response.

Phase I: The Counter-Story

In Cohen's analysis, the first phase of a moral panic is the emergence of a threat which is stereotypically presented by the mass media.[31] Clearly, the media has played an essential role in the stalking initiative.[32] The construction of stalking as a particularly deviant example of male violence against women, and as one for which *more law* is an appropriate response, has its genesis in mass-media story-telling. The media treatment of stalking is not particularly unique — exploitative, sensationalized reporting and advocacy of simplistic solutions are a mass-media stock in trade. Yet stalking captured the public and political imagination sufficiently to fuel a swift and decisive response. Why? I will suggest two reasons which account for the swift legislative response to the media imagery.

The first reason is the high social status of many of those victimized by the newly identified problem of stalking. Much media attention has been paid to the

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[28]Appleby, *supra* note 23.

[29]Todd, *supra* note 22.

[30]Tharp, *supra* note 22.

[31]Cohen, *supra* note 17 at 9.

[32]In fact, Department of Justice officials later confirmed that the impetus behind the stalking initiative lay partially in the media coverage (Canada, Department of Justice, *Exchange of Information Meeting on Stalking: Information Document* (Ottawa, 6 April 1993) [hereinafter *Stalking Information Document*]). At a one-day Information Exchange in early April, Justice officials mentioned television talk shows, media coverage and letters from constituents, in response to a question regarding the motivation behind the legislation (*infra* note 59 and accompanying text).

particular vulnerability of celebrities and other public figures. In other words, stalking has been presented not only as a manifestation of male violence against women, but also as a risk of celebrity or public status — and therefore as a potential risk to legislators, judges and politicians.[33] In fact, *U.S. News and World Report* reported that the number of threats to United States Members of Congress rose from 394 to 566 in the four years between 1987 and 1991.[34] This representation of stalking makes it an issue which touches the lives and experiences of politicians. It is therefore likely to engage their understanding and galvanize their energies in ways that other violence issues, particularly violence against marginalized groups, may not.

It is a basic tenet of critical scholarship that law will tend to serve the interests of those who wield power in society.[35] Clearly, the criminalization of stalking offers the potential of increased protection to public figures. In addition, public figures have access to, and confidence in, the system. In fact, the criminal justice system, both in substance and process, is much more likely to take seriously and respond to harms experienced by the powerful than to harms experienced by the marginalized.[36] While it is not my intention to characterize the stalking initiative as a conscious and self-interested scheme of the elite, it is surely not unreasonable to suggest that an unconscious sense of personal vulnerability motivated the unusually speedy response to stalking.

The second reason accounting for the swift legislative response to the media imagery is the media portrayal of the stalking victim. It is a portrayal

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[33]This point was made by Joan Zorza, Director, National Battered Women's Law Project, New York, in her presentation at the National Conference on Stalking. Ms Zorza's assessment was based on conversations with a number of state attorneys general who contacted the Project for information on stalking legislation.

[34]Tharp, *supra* note 22.

[35]The following excerpt from Allan Hutchinson illustrates this claim:

> For CLS, the rule of law is a mask that lends to existing social structures the appearance of legitimacy and inevitability; it transforms the contingency of social history into a fixed set of structural arrangements and ideological commitments. CLS's demonstration that the status quo and its intellectual footings, far from being built on the hard rock of historical necessity, are actually sited on the shifting sands of social contingency, is both critical and constructive ("Crits and Cricket: A Deconstructive Spin (Or Was It a Googly?)" in Richard Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991) 181 at 183).

[36]The criminal justice response to sexual assault is a classic example. Feminist and critical literature has convincingly demonstrated the criminal law's failure, at a systemic level, to take seriously the harms experienced by women as a group. In fact, many argue that the criminal justice system has perpetuated women's unequal access to state protection and their disproportionate vulnerability to sexual assault. See *e.g.* Lorenne Clark & Debra Lewis, *Rape: The Price of Coercive Sexuality* (Toronto: Women's Press, 1977); Christine Boyle, *Sexual Assault* (Toronto: Carswell, 1985); Status of Women Canada, *A Feminist Review of Criminal Law* by Christine Boyle *et al.* (Hull, Que.: Supply & Services Canada, 1985); Toni Pickard "Culpable Mistakes and Rape: Relating Mens Rea to the Crime" (1980) 30 U.T.L.J. 75. And, even as the criminal justice response to women as a group appears to be improving, it is clear that within the gender group, race, class, ability and sexual orientation still operate to systemically disadvantage. See *e.g.* Margo Nightingale, "Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases" (1991) 23 Ottawa L.R. 71; Jennifer Wriggins, "Rape, Racism and the Law" (1983) 6 Harv. Women's L.J. 103; J. Doucette, *Violent Acts against Disabled Women* (Toronto: Disabled Women's Network, 1986). See also *supra* notes 9, 10.

which I characterize as pornographic, or one which, at a minimum, plays upon a cultural pornographic imagination. Feminist scholars have made similar arguments about the function and effect of the rape trial. In her book, *Feminism and the Power of Law*,[37] Carol Smart argues that in the rape trial women "come to embody the standard fantasy of the pleasure of abuse and sexual power."[38] She characterizes the reporting of rape trials as "little more than a pornographic form,"[39] and raises important questions about the politics of feminist law reform in the area of sexual assault. She writes:

> We have no justification for using women who have been raped as horror stories in a kind of propaganda war. Rape Crisis Centres rightly refuse to do this because they are so clearly aware of the thin line between the woman's story and its use as a kind of pornography which is damaging to women. It is also a dubious practice that puts vulnerable women who have "gone public" on their abuse in the vanguard of a struggle that concerns all women.[40]

Although the media coverage of stalking did not have the overtly sexual characteristics of the rape trial, I argue that it was nevertheless informed by, and resonates with, cultural messages about heterosexuality and the inevitability of male sexual aggression. It is a pornographic resonance that makes it fascinating, or even titillating, in ways that other issues of concern to women are not. In Catharine MacKinnon's analysis, pornography is primarily about power and powerlessness, and about the sexualization of male dominance and female submission.[41] She argues that in the pornographic genre, "subjection itself, with self-determination ecstatically relinquished, is the content of women's sexual desire and desirability."[42]

An examination of the media representation of the stalking victim, informed by this feminist analysis of pornography, illustrates "stalking's" pornographic resonance. The media coined and insisted upon the use of the word "stalking" and frequently sensationalized it in a title intended to capture the reader's attention.[43] This naming carries a powerful image. It constructs the man as the active hunter in stealthy pursuit and the woman as his prey — passive, objectified, vulnerable, terrified and powerless. This construction is confirmed by the ways the stories of victims were told. For example:

> For the past three years, Laurisa Anello hasn't been able to go anywhere without looking over her shoulder. An obsessed admirer began by swamping her house with deliveries of roses, dolls and pizzas, then started driving by at all hours, shadowing her every move and slipping chilling notes in with the daily newspaper.[44]

> The phone rings and she begins to shake. She sits in her home, which is a prison, with her expensive alarm system and her vicious dog, and waits for him to kill her. Just as he's promised.[45]

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[37]*Supra* note 3 at 29.
[38]*Ibid.* at 39.
[39]*Ibid.* at 40.
[40]*Ibid.* at 48-49.
[41]*Feminism Unmodified* (Cambridge, Mass.: Harvard University Press, 1987) at 148.
[42]*Ibid.*
[43]See *supra* notes 22, 23.
[44]"Women Winning Legal Help against Stalkers" *The Chicago Tribune* (16 April 1992) A1.
[45]"Stalked by Fear" *The Toronto Sun* (1 May 1993) A5.

In a society which normalizes male sexual aggressiveness and eroticizes submission, the notion of pursuit is deeply sexual. As Smart writes:

> Being a sexual predator is regarded as normal, even desirable for men. Sexualizing all women is equally regarded as natural. Pressing a woman until she submits is a natural, pleasurable phallocentric pastime.[46]

Certainly, the media representation of stalking is filled with outrage and condemnation. Yet the underlying message is that stalking scenarios are situations where normal heterosexual pursuit and submission have gone awry. This picture is confirmed by the pathologizing of the stalker as obsessed, sick or psychotic. The media portrayal failed to condemn the cultural underpinnings of male violence against women. In other words, the media confirmed the cultural normalization of male dominance and female submission. Stalking provided a comfortable forum for outrage over the abuse of male power without requiring engagement on its systemic nature. And we, the public and politicians, could react with horror to the plight of the stalking victim, presented as vulnerable, powerless and objectified, without at the same time questioning our assumptions about accepted modes of behaviour. How could the politicians resist?

Phase II: The Politicization of the Problem

The second phase of the stalking initiative occurred between December 1992 and April 27, 1993, when Bill C-126 was introduced in the House of Commons. During this time, the problem of stalking in Canada was highlighted by a "stampede ... [to] legislative reform"[47] in the United States and by American and Canadian media coverage. Stalking emerged as an urgent issue requiring an immediate political response.[48]

In the month of January, the issue received significant media attention. The tragic catalyst for this attention was the occurrence of three murders and a suicide in the space of a week in the City of Winnipeg. The murders were committed by men subject to restraining orders intended to keep them away from their

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[46]*Supra* note 3 at 42.

[47]Dr. Glenda Simms, President of the Canadian Advisory Council on the Status of Women, (Address to the Legislative Committee Hearings on Bill C-126, 25 May 1993) at 13 [unpublished]. See also Marilyn Pilon, *"Anti-Stalking" Laws in the United States: November 1992* (Research Branch, Library of Parliament, 18 November 1992) [unpublished].

[48]In fact, the first political response came from the opposition parties. Two private member's bills criminalizing stalking were introduced in the House of Commons prior to Bill C-126. In December, Liberal Associate Justice Critic George Rideout introduced Bill C-390, *An Act to Amend the Criminal Code* (*House of Commons Debates* (10 December 1992)). On February 24, 1993, New Democrat Status of Women Critic, Dawn Black, introduced a private member's bill on threats, intimidation and stalking. In the press release which accompanied the introduction of her bill, Ms Black stated:

> Our current laws are a hodge-podge of weak provisions enacted a long time ago without considering the situation of women victims of violence. ... My private member's bill brings together and strengthens current provisions of the Criminal Code, and draws on some of the ideas in the American laws. Canadians want this issue addressed in a meaningful way – a way that provides the protection we all have a right to expect (House of Commons, Press Release, "Black to Introduce Anti-Stalking Legislation" (23 February 1993)).

victims.[49] The political response to these events was immediate. On January 27, 1993, then Solicitor General Douglas Lewis indicated that the federal government was "considering an anti-stalking law to protect women from harassment from estranged boyfriends or spouses."[50] On February 2, 1993, this was confirmed by then Justice Minister Pierre Blais.[51] And in early March, while speaking to a National Symposium on Community Safety and Crime Prevention, former Justice Minister Blais reiterated his department's commitment to better protecting women from stalking.[52]

The week before the March symposium, a Quebec Coroner's report, investigating a murder-suicide by a stalker, was released. In her report, Coroner Anne-Marie David made a number of recommendations intended to improve the way governments and social agencies provide services to violent men and abused women.[53] The creation of a new crime was not among these recommendations. This is not surprising, since the case under investigation, like the Winnipeg cases, was far more an indictment of the system than a demonstration of the need for new law.[54]

Participants at the March symposium voiced similar objections to the government's planned initiative against stalking. Representatives from a number of national women's organizations,[55] none of whom had requested stalk-

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[49]Sherry Paul and her husband Maurice were killed by André Ducharme, who then committed suicide. Ducharme, who was fixated on Mrs. Paul, had threatened to kill her in November of 1992. He was charged with uttering threats and had been released on bail when he committed the murders. Teri-Lyn Babb was shot by a man who had become obsessed with her. Although subject to a restraining order, the man had been authorized to buy a handgun, which he used to commit the murder. See S. Edmonds, "Controlling Stalkers" *The Winnipeg Free Press* (30 January 1993) A6; "Stalked by Terror" *The Ottawa Citizen* (31 January 1993) A12.

[50]S. Durkan & L. Sollid, "Anti-Stalking Law on Table" *The [Calgary] Sun* (27 January 1993) A4.

[51]J. Douglas, "Ottawa Eyes Stalker Laws" *The Winnipeg Free Press* (2 February 1993) A1; S. Durkan, "New Law Will Help Protect Women" *The [Calgary] Sun* (2 February 1993) A4.

[52]Hon. Pierre Blais (Opening Address to the National Symposium on Community Safety and Crime Prevention, Toronto, 10 March 1993).

[53]See A. Picard, "Justice System Fails Stalked Women" *The [Toronto] Globe and Mail* (9 March 1993) A6, in which the 17 recommendations of the Quebec Coroner's report are presented. The report included the recommendations that: 1) better education on the causes of violence and training in dealing with abused women should be provided for all members of the judicial system, including police officers, Crown attorneys and judges; 2) courthouses and police stations should have information desks reserved for victims of conjugal violence so that they know their rights and so that they can overcome their insecurities about pressing criminal charges; and 3) women should be informed when their violent partner is released on bail or from prison.

[54]Marjolaine Landry was killed by a man who harassed her for fourteen months. She pressed charges against Pierre Lepage twice. At the time of the killing, Lepage was subject to a restraining order and had been ordered to turn in any weapons to the police. A week after the second restraining order was issued, and after two unanswered phone calls by Ms Landry to the police, she was shot while driving through downtown Montreal. Lepage then shot himself. For further details of the case, see Picard, *ibid.*

[55]Included amongst these groups were the National Action Committee on the Status of Women, the National Association of Women and the Law, the Elizabeth Fry Society, the Metro Action Committee on Public Violence Against Women and Children, the Canadian Advisory Council on the Status of Women, the Canadian Association of Sexual Assault Centres, the Disabled Women's Network, and the Native Women's Association of Canada.

ing legislation, gave the following message to the Minister of Justice. First, the criminal justice system's historic failure to protect women was an attitudinal and systemic failure based more on the marginalization of women's experiences than on the absence of specific legislation. Second, a government initiative posturing as a response to violence against women would lack legitimacy without significant input from those most affected by violence, women themselves. The process which accompanied the amendments to the sexual assault provisions of the *Criminal Code*[56] was proposed as a model of inclusion.[57]

As an apparent result of the interventions at the March symposium, the Department of Justice scheduled a one-day Stalking Information Exchange Meeting ("Information Exchange") in early April. The letter of invitation was distributed less than one week before the meeting. The letter began by noting the extensive media attention the issue of stalking had received[58] and continued with a reference to Minister Blais's commitment to "inclusive justice". The Information Exchange, invitees were informed, was an attempt to be inclusive in developing a final proposal on stalking.[59] Clearly conceived and organized in haste, the session was completely ineffective. Representatives of approximately twenty women's organizations were in attendance.[60] They were unanimous in their refusal to engage with government officials on the substantive aspects of a law against stalking. Most participants, due to the extremely short notice and lack of information, felt unable and unwilling to take any position on the desirability, possible efficacy or appropriateness of a stalking law. In fact, many expressed a general sense of cynicism over the real value of increased criminalization. The need for improved application and enforcement of existing legislation and for attitudinal and systemic change was repeatedly emphasized. The Information Exchange ended with a unanimous demand for meaningful consultation.[61]

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[56]R.S.C. 1985, c. C-46.

[57]See Sheila McIntyre, "Redefining Reformism: The Consultations that Shaped Bill C-49" in Julian Roberts & Renata Mohr, eds., *Sexual Assault: A Multi-Dimensional Study* (University of Toronto Press) [forthcoming]. For a collection of articles on Bill C-49, see (1993) 42 U.N.B.L.J. at 319-85.

[58]Letter of Richard G. Mosley, Q.C., Criminal and Social Policy Sector, Department of Justice to invitees of the Stalking Information Exchange Meeting (30 March 1993) [on file with author].

[59]*Ibid.* See also Canada, Department of Justice, Minutes (Stalking Information Exchange Meeting, 6 April 1993) [unpublished].

[60]The following is a list of those organizations in attendance: Associé à la condition féminine, Metro Action Committee on Public Violence against Women and Children, Canadian Federation of University Women, Department of Family Services (Manitoba), Canadian Advisory Council on the Status of Women, Ontario Association of Interval & Transition Houses, Manitoba Association of Women's Shelters, Manitoba Women's Directorate, Ontario Women's Directorate, National Council of Women of Canada, Canadian Panel on Violence against Women, Vancouver Rape Relief & Women's Shelter, Women's Secretariat, Disabled Women's Network, Cumberland County Transition House Association, Native Women's Association of Canada, Canadian Association of Elizabeth Fry Societies, Groupe d'aide et d'information sur le harcèlement sexuel au travail, National Action Committee on the Status of Women, National Association of Women & the Law, Canadian Congress of Black Women, Comité canadien sur la violence faite aux femmes, Canadian Farm Women's Network, and the Ministry of Women's Equality (B.C.).

[61]Letter of participants of the Stalking Information Exchange Meeting to the Hon. Pierre Blais (6 April 1993) [on file with author].

In a letter dated April 23, 1993, then Justice Minister Blais declared himself "unable to agree" to consultation.[62] Citing the current law's inadequacy, Minister Blais stated that it "would be irresponsible" not to proceed as quickly as possible.[63] Bill C-126 was introduced in the House of Commons four days later.[64]

Phase II: The Counter-Story

In the second phase of the stalking initiative, "public ownership", and thus control over the issue, transferred from the media to the political process. This shift in ownership was important as it provided a new focus for structuring a response to the problem — the law. Cohen argues that media coverage of an issue can "leave behind a diffuse feeling of anxiety" which, when it coincides with existing public concerns, provides an opportunity for "new rule creation."[65] The media coverage of stalking and, in particular, of the failure of criminal law to protect vulnerable women, made the recourse to law inevitable. The message, of course, is that law has the power to right wrongs. The fact that no national women's organization had requested this solution or even had a developed position on stalking became, rather than determinative, simply irrelevant. The politicization and resulting legalization of the issue left little or no room for women-defined approaches. Feminists were forced to respond from within the language and structure of the legal system.

This is a familiar problem for feminists[66] who, as Carol Smart points out, risk becoming "immobilized in the face of the failure of feminism to affect law and the failure of law to transform the quality of women's lives."[67] Many feminists, including Smart herself, discourage the resort to law. She argues that "in accepting law's terms in order to challenge law, feminism always concedes too much."[68] Nevertheless, many women's groups assert a general right to be consulted with respect to legal initiatives on women's issues. The stalking legislation presented an even more insidious challenge than have previous and ongoing initiatives in the areas of pornography and sexual assault: this particular resort to law on behalf of women was made without women's participation or consent.

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[62]Letter of the Hon. Pierre Blais to S. Bazilli (Metro Action Committee on Public Violence against Women and Children) (23 April 1993) [on file with author].

[63]*Ibid.*

[64]*House of Commons Debates* (27 April 1993) at 18479.

[65]Cohen, *supra* note 17 at 16-17.

[66]Others seeking to use the law as an instrument of social change face the same challenge. See Audre Lorde, *Sister Outsider: Essays and Speeches* (Trumansburg, N.Y.: Crossing Press, 1984) at 110-13.

[67]*Supra* note 3 at 5.

[68]*Ibid.* The concessions feminists make when they resort to the *criminal* law are particularly problematic. See Snider, *supra* note 6 at 351, who concludes:

> While effective reforms have also resulted in increased state control, this has been a trade-off in exchange for benefits delivered. Reforms in the criminal law sphere are different. They do not have this potential for amelioration: the institutions in this sphere function basically to control "the dangerous classes." We know from a myriad of studies that criminal law and its allied systems of parole, probation and prison, despite all their universalistic rhetoric, target the poor and powerless, the deviants and the underclass.

In fact, the stalking initiative was clearly part of a larger political agenda, which emphasized public safety and law and order solutions to problems of violence and crime.[69] In the early summer of 1993, with only a few weeks until adjournment of Parliament and with an election call imminent, the Conservative government tried to rush a number of bills through the House of Commons.[70] Bill C-126 was only one of several major criminal justice initiatives, which included: Bill C-128,[71] dealing with child pornography; Bill C-123,[72] on the management of seized crime proceeds; Bill C-90,[73] proposing sentencing reforms; and Bill C-85,[74] an amendment to federal drug laws. The inordinate haste which characterized the passage of Bill C-126 was replicated in each of the other initiatives. However, only the stalking legislation, the child pornography bill and the crime proceeds bill were passed that summer. The first two initiatives, which primarily engaged the interests of women's groups, represented the government's response to exploitable and sensationalized issues of sexuality. Virtual consensus regarding these initiatives in the House of Commons enabled the government to dismiss the criticisms of women's groups and to pass these bills in the name of law and order.

Women's organizations responded to the risk of co-optation by demanding consultation. It is a measure of just how small the gains achieved by women in law reform, that the request for consultation was apparently unanticipated and that the Information Exchange in early April was seen as an adequate response. Both the letter of invitation and the background materials provided for the Information Exchange make quite clear that the reasons behind the stalking initiative were public concern and media attention. The Department of Justice Background Paper begins by stating:

> Stalking is a phenomenon that is increasingly attracting media attention in Canada and the United States. More and more cases are being reported of women being stalked by men they used to be involved with and from whom they may be trying to escape. Recent cases in various Canadian cities in which women were stalked and killed by men they knew have greatly increased the public concern directed at this issue.[75]

The most complimentary analysis of both the tenor of the background document and the structure of the Information Exchange is that the feminist message has not been understood, and that the notion of "inclusive justice" is more about appearance than substance. A more forceful indictment is that politicians and

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[69]It should be noted that this political agenda is not a partisan one. In the fall of 1993, the Liberal party released a series of policy statements on law and order issues as part of its election platform. Public concern about crime was anticipated as a major election issue and a recent survey suggested that many Canadians are increasingly concerned about violence against women.

[70]See *e.g.* K. May, "Tories Seek Swift Justice in Last-Ditch Reform Bills" *The Ottawa Citizen* (31 May 1993) A9.

[71]*An Act to Amend the Criminal Code and the Customs Tariff (Child Pornography and Corrupting Morals)*, 3d Sess., 34th Parl., 1993 (assented to 23 June 1993, S.C. 1993, c. 46).

[72]*Seized Property Management Act*, 3d Sess., 34th Parl., 1993 (assented to 23 June 1993, S.C. 1993, c. 37).

[73]*An Act to Amend the Criminal Code (Sentencing)*, 3d Sess., 34th Parl., 1993.

[74]*An Act Respecting the Control of Psychoactive Substances*, 3d Sess., 34th Parl., 1993.

[75]*Stalking Information Document*, *supra* note 32.

legislators have no interest in hearing the insights and recommendations of those whose expertise on violence against women comes from living it. The second stage of the stalking initiative demonstrates that the criminal justice system's marginalization of women's voices continues to be replicated at the level of political process. What is particularly disturbing about this is that the political initiative is packaged and constructed as a legitimate response to violence against women.

Phase III: Solving the Problem — The Enactment of Law

> Ottawa, April 27, 1993 — In recognition of the seriousness of violence against women, child abuse and family violence, the Honourable Pierre Blais, Minister of Justice and Attorney General of Canada, tabled amendments to the *Criminal Code* in the House of Commons today. In an effort to increase the protection offered to women, a new offence of criminal harassment, referred to as stalking, has been created. ... "The government has the responsibility to ensure that the *Criminal Code* is adequate for the protection of the public; and this is a responsibility that must be carried out even while work continues on all other aspects of the problem of violence against women," said Minister Blais.[76]

The legislative package introduced by the government on April 27, 1993, contained fourteen proposed amendments to the *Criminal Code* dealing with, *inter alia*, the protection of child witnesses, spousal conspiracy, prohibition orders for convicted sexual offenders and the removal of children from Canada.[77] The criminal harassment provision, as initially proposed, provided as follows:

> **264.** (1) No person shall, without lawful authority and with intent to harass another person or recklessly as to whether the other person is harassed, engage in conduct referred to in subsection (2) that causes that other person reasonably to fear for their safety or the safety of anyone known to them.
>
> (2) The conduct mentioned in subsection (1) consists of
>
> (a) repeatedly following from place to place the other person or anyone known to them;
>
> (b) repeatedly communicating with, either directly or indirectly, the other person or anyone known to them;
>
> (c) besetting or watching the dwelling-house, or place where the other person, or anyone known to them, resides, works, carries on business or happens to be; or
>
> (d) engaging in threatening conduct directed at the other person or any member of their family.

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[76]Canada, Department of Justice, News Release, "Amendments to the *Criminal Code* Respecting Family Violence, Child Abuse and Violence against Women" (27 April 1993).

[77]Concern regarding the omnibus nature of the Bill was expressed by both opposition members (in particular, the N.D.P.) and witnesses appearing before the Parliamentary Committee examining it. The government refused to split the Bill into smaller segments which might have facilitated a more effective review process. Essentially, the government's position was that the entire package was too urgently needed to risk the delay which might result from splitting the Bill. It is also important to note that at the one- day information exchange on stalking, an official from the Department of Justice assured participants that the stalking legislation would *not* be part of an omnibus legislative package (Minutes (Stalking Information Exchange Meeting), *supra* note 59). For a helpful introduction to the entire package of amendments, see Nicholas Bala, "Criminal Code Amendments to Increase Protection to Children and Women: Bills C-126 & C-128" (1993) 21 C.R. (4th) 365.

(3) Every person who contravenes this section is guilty of
(a) an indictable offence and is liable to imprisonment for a term not exceeding five years; or
(b) an offence punishable on summary conviction.

Despite the Bill's omnibus nature, the media was quick to characterize it as "the stalker law".[78] Initial media response was supportive and congratulatory. On May 6, 1993, at the Second Reading of the Bill in the House of Commons, the mood of the House was, similarly, self-congratulatory.[79] Fourteen Members spoke to the Bill during Second Reading. Both opposition parties supported the Bill in principle; they urged that the committee process be expedited to prevent the Bill from dying on the order papers before the end of the parliamentary session.[80] However, Members from both opposition parties took the opportunity to question the motivation for and the sincerity behind a government initiative introduced so late in its mandate.[81]

Committee hearings on the legislation after the Second Reading were scheduled over five working days beginning May 25, 1993. Despite the relatively brief time for preparation, nineteen witnesses requested and were given permission to appear and to submit briefs. The witnesses who appeared before the Committee represented diverse interests, including women's organizations, provincial attorneys general, the Canadian Bar Association, representatives of victims' groups, and police associations. Despite this diversity, there was surprising consistency in the recommendations to the Committee. First, the failure to provide for meaningful consultation with survivors and women's advocates prior to the introduction of the legislation was condemned.[82] Second, the Committee was repeatedly reminded that given the systemic nature of male violence against women, piecemeal and stop-gap legislative reform would not provide an effective solution.[83] The following submission from the Metro Action Commit-

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[78]T. Appleby, "Stalking Law Targets Predators" *The [National] Globe and Mail* (28 April 1993) A1; "A Closer Look at the Stalker Law" *The [National] Globe and Mail* (28 April 1993) A22; D. Vienneau, "Tories Table Anti-Stalking Bill" *The Toronto Star* (28 April 1993) A1; "An Overdue Law against Stalking" *The Toronto Star* (29 April 1993) A18.

[79]*House of Commons Debates*, *supra* note 2.

[80]The following quote exemplifies the level of hyperbole. Nelson Riis stated:

> I want to say on behalf of the New Democratic Party we will do whatever we have to do. We will debate all night long. We will sit here over the weekend to ensure that this legislation passes so women can be protected from this hideous experience so many people have to put up with (*ibid.* at 19067).

[81]See *ibid.* at 19022, 19042, 19063.

[82]See *e.g.* Metro Action Committee on Public Violence against Women and Children (Brief to the Legislative Committee on Bill C-126, 26 May 1993) [hereinafter METRAC]; Canadian Advisory Council on the Status of Women (Briefing Notes and Recommendations on Bill C-126, 26 May 1993) [hereinafter CACSW].

[83]This was the message from women's groups to the Department of Justice throughout the process. In their presentation to the Committee, representatives from the National Action Committee on the Status of Women made the following points:

> [W]e find that the major problem facing women victims of repeated, obsessive harassment is that neither the police nor the courts believe that the threats have happened ... It has been clear for some time that the major problem concerning criminal harassment and other forms of violence against women is the lack of enforcement, lack of coordination of agencies dealing with the issue, and the underfunding of front-line women's

tee on Public Violence against Women and Children ("METRAC") illustrates this concern:

> A legislative response which is not accompanied by a commitment to police, prosecutorial, judicial and systemic changes regarding the response to violence against women, as well as the crucial provision of adequate and long-term financial support to programs and services aimed at achieving women's equality will be worth nothing.[84]

Finally, three substantive concerns about the legislation itself were raised by the women's groups that appeared before the Committee. These concerns were mirrored in other witnesses' presentations. These were: 1) the need for a preamble intended to "contextualize the reality of women's experience of criminal harassment";[85] 2) removal of the reasonable fear requirement;[86] and 3) amendment and/or removal of the intent requirement.[87] Each of these three substantive recommendations was directed at improving the proposed law's sensitivity to the specificity of women's experiences. The recommendations were informed by women's prior and continuing experience with the criminal justice system and, in particular, with the crime of sexual assault.

The request for a preamble followed the example of Bill C-49, the sexual assault legislation in which a gender-specific and equality-based preamble was enacted.[88] Women's organizations clearly viewed a preamble to the stalking provision as a mechanism for making explicit the particular vulnerability of women and children to male violence.[89] It was also proposed[90] as a way to connect vio-

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agencies such as rape crisis centres, transition houses, and women's centres (*Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-126*, *supra* note 5 at 1630, 1635).

[84]METRAC, *supra* note 82 at 27-28.

[85]Government of Ontario (Brief to the Legislative Committee on Bill C-126, 26 May 1993) at 2; METRAC, *ibid.* at 17.

[86]METRAC, *ibid.* at 20; CACSW, *supra* note 82 at 4.

[87]METRAC, *ibid.* at 22; CACSW, *ibid.* at 3, 5.

[88]See *An Act to Amend the Criminal Code (Sexual Assault)*, S.C. 1992, c. 38. The preamble to the sexual assault legislation was an overt attempt to bolster the record for an anticipated *Charter* challenge. For a discussion of the impact of a potential constitutional challenge to the reform process culminating in Bill C-49, see Rosemary Cairns Way, "Bill C-49 and the Politics of Constitutionalized Fault" (1993) 42 U.N.B.L.J. 325. The preamble includes, *inter alia*, the following provisos:

> Whereas the Parliament of Canada is gravely concerned about the incidence of sexual violence and abuse in Canadian society and, in particular, the prevalence of sexual assault against women and children;
>
> Whereas the Parliament of Canada intends to promote and help to ensure the full protection of the rights guaranteed under sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* ...

Although the preamble was enacted as part of the law, it is neither included nor referred to in the *Criminal Code*. It is therefore virtually inacessible to all but the most determined. In particular, the preamble will not be before the police, prosecutors and judges who will interpret and enforce the new legislation.

[89]See *e.g.* METRAC, *supra* note 82 at 17.

[90]In her presentation to the Committee, Lee Lakeman, representing the National Action Committee ("NAC") stated, "Women want a clear political statement in the preamble of what parliamentarians intend. We want no more ambiguity about this. We want to know exactly who it is we

lence against women to rhetorical (political) justiciable guarantees of equality and security of the person in the *Canadian Charter of Rights and Freedoms*. While the preamble recommendation addressed broad political concerns, the other two recommendations were intended to improve the substantive elements of the stalking law. The proposed section 264 of the *Criminal Code*, as initially drafted in Bill C-126, made causing reasonable fear an essential element of the offence. Not surprisingly, women's groups saw in the reasonable fear requirement a very real risk of revictimization, and characterized it as unnecessary and potentially antithetical to the supposed intention behind the legislation. The brief submitted by the Canadian Advisory Council on the Status of Women illustrates this claim:

> [T]he inclusion of this element is both unnecessary and potentially dangerous to women who are victimized by men. First, it makes the woman and her perceptions part of the offence. This exposes victims to cross-examination on the nature of their fear and on its objective reasonableness. Experience with sexual assault has demonstrated that courts have great difficulty in both understanding and characterizing women's perceptions. Imposing a standard of reasonableness opens the door to an examination [of] the victim's character, mental health, and stability. ... In addition, requiring reasonable fear vests increased discretion in the hands of police and prosecutors who may decide not to proceed based on their own assessment of the victim's perceptions. All of these potential results are frightening for women, and may in fact discourage their reliance on the criminal justice system.[91]

Finally, many witnesses expressed significant concern over the intent requirement. The offence of intimidation at section 423 of the *Criminal Code* was offered as an example of an offence with a similar narrowly drafted mental element. This section, among others, had been criticized as difficult to prove in relation to harassing behaviour.[92] Surprisingly, the proposed stalking offence required the Crown to prove the intent to harass another, or at the least, recklessness with respect to the harassment.[93] The wording established a subjective test of intent. This does not appear to have been understood by the Minister of Justice who wrote:

> Section 264 of Bill C-126 has been crafted to avoid, to the greatest extent possible, difficulties in proving the mental element of the crime. ... It would not ... be sufficient for an accused to say that he did not intend to harass the victim, but was simply trying to woo her, for example. If his conduct is such that it reasonably causes harassment, it will be possible to convict him.[94]

The error of this analysis, which posits an objective element to the *mens rea* requirement, was exposed during the Committee hearings. Both the govern-

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are holding responsible here" (*Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-126*, *supra* note 5 at 1645).

[91]CACSW, *supra* note 82 at 4.

[92]Several sections of the *Criminal Code* were, to varying degrees, applicable to criminal harassment prior to Bill C-126. These included: section 177, loitering or prowling at night on another person's property near a dwelling house; section 264.1, uttering a threat; section 430, wilful obstruction or interference with the lawful enjoyment of property; section 372, repeated telephone calls made with the intent to harass; and section 423, intimidation, which prohibits, *inter alia*, persistently following, persistently watching a dwelling house or workplace for the purpose of preventing lawful activity, or intimidating by threats of violence.

[93]See text accompanying note 77.

[94]Letter of the Hon. Pierre Blais to Dawn Black (6 May 1993) [on file with author].

ments of Ontario and Manitoba, the only provincial governments which appeared before the Committee, recommended removing the specific intent requirement, arguing that harassing conduct causing reasonable fear was sufficiently harmful to warrant criminalization.[95] Women's organizations were similarly concerned, suggesting that the proposed section insulated unreasonable behaviour by men who believed they were simply demonstrating their love.

After all the witnesses were heard, the Committee, during the "clause-by-clause" stage,[96] made amendments aimed at responding to two of the substantive issues raised during the hearings. First, the intent requirement was modified to capture knowing or reckless harassment rather than intentional harassment. Second, although causation of reasonable fear was retained as an essential element of the offence, the phrase "in all the circumstances" was added to signal the need to examine the fear from the perspective of the victim. The version presented to the House of Commons for Third Reading, and which has now been enacted as law, provided as follows:

> **264.** (1) No person shall, without lawful authority and *knowing that another person is harassed, or recklessly as to whether the other person is harassed,* engage in conduct referred to in subsection (2) that causes that other person reasonably, *in all the circumstances* to fear for their safety or the safety of anyone known to them.[97]

Phase III: The Counter-Story

The last chapter in the stalking story (at least for the present) is the passage of Bill C-126. The Bill represents, to use Cohen's chronology, the coping method that evolved in response to the perceived threat. The creation of a crime of criminal harassment was, I argue, the inevitable outcome of public and political reaction to stalking. Criminal law presents an attractive, apparently expedient and relatively costless option for legislators intent on responding, at least formally, to the problem of violence against women. Both the process and the results of the committee hearings demonstrate that the solution may be more apparent than real. Further, it was achieved in a manner that consistently devalued and ignored women's input.

The process by which Bill C-126 was enacted was characterized by inordinate haste. The Bill took less than six weeks to proceed through First, Second and Third Readings in the House of Commons. A scant three and one-half weeks after the Bill was tabled in the House, it was sent to Parliamentary Committee. Witnesses wishing to appear and present briefs were placed in the unenviable position of developing a complete response to a complex legislative proposal in this same brief time. For most organizations, time constraints made it impossible to examine the problem of stalking in its broader social context. Essentially, witnesses were forced to respond to the proposals without the benefit of a sustained and contextualized examination of the problem.

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[95]See Government of Ontario, *supra* note 85 at 3; Manitoba Department of Justice, *supra* note 15 at 1.

[96]At the "clause-by-clause" stage, each clause of the proposed legislation is considered individually for the purposes of possible amendment.

[97]*Supra* note 1 [emphasis added].

This time frame placed women's groups, long supportive of a contextualized and systemic response to violence against women, in a particularly difficult position.[98] Women's organizations were forced to choose between two options. The first option was to support the legislation in principle and advocate for substantive amendments intended to increase the possibility that the law would actually work for some victims of male violence. For some, this choice implied political co-optation into a process they viewed as fundamentally flawed, by a government whose intentions they did not trust, for a law they did not expect would achieve real change. The second choice was to engage in a macrocosmic critique of the entire process and to refuse, on grounds of principle, to support the law. The risk of the second option was its pragmatic disutility. Given the federal government's apparently unshakable determination to proceed, groups contemplating a refusal to engage in substantive critique of the proposed law faced sacrificing their only opportunity to advocate change. This would increase the real risk that the law would fail to benefit any women.

Most women's groups attempted to exercise both options. They began with a systemic critique of the authoritative and non-inclusive nature of the legislative process in the stalking initiative, before making substantive recommendations for amendments to the provision. The result of this strategy, necessitated by the way the stalking legislation evolved, was that both aspects of the critique were weakened. Perhaps more importantly, the strategy implicitly confirmed that process and substance are separate and divisible. Witnesses were asked if, despite their reservations about process and intent, they would nevertheless support the legislation as better than no law at all.[99] The two organizations which refused to concede that the law would be better than nothing, the National Action Committee on the Status of Women and METRAC, provoked both amazement and hostility from committee members.[100] The reaction of the Parliamentary Committee demonstrates a continuing fundamental misunderstanding about the potential efficacy of the criminal law in responding to systemic male violence.

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[98]The description of options facing women's groups is based on my own involvement in the process behind Bill C-126.

[99]See generally the questioning of the witnesses from NAC and METRAC, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-126*, *supra* note 5. Similar tactics were used during the legislative committee hearings on Bill C-49 (sexual assault) during which women's organizations were systematically asked whether they would continue to support the Bill if the preamble were not amended to specifically name women who are doubly and triply disadvantaged, and therefore at greater risk of victimization. See McIntyre, *supra* note 57.

[100]*Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-126*, *ibid.* See especially the questioning by Barbara Greene. For example, she stated (*ibid.* at 1650), "I'm very surprised at your attitude. I would have thought NAC would be very concerned about this issue, would have been studying it for some length of time, and would be coming here to say you are pleased to see the government finally acting on this." These comments were strikingly similar to those made by various state attorneys general to Joan Zorza, Director, National Battered Women's Law Project, New York, and reported by her at the National Conference on Stalking. Ms Zorza described how her organization was called by a number of attorneys general regarding proposed and enacted stalking legislation. To her surprise, these individuals did not want information about women's organizations or advocacy groups with expertise on violence issues; rather they wanted praise. Later, Ms Greene, in a spirited exchange with Susan Bazilli (METRAC), stated, "I don't think we could ever do anything that would satisfy [you people]" (*ibid.* at 1815).

I have argued that both the construction of the stalking issue in the media and by politicians, and the extremely truncated committee process, forced women's advocates into making difficult strategic choices over the right response to the legislation. Consequently, women's organizations were compromised even before their submissions were heard. The amendments which were ultimately passed by the Committee and by the House of Commons at Third Reading, failed to compensate for that political compromise.

The request for a preamble was dismissed virtually without discussion. The reasonable fear requirement has been retained as an essential element of the offence. I submit that the addition of the phrase "in all the circumstances" adds little of substance to the provision since reasonableness in the criminal law implies having regard to relevant circumstances. Potential revictimization remains — the new provision constitutes an open invitation to agents of the criminal justice system to interpret women's perceptions according to social and sexual stereotypes. The amendment to the intent requirement is also, I would argue, insubstantial. The original provision required more than proof of the basic intent to engage in the prohibited conduct — it required proof of a specific intent to harass or at least that the accused advert to the risk and disregard it. The amended provision still requires proof of two levels of intent. First, the prosecution must establish the basic intent to engage in the particular conduct (*i.e.* repeatedly following, engaging in threatening conduct, *etc.*). Second, the prosecution must establish that the accused knew that the conduct was harassing, or was reckless as to its effect. In other words, the amended provision simply changes the nature of the particularized intent required. The amended *mens rea* element is no less complex than the original, and it raises exactly the same concerns about unreasonable behaviour. In addition, the fact that a complex intent requirement with respect to the impact of harassing behaviour was retained suggests that the legislators did not accept the submission that harassing conduct is sufficiently serious in and of itself to warrant criminalization.

In my view, the legislation as drafted, with its complicated intent requirement and the requirement of reasonable fear, confirms the criminal justice system's implicit distrust of women, as well as its tendency to minimize the harms experienced by women. In the end, I submit, the committee process achieved nothing of significance for the women's groups which appeared. The amendments passed in an attempt to respond to the concerns raised by women are largely cosmetic. In addition, the legislative and committee process and the resulting legislation have been legitimated by their apparent response to feminist concerns.

Conclusion

In her analysis of the process reforming the sexual assault legislation, Bill C-49, Sheila McIntyre concludes:

> Abandoning law altogether is a luxury of theory and/or privilege from the perspective of those long abandoned by reformers and reformism. The precondition of any reform initiative must be adequate consultations among a constituency-based assembly of all who will or should benefit from legal change to ensure that when

> reformers conclude that something is better than nothing, those for whom nothing has been law's historic yield concur.[101]

By these standards, and virtually any other standard for inclusive, constituency-driven reform, the stalking initiative was a failure. In its first stage, the reform initiative was rooted in and responsive to what I have characterized as pornographic imagery. The naming and construction of stalking by the media pathologized the stalker without addressing systemic violence against women. This implicitly confirmed and normalized male aggressiveness and female passivity in heterosexual pursuit. This conceptualization of stalking led to legislative intervention that was superficial and piecemeal rather than comprehensive and equality-driven.

The second stage of the stalking initiative, legalization and law reform, was accomplished with almost total disregard for the stakeholders — the women whose voices had been heard in the Bill C-49 process and whose expertise is unequalled. Sheila McIntyre has argued with respect to Bill C-49 that for women, and particularly "for those sectors of the women's community who have never before so influenced power politics, there will be no going back."[102] The process which led up to Bill C-126 was in fact a gigantic step back, both in its failure to include meaningful consultations, and perhaps even more deeply, in its failure to acknowledge the essential nature of such consultations in any attempt to respond through law to inequality.

The procedural failure of Bill C-126 is real and demonstrable. Whether the new law will be effective against either the specific violent behaviour to which it is directed or, more generally, against male violence is difficult to predict. However, the absence of a preamble, the retained requirement of reasonable fear and the complex *mens rea* element make a significant impact unlikely. Media attention to the issue of stalking has virtually ceased.[103] This suggests an unwarranted public and media complacency towards violence against women; alternately this suggests public and media faith in the power of criminal law to provide solutions. The parallels with Cohen's chronology are especially troubling. Stalking has been defined, discussed and dealt with — now it is time, in Cohen's words, for it to disappear.

In the end, the significant players in the stalking initiative were differentially rewarded. The media got a good story. The politicians got a chance to demonstrate publicly their commitment to the issue of violence against women without the significant expenditures of time, energy or money required to actually address the roots of the problem. And Canadian women ended up, through a process characterized by non-inclusion and non-responsiveness, with a new piece of criminal law, uncertain in impact and rooted in a failure to appreciate and acknowledge the systemic nature of violence against women.

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[101] *Supra* note 57.

[102] *Ibid.*

[103] This article was completed in September 1993.