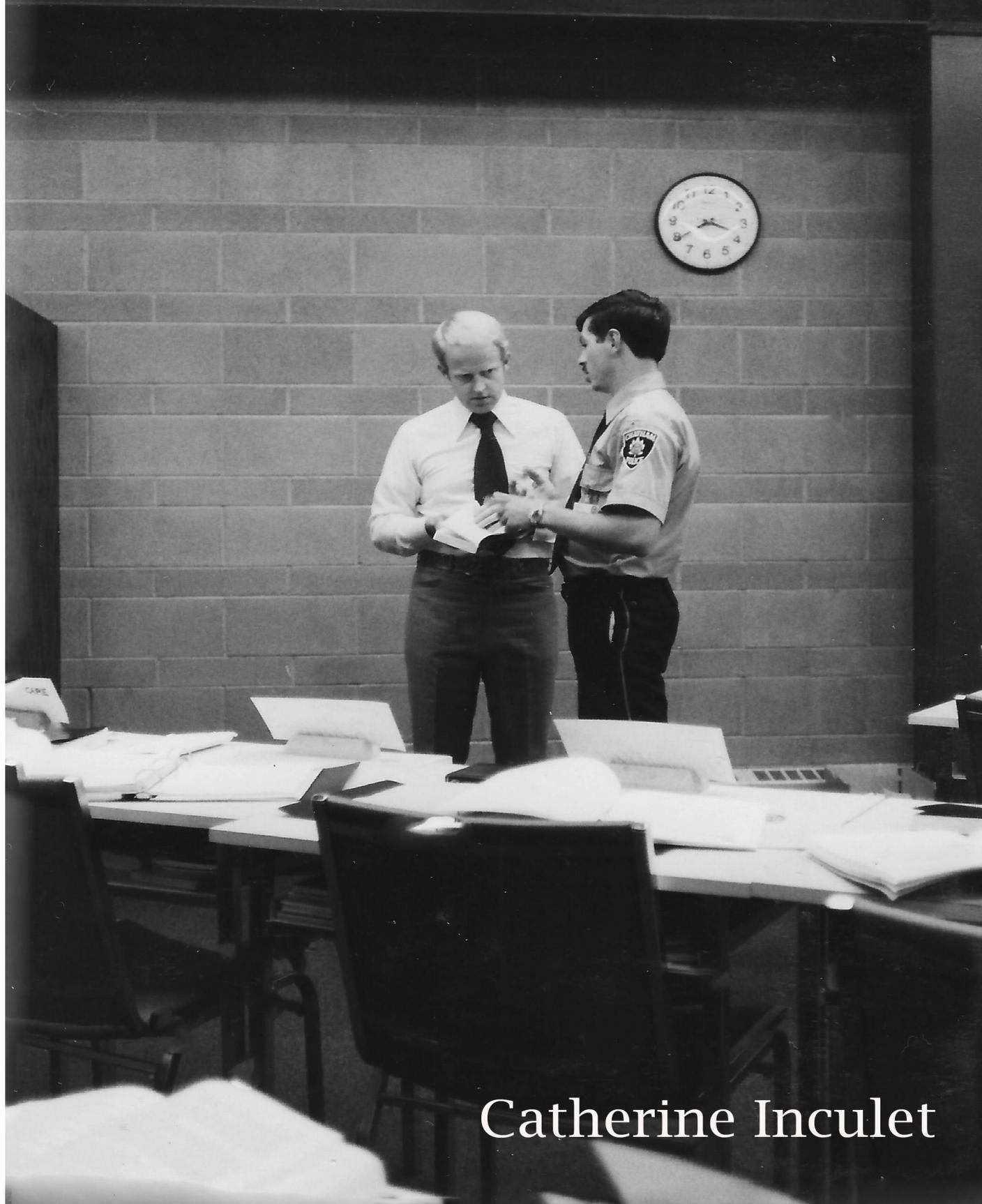


Criminal Law in Canada



Catherine Inculet



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An Essay as Part of
the Law Degree Program
The University of Western Ontario
1986

by

Catherine M. Inculet B.A., LL.B.

Electronic Books In Print
[an Imprint of HMS Press]
Box 340 Station B
London Ontario N6A 4W1
<http://hmspress.ca>
hmspress@outlook.com

ISBN 978-1-55253-109-9 PDF E-Book

Library and Archives Canada Cataloguing in Publication

Title: Criminal law in Canada : an essay as part of the Law Degree Program, The University of Western Ontario, 1986 / by Catherine M. Inculet, B.A., LL.B.

Names: Inculet, Catherine M., 1957-2015, author.

Identifiers: Canadiana 20210262729 | ISBN 9781552531099 (PDF)

Subjects: LCSH: Criminal law—Canada.

Classification: LCC KE8809 .I53 2021 | LCC KF9219 .I53 2021 kfmod | DDC 345.71—dc23

Acknowledgements

Research for this paper was conducted entirely through interviews and attendance at the Conference On Wife Battering on April 02 1982, which was sponsored by the London Coordinating Committee on Family Violence, and the London Status of Women Action Group. This paper is consequently full of opinions, hearsay, and perhaps what people thought I'd like to hear them say. I admit one foray into the report on Family Violence prepared by Carole Anne Burris and Dr. Peter Jaffee; this was followed by a silent vow to shun like the plague, anything or anyone vaguely resembling a statistic and the people who spouted them. One reference to Glanville Williams in the Textbook of Criminal Law, London 1978; as well as the Criminal Code of Canada, 1982. [*Modern opinion reveals that not all victims are female nor are all assailants male, ed. And an attempt to remain neutral or infer this is indicated in the paper with square brackets.*]

*Report
prepared by
Catherine Ancelet
010822
U. N. O
London, Ontario*

Criminal Law involves the action by the State against the individual. It serves as a tool of the community to control behavior, to protect the individual, and to confer a “safe and warm” feeling in the reinforcement of one’s good behavior and the punishment of the bad behavior of others.¹ When a man strikes a woman [or vice versa], regardless of whether they are married, divorced, separated, or just living together, [he] has committed a wrongful act. It is harmful, morally blameworthy, and it is worth controlling; society’s interest is served by declaring such behavior inappropriate and imposing a criminal sanction. But if instead the criminal justice system tolerates such behavior by not seeing that it is brought before the courts, and once there dealing with it lightly, then how can the wrongdoer be made to see the badness of his conduct, and how can we expect others like him to be deterred from behaving similarly? The community loses faith in the law and looks elsewhere for solutions.

Nobody denies that family violence is different from violence between strangers. It certainly may have independent causes, although alcohol undoubtedly plays a part in both. Criminal Code (Canada) S. 244/5 dealing with common assault; the “why’s” don’t matter, having had a stressful day, or debts that are piling higher is no defence.

The real difference is the vulnerability of the victim.² The [woman] is often financially and emotionally dependent upon the assailant. He is probably the father of her children, whether by love and marriage (partnership) or just being the “baby daddy” as a “sperm doner.” It is extremely difficult for her to pick up and leave. Instead, [she] tells herself that it was an isolated incident, believes that somehow she is at fault, or worse yet that she deserved it, for not having dinner ready etc., and stays. Then everything may be all right for a time, but [she]’s there again when [he] comes home wanting to strike out at something or anything.³

Agencies and Social Worker’s fill a very real need to alleviate the victim’s plight. But hers is a separate problem, the visibility consequence. The workers at the Women’s Community House can only supply the band-aid, both literal and figurative. They educate only those who came or are sent to them for help and those who read their pamphlets.

1. David H. Doherty, lecturing first year students in Criminal Law, Western University, 1981.

2. John Takach, (Director of Crown Attorneys) Conference on Wife Battering.

3. Delores Blonde, (Associate Director, Windsor Essex Mediation Center) on the Cycle Theory of Violence.

Whether changing violent behavior, or changing the tolerant attitude, whichever it is that the psychologists currently theorize must come first, the criminal justice system can be a potent educator and an effective vehicle for social change. The first thing is to get these cases before the courts. Why and how long a woman waits and has to endure before the Police are called is a hidden variable. Once the Police Officer is called to a “domestic” as they are so quaintly called,⁴ the exercise of their discretion is crucial. It would be nice if they had a quick method of finding out if there had been trouble there before, even minor things.⁵ Without it, they have to make their choice of action based upon one event in what may have been a series of events.

The Police Officer’s power of arrest without a Warrant (CCC S. 450) is limited to indictable offences and if they believe on reasonable and probable grounds that arrest is necessary to establish identity, preserve evidence, or prevent the continuation or repetition of the offence. An alternative ground is found in S. 31 concerning breach of peace. Both are difficult to exercise if he is greeted warmly by the alleged attacker by the officer or the officer in charge. Release may then be made on an appearance notice. Failure to appear is a separate offence, S. 133. If the officer doesn’t make an arrest, nonetheless they are left with either two people who should not be left alone together or one bruised and frightened female [or partner]. If, after calming the situation, the officer can attempt to mediate, or advise one party to leave. It seems that this advice is usually directed at the female. The male pays the rent.⁶ In London, Ontario, the Officer also has the option of calling the Police Family Consultant, should it appear there’s the need and willingness to accept “crisis intervention.”⁷

When the Family Consultants began in 1972, there was a mandatory two-week training program involving role-playing sessions and lectures by lawyers and social workers in family violence for all Police Officers. This program has been neither continued nor repeated. So the Police Officers’ discretion is exercised upon the basis of their particular experience, attitudes and education. Thankfully the police seem to be laying information with more clarity. Their willingness to do so is related to corresponding changes in the court policy and the charge will not be dropped.

4. Prof. C. Backhouse, Western Univ.

5. John Takach.

6, 7. Veronica Gooding.

The woman is left holding a yellow victim information form, the flagship of the Family Consultants. It contains telephone numbers of people who can help inform her: such as the Women's Community House, the Justice of the Peace, London Community Resource Center, etc. It is a needed innovation where the Police leave it to the [partner] woman to lay the information herself.

This brings us to the next stage; the Justice of the Peace, before whom the complainant or the Police Officer who seeks to lay an information must go with enough evidence that is considered a case to be made out and they issue process - either a summons or a warrant. This is the victim's [usually a female] first contact with the court. It can be a traumatic experience. [She] (or rarely, the male victim) has to wait to see the perpetrator, perhaps with a bruised face or body, and three children to control because she can't afford a babysitter. ⁸ The victim has made the effort to come to court; she should not be discouraged.

His Honor, Judge Genest goes further and paints a rather poor picture of a Justice as "*self-important in his own eyes, with no special training,*" ⁹ and one who "*puts up a barrier because he doesn't know how to cope, and the woman sees it as not caring.*" This is perhaps an exaggeration but it serves to illustrate the types of hurdles which a complainant may encounter in seeking to have her rights enforced in a court of law which exists for her and to which access should be easy.

Once process is issued, the case will come to court. It is listed on the Docket as an S. 245, and the criminal justice system like all educators must not contradict itself by saying "*all assaults are equal but some are more equal than others.*" There is a more significant bifurcation at this point, depending upon in which court the information was laid. Vague policy in London Ontario dictates that if a man and a woman are living together under the same roof, then the case will be heard by a Provincial Court Judge who usually sits in Family Court. If they are living separately, or if the charge is serious (threatening, weapons, wounding) then it goes before a Criminal Court Judge. Mr. Murphy would like to see the guidelines used in the Unified Family Court (in Hamilton ¹⁰), followed here. There, if they are "spouses" within the definition as used in the Family Law Reform Act, the case goes to a Family Court Judge.

8. Judge Genest

9. Ibid.

10. In the Court.

I question whether this was really a convenient test. As if the word “spouse” is fairly straightforward; I add that it isn’t an appropriate one. You just ask them if they went through a marriage ceremony that hasn’t been annulled (if it was voidable) and if it was void could they kindly say whether they had cohabited in the preceding year. The real “corker” is the S. 14 “spouse” with its requirements of duration and continuity of cohabitation and the niceties of interpreting “relationship of some permanence.”

Everyone in London seems fairly happy with the present distinction if the spouses are living together, the goal may be to maintain that, and the general consensus is that a Family Court Judge is better equipped to deal with sensitive family issues. He is more experienced with the appropriate resources in the community and is better able to tailor the disposition so as to balance the aspects of punishment with the need and willingness of the parties to mend their relationship.

After all, a wrong has been done to that relationship as well as to the spouse. Another advantage of a family courtroom is that it is normally closed, so even though it is sitting as an open criminal court, there is not likely to be an audience. This could of course be countered by an argument that public exposure may be desirable. Perhaps education demands that people should see these cases being dealt with, and justice being done.

A Criminal Court Judge, on the other hand, is probably dealing with a greater volume and variety of cases. Judge Genest mentioned the possible effect of the case directly preceding a family violence case. If it were armed robbery for example, a “mere assault” may be dealt with less severely than it warrants. However, there seems to be a downside to Family Court routing these cases which may reflect the very attitude that spawns them. Firstly, there is the feeling that in Family Court they don’t treat it for real.¹¹ Even amongst the lawyers there is a hope of greater leniency there.¹² A man who receives a judgement against him may not feel it carries as much weight or stigma, despite Judge Genest’s assurance to me that “When they come through my court they know they’ve been there.”

Secondly, the Crown Attorney in Family Court is an articling student. Not only can he not prosecute by indictment, but also his lack of experience is bound to affect the way in which the case is prosecuted and the judge; his faith in the ability and judgement of counsel can sway his decision.

11. Judge Genest

12. Takach

John Takach lamented the shortage of Crown Attorneys, saying “Justice is a poor relation when it comes to funding and resources.”

The role of the Crown Attorney is to prosecute on behalf of the Crown and on behalf of the complainant/victim. The CA may not feel it is their job to “hold her hand” and indeed it may not be, but the CA is all the victim has. [She] is rarely aware that [she] can have her own counsel there. It is in the interest of justice that she is informed; an informed victim is less reluctant to testify against the spouse, and is less likely to seek to have the charges withdrawn in fear of the negative consequences to the spouse and real or imagined repercussions if the victim “goes through with it.” In Windsor, a female lawyer is on hand to advise the female victim of their rights, court procedures, and what may happen. Someone should be doing this in London, perhaps through the existing Victim and Witness Assistance Program.

The present mandate against dropping charges has found only emphatic support among all those to whom I spoke. I understand it has been in effect for only about a year now. Its short-term consequence has been to remove much of the frustration felt by the police and court officers when a charge has been withdrawn after time and money were spent, only to see the parties return a few weeks later. Professor Constance Backhouse decried past reprisals against women who wished to stop proceedings, and then wanted to re-engage the legal system later. Pressures brought to bear on the Crown Attorney to drop charges don’t just come from the women with “cold feet” or who are using the criminal justice system to affect some other purpose in the relationship; they come indirectly from husbands who threaten, and lawyers who complain that it’s “screwing up the settlement.”¹³

This mandate is a good thing, but I suggest a word of caution. Where the criminal justice system seeks to enhance its deterrence of behaviour by widening the net, there should be some checks lest it be seen as too inflexible and heavy-handed. This too can breed distrust in the system.

These checks are in the form of the judge’s discretion, as they should be. A jail term is sometimes in order, but it may impose a hardship on the woman; if he is gainfully employed, it affects his ability to support her in the same way as a fine could. Judge Genest defended the virtues of weekend jail terms, which one conference member questioned as rather a light penalty.

13. Professor Constance Backhouse

He explained that each time the accused went in he had to be stripped and body searched, an unpleasantness which His Honor obviously felt outweighed the convenience of weekly freedom.

In addition to or in substitution for a fine or jail term, an order for probation normally is made.

The kinds of orders that can be made, seem limited only by the creativity of the judge. Judge

Genest expressed what was to me a rather surprising distrust of probation officers. He says they've got too much to do, or think so anyway, and tell the [man] he doesn't have to come back as often as the judge ordered. If this is so, it's a sad state of affairs and defeats the purpose somewhat. Not only that, it seems the judge has no say as to which probation officer takes the case, and being a government service, it's hard to get an officer changed or fired. So, His Honor takes a creative approach. He talks to the accused and gets a feeling for what's going on from him. He uses special care when the man is unrepresented by counsel and he always adjourns for a psychiatric examination. His Honor appears to put a great deal of weight on The Report after the examination. If it indicates a need for further counselling, then it is ordered. I found this to be somewhat anomalous to his comments on the subject of a diversion. This he describes as "backing away from the responsibility of criminal justice," and that it is "still a set-up with someone making a decision."

In his efforts to avoid depending upon the Probation Officers, His Honor uses a method which is described as "putting them on probation to me," after the plea but before sentencing. His Honor says, "I give the guy a chance. If he doesn't take it then I go for the jugular." This approach I can see working with juveniles. A young offender cannot always foresee the consequences of his actions and perhaps should be given the chance to go home and show that he is trying to be good. But as an adult, once found guilty, should bear the legal consequences. His Honor's rationale is that "making the accused sweat it out for a while" is making the process do something. It seems that the month-and-a-half to two months waiting period for trial is plenty of time to sweat it out.

It should be shown that after that the accused can sidestep [his] due punishment.

When the author asked His Honor Judge Vogelsang about family violence cases, his reason was, "I like them. They're fun!" My first reaction was that this was terribly insensitive. This man is a Family Court Judge? Unlike Judge Genest, he never talks to the accused, never initiates an adjournment. That is the job of Counsel; he confines his role to deciding the law. The adversary system lives. Everyone else is trying to be a Social Worker (except for the Crown Attorneys,

because they are: Crown Attorneys.) Judge Vogelsang's view was actually refreshing. He still has faith in the criminal justice system, which others seem to think has failed.

Family violence is in vogue now, whether due to an increase in frequency of occurrence or just publicity. Everyone has an opinion on it; Social Workers, Psychologists, Police, Lawyers, Judges, and feminists, are all seeking 'to solve the problem' through their particular discipline, sometimes at cross purposes and often without cross communication. The special sensitivity required in dealing with the victims of these offenses necessitates an ancillary support system, but it doesn't change the affect of the nature of the offense: family assaults.¹⁴ It should be ancillary to the main problem, dealing with the offender. But most important is that there is one policy in dealing with the offender. Family assaults should not be dealt with any more lightly than other assaults. They should be prosecuted as vigorously and dealt with as seriously.

14. George Savile, Marquis of Halifax, from Granville Williams, p. 25.

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A.B. Murphy. Justice of the Peace. Clerk of the Court.

David H. Doherty. Crown Attorney, Toronto Court of Appeal. Associate Professor of Law, UWO 1981.

Dominic Patterson. Former Victim and Educator.

The following set of love poems were written for Dave Doherty circa 1981:

Dave

August 03 1981

Such passions. Such
overwhelming passions.
Guarded hopes and still born dreams
and the ones that don't
pan out so well.

Not so sure
but sometimes it seems
that having you
is just another one of those.

Never asked you to be my
fairytale.
There you are like some
lonely unicorn,
leading me, making me behave.
Go to
the place where I was born.

Broken heart, deliver me alive,
send me there,
between the two.
Not much time spent
where love can hide me.
A dormant land,
unknown land.

I Dim The Light

I dim the light
and think about you.
Spend sleepless nights
to think about you.

Sometimes I sleep in the
middle of the floor.
Not going left,
not going right.

I thought you would be
a one night stand.
I thought, I would never
see you again.

My Love For You

My love for you comes easily.
I find patience
without needing a reason.
I was always the one
who had none for men.
You are not men.
You are man.
Without time there is no need
for patience.

I've searched the world,
well at least a part of it.
For a man who could be,
a part of me.
I thought I found you once
when I was young,
but that was just
a part of my youth,
not my truth.

The Last Time I Saw you

The last time I saw you,
was the first time.
I needed Heaven beside you.
I realized that beauty
without you,
was like a knife through my heart.

But still I play.
I didn't push you and still,
I am silent about my love for you.

The Sun Comes Up

The sun comes up, and
I think about you.
The coffee cup sipping.
I think about you as
you said you loved me,
or were you just being kind,
or am I losing my mind?

The morning ends,
I think about you.
I talk with friends, and
I think about you.
I want you so.
It's like I'm losing my mind.

All afternoon, doing every
little chore.
The thought of you stays bright.