

The Discourse of Inequality

Fighting to be Heard

BY ANNE DERRICK

Notwithstanding our efforts to secure the equal protection of the law for those rendered most vulnerable, we have been rewarded with unsatisfactory results.

À la lumière de l'enquête Arbour et de la révision des meurtres en légitime-défense, l'auteure rapporte que même si les expériences vécues par les femmes durant ces enquêtes sont prises en considération, les politiques pour un changement ou les recommandations qui ont suivi n'ont pas été implantées de manière à améliorer l'égalité des femmes.

I am going to talk about how women are not heard. I want to do this in the context of some recent efforts by women and their advocates to be heard and how those equality-driven efforts have been circumscribed. Notwith-

standing the challenges we face as we push for change, we have to keep fighting to make ourselves heard—by government, by the courts, by the media, by our communities—and we must make that hearing mean results—real change for women, real justice, real equality, not half measures, not crumbs from the table.

There are three contexts in which I am going to locate this discussion, contexts where women's inequality has been spoken but the hearing of it has become distorted or muted or silenced—and I offer these as just three of many—women in prison, women who have killed in self-defence, and women whose records are being sought after by the Defence in sexual assault cases.

Women are situated in each of these contexts because of their often compounded inequality, inequality that operates because of gender, class, race, disability, and other factors. Notwithstanding our efforts as activists to secure the equal protection and benefit of the law for those women rendered most vulnerable by inequality, we have, in these contexts, been rewarded with very unsatisfactory results.

Women in prison

I am taking as my starting point the Arbour Inquiry into Certain Events at the Prison for Women in 1994. Justice Arbour's *Report* was released in March 1996. She made numerous recommendations with respect to women's corrections and the treatment of women in prison in areas

such as cross-gender staffing, use of force, and emergency response teams (ERTs), Aboriginal women, segregation, accountability in operations, complaints and grievances, outside agencies, the interaction of the Correctional Service with other participants in the administration of criminal justice, etc.

Justice Arbour articulated the need, within corrections, for a "culture of rights," noting that the Rule of Law in the custodial context is essential as it reflects ideals of "liberty, equality and fairness, [and] ... expresses the fear of arbitrariness in the imposition of punishment" (Arbour 179). She referred to a statement in the *Report of the Subcommittee on the Penitentiary System in Canada* from 1977 where it was stated: "There is a great deal of irony in the fact that imprisonment ... the ultimate product of our system of criminal justice itself epitomizes injustice" (Arbour 179).

Over 300 women in Canada—the number of women serving sentences in federal institutions—live in the shadow of this injustice.

The Arbour Inquiry was, notwithstanding its limitations, a unique opportunity for federally sentenced women and activists on their behalf, to address individual, event-specific issues, and broader systemic ones facing women on the inside. All of the women involved in the "certain events" at the Prison for Women in 1994 had standing at the Inquiry. In addition to other parties, so did the Canadian Association of Elizabeth Fry Societies (CAEFS), the Prison Inmate Committee, the Native Sisterhood, the Native Women's Association of Canada, and the Women's Legal Education and Action Fund (LEAF).

Justice Arbour visited prisons and talked with women prisoners and prominent academics involved in prison issues. She held policy consultations in the form of roundtable discussions involving scholars and representatives from each of the parties with standing on issues such as: programming and treatment needs of federally sentenced women; managing violence and minimizing risk in women's corrections; federally sentenced Aboriginal women; and cross-gender staffing and workplace issues.¹

I attended the Inquiry as counsel to CAEFS. I sat in on some of the roundtables. Incarcerated women, brought over from the Prison for Women under guard to attend, spoke eloquently of their pain and their oppression. In this setting they were listened to and debated, their contributions informing the discussions on the issues. Justice

The recent Self Defence Review (SDR) is another context where women's lived experiences of inequality were articulated and heard, subject to the limitations of a legally-framed mandate.

The Self Defence Review, established by the federal Minister of Justice and the Solicitor General, was conducted from 1995-1997 by Judge Lynn Ratushny, of the Ontario General Division. Like the Arbour Inquiry, the SDR offered a rare opportunity to take a principled approach to the reality of women's inequality. The spirit in which the work of the SDR was done is articulated by Judge Ratushny in her "Foreword—To the Applicants":

No matter the thousands of words reviewed by the Self Defence Review and the legal principles applied, I have always been conscious of the fact that what I am doing is reviewing people's lives—lives that have been, more often than not, filled with abuses, misery and tragedy, and lives that ultimately led to the loss of others' lives. Each applicant before me, regardless of whether she was considered to be a "good" or "bad" person at the time of the killing, was entitled to defend herself. That has been the focus of the Self Defence Review: a respect for the dignity of the individual and the lives we are dealing with and the issue of self defence. With this focus, there has been no room for pre-judgment about the kinds of lives the applicants have lived. Most of them had no choice. I was here only to try to understand a part of each

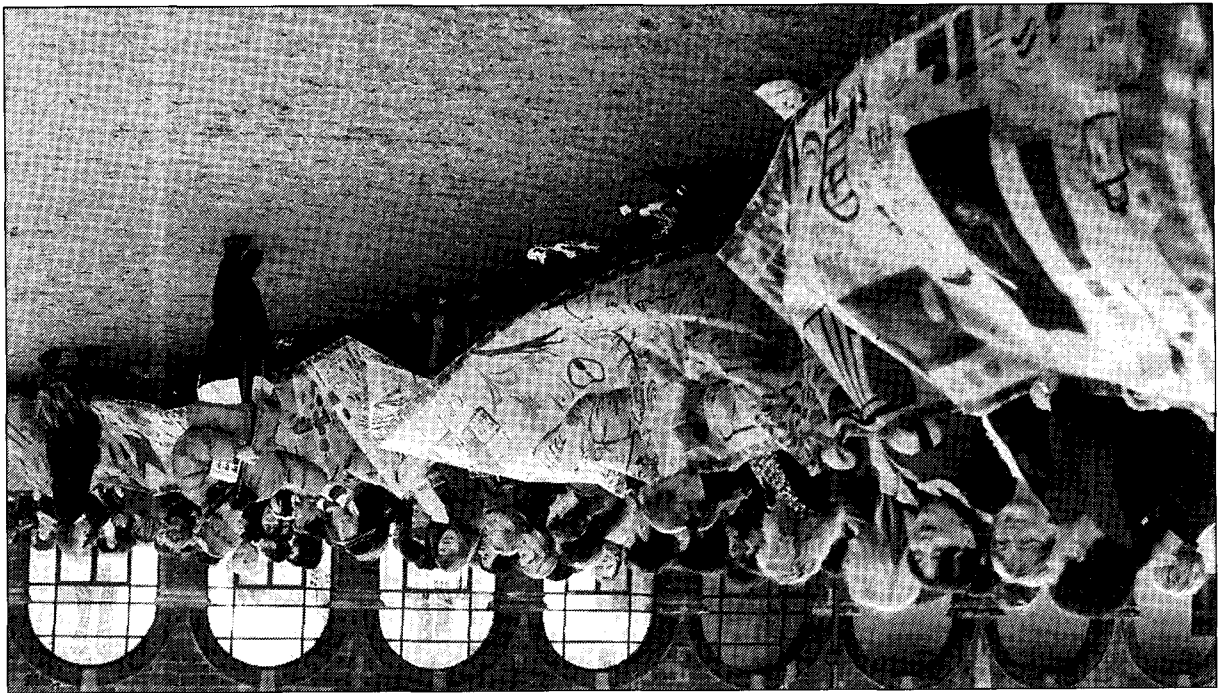
Women and self-defence

Arbour's *Report* showed that many important features of these experiences and the articulation of them as issues of inequality and injustice, were heard. The process and its results had its flaws, but nevertheless, the struggle of women in prison resonates in the *Report*.

However, did being heard by Justice Arbour mean being heard by government? In a word, no. There has been a negligible response to Justice Arbour's recommendations. The rights of women in prison are probably no more likely to be protected in the wake of Arbour's *Report* than they were before. It is my view that, ironically, federally sentenced women in Canada are in some respects worse off than they were before, except perhaps at the Healing Lodge. There is the "problem is fixed" paradigm—new prisons mean a new order. This has not been so. Since the new prisons opened there have been suicides, escapes, misconduct by staff, transfer of women to men's prisons, etc. Women may now be closer to their families but they are more isolated from each other: in terms of activism, there is no longer a critical mass of federally sentenced women in one location. This presents new and significant challenges to women in the community and organizations who support women in prison.

At the end of her *Report*, Justice Arbour identified no less than 15 government reports between 1938 and 1990 which have identified serious limitations in the provision of adequate services for women prisoners. This does not include the many briefs and submissions to government over the years by such organizations as CAFRS, LEAF, and the National Association of Women and the Law (NAWL). That's 60 years of shouting into a well.

Rochelle Rubinstein, facilitator, "Women's Rights are Human Rights" Banner (detail), dyes on silk organza, 75" x 4", Irish Museum of Modern Art, October 1997. Photo: Derek Speirs



person's life and try to "step into her shoes" at the time of the killing. (Ratushny 13)

Judge Ratushny reviewed 98 cases which were submitted by women who had been convicted of homicide and who were either still in prison, out on parole, or had completed their sentences. She issued three reports—her first one on February 6, 1997—*Women in Custody*—which described her process, standard of review, and general recommendations. This *Report* also included six confidential case summaries and detailed recommendations.

Judge Ratushny's second interim report—*Women Not in Custody*—was submitted on June 9, 1997, and consisted simply of a case summary and recommendation relating to one successful applicant. Judge Ratushny's final report submitted on July 11, 1997, contains proposals for reform of the law of self-defence.

Judge Ratushny also examined the need to reform sentencing for homicide and made the following observations:

The Problem—The Pressure to Plead Guilty

I have seen, over the course of my Review, cases where the accused person faced irresistible forces to plead guilty even though there was evidence that she acted in self defence. In some cases, this evidence was very strong. These irresistible forces are the product of the *Criminal Code's* mandatory minimum sentences for murder. A woman facing a murder charge risks imposition of a mandatory sentence of life imprisonment with parole eligibility after between 10 and 25 years. By contrast, a woman who pleads guilty to manslaughter will generally receive a sentence of between three and eight years with eligibility for full parole after serving one-third of her sentence. This would obviously be a difficult choice for any person accused of second-degree murder to make. However, there may be additional factors that exert even more pressure on a woman to plead guilty, including the fact that she may have a young family to care for; she may have been the victim of abuse and is reluctant to testify publicly about that abuse; she may be genuinely remorseful and even though she feels she had to act to defend herself she has difficulty justifying taking another person's life even to herself. For a woman in this situation, the forces impelling her to plead guilty are considerable. This situation causes me serious concern. It means that these guilty pleas are influenced in whole or in part by forces extraneous to the merits of the cases.... (Ratushny 23–24)

And what of Judge Ratushny's work and the recommendations she made in relation to the individual women for whom she recommended relief? The following

is her description of the resistance she encountered:

I encountered resistance to the work of the Self Defence Review from two groups. The first consisted of certain representatives of the Attorneys General of the provinces involved (directly or indirectly) in the prosecution of the applicants. Some were opposed to the very idea of the Self Defence Review, for one of two reasons: either because the Review's focus was on women convicted of homicide rather than all persons convicted under laws that had been struck down as unconstitutional; or, because they were opposed in principle to the idea of an independent body such as the Self Defence Review second-guessing convictions rendered through the due administration of justice. Others were concerned about the possibility of my making a positive recommendation in cases they had prosecuted. This resulted, in a few cases, in prosecutors making inappropriate remarks about the applicants rather than confining themselves to the evidence. These remarks related to such matters as the applicants' sexual orientation, lifestyle or general disposition. Obviously, such remarks were not only unhelpful but indicated an unwillingness to consider the issues and evidence contained in the applications on which I had asked them to comment. Some expressed concern about their potential liability should the Self Defence Review make recommendations in relation to cases in which they were involved—a possibility which I believe is extremely remote. In the end, however, I must say that, despite such views and some initial reluctance, I received cooperation from the provincial Attorneys General Departments in allowing me access to their files.

The other source of resistance to the work of the Self Defence Review came from a surprising source—officials of the very Department responsible for the creation of the Review, the federal Department of Justice. Unlike in the case of provincial prosecuting authorities, whose attitudes were, perhaps, understandable because of their involvement in the cases, I was unable to determine the rationale for resistance by federal officials. It did, however, cause me sufficient concern that I felt it necessary to bring it to the attention of the Minister of Justice in writing on more than one occasion. (Ratushny 28–29)

It is also revealing to note that before being acted upon by the federal ministers, Judge Ratushny's recommendations concerning the seven women were delivered to the relevant Attorneys General departments for their comment. Judge Ratushny indicates she was informed that these comments were very negative and that neither she nor any of the applicants were given an opportunity to respond to them.

Further, the government delayed in responding to the

recommendations made by Judge Ratushny from February to September 1997. Several of the women with respect to whom the Self Defence Review had made recommendations, although in custody when their applications were made, had been released on parole in the course of the Review.

In addition, the decision of government to “tinker” with Judge Ratushny’s recommendations had the effect of watering these recommendations down. It is telling that no women were released from custody because of the Review. The government refused relief of any kind in two of Judge Ratushny’s seven cases; these were the two cases where the women, at the time of the government’s decision, were still in prison.

What have we learned from this? That the provincial Crowns are heard, that senior Department of Justice officials are heard, that the right-wing law and order agenda is heard, but that women’s voices are still drowned out, even when they have been amplified through a judge’s careful and independent work.

Women and their records in sexual assault cases

It is crystal clear now, if it wasn’t already, that the courts have not heard us, do not want to hear us, on the issue of women’s equality and production of records. It has been the courts, most recently the Supreme Court of Canada—or let’s be specific about this, the men on the Supreme Court—and now the Alberta and Ontario Courts, who, in my submission have not only failed to protect, but have compounded, women’s inequality. I am thinking of the recent decision from Alberta—just released—which has struck down the *Criminal Code* amendments concerning production of records (the *Mills* case).²

Notwithstanding the significant efforts of equality-

seeking groups, appearing as coalitions, the equality rights of women were not even addressed by the majority decisions of the Court. The coalitions appeared before the Court in each of these cases “to ensure that the quality guarantees of the *Charter* animated by applications for production of records are recognized and addressed in the Court’s treatment of the issues arising in the cases.” The Court was told that production of records is a sex equality issue. This is because it is principally women who are sexually assaulted and it is principally men who sexually assault them. It is women, therefore, who obtain counselling from sexual-assault counselling centres or other therapeutic venues. It is therefore women’s lives that are the subject of records and women’s lives that are the subject of applications for production brought by the men they prosecute for sex crimes. Women who are most vulnerable to being sexually assaulted are also the same women most likely to have had their lives documented—women with disabilities, poor women, immigrant women, institutionalized women. Only an absolute prohibition against the production of records in sexual assault cases will promote women’s real equality.

Production of records represents yet another practice of sex inequality in the criminal justice process: it is a discriminatory practice that relies upon, reinforces, and promotes discriminatory stereotypes about women and sexual assault. At the rotten heart of such applications lies the foundational myth that women have a gendered propensity to fabricate sexual assault allegations, placing innocent men at risk of prosecution and wrongful conviction. Notwithstanding the claims of the Supreme Court of Canada in the earlier so-called “rape shield” case of *Seaboyer* that myths about women and sexual assault are to be repudiated, the majority decisions in *R. v. O’Connor* and *R. v. Beharriell* have breathed new life into



Rochelle Rubinstein, facilitator, “Women’s Rights are Human Rights” Banner (detail).
Irish Museum of Modern Art, October 1997. Photo: Lanny Shereek

these myths and increased the value of their currency in sexual assault cases.

The Court's decision in *O'Connor* is being taken by courts in Canada as an indication that women's personal records will often be relevant in a sexual assault prosecution. One judge has said they will rarely be irrelevant. The work of women's groups and coalitions to achieve legislation that was more consistent with women's equality guarantees under the *Charter* is now being undone. The legislation was only passed into law in May 1997: already courts in Alberta and Ontario have declared it unconstitutional on the grounds that it violates the fair-trial rights of accused assailants.

We told the Supreme Court of Canada very plainly how women's equality is implicated by records production. They didn't hear it. It is my view that they chose not to hear it. I know it didn't all come out in pig-latin because Justice L'Heureux-Dubé heard it.

As activists it is not enough however to identify new strategies with respect to the production of records issue or women in prison. We need to:

- press for government's implementation of the Arbour recommendations;
- support women in prison through the provision of legal services;
- push for the implementation of the law reforms proposed by the SDR;³
- continue the struggle to protect women's rights to therapeutic support and equality in the prosecution of crimes of sexual violence.

We also have to fight for women to be safe from rape, we have to change the way the world is ordered so that women do not go to prison, we have to insist on women having options that aren't limited to killing or being killed. I do not presume to know how to achieve any of these more intractable goals: I know I cannot figure out these challenges without being part of the collective effort of all women committed to this struggle. Indeed it is an imperative that we not tackle these challenges other than by way of collective engagement: we cannot know, without hearing from each other, in all our diversity, what directions we must take and what directions we must avoid. We must ensure that, amongst ourselves, there are not women who are fighting to be heard.

I am going to conclude with a short menu of suggestions for getting heard:

- 1) get mad: remember Doris Lessing said "A woman's deepest emotion is a sense of outrage."
- 2) get noisy: talk back, make demands, be pushy.
- 3) get out there: into the newspapers, onto the radio, in front of the cameras, into the streets, into the courts, into the polling booths—everywhere that democracy is supposed to happen.
- 4) raise hell.

The speech from which this article has been adapted was

dedicated to Helena Orton and was presented as a keynote address at the twelfth biannual National Association of Women and the Law Conference, "Access to Justice for Women: The Changing Face of Inequality," held October 30–November 2, 1997, in Halifax, Nova Scotia. A shorter version of this article was previously published in Herizons (Spring 1998). Reprinted with permission.

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¹I want to note that certain parties, such as CAEFS and LEAF took issue with the Commission's framing of particular issues, and with the direction taken by the commission in certain areas such as "Managing Violence" and "Cross-Gender Staffing."

²The *Mills* case from Alberta involves the counselling records of a thirteen-year-old girl. In the Ontario case, the charges against the Toronto obstetrician charged with two counts of sexual assault have been stayed. The *Mills* case was argued before the Supreme Court of Canada on January 19, 1999. The Attorney General of Canada also intervened arguing that the legislation has a constitutional purpose as evidenced by its Preamble and does not impair an accused's fair trial rights. Of the provinces, only Newfoundland and New Brunswick were not represented at the appeal. The other eight provinces all intervened in support of the amendments to the *Criminal Code*. Also intervening in support of the legislation were LEAF, the Canadian Mental Health Association, the Edmonton Sexual Assault Centre, and Association of Alberta Sexual Assault Centres, and the Child and Adolescent Services Association of Edmonton. A decision from the Court is expected before the end of 1999. Equality-seekers are concerned that even if the constitutionality of the legislation is upheld, it will not operate to protect women's equality rights if the Court's decision does not critique the assumptions that underlie these production applications.

³And the equality-driven reform of the law of self defence. Consultations amongst equality-seeking women's groups have considered the suitability of the Ratushny proposals concerning self-defence. Further consultations by the Federal Department of Justice with equality seekers on the issue of self defence have not been scheduled.

References

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